IMPORTANT:

This is a link to a simple pdf version of your Her Justice manual. Please download this document and then open it in Adobe Acrobat or Google Chrome in order to access all the features of this manual, including bookmarks and page thumbnails.

This training manual is intended for informational purposes only and to be used in consultation with a Her Justice mentor and should not be considered as a substitute for legal advice. Users should always consult with a qualified attorney regarding any specific legal questions or situations arising from their practice. The authors and publishers of this manual assume no responsibility for any errors or omissions contained herein, or for any consequences arising from its use.

Litigated Divorce Manual

2025

HER JUSTICE

LITIGATED DIVORCE MANUAL 2025

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LITIGATED DIVORCE MANUAL

TABLE OF CONTENTS

Click anywhere in the table to jump to that section!

xi. Immigration Considerations and the Violence Against Women Act (VAWA)
xii. Immigration Considerations and Custody Visitation
xiii. Immigration Considerations and Spousal Support Maintenance

C. Discovery
i. Discovery Basics
ii. *Discovery from Nonparty Witnesses* by Jane Aoyama-Martin
iii. *Taking and Defending Depositions* by Scott Rosenberg

SECTION III: SAMPLE DOCUMENTS

A. Initial Documents
i. Notary Language and a Note on Sample Documents
ii. Divorce Questionnaire
iii. Statement of Client's Rights and Responsibilities
iv. Order to Maintain Plaintiff's Address and Social Security Number Confidential
v. Affidavit in Support of Motion to Maintain Plaintiff's Address Confidential
vi. Affirmation in Support of Motion to Keep Plaintiff's Address Confidential
vii. Summons with Notices – Irretrievable Breakdown
viii. Verified Complaint - Irretrievable Breakdown
ix. Verified Complaint – Cruelty
x. Affidavit of Service of Complaint
xi. Sworn Statement of Removal of Barriers to Remarriage
xii. Notice of Appearance
xiii. Verified Answer and Counterclaim
xiv. Affirmation of Service of Answer and Counterclaim
xv. Verified Reply
xvi. Cover Letter to Commitment Facility for Service
xvii. Request for Preliminary Conference
xviii. Affirmation of Service of Request for Preliminary Conference

B. Discovery Documents
i. Authorization and Release for Plan Information
ii. Subpoena
iii. Certification of Authenticity
iv. Business Record Certification
v. Notice for Discovery and Inspection
vi. Plaintiff's First Set of Interrogatories to Defendant
vii. Plaintiff's Responses and Objection to Defendant's First Notice for Discovery and Inspection
viii. Notice of Deposition

C. Motion Practice
   i. Order to Show Cause Checklist
   ii. Sample Motion for Pendente Lite Relief
   iii. Affidavit in Support of Pendente Lite Relief
   iv. Affirmation in Support of Pendente Lite Relief
   v. Order to Show Cause for Contempt and to Compel
   vi. Affidavit in Support of Order to Show Cause for Contempt and to Compel
   vii. Affirmation in Support of Order to Show Cause for Contempt and to Compel
   viii. Affirmation of Good Faith
   ix. Order to Show Cause to Preclude
   x. Affidavit in Support of Order to Show Cause to Preclude
   xi. Affirmation of Support of Order to Show Cause to Preclude
   xii. Order to Show Cause for Consolidation
   xiii. Affirmation in Support of Order to Show Cause for Consolidation

D. Pre-Trial
   i. Demand for Witness List
   ii. Demand to Identify Experts and Notice to Produce Documents
   iii. Notice to Admit Genuineness of Documents
   iv. Notice to Admit
   v. Statement of Proposed Disposition
   vi. Affirmation of Translation

E. Inquest, Stipulations, and Trial
   i. *Separation Agreements and Stipulations of Settlement* by Jane Aoyama-Martin
   ii. Stipulation of Settlement
   iii. Matrimonial Inquest
   iv. Trial Outline
   v. Evidentiary Objections

F. Final Papers
   i. Required Documents Checklist: Contested Cases After Settlement, Inquest, or Trial
   ii. Note of Issue
   iii. Notice of Settlement
   iv. Judgment of Divorce – Stipulation
   v. Findings of Fact and Conclusions of Law – Stipulation
   vi. Judgment of Divorce – Trial
   vii. Findings of Fact and Conclusion of Law – Trial
   viii. Decision After Trial
   ix. Qualified Medical Child Support Order
   x. Support Collection Unit Information Sheet and Client Affidavit
   xi. Attorney Certification

xii. Affidavit of Late Filing Sample
xiii. Postcard
xiv. Notice of Entry

G. Retirement Accounts
i. Retirement Benefits Checklist
ii. Instructions and Definitions
iii. Names and Addresses of Pension Plans
iv. Sample Settlement Language
v. Defined Benefit Plan Stipulation Samples
vi. Defined Contribution Plan Stipulation Samples
vii. Drafting QDROs Outline
viii. 401K QDRO
ix. QDRO for Federal Pension CSRS or FERS
x. QDRO Federal Thrift Savings Plan
xi. QDRO Sample – Shared Interest; No Survivor Benefits
xii. QDRO Sample – Separate Interest with Survivor Benefits
xiii. NYCERS DRO with Arrears
xiv. A Note on Documents Regarding Pensions and Other Retirement Benefits
xv. Authorization to Release Plan
xvi. Client Release
xvii. Consent to Release Information
xviii. General ERISA Outline
xix. Participants' Release
xx. Retirement Benefits and Divorce

SECTION IV: APPENDIX

i. Trauma Informed Interviewing Best Practices
ii. Tips for Working with Interpreters
iii. Immigrant Power and Control Wheel
iv. Disability Power and Control Wheel
v. Lawyer's Manual on Domestic Violence Content and Link

SECTION I: ORIENTATION TO HER JUSTICE AND YOUR CLIENT

HER JUSTICE

A. Basic Information

FREQUENTLY ASKED QUESTIONS

Thank you for taking a pro bono case through Her Justice. We hope the following frequently asked questions will help guide your representation and troubleshoot some common challenges in pro bono work. Our manuals provide additional information and guidance specific to each type of case in our program. Of course, your mentor is always available to answer questions about legal strategy and client expectations as your case progresses.

1. What is my firm's relationship with Her Justice for the purpose of this matter?

Her Justice is a consultant to the firm. We provide mentoring, training, sample documents, and will also review any written materials that you produce in the case. When we put a client on our waitlist, we explain to them that they will be represented directly by a firm, and that we will act as consultants to their lawyers. We assert attorney-client privilege over our direct communications with clients and over our communications with our pro bono teams.

We recommend that you explain this relationship to your client at your initial meeting so that they can be reminded of our relationship with the firm and understand that the firm should be their main point of contact going forward. We recommend that Her Justice be described in your retainer agreement as an outside consultant with whom you may have privileged and confidential discussions and share documents and information.

2. This is my first pro bono client and I don't feel like I understand their perspective on the case. What should I do?

Our clients' culture and individual life histories influence their perspectives and priorities in making important decisions. It is possible that your client is making certain considerations in making these decisions or forming their perspective on their case that you are not aware of. This means that the perspective our client has on their case may vary significantly from you. Take this as an opportunity to explore sensitivity and cultural humility. Do not assume. Leave space for inquiry and introspection.

For more information, please see the Best Practices and Ethical Considerations section of this manual. Consult your mentor for further guidance.

3. What is required if my client and I do not speak the same languages?

We are grateful to firms that take cases for clients with limited English proficiency, who are even less likely to have access to justice than our similarly situated clients with English fluency. In working with LEP clients it is paramount that you ensure they are accurately understanding the information you are providing them with and that you are understanding the needs they are communicating to you. To do this, work with qualified interpreters. Qualified is a relative term so please consider the nature of the conversation and the language capacity of the interpreter you are working with. It is best practice to work with a qualified interpreter - any staff member that demonstrates written and spoken fluency - at your firm that can consistently interpret during all calls and communications with your client If that is not accessible to you, think creatively about the interpretation and translation services available to you. Ask your pro bono coordinator if it is possible to retain professional interpreter services, or assist you in reviewing the internal staff language capacity. For potentially non-sensitive information it may be appropriate to have a friend or family member interpret. **It is <u>never</u> appropriate to have a client's child interpret**. **It is never appropriate to rely on Google Translate or similar multilingual neural machines translation service.**

For more information, please see the Best Practices and Ethical Considerations section of this manual. Consult your mentor for further guidance.

4. What special considerations are there for working with domestic violence survivors?

Approximately 80% of Her Justice clients self-identify as survivors of Intimate Partner Violence (IPV). Your representation may or may not be directly related to the abuse that they have experienced. Depending on your client's specific circumstances, there are multiple ways that your client's experiences as a survivor may impact your work together. It is best practice in the course of your representation to make your client's safety and autonomy paramount.

For more information, please see the Best Practices and Ethical Considerations, and What is Domestic Violence sections, and Appendix Resources of this manual. Consult your mentor for further guidance.

5. What special considerations are there for working with clients with physical or cognitive disabilities?

Your client may have a physical, developmental, or emotional disability. Their disability may be the result of the abuse they've experienced. Their disability may or may not be diagnosed and may or may not be visible or obvious to you. Talk with your client about what, if any, accommodation is needed. Check in with your client periodically about what

they need in order to work most effectively with you throughout your representation, e.g., instead of handing them a written paper, ask if they are comfortable reading it to themselves or if they would like you to read it out loud to them. Be mindful of potential obstacles like the accessibility of your building or public transportation to get to your office or a court building.

For more information, please see the Best Practices and Ethical Considerations section of this manual. Consult your mentor for further guidance.

6. I am having trouble getting in contact with my client. What should I do?

We emphasize to clients that your time is valuable, and that they must be responsive to their pro bono attorney's calls, and respectful of attorney time. It is important for attorneys, however, to remember that Her Justice clients typically fall within 200% of the federal poverty line (approximately $30,000 for a household of one), are juggling multiple urgent needs, and are prioritizing accordingly. For example, in light of food or housing insecurities, your client may choose to forego buying cell phone minutes in order to put food on the table. We understand how this choice may impact you and your ability to communicate with your client, however, we ask for your understanding and compassion. We encourage you to speak with your client during your initial call and establish a safe back-up contact in case this situation arises. Be creative in contacting your client and responsive to their needs. Explore alternatives like using work email, text messages, or mail.

For more information, please see the Best Practices and Ethical Considerations section of this manual. Consult your mentor for further guidance.

7. My client has been late to meetings or hasn't shown up to court or my office. What should I do?

We emphasize to clients that they should call you if they need to change or cancel their appointment, or if they are running late. It is helpful if the pro bono attorneys understand that it is not unusual for a client to have trouble keeping an appointment. Our clients are under-resourced. They may be experiencing a more pressing crisis, like an eviction, health crisis, or safety concern. It is possible that attending an appointment may require them to take time off work, pay for round-trip transportation, and coordinate childcare which they may not have the resources to do. Your client, especially at the beginning of your relationship, may feel uncomfortable or embarrassed to share why they cannot make an appointment with you. We ask for your understanding, compassion, patience, and flexibility in this matter. Please keep in mind that the handling and outcome of the case primarily affects the client and any accommodation that can be provided is greatly appreciated.

Consider whether the firm could pay for a car service or a MetroCard for the client if transportation is a barrier to effective representation. At your first meeting with the client, ask them about their work and childcare schedules so you can select meeting dates and times that are easy to keep. For example, if your case will involve court appearances, tell the client that they should expect to meet with you or attend court during business hours, and that they will have to ask for time off from work or arrange for childcare in order to do so. Plan to meet up early on the day of a court appearance, taking into account the likelihood of the client needing extra time to get to court from home with everything they need and childcare in place. These expectations should be clear at the outset of the case so that the client can plan and does not feel surprised or overwhelmed later on. We thank you for your patience and compassion and encourage you to use your time with your client efficiently, to keep the number of meetings manageable.

For more information, please see the Best Practices and Ethical Considerations section of this manual. Consult your mentor for further guidance.

8. My client wants me to help with a new case or another issue. What should I tell them?

Remember that your firm is retained only for a specific case, and your retainer agreement should state the scope of the representation simply and specifically. For Family Court cases, we recommend that you specify the docket number for your case on the retainer, as you are not obligated to represent the client on future violation and modification petitions. While we encourage firms to assist clients if possible, with related cases, we do not recommend that the firm take on additional cases for a client without consulting with Her Justice or another legal services organization, if the new case is unrelated to family, matrimonial, or immigration work.

Be consistent with the client and maintain appropriate boundaries, remembering that you are their attorney for a discrete issue, and cannot provide social work services or unrelated legal services (for more information on these services, see Question 9, below). If the client has new legal issues, contact Her Justice for a new intake for the client. It is possible that Her Justice can provide advice or an appropriate referral. If the new issue is one that we would typically assist with, we can discuss whether the firm would like to expand its representation to include the new case (for example, the client now has an order of protection case in addition to a child support case).

9. I think my client needs to talk to a counselor or social worker. What should I do?

The litigation process can be very stressful and upsetting for clients. Many clients have underlying mental health concerns, such as depression or post-traumatic stress disorder, or would benefit from extra support in making decisions about the trajectory of their cases.

Contact your mentor about connecting your client to the in-house social work program at Her Justice. If your client is a survivor of domestic violence or elder abuse, they also qualify for services at a New York City Family Justice Center (FJC). Your mentor can assist with making a referral. Many clients already have case managers assigned at their local FJC.

10. How can I get up to speed on the substantive law that affects my case?

Our manuals provide an overview of the relevant law for each type of case that we mentor. In addition, we offer live and video training on every type of case, plus some additional advanced topics such as child support enforcement and division of pensions in a litigated divorce. It is imperative that you attend or view the relevant training before you start the case so that you are competent to answer basic questions that your client will have at the first meeting. Your mentor is available to answer your substantive law questions and provide guidance on any research you need to conduct, once you have viewed the training and reviewed our manual. It is also important to remember your general obligation as an attorney to familiarize yourself with the relevant law, so be sure to review, for example, the sections of the Family Court Act, Domestic Relations Law, Civil Practice Law and Rules, or applicable immigration laws you will be relying upon in your case.

11. I have a trial coming up in the Family or Supreme Court and I don't know where to begin. What should I do?

Getting courtroom experience as the lead attorney is one reason that pro bono attorneys, and leadership at their firms, seek out our cases. Our staff attorneys have personally litigated many cases, but we are primarily your consultants on substantive law, client management, and case strategy, rather than trial advocacy skills. For general litigation practice skills (for example, understanding hearsay, entering exhibits into evidence, and conducting cross examination), remember that your firm's litigation department has in-house expertise and resources in addition to the knowledge we can provide.

12. I am going on secondment, parental or other extended leave, or leaving the firm—what happens to my client? Can Her Justice take the case back?

The client has retained your firm, not any individual attorney, for pro bono representation. Her Justice is a pro-bono-first organization. With a relatively small staff of attorneys, we are able to mentor thousands of cases a year because the firms represent the clients directly, aided by our training and mentoring. Because of this leverage model, usually it is not possible for Her Justice to take the case back. Although it is possible to take on a client as an attorney working alone, it is best if the client has two associates in addition to a supervising partner. This will allow each attorney to accommodate very busy times for billable work and allows for seamless transition of cases in the event that an attorney

leaves the firm for any reason. If you are leaving, it is imperative that you find a replacement attorney at the firm before you go. The client should meet their new attorney with you, ideally in person, before you leave, and the new attorney should take possession of all files and materials. Contact Her Justice right away if you are leaving the firm for any significant period of time. Ultimately, when a pro bono attorney is no longer available to the client, it is the responsibility of the firm to re-staff the case. If your firm has taken an uncontested divorce that has become contested, and the firm has a policy against pro-bono contested matrimonial work, speak with your mentor immediately about your options.

BEST PRACTICES AND ETHICAL CONSIDERATIONS

Thank you so much for your time, effort and energy in providing pro bono legal representation to our clients. This document is meant to provide some useful framing of the unique experiences and needs of our clients as well as some best practices and ethical considerations to guide you in your practice.

POVERTY IS A RACE AND GENDER EQUITY ISSUE

The impacts of poverty are felt disproportionately amongst communities of color and communities with Limited English Proficiency (LEP) in New York City and New York State. A comprehensive study of poverty in New York City by the Poverty Tracker Research Group at Columbia University (2021) found that, before the pandemic, nearly one in five adults (or 1.2 million people) in New York City lived in poverty and more than 350,000 children (one in five) live in poverty[1]. Research from the New York State Comptroller shows that one quarter of New York's foreign born population lived below the poverty level in 2021 compared to 15% nationwide[2]. Further, a study by the Poverty Tracker Research Group at Columbia found that every year, from 2016 to 2019, Black and Latino New Yorkers were **twice** as likely as white New Yorkers to experience poverty; 22% of Black New Yorkers, 25% of Latino New Yorkers, 21% Asian New Yorkers lived in poverty from 2016 to 2019 compared to 12% of white New Yorkers.[3] Further, due to structural racism and discrimination, "roughly 40% of Black New Yorkers and 30% of Latino New Yorkers who exited poverty were pushed back below the poverty threshold just a year later"[4]. According to researchers at the Poverty Tracker Research Group at Columbia, "the interaction between racism, discrimination, and economic inequality leaves Black and Latino New Yorkers significantly more likely to endure material hardship than white New Yorkers[5]."

People of marginalized gender identity, referring to women and individuals who identify outside of the gender binary[6], in New York City were more likely to experience all forms of disadvantage than cisgender[7] men[8]. In fact, families with female heads of household experience poverty at more than two times the rate of all families and four times the rate

[1] Poverty Tracker Research Group at Columbia University. (2021). The State of Poverty and Disadvantage in New York City. Volume 3.
[2] New Yorkers in Need: A Look at Poverty Trends in New York State for the Last Decade (2022) New York State Comptroller Thomas P. DiNapoli
[3] Poverty Tracker Research Group at Columbia University. (2021). The State of Poverty and Disadvantage in New York City. Volume 3.
[4] Poverty Tracker Research Group at Columbia University. (2021). The State of Poverty and Disadvantage in New York City. Volume 3.
[5] Poverty Tracker Research Group at Columbia University. (2021). The State of Poverty and Disadvantage in New York City. Volume 3.
[6] The gender binary refers to the idea that there are only two genders
[7] Cisgender refers to someone whose gender identity is the same as the sex they were assigned at birth
[8] Poverty Tracker Research Group at Columbia University. (2021). The State of Poverty and Disadvantage in New York City. Volume 3.

of married couples.[9] A study conducted by Legal Services NYC (2016) found that Black Americans in same sex couples have poverty rates at least twice of those of different sex couples and Black people in same-sex couples are more than six times as likely to be impoverished than White men in same-sex couples[10]. This same study found that transgender Americans are nearly four times more likely to have a household income under $10,000 per year than the population as a whole (15% vs. 4%)[11].

HER JUSTICE CLIENT POPULATION

Her Justice serves low-income folks of marginalized gender identities who reside in the 5 boroughs of New York with legal issues in the areas of family, matrimonial, and immigration law. Our clients' income falls 200% below the Federal Poverty Level (FPL), which was $14,580 for a single person and $60,000 for a family of 4 in 2023[12]. Poverty is "when an individual or household does not have the financial resources to meet basic needs such as food, clothing, and shelter, or alternatively, access to a minimum standard of living".[13] Our clients are 92% women of color, 83% self-identify as survivors of intimate partner violence, and 48% have Limited English Proficiency (LEP) and would need an interpreter to effectively engage in court proceedings[14].

[9] New Yorkers in Need: A Look at Poverty Trends in New York State for the Last Decade (2022) New York State Comptroller Thomas P. DiNapoli
[10] Legal Services NYC. (2016). Poverty is an LGBT Issue: An Assessment of the Legal Needs of Low-Income LGBT People. Legal Services NYC.
[11] Legal Services NYC. (2016). Poverty is an LGBT Issue: An Assessment of the Legal Needs of Low-Income LGBT People. Legal Services NYC.
[12] ASPE Office of the Assistant Secretary for Planning and Evaluation US Department of Health and Human Services Poverty Guidelines for 2023
https://aspe.hhs.gov/sites/default/files/documents/1c92a9207f3ed5915ca020d58fe77696/detailed-guidelines-2023.pdf
[13] New Yorkers in Need: A Look at Poverty Trends in New York State for the Last Decade (2022) New York State Comptroller Thomas P. DiNapoli
[14] Her Justice Annual Report FY 2022

Her Justice is a pro bono first organization which means we employ a small highly-skilled staff of attorneys that use their skills and expertise to educate and mentor pro bono attorneys, like yourself, on how to effectively serve and represent our client population. In FY 2022, our model allowed us to leverage the skills and expertise of our 14 in-house attorneys to mentor 2,162 pro bono volunteer attorneys who served 5,313 women children, donating 46,092 hours of their time and energy amounting to a value of $35,958,719 in legal services[15].

BEST PRACTICES

Differences in Perspective – Cultural Humility

Her Justice clients come from diverse backgrounds. Our clients' culture and individual life histories influence their perspectives and priorities in making important decisions. It is possible that your client is making certain considerations in making these decisions or forming their perspective on their case that you are not aware of. This means that the perspective your client has on their case may vary significantly from yours. Take this as an opportunity to explore sensitivity and cultural humility.

The term cultural humility was coined by doctors Melanie Tervalon and Jann Murray-Garcia in 1998 and describes "a lifelong commitment to self-evaluation and self-critique, to redressing of power imbalances in the patient-physician dynamic, and to developing the mutually beneficial and non-paternalistic clinical and advocacy partnerships with communities"[16]. Similar to medical professionals, a power imbalance exists between legal professionals and the people they serve. We acknowledge and are grateful for your professional expertise; however, in challenging this power imbalance, it is important to recognize the client as the expert regarding their life experience and the needs of their family. Remember "client-centered lawyering prioritizes the client, the client's understanding of the problem, and achievement of the client's goals in the way the client deems best"[17]. Empower your client to make informed decisions by explaining the law, legal processes and possible outcomes. Don't assume things and be sure to leave space for inquiry and introspection.

Respect, Empathy & Trust

Many of our clients are survivors of various forms of victimization frequently related to their gender identity, race, ethnicity, sexual orientation, class, English language proficiency, and/or immigration status. They may have experienced further victimization in attempting

[15] Her Justice Annual Report FY 2022
[16] Tervalon, M. & Murray-Garcia, J. (1998). Cultural Humility Versus Cultural Competence: A Critical Distinction in Defining Physician Training Outcomes in Multicultural Education. Journal of Health Care for the Poor and Underserved. Vol 9.2. pp 117-125
[17] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.

to access help from agencies or individuals that did not give them the space to be understood. These experiences may cause them to feel hesitant, unsafe, or distrustful. It is important to prioritize building trust in your attorney-client relationship by approaching your client with respect, empathy, patience, and transparency.

Some suggestions for establishing a good relationship with your client are:

- Be prepared to listen. Do not be in a hurry to give advice without the complete picture
- Validate their experience and believe what they tell you unless there is clear evidence of the contrary
- Be mindful of your asks of the client. Keep in mind the other conflicting demands in their life and any existing restrictions on time or money and be as accommodating as possible
- Be realistic in your deliverables to your client and set clear boundaries
- Confirm with the client that you understand them, and they are understanding you
- Be patient in repeating information and be willing to rephrase information to improve understanding
- Listen carefully and encourage questioning
- Be responsive to the needs your client raises with you. If their need falls outside of the scope of your representation, speak with your mentor for appropriate referrals
- Empower the client's informed decision making and respect the decisions they've made

Considerations for LGBTQ+ Clients

LBGTQ+ clients are often among the most marginalized communities served by Her Justice[18]. In working with LGBTQ+ clients it is important to not assume their gender identity or sexual orientation. In your initial conversation with your client introduce yourself by your name and gender pronouns. Ask your client their name and if they feel comfortable sharing their gender pronouns with you. Understand that your client may not feel comfortable sharing their gender pronouns with you initially. If they do not share their gender pronouns with you, please refer to the client by name or using gender neutral pronouns (they/them/theirs). If you make a mistake in your client's gender pronouns, acknowledge the mistake and move on.

Mirror the language the client uses in referring to their gender identity and sexual orientation. Always refer to your client with the name the client gave you. Referring to a client by a name they no longer use is called "deadnaming" and is very traumatizing as it

[18] Meyer, E. (2021). Top 7 Best Practices for Representing Transgender and Nonbinary Pro Bono Clients. Proskauer for Good. Proskauer.

negates your client's identity[19]. If you make a mistake in referring to your client by the wrong name, acknowledge the mistake and move on.

Lastly, be an ally and advocate for your client. According to a Lamba Legal survey of 2,376 LGBTQ+ people, 19% of the survey respondents who had appeared in a court at any time in the past five years had heard a judge, attorney, or other court employee make negative comments about their sexual orientation, gender identity, or gender expression[20]. To the extent the client is comfortable, attempt to address bias in the courtroom and always respect the name, gender, and pronouns they identify with.

Considerations for Clients with Disabilities

Your client may have a physical, developmental, or emotional disability. Their disability may be the result of the abuse they've experienced. Their disability may or may not be diagnosed, and may or may not be visible or obvious to you. Talk with your client about what, if any, accommodations are needed. Be mindful of the accessibility of your building. Be patient with needing to repeat and rephrase information for your client. If you need additional resources to accommodate your client, speak to your Her Justice mentor.

Communication

Be thoughtful about the communication needs of your client. Frequently, our clients do not have experience with the legal system and may be unfamiliar with many of the terms commonly used in the court room or legal discourse. Due to circumstance, their formal education may be limited, and they may have a low level of literacy. Be mindful of the needs of your client. Ensure they are able to understand all materials presented to them to the fullest capacity. Always check for comprehension.

For limited English proficiency clients, please review the "Limited English Proficiency (LEP) Clients" on this document.

Scheduling

Before making your first phone call with your client, review the information we provided you with to ensure it is safe to call the client at the time you are calling and that it is safe to leave a voicemail. Remember that many of our clients self-identify as survivors of intimate partner violence and may still be residing with the opposing party.

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[19] Meyer, E. (2021). Top 7 Best Practices for Representing Transgender and Nonbinary Pro Bono Clients. Proskauer for Good. Proskauer.

[20] as cited in Meyer, E. (2021). Top 7 Best Practices for Representing Transgender and Nonbinary Pro Bono Clients. Proskauer for Good. Proskauer.

In your initial conversation with your client establish what methods and times are best for you to contact your client. Keep in mind that our clients are low income and may not have sufficient resources to maintain a phone plan or continuously purchase more minutes for their phone. If possible, ask if there is a trusted friend or family member whose phone you can contact if you experience difficulty in contacting your client.

In making appointments, especially in person, be mindful of time and economic restrictions your client may be experiencing. Take into account their work and child care schedules in making these appointments. Be mindful of any safety concerns your client may have in terms of what times are most appropriate in scheduling appointments. Consider whether the firm can pay for a car service or a MetroCard for the client if transportation is a barrier to effective representation.

When scheduling in person appointments with your client, consider the security requirements to enter the building. Many law offices require guests to present a valid form of identification and intense security checks to enter. This can be extremely anxiety inducing for undocumented clients that may not have a valid form of ID, LGBTQ+ clients that may not have a valid form of ID that reflects their gender identity, and clients with limited English proficiency. Some clients have difficulty navigating large office buildings and may not know where to enter, which elevator to use, or which security desk to go to. It is a best practice to meet your client in the lobby of your building and escort them to the meeting room or your office.

Missed Appointments

We emphasize to our clients that they should call you in advance if they need to change or cancel their appointment or are running late. However, it is not unusual for clients to have trouble keeping appointments. Our clients are under-resourced. They may be experiencing a more pressing crisis, like an eviction, health crisis, or safety concern. Or attending the appointment may require them to take time off work, pay for round-trip transportation, and coordinate childcare which they may not have the resources to do. Your client, especially at the beginning of your relationship, may feel uncomfortable or embarrassed to share why they cannot make an appointment with you. We ask for your understanding, compassion, patience, and flexibility in this matter. Please keep in mind that the handling and outcome of the case primarily affects the client and any accommodation that can be provided is greatly appreciated.

Responsiveness

Our clients typically have incomes below 200% of the federal poverty line, $14,580 for a single person and $60,000 for a family of 4 in 2023[21], and are typically juggling multiple urgent needs. Many of our clients do not have a phone plan and instead purchase minutes on a pre-paid phone. However, in light of food or housing insecurities, your client may choose to go without minutes to put food on the table. We understand how this choice may impact you and your ability to communicate with your client, however, we ask for your understanding and compassion. We encourage you to speak with your client during your initial call and establish a safe back-up contact in case this situation arises. Be creative in contacting your client and responsive to their needs. Explore alternatives like using work email, text messages, or mail.

Interacting with the legal system is inherently traumatizing and anxiety-inducing for many of our clients. Remember that for many of our clients the legal system is unfamiliar. This is not their area of expertise and they know they need to rely on your knowledge and support to successfully navigate their case. Be patient when fielding phone calls and questions from your client. Be transparent about your capacity and set clear boundaries with your client. For example, if you are receiving multiple calls a week from a client asking for case updates, call them back and schedule a regular check-in meeting with them that fits with your work schedule to go over any questions they have and provide any case updates. This will help ease the clients' anxiety as they know a schedule to expect regular communication from you on their case.

Interviewing

Clients are often sharing sensitive personal information with you that can be difficult to share. It is imperative to build trust in your attorney-client relationship. Remind your client that the information they share with you is confidential. When asking questions about sensitive information make sure your questioning is grounded in what is needed for the case. It may be helpful to provide the client with some additional framing when asking questions as to why the information is needed and what it will be used for. For example,

- when asking questions regarding sensitive information we suggest this framing: "I am going to ask you some questions to better understand your case and how I can help. Please be as forthcoming as possible so I can provide you with the best assistance possible. Some of these questions may ask you about sensitive or private information. I want to assure you that everything you share with me is confidential, I will not share what you tell me here without your permission. Before we begin, I just want to emphasize that you do not have to share anything with me that you do

[21] ASPE Office of the Assistant Secretary for Planning and Evaluation US Department of Health and Human Services Poverty Guidelines for 2023
https://aspe.hhs.gov/sites/default/files/documents/1c92a9207f3ed5915ca020d58fe77696/detailed-guidelines-2023.pdf

not feel comfortable sharing. Please let me know if you would like to take a break or stop at any point during our interview."

At the end of the interview thank the client for sharing this information with you. It was likely not easy for them to share that level of vulnerability with you. Reground them in what this information will be used for and provide them with any next steps.

Limited English Proficiency (LEP) Clients

As stated previously, our clients come from diverse backgrounds and speak a multitude of languages. In 2022, 6 million people in New York spoke a language other than English; of that, 2.5 million speak English less well and would be considered Limited English Proficient or LEP.[22] LEPs in New York City speak 151 different languages[23]. New York City has acknowledged the need for greater language access through NYC Local Law No. 33 (LL 30) that requires covered agencies to translate commonly distributed documents into 10 designated languages and provide telephonic interpretation in at least 100 languages[24]. However, LL 30, for the most part, does not apply to most legal organizations including legal nonprofits. This means that there is a huge gap in the legal services available for LEPs. Even in our own work we see cases for LEPs take much longer to receive services than similarly situated English speaking cases.

We greatly appreciate your effort if you are handling a case for an LEP client. In working with LEP clients it is paramount that you ensure they are accurately understanding the information you are providing them with and that you are understanding the needs they are communicating to you. To do this, work with qualified interpreters. Qualified is a relative term so please consider the nature of the conversation and the language capacity of the interpreter you are working with. It is best practice to use an in-house qualified interpreter to work with your client for the duration of the case. If that is not accessible to you, think creatively about the interpretation and translation services available to you. See if it is possible to retain professional interpreter services orreview the internal staff language capacity. For potentially non-sensitive information it may be appropriate to have a friend or family member interpret. **It is <u>never</u> appropriate to have a client's child interpret**. **It is never appropriate to rely on Google Translate or similar multilingual neural machines translation service.** The Spanish Group, an internationally recognized certified translation service list 5 reasons why you should not use Google Translate or a similar software for translations:

- Translation apps translate the text literally. Think about the number of times you speak in expressions in English. For example, the phrase "break a leg" is an

[22] VOLS. (2022). Language Access in Pro Bono Practice.
[23] VOLS. (2022). Language Access in Pro Bono Practice.
[24] VOLS. (2022). Language Access in Pro Bono Practice.

expression of good luck, however, if translated literally it gives the impression that you are wishing that someone would break their leg.
- Many of these translation apps are not updated or operated by professional translators
- The translator apps do not account for the regional dialect your client may speak.
- Using a translator app frequently requires proofreading by someone fluent in the language to ensure the grammar and language choices match with the idea being expressed.
- Using a translator app for translating sensitive information is unsafe as the information may be compromised during a data breach[25]

Here are some other best practices in working with interpreters:

- Always brief the interpreter on the nature of the call before starting the meeting with client
- Consult the interpreter regarding whether a legal interpreter is more appropriate for the call
- Speak to the client directly, do not address your comments to the interpreter
- Ask the interpreter to confirm the client can understand them
- Ask the client to ensure they understand you

Managing Your Case

Even if there are no updates in your case for the client, continue to regularly check in with them. Remember our clients are facing many complex issues and conflicting demands. Without regular check-ins you may miss vital information about your client's living situation, access to phone and internet services, and safety.

Be affirmative in asking questions to your mentor and informing them of any case updates. It is your responsibility to inform your mentor in a timely fashion when documents are due to be filed in court or immigration authorities, when court dates are scheduled, and when final orders or judgements are received. Without this information we are unable to accurately report on our cases and are unable to monitor the needs of our clients.

Change in Notary Requirements

On January 1, 2024 CPLR 2106 was substantially amended to allow ANY person to submit an affirmation instead of an affidavit, with essentially the same force and effect. Now, in civil proceedings, any Pro Se litigant can swear to the truth of something without the requirement of a notary.

[25] The Spanish Group. (2020). 5 Reasons why not to Use Google Translate for Business Purposes. The Spanish Group. https://thespanishgroup.org/blog/top-5-reasons-not-use-google-translate-business-purposes/

However, in a Divorce, the Verified Complaint, Sworn Statement of Removal of Barriers, and Statement of Net Worth must still be signed before a notary to comply with other provisions of the DRL.

Therefore, we believe it is best practice to continue notarizing all documents that have previously required a notary signature. This limits liability, claims of malfeasance or fraud and takes very little additional effort. The samples herein include the notary language.

WHAT IS DOMESTIC VIOLENCE?

The United Nations defines domestic abuse or domestic violence as a pattern of behavior in any relationship that is used to gain or maintain power and control over an intimate partner, child, relative, or any other household member[1]. The epidemic of domestic violence involves physical acts of violence, emotional, psychological, verbal, sexual, legal and financial abuse against an intimate partner or family member[2]. This includes any behaviors that "frighten, intimidate, terrorize, manipulate, hurt, humiliate, blame, injure, or wound someone"[3]. Fundamentally, domestic violence is "a pattern of coercive behavior or tactics that is culturally learned and socially condoned"[4].

> **Domestic violence can impact anyone of any race, age, sexual orientation, gender identity, nationality, religion, socioeconomic background, immigration status, language of fluency, or education level**[5].

Although many domestic violence cases involve individuals in a romantic relationship (typically referred to as intimate partner violence), this may not always be the case. The individuals involved may be dating, cohabitating, married, divorced, separated, and/or have a child in common. Domestic violence can present and be interpreted differently depending on the surrounding cultural and social context of the individuals involved. However, a consistent theme is use of power and control to victimize the other party.

EXAMPLES OF ABUSIVE BEHAVIORS

Physical Abuse

This form of abuse includes acts like spitting, scratching, biting, grabbing, shaking, shoving, pushing, restraining, throwing, twisting, slapping, punching, choking, burning, forcing sexual contact, forcing alcohol and/or drug use, and other acts that inhibit physical well-being. Food and medication may be withheld and access to medical attention or police services may be prevented. They may be kidnapped or confined in an enclosed space or abandoned in an unfamiliar place. Physical abuse may or may not cause visible physical injuries[6].

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[1] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse

[2] Breger, M. L., Kennedy, D.A., Zuccardy J.M., & Hon. Elkins, L.H. (2022). New York Law of Domestic Violence. Chapter 1. Domestic Violence Defined.

[3] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse

[4] New York State Coalition Against Domestic Violence (NYSCADV). (2011). Domestic Violence Handbook. NYSCADV.

[5] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse

[6] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse & New York State Coalition Against Domestic Violence (NYSCADV). (2011). Domestic Violence Handbook. NYSCADV.

Sexual Abuse

This form of abuse includes pressured sex when that is not consensual, coerced sex by manipulation or threat, physically forced sex, sexual assault accompanied by violence, or other acts the right to freely and safely express their sexuality[7].

Emotional Abuse

This form of abuse includes acts and behaviors like undermining a person's self-worth though constant criticism; belittle one's abilities; name-calling or other verbal abuse; damaging a partner's relationship with their children; and isolating a partner from friends and family[8].

Psychological Abuse

This form of abuse involves acts or behaviors causing fear or intimidation; threatening physical harm to self, a partner, or child(ren); attacking a partner's property, pets, or others acts of intimidation; and forcing isolation for anyone outside of the relationship or domestic violence situation[9].

Financial or Economic Abuse

Economic abuse occurs when control is invoked over the ability to acquire, use and maintain financial resources, such as transportation, food, clothing, shelter, insurance, credit, and money. This form of abuse involves making or attempting to make a person financially dependent by maintaining total control over financial resources, withholding access to money, committing identity theft by opening fraudulent accounts or credit lines in their name, placing sole financial responsibility for supporting their household, and/or forbidding attendance at school or employment[10].

Cyber Abuse

This form of abuse includes hacking, installation of spyware, cyber stalking, spoofing, identity theft, impersonation (including deep fakes), sexual extortion (colloquially known as

[7] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse & New York State Coalition Against Domestic Violence (NYSCADV). (2011). Domestic Violence Handbook. NYSCADV.
[8] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse & New York State Coalition Against Domestic Violence (NYSCADV). (2011). Domestic Violence Handbook. NYSCADV.
[9] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse & New York State Coalition Against Domestic Violence (NYSCADV). (2011). Domestic Violence Handbook. NYSCADV.
[10] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse & New York State Coalition Against Domestic Violence (NYSCADV). (2011). Domestic Violence Handbook. NYSCADV.

sextortion), and the nonconsensual distribution or threat of distribution of sexually explicit images and videos[11].

Abuse of Process

This form of abuse involves misusing and manipulating legal and social processes to weaponize them against the victimized person. This includes acts like making false reports of abuse, substance abuse, or child neglect to police or ACS, filing frivolous or fraudulent immigration or court proceedings, filing retaliatory orders of protection, intentionally delaying court or immigration proceedings, misleading or lying about their legal rights and options, threats of deportation, threats to withdraw or refusal to continue support in immigration applications, stealing newly received immigration benefits or identification – like employment authorization documents, A numbers, and social security numbers – to commit identity theft, etc.

POWER AND CONTROL WHEEL

Below is the original power and control wheel. Since its creation, subsequent power and control wheels have been developed to explore specific accepts of abuse in relation to a person's identity. It describes the tactics a responsible party may use to maintain control over the person they are victimizing[12]. This wheel is not comprehensive but provides helpful framing to understand the aspects of victimization someone may be experiencing. *Other versions of the power and control wheel specific to victimization experienced immigrants and people with a disability can be found in the Appendix section of this manual*

[11] New York Cyber Sexual Abuse Task Force. About Cyber Sexual Abuse. New York Cyber Sexual Abuse Task Force. https://cyberabuse.nyc/

[12] National Domestic Violence Hotline. (2023). Power and Control Break Free from Abuse. National Domestic Violence Hotline. https://www.thehotline.org/identify-abuse/power-and-control/

[13]

"WHY DO THEY STAY?" The Stages of Change Model

Domestic violence is a complex and multi-dimensional issue that's presentation and impact cannot be generalized. Each person processes the complexities of their relationship and their trauma from the abuse they experienced differently. This process is uniquely personal to them and often not a linear process[14]. The psychology field has developed a tool for understanding the complex needs and actions of domestic violence survivors[15]. It describes the process survivors go through when they seek to end the violence and abuse they experienced. The model includes five distinct stages:

(1) *Pre-contemplation*

a. In this stage the person experiencing the abuse is not aware of the extent of the problem and minimizes or denies the abuse. At this point they likely have no intention to change or leave the situation. They may feel responsible for

[13] Copyright by the Domestic Abuse Intervention Project, 202 East Superior Street, Duluth, MN, 55802 218-722-2781
[14] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[15] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.

the abuse they are suffering and may be modifying their actions to avoid further abuse[16].

(2) Contemplation

a. Usually in this stage the abuse has increased in its severity. The survivor begins to consider the possibility of changing their current situation and may begin building social, emotional, and financial support. They may make an initial attempt to leave. However, the survivor may express ambivalence and fluctuate between feeling troubled and unconcerned as they consider whether the situation can continue unchanged[17].

(3) Preparation

a. In this stage the survivor beings to understand the abuse they experienced differently. They become more aware of the abuse they are experiencing and attempt to determine the best course of action and develop a plan to carry it out. In this stage the survivor may set aside money; call an abuse hotline; gather information about resources, services, and legal options for survivors of domestic violence; and reconnect with people they were isolated from[18].

(4) Action

a. In this stage the survivor begins to carry out strategies to protect themselves and their children from future violence by taking actions such as going into shelter, seeking a protection order, or having others intervene in the abuse[19].

(5) Maintenance

a. This stage involves a continuation of actions by the survivor that are needed to maintain the change. These actions may involve safety planning, seeking mental health counseling, and rebuilding financial health[20].

This model is cyclical and nonlinear. In fact, it is common for survivors to fluctuate between stages as they move towards maintenance[21]. Again, a survivor's process of leaving a domestic violence situation and healing from the trauma they experienced is specific and personal to them.

OTHER MODELS AND THEIR LIMITATIONS

Two of the most common models used to understand the intricacies of domestic violence are the Battered Woman Syndrome and the Cycle of Violence. The Batter Woman Syndrome and Cycle of Violence models were developed by Lenore Walker in her 1979 book *The Battered Woman* and further developed in her 1984 book *The Battered Woman Syndrome*[22]. The Cycle of Violence describes the cyclical nature of abuse in intimate partner

[16] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[17] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[18] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[19] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[20] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[21] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[22] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.

violence. The cycle starts with building tension, acute abuse, and a honeymoon phase or a loving repentant period[23]. Walker defines battered woman syndrome as "a cluster of psychological and behavioral characteristics that abused women develop as a result of how they perceive their batterer's violence"[24]. Walker posits that abused women developed "learned helpless" as a result of the "cycle of violence"[25]. Meaning that the continued and repeated abuse and control will cause the abused women to enter "psychological paralysis" and stop trying to leave the abusive situation[26]. According to Walker, "Once the women are operating from a belief of helplessness, the perception becomes reality and they become passive, submissive, 'helpless'"[27].

This model conflates domestic violence with intimate partner violence (IPV), imposes a heteronormative cisgender understanding of IPV that positions the cisgender woman as victim and the cisgender man as abuser, disempowers the survivor, and implies the survivor is complicit in the continuation of abuse. In addition, these models are not created to understand domestic violence and intimate partner violence from the perspective of the person being victimized. It instead gives justification to view people who remain in abusive relationships as lost causes.

[23] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[24] as cited in Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[25] as cited in Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[26] as cited in Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[27] as cited in Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.

B. The Initial Client Interview

THE INITIAL CLIENT INTERVIEW
STEP BY STEP PROCESS FOR INITIATING CLIENT CONTACT

- Telephone the client to introduce yourself and schedule a date and time for the initial interview. Advise the client that all meetings will take place at your office and give them the exact address and your contact information. Inform the client that the initial interview will take approximately 2 to 3 hours.
- Provide the client with the name and address of your office, detailed directions, and a telephone number where you can be reached.
- Ask the client to contact your office 24 hours in advance to confirm the appointment and to call you if they need to reschedule or are running late.
- If any of the following are not in your client's file, ask the client to bring them to this meeting so that you can make copies: marriage certificate, proof of income, Domestic Incident Reports ("DIRs"), Family Court orders, orders of protection, and health insurance information, if any. ***(Make copies of all documents at the interview.)***
- If you know that your client is a domestic violence survivor, during your first telephone conversation direct the client (*if possible*), to write a detailed description of the last two or three incidents of physical or verbal abuse that occurred during the marriage within the last four to five years. Ask the client to include the month, day and year of each incident. The client should bring this information at the time of the initial interview.

  Note: It may be difficult or awkward for some clients to recall incidents of domestic violence spontaneously during the initial interview. This information will also make it easier to determine the client's ground(s) for divorce.

- Before beginning the interview, you must provide the client with a copy of the Client Statement of Rights and Responsibilities (see Sample provided in this Manual) and a Retainer Agreement. (See NYCRR, Sections 1400.2 and 202.16). It is mandatory that you use your own firm's Retainer Agreement as each document is firm specific. These documents explain to the client what they can expect from their legal counsel and that no fee will be charged for legal representation. Allow the client time to review these documents and discuss any questions they may have. Place these documents in the client's file after they are executed. You will need to file a copy of the Retainer Agreement with the court as well.
- Once the documents have been reviewed and all questions have been answered, the client and the attorney should sign both documents. Provide the client with copies of both documents.
- Advise the client at the start of the initial interview that you will be asking them a series of questions, so that you can obtain necessary information about them, their spouse and child(ren), if any, so that you can select their ground for divorce, determine any ancillary relief required, and prepare the divorce pleadings.
- Conduct the interview using the Divorce Questionnaire (discussed further below).

- ♦ Discuss and assess with the client (a) whether the **"basics"** have been satisfied; (b) the **grounds** for divorce; and (c) any requests for **ancillary relief** as outlined in the "Ancillary Relief" section of this Manual.
- ♦ Describe to them the filing process and set a follow-up appointment (approximately two weeks after the initial interview) at which time they will review and sign the Verified Complaint.
- ♦ Provide the client with a business card; tell them the best time to reach you and find out the best time to reach them.
- ♦ Prepare the initial divorce documents. Your firm may have drafting software to assist with this. Forward the draft of these documents to your Her Justice mentor for review.

THE DIVORCE QUESTIONNAIRE

The initial client interview is the first step in the process of getting a divorce for the client. A Divorce Questionnaire, a sample of which is provided in this Manual, is needed to obtain the necessary information for a litigated divorce. The Divorce Questionnaire is designed to assist in gathering facts to assess:

- Whether the client satisfies the "basics:"
  - Residency requirements of Domestic Relations Law ("DRL"), Section 230
  - Will service of the Defendant spouse be possible?
- Whether the client has grounds for divorce, as set forth in DRL § 170.
- What type of ancillary relief the client will seek: e.g. custody, child support or maintenance.

The Divorce Questionnaire will also assist in gathering the following information:

General Information

- ❑ Appropriate venue
- ❑ City, county, state or country where the client and spouse were married
- ❑ Date of marriage and nature of ceremony (civil or religious)
- ❑ Educational backgrounds of both client and spouse
- ❑ Dates and places of birth for client and spouse
- ❑ Number of prior marriages (if any) for the client and spouse
- ❑ Social security numbers for the client, spouse and children of the marriage. (Federal and state law now require the parties to a divorce action to provide the social security numbers for the above-mentioned individuals.) (DRL § 240(a).)
- ❑ Health insurance information for the client, spouse and child(ren) of the marriage. (The DRL now requires the parties in a divorce action to make provisions for available health insurance coverage for the children of the marriage.) (DRL § 240(1).)
- ❑ The current address of both client and spouse

Information Re: Client

- ❑ Prior surname
- ❑ Current source(s) and amounts of income (Public Assistance, Worker's Compensation, Social Security Income (SSI), Unemployment Insurance Benefits, Social Security Income (SSI), Employment)
- ❑ Whether the client needs to keep their address and social security number confidential. (See Part B, Subsection 2).
- ❑ Whether the client has any order(s) from Family Court relating to custody, visitation, child support or spousal support. (If yes, obtain a copy of the order(s) from your client, if not already in your client file.)
- ❑ Whether the client has any order(s) of protection. (If yes, obtain a copy of the order(s) from your client, if not already in your client file.)

Information Re: Spouse

- ❑ Current source(s) and amounts of income, if your client knows (Public Assistance, Worker's Compensation, Social Security Income (SSI), Unemployment Insurance Benefits, Social Security Income (SSI) or Employment)

Information Re: Children

- ❑ Are there any child(ren) of the marriage? This does not include child(ren) from a prior relationship or marriage, unless the client or spouse has legally adopted that child. (Client should provide proof of adoption.)
- ❑ The name(s), age(s) and date(s) of birth for all children of the marriage. If applicable, identify whether any of the children of the marriage are emancipated.

During the initial client interview, you must determine whether your client has satisfied all of the "basics" indicated above. Notify Her Justice immediately if the client does not satisfy one of the requirements.

PRACTICE TIPS FOR CONDUCTING THE INITIAL CLIENT INTERVIEW

Determine if the client knows how to locate their spouse for personal service. Advise the client that a divorce action cannot be commenced until their spouse can be located. **Notify Her Justice if the client is unable to provide a current home or work address for their spouse.**

If the client indicates that their spouse is incarcerated, they should provide the name and address of the correctional facility and the spouse's inmate identification number.

There are several online resources for locating inmates in New York. Following are a few of the websites. For inmates in local jails (including Rikers Island) go to http://a072-web.nyc.gov/inmatelookup/ For inmates in prisons-correctional facilities go to http://www.docs.state.ny.us/ For defendants in the midst of their court proceedings in

NYC go to
http://iapps.courts.state.ny.us/webcrim_attorney/AttorneySearchCase#search_result
For inmates in federal prisons go to http://www.bop.gov/iloc2/LocateInmate.jsp

Address Confidentiality: During the initial client interview, you should also discuss whether for safety reasons your client is, or plans to move to an address unknown to her spouse. If your client resides at a shelter or a safe home and wants to keep their address confidential, they may seek to obtain address confidentiality through the New York State Department of State Address Confidentiality Program (http://www.dos.ny.gov/acp/). Alternatively, you may seek permission to maintain the plaintiff's address confidential by filing an ex-parte application for confidentiality, including an affidavit from the client as well as an attorney's affirmation, demonstrating the bases for the request. Your Her Justice mentor can discuss these options with you.

THINKING AHEAD TO MANDATORY FINANCIAL DISCLOSURE

Contested matrimonial actions have mandatory financial disclosure requirements (discussed further in this manual). You should start preparing for this with your client early in the case.

Once the divorce case has commenced, you may need to take some immediate action, depending on your opposing party's response and whether your client needs temporary orders from the court. You may need to have follow-up conversations with your client to make decisions about next steps or to gather additional information needed for motion practice or in preparation for your first court appearance. You need to consider the mandatory financial disclosure requirements and how the timing of them may impact other immediate needs of your client (such as obtaining temporary custody, support, or an order of protection). You should discuss your client's immediate needs and the best strategies to address them with your Her Justice mentor. Here are some things to keep in mind when planning ahead:

Statement of Net Worth: Parties are required to exchange of Sworn Statements of Net Worth (discussed further in the Pendente Lite, Conference, and Discovery sections of this Manual). You may want to provide a blank copy or review this form with your client before you meet with her to complete it so she can become familiar with the required information and you can discuss options for gathering what she does not already have or know. You should not have your client complete the form on her own, and you should never submit it to court or the opposing party without thoroughly reviewing it with your client.

Credit Reports: In discussing your client's financial situation, including debts, it can be helpful to have a recent version of your client's credit report from one or all of the credit reporting agencies (Experian, Equifax, TransUnion) and go over it with your client. This may aid in helping your client identify the status of her accounts as well as whether any or all of them qualify as marital debt. It may also alert your client to any incidents of fraud or

identity theft, perhaps committed by her spouse, if she has accounts or liabilities she was not aware of and did not incur herself. **Bear in mind, however, that reviewing a credit report or discussing debts generally can be frightening, upsetting, or embarrassing to your client, especially if she has been the victim of financial abuse or a financial crime.** Consider the timing and setting of this conversation: after you have developed some trust with the client, and in a setting where she is able to speak freely about this subject. Credit reports are further discussed in the Discovery section of this Manual.

SECTION 2: ORIENTATION TO YOUR CASE

HER JUSTICE

A. Commencing the Case

THE COMMENCEMENT OF A CONTESTED DIVORCE ACTION

JURISDICTION

THE NEW YORK STATE COURT SYSTEM

Before handling your first divorce case it is important to understand the New York State Court system as it relates to matrimonial actions.

Supreme Court

The Supreme Court of the State of New York has exclusive original jurisdiction over matrimonial actions. This means that the Supreme Court of New York State is the only court that can grant a divorce. The Supreme Court of New York State is established in each county of the State and is part of the state's Unified Court System. The Domestic Relations Law ("DRL") governs matrimonial actions.

Family Court

The Family Court of the State of New York is established in each county of the state as part of the state's unified court system. Proceedings commenced in the Family Court are governed by the Family Court Act ("FCA").

The Family Court has jurisdiction over:

- abuse and neglect proceedings (Article 10)
- family offense proceedings (see Article 8)
- support proceedings (Article 4)
- paternity proceedings (Article 5)
- custody and visitation proceedings; termination of parental rights (Article 6)
- proceedings concerning whether a person is in need of supervision (PINS) (Article 7)
- juvenile delinquency proceedings (Article 3)
- habeas corpus proceedings.

Many of the clients referred by Her Justice to this program (particularly those with children) may have obtained Family Court orders prior to commencing the divorce action. Such orders may provide for custody of the minor child/children of the marriage, visitation rights, and/or payment of child support or spousal support. Normally, the orders of the Family Court are incorporated by reference and are continued in the final divorce judgment. Please review your client file to determine whether your client has any orders from the Family Court.

*** Orders for child support issued more than three years ago may be considered stale by the courts. Determine that the order of support is the most recent order issued, and call Her Justice with questions if your client has an old order.**

RESIDENCY – DRL § 230

In a New York State divorce action, one of the following residency requirements must be satisfied:

- ❑ The parties were married in New York State AND either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding, ***OR***
- ❑ The parties have resided in this state as spouses and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding, ***OR***
- ❑ The cause occurred in the state and either party has been a resident thereof for a continuous period of at least one year immediately preceding the commencement of the action, ***OR***
- ❑ The cause occurred in the state and both parties are residents thereof at the time of the commencement of the action, ***OR***

Either party has been a resident of the state for a continuous period of at least two years immediately preceding the commencement of the action.

NOTE: Most clients referred to this program have been residents of New York State for a period of at least two years prior to the commencement of the divorce action. However, you should always confirm your client meets the residency requirement.

COMMENCEMENT OF A DIVORCE ACTION – DRL § 211

Pursuant to **CPLR Section 304** an action is commenced by filing with the clerk of the court in the county in which the action is brought, either **(a) a Summons with Notice only**; or **(b) a Summons *and* Verified Complaint.**

The divorce action is commenced by obtaining an index number and filing either (a) the ***Summons with Notice***, or (b) ***Summons and Verified Complaint*** with the County Clerk's Office. Obtaining the index number and filing the initial papers are done simultaneously.

VENUE – CPLR SECTIONS 503(a), 509 and 515

Generally, in New York venue is determined by **(1)** the county of plaintiff's residence; **(2)** the county of defendant's residence; or **(3)** the county designated by the plaintiff. CPLR sections 503(a) & 509.

A recent change to the Civil Practice Law and Rules (CPLR) ***now restricts venue in a matrimonial action*** to a county in which either party or any minor child of the marriage resides. CPLR sec. 515. This means that Plaintiff is no longer permitted to designate venue pursuant to CPLR sec. 509. There is an exception where either party's address is

confidential; in those instances, Plaintiff may still designate venue. We recommend that you file your case in New York County (Manhattan) or Kings (Brooklyn), if either the client or the spouse lives in one of these counties or if either party has a confidential address. If you have questions about venue or would like to discuss the pros and cons of a particular county where you have a choice, speak with your Her Justice Mentor.

A divorce becomes a contested matter when the Defendant appears in the divorce, after being served with a Summons with Notice[1], or a Summons and Verified Complaint, by filing and serving upon Plaintiff or Plaintiff's counsel either a Notice of Appearance and Demand for a Complaint[2] (if served with a Summons with Notice) or a Verified Answer, within 20 (or 30, for service outside the State of New York) days of service[3].

A sample Notice of Appearance and Demand for Complaint is provided in this Manual. The next step is for the Verified Complaint to be served, which will state that the residency requirements have been met[4], and the grounds for divorce. After the Complaint has been served, the Defendant then generally has 20 days (or in certain cases 30 days) to file a Verified Answer, unless the parties stipulate in writing to extend this time limit. A sample Verified Answer and Counterclaim is also provided in this Manual. Defendant's attorneys beware: your client will be in default after 20 (or 30) days, so timeliness is essential.

The Answer and/or Counterclaim will contain denials of some or all of the allegations contained in the Complaint. There should be denials of the essential facts concerning grounds, and, if applicable, denials respecting the jurisdictional allegations as well. In order for a fact to remain a contested issue before the court, it is essential that the allegation in the Verified Complaint respecting this fact be denied in the Answer. If something is not expressly denied, it is deemed admitted. The Answer may also contain Counterclaims, which are allegations made by the Defendant.

After receiving the Counterclaim, the Plaintiff must in turn submit a **Reply** within 20 days, issuing the necessary denials, lest the Defendant obtain a divorce on default. A sample Reply is provided in this Manual.

It is permissible to serve the Answer/Counterclaim/Reply by mail, adding 5 days for mailing under CPLR §2103.

COURT/MOTION PRACTICE: GETTING INTO THE COURTHOUSE

When all the pleadings (Complaint, Answer, Reply, if needed) have been served in a matrimonial action, the issue is now considered **joined**. At this time, efforts begin to resolve the outstanding issues in the matrimonial action, which include whether the cause

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[1] CPLR §304, §CPLR 305(b).
[2] CPLR §320, §CPLR 3012(b).
[3] The general rule for time to file and serve a responsive pleading is 20 days; except that where service is not made within the state of New York, pursuant to CPLR §313, or by any means other than personal service pursuant to CPLR §308(2) through (5), or pursuant to CPLR §316, the time to respond is 30 days. Service by any other means than personal service can only be made with court approval in a matrimonial action. DRL §232.
[4] DRL §230.

of action for divorce (grounds) is to be granted, as well as the "ancillary" matters, including child support, maintenance, occupancy of the marital residence, equitable distribution of all marital assets, custody, visitation, and orders of protection.

CONSOLIDATING FAMILY COURT AND SUPREME COURT CASES

Clients may have begun litigating ancillary issues in the Family Court. Once a divorce action is commenced, the Supreme Court has general, unlimited jurisdiction over the ancillary matters, and as such, the Family Court matters may be removed to the Supreme Court. In order to consolidate the Family Court cases with the Supreme Court divorce case, a **Motion for Consolidation** must be made in Supreme Court to remove and consolidate the Family Court matters with the Supreme Court case[5]. These requests are very often granted, in the interests of judicial economy, especially where the Family Court proceedings have not yet progressed to hearing. A sample Motion to Consolidate is provided in this Manual. Annex the Family Court pleadings and orders to the application. Once the Supreme Court orders the transfer, a copy of the order should be sent to the Family Court and the file will be transferred over to the Supreme Court. The Family Court must wait for the Supreme Court to approve the removal and consolidation.

[5] CPLR §602(b).

GROUNDS FOR DIVORCE

New York State requires individuals to state "grounds" or a legal reason why the parties should be allowed to get divorced.

Listed below are the various legal grounds for divorce in New York State. While there are seven (7) different legal grounds for divorce, only four (4) of the seven (7) will be discussed below. All of the cases referred through the Her Justice Program meet one or more of these four (4) grounds.

The ***DRL § 170*** lists seven legal grounds for divorce:

- Cruel and Inhuman Treatment
- Abandonment/Constructive Abandonment
- Imprisonment
- Adultery*
- Living Separate and Apart Pursuant to a Separation Agreement*
- Living Separate and Apart Pursuant to a Separation Decree*
- Irretrievable Breakdown of the Marriage

None of the cases referred through the Program will involve this ground for divorce. Incidents of adultery could be listed under cruel and inhuman treatment.

The following pages will outline the elements for each of these grounds and provide examples and helpful tips that will assist you in identifying the appropriate grounds for your client.

However, please be aware that if the parties cannot agree on the grounds, the Court will *strongly advise* the parties to settle on the grounds of *DRL §170 (7) Irretrievable Breakdown of the Marriage* before moving forward to avoid proceeding with a grounds trial. We recommend including irretrievable breakdown as at least one of the grounds for divorce if it is applicable. Including the grounds of irretrievable breakdown even where you have other grounds will preserve your failsafe option to use it to avoid trial or in the event you discover you cannot prove other grounds to the court's satisfaction without having to amend the pleadings later.

CRUEL AND INHUMAN TREATMENT – DRL § 170(1)

Cruel and inhuman treatment includes any physical, psychological or verbal abuse that has occurred during the marriage, committed by the spouse, which endangers the client's well-being and makes it unsafe or improper for them to continue living with their spouse. To use this as a ground for divorce, the client must demonstrate a pattern of misconduct or wrongdoing by their spouse. The client should use incidents that occurred within the last five years (DRL § 210), if possible. If the client does use incidents that occurred more than five years ago, and the defendant appears in the action, they may use this as an affirmative defense and move to dismiss the action.

Generally, the longer the marriage, the higher is the standard to satisfy cruel and inhuman treatment. In a long marriage, the complaint should put forth a systemic pattern of egregious behavior against the client. See *Brady v. Brady*, 64 N.Y.2d 339 (1985) ("[W]hat might be considered substantial misconduct in the context of a marriage of short duration, might only be 'transient discord' in that of a long-term marriage…. Thus, courts in this State have required a high degree of proof of cruel and inhuman treatment where there is a marriage of long duration and an isolated act of mistreatment will rarely suffice.").

Cruel and inhuman treatment may include any or all of the following:

- physical, sexual, verbal, emotional or financial abuse
- threats of violence or harassment against client, the parties' children, or family
- insults by the spouse in the presence of third parties, client's family or spouse's family.

For purposes of this Program, all allegations of adultery committed by the spouse should be included under this ground, as long as the acts of alleged adultery occurred within the last five years.

Example 1:

On or about April 26, 2008, at the marital residence, 41 Temper Street, Bronx, New York, when the plaintiff refused defendant's request for money, the defendant punched the plaintiff in the face five times, causing them to fall to the floor, and repeatedly kicked plaintiff in the back and legs. This occurred in the presence of the plaintiff's sister, Rosie Courage, and caused the plaintiff great pain and humiliation. Plaintiff received medical treatment at Mt. Sinai Hospital for their injuries. As a result of this incident, plaintiff obtained a Temporary Order of Protection from Family Court, Bronx County, under the Docket Number 0-12345/04, dated April 28, 2008.

Example 2:

On or about February 14, 2008, at the marital residence, 41 Temper Street, Bronx, New York, the defendant admitted to plaintiff that they had an affair with the parties' next-door neighbor, Candie Stripe. Knowledge of this affair caused plaintiff great pain and humiliation.

Example 3:

On or about April 26, 2008, at the marital residence, 41 Temper Street, Bronx, New York, the defendant became enraged when Plaintiff served their dinner ten minutes late. They verbally abused the plaintiff by calling plaintiff "fat," "lazy" and "stupid" in front of defendant's friends. This caused plaintiff great pain and humiliation.

HELPFUL PRACTICE TIPS WHEN USING CRUEL AND INHUMAN TREATMENT AS A GROUND

In order to use Cruel and Inhuman Treatment as a ground for divorce, the client does not need to allege both physical and verbal abuse. Incidents of physical abuse within the last five years should always be listed first, with emphasis on selecting the most egregious incidents of physical abuse. Incidents of psychological abuse should follow, setting forth a pattern of psychological abuse against the client.

If the acts of Cruel and Inhuman Treatment committed by the spouse occurred more than five years ago, the defendant-spouse may assert as a defense that the five-year statute of limitations on this cause of action has elapsed and move to dismiss the action. (DRL § 210) Therefore, if there are sufficient acts of cruelty committed by the spouse against the client that occurred during the five years prior to the commencement of the action, the client should focus on those acts. Incidents of abuse that are older than 5 years may be included to provide context, but they should not be relied upon to make the case.

The client must allege how their spouse's acts of cruel and inhuman treatment have affected them either emotionally or physically. For example, each allegation should reflect whether the spouse's acts made the client fear for their life, humiliated them, required them to leave the marital residence out of fear for theirs or their children's safety, caused them to receive medical or psychological treatment as a result of injuries the spouse inflicted on them or to have obtained an order of protection.

Periods of abandonment/desertion by the spouse for a period of less than one year may be alleged under the ground of cruel and inhuman treatment.

Acts of cruelty must have occurred **during the course of the marriage**. Do NOT use incidents that occurred prior to the date of marriage.

For allegations based on **physical cruelty**, the client should indicate the following for each incident:

Who: Who else besides the parties was present when the incident occurred? (Children, friends or family, etc.)

Example: On or about May 5, 2009, at the marital residence, 300 Grand Concourse, Apt. #34, Bronx, New York, the defendant *in the presence of the three children of the marriage…*

What: What happened? The physical, verbal, mental or sexual abuse should be described in detail, including injuries sustained, medical treatment or police intervention.

Example: On or about May 5, 2009, at the marital residence, 300 Grand Concourse, Apt. #34, Bronx, New York, *the defendant punched the plaintiff about the head and face five times with a closed fist …*

Where: Where did the incident occur? Provide the address or location for each allegation.

Example: On or about May 5, 2009, at the marital residence, 300 Grand Concourse, Apt. 34, Bronx, New York…

When: When did the incident occur? At a minimum indicate the month (or season) and year for each allegation.

Example: On or about May 5, 2009… OR…In or about May 2009…

Why: Description of the events leading up to the incident of cruelty.

Example: On or about May 5, 2009, at the marital residence 300 Grand Concourse, Apt. #34, Bronx, New York, *the defendant became angry when the plaintiff served dinner at 6:30 instead of 6:00 p.m.,* threw a plate of hot pasta at the plaintiff's head and hit plaintiff over the head with an empty beer bottle…

How: Description of how the abuse made the client feel.

Example: On or about May 5, 2009, at the marital residence 300 Grand Concourse, Apt. #34, Bronx, New York, the defendant became angry when the plaintiff served dinner at 6:30 instead of 6:00 p.m., threw a plate of hot pasta at the plaintiff's head and hit plaintiff over the head with an empty beer bottle. *Plaintiff suffered burns and bruising on their head and felt pain and humiliation at defendant's misconduct.*

For allegations of verbal abuse, describe in detail the derogatory, humiliating or demeaning statements made by the client's spouse, even if these include obscene words or profanity. Indicate whether the verbal abuse took place in the presence of any third parties.

Example: On or about May 5, 2007 at the marital residence, 300 Grand Concourse, Apt. #34, Bronx, New York, the defendant during the parties' anniversary celebration called the plaintiff *"fat," "dumb," "lazy" and a "stupid bitch."* This incident occurred in front of the defendant's friends, Larry, Moe and Curly. Plaintiff felt humiliated due to defendant's demeaning remarks.

ABANDONMENT – DRL § 170(2)

Abandonment occurs when the spouse has left or deserted the client for a period of one year or more. The abandonment must be ***continuous for a period of one year or more prior to the filing of the action. (See Examples 1 and 2) The abandonment must also be unjustified or without the client's consent.***

Example 1:

If the spouse left on May 19, 2008 and returned on April 18, 2009 and then left the client again on May 1, 2009, the client will not be able to use abandonment as a ground for divorce. The abandonment was not continuous for one full year.

Example 2:

If the spouse left the client for a period of more than a year because the client kicked them out of the marital home and told them to stay away from the client and the children, the client will not be able to use abandonment as a ground for divorce. The abandonment must have been without their consent.

Example 3:

If the spouse left the marital residence without the client's consent on January 5, 2005, and returned on December 31 to stay the night, but does not move back into the residence, the client may still use the abandonment ground.

HELPFUL PRACTICE TIPS WHEN USING ABANDONMENT AS A GROUND

If the spouse has left the client for periods of time amounting to less than one year, **include these allegations under the ground of cruel and inhuman treatment.**

If the spouse is no longer living with the client because they kicked their spouse out of the house, the client may not be able to use abandonment as a ground for divorce.

The abandonment must be unjustified by the client's conduct or fault. Therefore, if the spouse left because of actions or conduct by the client, this ground may not be used.

If the client is the one who has left the spouse, the client will not be able to use abandonment as a ground for divorce. However, if the spouse forced or locked the client out of the house, then the ground may be constructive abandonment.

If both parties have consented to separate, the client may not use abandonment as a ground for divorce.

CONSTRUCTIVE ABANDONMENT – DRL § 170(2)

Constructive abandonment is another type of abandonment that can be used as grounds for divorce. There are two types of constructive abandonment: (i) refusal to engage in sexual relations and (ii) throwing or locking out one spouse from the marital residence.

I. REFUSAL TO ENGAGE IN SEXUAL RELATIONS

This type of constructive abandonment occurs when the spouse has refused to engage in sexual relations with the client for a period of one year or more. The spouse's refusal to engage in sexual relations with the client must be unjustified and without the client's consent. The sexual abandonment by the spouse must be continuous for a period of one year or more. There must be repeated requests by the Plaintiff. One request for sexual relations will not suffice.

Example 1:

If the client is the one who has refused to have sexual relations with their spouse or the parties have agreed not to have sex anymore, the client will not be able to use constructive abandonment as a ground for divorce.

II. LOCK OUT

This type of constructive abandonment occurs when the spouse demands that the client leave the marital residence, or locks them out of the marital residence. The lock-out must be unjustified and without the client's consent. The lock-out by the spouse must be continuous for a period of one year or more.

Example 2:

If the spouse has an order of protection against the client which excludes them from the marital residence, and the spouse refuses access to the residence for this reason, then the client will not be able to use "lock-out" constructive abandonment as a ground for divorce.

Note: if a client flees the marital residence due to domestic violence, they can use the abuse as an affirmative defense if their spouse commences a divorce based on grounds of abandonment. They can also use the abuse to counterclaim for divorce based on cruel and inhuman treatment.

IMPRISONMENT – DRL § 170(3)

An action for divorce may be brought on the ground of the spouse's confinement in prison for a period of three years or more. To allege imprisonment as grounds for divorce, there must be actual confinement. Confinement must be continuous for a period of three years or more after the marriage. This cause of action, like cruelty grounds, is subject to the five-year statue of limitations set forth in DRL§210. Specifically, plaintiff must commence an action for divorce within five years of defendant's release from prison. If plaintiff commences an action for divorce more than five years after the defendant's release, the defendant may use DRL § 210 as an affirmative defense and seek to dismiss the action. Covington v. Walker, 786 N.Y.S. 2d. 409 (2004) (Cause of action for divorce accrues on date defendant completes third consecutive year, but statute of limitations does not begin to run until date of their release.)

HELPFUL PRACTICE TIPS WHEN USING IMPRISONMENT AS A GROUND

If the client married their spouse while their spouse was incarcerated, the client may not use this ground for divorce.

A letter of commitment from the correctional facility is required if imprisonment is used as a grounds for divorce. As an alternative, a printout from the state inmate locater website showing the date the inmate was received and the expected release date can also be used.

Periods of confinement for less than three years may be used as allegations for the grounds of cruel and inhuman treatment.

Example 1:

If the parties were married in 2000 and the spouse started a five year prison sentence on August 1, 2009, the client may not use this ground until August 1, 2012.

Example 2:

If the parties were married in 1990, the spouse served a five year sentence between January 1, 1995 and December 31, 2000 and subsequently was released from prison on January 1, 2001; the client must file an action for divorce using this ground anytime between January 1, 1998 and December 31, 2005. If the client files for divorce before January 1, 1998 or after December 31, 2005, they may be able to use their spouse's incarceration as an element of cruel and inhuman treatment.

IRRETRIEVABLE BREAKDOWN OF THE MARRIAGE DRL § 170 (7)

New York's No Fault Divorce

This new legislation created the seventh ground for divorce that became effective October 12, 2010. It brings New York into conformity with all other states by providing for divorce on a "no-fault" basis and allows a plaintiff to allege, under oath that there has been an "irretrievable breakdown" in the parties' marriage for at least six months preceding the filing of the action. This satisfies the "grounds" element in the divorce proceeding. Note that in order to use this ground, the marriage must be at least six months old at the time of commencement.

To protect the non-monied spouse and to assure that the best interests of the children are addressed, the statute goes on to restrict the court from granting any divorce "unless and until" all ancillary issues (which may include property division, maintenance, child custody and/or child support) have been addressed. See Ancillary Relief, Part A, Subsection 3.

The Plaintiff will be required to prove the following elements of the ground:

1. The relationship between the spouses has irretrievably broken down;
2. For a period of at least six (6) months;
3. Provided that one party has so stated under oath.

Although there is no clear definition of what constitutes an "irretrievable breakdown" of a relationship, proof of "fault" is not required to show a marriage is "irretrievably broken down". Further, the statute does not state that an "irretrievable breakdown" of the marriage must be pled with specificity. The question really is whether or not the marriage is "already over and cannot be salvaged". As this is the only "no fault" ground, judges strongly encourage (and even expect) parties to agree to this ground, even if one or both spouses has another basis for divorce. This ground should be included as at least one basis for divorce whenever possible, in the event your client is unable to prove the elements of any other ground for divorce.

INITIAL DIVORCE DOCUMENTS

The divorce documents are prepared in two phases: the initial papers which are prepared before filing, and the final papers which are filed after there has been a settlement or decision by the court.

This section will provide assistance with the preparation of the initial divorce documents. Samples of the documents are located later in this manual.

The following initial documents are part of a divorce action:

1. Summons with Notice, Notice of Automatic Orders, Notice of Continuation of Health Care Coverage, and Notice of Guideline Maintenance;
2. Verified Complaint; and
3. Affidavit of Service.

In addition, depending on the case, you may also need to draft:

- a Sworn Statement of Removal of Barriers to Remarriage, if the parties were married in a religious ceremony; and
- an ex parte motion to keep plaintiff's address confidential, if your client needs to keep their address confidential from their spouse for safety reasons.

Once you have drafted all your initial papers, you must forward them to your Her Justice mentor for review before filing.

MOTION TO KEEP PLAINTIFF'S ADDRESS CONFIDENTIAL

When you represent a survivor of domestic violence, you must always consider carefully the safety of your client. Many domestic violence survivors have been forced to flee the marital residence, fearing for their safety and that of their children. Many have relocated to battered women's shelters, safe houses or other residences, and have kept their locations secret from their spouses.

Several of the documents submitted in a divorce action require litigants to disclose their current address, telephone number and social security number, for themselves and the children of the marriage, to the other party. For a survivor living in shelter or at a confidential location, revealing their address to her spouse may place their safety at risk. In such an instance, the court will permit an attorney to submit a request to keep the client's address confidential. If this request is granted, the client will not have to disclose their address on any of the divorce documents. It also acknowledges that the law firm or attorney filing the request has agreed to accept all correspondence in the divorce action on behalf of the litigant.

Note that all divorce documents are maintained confidential by the court clerk, so the client does not need to submit a motion to keep their address and/or social security number confidential if they are merely concerned about personal identifying information

appearing in a court document accessible to the general public. This motion is only necessary if the client needs to keep their information confidential from their spouse.

When filing a divorce action in New York County, the motion is filed at the same time as the Summons with Notice.

The application requires:

a. an affidavit from the client describing their need for relief, and attaching supporting documentation (i.e., current order of protection);
b. an affirmation by the attorney of record;
c. a proposed ex-parte order of address confidentiality; and
d. a letter from the attorney of record stating that that their law firm agrees to accept service of all pleadings and correspondence in relation to this divorce action.

Once the Order of Address Confidentiality is signed by a judge, the Order needs to be served on the Defendant along with the initial papers. Service of the Order on the Defendant must be indicated on the Affidavit of Service.

PLEASE NOTE: An Order of Address Confidentiality is NOT NECESSARY if the Plaintiff has previously applied for an obtained a confidential address through the New York State Department of State Address Confidentiality Program. Details can be obtained here: https://dos.ny.gov/apply-address-confidentiality-program

SUMMONS WITH NOTICE AND NOTICE OF AUTOMATIC ORDERS

The Summons with Notice provides notice to the defendant-spouse **(a)** that a divorce action has been commenced against them; **(b)** the amount of time for them to respond; **(c)** the name, address and phone number of plaintiff's counsel; **(d)** the grounds for divorce; **(e)** the relief sought (i.e., custody, child support, etc..); **(f)** DRL Sec. 255 Notice; and **(g)** DRL Sec. 236 Notice of Automatic Orders.

In a contested divorce case, the Summons is not the only document the defendant-spouse will see which gives notice of the nature of the action. They will later be served with the Verified Complaint.

Index Number / Date of Filing

You will not have the index number or the "date Summons filed" when you prepare the Summons with Notice. As described below, once you file the Summons with Notice and obtain an index number, you should add it to the rest of the documents.

Venue

For most cases, the basis for venue will be based on plaintiff's residence or the county designated by the Plaintiff. The venue may also be based on the defendant's residence. If plaintiff is a victim of domestic violence and has a confidential address,

then you may also list the address as Address Confidential, c/o name and address of your firm.

Date on the Summons with Notice

Should be dated on the date the attorney signs the Summons with Notice.

Signature on Summons with Notice

The Summons with Notice must have an attorney's signature.

Ancillary Relief

This is where you must list any relief sought by your client in addition to divorce. When preparing the request for ancillary relief, you must consider what your client is seeking, if anything, with regard to at least each of the following issues:

- Custody
- Child Support
- That the Plaintiff may resume use of their prior surname
- Equitable Distribution
- Maintenance
- Health Insurance
- Life Insurance
- Exclusive Use & Occupancy
- Expert Fees
- Such other and further relief as the Court deems just and proper

DRL Sec. 255

DRL Sec. 255 provides Defendant notice that upon the entrance of the Judgment of Divorce they will no longer be covered under the former spouse's health insurance. The client cannot be maintained under their spouse's health insurance coverage after the divorce is granted. Their coverage will terminate after the divorce. There is no legal obligation between ex-spouses to maintain such coverage; only children of the marriage are entitled to such coverage. The client will be able to purchase health insurance through COBRA. This is the essence of notice given under DRL 255.

DRL Sec. 236(B)(2)

The purpose of this provision is to place automatic restraining orders on the parties in a matrimonial action. The automatic orders are binding on both parties and are to remain in effect during the pendency of the matrimonial action. The automatic orders can only be modified, terminated, or amended by a further order of the court after a proper motion by either party or by a duly executed and acknowledged written agreement between the parties.

The automatic orders are binding on the plaintiff in a matrimonial action immediately upon the filing of the Summons with Notice or Summons and Complaint. The automatic orders

are binding on the defendant immediately upon the service of the Summons with Notice or Summons and Complaint.

HELPFUL PRACTICE TIPS FOR PREPARING THE SUMMONS WITH NOTICE

If there are unemancipated children of the marriage under the age of 18, the Summons with Notice must address the issue of custody as ancillary relief.

If there are children of the marriage that are under the age of 21, the Summons with Notice must address child support. If there is no previous child support order to continue in the Judgment of Divorce, request that the Defendant pay "statutory child support pursuant to the Child Support Standards Act."

Provide for concurrent jurisdiction in the Family Court on issues such as support, custody and visitation.

Make sure that the Summons with Notice requests all of the proper relief.

VERIFIED COMPLAINT

The Verified Complaint contains (a) the plaintiff's ground for divorce and the allegations constituting grounds for divorce; (b) the parties' insurance coverage information; and (c) the relief requested.

Pursuant to CPLR Section 304, an action may be commenced by filing either (a) a Summons and Verified Complaint; or (b) the Summons with Notice alone. The same applies to service of the divorce papers on the defendant-spouse. The plaintiff must serve the defendant with the document that was filed to commence the action, either the Summons and Verified Complaint or the Summons with Notice.

In a divorce, it is Her Justice's policy to: (a) file the Summons with Notice only to commence the divorce action; and (b) serve the defendant-spouse with the Summons with Notice only. While the Verified Complaint is considered part of the initial divorce documents, you should keep it in the client's file after obtaining the necessary signatures and serve it if the Defendant appears and makes a demand for a Verified Complaint or when you file the final papers for divorce.

You should draft the Verified Complaint at the same time as you draft the Summons with Notice, even if you do not intend to serve them together. (You do not want to find yourself in the position of having served the Summons with Notice and, later, when you are drafting the more detailed Verified Complaint, discovering that you made an error in the Summons with Notice.)

The Verified Complaint should not be dated or signed until after the index number has been purchased, unless you are submitting a motion to keep the Plaintiff's address confidential.

- **<u>Parties Over Age of Consent (First Paragraph)</u>**

- **Residency (Second Paragraph)**

Choose the residency description which is applicable to your case. See DRL Sec. 230.

- **Date, Place and Type of Marriage** (Third Paragraph)

List the date of the marriage, and the City, County and State (and Country, if applicable) where the marriage occurred. State whether the parties were married in a religious or civil ceremony.

  - **Barriers to Remarriage**

    If your client was married in a civil ceremony, you should state so in this paragraph. If your client was married in a religious ceremony, you must indicate that your client has taken or will taken all necessary steps to remove barriers to the defendant's remarriage.

- **Children** (Fourth Paragraph)
  - **Names of Children, Birth Dates and Social Security Numbers**

List the names, birth dates and social security numbers of all the parties' children. Although a minor child is one who is under the age of 18, children of the marriage between the ages of 18 and 21 receive child support.

- If your client cannot provide a child's social security number, state "unknown," or, if applicable, "application pending."
- If the parties have a child together who was born prior to their marriage, this child is considered a child "of the marriage."
- If the client has a child born during the marriage but with a partner other than their spouse, that child should be listed in the Summons with Notice and Verified Complaint. (Contact your Her Justice mentor if you encounter this issue.)
- If any of the children of the marriage are adults, 21 years or older, state this here, to make clear why the Plaintiff is not requesting child support for those children of the marriage.

- **Parties' Addresses and Social Security Numbers**

This information is now required for child support purposes.

- If your client does not know the defendant's address or social security number, state that it is "unknown." An affidavit explaining the unknown information must be provided to the court in certain counties.
- If your client does not have a social security number, usually because of their immigration status, write "none," "pending," or "not applicable." An affidavit explaining why the client does not have a social security number

must be provided to the court, but only in certain counties. Please make sure to speak to your Her Justice mentor about this issue.

- **Health Insurance Information** (Fifth Paragraph)

  State law now requires the parties to a divorce action where child support is an issue to: (a) indicate whether they have available health insurance through an employer or organization, and (b) designate responsibility to the appropriate party for maintaining those benefits on behalf of the children of the marriage. The children must have some form of health care coverage.

  - If there are no children of the marriage, or no children of the marriage under the age of 21, state in this paragraph, "NOT APPLICABLE – There are no [minor] children of the marriage."
  - This information is also not applicable in Bronx County if child support is being reserved.
  - Note: Only children of the marriage are required to be maintained under the spouse's policy. If your client currently receives health insurance benefits through the spouse, the spouse is not required to maintain your client under that policy once the judgment of divorce is granted. The client should be advised that they may be able to purchase coverage on their own through a COBRA option.
  - If your client does not have information about the defendant's health insurance, write "unknown," "not available," or "none known."
  - If your client and the children are covered by Medicaid, list the insurance as "Medicaid." If your client does not have health insurance, write "none."
  - If defendant has employer-provided health insurance benefits, provide as much information as is available about the health insurance. The final papers should require that the spouse shall maintain these health benefits on behalf of the children.
  - If the children do not have health care coverage, refer the client to the following website: http://nyc.gov/html/hia/html/home/home.shtml to find out what health care coverage the children would be eligible for.

- **Grounds** (Sixth Paragraph)

  List the grounds for divorce. Refer to the samples for the language to be used in pleading the different divorce grounds. Most often, the grounds will be no-fault: "Irretrievable Breakdown of the Relationship (DRL 170(7)): The relationship between the Plaintiff and Defendant has broken down irretrievably for a period of at least six months."

- **No Other Divorce Judgment** (Seventh Paragraph)

You must plead that there is no other divorce action pending in any other jurisdiction.

- **<u>Maintenance</u>** (Eighth Paragraph)

  In this paragraph you would indicate that the Plaintiff is requesting maintenance.

- **<u>Ancillary Relief</u>** (Wherefore Paragraph)

  Must be **IDENTICAL** to the relief being requested in the Summons with Notice.

  Tip: COPY and PASTE from the Summons with Notice.

- **<u>Verification & Attorney Signature</u>**

  The plaintiff must verify the complaint before a notary public. (If you are a notary, you can notarize the papers for your client.) The attorney must also sign the Verified Complaint.

HELPFUL TIPS FOR PREPARING THE VERIFIED COMPLAINT

The ancillary relief requested in the Verified Complaint must be identical to that requested in the Summons with Notice.

If there are minor children of the marriage, the Verified Complaint must provide (a) the *social security numbers* for all of the parties and children of the marriage (unless there is an order to maintain the SSNs confidential); and (b) information regarding the parties' *health insurance coverage*.

If the client does not know their spouse's *social security or health insurance information*, indicate "Unknown" in the appropriate paragraphs. (The client will then have to submit an additional affidavit regarding this unknown information.)

If the client's ground for divorce is *abandonment or constructive abandonment*, the allegations in the Verified Complaint should ideally include the month, day and year of the abandonment and the location where the abandonment took place. If the client cannot recall the exact day of the abandonment, state "on or about" the month, day and year.

If the client's ground for divorce is *cruel and inhuman treatment*, the allegations in the Verified Complaint should state the month, day and year of each act of cruelty and the location where each incident took place. If the client cannot recall the exact day of a particular incident, state "on or about" the month, day, and year.

The Verified Complaint must be signed and notarized and must be attached to a litigation back.

AFFIDAVIT OF SERVICE

The Affidavit of Service is completed by the person who serves the Summons with Notice on the defendant-spouse and is subsequently filed with the court to provide proof of service.

The person completing the Affidavit of Service must indicate **(a)** the time, place and date the defendant was served; **(b)** how they identified the defendant; **(c)** a physical description of the defendant, and **(d)** that they asked the defendant whether they are currently in the military.

HELPFUL TIPS FOR PREPARING THE AFFIDAVIT OF SERVICE

This document should reflect that the defendant-spouse was served with the Summons with Notice, Notice of Automatic Orders, Notice of Continuation of Health Care Coverage, and Notice of Guideline Maintenance.

You must also tailor paragraph two of the Affidavit to reflect service of any additional documents being served on Defendant; i.e. the Child Support Standards Chart, Sworn Statement of Removal of Barriers to Remarriage and/or signed Order to Maintain Plaintiff's Address Confidential.

If the person who served used a photograph to identify the defendant-spouse, they must return that photo with the completed Affidavit, as it must be annexed to the Affidavit of Service and filed.

The Affidavit of Service must be attached to a litigation back.

Tailor the Affidavit of Service for the server and indicate what information is needed to properly complete the Affidavit.

SWORN STATEMENT OF REMOVAL OF BARRIERS TO REMARRIAGE

This document is required as an initial divorce document only if the parties were married in a religious ceremony. If this is the case, a signed and notarized copy of this document should be served on the defendant-spouse <u>simultaneously</u> with the Summons with Notice, Notice of Automatic Orders, Notice of Continuation of Health Care Coverage, Affidavit of Defendant and, if applicable, the Child Support Standards Chart and signed Order to Maintain Plaintiff's Address Confidential.

THE CHILD SUPPORT STANDARDS CHART

The Child Support Standards Chart is required only if there are unemancipated children under the age of 21 of the marriage, and the issue of child support is being determined in the divorce. This document gives notice to the non-custodial parent (usually the Defendant) of their support obligation; the chart provides the dollar amount the law requires.

This document is required whenever the issue of child support is being determined in the divorce, whether or not the client is merely seeking the statutory minimum amount.

If the issue of child support is not being determined in the divorce because the divorce will continue a final Family Court Order of Support, it is not necessary to serve the Child Support Standards Chart.

When required, this chart should be served on the defendant-spouse along with the Summons with Notice, Notice of Automatic Orders, Notice of Continuation of Health Care Coverage, Affidavit of Defendant and, if applicable, the Sworn Statement of Removal of Barriers to Remarriage and signed Order to Maintain Plaintiff's Address Confidential.

As discussed above, Paragraph Two of the Affidavit of Service should be tailored to reflect that the defendant-spouse was served with this Chart.

The current version of the chart can be printed from the following website:
https://www.childsupport.ny.gov/dcse/pdfs/CSSA.pdf

COVER LETTER TO A CORRECTIONAL FACILITY REQUESTING A LETTER OF COMMITMENT

A Letter of Commitment from a correctional facility is required by the court in all cases where the client's ground for divorce is imprisonment. In such cases, a letter from the correctional facility where the defendant-spouse is incarcerated must certify (a) the date of the defendant's incarceration; and (b) either the date of the defendant's release, or that the defendant is still incarcerated.

The letter should be mailed to the correctional facility as soon as possible, to ensure that you receive back the Letter of Commitment in time to file it with the final documents. Include a self-addressed, stamped envelope with your request.

If you are unable to obtain a Letter of Commitment, as an alternative you may be able to use a printout from the New York State Department of Corrections website, indicating the date the inmate was received and the expected release date.

https://nysdoccslookup.doccs.ny.gov/

Before the Summons with Notice is filed, your Her Justice mentor must review your initial papers:

- Address Confidentiality Motion (if applicable)
- Summons with Notice, Notice of Automatic Orders, Notice of Continuation of Health Care Coverage, and the Notice of Guideline Maintenance.

- Verified Complaint
- Affidavit of Service
- Sworn Statement of Removal of Barriers to Remarriage (if applicable)

HER JUSTICE FEE WAIVER LETTER

Once your initial documents have been reviewed and approved by your mentor, your Her Justice Pro Bono Coordinator will mail you a fee waiver letter, so that you may purchase the index number and file the Summons with Notice.

In order to commence an action in Supreme Court, every plaintiff must purchase an index number when filing the Summons with Notice. The index number assigned to every action commenced within the New York State Supreme Court is used to identify a case throughout the court system of a particular county.

Normally, the cost for purchasing an index number is $210.00. However, where a plaintiff is indigent and cannot pay the filing fees, the fee for the index number can be waived.

Where a party is represented in a civil action by a nonprofit organization which has as its primary purpose the furnishing of legal services to indigent persons, or is represented by private counsel working on behalf of or under the auspices of such a society or organization, all fees and costs relating to the filing and service shall be waived without the necessity of a motion.

A fee waiver letter from Her Justice will be provided to attorneys filing on behalf of financially eligible clients referred through the Her Justice program.

FILING THE INITIAL DIVORCE DOCUMENTS

You commence a divorce action by purchasing an index number and filing the Summons with Notice with the court.

To file in person "on paper:"

Prepare the original and three copies of the Summons with Notice. The original will be filed with the court. Each of the three copies will be stamped by the clerk for the following purposes:

- one is for service on the Defendant,
- one will be filed with the final papers,
- one is for the client's records.

Complete an Application for Index Number form, available at the Supreme Court's Law and Equity desk/window. (Your firm's managing clerk's office may also have these forms.)

Submit the original and 3 copies of the Summon with Notice with the Index Number Application and fee waiver letter from Her Justice. **Tell the clerk before you hand them the papers that this is a "no fee" case.**

(Please note that the Bronx Supreme Court requires an additional copy of the first page only of the SWN for scanning purposes.)

The clerk will tear off the bottom of the Index Number Application (the portion marked "COMPLETE THIS STUB"), stamp it with the index number, and return it to you. **Keep this stub!** It is the "Proof of Purchase of Index Number" that must be submitted later with the client's final divorce documents. **Before leaving, confirm that the clerk has entered the parties' names correctly in the court system, and that you have the correct index number. If there is an error, be sure to have them correct it immediately.**

If you are requesting for the address to remain confidential, the filing procedures vary from county to county:

- New York (Manhattan): File Summons first with the Cashier, then insert that index number on your motion to keep the address confidential and file it with the Ex Parte Office—both may be filed on the same day.
- Queens & Kings (Brooklyn): Both the Summons and the confidentiality motion are filed at the same time.
- Bronx & Richmond (Staten Island): File Summons first.

E-Filing:

You also have the option to e-file using the NYSCEF system (https://iapps.courts.state.ny.us/nyscef/HomePage). Your supervising attorney or managing clerk/attorney at your firm may have a preference as to whether you e-file or paper file, so you should consult with them. In addition, there are certain requirements to e-filing when the other party is unrepresented, and rules covering when a case was commenced "on

paper" vs. e-filing, so you should also speak to your mentor about the pros and cons of e-filing if you have a choice. E-filing makes filing in a county other than where your office is located easier as well.

SERVICE OF THE INITIAL DIVORCE DOCUMENTS

REQUIREMENT OF PERSONAL SERVICE

Whether the defendant-spouse resides within or outside the State of New York, the law requires personal service of the Summons with Notice, unless an alternate method of service is authorized by the court. (DRL § 232; CPLR § 313.)

The defendant-spouse cannot be personally served until after an index number has been purchased and the Summons with Notice filed with the court.

The defendant must be personally served with the following documents:

- Copy of Order to Maintain Address Confidential (if applicable)
- Stamped copy of Summons with Notice, Notice of Automatic Orders, Notice of Continuation of Health Care Coverage, and Notice of Guideline Maintenance.
- Copy of Sworn Statement of Removal of Barriers to Remarriage (if the parties were married in a religious ceremony)
- Child Support Standards Chart (if there are unemancipated children of the marriage)

(The Defendant is *not* served with the Affidavit of Service. The person effecting service completes that document after service of process and must return the original to you).

HELPFUL TIPS FOR SERVICE OF THE INITIAL DIVORCE DOCUMENTS ON THE DEFENDANT-SPOUSE

A party to an action may not serve papers on another party (which means that your client may NOT serve the defendant the divorce papers themselves).

The server must be over the age of 18.

The client must be able to provide the server with an address where the spouse can be served (either a home or work address). If the client does not know their spouse's whereabouts, please contact your Her Justice mentor.

The client should provide a recent photograph of their spouse to assist the server in identifying them. The photograph must be returned by the server with the completed Affidavit of Service, so that it can be attached to and filed with the Affidavit.

If the client does not have a recent photograph, they should provide a detailed physical description of their spouse to the server.

Service may not occur on a Sunday, legal holiday, or on the Defendant's Sabbath.

If service on the defendant-spouse is made outside New York State, the server must be authorized to serve papers pursuant to the laws of the state where they are served.

The defendant-spouse must be served with the divorce papers **within 120 days** of commencement of the divorce action. If service is not made upon a defendant within 120 days, the court can, upon motion, dismiss the case or extend the time to serve.

Serve the defendant-spouse with copies. Keep the originals for filing with the final divorce papers

SERVICE ARRANGED BY THE CLIENT

The client can sometimes arrange for a family member or friend over the age of 18 to personally deliver the papers to the defendant. If they are arranging service on their own, give them a copy of the service instructions which follow this section.

Tell the client that the Defendant does not need to "accept" service. Once the person effecting service sees the Defendant and announces that they are being served with a Summons with Notice for divorce, the papers need only touch the Defendant's body. If they drop them on the ground or throw them back, it does not matter; they have still been served.

If the client cannot find a friend or relative to serve the Defendant, then they can use a licensed process server or the sheriff. If your firm does not bear the cost of that service, the client will have to pay the costs of that service themselves, generally between $52 and $120. **The client cannot serve the Defendant themself.**

Refer the client to the instructions and Service of Process Intake Sheet at https://www1.nyc.gov/site/finance/sheriff-courts/sheriff-serving-legal-papers.page if they will use the Sheriff's Department of a borough in New York City for service. The New York City Sheriff's Department also provides a different form of certificate of service.

If the server is not personally acquainted with the defendant, then your client can either accompany the server to point out the spouse, or they could supply the process server with a recent photograph of the defendant.

Remind the client of the following important points:

- Whoever serves the papers must ask the defendant if they are in the military.
- The papers may not be served on a Sunday, legal holiday, or on the Defendant's Sabbath.
- The defendant-spouse must be served with the divorce papers **within 120 days** of commencement of the divorce action. You should encourage your client to serve the papers immediately. (We also strongly advise you to notify your client that the papers should be served within 90 days, to make certain that all deadlines are observed. If your client does not effectuate service within the required 120 days, please call your Her Justice mentor to discuss the situation.)

After the papers have been served, your client or the server can mail or drop off the original completed Affidavit of Service.

HOW TO SERVE YOUR SPOUSE IF USING A FRIEND OR FAMILY MEMBER

STEP A:

Select the person who will serve your spouse. The person who serves the papers must be over 18 years of age and not a party to the action. You cannot serve the divorce papers.

STEP B:

If the person you chose does not know your spouse personally, provide them with a recent photograph of your spouse. If you do not have a recent photograph, provide that person with a detailed physical description of your spouse. This photo should be returned to you after service, along with the completed Affidavit of Service.

STEP C:

Provide the person you have selected with the following documents:

- COPY OF SIGNED ORDER TO KEEP PLAINTIFF'S ADDRESS CONFIDENTIAL (if applicable)
- COPY OF SUMMONS WITH NOTICE, NOTICE OF AUTOMATIC ORDERS, NOTICE OF CONTINUATION OF HEALTH CARE COVERAGE, AND NOTICE OF GUIDELINE MAINTENANCE (stamped "NOT COMPARED WITH COPY FILED," and with Index Number written on it)
- CHILD SUPPORT STANDARDS CHART (if you have children in common with your spouse)
- COPY OF SWORN STATEMENT OF REMOVAL OF BARRIERS TO REMARRIAGE (if you and your spouse were married in a religious ceremony), with Index Number written on it
- AFFIDAVIT OF SERVICE, with Index Number written on it

Except for the **Affidavit of Service**, these documents should be clipped together in the following order:

1. Summons with Notice, Notice of Automatic Orders, Notice of Continuation of Health Care Coverage, and Notice of Guideline Maintenance appearing on top;
2. Order to Keep Plaintiff's Address Confidential;
3. Child Support Standards Chart; and

4. Sworn Statement of Removal of Barriers to Remarriage.

IMPORTANT! The person serving your spouse should not serve the Affidavit of Service on them!

STEP D:

The person should ask your spouse two questions:

- "Are you _____?" (whatever your spouse's full name is)
- "Are you currently serving in the military?"

STEP E:

The person should then hand the clipped packet of documents directly to your spouse.

These documents should NOT be handed to your spouse in an envelope.

If your spouse refuses to accept these papers or drops the papers on the floor, don't panic! As long as the person serving your spouse has touched your spouse anywhere on their person with the papers, service is complete.

STEP F:

Once service is completed, the person who has served these documents on your spouse should read the following page: HOW TO COMPLETE THE AFFIDAVIT OF SERVICE. They should immediately fill out the Affidavit of Service by writing in the *date, time and location* where service took place, and signing the Affidavit in front of a Notary Public. (Make sure the Notary Public includes the correct date by their signature.)

THE AFFIDAVIT OF SERVICE CANNOT BE COMPLETED, SIGNED OR NOTARIZED UNTIL AFTER YOUR SPOUSE HAS BEEN SERVED.

NOTE:

1. IF YOUR SPOUSE WAS SERVED WITHIN NEW YORK STATE they have TWENTY (20) days from the date of service to respond. If they do not respond within 20 days, you will be entitled to a default judgment of divorce against your spouse.
2. IF YOUR SPOUSE WAS SERVED OUTSIDE OF NEW YORK STATE THEY HAVE THIRTY (30) days from the date of service to respond. If they do not respond within 30 days, you will be entitled to a default judgment of divorce against your spouse.

HOW TO COMPLETE THE AFFIDAVIT OF SERVICE

NOTE: The Affidavit of Service should be completed by the person only after they have served your spouse.

Have the person who served your spouse fill in all of the requested information on the Affidavit of Service.

Have the person who served your spouse sign the completed Affidavit of Service in front of a Notary Public.

NOTE: In order for the Affidavit of Service to be valid, the person who served your spouse must sign the Affidavit of Service in the presence of a Notary Public. The other parts of the Affidavit can be completed prior to going to the Notary.

Once the Affidavit of Service is completed, signed and notarized, have the person who served your spouse return the Affidavit of Service to you immediately, along with the photograph of your spouse, if you provided one.

Review the Affidavit of Service once it has been returned to you and make sure all of the necessary information has been filled out. If the Affidavit of Service has been filled out correctly, return the Affidavit of Service to your attorney.

SERVICE BY A CORRECTIONAL FACILITY

If the defendant-spouse is incarcerated, you must arrange to have the initial divorce documents served on them by their correctional facility. Most facilities will do this as a courtesy as long as you forward a request letter and the initial divorce documents. A sample cover letter requesting service of the Summons follows in this section.

If the defendant-spouse is incarcerated in one of the Riker Island facilities in New York City, service must be effectuated by sending a cover letter with the appropriate documents to the legal department of the New York City Department of Corrections.

To locate an inmate within the New York State Prison System, you can contact the New York State Correctional Services at (518) 457-5000 or visit the New York State Department of Correctional Services website at https://doccs.ny.gov/. The client should provide you with the Defendant's inmate number, name (including alias), date of birth and Social Security Number.

Call the correctional facility where the defendant is incarcerated to confirm that they are still there, and to ask for their specific procedures for service. It helps to get the name of a specific person you spoke to, so you can address the letter accordingly.

The cover letter should be sent to the facility along with the following documents:

- Summons with Notice, Notice of Automatic Orders, Notice of Continuation of Health Care Coverage, and Notice of Guideline Maintenance
- Affidavit of Defendant with Cover Letter
- Child Support Standards Chart (if applicable)
- Sworn Statement of Removal of Barriers to Remarriage (if applicable)
- Order to Keep Address Confidential (if applicable)
- Affidavit of Service
- Self-addressed stamped envelope (for the return of the Affidavit of Service)

In preparing the Affidavit of Service for prison service, fill in as much information as possible to decrease the likelihood of error. For example, you should fill in the index number and the location of service, which will be the address of the prison.

Allow 2-3 weeks for the correctional facility to return a completed and notarized Affidavit of Service.

SERVICE ON A DEFENDANT OUTSIDE NEW YORK STATE

A defendant-spouse residing outside New York State must be served by someone authorized to effectuate service in that state.

If the defendant-spouse resides outside of the State of New York, you can make arrangements for service by contacting the local Sheriff's Department for the county in which the defendant resides. The fees and the procedure vary from location to location. Service can also be accomplished out of state by retaining a process server in the state and county in which the defendant resides.

Once arrangements have been made with the proper Sheriff's Department or process server, forward the following documents for service:

- A cover letter requesting service of the initial divorce documents, including their residence and work addresses (this cover letter can be tailored from the sample letter to a correctional facility, in the previous section);
- Check or money order covering the fee for service;
- Summons with Notice, Notice of Automatic Orders, Notice of Continuation of Health Care Coverage, and Notice of Guideline Maintenance;
- Affidavit of Defendant with Cover Letter;
- Child Support Standards Chart (if applicable);
- Sworn Statement of Removal of Barriers to Remarriage (if applicable);
- Order to Keep Address Confidential (if applicable);
- Affidavit of Service;

- A clear, recent photograph of the spouse; and
- Self-addressed stamped envelope (for the return of the Affidavit of Service).

Allow 2-3 weeks for return of a completed and notarized Affidavit of Service.

DEFENDANT'S RESPONSE

If the Defendant is personally served within New York State, they have **twenty (20) days** from the date of service to respond or "appear." If the Defendant is personally served outside New York State, they have **thirty (30) days** from the date of service to respond or "appear."

Waiver:

The Defendant may "appear" by returning the completed and notarized Affidavit of Defendant (or "waiver"). This means that the Defendant does not intend to contest the divorce and consents to all of the relief requested by the client. If the defendant returns a signed Affidavit of Defendant, you can immediately draft the final papers for divorce. The client's case, in this instance, will be considered a "waiver" case.

Default:

If the Defendant does not appear within 20 days (or 30 days if outside New York State) from the date of service, the plaintiff can obtain a divorce based upon their default. If the Defendant has defaulted, proceed with the preparation of the final papers. However, there is a waiting period. The final papers may not be filed until the 41st day after the date of service. The client's case, in this instance, will be considered a "default" case. *If either of the two scenarios above occurs, you may follow the procedures outlined in the Uncontested Divorce Manual. In some cases, however, you may have to take some additional steps before you can proceed with an uncontested divorce, so be sure to contact your mentor first for guidance. *

IF THE DEFENDANT SERVES A NOTICE OF APPEARANCE

The Defendant may appear by serving a Notice of Appearance and Demand for the Verified Complaint. This means that the defendant intends to contest the divorce, either on the Plaintiff's grounds or the ancillary relief requested.

When the Defendant serves a Notice of Appearance, contact your Her Justice mentor.

Then:

1. Serve the Defendant with a copy of the Plaintiff's Verified Complaint, attached to a litigation back.
2. Prepare an Affirmation of Service.
3. File the original copy of the Verified Complaint with the original Affirmation of Service, attached to a litigation back.

PENDENTE LITE RELIEF

PENDENTE LITE MOTIONS

If there is no pending Family Court matter to be consolidated and extended by the Supreme Court, a motion for **pendente lite** relief may be necessary. Pendente lite means "during the pendency of the action." Pendente lite relief, if granted by the court, will continue until the final judgment of divorce. The final judgment of divorce may or may not continue the relief granted in the pendente lite application.

Relief sought in the pendente lite motion frequently includes (but is not limited to) the following: a request for interim child support, spousal maintenance, exclusive occupancy of the marital home, an Order of Protection, custody, visitation, or an interim award of counsel fees. Several types of interim relief may be requested in one motion.

PROCEDURE

Pendente lite motions may be brought by **Notice of Motion** or by **Order to Show Cause**. In the case of a Notice of Motion, the motion must be served upon the opposing side or opposing counsel (if the other side is represented at the time of bringing the motion) at least **eight** days before the requested return date. CPLR §2214(b) contains the time periods for serving and responding to motions. The requested return date shall be chosen by the attorney and set forth on the Notice of Motion. If service is made by mail, and not personal delivery, five days must be added to the eight days' notice, for a total of thirteen. However, if overnight delivery such as Fedex is used, only one day need be added to the eight. Be aware that the court frequently changes the return date requested on the Notice of Motion if the date submitted is inconvenient for the court. It is wise to check with the Motion Support Office in your county to determine when and where the motion is returnable.

Pendente lite applications, often of an emergency nature, are frequently brought by Order to Show Cause, rather than by Notice of Motion. They may also be brought simultaneously with the service of the Summons with Notice. An application must be brought by Order to Show Cause if a Temporary Restraining Order is requested in the Order to Show Cause[1]. Sample Orders to Show Cause for Pendente Lite Relief are provided in this manual.

Orders to Show Cause must be signed by a judge prior to service upon the opposing side. The Court decides the date the motion will be heard. The application itself is comprised of an **Order to Show Cause cover sheet, an Attorney Affirmation, a Client Affidavit, and supporting documentation and exhibits, a Part 130 Certification, Applicable Child Support and Order of Protection Registry forms, and a Request for Judicial Intervention (RJI), along with a Her Justice fee waiver letter and 22 NYCRR 202.7 Affirmation Notice, if seeking injunctive relief in the Order to Show Cause. Whenever child support, spousal support, maintenance, or counsel fees pendente**

[1] See 22 NYCRR 202.7

lite are requested you must also include a Statement of Net Worth, discussed further in the Discovery section of this Manual. New actions must include a copy of the Summons with Notice or Summons and Complaint and provide for simultaneous personal service of the summons. If filing an emergency request, the Court may require an Emergency Affirmation, explaining the nature of the emergency. A sample RJI is provided in this manual. An RJI is filed only once in each case, but is needed at such time as judicial intervention, whether it be in the form of motion practice or a preliminary conference, is necessary. At the time of filing an RJI, a judge will be assigned to the case. All further conferences and motions will be heard before that judge unless the judge is changed for some administrative reason.

In an Order to Show Cause, the court may specify the means of service on the defendant and/or opposing counsel and may alter the means of service if they feel that the Order to Show Cause drafted by the attorney does not provide adequate notice. In most instances, the Court will require personal service of the papers on the defendant.

The Attorney Affirmation or Client Affidavit must contain language indicating that no application for the relief requested was made therein. If there was prior relief requested, it should state such prior relief[2].

Once the Order to Show Cause is signed by the assigned Judge, the attorney's copy of the Order to Show Cause will have to be "conformed" to that of the Court, and then served. The Judge will indicate on the original Order to Show Cause the date that the motion will be heard, the method of and the date by which service must be completed, and whether any Temporary Restraining Order requested therein has been approved.

To get the Order to Show Cause signed, bring the original along with the RJI to Room 315, the Ex Parte Clerk, if you are proceeding in New York County. In other counties, you will need to inquire as to where and how the papers are to be filed and processed; most courts have a checklist of the filings they require and procedures. Be sure to make several extra copies of the Order to Show Cause. Check in with the Ex Parte office as to when/whether the Order to Show Cause was signed by a judge. Most Courts will now fax you the conformed copy or a notice that the Order to Show Cause has been signed and must be conformed.

You will need to return personally (or send someone from your firm) to pick it up once is signed. Bring extra copies with you and conform your copies to the Court's original, which remains with the court. It is often best to make photocopies of the signed Order to Show Cause and attach it to your copies, but it is also acceptable to conform by hand if copying is impracticable. Note the method of service and the time for service upon the opposing party and counsel. After service, but prior to or (at the latest) on the day of the Order to Show Cause return date, you must file an original Affidavit of Service of the Order to Show Cause with the Court.

Pendente Lite Orders to Show Cause may be made prior to, or concurrently with, a **Request for a Preliminary Conference**. Often, the Court will schedule or hold a Preliminary Conference at the same time as the pendente lite motion is heard. A Request

[2] CPLR §2217.

for Preliminary Conference should be filed along with the RJI. The Request for Preliminary Conference form is provided later in this section. A description of what transpires at the Preliminary Conference will also be found later in this manual.

WHAT RELIEF SHOULD MY CLIENT SEEK IN HER PENDENTE LITE MOTION?

Several kinds of interim relief are commonly sought in a pendente lite motion, depending upon the needs of the client. This relief could be interim child support, maintenance, exclusive occupancy of the marital home, a TRO regarding the marital assets, an Order of Protection, temporary custody, and visitation, all that is necessary to keep the litigants and the children of the marriage stable and cared for during the pendency of the divorce litigation. However, the pendente lite order can set the tone for the rest of the litigation.

In order to obtain pendente lite relief, your client must show that they have a current need and basis for the relief sought. Some courts will hear oral arguments on the issues. It is standard practice for the party served with a pendente lite request to respond by filing **Opposition Papers** in writing, sometimes **cross-moving** for their own relief. **Reply papers** may then be submitted by the moving attorney.

Where the pendente lite relief sought is economic, a **Statement of Net Worth** is required to be submitted with the motion[3]. A sample Statement of Net Worth is provided in the samples section of this Manual. The Statement of Net Worth is a uniform court form, the purpose of which is to capture a comprehensive financial picture of the parties' income, expenses, assets and liabilities. With respect to maintenance, the court will look at both parties' Statements and seek to redistribute the available income between the parties so that both parties' reasonable financial needs are being met. The court will also expect that both parties maximize their earning potential to the extent feasible. The Court will be loath to deprive the non-custodial parent of income sufficient to maintain their own reasonable separate household expenses. With respect to child support, the court may use the income set forth in the Statement of Net Worth to apply the Child Support Standards Act ("CSSA") formula to determine the child support obligation. With respect to equitable distribution, the Statement of Net Worth will provide a comprehensive list of assets which may be subject to equitable distribution. Further discovery is frequently conducted to determine the nature of the asset (marital or separate).

Pendente lite relief may not be necessary if there is a current Family Court order which provides the relief your client is seeking. They may, however, seek relief if the Family Court order is not adequate, or is "stale," or circumstances have changed, warranting emergency, interim relief. Pendente lite relief will **not** be available when there has been a prior separation agreement or prenuptial agreement waiving the relief sought, although a waiver of the payment of child support by a parent is void as a matter of public policy.

Below is an overview of how the Supreme Court treats the various requests made in pendente lite motions:

[3] See 22 NYCRR 202.16 (k); DRL §236(B)(4).

CHILD SUPPORT

Parents are obligated to support the children until the child is 21 years old or sooner emancipated. The Court uses the formula contained within the Child Support Standards Act ("CSSA") if possible, to establish the child support amount to be paid. The Child Support Standards Act provides that a certain percentage of the non-custodial parent's income be paid for child support after certain deductions are taken. A pendente lite motion for child support will only be needed if there is no Family Court child support order, or if the one in existence is significantly stale or does not comport with the CSSA.

The CSSA is set forth in DRL § 236(B)(7) and § 240 and provides a formula for setting child support in all proceedings where child support is at issue. Under the CSSA, the court first determines the combined parental income and then allocates to the first $183,000 (as of March 2022)[4] per year of combined parental income a percentage to child support, specifically: 17% for one child of the marriage, 25% for two children of the marriage, 29% for three children of the marriage, and 31% for four children of the marriage and no less than 35% for five or more children[5]. The guidelines presumptively apply to combined parental income over $183,000 in the discretion of the court.[6]

As child support is granted retroactive to the date of the application for such, it is important to request it as soon as possible. Within the final divorce, the parties can opt-out of the CSSA by entering into a separate agreement, provided that the parties are advised and aware of the provisions of the CSSA and the agreement explains why the parties have agreed to deviate from the guidelines.[7]

If the court finds that the noncustodial parent's pro rata share of the child support obligation is unjust or inappropriate per the CSSA, it may order an amount it considers to be just and appropriate. In addition to the above, the court must pro rate the cost of reasonable medical and child care expenses. The court also has the discretion to allocate payment of a portion of educational and other child care expenses, where it is determined that the custodial parent is seeking work and incurs such.

Income from all sources, actual or imputed are subject to the CSSA. Deductions for Social Security and Medicaid tax ("FICA") and New York City or Yonkers taxes paid are made before applying the percentages. SSI and public assistance are also deducted from income, as is child support or alimony paid pursuant to a court order or written agreement on behalf of a child or spouse not subject to the current action.

The Court can make a temporary award of child support even in the absence of income information based upon the child's present stated needs and the standard of living of the children during the marriage. The Court can order child support even if the parents still live together, if it is found that one parent has not been providing financially for the children.

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[4] Note: the child support "cap" is adjusted every 2 years. This link provides the most recent cap amount, as well as self-support reserve and the poverty level: https://www.childsupport.ny.gov/dcse/child_support_standards.html

[5] https://www.childsupport.ny.gov/dcse/pdfs/CSSA.pdf is the link to the current Child Support Standards Chart, setting forth income and the basic child support obligation, as well as a Child Support Worksheet.

[6] Cassano v. Cassano, 628 N.Y.S. 2d 10 (1995).

[7] DRL §240(1)(h).

The Court will require the parent most able to provide health insurance coverage to the children to do so. If your client wishes to obtain health, life, or accident insurance coverage for the children from their spouse, or needs to obtain ID cards, ID numbers or claim forms, or needs to garnish premiums for health insurance to be paid, they can also make this part of the relief sought.[8]

An application for child support must contain either a request for Child Support Enforcement services or an express statement declining these services[9]. Even if the services are declined, an Income Deduction Order may be sought pursuant to CPLR §5242(c) after the Child Support Order is issued. Child support may be ordered paid through immediate wage withholding[10] or directly to the client. An application for temporary Child Support must be decided by the Court within 30 days.[11]

In a pendente lite application, it is helpful to provide the CSSA calculations with supporting documentation, such as paystubs, tax returns, as well as proof of child care and educational costs. More detailed information about the determination and enforcement of Child Support awards and the Child Support Standards Act can be found in the Her Justice training manual regarding Child Support.

SPOUSAL MAINTENANCE

An application can be made to the court for temporary maintenance (formerly "alimony") to meet the reasonable needs of a party to the action during the pendency of the divorce proceedings. It may be agreed upon by the parties or determined by the Court. As is the case with child support, temporary maintenance awards are made retroactive to the date of application and should be made as soon as possible.

TEMPORARY MAINTENANCE

Temporary maintenance may be awarded in cases of a non-monied spouse who is temporarily out of the workforce, especially if that spouse will need time to obtain skills or training to re-enter the job market, or if there is a substantial disparity in income between the parties. Courts will not award maintenance if they believe that the payor spouse will not be able to support themself if they pay maintenance. This award will be paid to the payee or non-monied spouse during the pendency of the divorce action.

The parties remain able to opt-out of the mandatory formulae relating to temporary maintenance, provided that they comply with the opt-out requirements in DRL § 236(B)(3).

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[8] DRL §236(B)(8).
[9] DRL §236(B)(7)(b).
[10] DRL §240(2-b).
[11] 22 NYCRR 202.16(k)(6).

DEFINITIONS

DRL § 236(B)(5-a)(b) provides the relevant definitions for this section:

1. "**Payor**" shall mean the spouse with the higher income.
2. "**Payee**" shall mean the spouse with the lower income.
3. "**Length of marriage**" shall mean the period from the date of marriage until the date of commencement of action.
4. "**Income**" shall mean income as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act without subtracting alimony or maintenance actually paid or to be paid to a spouse that is a party to the instant action pursuant to subclause (C) of clause (vii) of subparagraph five of paragraph (b) of subdivision one-b of section two hundred forty of this article and subclause (C) of clause (vii) of subparagraph five of paragraph (b) of subdivision one of section four hundred thirteen of the family court act and without subtracting spousal support paid pursuant to section four hundred twelve of such act.
5. "**Income cap**" shall mean up to and including two hundred and three thousand dollars of the payor's annual income; provided, however, beginning March first, two thousand twenty-two and every two years thereafter, the income cap amount shall increase by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of labor bureau of labor statistics for the prior two years multiplied by the then income cap and then rounded to the nearest one thousand dollars. The office of court administration shall determine and publish the income cap.
6. "**Guideline amount of temporary maintenance**" shall mean the dollar amount derived by the application of paragraph c or d of this subdivision.
7. "**Self-support reserve**" shall mean the self-support reserve as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act.
8. "**Agreement**" shall have the same meaning as provided in subdivision three of this part.

METHODOLOGY

There are two formulae for calculating temporary maintenance contained in § 236(B)(5-a)(c).

1. The first formula is used when child support will be paid for the children of the marriage AND the maintenance payor is the non-custodial parent (pursuant to the Child Support Standards Act (CSSA) contained in DRL § 240(1-b) and Family Court Act (FCA) § 413).
2. The second formula is used when EITHER child support will not be paid OR child support will be paid AND the maintenance payor is the custodial parent.

The statutory income cap limits these calculations to the first $228,000 of the payor's income. Any income above that amount will be dealt with in accordance with DRL § 236(B)(5-a)(d), which will be discussed below.

The following flow-chart assists with determining which formula to use in any given case:

For both sets of calculations, if the payor's income exceeds $228,000, simply use $2283,000 as the value for the payor income.

FORMULA # 1

The calculations contained in DRL § 236(B)(5-a)(c)(1) apply when child support will be paid and the maintenance payor is the non-custodial parent:

A = [20% of payor income] – [25% of payee income]

B = 40% of [payor income + payee income]

C = B – [payee income]

The temporary maintenance amount shall be the lower of A and C.

If the lower value is $0.00 or less than $0.00, the amount of temporary maintenance is $0.00.

Temporary maintenance shall be calculated prior to child support because the amount of temporary maintenance shall be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation.

FORMULA # 2

The calculations contained in DRL § 236(B)(5-a)(c)(2) apply when child support will not be paid or the maintenance payor is the custodial parent:

A = [30% of payor income] – [20% of payee income]

B = 40% of [payor income + payee income]

C = B – [payee income]

The temporary maintenance amount shall be the lower of A and C.

If the lower value is $0.00 or less than $0.00, the amount of temporary maintenance is $0.00.

Temporary maintenance shall be calculated prior to child support because the amount of temporary maintenance shall be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation.

INCOME OVER THE STATUTORY INCOME CAP (DRL § 236(B)(5-A)(D))

Where the payor's income exceeds the income cap, the court shall determine the guideline amount of temporary maintenance as follows:

(1) the court shall perform the calculations set forth in paragraph DRL § 236(B)(6)(c) of this subdivision for the income of the payor up to and including the income cap; and

(2) for income exceeding the cap, the amount of additional maintenance awarded, if any, shall be within the discretion of the court which shall take into consideration any one or more of the factors set forth in one of paragraph DRL § 236(B)(5-a)(h); and

(3) the court shall set for the factors it considered and the reasons for its decision in writing or on the record. Such decision, whether in writing or on the record, may not be waived by either party or counsel.

SELF-SUPPORT RESERVE (DRL § 236(B)(5-A)(E))

Where the calculations above would reduce the payor's income to below the self-support reserve for a single person, the guideline amount of temporary maintenance will be the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there is a rebuttable presumption that no temporary maintenance is awarded.

MISCELLANEOUS PROVISIONS

DURATION OF TEMPORARY MAINTENANCE AWARD (DRL § 236(B)(5-A)(F) AND (G))

The duration of the temporary maintenance award is determined by considering the length of the marriage and terminates upon the issuance of the judgment of divorce or the death of either party, whichever occurs first.

DEVIATION FROM FORMULAE (DRL § 236(B)(5-A)(H)).

The Court shall order the guideline amount of temporary maintenance up to the income cap in accordance with DRL § 236(B)(6)(c) of this subdivision, unless the court finds that the guideline amount of temporary maintenance is unjust or inappropriate, which finding shall be based upon consideration of any one or more of the following factors, and adjusts the guideline amount of temporary maintenance accordingly based upon such consideration:

1. the age and health of the parties;
2. the present or future earning capacity of the parties, including the history of limited participation in the workforce;
3. the need of one party to incur education or training expenses;

4. the termination of a child support award during the pendency of the temporary maintenance award when the calculation of temporary maintenance was based upon child support being awarded and which resulted in a maintenance award lower than it would have been had child support not been awarded;
5. the wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration;
6. the existence and duration of a pre-marital joint household or a pre-divorce separate household;
7. acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;
8. the availability and cost of medical insurance for the parties;
9. the care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity;
10. the tax consequences to each party;
11. the standard of living of the parties established during the marriage;
12. the reduced or lost earning capacity of the payee as a result of having foregone or delayed education, training, employment or career opportunities during the marriage; and
13. the equitable distribution of marital property and the income or imputed income on the assets so distributed;
14. the contributions and services of the payee as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and
15. any other factor which the court shall expressly find to be just and proper.

UNREPRESENTED PARTIES (DRL § 236(B)(5-A)(H)(3))

Where either or both parties are unrepresented, the court shall not enter a temporary maintenance order unless the court informs the unrepresented party or parties of the guideline amount of temporary maintenance.

DEFAULTS AND NON-DISCLOSURE (DRL § 236(B)(5-A)(J)).

When a payor has defaulted or the court is otherwise presented with insufficient evidence to determine income, the court shall order the temporary maintenance award based on the needs of the payee or the standard of living of the parties prior to commencement of the divorce action, whichever is greater. Such order may be retroactively modified upward without a showing of change in circumstances upon a showing of newly discovered evidence.

MODIFICATION OF ORDERS AND AGREEMENTS (DRL § 236(B)(5-A)(K) AND (L)).

The changes to the temporary maintenance guidelines shall not constitute a change of circumstances warranting modification of any pre-existing orders or agreements.

ALLOCATION OF FAMILY EXPENSES (DRL § 236(B)(5-A)(M))

In determining temporary maintenance, the court shall consider and allocate, where appropriate, the responsibilities of the respective spouses for the family's expenses during the pendency of the proceeding.

WITHOUT PREJUDICE TO POST-DIVORCE MAINTENANCE AWARD (DRL § 236(B)(5-A)(N))

The temporary maintenance order shall not prejudice the rights of either party regarding a post-divorce maintenance award.

A full copy of the Maintenance bill can be found at
https://www.nysenate.gov/legislation/laws/DOM/236

EXCLUSIVE TEMPORARY OCCUPANCY OF THE MARITAL HOME

Application to the court may be made for one party to have exclusive temporary occupancy of the marital home during the pendency of the action[12]. In the absence of an agreement, the issue of exclusive occupancy must be decided by the Court. Awarding one party exclusive occupancy can have the effect of excluding the other party from the marital home. Exclusive temporary occupancy can be ordered whether the home is rented or owned by the parties.

The equities and the necessity of protecting persons or property safe will be considered in determining the issue of exclusive occupancy. Factors the court will consider include: the domestic strife between the parties and joint occupancy being unsafe; one party's lengthy absence from the home; whether one party and/or children need to occupy the home, i.e., the parent who will be the primary physical custodian of children; whether one party needs to be in that geographic location for work, or education.

Generally, the Courts will hold a hearing on the issue of exclusive occupancy unless there is a sufficient showing, from the papers and other supporting documentation, that exclusive possession is necessary.

Later is this chapter, an outline on the law governing Exclusive Possession of the Marital Residence in Divorce Proceedings is provided.

[12] DRL §§234; 236(B)(5)(f).

INTERIM PROPERTY RESTRAINTS

An application was formerly made to the court to restrain a party from spending or transferring assets of the marriage, notwithstanding which spouse has title to the assets.[13] The assets involved can include, but are not limited to, bank accounts, stock accounts, pension or IRA accounts, real property, stock in cooperative apartments, vehicles, etc.

In order to obtain this relief, some showing had to be made that a party has, or attempted or threatened to waste, dissipate, or transfer marital assets for the purpose of hiding them or otherwise rendering them unavailable for equitable distribution. The relief granted by the court would be in the nature of an injunction. It was necessary to show likelihood that the party to be enjoined will take actions which would be prejudicial to the equitable distribution rights of the other party.

DRL § 236 (B)(2)(a) and (b) is a significant change in the law that establishes **automatic restraining orders in all matrimonial actions initiated on or after September 1, 2009.** The law aims to prevent both parties from dissipating assets, incurring unreasonable debts, or removing a spouse or children from health or life insurance policies. These prohibitions are made automatically upon commencement of the divorce action. The Plaintiff is required to serve a copy of the Automatic Orders Notice upon the defendant simultaneously with service of the Summons with Notice or Summons and Complaint.[14]

CUSTODY AND VISITATION

The parties will frequently have unresolved issues with respect to custody and visitation. Custody is the legal authority to make decisions (medical, educational, religious) concerning a child. The court may award or the parties may agree to sole or joint custody. Traditionally, the child resides with the custodial parent and the noncustodial parent has visitation, or "parenting time" with the child.

Generally, the legal standard for awarding custody and visitation is the "best interests of the child." This standard is derived largely from case law that applies equally to Family Court and Supreme Court cases. In making best interest determinations, courts have weighed factors such as: the child's preference; the parent's stability and fitness; the nature of the parent-child relationship; the primary caretaker doctrine; religious beliefs, and willful interference with visitation rights of the other parent.

Custody may always be changed, where it is in the child's best interests, after considering all factors. A party seeking a change of custody must show a substantial change in circumstances before the court will upset the initial custody determination. If a Family Court action is pending regarding custody and visitation, it may be consolidated with the Supreme Court case once a divorce has been initiated.

The appointment of an Attorney for the Children to represent the children of the marriage and Forensic Experts to provide the court with information regarding the family may be

[13] DRL §234.
[14] DRL § 236(B)(2)(a) and (b)

addressed in a pendente lite application. The experts' fees will have to be allocated between the parties or otherwise addressed.

In 1996, the Legislature amended the DRL and the Family Court Act to protect domestic violence victims in custody and visitation disputes by requiring courts to consider proof of domestic violence in making custody and visitation decisions. Where allegations of domestic violence are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interest of the child, together with such other facts and circumstances as the court deems relevant[15]. Similarly, where there is domestic violence or parents are severely antagonistic or embattled, joint custody and collaborating on decision making is considered inappropriate[16]. Mediation for these clients should not be consented to.

Pursuant to 2009 changes in the law under DRL § 240(a-1)(1), if more than prior to the issuance of a court order affecting child custody or visitation with the children, the court will ninety (90) days have passed since the issuance of the previous order, the court is required to conduct a record check review of the parties and children involved in the action in the statewide registries of Orders of Protection, Sex Offenders, and the Family Court child protective records and warrants[17]. The court is required to notify the attorneys for the parties and children and any self-represented litigants of the results of these searches and to indicate on the record its consideration of the results in making custody and visitation determinations[18].

It is presumed that visitation and a meaningful relationship between a parent and child is in the child's best interests. Visitation could range from supervised visitation to daily contact with the child and essentially varies on a case-by-case basis. The Courts have promulgated a blank Parenting Plan form, setting forth the types of parenting time the litigants may agree to and/or be awarded.[19]

The legal aspects of custody determinations are discussed in greater detail in the Her Justice manual entitled "Litigating Custody and Visitation Matters in Family Court."

ORDERS OF PROTECTION

The Supreme Court is empowered to issue Orders of Protection.[20] The Supreme Court uses the standards set forth in Article 8 of the Family Court Act in making the determination to issue an Order of Protection, as set forth in greater detail in the Her Justice manual entitled "Representing Victims of Domestic Violence in Family Offense Proceedings." Generally, a family offense, as defined by the penal law, must be proven by a preponderance of the evidence.

If a Temporary Order of Protection is requested, the Court may schedule an emergency hearing to determine that there exists good cause to issue a Temporary Order of

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[15] DRL § 240 (1)(a); Laws of 1962, ch 85.
[16] Braiman v. Braiman, 44 N.Y.2d 584, 587 (1978).
[17] DRL § 240 (1)(a-1)(2)
[18] DRL § 240 (1)(a-1)(4)
[19] http://www.courts.state.ny.us/ip/matrimonial-matters/forms.shtml ParentingPlanForm.wpd
[20] DRL §§ 240(3) and 252.

Protection. The movant must be present and must testify. The court issues a uniform Order and the Order is kept on the State-Wide registry. The movant's entitlement to a permanent Order of Protection will be heard or addressed later in the case.

COUNSEL AND EXPERT FEES

In recognition of the importance of pendente lite counsel fee awards and the frequency of financial imbalance in divorces, the law provides a rebuttable presumption that the less-monied spouse in a divorce shall be awarded counsel fees in a divorce action or in a proceeding to enforce a judgment of divorce. Amendments to DRL §§ 237 and 238[21] address the potential inequity of a financially disadvantaged spouse's ability to retain counsel and experts. The current law charges the Court with assuring that each party is adequately represented and that fees are awarded on a timely basis pendente lite. Both parties must submit affidavits detailing the retainers paid, amounts owing, the hourly rates paid, and the fact that a non-monied spouse previously paid a retainer does not preclude an award of counsel fees. Furthermore, the Court can award expert fees for any experts retained in the divorce, to be paid by the more monied spouse for the less-monied spouse.

THE MATRIMONIAL RULES AND CASE CONFERENCES

Court rules governing matrimonial practice, including the attorney client relationship and the handling of matrimonial matters by the courts, were first adopted in 1993 to improve attorney-client relationships and to move cases through the courts more expeditiously and at less cost to litigants. Retainer Agreements, the Statement of Net Worth and the exchange of financial information, case management, and the use of expert witnesses are governed by the Rules.[22]

The Matrimonial Rules and Frequently Asked Questions relating to the Rules can be found at: http://courts.state.ny.us/ip/matrimonial/ and a copy is included in the appendix.

The courts will hold a series of conferences to ensure that issues are discussed, resolved, and discovery exchanged at an early stage of the case and so cases proceed in an expeditious and focused manner.

[21] DRL §237(1)(a) & (b), DRL §238(2)
[22] 22 NYCRR §202.16.

CONFERENCES

THE PRELIMINARY CONFERENCE

The **Preliminary Conference** can address issues such as applications for pendente lite relief, compliance with compulsory financial disclosure, the appointment of experts, the simplification and limitation of issues and establishing a timetable for financial disclosure.

The Preliminary Conference may be requested at the same time as the Pendente lite motion. Whether it is requested at that time, or otherwise, the Preliminary Conference must be held within 45 days after a judge is assigned to the case. A Preliminary Conference is requested by the filing of a **Request for Preliminary Conference** form with the court. One may request a Preliminary Conference to move the case forward at any time after issue is jointed. Counsel for either the Plaintiff or the Defendant may file a request for a conference. If there have been no prior motions, the **Request for Preliminary Conference must be accompanied by an RJI** (Request for Judicial Intervention). As the filing of the RJI involves a fee of $95.00, **a fee waiver letter** should be requested from Her Justice if your client is eligible for a fee waiver as a poor person. A sample request for a Preliminary Conference and RJI is provided in this Manual.

Both parties must be present at the Preliminary Conference. Often, the Judge will address the parties directly. In addition to discussing or hearing any pendente lite motions before it, the court will set down a discovery schedule, including dates by which the parties must serve and respond to discovery requests, such as a request for Discovery and Inspection and Demand for Interrogatories, and depositions, if requested. In order to demand a deposition of the opposing side, a Notice for Deposition must be served.

The **Statement of Net Worth**, a form affidavit which requires each party to disclose to the other party their income, expenses, assets and debts, is to be exchanged 10 days prior to the Preliminary Conference. This form is discussed in detail in the Discovery section of this Manual. Parties are required to annex documentation to the Statement of Net Worth along with all documentation supporting income and assets, including but not limited to pay stubs, W-2 forms, income tax returns, bank statements, life insurance policies, and statements of any retirement plans of the parties. Parties must also disclose any transfers of assets made within the past 3 years. The exchange of this information will allow the parties to determine if additional discovery is needed. The Statement of Net Worth must be amended if there is a substantial change in any of the information contained therein during the course of the divorce action.

Discovery regarding issues relating to grounds for divorce is generally not permitted in the First or Second Judicial Departments. (Corsel vs. Corsel, 133 A.D.2d 604, 519 NYS2d 710 (1987) (2nd Dep't), McMahan vs. McMahan, 100 A.D.2d 826, 474 NYS2d 974 (1984) (1st Dep't)). If a party objects to a requested item of discovery, they may so state at the Preliminary Conference and the judge may rule on whether the item of discovery is sufficiently material and necessary to the proceeding or if any privilege attaches to the item.

At the conclusion of the Preliminary Conference, the parties may stipulate issues raised in the motions Pendente lite, or the judge may issue a bench order deciding the applications. At the conference, the Court will issue a discovery schedule which will reflect any stipulations made by the parties as to the matters at issue. The parties will set forth the stipulation and/or judge's directives in a Preliminary Conference order form, which shall then be "so ordered" by the court. A sample **Preliminary Conference Stipulation and Order** is provided in this Manual.

Even if it does not appear at that time of the Preliminary Conference that a certain type of discovery or a certain discovery mechanism (e.g., depositions) will be needed, that discovery option should not be waived by the attorney at the time of the conference.

The order will also specify a date for the parties and their attorneys to return for a **Compliance Conference**. The Judge or court personnel may try to facilitate a settlement of contested issues during the Preliminary Conference, at the Compliance Conference, or a later date. Attorneys should not enter into a settlement of the outstanding issues in the divorce until all discovery has been completed so that the client is able to form an informed decision based on all the information available.

COMPLIANCE CONFERENCE(S)

The Court will hold a Compliance Conference to determine whether discovery is completed and resolve ongoing issues so that the matter is ready for trial. It is common for the Court to hold more than one Compliance Conference if there are issues with discovery. At the conclusion of the Compliance Conference(s), the court will set a date by which the Note of Issue must be filed. A **Sample Compliance Conference Order** is provided in this Manual.

By the **Note of Issue** date, it is expected that all discovery will be completed. A Note of Issue puts the case on the trial calendar. As there is a fee of either $30 or $125 involved in the filing of a Note of Issue, a **fee waiver letter** will be necessary to demonstrate that your client has poor person status.

The parties are often ordered to file a **Statement of Proposed Disposition**[1], in which both parties set forth what disposition the party seeks in the divorce, and the statutory and factual bases for the disposition. A copy of a **Statement of Proposed Disposition** is provided later in this section. The matters next appear in court for a **Pre-Trial Conference**.

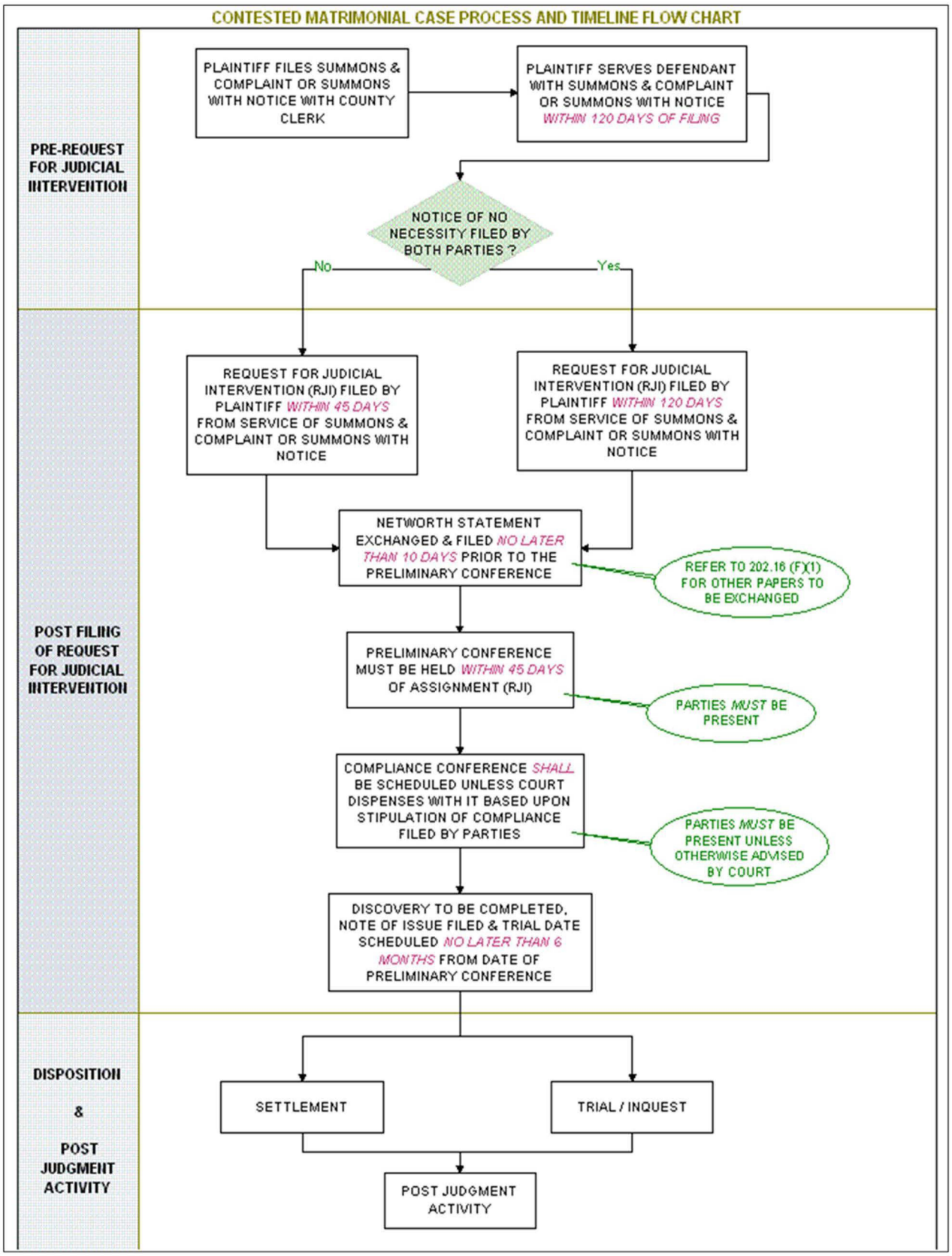
PRE-TRIAL CONFERENCE

The Court will hold a Pre-trial Conference to narrow and resolve outstanding issues. Cases are often settled at or before this stage. The court may encourage the attorneys to conduct an inquest, where grounds for divorce and the jurisdictional bases are set forth on the record, or to put an oral stipulation of settlement of divorce on the record. Please note that the submission of a written stipulation is always preferable to an oral stipulation of the

[1] 22 NYCRR §202.16(h).

settlement terms. Attorneys should insist on having the time and space to reduce agreements to writing with time to review with their clients to avoid confusion or inadvertently failing to include important terms or conditions.

Where there is no settlement, or some issues are to be tried, the Court will schedule a trial date and, in some instances, send the case off to a Referee or JHO to hear and report, or hear and determine.


CONTESTED MATRIMONIAL CASE PROCESS AND TIMELINE FLOW CHART
PRE-REQUEST FOR JUDICIAL INTERVENTION
PLAINTIFF FILES SUMMONS & COMPLAINT OR SUMMONS WITH NOTICE WITH COUNTY CLERK
PLAINTIFF SERVES DEFENDANT WITH SUMMONS & COMPLAINT OR SUMMONS WITH NOTICE WITHIN 120 DAYS OF FILING
NOTICE OF NO NECESSITY FILED BY BOTH PARTIES ?
No
Yes
POST FILING OF REQUEST FOR JUDICIAL INTERVENTION
REQUEST FOR JUDICIAL INTERVENTION (RJI) FILED BY PLAINTIFF WITHIN 45 DAYS FROM SERVICE OF SUMMONS & COMPLAINT OR SUMMONS WITH NOTICE
REQUEST FOR JUDICIAL INTERVENTION (RJI) FILED BY PLAINTIFF WITHIN 120 DAYS FROM SERVICE OF SUMMONS & COMPLAINT OR SUMMONS WITH NOTICE
NETWORTH STATEMENT EXCHANGED & FILED NO LATER THAN 10 DAYS PRIOR TO THE PRELIMINARY CONFERENCE
REFER TO 202.16 (F)(1) FOR OTHER PAPERS TO BE EXCHANGED
PRELIMINARY CONFERENCE MUST BE HELD WITHIN 45 DAYS OF ASSIGNMENT (RJI)
PARTIES MUST BE PRESENT
COMPLIANCE CONFERENCE SHALL BE SCHEDULED UNLESS COURT DISPENSES WITH IT BASED UPON STIPULATION OF COMPLIANCE FILED BY PARTIES
PARTIES MUST BE PRESENT UNLESS OTHERWISE ADVISED BY COURT
DISCOVERY TO BE COMPLETED, NOTE OF ISSUE FILED & TRIAL DATE SCHEDULED NO LATER THAN 6 MONTHS FROM DATE OF PRELIMINARY CONFERENCE
DISPOSITION & POST JUDGMENT ACTIVITY
SETTLEMENT
TRIAL / INQUEST
POST JUDGMENT ACTIVITY

CONTESTED MATRIMONIAL TIMELINES

RJI Filed	**Net Worth Statement**	**Preliminary Conference**	**Compliance Conference**	**Discovery**	**Trial**
No later than 45 days from service of summons, OR No later than 120 days from service of summons if Notice of No Necessity filed by both sides	Exchanged and filed no later than 10 days prior to preliminary conference Refer to 202.16(f)(1) for other papers which the court directs to be exchanged	To be held within 45 days of assignment (RJI date) **Parties must be present and the Judge shall address the parties	Shall be scheduled unless court dispenses with it based upon stipulation of compliance filed by parties **Parties must be present unless otherwise advised by court and the Judge shall address the parties	To be completed and Note of Issue filed no later than 6 months from date of preliminary conference unless otherwise shortened or extended by the court depending on the circumstances	To be scheduled for no later than 6 months from date of preliminary conference
202.16(d)	202.16(f)(1)	202.16(f)(1)	202.16(f)(3)	202.16(f)(2)(iv)	202.16(f)(3)

COURT RULES

The following is a selection from the Uniform Civil Rules for the Supreme Court commonly cited in Matrimonial cases provided for your convenience. It is not a complete list of all Rules that may apply in your case.

22 NYCRR Section 202.7 Calendaring of motions; uniform notice of motion form; affirmation of good faith.

(a) There shall be compliance with the procedures prescribed in the CPLR for the bringing of motions. In addition, except as provided in subdivision (d) of this section, no motion shall be filed with the court unless there have been served and filed with the motion papers (1) a notice of motion, and (2) with respect to a motion relating to disclosure or to a bill of particulars, an affirmation that counsel has conferred with counsel for the opposing party in a good faith effort to resolve the issues raised by the motion.

b) The notice of motion shall read substantially as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____
----------X File No. XXXXXX

A.B., Plaintiff,

-against-

C.D., Defendant.
----------X

Notice of Motion
Index No.

Name of Assigned Judge
_____

Oral argument is requested ☐ (check box if applicable)

Upon the affidavit of _____, sworn to on _____, 20___, and upon (list supporting papers if any), the … will moved this court (in Room _____) at the _____ Courthouse, _____ New York, on the _____ day of _____, 20___, at _____ (a.m.) (p.m.) for an order (briefly indicate relief requested).

The above-entitled action is for (briefly state nature of action, *e.g.*, personal injury, medical malpractice, divorce, etc.).

This is a motion for or related to interim maintenance or child support. ☐ (check box if applicable)

An affirmation that a good faith effort has been made to resolve the issue in this motion is annexed hereto.
(required only where the motion relates to disclosure or to a bill of particulars)

Pursuant to CPLR 2214(b), answering affidavits, if any, are required to be served upon the undersigned at least seven days before return date of this motion. ☐ (check box if applicable)

Dated:

(print name)

_____
Attorney (or attorney in charge of case if
law firm) for moving party.
Address:
Telephone number:

(print name)

TO:

_____
Attorney for (other party)
Address:
Telephone number:

(print name)

_____
Attorney for (other party)
Address:
Telephone number:

(c) The affirmation of the good faith effort to resolve the issues raised by the motion shall indicate the time, place and nature of the consultation and the issues discussed and any resolutions, or shall indicate good cause why no such conferral with counsel for opposing parties was held.

(d) An order to show cause or an application for ex parte relief need not contain the notice of motion set forth in this section, but shall contain the affirmation of good faith set forth in this section if such affirmation otherwise is required by this section.

(e) Ex parte motions submitted to a judge outside of the county where the underlying action is venued or will be venued shall be referred to the appropriate court in the county of venue unless the judge determines that the urgency of the motion requires immediate determination.

(f) Any application for temporary injunctive relief, including but not limited to a motion for a stay or a temporary restraining order, shall contain, in addition to the other information required by this section, an affirmation demonstrating there will be significant prejudice to the party seeking the restraining order by giving of notice. In the absence of a showing of significant prejudice, the affirmation must demonstrate that a good faith effort has been made to notify the party against whom the temporary restraining order is sought of the time, date and place that the application will be made in a manner sufficient to permit the party an opportunity to appear in response to the application. This subdivision shall not be applicable to orders to show cause or motions in special proceeding brought under Article 7 of the Real Property Actions and Proceeding Law.

If any party is appearing *pro se*, the name, address and telephone number of such party shall be stated.

22 NYCRR § 202.16 Matrimonial actions; calendar control of financial disclosure in actions and proceedings involving alimony, maintenance, child support and equitable distribution: motions for alimony, counsel fees pendente lite, and child support; special rules

(a) *Applicability:* This section shall be applicable to all contested actions and proceedings in the Supreme Court in which statements of net worth are required by section 236 of the Domestic Relations Law to be filed and in which a judicial determination may be made with respect to alimony, counsel fees *pendente lite,* maintenance, custody and visitation, child support, or the equitable distribution of property, including those referred to Family Court by the Supreme Court pursuant to section 464 of the Family Court Act.

(b) *Form of Statements of Net Worth.* Sworn statements of net worth, except as provided in subdivision (k) hereof, exchanged and filed with the court pursuant to section 236 of the Domestic Relations Law, shall be in substantial compliance with the Statement of Net Worth form contained in appendix A of this Part.

(c) Retainer agreements.

1. A signed copy of the attorney's retainer agreement with the client shall accompany the statement of net worth filed with the court, and the court shall examine the agreement to assure that it conforms to Appellate Division attorney conduct and disciplinary rules. Where substitution of counsel occurs after the filing with the court of the net worth statement, a signed copy of the attorney's retainer agreement shall be filed with the court within 10 days of its execution.
2. An attorney seeking to obtain an interest in any property of their client to secure payment of the attorney's fee shall make application to the court for approval of said Interest on notice to the client and to their adversary. The application may be

granted only after the court reviews the finances of the parties and an application for attorney's fees.

(d) *Request for judicial intervention.* A request for judicial intervention shall be filed with the court by the plaintiff no later than 45 days from the date of service of the summons and complaint or summons with notice upon the defendant, unless both parties file a notice of no necessity with the court, in which event the request for judicial intervention may be filed no later than 120 days from the date of service of the summons and complaint or summons with notice upon the defendant. Notwithstanding section 202.6(a) of this Part, the court shall accept a request for judicial intervention that is not accompanied by other papers to be filed in court.

(e) *Certification.* Every paper served on another party or filed or submitted to the court in a matrimonial action shall be signed as provided in section 130-1.1-a of the Rules of the Chief Administrator.

(f) *Preliminary conference*.

(1) In all actions or proceedings to which this section of the rules is applicable, a preliminary conference shall be ordered by the court to be held within 45 days after the action has been assigned. Such order shall set the time and date for the conference and shall specify the papers that shall be exchanged between the parties. These papers must be exchanged no later than 10 days prior to the preliminary conference, unless the court directs otherwise. These papers shall include:

(i) statements of net worth, which also shall be filed with the court no later than 10 days prior to the preliminary conference;

(ii) all paycheck stubs for the current calendar year and the last paycheck stub for the immediately preceding calendar year;

(iii) all filed state and federal income tax returns for the previous three years, including both personal returns filed on behalf of any partnership or closely held corporation of which the party is a partner or shareholder;

(iv) all W-2 wage and tax statements, 1099 forms and K-1 forms for any year in the past three years in which the party did not file state and federal income tax returns;

(v) all statements of accounts received during the past three years from each financial institution in which the party has maintained any account in which cash or securities are held;

(vi) the statements immediately preceding and following the date of commencement of the matrimonial action pertaining to: (A) any policy of life insurance having a cash or dividend surrender value; and (B) any deferred compensation plan of any type or nature in which the party has an interest including, but not limited to, Individual Retirement Accounts, pensions, profit-sharing plans, Keogh plans, 401K plans and other retirement plans.

Both parties personally must be present in court at the time of the conference, and the judge personally shall address the parties at some time during the conference.

(2) The matters to be considered at the conference may include, among other things:

(i) applications for pendente lite relief, including interim counsel fees;

(ii) compliance with the requirement of compulsory financial disclosure, including the exchange and filing of a supplemental statement of net worth indicating material changes in any previously exchanged and filed statement of net worth;
(iii) simplification and limitation of issues;
(iv) the establishment of a timetable for the completion of all disclosure proceedings, provided that all such procedures must be completed within six months from the commencement of the conference, unless otherwise shortened or extended by the court depending upon the circumstances of the case;
(v) and any other matters which the court shall deem appropriate.

(3) At the close of the conference, the court shall direct the parties to stipulate, in writing or on the record, as to all resolved issues, which the court then shall "so order," and as to all issues with respect to fault, custody and finance that remain unresolved. Any issues with respect to fault, custody and finance that are not specifically described in writing or on the record at that time may not be raised in the action unless good cause is shown. The court shall fix a schedule for discovery as to all unresolved issues and, in a non-complex case, shall schedule a date for trial not later than six months from the date of the conference. The court may appoint a law guardian for the infant children, or may direct the parties to file with the court, within 30 days of the conference, a list of suitable law guardians for selection by the court. The court also may direct that a list of expert witnesses be filed with the court within 30 days of the conference from which the court may select a neutral expert to assist the court. The court shall schedule a compliance conference unless the court dispenses with the conference based upon a stipulation of compliance filed by the parties. Unless the court excuses their presence, the parties personally must be present in court at the time of the compliance conference. If the parties are present in court, the judge personally shall address them at some time during the conference.

(g) *Expert witnesses*.

(1) Responses to demands for expert information pursuant to CPLR § 3101 (d) shall be served within 20 days following service of such demands.
(2) Each expert witness whom a party expects to call at the trial shall file with the court a written report, which shall be exchanged and filed with the court no later than 60 days before the date set for trial, and reply reports, if any, shall be exchanged and filed no later than 30 days before such date. Failure to file with the court a report in conformance with these requirements may, in the court's discretion, preclude the use of the expert. Except for good cause shown, the reports exchanged between the parties shall be the only reports admissible at trial. Late retention of experts and consequent late submission of reports shall be permitted only upon a showing of good cause as authorized by CPLR§ 3101 (d)(1)(i). In the discretion of the court, written reports may be used to substitute for direct testimony at the trial, but the reports shall be submitted by the expert under oath, and the expert shall be present and available for cross-examination. In the discretion of the court, in a proper case, parties may be bound by the expert's report in their direct case.

(h) *Statement of proposed disposition*.

(1) Each party shall exchange a statement setting forth the following:
(2) the assets claimed to be marital property;
(i) the assets claimed to be separate property;

(ii) an allocation of debts or liabilities to specific marital or separate assets, where appropriate;
(iii) the amount requested for maintenance, indicting and elaborating upon the statutory factors forming the basis for the maintenance requests;
(iv) the proposal for equitable distribution, where appropriate, indicating and elaborating upon the statutory factors forming the basis for the proposed distribution;
(v) the proposal for a distributive award, if requested, including a showing of the need for a distributive award;
(vi) the proposed plan for child support, indicating and elaborating upon the statutory factors upon which the proposal is based; and
(vii) the proposed plan for custody and visitation of any children involved in the proceeding, setting forth the reasons therefor.

(3) A copy of any written agreement entered into by the parties relating to financial arrangements or custody or visitation shall be annexed to the statement referred to in paragraph (1) of this subdivision.
(4) The statement referred to in paragraph (1) of this subdivision, with proof of service upon the other party, shall, with the note of issue, be filed with the court. The other party, if they have not already done so, shall file with the court a statement with paragraph (1) within 20 days of such service.

(i) *Filing of note of issue.* No action or proceeding to which this section is applicable shall be deemed ready for trial unless there is compliance with this section by the party filing the note of issue and certificate of readiness.

(j) *Referral to Family Court.* In all actions or proceedings to which this section is applicable referred to the Family Court by the Supreme Court pursuant to section 464 of the Family Court Act, all statements, including supplemental statements, exchanged and filed by the parties pursuant to this section shall be transmitted to the Family Court with the order of referral.

(k) *Motions for Alimony, Maintenance, Counsel Fees Pendente Lite and Child Support* (Other Than Under Section 237(c) or Section 238 of the Domestic Relations Law).

Unless, on application made to the court, the requirements of this subdivision be waived for good cause shown, or unless otherwise expressly provided by any provision of the CPLR or other statute, the following requirements shall govern motions for alimony, maintenance, counsel fees (other than a motion made pursuant to section 237(c) or section 238 of the Domestic Relations Law for counsel fees for services rendered by an attorney to secure the enforcement of a previously granted order or decree) or child support or any modification of an award thereof:

(1) Such motion shall be made before or at the preliminary conference, if practicable.
(2) No motion shall be heard unless the moving papers include a statement of net worth in the official form prescribed by subdivision (b) of this section.
(3) No motion for counsel fees shall be heard unless the moving papers also include the affidavit of the movant's attorney stating the moneys, if any, received on account of such attorney's fee from the movant or any other person on behalf of the movant, and the moneys such attorney has been promised by, or the agreement made with, the movant or other persons on behalf of the movant, concerning or in payment of the fee.
(4) The party opposing any motion shall be deemed to have admitted, for the purpose of the motion but not otherwise, such facts set forth in the moving party's statement of net worth as are not controverted in:

(i) a statement of net worth, in the official form prescribed by this section, completed and sworn to by the opposing party, and made a part of the answering papers, or

(ii) other sworn statements or affidavits with respect to any fact which is not feasible to controvert in the opposing party's statement of net worth.

(5) The failure to comply with the provisions of this subdivision shall be good cause, in the discretion of the judge presiding, either:

(i) to draw an inference favorable to the adverse party with respect to any disputed fact or issue affected by such failure; or

(ii) to deny the motion without prejudice to renewal upon compliance with the provisions of this section.

(6) The notice of motion submitted with any motion for or related to interim maintenance or child support shall contain a notation indicating the nature of the motion. Any such motion shall be determined within 30 days after the motion is submitted for decision.

(7) Upon any application for an award of counsel fees or appraisal/accounting fees made prior to the conclusion of the trial of the action, the court shall set forth in specific detail, in writing or on the record, the factors it considered and the reasons for its decision.

(I) Hearings or trials pertaining to temporary or permanent custody or visitation shall proceed from day-to-day conclusion. With respect to other issues before the court, to the extent feasible, trial should proceed from day to day to conclusion.

B. Ancillary Relief

ANCILLARY RELIEF

In addition to determining the client's ground for divorce, the client and their legal team must decide which types of ancillary relief to request in the divorce action. The ***Divorce Questionnaire*** is designed to assist the client and their legal team in identifying the appropriate type of ancillary relief to request in the divorce action. The client's request for ancillary relief appears in the Summons with Notice, Verified Complaint, Plaintiff's Affidavit and Judgment of Divorce.

Many of contested divorce cases referred through this program will involve requests for the following types of ancillary relief:

- Custody of the minor children of the marriage **(*if applicable*)**
- Payment of child support by the non-custodial parent to either the custodial parent or to the Commissioner of Social Services if client is on public assistance **(not *applicable if child support is being reserved*)**
- Continuation of a family court order for custody, visitation or child support (if applicable, does not include orders of protection which remain in effect after the divorce)
- Maintenance of health insurance on behalf of children of the marriage, if any, and payment of unreimbursed medical expenses (**not** ***applicable if child support is being reserved***)
- Right to resume use of prior surname (must be requested even if the client never used the spouse's name)
- Equitable distribution of the marital property
- Exclusive occupancy of the marital residence
- Visitation with the children of the marriage

CHILD CUSTODY

The Court will not issue a Judgment of Divorce if there are minor children of the marriage under the age of 18 and the ancillary relief does not request that one of the parents have custody. The client must, therefore, state that they seek sole custody of the minor children of the marriage.

Under the ***Domestic Relations Law*** and the ***Family Court Act***, there is a rebuttable presumption of paternity. Any child born during the course of the marriage is considered a child of the marriage, regardless of the fact that the parties have been separated for an extended period of time when the child is born. **Notify Her Justice immediately if there are children of the marriage and the spouse is not the biological father.**

If either party to a divorce action has a child from a prior marriage or past relationship, that child should not be considered in the divorce action ***unless*** that child has been legally adopted by the non-biological parent. If there is a child that has been legally adopted by one of the litigants, that child should be considered "of the marriage" for purposes of the

divorce action. If the parties have a child in common who was born prior to the marriage, this child should also be included in the divorce action.

A **minor** is defined as a person under the age of 18. ***(DRL § 2)*** The court does not require a party in a divorce action to address the issue of custody for a child of the marriage who is age 18 or older.

There are events, however, that may cause a child of the marriage under the age of 18 to be deemed emancipated as a result of an "emancipation event." *A request for custody should not be made in a divorce action for an emancipated child.* Examples of emancipation events are:

- Marriage
- Full-Time Employment
- Enlistment in the Armed Services
- Death

REGISTRY CHECKS.

Domestic Relations Law Section 240 (DRL § 240) requires the court to access information from three separate state registries before it issues a temporary or permanent order of custody or visitation:

1. Child abuse registry or decisions in proceedings under Article 10 of the Family Court Act and Family Court warrants
2. Sex offender registry
3. Registry of orders of protection

These registries must be checked in instances where either more than one month has passed since the issuance of any previous custody or visitation order or where no such prior order has been issued.

The purpose of this provision is to ensure that judges making custody or visitation decisions have relevant information about any individual seeking custody or visitation before the court issues any order involving the children of the marriage.

The legislation applies only to divorce matters where there are minor children and where custody and visitation are at issue. Once the court conducts the required searches, if there is no record found (i.e., there is no "hit"), the court will sign and enter the Judgment of Divorce.

Where the search results in a hit, there is the possibility that the court will gather additional facts from the parties before entering the Judgment of Divorce. We advise you, when interviewing your client, to discuss the DRL 240 1(a-1) requirements with them and how it might affect their case.

HELPFUL PRACTICE TIPS FOR REQUESTING CUSTODY AS ANCILLARY RELIEF

Most of the clients referred through this program will request to be the custodial parent if there are children of the marriage. In rare instances, a client may request for their spouse to be the custodial parent. Under this circumstance, advise your client that they will be obligated to pay child support to their spouse or a third party.

The divorce papers should provide the names and dates of birth and social security number for each unemancipated child of the marriage.

If there is a prior Family Court order for custody and the client wants that order to remain in effect, the divorce papers should request that **(a)** custody be awarded to the parent pursuant to the family court order; and **(b)** the order be continued. The divorce papers should indicate the dates of the orders, the docket numbers, and the court that issued the orders. The client should provide their legal team with copies of any Family Court orders.

When there is a request for custody as ancillary relief, the divorce papers must request that the Family Court shall have concurrent jurisdiction with the Supreme Court concerning any future issues of custody.

VISITATION

For many cases in our program, visitation rights for the defendant are not sought. The initial documents may be drafted to remain silent on the issue and the defendant will likely raise the issue in their Answer or Counterclaim.

However, the client may specifically request visitation for their spouse as ancillary relief if **(a)** there is a Family Court order for visitation and they seek to continue that order, or; (**b)** the parties have previously agreed to a visitation schedule and the client wants to incorporate that schedule into the divorce judgment. **Please discuss these options carefully with your client and your Her Justice mentor.**

HELPFUL PRACTICE TIPS FOR VISITATION AS ANCILLARY RELIEF

If the client has a Family Court order for visitation, the client should request as ancillary relief that **(a)** the non-custodial parent have visitation with the minor children of the marriage as specified in the order; and **(b)** the order be continued. The divorce papers should indicate the dates of the order, the docket number, and the court that issued the order. The client should provide their legal team with a copy of any Family Court orders.

***Note*:** With the exception of an Order of Protection, all other orders issued by the Family Court (custody, visitation, child and spousal support) will no longer be enforceable once a Judgment of Divorce has been signed and entered in the Office of the County Clerk unless each order is specifically continued in the divorce action.

If there are minor children of the marriage and the client does not want to make a request for visitation as ancillary relief, the divorce papers should provide the Family Court with concurrent jurisdiction with the Supreme Court concerning any future issues of visitation.

CHILD SUPPORT

Parents are presumed to be legally obligated to support a child born to them during the marriage. Pursuant to state law, the courts will not issue a judgment of divorce if the issue of child support is not addressed.

A child born during the course of the marriage is defined as "of the marriage." With regard to a child born prior to the marriage, Section 417 of the Family Court Act states that **[a] child born of parents who at any time prior or subsequent to the birth of said child shall have entered into a ceremonial marriage shall be deemed the legitimate child of both parties…regardless of the validity of such marriage.**

The obligation to pay child support on behalf of a child **extends to the age of 21**. (DRL § 32(3); FCA, Section 413(1); FCA, Section 545(1); SSL, Section 102(1)) There is no obligation to support any child of the marriage **over the age of 21**. The obligation of parents to support a child or children **under the age of 21** may cease if that child is emancipated as a result of an emancipation event. Some examples of emancipation events are:

- Marriage
- Full-Time Employment
- Enlistment in the Armed Services
- Death

Support should only be requested for the unemancipated children of the marriage.

The obligation to pay child support is defined in the Child Support Standards Act ("CSSA"). The statues governing this issue are DRL § 240-1-b and the FCA Section 413. The CSSA provides for basic child support and pro rata allocation of mandatory ancillary expenses, namely, unreimbursed medical expenses and the custodial parent's work-related child care expenses.

Part One: Calculate the adjusted combined parental income ("Adjusted CPI") (combined parental income minus the statutory deductions such as FICA, Medicare and New York City taxes)

Part Two: Calculate the total basic child support obligation by multiplying the adjusted combined parental income (up to $163,000) by the specific statutory percentage based on the number of children of the marriage. The statutory percentages are:

- **1 Child 17% of Adjusted CPI**
- **2 Children 25% of Adjusted CPI**
- **3 Children 29% of Adjusted CPI**
- **4 Children 31% of Adjusted CPI**
- **5 Children At least 35% of Adjusted CPI.**

Part Three: Determine each parent's pro rata share of the total child support obligation by dividing each parent's income by the Adjusted CPI, then multiplying each parent's pro rata share by the basic child support obligation.

Part Four: Determine each parent's pro rata share of the total mandatory ancillary expenses.

- Mandatory ancillary expenses are unreimbursed medical and dental expenses and work-related child care expenses.

Note: **When the Adjusted CPI exceeds $183,000, certain factors will be considered to determine what the child support obligation is. Cases referred through this Program will not involve using this calculation.**

SAMPLE CHILD SUPPORT CALCULATION:

Step One:

Non-custodial parent's income: $ 82,500

Custodial parent's income: $ 27,800

Non-custodial parent's adjusted income: $ 75,000

Custodial parent's adjusted income: $ 25,000

Total Adjusted Combined Parental Income: $ 100,000

Step Two:

Total basic child support obligation for 1 child: $ 17,000 ($ 100,000 x 17%)

Step Three:

Custodial parent's pro rata share: ($ 25,000/$ 100,000)* $ 17,000=
$ 4,250 (25% pro rata share)

Non-custodial parent's pro rata share: ($ 75,000/$ 100,000)* $ 17,000=
$ 12,750 (75% pro rata share)

Step Four:

Unreimbursed medical expenses of $ 600.00 annually:

Non-custodial parent's share: ($600.00*75%) = $ 450
Custodial parent's share: ($600.00*25%) = $ 150

Non-custodial parent's total child support obligation: $ 13, 200
($ 1,100 monthly or $ 508 bi-weekly)

Note: The non-custodial parent's child support obligation is payable weekly, bi-weekly, semi-monthly or monthly, usually depending on how often he gets paid.

Note: Beginning in 2010 and every two years thereafter, the combined parental income cap will change according to the Consumer Price Index, pursuant to SSL § 111-i.

CONTINUING PRIOR ORDERS OF SUPPORT

Some clients may already have a Family Court order for support. That order will specify the amount and date child support payments should be made by the non-custodial parent. The client should provide copies of any Family Court orders at the time of the initial client interview. In the Summons with Notice, you should set forth the date, Docket number, and amount of the order and that it shall be continued in the divorce.

NOTE: Orders for child support issued more than three years prior to the divorce action may be considered "stale" by the courts. As the Support Collection Unit ("SCU") is empowered to review and adjust child support orders periodically, you must make sure the order of support is the most recent. Call Her Justice with questions.

Normally, child support is paid by the non-custodial parent to the custodial parent, generally through the Support Collection Unit. **However, when an individual receives Public Assistance they assign the right to the Commissioner of Social Services to pursue any individual deemed responsible for their support or that of the children of the marriage**. In such cases, support payments must be directed to be paid to the Commissioner of Social Services, through the Support Collection Unit.

DRL 240 MAINTENANCE OF HEALTH INSURANCE FOR CHILDREN OF MARRIAGE AND PAYMENT OF UNREIMBURSED MEDICAL EXPENSES

Pursuant to state and federal law, parties to a divorce action are required to designate which parent will be responsible for maintaining health insurance coverage for the children of the marriage under 21 years old. (DRL § 240 (1)(a)(b))

Domestic Relations Law Section 240 (DRL § 240), Family Court Act Section 413 (FCA § 413), and Family Court Act Section 416 (FCA § 416) have been amended to provide definitions for cash medical support and parameters for determining whether employer-sponsored health insurance benefits are reasonable in cost and are reasonably accessible. The rules took effect on October 9, 2009.

In essence, if employer-sponsored health insurance is available to one of the parties, and the coverage is reasonably accessible, then the parent with the insurance coverage must cover the children of the marriage until they are emancipated.

The court must determine the identity and nature of all health plans available to each party. If either parent has health insurance coverage available through an employer, that

parent must maintain health insurance coverage for all unemancipated children, unless either: (i) coverage costs exceed 5% of the combined parental income or (ii) the coverage is inaccessible, meaning the plan doctors are more than 30 miles or 30 minutes away from the custodial parent. If the coverage is inaccessible, then a New York State subsidized health insurance program must be maintained for the child.

All insurance reimbursement payments must be assigned to the parent who advanced the money. In assessing available health insurance, the court may allocate any costs for obtaining the insurance between the parents on a pro rata basis.

The Findings of Fact and Conclusions of Law and the Judgment of Divorce must direct that the legally responsible parent maintain health insurance coverage for all unemancipated children.

Along with the final Findings of Fact and Conclusions of Law and Judgment of Divorce, the court will issue a *Qualified Medical Child Support Order* which contains the information necessary to require the insurance company to provide the coverage for the child (29 USC §1169) pursuant to DRL § 240.

In addition, the parties are also required to specify how unreimbursed medical costs will be paid by the parties. The non-custodial parent is usually responsible for his pro-rata share of un-reimbursed medical expenses.

The client's file will contain information regarding the client's health insurance coverage and that of their children (if applicable.)

If a client receives Public Assistance, it is more than likely that the children of the marriage are covered by Medicaid. This is different than the client having insurance though employment.

HELPFUL PRACTICE TIPS FOR REQUESTING CHILD SUPPORT AS ANCILLARY RELIEF

If the client is the custodial parent and has a Family Court order of support that was issued ***within the last three years***, request that the ***order be continued***.

If a Family Court order of support was issued ***more than 3 years ago***, make sure the order is the most current order, and call Her Justice.

Her Justice recommends that clients not on Public Assistance elect to receive their support payments through the Support Collection Unit (SCU.) Although this may cause initial delays in the payments being received by your client, the SCU has broad enforcement powers and can garnish the defendant's wages, if necessary.

LINK TO LISTINGS OF LOCAL SUPPORT COLLECTION UNIT OFFICES:

https://www.childsupport.ny.gov/DCSE/LocalOffices_inputMain

Office:

Support Collection Unit
151 West Broadway, 4th floor
New York, NY 10013
8:00 AM-7:00 PM, Monday-Friday
Arrive by 6:45 PM
Saturday: By appointment only
Email: dcse.cseweb@dfa.state.ny.us

SPOUSAL MAINTENANCE

Your contested divorce client may seek spousal maintenance as ancillary relief. A client receiving Public Assistance has assigned their right to the Commissioner of Social Services to pursue any individual deemed responsible for their support. As such, maintenance should be payable to the client's assignee, the Commissioner of Social Services.

RIGHT TO RESUME PRIOR SURNAME OR ANY OTHER FORMER SURNAME

The client must always request the right to resume their prior surname or any other surname as ancillary relief, even if the client has never assumed the married surname or does not intend to change their name after the divorce. This will preserve the right for the client to change their name at a later date.

EQUITABLE DISTRIBUTION

Your contested divorce client will likely seek distribution of the marital property.

EXCLUSIVE POSSESSION OF THE MARITAL RESIDENCE

Your contested divorce may seek exclusive possession or occupancy of the marital residence. Note: this is separate from ownership or claim to a portion of the value of the marital residence. This only address which party may reside in the marital residence for the duration of the court case and/or for a specified time thereafter.

EQUITABLE DISTRIBUTION:

WHAT'S FAIR?

The Equitable Distribution Law is applicable to all marital actions after July 19, 1980. It applies to agreements signed and judgments entered on or after that date.

The Equitable Distribution law is significant in that it:

(i) Made statutes relating to marital property (and maintenance) gender neutral.
(ii) Redefined "marital property" so that title no longer controls distribution of property upon divorce. Courts now look to property accumulated during marriage due to individual and joint efforts.
(iii) Diminished the role of "marital fault".

The premise underlying the Equitable Distribution Law is that marriage is among other things, an **"economic partnership" to which both parties contribute as spouse, parent, wage earner and/or homemaker.**

The process of equitable distribution has three parts: 1) categorizing property as marital or separate; 2) evaluating the property and 3) distribution.

MARITAL PROPERTY

How property is held or titled is no longer relevant to how it will be distributed upon divorce.

Marital property is defined as all property acquired by either or both spouses during the marriage from the date of the marriage through the commencement of a matrimonial action or the execution of a separation agreement, regardless of the form in which title is held.

The language of DRL §236(B)(5) supports a broad view as to what constitutes "property."

Once it is proved that property was acquired during the marriage, the party claiming that property to be separate property has the burden of proving the property is separate.

Marital assets commonly distributed are:

- Real Estate.
- Automobiles and other vehicles.
- Stocks, Bonds, Cash & Savings Accounts.
- Individual Retirement Accounts, Pension Plans, 401K's and other funds set aside for retirement.
- Cash value of Life Insurance Policies.
- Furniture and fixtures in all houses.

- Business owned by one or both spouses.

Since the seminal case *O'Brien v. O'Brien*, 66 NY 2d 576 (1985), involving a medical license which was found to be marital property, Courts have been enlarging the concept of "marital property" to include any license or skill that enhances future earning capacity. Professional practices have also been held to be marital property subject to equitable distribution.

Property acquired after a matrimonial action is commenced will not be considered marital property DRL§236(1)(c). However, if marital property is used to acquire other property, the new property retains its identity as marital property. It is thus important to trace the funds used for the acquisition of assets after the commencement of a matrimonial action to determine whether or not the assets acquired are marital or separate.

SEPARATE PROPERTY

Separate property is an exception to marital property and is defined as follows:

- Property acquired before marriage or property acquired by bequest, devise, descent or gift from a person other than your spouse;
- Compensation for personal injuries;
- Property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse; or
- Property described as separate property by a written agreement of the parties.

Separate property can be considered marital property if it has been co-mingled with marital assets or if it has appreciated in value during the marriage due to the efforts of the spouses.

MARITAL LIABILITIES

The Court not only orders equitable distribution of marital property but also marital liabilities and debt. Marital Debt can include:

- The mortgage balance on a home.
- Any debts owed to banks, savings and loan association, or any lending institutions.
- Car loans, school loans (if not premarital), home improvement loans, any money borrowed during the marriage not paid back in full
- Loans payable to relatives or friends.
- Unpaid bills at the time of the hearing (department stores, credit cards, doctors, dentists, etc.)

As far as the creditor is concerned, if there is a joint obligation or account, each of the parties is fully responsible, regardless of what the court order says, and the creditor can sue for payment. Consider asking for a security from the spouse obligated to pay the debt,

purchasing an insurance policy to secure the obligation, or having one spouse refinance the account.

VALUATION

The **Court cannot make an equitable distribution of property unless there is proof as to the value of the marital property.** Pensions, Real Estate, and Professional Licenses or Practices and Businesses are often valued by appraisers for equitable distribution purposes.

As a general rule, the valuation date marital assets is the date of the commencement of the action. Real estate is generally valued at the time of trial or settlement, for a variety of reasons. The Court has the discretion to determine valuation dates.

EQUITABLE DISTRIBUTION OF MARITAL PROPERTY

The term "equitable distribution" does not dictate "equal" distribution of marital assets, though Courts are generally distributing property on an equal basis between spouses in marriages of long duration in which there are children.

Once a divorce has been granted, the court determines how the marital property will be equitably distributed in accordance with thirteen enumerated factors under the law:

1. The **income and property** of each party at the time of marriage, and at the time of the commencement of the action;
2. The **duration of the marriage** and the age and health of both parties;
3. The need of a **custodial parent** to occupy or own the marital residence and to use or own its household effects;
4. The loss of **inheritance and pension rights** upon dissolution of the marriage as of the date of dissolution;
5. **The loss of health insurance benefits** upon dissolution of the marriage;
6. Any award of maintenance;
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;**
8. The **liquid or non-liquid** character of all marital property;
9. The **probable future financial circumstances** of each party;
10. The impossibility 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;
11. The tax consequences to each party;
12. The wasteful dissipation of assets by either spouse;

13. Any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration
14. **Whether either party has committed an act or acts of domestic violence, as described in subdivision one of section four hundred fifty-nine-a of the social services law, against the other party and the nature, extent, duration and impact of such act or acts**
15. Any other factor the court expressly finds to be a just and proper consideration.

EQUITABLE DISTRIBUTION BY AGREEMENT:

"An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded. Such an agreement may include (1) contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will; (2) provision for the ownership, division or distribution of separate and marital property; (3) provision for the amount and duration of maintenance or other terms and conditions of the marriage relationship, subject to the provisions of section 5-311 of the general obligations law, and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of the entry of final judgment; and (4) provision for the custody, care, education and maintenance of any child of the parties, subject to the provisions of section two hundred forty of this chapter. Nothing in this subdivision shall be deemed to affect the validity of any agreement made prior to the effective date of this subdivision." DRL § 236(B)(3).

IS "EQUITABLE" DISTRIBUTION THE SAME AS "EQUAL" DISTRIBUTION?

Not in New York. "Equitable" distribution of marital property does not necessarily mean a 50-50 division of property, but in a "long" marriage the courts may presume 50-50 should be the outcome. Courts are generally distributing property on an equal basis between spouses in marriages of long duration in which there are children. Courts take a flexible approach, based on the following factors set forth in DRL § 236B(5)(d):

- The income and property of each party at the time of marriage, and at the time of the commencement of the action;
- The duration of the marriage and the age and health of both parties;
- The need of a custodial parent to occupy or own the marital residence and to use or own its household effects;
- The loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;
- The loss of health insurance benefits upon dissolution of the marriage;
- Any award of maintenance;
- Any equitable claim to, interest in, or direct or indirect contribution made wage earner and homemaker, and to the career or career potential of the other party. The court shall not consider as marital property subject to distribution the value of a

spouse's enhanced earning capacity arising from a license, degree, celebrity goodwill, or career enhancement. However, in arriving at an equitable division of marital property, the court shall consider the direct or indirect contributions to the development during the marriage of the enhanced earning capacity of the other spouse;

- The liquid or non-liquid character of all marital property;
- The probable future financial circumstances of each party;
- The impossibility 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;
- The tax consequences to each party;
- The wasteful dissipation of assets by either spouse;
- Any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
- Whether either party has committed an act or acts of domestic violence, as described in subdivision one of section four hundred fifty-nine-a of the social services law, against the other party and the nature, extent, duration and impact of such act or acts.
- Any other factor which the court shall expressly find to be just and proper.

DISTRIBUTIVE AWARD

A distributive award is an award of liquid assets in lieu of an equitable share in specific marital property. Such an award can be made if the court, in its discretion, finds it appropriate.

DRL § 236(B)(5)(e) provides:

In any action in which the court shall determine that an equitable distribution is appropriate but would be impractical or burdensome or where the distribution of an interest in a business, corporation or profession would be contrary to law, the court in lieu of such equitable distribution shall make a distributive award in order to achieve equity between the parties. The court, in its discretion, also may make a distributive award to supplement, facilitate or effectuate a distribution of marital property.

"MARITAL" PROPERTY VS. "SEPARATE PROPERTY"

How property is held or titled is no longer relevant to how it will be distributed upon divorce.

Marital property is defined as all property acquired by either or both spouses during the marriage from the date of the marriage through the commencement of a matrimonial action or the execution of a separation agreement, regardless of the form in which title is held.

The language of DRL §236(B)(5) supports a broad view as to what constitutes "property."

Once it is proved that property was acquired during the marriage, the party claiming that property to be separate property has the burden of proving the property is separate.

Marital assets commonly distributed are:

- Real Estate.
- Automobiles and other vehicles.
- Stocks, Bonds, Cash & Savings Accounts.
- Individual Retirement Accounts, Pension Plans, 401K's and other funds set aside for retirement.
- Cash value of Life Insurance Policies.
- Furniture and fixtures in all houses.
- Business owned by one or both spouses.

Property acquired after a matrimonial action is commenced will not be considered marital property DRL§236(1)(c). However, if marital property is used to acquire other property, the new property retains its identity as marital property. It is thus important to trace the funds used for the acquisition of assets after the commencement of a matrimonial action to determine whether or not the assets acquired are marital or separate.

A. TERMS AND DEFINITIONS:

The term "marital property" shall mean all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, except as otherwise provided in agreement pursuant to subdivision three of this part. Marital property shall not include separate property as hereinafter defined." DRL § 236(B)(1)(c).

DRL § 236(B)(1)(c): "The term separate property shall mean:

(iv) property acquired before marriage or property acquired by bequest, devise or descent or gift from a party other than the spouse;
(v) compensation for personal injuries;
(vi) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contribution or efforts of the other spouse;
(vii) property described as separate property by written agreement or the parties pursuant to subdivision three of this part."

B. COMMINGLED PROPERTY

If a spouse places their separate property into joint names, a presumption of gift arises, which, unless rebutted, results in the conclusion that the property is to be treated as marital property. If the presumption is rebutted, then the entire amount of the asset will be treated as separate property. For example, in the case of McGarrity v. McGarrity, 211 A.D.2d 669, 622 N.Y.S.2d 521 (2d Dep't 1995), the spouse inherited funds during the marriage and placed them in joint account. These funds were designated as entirely separate property upon a showing that the spouse simply deposited the funds in the joint account for the sake of convenience.

When a party contributes separate property to the creation of a marital asset, the party who contributed the separate property is entitled to a credit in the amount of the separate property contributed. See, e.g., Coffey v. Coffey, 119 A.D.2d 620, 501 N.Y.S.2d 74 (2d Dep't 1986).

C. LEADING CASES:

(i) Price v. Price, 69 N.Y.2d 8, 511 N.Y.S.2d 219 (1986)

The certified question on appeal to the Court of Appeals was as follows: "Whether a nontitled spouse's contributions or efforts' (citation omitted) as homemaker and parent are entitled to recognition by the court in awarding said spouse a share of the appreciated value of the titled spouse's separate property which accrued during the parties' marriage." N.Y.S.2d at 221.

The Court held as follows:

"We hold, therefore, that where separate property of one spouse has appreciated during the marriage and before execution of a separation agreement or commencement of a matrimonial proceeding and where such appreciation was "due in part" to the contribution or efforts of the non-titled spouse as parent and homemaker, the amount of that appreciation should be added to the sum of marital property for equitable distribution (citation omitted). Whether assistance of a non-titled spouse, when indirect, can be said to have contributed "in part" to the appreciation of an asset depends primarily upon the nature of the asset and whether its appreciation was due in some measure to the time and efforts of the titled spouse." … N.Y.S.2d at 224.

"The question under section 236(B)(1)(d)(3) as to indirect contribution of the non-titled spouse as parent and homemaker is whether there was an appreciation of separate property due to the efforts of the titled spouse during the period when it is shown that those efforts were being aided or facilitated in some way by these indirect contributions. If so, the amount of the appreciation during that period is considered a product of the marital partnership over which the trial court "retains the flexibility and discretion to structure." N.Y.S.2d at 225.

(ii) Burns v. Burns, 84 N.Y.2d 369, 618 N.Y.S.2d 761 (1994)

Appreciation of separate property may be subject to equitable distribution. "It follows that where the non-titled spouse has contributed to the appreciation of the titled spouse's interest in a partnership, even though the spouse was already a partner at the time of the marriage, the appreciation constitutes marital property subject to equitable distribution." N.Y.S.2d at 763.

(iii) Hartog v. Hartog, 85 N.Y.2d 36.623 N.Y.S.2d 537 (1995)

The 'lead' issue for the Court was as follows:

"[W]hether the spouse's limited involvement during the marriage in businesses that appreciated in value qualified as active participation to transmute the appreciation of that otherwise separate property into marital property subject to equitable distribution." N.Y.S.2d at 540.

The holding on the 'lead' issue was as follows:

"We conclude, as the Supreme Court did, that the record supports the view that the spouse's involvement was sufficient to convert a proportionate share of the appreciated value of these businesses into marital property." … N.Y.S.2d at 540.

"We conclude that requiring a non-titled spouse to produce a substantial almost quantifiable, connection between the titled spouse's efforts and the appreciated value of the asset would be (1) contrary to the letter and spirit of the relevant statues (citation omitted); (2) inconsistent with legislative intent (citation omitted); and (3) at odds with the purport of this Court's precedents construing the Legislature's directives (citing Price)." … N.Y.S.2d at 542.

Highlights of the Court's Dicta:

"When a non-titled spouse's claim to appreciation in the other spouse's separate property is predicated solely on the non-titled spouse's indirect contribution, some nexus between the titled spouse's active efforts and the appreciation in the separate asset is required (citations omitted). Applying *Price*'s nuanced principles to this case, we hold that the weight of the adduced evidence favors the fact-finding trial court's conclusion that the titled spouse actively participated to some degree regarding the separate nonpassive asset and that the appreciation in the asset is, to that proportionate extent, marital property." N.Y.S.2d at 542.

"Thus, to the extent that the appreciated value of separate property is at all "aided or facilitated" by the non-titled spouse's direct or indirect efforts, that part of the appreciation is marital property subject to equitable distribution (citations omitted). Consequently, while some connection between the titled spouse's effort and the appreciation must be discernible from the evidence, neither the statutory language nor its legislative history justifies the Appellate Division's and the spouse's exacting causation prerequisite." N.Y.S.2d at 542.

D. COMMENTS ON *PRICE/HARTOG*.

(i) The Court in Price requires that both the nature of the asset and the efforts of the titled spouse be considered in determining whether the asset is marital or separate property:

"Active/passive test"

Non-titled spouse must show:

(a) Property appreciated in value due at least in part to efforts or contributions of titled spouse;

AND

(b) Non-titled spouse contributed at least in part to that appreciation as homemaker, parent, etc. by giving titled spouse time and support needed to devote themselves to enterprise.

Where asset is non-passive and titled spouse engaged in active efforts with respect to that asset, even to small degree, appreciation is, to proportionate degree, marital property subject to equitable distribution. In Hartog v. Hartog, supra, court held that 25% of spouse's interest in separate business was marital property where his activities, such as attending board meetings, discussing business matters, and signing checks, although not central to day-to-day operations, constituted "active" involvement and contributed to appreciated value of business.

(ii) The Price Court "was silent, however, as to quantifying the threshold "CAUSAL LINK" necessary to trigger the classification of the appreciation of separate property, in whole or in part, as marital property". Hartog, N.Y.S.2d at 543.

(iii) The Court in Hartog defines 'causal link':

"[W]e conclude that where an asset, like an ongoing business, is by its very nature, nonpassive and sufficient facts exist from which the fact finder may conclude that the titled spouse engaged in active efforts with respect to that asset, even to a small degree, then the appreciation in that asset is, to a proportionate degree, marital property. By considering the extent and significance of the titled spouse's efforts in relation to the active efforts of others and any additional passive or active factors, the fact finder must then determine what percentage of the total appreciation constitutes marital property subject to equitable distribution (citations omitted)." Hartog, N.Y.S.2d at 544.

E. MISCELLANEOUS CASES

DeJesus v. DeJesus, 90 N.Y.2d 643, 665 N.Y.S.2d 36 (1997)

The issue was whether and to what extent an interest in a restricted stock and stock option benefit plans provided by a spouse's employer constitutes marital property where the plans come into being during the marriage but are contingent on the spouse's continued employment with the company after the divorce. Held that a court must first determine to what extent the plans were granted as compensation for past services or as incentive for future services. Relevant factors include but are not limited to whether the plans were offered as a bonus or alternative to fixed salary, the value or quantity of the shares tied to future performance, and whether the plans are used to attract top key personnel from other companies. The case contains a good discussion of the calculations to be used to determine the marital portion of such plans and the value thereof.

Miness v. Miness, 229 A.D.2d 520, 645 N.Y.S.2d 838 (2nd Dept. 1996)

No error in lower court's determination that spouse's interest in deceased parent's nursing home business was his separate property, not subject to equitable distribution where wife failed to meet her burden of showing that she contributed directly or indirectly to business so as to entitle her to share in any appreciation in value. Spouse, however, learned the nursing home business which enabled him to develop his own separate facility which is clearly marital property and court properly granted wife 50% interest in business.

Gann v. Gann, 233 A.D.2d 188, 649 N.Y.S.2d 154 (1st Dept. 1996)

Proceeds of spouse's disability insurance policies held to be his separate property as compensation for personal injury where premiums paid from separate property funds and policies did not have deferred income component as with disability pensions.

Gundlach v. Gundlach, 223 A.D.2d 942, 636 N.Y.S.2d 914 (3rd Dept. 1996)

Defendant's personal injury action proceeds of $208,198.05 deposited into joint bank account, also usually considered separate property, a presumption that each party entitled to an equal share of deposit arose when funds deposited into joint account. Defendant failed to meet burden of proof that joint account was created only as matter of convenience where evidence of various transfers from the joint account into and out of other accounts confirms plaintiff's testimony that all money was subject to equitable distribution.

LeRoy v. LeRoy, 274 A.D.2d 362, 712 N.Y.S.2d 33 (1st Dept. 2000)

Defendant failed to meet his burden of proof to establish his claim of separate property contributions where the property had been commingled with marital assets.

Imhof v. Imhof, 259 A.D.2d 666, 686 N.Y.S.2d 825 (2nd Dept. 1999)

Separate property can be transmuted into marital property when the actions of the titled spouse demonstrate intent to transform the character of the property into marital asset. The spouse, who commingled his funds by depositing them into joint accounts and

using the accounts for family and business purposes evidenced an intent to transform the property from separate into marital.

Diaco v. Diaco, 278 A.D.2d 358, 711 N.Y.S.2d 635 (2nd Dept. 2000)

Although plaintiff placed the marital home in joint names and changed the property from separate to marital, plaintiff entitled to a credit for contribution of separate property, and trial court properly awarded defendant one-third the value of the home.

Cowles v. Stahmer, 255 A.D.2d 103, 679 N.Y.S.2d 607 (1st Dept. 1998)

Trial court properly included as marital asset 25% of the appreciation of defendant's separate property since the appreciation during the marriage was at least partially attributable to defendant's active efforts with respect to the asset, and plaintiff entitled to a proportionate degree of that asset.

Allen v. Allen, 263 A.D.2d 691, 693 N.Y.S.2d 708 (3rd Dept. 1999).

Allen represents the proposition that a nontitled spouse is entitled to share in an increase in value which resulted from his or her own efforts.

One spouse operated a business. The court adopted the calculations contained in the owner-spouse's report (which probably undervalued the business). The other spouse did not present evidence of the value of her contribution.

The court awarded the non-titled spouse one-half of the amount that the business increased in value during the marriage.

Burden: The nontitled spouse has the burden of producing evidence that establishes the value of her contribution to the increase in value.

Van Dyke v. Van Dyke, 273 A.D.2d 589, 709 N.Y.S.2d 672 (3rd Dept. 2000).

Unless spouse co-mingles marital assets with separate assets, they retain their character as separate assets.

- Nontitled spouse has the burden of showing a nexus between her contribution and an increase in the business's value.
- Spouse inherited a family business. The court acknowledged the holding in Allen that property acquired by one spouse as a gift or by inheritance and retained separately is not marital property.
- Under Van Dyke, what could spouse show to undermine character of separate property?
    - Spouse took on additional homemaking activities.
    - Marital assets were used to increase value of separate property.
    - Joint bank accounts. Cf. Feldman v. Feldman, 194 A.D.2d 207, 605 N.Y.S.2d 777 (2d Dept. 1994) (fact that a small portion of the spouse's inheritance was deposited into a joint account did not support the inference that the spouse intended to treat all funds received as marital).

- However, a retirement account that the spouse maintained was subject to equitable distribution. Appellate division remitted the case to Supreme Court to determine wife's share of account based on the duration of the marriage.

PARTIES' BURDEN OF PROOF AND DISCRETION OF THE COURT

Antes v. Antes, 304 A.D.2d 597, 758 N.Y.S.2d 163 (2d Dept. 2003):

Trial court has discretion to decide whether property was separate or marital based on the credibility of the witnesses. The trial court is afforded great discretion in its decision making.

Pulice v. Pulice, 242 A.D.2d 527, 661 N.Y.S.2d 675 (2d Dept. 1997):

- Start: Presumption that all property is marital property subject to equitable distribution.
- Titled spouse has the burden of showing that property is separate property.
- Non-titled spouse must show the manner in which his or her contributions resulted in the increase in value and the amount of the increase that is attributable to his or her efforts.

Kay v. Kay, 302 A.D.2d 711, 754 N.Y.S.2d 766 (3rd Dept. 2003):

Presumption arises that funds transferred into a joint account are marital property; presumption may be overcome if it is proven that the joint account was established solely for the purpose of convenience.

- Standard: Spouse must have clear and convincing proof that a joint account was established solely for the purpose of convenience.
- In Kay, most of the funds came from the spouse's family. There was also an American Express card issued on the joint account that either party could use. Although the plaintiff did not actively manage the account, she has the right of survivorship, as well as the authority to give orders and execute trades.
- The Court determined this was sufficient to deem it a marital asset subject to equitable distribution.

Parkinson v. Parkinson, 295 A.D.2d 909, 744 N.Y.S.2d 101, (4th Dept. 2002):

A gift to plaintiff from her mother was considered separate property not subject to equitable distribution; however, the fact that the plaintiff has this separate property may inform the court's decision as to what is "equitable."

- Plaintiff's mother gave her some property as a gift; however, the property was originally put in the name of both spouses. The mother asked that the title to the property be transferred into plaintiff's name alone because the mother wanted her to have the property as the Plaintiff did not have her own retirement account.
    - The parties' written agreement said that it was plaintiff's separate property.

- The agreement did not meet the requirements of § 236(B)(3), although the plaintiff did provide additional evidence that the plaintiff's mother intended to give the property only to the plaintiff.
- The Court held that separate title in and of itself is insufficient to establish separate property. There is a presumption that all property acquired during marriage is marital property. The burden of proof in establishing an asset as separate property is on the spouse claiming separate property.

- Important language: "The court considered the appropriate factors, <u>including plaintiff's substantial separate property</u> and ability to be self-supporting, in awarding plaintiff less than half of defendant's pension and in awarding defendant title to 180 Koenig Road [the marital property]" <u>Parkinson</u>, 295 A.D.2d at 910, 744 N.Y.S.2d at 102 (emphasis added).

VALUATION DATE FOR MARITAL PROPERTY

<u>Statutory/Case Law Generally:</u>

"As soon as practicable after a matrimonial action has been commenced, the court shall set the date or dates the parties shall use for the valuation of each asset. The valuation date or dates may be anytime from the date of commencement of the action to the date of trial." DRL § 236(B)(4)(b).

<u>McSparron v. McSparron</u>, 87 N.Y.2d 275, 639 N.Y.S.2d 265 (1995):

"Domestic Relations Law 236B(l)(c) provides that the classification of property as "marital" or separate" is governed by the date on which the matrimonial action was commenced, or the parties' separation agreement executed. However, the equitable distribution statute does not specify the date that is to be used as the touchstone for measuring the value of the marital property (citations omitted). Thus, the appropriate date for measuring the value of marital property has been left to the sound discretion of the trial courts, which should make their determinations with due regard for all relevant facts and circumstances (citations omitted)."

Cutoff Date re: What Constitutes Marital Property:

Statutory language - property acquired "before the commencement of a matrimonial action" - is not always sure answer. DRL § 236(B)(1)(c).

<u>Anglin v. Anglin</u>, 80 N.Y.2d 553, 592 N.Y.S.2d 630 (1992):

[the issue is] "Whether a separation action ends the period for the accrual of marital property...". N.Y.S.2d at 631. "We, too, conclude that a separation action does not, ipso facto, terminate the marital economic partnership and, therefore, does not preclude the subsequent accrual of marital property."

Active/Passive Assets:

McSparron, supra: "In attempting to select a suitable valuation date, some courts have drawn a distinction between "active" assets (i.e., those whose value depends on the labor of a spouse) and "passive assets" (i.e., those whose value depends only on market conditions). These courts have concluded that "active" assets should be valued only as of that date of the commencement of the action, while the valuation date for "passive" assets may be determined more flexibly (citations omitted). Such formulations, however, may prove too rigid to be useful in particular cases. Thus, they should be regarded only as helpful guideposts and not as immutable rules of law (citations omitted)." See, e.g., Greenwald v. Greenwald, 164 A.D.2d 706, 505 N.Y.S.2d 494 (1st Dept. 1991).

"Active" assets – are usually valued as of the date of commencement of matrimonial action

- Active assets are those that appreciate or lose value due to activities of titled spouse, e.g., dry cleaning store
- Rationale is that marriage is over as a practical matter when action is commenced and "non-contributing" spouse should no longer share in appreciation due to other spouse's labors.
- "Passive" assets – are usually valued as of date of trial
- Passive assets are those that appreciate or lose value due to market conditions or efforts of third parties, e.g., marital residence
- Rationale is to prevent windfall to titled spouse if asset increases in value during divorce proceeding.

Miller v. Miller, 4 A.D.3d 718, 772 N.Y.S.2d 413 (3rd Dept. 2004):

Couple verbally agreed from the outset not to treat the marriage as an economic partnership. Spouse owned the house before the marriage and made all mortgage payments; in addition, spouse owned some investment properties.

Spouse can still receive some of the property's appreciated value if he or she made direct or indirect contributions.

- In *Miller*, the wife lived in the house for 17 years and made direct and indirect contributions.
- Helped with decorating (she has an MFA).
- Assisted in sundry ways with spouse's teenage son from a previous marriage.
- Long-term residence and non-monetary contributions informed the court's decision to award her 40% of the house's value. However, wife was not found to make a substantial contribution to the investments, and as a result, these were found to be separate property of the spouse.

Bankruptcy:

Clark v. Clark, 219 A.D.2d 787, 631 N.Y.S.2d 467 (3rd Dept. 1995):

- Spouse had pension subject to equitable distribution. After the divorce, he filed for bankruptcy.
- Spouse claimed that bankruptcy law should discharge his obligation to the wife as a debt.
- Court says NO. The spouse's bankruptcy petition did not affect the defendant's interest in his pension fund because by the time that the spouse filed his bankruptcy petition, the wife's interest in his pension was considered *her* sole and separate property by virtue of a prior judicial order awarding the wife equitable distribution of a share in the pension; therefore, it could not be counted as one of his debts or discharged by order of Bankruptcy Court.*

*N.B. Interests in pension funds are not assets which are reachable for distribution to creditors in bankruptcy proceedings. However, the wife's interests in reachable assets such as a business or home would be defeated in the spouse's bankruptcy proceeding to the extent that the interests are not divided by title or judicial order prior to bankruptcy filing.

- Sinha v. Sinha, 285 A.D.2d 801, 727 N.Y.S.2d 537 (3rd Dept. 2001):State court has jurisdiction to determine the parties' rights in the marital property that was not reachable by spouse's creditors in the bankruptcy proceeding.
- Just because creditors can't reach certain assets under federal bankruptcy law does not mean that they are not subject to equitable distribution under state divorce law.

VALUATION OF PROFESSIONAL LICENSES AND PRACTICES

F. PROFESSIONAL LICENSES:

EFFECTIVE January 25, 2016, DRL § 236(B)(6)(d)(7) which provides as follows:

> **The court shall not consider as marital property subject to equitable distribution the value of a spouse's enhanced earning capacity arising from a license, degree, celebrity goodwill, or career enhancement. However, in arriving at an equitable division of marital property, the court shall consider the direct or indirect contributions to the development during the marriage of the enhanced earning capacity of the other spouse.**

G. PROFESSIONAL PRACTICES:

Professional practice (e.g., legal, medical, dental, accounting) is also marital property if established during marriage and before commencement of matrimonial action. Sweeny v. Sweeny, 118 A.D.2d 774, 500 N.Y.S.2d 282 (2d Dept. 1986).

Appreciation in value of professional practice established before marriage, where there have been contributions by nonprofessional spouse, is also marital property. Price v. Price, 69 N.Y.2d 8, 511 N.Y.S.2d 219 (1986)

No uniform rule governs, valuation of professional practice for equitable distribution purposes. See, Burns vs. Burns, 84 N.Y.2d 369, 618 N.Y.S.2D 761 (1994), and McSparron vs. McSparron, 87 N.Y.2d 275, 639 N.Y.S.2d 265 (1995).

Smith v. Smith, 1 A.D.3d 870, 769 N.Y.S.2d 306 (3rd Dept. 2003):

Spouse had a veterinary practice; his own expert testified that the spouse underreported the income from the practice.

- "[I]ncome may be properly imputed under such circumstances as when a party's income is underreported, or his employment has paid some of his personal expenses."
- Note: Wife also had a dental hygiene license. This was included as part of the marital assets.

H. "MERGER" DOCTRINE DISCARDED: MCSPARRON V. MCSPARRON, 87 N.Y.2d 275, 639 N.Y.S.2d 265 (1995):

Primary Issue: "[W]hether a license that has been exploited by the licensee to establish and maintain a career may be deemed to have "merged" with the career and thereby lost its character as a separate distributable asset."

Holding: "[W]e conclude that the letter and spirit of our holding in O'Brien is best served by eliminating the concept of "merger" from the inquiry. The merger doctrine should be discarded in favor of a common-sense approach that recognizes the ongoing independent vitality that a professional license may have and focuses solely on the problem of valuing that asset in a way that avoids duplicative awards. O'Brien permits the court to include in the marital estate the present value of any increased earning capacity attributable to a professional license earned during the marriage. That increased earning capacity continues to exist, to a greater or lesser degree, throughout the life of the license. Even after the licensee has had the time and opportunity to exploit the license and to realize a portion of the enhanced earning potential it affords, the license itself retains some residual economic value, although in particular cases it may be nominal (citations omitted). The value can be measured and distributed just as a newly-acquired license is valued throughout various actuarial techniques that are well known to valuation experts."

I. DOUBLE DIPPING PROBLEM – GRUNFELD V. GRUNFELD:

i. Trial Court: Rochelle G. v. Harold M.G., NYLJ 08/14/96 p. 22, col. 1 (New York Co. Sup. Ct., Friedman, J.): Where hearing on valuation and distribution of assets reopened to consider value of spouse's license to practice law after Court of Appeals ruling in McSparron, trial court held that as the wife would receive lifetime maintenance from earnings generated by spouse's license and the enhanced earnings potential from the license, it would be duplicative to award her a share of the license. After a 21 year marriage, the wife, a former schoolteacher, age 47, was awarded $15,000 per month in maintenance until youngest child begins college, then $8,500 per month until death or remarriage. Wife also was awarded 50% of value of spouse's share of law firm, or $1.29 million to be paid in installments of $250,000 per year. Trial court rejected spouse's contention that his practice should be valued as of 1995 (spouse claimed value decreased resulting from firm's loss of clients) instead of 1992 (commencement) stating that "absent a factor that would deprive asset of any substantial value or some other extraordinary circumstance, court should give benefit of both increases and decreases in value to the spouse owning and operating a business." The facts here established "no more than that spouse's firm has lost several clients".

ii. *Appellate Division First Dept: 255 A.D.2d 12, 688 N.Y.S.2d 77 (1st Dept., 1999):* The First Department modified the trial court in holding that it was error not to award the wife a percentage of the marital portion of the spouse's law license, rejecting the trial court's decision that to do so would result in a duplicative award (which is a second dip into excess earnings which had already been valued). The Appellate Division upheld the valuation date as of the commencement of the action (not as of the time of trial). To avoid duplication of the value of the license and the spouse's enhanced earning capacity, the Appellate Division removed the portion of the spouse's expected lifetime compensation that was already considered in calculating the goodwill portion of the spouse's share in the law practice. To avoid double counting, the income used in determining the present value of the practice was deducted from the enhanced earnings calculation. The Appellate Division also found it error to substitute an award of maintenance for a distribution of an asset when maintenance is subject to income tax.

iii. *Court of Appeals: 94 N.Y.2d 696, 709 N.Y.S.2d 486 (2000):* The Court of Appeals held that "where license income is considered in setting maintenance, a court can avoid double counting by reducing the distributive award based on that same income ... One advantage of this method is that the maintenance award may be adjusted in the future if the licensed spouse's actual earnings turn out to be less than expected at the time of the divorce … This method is also consistent with our observation that in particular cases the value of the license may be nominal... On the other hand, there may be cases where it is more equitable to avoid double counting by reducing the maintenance award …where the license is likely to retain its value in the future but the non-licensed spouse may only be entitled to receive maintenance for a short period of time, it may be fairer actually to distribute the

value of the license as marital property rather than to take the license income into consideration in determining the licensed spouse's capacity to pay maintenance".

The Court also considered the tax aspects of a distributive award as opposed to a maintenance award. The Court noted "the recipient of spousal maintenance bears the obligation to pay taxes on that income (unless provision is made to the contrary), whereas receipt of a distributive award is not considered income for taxation purposes … since the dollar value assigned to defendant's law license was computed based upon projected after-tax earnings, a distribution of that asset would already have been tax impacted. To substitute an award of maintenance for a distribution of that asset, which maintenance is then subject to income tax, is tantamount to making plaintiff the victim of double taxation".

The Court limited its exploration to the formulas used in both the trial and appellate court and the McSparron valuation rule but did not really resolve the question of double dipping. The Court approved part of the lower court's computations, modifying the Appellate Division since, in the Court of Appeals opinion, the appellate court double counted the spouse's income when it ordered that the wife should receive both maintenance and a distributive award of the full value of the law license. The case was remanded, without giving much guidance on how the trial court should now proceed to avoid the double dipping problem.
If you are confused, you should be. Grunfeld and its future application remains the subject of great debate and uncertain outcome.

J. VORA V. VORA, 702 N.Y.S.2D 343 (2d DEPT. 2000)

(the Second Department found the trial court erred in failing to apply a "coverture fraction" to the enhanced earning valuation to account for the portion of the spouse's medical education and training completed before the marriage and after the commencement of the action (citing Grunfeld). The spouse was a practicing physician in India for several years before coming to the United States and completing the last two months of his residency after the commencement of the divorce proceedings. The Second Department also found that the trial court erred in reducing the value of the spouse's enhanced earnings by loans totaling $45,000 allegedly advanced by the spouse's father prior to the marriage. Loans taken for educational purposes prior to the marriage should not be deducted from the estimated value of future enhanced earnings. The Second Department found that the spouse achieved 22.6% of his medical education training during the marriage and therefore the marital portion of the value of the spouse's enhanced earnings ability was $189,162 of which the Second Department found that the trial court properly awarded 10% as her contribution. In light of the substantial reduction of the amount of the distributive award, the Appellate Division reduced the payout from twenty years to two years.

VALUATION OF BUSINESSES

General Rule: Spouse has interest (in context of divorce proceeding) in other spouse's interest in closely held corporation, partnership, businesses etc.

K. VALUATION DATE AND METHODOLOGY:

(i) No fixed rule re: valuation date. See, e.g., McSparron.

(ii) No fixed valuation methodology: Amodio v. Amodio, 70 N.Y.2d 5, 516 N.Y.S.2d 923 (1987): Stock in a closely held corporation is a marital asset. "That the stock could not immediately be sold is not dispositive; marital property may have a value to the holder notwithstanding that it has no present market value." N.Y.S.2d at 924.

(iii) Courts recognize there are several methods available to value assets and do not usually disturb the methodology accepted by the trial court. Wilbur v. Wilbur, 116 A.D.2d 953, 498 N.Y.S.2d 525 (3rd Dept. 1986); Rosenberg v. Rosenberg, 126 A.D.2d 537, 510 N.Y.S.2d 659 (2nd Dept. 1987) lv denied 70 N.Y.2d 601, 518 N.Y.S.2d 1023) (1987); Ferraro v. Ferraro, 257 A.D.2d 596, 684 N.Y.S.2d 274 (2nd Dept. 1999).

(iv) Failure to value can lead to malpractice claims. In Lukacs v. Lukacs, 238 A.D.2d 483,657 N.Y.S.2d 191 (2d Dept. 1998) the trial court ordered that an appraisal be conducted immediately after the trial to determine the value of the appreciation since the parties failed to offer any evidence of the current value of the apartment building at the trial.

L. HOW TO VALUE:

Revenue Ruling 59-60 requires valuation of business be at "fair market value" - price at which property would change hands between willing buyer and willing seller, both having reasonable knowledge of all relevant facts

Factors to consider in arriving at "fair market value":

Nature of business

Economic outlook generally and condition and outlook of industry specifically

Financial condition of business

Earning capacity of business

Dividend-paying capacity

Whether business has goodwill or other intangible value

M. Various Valuation Methods VARIOUS VALUATION METHODS:

(i) Capitalization of Earnings Method:
Good method for valuing product or service-oriented business

Method by which expected earnings are converted into present value

Business' past earning capacity is considered as indication of future earnings

(ii) Liquidation Method:
Suggested method where business has considerable assets susceptible of liquidation, such as real estate, and is earning relatively little in relation to value of those assets

Method assumes that as of certain date, entire business will be sold and liabilities paid

(iii) Adjusted Book Value Method:
Good method where business owns income producing assets, such as securities, which are not essential to operating business

Book value equals business' assets minus liabilities, adjusted for obsolescence, depreciation, actual market value of inventory, etc.

(iv) Excess Earnings Method:
Method that computes fair market value by adding together net tangible assets and goodwill (reputation of business, ownership of brand or trade name, record of successful operation over prolonged period).

N. Van Dyke v. Van Dyke, 273 A.D.2d 589, 709 N.Y.S.2d 672 (3rd Dept. 2000):

O. Non-titled spouse has the burden of showing a nexus between their contribution and an increase in the value of the business.

VALUATION OF REAL ESTATE:

P. GENERALLY:

Valued at "market value" or "most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and

seller, each acting prudently, knowledgeably and assuming the price is not affected by undue stimulus".

Q. FOUR TRADTIONAL APPROACHES:

(i) Sales comparison approach:

Value as reflected by recent sales of comparable properties in market; Not to be used for unique properties

(ii) Cost approach:

Value derived by estimating current cost of reproducing or replacing improvements, minus loss in value from depreciation, plus land values

(iii) Income capitalization approach:

Value derived by measuring present value of future benefits of property

(iv) Appraiser arrives at "market value" by using one or more of the above approaches, depending on the type of property, quality, and quantity of data available for analysis.

Pensions/Deferred Compensation Plans

NOTE: A comprehensive discussion of equitable distribution of pensions and deferred compensation may be found in the following section of this manual,

R. LEADING CASES:

(i) The Rule of Majauskas v. Majauskas, 61 N.Y.2d 481, 474 N.Y.S.2d 699 (1984): Vested but unmatured pension rights in noncontributory pension plan are marital property subject to equitable distribution to extent they are acquired between date of marriage and commencement of matrimonial action. Court may:

Order immediate distribution to one spouse of equitable portion of present value of other spouse's pension to extent earned during marriage;

OR

provide that on maturity of pension rights, recipient shall pay to former spouse portion of each payment received;

OR

order "distributive award" in place of equitable distribution of pension, if equitable distribution of pension would be burdensome or impractical.

(ii) Dolan v. Dolan, 78 N.Y.2d 463, 577 N.Y.S. 195 (1991). "[T]o the extent plaintiffs ordinary disability pension represents deferred compensation, it is distinguishable from a retirement pension and therefore to that extent is subject to equitable distribution." N.Y.S.2d at 197.

(iii) Olivo v. Olivo, 82 N.Y.2d 202, 604 N.Y.S.2d 23 (1993). "issue is [W]hether a woman who is entitled to share in her former spouse's pension is also entitled to share in benefits from an early retirement incentive package accepted by the former spouse after divorce. We hold that such post divorce incentive packages are not marital property, and therefore not subject to equitable distribution, except for the portion of the package that enhances pension benefits payable to the employee." N.Y.S.2d at 24.

(iv) Burns v. Burns, 84 N.Y.2d 369, 618 N.Y.S.2d 761 (1994). Non-vested pensions subject to equitable distribution. "Mindful of the purposes underlying the adoption of equitable distribution and the broad legislative definition of "marital property (citing Majauskas), we conclude that non-vested pensions are subject to equitable distribution."

S. WHAT IS A QDRO?

Qualified Domestic Relations Order ("QDRO") or Domestic Relations Order ("DRO") is any judgment, decree, or order made pursuant to a state's domestic relations law that relates to the provision of child support, alimony payments or marital property rights to spouse, former spouse, child or other dependent of participant, and that creates or recognizes existence of an alternate payee's right to, or assigns to alternate payee, right to receive all or portion of benefits payable with respect to participant under an employer provided pension plan. Employee Retirement Income Security Act ("ERISA") § 206(d), 29 U.S.C. § 1056(d).

Lavin v. Lavin, 263 A.D.2d 932, 694 N.Y.S.2d 243 (3rd Dept. 1999). The spouse had the right to appeal the entry of a QDRO that was proposed to implement the terms of the separation agreement, which had been incorporated but not merged into the judgment of divorce.

FINANCIAL DISCLOSURE - DRL § 236(B)(4)

T. DO I HAVE TO TELL?

You bet. New York requires compulsory disclosure by both parties "of their respective financial states" in all matrimonial actions involving alimony, maintenance, or support. DRL § 236(B)(4). In practice, this also extends to claims for equitable distribution and to virtually all negotiated settlements.

This statute has been interpreted broadly. In appropriate cases, the entire financial history of the marriage must be open to inspection by both parties. Each party is entitled to "searching exploration" to discover extent of "marital property", extent of "separate property", and generally to discover information that may bear on financial issues to be determined. Kaye v. Kaye, 102 A.D.2d 682,478 N.Y.S.2d 324 (2d Dept. 1984).

Financial disclosure is not necessarily restricted to the parties and may be obtainable from appropriate third parties, including an employer. De La Roche v. De La Roche, 624

N.Y.S.2d 1 (1st Dept. 1995). However, there is no automatic disclosure from third parties. Need for such disclosure must be shown.

Note: for many clients, especially those who were abused by their spouse, this can be a difficult process. Intimate partner violence often includes financial abuse and your client may fear giving detailed access of their finances to their spouse will put them at risk of further abuse. If your client expresses these concerns, be considerate of their feelings while explaining that full financial disclosure is required to get them the relief they need and want. Reach out to your mentor to discuss whether there may be options to help protect them from further abuse or financial exploitation by their spouse.

U. SWORN STATEMENT OF NEW WORTH DRL § 236(B)(4).

[See Section I in this manual for standard form of Statement of Net Worth]Must be provided upon demand of other party or within statutory time frame: DRL 238(B)(4) and 22 N.Y.C.R.R. 202.16. A fillable PDF provided by the New York State Courts can be found at **https://www.nycourts.gov/LegacyPDFS/forms/matrimonial/NetWorthStatementFillable.pdf**

PERMANENT EXCLUSIVE OCCUPANCY OF THE MARITAL RESIDENCE:

V. STATUTORY AUTHORITY:

DRL § 236B (5)(f) provides that the court may make such orders regarding use and occupancy of the marital home without regard to the form of ownership of the home. DRL § 234 authorizes the court to make directions between the parties concerning the possession of property. DRL § 236B (5)(d) authorizes a court to consider the needs of the custodial parent to occupy the marital residence.

W. PERMANENT AWARD OF EXCLUSIVE OCCUPANCY:

In order to obtain a permanent award of exclusive occupancy, common factors courts consider in making such awards include the age and health of the party seeking the award and the needs of minor children of the marriage (See DRL § 234). The length of the period of permanent exclusive occupancy varies but is usually closely related to the time of the emancipation of the children. When there are no children, there is less reason for exclusive occupancy to be granted to one party unless the parties agree or a physical or mental disability makes it necessary for one party to have such occupancy. Clearly, which spouse will pay the costs of the marital residence (example - mortgage, maintenance, rent, utilities, insurance, repairs) during the exclusive occupancy is an issue that must be considered and addressed.

Crane v. Crane, 264 A.D.2d 749, 694 N.Y.S.2d 763 (2nd Dept. 1999): Appellate Division upheld an award of exclusive occupancy of the former marital residence to mother

until youngest child reaches the age of 18. The children had been in the marital residence since birth, attended school in the neighborhood, and had friends in the community. Evidence also showed that comparable housing was not available for the mother and children. The need for the mother and children to occupy the home outweighed the need for the father's share of the sale proceeds.

Marrazone v. Marrazone, 290 A.D.2d 495, 736 N.Y.S.2d 683 (2d Dept. 2002). The Court directed that wife retain exclusive occupancy of the marital residence until their daughter turned 18 or was otherwise emancipated.

- In order to challenge an award of exclusive occupancy, the other spouse must show that:
    - They were in immediate need of the proceeds of the sale of the former marital residence;

OR

- Comparable housing was available to the spouse in the same area at a lower cost;

OR

- The parties were financially incapable of maintaining the residence.

Note: Under Boyajian v. Boyajian, 194 Misc.2d 756, 755 N.Y.S.2d 751 (Sup. Ct. Nassau Co. 2003), evidence that supports any of these factors would be sufficient to rebut the court's preference for granting the custodial parent exclusive occupancy of the marital residence.

DISTRIBUTION OF THE MARITAL HOME: SEVERAL OPTIONS

X. WHERE HOME IS OWNED BY THE PARTIES:

(i) One party receives the marital home outright in exchange for other assets of equivalent value;

OR:

(ii) One party "buys out" the other party;

OR:

(iii) The home is sold and the proceeds divided.

Y. WHERE HOME IS RENTED BY THE PARTIES:

The Court must first look to whether the parties are joint lessees on the lease or whether one spouse is the sole lessee. Regardless, the parties may agree or the court may direct that one party have exclusive occupancy of the home. Beware of the landlord! The lessee is liable to the landlord for rent so be sure that if your client is financially liable under

the lease and is moving out, that you obtain an indemnity from the remaining spouse or change the lease to the occupying spouse's sole name.

LIFE INSURANCE

Z. STATUTORY AUTHORITY:

DRL § 236(B)(8)(a) authorizes a court to order a party to purchase, maintain or assign a life insurance policy where that party has an obligation for maintenance, child support, distributive award and/or equitable distribution. The obligation generally continues until the payments terminate, the beneficiary remarries or predeceases the insured.

AA. AN ASSET TO SECURE MAINTENANCE, CHILD SUPPORT, DISTRIBUTIVE AWARD OR EQUITABLE DISTRIBUTION PAYMENTS:

Where one spouse will be obligated to pay maintenance and/or child support, that spouse may be required to obtain and/or maintain life insurance for the benefit of the payee spouse or child so that in the event of death the maintenance and/or child support obligation is paid from life insurance proceeds. The amount of life insurance to be maintained should be in an amount sufficient to ensure said payments or the surviving spouse's rights to equitable distribution of marital property.

Important Notes:

I. Premiums paid by a payor spouse on behalf of the payee spouse is a form of maintenance such that the payment of premiums will be taxable to the payee and deductible by the payor to the extent that the payee spouse is the owner of the policy. The same rule applies where life insurance policy is obtained/maintained to secure child support payments if the payee spouse is the owner of the policy. However, if the payee spouse's ownership of the policy is conditional, or payee is a contingent beneficiary, the premium payments will not be taxable to payee spouse. Where the child is the primary beneficiary and payee spouse is contingent beneficiary, the premium payments will not be taxable to the payee spouse.

II. It is generally inadvisable to name a minor child as beneficiary where life insurance is meant to secure child support payments in event of payor's death. It is best to name the surviving spouse as trustee of the proceeds for the benefit of the child, which will not only obligate the survivor to use the proceeds for the child's support but will avoid tax consequences to the payee spouse.

III. Proceeds of a life insurance policy may be includable in the payor's gross estate for estate tax purposes unless the policy proceeds qualify as exempt under Internal Revenue Code § 2053(a).

IV. If the policy is a whole life policy, make sure the payor spouse cannot encumber the policy since any encumbrance will reduce the value of the policy.

BB. ASSET WITH VALUE SUBJECT TO EQUITABLE DISTRIBUTION:

If the parties own whole life insurance, the policy has a cash surrender value which is subject to equitable distribution.

HEALTH INSURANCE:

CC. STATUTORY AUTHORITY: DRL § 236B(8)(a) AND DRL § 240:

(i) For Spouse:

The court may order a party to purchase or maintain health insurance for the spouse, either pendente lite or as part of the final divorce order, if such is found to be equitable pursuant to DRL § 236B(8). Courts may require a party to pay for the other spouse's unreimbursed medical expenses.

The Consolidated Omnibus Budget Reconciliation Act of 1985, Title X ("COBRA") mandates that where one spouse has group health insurance available through employment, upon divorce the employer is required to offer the non-employee spouse group health insurance coverage for a period not to exceed thirty-six months following the entry of the Judgment of Divorce. The non-employee spouse is responsible for the payment of premiums (unless the parties agree or the court directs otherwise).

(ii) For Children:

DRL § 240(1) and Family Court Act § 416 were amended in 1993 and the court is now mandated to require a parent/spouse who has health insurance available through employment to obtain/maintain such coverage so long as the coverage remains available from the employer. Additionally, income executions may now be utilized to collect monies due for health insurance premiums and unreimbursed medical expenses where a court order directing such payments exists. These mandates are in addition to the mandate under the Child Support Standards Act that require the non-custodial parent to pay a percentage share of a child's unreimbursed medical expenses (See DRL § 240 (1-b)(c)(5)).

MARITAL DEBTS:

The Court not only orders equitable distribution of marital property but also marital liabilities and debt. Marital Debt can include:

- The mortgage balance on a home.
- Any debts owed to banks, savings and loan association, or any lending institutions.
- Car loans, school loans (if not premarital), home improvement loans, any money borrowed during the marriage not paid back in full
- Loans payable to relatives or friends.
- Unpaid bills at the time of the hearing (department stores, credit cards, doctors, dentists, etc.)

As far as the creditor is concerned, if there is a joint obligation or account, each of the parties is fully responsible, regardless of what the court order says, and the creditor can sue for payment. Consider asking for a security from the spouse obligated to pay the debt, purchasing an insurance policy to secure the obligation, or having one spouse refinance the account.

DD. GENERAL RULES: JUST AS MARITAL ASSETS GET EQUITABLY DIVIDED, SO TOO DO MARITAL DEBTS AND LIABILITIES. CLIENT SHOULD PROVIDE SPECIFIC INFORMATION ABOUT DEBTS AND LIABILITIES (SEE STATEMENT OF NET WORTH IN SECTION 1).

(i) Marital debt may be incurred prior to the commencement of the action or after the action is commenced but prior to trial. Just like assets, debts may be valued at the time of trial. Trial court will consider when the debt was incurred and its purpose in determining if is it "marital debt" and the marital portion thereof. See, e.g., Wegman v. Wegman, 123 A.D.2d 220, 509 N.Y.S.2d 342 (2nd Dept. 1986); Capasso v. Capasso, 129 A.D.2d 267, 517 N.Y.S.2d 952 (1st Dept. 1987), and Savage v. Savage, 155 A.D.2d 336, 547 N.Y.S 2d 306 (1st Dept. 1989).

(ii) If the debt is incurred for the benefit of only one spouse, such debt will be found to be that person's sole responsibility. See, e.g., Balch v. Balch, 598 N.Y.S.2d 880 (4th Dept. 1993); Godfryd v. Godfryd, 607 N.Y.S.2d 765 (4th Dept. 1994).

(iii) See also Ciafone v. Ciafone, 228 A.D.2d 949, 645 N.Y.S.2d 549 (3rd Dept. 1996). Husband took out an $80,000 home equity loan on the house for his own personal benefit. Appellate division upheld supreme court's determination that the debt is separate.

Critical Inquiry: Is there any indication that the proceeds of the loan were utilized in the marital partnership? See Ciafone, 228 A.D.2d. at 951, 645 N.Y.S.2d at 553.

(iv) Debts incurred for marital purposes should be repaid from marital funds or assets. Markel v. Markel, 602 N.Y.S.2d 477 (4th Dept. 1993); Raniolo v. Raniolo, 612 N.Y.S.2d 589 (2nd Dept. 1994); Panasci v. Panasci, 590 N.Y.S.2d 358 (4th Dept. 1992).

EE. SPECIFIC TYPES OF DEBTS:

(a) Taxes:

Generally: Parties are jointly liable for income taxes incurred during the marriage. To argue that taxes should be paid in proportion to income of each spouse, one may consider having tax returns filed as "married filing separately". However, the court may still find the total tax bill for both parties to be joint debt. See Kaltenbach v. Kaltenbach, 121 A.D.2d 689, 504 N.Y.S.2d 452 (2nd Dept. 1989); and Purpura v. Purpura, 193 A.D.2d 793, 598 N.Y.S.2d 538 (2nd Dept. 1993).

See also Lekutanaj v. Lekutanaj, 234 A.D.2d 429, 651 N.Y.S.2d 154 (2d Dept. 1996). Taxes that were incurred before the action is commenced will be constituted as a marital

debt. Court may place penalties and interest on one party if they are solely responsible for them. See Capasso v. Capasso, 129 A.D.2d 267; 517 N.Y.S.2d 952 (1st Dept. 1987).

(b) Credit Cards:

Generally: If consumer debt is classified as marital, it is a joint liability. Even if the debt is in one spouse's name, if it is marital then it must be paid jointly or from marital assets. See Ruvolo v. Ruvolo, 133 A.D.2d 364, 519 N.Y.S.2d 267 (2nd Dept. 1987).

(c) Necessaries:

Definition: Generally "necessary" expenses include food, clothing, shelter, utilities, medical, counsel fees in matrimonial action.

Rule: A spouse is liable to third party creditor if other spouse incurred debt for necessaries.

Note: However, a spouse who has adequately provided support to the other spouse is not liable to the third party who supplies the "necessaries".

Must Be Pleaded as Cause of Action: The necessary allegations are a showing of (1) the existence of a marital relationship; (2) the monied spouse's failure to provide adequate funds to the dependent spouse to obtain necessaries in accordance with their station in life; (3) funds expended by the dependent spouse for necessary goods and/or services (in accordance with the monied spouse's means) provided to the dependent spouse for their or the parties' child; and (4) with expectation of reimbursement from the monied spouse.

Cases: Our Lady of Lourdes Memorial Hospital v. Frey, 152 A.D.2d 73, 548 N.Y.S.2d 109 (3rd Dept. 1989).

Helen A.S. v. Weiner A.S., 166 A.D.2d 515, 560 N.Y.S.2d 797 (2nd Dept. 1990)

New York Civil Practice, Zett-Edmonds-Schwartz, Vol. 11A § 28.02[2]

FF. DIMINISHED ROLE OF "MARITAL FAULT":

General Rule: the Blickstein rule. Marital fault is relevant in determining equitable distribution only where it is so egregious or uncivilized that it "shocks the conscience" of the court. Blickstein v. Blickstein, 99 A.D.2d 287, 472 N.Y.S.2d 110 (2d Dept. 1984).

e.g. dissipation or waste of marital assets. Whalen v. Whalen, N.Y.L.J., Sept. 24, 1981 (Sup. Ct. Nassau Co.); use of assets to procure spouse's murder. Wenzel v. Wenzel, 122 Misc.2d 1001, 472 N.Y.S. 2d 830 (1984)

Even in egregious cases, marital fault is only one factor to be considered.

Courts dislike "dirty laundry" cases; also they recognize difficulty or impossibility of deciding who really was at fault and to what extent.

Objective is equitably to allocate economic products of marital partnership (and to award maintenance where necessary), not to reward marital "virtue" or to punish marital "sin". But see the following cases where "fault" was considered in determining equitable distribution:

Where the husband assaulted the wife with a barbell, causing severe injury and resulting in the indictment of the husband for attempted murder and subsequent sentencing to 8 ¼ years in prison upon his plea of guilty to assault in the first degree, the wife was awarded over 95% of the marital estate as equitable distribution. Havell v. Islam, 301 A.D.2d 339, 751 N.Y.S.2d 449 (1st Dep't, 2002).

Raping one's step-daughter constitutes egregious conduct. Thompson v. Thompson, (S. Ct. Nassau Co., NYLJ 1/5/90.)

The committing of adultery with a minor step-daughter was held to be egregious marital fault and therefore it was considered in the distribution of marital property. Vasquez v. Vasquez, (S. Ct. Queens Co., NYLJ 5/20/87.)

No part of the husband's interest in his law firm was distributed to the wife where she continuously harassed him at his place of business and attempted to arrange for physical harm to be done to him and his companion, but she was awarded 50% of the other marital property, which resulted in a 45% overall award. Gordon v. Gordon, 205 A.D.2d 446, 614 N.Y.S.2d 904 (1st Dept. 1994) (trial court decision NYLJ 3/10/92).

Where a husband unsuccessfully contrived to have his wife murdered, the trial court properly refused to distribute to him any portion of his wife's dental practice. Brancoveanu v. Brancoveanu, 145 A.D.2d 395, 535 N.Y.S.2d 86 (2nd Dept. 1988).

Where the husband's treatment of the wife was so severe and so brutal as to clearly demonstrate gross and complete disregard of the marital relationship, the wife was awarded 60% of the marital property. Debeny v. Debeny, (S. Ct. Nassau Co. NYLJ 1/24/91.)

Where the husband had assaulted and raped his wife, and she had unsuccessfully attempted to have him murdered, the trial court distributed 70% of the marital property to the husband and 30% to the wife after considering each party's marital fault. Valenza v. Valenza, (S.Ct. Queens Co. NYLJ 1/16/90.)

Ex-husband, a professional football player, walked away from a lucrative professional career to be with girlfriend undergoing cancer treatment. Court determined that it was waste; his decision to voluntarily terminate his professional football contract deprived the ex-wife of the standard of living to which she had become accustomed. His failure to obtain meaningful employment after his football career ended and the indirect contributions made by the ex-wife during the course of the marriage supported the generous property distribution for the ex-wife. Gastineau v. Gastineau, 151 Misc.2d 813, 573 N.Y.S.2d 819 (Sup. Ct. Nassau Co. 1991).

Court issued pendente lite injunction preventing wife from dissipating marital assets after wife began to draw massive sums of money ($270,000) from marital accounts. The goal is to preserve the parties' financial status quo as of the time of the commencement of the

action. "[G]enerally a speedy trial is the proper remedy for any claimed inequity in a pendente lite maintenance award[.]" Balkin v. Balkin, 778 N.Y.S.2d 537, 2004 N.Y. Slip. Op. 05180 (2d Dept., June 14, 2004).

BUT, also beware of:

Consumption of extraordinary amounts of alcohol, verbal and physical abuse, a threat to commit violent actions, and a threat to kill the plaintiff with a rifle that was held to her head did not rise to a level where marital fault should be considered in distributing marital property. Orofino v. Orofino, 627 N.Y.S.2d 460 (3rd Dept. 1995).

Verbal harassment, threats and several acts of minor domestic violence, did not rise to a level that would justify divesting the guilty spouse of any of his interest in the marital property. Kellerman v. Kellerman, 187 AD 2d 906, 590 N.Y.S.2d 570 (3rd Dept. 1992).

Unless the parties' marital assets were in fact dissipated as a result of the husband's being an alcoholic, a gambler and a libertine, such conduct should not be considered as a factor affecting the distribution of marital property. Collura v. Puglisi, 204 A.D.2d 589, 612 N.Y.S.2d 202 (2nd Dept. 1994).

Trial court properly refused to consider plaintiff's marital fault since plaintiff had severe emotional and psychological problems. Bara v. Bara, 115 A.D.2d 628, 496 N.Y.S.2d 287 (2nd Dept. 1985).

The fact that the wife was involved in an adulterous relationship does not rise to the level of such egregious or uncivilized conduct as to warrant depriving her of an equal share of the marital assets. Lestrange v. Lestrange, 148 A.D.2d 587, 539 N.Y.S.2d 53 (2nd Dept. 1989).

Pretrial disclosure of marital misconduct not permitted. Public policy discussed. McMahon v. McMahon, 100 A.D.2d 826, 474 N.Y.S.2d 974 (1st Dept. 1984). Cf. Nigro v. Nigro, 121 A.D.2d 833, 504 N.Y.S.2d 264 (3rd Dept. 1986) (refused to enact a blanket prohibition on pretrial disclosures of misconduct).

The Supreme Court erred in enjoining the defendant from transferring, encumbering, selling, or disposing of any assets or property held solely in his name or jointly with others except in the ordinary course of business, and requiring the defendant to, among other things, notify the plaintiff of personal expenditures over $ 10,000. The relief sought by the plaintiff was not supported by proof that the defendant was attempting or threatening to dispose of marital assets so as to adversely affect her ultimate rights regarding equitable distribution. Reich v. Reich, 278 A.D.2d 214, 717 N.Y.S.2d 277 (2d Dept. 2000).

Reich inquiry: Is the spouse (1) attempting to or (2) threatening to (3) dispose of marital assets so as to (4) adversely affect the other spouse's rights regarding (5) equitable distribution? Reich, 278 A.D.2d at 214, 717 N.Y.S.2d at 278. Under Guttman v. Guttman, 129 A.D.2d 537, 514 N.Y.S.2d 382 (1st Dept. 1987), the spouse must show proof that the other spouse is disposing or threatening to dispose of marital assets in a way that will affect the other's equitable distribution rights.

Spouse must demonstrate that his or her spouse's gambling resulted in wasteful dissipation of marital assets. Court's language suggests a high level of proof. See Weissman v. Weissman, 2003-07741, 2004 N.Y. App. Div. LEXIS 7514 (2d Dept., June 1, 2004).

GG. DOMESTIC VIOLENCE AS A FACTOR

While marital fault must rise to the level of "egregious" to be a factor in Equitable Distribution, pursuant to recent amendments to DRL § 236B(5)(d)(14), acts of domestic violence committed by either party against the other[1] and their nature, extent, duration, and impact, is explicitly an Equitable Distribution factor as of cases filed beginning May 3, 2020. Thus the court must consider domestic violence separate and apart from whether such acts are alleged as part of a marital fault claim; in fact, neither party need raise domestic violence in a marital fault claim or in any other context in the divorce action for it to be an equitable distribution factor. A party raising this factor may seek to allege and prove the domestic violence solely in the context of determining equitable distribution in the divorce action, and/or may rely on applicable findings from prior criminal or civil actions (such as findings after trial in a family offense proceedings or a criminal court conviction). The term "domestic violence" for the purposes of this statute refers to the definition in Social Services Law § 459-a, which is a broader definition than, for example, the enumerated "family offenses" required to be pled and proved in order to obtain a family court order of protection pursuant to Family Court Act § 812. This is a relatively new and growing body of law which directly counters the decades of precedent referenced in the prior section; thus, we encourage attorneys to think broadly and creatively about how domestic violence impacts their strategy in settlement or trial of equitable distribution claims.

Caselaw:

J.N. v. T.N., 77 Misc.3d 894, 182 N.Y.S.3d 497 (Sup. Ct. New York County 2022). The Court discussed the history of the egregious fault standard and distinguishes it from the new legislative mandate to consider domestic violence as defined in the Social Services Law. The Court awarded the wife, after an eleven (11) year marriage, 85% of the marital assets in part due to the husband's "unabated harassment and verbal abuse" which continued throughout the proceedings and even at times in the courtroom. The Court made this award despite the wife's long term gainful employment, noting of the husband's "relentless" attempts to harm her career and attempts to manufacture false allegations against her.

S.C. v. R.N., 79 Misc.3d 383, 187 N.Y.S.3d 541, (Sup. Ct, New York County 2023). The Court held the wife after a ten (10) year marriage was entitled to no equitable distribution

[1] Notably, the amendment references parties, but not children. Thus there is a question that has yet to be resolved in caselaw whether domestic violence involving children would be a factor in equitable distribution. However, domestic violence is generally understood to include household members such as children, and certainly abuse of, in front of, or involving children may still be considered in an "egregious fault" claim.

"in light of her egregious marital fault" including, among other conduct, abducting the parties' young child to a non-Hague signatory country in the midst of the court proceedings after filing multiple baseless allegations against the husband to law enforcement and ACS. Notably, though the Court took note of the recent amendment requiring domestic violence to be considered in determining equitable distribution, this case illustrates that that the egregious fault standard remains.

A.S. v A.B., 2024 NY Slip Op 24191, (Sup. Ct. Kings County). Among other holdings, this decision granted the wife leave to seek non-party discovery of a tracking device allegedly installed by the husband into her vehicle in violation of an existing order of protection from another court. The Court discussed how this conduct is of the nature to be considered in DRL § 236B(5)(d)(14) and that a party may seek to establish the conduct in the divorce action even where law enforcement elected not to pursue the matter in a criminal context.

Gary G. v. Elana AG., 81 Misc.3d 1226(A), 201 N.Y.S.3d 921 (Sup. Ct. Kings County 2024). This decision is notable in that the trial court made a point of noting that this action commenced prior to May 3, 2020, thus the court was bound to apply the law as it was at the time of commencement. The court specifically found that the domestic violence alleged and proven did not rise to the level of "egregious fault" and thus was not a factor in awarding equitable distribution, but the language of the decision suggests that had the new law been in place the court may have made a different award,

For further discussion, see also NYSBA Family Law Review 2023 Vol. 55, No. 3, "Domestic Abuse Considerations in Equitable Distribution: Application of the 2020 Amendment to DRL 236B(5)(d)" by Lee Rosenberg, Editor in Chief.

RETIREMENT BENEFITS AND DIVORCE

1) RETIREMENT BENEFITS SUCH AS PENSIONS ARE A FORM OF DEFERRED COMPENSATION. *MAJAUSKAS V. MAJAUSKAS*, 61 N.Y.2D 481 (1984).

2) THE MARITAL SHARE

a) Retirement benefits, to the extent that they were acquired between the date of the marriage and the commencement of a matrimonial action or date of a separation agreement, are marital property subject to equitable distribution. *Majauskas v. Majauskas*, 61 N.Y.2d 481 (1984).

b) This holds even if the right to a pension has not vested at the time of the separation agreement or commencement of the matrimonial action, so long as it eventually does. *Burns v. Burns*, 84 N.Y.2d 369 (1994).

c) The non-employee spouse is generally not entitled to share in any part of the pension that was earned before or after the marriage

   i) *Moldofsky v. Moldofsky*, 43 A.D.3d 1011 (2d Dept. 2007) (amending order to exclude husband's pension earned prior to marriage)

   ii) *DeLuca v. DeLuca*, 97 N.Y.2d 139 (2001) (Payments to compensate for post-divorce events not subject to equitable distribution)

   iii) *Olivo v. Olivo*, 82 N.Y.2d 202 (1993) (Wife who was entitled to share in husband's pension was not entitled to post-divorce early retirement incentive package, except for that portion of package that enhances pension benefits)

   iv) *Jones v. Jones*, 4 Misc.3d 552 (Sup. Ct. Orange Cty. 2004) (Parties stipulated that first ten years of pension would be considered marital property. Subsequent to divorce, employer offered retirement incentive package that provided additional credits. Held: this constitutes marital property, citing *Olivo*. Since neither party was (or could have been) aware of this package at time of divorce, a hearing is ordered

d) But the parties can always reach an agreement between themselves.

   i) *See, e.g., Reed v. Reed*, 180 A.D.2d 1006 (3d Dept. 1992) (Husband and wife can agree as to how post-divorce pension benefits are to be divided)

3) THE EQUITABLE SHARE

a) Determining how much of the marital share of the pension goes to the non-employee spouse

b) Parties may stipulate to the equitable share; or

c) Court determination by applying criterial set forth in DRL 236[B]

   i) Non-employee spouse frequently (but not always) receives 50% of the marital share of the pension

ii) Equitable distribution could mean non-employee spouse receives share of pension:
    (1) *Cherry v. Cherry*, 34 A.D.3d 1186 (4th Dept. 2006) (Non-employee spouse awarded no part of pension)
    (2) *Gasiorowski v. Gasiorowski*, 267 A.D.2d 557 (3d Dept. 1999) (although wife was awarded part of husband's pension, husband was not awarded any part of wife's pension)

4) RETIREMENT BENEFITS MAY BE DISTRIBUTED TO THE NON-EMPLOYEE SPOUSE IN ONE OF TWO WAYS:

a) In immediate lump sum form that represents the equitable portion of the present value of the other spouse's pension rights that were earned during the marriage; or
b) As a portion of each benefit payment upon maturity (either retirement of participant or earliest age at which participant could retire)
c) Where the non-employee spouse is not seeking a lump sum distribution of the employee spouse's pension, it is not necessary to determine the pension's actuarial present value. The application of the *Majauskas* formula suffices. *Matwijczuk v. Matwijczuk*; 261 AD.2d 784, 787-88, 690 N.Y.S.2d 343 (3d Dept. 1999); *Church v Church*, 169 A.D.2d 851, 852, 564 N.Y.S.2d 572 (3d Dept. 1991); *Mele v. Mele*, 152 A.D.2d 685,.686-87, 544 N.Y.S.2d 25 (2d Dept. 1989); *Van Hausen v Van Hausen*, 114 A.D.2d 411, 494, N.Y.S.2d 135 (2d Dept. 1985). *But see Culnan v. Culnan*, 142 A.D.2d 805, 806, 530 N.Y.S:2d 688 (3d Dept. 1988); *Michalek v. Michalek*, 114 A.D.2d 655, 656-67, 494 N.Y.S.2d 487 (3d Dept. 1985).

5) CALCULATING THE BENEFITS:

a) The non-employee spouse has the right to share in the pension as it is ultimately determined. *Olivo v. Olivo*, 82 N.Y.S.2d 202, 210 (1993)
    i) The employee spouse is generally free to retire early and thereby reduce the amount of the non-employee spouse's benefits. *Id*. at 209
    ii) On the other hand, an employee who engages in extended employment at progressively higher wages is not entitled to keep the 'excess' earned beyond what would have accrued at time of expected retirement. *Id*.
b) The non-employee may be awarded a fixed dollar amount or a portion of the pension determined by formula
c) The *Majauskas* formula to calculate the non-employee spouse's share
    i) Generally, the non-employee spouse is entitled to an equitable share of the percentage that the months they were married bears to the total number of months that the employee spouse was employed and accruing credits prior to retirement

ii) If the Alternate Payee's (non-employee spouse) share of the marital portion of the pension is one-half, the formula would be expressed as follows:

Number of months of pension credits earned during marriage ___
Alternate

Total number of months of pension benefits earned by participant X 50% =
Payee's share

d) For defined contribution plans, do not use the *Majauskas* formula. Instead, use valuation dates of date of marriage and commencement of action.

6) DISTRIBUTIVE AWARDS OF PENSIONS MUST BE MADE PURSUANT TO A DOMESTIC RELATIONS ORDER

a) Public retirement systems require that the DRO provide specific information
b) Private employer plans must determine whether the DRO is "qualified" under ERISA's Qualified Domestic Relations Order ("QDRO") procedures, 29 U.S.C. § 1056
c) The DRO or QDRO can convey only those rights to which the parties stipulated or that the court decreed
    i) *McCoy v. Feinman*, 99 N.Y.2d 295 (2002) (divorce attorney negligent in failing to assert client's claim to pre-retirement survivor benefits in the stipulation or judgment; claim cannot be included in the QDRO)

7) SURVIVOR BENEFITS

a) Pre- and Post- retirement survivor benefits are subject to equitable distribution, see, e.g., 29 U.S.C. § 1055
b) Court order or separation agreement may require employee spouse to provide non-employee spouse with survivor benefits
    i) *Westfall v. Westfall*, 194 A.D.2d 960 (3d Dept. 1993) (DRO could require employee spouse to elect an option that provides survivor benefits to non-employee former spouse)
    ii) *McDermott v. McDermott*, 119 A.D.2d 370 (2d Dept. 1986) (Court has authority to restrict the option employee spouse can select and to compel that non-employee spouse be irrevocably designated as beneficiary to extent of her interest)
    iii) *Ponzi v. Ponzi*, 45 A.D.3d 1327 (4th Dept. 2007) (It is within court's discretion to direct employee spouse to select a survivor pay-out option yet also, direct that non-employee spouse's share of each payment be calculated as though employee spouse had selected an option providing for the highest payment so that non-employee spouse's share would not be impaired)
c) Right to pre-retirement and post-retirement survivor benefits should each be explicitly provided for in separation agreement or judgment

i) *Kazel v. Kazel,*3 N.Y.2d 331, 332 (2004) (Judgment of divorce and QDRO awarding an interest in employee spouse's pension do not automatically include pre-retirement death/survivor benefits; if the intent is to distribute such benefits, that must be separately and explicitly stated in the stipulation or decree and the QDRO)
ii) *Von Buren v. Von Buren,* 252 AD.2d 950 (4th Dep't 1998) (Where separation agreement was silent on death/survivor benefits and did not direct employee spouse to select a particular option that would provide them, the non-employee spouse was not entitled to them)
iii) *Janofsky v*. *Janofsky,* 232 A.D.2d 457 (2d Dep't 1996) (parties' stipulation to non-employee spouse receiving pre-retirement survivor benefits was silent on post-retirement survivor benefits; non-employee spouse held to have no right to benefits if employee spouse dies after retiring)

8) COST OF LIVING ADJUSTMENTS (COLAS) AND VARIABLE SUPPLEMENTAL FUNDS

a) Supplemental Increases to pension benefits are subject to equitable distribution
   i) *Olivo v. Olivo*, 82 N.Y.2d 202 (1993) (Wife who was entitled to share in husband's pension was entitled to post-divorce early retirement incentive package to the extent that it was an enhancement of the existing pension asset)
   ii) *Condon v. Condon*, 46 A.D.3d 596 (2d Dept. 2007) (per quoted stipulation, non-employee spouse entitled to COLAs as long as the increases are limited to her portion of the pension)
b) Supplements should be explicit but don't need to be
   i) *Pagliaro* v. *Pagliaro,* 31 A.D.3d 728 (2d Dept. 2006) (COLA's and variable supplement funds are to be included in (Q)DRO even if not specifically provided for in separation agreement or divorce decree because they are merely supplements to the existing pension)
   ii) *Luongo v. Luongo,* 50 A.D.3d 858 (2d Dept. 2008) (Non-employee spouse entitled to share in the pension as well as supplements such as variable supplement fund benefits)
c) Still, it might be the better practice to be explicit on non-employee spouse's entitlement to these increases

9) DISABILITY PENSION BENEFITS

a) That portion of a disability pension that represents deferred compensation acquired during the marriage is marital property subject to equitable distribution. *Dolan v. Dolan*, 78 N.Y.2d 463 (1991)
b) Presumption is the entire disability pension is marital (*Palazzolo v. Palazzolo*, 242 A.D.2d 688 (2d Dept. 1997)

c) Burden of proving what portion of a disability pension is marital and what portion is separate interest is on party claiming it's separate; where no reliable evidence as to what was separate, entire disability pension held to be marital property. *Parrish v. Parrish*, 213 A.D.2d 928 (3d Dept. 1995)

10)TIMING ISSUES: WHEN TO FILE THE DRO

a) Six-year statute of limitations
    i) *Duchamel v. Duchamel*, 188 Misc.2d 754 (Sup. Ct. Monroe Cty. 2001) (six- year limitation period commences when employee spouse reaches pay status or has actually retired; 1986 judgment of divorce awarded non-employee spouse share of pension; employee spouse retires in 2001 and non-employee spouse seeks entry of QDRO soon thereafter; entry permitted.)
    ii) *Boylan v. Dodge*, 42 A.D.3d 632 (3d Dept. 2007) (QDRO issued pursuant to separation agreement 12 years after judgment of divorce and employee spouse's retirement; the late filing of QDRO is permissible; QDRO could also provide for payment of arrearages, but only six years' worth under SoL)
b) Pension Plan Protection Act of 2006—amends ERISA
    i) An otherwise qualified DRO can be issued after, or revise, another QDRO
    ii) A DRO can be issued at any time and still be a QDRO
c) Best practice is to file DRO with the judgment or soon thereafter because delays can harm the non-employee spouse
    i) Most plans will not permit the form in which benefits are paid to be changed once they commence. So, if the employee spouse retires and selects an option that, for example, does not provide for survivor benefits, the non-employee spouse may have lost their right to them.
    ii) *See, e.g., Fodrowski v. Fodrowski,* 227 A.D.2d 519 (2d Dep't 1996) (Stipulation of settlement provided that non-employee spouse to be survivor beneficiary but no QDRO had been filed when husband subsequently retired and named someone else as beneficiary; non-employee spouse then tried to file a QDRO that designated them as survivor; the plan administrator refused to recognize the QDRO because it did not permit substitution of annuitants. Non-employee spouse then moved for order designating them as survivor. Motion was denied; their only remedy. if any, is to sue spouse for breach of the stipulation
    iii) *Winter v. Baski*, 181 AD.2d 1000 (4th Dept. 1992) (Separation agreement gave non-employee spouse a share of employee spouse's pension; no QDRO ever filed and employee spouse withdrew funds; Held: employee spouse did nothing illegal; employee spouse can file QDRO but will receive only a share of remaining funds)
    iv) *Boylan v. Dodge*, 42 AD.3d 632 (3d Dept. 2007) (QDRO issued pursuant to separation agreement 12 years after judgment of divorce

and employee spouse's retirement; the late filing of QDRO is permissible; QDRO could also provide for payment of arrearages, but only six years' worth under SoL

v) *But see Haydock v. Haydock*, 254 A.D.2d 577 (3d Dept. 1998) (public retirement system; husband ordered to cooperate in passage of "one-man" bill to amend legislation to allow rescission of his election of single life annuity contrary to terms of settlement agreement and designate former spouse as survivor)

Where the non-employee spouse is not seeking a lump sum distribution of the employee spouse's pension, it is not necessary to determine the pension's actuarial present value. The application of the *Majauskas* formula suffices. *Matwijczuk v. Matwijczuk*; 261 AD.2d 784, 787-88, 690 N.Y.S.2d 343 (3d Dept. 1999); *Church v Church*, 169 A.D.2d 851, 852, 564 N.Y.S.2d 572 (3d Dept. 1991); *Mele v. Mele*, 152 A.D.2d 685,.686-87, 544 N.Y.S.2d 25 (2d Dept. 1989); *Van Hausen v Van Hausen*, 114 A.D.2d 411, 494, N.Y.S.2d 135 (2d Dept. 1985). *But see Culnan v. Culnan*, 142 A.D.2d 805, 806, 530 N.Y.S:2d 688 (3d Dept. 1988); *Michalek v. Michalek*, 114 A.D.2d 655, 656-67, 494 N.Y.S.2d 487 (3d Dept. 1985).

MATWIJCZUK V. MATWIJCZUK

261 AD.2d 784, 787-88, 690 N.Y.S.2d 343 (3d Dept. 1999)

In *Church v. Church,* 169 A.D.2d 851, 564 N.Y.S.2d 572, we held that a party seeking a share of their spouse's future periodic pension benefits need not present evidence of the pension's present value to establish their interest but may, instead, employ the *Majauskas* formula to calculate the equitable share. Since plaintiff did not request a lump-sum distribution of the marital portion of defendant's pension benefits, there was no need to provide the court with proof of its present value. As for the court's distribution of this asset, clearly, pension rights earned during a marriage and prior to the commencement of a matrimonial action are marital property subject to equitable distribution (*see, Majauskas v. Majauskas,* 61 N.Y.2d 481, 474 N.Y.S.2d 699, 463 N.E.2d 15). However, where, as here, the party seeking to establish an interest in the pension fails to demonstrate any discernable "direct or indirect contribution made to the acquisition of such marital property 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" (Domestic Relations Law § 236[B][5][d][6]), then an award of a share in the other party's pension benefits is unwarranted.

At the time of trial, the parties stipulated that plaintiff earned $10,000 per year and defendant earned $45,000 per year. Defendant testified that plaintiff never worked a full-time job though she began working full time in 1974. She stated that for many years during the marriage she gave her paycheck to plaintiff and that he handled the parties' finances. Her unrebutted testimony established that she did all the housework, cooking, sewing, cutting the grass and gardening. She also indicated that plaintiff would disappear for months at a time and stated that she was the children's primary care giver. In 1984, after plaintiff surreptitiously withdrew nearly all of the parties' joint savings—over

$25,000—defendant started retaining her paycheck and began paying all the necessities for herself and the children. From that point forward, plaintiff only contributed to the property taxes; however, that ended following his relocation to Tennessee in May 1991. In our view, to award plaintiff a share in defendant's pension under the facts of this case would be demonstrably unfair.

CHURCH V. CHURCH

169 A.D.2d 851, 852, 564 N.Y.S.2d 572 (3d Dept. 1991)

While we are aware of the cases holding that the absence of any proof by the party seeking to establish an interest in their spouse's pension of its value precludes such pension from being divided (*see, e.g., Culnan v. Culnan,* 142 A.D.2d 805, 806, 530N.Y.S.2d 688, *lv. dismissed* 73 N.Y.2d 994, 540 N.Y.S.2d 1005, 538 N.E.2d 357; *Del Gado v. Del Gado,* 129 A.D.2d 426, 428, 513N.Y.S.2d 689; *Michalek v. Michalek,* 114 A.D.2d 655, 657, 494 N.Y.S.2d 487, *lv. denied* 69 N.Y.2d 602, 512 N.Y.S.2d 1025, 504 N.E.2d 395; *Bizzarro v. Bizzarro,* 106 A.D.2d 690, 692, 484 N.Y.S.2d 144), we cannot conclude that the lack of valuation evidence in this case precludes an award to plaintiff (*see, Parks v. Parks,* 159 A.D.2d 841, 842, 552 N.Y.S.2d 987; *Mele v. Mele,* 152 A.D.2d 685, 686, 544 N.Y.S.2d 25; *Van Housen v. Van Housen,* 114 A.D.2d 411, 494 N.Y.S.2d 135). Plaintiff is not seeking a lump-sum distribution, which clearly would require a calculation of the present value of the pension benefits at the time of divorce (*see, Damiano v. Damiano, supra,* 94A.D.2d at 139, 463 N.Y.S.2d 477). Rather, plaintiff seeks a "share of the periodic pension benefits [defendant] will receive in the future", a preferable method of enforcing a spouse's right to pension benefits where determination of present value is difficult (*id.*). Here, the parties have limited assets and resources with which to obtain pension evaluation evidence, and any evaluation would be further complicated by the contingencies described in defendant's testimony. Thus, "[l]ittle purpose [would have been] served in incurring the additional expense necessary to litigate the value of [plaintiff's] share" (*Majauskas v. Majauskas,* 94 A.D.2d 494, 497, 464 N.Y.S.2d 913, *supra*). Accordingly, the matter should be remitted to Supreme Court for a determination of the percentage of defendant's pension to which plaintiff is entitled based upon the number of months the parties were married prior to the commencement of this action divided by the total number of months defendant will have earned toward his pension as of the date of retirement (*see, id.,* at 497–498, 464 N.Y.S.2d 913).

CULNAN V. CULNAN

142 A.D.2d 805, 806, 530 N.Y.S:2d 688 (3d Dept. 1988)

Next, Supreme Court ruled that plaintiff's pension was marital property and ordered him to pay to defendant $5,000 as her share of such pension.

Vested rights in a noncontributory pension plan are marital property to the extent that they were acquired between the date of the marriage and the commencement of a matrimonial action, even though the rights are unmatured at the time the action is begun (*Majauskas v. Majauskas,* 61 N.Y.2d 481, 485–486, 474 N.Y.S.2d 699, 463 N.E.2d 15).

This court has also applied the principle in the case of a nonvested pension plan (*Reed v. Reed,* 93 A.D.2d 105, 110–111, 462 N.Y.S.2d 73). Here, the evidence indicates that plaintiff joined the New York State Policemen's and Firemen's Retirement System in October 1977. Thus, the pension was properly determined to be marital property. Plaintiff had only been in the Retirement System for about seven years when this action was commenced. The record does not indicate whether plaintiff's pension rights were vested at that time, nor is there any proof regarding the current worth of the pension. The only proof concerning plaintiff's pension is a letter from the Retirement System stating that he would be eligible to retire in October 2002 and that, assuming his current salary will be his highest and that he completes 25 years of service, he will receive $5,877 per year upon retirement. Defendant offered no proof whatsoever regarding the present or future value of the pension or establishing what amount she was entitled to. Indeed, it does not appear from the record that she sought a distribution of plaintiff's pension rights. In the absence of any proof regarding the value of plaintiff's pension, Supreme Court's decision to value defendant's share at $5,000 was mere speculation. Defendant had the burden of establishing the value of the pension interest she is seeking by actual evidence or some other evidence establishing the value of the pension (*see, Del Gado v. Del Gado,* 129 A.D.2d 426, 428, 513 N.Y.S.2d 689). Since she failed to do so, Supreme Court was not required to speculate as to the value.

MICHALEK V. MICHALEK

114 A.D.2d 655, 656-67, 494 N.Y.S.2d 487 (3d Dept. 1985)

Although a pension interest is marital property subject to equitable distribution, notwithstanding the fact that it is noncontributory and not vested at the time of distribution (*Reed v. Reed,* 93 A.D.2d 105, 110–111, 462 N.Y.S.2d 73, *appeal dismissed sub nom. Patricia R. v. Thomas R.,* 59 N.Y.2d 761), a pension interest cannot be divided where it is unvalued (*Bizzarro v. Bizzarro,* 106 A.D.2d 690, 692, 484 N.Y.S.2d 144). Thus, plaintiff has the burden, as the one seeking a portion of the pension interest, of establishing the value of said interest, usually by actuarial evidence, as well as evidence of the plan itself, establishing the pensioner's rights (*see, Rodgers v. Rodgers,* 98 A.D.2d 386, 392–393, 470 N.Y.S.2d 401, *appeal dismissed* 62 N.Y.2d 646; *see also, Hirschfeld v. Hirschfeld,* 96 A.D.2d 473, 464 N.Y.S.2d 789, *appeal dismissed* 60 NY2d 701). Plaintiff failed to introduce evidence of facts sufficient to form a basis for the computation set forth in her memorandum of law submitted after the close of the hearing.

MELE V. MELE

152 A.D.2d 685, 686, 544 N.Y.S.2d 25 (2d Dept. 1989)

Where, as at bar, the facts and circumstances warrant, the court, in its discretion, may effect an equal division of the parties' marital property (*see, Marcus v. Marcus,* 135 A.D.2d 216, 525 N.Y.S.2d 238; *Gluck v. Gluck,* 134 A.D.2d 237, 520 N.Y.S.2d 581). As to the issue of valuation, where, as here, the court has properly considered the parties' monetary and nonmonetary contributions to the marriage and the feasibility of a lump-sum award and the proper formula has been applied, valuation of the parties' respective interests may not be required (*see, Van Housen v. Van Housen,* 114 A.D.2d 411, 494 N.Y.S.2d 135). In the instant case, however, the court erred when setting forth the formula by which the interests of the respective parties should be calculated at the time the pension benefits are to be distributed. This may be modified by a reviewing court (*Ward v. Ward,* 101 A.D.2d 1006, 476 N.Y.S.2d 712) by applying the proper formula as adopted in *Majauskas v. Majauskas,* 61 N.Y.2d 481, 474 N.Y.S.2d 699, 463 N.E.2d 15).

VAN HOUSEN V. VAN HOUSEN

114 A.D.2d 411, 494 N.Y.S.2d 135 (2d Dept. 1985)

Although no expert testimony was presented as to the value of the parties' marital assets (the marital residence, New York Telephone Company stock and defendant's vested pension), Special Term's award of one half of the value of each asset to each party effectuated the purpose and intent of equitable distribution. Specifically with regard to defendant's pension, Special Term's award to plaintiff of one half of defendant's pension benefits which had accrued as of the date of commencement of the action was proper since defendant began his current job subsequent to the marriage, and the distribution formula used was the appropriate one in the absence of any lump-sum distribution of assets (*see, Majauskas v. Majauskas,* 61 N.Y.2d 481, 474 N.Y.S.2d 699, 463 N.E.2d 15).

IMPLIED VS EXPLICIT PROVISIONS IN QDROS

What can the QDRO provide if the Stipulation or Order states, "Pension shall be divided 50% pursuant to *Majauskas*"?

I. Implied Provisions That May be Included in QDRO Even When Not Stated in Stipulation or Order

General Rule: AP is entitled to a share of the pension as it is "ultimately determined"[1]

- Cost-of-Living Adjustments, improvements, and ad hoc changes; Variable Supplement Funds[2]
- Payment of Arrears[3]
- AP's share is not reduced for any outstanding loan taken out by P[4]

II. Provisions That Must be Explicitly Awarded in Stipulation or Order to be Included in QDRO

General Rule: QDRO may provide only what is agreed by the parties or ordered by the court[5]

- Death benefits and survivor annuities[6]
- Separate Interest QDRO[7]
- *Pro rata* share of refund of P's contributions[8]
- AP's share of pension will be reduced for any option selected by P at retirement without explicit provision to the contrary[9]

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[1] *Olivo v. Olivo*, 82 N.Y.2d 202, 624 N.E.2d 151, 604 N.Y.S.2d 23 (1993).
[2] *DeLuca v. DeLuca*, 97 N.Y.2d 139, 762 N.E.2d 337, 736 N.Y.S.2d 651 (2001); *Kraus v. Kraus*, 131 A.D.3d 94, 14 N.Y.S.3d 55 (2d Dep't 2015); *Luongo v. Luongo*, 50 A.D.3d 858, 856 N.Y.S.2d 636 (2d Dep't 2008); *Pagliaro v. Pagliaro*, 31 A.D.3d 728, 821 N.Y.S.2d 602 (2d Dep't 2006).
[3] *Boylan v. Dodge*, 42 A.D.3d 632, 839 N.Y.S.2d 580 (3d Dep't 2007).
[4] *Kraus v. Kraus*, 131 A.D.3d 94, 14 N.Y.S.3d 55 (2d Dep't 2015).
[5] *McCoy v. Feinman*, 99 N.Y.2d 295, 785 N.E.2d 714, 755 N.Y.S.2d 693 (2002).
[6] *Kazel v. Kazel*, 3 N.Y.3d 331, 819 N.E.2d 1036, 786 N.Y.S.2d 420 (2004); *Lauzonis v. Lauzonis*, 105 A.D.3d 1351, 964 N.Y.S.2d 796 (4th Dep't 2013); *Von Buren v. Von Buren*, 252 A.D.2d 950, 675 N.Y.S.2d 739 (4th Dep't 1998); *Janofsky v. Janofsky*, 232 A.D.2d 457, 648 N.Y.S.2d 164 (2d Dep't 1996).
[7] *Gursky v. Gursky*, 93 A.D.3d 1127, 941 N.Y.S.2d 760 (3d Dep't 2012); *Stachowski v. Stachowski*, 35 A.D.3d 1245, 825 N.Y.S.2d 416 (Mem.) (4th Dep't 2006).
[8] Greenberg writes that it is prudent to be explicit about any refund of employee contributions.
[9] *Kraus v. Kraus*, 131 A.D.3d 94, 14 N.Y.S.3d 55 (2d Dep't 2015).

- Interest, or investment earnings and losses, from a certain date to date of distribution (DC Plans)[10]

[10] *Twiss v. Twiss*, 245 A.D.2d 502, 666 N.Y.S.2d 35 (2d Dep't 1997); *Altner v. Altner*, 281 A.D.2d 379, 721 N.Y.S.2d 279 (2d Dep't 2001); *McWade v. McWade*, 253 A.D.2d 798, 677 N.Y.S.2d 596 (2d Dep't 1998).

PRIVATE SECTOR PENSION PLANS

1) OVERVIEW OF EMPLOYEE BENEFITS PLANS

a) Employee Retirement Income Security Act ("ERISA",)
   i) Covers pension plans sponsored by private employers
b) Written Instrument Requirement:
   i) Plan must be established and maintained pursuant to a written instrument
   ii) Includes all legally operative documents, including plan, Summary Plan Description, cash balance account, trust agreement, and other governing instruments, e.g., insurance policies and Collective Bargaining Agreements
c) Summary Plan Description (SPD)
   i) Accurate reflection of plan
   ii) Participation, vesting, benefit accrual, breaks in service, joint and survivor benefits, and normal retirement age provisions
   iii) Circumstances that can cause benefits to be lost, offset, reduced, forfeited or suspended
   iv) Claims procedures
   v) Legal rights to receive documents and to initiate litigation
   vi) Must be written in a manner calculated to be understood by the average plan participant

2) TYPES OF PLANS

a) Single-Employer vs. Multi-Employer Plans
   i) Single-Employer
      (1) Maintained by one employer ("sponsor")
   ii) Multi-Employer plans ("Taft-Hartley Plans")
      (1) Industry wide
      (2) Negotiated between employers and union pursuant to Collective Bargaining Agreement (CBA)
      (3) Board of trustees: employer representatives and union representatives
b) Defined Benefit Plans (DBP)
   i) Benefit defined at retirement age, usually as an annuity for life of participant
   ii) Formula for amount of benefit usually based on years of service and average salary
   iii) Sponsor(s) make actuarially determined contributions to fund on behalf of all participants
   iv) But vesting rules mean not all participants will receive benefits
   v) Investment risk on employer
   vi) Insured by PBGC

vii) Subject to minimum funding standards

c) Defined Contribution Plans (DCP):
   i) Plan sets amount employer and/or employees to contribute (e.g., % of salary) and how allocated among participants
   ii) But does not specify ultimate benefit
   iii) Individual accounts usually established
   iv) Benefit is account balance which participant can use to buy annuity, roll over to another DCP or take in lump sum
   v) Investment risk on employee
   vi) Mobile
   vii) No PBGC guaranty
   viii) Examples:
      (1) 401(k) and 403(b) plans,
      (2) Profit sharing plans
d) Cash Balance Plans
   i) Treated as a kind of DBP because "normal" payment form is annuity;
   ii) Benefit expressed as an account rather than an annuity
   iii) Plan provides pay credit and interest each year
e) Welfare Plans: Health and Disability Benefits
   i) Generally, vesting and participation standards do not apply

3) DISCLOSURE RULES

a) Upon written request, plan administrator must provide SPD, annual report, cash balance account, trust agreement, contract, other instruments under which plan is operated, statement of vested benefits
   i) Must be provided within 30 days
   ii) Penalties up to $110.00/day of noncompliance
   iii) Also contact EBSA for assistance with failures to provide information
b) Individual benefit statement: Statement of accrued and vested benefits upon written request

4) VESTING RULES

a) Once pension rights are vested they cannot be lost, even if participant leaves employment prior to Normal Retirement Age
b) When does Participant vest:
   i) Participant is always fully vested in their own contributions to pension plan, if any (e.g, employee payroll deductions for 401(k), 403(b) plans)
   ii) Vesting in sponsor's contributions:
      (1) Participant fully vests upon reaching Normal Retirement Age while working in covered employment
      (2) Upon plan termination Code 411 (d) (3)
      (3) Upon meeting vesting schedule
c) Vesting Schedules for DBPs
   i) Cliff vesting:

(1) Pre ERISA (1976): Look to plan then in effect
(2) Since Jan. 1, 1989: 5 years to vest 100%;
(3) Between Jan. 1, 1976 and Dec. 31, 1988: 10 years to vest 100%
(4) Exception for union plans:
(a) prior to 1999: 10 years

d) Vesting Schedule for DCPs, effective Jan. 1, 2002
   i) 3 year cliff vesting
e) Vesting Rules do not apply:
   i) Welfare benefit plans;
   ii) Top-hat plans ERISA (management and highly compensated employees)
   iii) IRAs, erisa ERISA

5) ACCRUAL RULES: AMOUNT OF BENEFIT

a) Generally, no minimums required; the amount can be just about anything
b) Common plan designs/formulas for determining amount
   i) FAS Method:
      (1) Final average salary of final few years of service X a fixed number based on units
      (2) e.g. FAS x 1% for each year of service
   ii) CAP method:
      (1) Career average plan: based on % of pay earned each year
   iii) Flat benefit/fixed dollar: e.g, $10 for each year service

6) WHEN BENEFITS ARE PAYABLE

a) Generally, benefits available no later than 60 days after the Plan year in which latest of following occurs:
   i) Earlier of age 65 or NRA under plan
   ii) End of 5th year of participation
   iii) Termination of service with covered employer
   iv) Plans can allow participant to delay distribution but they must begin at 70½
b) Plans may allow access to benefits before later of NRA or 62
   i) If benefit exceeds $5000, participant must consent to lump sum distribution
   ii) DBPs usually don't permit collection until NRA even if participant is no longer in covered employment
   iii) DCPs often allow distribution upon termination of employment
c) Latest can begin receiving: IRC 401(a)(9):
   i) Payment begins at 70½
   ii) If participant is still working, still accrues credits while collecting

7) FORM OF PAYMENT

a) DBP must offer annuity form

b) Single life annuity: monthly benefits for life of participant
c) Qualified Joint and Survivor Annuity (QJSA)
    i) Monthly benefit for life of participant, at least 50% of that amount to surviving spouse for their life
    ii) Required default form of payment for married participants under Retirement Equity Act of 1984, effective Aug. 24, 1984
d) Qualified Preretirement Survivor Annuity (QPSA)
    i) Vested participant who dies prior to commencement of benefits
    ii) Surviving Spouse receives at least 50% of what participant would have received have they been receiving benefits on date of death
    iii) If participant was no longer in covered employment, amount to surviving spouse is at least 50% of what participant would have received have they been receiving benefits as of date of separation from service
    iv) Required default form of payment for married participants under Retirement Equity Act of 1984 (''REA''), effective Aug. 24, 1984
e) Qualified Optional Survivor Annuity (QOSA)
    i) New addition found in Pension Protection Act of 2006
    ii) Plans must offer a 75% survivor annuity as well as the 50% annuity
    iii) Effective date: first plan year beginning after December 31, 2007 or no later than 2009 for plan that is the subject of a Collective Bargaining Agreement
f) Waiver of QPSA or QJSA or QOSA requires spouse's consent after receiving information in writing of benefits being waived under REA
g) Plans may have one-year marriage eligibility requirement
h) Optional forms of payment
    i) Examples
        (1) Single life annuity with term certain
            (a) Monthly payments to participant, with guaranteed minimum of payments (e.g. 10 years)
            (b) If participant dies within the term, balance goes to beneficiary
            (c) If participant outlives term, no remainder to beneficiary
        (2) Lump sum
            (a) Amount rolled over not taxable
            (b) Direct rollover from plan to IRA or other eligible plan
            (c) Indirect rollover: plan issues funds to participant, who has 60 days to deposit it to IRA etc.; plan must withhold 20% income tax on distribution; can be refunded if participant makes rollover within the 60 days, but participant would have to come up with the amount withheld if they want to rollover entire amount; possible 10% early withdrawal tax penalty if younger than 59, if not rolled over to another account
            (d) Plans can refuse to accept direct rollovers from other plans
        (3) Periodic payments/installments
        (4) Rollovers of lump sums to IRAs or other DCP

8) FAMILIES AND EMPLOYEE BENEFITS

a) Survivor benefits under QPSAs and QJSAs and QOSAs discussed above
b) Qualified Domestic Relations Order ("QDRO")
    i) IRC § 414(P)
    ii) AB exception to anti-alienation spendthrift provisions of ERISA
        (1) Originally a common law exception
        (2) Codified in REA
    iii) Usually issued at time of divorce, court order directing distribution of benefits to non-participant spouse
c) State domestic relations law on pensions as marital property
    i) New York DRL 236 Part B
    ii) Marital portion of retirement benefit subject to equitable distribution is period during the marriage when pension credits accrued, divided by entire time during which benefits accrued Majauskas v. Majauskas, 61 N.Y.2d 481 (1987)
        (1) Exclude from marital share portion of pension benefits that accrued before or after the marriage
        (2) Property Settlements can use different formulas
    iii) Survivor benefits: must be explicit in QDRO
    iv) Have state court retain jurisdiction over pension issue
d) Technical requirements in QDROs:
    i) Order must relate to marital property rights, alimony, child support, for spouse, ex-spouse child or dependent: a.k.a, "alternate payees";
    ii) Must state name and last known address of participant and alternate payee
    iii) Must specifically describe rights of alternate payee,
        (1) Can be a set amount, or formula
    iv) Must state period payments will be made
    v) Provide name of plan
    vi) State whether alternate payee is treated as "surviving spouse"
    vii) Order may not order plan to
        (1) provide greater benefits than ordinarily provided;
        (2) require plan to pay in form not otherwise available; or
        (3) pay to alternate payee benefits the plan is already required to pay to another alternate payee
    viii) Pension Plan Protection Act of 2006
        (1) an otherwise qualified DRO can be issued after, or revise, another QDRO
        (2) A DRO can be issued at any time and still be a QDRO

9) PLAN TERMINATIONS

a) Can occur if employer goes out of business or bankruptcy or just decides to end its pension

b) For Defined Benefit Plans. Pension Benefit Guaranty Corporation acts as governmental insurer and trustee if there are insufficient funds for benefits
c) Defined Contribution Plans are "fully funded" as each participant has individual account
    i) If employer failed to make contributions to DCB, contact EBSA or sue for failure to make contributions or for breach fiduciary duty

10) CLAIMS PROCEDURES/APPLYING FOR BENEFITS

a) Every plan must have a reasonable procedure for filing of claims, notification of determinations and appeals
b) 29 CFR § 2560.S03-1(b) sets out requirements
c) Plans must provide written notice of denial and to provide opportunity for appeal of adverse determinations,
d) SPD must outline claims procedures
e) Claims Procedures
    i) Cannot be unduly burdensome
    ii) Must ensure that determinations comply with plan provisions and that provisions are applied consistently
    iii) Must provide timely notice of time limits
    iv) Must establish reasonable time limits to request review and set time limits for decisions on review
    v) Must state claimant's right to sue after an adverse decision on review
    vi) Usual remedy for procedural failure is remand for reconsideration, Crocco v. Xerox Corp., 137 F.3d 105 (2d Cir. 1998)

11) NOTICE OF DENIAL OF CLAIM FOR BENEFITS

a) Must be issued within 90 days of claim unless written extension of time is made
b) Must be "written in a manner calculated to be understood by the claimant"
c) Must provide specific reasons for denying claim,
d) Must provide specific reference to plan provision denial based on,
e) Must describe additional material needed to perfect the claim, explain why, and
f) Must provide information on steps for appealing the denial
g) If no denial is issued in timely manner, it is "deemed denied" and claimant can file lawsuit

12) APPEALS PROCEDURES

a) Every plan must "afford a reasonable opportunity for a full and fair review of the decision denying the claim Full and fair review of adverse decisions"
b) Plans must have reasonable procedure for appealing to a fiduciary or designate,
c) Plan must provide access to documents, records and other information relevant to the claim
d) Plan must provide opportunity to submit comments, records and other information

i) Information submitted must be taken into account, even if submitted for first time on appeal

e) Time to appeal cannot be shorter than 60 days after receipt of denial notice

f) Decision on appeal
   i) Must be made promptly
      (1) usually within 60 days unless extension is requested; or
      (2) if there's designated review committee, review can be made at its next regularly scheduled meeting, which must occur at least quarterly
      (3) if decision on review is not issued in timely manner, it is "deemed "denied"
   ii) Must be written,
   iii) In a way calculated to be understood by claimant;
   iv) Must refer to specific plan provisions relied on;

13)EXHAUSTION

a) Common-law prerequisite to bringing suit to enforce terms of plan

b) Exceptions:
   i) Futility of using appeals procedures;
   ii) Wrongful denial of meaningful access to procedures
   iii) Impossibility or threat of irreparable harm, e.g., in health care claims
   iv) Equitable tolling where claimant suffered mental disability, Chapman v. Choicecare Long Term Disability Plan, 288 F.3d 506 (2d Cir. 2002)
   v) When claim is "deemed denied":
      (1) Plan failure to follow appropriate claims procedures
         (a) Claimant is deemed to have exhausted 29 CFR 2560.503-1(1) (2000)
      (2) Or failure to issue decision within applicable time limit, claim is deemed denied, and participant/beneficiary has exhausted administrative remedies
      (3) When claim is "deemed denied," standard of review is de novo, even if plan gives discretionary authority to fiduciaries

14)CIVIL LITIGATION GENERALLY:

a) Civil action may be brought in state or federal court in any jurisdiction where defendant may be located or plan is administered
   i) No amount in controversy requirement
   ii) Must notify Secretaries of Labor and Treasury
   iii) Nationwide service of process

15)CIVIL LITIGATION: LEGAL THEORIES

a) Reporting and disclosure requirements of ERISA
   i) Remedies: disclosure and fines up to $110 per day

b) To recover benefits due under the plan
c) To enforce rights under the plan
d) To clarify future rights to benefits under the plan
e) For "other equitable relief"
f) Statute of Limitations not provided in ERISA
    i) For lawsuits challenging denial of claim for benefits, use analogous state Statute of Limitations
        (1) In NY: 6 year contract Statute of Limitations, Larsen v. NMU Pension Trust, 902 F.2d 1069 (2d Cir. 1990).

16) CIVIL LITIGATION: REMEDIES

a) Order to pay benefits
b) Declaration of right to future benefits
c) Extra-contractual compensatory or punitive damages not available, Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985)
d) Prejudgment interest and fees and costs available at discretion of court

PUBLIC RETIREMENT SYSTEMS

1) **GOVERNED BY STATUTES, REGULATIONS AND CODES AND COLLECTIVE BARGAINING**
    a) Not subject to ERISA
    b) New York State and City retirement benefits are not subject to State or Local Taxes
    c) Transfer of membership between various State/City Retirement Systems

2) **CONSTITUTIONAL PROTECTIONS**
    a) Membership in a pension or retirement system of the state or civil division is a contractual relationship the benefits of which shall not be diminished or impaired, N.Y. Const, Art. 5 § 7
    b) Public retirement benefits are a form of property protected by the due process clause of the U.S. Const. 14th Amendment, Winston v. City of New York, 759 F.2d 242 (2d Cir. 1985)
    c) Adequate notice and opportunity to be heard, Ortiz v. Regan, 749 F. Supp. 1254 (S.D.N.Y. 1990)

3) **LEGAL AUTHORITY**
    a) NYRSSL;
    b) NYC Admin Code;
    c) SPDs available on websites

4) **EXAMPLES OF STATE AND LOCAL RETIREMENT SYSTEMS**
    a) NYCERS (New York City Employees' Retirement System)
        i) Coverage: City-service employees not eligible for other System
    b) TRS (Teachers' Retirement System of the City of New York)
        i) Coverage: City Teachers
    c) BERS (Board of Education Retirement System)
        i) Statutory authority
        ii) Website
        iii) Coverage: Non-teaching positions in the Board of Education
    d) MaBSTOA (Manhattan and Bronx Surface Transit Operating Authority)
    e) New York Police Department Pension Fund
    f) NYSERS (New York State and Local Employees' Retirement System)
    g) NYSTRS (New York State Teachers' Retirement System)

5) EXAMPLES: FEDERAL SYSTEMS (NOT DISCUSSED IN THIS OUTLINE)

a) FERS/CSRS (Federal Employees' Retirement System; Civil Service Retirement System)
b) VA

6) TIER STRUCTURE

a) Date of hire determines vesting schedule and benefit amount
    i) Unlike private pension plans, where date of termination typically controls
b) Earlier tiers more generous in amount of benefits
c) Funded by Employer and Member contributions
    i) Example of member contributions: 3% wages

7) "BUY-BACK" OF PREVIOUS SERVICE

a) Concept: due to member contribution requirement
b) Amount: contribution rate + 5% annual interest
c) When allowed
    i) For service performed prior to membership
    ii) For military service
d) Purpose:
    i) Increases benefits
    ii) But does not change membership date/tier status

8) NYCERS

a) As a typical Retirement System in New York
b) NYC Admin. Code 13-101·et seq.:
c) Coverage: City-service employees not eligible for other System
d) Defined Benefit Plan funded by employer and employee contributions
    i) Contribution rate generally of 3% wages (incl. Overtime)
    ii) Members who leave City Service prior to retirement can have their contributions refunded (with 5% annual interest)
        (1) But this forfeits benefits
    iii) Members who leave City Service with insufficient credits for vesting will incur permanent break: in service after 5 years (generally) and automatically have contributions refunded
e) Generally 5 years required for vesting
f) Age requirement for benefits starts as early as age 55, depending on Tier and job category
g) Tier I
    i) For members who joined prior to October 1, 1920
h) Tier II
    i) For members who joined prior to July 1, 1973

i) Tier III
    i) For Corrections members who joined prior to July 27, 1976
j) Tier IV
    i) Joined after July 27, 1976

9) DISABILITY BENEFITS:

a) Ordinary disability:
    i) 10 years credited service
    ii) Medical Board determines member is physically or mentally incapacitated from performing duties of job title at time cease working
b) Accident disability
    i) no service requirement
    ii) Medical Board determines member is physically or mentally incapacitated from performing duties of job title at time cease working
    iii) as a result of an accidental injury sustained during the course of job duties that was not cause by member's willful negligence
    iv) Accident:
        (1) "A sudden fortuitous mischance, unexpected, out of the ordinary, and injurious in impact"
        (2) not the same as any line of duty injury: injuries sustained while performing routine duties are not accidents
            (a) routine lifting or bending not accidents
            (b) slip and falls on slick surface usually are accidents
    v) Not taxed by IRS, NYS, NYC

10)OPTIONS

a) Maximum: single life annuity
b) Joint and survivor: reduced to pay over two lives
c) Term certain: if member dies prior to expiration of term (e.g., 5, 10 years), balance of benefits payable over term goes to designated beneficiary
d) Pop-up: if designated beneficiary predeceases, member's benefit "pops up" to maximum amount

11)FAMILY ISSUES

a) Domestic Relations Orders
b) Survivor benefits available but not mandatory for married members
    i) No requirement for spousal consent to election/option not providing survivor benefits
    ii) But EPTL 5-5.1A on survivor's right of election does not allow one spouse to disinherit the other without the survivor's consent

12)CLAIMS PROCEDURES

a) Administrative procedures
    i) Disability claims
        (1) Medical Review Board
        (2) Special Medical Review Board
            (a) waiver of right to judicial review
            (b) All claims: possible appearance before Board of Trustees
b) Article 78 proceedings
    i) Deferential standard of review
    ii) Judicial remand where administrative decision fails "to set forth an adequate statement of the factual basis for the determination." *See, e.g., Samadjopoulos v. New York City Employees Retirement System*, No. 4060/07, 200B WL 1821875 (N.Y. Cty. Apr. 1, 2008) (quoting *Montauk Improvement, Inc. v. Proccacino*, 41 N.Y.2d 913,914 (1977)).

CHILD SUPPORT AND THE CHILD SUPPORT STANDARDS ACT

On September 15, 1989 the Child Support Standards Act (CSSA) became effective.

This sweeping legislation (sometimes unofficially called the "guidelines") amended DRL §236(B)(7) and §240 and FCA §413 and §513 to provide a formula for setting child support in all proceedings where child support is at issue, including those commenced prior to its enactment in 1989.

The CSSA is premised on the notion that children are entitled to share in the income and standard of living of both parents, even if they no longer live together, and that child support should be the first obligation to be met, not the last.

The Court is required to use the CSSA in all child support determinations.

Under the CSSA the court first determines combined parental income and then allocates to the first $183,000[1] of combined parental income a percentage to child support.

The trial court is required, under the CSSA, to follow a three-step process for determining the basic child support obligations:

1. Calculation of combined parental income;
2. Multiplication of the combined parental income up to $183,000 by the correct statutory percentage, and allocation of support between the parents on a pro rata basis, unless it is articulated in a written order that this would be unjust or inappropriate, and why it would be so;
3. For the amount of parental income over $183,000, application of the statutory percentage or of the factors set forth in DRL Section 240 (1-b) (f), and articulation of the reasons for the method used. See Cassano v. Cassano, 86 NYS 2d 649, 628 NYS 2d 10 (1995).

There is a rebuttable presumption that the noncustodial parent should be ordered to pay their pro rata share of the basic child support obligation, unless either parent can prove there are reasons the court should deviate, upward or downward.

If the court finds that the noncustodial parent's pro rata share of the child support obligation is unjust or inappropriate, it may order an amount it considers to be just and appropriate, but the factors considered and the reasons for the level of support ordered must be set forth in a written order.

In addition to the above, the court must pro rate the cost of reasonable medical and childcare expenses. The court also has the discretion to allocate payment of a portion of educational expenses and other childcare expenses, where it is determined that the custodial parent is seeking work and incurs such.

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[1] Effective January 1, 2010, see DRL §240(1-b). Beginning in 2010 and every two years thereafter, this cap will change in accordance with changes to the Consumer Price Index.

REBUTTING THE PRESUMPTION

The Court may vary from the presumptive CSSA amount in accordance with the factors set forth in DRL§240(1-b) (f):

1. The financial resources of both parents and the child;
2. The child's physical and emotional health, or if child has any special needs;
3. The standard of living the child would have enjoyed if the parent's marriage remained intact;
4. The tax consequences to the parties;
5. The non-monetary contributions the parents make towards the care and well-being of the child;
6. The education needs of either parent;
7. A determination that the gross income of one parent is substantially less than the other parent's gross income;
8. The needs of other children for whom the noncustodial parent is providing support, and whose support has not been deducted from income. This factor may apply only if the resources available to support such other children are less than the resources available to support the children in the instant action;
9. Provided the child is not on public assistance, any extraordinary expenses incurred by the noncustodial parent in exercising visitation or extended visitation, provided that the custodial parent's expenses are substantially reduced as a result thereof;
10. Any other factor the court deems relevant in each case.

INCOME UNDER THE CSSA

Income from all sources, whether actual or imputed, are subject to the CSSA. The Court is not limited to the sources of income set forth in the statute, just taxable income, or income set forth on tax returns.

Income or compensation that is being voluntarily deferred is considered income and can be recaptured as income under the CSSA. See pay stubs and W-2s, for salaried workers, and 1099 Forms, tax returns and Schedule Cs for self-employed workers.

Income from public and private Social Security retirement and Social Security disability benefits is also included under the CSSA and can be garnished.

Expenses deducted from business income that represent personal expenditures are included in the CSSA as income. So is investment income, depreciation, and entertainment and travel allowances deducted from business income to the extent they reduce personal expenditures.

Income shall also include, if the Court determines that a parent has intentionally reduced resources or income in order to reduce or avoid the parent's obligation for child support, an amount imputed as income based on the parent's former resources or income.

IMPUTED INCOME

Pursuant to FCA § 413 (1)(5)(iv) and DRL § 240 1-b (b)(5)(iv), the Court, in the exercise of its discretion, may attribute or impute income to either parent - from any resources as may be available to the parent, including, but not limited to:

A. Non-income-producing assets;
B. Meals, lodging, memberships, automobiles, or other perquisites that are provided as part of compensation for employment to the extent that such perquisites constitute expenditures for personal use or which expenditures directly or indirectly confer personal economic benefits;
C. Fringe benefits provided as part of compensation for employment; and
D. Money, goods, or services provided by relatives and friends.

The Court is not bound by the Respondent's own account of their finances and if a version of a party's finances is patently unbelievable, the Court is justified in finding a true or potential income higher than that stated.

Certain occupations pose particular challenges, including taxi drivers, self-employed individuals, and those that work in a cash business and can hide their income by manipulating their business expenses.

The attorney should prove to the court that respondent is able to meet expenses or has access to income, though is not admitting to it, then ask the court to impute income to the party, based on the evidence presented. Every effort should be made to spell out the exact amount sought to be imputed.

Courts will impute income where it is demonstrated that the Respondent:

- Presents inconsistent financial information
- Appears to have access to assets / income seemingly belonging to friends, family, or a business
- Refuses to provide sufficient financial disclosure and documentation of income, personal, and business expenses
- Cannot fully explain a shortfall between income and expenses
- Has deliberately reduced their income
- Refuses to work in accordance with earning potential, experience, and skill
- Enjoys a lavish lifestyle
- Uses business funds to pay for personal expenses (use of car, home)
- Suffers a dramatic decline in income when support is likely to be sought

See, e.g., Fruchter v. Fruchter, 816 N.Y.S. 2d 525 (2d Dep't 2006) (the court need not rely on party's own account of finances and can impute income based upon earning potential, not current economic situation); Askew v. Askew, 700 N.Y.S. 2d 594 (3rd Dep't 1999)(imputing income from business expenses); Bianchi v. Breakell, 804 N.Y.S. 2d 846 (3rd Dep't 2005)(court imputed income based on expenses being in excess of his claimed income after taxes); Rocano v. Rocano, 820 N.Y.S.2d 845 (Supreme.Ct. Kings Cty 2006) (court imputed income where the reported income was suspect).

Additionally, where a party has defaulted and the Court is otherwise presented with insufficient evidence to determine gross income, the Court shall order child support based upon the needs or standard of living of the child, whichever is greater. Such order may be retroactively modified upward, without a showing of change in circumstances. FCA §413 (1) (k); DRL §240 (1-b) (b) (k).

DEDUCTIONS FROM PARENTAL INCOME

Unreimbursed employee business expenses may be deducted from income, but not if the money was spent for personal expenditures that would have otherwise been made.

Maintenance actually paid pursuant to a court order or written agreement to a spouse not a party to the action may be deducted. Maintenance paid to the spouse in the current action is deducted if the order or agreement provides for an adjustment in the amount of child support payable upon termination of maintenance.

Child support actually paid pursuant to court order or written agreement on behalf of a child not subject to the action is deductible.

FICA (Medicare and Social Security) taxes actually paid and New York City or Yonkers taxes actually paid are also deductible. Note that only the amount actually required and paid should be deducted.

Income from Public Assistance and SSI are deducted from income.

THE CSSA PERCENTAGES

17% for one child

25% for two children

29% for three children

31% for four children

No less than 35% percent for five or more children

MANDATORY ADD-ONS

The court must require either parent to extend to the children health insurance coverage available through an employer. Future reasonable medical expenses not covered by insurance are pro- rated between the parties.

Where the children are not currently covered, the parent that has available health insurance benefits shall provide or maintain such benefits to the children. Private health insurance is considered available when it is reasonable in cost and reasonably accessible in that costs do not exceed five percent (5%) of the parental gross income. Reasonably

accessible is defined as within 30 minutes travel time or 30 miles. If reasonable in cost, the court must order the parents to pay a pro rata share of the health insurance premium.

Where not available or reasonably accessible, either parent will be required to enroll the children in a public health insurance program and the costs of the program as well as unreimbursed medical expenses will be pro-rated between the parties.

The CSSA requires noncustodial parents to pay a pro rata share of reasonable child care expense incurred by the custodial parent while working, receiving an education, or receiving vocational training.

DURATION OF CHILD SUPPORT EXCEPTIONS

Generally, parents are required to continue to support their child until the child has reached the age of 21 or becomes emancipated. Although parents may agree to extend the child support obligation beyond the age of 21, they may not agree to terminate it at an earlier date, absent emancipation. The court **did not** have the power to order the payment of child support beyond the age of 21 but that changed on October 8, 2021, when the Family Court Act and Domestic Relations Law were amended.

The amendment is found in Family Court Act §413-B and Domestic Relations Law §240-d. The new law raises the support obligation to the age of 26 if the person is developmentally disabled as defined under the Mental Hygiene Law. *See* Mental Hygiene Law §1.03(22). A custodial parent or kinship caregiver of a developmentally disabled adult child may seek support up to the age of 26. The developmentally disabled person must reside and be principally financially dependent on the person seeking support.

A finding of a developmental disability shall be supported by a diagnosis and accompanying report of a physician, licensed psychologist, registered professional nurse, licensed clinical social worker, or a licensed master social worker under the supervision of a physician, psychologist or licensed clinical social worker authorized to practice under title eight of the education law, and acting within their lawful scope of practice.

OPTIONAL ADDITIONAL AMOUNTS

The court has the discretion to apportion reasonable childcare expenses where the custodial parent is seeking work and incurs such expenses. They are to be paid in a manner to be determined by the court.

Private education for the children can be ordered under the CSSA, if the Court determines it would be appropriate, having regard for the circumstances of the case and of the respective parties and in the best interest of the child, as justice requires.

NON RECURRING PAYMENTS

The Court may allocate a portion of extraordinary sources such as life insurance policies, discharges of indebtedness, recovery of bad debts and delinquency amounts, gifts and inheritances, and lottery winnings, payable in a manner to be determined by the Court.

LOW INCOME CAPS

Where the annual amount of the basic child support obligation reduces the noncustodial parent's income below the poverty level, the order will be reduced to $25/month. For parents above the poverty level but below the self-support reserve, the award will be $50/month or the difference between the income and the self-support reserve.

A poverty level non-custodial parent cannot accrue unpaid child support arrears over $500.

AGREEMENTS BETWEEN PARENTS AND THE CSSA

Parents may agree to opt out of the child support guidelines of the CSSA. The agreement must be knowing and voluntary, and to be valid, the opting-out agreement must include:

- a statement that both parties were advised of the CSSA guidelines
- a statement that pro se parties received a copy of the CSSA guidelines chart
- a statement that an order of support entered pursuant to the guidelines would presumptively be correct
- where the agreement deviates from the basic child support obligation, the amount which would have been awarded under the guidelines and
- the reason the agreement does not provide for payment of that amount.

See FCA §413(1) (h) & (i); DRL §240 (1-b) (h) & (i).

These mandates may not be waived. Where the opt-out agreement is void, child support shall be established de novo based on the CSSA.

MODIFICATION OF CHILD SUPPORT ORDERS

Effective October 12, 2011 and pursuant to DRL § 236 b.(2)(i), the court may modify an order of child support, including an order of support and/or a judgment of divorce that incorporates without merging a stipulation on child support, upon a showing that:

i. there has been a substantial change in circumstances; or
ii. three years or more have passed since the issuance of the last order of support; or
iii. there has been a change of at least 15% in either party's gross income.

These statutory provisions are applicable <u>unless</u> the parties expressly opt out of the provision in a validly executed stipulation.

Where there is a written agreement that was incorporated into a divorce judgment, pursuant to the New York Court of Appeal case of Boden v. Boden, 42 N.Y.2d 210, 397 N.Y.S 2d 701 (1977) the Court cannot reallocate the child support obligations between the parents where the agreement was fair when entered into, unless there is an unanticipated and unreasonable change in circumstances resulting in a concomitant showing of need.

Also in 1977, the Court of Appeals narrowed the Boden rule when it decided Brescia v. Fitts, 56 N.Y.2d 321,139, 451 N.Y.S 2d 68 (1982), holding that the Court may increase the amount of child support upon a showing of changed circumstances warranting an increase is in the best interests of the child. The Court will look to the child's right to be adequately supported. An agreement between the parties is considered binding on the parents, but not binding on the child, who is not a party to the agreement.

Thus, the Boden rule is applied where there is no allegation that the child is not being adequately supported, but the dispute concerns the allocation of child support between the parents. For all other cases the Brescia rule will apply.

Modifications are granted retroactive to the date of the request for modification. In the interim, child support is due. This is very important for the noncustodial parent whose circumstances has changed and has not yet requested a downward modification of their support obligations.

ARREARS

Pursuant to DRL §244, the court must direct entry of a judgment for arrears of child support. Any child support arrears which have accrued under a judgment or order prior to the making of an application for modification are not subject to modification or annulment. DRL §236(b) (9) (b).

SHARED AND SPLIT CUSTODY ARRANGEMENTS

Under traditional "sole custody" arrangements, custodial rights were assigned to the one parent who obtains physical custody, and the noncustodial parent receives visitation rights and pays child support. Non-traditional joint custody arrangements, such as "shared custody" and "split custody" have given rise to some new child support issues.

CHILD SUPPORT IN SHARED CUSTODY SITUATIONS

Shared custody generally refers to those custodial situations where a child shares approximately equal time between two parents. It can also encompass situations where there are arrangements for joint custody, shared custody, or extraordinary visitation for one parent.

In the leading case of Bast v Rosoff, 91 N.Y.2d 723 (1998), the Court of Appeals established a framework for applying the CSSA to shared custody situations. There, the

Court of Appeals held that even where parents share physical custody of their children in a shared custody arrangement, child support should be calculated in a three step process, pursuant to the CSSA, as it is in any other case.

In Bast, the Court of Appeals rejected using a proportional offset formula, where each parent's obligation is calculated and the parent with the larger obligation paying the difference to the parent with the smaller obligation. The only time the court should deviate from ordering the noncustodial parent to pay a pro rata share under the CSSA is where it will be "unjust or inappropriate" according to the FCA § 413(1) (f) and DRL § 240 (1-b) (f) factors, or if it will reduce the noncustodial parent's income below the low income caps or the self-support reserve.

Under Bast, to identify the custodial parent for the purposes of child support, the Court should determine which parent as physical custody of the child for the majority of the time. See Redder v. Redder, 17 A.D. 3d 10 (3rd Dep't 2005).

THE CUSTODIAL PARENT AFTER BAST

As the Bast case did not address how to apply the CSSA in cases of equal shared custody, the Third Department, in Baraby v Baraby, 250 A.D.2d 201 (3d Dept 1998), held that where it is not possible to determine who is the custodial parent by who spends more time with the children, the parent having the greater pro rata share of the basic child support obligation after application of the three-step statutory formula set forth in the CSSA shall be deemed the noncustodial parent, i.e. the payor parent, regardless of the labels employed by the parties, unless the result is unjust or inappropriate. See Moore v. Shapiro, 815 N.Y.S. 2d 855 (4th Dep't 2006); Mendenhall v. Mendenhall, 4 A.D. 3d 344 (2d Dep't 2006).

CHILD SUPPORT IN SPLIT CUSTODY SITUATIONS

Split custody generally refers to those custodial situations where each parent has primary physical custody of at least one of the parties' children.

The Court of Appeals has not yet ruled on establishing child support in a split custody scenario. The 1992 Third Department case of Kerr v. Bell, 178 A.D. 2d 1 (3rd Dep't 1992), decided prior to Bast, provides for an offset method, where the combined parental income (or each party's income) is multiplied by the statutory percentage applicable to the number of children residing in each household, and the court subtracts the lesser child support obligation from the larger child support obligation to determine the net amount owed by the parent with the larger obligation.

Recent decisions do utilize the offset method where custody is split between parents, but go on to adjust this amount if found to be unjust or inappropriate under the statutory "paragraph f" factors. See Simmons v Hyland, 235 A.D.2d 67 (3d Dept 1997); Daley v. Daley, 2002 NY Misc. LEXIS 761 (Supreme Ct. NY County 2002); McMillen v. Miller, 15 A.D. 3d 814 (3rd Dep't 2005).

SPOUSAL SUPPORT AND MAINTENANCE

POST-DIVORCE MAINTENANCE

The parties remain able to opt-out of the mandatory formulae relating to post-divorce maintenance, provided that they comply with the opt-out requirements in DRL § 236(B)(3).

DEFINITIONS

DRL § 236(B)(6)(b) provides the relevant definitions for this section:

1. "**Payor**" shall mean the spouse with the higher income.
2. "**Payee**" shall mean the spouse with the lower income.
3. "**Income**" shall mean:
    1. income as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act, without subtracting alimony or maintenance actually paid or to be paid to a spouse that is a party to the instant action pursuant to subclause (C) of clause (vii) of subparagraph five of paragraph (b) of subdivision one-b of section two hundred forty of this article and subclause (C) of clause (vii) of subparagraph five of paragraph (b) of subdivision one of section four hundred thirteen of the family court act and without subtracting spousal support paid pursuant to section four hundred twelve of such act; and
    2. income from income-producing property distributed or to be distributed pursuant to subdivision five of this part.
4. "**Income cap**" shall mean up to and including two hundred and three thousand dollars of the payor's annual income; provided, however, beginning January thirty-first, two thousand sixteen and every two years thereafter, the income cap amount shall increase by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of labor bureau of labor statistics for the prior two years multiplied by the then income cap and then rounded to the nearest one thousand dollars. The office of court administration shall determine and publish the income cap.
5. "**Guideline amount of post-divorce maintenance**" shall mean the dollar amount derived by the application of paragraph c or d of this subdivision.
6. "**Guideline duration of post-divorce maintenance**" shall mean the durational period determined by the application of paragraph f of this subdivision.
7. "**Post-divorce maintenance guideline obligation**" shall mean the guideline amount of post-divorce maintenance and the guideline duration of post-divorce maintenance.
8. "**Length of marriage**" shall mean the period from the date of marriage until the date of commencement of the action.

9. "**Self-support reserve**" shall mean the self-support reserve as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act.
10. "**Agreement**" shall have the same meaning as provided in subdivision three of this part.

METHODOLOGY

There are two formulae for calculating post-divorce maintenance contained in § 236(B)(6)(c). The flow chart from temporary maintenance can be used to determine which formula is to be used in this section as well.

Note that the statutory income cap limits these calculations to the first $228,000 of the payor's income. Any income above that amount will be dealt with in accordance with DRL § 236(B)(6)(d), which will be discussed below.

FORMULA # 1

The calculations contained in DRL § 236(B)(6)(c)(1) apply when child support will be paid and the maintenance payor is the non-custodial parent:

A = [20% of payor income] – [25% of payee income]

B = 40% of [payor income + payee income]

C = B – [payee income]

The temporary maintenance amount shall be the lower of A and C.

If the lower value is $0.00 or less than $0.00, the amount of temporary maintenance is $0.00.

Maintenance shall be calculated prior to child support because the amount of temporary maintenance shall be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation.

FORMULA # 2

The calculations contained in DRL § 236(B)(6)(c)(2) apply when child support will not be paid or the maintenance payor is the custodial parent:

A = [30% of payor income] – [20% of payee income]

B = 40% of [payor income + payee income]

C = B – [payee income]

The temporary maintenance amount shall be the lower of A and C.

If the lower value is $0.00 or less than $0.00, the amount of temporary maintenance is $0.00.

Maintenance shall be calculated prior to child support because the amount of temporary maintenance shall be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation.

INCOME OVER THE STATUTORY INCOME CAP

DRL § 236(B)(6)(d) provides for maintenance in relation to the income over the $228,000 cap. The calculations above are performed for the income up to and including $228,000, and then any additional maintenance awarded in relation to income above the cap will be within the discretion of the court. The court shall take into consideration the same factors as for a temporary maintenance award, as well as the following two additional factors:

(m) the equitable distribution of marital property and the income or imputed income on the assets so distributed;

(n) the contributions and services of the payee as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; […]

SELF-SUPPORT RESERVE (DRL § 236(B)(5-A)(E))

Where the calculations above would reduce the payor’s income to below the self-support reserve for a single person, the guideline amount of temporary maintenance will be the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there is a rebuttable presumption that no temporary maintenance is awarded.

MISCELLANEOUS PROVISIONS

DEVIATION FROM FORMULAE (DRL § 236(B)(6(E))

If the guideline amount of post-divorce maintenance would be unjust or inappropriate, the court can adjust the guideline amount of post-divorce maintenance. The adjustment is based on the consideration of the same factors as income over the statutory income cap set out above. Any decision to deviate from the formulae must be reasoned and given in writing.

DURATION OF POST-DIVORCE MAINTENANCE AWARD

DRL § 236(B)(6)(f) provides an advisory schedule for the duration of the post-divorce maintenance award:

Length of marriage	Percent of the length of marriage for which maintenance is payable
0 to 15 years (inclusive)	15% - 30%
15 to 20 years (inclusive)	30% - 40%
More than 20 years	35% - 50%

Regardless of whether the court uses the above schedule, it must consider the factors in DRL § 236(B)(6)(e) and provide a written decision or record the factors it considered. The court is also able to award non-durational maintenance in an appropriate case.

Post-divorce maintenance shall terminate upon the occurrence of the following matters:

1. the death of either party; or
2. upon the payee's valid or invalid marriage; or
3. upon modification pursuant to DRL § 236(B)(9)(b) or § 248.

Further, § 236(B)(6)(f)(4) provides: Notwithstanding the provisions of subparagraph one of this paragraph, when determining duration of post-divorce maintenance, the court shall take into consideration anticipated retirement assets, benefits, and retirement eligibility age of both parties if ascertainable at the time of decision. If not ascertainable at the time of decision, the actual full or partial retirement of the payor with substantial diminution of income shall be a basis for a modification of the award.

UNREPRESENTED PARTIES (DRL § 236(B)(6)(G))

Where either or both parties are unrepresented, the court shall not enter a post-divorce maintenance order unless the court informs the unrepresented party or parties of the guideline amount of post-divorce maintenance.

DEFAULTS AND NON-DISCLOSURE (DRL § 236(B)(6)(I))

If a payor has defaulted or the court has insufficient evidence to determine income, the court shall order the post-divorce maintenance award based on the needs of the payee or the standard of living of the parties prior to commencement of the divorce action, whichever is greater. This can be retroactively modified upward upon a showing of newly discovered evidence, and without a showing of change in circumstances.

MODIFICATION OF ORDERS AND AGREEMENTS

Post-divorce maintenance may be modified pursuant to DRL § 236(B)(9)(b). (DRL § 236(B)(6)(j)).

The present changes to the post-divorce maintenance guidelines shall not constitute a change of circumstances warranting modification of any pre-existing orders or agreements (DRL § 236(B)(6)(k) and (l)).

MODIFICATION OF PRE-EXISTING ORDERS AND AGREEMENTS

In any action for modification of an order or agreement of maintenance or alimony existing prior to the effective date of these provisions, the guidelines for post-divorce maintenance set out in DRL § 236(B)(6)(c), (d) and (e) will not apply to that action or proceeding for modification (DRL § 236(B)(6)(m) and (n)).

BARRIERS TO REMARRIAGE

The court shall also consider the effect of a barrier to remarriage (where appropriate) along with the factors in § 236(B)(6)(e).

FURTHER AMENDMENTS

SECTION 5 OF THE BILL AMENDS DRL § 236(B)(9)(B)(1) AS FOLLOWS:

DRL § 236(B)(9)(b)(1): Upon application by either party, the court may annul or modify any prior order or judgment made after trial as to maintenance, upon a showing of the payee's inability to be self-supporting or upon a showing of a substantial change in circumstance, including financial hardship or upon actual full or partial retirement of the payor if the retirement results in a substantial change in financial circumstances. Where, after the effective date of this part, an agreement remains in force, no modification of an order or judgment incorporating the terms of said agreement shall be made as to maintenance without a showing of extreme hardship on either party, in which event the judgment or order as modified shall supersede the terms of the prior agreement and judgment for such period of time and under such circumstances as the court determines. The court shall not reduce or annul any arrears of maintenance which have been reduced to final judgment pursuant to section two hundred forty-four of this article. No other arrears of maintenance which have accrued prior to the making of such application shall be subject to modification or annulment unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears and the facts and circumstances constituting good cause are set forth in a written memorandum of decision. Such modification may increase maintenance nunc pro tunc as of the date of application based on newly discovered evidence. Any retroactive amount of maintenance due shall, except as provided for herein, be paid in one sum or periodic sums, as the court directs, taking into account any temporary or partial payments which have been made. The provisions of this subdivision shall not apply to a separation agreement made prior to the effective date of this part.

SECTION 6 OF THE BILL AMENDS DRL § 248 AS FOLLOWS:

DRL § 248: Modification of judgment or order in action for divorce or annulment. Where an action for divorce or for annulment or for a declaration of the nullity of a void marriage is brought by a spouse, and a final judgment of divorce or a final judgment annulling the marriage or declaring its nullity has been rendered, the court, by order upon the application of the payor on notice, and on proof of the marriage of the payee after such final judgment, must modify such final judgment and any orders made with respect thereto by annulling the provisions of such final judgment or orders, or of both, directing payments of money for the support of the payee. The court in its discretion upon application of the payor on notice, upon proof that the payee is habitually living with another person and holding themself out as the spouse of such other person, although not married to such other person, may modify such final judgment and any orders made with respect thereto by annulling the provisions of such final judgment or orders or of both, directing payment of money for the support of such payee.

The trial court is required to set forth the factors considered in rendering the maintenance award and failure to do so may result in reversible error. Johnson v. Johnson, 261 A.D.2d 439, 690 N.Y.S.2d 92 (2d Dep't 1999); Nielsen v. Nielsen, 259 A.D.2d 916, 686 N.Y.S.2d 894 (3d Dep't 1999).

As noted in Nielsen v. Nielsen, 259 A.D.2d 916, 686 N.Y.S.2d 894 (3d Dep't 1999), although the reviewing court is not required to analyze and apply every factor set forth in Domestic Relations Law § 236 (B)(6)(a) it must provide a "reasoned analysis" for its decision to award plaintiff spousal maintenance, including a discussion of the factors upon which it relied. Id. at 917. See also Wojewodzic v. Wojewodzic, 300 A.D.2d 985,753 N.Y.S.2d 160 (3d Dep't 2002); McAteer v. McAteer, 294 A.D.2d 783, 742 N.Y.S.2d 718 (3d Dep't 2002); Goudreau v. Goudreau, 283 A.D.2d 684, 724 N.Y.S.2d 123 (3d Dep't 2001).

1. CASE LAW INTERPRETATION OF THE STATUTORY FACTORS:

A. Income and Property:

Income and property are two critical factors courts use in determining whether one party has the need for maintenance and the other party has the ability to pay it.

Friedman v. Friedman, 309 A.D.2d 830,766 N.Y.S.2d 82 (2d Dep't 2003) (holding that "in determining a party's maintenance obligation, a court need not rely solely on the party's own account of his or her finances, but may impute income based upon the party's past earnings or demonstrated earning potential").

Finkelstein v. Finkelstein, 268 A.D.2d 273, 701 N.Y.S.2d 52 (1st Dep't 2000) (trial court's award of non-durational maintenance of $5,000 per month was affirmed where after 22 years of marriage the wife could only be expected to earn $35,000 a year, substantially less than needed to maintain the marital lifestyle, where wife received

$4,000,000 in equitable distribution, and husband had demonstrated ability to earn substantial sums as a stock trader and recently inherited substantial funds from his mother).

Nee v. Nee, 240 A.D.2d 478, 658 N.Y.S.2d 440 (2d Dep't 1997) (Ruling that courts must consider both the issues of maintenance and property distribution in determining whether and how much to award in support).

Damato v. Damato, 215 A.D.2d 348, *626 N.Y.S.2d 221* (2d Dep't 1995) (upholding maintenance award where there was a great disparity between the husband and wife's income and the husband's income was significantly supplemented by his parents).

Match v. Match, 179 A.D.2d 124, 583 N.Y.S.2d 224 (1st Dep't 1992) (finding that where the primary reason for the parties' high standard of living was due to husband's expenses being paid by his employer, husband was not required to provide the wife with the same standard of living since to do so would deplete more that half of his income).

Malin v. Malin, 172 A.D.2d 721, *569 N.Y.S.2d 745* (2d Dep't 1991) (modifying lower court's maintenance judgment where earlier ruling might have allowed husband to terminate obligation to pay maintenance to the wife upon the sale of a piece of property).

B. Marital Standard of Living:

Even if dependent spouse has resources or the ability to meet their reasonable needs, the other spouse may still have to pay support in order to maintain the dependent spouse in the same standard of living enjoyed during the marriage.

Summer v. Summer, 85 N.Y.2d 1014, 630 N.Y.S.2d 970 (1995): Appellate Court failed to consider the factor of the parties' marital standard of living in making maintenance award. Supreme Court award granting plaintiff wife lifetime maintenance reinstated, citing to the court's ruling and analysis in Hartog v. Hartog, 85 N.Y.2d 36, 623 N.Y.S.2d 537 (1995).

In Hartog, supra, the Court of Appeals held the wife was entitled to lifetime maintenance as she was not capable of being self-supporting at a level commensurate with the marital standard of living. In so ruling, the court noted that "the wife's ability to become self-supporting with respect to some standard of living in no way (1) obviates the need for the court to consider the predivorce standard of living; and (2) certainly does not create a per se bar to lifetime maintenance." See;

Konigsberg v. Konigsberg, 3 A.D.3d 330, 770 N.Y.S.2d 322 (2004 N.Y. App. Div. LEXIS 139) (finding an award of lifetime maintenance to be appropriate, even in light of the fact that plaintiff worked throughout the marriage, where plaintiff was incapable of becoming self-supporting at a level roughly commensurate with marital standard).

Shai v. Shai, 301 A.D.2d 461, 754 N.Y.S.2d 17 (1st Dep't 2003) (ruling that husband was entitled to lifetime maintenance where in light of his age, education and skills, he would not be capable of becoming self-supporting "at a level roughly commensurate with the marital standard of living").

Dunnan v. Dunnan, 261 A.D.2d 195, 690 N.Y.S.2d 46 (1st Dep't 1999) (finding that while it was true that defendant was accorded half of the marital property and also collected disability and retirement benefits, she, unlike plaintiff, was "completely without the capacity to earn any additional income," and thus required $5000 per month in maintenance to be able to approach the pre-divorce standard of living).

Deutsch v. Deutsch, 254 A.D.2d 8, 677 N.Y.S.2d 792 (1st Dep't 1998) (increasing maintenance award where original amount was insufficient to maintain pre-divorce standard of living).

C. Length of Marriage, Age and Health:

The court will look at the duration of the marriage, as well as the age and health of the parties in determining the length or duration of the award as opposed to the amount of the award.

Gorelik v. Gorelik, 303 A.D.2d 553, 757 N.Y.S.2d 67 (2d Dep't 2003) (upholding a lower court maintenance award of $800 a month for twelve months where the parties were married only a brief time, were relatively young, in good health and defendant's Master's Degree in computer science allowed her to earn an annual income of $45,000).

Goddard v. Goddard, 256 A.D.2d 545, 682 N.Y.S.2d 423 (2d Dep't 1998) (holding that since the marriage in question was of relatively short duration, and the plaintiff was in good health and could, therefore, become self-supporting, the court did not improvidently exercise its discretion in denying the plaintiff's request for maintenance).

Daniels v. Daniels, 243 A.D.2d 254, 663 N.Y.S.2d 141 (1st Dep't 1997) (ruling that in 10 month marriage where parties lived upper-class lifestyle but wife had only stopped working just prior to the marriage, and was employable as real estate agent, husband was required to pay maintenance of $10,000 per month for 20 months).Distinguished by Allen v. Allen, 275 A.D.2d 225, 712 N.Y.S.2d 496 (1st Dep't 2000) (declining to increase the duration of maintenance on the additional ground that the wife was employable).

Walsh v. Walsh, 226 A.D.2d 707, *641 N.Y.S.2d 704* (2d Dep't 1996) (finding that court's failure to impose a durational limit on wife's maintenance award was not improvident where wife's mental health was impaired and she would be unable to become self-supporting in the foreseeable future). See also; Aguirre v. Aguirre, 245 A.D.2d 5, 665 N.Y.S.2d 638 (1st Dep't 1997) (finding that defendant was entitled to lifetime maintenance where she was suffering from Lupus and was unlikely to ever become self-supporting).

Lekutanaj v. Lekutenaj, 234 A.D.2d 429, 651 N.Y.S.2d 154 (2d Dep't 1996) (finding that a reduction in maintenance award was warranted where wife was still young, in good health, and had secured some employment).

Iwahara v. Iwahara, 226 A.D.2d 346, 640 N.Y.S.2d 217 (2d Dep't 1996) (based upon distributive award to wife, the duration of marriage, the wife's relatively young age and excellent health, appellate court reduced maintenance award of $30,000 per year for 10 years and $15,000 per year for next 5 years to $20,000 per year for 10 years).

Gulotta v. Gulotta, 215 A.D.2d 724, 627 N.Y.S.2d 428 (2d Dep't 1995) (finding that $150 per week in non-durational maintenance not improvident where wife was suffering from debilitating disease).

Feldman v. Feldman, 194 A.D.2d 207, 605 N.Y.S.2d 777 (2d Dep't 1993) (awarding the wife lifetime maintenance in light of the long duration of the parties' marriage, and the fact that the wife, who was 61 years old and in poor health, had never worked outside the home, and had no marketable skills. However, court also ruled to reduce husband's maintenance requirement in light of the fact that he would have to support himself and his wife on the basis of the fluctuating income he received from investments) See Also Spencer v. Spencer, 230 A.D.2d 645, 646 N.Y.S.2d 674 (1st Dep't 1996).

D. Earning Capacity:

Earning capacity has been used by courts to not only determine the duration of maintenance, but in deciding whether maintenance should be awarded at all. At times, ruling courts will make a maintenance determination based on a party's earning capacity rather than their actual earnings. This practice limits the opportunity of one spouse escaping their maintenance obligation by accepting a lesser paying job than their education and experience would otherwise permit.

Wojewodzic v. Wojewodzic, 300 A.D.2d 985, *753 N.Y.S.2d 160* (3d Dep't 2002) (upholding lower court's maintenance determination where plaintiff had limited earning capacity and an inability to improve her financial status due to her age, lack of higher education and work experience).

Levy v. Levy, 260 A.D.2d 324, 689 N.Y.S.2d 62 (1st Dep't 1999) (finding that maintenance award was justified given the vast disparity in the parties' earning capacities and where plaintiff had not worked in 24 years).

Junkins v. Junkins, 238 A.D.2d 480, 656 N.Y.S.2d 650 (2d Dep't 1997) (ruling that no maintenance should be awarded where wife had a master's degree, earned $60,000 per year, and had the ability to earn more).

Sergeon v. Sergeon, 228 A.D.2d 354, *644 N.Y.S.2d 264* (1st Dep't 1996) (holding that where husband voluntarily decided to accept less lucrative employment, the level and duration of support should be based on defendant's earning capacity rather than his actual earnings).

Strang v. Strang, 222 A.D.2d 975, 635 N.Y.S.2d 786 (3d Dep't 1995) (upholding maintenance award of $100 per week where although defendant's working history was sporadic, she did possess a college degree, held various responsible positions and was thus determined by an independent court psychologist to be employable on a full-time basis in several years).

Borra v. Borra, 218 A.D.2d 780, 631 N.Y.S.2d 76 (2d Dep't 1995) (awarding wife lifetime maintenance where she had no real marketable skills and negligible earning potential).

E. Ability to Become Self-Supporting:

The ultimate goal after any divorce proceeding is to effectuate a split whereby both parties are capable of maintaining themselves as self-sufficient individuals in society. As such, in addition to determining whether a maintenance award will be provided at all, a party's ability to become self-supporting also affects the length of the maintenance award. In determining the latter, the presumption is that the dependent spouse may need some time to become self-sufficient, either because additional training or education is needed, or time is needed to allow the dependent spouse to increase earnings to a level that will enable that spouse to be self-supporting.

Bains v. Bains, 308 A.D.2d 557, 764 N.Y.S.2d 721 (2d Dep't 2003) (stating that spousal support should be awarded for a duration that would provide the recipient with enough time to become self-supporting).

Bittner v. Bittner, 296 A.D.2d 516, *745 N.Y.S.2d 559* (2d Dep't 2002) (upholding lower court's refusal to award spousal maintenance where plaintiff was able to be self-supporting and was receiving child support as well as full title to the marital residence).

DeNapoli v. DeNapoli, 282 A.D.2d 494, 722 N.Y.S.2d 747 (2d Dep't 2001) (stating that "unrealistic assumptions should not be made regarding the ability of a non-working spouse in a long-term marriage to become self-supporting").

Loughran v. Loughran, 277 A.D.2d 359, 717 N.Y.S.2d 895 (2d Dep't 2000) (finding that defendant husband had the ability to be self-supporting and thus should not be awarded maintenance despite his failure to engage in regular gainful employment during the marriage).

Morrissey v. Morrissey, 259 A.D.2d 472, 686 N.Y.S.2d 71 (2d Dep't 1999) (finding that where wife was out of workforce for 10 years and had some health problems, maintenance award for 7 years was justified) See also Constantino v. Constantino, 225 A.D.2d 651 (2d Dep't 1996).

Kirschenbaum v. Kirschenbaum, 264 A.D.2d 344, 693 N.Y.S.2d 149 (1st Dep't 1999) (finding that the fact that a payee spouse has the ability to become self-supporting with respect to some standard of living "does not preclude an award of lifetime maintenance nor obviate the court's responsibility to consider the parties' pre-divorce standard of living").

Orvieto v. Orvieto, 251 A.D.2d 387, 673 N.Y.S.2d 916 (2d Dep't 1998) (holding that wife not entitled to maintenance given the relative financial circumstances of the parties, the wife's equitable distribution award, and the fact that she was already self-supporting).

Granade-Bastuck v. Bastuck, 249 A.D.2d 444, 671 N.Y.S.2d 512 (2d Dep't 1998) (finding that husband was only required to support wife for four years rather than nine as this was sufficient to enable plaintiff to obtain the necessary credentials to teach and to obtain employment, while still allowing her to care for her young son).

Popack v. Popack, 179 A.D.2d 746, 578 N.Y.S.2d 650 (2d Dep't 1992) (finding that the award $250 per week for three years from the date of entry of the judgment was

inadequate in light of the wife's need to become self-supporting and her desire to obtain a nursing degree).

Rosenkrantz v. Rosenkrantz, 184 A.D.2d 478, 585 N.Y.S.2d 426 (1st Dep't 1992) (upholding lower court finding that the wife would not be self-supporting in 5 years where husband could earn $200,000 while wife could only earn $25,000,).

F. Foregone or Delayed Educational/Employment Opportunity:

This factor takes into account several situations: where one spouse sacrifices their education, employment or career opportunities to be a full-time parent or spouse, or one spouse gives up their career and works at a lesser job to allow the other spouse to fully develop their career.

Neilson v. Neilson, 259 A.D.2d 916, 686 N.Y.S.2d 894 (3rd Dep't 1999) (finding that where the parties were married for over 30 years, the wife raised five children and allowed the husband to pursue his career, the permanent award of maintenance was affirmed). See also Kirschenbaum v. Kirschenbaum, 264 A.D.2d 344, 693 N.Y.S.2d 149 (1st Dep't 1999) (same); Liadis v. Liadis, 207 A.D.2d 331, 615 N.Y.S.2d 409 (2d Dep't 1994); Pagano v. Pagano, 202 A.D.2d 652, 609 N.Y.S.2d 313 (2d Dep't 1994).

Kaprelian v. Kaprelian, 236 A.D.2d 369, 653 N.Y.S.2d 634 (2d Dep't 1997) (holding that lifetime maintenance was appropriate in view of wife's lack of skills and training, and fact that she subordinated her career to manage the home and children).

Hart v. Hart, 227 A.D.2d 698, 641 N.Y.S.2d 459 (3d Dep't 1996) (holding that in long term marriage where wife sacrificed her education in favor of husband, a support award of $30 per week was appropriate where wife chose not to pursue economic independence during the period of separation).

Nadel v. Nadel, 220 A.D.2d 565, 632 N.Y.S.2d 631 (2d Dep't 1995) (reversing 5-year durational limit on maintenance and instating lifetime maintenance where wife left workforce to accommodate husband's career, was unlikely to become self-supporting and parties enjoyed a lavish standard of living).

Fischer v. Fischer, 199 A.D.2d 1028, *606 N.Y.S.2d 494* (4th Dep't 1993) (modifying lower court's ruling of three years maintenance to an award of permanent maintenance where, among other things, plaintiff lacked education and work experience due to the parties' decision that plaintiff would assume the role of full time homemaker and caretaker of the parties' children).

G. Presence of Children in the Home:

In analyzing the presence of children in the home, the court addresses whether a stay-at-home parent should continue to stay at home and receive maintenance, or whether that parent should be required to become self-supporting by returning to work. Courts differ on the application of this factor. Questions addressed by the Court in these situations are,

e.g.: Can the family afford to have one parent stay at home? What are the costs of child care? Do any of the children have special needs?

Blenk v. Blenk, 775 N.Y.S.2d 294 (1st Dep't 2004) (finding that although plaintiff wife had formerly owned her own opthamology practice, "the reality of her situation may be that she will instead be required to care for the child for the rest of her life" thus an award of maintenance must be made).

Greenfield v. Greenfield, 234 A.D.2d 60, 650 N.Y.S.2d 698 (1st Dep't 1996) (finding that based upon husband's net earnings of $5530 per month, his child support of $1,000 per month, personal expenses of $1,166 per month, coupled with the wife's reasonable needs of $1,725 per month and her earning potential of $1,666 per month once she resumes employment in two years, maintenance award increased from $150 per week to $400 per week for 2 years).

Wilson v. Wilson, 203 A.D.2d 558, 612 N.Y.S.2d 158 (2d Dep't 1994) (increasing maintenance award from five years to eight years where wife had ability to be self supporting but her custody of parties' infant child precluded her from immediately obtaining full time employment).

Leabo v. Leabo, 203 A.D.2d 254, 610 N.Y.S.2d 274 (2d Dep't 1994) (finding that where wife was custodial parent of parties' four minor children, courts award of maintenance for a limited period was proper to ensure that wife's needs were met until children were older and she was able to obtain full time employment).

Relf v. Relf, 197 A.D.2d 611, 602 N.Y.S.2d 690 (2d Dep't 1993) (holding that award of maintenance for three years was appropriate where wife had custody of three small children which prevented her from obtaining full time employment).

Milewski v. Milewski, 197 A.D.2d 562, 602 N.Y.S.2d 660 (2d Dep't 1993) (holding that court properly awarded maintenance of $350 per week where wife would be required to take care of parties' child for the rest of her life).

G. Tax Consequences While New York State continues to consider maintenance payments as taxable to the recipient spouse and deductible by the payor spouse, the federal government no longer recognizes this deduction due to the tax bill passed in 2018. For more information, refer to the Tax Issues section found later in this manual.

H. Contributions of Spouse, Parent, Wage Earner & Homemaker:

Klein v. Klein, 296 A.D.2d 533, 745 N.Y.S.2d 569 (2d Dep't 2002) (holding that wife's maintenance award should be increased in light of her active role in caring for the parties' three minor children).

Murtari v. Murtari, 249 A.D.2d 960, 673 N.Y.S.2d 278 (4th Dep't 1998) (finding that wife was entitled to 50 percent of the marital asset as she cared for the parties' children, provided some economic support, and to some extent sacrificed her nursing career while the husband pursued his medical license, however, due to the fact that the wife was relatively self-supporting, no maintenance award was warranted).

Treffiletti v. Treffiletti, 675 N.Y.S.2d 1921 (3d Dep't 1998) (ruling to extend maintenance award until the time that wife becomes eligible for social security, where parties were married 26 years and wife had devoted herself to home and raising children).

Felicello v. Felicello, 240 A.D.2d 624, 659 N.Y.S.2d 1004 (2d Dep't 1997) (finding that wife was entitled a 50% share of husband's business in light of her substantial contributions to the business, as well as, as a homemaker and parent).

L'Esperance v. L'Esperance, 243 A.D.2d 446, 663 N.Y.S.2d 95 (2d Dep't 1997) (holding that wife's economic and non-economic contributions throughout the 19 year marriage supported award of portion of husband's business, engaged in throughout the marriage as well as maintenance).

I. Wasteful Dissipation/Economic Fault:

It is well established that economic fault by one spouse may be considered as a factor in determining the equitable distribution of marital property.

Hasegawa v. Hasegawa, 290 A.D.2d 488, 736 N.Y.S.2d 398 (2d Dep't 2002) (holding that the court properly considered economic fault, namely dissipation and secretion of marital assets, in allocating marital assets).

Coleman v. Coleman, 284 A.D.2d 426, 726 N.Y.S.2d 566 (2d Dep't 2001) (holding that award to defendant of less than 50% of marital assets was proper given his economic misconduct). Katzman v. Katzman, 284 A.D.2d 160, *725 N.Y.S.2d 849* (1st Dep't 2001) (same); Walasek v. Walasek, 243 A.D.2d 851, *664 N.Y.S.2d 626* (3d Dep't 1997) (same); Guneratne v. Guneratne, 214 A.D.2d 871, *625 N.Y.S.2d 354* (3d Dep't 1995) (same).

Solomon v. Solomon, 276 A.D.2d 547, 714 N.Y.S.2d 304 (2d Dep't 2000) (stating that "it is well settled that a party may be penalized in the distribution of assets from a marital estate where that party's egregious conduct has prevented the court from making an equitable determination").

Maharam v. Maharam, 245 A.D.2d 94, 666 N.Y.S.2d 129 (1st Dep't 1997) (holding that where the husband "squandered sizeable sums [of money] on luxury items and in admitted adulterous affairs … a 65%-35% division of marital property was appropriate"). See also Gadomski v. Gadomski, 245 A.D.2d 579 (3 Dep't 1997); Ferdinando v. Ferdinando, 236 A.D.2d 585 (2d Dep't 1997).

Conceicao v. Conceicao, 203 A.D.2d 877, 611 N.Y.S.2d 318 (3d Dep't 1994) (finding that trial court's award of 70% of the marital property to 52 year old wife and 30% to 62 year old husband was warranted on the ground that the husband had engaged in economic misconduct in light of his "tangled financial records, his gambling activities, his attempted secretion of monies and his evasiveness").

Collura v. Puglisi, 204 A.D.2d 589, 612 N.Y.S.2d 202 (2d Dep't 1994) (finding that husband's dissipation of marital assets as a result of being an alcoholic, gambler and libertine should be considered a factor affecting the distribution of marital property).

Wilner v. Wilner, 192 A.D.2d 524, 595 N.Y.S.2d 978 (2d Dep't 1993) (holding that trial court properly awarded the wife 75% of the marital assets where "the record supports the [trial court's] finding that [the husband] dissipated substantial sums of money by gambling").

Goldberg v. Goldberg, 172 A.D.2d 316, 568 N.Y.S.2d 394 (1st Dep't 1991), (affirming trial court's decision which added back to the marital assets subject to distribution, marital funds totaling over $1.8 million. The husband had secreted the funds by transferring them to various trusts and alter ego corporations that he had established. The court ruled that such "dissipation or secreting of marital assets constitutes a form of 'economic fault' which should be considered in making an equitable distribution").

Lenczycki v. Lenczycki, 152 A.D.2d 61, 543 N.Y.S.2d 724 (2d Dept; 1989) (finding that since "wife dissipated the family's saving … during the three-year period between 1982 and 1985 and engaged in a course of conduct designed to conceal her waste of assets from [the husband]" the wife's share of marital assets were charges against her, with at least a portion of the amounts dissipated by her, for the purpose of equitable distribution of the marital assets).

Contino v. Contino, 140 A.D.2d 662, 529 N.Y.S.2d 14 (2d Dep't 1988) (affirming trial court's award of funds that the husband withdrew from bank accounts and then concealed so they could not be distributed. The Appellate Division held that "[s]ecreting assets in order to prevent the trial court from making an equitable distribution supports a finding of economic fault").

But see; Kittredge v. Kittredge, 441 Mass. 28, 803 N.E.2d 306 (2004 Mass. LEXIS 47) (finding that "husband's gambling was not a form of 'conduct' that harmed the marriage and as such, the court did not err in refusing to treat the entirety of the gambling loss as a dissipation). See also Kittredge for explanation of features of a "dissipation."

J. Transfer or Encumbrance:

Where a monied spouse claims not to have the resources to pay maintenance, the court may discover that spouse has actually transferred or secreted assets and income so as to avoid a maintenance award. Courts are allowed under this factor to inquire into all transfers or encumbrances to determine if they were done in order to avoid the support obligation.

2. Duration of Support:

In making a maintenance determination, courts will consider all the factors listed above in determining the duration of a maintenance award.

Palestra v. Palestra, 300 A.D.2d 288, 751 N.Y.S.2d 509 (2d Dep't 2002) (upholding three year durational limit on maintenance award where defendant was 35 years old at the time of trial, had no child-care responsibilities, had many years of experience as a book-keeper, "did not reduce or lose a lifetime earning capacity as a result of having foregone or

delayed education, employment, training or career opportunities during the marriage," and while presently receiving social security disability benefits, earned an off-the-books salary and needed incentive to obtain employment and/or training to become self-supporting).

Fruchter v. Fruchter, 288 A.D.2d 942, 732 N.Y.S.2d 810 (4th Dep't 2001) (modifying lower court ruling to allow for only 12 years of maintenance, finding that this would provide plaintiff with ample time to fulfill her parental obligations and become self-supporting at a level "roughly commensurate with the marital standard of living").

Kirschenbaum v. Kirschenbaum, 264 A.D.2d 344, 693 N.Y.S.2d 149 (1st Dep't 1999) (modified trial court's durational term of 10 years to wife at $4,000 to an award of lifetime maintenance in the amount of $2,000 per month where wife was 48 year old former teacher who had not worked in over 20 years and raised two children).

Ferraro v. Ferraro, 257 A.D.2d 596, 684 N.Y.S.2d 274 (2d Dep't 1999) (holding that wife should be awarded the sum of $1,300 per month retroactive to the date of commencement of the action and for five years from the date of the judgment of divorce where she was in need of rehabilitative maintenance to become self-supporting).

Toffler v. Toffler, 252 A.D.2d 580, 675 N.Y.S.2d 309 (2d Dep't 1998) (holding that a durational maintenance award of $125 per week for two-and-a-half years was sufficient to provide defendant with opportunity to complete college degree and become self-supporting). See also Klein v. Klein, 296 A.D.2d 533 (2d Dep't 2002) (ruling to increase maintenance award to allow plaintiff time to acquire appropriate job skills).

Gulotta v. Gulotta, 215 A.D.2d 724, 627 N.Y.S.2d 428 (2d Dep't 1995) (expressly providing for non-durational maintenance in cases where wife was suffering from a debilitating disease and would be incapable of seeking employment in the future).

McGarrity v. McGarrity, 211 A.D.2d 669, 622 N.Y.S.2d 521 (2d Dep't 1995) (upholding the duration of maintenance award where wife was now gainfully employed and was to receive substantial distributions from husband's profit sharing plan upon his retirement).

Friedman v. Friedman, 216 A.D.2d 204, 629 N.Y.S.2d 221 (1st Dep't 1995) (finding it was proper to limit maintenance to the date on which the youngest child attained the age of 21).

Feldman v. Feldman, 194 A.D.2d 207, 605 N.Y.S.2d 777 (2d Dep't 1994) (holding that wife who was age 61, in poor health and never worked outside the home was entitled to lifetime maintenance).

Rauer v. Rauer, 168 A.D.2d 549, 562 N.Y.S.2d 772 (2d Dep't 1990) (increasing maintenance award from two years to five years where plaintiffs age, troubled state of health, and status as homemaker and mother had reduced her earning capacity and made it unlikely that she would return to the workforce in her prior capacity).

Neumark v. Neumark, 120 A.D.2d 502, 501 N.Y.S.2d 704 (3d Dep't 1986) (holding that given plaintiff's age and the fact that she was virtually un-employable, it was unrealistic to expect her to embark on a new career and thereby become self-supporting in

the limited duration in which the trial court awarded maintenance. As such, reviewing court found that it was error for the trial court to place a time limit on plaintiff's maintenance award). See also Neumark supra (finding that the effect of defendant's retirement plans on his prospective ability to pay maintenance award was not a factor to be taken into consideration by the court, especially where defendant was free to petition a modification of the award should he experience changed financial circumstances in the future).

In accordance to DRL § 236(B) (6)(f), there is an advisory schedule for the duration of maintenance which the Court may use while continuing to consider the factors outline in DRL §236 (B)(6)(e).

3. Life Insurance:

The court may order the payor spouse to maintain life insurance as security for the payment of the maintenance award. DRL § 236(B)(8)(a).

2. Termination of Support:

In accordance with DRL § 236(B)(1)(a) the payor's obligation to support the dependent spouse stops on the death of either party, unless the parties' agree in writing that the payments should continue after death.

The support obligation also terminates upon the remarriage of the recipient spouse, unless the parties agree otherwise in writing. DRL § 236(B)(1)(a).

Courts also have the discretion to order the support obligation terminated where the dependent spouse cohabits with another. Cohabitation is defined as habitually living with another and holding oneself out as married. DRL § 248. Bliss v. Bliss, 66 N.Y.2d 382, 497 N.Y.S.2d 344 (1985). The Court of Appeals held that the legal test is a showing of objective evidence that the wife held herself out to be the wife of another, not simply whether she was habitually living with another man.

5. Agreements:

Parties are free to enter into agreements regarding spousal support, provided "that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment". DRL § 236(B)(3). General Obligations Law §5-311 states that a spouse cannot contract to relieve their liability to support the other "in such a manner that he or she will become incapable of self-support and therefore is likely to become a public charge."

MODIFICATION

A court ordered provision for maintenance in a divorce judgment made after July 19, 1980 may be modified downwards or upwards upon a showing of the recipient's inability to be self-supporting or a substantial change of circumstances, including financial hardship. This modification power also exists where an agreement has been incorporated into an order or dissolution judgment and merges into it and ceases to exist as a separate agreement.

DRL §236 (B)(9)(b), applies to all agreements and expressly authorizes the Court to modify the maintenance provisions of a judgment where there is a surviving agreement which is incorporated into it, upon a showing of extreme hardship. It is difficult to prove extreme hardship. There have been constitutional challenges to this provision.

ARREARS

Any maintenance arrears which have accrued under a judgment or order prior to the making of an application for modification **are not subject to modification or annulment** unless the defaulting party shows **good cause for failure to move for relief from the order directing payment prior to the accrual of the arrears.**

RETROACTIVE PAYMENTS

Retroactive child support payments and spousal maintenance payments should be determined at the time of settlement or trial. These payments are calculated by adding up child support and spousal maintenance payments that are owed prior to the entry of a court order or on consent and commencing from the date the initial request for child support and spousal maintenance.

TAX ASPECTS/ISSUES IN DIVORCE AND SEPARATION

There are many tax issues and considerations attendant to divorce and separation. The parties' filing status, exemptions for dependents, liability for past returns, and the taxable nature of payments and transfers of property that occur as a result of divorce often arise.

An excellent and inexpensive source of tax information is IRS publications, available free, from the IRS, online or from your fax machine. *Form 504, Divorced or Separated Individuals*, for example, sets form a complete discussion of a variety of divorce tax issues.

The IRS web site address where one can find publications is https://www.irs.gov/publications.

CHILD SUPPORT

Child support payments are NOT deductible to the payor spouse and are NOT taxable to the payee for income tax purposes.

MAINTENANCE (ALIMONY)

As of December 31, 2018, under Federal law, any payments received by or on behalf of a spouse or former spouse **under a divorce or separation decree or written agreement are NOT taxable to the payee and NOT deductible** to the payor, pursuant to publication 504. The parties are **permitted to agree** that the maintenance will **not be taxable by the recipient and not deductible by the payor**. Maintenance payments continue to be tax deductible on state income tax returns. For more information on this issue, see the article by Matthew A. Feigin on the alimony deduction.

TRANSFER OF MARITAL PROPERTY

Generally, splitting up ownership of assets has no immediate federal tax consequences. You are allowed to make **tax-free transfers** of houses, cars, other real and personal property, investments held in taxable investment accounts, and so forth **while still married, or as part of a property settlement agreement.**

Internal Revenue Code §1041 makes **property transfer between spouses during the marriage tax-free.** This section also applies to **transfers made to a former spouse of the transferor if the transfer is incident to a divorce (made within one year of the cessation of the marriage, or related to the cessation of the marriage.)** A transfer to children will not qualify as a §1041 transfer.

TREATMENT OF GAINS

Notwithstanding the fact that transfers incident to divorce are tax-free, whomever winds up owning appreciated assets will eventually owe taxes when the assets are sold.

After such a tax-free transfer, the new owner's tax basis in the investment is the same as the old owner's, and the new owner's holding period includes that of the old owner.

It is very important that the client receives the necessary records to compute the tax cost for any item they might later sell. This is usually an issue for the transfer of a house, and investments like mutual funds, stocks, and bonds as well as collectible items and valuable art work.

Pursuant to Internal Revenue Code §121 and recent changes in the tax laws, each individual is entitled to a $250,000.00 exclusion of gain on the sale of a primary residence. Married individuals filing jointly are entitled to a combined exclusion of $500,000.00 as long as they meet certain ownership requirements.

TAX IMPACTING CONSIDERATIONS

The Court must take into consideration tax consequences of distribution of property or a distributive award pursuant to DRL §236(b)(5)(d)(10).

As appreciated investments come with a tax liability attached, appreciated investments are worth less than an equal amount of cash or assets that have not appreciated. Net-of-tax figures should be used to make your property settlement.

FILING STATUS AND TAX LIABILITY

Where the parties have filed a joint tax return, either party can be held liable for the entire amount of any additional income tax, interest and penalties. Thus, another major issue for separated and divorced individuals is whether to file joint or separate tax returns.

Marital standing at year-end determines filing status for the entire year. A person who is married at the end of the year can either file jointly with the soon-to-be ex or use married filing separate status. While married filing separate filers get treated less favorably under the tax rules, filing separate can avoid joint and several tax liability or liability for unfiled returns.

1998 changes to the laws have made it easier for "injured" and innocent" spouses who have filed joint Federal tax returns and who have financially suffered or been penalized because of the actions of their spouses or former spouses. *See Internal Revenue Code Section §6015, IRS Publication 971, Innocent Spouse Relief, and Form 8857.*

The new Innocent Spouse Rule is comprised of three sections, each of which has its own criteria and addresses its own concerns:

1. **Innocent Spouse Status**: relief from **any or all tax liability** with respect to **jointly filed return.** A spouse can now elect to seek innocent spouse status if they meet all of the following five criteria:
    i. A joint return was made;
    ii. There was an understatement of tax attributable to erroneous items of the individual's spouse;
    iii. In signing the return the individual did not know, and had no reason to know, that there was an understatement of tax;
    iv. Taking into account all of the facts and circumstances, it is inequitable to hold the individual liable for the, deficiency in tax; and
    v. The individual files an innocent spouse election with the IRS and elects to apply for relief no later than two years after the date of the Service's first collection activity after July 22, 1998, with respect to the individual.

If the innocent spouse has knowledge of a portion of the understatement but was unaware of the full nature of the understatement and otherwise meets the prerequisite for relief, they are responsible only for the tax relating to that portion.

2. **Limited Liability Status:** 1) the Individual does not qualify for Innocent Spouse Status and 2) the individual would only have to pay tax on any liability which that individual would have incurred if they had filed a separate rather than joint return.

A divorced or separated individual seeking limited liability status with regard to a previously filed joint return must meet the following criteria:

    vi. A joint return was made;
    vii. At the time relief is elected the individual is no longer married to, is legally separated from, or has been living apart at all times for at least 12 months from their spouse or former spouse; or the spouse died.
    viii. The individual elects to apply for relief no later than two years after the date of the Service's first collection activity after July 22, 1998, with respect to the individual; and
    ix. the liability remains unpaid at the time relief is elected.

3. **Equitable Relief Status**: the individual does not qualify for either Innocent Spouse relief or Limited Liability status, but may nevertheless be exempt from any tax liability, **if, considering all the facts and circumstances, it would be inequitable to hold the individual liable for the unpaid tax or deficiency.**

Dependency Exemptions

The general rule is that the custodial parent automatically receives the dependency exemption and the child tax credit, unless the custodial parent signs a written declaration that the non-custodial parent may claim the exemption. Allowing an ex to have the exemption will not preclude the custodial parent from claiming head of household filing status.

The custodial parent must sign a written declaration relinquishing the right to claim a child as a dependent in a given year, *Form 8332, Release of Claim to Exemption for Child of Divorced or Separated Parents.*

The right to claim the children as dependents is often made subject to the payment of child support or other obligations under the agreement.

The child tax credit ($1,000 per year per qualifying child under age 17) is allocated to the party claiming the dependency exemption for a child and cannot be declared by a party not claiming the exemption for that child. Since the child dependency exemption is tied to the child tax credit, calculations should be made to see which parent will receive the highest economic benefit. The child tax credit reduces tax liability dollar for dollar and is not a deduction.

The child care credit ($2,000 per year for one individual in 2022) is related to the credit for employment related expenses of a taxpayer to care for children under the age of 13 years. This may be claimed by a party who cannot claim the child as a dependency exemption.

For older children who are in college, having the dependency exemption is necessary in order to receive benefits under the new education credit and to deduct interest on educational loans.

EXCLUSIVE POSSESSION OF THE MARITAL RESIDENCE IN DIVORCE PROCEEDINGS

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The Legal Aid Society – DV Project
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I. INTRODUCTION

A major issue that commonly arises when spouses decide to divorce is exclusive possession of the marital residence[1]. The issue may be especially contentious, because of the practical difficulties in finding alternate affordable housing and also because of the strong link between child custody issues and exclusive possession of the residence.

Parties always have the option of reaching an agreement concerning the disposition of the marital home. They may agree upon who will have exclusive possession of the marital home, the terms under which that person will have possession, or if owned, whether the home should be sold or proceeds split. However, in the absence of an agreement, the issue must be decided by the court.

In a matrimonial action, exclusive possession of the marital residence, whether owned or rented, may be granted in two ways: pendente lite as an interim temporary award or in the final judgment for a specified period of time after which time the property may be sold, as part of equitable distribution of marital property.[2]

II. STATUTES

Domestic Relations Law § 234 authorizes the Supreme Court to determine any question as to title to, occupancy and possession of property both in the final judgment, or in an interim award pendente lite:

> In any action for divorce, for a separation, for any annulment or to declare the nullity of a void marriage, the court may (1) determine any question as to the title to property arising between the parties, and (2) make such direction, between the parties, concerning the possession of property, as in the court's discretion justice requires having regard to the circumstances of the case and of the respective parties. Such direction may be made in the final judgment or by one or more orders

[1] This memo assumes that the client wants exclusive possession of the marital residence and that it is an appropriate option under the circumstances. In some situations, the client may not want possession of the marital residence because she needs a confidential address.

[2] Also, the issue of exclusive possession often arises in Family or Criminal Court when a petitioner seeks exclusive possession or a "stay away from home" provision as one of the conditions in an order of protection. This memo will not address such orders. An excellent article by Jenifer DeCarli/GULP that covers this topic is included in these materials.

from time to time before or subsequent to final, judgment, or by both such order or orders and final judgment. . . .

Furthermore, the court may make such orders regarding the use and occupancy of the marital home and it household effects without regard to the form of ownership of such property D.R.L. § 236(B)(5)(f).

III. EXCLUSIVE POSSESSION PENDENTE LITE

Because final resolution of a matrimonial action may take a considerable period of time, interim temporary exclusive possession for one of the parties may be appropriate because of safety concerns, particularly when there is domestic violence, and continued joint occupancy by the parties is unsafe. Generally, exclusive use and occupancy of the marital residence may be awarded pendente lite only upon a showing that the award is necessary to protect the safety of persons or property. Brown v. Keating, 166 A.D.2d 220, 564 N.Y.S.2d 101 (1st Dep't 1990) (wife granted exclusive possession because of repeated physical and verbal attacks by husband and extreme domestic strife); Held v. Held, 170 A.D.2d 310, 566 N.Y.S.2d 132 (1st Dep't 1991) (exclusive possession pendente lite was warranted to protect the best interests of the child of the marriage where there was extreme domestic strife caused by husband's repeated physical and verbal attacks on wife); Goodson v. Goodson, 135 A.D.2d 604, 522 N.Y.S.2d 182 (2d Dep't 1987) (exclusive possession denied where wife failed to adequately demonstrate that it was necessary to protect her or her children's safety or the safety of her property).

Notwithstanding the general rule, courts have developed a broader, alternative standard and have awarded exclusive use and occupancy when it is necessary to avoid domestic strife, particularly where the party sought to be excluded has voluntarily established an alternate residence. In Delli Venneri v. Delli Venneri, 120 A.D.2d 238, 507 N.Y.S.2d 855 (1st Dep't 1986), the Appellate Division, First Department, while acknowledging the general standard stated,

> While that is undoubtedly the general rule, the standard for granting such relief should not be so inflexible as to exclude consideration of any other circumstances which would otherwise warrant judicial intervention. The presence of domestic strife is a recognized standard for an award of temporary exclusive possession.

120 A.D.2d at 240. In Delli Venneri, the Appellate Court reversed the trial court's denial of the wife's application for temporary exclusive possession of the marital apartment on a combination of factors: the husband had allegedly threatened the wife; was absent from the apartment for 1-1/2 years between the time he left and the hearing; had alternate housing; and his return would cause obvious strain and potential turmoil. See also Brown v. Keating, supra; Judell v. Judell, 128 A.D.2d 416, 512 N.Y.S.2d 699 (1st Dep't 1987) (lower court should not have denied wife's motion for exclusive occupancy pendente lite where husband's return would cause unnecessary domestic strife and husband

voluntarily lived in Connecticut and had other residences available); De Cillis v. De Cillis, 157 A.D.2d 822, 550 N.Y.S.2d 724, appeal denied, 76 N.Y.2d 706, 560 N.Y.S.2d 988, 561 N.E.2d 888 (1990) (wife awarded exclusive occupancy of the marital residence even though divorce was denied to husband, where husband voluntarily established alternative living arrangements, was absent from the marital residence over 3-1/2 years, and his return would create the potential for unnecessary strife); Tillinger v. Tillinger, 141 A.D.2d 535, 529 N.Y.S.2d 147 (2d Dep't 1988) (wife granted exclusive possession pendent lite where husband had voluntarily established an alternate residence and had conceded that he had moved from the marital residence to avoid continuing marital difficulties which might lead to violence); Preston v. Preston, 147 A.D.2d 464, 537 N.Y.S.2d 824 (2d Dep't 1989) (exclusive possession denied to wife where wife failed to show domestic strife and husband left only temporarily at wife's insistence that she needed "breathing space" or "some time alone"); Wolfe v. Wolfe, 111 A.D.2d 809, 490 N.Y.S.2d 555 (2d Dep't 1985) (exclusion from marital residence pendente lite was proper where husband's presence caused domestic strife and he had voluntarily established an alternate residence for himself); Kristiansen v. Kristiansen, 144 A.D.2d 441, 534 N.Y.S.2d 104 (2d Dep't 1988) (exclusive possession of the marital residence pendente lite should have been granted to the wife and children where husband voluntarily established an alternative residence for himself, the relationship between the parties was acrimonious, and potential turmoil might result if the husband returned to the marital home); Shanon v. Patterson, 294 A.D.2d 485, 742 N.Y.S.2d 653 (2d Dep't 2002) (exclusive possession of the marital residence pendente lite proper where husband left and established his own residence, and the parties had an acrimonious relationship).

Mere petty harassment will not support an interim award of exclusive possession. Fleming v. Fleming, 154 A.D.2d 250, 546 N.Y.S.2d 88 (1st Dep't 1989) (exclusive possession pendente lite of NYC apartment to husband not proper because wife did not intend to voluntarily establish an alternate residence and husband admitted that wife's presence in the marital apartment amounted to no more than "petty harassments").

A. NECESSITY OF A HEARING

An interim award of exclusive possession generally requires a hearing, unless there is a sufficient showing, from affidavits and other supporting documents or corroboration, that interim exclusive possession is necessary to protect the safety of persons or property.

Where the parties' affidavits are conflicting and there are no other corroborating statements or documents, a hearing is required. Willig v. Moses, 190 A.D.2d 570, 593 N.Y.S.2d 232 (1st Dep't 1993) (immediate hearing granting wife interim exclusive use and occupancy was appropriate); Blumenfeld v. Blumenfeld, 96 A.D.2d 895, 466 N.Y.S.2d 63 (2d Dep't 1983) (absent any showing that exclusive possession was necessary to protect the safety of persons and property, wife should not have been awarded exclusive possession prior to trial and without a hearing. The Appellate Division noted that there was no evidence of prior police intervention nor any affidavits by third parties to corroborate wife's allegations of husband's misconduct. Interestingly, the Appellate Division did not disturb the lower court's award of a temporary order of protection);

Formato v. Formato, 173 A.D.2d 274, 569 N.Y.S.2d 655 (1st Dep't 1991) (hearing was necessary for pendente lite relief where the wife's uncorroborated affidavit was disputed by the husband); Waldeck v. Waldeck, 138 A.D.2d 373, 525 N.Y.S.2d 656 (2d Dep't 1988) (lower court erred in granting wife exclusive occupancy pendente lite of the marital residence without a hearing, in view of conflicting affidavits and wife's failure to show by any corroborating evidence that the relief was necessary to protect the safety of persons or property; early trial of the entire case would obviate the need for holding a separate hearing solely on temporary exclusive possession); Harkavy v. Harkavy, 93 A.D.2d 879, 461 N.Y.S.2d 421 (2d Dep't 1983) (hearing required where affidavits of the parties were sharply contradictory and there was no other significant evidence to justify the lower court's grant of exclusive occupancy; expeditious trial would obviate the need for a hearing); Karakas v. Karakas, 154 A.D.2d 439, 546 N.Y.S.2d 11 (2d Dep't 1989) (affidavits were conflicting and evidentiary inquiry should *have been made before granting exclusive occupancy pendente lite; matter remitted to lower court for an immediate hearing on all issues relating to exclusive occupancy and an order of protection).

B. HEARING NOT REQUIRED

Where the parties' affidavits are conflicting, but there is also other corroborating evidence such as witnesses' affidavits, an order of protection, police reports or medical records, courts have granted relief pendente lite without a hearing. De Millio v. De Millio, 106 A.D.2d 424, 482 N.Y.S.2d 517 (2d Dep't 1984) (although the parties' affidavits contained conflicting factual allegations, wife made a sufficient showing that exclusive possession of the marital residence, prior to trial and without a hearing, was necessary to protect the safety of persons and property. Wife's evidence included, inter alia, the undisputed existence of an order of protection and affidavits from witnesses to the husband's conduct); Aquart v. Aquart, 182 A.D.2d 735, 582 N.Y.S.2d 483 (2d Dep't 1992) (award of exclusive possession of the marital residence to the wife was warranted based on the existence of an order to protection which established that the relief was necessary to protect her safety); King v. King, 109 A.D.2d 779, 486 N.Y.2d 291 (2d Dep't 1985) (Appellate Division reversed lower court's award of exclusive possession of the marital residence pendente lite to the husband and denial of an order of protection to the wife, and granted to wife exclusive possession and an order of protection where wife's allegations of physical injuries were corroborated by uncontroverted medical evidence); Harrilal v. Harrilal, 128 A.D.2d 502, 512 N.Y.S.2d 433 (2d Dep't 1987) (interim exclusive use and occupancy of the marital residence to the wife, without a hearing, was proper where wife's allegations of husband's violence were corroborated by third-party affidavit from parties' adult son and were not directly denied by the husband); Kurppe v. Kurppe, 147 A.D.2d 533, 537 N.Y.S.2d 612 (2d Dep't 1989) (wife properly awarded exclusive occupancy pendente lite and a temporary order of protection, without a hearing, where, although there were conflicting accusations of domestic violence between the parties, the daughters' corroborating affidavits supported their mother's allegations and the husband did not seek custody of the children); Ljutic v. Ljutic, 216 A.D.2d 274, 627 N.Y.S.2d 759 (2d Dep't 1995) (award of temporary exclusive possession to the wife was proper where

husband failed to deny the wife's allegations of violence or otherwise to create a triable question regarding possession of the apartment).

In I.O. v. A.O., 228 A.D.2d 301, 643 N.Y.S.2d 587 (1st Dep't 1996), the Appellate Division upheld the lower court's award of temporary exclusive possession of the marital home based on domestic strife. What is significant about this case is that the award pendente lite was made without a hearing. The court stated,

There being no dispute of a significant potential for strife should defendant return, and no genuine issue raised that defendant's exclusion would cause him more than minimal disruption, the motion court's award of temporary exclusive possession, without a hearing, was a proper exercise of discretion.228 A.D.2d at 301; 643 N.Y.S.2d at 588 (emphasis added). See also Lawson v. Lawson, 194 A.D.2d 389, 598 N.Y.S.2d 517 (1st Dep't 1993) (exclusive occupancy properly awarded to wife, without a hearing, where husband had moved out nearly four years earlier and for the first time, during the pendency of the action, expressed his desire to move back into the marital apartment).

C. SPEEDY TRIAL

The remedy for any perceived inequities in a pendente lite order is a speedy trial. Aquart v. Aquart, 182 A.D.2d 735, 582 N.Y.S.2d 483 (2d Dep't 1992); Tillinger v. Tillinger, 141 A.D.2d 535, 529 N.Y.S.2d 147 (2d Dep't 1988); Harkavy v. Harkavy, 93 A.D.2d 879, 461 N.Y.S.2d 421 (2d Dep't 1983). Notwithstanding, orders awarding pendente lite relief may be modified on appeal in the interest of justice. Ljutic v. Ljutic, 216 A.D.2d 274, 627 N.Y.S.2d 759 (2d Dep't 1995) (husband's support obligation was reduced by the Appellate Division to leave him with adequate resources from which to pay his actual, reasonable living expenses").

IV. EXCLUSIVE OCCUPANCY AND EQUITABLE DISTRIBUTION IN THE FINAL JUDGMENT

A. SALE OF MARITAL RESIDENCE

In situations where there is no compelling reason to award exclusive occupancy of the marital residence to either party, the courts will order a sale of the marital residence. However, the court need not direct a sale when only one of the parties wishes to keep the residence; the party wishing to keep the residence should have the option of purchasing the other spouse's equitable share of the residence's value. Ieradi v. Ieradi, 151 A.D.2d 548, 542 N.Y.S.2d 322 (2d Dep't 1989). Consequently, absent unusual or extenuating circumstances and unless title to the marital home is awarded to either spouse, the property should be ordered sold at the time of the divorce. Wojtowicz v. Wojtowicz, 171 A.D.2d 1073, 569 N.Y.S.2d 248 (4th Dep't 1991) (the Appellate Division directed that the property be sold, although ordinarily exclusive possession is awarded to the custodial

parent, the only child living in the marital residence was a 23-year old child, so the premises).

B. EXCLUSIVE OCCUPANCY FOR CUSTODIAL PARENT

When there are minor children in the marital home extenuating circumstances exist, and exclusive occupancy is usually awarded to the spouse who is awarded custody of the parties' minor children. Flanagan v. Flanagan, 118 A.D.2d 681, 500 N.Y.S.2d 34 (2d Dep't 1986) (wife, who was awarded custody of the children, should have exclusive possession of the marital residence until two years after entry of judgment); Marano v. Marano, 200 A.D.2d 718, 607 N.Y.S.2d 359 (2d Dep't 1994) (lower court erred in ordering the immediate sale of the marital residence, and wife was awarded exclusive possession, at her sole expense, until the parties' youngest child reaches age 18 or is sooner emancipated). In fact, D.R.L. §236(B)(5)(d)(3) provides that one factor in equitable distribution that the court must consider is "the need of a custodial parent to occupy or own the marital residence and to use or own its household effect." Accordingly, where there is no showing that either party is in immediate need of the proceeds from a sale, that comparable housing is available in the same area at a lower cost, or that the party who retains possession is financially incapable of maintaining the residence, the courts favor allowing the custodial parent to remain in the marital residence until the youngest child reaches the age of 18 or is sooner emancipated. Leabo v. Leabo, 203 A.D.2d 254, 610 N.Y.S.2d 274 (2d Dep't 1994) (wife, the custodial parent of four children under the age of 18, was awarded exclusive possession of the marital residence until the parties' youngest child is emancipated or until the wife remarries); Mazzone v. Mazzone, 290 A.D.2d 495, 736 N.Y.S.2d 683 (2d Dep't 2002) (wife awarded exclusive occupancy of the marital residence until child reaches the age of 18 or is otherwise emancipated).

It is proper to award exclusive occupancy to the marital home to the custodial parent to enable the children to complete high school. Rice v. Rice, 222 A.D.2d 493, 634 N.Y.S.2d 761 (2d Dep't 1996) (wife granted exclusive possession of marital residence until the youngest child graduates from high school); Litwack v. Litwack, 237 A.D.2d 580, 655 N.Y.S.2d 613 (2d Dep't 1997) (modifying, inter alia, the trial court's award of exclusive possession of the marital residence to the wife until the parties' twins reach age 25, to when they 18 or are sooner emancipated); Waldmann v. Waldmann, 231 A.D.2d 710, 647 N.Y.S.2d 827 (2d Dep't 1996), appeal, 89 N.Y.2d 809, 678 N.E.2d 502, 655 N.Y.S.2d 889 (1997) (modifying, inter alia, the trial court's award of exclusive possession of the marital residence to the wife until the parties' youngest child is 21, to the youngest reaches age 18 or is sooner emancipated).

Exclusive occupancy of the marital residence may also be granted for leased apartments. In Elkon v. Elkon, 59 Misc. 2d 725, 300 N.Y.S.2d 259 (Sup. Ct. N.Y. County 1969), exclusive possession of a rent-controlled apartment was granted to the custodial parent, both pendente lite and as part of the final judgment of divorce. See Ljutic v. Ljutic, 216 A.D.2d 274, 627 N.Y.S.2d 759 (2d Dep't 1995) (award of temporary exclusive possession of rental apartment to the wife); Delli Venneri v. Delli Venneri, 120 A.D.2d 238,

507 N.Y.S.2d 855 (1st Dep't 1986) (wife awarded temporary exclusive possession of apartment which husband had leased in his own name prior to the marriage).

C. EXCLUSIVE OCCUPANCY OF SEPARATE PROPERTY

Although exclusive occupancy of the marital residence may be awarded to the custodial parent, even if sole title is held by the other parent, some courts are loathe to grant exclusive possession if the marital residence is the separate property of the other spouse. Zelnick v. Zelnick, 169 A.D.2d 317, 573 N.Y.S.2d 261 (1st Dep't 1991) ("[w]hile the Equitable Distribution Law makes provision for the use and occupancy of the marital home 'without regard to the form of ownership of such property' [citation omitted], any order so providing must necessarily be limited to the extent that it 'will not deprive a person of his title to or possession of property he or she acquired prior to the marriage [citation omitted]"); Krause v. Krause, 112 A.D.2d 862, 493 N.Y.S.2d 142 (1st Dep't 1985) (husband not entitled to use and occupancy pendente lite of couple's vacation home acquired during the marriage, where vacation residence was wife's separate property purchased with portion of inheritance received from her mother's estate). But see Graziano v. Graziano, 285 A.D.2d 488, 727 N.Y.S.2d 473 (2d Dep't 2001), appeal dismissed, 97 N.Y.S.2d 725, 767 N.E.2d 153, 740 N.Y.S.2d 696 (2002) (wife entitled to exclusive occupancy of marital residence, even though residence was owned solely by husband as his separate property, as she lacked income to house herself and two children over whom she had custody until the youngest child reaches 18 years of age at which time the wife would vacate the premises and the husband would pay to the wife, the wife's share of the increase in value of the marital residence); Goldblum v. Goldblum, No. 2002-00773, 2003 N.Y.A.D. LEXIS 445 (2d Dep't January 21, 2003) (wife granted exclusive use and occupancy of the marital residence until youngest child turns 18; husband bought marital residence with separate property and held title in his name alone, although wife had an interest in the increased value of the home).

D. EXCLUSIVE OCCUPANCY AND FINANCIAL CONSIDERATIONS

Extenuating circumstances warranting an award of exclusive possession to the custodial parent may also include the parents' financial ability to maintain the residence. The need of the custodial parent to occupy the marital residence is weighed against the financial need of the parties. Thus, although there are minor children, a sale may be ordered where the expenses of maintaining the marital home are unaffordable or where the parties are incapable of maintaining it and lower cost housing is available. Stolow v. Stolow, 149 A.D.2d 683, 540 N.Y.S.2d 484, motion granted, in part, motion denied, in part, 152 A.D.2d 599 (2d Dep't 1989) (immediate sale of marital residence was ordered when expense of maintaining marital "mini-mansion" was wastefully extravagant and sale would leave the custodial parent with sufficient resources to purchase smaller residence in the same neighborhood); Behrens v. Behrens, 143 A.D.2d 617, 532 N.Y.S.2d 893 (2d Dep't 1988) (trial court property ordered immediate sale of marital residence when parties were financially incapable of maintaining the home and lower cost housing available

elsewhere on Long Island); Milewski v. Milewski, 197 A.D.2d 562, 602 N.Y.S.2d 660 (2d Dep't 1993) (financial needs of the parties outweighed the wife's needs as custodial parent to exclusive possession of the marital residence).

E. SUMMARY PROCEEDINGS IMPROPER WHEN MATRIMONIAL ACTION IS PENDING

In addition, when a matrimonial action is pending, regardless of whether the husband or wife is owner of the marital premises, the other may not be evicted by summary proceedings in Housing Court, and possession of the marital home should be determined in the matrimonial proceeding. One spouse cannot invoke the limited jurisdiction of the Housing Court to determine the legal status and rights to the marital residence. Rosentiel v. Rosentiel, 20 A.D.2d 71, 245 N.Y.S.2d 395 (1st Dep't 1963) (husband cannot use summary proceeding to evict wife; wife is not a licensee of husband as long as the marriage is unabridged by a court decree or by valid agreement); Padilla v. Padilla, 164 Misc. 2d 740, 626 N.Y.S.2d 656 (Civ. Ct. Bronx County 1995) (rights to ownership and occupancy of marital premises should be resolved in Supreme Court where the parties obtained their divorce, rather than in Housing Court, in the absence of any agreement or judicial determination by a court of competent jurisdiction; 2 RASCH's LANDLORD AND TENANT § 35:38 (4th ed. 1998).

In Wildenstein v. Nineteen East Sixty-Fourth Street Corp., 177 Misc. 2d 517, 676 N.Y.S.2d 846 (Sup. Ct. N.Y. County 1998), a heavily litigated divorce action, the Supreme Court stayed the Housing Court proceedings in which the corporate owner sought to evict the wife. The Supreme Court viewed the housing proceeding as a litigation tactic by a corporate entity under the control or influence of the husband who retained indirect ownership control and decision-making over the corporate entity, finding, "[i]t is no more permissible for a spouse to hide behind a corporate veil and have the Corporation evict the other spouse than it would be for an owner-spouse to do so personally." 177 Misc. 2d at 520; 676 N.Y.S.2d at 846.

V. CONCLUSION

Exclusive possession of the marital residence, whether pendente lite or as part of the final judgment in a matrimonial proceeding, should be considered as one type of relief that may be requested in all cases where there is a marital residence. Factors to consider include safety issues, finances and custody of the children. In domestic violence situations, the advocate and client must decide if the option is appropriate given the circumstances of their particular case.

IMMIGRATION CONSIDERATIONS AND THE VIOLENCE AGAINST WOMEN ACT (VAWA)

The Violence Against Women Act[1] was signed into law in 1994 as Title IV of the Violent Crime and Law Enforcement Act, pursuant to Congress' Commerce Clause powers. VAWA's goal is to improve the prevention and prosecution of violent crimes against women and children. VAWA is the first federal law recognizing and attempting to stop crimes of violence motivated by gender. In pursuit of this goal, VAWA includes provisions such as:

- a requirement that states, territories, and tribal courts give full faith and credit to protective orders issued by all other states, territories and tribal courts
- establishment of a federal civil rights cause of action for victims of gender-motivated crimes of violence
- federal criminal penalties for persons who travel to another state with intent to injure their spouse or partner, or who cause the victim to cross state lines for this purpose, and cause injury to their victims
- federal criminal penalties for persons who travel to another state with intent to violate a protective order and do violate such order
- self-petitioning for legal resident status by battered immigrant women (on behalf of themselves and their children) who are married or related by blood to an abuser with legal resident status, even if the marriage is legally terminated after the petition is filed
- suspension of deportation for battered immigrant women and children who have resided in the U.S.A. for at least three years, if such would result in extreme hardship to the victim or her parent or child

Another important aspect of VAWA for survivors of domestic violence is the Civil Rights Remedy.[2] This provision permits victims of violent crimes sue in federal or state court and to seek money damages, compensatory and punitive damages, an injunction, a declaratory judgment, and attorneys' fees for injuries suffered as a result of gender-based crimes that could be felonies under state or federal law. These crimes include family offenses, sexual assault and rape, physical abuse in the course of one's employment, and felonies against property (as long as they involve injury or serious risk of injury to a person as well). Some examples of what money damages can cover include costs associated with injuries to a victim's person (such as medical bills or counseling) or property, loss of employment or lost time from work as a result of harassment at work, financial compensation for pain and suffering, and punitive damages to punish the attacker.

To prevail on a civil lawsuit pursuant to the Civil Rights Remedy, a woman must prove two things by a preponderance of the evidence:

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[1] P.L. No. 103-322, 108 Stat. 1902 (1994).

[2] Codified at 42 U.S.C. §13981(d)(1997).

(1) that she suffered a "crime of violence"[3] that is seriousness enough to rise to the level of a felony under federal or state law; and

(2) that the violent crime committed against her was motivated, at least in part, by her gender. The perpetrator does not have to have been charged, prosecuted or convicted for the act in a criminal proceeding in order for the VAWA civil rights lawsuit to proceed.

VAWA does not include any express statute of limitations period in which actions must be brought. It is likely that the federal "catch-all" statute of limitations[4] will be applied to VAWA Civil Rights Claims commenced in state as well as federal courts. The "catch-all" provides a four-year limitations period for civil actions arising under federal laws that do not specify otherwise.

[3] An act that involves the use or threat of force.

[4] 28 U.S.C. §1658 (1990).

IMMIGRATION CONSIDERATIONS AND CUSTODY/ VISITATION

As part of the representation of your client, you should know the immigration status of your client, their children and the adverse party and be aware of immigration-related consequences and issues that may arise in the custody case. If you need assistance ascertaining the immigration status of your client or members of their family, please contact your Her Justice mentor.

FAMILY COURT JURISDICTION AND IMMIGRATION STATUS:

Public policy favors granting families living in the U.S. access to the Family Court to resolve conflicts and tensions for the best interests of the children. Courts have consistently held that immigration status, or lack thereof, does not preclude an individual from establishing residency in order to maintain an action for custody. New York follows the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) regarding which court has jurisdiction over a particular custody dispute. The UCCJEA focuses on the physical location of the child, the child's contact and connections in the state, and the child's welfare. It makes no mention of immigration status in determining the relevant factors for jurisdiction.

IMMIGRATION STATUS AND "BEST INTERESTS" ANALYSIS:

In applying the "best interests" standard, the adjudicator weighs a variety of factors in determining who should have primary care of the children. Unlike domestic violence, immigration status is not one of the statutorily mandated factors that the adjudicator must consider. However, immigration status does play into family power dynamics, especially when there are families with members who have different immigration statuses and domestic violence is present. It is important to have an understanding and awareness of these dynamics in developing your case strategy. Please speak to your Her Justice mentor to discuss these issues.

ACCUSATIONS OF KIDNAPPING:

The adverse party may accuse your client of planning to kidnap the children and take them to their home country. Conversely, your client may have concerns that the adverse party will kidnap the children and travel abroad with them. You may want to consult the Federal Parental Kidnapping Prevention Act (PKPA) and the UCCJEA for guidance. You may be able to request supervised visitation from the court because of specific threats to kidnap the children, but this relief is not always granted. The judge may also order that the parties give the children's passports to the Court while the case is pending to ensure that the children are not removed from the U.S. Another option to prevent international child

abduction is to place the children on the Department of State "Children's Passport Issuance Alert Program." Please speak to your Her Justice mentor about how best to handle these concerns.

TRAVEL ABROAD DURING PENDENCY OF CUSTODY CASE:

If your client has custody of the children, they may want to take the children abroad to visit their family during the pendency of the custody case. Before advising them that this is permissible, please speak to your Her Justice mentor. Depending on your client's immigration status, they may not be able to re-enter the U.S. after leaving. Several countries also have exit requirements for children who are citizens of that country. Once they enter certain countries, children may not be able to leave that country without the permission of both parents.

THREATS TO REMOVE CLIENT:

If your client is undocumented, the adverse party may threaten to remove them from the U.S. Please contact your Her Justice mentor if your client has received these threats. You should be aware that, while the adverse party is free to contact federal immigration authorities to report their unlawful presence, they have no power to "remove" them; only the federal government has that authority. There is generally a very small probability that the government will take action to remove your client as a result of another individual's phone call to "report" their unlawful presence in the U.S. In addition, undocumented immigrants are entitled to due process protections and your client may be entitled to a hearing before an immigration judge before they are removed from the U.S. Your client may be eligible for relief from removal before an immigration judge and you should contact your Her Justice mentor if removal proceedings are initiated against them.

IMMIGRATION CONSIDERATIONS AND SPOUSAL SUPPORT/ MAINTENANCE

If an adverse party spouse has filed a family-based petition for the client to gain lawful residency in the United States, they may be held accountable for their support. The adverse party files an I-130 Petition for Alien Relative along with an I-864 Affidavit of Support. Courts have consistently treated the Affidavit as an enforceable contract and have obligated the petitioner spouse to support the spouse even after the parties divorce. Please contact your Her Justice mentor to discuss your case if your client is not a U.S. citizen.

A. The I-864 Affidavit of Support

The Immigration and Naturalization Act ("INA") states that in order for any immigrant to immigrate through a family-based petition and to overcome the public charge ground of inadmissibility, the petitioner filing the I-130 Petition for Alien Relative on their behalf must also file an I-864 Affidavit of Support. INA § 212(a)(4)(C)(ii), (D). By submitting a properly executed I-864, the petitioner is entering into a legally enforceable contract under which the petitioner agrees to "provide the intending immigrant any support necessary to maintain [them] at an income that is at least 125 percent of the Federal Poverty Guidelines for his or her household size." Dep't of Homeland Sec., USCIS, Form I-864, Affidavit of Support Under Section 213A of the Act, https://www.uscis.gov/i-864; 8 USC § 1183a(a) ("No affidavit of support may be accepted by the Attorney General or by any consular officer to establish that an alien is not excludable as a public charge . . . unless such affidavit is executed by a sponsor of the alien as a contract—(A) in which the sponsor agrees to provide support to maintain the sponsored alien at an annual income that is not less than 125 percent of the Federal poverty line during the period in which the affidavit is enforceable; (B) that is legally enforceable against the sponsor by the sponsored alien"). The I-864 form states that "[t]he intending immigrant's becoming a permanent resident is the 'consideration' for the contract." Dep't of Homeland Sec., USCIS, Form I-864, Affidavit of Support Under Section 213A of the Act, which can be found here.

If the petitioner fails to provide this support, the sponsored immigrant may sue them for that support. *Id*. Additionally, if a Federal, State, local or private agency provides any covered means-tested public benefit to the sponsored immigrant, "the agency may ask [the petitioner] to reimburse the amount of the benefits they provided. If [the petitioner] [does] not make the reimbursement, the agency may sue [the petitioner] for the amount that the agency believes [the petitioner] owes." *Id*. The petitioner agrees "to submit to the personal jurisdiction of any Federal or State court that has subject matter jurisdiction of a lawsuit against [the petitioner] to enforce [the petitioner's] obligations under" the I-864. *Id*.

B. The Legal Enforceability of the I-864 Affidavit of Support

Although the I-864 form and governing statute both explicitly state that the affidavit of support is a legally-enforceable contract by the sponsored immigrant, many petitioners have challenged its enforceability. Federal Courts that have considered the issue have uniformly held that the I-864 affidavit of support is in fact enforceable as a contract by the sponsored immigrant. *See, e.g., Chang v. Crabill*, 1:10 CV 78, 2011 WL 2471745, at *2 (N.D. Ind. June 21, 2011); *Al-Mansour v. Shraim*, Civil No. CCB-10-1729, 2011 WL 345876, at *5 (D.Maryland Feb. 2, 2011); *Blain v. Herrell*, Civ. No. 10-00072 ACK-KSC, 2010 WL 2900432, at *7 (D.Hawaii July 21, 2010); *Wenfang Liu v. Mund*, 748 F.Supp.2d 958, 962-64 (W.D.Wis. 2010); *Younis v. Farooqi*, 509 F.Supp.2d 552, 554 (D.Maryland 2009); *Hrachova v. Cook*, No. 5:09-cv-95-Oc-GRJ, 2009 WL 3674851, at*2-*3 (M.D.Fla. Nov. 3, 2009); *Storychenko v. Tompkins*, No. 08-cv-626-bbc, 2009 WL 3126379, *3 (W.D.Wis. Sept. 28, 2009); *Mergia v. Adams*, No. 2:08-cv-1159, 2009 WL 1604706, at *5 (E.D.Cal. June 5, 2009); *Shumye v. Felleke*, 555 F.Supp.2d 1020, 1023 (N.D.Cal. 2008) ("A Form I-864 is a legally enforceable contract between the sponsor and both the United States Government and the sponsored immigrant."); *Cheshire v. Cheshire*, 3:05CV00453TJCMCR, 2006 WL 1208010, at *3 (M.D. Fla. May 4, 2006) ("Both by law and by its terms, Form I-864, signed by defendant, is a valid contract."); *Stump v. Stump*, No. 1:04-CV-253-TS, 2005 WL 1290658, at *4-*6 (N.D. Indiana May 27, 2005); *Schwartz v. Schwartz*, No. CIV-04-770-M, 2005 WL 1242171, at *2 (W.D.Okla. May 10, 2005) ("Specifically, the Court finds that plaintiff, a sponsored immigrant, can maintain an action against defendant, a sponsor, to enforce defendant's obligations under the Affidavit of Support . . . The Court further finds that an Affidavit of Support is a legally enforceable contract."); *Ainsworth v. Ainsworth*, No. 02-1137-A-M2, 2004 WL 5219037, at *2-*3 (M.D. La. 2004); *Tornheim v. Kohn*, No. OO CV 5-84(SJ), 2002 WL 482534, at *4 (E.D.N.Y. Mar. 26, 2002) (discussing legal-enforceability of I-864 affidavits of support, but holding the I-134 that was signed in this case unenforceable).

State courts that have considered the issue have also almost uniformly held that the I-864 is legally enforceable by the sponsored immigrant and some state courts have gone out of their way to emphasize that they do have jurisdiction over such a claim. *See, e.g., Greenleaf v. Greenleaf*, 299131, 2011 WL 4503303, at *3 (Mich. Ct. App. Sept. 29, 2011) ("[W]e hold that the Affidavit of Support was a contract that could be enforced by defendant against plaintiff."); *In re Marriage of Kamali & Alizadeh*, 356 S.W.3d 544, 547 (Tex. App. 2011); *Love v. Love*, 2011 PA Super 268, 33 A.3d 1268, 1275-76 (Pa. Super. Ct. 2011); *Barnett v. Barnett*, 238 P.3d 594, 598-99 (Alaska 2010); *Baines v. Baines*, E200900180COAR3CV, 2009 WL 3806131, at *3-*6 (Tenn. Ct. App. Nov. 13, 2009); *In re Marriage of Sandhu*, 41 Kan. App. 2d 975, 976 (Kan. Ct. App. 2009); *Varnes v. Varnes*, 13-08-00448-CV, 2009 WL 1089471, at *5 (Tex. App. Apr. 23, 2009); *Naik v. Naik*, 399 N.J. Super. 390, 397-98 (App. Div. 2008) ("[W]e hold that when the obligation created by the Affidavit of Support is against a resident or for the benefit of a New Jersey resident, it

may be enforced in the Superior Court of New Jersey. When the action involves, as it does here, a claim between spouses, it should be enforced in the Family Part by the sponsored immigrant."); *Moody v. Sorokina*, 830 N.Y.S.2d 399, 402 (N.Y. App. Div 2007) ("We therefore conclude that the court erred in determining that defendant was not entitled to seek enforcement of the federal affidavit of support on the grounds that the statute was for public benefit only and did not afford defendant a private cause of action."); *Davis v. Davis*, No. WD-04-020, 2004 WL 2924344, at *3-*4 (Ohio Ct. App. Dec 17, 2004); *Muir v. Muir*, FA010452778S, 2002 WL 1837964, at *3 (Conn. Super. Ct. July 10, 2002).

a. Effect of Divorce on Enforceability

As discussed above, the petitioner's obligation to support the sponsored immigrant terminates only upon the occurrence of one of the circumstances listed on the I-864 form. Nevertheless, petitioners have argued that divorce terminates any obligation under the I-864 to support the ex-spouse. Naturally, every court that has considered the argument has rejected it as contrary to the plain language of the governing statute and the I-864 form itself. *See, e.g., Chang v. Crabill*, 1:10 CV 78, 2011 WL 2471745, *2 (N.D. Ind. June 21, 2011); *Hrachova v. Cook,* No. 5:09–cv95–Oc–GRJ, 2009 WL 3674851, at*3 (M.D.Fla. Nov.3, 2009); *Skorychenko v. Tompkins,* No. 08–cv–626, 2009 WL 3126379, at *2 (W.D.Wis. Sept. 28, 2009); *Mergia v. Adams*, No. 2:08-cv-1159, 2009 WL 1604706, at *5 (E.D.Cal. June 5, 2009); *Younis v. Farooqi*, 509 F.Supp.2d 552, 554 (D.Maryland 2009); *Shumye v. Felleke*, 555 F.Supp.2d 1020, 1024 (N.D.Cal. 2008); *Cheshire v. Cheshire*, 3:05CV00453TJCMCR, 2006 WL 1208010, at *4 (M.D. Fla. May 4, 2006); *Schwartz v. Schwartz*, No. CIV-04-770-M, 2005 WL 1242171, at *2 (W.D.Okla. May 10, 2005); *In re Marriage of Kamali & Alizadeh*, 356 S.W.3d 544, 547 (Tex. App. 2011); *Greenleaf v. Greenleaf*, 299131, 2011 WL 4503303, at*3 (Mich. Ct. App. Sept. 29, 2011); *Iannuzzelli v. Lovett*, 981 So.2d 557, 559 (Fla. 3d DCA 2008).

b. Enforceability in Divorce, Spousal Support, and Child Support Proceedings

Sponsored immigrants can seek enforcement of the affidavit in "any appropriate court" and may therefore seek enforcement in divorce, spousal support, or child support proceedings in family court or other appropriate state courts. *See, e.g.,* 8 USC § 1183(a)(e) ("An action to enforce an affidavit of support executed under subsection (a) of this section may be brought against the sponsor in any appropriate court."); *Love v. Love*, 33 A.3d 1268, 1275-76 (Pa. Super. Ct. 2011) (rejecting "the trial court's conclusion that Wife was precluded from enforcing the affidavit of support during the support proceedings and its attendant holding that Wife is required to initiate a separate civil action based upon the Affidavit seeking either compensatory damages or specific performance" and concluding "the Affidavit memorializing Husband's commitment to support Wife at a minimum

baseline level was relevant evidence upon which the trial court was authorized to deviate from the support guidelines"); *Davis v. Davis*, No. WD-04-020, 2004 WL 2924344, at *2 (Ohio Ct. App. Dec 17, 2004) (holding state court presiding over divorce had jurisdiction to hear wife's I-864 enforcement claim against husband).

Although a sponsored immigrant can enforce an I-864 affidavit of support in divorce, spousal support, or child support proceedings, the obligation under the I-864 and the obligation to pay maintenance, spousal or child support should be kept distinct. *See, e.g., Wengfang Liu v. Mund*, 686 F.3d 418, 419-20 (7th Cir. 2012) ("The right of support conferred by federal law exists apart from whatever rights Liu might or might not have under Wisconsin divorce law."); *Greenleaf v. Greenleaf*, 299131, 2011 WL 4503303, at*3 (Mich. Ct. App. Sept. 29, 2011) ("[P]laintiff's equitable obligation to pay spousal support under appropriate circumstances is separate and distinct from his contractual obligation imposed by the Affidavit of Support").

One court explained how the process would work when a sponsored immigrant is seeking both spousal support and support under the I-864 in the same case:

> Because plaintiff's equitable obligation to pay spousal support under appropriate circumstances is separate and distinct from his contractual obligation imposed by the Affidavit of Support, we conclude that the trial court erred in conflating the two obligations and applying them in a manner that it found equitable.
>
> Accordingly, we vacate the spousal support provision of the judgment of divorce and remand for further proceedings. On remand, the trial court shall first determine plaintiff's obligation under the Affidavit of Support and enforce that obligation. It shall determine plaintiff's obligation in reference to the terms of the Affidavit of Support . . . In this context, we note that the Affidavit of Support provides that plaintiff will provide the necessary support to maintain defendant "at an income that is *at least 125 percent* of the Federal Poverty Guidelines" for her household size," not "*up to 125 percent* of the poverty level" as stated by the trial court at the evidentiary hearing . . . In addition, because the Affidavit of Support provides the six circumstances when plaintiff's obligation will cease, the trial court may not set its own date for the termination of plaintiff's obligation. Then, after having determined plaintiff's obligation under the Affidavit of Support, the trial court shall make a separate determination whether defendant is entitled to spousal support. In making its spousal support decision, the trial court shall utilize its discretion and may consider plaintiff's obligation under the Affidavit of Support, as that obligation affects plaintiff's ability to pay and the parties' needs and present situations.

c. Defenses to Enforcement

The normal defenses to enforcement of a contract, such as unconscionability, fraud, or lack of consideration, apply in cases seeking to enforce an I-864 affidavit of support. Charles Wheeler in *Alien vs. Sponsor: Legal Enforceability of the Affidavit of Support* lists several possible defenses that sponsors who wish to defend against enforcement actions may wish to raise, including:

- "While the statute and regulations may be clear, the affidavit itself is ambiguous as to the sponsor's obligation to the sponsored alien. It is the language in the I-864 that determines whether it is an enforceable contract, not what is contained in the statue and regulations."
- "The contract is void for vagueness, since one of the key terms – the duration or term of the contract – is too indefinite."
- "There is a lack of consideration. The sponsor's, and more appropriately the joint sponsor's, promise to support the intending immigrant was a gift, which is unenforceable. Furthermore, the sponsor executed the affidavit only because without the affidavit the alien would be found inadmissible . . . But consular and USCIS officials still retain the discretion to deny the application and find the intending alien likely to become a public charge, even when a satisfactory affidavit is submitted. Hence, the sponsor is receiving little in return for executing the document."
    - Note however that the I-864 form specifically states that the intending immigrant's becoming a permanent resident is the consideration for the contract.
- "The affidavit is an adhesion contract, since the parties (the government and the sponsor) are in disparately unequal bargaining positions."
- "INA § 213A(a)(1)(C) states that the affidavit must be one where the 'sponsor agrees to submit to the jurisdiction of any Federal or state court for the purpose of actions brought under (b)(2).' But that section relates only to reimbursement actions brought by the government."
- "INA § 213A(a)(2), titled 'Period of Enforceability,' states that the 'affidavit of support shall be enforceable with respect to benefits provided for an alien before the date the alien is naturalized as a citizen of the United States, or if earlier, the termination date provided under paragraph (3).' Paragraph 3 adds termination upon acquiring 40 qualifying quarters. The statute does not mention the period of enforcement for actions brought by the sponsored alien, only for actions to reimburse for benefits received by the alien. This bolsters the defense that the affidavit is too vague to be enforceable by the sponsored alien."
- "The sponsored alien never intended to enter into a lasting marital relationship, but was merely using the sponsor to gain immigrant status. If the sponsor can show that the alien committed fraud, this is a complete defense to any future liability."
- "8 CFR §213a.2(e) delineates the ways the contract terminates 'by operation of law,' which leaves open other ways for the contract to terminate in a court's discretion. The statutory and regulatory bases for termination are therefore not exclusive."

Charles Wheeler, *Alien vs. Sponsor: Legal Enforceability of the Affidavit of Support,* Immigration Daily, http://www.ilw.com/articles/2006,0110-wheeler.shtm

d. Effect of Sponsor's Bankruptcy on Enforceability

A sponsor's declaration of bankruptcy should not discharge their responsibility to support the sponsored immigrant under the I-864. Under bankruptcy law, a "domestic support obligation" is not dischargeable under bankruptcy. 11 USC § 523(a)(5). A domestic support obligation is defined as a debt owed to or recoverable by "a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative" that is "in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated." 11 USC §101(14A). The debt must have been established before, on, or after the bankruptcy by a separation agreement, divorce decree, property settlement agreement, a court order, or "a determination made in accord with applicable non-bankruptcy law by a governmental unit." *Id*.

The only bankruptcy courts to have considered the issue have held that a sponsor's responsibility under the I-864 qualifies as a non-dischargeable domestic support obligation. The first court explained:

> Courts determining domestic support obligation look at the substance of the agreement creating the obligation as to whether it constitutes alimony, maintenance, or support, largely disregarding what the agreement is called. A "simple inquiry as to whether the obligation can be legitimately characterized as support, that is, whether it is in the nature of support" is all that is required. A debt is "in the nature of support" if, at the time the debt was created, the parties intended the obligation to function as support. "All evidence, direct or circumstantial, which tends to illuminate the parties subjective intent is relevant." The key in determining whether a debt is a non-dischargeable domestic support obligation under § 523(a)(5) is the intent of the parties.
>
> Clearly the intent of the plaintiff and defendant in signing the Affidavit of Support was to comply with the mandate in 8 U.S.C. § 1182 and to guarantee future support for the plaintiff, an otherwise inadmissible immigrant, at no less than 125 percent of the poverty level until the Affidavit of Support terminated by law. The intent of the government, a party to the Affidavit of Support, was to ensure plaintiff was adequately supported so as not to become a public burden. When plaintiff

> married defendant and arrived in the United States, they were not employable as a United States citizen, and for years they lacked the ability to earn a wage above the poverty level. Defendant swore they had the ability to support plaintiff in the United States as required by United States immigration law and agreed to provide "whatever support is necessary" to maintain plaintiff at or above 125 percent of the poverty level. The intent of the parties in signing the Affidavit of Support, in this case as reflected in the name of the agreement, clearly was to support plaintiff financially until she was able to support herself and avoid becoming a drain on the public benefit system.
>
> To allow defendant now to discharge this obligation would contravene the purpose of § 523 of subordinating a debtor's fresh start to the more compelling interest of requiring debtors to pay all legitimate domestic support obligations. This seemingly harsh outcome is mitigated by the fact that defendant specifically sought out a foreigner to bring to the United States to marry. In doing so, defendant accepted the responsibilities of the arrangement along with its benefits. The Affidavit of Support is non-dischargeable debt under § 523(a)(5)

In re Cook, 473 B.R. 468, 473-74 (Bankr. M.D. Fla. 2012); *see also In re Ortiz*, 6:11-BK-07092-KSJ, 2012 WL 5556935, at *2-3 (Bankr. M.D. Fla. Oct. 31, 2012).

C. Determining the Amount of Support Owed

a. Calculating Amount Owed

After establishing liability, the court will next calculate the amount of support the sponsor owes. The court typically looks at the figures representing 125% of the poverty level for a household size of one for each year that the sponsor failed to support the sponsored immigrant and subtracts from these figures any income or support the immigrant receives from other sources. The sponsor is required to pay the sponsored immigrant the deficiency between the immigrant's income and 125% of the poverty level. *See, e.g., Stump v. Stump,* No. 1-04-CV-253-TS, 2005 WL 2757329, at *6 (N.D.Indiana Oct. 25, 2009) ("[T]he Court finds that awarding damages using the poverty-level for a one-person household is appropriate."); *Cheshire v. Chesire*, No. 3:05-cv-oo453-TJC-MCR, 2006 WL 1208010, at *6 (N.D.Cal. Apr. 4, 2008) ("The sponsor's financial obligation under the affidavit of support should be reduced by the amount of any income or benefits the sponsored immigrant receives from other sources . . . the express terms of Form I-864 provide that a 'sponsored immigrant's assets may also be used in support of [a sponsor's] ability to maintain income at or above 125 percent of the poverty line if the assets are or will be available in the United States . . ."); *Barnett v. Barnett*, 238 P.3d 594, 598-99

(Alaska 2010) ("Existing case law supports the conclusion that a sponsor is required to pay only the difference between the sponsored non-citizen's income and the 125% of poverty threshold"). Courts include any maintenance the sponsored immigrant receives as part of his or her income. *See, e.g., Storychenko v. Tompkins*, No. 08-CV-626-BBC, 2009 WL 3837340, at *3 (W.D.Wis. Nov. 16, 2009); *Stump v. Stump,* No. 1-04-CV-253-TS, 2005 WL 2757329, at *3 (N.D.Indiana Oct. 25, 2009).

b. Duty to Mitigate

The sponsored immigrant's duty to mitigate is often raised by sponsors as a reason to reduce their support obligation. Neither the statute nor the I-864 form mention a duty to mitigate, thus leaving the issue to the courts. Courts that have considered the issue have come to inconsistent conclusions.

The only Federal Circuit Court of Appeals that has ruled on the issue refused, in *Wengfang Liu v. Mund*, to read a duty to mitigate into the statute. 686 F.3d 418 (7th Cir. 2012). In that case, the Justice Department had urged the court to impose such a duty, arguing that "to impose a duty to mitigate would encourage immigrants to become self-sufficient." *Id*. at 422. The Justice Department pointed out that "the duty to mitigate is a conventional part of the common law of contracts and can be enforced against a third-party beneficiary . . . because a third-party beneficiary has the duties as well as the rights of a signatory to the contract" and "invoke[d] . . . the 'canon' of statutory construction that statutory repeals of common law rules are disfavored." *Id*. at 421. The Court acknowledged both the common law duty to mitigate and the canon, but stated that the real "question was whether reading a duty of mitigation into the immigration statue and the regulations and the affidavit-contract would serve or disserve statutory and regulatory objectives . . . If it would disserve them, a common law principle gives way." *Id*. at 421-22.

According to the Court, the purpose of the statue was not to ensure that the sponsored immigrant became self-sufficient, but "to prevent the admission to the United States of any alien who 'is likely at any time to become a public charge.'" *Id*. at 422. The best way to achieve that goal "would involve imposing on the sponsor a duty of support with no excusing conditions. Some such conditions are specified; but why should the judiciary add to them—specifically why should it make failure to mitigate a further excusing condition? The only beneficiary of the duty would be the sponsor—and it was not for his benefit that the duty of support was imposed; it was imposed for the benefit of federal and state taxpayers and of the donors to organizations that provide charity for the poor." *Id*. In addition, "[t]he absence of such a duty serves the statutory objective in a second way: it tends to make prospective sponsors more cautious about sponsoring immigrants." *Id*. The Court reminded the Justice Department that "[t]he poverty-line income is meager, even when enhanced by 25 percent, and a sponsored immigrant has therefore a strong

incentive to seek employment, quite apart from having any legal duty to do so in order to secure the meager guaranty." *Id*.

The Court summarized, "we can't see much benefit to imposing a duty to mitigate on a sponsored immigrant. The cost, besides the sponsor's diminished incentive to screen the alien for a bad work ethic, would be the increased complication of enforcing the duty of support by giving the sponsor a defense—and not even a defense likely to prevail. If Liu doesn't want to work, forcing her to make job applications is unlikely to land her a job . . . Mund's imposition of the defense may be motivated more by spite than by greed. The last thing federal courts need is to be dragged into domestic-relations disputes." *Id*. at 422-23.

In *Stump v. Stump*, a federal district court, prior to the Seventh Circuit's decision in *Wengfang Liu v. Mund,* stated that while the duty to mitigate does not affect liability, it could affect damages as "the duty to mitigate, or avoid, damages is a basic tenant of contract law." No. 1:04-CV-253-TS, 2005 WL 2757329, at *7 (N.D. Indiana Oct. 25, 2009); *see also Hrachova v. Cook*, No. 5:09-cv-95-Oc-GRJ, 2009 WL 3674851, *4 (M.D.Fla. Nov. 3, 2009) (stating "the duty to mitigate, or avoid, damages is a basic tenet of contract law," but holding that defendant in the case before the court failed to provide evidence that plaintiff did not pursue citizenship or make reasonable efforts to find a job). A New Jersey Superior Court went even further, holding outright that "the sponsored immigrant is expected to engage in gainful employment, commensurate with his or her education, skills, training and ability to work in accordance with the common law duty to mitigate damages." 944 A.2d 713, 717 (N.J.Super.Ct. 2008).

Other courts have raised the issue without deciding whether mitigation of damages is in fact an actual defense. *See, e.g., Carlborg v. Tompkins*, No. 10-cv-187-bbc., 2010 BL 261160, at *4 (W.D. Wis. Nov. 03, 2010) ("[D]efendant argues that plaintiff has failed to mitigate her damages by working. Defendant points to no controlling authority supporting his assertion that plaintiff is obligated to seek work to reduce defendant's obligation . . . The law on this issue remains unclear."); *Younis v. Farooqi*, 597 F.Supp.2d 552, 556-57, 557 n.5 (D.MD. 2009) (stressing even "[a]ssuming the plaintiff had an obligation to mitigate her damages by seeking employment, she need not apply for every available job in order to mitigate her losses; she need only make reasonable efforts" and "in the event the plaintiff is unable or even unwilling to attain full-time employment, that does not necessarily relieve the defendant of his liability under the affidavit"); *Love v. Love*, 33 A.3d 1268, 1278 (Pa.Super.Ct. 2011) ("Nevertheless, Wife's alleged failure to mitigate damages is, at best, an affirmative defense for which Husband bears the burden of raising and proving."); *Iannuzzelli v. Lovett*, 981 So.2d 557, 561 n.3 (stating plaintiff, who could not presently prove that she has been unable to sustain herself at 125% of the poverty level, could later seek enforcement should her income fall short of 125% of the poverty level, but "[s]uch claims . . . may be subject to an affirmative defense of 'failure to mitigate' if the claimant intentionally avoids employment").

c. Does Child Support Mitigate the Sponsor's Obligation?

At least one court has held that child support payments paid to a sponsored immigrant should *not* mitigate the petitioner's obligation under the I-864. *Younis v. Farooqi*, 597 F. Supp. 2d 552, 555 (D. Md. 2009). In that case, the plaintiff, a Pakistani citizen, married the defendant, a U.S. citizen. *Id*. at 555. Shortly after the marriage, the defendant executed an I-864 on behalf of the plaintiff. *Id*. The couple later separated and full custody of their only child was awarded to the plaintiff. Defendant was ordered to pay child support and temporary alimony. *Id*. The "parties agree[d] that the plaintiff's alimony should offset the defendant's obligation under the affidavit," but the defendant further argued "that his child support payments to the plaintiff should further reduce that obligation." *Id*. The Court disagreed:

> No federal court has yet examined whether child support payments should mitigate a defendant's contractual obligation under the affidavit. Considering the underlying purpose of child support payments, the court concludes they do not.
>
> In Maryland, child support obligations are determined by considering the needs of the child and apportioning the expense of those needs based on the parents' income . . . The purpose is to ensure children "receive the same proportion of parental income, and thereby enjoy the standard of living, [they] would have experienced had the[ir] . . . parents remained together." Id. at 321. The purpose is not, as the defendant suggests, to benefit the other parent. Moreover, the federal government does not consider child support, as it does alimony, to be part of an individual's gross income for tax purposes, see 26 U.S.C. § 71(a), (c), and the defendant offers no evidence that Congress intended to broaden its definition of income to include child support in this context.
>
> Further, child support is distinguishable from the housing subsidies and educational grants found to constitute mitigating income in *Shumye*, 555 F.Supp.2d at 1026. Those benefits are designed to supplement the beneficiary's income to pay for specific services — housing and education — while child support is designed to meet the needs of the child. As discussed above, child support is a financial obligation to one's non-custodial child, not a monetary benefit to the other parent. In light of these policy considerations, the court concludes that child support payments do not offset the defendant's obligation under the affidavit.

C. Discovery

DISCOVERY

Financial disclosure is compulsory in contested matrimonial actions. The process begins early in the case, even before standard discovery devices are used, with the Statement of Net Worth. The parties in contested matrimonial proceedings must complete and exchange Sworn Statements of Net Worth. See DRL § 236(B)(4)(a).

THE STATEMENT OF NET WORTH

A copy of a Statement of Net Worth provided by the New York Courts can be found at this link: https://www.nycourts.gov/LegacyPDFS/forms/matrimonial/NetWorthStatementFillable.pdf and https://www.nycourts.gov/LegacyPDFS/forms/matrimonial/Net-Worth-Statement-Form-Gender-Neutral.pdf.

A current and representative paycheck stub, recently filed federal and state tax returns and a signed retainer must accompany the Statement of Net Worth.

The Statement of Net Worth is to be filed and served at the earliest of the following:

1. Ten (10) days prior to the Preliminary Conference.
2. As an exhibit to any motion that includes requests for child support, spousal support or maintenance, or counsel fees pendente lite. (You should also file the Statement of Net Worth as an independent document with the court.) If any such motion is filed after the Statement of Net Worth is filed, your motion must include an updated Statement.
3. Upon demand by the opposing party.
4. As ordered by the court.

By requiring the parties to exchange and file a sworn Statement of Net Worth, along with corroborative documentation, New York State mandates the verification of income and expenses. This disclosure may not be waived by either party or by the court.

In addition to the Statement of Net Worth the Court may require income verification such as: past and present federal and state income tax returns; current and representative pay stubs; W-2 forms; employer statements; corporate, business or partnership books and records; corporate and business tax returns; or receipts for expenses. This is typically included in the Preliminary Conference Order, discussed further in the Conferences section of this Manual.

As a sworn statement, the Statement of Net Worth can be used for impeachment on cross-examination at trial.

The Statement of Net Worth may need to be updated several times over the course of your case. You must do this if directed by the court, and you should do this if your client experiences any significant changes to her financial circumstances (and you may also

demand an updated one from the opposing party if you learn of any significant changes to their financial circumstances). Discuss with your Her Justice mentor whether and when you need to update the document.

PRACTICE TIP: You may find yourself in a situation where your client or the opposing party is proposing settlement before the exchange of Statements of Net Worth. This is potentially a precarious situation: settlement before even the most basic exchange of financial information can put your client at a great disadvantage, and raise concerns about your zealousness in representing her. If this situation arises, speak to your Her Justice mentor immediately and before you or your client agree either formally or informally to settlement.

CPLR DISCOVERY DEVICES

The discovery devices found in Article 31 of the CPLR are available in a divorce proceeding, as are sanctions for non-compliance with discovery. It is best practice for the attorney to tailor all discovery requests to the facts and circumstances of each case, and consider whether any/all devices are appropriate for your specific case.

NOTICE TO PRODUCE/NOTICE FOR DISCOVERY AND INSPECTION

This is a document served on the other party, requesting the production of discovery documents. See CPLR § 3120. This device is particularly useful to request documentary proof as to anything on a Financial Disclosure Affidavit requiring verification.

Where the other attorney has failed to produce documents demanded, the attorney who made the demand may present secondary evidence to prove the information contained in the demanded papers and documents.

SUBPOENAS

An attorney may serve third parties with a *subpoena duces tecum,* requesting the production of documents. Personal service of the subpoena is necessary.

WHO IS AUTHORIZED TO ISSUE A SUBPOENA?

CPLR § 2302 authorizes attorneys of record to a party in a case to issue non-judicial subpoenas, and both attorneys and pro se parties to move the court for a judicial subpoena. The Family Court Act § 153 authorizes the Family Court to issue a subpoena to compel the testimony of a witness or the production of documents pursuant to the provisions of CPLR Article 23.

WHAT TYPE OF SUBPOENA DO I NEED?

Article 23 of the CPLR provides for different procedures depending on what you are subpoenaing, and who you are subpoenaing. For instance, a telephone service provider will likely accept service of a non-judicial subpoena by mail, and you will need to mail the subpoena to the company, a copy and notice to your adversary, and then follow up with the company to ensure compliance with the subpoena. But if you need to subpoena police records, you have to notify your adversary 24 hours before submitting a judicial subpoena to the court, and then serve the signed judicial subpoena on the police department. Ask yourself the following questions to determine what type of subpoena you need.

1. What type of evidence are you subpoenaing (see CPLR §§ 2301, CPLR 5224)?
    a. Testimony from a person è Subpoena *Ad Testificandum*
    b. Documents/Records è Subpoena *Duces Tecum*
    c. Information/ statements in answer to questions è Information subpoena
2. Who are you subpoenaing?
    a. Government è Judicial subpoena (CPLR §2307)
    b. Business, corporation, individual è Non-judicial subpoena (CPLR §3120)
    c. Hospital or other department holding medical records è Either a non-judicial subpoena accompanied by a written authorization from the patient, or a Judicial Subpoena (CPLR §3122).

JUDICIAL V. NON-JUDICIAL SUBPOENAS DUCES TECUM

Judicial subpoenas duces tecum are distinguishable from non-judicial subpoenas by the entities they are served on,[1] the procedure for issuing them,[2] where they are returnable,[3] and how they are enforced.[4] Subpoenas demanding records from state or municipal governments must be issued by a court (see CPLR § 2307). For example, to obtain records from the New York Police Department, a litigant must move the court for a judicial subpoena, and if it is granted, serve it upon the department. Records produced pursuant to a judicial subpoena should be made returnable to the court which issued it and directed to the proper records room. If the subpoenaed entity fails to comply with the judicial subpoena, then such failure is punishable as contempt of court pursuant to CPLR § 2308.

Non-judicial subpoenas duces tecum, by contrast, may be issued directly by an attorney to a non-government entity, such as a business, corporation, or individual. For example, to obtain telephone records, an attorney may serve a subpoena upon the telephone service company pursuant to the rules of CPLR §§ 308 and 2303. Records produced pursuant to a non-judicial subpoena may be returnable for inspection to the office of the attorney who issued it. If the subpoenaed entity fails to comply with the subpoena, the issuing attorney

[1] CPLR § 2307.
[2] CPLR §§ 2307. 3120.
[3] Lyon Fin. Servs. v. Pinto Trading Co., 24 Misc. 3d 1237(A) (Kings Cnty Sup. Ct. 2009).
[4] CPLR § 2308.

may move the court to compel compliance. If the subpoenaed entity is a party to the case, failure to comply may be considered the basis for a motion to compel.

WHAT IS THE PROCEDURE FOR ISSUING A SUBPOENA?

As mentioned above, the procedure for issuing a subpoena depends upon the type of subpoena.

Subpoenas Ad Testificandum: Pursuant to CPLR § 2303, a party is required to pay one day's witness fee upon service of the subpoena, as well as traveling expenses for the witness to the place of attendance (usually the courthouse). The witness fee currently is $15.00 (CPLR §8001). Travel expenses are 23 cents per mile for each mile traveled round-trip to the courthouse. Note, however, that there is no mileage fee required for travel wholly within a city. Thus, if your witness is traveling from the Bronx to the Manhattan Family Court, you do not have to provide travel expenses, just the witness fee. A check for the relevant amount should be served along with the subpoena.

Subpoenas duces tecum: Whether they are judicial or non-judicial, subpoenas duces tecum should be served with a Business Records Certification with blank lines for the subpoenaed party to fill out to certify that they were produced by a qualified person able to identify and testify respecting their origin, purpose, and custody in satisfaction of CPLR § 2305 (and so that they are admissible as evidence).

All subpoenas duces tecum should describe each item and category requested with reasonable particularity in order to survive a motion to quash (see CPLR §§ 2304, 3120).

Judicial Subpoena (see sample in Appendix): To subpoena records from a city or state entity, a party or their attorney must submit a Judicial Subpoena Duces Tecum to the court where the action is pending by following a strict timeline:

1. Because a motion to request a judicial subpoena requires an *ex parte* appearance, New York requires that such a motion may only be made upon a full 24 hours' notice to all parties to the action. Notice by telephone call or email is sufficient, but must be made at least 24 hours in advance (CPLR § 2307). It is best practice to provide notice in writing in order to have a record, preferably with a copy of the subpoena to be submitted to the court.
2. An attorney should call the court ahead of time to ask when the court will have time to review a Judicial Subpoena, and then appear in person with an affirmation of 24 hours' notice to the other party(ies), and the unsigned subpoena. The attorney should be prepared to explain why the subpoena is necessary and the requested documents are relevant to the action.
3. If the judge or referee signs the subpoena, it should be served along with a Business Records Certification upon the government agency pursuant to CPLR §§ 2303 and

308. However, the attorney should call the agency ahead of time to determine how they will accept service, and whether they will charge any processing fees.
4. The subpoena should be made returnable to the court which issued it. While subpoenaed records should be returned within 20 days pursuant to CPLR § 3120, the court may write in a different return date.
5. Frequent follow-up with the subpoenaed agency and the court is usually necessary to ensure the records are actually produced. Once the records are sent to the records room, the other parties should promptly be informed of where and when the records are available for inspection.

Non-judicial subpoena (see sample in Appendix): To subpoena records from a non-government entity, an attorney must serve it upon the party with records in the same manner that a summons is served, pursuant to CPLR §§ 2303 and 308. T**he attorney should simultaneously mail notice of the subpoena along with a copy of the subpoena upon all parties to the action (CPLR § 2303).** The subpoena may be made returnable to the attorney, and must give the subpoenaed party at least 20 days to respond (CPLR § 3120). **A copy of the records should be sent to all of the other parties within five days of receiving a response from the subpoenaed entity.**

HOW SHOULD I SERVE A SUBPOENA?

In general, CPLR § 2303 requires that subpoenas be served in the same manner as a summons pursuant to CPLR § 308. The exception to this rule is information subpoenas which may be served via registered or certified mail (CPLR §5224(a)(3)).

Special attention should be paid to the service of judicial subpoenas upon out-of-state third parties. If the judicial subpoena is addressed to a party outside the state of New York, then assess whether that state has adopted the Uniform Interstate Depositions and Discovery Act, or has non-uniform laws governing the service of out-of-state subpoenas. If the UIDDA is adopted in that state, then the judicial subpoena should first be submitted to the clerk of the court in that state which will then issue that subpoena in the form of that state's courts. Service must comply with the laws and rules of that state. Likewise, if an out-of-state party or third party attempts to subpoena your client, then they must comply with New York's UIDDA under CPLR § 3119 and service requirements of CPLR § 308.

Practice tip: Although CPLR § 2303 requires that subpoenas be served in the same manner as a summons pursuant to § 308, in practice, many entities will respond to subpoenas sent via mail or even fax. Before attempting to serve a subpoena, contact the legal department of whatever agency or corporation you will subpoena to ask how they prefer to receive subpoenas. If possible, obtain an individual's name so that you can address the subpoena to their attention. However, be aware that enforcing compliance or surviving a motion to quash may depend upon proper service under the laws of whichever state you are attempting to obtain documents from.

MOTION TO QUASH, FIX CONDITIONS, OR MODIFY A SUBPOENA

If a subpoena is judicial and therefore returnable to the issuing court, then CPLR §2304 provides that a motion to quash, fix conditions or modify a subpoena may be made to that court. If the subpoena was non-judicial and therefore not returnable directly to the court, then a request to quash, modify, or fix conditions in a subpoena must be made directly to the issuing party. If that request is denied, then the requesting party can then make a motion in the Supreme Court (not the family court where the matter is held, see CPLR §2304)

If your client is served with a subpoena by the respondent, you may move the Court for an order quashing or modifying the subpoena under CPLR § 2304. You will need to explain the specific harm your client will suffer if they are compelled to comply.

HOW IS COMPLIANCE WITH A SUBPOENA ENFORCED?

CPLR § 2308 provides for sanctions if a subpoena is ignored and the time limit for compliance is exceeded. Failure to comply with a judicial subpoena is punishable as contempt of court, and the court may impose costs not to exceed one hundred and fifty dollars ($150.00).

Pursuant to CPLR § 2308(b) non-judicial subpoenas may be enforced by filing a motion to compel in Supreme Court. Under CPLR § 2308(b), the court may order compliance and impose costs not to exceed fifty dollars ($50.00). Additional sanctions, including the striking of pleadings and preclusion of the production of evidence, may be sought under CPLR § 3126.

The court is also empowered to issue a warrant directing the sheriff to bring a witness before the court. If the party served with the subpoena continues to ignore the subpoena and motions to compel, they may be committed to jail.

INTERROGATORIES

Pursuant to CPLR §3131, interrogatories can be used in addition to depositions. Requests for the production of documents relevant to the answers can be included.

Specific questions, rather than open-ended or overbroad questions, are more likely to elicit informative answers.

DEPOSITIONS (EXAMINATIONS BEFORE TRIAL)

This disclosure device is commonly used to elicit information regarding only the financial issues in a matrimonial action. Discovery on issues regarding custody or grounds for divorce is not permitted in most of the Judicial Departments.

A demand is served on the other attorney with the date, time and place of the examination, and may demand the production of books, papers and records in the control of the person to be examined.

One should confirm with the adversary that they are ready to proceed on the date noticed.

ADDITIONAL DEVICES

DEMAND FOR ADDRESS

Pursuant to CPLR §3118, a demand for the post office address and residence of a party must be furnished and verified by the party.

NOTICE TO ADMIT

An attorney may issue a notice to admit at least 20 days prior to the trial. This notice may relate to the genuineness of papers, the correctness or representation of photographs, or the truth of any contested, relevant facts.

If the responding attorney fails to serve a statement specifically denying the facts in question or detailing why the facts cannot be truthfully admitted or denied, the facts are deemed admitted for the purposes of trial. Wrongfully denying facts subjects the party in error to pay expenses, including attorney's fees, incurred to prove the facts.

AUTHORIZATIONS AND RELEASES

These are commonly used in a matrimonial proceeding to access information from a third party, for example an accountant or a pension plan. If the adverse spouse is unwilling to sign the authorization, one can bring the release or authorization to Court and ask the Court for a direction requiring the spouse to sign it.

NON-COMPLIANCE WITH COMPULSORY FINANCIAL DISCLOSURE

Pursuant to CPLR §§ 3124,3126, and DRL §236(B)(4)(a), if a party refuses to comply with financial disclosure in a Supreme Court proceeding, the Court can:

1. Order that the issues to which the information is relevant be deemed resolved in accordance with the claims of the party obtaining the order;
2. Prohibit the disobedient party from supporting or opposing claims or defenses or from producing evidence; or
3. Strike provisions, or parts of them, stay proceedings until the order is obeyed, or render judgment by default.

After a good faith effort to obtain the information, the attorney should file a motion to compel/preclude discovery.

UNCOVERING INCOME AND ASSETS

Even where all preliminary discovery requests are complied with, practitioners should not assume that no further discovery is necessary. Some parties will not tell the truth in the required forms and there must be a check on the accuracy and completeness of the disclosure. The required documentation should serve as a STARTING POINT and not the end of the inquiry.

The best practice is to carefully examine the documentation and determine if the documents reveal assets or income hidden by one spouse from the other. If so, additional discovery will be necessary.

Assets can be hidden in several ways, including:

- Denying the existence of an asset
- Transfers to third parties
- Claims that the asset was lost, consumed, or dissipated
- Creation of false debt

TAX RETURNS

The Individual Tax Return, IRS Form1040, reflects a party's salary and wages. The first two pages list all the schedules and attachments to the return.

Sometimes a party will provide the federal and not the state return; sometimes a party will fail to supply schedules or forms reflecting income or major deductions. It is important to review both federal and state returns and all Forms 1099 and W-2.

The following tax schedules should be examined:

- Schedule A-itemized deductions
- Schedule B-interest and dividends
- Schedule C-business and professional income
- Schedule D-gains and losses from stocks, bonds and real estate

- Schedule E-supplemental income and loss
- Form 2119: sale of a residence
- Form 2441: child care expenses

Itemized deductions, detailed on Schedule A, reflect a party's lifestyle and can reveal information useful for imputing income.

Real estate taxes paid, when checked against real property records, may indicate that additional pieces of real property are owned.

Home mortgage interest, if increasing over the years, may indicate a refinancing of the property and that one spouse has retained cash as a result.

Interest income is always derived from an asset. For example, interest income on Lines 8a and 8b of a Form 1040 will indicate that there are sums of money on deposit with banks, brokerages, partnerships, etc.

Dividend income, reported on Line 9 and detailed on Schedule B, sets forth the name of the payor and the amount received. The amount of the principal can be calculated by knowing the dividend-per-share rate.

Business income or losses are reported on Line 12 of the form 1040 and detailed on Schedule C. This will reveal the sales, expenses, and assets of the business. Expenses deducted from business income that represent personal expenditures are included, pursuant to the Child Support Standards Act (hereinafter "CSSA"), as income.

Also included as income for CSSA purposes are investment income, depreciation, and entertainment and travel allowances deducted from business income to the extent to which they reduce personal expenditures.

Capital gains or losses, reported on Line 13 and detailed on Schedule D, relate to assets that have been sold.

Supplemental income and loss, reported on line 17 of the Form 1040 and detailed in Schedule E, reflects real estate rental income, royalty income, and income from trusts, partnerships, and S corporations.

Not Necessarily On The Return

Many types of income will not necessarily appear on a tax return, including:

1. Veteran's benefits, including military retirement benefits and veteran's disability benefits
2. Gifts, prizes, educational grants, lottery, and gambling winnings
3. Income of a new spouse or paramour
4. Expense reimbursements
5. In-kind income

6. Voluntary contributions to pension, retirement, savings plans, medical spending accounts
7. Interest from custodial accounts
8. Voluntary debt reduction.

PAY STUBS/W2S

Employers are required to check various boxes on the employee's Form W-2 to alert the IRS to the existence of certain important payroll deductions. This form can be used to determine if an employee participates in a pension plan or makes elective deferrals to a 401(k), 403(b), 457 or other retirement plan.

Pay stubs/W-2s may also reflect voluntarily deferred income, which is includable as income for CSSA purposes.

Review the Form W -2 for evidence of a benefits "package." For example, many New York City employees have access to the Municipal Credit Union and participate in the New York City pension plan, as well as the New York City Deferred Compensation Plan.

FICA (Medicare and Social Security) taxes actually paid and New York City or Yonkers taxes actually paid are deductible from a parent's income for CSSA purposes. Note that only the amount actually required and paid may be deducted.

Make sure not to overcount the FICA deduction. In 2024, the FICA deduction is 6.2% of wages, up to a limit of $168,600. FICA tax on the remaining wages remains at 7.65% The Medicare deduction of 1.45% on the first $200,000. 2.3% Medicare tax on all wages in excess of $200,000.

CHECKING AND SAVINGS BANK ACCOUNT RECORDS

Review bank statements, check registers, passbooks, and cancelled checks for patterns in or unusual amounts of withdrawals or deposits and transfers to accounts or third parties.

These records will often show a party's standard of living and can indicate regular payments to purchase or maintain property. One can determine whether total expenditures set forth in the statements exceed income. Sometimes cancelled checks may have been removed before they were delivered for discovery. Put all the cancelled checks in order and obtain copies of missing cancelled checks from the bank, if necessary.

EMPLOYERS' RECORDS

Check a party's salary directly with an employer, by subpoena or release.

These records can reveal the employee's work history and a larger context for any overtime work.

Look for an increase in income that may be overdue as well as bonuses, commissions, or income that might have been deferred.

Where a party has left or been laid off from a job, employee records can reveal whether the parting was voluntary, or attributable to the party's wrongful behavior, for example, the result of criminal activity or a refusal to heed warnings and improve performance.

PUBLIC RECORDS AND THE INTERNET

A great deal of useful information is available in the public domain, and may be accessed via the Internet, or using Westlaw or Lexis.

Real estate deeds and mortgage records are a matter of public record, and can be found at the City Register's Office where the property is located.

Pending lawsuits, judgments, and liens can be accessed at the County Clerk's office. Financing Statements regarding a co-op (UCC~1s), security interests, security agreements, and lien filings (UCCs) can also be obtained relatively inexpensively. See the NYS Department of State website here.

If locating a parent is a problem, many states have DMV and Board of Election records available online, or information may be requested from the agency for a small fee.

Corporate information, such as the date of incorporation and the names of corporate officers can be accessed on the New York Department of Corporations website here.

If a parent operates a small business, check the Internet for a website or advertisements that can reveal information about the respondent's professional background, and that of the business.

CREDIT REPORTS

Only a judgment creditor with a "So Ordered" subpoena may access a party's credit report in accordance with a permissible purpose under the Fair Credit Reporting Act. See Baker v. Bronx-Westchester Investigations, Inc., 850 F.Supp 260 (S.D.N.Y. 1994); Klapper v. Shapiro, 586 N.Y.S. 2d 846 (1992). A party's credit report will reveal their address, assets, employment, payment history, and current credit accounts.

Parties may agree to exchange credit reports, but before doing so, be sure to have a thorough discussion with your client about whether she has any concerns about sharing any information contained in her report. You should always review a recent version of your client's credit report with your client when having this discussion.

Information obtained from a credit report may be used to demonstrate, in a contempt proceeding for non-payment of support, that the parent failed to pay support despite an ability to do so, i.e., a parent chose to pay credit card bills rather than child support.

The credit report may also inspire further discovery. For example, the attorney may subpoena from the obligor's creditors their loan documents and applications, and discover a sworn statement of (often-inflated) income and assets.

PRACTICE TIPS: Always thoroughly review with your client any discovery from your client to the opposing party for accuracy and completeness. Never direct your client to complete or produce any discovery forms or documents on her own—you should be available to answer her questions about what she is being asked and provide clarification. In addition, when you receive any discovery forms or responses from the opposing party, always review them with your client to compare the information provided to what she knows or anticipated.

Discovery from Nonparty Witnesses

by Jane Aoyama-Martin, The Legal Aid Society

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DISCOVERY FROM NONPARTY WITNESSES

The narrow purpose of this memorandum is to review the recent CPLR amendments and procedure regarding discovery from nonparty witnesses and the use of a subpoena (testimonial or duces tecum) to obtain documents from nonparties[1]. The need for the subpoena device typically arises during litigation when you are unable to obtain necessary documents directly from opposing counselor a party through the regular discovery devices.

Article 31 of the CPLR governs discovery. The use of a subpoena duces tecum to obtain documents from nonparty witnesses during litigation is considered to be discovery and is therefore governed by all of the provisions of Article 31.

Article 23 of the CPLR specifically governs subpoenas thus providing a mechanism for conducting discovery against nonparty witnesses under Article 31.

I. DISCOVERY PROVISIONS

A. GENERAL PROVISIONS

New York favors full disclosure in litigated cases. CPLR §3101(a) states, "there shall be full disclosure of all matter material and necessary in the prosecution or defense of an action ...." The section only requires that the information sought in discovery be relevant to the proceeding. For disclosure from a nonparty witness, in addition to the relevancy requirement, CPLR §3101(a)(4) mandates service of a "notice stating the circumstances or reasons such disclosure is sought or required."

The main sections of the CPLR applicable to discovery from nonparty witnesses are: CPLR §3106 and §3111 which govern depositions; and CPLR §3120 which governs discovery and inspection of documents.

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[1] The CPLR amendments include changes to the following sections: effective September 1, 2003, CPLR §§2305(b), 3120 and 3122; effective January 1, 2004, CPLR §2303(a). These provisions involve discovery. including the use of a subpoena duces tecum for pre-trial discovery against a nonparty, timing of document production, and procedure for the nonparty to object. (Although not addressed in this memo, effective September 1, 2003, the new section CPLR §3122-a has been added and provides a mechanism for the admission into evidence of business records certified by the custodian of records without the need for the custodian's testimony.)

B. CPLR §3106 and CPLR §3111

CPLR §3106(a) provides, "After an action is commenced, any party may take the testimony of any person by deposition ...." The procedural means for deposing a nonparty witness is through the issuance of a subpoena requiring that nonparty to attend the deposition. CPLR §3106(b) states, "(w]here the person to be examined is not a party…he shall be served with a subpoena." Unless the court orders otherwise, the subpoena must be served upon each party at least (20) twenty days in advance of the deposition date. CPLR §3106(b); CPLR §3107. This type of subpoena is also called a "subpoena ad testificandum" or just "subpoena," for short.

CPLR §3111 supplements the nonparty deposition provisions of CPLR §3106(b) by allowing a demand for production of documents in the subpoena. The statute provides, "[the notice or subpoena may require the production of books, papers and other things in the possession, custody or control of the person to be examined…reasonable production expenses of the non-party witness shall be defrayed by the party seeking discovery."

A subpoena for the nonparty witness and documents must be returnable in the county in which the person resides or has an office. CPLR§ 3110(2). For the purposes of this rule, New York City is considered to be one county. Ordinarily, provided the nonparty witness lives or has an office in New York City, the subpoena can be made returnable in your office during the pretrial stage of the litigation.

C. CPLR §3120

The document production provisions of CPLR §3111 and §3120 should not be confused. CPLR §3111 is used to obtain documents in conjunction with a deposition, whereas CPLR §3120 provides the mechanism for discovery of documents from a nonparty through a subpoena duces tecum.

Under CPLR §3120, after an action is commenced, a party may serve a subpoena duces tecum "on any other person."[2] Under this provision, similar to CPLR §3106, the subpoena duces tecum must be served at least (20) twenty days in advance of the return date. CPLR §3120(2).

Prior to the recent amendments, the method of obtaining documents under CPLR §3120 required a motion on notice to all parties, with service of the motion upon the nonparty in the same manner as a summons. The new amendment eliminates the need for a motion and allows for discovery of documents from a nonparty by mere service of a subpoena duces tecum.

A subpoena duces tecum must specify the time, place and manner of making the inspection, copying, etc. CPLR §3120(2). Most often, the subpoena duces tecum should be made returnable in your office during the pretrial stage of the litigation.

[2] Although CPLR §3120 also governs discovery on parties by notice of discovery and inspection, this memo focuses on discovery from nonparty witnesses.

The new subsection (3) of CPLR §3120 requires service of a copy of the subpoena duces tecum on all other parties at the same time that it is served on the nonparty witness. It also mandates, within (5) five days of compliance, notice to each party that the items produced in response to the subpoena duces tecum are available for inspection and copying, specifying the time and place.

CPLR §3120(4) explicitly exempts this new procedure in situations involving a library or a department or bureau of a municipal corporation, or of the state, or an officer thereof, and still requires a motion made on notice to the nonparty witness and the adverse party pursuant to CPLR §2307.

II. SUBPOENAS

Article 23 of the CPLR governs subpoenas. CPLR §2301 distinguishes subpoenas for testimony from subpoenas for the production of books, papers and other things (duces tecum). In addition, it requires that a trial duces tecum state, on its face, that all papers or items delivered to the court pursuant to a subpoena must be accompanied by a copy of the subpoena.

CPLR §2302(a) allows issuance of a subpoena by an attorney for a party. Unless a court-ordered subpoena is required, most attorneys take advantage of this provision, and most courts also appreciate the use of attorney-issued subpoenas.

In some situations a court-ordered subpoena is required. Under CPLR §2307, a subpoena duces tecum must be issued by the court if service will be upon a library department or bureau of a municipal corporation or of the state.[3]

A. NOTICE REQUIREMENTS FOR SUBPOENAS

Service of a subpoena or subpoena duces tecum is governed by CPLR §2303, which requires that the subpoena be served upon the nonparty witness in the same manner as a summons.

Effective January 1,2004, CPLR §2303(a) was amended to require service of a copy of the subpoena duces tecum on "each party who has appeared in the action so that it is received by such parties promptly after service on the witness and before the production of books, papers or other things.?"[4] The amendment explicitly authorizes service of the copy on the other party by the usual methods for interlocutory papers (e.g. by mail) under CPLR §2103(b). As the amendment applies to "any subpoena duces tecum served in a pending action," it appears to apply to both trial and pretrial subpoenas.

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[3] Also, under CPLR §2302(b), and upon motion on at least one day's notice to the custodian of records, the subpoena duces tecum shall be issued by the court if the subpoena is to compel production of an original record or document where a certified copy is admissible in evidence, or to compel attendance of any person confined in jail.

[4] Since the notice requirements in the amendment explicitly refer to only a subpoena duces tecum, it is unclear whether a copy of a trial subpoena ad testificandum needs to be served upon the opposing party.

Amended CPLR §2303(a) only requires that service of a copy of the subpoena on the other parties be made so that it is received "promptly after service on the witness." In contrast, amended CPLR §3120 requires that the other parties are served at the same time that the subpoena duces tecum is served on the nonparty witness. Since the statutes are arguably inconsistent, and in order to avoid any procedural disputes, the best practice is likely service of the copy on the parties at the same time as service on the nonparty witness.

If documents are sought from a library, department or bureau of a municipal corporation or of the state, the motion for a court-ordered subpoena is made pursuant to CPLR §2307 on at least one day's notice of the motion to the opposing party and to the nonparty witness from whom documents are sought. In practice, some courts require a motion on notice before it will issue a subpoena, while other courts simply sign the subpoena ex parte upon submission.

B. SUBPOENA FEES

CPLR §2303(a) requires that subpoena fees for traveling expenses and one day's witness fee must be paid in advance.

Pursuant to CPLR §800 1 (a), subpoena fees for a person are $15.00 per day plus $0.23 per mi le for travel, except there is no mileage fee for travel wholly within a city. Thus, if the person subpoenaed travels wholly within the City of New York, payment for mileage is unnecessary.

In addition, CPLR §8001(b) states, that if a nonparty witness is subpoenaed to give testimony or produce documents at an EBT, the person shall receive an additional $3.00 for each day.

III. CASE LAW

An opposing party is entitled to notice of all discovery from a nonparty. The leading case is Beiny v. Wynyard, 129 A.D.2d 126,517 N.Y.S.2d 474, reargument denied with further opinion, 132 A.D.2d 190, 522 N.Y.S.2d 511 (rst Dep't 1987). In Beiny, a major law firm (Sullivan & Cromwell) obtained and used privileged documents by subpoena without giving notice to the opposing party. The Appellate Division went further than the lower court in reprimanding the offending law firm, and suppressed all of the materials that were obtained, disqualified the offending law firm, and referred the matter to the local disciplinary committee for further investigation.

In Estate of Kochovos, 140 A.D. I2d 180,528 N.Y.S.2d 37 (ISI Dep't 1988), subpoenas duces tecum were served on nonparty witnesses without giving notice to other parties to the litigation. Although none of the documents obtained were privileged, the lower court suppressed certain documents from being admitted into evidence at trial. The Appellate Division in upholding the lower court stated,

> The service of subpoenas on these nonparty witnesses, requiring production of documents and attendance at a deposition, without notice to the other parties to the action violates the express provisions of CPLR 3107 and 3120(b), which require notice to all adverse parties when such discovery devices are served on non-parties, The conduct here involved evinces (sic) an unprincipled approach to the practice of litigation and is deplored.

Estate of Kochovos, 140 AD.2d at 181.

In a housing court case, Henriques v. Boitano, N.Y.L.J., October 27, 1999, p.30, col. 1 (Civ.Ct., N.Y.Co.), a landlord's firm used subpoenas duces tecum to obtain documents from nonparties without giving the opposing attorneys notice. The 17 subpoenas issued by the petitioner landlord's firm were served on nonparties, including banks, and the subpoenas stated. that the information sought "may be sent directly" to the firm. Although the offending firm claimed that the failure to give notice was the mistake of a young associate and paralegal, and that all of the documents they obtained were returned to the nonparty sources, the court nevertheless suppressed all of the materials and under Rule 130-1,22 N.Y.C,RR. l30-1.1, et seq., assessed sanctions in the form of costs and attorney's fees for the firm's frivolous litigation practice.

Taking and Defending Depositions
by Scott A. Rosenberg, The Legal Aid Society
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TAKING AND DEFENDING DEPOSITIONS

Scott A. Rosenberg

July 20, 2004

1) INTRODUCTION

a) Rules you should know for federal practice:
   i) Federal Rules of Civil Procedure. Read Rules 26, 30, and 32 carefully. Pay special attention to Rule 30(d) (form of objections, instructions not to answer), 30(e) (review of and changes to the transcript), and all of Rule 32 (use of depositions in court proceedings).
   ii) Federal Rules of Evidence. Review the hearsay rules, especially Rules 801(d) (statements that are not hearsay), 803(5) (recorded recollection), and 804(b)(l) (former testimony of unavailable declarant)
   iii) Local Rules. See Local Civil Rules 26.2 (claims of privilege), 30.6 (conferences between *deponent and attorney), and 37.3 (disputes during depositions).*

b) Rules you should know for state practice:
   i) CPLR Article 31 (disclosure), especially CPLR §§3103 (protective orders), 3115 (objections), and 3117 (use of depositions)
   ii) Familiarize yourself with CPLR Article 45 (evidence), especially CPLR §§4514 (impeachment by prior inconsistent statement) and 4517 (prior testimony by unavailable witness)

c) Books and articles
   i) D. Malone & P. Hoffman, The Effective Deposition (NITA 1993)
   ii) R. Haydock, D. Herr & I. Stempel, Fundamentals of Pretrial Litigation, ch. 6 (4th ed. 2000).

Preparing for taking a deposition

d) Begin by clarifying in your own mind why you are deposing this witness. The role the deponent is expected to play in the case profoundly affects how you organize and conduct the deposition. Into what category does the deponent fall?

i) A party opponent whose statements you hope to use to establish liability?
ii) A party opponent whom you expect your adversary to call as a trial witness, and whom you expect to cross examine?
iii) A third party whom you expect to appear as a trial witness, and whom you expect to examine or cross-examine?
iv) A third party who is not expected to testify at trial, and whose statements are expected to be used to establish liability or a defense?
v) A deposition taken to preserve the testimony of your own client?
vi) A witness with background info who is unlikely to testify at trial for either side?

e) Familiarize yourself with:
i) All documents in your file, or produced by your adversary, written by or to the witness, or referring to the witness or information relevant to the witness
ii) All allegations in the pleadings pertaining to the witness
iii) Any interrogatory responses, deposition testimony, or other information obtained in discovery referring to the witness or to information relevant to the witness

2) THREE GUIDELINES FOR GOOD DEPOSITION TECHNIQUE

a) Decide on a logical progression and stick to that order
i) Organize your questions in a systematic fashion and stick to that design. For example, systematically explore this witness' involvement in the case chronologically.
ii) Make lists of all items the witness mentions and then inquire about each item on the list systematically
iii) Deviate from the systematic approach only when there is a strategic reason for doing so (for example, when you do not want the answer to a question to be influenced by related questions). Some examples of this exception are discussed in the section on impeachment.
iv) Avoid chasing "rabbits." A "rabbit" is the mention of a new topic that takes the examiner in another direction. When you see a rabbit, do not chase it. Instead, make a note of it; finish your list; and chase the rabbit later. Unless you are very skilled, chasing rabbits will cause you to leave gaps in your deposition.

b) Before exploring the substance of any communication or event, frame the event in time and place:
i) When did the event occur (date and time)?
ii) Who was present?
iii) Where did the event occur?
iv) How did the communication take place? (In person, by phone, by e-mail?)
v) Who initiated the communication?
vi) How long did the meeting/conversation/event last?

c) After framing the event in time and place, use the funnel technique
    i) Start with open-ended questions. What happened? What was said? Do not ask leading questions in this phase, even if there are details about which you want to ask questions.
    ii) Next, ask questions designed to exhaust the subject. Is that all that was said? What happened next? Was there anything else? Is that everything? Repeat this as a mantra until the witness affirmatively says this is all s/he remembers.
    iii) Fill in gaps. Use your independent knowledge of the event to ask about subjects the witness may have left out. E.g., was there discussion about X?
    iv) Recap. Is it a fair summary of your testimony that on such and such date and time, you discussed x and y and z with so and so and no other subjects
    v) Admissions. Isn't it true that…? Do you agree with me that…?

3) BEGINNING OF THE DEPOSITION: THE USUAL STIPULATIONS

a) What are the usual stipulations?
    i) IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that filing and sealing be and the same are hereby waived.
    ii) IT IS FURTHER STIPULATED AND AGREED that all objections except as to the form of the question shall be reserved for trial.
    iii) IT IS FURTHER STIPULATED AND AGREED that the within examina-tion may be signed and sworn to before any notary public with the same force and effect as though signed and sworn to before this Court.
b) Why stipulate to the usual stipulations?
    i) "Filing" used to refer to a sentence in Fed. R. Civ. P. 30(f)(1) requiring the court reporter to file the transcript with the court or send it to the attorney. An amendment to Rule 30(f)(1) has deleted the reference to filing. Even before that amendment, Local Civil Rule 5.1 provided: "Depositions...shall not be filed with the clerk's office except by order of the court."
    ii) Fed. R. Civ. P. 32(d)(3)(A): "Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time."
c) Best practice is to stipulate that the deposition shall be governed by the Federal Rules of Civil Procedure. If you ignore this advice, make sure to ask the reporter to read what s/he regards as the "usual" stipulations.
d) Make a request pursuant to Rule 30(e) that within 30 days the deponent sign the deposition and, if any changes are made, sign statement reciting the changes and the reasons given for making them.

4) INITIAL "INSTRUCTIONS"

a) Typical initial questions
   i) If you do not hear any of my questions, will you say so, so that I may repeat the question?
   ii) If you do not understand a question, will you say so, so that I may rephrase or repeat the question
   iii) If you realize that an earlier answer that you gave was inaccurate or incomplete, will you indicate that you want to correct or supplement your answer?
   iv) If you want to stop at any time to use the restroom or stretch or get some water, or for whatever reason, will you indicate that you want to do so?
   v) If you find that you are tired or confused or want to take a short break, or stop for the whole day, will you indicate that you want to do so?
   vi) If you do not know or do not remember the information necessary to answer a question, will you please say so?
   vii) If you answer the question, I will assume that you have heard it and understood it and have given me your best recollection. Do you understand that?
   viii) Do you understand that your testimony must be truthful and is subject to the penalties for perjury?
   ix) Do you understand that your testimony in this deposition may be used in court?
   x) Do you understand that when the deposition is over, you will be provided a copy of the deposition transcript to review, make any necessary corrections, and sign? [For purposes of Rule 30(e).]

b) Reasons for asking these questions
   i) Set the witness at ease,
   ii) If the deposition is used at trial to impeach, the witness cannot contend without contradiction that s/he did not hear or understand the question, or was confused or tired, etc.

c) Best practice is to frame these questions as "Will you do X?," rather than "I am going to give you the following instructions." The questions should elicit the witness' assent to the instructions

5) TYPICAL BACKGROUND QUESTIONS

a) Have you ever been deposed before? Testified in court before?
b) Have you ever sued anyone? Have you ever been sued? Involved in a lawsuit?
c) Do you consider yourself to be in good health? Do you have any medical condition that could affect your understanding of my questions or your answers to them in this deposition? Are you taking any medication that

could affect your understanding of my questions or your answers to them in this deposition?

d) What is your address? [If the witness' family is relevant, additional personal questions may be appropriate, including: Whom do you live with? How long have you lived there? Do you have any close family in the area? Are you married? Do you have children?
e) [If medical or other records may have to be requested:] What is your date of birth? What is your Social Security number?
f) Did you meet with anyone to prepare for this deposition? Whom? When? For how long? How many times? Was anyone other than your attorneys present during any of those meetings?
g) Did you review any documents in preparation for this deposition? [You may call for production of any documents used to refresh recollection in a deposition, Fed, R, Evid. 612.]
h) Aside from your attorneys, have you spoken to anyone in order to prepare for this deposition?
i) Have you read the complaint in this case? [Or answer? Or any legal papers in this case]
j) [If interrogatory answers have been served:] Did you assist in the preparation of answers to any interrogatories?
k) Do you have an understanding of what this case is about?
l) What is the highest level of education you have attained (by which I mean attained a degree)? From what institution? When? What degree?
m) Elicit similar information for all other schools attended in reverse chronological order.
n) Have you taken any classes or courses at an educational institution that did not result in a degree? [Same questions.]
o) Any professional degrees?
p) By whom are you currently employed? What is your current job title? When did you begin work in that job title?
q) Elicit similar information for all other jobs/titles in reverse chronological order.
r) Do you have a curriculum vitae? Call for production.
s) In your current job title, who is your immediate superior? What is her/his title?
t) [If job performance may be at issuer] In your current job position, are you evaluated by your supervisor? Who performs evaluations? How often? Most recent? Have you ever been fired by an employer? Been asked to resign?
u) Elicit information about how the office in which this person works fits into the organizational structure.
v) Do you have, or are you aware of, an organizational chart for your office/ division/agency? Call for production.
w) [If the witness' financial records could be relevant.] What banks do you use? What branches? Account numbers? Accounts with any other financial institutions?

6) USING DOCUMENTS DURING A DEPOSITION

a) Important rules of thumb about using documents in a deposition
   i) As a general rule, when you show the witness a document, the witness will remember nothing other than what is in the document. Avoid using documents unless you have a specific purpose for doing so.
   ii) Delay using documents until you have determined independently what the witness remembers/understands about the subject.
   iii) You don't have to show the witness a document just because you are asking questions about it. For example, to find out what the witness did in response to receiving a document, just ask. You need not show the document to the witness to ask that question.
   iv) Typical purposes for using documents in a deposition:
      (1) To identify and authenticate the document. E.g., authenticate a print-out of an e-mail that is not on agency letterhead; verify that a signature on the document is the witness' signature.
      (2) To establish the basis for admissibility of the document under a hearsay exception. E.g., that the document is a business record. But remember: this can also be done by stipulation as part of the pre-trial order or by means of a notice to admit.
      (3) To clarify the meaning of markings, symbols, words or phrases on a document. E.g., on an e-mail, what names belong to the initials indicated on the e-mail?
      (4) To refresh the witness' recollection, especially when you want the witness to confirm a fact. E.g., to confirm that a witness was at a place at (or before or after) a certain time, or that a witness knew a fact before (or after) a certain date.

b) Make enough copies of all documents to be used as exhibits so that you have an "original" and copies for all counsel attending the deposition.

c) Procedure for marking and using an exhibit:
   i) As the reporter to mark the document as Exhibit X (e.g., Witness Name-1 or P-l) for identification.
   ii) I am showing you a document marked as P-l for identification. Can you identify this document?
   iii) What is it?
   iv) Have you seen P-l document before? When did you first see it?
   v) [If signed by the witness] Is this your signature at the bottom of P-l ?
   vi) Ask any other questions needed to demonstrate the authenticity and admissibility of the document and the witness' familiarity with it. Refer to the document by its exhibit number.

d) Reserve your substantive questions about the document until you have finished this procedure. Remember to refer to the document by its exhibit number.

e) Remember that you are not moving or offering the document into evidence. No judge is present during a deposition to receive or admit evidence.
f) You are permitted to ask the witness to make marks or notations on an exhibit to help clarify the witness' testimony.

Example. In the deposition of a building inspector: I'm showing you Exhibit P-1 for identification, which is a diagram of the building. Please mark with an "X" the areas of the building where you found violations of the building code.

g) If you use this technique, you should mark two exhibits, one "clean" document without any markings by the deponent, and a second one for the deponent to mark up.
h) You are permitted to ask the deponent to make a drawing to illustrate or clarify the witness' testimony. If you do so, mark a blank piece of paper as an exhibit and ask the witness to make the drawing on the marked document.
i) At the end of the deposition, retain all deposition exhibits in the deposition file (which will also contain the transcript, all notes, etc.). When you provide copies of the transcript to your adversaries, provide copies of any exhibits that the adversaries didn't otherwise receive during the deposition. (For example, if the witness made a drawing during the deposition, provide a copy of that exhibit along with the transcript.)

7) OBJECTIONS AND INSTRUCTIONS NOT TO ANSWER

a) Three kinds of objections may be raised during a deposition,
    i) Claims of privilege
        (1) Fed R. Civ. P. 26(b)(5) provides generally that where a party withholds information otherwise discoverable on grounds of privilege or work product, "the party shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged, will enable other parties to assess the applicability of the privilege or protection."
        (2) Local Civil Rules 26.2(a) and (b) flesh out this requirement for assertions of privilege or work product made during a deposition. Local Rule 26.2(a) lists the information that presumptively must be disclosed in order to enable other parties to assess the applicability of the privilege. Local Rule 26.2(b) adds that this information must be provided during the deposition to the extent that it is readily available; otherwise, the information must be provided within ten business days.
        (3) To protect a privilege, counsel not only may, but must instruct the deponent not to answer. Under Fed. R. Civ. P. 30(d)(1), this is one of three occasions on which an instruction not to

answer is per- mitted. (See p. 14 below for the other permissible reasons for such an instruction.)

(4) Under Fed. R. Civ. P. 30(c), all objections during a deposition on grounds other than privilege or work product "shall be noted by the officer upon the record of the deposition, but the examination shall proceed, with the testimony being taken subject to the objections." In other words, except for the three cases mentioned in Rule 30(d)(1), after an objection the deposition goes forward, the objection is preserved, and the witness must answer.

ii) Objections to form

(1) Objections to form are waived unless timely made. Rule 32(d)(3)(B) provides that errors "in the form of the questions or answers, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless reasonable objection is made at the taking of the deposition." The parallel provision under state law appears at C.P.L.R. §3115(b).

(2) Common objections include:

(a) No foundation (i.e., assumes a fact not established)
(b) Misstates a fact
(c) Misstates prior testimony
(d) Compound question
(e) Leading
(f) Argumentative
(g) Asked and answered
(h) Ambiguous
(i) Unintelligible
(j) Calls for legal conclusion
(k) Calls for speculation

(3) When a form objection is made, the examiner must decide whether to rephrase the question. If the question is not rephrased, the witness must answer.

(4) General rules on when to rephrase a question:

(a) Questions subject to a legitimate lack-of-foundation objection should be rephrased, or an additional question should be asked first, to cure the objection if possible. If a question inherently requires the witness to make an assumption, first ask the witness to make the necessary assumption and then ask the question.

(b) For other valid form objections, if the question and answer mayor are expected to be used at trial, and the ground for objection can readily be cured, then the best course is to cure it.

Example. If the objection is to a compound question, then withdraw it and ask each part separately.

Example. If the question was indeed confusing and can be made clearer, then withdraw the question and ask a clearer one.

(c) If the question and answer are not likely to be used at trial (e.g., if this deposition or series of questions is simply for the purpose of learning new information), and the witness understands and can answer the question, the best course is generally to ignore the objection and insist on an answer.

iii) Objections to "substance" (competency of a witness or the competency, relevancy, or materiality of testimony)

(1) Substantive objections are not waived by the failure to make them during the deposition unless the ground could have been cured if presented. Rule 32(d)(3)(A) provides that objections "to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition unless the ground of the objection is one which might have been obviated or removed if presented at the time." The parallel provision under state law is C.P.L.R. § 3115(d). Under federal and state law, these objections are preserved automatically for trial as "if the witness were then present and testifying." (Fed. R. Civ. P. 32(b); C.P.L.R. §3115(a).)

(2) Common substantive objections include:

(a) Relevance
(b) Hearsay
(c) Fed. R. Evid. 403 (probative value substantially outweighed by the danger of unfair prejudice, confusion of the issues, etc.)
(d) Authentication
(e) Original document

b) Dealing with a difficult adversary

i) Asserting control over a difficult adversary early during a deposition is critical—especially for less experienced attorneys who may feel unsure of their ground, and whom the adversary may perceive as vulnerable to obstructive tactics.

ii) As a general rule, your goal is to treat your adversary as though *s/he* is not present in the room. Whenever possible, ignore your adversary completely and tell the witness: "You may answer." If you are faced with a valid objection to form, rephrase the question or ignore it, but do not respond or speak to your adversary. Avoid engaging in argument or colloquy with your adversary; indeed, avoid looking at your adversary.

iii) Guidelines on how to handle common obstructive tactics:

(1) Instructions not to answer.

In federal practice, instructions not to answer are permissible in only three circumstances: to protect a privilege, to enforce a court- ordered limitation on evidence, or to present a motion that the deposition is being conducted "in bad faith" or "unreasonably to annoy, embarrass, or oppress the deponent." (Fed. R. Civ. P. 30(d)(5).)

(a) In federal practice, where the instruction is based on a privilege, invoke Local Civil Rule 26.2 immediately and inquire about the matters discussed in Rule 26.2(a)(2)(B).

(b) For federal cases, where the instruction is based on conduct allegedly in bad faith or made to annoy or oppress the deponent, seek a ruling immediately from the Court pursuant to Rule 30(d)(3). Before doing so, draw your adversary's attention to Rules 30(d)(3) and 37(a)(4), which authorize an award of attorneys' fees in connection with a successful motion.

(2) Objections that the inquiry is "irrelevant."

During a deposition, objections on the ground of relevancy are inappropriate.

(a) Relevancy objections are automatically preserved for trial. Thus, relevancy is never a basis for objection during a deposition, much less a basis for an instruction not to answer. If faced with this objection, just look at the witness and state: "You may answer."

(b) Until recently, Rule 26(b)(l) provided that discovery may be obtained regarding any matter, not privileged, that is "relevant to the subject matter involved in the pending action…." A recent amendment to Rule 26(b)(1) modified that language to authorize discovery "relevant to the claim or defense of any party ...." It further provides that "[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action."

(c) A line of inquiry so far afield that it bears almost no relation to the claim or defense would ordinarily be treated as the basis to seek a protective order to protect a party or person "from annoyance, embarrassment, oppression, or undue burden or expense." Rule 26(c).

(d) In state practice, the standard is whether the information is "material and necessary in the prosecution or defense of an action." C.P.L.R. § 3101(a).

(3) Consulting with the witness

In the Eastern District, Local Civil Rule 30.6 expressly forbids an attorney from initiating a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted. Note that this does not prohibit consultation during breaks.

(4) Suggestive objections

Suggestive, "speaking" objections—such as "if you know," "if you remember," and "I don't understand the question"—are prohibited by Fed. R. Civ. P. 30(d)(1), which provides: "Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner." If faced with one of the speaking objections underscored below, try the following:

(a) "If you know" or "if you remember." Looking only at the witness, state: ''This objection is suggestive and therefore is improper. Moreover, as we agreed at the outset, all my questions call for the witness' knowledge as s/he remembers it. You may answer."
(b) "I don't understand the question." Looking only at the witness, state: "This objection is improper. Your attorney's understanding is not being sought. You may answer." Of course, a well-coached witness will respond, "I don't understand the question," in which case you will have to rephrase it.
(c) "Could you rephrase the question?," or, "Try asking the question this way" Do not rephrase the question; repeat it or ask the reporter to re-read it.

8) SEVEN WAYS THAT A DEPOSITION MAY BE USED AT TRIAL

a) Impeachment

A deposition may be used to impeach any witness (whether or not a party, and whether or not adverse) who testifies at trial and was deposed (Fed. R. Civ. P. 32(a)(1); C.P.L.R. §§3117(a)(1), 4514)

b) Admissions

A deposition of any party may be introduced as substantive evidence by any adverse party, whether or not the party who was deposed testifies at trial (Fed. R. Evid. 801(d)(2); Fed. R. Civ. P.32(a)(2); C.P.L.R. § 3117(a)(2).

c) Prior inconsistent statement by a witness

A deposition may be introduced as substantive evidence where a witness (whether or not a party) was deposed, testifies at trial, and the trial testimony is inconsistent with what the witness said during the deposition (Fed. R. Evid. 801(d)(1). Although this Rule works for witnesses who are either parties or non-parties, it is generally needed only for non-party witnesses. The statements of a party, whether a witness or not, may always be offered as admissions by an adverse party.

d) Testimony of an unavailable witness

In federal practice, the deposition of a witness (whether or not a party) may be introduced as substantive evidence where the witness is "unavailable" at the time of trial because of (1) death, (2) absence from the jurisdiction, (3) inability to testify because of age, illness, infirmity, or imprisonment; (4) inability to testify because of lack of memory, or (5} privileged or unprivileged refusal to testify (Fed. R. Evid. 804(a)(1)-(5), 804(b)(1); Fed. R. Civ. P. 32(a)(3).

In state practice, only grounds (1), (2), and (3) are recognized explicitly as grounds of unavailability (C.P.L.R. § 3117(a)(3), and in general, the deposition must have been conducted in the same proceeding or a parallel or subsequent proceeding between the same parties (C.P.L.R. § 3117(c».

e) Refreshing recollection

A deposition may be used to refresh the recollection of any witness who was deposed.

f) Past recollection recorded

In federal practice, a deposition may be used as substantive evidence where a witness who was deposed suffers a loss of memory and recollection is not refreshed using the deposition (Fed. R. Evid. 804(a)(3)). Loss of memory is not recognized as a ground of unavailability in state practice. However, in state or federal practice, a deposition may be used as substantive evidence as the recorded recollection of a forgetful witness if the deposition was near in time to the event. (Fed. R. Evid. 803(5); Richardson on Evidence § 469.)

g) Offer of proof

9) HOW TO USE A DEPOSITION TO PREPARE FOR IMPEACHMENT

a) Objective: Confine, as narrowly as possible, the scope of the witness' testimony at trial by closing off all alternatives.
b) Illustration of the problem: During the deposition, the witness testifies that topics A and B were discussed during a meeting. The examiner fails to

establish that no other topics were discussed at that time. At trial, the witness testifies that topic C was discussed as well. On cross-examination, the witness is challenged on the ground that he did not testify about C during the deposition. The witness says "You never asked me about C."

c) The technique: Use the funnel to foreclose all escapes from a contradiction
d) Begin by asking open-ended questions: Who, what, where, why, when, how, describe, explain. Do not ask leading questions. Find out what the witnesses knows/remembers on her own. Develop a list of the details. On a note pad, keep track of all items on the list.

Example. "We talked about A and Band C and D."

e) Second stage: Exhaust
    i) The goal is to close the door on the list. In other words, establish conclusively that there are no items other than the ones stated on the record.
    ii) Remember that there are other ways to communicate besides talking (letters, faxes, e-mail). You must close the door on all the different possible means of communicating.

        Example. "You talked about A and B and C and D. Was anything else discussed? Is that everything?"

    iii) Remember that subsequent communications can change everything. You must exhaust forward in time as well.

        Example. "Did you have any conversations about X after the meeting?"

f) Third stage: "What about Y? Was Z discussed during that meeting?" Use information you have learned thus far about the case to suggest other topics that may have been omitted.
g) Fourth stage: Recapitulate: "Is it an accurate summary of your testimony that at the meeting with Smith on [date], you discussed topics A and B and C and D, and no others?" Is that correct?" If A, B, C, and D are complex or difficult to paraphrase, then summarize them in a separate sentence and add at the end: "You discussed those four topics and no others, is that correct?"

    Note: This question and answer are being packaged for use during cross-examination at trial. Make your question as clear and simple as possible, and make sure it will be understood if it is read alone and out of context.

h) Final stage: Where necessary for clarity, ask leading questions that follow from the recapitulation.

    Example. "You agree with me that at the meeting with Smith on [date], you did not discuss topic E, is that correct?

i) Illustrating the use of the funnel: see Examples 1, 2, and 3 attached.
j) When should you stop asking questions?

i) The technique of drawing a circle around the ultimate question. (The ultimate question is the one you will ask during cross-examination at trial.)
    (1) First, write down a leading question you want to ask during cross examination at trial ("Isn't it a fact that you never discussed X with Smith?").
    (2) Next, using the funnel technique, write down all the questions you would have to ask the witness during the deposition in order to close every avenue of escape from the answer you want at trial.
    (3) Finally, erase the leading question from your deposition outline, leaving only the circle of questions "surrounding it."

ii) As a general rule, avoid confronting a witness with a contradiction; instead, save the contradiction for impeachment. Where the witness is expected to try to explain away the contradiction at trial, anticipate the explanation. Then using the funnel technique, ask all the questions you need during the deposition in order to foreclose the explanation at trial.

iii) To fill in gaps, or not to fill in gaps? There is no general rule about whether to ask a gap-filling question during a deposition. The danger of asking is that the witness will be reminded about X during the deposition when that deposition testimony would otherwise have been omitted. The danger of not asking is that the record may not clearly reflect the witness' position on X, so that X will become an avenue of escape at trial. Often, the decision to fill in a gap about X will tum on whether the witness is or should be aware of the significance of X at this stage in the deposition.

k) When to deviate from the general rule about sticking to a logical order

i) At times, the most effective way to close a door is to ask a door-closing question out of order, in an unrelated portion of the deposition

ii) This technique can be used most effectively if the witness does not foresee the real purpose for asking a question, and/or if the witness can be led to believe you want a different answer than the one you would like.

Example. The witness, a process server, says that he served the tenant. His log, however, says that he was in a different building. The contradiction could be reconciled if the witness says that the log is inaccurate. Early in the deposition, before discussing service on the tenant, ask questions designed to show that the process server keeps very accurate logs. Let the process server believe you want an admission that s/he keeps inaccurate records.

Example. The witness, a Borough Commissioner of the Buildings Department, was involved as an architect in private practice in heroic efforts to save dilapidated buildings from demolition. He has

submitted a declaration attesting that a building should be demolished. Before discussing the condition of the building, ask questions designed to show that a good architect can save any building.

l) Technique for using the deposition at trial to impeach
   i) See Example 1 on p. 31 for an illustration of the technique.
   ii) This technique uses the routine questions asked at the start of a deposition (and is one reason those questions are asked). ("If you do not understand a question, will you ask me to rephrase it? If you do not hear a question, will you ask me to repeat it? If at any time you need to supplement or amend an answer, will you do so?") The technique also uses the fact that the witness reviewed and signed the deposition (which is why you should insist that the witness review and sign the deposition pursuant to Rule 30(e)).
   iii) This technique is most effective when the portion of the deposition read in court is short, preferably a single question and answer (which is why you should ask recapitulation questions as part of the funnel technique).

10)USING A DEPOSITION AT TRIAL FOR ITS TRUTH

a) Background on the hearsay rules
   i) When offered for its truth, deposition testimony is hearsay. Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c). If it is to be admitted as substantive evidence, deposition testimony must satisfy one of the hearsay exceptions.
   ii) Rules 801-807 of the Federal Rules of Evidence are not the only federal hearsay exceptions. Rule 802 provides that hearsay is not admissible except as provided "by these rules or by other rules prescribed by the Supreme Court...." (emphasis added). The Advisory Committee Notes to Rule 802 list some of those other rules; among the most important is Fed. R. Civ. P. 32.
   iii) The provision parallel to Fed. R. Civ. P. 32 in New York law is C.P.L.R. §3117.

b) Admissions
   i) Federal and state law provide that the deposition of a party may be used by an adverse party "for any purpose." Fed. R. Civ. P. 32(a)(2); C.P.L.R. §3117(a)(2). The phrase "for any purpose" means for substantive evidence as well as for impeachment. Under New York law, the party need not be adverse at the time of trial if it "was adversely interested when the deposition testimony was given." C.P.L.R. § 3117(a)(2).
   ii) Where a patty's deposition testimony is inconsistent with his or her trial testimony, the cross-examiner may (especially in a jury trial)

prefer to impeach using the deposition rather than merely introducing the deposition testimony as an admission.

iii) Under federal and state law, if only part of a deposition is offered in evidence, an adverse party may require the offeror to introduce any other part "which ought in fairness to be considered." Fed. R. Civ. P. 32(a)(4); Fed. R. Evid. 106; C.P.L.R. § 3117(b).

iv) See Example 4 for an illustration of how to use a deposition as evidence of an admission and how to require additional parts to be read.

c) Prior inconsistent statements

i) Any time a deposition is used to impeach, it may also be used to introduce a prior inconsistent statement as substantive evidence (so long as the statement is relevant and otherwise unobjectionable). The Federal Rules of Evidence expressly make a prior inconsistent statement admissible for its truth. Fed. R. Evid. 801(d)(1). Although not codified in the C.P.L.R., this hearsay exception is judicially recognized in New York. *Letendre v. Hartford Acc. & Ind. Co.*, 21 N.Y.2d 518,289 N.Y.S.2d 183 (1968).

ii) The procedure for introducing at trial a prior inconsistent statement in a deposition is the same as the procedure for using deposition testimony to impeach.

d) Testimony of an unavailable witness

i) In federal court, any former deposition testimony of any person, whether or not a party, may be introduced as substantive evidence if the person is "unavailable" at the time of trial. As noted, unavailability may be caused by (1) death, (2) absence from the jurisdiction, (3) inability to testify because of age, illness, infirmity, or imprisonment; (4) inability to testify because of lack of memory, or (5) privileged or unprivileged refusal to testify (Fed. R. Evid. 804(a)(l)-(5), 804(b)(l); Fed. R. Civ. P. 32(a)(3).

ii) Under New York law, only grounds (1), (2), and (3) are recognized explicitly as grounds of unavailability (C.P.L.R. § 3117(a)(3)).

iii) In practice under New York law, in general, the deposition must have been conducted in the same proceeding or a parallel or subsequent proceeding between the same parties (C.P.L.R. § 3117(c)). An exception to this limitation applies to a deposition in another case that was admitted in evidence at trial in that case. If the deponent is now unavailable on grounds (1), (2), (3), or because of a valid privilege, that deposition may be admitted in evidence as former testimony under C.P.L.R. § 4517.

iv) See Example 5 for an illustration of how to offer the testimony of an unavailable witness.

v) Example 5 also illustrates how to make objections to deposition testimony introduced at trial. See Point H below for a discussion of this issue.

e) Refreshing recollection

i) A witness' recollection may be refreshed with anything, including the witness' deposition testimony. When used to refresh recollection, the deposition testimony is not evidence and is not read aloud. Instead, the witness is shown the relevant portion of the testimony, asked to read it, and asked whether it refreshes the witness' recollection.
ii) The rules regarding reading related portions of deposition testimony (Fed. R. Civ. P. 32(a)(4), Fed. R. Evid. 106, C.P.L.R. § 3117(b)) do not apply to refreshing recollection, since the deposition is not being offered in evidence. The only evidence is the refreshed memory of the witness
iii) See Example 6 for an illustration of using a deposition to refresh recollection.

f) Past recollection recorded
i) In federal court, any witness who testifies that his or her recollection is not refreshed is deemed to be "unavailable." Fed. R. Evid. 804(a)(3). In that event, deposition testimony regarding the point on which there is a lapse of memory is not hearsay and may be introduced for its truth.
ii) This exception—adopted in 1974 in the wake of the Watergate hearings, at which many witnesses testified that they lacked a present recollection of past events—is sometimes known as the "Watergate exception" to the hearsay rules.
iii) Although the so-called Watergate exception works with a party or non-party witness, in practice it would not be used with an adverse party. (The deposition of an adverse party is admissible under independent hearsay exceptions.) The technique is therefore used with either a non-party or one's own witness.
iv) The Watergate exception has not been adopted in New York State. In state court, deposition testimony that fails to refresh recollection may be introduced only insofar as it qualifies as a recorded recollection. To satisfy that exception, it must be shown that the matter was fresh in the witness' mind at the time of the deposition. This showing may not be difficult with a friendly witness, but may be unattainable if the witness is hostile.
v) See Examples 7 and 8 for illustrations of introducing the deposition testimony of a non-party as former testimony and past recollection recorded.

g) Offer of Proof
i) An offer of proof may be used to establish that certain evidence is relevant, or that a foundation will be established for certain questions, or that a line of questioning is proceeding in good faith.

Example. Where an expert will testify later in a case, and an earlier witness alludes to facts that will be established by the expert, an offer of proof would be used to show what the expert testimony will be.

ii) See Example 9 for an illustration of using an offer of proof to show that certain testimony is relevant.

h) Making objections at trial to deposition testimony offered in evidence
   i) Rule 32(b) provides that, subject to any waiver of objections to form, "objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying." The parallel provision in state practice is C.P.L.R. §3115(a).
   ii) This means that when a deposition is read at trial, you must make timely objections in the midst of the testimony as though the witness were present in the courtroom. If the objection is to form, the court will inquire whether the objection was preserved (made during the deposition) and, if so, it will be ruled upon. If the objection is to form and was not preserved, it will be overruled.

11)HOW TO PREPARE TO DEFEND A DEPOSITION

a) Why is a witness' deposition performance important?
   i) Quality of a deposition performance may influence settlement options
   ii) Information obtained during a deposition may be used by your adversary as a basis for seeking additional discovery or to conduct additional investigation
   iii) A deposition may play an important role at trial
      (1) The deposition of a party opponent may be used for any purpose; see Fed. R. Civ. P. 32(a)(2). A party opponent's deposition may be read into the record even if it doesn't impeach
      (2) The deposition of any person may be used at trial to impeach, see Rule 32(a)(1).

b) Prepare yourself first
   i) Review all documents the witness received, wrote, or that pertain to the witness
   ii) Review any other prior statements of the witness. Letters, affidavits, prior testimony, prior deposition transcripts, public statements
   iii) Review the pleadings
   iv) Get the big picture in mind. How does this witness relate to the case? Where does she fit in the chronology? What does your adversary intend to do with this deposition?
   v) Know your legal arguments.

c) Preparing the client on the substance of what happened
   i) How many preparation sessions? For an important witness who is expected to testify, two preparation sessions before the deposition are recommended.
   ii) Instruct the client not to discuss the case or the deposition with anyone other than you.

iii) Should you refresh the client's memory?
    (1) Advantage to not refreshing: The opposing side learns nothing from an "I don't remember."
    (2) Disadvantage to not refreshing: If the client testifies at trial that he does remember, the testimony can be impeached using the deposition.
    (3) With regard to a potential trial witness, the better practice is to re- fresh on issues likely to be the subject of questioning at. trial and which the witness would be expected to remember
iv) How to refresh the client's recollection. Start by asking the client to recount the key facts to you, in the client's own words and in chronological order. After finishing, go back and direct the client to key factual areas and, if necessary, to documents already produced to the other side.
v) Do not show the witness documents that have not been produced to the other side. They are subject to production under Fed. R. Evid. 612.
vi) Do not instruct the witness to "answer this way." But you may explore different ways a question may be answered truthfully.
vii) Go over anything embarrassing
viii) When should you explain the legal theory to the client?
    (1) As a general rule, don't try to teach the client the law. Instruct the client not to offer any opinions about the law. Any question during a deposition calling for such an opinion should be met with an objection to form.
    (2) An exception to the general rule: If the client is sophisticated and can be expected to understand the legal issue, then a client who is educated about the legal theory will be better able to explain the facts in a helpful way.

        Example: Prior to class certification, a potential class representative is often asked at a deposition whether s/he knows the case is a class action, whether s/he knows what that means, and whether s/he wants to sue alone or as part of a class action. A limited understanding of what a class action is and what that means is essential.

ix) sq

d) Preparing the client on procedure (how to answer questions at the deposition)
    i) Explain what a deposition is: Questioning under oath by the opposing attorney. Describe the setting in the room. Who will be present, where they will sit, etc.
    ii) Explain how the deposition will be used, at trial and otherwise.
    iii) Explain the attorney-client privilege and the fact that everything you now discuss is privileged.
    iv) Advise the client that there are two cardinal rules:

(1) Tell the truth. Explain the concept of perjury. Additionally, explain that untruthful answers generally lead to inconsistencies that are uncovered.
(2) In general, don't volunteer information. Give only the information needed to answer a question and no more.

v) Advise the client to listen to each question carefully. Tell the client to make sure s/he understands the question before answering

vi) Pause before answering (a) to allow the attorney to object, and (b) to think.

vii) Listen to the objections and, most importantly, follow the attorney's lead on objections. Explain that objections can be used to help the witness understand how best to answer.

Example. If the objection is: "Objection, the question is unclear," then the witness should consider carefully whether she understands the question. If she doesn't, she should say so.

Example. If the objection is: "Objection, that was not her testimony," then the witness should consider carefully whether the question correctly reflects her prior testimony. If it doesn't, she should say so.

Note that "speaking objections" like these are technically improper (the correct objection is "objection to form"), but that rule is commonly breached during a deposition.

viii) The witness should use one of the following answers whenever possible:
(1) Yes
(2) No
(3) I don't know
(4) I don't remember
(5) I don't understand the question
(6) I don't understand the questions
(7) I can't answer the question

Note: If the witness answers (5) or (6), there probably should have been an objection to form before the answer.

ix) Answer the question and stop.

x) Don't volunteer unnecessary advice like "You'd have to ask X," or "I would have to consult my diary." The questioner's job is to ask these questions.

xi) Now is not the time to plead your side of the case. Clients sometimes think that if they only make a sufficiently eloquent plea, the other side will surrender.

xii) Avoid adjectives

xiii) Don't get informal. No jokes. No asides.

xiv) Don't speculate. Don't guess

xv) Don’t bring documents with you (especially not any notes taken during the preparation sessions).
xvi) Don’t refer to documents that are not the subject of questioning. However, with documents that you know the other side has, refer to the documents rather than attempt to paraphrase. ("I would have to refer to the document.")
xvii) Exceptions to the "don't volunteer" rule:
(1) Don’t hold back key information on core issues.
(2) Don’t be afraid to say that a question is unfair because it makes an improper assumption. But note that such a question should have been met with an objection to form before the client began the answer. If the client has to say this, the attorney is not alert enough.
xviii) Don’t argue. The attorney's job may be to argue; but that is not your job.
xix) If you think of a correction, make it,
xx) Use names, not pronouns.
xxi) Distinguish corporations from individuals
xxii) During the dep, the client may ask for a short break if she feels tired or confused or needs to consult.
xxiii) The client may consult with you if she needs clarification before an answer. But you may not initiate a conversation with the witness while a question is pending except to give instructions about a privileged matter.
xxiv) During breaks, stay with your lawyer. Don't consult with anyone else.

e) Warn about the interrogator's habits, tricks, demeanor
f) Consider doing a mock deposition
g) You can show videotapes of depositions. Go through and annotate important points.

12) DEFENDING DEPOSITIONS

a) Bring a colleague to take notes.
b) Listen carefully to every question as though pearls of wisdom are raining down. The defender's job is not to take notes, but to listen intently and make necessary objections.
c) Be aware of your client's signs, signals, body language. Is the witness tiring? Frustrated? Misunderstanding?
d) Objections
i) As to any privileged matter, raise the claim of privilege. Direct the witness not to answer. Do not selectively waive the privilege.
ii) As to non-privileged matter, all objections, except as to form, are preserved for trial.

Example. A hearsay objection is preserved and need not (and should not) be made during a deposition.

For common "substantive" objections, see page 13.

iii) Form objections are not preserved for trial. An objection to form that is not preserved during a deposition is waived. If the deposition testimony could be used at trial and that a form objection would be sustained, the objection should be made now.

iv) For common form objections, see page 11-12.

v) In deciding whether to object, consider whether the objection is likely to be sustained.

Example: "Leading" is a proper form objection. But if the deponent is your client and the questioner is a party opponent, a "leading" objection would be overruled at trial. Thus, there is little purpose in preserving such an objection during a deposition.

Example: If the deponent is a non-party, a "leading" objection could be sustained at trial—but only if it is preserved.

vi) When a form objection is made, the questioner must decide whether to rephrase the question. In deciding whether to rephrase, the questioner must also decide whether the objection would probably be sustained at trial and whether it matters.

Example: If the deposition testimony is not likely to be used at trial, then the questioner may not care about the objection.

vii) If the question is not rephrased, the witness must answer. The only basis for directing a witness not to answer is to protect a pri vilege, to enforce a court-ordered limitation on evidence, or to present a motion that the deposition is being conducted "in bad faith" or "unreasonably to annoy, embarrass, or oppress the deponent." (Fed. R. Civ, P. 30(d)(5).)

SECTION 3: SAMPLE DOCUMENTS

HER JUSTICE

A. Initial Documents

CHANGE IN NOTARY REQUIREMENTS

On January 1, 2024 CPLR 2106 was substantially amended to allow ANY person to submit an affirmation instead of an affidavit, with essentially the same force and effect. Now, in civil proceedings, any Pro Se litigant can swear to the truth of something without the requirement of a notary.

However, in a Divorce, the Verified Complaint, Sworn Statement of Removal of Barriers, and the Statement of Net Worth must still be signed before a notary to comply with other provisions of the DRL.

Therefore, we believe it is best practice to continue notarizing all documents that have previously required notary signature. This limits liability, claims of malfeasance or fraud and takes very little additional effort. The samples herein include the notary language.

NOTICE ON SAMPLE LANGUAGE

Her Justice acknowledges that anyone of any race, age, sexual orientation, gender identity, nationality, religion, socioeconomic background, immigration status, language of fluency, or education level may be victimized by domestic violence[1]. Therefore, we made our materials gender neutral in their discussion of domestic violence, best legal practices, and explanations of the substantive law and practical application of the law. Please note, per standard legal practice, we do not make language edits to direct quotes of legal statute.

However, when it came to our samples, we had to consider additional factors. Court room professionals commonly do not acknowledge the gender pronouns or the chosen name of LGBTQ+ people in the court room. In fact, a Lamba Legal survey of 2,376 LGBTQ+ people found that 19% of the survey respondents who had appeared in a court at any time in the past five years had heard a judge, attorney, or other court employee make negative comments about their sexual orientation, gender identity, or gender expression[2]. The blatant homophobia and transphobia in the court room may result in a client being unfairly scrutinized for gender neutral pronouns being left in court submitted documents. Therefore, we made the decision to use gender neutral names but not gendered pronouns in our samples.

The language used in affidavits, motions, orders, etc. submitted on behalf of your client should reflect the gender pronouns and name they identify with. We encourage you to advocate for your client by affirming their gender identity and sexual orientation in and outside of the court to the extent the client feels comfortable.

DIVORCE QUESTIONNAIRE

This Questionnaire should be used during the initial client interview to obtain basic information about the client and their spouse, assist in the preparation of documents and identify the relief sought by the client in the divorce action

CLIENT INFORMATION

NAME:

Last* First Middle

* Make sure that the last name provided by the client is legally their last name. Some clients do not use their married names and will go by their maiden names. If the client legally changed their last name to that of their spouse's, that name must be used for purposes of the divorce action.

PREFERRED PRONOUNS:

(Client's preferred pronoun and Adverse Party's preferred pronoun)

MAIDEN NAME:

(Client's last name before they got married, if different from current last name.)

SOCIAL SECURITY NUMBER:

(State law now requires this information on the Certificate of Dissolution-DOH-2168 9/97.)

CURRENT ADDRESS:

Street Apt. #

City State Zip Code

IS CLIENT STILL LIVING WITH THEIR SPOUSE? Yes ☐ No ☐

DOES CLIENT WISH TO KEEP THEIR CURRENT ADDRESS AND/OR SOCIAL SECURITY NUMBER CONFIDENTIAL FROM THEIR SPOUSE?*

Yes ☐ No ☐

* Note that matrimonial documents are confidential, so their address and SSN will not be accessible to anyone other than their spouse.

COUNTY

New York ☐ Bronx ☐ Kings ☐ Queens ☐ Richmond ☐

PHONE NUMBERS: **( )** _____ (H)

( ) _____ (W)

( ) _____ (Other: _____)

(The client should provide a daytime and evening telephone number where they can be reached and receive messages. If the client does not have a telephone, request the number of a relative, neighbor or friend for a contact number. Clients should also be advised that they must respond promptly or within 24 hours to all telephone calls.)

DATE OF BIRTH:

Month Day Year

PLACE OF BIRTH:

City State Country

RACE:

☐ Black ☐ White ☐ Asian

☐ South Asian ☐ Native American ☐ Bi-Racial

☐ Latina ☐ Other: _____

HIGHEST LEVEL OF EDUCATION COMPLETED:

☐ GED ☐ High School ☐ College

☐ Post College ☐ Partial College (How Many Years ___?)

☐ Vocational/Trade School ☐ Partial High School (How Many Years ____?

IS ENGLISH THE CLIENT'S FIRST LANGUAGE? ☐ Yes ☐ No

If the answer is "no," what is her first language?

IF THE CLIENT'S ANSWER IS "NO", WILL THEY REQUIRE AN INTERPRETER AT OTHER CLIENT MEETINGS? ☐ Yes ☐ No

NAME OF INTERPRETER:

ADDRESS OF INTERPRETER:

TELEPHONE # OF INTERPRETER:

Information Re: Client Employment

NAME AND ADDRESS OF EMPLOYER: (If applicable)

Name

Address

INCOME*: _____ _____

(Weekly) (Bi-weekly) (Monthly)

* Client should provide proof of their source(s) of income at the time of the initial client interview. Specify if amount is net or gross income.

CLIENT'S PROOF OF EMPLOYMENT INCOME:

☐**Paycheck** ☐**W-2 For Income** ☐**Tax Return**

IF THE CLIENT IS NOT EMPLOYED, WHAT IS/ARE THE CLIENT'S SOURCE(S) OF INCOME?

☐ Public Assistance ☐ Disability (SSD) ☐ Soc Sec (SSI)

☐ Unemployment ☐ Worker's Compensation ☐ Child Support

☐ Alimony (Maintenance)

☐ Other (Please indicate source: _____)

AMOUNT(S) RECEIVED*: _____ _____

(Weekly) (Bi-weekly) (Monthly)

* Client should provide proof of their source(s) of income at the time of the initial client interview.

PROOF OF CLIENT'S SOURCE OF INCOME:

☐ Budget Letter (Public Assistance) ☐ Check

☐ Statement ☐ Other: _____

<u>Information Re: Client's Medical and Dental Health Insurance</u>

DOES THE CLIENT HAVE HEALTH INSURANCE BENEFITS? ☐ Yes ☐ No

If the answer is "no", please skip to next page. If the answer is "yes", answer the following:

IS/ARE THE INSURANCE BENEFIT(S) PROVIDED BY AN EMPLOYER OR OTHER SOURCE(S)? ☐ **Employer** ☐ **Other**

IS THE SPOUSE COVERED UNDER THESE BENEFIT(S)? ☐ Yes ☐ No

IS/ARE THE CHILD(REN) OF THE MARRIAGE COVERED UNDER THESE BENEFIT(S)?

☐ Yes ☐ No

Group Health Plan*: _____

Address: _____

ID #: _____

Plan Administrator (If Known):

Type of Coverage: _____

** New York State law now requires the parties to a divorce action to: (a) indicate whether they have health insurance, and (b) designate responsibility to the appropriate party for maintaining those benefits on behalf of the child(ren) of the marriage. One parent is obligated to secure and maintain health insurance for all the children of the marriage until the age of 21 years. If any child under the age of 21 currently does not have health insurance coverage, one parent will be designated as the legally responsible parent to secure and maintain health insurance coverage. Proof of coverage, and all pertinent information, must be submitted to the Court along with the final divorce documents.

For any child under the age of 21 who does not have health insurance coverage, does either parent have health insurance coverage available through an employer?

Client: ☐ Yes ☐ No Spouse: ☐ Yes ☐ No

If so, what is the cost of said health insurance coverage for the child:

$ _____ per _____.

If either: (i) the cost of health insurance coverage exceeds 5% of the Combined Parental Income, or (ii) service providers are more than 30 minutes or 30 miles from the custodial parent, then the Court will not obligate this parent to secure and maintain coverage because the coverage is inaccessible. In this case, the child must be enrolled in a New York State subsidized health insurance program.

If the client receives medical and/or dental benefits from their employer, indicate as such above. If the client is a recipient of Public Assistance, they will most likely receive Medicaid. In this instance this will qualify as health insurance benefits and complete the information above.

If the client and the child(ren) of the marriage are covered under the spouse's benefits, the divorce papers where indicated should reflect that the spouse shall maintain health benefits on behalf of the child(ren). If the client has no information about their spouse's health benefits, the divorce papers should indicate that the client will maintain the health benefits.

If your client currently receives health insurance benefits through their spouse, please note that the client will not be a covered family member under the policy once a judgment of divorce is granted by the court. The non-participant spouse may continue coverage under

COBRA for up to three years, but this will be provided to the non-participant spouse at cost, unless the participant spouse agrees to pay or is ordered to pay this cost.

INFORMATION RE: MARRIAGE

NUMBER OF YEARS THAT THE CLIENT HAS LIVED IN NEW YORK STATE CONTINUOUSLY: _____

(Confirm that the client has lived in the State for a minimum of two years. If the client has lived in New York State for less than two years, see Domestic Relations Law Section 230, outlined on page 9 of the Divorce manual.)

DATE OF MARRIAGE: _____

Month Day Year

PLACE OF MARRIAGE: _____

City State Country

WERE THE CLIENT AND SPOUSE MARRIED IN A RELIGIOUS (i.e.,Priest, Minister or Rabbi) OR CIVIL CEREMONY? ☐ Religious ☐ Civil

DATE THE CLIENT AND SPOUSE BEGAN TO LIVE SEPARATE AND APART:

_____

Month Day Year

IS THIS THE CLIENT'S FIRST MARRIAGE? ☐ Yes ☐ No

IF THIS IS NOT THE CLIENT'S FIRST MARRIAGE, HOW MANY TIMES HAS THE CLIENT BEEN MARRIED? _____

IF THIS IS NOT THE CLIENT'S FIRST MARRIAGE, HOW DID THE CLIENT'S PREVIOUS MARRIAGE(S) END? _____

(Indicate if marriage(s) ended by divorce, annulment or death.)

SPOUSE INFORMATION

Re: General Spouse Information

NAME OF SPOUSE:

Last First Middle

SOCIAL SECURITY NUMBER:

CURRENT RESIDENCE ADDRESS OF SPOUSE (meaning address within last 30 days):
(The client must provide accurate information for purposes of service and determining venue.)

Street Apt. #

City State Zip Code

IF THE SPOUSE IS CURRENTLY INCARCERATED, THE CLIENT MUST PROVIDE THE CORRECT NAME AND ADDRESS OF THE CORRECTIONAL FACILITY WHERE THE SPOUSE IS INCARCERATED AND THE INMATE NUMBER. THE CLIENT SHOULD ALSO PROVIDE ANY ALIAS NAMES THAT THE SPOUSE MAY USE. (Accurate information is necessary for purposes of service of the divorce papers at the correctional facility. Refer to the New York City and New York State Department of Corrections websites, http://www.nyc.gov/html/doc/html/home/home.shtml and https://doccs.ny.gov/ for further information)

INMATE NUMBER:

NAME OF CORRECTIONAL FACILITY:

ADDRESS OF FACILITY:

CONTACT PERSON AT FACILITY:

(This information may be obtained at the time arrangements are made for service on the spouse at the correctional facility).

IF THE CLIENT DOES NOT KNOW THEIR SPOUSE'S CURRENT ADDRESS, IS THERE ANY OTHER LOCATION WHERE THEY CAN BE FOUND? YES NO

If yes, where?

NOTE: The defendant-spouse must be personally served with the Summons with Notice. Therefore, it is important for the client to make every effort to provide current and correct information regarding the whereabouts of their spouse. ☐ ☐

PHONE NUMBERS: **( )** _____ (H)

( ) _____ (W)

( ) _____ (Other: _____)

DATE OF BIRTH:

Month Day Year

PLACE OF BIRTH:

City State Country

RACE:

☐ Black ☐ White ☐ Asian

☐ South Asian ☐ Native American ☐ Bi-Racial

☐ Latino ☐ Other: _____

HIGHEST LEVEL OF EDUCATION COMPLETED:

☐ GED ☐ High School ☐ College

☐ Post College ☐ Partial College (How Many Years ___?)

☐ Vocational/Trade School ☐ Partial High School (How Many Years ____?

IS ENGLISH THE SPOUSE'S FIRST LANGUAGE? Yes No
If the answer is "no," what is their first language?

Re: Spouse's Employment Information

NAME AND ADDRESS OF THEIR EMPLOYER: (If applicable) ☐

Name

Address

THEIR INCOME*: _____ _____

(Weekly) (Bi-weekly) (Monthly)

*Specify whether gross or net amount. If available, the client should present a current copy of the spouse's proof of income at the time of the initial client interview. If the spouse is incarcerated, it is likely that they will have no income. In this instance request the total sum of $25.00 per month for child support in the divorce papers (if applicable), unless there is an order of support issued by the Family Court within the last three years. In this instance a request should be made in the divorce papers to continue the Family Court Order.

SPOUSE'S PRIOR EMPLOYERS DURING THE COURSE OF THE MARRIAGE*:

Name

Address

Duration of employment -- Dates

Name

Address

Duration of employment -- Dates

Name

Address

Duration of employment -- Dates

SPOUSE'S UNION MEMBERSHIP (if any)*:

Name

Address

*This information is relevant for determining client's rights to any pensions their spouse has.

IF THE SPOUSE IS NOT EMPLOYED, WHAT IS/ARE THEIR SOURCE(S) OF INCOME?

☐ Public Assistance ☐ Disability (SSD) ☐ Soc Sec (SSI)

☐ Unemployment ☐ Worker's Compensation ☐ Child Support

☐ Alimony (Maintenance)

☐ Other (Please indicate source: _____)

AMOUNT(S) RECEIVED*: _____ _____

(Weekly) (Bi-weekly) (Monthly)

Re: Spouse's Health Insurance Information

DOES THE SPOUSE HAVE HEALTH INSURANCE BENEFIT(S)? ☐ Yes ☐ No

If the answer is "no", please skip to next page. If the answer is "yes", answer the following:

IS/ARE THE INSURANCE BENEFIT(S) PROVIDED BY AN EMPLOYER OR OTHER SOURCE(S)? Employer Other:_____

IS THE CLIENT COVERED UNDER THESE BENEFIT(S)? ☐ Yes ☐ No

IS/ARE THE CHILD(REN) OF THE MARRIAGE COVERED UNDER THESE BENEFIT(S)?
☐Yes ☐No

Group Health Plan*: _____

Address: _____

ID #: _____

Plan Administrator (If Known): _____

Type of Coverage: _____

If there is no information on the spouse's health benefits, the divorce papers should indicate that the client will maintain the health benefits.

If your client currently receives health insurance benefits through their spouse, please note that the client will not be a covered family member under the policy once a judgment of divorce is granted by the court. The non-participant spouse may continue coverage under COBRA for up to three years, but this will be provided to the non-participant spouse at cost, unless the participant spouse agrees to pay or is ordered to pay this cost.

Re: Spouse Miscellaneous

NUMBER OF YEARS THAT THE SPOUSE HAS LIVED IN NEW YORK STATE CONTINUOUSLY: _____

IS THE SPOUSE CURRENTLY IN THE MILITARY OF THE UNITED STATES? ☐Yes ☐No

IF YES, ☐ACTIVE DUTY ☐RESERVES

IS THIS THE SPOUSE'S FIRST MARRIAGE? ☐Yes ☐ No

IF THIS IS NOT THE SPOUSE'S FIRST MARRIAGE, INDICATE THE NUMBER OF PRIOR MARRIAGES _____

IF THIS IS NOT THE SPOUSE'S FIRST MARRIAGE, HOW DID THE SPOUSE'S PREVIOUS MARRIAGE(S) END? _____

(Indicate if marriage(s) ended by divorce, annulment or death.)

INFORMATION RE: CHILDREN

NUMBER OF CHILD(REN) OF THIS MARRIAGE: _____

Client is required by state law to request child support in the divorce papers for all child(ren) in common (also known as "children of the marriage") of the parties under the ages of 21, whether or not they were born during the marriage. This does not apply if any of the child(ren) under the ages of 21 are emancipated. (See below). There is no legal obligation to financially support child(ren) over the age of 21.

	NAME	**DATE OF BIRTH**	**SSN**	**CHILD(REN) RESIDES WITH WHOM?**
1.				
2.				
3.				
4.				
5.				
6.				

IS/ARE ANY OF THE CHILD(REN) OF THIS MARRIAGE UNDER THE AGE OF 21 EMANCIPATED*? ☐ Yes ☐ No

* Emancipation events: (a) full-time employment and no school; (b) enlistment in any of the armed forces; (c) marriage; (d) death, and in some cases (e) having a child.

IF THE ANSWER IS "YES", TO THE PREVIOUS QUESTION, GIVE THE NAME(S) AND DATES(S) OF BIRTH OF THE EMANCIPATED CHILD(REN) UNDER 21:

	NAME	**DATE OF BIRTH**	**EMANCIPATION EVENT**

1.			
2.			
3.			
4.			
5.			
6.			

NUMBER OF CHILD(REN) OF THIS MARRIAGE <u>OVER THE AGE OF 21:</u>

Children of the marriage over the age of 21 should be reflected as emancipated in the divorce papers. (There is no legal obligation to financially support children over the age of 21).

	<u>NAME</u>	**<u>DATE OF BIRTH</u>**
1.		
2.		
3.		
4.		
5.		
6.		

DOES THE CLIENT HAVE ANY CHILD(REN) UNDER 21 FROM A PREVIOUS MARRIAGE(S) OR RELATIONSHIP(S)*? ☐Yes ☐No

If the answer is "yes", how many children?

_____

* Child(ren) from these relationships are not included in the divorce action unless they were legally adopted by the client's spouse.

DOES THE SPOUSE HAVE ANY CHILD(REN) UNDER 21 FROM A PREVIOUS MARRIAGE(S) OR RELATIONSHIP(S)? ☐Yes ☐No

If the answer is "yes", how many children?

_____

* Child(ren) from these relationships are not included in the divorce action unless they were legally adopted by the client.

Domestic Relations Law 240 requires the Court to check specific registers in all cases involving children under the age of 21.

Has either Spouse or Client been a party to an Order of Protection case, in either Family Court or Criminal Court ?

Client: **Spouse:**

Yes _____ No _____ **Yes _____ No _____**

List all Family/Criminal Court Docket numbers and Counties, Supreme Court Index numbers and Counties:

_____

_____

_____

Has either Spouse or Client been a party to a Child Abuse or Neglect proceeding in Family Court, under FCA Art. 10 ?

Client: **Spouse:**

Yes _____ No_____ **Yes _____ No _____**

List all Family Court Docket numbers and Counties:

_____

_____

_____

_____

Has either Spouse or Client been registered under New York State's Sex Offender Registration Act?

Client: **Spouse:**

Yes _____ No _____ **Yes _____ No _____**

List all names under which either party is registered:

FAMILY COURT ORDERS

DOES THE CLIENT HAVE ANY FAMILY COURT ORDERS FOR CHILD SUPPORT*, CUSTODY*, VISITATION OR SPOUSAL SUPPORT?

☐Yes ☐No

* If the parties have child(ren) in common, whether born prior to or during the marriage, the client must request custody and child support in the divorce action, regardless of whether the client has any of the above orders from the Family Court.

Re: Custody Orders

DATE OF FAMILY COURT ORDERS FOR CHILD CUSTODY, IF ANY*:

Month Day Year

* If the client has an order of custody issued by the Family Court, the divorce papers should request that this order be continued. Client must provide a copy of the order for filing with the final divorce documents.

CUSTODY PROVISIONS IN THE FAMILY COURT ORDER:

_____

_____

_____

_____

Re: Visitation Orders

DATE OF FAMILY COURT ORDER FOR VISITATION, IF ANY*:

Month Day Year

VISITATION SCHEDULE, IF ANY:

_____

_____

_____

* If the client has an order of custody issued by the Family Court which is silent on the issue of visitation, do not make any requests for visitation in the divorce papers. The divorce papers should request that the Family Court shall have concurrent jurisdiction with the Supreme Court over issue(s) regarding visitation.

If the client has an order for visitation issued by the Family Court, the divorce papers should request that this order be continued. If there is no Family Court order for visitation, please discuss visitation with your client. The divorce papers can include a statement requesting reasonable visitation or remain silent on the issue of visitation.

Re: Child Support Orders

DATE OF FAMILY COURT ORDERS FOR CHILD SUPPORT, IF ANY*:

_____

Month Day Year

* If the client has an order for child support that was issued by the Family Court within the last three years, client may choose to request that this order be continued.

If the client has an order for child support that was issued by the Family Court **more than three years old**, **do not request in the divorce papers that the order be continued**. The Supreme Court will consider a Family Court Order for child support issued more than three years ago to be "stale."

AMOUNT OF CHILD SUPPORT THAT YOU OR YOUR SPOUSE MUST PAY, PURSUANT TO A FAMILY COURT ORDER, IF ANY:

_____ _____

(Weekly) (Biweekly) (Monthly)

Re: Spousal Support Orders

DATE OF FAMILY COURT ORDERS FOR SPOUSAL SUPPORT ("Maintenance"), IF ANY*

_____

Month Day Year

If the client has a Family Court spousal support order, this order cannot be continued in the divorce. If the client wants the support to continue, they must make a request for maintenance. Contact Her Justice if this relief is requested.

If the client receives Public Assistance, the divorce papers should request that the Family Court shall have concurrent jurisdiction with the Supreme Court over the issue of maintenance. A client on Public Assistance does not have the legal right to waive their right to maintenance.

If the client does not receive Public Assistance and does not have an order of spousal support ("maintenance"), do not request this type of relief in the divorce papers, **EXCEPT IF HER JUSTICE HAS INDICATED THAT THE CLIENT IS REQUESTING MAINTENANCE.**

AMOUNT OF SPOUSAL SUPPORT THAT THE CLIENT OR SPOUSE MUST PAY, PURSUANT TO A FAMILY COURT ORDER, IF ANY:

_____ _____

(Weekly) (Biweekly) (Monthly)

ORDERS OF PROTECTION

The client should provide a copy of any orders of protection at the initial client interview.

DOES THE CLIENT HAVE AN/ANY ORDER(S) OF PROTECTION* AGAINST THEIR SPOUSE? ☐Yes ☐No

IF THE ANSWER IS "YES", PLEASE INDICATE THE FOLLOWING:

	Date of Order	Docket Number	Criminal or Family Court	Date Order Expires	Temporary or Final
Ex.	**7/12/05**	**#4557**	**Criminal Court**	**7/12/05**	**Final**
1.					
2.					
3.					

*Existing Family Court or Criminal Court Orders of Protection may not be continued as part of the divorce, however, they will continue to be in force until their expiration date. A new Order of Protection may be sought as part of the relief requested in the divorce**. If your client is interested in seeking a new Order of Protection in their divorce, contact Her Justice.**

Does the client wish to maintain their address confidential?

☐Yes ☐No

MARITAL ASSETS

Notify Her Justice immediately if the client and their spouse have any marital assets. (EXCEPT IF HER JUSTICE HAS INDICATED THAT CLIENT IS SEEKING EQUITABLE DISTRIBUTION OF THE PROPERTY.)

NOTE: **Marital Property includes any property whether real or personal, such as a house, land, mobile home, car, jewelry, bank account, furniture, insurance policy, pension plan, or 401(k) plan.**

It does not matter who has title to the property. If the property was acquired during the marriage, it is considered a marital asset.

Equitable distribution also includes the allocation of any debts incurred by the parties during the marriage.

GROUNDS FOR DIVORCE

In order to divorce in New York State, the client must have a legal reason to be divorced. New York allows only seven legal reasons for divorce (called "grounds for divorce"). For the purposes of this Program, your client will fit into one of three grounds: Cruel and Inhuman Treatment, Abandonment or Constructive Abandonment, or Imprisonment.

Refer to the Grounds section in the Manual before selecting the applicable ground for divorce.

Once you have advised the client of the various grounds for divorce, turn to the appropriate section(s) in this questionnaire and have the client describe all incidents in detail. Again, the client is required to only have one ground for divorce. You may however, for purposes of the initial client interview, choose to complete more than one of the sections below.

ABANDONMENT

DRL § 170 (2)

In order to use abandonment as a ground for divorce, the abandonment by the spouse must be continuous for one year or more without your client's consent. If your client is the

one who asked their spouse to leave the marital residence or if the client voluntarily left the house they will not be able to use this as a ground for divorce.

If the abandonment by the spouse was for a period of less than one year, the client cannot use the ground of abandonment, but should consider the ground of cruel and inhuman treatment as long as the other requirements for that ground are satisfied.

If the client kicked the spouse out of the marital residence or if they left ("fled") the house as a result of their spouse's physical, emotional or verbal abuse, the client may be able to use cruel and inhuman treatment as the ground for divorce.

If the spouse kicked or locked the client out of the house, and prevented their return, the client may use abandonment as a ground for divorce.

DATE THE SPOUSE LEFT THE MARITAL RESIDENCE WITHOUT THE CLIENT'S CONSENT:

_____

Month Day Year

* The client should provide at least the month and the year of the abandonment.

PLACE WHERE THE PARTIES WERE LIVING WHEN THEIR SPOUSE LEFT THE MARITAL RESIDENCE WITHOUT THE CLIENT'S CONSENT:

Street Apt. #

City State Zip Code

INDICATE BELOW THE REASON(S) WHY THE SPOUSE LEFT THE MARITAL RESIDENCE WITHOUT THE CLIENT'S CONSENT:

_____

_____

_____

CONSTRUCTIVE ABANDONMENT

DRL § 170(2)

In order to use constructive abandonment as a ground for divorce, the refusal by the spouse to have sex must be continuous for one year or more without the client's consent.

If the client is the one who refused to engage in sexual relations without their spouse's consent, or if the parties did not engage in sexual relations by mutual consent, the client cannot allege constructive abandonment as the ground for divorce.

If the reason for the client's refusal to have sex is based on an act of adultery by the spouse, the client should consider using the ground of cruel and inhuman treatment and use the spouse's adultery as an allegation (provided the act of adultery occurred within the last 5 years).

DATE THE SPOUSE BEGAN TO REFUSE TO ENGAGE IN SEXUAL RELATIONS WITH THE CLIENT:

_____
_____

Month Day Year

* The client should provide at least the month and the year of the constructive abandonment.

INDICATE BELOW THE REASON(S) FOR THE SPOUSE'S REFUSAL:

_____

_____

_____

CRUEL AND INHUMAN TREATMENT

DRL § 170(1)

Be sure that all acts of cruel and inhuman treatment have occurred within the past five (5) years. However, if client is unable to recall any acts within the past five years, client may allege acts prior to the five year statute of limitation period. Please contact Her Justice for further advice, if this is the case.

All acts of adultery committed by the spouse within the past five years should be included under this ground. Please also indicate, if possible, the name of the person with whom the spouse committed adultery.

Acts of abandonment by the spouse which occurred for a period shorter than one year (i.e., three months, three weeks or three days) should be included under this ground.

If the client has an Order of Protection, the incident(s) which caused the client to obtain the order of protection may be used under this ground.

When describing acts of cruelty by the spouse, also indicate whether the spouse was under the influence of drugs or alcohol, or used any objects to hit the client that could be considered weapons. Also describe whether the client called the police, sustained any injuries or required any medical attention.

EMOTIONAL AND VERBAL ABUSE

DID THE SPOUSE VERBALLY ABUSE THE CLIENT ☐Yes ☐No

WITHIN THE LAST FIVE YEARS?

DATE SPOUSE BEGAN TO VERBALLY ABUSE CLIENT:

_____

___

Month Day Year

DESCRIBE INCIDENTS OF VERBAL ABUSE, INCLUDING MONTH, DAY AND YEAR. (Within past five years) If the verbal abuse by the spouse occurred in front of a third party (e.g., children of the marriage, other family members or friends), include this in the allegation.

1. _____

_____

_____

_____

2. _____

_____

_____

_____

3. _____

_____

_____

_____

4. _____

_____

_____

_____

DATE WHEN VERBAL ABUSE ENDED, if applicable:

_____

Month Day Year

DID THE SPOUSE DURING THE MARRIAGE ABANDON THE CLIENT FOR A PERIOD OF TIME THAT WAS LESS THAN
ONE YEAR WITHOUT THEIR CONSENT? ☐Yes ☐No

If yes, provide below date and length of the abandonment.

DATE AND LENGTH OF ABANDONMENT:

_____

Month Day Year

PHYSICAL ABUSE

List and describe below all acts of physical abuse if any, during the marriage that have occurred within the past five years.

Include whether (a) the police were contacted; (b) injuries were suffered; (c) medical attention was necessary; or (d) if an order of protection was obtained for each allegation. (The client should provide copies of any Orders of Protection obtained.)

Acts of physical cruelty by the spouse toward the client can still be alleged even if the client did not call the police, sustain injuries, require medical attention and did not obtain an order of protection.

The client must allege at least two acts of physical violence or three to five acts of verbal abuse to use this ground for divorce. The client must establish a pattern of behavior that makes it unsafe for the client to continue residing with the spouse.

Example: *On or about May 5, 2004, at 300 Park Avenue South, Apt. 3B, New York, New York, the client's spouse, while under the influence of "crack" cocaine, became angry because the plaintiff came home from work fifteen minutes late and punched the client about the face with a closed fist five times. The client suffered a black eye and a swollen face. The client contacted the 73rd police precinct who were summoned to the marital residence. The client thereafter filed a domestic incident report with said police officers. The client received medical treatment at Metropolitan Hospital in Manhattan. Upon information and belief, the client's spouse was arrested as a result of this incident. The client was granted an order of protection by the Criminal Court, New York County, dated May 10, 2004, under the docket number DNV123456/05****.***

1. On or about _____, at the client's spouse

(Date of incident)(place incident occurred)

_____

2. On or about _____, at _____ the client's spouse

(Date of incident) (place incident occurred)

3. On or about _____, at_____ client's spouse

(Date of incident) (place incident occurred)

4. On or about _____, at_____ client's spouse

(Date of incident) (place incident occurred)

5. On or about _____, at_____ client's spouse

(Date of incident)(place incident occurred)

IMPRISONMENT

DRL § 170(3)

The ground of imprisonment may be used if the spouse has been imprisoned for the last 3 years **continuously** and is still imprisoned. In order to use this ground, the parties **cannot** have married while the spouse was in prison. In order to prove this ground, a commitment letter from the correctional facility must be submitted with the final divorce papers.

DATE WHEN SPOUSE WAS INCARCERATED:

HAS THE SPOUSE BEEN RELEASED SINCE THAT DATE? ☐Yes ☐No

DATE OF MARRIAGE:

WERE PARTIES MARRIED WHILE SPOUSE WAS INCARCERATED? ☐ Yes ☐No

DRL § 170(7): IRRETRIEVABLE BREAKDOWN OF THE MARRIAGE

The ground of irretrievable breakdown may be used if the relationship between spouse and client has broken down irretrievably for a period of at least six (6) months and one party has so stated under oath. A final judgment of divorce cannot be granted until all ancillary issues have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce.

DATE WHEN RELATIONSHIP BROKE DOWN IRRETRIEVABLY:

_____

____

Month Day Year

RELIEF SOUGHT BY THE CLIENT IN THE DIVORCE ACTION

(Check all that apply)

☐ **Divorce on the ground of:**

☐ Cruel and Inhuman Treatment

DRL 170(1)

☐ Abandonment

DRL 170(2)

☐ Constructive Abandonment

DRL 170(2)

☐ Imprisonment

DRL 170 (3)

☐ Irretrievable Breakdown

DRL 170 (7)

☐ **Child Custody:** (If applicable)

☐ That the plaintiff/defendant shall have sole custody of the child(ren) of the marriage.

☐ That the plaintiff/defendant shall have custody of the child(ren) of the marriage, pursuant to the order of custody, dated _____, of the Family Court, _____County, under the docket number _____. (Use only if there is an order of custody issued by the Family Court.)

☐ Visitation***:** (If applicable)

☐ That the plaintiff/defendant shall have reasonable rights or visitation with the children of the marriage.

☐ That the plaintiff/defendant shall have visitation with the child(ren) of the marriage, pursuant to the order of visitation, dated _____, of the Family Court, _____County, under the docket number _____. (Use only if there is an order of visitation issued by the Family Court.)

☐ The plaintiff/defendant shall have visitation with the children of the marriage pursuant to a specific schedule (***write schedule below)***:

_____

*** If there is no Family Court order for visitation, or if client chooses not to address the issue of visitation, the divorce papers should request that the Family Court have concurrent jurisdiction with the Supreme Court over issues concerning visitation.**

☐ **Child Support*:** (If applicable)

☐ That the defendant shall pay $25.00 per month to the plaintiff for child support

☐ That the defendant shall pay $25.00 per month to the plaintiff through the Support Collection Unit

☐ That the defendant shall pay to the plaintiff statutory child support, pursuant to the Child Support Standards Act.

☐ That the defendant shall pay to the plaintiff statutory child support, through the Support Collection Unit, for child support pursuant to the Child Support Standards Act.

☐ That the defendant shall pay statutory child support to the Commissioner of Social Services, through the Support Collection Unit for New York County (Use only use if client receives Public Assistance.)

☐ That the defendant shall pay to the plaintiff/defendant/commissioner of social services_____ the amount of $_____ per _____, pursuant to the order of support, dated _____, of the Family Court, _____County, under the docket number _____, and that said Order shall be continued. (Use only if there is a Family Court order of support issued within the last three years by the Family Court.)

* If there are unemancipated child(ren) of the marriage under the age of 21, the divorce papers **MUST** request and provide for the support of the child(ren) by the non-custodial parent.

☐ **Maintenance (Spousal support)*:** (If applicable)

- In cases where the client is seeking maintenance, request:

That the plaintiff/defendant shall pay to the plaintiff reasonable amounts for maintenance.

- Existing Family Court orders for spousal support may not be continued in the divorce.
- If the client receives public assistance, request that the Family Court have concurrent jurisdiction with Supreme Court concerning issues of maintenance and support.

☐ **Continuation of Orders issued by the Family Court*: (If applicable)**

☐ Order of Custody

☐ Order of Visitation

☐ Order of Child Support*

* ***Request continuation of this type of order only if the Family Court order for support was issued within the last three years. If the order is more than three years old, request that the defendant pay reasonable amounts to the plaintiff for child support***. ***Include the date the order was issued, the issuing court, and the docket number.***

☐ **Resume Use of Maiden Name*:**

☐ That the plaintiff may resume their maiden name.

* Should always request this to give the client the option to change their name sometime in the future.

☐ **Equitable Distribution*:**

- **In cases where the client is seeking equitable distribution, request:**

☐ That the marital property be equitably distributed.

☐ **Health Insurance Benefits:**

☐ That the plaintiff shall maintain health insurance benefits for the child(ren) of the marriage.

☐ That the defendant shall maintain health insurance benefits for the child(ren)of the marriage

☐ That the plaintiff shall pay for all of unreimbursed medical expenses incurred on behalf of the child(ren).

☐ That the defendant shall pay for all of unreimbursed medical expenses incurred on behalf of the child(ren).

☐ That the plaintiff and defendant will each pay their pro rata statutory share of the unreimbursed medical expenses incurred on behalf of the children.

☐ That the Court issue an appropriate Qualified Medical Child Support Order.

☐ **Exclusive occupancy and possession of the marital residence:**

That the plaintiff shall be entitled to exclusive occupancy and possession of the marital residence located at

☐ **Life Insurance:**

- Life insurance is sometimes requested to secure the child support, spousal support or distributive payments in the event that the monied spouse dies before his obligations are satisfied.
- In cases where the client is seeking life insurance, request:

  That the defendant maintain for the benefit of the parties' child(ren) a life insurance policy in the amount of _____, plaintiff to be named as trustee and the defendant may not borrow from the policy.

  That the defendant maintain for the benefit of the plaintiff a life insurance policy in the amount of _____ and may not borrow from the policy.

☐ **Service**

Defendant -Spouse will be served* by:

☐ friend/relative of client

☐ a process server

☐ sheriff's office for the county where the defendant-spouse resides

☐ Defendant-Spouse is incarcerated and arrangements will be made to have them served at the correctional facility.

**** Client should provide a recent picture of their spouse to the person designated for service. If the client does not have a picture, they should provide a detailed description of their spouse to the person who will serve the divorce documents on their spouse***.

VENUE

Venue* is based on:

- ☐ CPLR Section 503 basis is plaintiff's county of residence.
- ☐ CPLR Section 503 basis is defendant's county of residence.
- ☐ CPLR Section 509 basis is the county designated by plaintiff.

The client's divorce action should be commenced in the county where either party resides. In the alternative, if the plaintiff or the defendant reside outside of the county in which the divorce is filed, the divorce papers must indicate that venue is based on CPLR, Section 509. However, if the plaintiff files a motion to maintain their address confidential, the divorce papers must indicate that venue is based on CPLR, Section 509.

STATEMENT OF CLIENT'S RIGHTS AND RESPONSIBILITIES

The following signed document must be provided to your client along with a copy of your firm's retainer:

Statement of Client's Rights and Responsibilities

Your attorney is providing you with this document to inform you of what you, as a client, are entitled to by law or by custom. To help prevent any misunderstanding between you and your attorney please read this document carefully.

If you ever have any questions about these rights, or about the way your case is being handled, do not hesitate to ask your attorney. They should be readily able to represent your best interests and keep you informed about your case.

An attorney may not refuse to represent you on the basis of race, creed, color, sex, sexual orientation, age, national origin or disability.

You are entitled to an attorney who will be capable of handling your case; show you courtesy and consideration at all times, represent you zealously, and preserve your confidences and secrets that are revealed in the course of the relationship.

You are expected to be truthful in all discussion with your attorney, and to provide all relevant information and documentation to enable them to competently prepare your case.

You are entitled to be kept informed of the status of your case and to be provided with copies of correspondence and documents prepared on your behalf or received from the court or your adversary.

You have the right to be present in court at the time that conferences are held.

You are entitled to make the ultimate decision on the objectives to be pursued in your case, and to make the final decision regarding the settlement of your case.

You are entitled to have your attorney's best efforts exerted on your behalf, but no particular results can be guaranteed.

If you entrust money with an attorney for an escrow deposit in your case, the attorney must safeguard the escrow in a special bank account. You are entitled to a written escrow agreement, a written receipt, and a complete record concerning the escrow. When the terms of the escrow agreement have been performed, the attorney must promptly make payment of the escrow to all persons who are entitled to it.

Receipt acknowledged on this _____ day of _____, 20____:

_____ _____

Client's signature Attorney's signature

ORDER TO MAINTAIN ADDRESS CONFIDENTIAL

At an Ex Parte Motion Office of the Supreme Court of the State of New York, held in the County of New York, at the courthouse located at 60 Centre Street, New York, New York, on _____, 2022

PRESENT: Hon. _____ Justice

----------x Index No. XXXXX/XX

JAMIE DOE,

Plaintiff,

- against -

LEE DOE,

Defendant.

ORDER TO MAINTAIN PLAINTIFF'S ADDRESS & SOCIAL SECURITY NUMBER CONFIDENTIAL

----------x

Upon the annexed Affirmation of Dylan Advocate, Esq., dated November 18, 2022, the affidavit of Jamie Doe, sworn to on November 18, 2022 and the exhibits annexed thereto, and upon all prior papers and proceedings had herein; and it being alleged that Jamie Doe has a good cause of action for divorce based on cruel and inhuman treatment and that she has requested to maintain her address and social security number confidential for purposes of this proceeding, NOW on motion of Plaintiff, it is hereby

ORDERED, that the Plaintiff is permitted to maintain her address and social security number confidential for purposes of this action for divorce, and that Plaintiff may utilize the address of Law Firm LLP, attn: Dylan Advocate, Esq., 123 Fifth Avenue, New York, NY 10001 for service of papers, and such address is deemed her residence for the purposes of this action, and it is further,

ORDERED, that Plaintiff must insert the address of Law Firm LLP, attn: Dylan Advocate, Esq., 123 Fifth Avenue, New York, NY 10001, for service in the place and stead of Plaintiff's place of residence on the summons with notice and all other papers filed by the Plaintiff, and it is further

ORDERED, that the County Clerk is directed to accept the Plaintiff's summons with notice for filing without Plaintiff's home address indicated thereon, and it is further

ORDERED, that personal service of a copy of this order together with the Summons with Notice must be made on the defendant, and it is further

ORDERED, that service of any responsive pleadings and papers shall be made upon Law Firm LLP, attn: Dylan Advocate, Esq., 123 Fifth Avenue, New York, NY 10001, the agent for service of papers designated by the Plaintiff, and not upon the Plaintiff directly, and further

ORDERED, that under the circumstances presented herein warranting the need to keep the Plaintiff's address confidential, Plaintiff's compliance with statutes requiring that certain documents contain the parties' name, address, and/or social security numbers, i.e. Public Health Law Sec. 4139 and DRL, Section 240(b), is excused to the extent that Plaintiff's address and social security number shall be redacted from all papers filed with the court to which a party or her attorney has access, including, but not limited to, the Verified Complaint, the Affidavit of Plaintiff, the Support Collection Information Sheet, a Qualified Medical Support Order, the Findings of Fact and Conclusions of Law, and the Judgment of Divorce. Plaintiff's address and social security number may be revealed upon motion on notice to the Plaintiff to be granted at the discretion of the court, in which defendant demonstrates a compelling need to obtain such information.

ENTERED:

_____

AFFIDAVIT IN SUPPORT OF MOTION TO MAINTAIN PLAINTIFF'S ADDRESS & SOCIAL SECURITY NUMBER CONFIDENTIAL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

_____x

JAMIE DOE, Index No. XXXX/XX
Plaintiff,

-against-

LEE DOE,
Defendant.

_____x

AFFIDAVIT IN SUPPORT OF MOTION TO MAINTAIN PLAINTIFF'S ADDRESS & SOCIAL SECURITY NUMBER CONFIDENTIAL

STATE OF NEW YORK) ss.:
COUNTY OF NEW YORK)

JAMIE DOE, being duly sworn, deposes and says:

1. I am the Plaintiff herein and submit this affidavit in support of a proposed Order to Maintain Plaintiff's Address & Social Security Number Confidential.

2. I am filing an action for divorce on the grounds of cruel and inhuman treatment based upon years of physical and verbal abuse inflicted upon me by the Defendant, my spouse. See the accompanying Verified Complaint at paragraph five (a-c), a copy of which is annexed hereto as Exhibit A. Because of this pattern of physical and verbal abuse, I fear for my safety.

3. I have relocated to a new location within the last year and respectfully request an order from this court to keep my address and social security number confidential.

4. In order to keep my address and social security number confidential, my counsel, Law Firm LLP, attn: Dylan Advocate, Esq., 123 Fifth Avenue, New York, NY 10001, will receive service of legal papers from the defendant in this action for divorce. Ms. Advocate's

Affirmation in Support of this motion and Law Firm's letter consenting accompany this application.

5. No previous application for the relief sought herein has been made in this court.

WHEREFORE, I respectfully request that this court sign the attached order to maintain my address confidential and to require that any papers pertaining to the defense of this action shall be served upon my agent for service.

_____

JAMIE DOE

Sworn to before me on ----------

this day of , 20__

_____

Notary Public

My commission expires on _____

AFFIRMATION IN SUPPORT OF MOTION TO MAINTAIN PLAINTIFF'S ADDRESS & SOCIAL SECURITY NUMBER CONFIDENTIAL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JAMIE DOE,	:	
Plaintiff,	:	Index No. XXXX/XX
	:	**AFFIRMATION IN**
	:	**SUPPORT OF MOTION TO**
-against-	:	**KEEP PLAINTIFF'S**
	:	**ADDRESS AND SOCIAL SECURITY NUMBER CONFIDENTIAL**
LEE LEE,	:	
Defendant.	:	

I, Dylan Advocate, Esq., an attorney duly admitted to practice in the State of New York, hereby affirm under penalty of perjury:

I am associated with Law Firm LLP, counsel of record for the Plaintiff. As such, I am fully familiar with the facts and circumstances of this action.

This affirmation is submitted in support of the instant motion by the plaintiff to keep her address and social security number confidential.

The plaintiff JAMIE DOE, is about to commence an action for divorce against the defendant LEE DOE, based upon the grounds of cruel and inhuman treatment.

I have examined the facts of the proposed action of the plaintiff and have determined that there is good cause for filing the instant motion as a result of plaintiff's being a victim of domestic violence.

Law Firm LLP consents to the use of its address at 123 Fifth Avenue, New York, New York 10001 as the plaintiff's address for the purpose of service of papers, and consents to the use of such address as plaintiff's residence for the purpose of this action. *See* the letter of consent from Law Firm LLP attached hereto as Exhibit A.

There has been no prior request for the relief requested in accordance with CPLR 2217(B).

Dated: November 18, 2022

New York, New York

LAW FIRM LLP

_____

By: Dylan Advocate, Esq.
123 Fifth Avenue
New York, NY 10001
(212) 555-8181
Attorneys for Plaintiff

November 18, 2022

Ex-Parte Motion Office
Supreme Court/New York County
60 Centre Street
New York, New York 10007

Re: DOE v. DOE, Index No. XXXX/XX

Motion to Keep Plaintiff's Address & Social Security Number Confidential

To Whom it may Concern:

This firm is counsel of record for the plaintiff, JAMIE DOE, in the above-referenced action. This letter is submitted in support of plaintiff's motion to keep their address and social security number confidential.

The undersigned has reviewed the facts of this case and has determined that Plaintiff is a victim of domestic violence and must keep their current address and social security number confidential.

Law Firm LLP has consented to be designated as the Plaintiff's address for service, process and all correspondence.

Please contact the undersigned at (212) 695-3800 if there are any questions.

Very truly yours,

Dylan Advocate, Esq.

SAMPLE SUMMONS WITH NOTICE, AUTOMATIC ORDERS, DRL § 255 NOTICE OF GUIDELINE MAINTENANCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x		Index No.
JAMIE DOE,	:	Date Summons Filed:
Plaintiff,	:	
		The basis of venue is CPLR Sec. 509
	:	
	:	**SUMMONS WITH NOTICE**
-against-	:	
	:	
LEE DOE,	:	Plaintiff resides at XXXXX, Apt 4D, Bronx, NY XXXXX
Defendant.	:	
----------x		

ACTION FOR DIVORCE

To the above named Defendant:

YOU ARE HEREBY SUMMONED to serve a notice of appearance on the Plaintiff's Attorneys within twenty (20) days after the service of this summons, exclusive of the day of service (or within thirty (30) days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear, judgment will be taken against you by default for the relief demanded in the notice set forth below.

Dated: _

_____

Dylan Advocate, Esq.
My Law Office
Attorneys for Plaintiff
123 Main Street
New York, NY 10000
212-123-4567

NOTICE: The nature of this action is to dissolve the marriage between the parties, on the grounds: DRL Section 170 subd. (7) - the relationship between the Plaintiff and Defendant has broken down irretrievably for period of at least six months. [INCLUDE ANY ADDITIONAL GROUNDS]

The relief sought is a judgment of absolute divorce in favor of the Plaintiff dissolving the marriage between the parties in this action. The nature of any ancillary or additional relief demanded is:

That the Family Court shall have concurrent jurisdiction with the Supreme Court with respect to any future issues of maintenance and support.

That the Defendant shall pay reasonable maintenance to the Plaintiff.

That the Defendant shall provide health insurance benefits to the Plaintiff.

That the Defendant shall obtain or continue to maintain a life insurance policy for the benefit of the Plaintiff.

That the Court equitably distribute the marital property and the marital debt and liabilities.

That either party may resume the use of a prior surname.

That the Plaintiff may resume use of her prior surname, xxxx.

That the Court grant such other and further relief as the Court may deem just and proper.

Automatic orders pursuant to DRL Section 236(B)(2) accompany this summons.

NOTICE OF AUTOMATIC ORDERS (DRL Section 236)

PURSUANT TO DOMESTIC RELATIONS LAW Section 236 Part B, Section 2, as added by Chapter 72 of the Laws of 2009, both you and your spouse (the parties) are bound by the following AUTOMATIC ORDERS, which shall remain in full force and effect during the pendency of this action, unless terminated, modified or amended by further order of the court upon motion of either of the parties or upon written agreement between the parties:

(1) Neither party shall sell, transfer, encumber, conceal, assign, remove or in any way dispose of, without the consent of the other party in writing, or by order of the court, any property (including, but not limited to, real estate, personal property, cash accounts, stocks, mutual funds, bank accounts, cars and boats) individually or jointly held by the parties, except in the usual course of business, for customary and usual household expenses or for reasonable attorney's fee in connection with this action.

(2) Neither party shall transfer, encumber, assign, remove, withdraw or in any way dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401k accounts, profit sharing plans, Keogh accounts, or any other pension or retirement account, and the parties shall further refrain from applying for or requesting the payment of retirement benefits or annuity payments of any kind, without the consent of the other party in writing, or upon further order of the court.

(3) Neither party shall incur unreasonable debts hereafter, including, but not limited to, further borrowing against any credit line secured by the family residence, further encumbrancing any assets, or unreasonably using credit cards or cash advances against credit cards, except in the usual course of business or for customary or usual housing expenses, or for reasonable attorney's fees in connection with this action.

(4) Neither party shall cause the other party or the children of the marriage to be removed from any existing medical, hospital and dental insurance coverage, and each party shall maintain the existing medical, hospital and dental insurance coverage in full force and effect.

(5) Neither party shall change the beneficiaries of any existing life insurance policies, and each party shall maintain the existing life insurance, automobile insurance, homeowners and renters' insurance policies in full force and effect.

NOTICE CONCERNING CONTINUATION OF

HEALTH CARE COVERAGE

(Required by Section 255(1) of the Domestic Relations Law)

PLEASE TAKE NOTICE that once a judgment of divorce is signed in this action, both you and your spouse may or may not continue to be eligible for coverage under each other's health insurance plan, depending on the terms of the plan.

NOTICE OF GUIDELINE MAINTENANCE

If your divorce was commenced on or after January 25, 2016, this Notice is required to be given to you by the Supreme Court of the county where your divorce was filed to comply with the Maintenance Guidelines Law ([S. 5678/A. 7645], Chapter 269, Laws of 2015) because you may not have counsel in this action to advise you. **It does not mean that your spouse (the person you are married to) is seeking or offering an award of "Maintenance" in this action. "Maintenance" means the amount to be paid to the other spouse for support after the divorce is final.**

You are hereby given notice that under the Maintenance Guidelines Law (Chapter 269, Laws of 2015), there is an obligation to award the guideline amount of maintenance on income up to $228,000 to be paid by the party with the higher income (the maintenance payor) to the party with the lower income (the maintenance payee) according to a formula, unless the parties agree otherwise or waive this right. Depending on the incomes of the parties, the obligation might fall on either the Plaintiff or Defendant in the action.

There are two formulas to determine the amount of the obligation. If you and your spouse have no children, the higher formula will apply. If there are children of the marriage, the lower formula will apply, but only if the maintenance payor is paying child support to the other spouse who has the children as the custodial parent. Otherwise the higher formula will apply.

Lower Formula

1. Multiply Maintenance Payor's Income by 20%.
2. Multiply Maintenance Payee's Income by 25%.

Subtract Line 2 from Line 1 = **Result 1**
Subtract Maintenance Payee's Income from 40% of Combined Income* = **Result 2**.
Enter the lower of **Result 2** or **Result 1**, but if less than or equal to zero, enter zero.
THIS IS THE CALCULATED GUIDELINE AMOUNT OF MAINTENANCE WITH THE LOWER FORMULA.

Higher Formula

1. Multiply Maintenance Payor's Income by 30%
2. Multiply Maintenance Payee's Income by 20%

Subtract Line 2 from Line 1 = **Result 1**
Subtract Maintenance Payee's Income from 40% of Combined Income* = **Result 2**
Enter the lower of **Result 2** or **Result 1**, but if less than or equal to zero, enter zero.
THIS IS THE CALCULATED GUIDELINE AMOUNT OF MAINTENANCE WITH THE HIGHER FORMULA.

*** Combined Income equals Maintenance Payor's Income up to $228,000 plus Maintenance Payee's Income.**

Note: The Court will determine how long maintenance will be paid in accordance with the statute.

VERIFIED COMPLAINT (Irretrievable Breakdown)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X Index No.

JAMIE DOE.,

Plaintiff,

VERIFIED COMPLAINT

-against-

ACTION FOR DIVORCE

LEE DOE,

Defendant.

----------X

The Plaintiff, by My Law Office, Inc., complaining of the Defendant, alleges the following:

FIRST: The parties are over the age of 18 years.

SECOND: This court has jurisdiction to hear this action for divorce. The Plaintiff has resided in New York State for a continuous period in excess of two years immediately preceding the commencement of this action.

THIRD: The Plaintiff and Defendant were married to each other on May 12, 1992, in acivil ceremony in the City of New York, the County of Brooklyn and the State of New York. The Plaintiff and Defendant subsequently had a religious marriage ceremony on November 29, 2003 in the City of New York, the county of Bronx and the State of New York.

The marriage was performed by a clergyman, minister or leader of the Society for Ethical Culture. To the best of the Plaintiff's knowledge, the Plaintiff has taken all steps solely within the power of the Plaintiff to remove any barrier to the Defendant's remarriage.

FOURTH: There is no child as a result of this marriage, and no child is expected.

The Plaintiff resides at XXXXXXX, Bronx, NY XXXXX. The Defendant resides at XXXXXXX, Bronx, NY XXXXX.

FIFTH: The parties are covered by the following group health plans:

Plaintiff

Group Health Plan: NONE

Defendant

Group Health Plan: Medco
Address: New York, NY
Identification Number: XXXXXXXX
Plan Administrator: Building Service 32BJ
Type of Coverage: Medical and Dental

The Defendant has no other group health plans.

SIXTH: The grounds for divorce are as follows: Irretrievable Breakdown of the Relationship (DRL Sec. 170(7)): The relationship between the Plaintiff and Defendant has broken down irretrievably for a period of at least six months.

SEVENTH: There is no judgment in any court for a divorce and no other matrimonial action for divorce between the parties is pending in this Court or in any other court of competent jurisdiction.

EIGHTH: The Court should make a fair and equitable division of all marital property and marital debt and liabilities.

NINTH: The Plaintiff needs maintenance and the Defendant is able to pay that

maintenance.

WHEREFORE, the Plaintiff demands judgment against the Defendant, dissolving the

marriage between the parties to this action, and granting the following relief:

That the Family Court shall have concurrent jurisdiction with the Supreme Court with respect to any future issues of maintenance and support.

That the Defendant pay reasonable maintenance to the Plaintiff.

That the Defendant shall provide health insurance benefits to the Plaintiff.

That the Defendant shall obtain or continue to maintain life insurance for the benefit of the Plaintiff.

That the Court equitably distribute the marital property and the marital debt and liabilities.

That either party may resume the use of a prior surname.

That the Plaintiff may resume use of her prior surname, xxxxxx.

That the Court grant such other and further relief as the Court may deem just and proper.

Dated: October , 2022

_____

Dylan Advocate, Esq.
My Law Office, Inc.
Attorneys for Plaintiff
123 Main Street, 10th floor
New York, NY 10000
212-123-4567

VERIFICATION

STATE OF NEW YORK,

COUNTY OF , ss.

I, Jamie Doe, am the Plaintiff in the within action for a divorce. I have read the foregoing Complaint and know the contents thereof. The contents of the Complaint are true to my own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true.

_____

Jamie Doe

Subscribed and sworn to before me

on October ,2012

_____

Notary Public

My commission expires on

VERIFIED COMPLAINT (CRUELTY)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X Index No. XXXXX/22

JAMIE DOE,

Plaintiff,

VERIFIED COMPLAINT

-against- **ACTION FOR DIVORCE**

LEE DOE,

Defendant.

----------X

The Plaintiff, by _____, complaining of the Defendant, alleges the following:

FIRST: The parties are over the age of 18 years.

SECOND: The Plaintiff has resided in New York State for a continuous period in excess of two years immediately preceding the commencement of this action.

THIRD: The Plaintiff and Defendant were married to each other on June 25, 1994, in City of New York, County of Bronx and State of New York.

The marriage was performed by a clergyman, minister or leader of the Society for Ethical Culture. To the best of the Plaintiffs knowledge the Plaintiff has taken all steps solely within the power of the Plaintiff to remove any barrier to the Defendant's remarriage.

FOURTH: There are three children the marriage, namely:

Name	SS#	Date of Birth	Address
Child 1			
Child 2			
Child 3			

There is no other child as a result of this marriage, and no other child is expected.

The Plaintiff resides at _____. The Defendant resides at _____ .

The parties are covered by the following group health plans:

Plaintiff
Group Health Plan:
Address:
Identification Number:
Plan Administrator:
Type of Coverage: Medical, dental
The Plaintiff has no other group health plans.

Defendant
Group Health Plan: NONE

FIFTH: The grounds for divorce are as follows: Cruel and Inhuman Treatment (DRL Sec. 170(1)): At the following times, none of which is more than five (5) years prior to the commencement of this action, the Defendant engaged in conduct that so endangered the physical or mental well-being of the Plaintiff so as to render it unsafe or improper for the parties to cohabit (live together) as husband and wife.

1. In or about June 2003, while at the marital residence, located at _____, Defendant was intoxicated. He grabbed Plaintiff by her hair and forcibly threw her against a kitchen shelf. Plaintiff fell to the floor and sustained a head injury. She suffered pain, bruising and humiliation as a result.

2. In or about August 2003, while at the marital residence, located at

_____, Defendant screamed at Plaintiff because of what she was wearing because he felt that her skirt was too short. Defendant called her a "bitch" and a "whore."

3. In or about June 2004, while at the marital residence, located at

_____, Defendant was intoxicated and punched Plaintiff in the face with his fist. She suffered bruising, pain and humiliation as a result of Defendant's attack.

4. On or about July 18, 2004, while at the marital residence, located at

_____, Defendant was intoxicated and beat Plaintiff repeatedly.
Defendant threatened Ms. Plaintiff with further physical harm, saying that he was going to "get her." This caused Plaintiff to feel severe stress and anxiety and to fear for her safety. The following day, Ms. Plaintiff went to Bronx Independent Living Services (BILS) to seek help and to join their domestic violence support group. Ms. Plaintiff's advocate at BILS called the police, who came to the BILS office to get a statement from Ms. Plaintiff. Defendant was arrested and subsequently released. As a result of this incident, Ms. Plaintiff obtained a two-year Order of Protection under Docket # 0-
_____. Defendant was excluded from the marital residence due to the Order of Protection.

5. During February 2005, the parties re-united in an attempt to salvage their marriage. On or about February 14, 2005 _____ New York 10458, Defendant was again intoxicated and began arguing with Ms. Plaintiff. Defendant forcibly punched Ms. Plaintiff in the face, in front of their children, and then walked out. Ms. Plaintiff suffered pain and humiliation as a result of defendant's abuse.

6. In or about April 2005, at the marital residence located_____Ms.

Plaintiff confronted Defendant about his excessive drinking and the physical abuse he repeatedly inflicted on her. Defendant responded that his father beat his mother and "if it worked for them it was good enough for him." Defendant then physically assaulted Ms. Plaintiff, feeling terrified and fearing for her safety, called the police. Defendant was again arrested and subsequently released. After this incident, the parties separated and have remained living apart to-date.

7. In or about July 2006, at the marital residence located at _____ Defendant screamed at Ms. Plaintiff, accusing her of not taking care of their children properly. Defendant called Ms. Plaintiff a "f- —ing bitch" in the presence of their children. Ms. Plaintiff suffered humiliation and anxiety as a result of defendant's verbal attack.

The conduct of the Defendant was cruel and inhuman and so endangered the physical or mental well-being of the Plaintiff as to render it unsafe or improper for the Plaintiff to cohabit with the Defendant.

SIXTH: There is no judgment in any court for a divorce and no other matrimonial action for divorce between the parties is pending in this Court or in any other court of competent jurisdiction.

WHEREFORE, the Plaintiff demands judgment against the Defendant, dissolving the marriage between the parties to this action, and granting the following relief:

That the Plaintiff shall have custody of the children of the marriage, Child 1 PLAINTIFF, born on_____ , Child 2 PLAINTIFF, born on _____ and Child 3 PLAINTIFF, born on _____ ;

That the Defendant shall pay to the Plaintiff, through the Support Collection Unit for New York County, statutory child support pursuant to the Child Support Standards Act;

That the Plaintiff shall provide health insurance benefits to the children until the age of 21 years;

That the Defendant shall his pro-rata share of the un-reimbursed medical expenses of the children until the age of 21 years;

That the Defendant shall pay to the Plaintiff reasonable maintenance;

That the Plaintiff shall have exclusive occupancy of the marital residence;

That marital property be equitably distributed;

That the Family Court shall have concurrent jurisdiction with the Supreme Court with respect to any future issues of maintenance, child support, custody and visitation;

That the Plaintiff may resume use of her maiden name,_____

That the Court grant such other and further relief as the Court may deem just and proper.

The parties have divided up the marital property, and no claim will be made by either party under equitable distribution.

Dated: September 11, 2008

_____

Dylan Advocate, Esq.
My Law Office, Inc.
Attorneys for Plaintiff
123 Main Street, 10th floor
New York, New York 10000
212-123-4567

VERIFICATION

STATE OF NEW YORK, COUNTY OF NEW YORK, ss.

I, PLAINTIFF, am the Plaintiff in the within action for a divorce. I have read the foregoing Complaint and know the contents thereof. The contents of the Complaint are true to my own knowledge, except as to those matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true.

_____

PLAINTIFF

Subscribed and sworn to before me
on September 11, 2022

_____

Notary Public

My commission expires

AFFIDAVIT OF SERVICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------X Index No.
JAMIE DOE.,

Plaintiff,

AFFIDAVIT OF SERVICE

-against-

LEE DOE,

Defendant.
----------X

STATE OF NEW YORK, COUNTY OF _____, ss.

_____ being duly sworn, says:

1. I am not a party to this action, and I am over 18 years of age and reside at/have offices at: _____.

2. On _____, 2022, at _____ .M., at

_____

_____I served the within Summons With Notice, and notice of automatic orders, on Lee Doe the Defendant named by delivering a true copy on the Defendant personally. In addition I served a copy of the Notice of Continuation of Health Care Coverage and Notice of Guideline Maintenance.

3. The notice required by the Domestic Relations Law, Section 232 -- "ACTION FOR DIVORCE" -- was legibly printed on the face of the Summons served on the Defendant.

4. I knew the person so served to be the person described in the Summons as the

Defendant. My knowledge of the Defendant and how I acquired it are as follows:

[ ] I have known the Defendant for ___ years and

OR

[**X**] I identified the Defendant by a photograph annexed to this affidavit which was given to me by the Plaintiff.

OR

[ ] Plaintiff accompanied me and pointed out the Defendant.

OR

[ ] I asked the person served if he was the person named in the Summons and Defendant admitted being the person so named.

5. Deponent describes the individual served as follows:

Sex	Height	Weight	Age	Hair Color
[] Male	[] Under 5'	[] Under 100 Lbs	[] 14-20 Yrs	[] Black
[] Female	[] 5'0"-5'3"	[] 100-130 Lbs	[] 21-35 Yrs	[] Brown
	[] 5'4"-5'8"	[] 131-160 Lbs	[] 36-50 Yrs	[] Blond
	[] 5'9"-6'0"	[] 161-200 Lbs	[] 51-65 Yrs	[] Grey
	[] Over 6'	[] Over 200 Lbs	[] Over 65	[] Red
				[] White
				[] Balding
				[] Bald

Color of Skin - describe color:
Other identifying features, if any:

6. At the time I served the Defendant, I asked him whether he was in the military service of this state, any other state or this nation, and the Defendant responded in the negative.

_____

Name:

Subscribed and sworn to before me
on

_____

Notary Public
My commission expires on

REMOVAL OF BARRIERS TO REMARRIAGE STATEMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X Index No. XXXXX/22

JAMIE DOE,

Plaintiff,

-against-

AFFIDAVIT OF SERVICE
REMOVAL OF BARRIERS TO REMARRIAGE

LEE DOE,

Defendant.

----------X

STATE OF NEW YORK, COUNTY OF NEW YORK, ss.

I, JAMIE DOE, state under penalty of perjury that the parties' marriage was solemnized by a minister, clergyman or leader of the Society of Ethical Culture, and that to the best of my knowledge I have taken all steps solely within my power to remove any barriers to the Defendant's remarriage following the divorce.

_____

JAMIE DOE

Subscribed and sworn to before me on

_____

Notary Public

My commission expires on

NOTICE OF APPEARANCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X Index No. 12345/09

JAMIE DOE

Plaintiff,

-against-

NOTICE OF APPEARANCE

LEE DOE,

Defendant.

----------X

PLEASE TAKE NOTICE that the defendant JAMIE DOE hereby appears by her attorney, Dylan Advocate in the above-entitled action and demands that the complaint and all papers in this action be served upon the undersigned at the address stated below.

PLEASE TAKE FURTHER NOTICE that the ancillary relief sought by defendant shall include an award of maintenance and support, health and life insurance, equitable distribution, counsel fees, and such other and further relief as to this Court may seem just and proper.

Dated: December ____, 2022
New York, New York

_____

Dylan Advocate, Esq.
Attorney for Plaintiff JAIME DOE
123 Main Street
New York, NY 10000
(212) 123-4567

TO: Lucy Lawyer, Esq.
Attorney for Defendant LEE DOE
456 Divorce Way
New York, NY 10002
(347) 555-1234

VERIFIED ANSWER AND COUNTERCLAIM

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JAY,	:	Index No.
	:	
Plaintiff,	:	Justice Assigned:
	:	Hon. _____
	:	
- against -	:	
	:	**VERIFIED ANSWER AND**
JO,	:	**COUNTERCLAIM**
	:	
Defendant	:	
	:	
	:	

The Defendant, by her attorney Dylan Advocate Esq., as and for her Verified Answer and Counterclaim, respectfully alleges as follows:

1. Admits the allegations contained in paragraphs FIRST, SECOND, THIRD, and EIGHTEENTH, thereof.

2. Denies all the allegations contained in paragraphs FIFTH through SIXTEENTH, thereof.

3. Admits the allegations in paragraph SEVENTEENTH to the extent that the marriage between the parties was solemnized by a person specified in Domestic Relations Law § 11(1). The Defendant lacks knowledge and information sufficient to form a belief as to the truth of the remaining allegations and therefore denies them.

4. Admits all the allegations in paragraph FOURTH, except denies the allegation that CC was born on June 17, 1984 and is age 19. CC was born on January 17, 1984 and is age 20.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

5. The complaint fails to state a cause of action pursuant to § 170(2) of the Domestic Relations Law and § 3211(a)(7) of the Civil Practice Law and Rules.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

6. The complaint fails to state a cause of action pursuant to § 170(1) of the Domestic Relations Law and § 3211(a)(7) of the Civil Practice Law and Rules.

AS AND FOR A COUNTERCLAIM FOR

DIVORCE ON THE GROUNDS OF ABANDONMENT

7. The Defendant and Plaintiff were both over the age of 18 at the time of commencement of this action.

8. The Defendant was a resident of New York State for a continuous period of two years prior to the commencement of this action.

9. The Plaintiff and the Defendant were married on June 25, 1980 in the City, County and State of New York.

10. The marriage was performed by a clergyman, minister, or by a leader for the Society of Ethical Culture. The Defendant will take all steps solely within her power to remove any barrier to the Plaintiff's remarriage.

11. There are three children of the marriage, namely: DD, born on March 11, 1982, age 24, an emancipated adult; CC, born on January 17, 1984, age 20, an emancipated adult; and EE, born on January 26, 1991, age 15. There is no other child as a result of this marriage, and no other child is expected.

12. The parties are covered by the following group health plans:

Plaintiff: unknown

Defendant: Group Health Plan: Health Plus/Medicaid
Address: _____ Brooklyn, NY
I.D. No. XXX
Plan Administrator: Health Plus
Type of Coverage: Medical, hospitalization

13. There is no decree or judgment of divorce, separation or annulment or other dissolution of the marriage in favor of either party and against the other in any of the Courts of this State or any state or territory of the United States or in any court of competent jurisdiction, nor is there any such action other than this action pending.

14. The grounds for divorce, in accordance with Domestic Relations Law § 170(2) are as follows:

(a) Commencing in or about March 2003, and continuing for a period of more than one (1) year immediately prior to the commencement of this action, the Plaintiff willfully and without cause or justification left the marital residence of the parties located at _____ New York, and has never returned. Such action was without cause or justification, and was without the Defendant's consent.

WHEREFORE, the Defendant demands judgment as follows:

a. dismissing Plaintiff's causes of action for divorce;

b. granting to Defendant a judgment of absolute divorce dissolving the bonds of matrimony

between Plaintiff and Defendant forever on the ground of the abandonment of Defendant by Plaintiff;

c. directing that the Order of Support dated October 20, 2003 under Bronx County Family

Court Docket No. XXX, be continued;

d. directing that the Order of Custody and Visitation dated June 25, 2003 under Bronx

County Family Court Docket No. XXX, be continued to the extent that it grants custody of the parties' minor children to Defendant and permits Defendant to relocate, and modifying the order with regard to visitation granted to Plaintiff;

e. granting Defendant reasonable spousal support and maintenance;

f. providing that Plaintiff obtain employer provided health insurance, hospital care and

related services for the benefit of Defendant up to the maximum amount of time allowed after the divorce and providing that Plaintiff pay the premiums for such insurance and provide Defendant with identification cards, numbers and claim forms and to cooperate fully in filing claims for Defendant;

g. directing Plaintiff to purchase and/or maintain a policy of insurance on Plaintiff's life

and name Defendant and the parties' minor children as irrevocable beneficiaries thereof;

h. providing that Defendant be granted her interest in any retirement type plan available to

Plaintiff through his current employer, or any other employer for whom Plaintiff worked during the course of the parties' marriage, including but not limited to any pension plan, profit sharing plan, 403B plan, 401K plan, Keogh plan, Individual Retirement Account, employee stock ownership plan, stock bonus plan, other employee benefit plan, or any other similar plan in Plaintiff's name;

i. providing for equitable distribution of the marital property;

j. granting to Defendant exclusive possession and title to the marital residence together

with the contents thereof;

k. providing that Defendant may resume the use of her pre-marriage name, _____;

l. providing that any future issues of maintenance, custody, visitation and child support

may be heard by this Court, the Family Court or any other court of competent jurisdiction;

m. granting to Defendant such other and further relief as this Court may deem just and proper.

Dated: May 26, 2017

_____

Dylan Advocate, Esq.
Attorney for Defendant
Of Counsel to Her Justice, Inc.
100 Broadway, 10th floor
New York, NY 10005

TO: _____, Esq.
Attorney for Plaintiff

VERIFICATION

STATE OF NEW YORK)
) ss:
COUNTY OF BRONX)

JO being duly sworn, deposes and says:

I am the Defendant in the within action. I have read the foregoing Verified Answer and Counterclaim, and I know the contents of the same to be true to my own knowledge, except as to the matters stated therein to be alleged upon information and belief, and as to those matters, I believe them to be true.

_____
JO

Sworn to before me
this ___ day of May, 2017

_____
NOTARY PUBLIC

AFFIRMATION OF SERVICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

JAMIE DOE,	:	Index No.
	:	
Plaintiff,	:	
	:	
- against -	:	**AFFIRMATION OF SERVICE**
	:	
LEE DOE,	:	
	:	
Defendant.	:	
	:	

----------X

Dylan Advocate,Esq., an attorney duly admitted to practice law before the Courts of the State of New York, affirms under penalty of perjury:

That I am not a party to this action, I am over 18 years of age, and I am Of Counsel to My Law Office, , 123 Main Street, , New York, New York 10000.

That on May 26, 2017, I served the within Verified Answer and Counterclaim by depositing a true copy of same in an official United States Post Office depository, in a postage paid envelope addressed to the Plaintiff's attorney, as follows:

_____, Esq.

AFFIRMED: May 26, 2017

Bronx, New York

_____

Dylan Advocate, Esq.

VERIFIED REPLY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
_____x

JAMIE DOE,
Plaintiff,

Index No. 12345/09

VERIFIED REPLY

-against-

LEE DOE,
Defendant.
_____x

Plaintiff, JAMIE DOE, by her attorney, My Law Office Inc., replying to the counterclaim of the defendant, respectfully alleges as follows:

FIRST: Denies the allegations contained in paragraphs eight and nine, thereof.

SECOND: Denies knowledge or information sufficient to form a brief as to the truth of the allegations contained in paragraphs six and ten, thereof.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

THIRD: The counterclaim of the defendant fails to state a cause of action upon which relief may be granted.

WHEREFORE, plaintiff demands judgment against the defendant as follows:

1. Dismissing the counterclaim;
2. Granting the relief demanded in the complaint;
3. Granting such other and further relief as to this Court may seem just and proper.

Dated: March 10, 2022
New York, New York

Dylan Advocate, Esq.
Attorneys for Plaintiff
123 Main Street, 10th floor
New York, New York 10000
(212) 123-4567

To: Lucy Lawyer
Attorney for LEE DOE

VERIFICATION

STATE OF NEW YORK)

SS:

COUNTY OF BRONX)

LEE, being duly sworn, deposes and says:

I am the plaintiff in the within action. I have read the foregoing Verified Reply and know the contents of the same to be true to my knowledge, except as to the matters stated herein to be alleged upon information and belief, and as to those matters, I believe them to be true.

LEE DOE

Sworn to before me this
10th day of March, 2022

NOTARY PUBLIC

COVER LETTER TO COMMITMENT FACILITY FOR SERVICE

December 10, 2022

Inmate Records
[Name of Correctional Facility]
[Address of Correctional Facility]

RE: Jamie Doe -v- Lee Doe
Index Number: XXXXXXX/22

INMATE: Jo Spouse
NYSID# XXXXXXXXX

To Whom it may Concern:

The law firm of Law Firm, LLP has been retained as counsel for Jamie Doe in the above-referenced divorce action against Jo Doe, an inmate at [Correctional Facility]. Mx. Doe is seeking a divorce on the ground of imprisonment for more than three consecutive years. The New York State Supreme Court requires a copy of Mx. Spouse's commitment paper to be submitted with the divorce papers.

As a courtesy it is requested that your office forward a copy of Mx. Spouse's commitment paper to the undersigned at your earliest convenience in the self-addressed stamped envelope provided. Please contact me at 212-555-1212 if you have any questions.

Thank you for your assistance.

Sincerely,

Dylan Advocate, Esq.

cc: Jamie Doe

REQUEST FOR A PRELIMINARY CONFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

JAMIE DOE,
Plaintiff,

- against -

LEE DOE,
Defendant.

----------X

Index No.

REQUEST FOR A PRELIMINARY CONFERENCE

The undersigned requests a preliminary conference.

The nature of the action is contested divorce.

The names, addresses and telephone numbers of all attorneys appearing in this action are as follows:

Dylan Advocate Esq.
Attorney for Defendant
My Law Office, Inc.
123 Main Street, 10th floor
New York, NY 10000

_____, Esq.
Law Office of Attorney for Plaintiff
phone number

Dated: June 28, 2022
Bronx, New York

Rachel L. Braunstein, Esq.
Attorney for Defendant
Her Justice, Inc.
100 Broadway, 10th floor
New York, New York 10005

AFFIRMATION OF SERVICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

JAMIE DOE,
Plaintiff,
- against -

Index No.

AFFIRMATION OF SERVICE

LEE DOE,
Defendant.

----------X

Dylan Advocate, an attorney duly admitted to practice law before the Courts of the State of New York, affirms under penalty of perjury:

That I am not a party to this action, I am over 18 years of age, and I am Of Counsel to My Law Office., 123 Main Street, New York, NY 10000.

That on June 28, 2022, I served the within Request for a Preliminary Conference by depositing a true copy of same in an official United States Post Office depository, in a postage paid envelope addressed to the Plaintiff's attorney as follows:

_____, Esq.

Law Office of _____

AFFIRMED: June 28, 2022

Bronx, New York

_____

Dylan Advocate

B. Discovery Documents

AUTHORIZATION AND RELEASE

I, [*Client's name*], authorize and direct the Plan Administrator of each pension, profit sharing, 401(k), or other retirement or deferred compensation plan or program sponsored by [*Employer or Union name*] or any such plan or program to which makes contributions for the benefit of its employees or under which its employees have economic interests (the "Plans"), to release and provide to [*Client's name*] and their attorneys [*Firm and/or Individual Attorney's name*] upon request of such individual or counsel, any and all information relating to the Plans or my interests in or rights under any of the Plans including, without limitation:

(a) all information relating to any of the Plans;
(b) all documents reflecting the terms of the Plans;
(c) the amount of any benefits in which I have a vested or non-vested interest under any of the Plans;
(d) any account balances that may be held in my name or for my benefit in any of the Plans;
(e) the actuarial equivalent or present value amounts of any optional forms of benefits payment to which I am currently entitled or to which I may be entitled at any future time.

The purpose of this Authorization and Release is to provide [*Client's name*] and their attorneys access to all information necessary to determine my rights, interests, and options in or under the Plans.

_____
(*signature of client*)
Name: _____
Social Security No. _____
Address: _____

NEW YORK)

COUNTY OF) SS.:

On this day of , 202_, before me personally came to me known and known to me to be the individual described in and who executed the foregoing release, and he acknowledged to me that he executed the same.

_____
Notary Public

SUBPOENA

July 22, 2022

Citibank Subpoena Compliance Unit
One Court Square
43rd Floor, Zone 6
Long Island City, New York 11120

To Whom It May Concern:

Thank you for your compliance with the enclosed subpoena duces tecum in the above-referenced action.

In lieu of a personal appearance, you may submit the responsive documentation to my office and to my attention, at the following address:

My Law Office
123 Main Street
New York, New York 10000

Because we are a non-profit organization representing indigent clients, I respectfully request that any fees associated with copying the requested statements be waived.

I can be reached at 718-991-4758 x. 269 with any questions. Thank you, again, for your attention to this important matter.

Very truly yours,

Dylan Advocate
Attorney for xxxxx

Cc: XXXXXXXXXXX

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----------X

JAMIE DOE,
Plaintiff,
- against -

Index No.

SUBPOENA DUCES TECUM

LEE DOE,
Defendant.

----------X

To: The Chase Manhattan Bank
Legal Papers Service
One Chase Manhattan Plaza 20th Floor
New York, New York 10081
Attn: Carl

WE COMMAND YOU, that all business and excuses be laid aside, you and each of you appear before a notary public who is not an attorney, or employee of an attorney, for any party or prospective party herein and is not a person who would be disqualified to act as a juror because of interest or because of consanguinity or affinity to any party herein, and attend a deposition upon oral questions at the offices of My Law Office, 123 Main Street, New York, New York 10000, on January 20, 2022, at 10 a.m., and at any recessed or adjourned date, to give deposition testimony in the above-captioned action and that you bring with you and produce at the time and place aforesaid, the documents requested on Schedule A annexed hereto.

Please take notice that this examination and documents are necessary because they are relevant to the issue of equitable distribution of marital property and support in this action.

Failure to comply with this subpoena is punishable as a contempt of Court and shall make you liable to the person on whose behalf this subpoena was issued for a penalty not to exceed fifty dollars and all damages sustained by reason of your failure to comply.

Dated: Bronx, New York
August 7, 2022

_____

Dylan Advocate
My Law Office
Attorneys for Plaintiff
123 Main Street
New York, New York 10000
(123) 456-7890

cc: XXXXX, Esq.
xxxxxxxx
New York, New York 10165

CERTIFICATION OF AUTHENTICITY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: Trial Term Part 18

----------X

JAMIE DOE, Index No.

Plaintiff,

- against - Justice Assigned:

LEE DOE, **CERTIFICATION OF AUTHENTICITY**

Defendant. **PURSUANT TO CPLR § 4518(a)**

----------X

I, _____, state:

I am (an employee of) _____, with an office located at: _____ (print business address). My position is that of _____ (insert title).

I hereby certify that, in accordance with Rule 4518(a) of the New York Civil Practice Law and Rules, the attached ____ pages (insert number of pages) are true and complete copies of the records maintained by _____ with respect to BB (DOB XX) (SSN XX), that these records were made in the regular course of business and in accordance with applicable law, it is the regular course of business to make such records and these records and said records are made near or at the time of the incidents or events reflected.

_____

(Signature)

_____

(Print Name)

_____

(Title)

Sworn to before me
this _____ day of _____, 2022

_____

Notary Public

BUSINESS RECORD CERTIFICATION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

JAMIE DOE	:	Index No. XXXXX/22
	:	
Plaintiff	:	**BUSINESS RECORD**
against	:	**CERTIFICATION PURSUANT**
	:	**TO CPLR 3122-a**
LEE DOE	:	
Defendant	:	

STATE OF NEW YORK)
COUNTY OF _____) s.s.

1. I am the duly authorized custodian or other qualified witness of the business records and have the authority to make this certification;

2. To the best of my knowledge, after reasonable inquiry, the records or copies thereof are accurate versions of the documents described in the subpoena duces tecum that are in the possession, custody, or control of the person receiving the a subpoena;

3. To the best of my knowledge, after reasonable inquiry, the records or copies produced represent all the documents described in the subpoena duces tecum, or if they do not represent a complete set of the documents subpoenaed, an explanation of which documents are missing and a reason for their absence is provided; and

4. The records or copies produced were made by the personnel or staff of the business, or persons acting under their control, in the regular course of business, at the time of the act, transaction, occurrence or event recorded therein, or within a reasonable time thereafter, and that it was the regular course of business to make such records.

Signature: _____

Print Name: _____

Subscribed and sword to before me on:

_____

Notary Public

NOTICE FOR DISCOVERY AND INSPECTION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:

JAMIE DOE	:	Index No.
	:	
Plaintiff	:	**NOTICE FOR DISCOVERY**
against	:	**AND INSPECTION**
	:	
LEE DOE	:	
Defendant	:	

MADAM:

PLEASE TAKE NOTICE that S. G., Defendant in this action, by her attorneys the MY LAW OFFICE, and pursuant to section 236 of Domestic Relations Law and section 3120 of the Civil Practice Law and Rules, requests that LEE DOE., Defendant in this action, produce for discovery at the office of the MY LAW OFFICE, located at 123 Main Street, New York, New York 10000, on February 2, 2022, at 10:00 a.m. copies of the following documents:

1. Federal income tax returns including all schedules, work sheets and W-2 forms, filed by Defendant individually and/or jointly with Defendant for the years 2018 through 2022;

2. All records in possession of Defendant relating to the tax returns filed by Defendant individually and/or jointly with Defendant for the years 2018 through 2022, including but not limited to all correspondence, fining notices, and audits from the Internal Revenue Service and the New York State Department of Taxation and Finance.

3. Any and all records and statements regarding all checking accounts held in Defendant's name alone or together with any other person or persons, since 2018. This shall include checkbooks, checkbook stubs, statements, canceled checks, deposit slips and withdrawal

slips from 2018 through the present date, whether said accounts are current or may have been closed, and wherever these accounts may be situated.

4. Any and all records and statements regarding all savings accounts held in Defendant's name alone or together with any other person or persons since January 1, 2018. This shall include savings bank books, records, accounts and statements, from January 1, 2018, through the present date, whether said accounts are current or have been closed and wherever these accounts may be situated.

5. All records and monthly statements relating to securities transactions, including stocks, bonds, options, mutual funds and any other transaction involving the use of a broker. Said records shall include all accounts in Defendant's name individually or together with any other person or persons from January 1, 2018, through the present date.

6. All records regarding Defendant's current medical and dental insurance, including information on the premiums which would be due if Defendant and her two children elected to utilize his health insurance.

7. All records relating to all loans made to Defendant, from January 1, 2018, through the present date. This shall include a list of banks and persons from whom loans were made, for what purpose the loans were made, the amounts of the loans at the time the loans were taken, and the current statements of balance.

8. All records of all of Defendant's rental/lease agreements to which Defendant is a party, either as an landlord/lessor or tenant/lessee of any real estate property from January 1, 2018, to the present date.

9. All insurance policies covering Defendant, including, but not limited to, life, annuity, liability, health, and accident, automobile, homeowners, property and casualty, and endowment insurance.

10. All records relating to all retirement accounts held by Defendant including, but not limited to, individual retirement accounts, Keogh accounts, and 401(k) plans. The documents to be produced shall include the most recent semi-annual statement, and contain the date of the creation of the plan, the amounts contributed by Defendant to the plan, the value of Defendant's account under the plan and the amount of the plan earned during the marriage of the parties.

11. All records relating to monies received by Defendant from all sources from January 1, 2018, through the present date, including items not considered taxable by the Internal Revenue Service.

12. All employment agreements currently in effect or under consideration, including records of salary, bonuses, compensation, including deferred compensation and overtime paid to Defendant by his employer(s) from January 1, 2018, through the present date.

13. All records relating to Defendant's interest in ventures, partnerships and corporations acquired during the marriage.

14. All records regarding any transfer of real property made by Defendant during the marriage, including but not limited to the following: XXXXX Street, Rego Park, NY; XXXXX Ave., Forest Hills, NY; and XXXXXXXXX Road, Albertson, NY.

15. All records relating to any assets held for Defendant's benefit by or in the name of any other person or persons, firm, or corporation.

16. All records relating to any trust agreement in which Defendant is a grantor, beneficiary, or holder of a power of appointment for any trust created by Defendant, members of his family, or any other persons or corporations.

17. All documents relating to estate proceedings which occurred during the marriage if Defendant is a beneficiary, legatee, distributee, executor, or trustee.

18. A record of all safe deposit boxes held by Defendant individually or jointly, specifying the contents and location of said box.

19. All records relating to the use or ownership of any and all vehicles including automobiles, boats, motorcycles, or vans.

20. All records relating to any works of art, jewelry, collections, and antiques owned by Defendant individually or together with any other person or persons.

21. Copy of Defendant's current passport.

PLEASE TAKE FURTHER NOTICE that this demand is a continuing one and that should any of the above become known in the future, then said information should be furnished within reasonable time after acquiring same.

PLEASE TAKE FURTHER NOTICE, that any attempt to introduce testimony at the time of trial of any information not disclosed will be objected to.

Dated: New York, New York
December 30, 2022

Yours, etc.
Dylan Advocate, Esq.
My Law Office
123 Main Street
New York, New York 10000
(212) 123-4567,
xxxxxxx, Esq., Of Counsel
Attorneys for Defendant

TO: XXXXXXX, Esq.
XXX xxxx and XXX
XXXXXXXXXXX
New York, NY 10165

PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

JAMIE DOE	:	Index No. XXXXXX/22
	:	
Plaintiff	:	**PLAINTIFF'S FIRST SET OF**
against	:	**INTERROGATORIES TO**
	:	**DEFENDANT**
LEE DOE	:	
Defendant	:	

PLEASE TAKE NOTICE that, pursuant to N.Y. Civil Practice Law and Rules § § 3130-3133, Plaintiff JAMIE DOE hereby demands that Defendant, LEE DOE, answer the following interrogatories separately and fully in writing and under oath and serve a copy of his answers upon the undersigned at the offices of MY LAW OFFICE, 123 Main Street, , New York, New York 10000 no later than September 10, 2022.

DEFINITIONS

PLEASE TAKE FURTHER NOTICE that, as used herein, the following terms shall have the meaning, and be interpreted, as set forth below:

1. "The undersigned" means Plaintiff s counsel

2. "You" or "your" means Defendant.

3. "Communication" means the transmittal of information in the form of facts, ideas, inquiries or otherwise.

4. "Documents" includes writings, drawings, graphs, charts, photographs, phone records and other electronic or computerized data compilations from which information can be

obtained or translated, if necessary, by Plaintiff through detection devices into reasonably usable form. A draft or non-identical copy is a separate document within the meaning of this term.

5. "Things" means all categories of tangible objects not included within the definition of "documents."

6. "Identify" means, when referring to a person, to give, to the extent known, the person's full name, present or last known address and when referring to a natural person, additionally, the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

7. "Identify" means, when referring to documents, to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of document; and (iv) author(s), addressee(s) and recipient(s).

8. "Persons" means any natural person or any business, legal or governmental entity or association.

9. "Concerning" means in whole or in part constituting, containing, referring, embodying, reflecting, describing, analyzing, identifying, stating, dealing with, or in any way pertaining to.

10. The terms "all" and "each" shall be construed as all and each.

11. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

12. The use of the singular form of any word includes the plural and vice versa.

INSTRUCTIONS

PLEASE TAKE FURTHER NOTICE of the following:

A. These interrogatories shall be answered under oath by the party upon whom served and each question shall be answered separately and fully and each answer shall be preceded by the question to which it responds pursuant to N.Y. C.P.L.R. § 3133(b).

B. In responding to each interrogatory, Defendant is to review and search all relevant files of appropriate entities and persons.

C. The answers to these interrogatories must include all information known to Defendant, his agents, employees, representatives, including his attorneys and all persons acting on his behalf or under his control. If Defendant does not possess information to answer any interrogatory, Defendant is under a duty to make reasonable effort to obtain such information.

D. If the answer to any interrogatory, or any subsection of any interrogatory, is unknown, so state and include the name(s) and address(es) of any person that might have such information.

E. If any of these interrogatories cannot be answered in full, answer to the extent possible, specifying the reasons for Defendant's inability to answer the remainder, and stating what information, knowledge or belief Defendant has concerning the unanswered portion.

F. Each interrogatory should be construed independently. No interrogatory should be construed by reference to any other interrogatory for the purpose of limiting the scope of response to such interrogatory.

G. These interrogatories are continuing in character so as to require each Plaintiff to supplement his responses within a reasonable time if he obtains or becomes aware of any further information responsive to these interrogatories. Defendant reserves the right to propound additional interrogatories.

H. Unless otherwise indicated in a particular request, the time period covered by these requests is from September 18, 2004 to the present.

INTERROGATORIES

1. State your full name, age, residence and post office address, home telephone number, social security number, and business address.

2. State:

(a) The names, birth dates, and present address of all children born to or adopted by the Defendant;

(b) Whether any of the children are emancipated;

(c) The name of the individual who has custody of each of the children;

(d) Whether you are paying child support for each of the children;

(e) The amount of the child support, if any, that you are paying for each of the children (the "Child Support Payments"); and

(f) Whether the Child Support Payments, if any, are being paid pursuant to a court order. Annex a true and current copy of said child support order to your answers to these Interrogatories.

3. As to yourself, state:

(a) Your present health;

(b) Whether you have any need of any usual or extraordinary medical care or other special financial needs; and

(c) Your educational background, including all school attended, years of attendance, any degrees conferred, special training courses, licenses obtained, and employment skills.

4. State the address of each residence at which you have resided during the past eighteen (I8) years, indicating the periods of time during which you resided at each address.

5. State the number of people with whom you currently reside, their names, ages, and relationship to you, and whether such residence is on a permanent or periodic basis.

6. If your residence is rented or leased, state:

(a) The monthly rental and term of the lease or agreement (annex a true and current copy of said lease and any renewal thereof to your answers to these Interrogatories);

(b) To whom rent is paid, including name and address;

(c) Whether any other person(s) contribute to the rental, the amount of such contribution, and the name(s) of any such person(s).

7. If your present residence is owned by you, state:

(a) The date the residence was acquired;

(b) From whom it was purchased;

(c) The purchase price;

(d) The down payment;

(e) Source of the down payment showing contribution by each purchaser;

(f) The amount of the original mortgage;

(g) The amount of the mortgage(s) at present if difference from (f) above;

(h) The name and address of all mortgages and the mortgage numbers, if any;

(i) The market value of the property at present;

(j) The tax basis on the home when acquired; and

(k) The nature and dollar amounts of any liens and/or encumbrances on the property not heretofore indicated.

8. Identify any interests that you have in any income producing real property, as well as non-income producing real property.

9. State whether you have sold or otherwise disposed of any real property in which you had an interest within the last eighteen (18) years.

10. State the names, addresses, and telephone number of all employers by which you have been employed during the last eighteen (18) years and give the dates of such employment, position held, reason for termination, and salary.

11. As to your present employer(s), state:

(a) Name and address of each employer;

(b) Type of work performed, position held and nature of work or business in which your employer is engaged;

(c) Amount of time you have been employed in your present job;

(d) Hours of employment per week; and

(e) Rate of pay or earnings, setting forth specifically your gross wages, F.I.C.A., Federal, State, and Municipal Income Taxes, wages, commissions, overtime pay, bonuses, and gratuities.

12. State what benefits your current employer and/or employers provide to you and/or your family inclusive but not limited to all of the following:

(a) Health insurance plans;

(b) Life Insurance coverage;

(c) Pension, Profit Sharing or retirement income program;

(d) Expense account and/or drawing accounts;

(e) Credit cards (include reimbursement for business expenses placed on your personal credit cards);

(f) Disability insurance coverage;

(g) Stock Purchase plans;

(h) Indicate whether you are required to pay for all or part of the benefits listed in this Interrogatory and the amount of those payments and/or contributions.

13. State whether you have been furnished with a vehicle by any person, employer, or entity.

14. State and itemize all deductions taken from your gross weekly earnings or other emoluments, including but not limited to taxes, insurance, savings, loans, pensions, profit sharing, dues, and stock options.

15. As a result of your employment at any time during your marriage are you entitled to receive any monies from any deferred compensation agreement? If so, for each agreement state:

(a) The date of such agreement (annexing a true and correct copy to your answers to these Interrogatories);

(b) The parties making or executing such agreement; and

(c) The amount you are to receive under such agreement and whether you are to receive same.

16. State whether you have filed federal, state, and/or municipal income taxes during the last ten years. If so, annex a true and correct copy of each such return to your answers to these Interrogatories.

17. List any and all saving, checking, money market, certificate of deposit, trust accounts that you maintain individually, jointly with any other person, or in trust for any other person, setting forth the name of institution, the address of the institution, the account number of each such account, the date of opening, the opening balance, the balance as of January 2004, and the balance at present. Annex a true and correct copy of the most recent statement relating to each such account.

18. State whether you are self-employed or conduct a business or profession as a sole proprietor, partner, or as a corporation.

19. If a partnership, list the names and address of each partner, each partner's relationship to you, and the extent of the interest held by you and each partner in said partnership.

20. Annex a true and correct copy of any and all partnership and/or shareholders agreements to your answers to these Interrogatories.

21. For any self-employment as set forth in Interrogatories 18 through 20, state:

(a) The name of the business;

(b) The address of the business;

(c) Date the business commenced;

(d) Gross receipts for the last calendar year and year to date;

(e) Annex copies of any and all federal, state, and/or municipal income tax returns for the business, quarterly tax returns, and estimated tax returns for the current calendar year.

22. State whether you have a safe deposit box, providing the name of the institution in which the box is located, the address of such institution, the date said box was acquired and in whose name title to said safe deposit box is held.

23. List any and all cash in your possession in excess of $250.00, setting forth from whom said cash was obtained, the date of said cash being obtained, and the purpose for which you obtained such cash.

24. List all household goods, furniture, jewelry, and furs with a value in excess of $250.00, stating for each:

(a) The nature of each;

(b) Your interest therein;

(c) The price paid and the date acquired;

(d) The present value of each; and

(e) Whether said property is encumbered in any manner whatsoever, and, if so, the amount of the debt, to whom the debt is owed, the address of the creditor, the balance of the debt, and the monthly or other periodic installment payments.

25. State whether you have any H.R. 10 or I.R.A. arrangements. If so, state:

(a) The date of the creation of each such plan;

(b) The amounts contributed by you to each such plan; and

(c) The current value of your account under such plan.

26. State the name and address of each person that owes you money, including the amount thereof, the date said debt becomes due, the nature of the transaction that entitled you to receive the money, and when the transaction occurred.

27. Itemize all shares of stock, securities, bonds, mortgages, and other investments, other than real estate, not revealed in previous Interrogatories.

28. State whether any of the shares of stock owned by you and listed in any of your previous answer to Interrogatories is subject to any cross-purchase or redemption agreement.

29. Are you the holder of any mortgages, accounts receivable, notes, or other evidence of indebtedness not included in your answers to previous Interrogatories.

30. List any and all other money invested in any business venture whatsoever not previously answered herein, and for each such investment, state:

(a) The nature of such investment;

(b) Your share of the interest therein;

(c) The original cost of such investment and the sources of monies used for said investment; and

(d) Amount of income yielded from the said investment.

31. Set forth any and all inheritances, bequests, and gifts that you have received during the past eighteen (18) years, stating from whom said inheritance, bequest, or gift was received, the amount of same, and the relationship of the grantor to you.

32. Set forth whether you are the grantor, beneficiary, or holder of a power of appointment for any trust created by you, the members of your family, or any other person or corporation, annexing a true and correct copy of any trust instruments or writings evidencing the same.

33. List each life insurance policy, annuity policy, disability policy, or other form of insurance not disclosed in a previous interrogatory, stating for each:

(a) The name and address of the insurance company;

(b) The policy number;

(c) The type of policy;

(d) Name and address of the owner, beneficiary of the policy;

(e) The face amount of the policy;

(f) The cash surrender value of such policy; and

(g) The premium payments upon such policy.

34. State whether you are entitled to any pension, profit sharing and/or retirement plan not previously disclosed herein. If so, state:

(a) The nature of the plan;

(b) The name and address of the entity or person providing the plan;

(c) Whether your interest in the plan is vested, and if not, the date and conditions under which the plan will vest;

(d) Whether the plan is contributory and, if so, the amount you contribute;

(e) The amount you earned in the plan during the past three years;

(f) If you have the right to withdraw any monies from the plan, how much money you may withdraw, and when;

(g) If there are any survivor benefits, give a brief description thereof; and

(h) Annex a true copy of each plan to the answers.

35. State whether anyone contributes to your support, income, and/or living expenses who has not been included in a previous Interrogatory. If so, state:

(a) Their name and address;

(b) Relationship to you;

(c) The amount of support, income and/or living expenses received by you during the last eighteen (18) years and the frequency of said support, income and/or living expenses;

(d) The reason for said support;

(e) The nature of said support; and

(f) Annex a copy of any and all agreement evidencing acknowledgment of any such debt by you to such person(s).

36. Set forth a list of all credit card balances, stating:

(a) The name of the obligor and/or who incurred the debt;

(b) The total amount of the debt at present;

(c) The minimum monthly payment;

(d) The name in which the card is listed and the name of all persons entitled to use the card;

(e) The nature of the debt;

(f) The date the debt was incurred;

(g) The name of the obligee, credit card number, and address of the obligee; and

(h) Annex a true copy of the most recent credit card statement for each card.

37. List any and all other obligations, including mortgages, conditional sales contracts, contract obligations, promissory notes, government agency loans not included in previous answers.

PLEASE TAKE NOTICE that the answers to these Interrogatories must be sworn to before a notary public as to the truth and accuracy of the contents therein contained. Failure to provide complete and truthful answers will result in an application for sanctions and remedies prescribed pursuant to the Civil Practice Law and Rules of the State of New York.

PLEASE TAKE FURTHER NOTICE that your answers to these Interrogatories must be served upon the undersigned not later than September 10, 2022.

Dated: New York, New York
August 6, 2022

_____

Dylan Advocate, Esq.
123 MainStreet
New York, New York 10000
(212) 123-4567
Attorneys for Plaintiff

TO: xxxxxxxx

xxxxxxxxxxxx
New York, NY 10011
Attorneys for Defendant

PLAINTIFF'S REPONSES AND OBJECTIONS TO DEFENDANT'S FIRST NOTICE FOR DISCOVERY AND INSPECTION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

JAMIE DOE	:	Index No.
	:	
Plaintiff	:	**PLAINTIFF'S RESPONSE AND**
against	:	**OBJECTION TO**
	:	**DEFENDANT'S FIRST NOTICE**
	:	**FOR DISCOVERY AND**
LEE DOE	:	**INSPECTION**
Defendant	:	

GENERAL OBJECTIONS

Subject to the foregoing and subject to any documents being in existence and recoverable through a reasonably diligent search, and without representing that any particular document or documents are or are not thus existing and recoverable, Plaintiff responds to the individual discovery request without waiver and with preservation of: (i) The right to object to the use of any responses, or the subject matter thereof, on any ground in any proceedings in any action (including any trials); (ii) The **right** to object on any ground at any time to a demand or request for a further response to this discovery request or to any other requests, document requests, or other discovery proceedings involving or relating to the subject matter of the discovery requests herein responded to; and, (iii) The right at any time to revise, correct, add to, supplement or clarify any of the individual responses.

Accordingly, Plaintiff in response to Defendant's First Notice for Discovery and Inspection, states as follows:

OBJECTIONS AND RESPONSES TO REQUESTS

1. All records, papers and memoranda, including, but not limited to, checkbooks, stubs, registers, statements, canceled checks and deposit slips concerning all checking accounts, domestic or foreign, current as well as those that have been canceled, closed or transferred, held in your name individually, or in conjunction with any other person(s).

Response: Plaintiff objects to these requests to the extent Defendant is currently in possession of any of the above as regards the Plaintiff. Otherwise, to the extent Plaintiff is in the possession of any of the above, they will be produced.

2. All stock certificates, bonds or other securities in the name of the Defendant in any corporation, domestic or foreign, or governmental agency, domestic or foreign, in your name individually or in conjunction with any other person(s).

Response: To Plaintiff's knowledge, no such evidence exists.

3. Copies of all accounting, correspondence, memoranda and other writing respecting any inheritances received by you or expected to be received by you, any gifts from a donor other than your spouse and insurance proceeds from any source.

Response: To Plaintiff's knowledge, no such evidence exists.

4. Copies of all trust agreements and all amendments thereto for trusts for which you have a power of disposition either during your lifetime or upon your death by will.

Response: Plaintiff is not aware of any such agreements at this time.

5. Any and all records, statements and memoranda pertaining to all retirement plans/accounts including, but not limited to, pensions, IRA accounts, 401(k) accounts, tax deferred annuities, etc. in your name. If the plan is a profit sharing plan or defined contribution pension plan, provide copy of the records of the individual account balance as of the last evaluation date.

Response: To Plaintiff's knowledge, no such evidence exists.

6. All savings bankbooks, records, accounts and memoranda concerning all savings accounts, current as well as those that have been canceled, closed or transferred, whether in your name individually, or in conjunction with any other person(s), whether domestic or foreign.

Response: Plaintiff objects to these requests to the extent Defendant is currently in possession of any of the above as regards the Plaintiff. Otherwise, to the extent Plaintiff is in the possession of any of the above, they will be produced.

7. Any and all contracts for the rental and/or lease of safe deposit boxes or vaults in your name individually, or in conjunction with any other person(s).

Response: To Plaintiff's knowledge, no such evidence exists.

8. All credit and charge account cards receipts and monthly statements pertaining thereto, whether such credit or charge cards are in your name individually, or held with any other person(s), firm or corporation.

Response: Plaintiff objects to these requests to the extent Defendant is currently in possession of any of the above as regards the Plaintiff. Otherwise, to the extent Plaintiff is in the possession of any of the above, they will be produced.

9. Copies of all financial statements, loan applications, credit and charge card applications and budgets prepared by you or for your benefit.

Response: To Plaintiff's knowledge, no such evidence exists.

10. Any and all policies of insurance and all amendments, endorsements, statements and memoranda thereto, covering you or under which you or your estate are beneficiary including, but not limited to life, endowment, annuity, theft floater, liability, health and accident, and automobile and all records showing payment for premiums therefore including all statements of any loans against any life insurance policy.

Response: To Plaintiff's knowledge, no such evidence exists.

11. Any and all records, documents, papers and memoranda pertaining to monies received and being presently received by you from all sources, including, but not limited to salaries, wages, drawings, dividends, bonuses, sick pay, pensions or retirement funds and reimbursed expenses. This includes any and all wages being earned "off the books."

Response: Plaintiff objects to these requests to the extent Defendant is currently in possession of any of the above as regards the Plaintiff. Otherwise, to the extent Plaintiff is in the possession of any of the above, they will be produced.

12. All books, records, accounts, monthly statements, statements of transactions and all other papers and memoranda of stock brokerage accounts in your name individually, or in conjunction with any other person(s)

Response: To Plaintiff's knowledge, no such evidence exists

13. All stock certificates, bonds and other securities and all periodic statements of investment accounts and transaction confirmation statements concerning such securities in your name individually, or in conjunction with any other person(s) or which may be held in your account individually, or in conjunction with any other person(s).

Response: To Plaintiff's knowledge, no such evidence exists

14. If you have, or had a beneficial or legal interest, directly or indirectly, as owner, part-owner or beneficiary, or any proprietorship, partnership, trust estate, joint venture or corporation in which you are either a stockholder, officer or director, produce all financial statements, tax returns, books and records, including, but not limited to, checkbooks, bank statements, insurance policies, general ledgers, general journals, all other journals, deeds, contracts, long-term and loan agreements and other records that may or do have a bearing on your financial status.

Response: Plaintiff does not currently have any interest in any partnership, corporation, joint venture or other business enterprise.

15. Copies of all Federal and State and local income tax returns, whether individually or jointly filed, together with the schedules and worksheets thereto and all other papers,

documents and memoranda referring to any adjustment made in connection therewith. If there are any years for which such returns are not filed, copies of any and all extension applications and any supporting documents submitted therefore.

Response: Plaintiff objects to these requests to the extent Defendant is currently in possession of any of the above as regards the Plaintiff. Otherwise, to the extent Plaintiff is in the possession of any of the above, they will be produced.

16. Copies of all closing statements, statements of purchase, contracts of sale, deeds of conveyance, property leases, stock certificates and any appraisals for all real property, condominium apartments and cooperative apartments, in your name individually, or in conjunction with any other person(s), or of which you are the legal, beneficial or equitable owner or have any interest therein, including, but not limited to, the marital residence and any other real property owned by you and located within or without New York State.

Response: Plaintiff objects to these requests to the extent Defendant is currently in possession of any of the above as regards the Plaintiff. Otherwise, to the extent Plaintiff is in the possession of any of the above, they will be produced.

17. Copies of all financial statements, loan applications, notes, mortgages or other evidences of indebtedness prepared by you or for you for your benefit in connection with the purchase of any real property or cooperative shares owned by you and located within or without New York State.

Response: Plaintiff objects to these requests to the extent Defendant is currently in possession of any of the above as regards the Plaintiff Otherwise, to the extent Plaintiff is in the possession of any of the above, they will be produced.

18. Copies of all maintenance, mortgage, rent, utility, and other bills in connection with your current residence and any other residence owned, rented or occupied by you and located within or without New York State.

Response: Plaintiff objects to these requests to the extent Defendant is currently in possession of any of the above as regards the Plaintiff. Otherwise, to the extent Plaintiff is in the possession of any of the above, they will be produced.

19. Originals or certified copies of any invoice, bill of sale or evidence of payment/purchase of any household furnishings having an individual value in excess of One Hundred Dollars ($100.00).

Response: Plaintiff objects to these requests to the extent Defendant is currently in possession of any of the above as regards the Plaintiff. Otherwise, to the extent Plaintiff is in the possession of any of the above, they will be produced.

20. Any and all documents in connection with any business owned and/or operated by you including, but not limited to:

(a) all agreements/contracts to which you are a party

(b) all loans, personal expenses, disbursements and receipt accounts with respect to you

(c) office or business diaries and appointment books

(d) cash books and ledgers relating to practice or business

(e) tax returns and any and all schedules and attachments thereto

21. Any and all leases for commercial and/or residential premises in your name individually, or in conjunction with any other person or persons or firms.

Response: Plaintiff has no interest in, and documentation regarding, any business.

22. Any and all records, documents, correspondence or other writing pertaining to any social security fund you participate in, or similar funds or programs for the years referred to, whether such fund or program is a United States or foreign fund or program.

Response: To Plaintiff's knowledge, no such evidence exists.

23. Copies of all Powers of Attorney as to which you are either a principal or agent.

Response: To Plaintiff's knowledge, no such evidence exists.

24. Your United States Passports, current and expired.

Response: Plaintiff objects to this request because it is irrelevant and not likely to lead to the discovery of relevant evidence. Defendant is attempting to harass Plaintiff with this request.

25. Copies of your will and any Trust Agreement attendant thereto and copies of all Wills and Trust Agreements of which you are a present income beneficiary, remainderman, or ultimate beneficiary.

Response: Plaintiff objects to this request because it is irrelevant and not likely to lead to the discovery of relevant evidence. Defendant is attempting to harass Plaintiff with this request.

26. Copies of all medical and dental reimbursement plans.

Response: Plaintiff is not aware of any such agreements at this time.

27. All records of membership in and contributions to any charity and any other organization or association, including private and professional clubs or associations.

Response: To Plaintiff's knowledge, no such evidence exists.

28. Copies of the title and certificate of registration for any automobile, boat and airplane owned or used by you.

Response: Plaintiff objects to these requests to the extent Defendant is currently in possession of any of the above as regards the plaintiff. Otherwise, to the extent Plaintiff is in the possession of any of the above, they will be produced.

29. All information regarding stamps, coins, art and any other hobbies or collections.

Response: To Plaintiff's knowledge, no such evidence exists.

30. Copies of all statements, bills, records, correspondence, fee agreements and canceled checks, money orders or paid receipts evidencing your retention of all counsel in this action.

Response: To Plaintiff's knowledge, no such evidence exists.

31. Current driver's license

Response: A photocopy of Plaintiff's current driver's license will be produced.

32. Documentary proof of any health problems claimed by you.

Response: Plaintiff objects to these requests to the extent Defendant is currently in possession of any of the above as regards the plaintiff. Otherwise, to the extent Plaintiff is in the possession of any of the above, they will be produced.

33. Documentary proof of any expenditures for medical, dental and/or optical or other similar health related expenses in the last two years

Response: To Plaintiff's knowledge, no such evidence exists.

34. Proof of contribution of any monies for any claimed dependents.

Response: Plaintiff objects to these requests to the extent Defendant is currently in possession of any of the above as regards the plaintiff Otherwise, to the extent Plaintiff is in the possession of any of the above, they will be produced.

35. All pay stubs, paychecks, W-2's, 1099's, and other financial documents relating to your wages, salary and benefits for any job held by you since May 1992.

Response: To Plaintiff's knowledge, no such evidence exists.

36. Any and all diplomas, university degrees and/or certificates, grades, transcripts, attendance records and any and all other records issued by any educational institution at which you have studied during and/or before the marriage.

Response: To Plaintiff's knowledge, no such evidence exists.

37. Records, documents or other writings evidencing your current indebtedness. Please attach copies of the monthly bills indicating the amount owed since March 1995.

Response: To Plaintiff's knowledge, no such evidence exists.

38. Copies of any and all claim forms for workers compensation, any and all acknowledgments of claim, and any and all receipts of payment. Please provide any and all policy and claim numbers.

Response: To the extent Plaintiff is in the possession of any of the above, they will be produced.

39. Copies of any and all applications submitted for Social Security Disability benefits.

Response: To the extent Plaintiff is in the possession of any of the above, they will be produced.

40. All records or documents reflecting the current market value of any property that you have an interest in, together with an itemization of encumbrances against said property or properties, including the date on which such encumbrances were incurred.

Response: To Plaintiff's knowledge, no such evidence exists.

41. Produce records of any and all other income from any other source other than your present employer including, but not limited to, personal services and other services performed either alone or an independent contractor.

Response: To the extent Plaintiff is in the possession of any of the above, they will be produced.

42. Produce any and all mortgages held by you in connection with any and all properties upon which such mortgages were given including, but not limited to, mortgage notes, bonds, mortgagors, mortgagors' names, addresses, copies of any and all checks and/or money orders received by you upon such mortgages.

Response: Plaintiff objects to these requests to the extent Defendant is currently in possession of any of the above as regards the Plaintiff. Otherwise, to the extent Plaintiff is in the possession of any of the above, they will be produced.

43. Copies of any bankruptcy petitions, which may have been previously filed by or against you as an individual.

Response: To Plaintiff's knowledge, no such evidence exists.

44. Records of all treasury notes, bills, and/or bonds, corporate debentures, certificates of deposit, held by you either solely or jointly and all tax exempt securities and shelter investments solely or jointly.

Response: To Plaintiff's knowledge, no such evidence exists.

45. Records of membership in private clubs, health clubs, organizations, including records of payment made for dues, assessments, expenses and services.

Response: To Plaintiff's knowledge, no such evidence exists.

46. Records of all present credit card accounts with any bank, firm or corporation, including but not limited to department stores, gasoline and oil companies, Diners Club, American Express, Visa, Mastercard, Discover Card, whether in individual or joint name, in personal name or a company name, or another individual's name over which you have use.

Response: Plaintiff objects to these requests to the extent Defendant is currently possession of any of the above as regards the Plaintiff. Otherwise, to the extent Plaintiff is the possession of any of the above, they will be produced.

Dated: February 21, 2023
New York, NY

_____

PLAINTIFF

_____

Subscribed and sworn to before me on

_____

Notary Public

My commission expires on: _____

NOTICE OF DEPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:

JAMIE DOE	:	Index No. XXXXXX/22
Plaintiff	:	
against	:	**NOTICE OF DEPOSITION**
LEE DOE	:	
Defendant	:	

PLEASE TAKE NOTICE, that pursuant to CPLR Article 31, the deposition upon oral examination of defendant, LEE DOE, whose address is: 1 West 1st Street, New York, New York 10023 will be taken before a notary public, who is not an attorney or employee of an attorney for any party or prospective party herein and is not a person who would be disqualified to act as a juror because of interest or because of consanguinity or affinity to any party herein, at 1:30 PM on September 28, 2023, at the offices of My Law Office, 123 Main Street, New York, New York 10000, and to produce with you at that time the following documents:

1. All documents required to be produced pursuant to Plaintiffs First Set of Interrogatories and Documentation Demand;
2. All passports of any country(ies), including but not limited to France and the United States, both current and expired, held by defendant during the last ten (10) years.
3. Copies of any and all documentation of employment or compensation agreements or any other agreements made by defendant for the services of any employees,

agents, independent contractors or any other party in conjunction with defendant's business.

Dated: New York, New York
August 24, 2023

Yours, etc.
My Law Office
By: Dylan Advocate, Esq.
123 Main Street
New York, New York 10000
(212) 123-4567

To:
XXXXXXXXX Esq.
Attorneys for Defendant
123 Third Avenue
New York, New York 10017
(212) xxx-xxxx

C. Motion Practice

ORDER TO SHOW CAUSE CHECKLIST

Please *check off the forms that you are submitting and attach to front* ***of O.S.C.*** *when filing.*

Title of Action_____Index #

EVERY ORDER TO SHOW CAUSE REQUIRES

- ❑ All forms being submitted are fully completed with legible print using black ink
- ❑ Proper Heading (Jurat)
- ❑ Proper "Show Cause" statement
- ❑ Affidavit in Support (signed - dated - notarized)
- ❑ Part 130 Certification
- ❑ Exhibit tab on each supporting document identified and noted in the order to show cause
- ❑ CPLR 2217 prior or no prior application *in this or any other court* statement (affidavit or affirmation
- ❑ Fee waiver from *Her Justice*
- ❑ *22 NYCRR 202.7 Notice Requirement, if applicable*

ADDITIONAL REQUIREMENTS

For New Actions Only

- ❑ Request for Judicial Intervention (RJI) with payment stamped by County Clerk
- ❑ Stamped Copy of Summons with Notice or Summons and Complaint
- ❑ Simultaneous personal service of Summons clause

For Money Requests - (Child Support, Maintenance)

- ❑ Net Worth Statement
  (signed - dated - notarized - **total net worth section completed)**
- ❑ Child Support Registry Form

For Counsel Fee Requests

- ❑ Retainer Agreement (signed by attorney and client)
- ❑ Net worth Statement, if not filed previously

For Order of Protection Requests

- ❑ Family Offense Registry Form
- ❑ T.O.P. Form

For Contempt Applications

- ❑ Proper Warning and Notice pursuant to Judicial Law 756
- ❑ Copy of order or judgment that contempt application is based on
- ❑ Personal service on other party

For All Post-Judgment Applications

- ❑ copy of signed Judgment

For Enforcement of Judgment Application

- ❑ copy of signed Judgment with proof of service and notice of entry (prevailing party only)

For Emergency Applications

- ❑ separate Affidavit of emergency (nature of emergency explained - signed - dated - notarized)

For Modification of an existing child support order or child support arrears

- ❑ updated Net Worth Statement (signed - dated - notarized)

MOTION FOR *PENDENTE LITE* RELIEF[1]

At Trail Term Part ___ of the
Supreme Court of the State of New York,
held in and for the County of
Westchester, at 111 Dr. Martin
Luther King, Jr. Boulevard, White
Plains, New York, on
_____.

PRESENT:

HON._____, Justice

----------x

XXXXXXXXXX	:	Index No. XXXXXXXXX
	:	
Plaintiff	:	
against	:	**ORDER TO SHOW CAUSE**
	:	
XXXXXXXXXX	:	
Defendant	:	

----------x

UPON the annexed Affirmation of XXXXXXXXXX, Esq., dated _____, 2010, and the Affidavit of Plaintiff XXXXXXXXXX, sworn to on_____, 2010, together with the exhibits annexed hereto, and all of the papers, pleadings and proceedings heretofore had herein,

LET the Defendant, XXXXXXXXXX, show cause before Trial Term Part ___, to be held in and for the County of Westchester at the Courthouse located at 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York on the _____ day of_____, 2010, at 9:30 in the forenoon or as soon thereafter as counsel can be heard, why an order should not be made pursuant to DRL §§236B and 240 and entered herein:

---

[1] Special thanks to Emily Ruben, Legal Aid Society, Jane Aoyama-Martin and Karen Johansen, Pace Women's Justice Center, and Antoinette DelRuelle, NY Legal Assistance Group.

a. Granting the Plaintiff a Temporary Order of Protection against the Defendant, which provides that the Defendant stay away from the Plaintiff's residence, and to refrain from menacing, harassing, assaulting, or threatening Plaintiff, either in person, by a third party, on the telephone, or by email; and

b. Awarding temporary custody of the parties' minor children of the marriage to the Plaintiff, namely: XXXXXXXXXX, born xxxxxxxxxxx and XXXXXXXXXX, born xxxxxxxxxxx; and

c. Awarding Temporary Maintenance to the Plaintiff of $189 biweekly; and

d. Awarding Temporary Child Support of $354.25 biweekly for the minor children of the marriage, pursuant to the Child Support Standards Act; and

e. Permitting to keep her address confidential; and,

f. Granting such other and further relief as the Court deems just and proper.

SUFFICIENT REASON APPEARING THEREFOR, IT IS

ORDERED that pending the hearing and determination of this motion, the Plaintiff is awarded a Temporary Order of Protection against the Defendant, which provides that the Defendant stay away from the Plaintiff; and

ORDERED that pending the hearing and determination of this motion, the Plaintiff is awarded temporary custody of the parties' minor children of the marriage to the plaintiff, namely: XXXXXXXXXX, born xxxxxxxxxxx and XXXXXXXXXX, born xxxxxxxxxxx ; and

ORDERED that pending the hearing and determination of this motion, the Plaintiff is granted permission to keep her address confidential in this matter; and ORDERED that further relief be granted as this court deems just and proper; and

ORDERED, that sufficient reason appearing therefore let personal service of a copy of this order to show cause, and the papers upon which it is based, upon the defendant or his attorneys, on or before the ___ day of _____, 2010, be deemed good and sufficient service.

ENTER,

_____

XXXXXXXXXXXXXXX, J.S.C.

AFFIDAVIT IN SUPPORT OF PENDENTE LITE RELIEF

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

XXXXXXXXX	:	Index No. _____
	:	
Plaintiff	:	
against	:	**AFFFIDAVIT IN SUPPORT OF**
	:	**PENDENTE LITE RELIEF**
XXXXXXXX	:	
Defendant	:	

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) s.s.:

XXXXXXXXXXXXX, being duly sworn, deposes and says:

I am the Plaintiff in this divorce action.

2. I submit this affidavit in support of my application to obtain a Temporary Order of Protection for myself, temporary custody, interim child support, interim maintenance, and an order permitting me to keep my address confidential during the pendency for this Action for Divorce. A Summons with Notice for the divorce action will be served on Defendant simultaneously with this motion. (A copy of the Summons with Notice, dated ____, is annexed as “Exhibit A”).

3. I am moving for this relief by Order to Show Cause because of the urgency of my situation.

I. BACKGROUND

4. The defendant and I were married in a civil ceremony on April 5, 1999, in Brooklyn, New York. There are two minor children born of the marriage, namely, XXXXXXXX, born XXXXXXXX, and XXXXXXXX, born XXXXXXXX.

5. Over the years, my spouse has engaged in numerous acts of mental, verbal and emotional cruelty. He has threatened me with physical violence on several occasions, once by holding up an axe and another time aiming a pair of scissors at me with force. These incidents happened in front of the children.

6. I obtained counsel and with the help of my attorneys I began to prepare an action for divorce in February 2009. However, I have remained ambivalent about commencing the divorce action because I feared my spouse's reaction. I did not want to move out of the marital residence and disrupt my children's schooling in the middle of their semester. After a violent incident occurred, on June 1, 2009, as described in paragraph 7 below, I called the police who advised me to go to Family Court and obtain a Temporary Order of Protection. On June 3, I was so fearful for my safety that I rushed to Family Court in a state of emergency without my lawyers and I filed a *pro se* petition for a Temporary Order of Protection and temporary custody. The referee in Family Court denied my pro se petition for a Temporary Order of Protection and simply issued a Summons. (Copies of the *pro se* petitions for a Temporary Order of Protection and Temporary Custody are annexed as "Exhibit B"). My lawyers advised me to abandon the action because it was not safe for me to serve the Summons on the defendant without the Temporary Order of Protection, while I was still living with him. I am now applying for a Temporary Order of Protection, Temporary Custody and Temporary Child Support and Interim Maintenance. I plan to serve my spouse with the Action for Divorce and this Order to Show

Cause while simultaneously moving out of the marital residence with my children to a safe and confidential location. I have no desire to deprive my spouse of contact with the children and I am willing to cooperate with reasonable visitation as long as the pick-ups and drop-offs occur in a safe public place.

II. HISTORY OF ABUSE

The court should grant me a Temporary Order of Protection because my spouse has a long history of abuse towards me, which is likely to be triggered again by the service of these papers.

7. On or about February 24, 2009, at XXXXXXXXXXXX, upon coming home to see new blinds on the windows which I installed on my own, the defendant accused me of having a male neighbor inside the apartment to install the blinds on the windows. He got a tomahawk axe and threatened to cut down the blinds while yelling at me with the axe. He further falsely accused me of having an affair with the male neighbors and became enraged, waking up the children, who were sleeping in their room.

8. On June 1, 2009, at XXXXXXXXXXXXX, the defendant began to scream and verbally abuse me regarding a car insurance bill. I was in the children's room, where he came in and yelled "where is the f*king bill for the car insurance?" When I did not respond, he poked me hard on the shoulder. I asked him to leave me alone, but he continued his outburst in front of the children. My daughter, XXXXXXXX, asked him to please stop and he said, "not until mommy answers." I called 911. The defendant then picked up a pair of scissors and pointed them at my face, getting very close to my face, in a violent, coercive, and threatening manner. When I asked him what he was doing with the scissors, he responded in a menacing voice, "I am going to cut your hair." Meanwhile, he was holding the scissors in his fist with the sharp point poking out of his hand as if to stab me with it.

9. Defendant owns a BB gun and has verbally threatened me by stating, “If you leave me you will see.”

10. Defendant frequently suspects and falsely accuses me of seeing other men and being unfaithful to him, subjecting me to verbal and emotional abuse by doing so.

11. Defendant consistently berates me in front of the children, calling me a “petty bitch”, or “stupid” or “pathetic,” laughing at me while I cry, and calling me other names and belittling me in front of the children.

12. Defendant attempts to exercise control over me financially. When I ask for money for groceries, he tells me to give up my cell phone or my car to pay for groceries. He falsely claims he pays all my bills.

III. CUSTODY AND VISITATION

The court should grant me temporary custody of the children because I am the primary caretaker of the children and the defendant has shown that he is unfit to care for them on his own.

13. I am the primary caretaker of the children. I attend school meetings, take the children to their activities, to the doctor, and to summer camp. I prepare all of their meals, do homework with them, stay up with them at night if they are sick, read them bedtime stories, give them baths, shop for their clothes and other needs, and spend most of my time with them. The children spend almost all of their free time with me, whether it be playing games, going to the grocery store together, doing laundry together, or watching television at home together. Defendant does not attend school meetings and does not help with homework. When they were babies, I changed their diapers, fed them, took them to doctors’ appointments and cared for them.

14. On Father's Day, June 21, 2009, Defendant insisted on spending the day alone with the children. I accommodated him and left the home for the day. I later learned that instead of spending time with them, he slept past noon, and when they insisted they were hungry, he told them they eat too much.

15. Defendant often drinks alcohol and smokes marijuana at home while the children are present. He keeps a small pipe, other devices for smoking marijuana, and cigarettes in the house where the children could find them. When I've asked him to stop smoking marijuana in the presence of the children, he gets angry and says he pays the bills so he can do as he pleases.

16. Defendant uses profanity and derogatory words around the children. He often calls them derogatory names.

17. I have secured an apartment in a safe neighborhood. I plan for them to continue to attend their same school in the fall. They will attend a summer camp near the apartment in the coming weeks. My mother will be able to assist me with the children while I search for employment.

18. I do not want to deprive my spouse of visiting with the children and will make reasonable accommodations for visitation, so long as the pick-up and drop off locations are in a safe and public place.

IV. FINANCIAL RELIEF

19. Until I can find a job, I desperately need support and I am asking for pendente lite maintenance. My sworn statement of net worth is annexed as "Exhibit C." A bi-weekly temporary maintenance award of $189.00 is just and proper in this case.

20. According to my attorney, under the new temporary guidelines formula, I would be entitled to $189.00 bi-weekly. This amount will help me support myself as I reestablish my life.

21. In addition, the expenses reflected in my Sworn Statement of Net Worth total $3,136. These are barebones expenses. My current income/unemployment is only $1,625 per month, leaving a deficit of $1,511 per month. I will need at least $189 bi-weekly in maintenance, plus the child support amount of $354.25 bi-weekly, to close this gap.

22. I ask the court to grant me temporary child support and maintenance. During the course of our marriage, my spouse was the primary support of our family. I have always worked, most recently for a bank, XXXXXXXX, but was laid off eight months ago because of the economic downturn. I am currently looking for work without success due to the current state of the economy. My spouse has worked as an imaging technician with his present company through since 2001. To the best of my knowledge his salary has gradually increased over the years.

23. My spouse makes a gross salary of approximately $45,463.63 per year. (A copy of his September 15, 2008 paystub is annexed as "Exhibit D"). This is his most recent one I could find. My spouse's bi-weekly gross income is approximately $1,792. His applicable deductions for the purposes of determining temporary maintenance payments are local taxes ($49), Social Security ($111), and Medicare ($26), making his adjusted income $1606 bi-weekly.

24. I currently only receive unemployment insurance benefits, making my income $1,625 per month, or $756 bi-weekly, the only income to contribute to my upkeep or that of my

daughters. I anticipate that my unemployment insurance will end in December of 2009, after which my income will be $0, unless I am able to obtain another job by then.

25. I understand that I am entitled to child support to care for our two children.

26. I am seeking $354.25 bi-weekly in child support pursuant to the Child Support Standards Act, for two children, I am entitled to 25% of my spouse's bi-weekly adjusted income; this equals $354.25 bi-weekly for child support. Because I am not working right now, I do not have child care expenses. However, once I become employed, I may need to pay for child care and want to reserve my right to seek defendant's pro rata contribution for this expense in the future.

V. CONFIDENTIAL ADDRESS

27. I commenced an action for a divorce on the grounds of cruel and inhuman treatment on February 2009.

28. With this motion, I am requesting a Temporary Order of Protection to ensure my safety and request that our new address be kept confidential. I am not seeking an order excluding my spouse from the marital residence because I do not feel it is safe for me and the children to remain there. Because I am so fearful of my spouse's violent reaction once he finds out that I am seeking a divorce, I have rented an apartment for myself and my children and plan to move in before he is served with this motion and Summons with Notice. I believe it is critically important that I be allowed to keep my new address confidential.

29. I make this application pursuant to Section 254 of the Domestic Relations Law upon the grounds that the disclosure of my address or other identifying information would pose an unreasonable risk to my health and safety.

VI. CONCLUSION

30. Because of the defendant's history and pattern of abuse, I fear an escalation of violence when the Summons with Notice of Divorce is served on him. I, therefore, request that the Court grant a temporary order of protect for me, pending the final judgment of divorce, as well as, award me a temporary order of custody, child support, maintenance and permit me to keep my address confidential.

31. The Summons with Notice is being served simultaneously with this motion.

32. No prior application (except for as noted above in paragraph 6, has been made for the relief requested herein).

WHEREFORE, I respectfully request that this court grant me the relief I seek in the annexed Order to Show Cause and such other further relief as this Court may seem just and proper.

_____

XXXXXXXXXX

Sworn to before me this

___day of _____, 2010

_____

NOTARY PUBLIC

AFFIRMATION IN SUPPORT OF PENDENTE LITE RELIEF

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

XXXXXXXXXX	:	Index No. _____
	:	
Plaintiff	:	
	:	
Against	:	**AFFFIRMATION IN SUPPORT OF**
	:	**PENDENTE LITE RELIEF**
XXXXXXXXXX	:	
Defendant	:	

STATE OF NEW YORK)
COUNTY OF WESTCHESTER) s.s.:

XXXXXXXXXX, Esq., an attorney duly admitted to practice before the courts of the State of New York, affirms the truth of the following pursuant to the Rule 2601 of the CPLR and under penalties of perjury:

1. I am the attorney of record for XXXXXXXXXX, the Plaintiff herein, and I am fully familiar with the facts and circumstances of this matter.

2. I submit this affirmation in support of Plaintiff's motion for pendente lite relief for a temporary order of protection, custody, maintenance, child support, and permission to keep her address confidential.

3. Plaintiff is proceeding by Order to Show Cause for safety reasons and due to her urgent need for the temporary relief requested herein.

TEMPORARY ORDER OF PROTECTION

4. DRL §252(1) provides that in an action for divorce, the Supreme Court shall entertain an application for an order of protection or temporary order of protection by either party.

5. Plaintiff should be granted a temporary order of protection during the pendency of this action based on the numerous incidents of domestic violence perpetrated by Defendant against her during the marriage. Plaintiff's Aff. pp. 7-12.

6. These incidents constitute family offenses of disorderly conduct, reckless endangerment, harassment, menacing, and attempted assault.

7. Given the long history of abuse by Defendant against Plaintiff, Plaintiff is rightfully fearful for her safety. Her plan is to serve her Defendant spouse with the Action for Divorce and this Order to Show Cause while simultaneously moving out of the marital residence with her children to a safe and confidential location. Plaintiff's Aff. p. 6.

8. Plaintiff believes that service of the divorce summons in this action will likely trigger further violent behavior against her and desperately needs a temporary protective order prior to service of the divorce summons in this action.

TEMPORARY CUSTODY

9. It is well established that the pivotal concern in all custody determinations is the best interest of the child. Vezina v. Vezina, 8 A.D.3d 1047, 778 N.Y.S.2d 602 (4th Dept. 2004); Fox v. Fox, 177 A.D.2d 209, 582 N.Y.S.2d 863 (4th Dept. 1992); McIntosh v. McIntosh, 87 A.D.2d 968, 451 N.Y.S.2d 200 (3rd Dept. 1984). When determining the best interest of the

child, the court must look at the totality of the circumstances including, but not limited to, the ability of each party to satisfy the child's emotional and intellectual needs, the preference of the child, and the length of time current custody arrangements have existed. Diffon v. Towne, 787 N.Y.S.2d 677 (N.Y. Fam. Ct. 2004).

10. DRL §240-1(a) also mandates that the court consider the effects of domestic violence on the best interests of the children. The New York State Legislature stated in a 1996 preamble to the enactment of the law:

> The Legislature hereby establishes domestic violence as a factor for the court to consider in child custody and visitation proceedings, regardless of whether the child has witnessed or has been a direct victim of domestic violence. Studies indicate that children raised in a violent home experience shock, fear, and guilt and suffer anxiety, depression, somatic symptoms, low self-esteem, and developmental and socialization difficulties. Additionally, children raised by a violent parent face increased risk of abuse.

11. The court will weigh heavily incidents of verbal abuse and/or violence committed by a party in a custody determination. Musgrove v. Bloom, 797 N.Y.S.2d 161, 162 (3rd Dept. 2005).

12. It would be in the best interest of the children for Plaintiff to be granted temporary custody based on the facts presented since Plaintiff is and always has been, the primary caretaker of the children, and because of the violence perpetrated by Defendant against Plaintiff. Plaintiff's Aff. pp. 7-12, 13-16.

FINANCIAL RELIEF – TEMPORARY MAINTENANCE AND CHILD SUPPORT

13. Effective October 12, 2010, new DRL §236, Part B(5-A), provides that this Court shall make a temporary maintenance award to the lower-income spouse pursuant to established formulaic guidelines.

14. The new guidelines adopted by New York State are intended to produce more consistent and equitable maintenance awards to reduce often excessive amounts of judicial resources, time, and money expended on divorces in New York State. The use of these guidelines, which are similar in approach to the application of guidelines in the Child Support Standards Act ("CSSA"), is a means of protecting economically vulnerable spouses and will introduce fairness, predictability, and consistency into the area of maintenance awards.

15. The temporary maintenance guidelines rely on a relatively simple formula to calculate interim maintenance. The temporary maintenance award is 30% of the payor's adjusted income minus 20% of the payee's adjusted income. The adjustments to income are the same as those made when determining adjusted income under the CSSA. A maximum temporary maintenance award is set at the amount that would bring the income of the payee spouse to no more than 40% of the combined incomes of both spouses.

16. Defendant's bi-weekly adjusted income is approximately $1,606 (gross $1,792 minus local tax of $49, social security of $111, and Medicare of $26). Plaintiff's bi-weekly income of unemployment insurance is $756.

17. Under this formula, Plaintiff is entitled to $189 bi-weekly, calculated as follows:

A	**B**	**C**	**D**	**E**	**F**	**G**	**H**	**I**	**J**
Payor's pre-award income	Payee's pre-award income	30% of Payor's pre-award income	20% of Payee's pre-award income	30% of Payor's pre-award income *minus* 20% of Payee's pre-	Combined income	40% of com-bined income	Temp. Maint. Award: lesser of (column E) or (column G minus column B)	Payor's income with temp. maint. award deducted	Payee's income with temp. maint. award added

				award income					
$1606	$756	$482	$151	$331	$2362	$944.8	**$189** (lesser of $331 or $189)	$1417	$945

18. In addition, Plaintiff's expenses reflected in her Sworn Statement of Net Worth total $3,136. These are barebones expenses. Plaintiff's current income/unemployment is only $1,625 per month, leaving a deficit of $1,511 per month. She will need at least $189 bi-weekly in temporary maintenance, plus the child support amount of $354.25 bi-weekly, to help close this gap.

19. Pursuant to DRL §240(1-b), Plaintiff is seeking $354.25 bi-weekly in child support. Pursuant to the Child Support Standards Act, for two children, she is entitled to 25% of Defendant's bi-weekly adjusted income adjusted income of approximately $1,606 (gross $1,792 minus local tax of $49, social security of $111, Medicare of $26, and temporary maintenance award to be paid of $189).

A	**B**	**C**	**D**	**E**	**F**
Payor's pre-award income	Payee's pre-award income	Combined income	25% of combined income	Pro-rata share % of the payor (non-custodial parent)	Payor's amount of Child Support
$1417	$756	$2173	$543.25	65%	$354.25.

20. Because Plaintiff was laid-off and is not currently employed, she does not have child care expenses. However, she is diligently looking for work and once employed, she may need to pay for child care and reserves her right to seek Defendant's pro rata contribution for this expense in the future. Plaintiff's Aff. ¶ 26.

CONFIDENTIAL ADDRESS

21. Pursuant to DRL §254, Plaintiff's address should be kept confidential upon the grounds that the disclosure of her address or other identifying information would pose an unreasonable risk to her health and safety.

22. No prior request has been made for the relief requested herein, except as otherwise set forth herein.

WHEREFORE, Plaintiff respectfully requests that this court grant all of the relief requested in the annexed Order to Show Cause and such other further relief as this Court may seem just and proper.

Dated: White Plains, New York
xxxxxxxxxxx, 2010

_____
XXXXXXXXXXXXX
Pace Women's Justice Center
Attorneys for Plaintiff
27 Crane Avenue
White Plains, New York 10603
(914) 422-4069

ORDER TO SHOW CAUSE FOR CONTEMPT AND TO COMPEL

The Legal Aid Society
Bronx Neighborhood Office
Tel: 718-991-4758 x. 269
Fax # 718-842-2867

At Trail Term Part ____ of the Supreme Court of the State of New York, held in and for the County of Westchester, at 111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York, on _____.

PRESENT:

HON._____, Justice

----------x

XXXXXXXXX	:	Index No. _____
	:	
Plaintiff	:	
against	:	**ORDER TO SHOW CAUSE**
	:	
XXXXXXXXX	:	
Defendant	:	

----------x

NOTICE: THE PURPOSE OF HIS HEARING IS TO PUNISH THE ACCUSED FOR CONTEMPT OF COURT AND SUCH PUNISHMENT MAY CONSIST OF FINE, IMPRISONMENT, OR BOTH ACCORDING TO LAW.

WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT.

UPON the annexed affirmation of RHONDA J. PANKEN, dated January 10, 2003, and the affidavit of JAY DOE, sworn to on January 10, 2003, together with the exhibits annexed hereto, and all of the papers, pleadings and proceedings heretofore had herein,

LET the defendant, JO DOE, or his attorneys, show cause before Trial Term Part 18, to be held in and for the County of Bronx at the Courthouse located at 851 Grand Concourse, Bronx, New York on the _____day of _____ 2003, at 9:30 a.m. of that day or as soon thereafter as counsel can be heard, why an Order, pursuant to Judiciary Law §756 and Domestic Relations Law §§ 243, 244 and 245 should not be made:

(a) holding defendant Jo Doe in contempt of court for his failure to pay child support, pursuant to the Order of this Court dated October 1,2002, continuing the May 16, 2002 Temporary Order of Support issued by the Family Court under Docket No.:F-xxxxx, requiring defendant to pay $600 bi-weekly in child support, via income execution and S.C.U; and

(b) directing that defendant be imprisoned for his civil contempt until such time as he has satisfied child support arrears of $7,504; and

(c) directing defendant to post a $20,000 bond with S.C.U. to secure future payment of child support, pursuant to the Order of this Court dated October 1, 2002; and

(d) granting plaintiff leave to enter a money judgment in the amount of $7,504, plus interest, for child support arrears accrued under the Order of this Court dated October 1, 2002; and

(e) compelling defendant to produce the requested financial disclosure and attend a deposition, or, in the alternative, deeming the issue of defendant's income, child support obligations, and equitable distribution resolved in accordance with Mx. Doe's claims, and precluding defendant from providing evidence or testimony in the above-captioned action, from making any further discovery requests, or using information contained in discovery already provided to him; and

(f) for such other and further relief as this Court may seem just and proper.

SUFFICIENT REASON APPEARING THEREFOR, IT IS

ORDERED, that personal service upon JO DOE by his attorney, XXXXXXXXX, ESQ., XXXXXXXXX, New York, New York 10165 on or before _____, 2003, be deemed good and sufficient service.

Enter

_____

J.S.C

AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE FOR CONTEMPT AND TO COMPEL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

XXXXXXXXX	:	Index No. _____
	:	
Plaintiff	:	
against	:	**AFFIDAVIT**
	:	
XXXXXXXXX	:	
Defendant	:	

State of New York)
ss:
County of Bronx)

JAY DOE, being duly sworn, deposes and says:

1. I am the plaintiff in the above-captioned matter, and submit this affidavit in support of my application to hold defendant in contempt for his willful failure to comply with his court- ordered child support obligations as well as financial discovery.

2. Defendant and I were married in Mexico on October 1,19 and again in the Queens, New York, on May 22,19. We have two children, Hector I. F., d.o.b. xxxxxx, and Misael M. F., d.o.b., xxxxxx. My daughter from a previous marriage, Lizeth D., d.o.b. xxxxx, has always known defendant as a father; we have lived together as a family since 1992. I have two other adult children from my previous marriage, Josue D., d.o.b. xxxxxx and Josafat D., d.o.b. **xxxxxx.**

3. I filed for divorce on May 13, 2002. See Exhibit B. I was granted a Criminal Court Order of Protection under Docket No. 2001 BXxxxxxx, against Plaintiff in December 2002, which is in effect until December 13, 2004.

4. I filed a petition for support in the Family Court under Docket No. F-xxxxxx/01 on December 11, 2001. On April 24, 2002, I amended my petition to include a request for support of defendant's step-daughter, Lizeth, as she had been omitted from the first petition. See Exhibit A. Defendant was then ordered to pay, effective April 26, 2002, $705.00 bi-weekly, through S.C.U. Medical insurance was also to be provided by defendant.

5. On the last Family Court date, May 16, 2002, defendant informed the court that he had resigned from his position as an engineer and Project Manager at xxxxxxx Signaling, where he earned over $84,000 a year in 2001. The Temporary Order of Support was modified to $600 bi-weekly, via S.C.U., effective May 24, 2002. See Exhibits D and E.

6. Defendant has continued to work as a Project Manager for xxxxxxxx Signaling's West Side Subway Project, but, instead of working as an employee of xxxxxx, he is paid as a consultant by x & x Transit, Inc., a California company, who in turn invoices xxxxxxx.

7. Defendant has the means to comply with the Order of Support, but has willfully and intentionally failed to do so. Between his job and retirement benefits, defendant's income exceeds $107,000 per year. He has not made one payment voluntarily; the only way partial payments have been made since this past July 2002, is via an S.C.U. income execution that was served on defendant's pension through N YCERS. I understand that defendant continues to work in the same Brooklyn location he worked at before his staged "resignation" and he drives the same car and speaks on the same cellular telephone, all supplied by ***xxxxxxxx*** • See Exhibits H, I, J, and K.

8. Additionally, upon information and belief, defendant took several trips to Las Vegas, as well as a trip to Aruba, with his girlfriend, Chris who works at xxxxx as a secretary.

Also, upon information and belief, defendant tells others that he will do anything, even move out of state, rather than pay me anything.

9. My family and I no longer have health insurance and now rely on Medicaid, food stamps, and a small amount of cash public assistance. Defendant, upon information and belief, removed the family from his NYCERS health insurance plan. My recent surgery on both feet this summer was not covered by Medicaid, and as such, I owe my podiatrist over $7,800. I do not yet have INS work authorization and as a result, have been reliant on my sons to support our family.

10. I believe that nothing less than a contempt sanction and incarceration will inspire defendant to comply with his court-ordered support obligations. Without his compliance, my family and I will continue to struggle to pay for basic necessities such as food, clothing, shelter and health care.

11. Throughout our separation and the support litigation I commenced in December 2001, defendant has been evasive as well as dishonest with the Court and counsel. He refuses to disclose his true financial circumstances and has deliberately flouted the Order of Support at every turn.

12. I have made no prior application for the relief requested in this motion.

WHEREFORE, it is respectfully requested that I be awarded the relief sought herein.

_____

JAY DOE

Sworn to before me this day of , 2003

_____

Notary Public

AFFIRMATION IN SUPPORT OF ORDER TO SHOW CAUSE FOR CONTEMPT AND TO COMPEL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

XXXXXXXXX,	:	Index No. _____
	:	
Plaintiff	:	
against	:	**AFFIRMATION**
	:	
XXXXXXXXX,	:	
Defendant	:	

RHONDA J. PANKEN, an attorney duly admitted to practice law in the courts of the State of New York, affirms the following under penalty of perjury:

1. I am of counsel to Marshall Green, Attorney-in-Charge, The Legal Aid Society, Bronx Neighborhood Office, attorney for the plaintiff in this action.

2. I submit this affirmation in support of Ms. F.'s Order to Show Cause requesting an order: (1) holding defendant Hector F. in contempt of court for failure to pay child support; (2) directing that defendant be imprisoned for his civil contempt until such time as he has satisfied $7,504 in child support arrears owed to Ms. F.; (3) directing defendant to post a bond to secure his future child support obligations; (4) granting Ms. F. leave to enter a money judgment in the amount of $7,504, the child support arrears owed; (5) compelling defendant to produce the requested discovery and attend a deposition, or, in the alternative, deeming the issue of defendant's income, child support obligations and equitable distribution resolved in accordance with Ms. F.'s claims, and precluding defendant from providing evidence or testimony in the above-captioned action, from making any further discovery requests, or using information

contained in discovery already provided to him; and (6) for such other and further relief as to this Court may seem just and appropriate. I am fully familiar with the all of the facts and circumstances of this case.

PROCEDURAL BACKGROUND

3. The parties were married in Mexico on October 1, 19 , and again in Queens, New York, on May 22,19__ .They have two children, Hector I. F., xxxxxxx, and Misael M. F., xxxxxxxx. Additionally, Ms. F. has two adult children and one minor child from a previous relationship.

4. The parties have lived apart since December 2001 and plaintiff holds a Criminal Court Order of Protection against defendant under Docket No. 2001BXxxxxxx, effective until December 13, 2004.

5. Ms. F. petitioned the Bronx Family Court for child and spousal support under Docket No.:F-xxxxxx on December 11, 2001. On April 24, 2002, she amended her Family Court petition to include a request for support for her daughter who is defendant's step-daughter, Lizeth, as the child had been omitted from her first petition, and had been living with the parties since 1992. See Exhibit A.

6. On April 25, 2002, pursuant to the Temporary Order of Support of the Bronx Family Court, defendant was directed to pay child support, effective April 26, 2002, $705.00 bi-weekly, through S.C.U. Medical insurance was also ordered to be paid by defendant, and the matter was adjourned to May 16, 2002.

7. This matrimonial proceeding was commenced on May 13, 2002, by the filing of a Summons with Notice, attached as Exhibit B. Ms. F. has served a complaint stating the grounds

of defendant's cruel and inhuman treatment. See Exhibit C. Defendant has failed to file an Answer to date.

8. On May 16, 2002, the parties appeared before Bronx Family Court Hearing Examiner Kemp J. Reeves. That day, defendant revealed to the court that he had resigned his position with _____. Signaling in early April 2002, and was unemployed and looking for work. A transcript of the May 16, 2002 proceedings is attached as Exhibit D. Defendant was ordered to pay, effective May 24, 2002, $600 bi-weekly, via S.C.U. and income execution. A copy of the Temporary Order of Support is attached as Exhibit E.

9. On August 29, 2002, Ms. F. moved to remove the Family Court support matter to the Supreme Court, to consolidate the support action with the instant divorce, and for a continuation of the Order of Support dated May 16, 2002. The Order of Support was continued and the matter was made returnable, along with a Preliminary Conference, for October 1, 2002.

10. On October 1, 2002, at the Preliminary Conference and the return date of Ms. F.'s Order to Show Cause to Consolidate, this Court, pursuant to stipulation, consolidated Ms. F.'s pending child support action, and the Family Court Order of Support, dated May 16, 2002, directing defendant to pay, effective May 24, 2002, $600 bi-weekly, via S.C.U., was continued until further order of this court. See Exhibit F.

11. The defendant has been represented by counsel, XXXXXXXXX, Esq., in the Family Court support action as well as this divorce action.

DEFENDANT'S WILLFUL FAILURE TO PAY SUPPORT

12. Over $7,504 in child support arrears are due and owing Ms. F., for no reason other than defendant's recalcitrance. Defendant has worked as engineer and Project Manager for

xxxxxx Signaling Inc., since late 1999, most recently on a project with the New York City Transit Authority, overhauling the West Side New York City subway system. Working for xxxxxxxxx, defendant has earned over $84,000 per year, as well as an estimated additional $22,000 per year in retirement income from NYCERS. See Exhibit G. While at xxxxxxxxxx, defendant and his family availed themselves of a generous benefit package, including medical, dental, life, and disability insurance coverage, as well as a 401(k). Defendant's employment, earnings, and benefits history and his resignation letter were obtained via subpoena of May 6,2002, served on xxxxxx, attached as Exhibit FI.

13. Confronted with the xxxxxxxx documentation, defendant represented to the Family Court in May 2002 that he was unemployed. In his Statement of Net Worth dated September 26, 2002, however, he acknowledged, on page 5, that he works “sporadically” as a consultant. Defendant failed, however, to disclose where he in fact works as a consultant and what he earns as such.

14. In an effort to avoid paying child support via income execution and to avoid providing benefits for his family, defendant voluntarily "resigned" from his position at Alstom. Despite his resignation from Alstom, he did, however, continue to work as Project Manager of xxxxxxxx's West Side Project, as a consultant and independent contractor for a California business entity, x & x Transit Consultants, Inc. x & x Transit Consultants, Inc. subcontracts with xxxxxxx. In essence, defendant has the same job on the same project at the same pay, only his employment relationship has changed.

15. Counsel has attempted several times to obtain documentation of such from defendant, as described below, as well as from x & x Transit; x & x is unwilling to comply with counsel's subpoena, attached as Exhibit I.

16. Indeed, documentation received in response to the November 12, 2002 subpoena served on xxxxxxx Inc. makes it clear that, since mid April 2002, defendant has consistently worked at least forty hours per week at his regular rate of $52.80 per hour, plus many hours per week overtime in the same capacity, as a Project Manager, that he did before his staged "resignation." The documentation reveals that defendant is paid through x & x Transit, who in turn, invoices xxxxx for his services. In fact, as set forth below, from Apxril 14, 2002 through October 13, 2002, x & x Transit has invoiced xxxx for over $83,758 and 1,586 hours for defendant's services:

Invoice #	**Dates worked**	**Hours workers**	**Amount invoiced**
1001	4-14-02 through 4-17-02	136	$7,208
1001	**4-28-02** through 5-11-02	135	$7,155
1002	5-13-02 through 5-26-02	119	$6,307
1003	5-27-02 through 6-9-02	122	$6,166
1004	6-**10-**02 through 6-22-02	152	$8,056
1004	6-24-02 **through** 6-30-02	75	$3,975
1006	7-8-02 through 7-21-02	129	$6,837
1007	7-29-02 through 8-17-02	301	$15,953
1008	8-19-02 through 9-1-02	82	$4,346
1009	9-2-02 through 9-13-02	80	$4,240
10010	9-16-02 through 10-13-02	255	$13,515
	Total	**1,586**	**$83,758**

The documentation simply belies defendant's representations of "matrimonial bankruptcy." A copy of the subpoena as well as defendant's time sheets, and invoices relating to his employment are attached as Exhibit J.

17. Over and above the thousands of dollars in income defendant has earned working for Alstom through x & x Transit, Alstom has continued to provide defendant with Nextel cellular telephone services, reimbursed expenses such as gas, tolls, meals and entertainment, and

a leased Ford Taurus. See defendant's expense reimbursement sheet, and leasing information, annexed as Exhibit K. These expenses, to the extent that they reduce defendant's personal expenditures, should be imputed to defendant as income.

18. It is clear that defendant willfully refuses to comply with the Order of Support, or, as set forth below, compulsory financial disclosure. While defendant's child support obligations remain $600 bi-weekly, defendant has made not one payment on a voluntary basis; all funds collected have been garnished via an S.C.U. income execution served on NYCERS on or about June 2002. Upon information and belief, because a percentage of this income is paid to defendant's ex-wife, Ms. F. has only received partial payments of $585.82 per month since July 2002

19. Accordingly, $7,504 in outstanding child support arrears have accrued to date, comprised of 2 payments of $705 plus 17 payments of $600, less seven partial payments of $585.82 made to S.C.U.:

$ 1,410	Arrears owed from 4/26/02 through 5/10/02
+ $10,200	Arrears owed from 5/24/02 through 1/03/03
$11,610	
($ 4,096.40)	Payments made from July 2002 through January 2003
$ 7,504	

20. Of the many machinations defendant has employed in order to avoid his support obligations, most offensive is his having left his family without health insurance benefits upon which they have always relied. Ms. F. had surgery on both feet this past summer, and was uninsured. She now owes over $7,800 to her podiatrist. The child Lizeth recently had a biopsy regarding a growth on her jaw. Because Ms. F. does not yet have work authorization from the INS, she is relying on public assistance and her sons' support to sustain herself and the parties'

children. Defendant's calculated and obstructionist conduct has clearly impaired, impeded, and prejudiced Ms. F.'s rights and those of the parties' children.

21. Defendant's lack of regard for the Orders of the Court is manifest. He clearly has the resources to obey the Order of Support, but has willfully refused to do so. Nothing less than a contempt sanction and incarceration is likely to obtain defendant's compliance, as the NYCERS Income Execution garnishes the maximum deductions allowed under CPLR §5241, and x & x Transit, the California entity through which defendant works as a consultant, has thus far refused to honor counsel's subpoena. See Exhibit G. Upon information and belief, the Support Collection Unit has also served an income execution on x & x Transit, on or about November 2002, without success.

22. Given defendant's demonstrated recalcitrance, enforcement remedies other than incarceration would likely prove ineffectual. Defendant is unlikely to post a cash bond and has no available assets subject to attachment. Additionally, as set forth in Ms. F.'s affidavit, defendant has threatened to leave New York State and find another job elsewhere and to do anything he has to, to avoid paying her.

REQUEST TO COMPEL AND/OR PRECLUDE DISCOVERY

23. At the Preliminary Conference held on October 1, 2002, the parties stipulated to a discovery schedule, which was "So Ordered" by the Court. See Exhibit L. Depositions, pursuant to the schedule, were to be held on or before November 15, 2002.

24. Additionally, on October 1, 2002, I presented and requested that defendant sign two releases for discovery. The first release, signed by defendant, authorized Ms. F. to obtain any

information from NYCERS relevant to her interest in defendant's pension plan in connection with defendant's past employment with the New York City Transit Authority; this pension is currently in pay status. The second release was for information concerning x & x Transit, Inc., the company for which defendant has been performing work on a consultant basis since his "resignation" from Signaling in April 2002. This release defendant simply refused to sign.

25. On October 21, 2002, Ms. F. served defendant with Interrogatories and a Notice to Take Defendant's Deposition on November 15, 2002.

26. On or about October 25, 2002, Ms. F. was served with defendant's Notice for Discovery and Inspection and Interrogatories. Both requests required a response by November 29, 2002; Ms. F.'s responses were served on defendant on November 26, 2002.

27. On November 5, 2002, when Mr. F.'s discovery requests had not been provided, I contacted counsel for defendant in order to move back the date of the depositions as well as the Compliance Conference, previously scheduled for December 9,2002. Counsel stipulated to schedule depositions for December 16, 2002, and to reschedule the Compliance Conference for January 21, 2003. See Exhibit M.

28. On November 20, 2002, I spoke to a paralegal with defendant's counsel's office, who informed me that they were working on defendant's responses to our discovery requests.

29. By December 10, 2002, when defendant's discovery had still not been received, I again contacted counsel for defendant via facsimile and mail, requesting an explanation of when the discovery would be produced, and informing him of the necessity of receiving discovery sufficiently in advance of the depositions. See Exhibit N.

30. In response to my letter, defendant's counsel informed me on December 10, 2002, that he had tried several times, without success, to contact his client to complete and forward their discovery. Counsel agreed a postponement of the deposition would be necessary.

31. On December 17,2002, counsel and I rescheduled the parties' depositions for January 17, 2003. At that time, counsel informed me that he had just heard from his client and his responses to our requests, although meager, would be forwarded shortly.

32. Not having received defendant's responses, on January 7, 2002, I contacted Mr. Yagerman, who said he would check whether they were previously sent by mail. On January 8, 2002, not having received a call or fax from counsel, I sent another letter via fax requesting the discovery. See Exhibit O.

33. On January 8, 2003, I received, by fax, defendant's unsworn responses to Ms. F.'s Interrogatories. Not one of the documents requested, such as W-2's, 1099s, or proof of past or present income was remitted. Most of the questions are answered "N/A," or "Ask Plaintiff for Details." Not one question relating to marital assets or defendant's current employment and income was answered in any detail. See Exhibit P.

34. Defendant has repeatedly refused to disclose his current employer or income and has made discovery via subpoena on xxxxx Signaling, see Exhibits H, I, J and K, the only source of credible, objective information. Furthermore, the documentation received clearly reveals defendant's willful refusal, despite having the ability, to comply with the Order of Support.

35. Without defendant's financial disclosure, I cannot adequately prepare for either trial or settlement of this matter. As set forth above, a good faith effort to obtain defendant's compliance has been made.

36. As Defendant has completely disregarded the Order of this Court, I respectfully request that defendant either be compelled to comply with Ms. F.'s discovery requests, or in the alternative, be precluded from presenting evidence or testimony concerning his financial condition and from making any further discovery requests or using information contained in discovery already provided to him by Ms. F..

NO PREVIOUS REQUEST

37. No previous application has been made for the relief sought herein.

WHEREFORE, it is respectively requested that this Court issue an Order:

(a) holding defendant Hector F. in contempt of court for his failure to pay child support, pursuant to the Order of this Court dated October 1, 2002, continuing the May 16, 2002 Temporary Order of Support issued by the Family Court under Docket No.Fxxxxxx- requiring defendant to pay $600 bi-weekly in child support, via S.C.U; and

(b) directing that defendant be imprisoned for his civil contempt until such time as he has satisfied child support arrears of $7,504; and

(c) directing defendant to post a $20,000 bond with S.C.U. to secure future payment of child support, pursuant to the Order of this Court dated October 1, 2002; and

(d) granting plaintiff leave to enter a money judgment in the amount of $7,504, plus interest, for child support arrears accrued under the Order of this Court dated October 1, 2002; and

(e) compelling defendant to produce the requested financial disclosure and attend a deposition, or, in the alternative, deeming the issue of defendant's income, child support

obligations, and equitable distribution resolved in accordance with Ms. F.'s claims, and precluding defendant from providing evidence or testimony in the above-captioned action, from making any further discovery requests, or using information contained in discovery already provided to him; and

(f) for such other and further relief as this Court may seem just and proper.

Dated: New York, New York
January 10, 2003

_____

RHONDA J. PANKEN

AFFIRMATION OF GOOD FAITH

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

XXXXXXXXX	:	Index No. _____
	:	
Plaintiff	:	
against	:	AFFIRMATION OF GOOD FAITH
	:	PURSUANT TO 22 NYCRR 202.7
XXXXXXXXX	:	
Defendant	:	

RHONDA J. PANKEN, an attorney duly admitted to practice law in the courts of the State of New York, affirms the following under penalty of perjury:

1. I am of counsel to Marshall Green, Attorney-in-Charge, The Legal Aid Society, Bronx Neighborhood Office, attorney for the plaintiff in this divorce action.

2. This is a motion for contempt and to compel and preclude discovery.

3. Counsel for defendant and I have communicated several times by letter, as well as by phone, in an effort to resolve the issues raised in Ms. F.'s motion, to no avail.

4. My office sent a letter concerning defendant's continuing to work for Alstom, his failure to pay support, and other disclosure issues on September 23, 2002. On November 15, 2002, when defendant's discovery was not forthcoming, we adjourned the deposition to a December date. Thereafter, on or about December 10, 2002, and again on December 17, 2002, I again requested defendant's disclosure and counsel and I. again rescheduled the deposition for January 17. Finally, on January 7, 8, and 9, via fax, letter, and telephone, I received defendant's responses to Ms. F.'s Interrogatories and informed defendant of their being defective as well as nonresponsive.

5. As over $7,500 in child support arrears are due and owing plaintiff and defendant continues to engage in obstructionist conduct rather than comply with his court-ordered obligations and compulsory financial disclosure, the court's intervention is a necessity.

Dated: New York, New York
January 10, 2003

_____
RHONDA J. PANKEN

ORDER TO SHOW CAUSE TO PRECLUDE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

XXXXXXXXXX	:	Index No. _____
	:	
Plaintiff	:	
against	:	**ORDER TO SHOW CAUSE**
	:	
XXXXXXXXXX	:	
Defendant	:	

PLEASE TAKE NOTICE that upon the affidavit of Defendant, B, sworn to on April 22, 2004, the affirmation of AMANDA NOREJKO, Esq., Sanctuary for Families, Inc., Center for Battered Women's Legal Services, dated April 22, 2004, the annexed exhibits, and all of the proceedings heretofore had herein, the Defendant, B, by her attorneys, will move before the Honorable La Tia Martin, a Justice of the Supreme Court, to be held at the courthouse thereof, located at 851 Grand Concourse, Bronx, New York, on the _____ day of ____, 2004, at 9:30 a.m. or as soon thereafter as counsel can be heard for an Order pursuant to Civil Practice Law and Rules § 3126

1. Compelling Plaintiff to arrange for the appraisal of the marital residence;
2. Precluding Plaintiff from presenting evidence of marital debt;
3. Resolving that Plaintiff works a second job as a taxicab driver;
4. Resolving that Plaintiff's income cannot be determined;
5. Resolving that all real property in South Africa is marital property;
6. Resolving that the value of the South African property is $20,000;
7. Precluding Plaintiff from serving Defendant with additional discovery;

8. Granting such other and further relief as this Court deems just and proper.

ORDERED that service by mail of a copy of this Order to Show Cause together with papers upon which it is based upon the Plaintiff's attorney, on or before the _____day of April, 2004, shall be deemed sufficient service.

ENTER:

_____
Justice of the Supreme Court

AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE TO PRECLUDE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----------x

XXXXXXXXX	:	Index No. _____
	:	
Plaintiff	:	
against	:	**ORDER TO SHOW CAUSE**
	:	
XXXXXXXXX	:	
Defendant	:	

----------x

I, XXXXXXXXX, being duly sworn, deposes and says:

1. I am the defendant in the above-captioned divorce action and am personally familiar with all the facts and circumstances herein and make this affidavit in support of the annexed motion for the following relief:

A. That the Court compel Plaintiff to arrange and pay for appraisal of the marital residence;

B. That the Court preclude Plaintiff from offering any evidence regarding debt in his name as marital debt;

C. That the Court resolve the issue that Plaintiff has a second job as a taxicab driver and the amount of his income from this job cannot be established;

D. That the Court resolve that the property in South Africa is marital property;

E. That the Court resolve that the value of the South African property is $20,000;

F. That the Court preclude Plaintiff from serving me with any further discovery; and

G. That the Court grant such other and further relief as this Court deems just and proper.

2. On September 9, 2003, my attorney served the Defendant's First Set of Interrogatories and a Notice of Discovery and Inspection on Plaintiff's attorney. See Exhibits A and B.

3. On November 16, 2003, I appeared in Court with my attorney for a compliance conference. Plaintiff and his attorney were also present. Plaintiff had still not responded to my request for discovery. The Court issued an Order setting a new deadline of December 31, 2003 for Plaintiff to serve a response to my discovery requests. In addition, Plaintiff was ordered to send to my counsel a copy of the appraisal of the marital co-op and a retirement account authorization by November 30, 2003. See Exhibit C.

4. Although Plaintiff's counsel sent my attorney Plaintiff's request for interrogatories and a notice of discovery and inspection, the documents I requested in my own discovery papers still did not arrive. I answered Plaintiff's discovery requests to the best of my ability before the next compliance conference on February 22, 2004. In the meantime, my attorney had to postpone a previously-scheduled deposition because without Plaintiff's answers to the discovery requests, she would have to depose him again and it would be too expensive.

5. On February 22, 2004, I again appeared before this Court for another compliance conference. Plaintiff was once again present with his attorney. Plaintiff had yet to provide my attorney with any of the items ordered by the Court on November 16, 2003. The Court once again ordered Plaintiff to submit all requested documents to Defendant's attorney by March 15, 2004. Meanwhile, Plaintiff requested additional documents from me that were included in the compliance conference order. See Exhibit D.

6. My attorney sent Plaintiff all of the documents he requested at the February 22, 2004 compliance conference. However, Plaintiff has yet to fully comply with the Order made at

the two compliance conferences. The only document Plaintiff has sent to my attorney is a Statement of Net Worth. See Exhibit E. Over a month has passed since the March 15, 2004 deadline given by the Court at the last compliance conference.

APPRAISAL OF MARITAL RESIDENCE

7. Plaintiff signed a stipulation agreeing to arrange for an appraisal of the marital residence, with the costs of the appraisal to be divided between us based upon our declared incomes, 55% to Plaintiff and 45% to me, subject to reallocation. Plaintiff indicated that it would be no problem for him to arrange the appraisal of the marital residence and that he would do so. Plaintiff has failed to produce any documentation regarding an appraisal of the marital residence. I request that the Court compel him to get the marital residence appraised and pay for the appraisal.

PRECLUSION OF MARITAL DEBT

8. Plaintiff's Statement of Net Worth claims $75,618.00 in debt. However, Plaintiff has failed to produce any documentation regarding such debt. I fear that Plaintiff will claim this debt as marital debt and that I will be forced to help pay off debt that I am not sure exists and do not know if it was spent during our marriage and on what he spent it. I did not consent to Plaintiff incurring such high debts.

9. I request that Plaintiff be precluded from presenting evidence of marital debt at trial since I have not had a fair opportunity to examine any documentation of such debts.

PLAINTIFF'S INCOME RESOLVED IN FAVOR OF DEFENDANT

10. Plaintiff has only produced a W-2 form for the year 2002, despite requests that he produce income tax documents from the duration of the marriage. Moreover, Plaintiff's

Statement of Net Worth does not disclose his earnings from driving a taxicab part-time as a second job. Plaintiff has worked as a taxicab driver during our marriage. His other employment is as a New York City government employee.

11. I request that the Court resolve that Plaintiff is a taxicab driver as well as a New York City government employee and his income cannot be determined. I further request that the Court base child support and maintenance on my needs and those of my child.

RESOLVE THE VALUE OF PROPERTY IN SOUTH AFRICA

12. All documentation as to the marital property in Capetown, South Africa is in the possession of the Plaintiff and his family members in Africa. Plaintiff sent thousands of dollars to his relatives in Africa to purchase a plot of land. Once he had confirmation that the land had been purchased, he sent more money to begin construction of a fence around that plot. When Plaintiff went back to Africa for about a month, he paid for and oversaw other improvements to the land, including the beginning of construction on a house. We were building a home near where my spouse's family resides to be used by us as a vacation home.

13. Plaintiff told me about these transactions and showed me letters and emails from his brother updating him on the purchase of the land and the work that was being done by the construction team. Plaintiff has all of the evidence of this purchase in his possession and I am unable to obtain any documentation with regard to this property. By not producing bank statements showing withdrawals or other financial records from the marriage, Plaintiff is able to hide this asset and claim that it does not exist, as he has done at the previous compliance conferences.

14. Plaintiff should not be permitted to benefit from his failure to comply with discovery requests. I request that the value of the African property be resolved in my favor. The

property should be deemed marital and valued at $20,000, which includes the purchase price and subsequent improvements such as construction on the land.

15. I request that this Court consider the burdens of prolonged litigation that Plaintiff is causing as well as my inability to prove the necessary facts to make out my case for maintenance and equitable distribution when Plaintiff refuses to cooperate with discovery requests. Plaintiff should not be allowed to benefit from getting all of the information about my finances while keeping information about his finances hidden.

16. Plaintiff initiated this Action for Divorce and has failed to prosecute it despite the fact that he is represented by private counsel.

17. There has been no prior application for the relief requested herein.

WHEREFORE, for the foregoing reason, I respectfully request that the Court grant the relief sought herein, ordering Plaintiff to produce an appraisal of the marital residence, precluding Plaintiff from presenting evidence regarding marital debts, and resolving the issues of Plaintiffs income and the existence and value of marital real property in South Africa in my favor, and such other and further relief as may be just and proper.

Dated: Bronx, New York

April 22, 2004

_____

XXXXXXXXXXX
Sworn to before me
on April 22, 2004

_____

Notary Public

AFFIRMATION IN SUPPORT OF ORDER TO SHOW CAUSE TO PRECLUDE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

A	:	Index No. _____
	:	
Plaintiff	:	
against	:	**AFFIRMATION**
	:	
B	:	
Defendant	:	

AMANDA NOREJKO, ESQ., an attorney duly admitted to practice law before the Courts of the State of New York, affirm under penalty or perjury, that the following is true and correct:

1. I am employed at Sanctuary for Families, Inc., Center for Battered Women's Legal Services, attorneys for Defendant, B, and as such am fully familiar with the facts and circumstances herein.

2. I make this affirmation in support of the Defendant's motion to compel Plaintiff to provide an appraisal of the marital residence, to preclude the Plaintiff from giving testimony or evidence as to any debts or liens on marital property, to resolve the issue of marital property in South Africa in favor of the Defendant, and to preclude Plaintiff from serving Defendant with any further discovery.

3. On September 9, 2003, I served the Defendant's First Set of Interrogatories and a Notice of Discovery and Inspection on Plaintiff’s attorney. See Exhibits A, and B.

4. On November 16, 2003, the parties appeared in Court with their attorneys for a compliance conference. Plaintiff had still not responded to Defendant's request for discovery.

The Court issued an Order setting a new deadline of December 31, 2003 for Plaintiff to serve a response to Defendant's discovery requests. In addition Plaintiff was ordered to send to Defendant's counsel a copy of the appraisal of the marital residence and a retirement account authorization by November 30, 2003. See Exhibit C.

5. On February 22, 2004, the parties and their attorneys again appeared before this Court for another compliance conference. Plaintiff had yet to provide to Defendant's attorney any of the items ordered by the Court on November 16, 2003. The Court once again ordered Plaintiff to submit all requested documents to Defendant's attorney by March 15, 2004. See Exhibit D.

6. Despite Defendant's compliance with all discovery requests made by Plaintiff's attorney, Plaintiff has yet to fully comply with the Order made at the two compliance conferences, despite being required to do so by Order of the Court and having been advised by the Court to do so on more than one occasion. The only document Plaintiff has produced to Defendant is a Statement of Net Worth. See Exhibits E.

APPRAISAL OF MARITAL RESIDENCE

7. Plaintiff signed a stipulation agreeing to arrange for an appraisal of the marital residence, with the costs of the appraisal to be divided between the parties, 55% to Plaintiff and 45% to Defendant, subject to reallocation. Plaintiff indicated that it would be no problem for him to arrange the appraisal of the marital residence and that he would do so. Plaintiff has failed to produce to Defendant any documentation regarding an appraisal of the marital residence. As the marital residence is one of the major assets of the marriage, an appraisal of its value is necessary to determine equitable distribution.

8. Defendant requests that this Court compel Plaintiff to arrange for an appraisal and that Plaintiff be ordered to pay the cost of the appraisal.

PRECLUSION OF MARITAL DEBT

9. Plaintiff's Statement of Net Worth claims $75,618.00 in debt. However, Plaintiff has failed to produce any documentation regarding such debt, despite Defendant's repeated demands that Plaintiff answer Interrogatories and submit documents for Discovery and Inspection.

10. Defendant requests that Plaintiff be precluded from presenting evidence of marital debt at trial since Defendant has not had a fair opportunity to examine any documentation of such debts.

PLAINTIFF'S INCOME RESOLVED IN FAVOR OF DEFENDANT

11. Plaintiff has only produced a W-2 form for the year 2002, despite requests that he produce income tax documents from the duration of the marriage. Moreover, Plaintiff's Statement of Net Worth does not disclose his earnings from driving a taxicab part-time as a second job. Defendant has stated that Plaintiff has worked as a taxicab driver during the marriage. Plaintiff's other employment is a New York City government employee, which he states on his Statement of Net Worth. See Exhibit E.

12. Defendant requests that the Court resolve that Plaintiff works as a taxicab driver and that his income cannot be determined. Defendant further requests that the Court base child support and maintenance on the needs of the Defendant and the child.

RESOLVE THE VALUE OF PROPERTY IN SOUTH AFRICA

13. All documentation as to the marital property in Capetown, South Africa is in the possession of the Plaintiff and his family members in Africa. Plaintiff sent thousands of dollars to Africa to purchase a plot of land and begin construction of a home on that plot during the marriage. Plaintiff would periodically send money to pay for the improvements to the land.

14. Plaintiff told Defendant about these transactions and showed her letters and emails from his brother updating him on the purchase of the land and the work that was being done by the construction team. Plaintiff has all of the evidence of this purchase in his possession and Defendant is unable to obtain any documentation with regard to this property. By not producing bank statements showing withdrawals or other financial records from the marriage, Plaintiff is able to hide this asset and claim that it does not exist.

15. Plaintiff should not be permitted to benefit from his failure to comply with discovery requests. Defendant requests that the value of the property in South Africa be resolved in her favor. The property should deemed marital and valued at $20,000, which includes the purchase price and subsequent improvements such as construction on the land. Plaintiff should not be permitted to hide all evidence of the existence of this major marital asset.

ARGUMENT

16. Under CPLR 3124, "[i]f a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, ... the party seeking disclosure may move to compel compliance or a response." Plaintiff has failed to respond to the discovery requests made by Plaintiff in September 2003 and again at two compliance conferences since that time.

17. CPLR 3126 provides for penalties for refusal to disclose. It states "if any party . . . refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just" and lists the following relief:

> 17. 1.an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order;
>
> 17. 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
>
> 17. 3.an order striking our pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

18. Plaintiff has failed to respond to numerous discovery requests for nearly eight months. Since Plaintiff is represented by private counsel who can explain to him what is required and he has had sufficient time and sufficient warnings at two compliance conferences, an inference can be drawn that Plaintiff's failure to disclose is willful.

19. The discovery demands made upon Plaintiff regarding information that ought to have been produced in an Action for Divorce. Defendant's discovery requests all related to information necessary to determine issues of maintenance and equitable distribution under DRL § 236 (B) (4), which states that "[i]n all matrimonial actions and proceedings in which alimony, maintenance or support is in issue, there shall be compulsory disclosure by both parties of their respective financial states." DRL § 236 (B) (4) further states that "noncompliance shall be punishable by any or all of the penalties prescribed in section thirty-one hundred twenty-six of the civil practice law and rules, in examination before or during trial."

20. In Wolfson v. Nassau County Medical Center, the Court found that "the extensive nature of the plaintiff's' delay in responding to the defendant's interrogatories permits an inference that the delay was willful." 141 A.D.2d 815, 530 N.Y.S.2d 27 (2d Dep't 1988); see also Glasburgh v. Port Authority, 193 A.D.2d 441, 597 N.Y.S.2d 327 (1st Dep't 1993). The delay in the instant matter has been nearly eight months, Interrogatories and a Notice of Discovery and Inspection having been served on September 9, 2003. This is more than enough time for Plaintiff to produce the documents requested, most of which are already in Plaintiff's possession or can be easily obtained. Moreover, Plaintiff's failure to disclose can be viewed as willful in that he has been willing and able to request discovery from Defendant on numerous occasions, to which she has responded. It is unclear what disability would prevent Plaintiff from complying with discovery requests while he is clearly able to serve his own requests on Defendant.

21. Plaintiff's failure to comply with discovery demands is deliberate and in bad faith, extending beyond mere inadequacy of responses. In fact, Plaintiff has offered no response to Interrogatories, Notice of Discovery and Inspection, and most provisions of the compliance conference orders. Plaintiff's actions make it clear that he expects Defendant to provide detailed documentation with regard to her finances while keeping his own hidden and possibly liquidating assets in his sole control or possession. Such a situation creates an inequity between the parties, with Plaintiff having the opportunity to hide all evidence of assets in his control or possession while assets in Defendant's control or possession are in the open and therefore subject to equitable distribution. Defendant should not be penalized at trial for abiding by the orders of this court and the laws governing discovery in this jurisdiction when Plaintiff refused to do so.

22. When a notice for disclosure is ignored, the party requesting the discovery can either proceed under Rule 3124 of the CPLR to obtain an order to compel it or under CPLR § 3126 for the imposition of the penalties for willful failure to disclose. Coffey v. Orbachs. Inc.. 22 A.D.2d 317, 254 N.Y.S.2d 596 (1st Dep't 1964); Infinity Records. Inc. v. Pathe News, Inc.. 89 A.D.2d 423, 455 N.Y.S.2d 631 (1st Dep't 1982). There is no requirement that before a court may punish a failure to disclose, there must have been a prior motion to compel disclosure. Di Bartolo v. American & Foreign Ins. Co., 48 Mise.2d 843, 265 N.Y.S.2d 981 (1966), aff'd 26 A.D.2d 992, 275 N.Y.S.2d 805 (2d Dep't 1966); In re T./P. Children, 165 Misc.2d 333, 629 N.Y.S.2d 677 (Fam. Ct. 1995). Preclusion is clearly warranted where repeated, legitimate demands by adversary, as well as court orders, are ignored. Santini v. Alexander Grant Co., 245 A.D.2d 30, 664 N.Y.S.2d 784 (1st Dep't 1997).

23. The nature and degree of penalty to be imposed pursuant to CPLR § 3126 is generally left to the discretion of the Supreme Court. See Kinglsey v. Kantor, 265 A.D.2d 529,

697 N.Y.S.2d 141 (2d Dep't 1999); DePierro v. Bank of New York, 308 A.D.2d 430, 764 N.Y.S.2d 208 (2d Dep't 2003). In this case, Defendant is not asking for the most severe penalties available under the law. Defendant simply requests this Court to impose penalties that will facilitate a timely and equitable resolution to this matter.

24. Courts have found that a party who fails to provide requested discovery after being given extensions of the time to respond and cannot demonstrate a reasonable excuse and meritorious defense are not entitled to a final opportunity to disclose. Cohen v. Cohen, 228 A.D.2d 961, 644 N.Y.S.2d 831 (3d Dep't 1996). In the instant action, Plaintiff's responses were due at the end of September 2003. He was given extensions of his time to answer on two separate occasions at compliance conferences held in November 2003 and February 2004. He should not be given yet another opportunity to respond, causing further delay and requiring Defendant to take additional time off from work to attend more court dates and rescheduled depositions.

25. Courts have also found that in an equitable distribution action, where a preclusion order can "permit a party to secrete the very property the other party is seeking to discover," the "more appropriate sanction . . . would be to deem true the defendant's allegations regarding the property about which discovery has been withheld." Micelli v. **Micelli,** 233 A.D.2d 372, 650 N.Y.S.2d 241 (2d Dep't 1996). In the instant action, Defendant seeks to have her allegations regarding the property in South Africa deemed true since Plaintiff persists in denying such property exists and refuses to produce any financial documents that Defendant might use to prove its existence. To allow Plaintiff to hide assets so flagrantly would be an affront to the purposes of discovery in an equitable distribution action.

26. Plaintiff, by his attorneys, Dumb & Dumber, PC, has initiated the instant Action for Divorce, but has failed to prosecute the case. The Plaintiff has caused unnecessary delay by failing to comply with discovery requests.

27. There has been no prior application for the relief requested herein.

WHEREFORE, for the foregoing reason, your affirmant respectfully requests that the Court grant the relief sought herein, ordering Plaintiff to produce an appraisal of the marital residence, precluding Plaintiff from presenting evidence regarding marital debts, and resolving the issues of Plaintiff's income and the existence and value of marital real property in South Africa in favor of Defendant, precluding Plaintiff from serving Defendant with additional discovery, and such other and further relief as may be just and proper.

Dated: Bronx, New York

April 22, 2004

_____

ORDER TO SHOW CAUSE FOR CONSOLIDATION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

AA	:	Index No. _____
	:	
Plaintiff	:	
against	:	**ORDER TO SHOW CAUSE**
	:	
BB	:	
Defendant	:	

----------x

UPON the annexed affirmation of KATHARINE F. BROWNSTEIN, dated _____, and the affidavit of BB, sworn to on _____, together with the exhibits annexed hereto, and all of the papers, pleadings and proceedings heretofore had herein,

LET the plaintiff, AA, or his attorneys, show cause before _____, to be held in and for the County of New York at the Courthouse located at _____ on the day of _____, 2010, at _____ of that day or as soon thereafter as counsel can be heard, why an Order should not be made:

(a) Consolidating the pending Family Court support matters under Docket Number F-xxxxx-08, with the instant action; and

(b) Continuing all temporary orders of the Family Court; and

(c) Directing Plaintiff to refrain from transferring, diminishing, or otherwise encumbering the assets of the marriage, except for reasonable daily living expenses or ordinary business expenses;

(d) Granting Defendant such other and further relief as the Court deems just and proper.

SUFFICIENT REASON APPEARING THEREFOR, IT IS

ORDERED, that personal service of this order to show cause, and the papers upon which it is based, upon the Plaintiff's attorneys on or before the _____ day of _____ 2010, be deemed good and sufficient service.

E N T E R

_____

J.S.C.

AFFIRMATION IN SUPPORT OF ORDER TO SHOW CAUSE FOR CONSOLIDATION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

AA	:	Index No. _____
	:	
Plaintiff	:	
against	:	AFFIRMATION IN SUPPORT
	:	OF ORDER TO SHOW CAUSE
BB	:	FOR CONSOLIDATION
Defendant	:	

I, **KATHARINE F. BROWNSTEIN**, an attorney duly admitted in the State of New York, hereby affirm under penalty of perjury as follows:

1. I am an associate with the law firm Sidley Austin LLP, c/o Her Justice, Inc., 100 Broadway, 10th floor, New York, NY 10005 ("Sidley Austin"), attorneys for BB. I am familiar with the facts and circumstances of this matter either from personal knowledge or on the basis of documents that have been provided to me.

2. I submit this affirmation in support of Mx. B.'s Order to Show Cause for an Order (1) pursuant to CPLR § 602, removing from the Family Court and consolidating with this action Mx. B.'s Petition for Spousal Support in the Family Court of Bronx County (File No.xxxx, Docket No. F-sss); (2) continuing the Temporary Order of Spousal Support in the Family Court of County of Bronx dated October 13, 2009; and (3) for such other and further relief as this Court may deem just and appropriate.

PROCEDURAL BACKGROUND

3. Mx. B. and Plaintiff lived together and dated for over twenty years. They were married in a civil ceremony on September 4, 1998 in the County of Bronx, City and State of New York. There are no children of the marriage.

4. The parties separated on or about November 21, 2008 after an altercation. As a result of the altercation, on or about December 28, 2008, the Bronx Criminal Court issued a Temporary Order of Protection against Plaintiff, Case No. 76708C-2008. *See* Exhibit A. Additional Temporary Orders of Protection were issued against Plaintiff on January 13, 2009, February 11, 2009, March 25, 3009, May 3, 2009, and again on May 20, 2009. *See* Exhibit A.

5. Mx. B. filed a Petition for Spousal Support in the Bronx Family Court on November 24, 2008 (the "Support Proceeding"). *See* Exhibit B. There is currently a Temporary Order of Support, issued by Support Magistrate Aloni on October 13, 2009, granting Mx. B. $1,500.00 per month in spousal support (the "October 2009 Support Order"). *See* Exhibit C.

6. On or about October 30, 2009, Plaintiff commenced this matrimonial proceeding by the filing of a Summons with Verified Complaint for divorce in this court. *See* Exhibit D. On December 11, 2009, Mx. B., through her attorneys, filed a Verified Answer and Counterclaim in Bronx County, where the Support Proceeding is pending. *See* Exhibit E. The Bronx County Clerk's Office thereby transferred the Verified Answer and Counterclaim to New York County on or about February 3, 2010.

7. On May 19, 2010, Plaintiff filed a Request for Judicial Intervention. *See* Exhibit F. Plaintiff falsely indicated on the Request for Judicial Intervention that there are no related cases, despite Plaintiff's knowledge of and appearance in the pending Support Proceeding. As

Plaintiff well knows, he is currently obligated to pay Mx. B. $1,500 per month in spousal support pursuant to the October 2009 Support Order.

8. The next Family Court appearance in the Support Proceeding is scheduled for June 7, 2010.

MAINTENANCE

9. Mx. B. requests a continuation of the October 2009 Support Order, under Docket No. F-27465-08.

10. Mx. B.'s Affidavit in support of this motion and her Statement of Net Worth detail her financial situation and standard of living. *See* Exhibit G.

11. Mx. B.'s sole source of income is the $1,500.00 per month she receives from Plaintiff pursuant to the October 2009 Support Order.

12. Defendant is disabled by numerous ailments including severe rheumatoid arthritis, spinal stenosis of the cervical and lumbar spine, and carpal tunnel syndrome, and has back, knee and neck injuries. Defendant is severely limited in her daily activities and is unable to sit, stand, or walk for more than twenty minutes. In addition, Defendant has difficulty using her hands and cannot lift heavy objects with her hands or perform prolonged repetitive movements with her hands. *See* Exhibit H.

13. Defendant's most recent employment was in early 2008, cleaning makeup testers at Sephora. Mx. B. was employed by Sephora for around six weeks and earned approximately $300 per week. Due to her disabilities, Mx. B. was forced to quit the job at Sephora in April of 2008 and has been unable to work since that time. Though Defendant is a certified

cosmetologist, due to her extensive disabilities, Mx. B. in unable to work and is unlikely to become self-supporting in the foreseeable future.

14. In contrast, Plaintiff has worked at New York Presbyterian Hospital for the last twelve years as a financial analyst, earning upwards of $72,500 a year. In addition to his compensation, Plaintiff receives additional benefits through his employer, including health insurance, life insurance, and a Teachers Insurance and Annuity Association Group Supplemental Retirement Annuity, account number L364768601 (the "TIAA Retirement Account").

15. The parties have been married for more than eleven years. During that time, Plaintiff exercised and continues to exercise exclusive control over the marital assets. During the marriage, in 2005 and 2006, Plaintiff unilaterally decided to withdraw approximately $50,217 from the TIAA Retirement Account, a marital asset, in order to purchase property in the Dominican Republic. Upon information and belief, title to the property in the Dominican Republic is in Plaintiff's name, or in the name of his mother, Mercedes B.

REQUEST FOR CONSOLIDATION

16. CPLR § 602 provides that when actions involving a common question of law or fact are pending before a court, the court may order a joint trial of all matters.

17. A removal of the Support Proceeding and consolidation with this Supreme Court matter would conserve the time of the parties, counsel and the courts, and would cause no prejudice to either party.

18. Furthermore, the parties' marital assets, including but not limited to the TIAA Retirement Account, can only be divided by this Court. It is therefore appropriate and expedient for the Support Proceeding to be consolidated with this Supreme Court matter.

19. Defendant thus request a continuation of the October 2009 Support Order and for the Support Proceeding to be consolidated with the instant divorce action so all of the issues may be resolved issues in one forum.

NO PRIOR REQUEST

20. No previous application has been made to this Court for the relief requested herein, except as otherwise set forth herein.

WHEREFORE, it is respectfully requested that BB's application be granted in its entirety.

Dated: June 2, 2010
New York, New York

_____

D. Pre-Trial

DEMAND FOR WITNESS LIST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JAMIE DOE	:	Index No. _____
	:	
Plaintiff	:	
against	:	**DEMAND FOR WITNESS LIST**
	:	
LEE DOE	:	
Defendant	:	

PLEASE TAKE NOTICE that pursuant to **CPRL § 3101(2)(e),** Plaintiff, by her attorneys, MY LAW OFFICE LLP hereby demands that Defendant furnish a list of witnesses he intends to call at trial. Please take further notice that if such list is not delivered to the undersigned at the offices of MY LAW OFFICE LLP, 123 Main Street, New York, New York, 10xxx on or before December 20, 2022, objection will be made, on the trial hereof, to the introduction of any such examination of witnesses.

Dated: New York, New York
November 12, 2022

_____
Dylan Advocate , Esq.
New York, New York 10036
(212) 123-4567
Attorneys for Plaintiff

TO: , Esq.

Brooklyn, New York 11217
Attorney for Defendant

DEMAND TO IDENTIFY EXPERT(S) AND NOTICE TO PRODUCE DOCUMENTS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

JAMIE DOE	:	Index No. _____
	:	
Plaintiff	:	**DEMAND TO IDENTIFY**
against	:	**EXPERT(S) AND NOTICE**
	:	**TO PRODUCE DOCUMENTS**
LEE DOE	:	
Defendant	:	

PLEASE TAKE NOTICE, that pursuant to Sections 3101 and 3120 of the C.P.L.R., defendant, LEE DOE, demands that plaintiff serve on his undersigned attorneys:

A statement stating as follows:

identifying each person plaintiff intends to call as an expert witness in any hearing or trial of this matter; and disclosing in reasonable detail the subject matter on which each such expert is expected to testify, the qualifications of each expert witness and a summary of the grounds for each expert's opinion.

Copies of any report(s) or writing(s) made by any expert named in 1(a) above regarding any issue in this matter.

PLEASE TAKE FURTHER NOTICE, that the above requested information must be produced to the office of the undersigned attorneys for defendant not more than twenty days from the date of this notice.

Dated: xxxxxxxxxxx

New York, New York

Name of Atty
Address
Tel.#
Atty for xxxxx

TO: Name of atty
Address
Tel. #
Atty for xxxxx

NOTICE TO ADMIT GENUINENESS OF DOCUMENTS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

JAMIE DOE	:	Index No. _____
	:	
Plaintiff	:	**NOTICE TO ADMIT**
against	:	**GENUINENESS OF**
	:	**DOCUMENTS**
LEE DOE	:	
Defendant	:	

PLEASE TAKE NOTICE, that pursuant to CPLR 3123 you are hereby requested to furnish to the undersigned, within twenty days after the service of this notice, a written admission of the genuineness of the following documents, copies of which are annexed hereto:

1. Dominican Republic Deed, dated August 26, 1991, between XXXXXXXXXXXXXXXXXX and XXXXXXXXXXXXXXXXXXXXXX (in Spanish language);
2. English translation of Dominican Republic Deed, dated August 26, 1991, between XXXXXX and XXXXXXXXXXXXXX;
3. Dominican Republic Sworn Declaration Over Donation, dated August 28, 2003, by XXXXXXXXXXXXXXXXX
4. English translation of Dominican Republic Sworn Declaration Over Donation, dated August 28, 2003, by XXXXXXXXXXXXXXX.

Dated: June 18, 2022

Bronx, New York

_____

DYLAN ADVOCATE, ESQ
MY LAW OFFICE
Attorneys for Plaintiff
123 Main Street
New York, NY 10000
212-123-4567

TO: xxxxxxxxxxxxxxxxx, ESQ.
Attorney for Defendant
2 East 1st Street
Bronx, NY 10451
(718) 7654-321

NOTICE TO ADMIT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

JAMIE DOE	:	Index No. _____
Plaintiff	:	
against	:	**NOTICE TO ADMIT**
LEE DOE	:	
Defendant	:	

PLEASE TAKE NOTICE that pursuant to Civil Practice Law and Rules §3123, Plaintiff, JAMIE DOE, by her undersigned attorneys hereby demands that Defendant admit on or before December 12, 2022 the following matters as to which Plaintiff reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of Defendant or can be ascertained by him upon reasonable inquiry:

1. That at or about the time of filing the instant action, Plaintiff had $5,514.64 of debt in her name and Defendant had $4,171.72 of debt in his name.

2. That all of the debt in Plaintiff's name, i.e. $5,514.64, is marital debt.

3. That Exhibit A is a genuine copy of a May 2007 billing statement from Chase Visa Card in Defendant's name.

4. That the jewelry and airline tickets in Exhibit A, totaling $2,200.35, is Defendant's separate debt.

5. That Exhibit B is a genuine copy of Plaintiff's Chase Bank credit card statements.

6. That Exhibit C is a genuine copy of Plaintiff's 2007 income tax returns, showing her total annual income as $8,186.00.

7. That Exhibit D is a genuine copy of Defendant's 2007 income tax returns, showing his total annual income as $24,174.00.

8. That the parties have one child, BB, DOB 04/28/2005, who is not emancipated.

9. That Exhibit E is a genuine copy of an August 25, 2008 receipt for the child's bi-weekly day care costs ($280), paid by Plaintiff to A.B.C. Day Care Center.

Dated: New York, New York
November 20, 2022

_____

Dylan Advocate, Esq.
My Law Office, Inc.
Attorney for Plaintiff
123 Main Street
New York, NY 10000
(212) 123-4567

STATEMENT OF PROPOSED DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

XXXXXXXXX	:	Index No. _____
	:	
Plaintiff	:	
against	:	**ORDER TO SHOW CAUSE**
	:	**STATEMENT OF PROPOSED**
XXXXXXXXX	:	**DISPOSITION**
Defendant	:	

This Statement of Proposed Disposition is made by Plaintiff herein, pursuant to 22 NYCRR Section 202.16(h).

I. Assets Claimed to Be Marital Property:

1. None.

II. Plaintiff's Assets Claimed to Be Separate Property:

1. Plaintiff's jewelry received as a gift from her father worth approximately $1,307.

III. Marital Debt

1. Marital Credit Card Debt

A. **Creditor:** Bank of America

Amount of Current Debt: $984.60 and $923.43.

Date of Incurring Debt: 2007.

Purpose: Food, clothing, and other living expenses for Plaintiff and the parties' children. Plaintiff opened two Bank of America credit cards after Defendant moved out in February 2007, in order to pay for living expenses because she no longer had access to Defendant's income

B. **Creditor:** Citicorp Credit Services, Inc.

Amount of Current Debt: $1,737.72.

Date of Incurring Debt: In or around 2006 and 2007.

Purpose: The credit card was used by both Plaintiff and Defendant to cover food, clothing and other living expenses for the parties and their children.

C. **Creditor:** Verizon.

Amount of Current Debt: $188.94.

Date of Incurring Debt: 2007

Purpose: Phone and internet for the marital residence

D. **Creditor:** Chase Bank USA, Inc.

Amount of Current Debt: $698.00.

Date of Incurring Debt: 2006

Purpose: BP gas card purchases by Defendant for his livery cab business.

E. **Creditor:** Bank of America

Amount of Current Debt: $12,639.73

Date of Incurring Debt: In or around 2006

Purpose: Approximately $2,000 to cover car insurance with respect to Defendant's livery cab business. Approximately $2,000 to cover food, clothing and other living expenses of the family. The remaining debt on this card is separate as it covers approximately $8,000 for repairs to property at xxxxx, Woodside, New York 11377.

IV. Defendant's Separate Debt

1. Property located at xxxxxx, Woodside, NY 11377

A. Defendant and Plaintiff's uncle, Julio P, purchased the two family dwelling on February 16, 2006 for $705,000. The deed named Defendant and Mr. P as the owners. Plaintiffs' name does not appear on the deed or the loans associated with this property. On information and belief, Defendant and Mr. P made a $35,250 down payment on the property, with each contributing $17,625 towards to total amount. The parties, their children and Mr. P began residing at the property on or about November 2005. In addition, a third party leased the second floor of the property. Proceeds from the third party lease went to either Defendant or Mr. P to defer the cost of mortgage payments. The parties and their children resided at the property until February 2007, when a domestic violence incident occurred during which Defendant hit and threatened to

kill Plaintiff. As a result of Defendant's violent actions towards Plaintiff, Plaintiff sought and received an Order of Protection from the Queens Family Court on March 22, 2007 (Docket # O-xxxx-07) which prevented Defendant from returning to the property. Thereafter, Defendant ceased making payments on the mortgage of the home where both his wife and two children continued to reside and refused to pay any of the children's living expenses. Defendant knew that Plaintiff was unemployed and would be unable to meet the mortgage payments or to support their two children. Without his financial assistance, the property was foreclosed upon and his children were evicted from their home. Defendant continued to refuse to contribute to the children's living expenses until forced to do so by an Order of Support issued by the Queens Family Court on November 14, 2007 (Docket # F-xxxx-07).

B. Unknown amount of outstanding debt to first mortgagor

1) Defendant and Julio P received a $564,000 first mortgage to pay for the property. Under the judgment of foreclosure and sale in the Supreme Court, County of Queens (Index No. xxxx/07), the mortgagor was owed $589,080.52 at the time of foreclosure. On information and belief, the home resold for $530,000.

C. $104,950 home equity line of credit ("HELOC") loan in Defendant's and Mr. P's name.

1) Defendant and Mr. P received a $105,750 HELOC loan to help them purchase the property.

2) Upon information and belief, on January 5, 2010, Defendant and Julio P received an offer to settle this debt for a single payment of $20,990.

D. **Credit Card Debt in Defendant's Name:** After Defendant moved out of the marital residence, he incurred credit card debt from expenses that he made for his own personal benefit.

E. **Credit Card Debt in Plaintiff's Name:**

1) **Creditor:** Bank of America

Amount of current debt: $12,639.73

Date of incurring debt: In or around 2006

Purpose: Approximately $8,000 for repairs to property at xxxxxx Street, Woodside, New York 11377. The remaining debt on this credit card is marital as it was used to cover car insurance with respect to Defendant's livery cab business and food, clothing and other living expenses of the family.

V. **Amount request for maintenance:** $250 per month for four years after the judgement of the divorce

Statutory factors forming basis for maintenance request pursuant to [DRL 236(B)(6)(a)]:

1. **Income and Property of the Respective Parties:**

A. Defendant Income**:** Defendant's income should be deemed to be at least $87,000 per year. Defendant has acknowledged that he is employed as a livery car driver and works in a cash based business. To date, Defendant's financial disclosure includes a statement of net worth and tax returns from 2008, 2007 and 2006. Defendant has provided no other documentation to prove his income level. Because Defendant works on a cash basis, he is able to underreport his income. Through discovery we have received: (i) certified bank statements showing that Defendant made deposits exceeding $90,000 in his joint checking account during 2006, a period when he earned the vast majority of the family's income and claimed on his Federal tax return to have only earned $16,680; (ii) certified loan applications and other documentation that show that Defendant swore that he made approximately $87,000 as a limousine driver; (iii) certified bank statements and returned checks that show Defendant was able to make payments of approximately $4,000 per month to cover the mortgage on the property at xxxxxxx, Woodside, New York 11377; (iv) certified bank statements showing deposits from the first month and a half of 2007 of approximately $13,000, despite the fact that Defendant claimed on his 2007 tax return that he only earned $3,164 the whole year; and (v) certified bank statements showing deposits of over $100,000 in 2005 and $80,000 in 2004. Based on this information, we believe it is clear that Defendant has

significant income that he does not report. Therefore, Defendant's total income level should be established to be $87,000 per year.

B. Defendant Property**:** Unknown.

C. Plaintiff Income: $300 per week ($250 salary and approximately $50 tips) at The xxxxxx Beauty Salon, xxxxxxxx, Elmhurst, New York, 11373.

D. Plaintiff Property**:** Jewelry received from her father valued at approximately $1,307.30.

2. Duration of Marriage and Age and Health of Both Parties:

Duration of the Marriage: Approximately 7 years 8 months (April 12, 2001 through December 1, 2009, the date of filing of this divorce proceeding)

Age of Plaintiff: 32

Age of Defendant: 40

Health of Plaintiff: Good.

Health of Defendant: Good.

3. Present and Future Earning Capacity of both parties:

Plaintiff presently works in a beauty salon making $250 per week plus approximately $50 per week in tips. Prior to moving to the United States, Plaintiff completed the equivalent of middle school in Ecuador. Plaintiff also has some vocational training as a cosmetologist, however, she is not currently licensed to practice cosmetology in the state of New York. Plaintiff would like to become licensed, but her ability to do so is inhibited by the cost of the classes she must take in order to do so. As Plaintiff works six days a week and takes care of the parties' two children, she has limited time in which to take classes. Even is she earns a license in cosmetology, it is unclear whether Plaintiff will have the ability to earn an income that will allow her to approach the marital life style. Defendant has earned at least $87,000 per year working as a livery car driver in the past. He is in good health and continues to have the potential to earn as much, if not more, in the same profession. Upon information and belief, Defendant continues to work as a livery car driver and owns his own vehicle. As such, at present he has greater earning potential than Plaintiff.

4. **Ability of Party Seeking Maintenance to Become Self-Supporting/Training Necessary:**

Plaintiff desires to become a licensed cosmetologist in the State of New York. In order to do so, she requires maintenance payments to assist in defraying the cost of the classes she must take to become licensed and to learn English. Plaintiff has approximately 1,000 class and practice hours combined remaining before the New York State Board of Cosmetology will allow to her to take the written exams and in person practical that she must pass to become licensed. In addition, Plaintiff will have to cover any fees associated with applying for a license and becoming licensed in New York.

5. **Reduced or lost lifetime earning capacity:**

Plaintiff needs time to obtain additional education and training to become a licensed cosmetologist and to learn English in order to increase her potential income. Plaintiff did not obtain any significant job skills during the marriage because Plaintiff stayed home and cared for the children while Defendant worked as a livery car driver. Consequently, Plaintiff put her career aspirations on hold during the marriage and was not able to pursue a license in cosmetology at that time.

6. **Presence of Children in the Homes of the Parties:**

Plaintiff is the custodial parent, and she lives with and pays the expenses for the parties' two children.

7. **Tax Consequences to the Parties:**

Plaintiff may take a tax deduction for the children.

Any spousal maintenance payment made by Defendant to Plaintiff would be deductible by Defendant and taxable to Plaintiff.

8. **Contributions of Party Seeking maintenance to Career/Career Potential of Other Party:**

Until Defendant vacated the marital residence in February 2007, Plaintiff was a homemaker and mother. By staying home and caring for the children, Plaintiff enabled defendant to pursue his job as a livery car driver full time.

9. **Wasteful Disposition of Marital Property:**

Prior to foreclosure, the property at xxxxxxx, Woodside, New York 11377, was the separate property of Defendant. In the alternative, should the court find that the property was in fact marital, Defendant should be found to have wasted this marital asset. Defendant ceased making mortgage payments on the property after he was ordered to stay away from the property pursuant to the Order of Protection granted by the Queens Family Court on March 22, 2007 (Docket # O-xxxx-07). At that time, Defendant was fully aware that Plaintiff was not employed and did not have sufficient income to meet the mortgage payments. Despite this, Defendant willfully refused to make any payments on the mortgage, causing the bank to foreclose on the property and his children to be without a home. In addition, Defendant refused to contribute financially for the living expenses of his children, until forced to do so by an Order of Support of the Queens Family Court on November 14, 2007 (Docket # F-xxxx-07).

VI. Proposal for Equitable Distribution:

Statutory factors forming basis for proposed distribution [DRL § 236(B)(5)(d)]:

1. Income and Property of Each Party at the Time of Marriage and Commencement of the Action:

Plaintiff Income at Time of Marriage: $0

Plaintiff Income at Commencement of Action: $1,365 per month

Plaintiff Property at Time of Marriage: None

Plaintiff Property at Time of Commencement of Action: jewelry received from father as gift valued at approximately $1,307.

Defendant Income at Time of Marriage: at least $87,000 per year as certified in loan documentation completed by Defendant

Defendant Income at Time of Commencement of Action: at least $87,000 per year as certified in loan documentation completed by Defendant

Defendant Property at Time of Marriage: unknown.

Defendant Property at Time of Commencement of Action: unknown.

2. Duration of Marriage and Age and Health of Both Parties:

The duration of the marriage was approximately 7 years 8 months. Both parties are in good health and Plaintiff and Defendant are 32 and 40 years of age respectively.

3. Need of Custodial Parent to Occupy/Own Marital Residence:

N/A

4. Loss of Inheritance and Pension rights Upon Dissolution of the Marriage:

N/A

5. Loss of Health Insurance Benefits Upon Dissolution of Marriage:

N/A

6. Any Award of Maintenance:

Plaintiff seeks an award of maintenance in the amount of $250 a month for a period of four years following the judgment of divorce. Plaintiff seeks this amount as a means of allowing her to learn English and to fulfill the additional requirements necessary to become a licensed cosmetologist in New York. Plaintiff could not pursue this career path during the marriage, because she stayed at home to care for the Parties' children while Defendant worked as a livery car driver.

7. Equitable Claim to, Interest in, or Direct or Indirect Contribution to Acquisition of Marital Property:

N/A

8. Liquid or Non-Liquid Character of Marital Property:

N/A

9. Probable future financial circumstances of each party:

Plaintiff's financial circumstances will remain the same unless she is able to take classes and otherwise fulfill the requirements to become a licensed cosmetologist in the state of New York. Currently, Plaintiff needs to complete 1,000 hours of class and practice time and to take the required written and in-person examinations. If she becomes licensed, it is expected that her potential earning capacity will increase.

Defendant will continue working as a livery cab driver, having the potential to make at least $87,000 per year, as he certified in loan documentation.

10. Impossibility or Difficulty of Evaluating And Component Asset or Interest in Business, Corporation or Profession:

N/A

11. Tax Consequences to Each Party:

Unknown

12. Wasteful dissipation of family assets by either spouse:

Should the Court find that the property at xxxxxx Street, Woodside, New York 11377, was in fact marital, Defendant should be found to have wasted the asset. Defendant ceased making mortgage payments on the property after he was ordered to stay away from the property pursuant to the Order of Protection issued by the Queens Family Court on March 22, 2007 (Docket # O-xxxxx-07). Moreover, Defendant failed to provide any financial assistance with respect to the living expenses of the children. Defendant took these drastic actions, despite the fact that he knew neither Plaintiff nor Mr. P would be able to cover the mortgage on their own and that his wife and children depended on him for financial support. Defendants' actions directly caused the mortgage to go into arrears and the bank to foreclose on the property, leaving his wife and children homeless. In addition, it was not until the Queens Family Court issued an Order of Support on November 14, 2007 (Docket # F-xxxxx-07) that Defendant even provided any financial assistance to Plaintiff with respect to the living expenses of his children.

13. Any Transfer or Encumbrance Made in Contemplation of a Matrimonial Action Without Fair Consideration:

N/A

VII. Proposed Plan for Child Support:

The Order Modifying an Order of Support issued by the Queens County Family Court on July 10, 2008 (Docket # F-xxxx-07) shall be continued such that Defendant will continue paying child support in the amount of $447 to Plaintiff every month until the Parties' children are emancipated.

Plaintiff will be responsible for ensuring that both children are covered by health insurance. Pursuant to *DRL § 240(b-1)(c)(5)(iv)*, the parties shall split the children's medical expenses pro rata, including the $9 per month premium for Joseline G's health insurance and $5 co-pay for doctor visits. The combined parental income is $102,600 ($15,600 Plaintiff and $87,000 Defendant). Therefore, Plaintiff's pro rata share of any unreimbursed medical expenses is 15% and Defendant's pro rata share is 85%.

Statutory factors forming basis for child support obligation [DRL § 240(1-b)(f)]:

1. Financial Resources of Parents and Children:

Plaintiff will continue to earn approximately $300 a week working at the Xxxxxx, Beauty Salon. Defendant will continue to work as a livery car driver, with the potential to earn at least $87,000 per year. The Children do not have any financial resources.

2. Physical and Emotional Health of the Children

Both children are in good physical and emotional health.

3. Standard of living of children had marriage not dissolved:

The parties lived in a home worth approximately $700,000 before Defendant's domestic violence led to the parties' separation. Moreover, Defendant's income as a livery car driver covered all of the needs of the children. Furthermore, when Defendant left the marital home pursuant to the Order of Protection issued by the Queens Family Court on March 22, 2007 (Docket # O-xxxx-07), he stopped contributing to the children's living expenses. It was not until he was ordered by the Queens Family Court to pay child support pursuant to the Order of Support issued by it on November 14, 2007 (Docket # F-xxxx-07) that he began financially assisting Plaintiff in covering such costs again. Defendant should continue to pay the child support ordered by the Queens County Family Court on July 10, 2008, in order to maintain the children's standard of living.

4. The Tax Consequences to the Parties:

Any child support payment made by Defendant to Plaintiff would not be deductible by Defendant and would not be taxable to Plaintiff.

5. **Non-monetary contributions of parents to child:**

Plaintiff is the primary caregiver to the children.

6. **The Educational Needs of the Parents:**

Plaintiff requires at least 1,000 additional hours of class in order to become eligible to take the exams required to become a licensed cosmetologist. Upon information and belief, Defendant has no further educational needs.

7. **Gross Income of One Parent Substantially Less than that of Other Parent:**

Defendant's gross income is substantially higher than that of Plaintiff. Plaintiff currently earns approximately $300 a week ($15,600 a year) working at xxxx Beauty Salon. Her earning potential will not change unless she can fulfill the requirements to become a licensed cosmetologist. However, we estimate that Defendant earns at least $87,000 a year as a livery car driver.

8. **The Needs of the Other Children of the Non-Custodial Parent:**

N/A

9. **The Amount of Extraordinary Costs of Visitation:**

N/A

VIII. Proposed plan for custody and visitation of minor children

1. **Children of the marriage:**

Joseline G (9/16/2019)

Andres G (11/17/2017)

2. **The Final Order of Custody issued by the Queens County Family Court (Docket # V-xxxx-07, V-xxxx-07) on January 8, 2022 shall be continued such that Plaintiff, Graciela G, shall have full legal and physical custody due to the fact that she has been the primary caregiver for the children since their birth.**

3. **The order issued by the Queens County Family Court (Docket # V-xxxx-07-08A, et al.) on February 23, 2022 shall be continued such that Defendant shall be entitled to visitation on alternate Sundays. Pick up shall occur at 10a.m. and drop off shall occur at 7 p.m. at McDonalds on Greenpoint Avenue. Paternal uncle Manuel G and/or Hilda E. will handle the pick-up and drop off at McDonalds. There shall be a 30 minutes grace period for lateness. The emergency contact for mother is Narciss**

C., maternal aunt (347-xxxx-xxx) and the emergency contact for the father is 718-xxx-xxxx. Defendant and Plaintiff shall not use any disparaging or any negative communication with or about each other to the children or in front of the children.

4. Neither the Final Order of Custody nor the Final Order of Visitation should be amended. Defendant has proven on numerous occasions that he is a violent and short-tempered parent. Plaintiff sought and received a temporary Order of Protection from the Queens Family Court on March 22, 2007 (Docket # O-xxxx-07) as a result of an incidence of domestic violence that occurred in the marital home in February of 2007. Between March 2007 and October of 2008, several additional incidences of domestic violence occurred and Defendant otherwise violated the temporary Order of Protection issued by the Queens Family Court by: (i) appearing at Plaintiff's workplace in August 2007 while she was present and physically attacking her manager; (ii) appearing at a coffee shop close to Plaintiff's workplace in December of 2007 while she was present; (iii) appearing at Plaintiff's residence after scheduled visitation with the children and physically assaulting Plaintiff in front of the Parties' children in June 2008; and (iv) appearing at a deli next door to Plaintiff's workplace in August of 2008 while Plaintiff was present. Consequently, the Queens Family Court issued a three year Final Order of Protection on October 28, 2008 (Docket # O-xxx-07) which prevents Defendant from harming his wife or children. Additionally, for a period of time in 2008, the Queens Family Court stopped visitation altogether. Unsupervised visitation began again in February of 2009, but only after a period of four months of supervised visitation. Shortly thereafter, on May 29, 2009, Defendant violated the Family Court's Final Order of Protection by verbally and physically assaulting Plaintiff outside the Department of Motor Vehicles in Flushing, New York. As a result, the Queens Criminal Court issued a criminal Order of Protection on April 8, 2010 (Docket # 2009-QNxxxx) which expires on October 7, 2008. Under New York law, this Court should give weighty consideration to incidences of domestic violence and the repeated violation of existing Orders of Protection when considering whether to amend the existing Final Orders of Custody and Visitation. Pursuant to the facts and the law, the pre-existing Final Orders of Custody and Visitation

at issue here should not be amended and any time that the Defendant spends with the children should be limited so as to guarantee their safety and well-being.

Dated: September ___, 2023

_____

Attorney

Subscribed and sworn to before me
on _____, 2023

_____

Notary Public

AFFIRMATION OF TRANSLATION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

----------x

JAMIE DOE: Index No. _____

Plaintiff	:	
against	:	**AFFIRMATION OF TRANSLATION**
LEE DOE	:	
Defendant	:	

----------x

JAY JONES, affirms under penalty of perjury:

That I am associated with My Law Office, Inc.;

That I speak Spanish fluently; and

That on September 13, 2022, I translated the Proposed Statement of Disposition for Ms. Doe. Ms.Doe stated that she understood each question and answer and each was true, complete, responsive and correct.

Dated: September 13, 2022

_____

_

JAY JONES

Subscribed and sworn to before me

on _____, 2022

_____

Notary Public

E. Inquest, Stipulations, and Trial

Jane Aoyama-Martin
Family Law Unit
The Legal Aid Society
Bronx Neighborhood Office
November 2000
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SEPARATION AGREEMENTS AND STIPULATIONS OF SETTLEMENT

MARITAL AGREEMENTS GENERALLY

When a matrimonial case is settled and the terms agreed upon, the parties typically enter into a written settlement agreement. This agreement is ordinarily called a separation agreement when the case is settled before an action is commenced, or a stipulation of settlement if the action is pending. In either situation, both types of agreements contain essentially similar language and terms. For purposes of this outline, the term "agreement" will mean either a separation agreement or stipulation of settlement.

This outline assumes that the practitioner is experienced and familiar with the standard clauses typically found in marital agreements, such as the "no molestation," "waiver of estate right," etc. This outline will focus upon drafting an agreement for property settlement, child support and maintenance issues. The remaining ancillary issues including child custody and visitation will not be considered in these materials, nor will the issues surrounding pre-nuptial agreements.

In order to be enforceable in a matrimonial action the agreement must be executed by the parties following the formalities that are set forth in Section 236(B)(3) of the

Domestic Relations Law ("DRL[1]).[2] Similarly, the agreement should contain language that the agreement will be incorporated, but not merged, into the Judgment of Divorce.

APPLICABLE LAW

Marital agreements are viewed as enforceable contracts under basic common law principles. A marital agreement, however, is subject to higher scrutiny than an ordinary contract given the special status and fiduciary relationship between spouse and wife. Such contracts require utmost good faith and are subject to rigid scrutiny by the courts concerning the fairness and propriety of their negotiation and execution. *Christian v. Christian*, 42 N.Y.2d 63, 396 N.Y.S.2d 817, 365 N.E.2d 849 (1977).

The principal statute addressing marital agreements is DRL §236(B)(3). [3] This subdivision sets forth a two-pronged standard for maintenance in marital agreements. For the maintenance provisions to be enforceable, the terms of the agreement must be: (1) fair and reasonable at the time of making the agreement; and (2) not unconscionable at the time of entry of final judgment. Specifically, the statute provides:

3. Agreement of the parties. An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded Such an agreement may include (1) a contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will; (2) provision for the ownership, division or distribution of separate and marital

[1] The language for the acknowledgment or proof in the manner required to entitle a deed to be recorded became uniform in 1997 by a new Section 309-a of the Real Property Law. Attached as Sample 1 are RPL §309-a and an acknowledgment form.

[2] DRL §236(B)(3) states that an agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded. See also DRL § 170(6).

[3] DRL §236(B) applies to any action or proceeding commenced on or after July 19, 1980, the effective date of New York's equitable distribution law

property; (3) provision for the amount and duration of maintenance or other terms and conditions of the marriage relationship, subject to the provisions of section 5-311 of the general obligations law, and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment; and (4) provision for the custody, care, education and maintenance of any child of the parties, subject to the provisions of section two hundred forty of this chapter. Nothing in this subdivision shall be deemed to affect the validity of any agreement made prior to the effective date of this subdivision.

Maintenance and Equitable Distribution

It should be noted that the two-pronged standard of fair and reasonable and not unconscionable is placed in subdivision (3), concerning the amount and duration of maintenance, and does not appear in subdivision (2) concerning property distribution. This has been interpreted to mean that property settlements are valid if they are not "unconscionable," but maintenance provisions are valid only if they meet the more rigorous two-pronged test.

The formal requirements of DRL 236(B)(3) must be followed. In Matisoff v. Dobi, 90 N.Y.2d 127, 659 N.Y.S.2d 209, 681 N.E.2d 376 (1997), the Court of Appeals held that a written post-nuptial agreement that was signed by the parties, but not acknowledged, was unenforceable.

In addition, practitioners should be aware of Section 5-311 of the New York General Obligations Law ("GOL")[4] which provides the broadest minimum standard for the validity of maintenance provisions in opt out agreements. GOL §5-311 provides, as a matter of public policy, that the parties' right to contractual freedom is limited only as to the public

[4] GOL §5-303 recognizes antenuptial agreements as valid and enforceable in New York State.

welfare exception, i.e., that a maintenance provision may not place the unpropertied spouse in the position of becoming a public charge. It provides,

> Except as provided in section two hundred and thirty-six of the domestic relations law, a husband and wife cannot contract to alter or dissolve the marriage or to relieve either of his or her liability to support the other in such a manner that he or she will become incapable of self-support and therefore is likely to become a public charge.

However, the parties are generally free to address support and maintenance in a matrimonial agreement under the Equitable Distribution Law. There is no duty to provide support or maintenance, except in the welfare situation. In essence, the parties may opt out of the statutory scheme by entering into a valid agreement.

Even in the welfare situation, however, a court may not impose the duty to support a public charge where it would be inequitable. Section 101 of the Social Services Law states, "except as otherwise provided by law," the spouse or parent of a welfare recipient, if of sufficient ability, may be required to contribute to the support of the welfare recipient. This language has been construed to permit a court to relieve a spouse or parent when it would be inequitable to impose such an obligation. See Parker v. Stage, 43 N.Y.2d 128, 400 N.Y.S.2d 794, 371 N.E.2d 513 (1977)(child support).

Lastly, under DRL 236(B)(9)(b) the court may permit the modification of a former judgment or order of maintenance, even if there is a surviving marital agreement, in an "extreme hardship" situation and regardless of the terms of an agreement.

Child Support

For child support, DRL §240(l-b)(h) allows the parties by agreement or stipulation to opt out of statutory child support formula found in the Child Support Standards Act ("CSSA"). DRL §240(l-b)(h) provides:

> (h) A validly executed agreement or stipulation voluntarily entered into between the parties after the effective date of this subdivision presented to the court for incorporation in an order of judgment shall include a provision stating that the parties have been advised of the provisions of this subdivision, and that the basic child support obligation provided for therein would presumptively result in the correct amount of child support to be awarded. In the event that such agreement or stipulation deviates from the basic child support obligation, the agreement or stipulation must specify the amount that such basic child support obligation would have been and the reasonn or reasons that such agreement or stipulation does not provide for payment of that amount. Such provision may not be waived by either party or counsel. Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the basic child support obligation provided such agreements or stipulations comply with the provisions of this paragraph. The court shall, however, retain discretion with respect to child support pursuant to this section. Any court order or judgment, incorporating a validly executed agreement or stipulation which deviates from the basic child support obligation shall set forth the court's reasons for such deviation.

Thus, in order to opt out of the provisions of the CSSA: 1) the agreement must be in writing; 2) must set forth the amount the payor would have been required to pay under the CSSA; 3) must set forth that the parties were advised of the CSSA and that the application of the CSSA would presumptively result in the correct amount of child support; 4) must set forth the court's reasons for approving the opt out agreement. Riggie v. Riggie, 217 A.D.2d 909, 630 N.Y.S.2d 184 (4th Dep't 1995).

ORAL AGREEMENTS ON THE RECORD

When the action is settled in court and an oral agreement is reached, the terms of the agreement may be read into the record. The attorneys and the court are often quick

to enter the stipulation on the record, before the parties change their minds. However, oral stipulations are not the preferred practice for a number of reasons. The practice of oral stipulations on the record is fraught with problems if the attorney is not careful or prepared in advance: new issues may arise on the spur of the moment and the attorney and client may not have enough time for careful consideration; it is difficult and time consuming to read into the record every provision that would have been included in a written agreement; the court stenographer may record a provision inaccurately and the transcript may have errors; and the attorney may forget to include certain safeguards that would have been included in a well thought out written agreement.

In addition, the plain language of DRL 236(B)(3), clearly requires a formal written acknowledgment by the parties to an agreement. Matisoff v. Dobi, 90 N.Y.2d 127, 659 N.Y.S.2d 209, 681 N.E.2d 376 (1997). Because oral stipulations often do not include a formal written acknowledgment by the parties, the question of whether oral stipulations on the record in court satisfy the formal requirements may be raised in a subsequent challenge. The Appellate Division, First and Second Departments, has upheld the validity of stipulations on the record, but there are a few decisions in the Third and Fourth Departments to the contrary. See e.g. Doppelt v. Doppelt, 215 A.D.2d715, 627 N.Y.S.2d 75 (2d Dep't 1995) (oral stipulation of settlement upheld and absent fraud, overreaching, mistake, or duress, the stipulation will not be disturbed); compare Conti v. Conti, 199 A.D.2d 985, 605 NY.S.2d 597 (4th Dep't 1993) (oral stipulation held invalid and

unenforceable since transcript did not show that an "opt out" agreement was made and statutory requirements of DRL §236(B)(3) were not met).[5]

Sometimes, the attorneys recite only the essential and basic terms of settlement on the record, with the representation that the parties will enter into a formal agreement subsequent to the court appearance. While in theory this sounds reasonable in order to avoid the pitfalls enumerated in the preceding paragraph, the parties may change their minds later or dispute the language in the subsequent proposed written agreement, and the parties may ultimately refuse to sign. It is therefore important that if the attorneys agree that a formal written agreement will follow at a later date, the oral stipulation on the record should also provide that if the formal written agreement is not executed, the oral stipulation will be binding.

The reality is that reaching an agreement in court happens quite often, particularly on the eve of trial or if the court pressures a settlement. In this event, the attorney must be prepared for the possibility of entering into an oral stipulation on the record. It is good practice to discuss in advance the possibility of settlement with your client, and to prepare in advance a stipulation specific to your case. The stipulation can be "marked up" and initialed in court. If advance preparation of a written stipulation is not possible, carry a sample agreement with you to court to serve as a checklist and model for language for a stipulation on the record.

[5] It should be noted that there is a strong public policy to uphold oral in-court stipulations. Court settlements are encouraged and serve the interests of efficient dispute resolution and case calendar management. Thus, the decisions which set aside oral stipulations usually contain additional grounds for setting aside the oral stipulation, and any failure to follow the formal requirements of DRL §236(B)(3) is secondary.

Where there is an oral stipulation on the record, and in order to comply with the written formalities required by DRL §236(B)(3), the parties should execute the form "Affidavit of Appearance and Adoption of Oral Stipulation." A sample affidavit is annexed as "Sample 2." This affidavit may be provided by the court.[6]

GENERAL CONSIDERATIONS TO HELP AVOID FUTURE CHALLENGES TO AN AGREEMENT

In anticipation of possible future allegations of impropriety or claims of unfairness, overreaching, fraud, duress, unconscionability, or other attempts to void the agreement, the practitioner should keep in mind the following factors:

1) Obtain full financial disclosure whenever possible. Full financial disclosure prior to execution of the agreement is strongly recommended. An exchange of Net Worth Statements may be appropriate. The financial statement should be accurate as of a date certain.

2) Include the recitals that each party has read and fully understands the agreement, that it is binding, and that each party has had a full opportunity to consult with counsel of their own choosing.

3) Avoid situations that give the appearance that one party may have signed under duress. If the agreement is oral and on the record, a thorough allocution in court may avoid later claims of duress. If the agreement is written, be sure to include the necessary clauses regarding free will, lack of duress, and other similar language. Practically speaking,

[6] At least in Supreme Court, Bronx County, the parties and attorneys are asked by the court clerk to execute this affidavit in the courtroom, after the oral stipulation is read into the record.

however, the courts are reluctant to set aside an agreement on this ground, unless there is a showing of extreme coercion or an egregious act by the other spouse.

4) Avoid agreements that provide grossly inequitable distribution of marital property, considering the respective contributions made by each spouse. If the agreement is highly disproportionate in the division of property, a court may later have grounds to set aside the agreement as unconscionable.

SAMPLE CLAUSES:

I. MAINTENANCE

(COMMENT: *It is suggested that the agreement contains a "whereas" clause that lists the maintenance factors of DRL 236(B)(6) to be considered by the court in any agreement which purports to fix the amount, duration, terms of maintenance)*

CLAUSE 1: PAYMENT OF MAINTENANCE

The Husband shall pay to the Wife, as and for spousal maintenance, the sum of $ .Such sum shall be payable monthly on or before the first day of each month, commencing as of the first day of the month of December, 2000.

CLAUSE 2: TERMINATION OF MAINTENANCE

Such maintenance shall cease upon the occurrence of whichever of the following first occurs: (a) upon reaching _; (b) death of either party; (c) remarriage of the Wife, as herein defined; (d) cohabiting with an unrelated adult person, whether or not they hold themselves out 'as husband and wife, for a consecutive period of ___ days; (e) ...other events ...

"Remarriage" for the purposes of this Agreement shall mean entering into a marriage contract or ceremony, whether civil or religious, and whether or not such marriage is void or voidable, or later annulled or declared void or dissolved or terminated.

CLAUSE 3: DIRECT PAYMENT OF MORTGAGE TO BE APPLIED TOWARD MAINTENANCE

The parties agree that the support and maintenance as set forth herein shall be paid by the Husband to the Wife in the form of direct payments of the mortgage and real estate taxes for the marital residence.

(COMMENT: *This clause is particularly suitable in the situation in which the Wife continues to occupy the marital residence, and the Husband remains jointly liable on the mortgage. The Husband may be able to take the applicable tax deductions for the mortgage and real estate payments),*

CLAUSE 4: MUTUAL WAIVER OF MAINTENANCE

The Husband and Wife intend by this Agreement to execute a complete, final and permanent settlement and adjustment of all property, support and other financial rights, obligations, interest and claims of every kind arising from and related to the marriage' relationship.

The Wife represents that she is in good health, and that she is capable of being gainfully employed, and that she is presently self-supporting and providing for her own reasonable needs. The Wife has been specifically advised of the provisions of Section 236(B) of the Domestic Relations Law regarding maintenance and makes this waiver with full knowledge of such rights as are set forth in that statute. Accordingly, the Wife expressly waives all claims, if any, for past, present and future maintenance and support from the Husband.

The Husband represents that he is in good health, and that he is capable of being gainfully employed, and that he is presently self-supporting and providing for his own reasonable needs. The Husband has been specifically advised of the provisions of Section 236(B)(6) of the Domestic Relations Law regarding maintenance and makes this waiver with full knowledge of such rights as are set forth in that statute. Accordingly, the Husband expressly waives all claims, if any, for past, present and future maintenance and support from the Wife.

CLAUSE 5: WAIVER OF RIGHT TO SEEK MODIFICATION

Each party specifically waives their respective rights which presently exist under Section 236(B)(9)(b) of the Domestic Relations Law of the State of New York to seek modification of the maintenance provisions herein.

(COMMENT: *This provision may not be upheld by a court as against public policy, but it could discourage future litigation or attempts to modify the maintenance provisions.)*

CLAUSE 6: WAIVER OF MAINTENANCE AND EQUITABLE DISTRIBUTION IN EXCHANGE FOR Lump Sum Payment

The Husband shell pay to the Wife, as and for a lump sum distribution, representing her interest in marital assets, and for any claims she may have by virtue of equitable distribution, by money order or certified check, the sum of $. The payment shall be made simultaneously upon execution of this Agreement, and the receipt and acceptance by the Wife of said payment shall be deemed in full satisfaction of her claims to equitable distributions and in full satisfaction of her interest, if any, in any property of the Husband, and of her claims to maintenance and spousal support, except as otherwise set forth in this Agreement.

In waiving maintenance and spousal support, the parties have taken into consideration the Wife's ability to support herself and/or to become gainfully employed. Notwithstanding this, if the Wife chooses not to work or is unable to work, both parties agree that the distribution provisions and sums provided herein as equitable distribution are sufficient for her support and maintenance.

(COMMENT: *There are public policy considerations regarding support waivers. The best you can do is spell out the reason for the waiver with particular reference to the assets, income of the spouse giving the waiver. The availability of a lump sum payment in lieu of maintenance is particularly attractive in cases where there are no children and/or a brief marriage. Be sure to get a maintenance waiver signed by your own client for your own protection).*

II. REAL PROPERTY

CLAUSE 1: IDENTIFY PROPERTY

The parties are owners (as tenants by the entirety)(as joint tenants)(as tenants in common) of real property located at 1234 Main Street, Bronx, New York 10459 ("marital home"). The marital home consists of land and a single family house which previously served as the marital residence. The marital home is described by deed, dated Apri1 29, 1991, and recorded in the Office of the County Clerk in Bronx County on May 1, 1991, Block 2, Lot 1.

The parties are joint owners of a cooperative apartment ("coop") located at 1234 Main Street, Apt. 2, Bronx, New York 10459. Ownership of the coop consists of _ shares in ABC Cooperative Corp., and an appurtenant proprietary lease for the apartment. The coop previously served as the marital residence.

The parties are joint tenants of a rental apartment located at 1234 Main Street, Apt. 2, Bronx, New York 10459 ("apartment"). The apartment previously served as the marital residence.

The Wife is sole owner of real property located at 1234 Main Street, Bronx, New York 10459 ("premises"). The premises have never served as the marital residence. The parties specifically acknowledge that the said premises shall remain the sole and exclusive property of the Wife. The parties agree that the Wife is entitled to sole and complete

possession and all right, title and interest in and to the premises, and all personal property contained therein.

CLAUSE 2: IDENTIFY MORTGAGE OR LOAN

The marital home is encumbered by a 30-year mortgage in the original amount of $160,000.00, currently held by Chase Manhattan Bank, its successors and assigns, as mortgagee. The parties are joint mortgagors and are jointly liable for the mortgage loan. The present principal balance on the mortgage is approximately $145,000.00. The mortgage and note were recorded in the Office of the County Clerk in Bronx County on May 1, 1991.

The marital home is encumbered by a 30-year coop loan in the original amount of $160,000.00, currently held by Chase Manhattan Bank, its successors and assigns, as creditor. The parties are joint debtors and are jointly liable for the coop loan. The present principal balance on the loan is approximately $145,000.00. The lien on the coop was recorded in the Office of the County Clerk in Bronx County on May 1, 1991.

CLAUSE 3: EXCLUSIVE USE AND POSSESSION

The Wife shall have exclusive use and possession of the marital residence.

CLAUSE 4: TERMINATION EVENTS

The Wife shall have exclusive use and possession of the marital residence until the earliest of the following events:

(a) the death of the Wife;

(b) the Wife's remarriage or cohabitation with another unrelated person;

(c) the parties' youngest child of the marriage reaches age 18, ceases to permanently reside in the marital residence, or becomes emancipated, as emancipation is defined in Article __, whichever first occurs;

(d) the Wife gives 60 days written notice to Husband that she will be vacating the marital residence.

(COMMENT:: The "cohabitation" description can become pretty elaborate and the practitioner must be sure to spell out the meaning of "cohabitation.")

CLAUSE 5: TRANSFER OF TITLE

(Husband conveys interest in marital residence to Wife in exchange for maintenance)

The Husband shall transfer all right, title and interest to the marital residence to the Wife, and the Wife, in consideration of the transfer, hereby relinquishes all claims for present and future maintenance or spousal support. Simultaneously upon execution of this Agreement, or as soon as practicable after the execution of this Agreement, the Husband will execute, acknowledge and deliver to the Wife a (bargain and sale) (quitclaim) deed conveying all of his right, title and interest in and to the marital residence to the Wife.

CLAUSE 6: DELIVERY OF DOCUMENTS

To effectuate the transfer of title to the marital residence, the Husband agrees to execute and deliver all necessary documents to the Wife at the signing of this Agreement. If for any reason additional documents must be executed, the Husband shall fully cooperate and promptly execute and deliver any such additional documents.

CLAUSE 7: EXPENSES OF TRANSFERRING TITLE

The Wife shall be responsible for all expenses relating to the transfer of the Husband's interest in the marital residence to the Wife, including but not limited to real estate taxes, recording fees, mortgage taxes, filing fees, transfer taxes, title fees, "flip taxes," and any other costs and expenses associated with the transfer.

CLAUSE 8: INDEMNIFICATION FOR EXPENSES ARISING OUT OF OWNERSHIP, OPERATION AND MAINTENANCE

The Wife hereby agrees to indemnify the Husband and holds him harmless of and from all debts, charges and liabilities hereafter incurred, commencing with the date of the making of this Agreement, arising out of the ownership, operation, and maintenance of the marital residence, including but not limited to mortgage payments, real estate taxes, and utilities.

CLAUSE 9: TAX TREATMENT

All payments made by the Husband for expenses of the marital residence are deemed ___% maintenance and ___% child support payments for tax purposes. In addition, or in the alternative, the Husband shall have the right to all available tax deductions, credits or benefits for the payments he makes on behalf of or toward or in connection with the marital residence.

(COMMENT: The parties, particularly the husband if the wife receives SS1, should be advised to seek independent tax advice. The issue is whether the husband can take the mortgage interest and real estate tax deductions on his tax returns, if he makes payment directly to the mortgagee and tax collector, in addition to the deduction for maintenance payments. It appears to be "double dipping," but the husband should seek the opinion of a tax expert. If our client receives SSI, the tax benefits, if any, are negligible.)

III. CHILD SUPPORT

CLAUSE 1: CHILD SUPPORT AMOUNT, COMMENCEMENT, TERMINATION

The Husband shall pay to the Wife as and for child support the monthly sum of $, commencing as of the first day of the month of December, 2000.

The payment of child support as provided for in this Agreement shall be reduced by $_ (or percentage) per month upon the emancipation, as "emancipation" is defined in Article ___ of this Agreement, of the first child and shall terminate upon the emancipation of the second child.

The support payments for each child shall continue until that child is emancipated, as "emancipation" is defined in Article ___ of this Agreement. In no case shall the husband be obligated to pay support beyond each child's reaching the age of twenty one.

(COMMENT: *At a minimum, the provision for child support should always contain the amount, payment time period, date payment is to begin, and date payment will cease. Under certain circumstances, you may wish to spell out the form of payment (check, money order payable to Wife), the address where payments should be sent, and any other conditions that may be applicable to your client's situation.)*

CLAUSE 2: OPT OUT LANGUAGE

The parties have been advised of the provisions and guidelines contained in the Child Support Standards Act, as set forth in Section 240 (1-b) of the New York Domestic Relations Law and Section 413(1)(b) of the Family Court Act, and commonly known as the Child Support Standards Act ("CSSA"), sometimes referred to as the "Child Support Guidelines." Each party acknowledges that he or she has read the provisions and has had the full opportunity to discuss the provisions with counsel of their own choosing. Each party further acknowledges that the CSSA provisions have been fully explained to him or her, and that he or she fully understands the applicability of the provisions to the issues of child support.

The parties have also been advised that the "basic child support obligation" provided under the CSSA would presumptively result in the correct amount of child support to be awarded unless the Court were to find such amount to be unjust or inappropriate. Further, the CSSA requires that if the child support provisions of this Agreement deviate from such "basic child support obligation: under the CSSA, this Agreement must specify the amount that the basic child support obligation would have been and the reasons for deviating from the CSSA.

The parties acknowledge and understand that in the absence of this Agreement, the provisions of the Child Support Guidelines would be controlling in determing their respective rights and obligations with regard to child support. The parties acknowledge

that, under the CSSA, the basic child support obligation for their two children would be twenty-five percent (25%) of the first eighty thousand dollars of the parties' combined gross income, to be shared by the parties pro rata, in addition to the pro rata share of child care expenses, health care expenses and educational expenses. In addition, twenty-five percent (25%) of the combined additional income of the parties or another amount arrived at by consideration of the factors set forth in the CSSA may be awarded in the court's discretion. The combined parental income in calendar year 1999 was $. Under the CSSA, the Wife's pro rata share for basic child support would have been ___% of $, or $. Under the CSSA, the Husband's pro rata share of basic child support would have been ___% of $, or $.

Notwithstanding the provisions of the CSSA, the parties wish to opt out of the statutory scheme and to enter into this Agreement with regard to child support. The parties intend and agree that their respective rights and obligations with respect to child support shall be governed by the Agreement rather than by the provisions of the CSSA. Each party, therefore, waives application of the CSSA.

The parties consider the provisions for child support in this Agreement to be fair and reasonable. The parties wish to deviate from the CSSA based on a number of considerations, including but not limited to the parties' respective finances and the financial provisions made in the Agreement, the needs of the children, the custodial and visitation arrangements, the children's standard of living had the parties not separated, the tax consequences to the parties, and the nonmonetary contributions of the parents.

(COMMENT: *If you opt out, the reasons or justification for deviation from the CSSA should be specified in as much detail as possible. DRL 240 (I-b)(f) lists the factors to be considered by the court in any agreement which deviates from the CSSA.)*

CLAUSE 3: DIRECT PAYMENT OF MORTGAGE TO BE APPLIED TOWARD CHILD SUPPORT

The parties agree that the child support payments as set forth herein shall be paid by the Husband to the Wife in the form of direct payments of the mortgage and real estate taxes for the marital residence

(COMMENT: *The details and breakdown of the payments will need to be added - also, it is wise to include provisions giving the wife some recourse in case the payments are not made by the Husband.)*

STIPULATION OF SETTLEMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

XXXXXXXXX	:	Index No. _____
	:	
Plaintiff	:	
against	:	**STIPULATION OF**
	:	**SETTLEMENT**
XXXXXXXXX	:	
Defendant	:	

STIPULATION OF SETTLEMENT

THIS STIPULATION, (hereinafter "Stipulation") duly made and executed this ___ day of August , 2009 in the County of the Bronx, State of New York, by and between JANE DOE , residing at 1111 Ward Avenue, #4M, Bronx, New York 10472, hereinafter called the "WIFE" and JOHN DOE, residing at 533 West 175th Street, #2, New York, New York, hereinafter called the "HUSBAND", collectively hereinafter referred to as the "Parties", in a divorce proceeding, INDEX# XXXXX/08, filed in Bronx County, Supreme Court.

WITNESSETH

WHEREAS, the Parties were married in a civil ceremony on November 30, 1995 in the City of San Miguel De Lozano Tecomatlan, Country of Mexico, and

WHEREAS, there are five (5) children as a result of this marriage, to wit:

NAME	**DATE OF BIRTH/AGE**	**ADDRESS**
JOSELYN DOE	10/06/2012 (12)	1111 Ward Avenue, #4M, Bronx, N.Y. 10472

LUIZ DOE	09/01/2013 (10)	1111 Ward Avenue, #4M, Bronx, N.Y. 10472
ADELIN DOE	10/04/2015 (8)	1111 Ward Avenue, #4M, Bronx, N.Y. 10472
MARIANA DOE	10/04/2019 (4)	1111 Ward Avenue, #4M, Bronx, N.Y. 10472
EDUARDO DOE	08/04/2023 (3)	1111 Ward Avenue, #4M, Bronx, N.Y. 10472

WHEREAS, a Judgment of Divorce is sought by the Plaintiff on the grounds that are in accordance with subdivision (2) of Section 170 of the Domestic Relations Law, Constructive Aban-donment of the Plaintiff by the Defendant; and

WHEREAS, the Parties desire to set forth the terms and conditions of the Judgment of Divorce for the custody, visitation and support of the minor children, spousal maintenance, exclusive occupancy and possession of the marital residence, located at 1111 Ward Avenue, #4M, Bronx, N. Y. 10472, a final five-year (5) complete stay away Final Order of Protection against the Defendant, and the division of the marital property under Equitable Distribution; and

WHEREAS, the Parties are fully aware of the child support standards guidelines, and

WHEREAS, the Parties are fully aware of their rights for the marital property division, regardless of form and title; and

WHEREAS, the parties have been fully informed of the fact that there has been enacted in the State of New York and is now in full force and effect, a statute commonly known as the "Equitable Distribution Statute"; and

WHEREAS, each party is aware that if he or she were to seek maintenance, if any, from the other party under New York Domestic Relations Law Section 236B (6) (a), the court would consider the following factors in determining the amount and duration:

1. the income and property of the respective parties including marital property distributed pursuant to subdivision five of this part;

2. the length of the marriage;

3. the age and health of both parties;

4. the present and future earning capacity of both parties;

5. the need of one party to incur education or training expenses;

6. the existence and duration of a pre-marital joint household or a pre-divorce separate household;

7. acts by one party against the other that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty nine-a of the social services law;

8. the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefore;

9. reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage;

10. the presence of children of the marriage in the respective homes of the parties;

11. the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity;

12. the inability of one party to obtain meaningful employment due to age or absence from the workforce;

13. the need to pay for exceptional additional expenses for the child/children, including but not limited to, schooling day care and medical treatment;

14. the tax consequences to each party;

15. the equitable distribution of marital property;

16. contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;

17. the wasteful dissipation of marital property by either spouse;

18. any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;

19. the loss of health insurance benefits upon dissolution of the marriage, and

20. any other factor which the Court shall find to be just and proper; and

WHEREAS, each party is aware that if he or she were to seek equitable distribution of property, if any, under New York Domestic Relations Law Section 236B (5) (d), the court would consider the following factors:

1. the income and property of each party at the time of marriage, and at the time of commencement of the action;

2. the duration of the marriage and the age and health of both parties;

3. the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;

4. the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;

5. the loss of health insurance benefits upon dissolution of the marriage;

6. any award of maintenance under subdivision six of this part;

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;

8. the liquid or non-liquid character of all marital property;

9. the probable future financial circumstances of each party;

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;

11. the tax consequences to each party;

12. the wasteful dissipation of assets by either spouse;

13. any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; and

14. whether either party has committed an act or acts of domestic violence, as described in subdivision one of section four hundred fifty-nine-a of the social services law,[1] against the other party and the nature, extent, duration and impact of such act or acts

15. any other factors which the court shall expressly find to be just and proper; and

WHEREAS, it is the intention of the parties to live separate and apart for the rest of their natural lives, and to enter into a Stipulation under which all of their respective rights, remedies, privileges, and obligations to each other arising out of the marriage relation or otherwise, shall be fully described and bounded thereby, fixing now and forever their rights therein; and

WHEREAS, the parties hereto have had the opportunity to be fully and independently advised of their respective legal rights, remedies and obligations arising out of the marriage relationship by counsel of their own choice, and each having, in addition, made independent inquiry with respect to same; and

WHEREAS, the parties hereto each warrant and represent to the other that they fully understand the terms of this Stipulation, and each believes the same to be fair, just and reasonable, and to their respective individual best interests; and

NOW, THEREFORE, in consideration of the premises and of the covenants and promises contained herein, the parties hereto mutually agree as follows:

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[1] SSA §459-a(1) "Victim of domestic violence" means any person over the age of sixteen, any married person or any parent accompanied by his or her minor child or children in situations in which such person or such person's child is a victim of an act which would constitute a violation of the penal law, including, but not limited to acts constituting disorderly conduct, harassment, aggravated harassment, sexual misconduct, forcible touching, sexual abuse, stalking, criminal mischief, menacing, reckless endangerment, kidnapping, assault, attempted assault, attempted murder, criminal obstruction of breathing or blood circulation, or strangulation; and (i) such act or acts have resulted in actual physical or emotional injury or have created a substantial risk of physical or emotional harm to such person or such person's child; and (ii) such act or acts are or are alleged to have been committed by a family or household member.

ARTICLE I

WHEREAS CLAUSES

The Parties hereby adapt as part of this Stipulation each of the recitals contained above in the "WHEREAS" clauses, and agree that they shall be binding upon them by way of a contract and not merely by way of recital or inducement, and confirm that such recitals are true and accurate.

ARTICLE II

NON-INTERFERENCE

Neither party shall in any way molest, disturb, compel or seek to compel the other to associate, cohabit or dwell with him or her, by any action or proceedings for restoration of conjugal rights or by any means whatsoever. Each party may contract, carry on and engage in any employment, business or trade which they may deem fit, free from control, restraint or interference, direct or indirect, by the other, in all respects as if such parties were sole and unmarried. Each party may make and keep such friends and acquaintances as he or she may desire, without interference from the other.

ARTICLE III

SEPARATE RESIDENCE

It is, and shall be, lawful for the parties hereto, at all times to live separate and apart from each other and to reside, from time to time, at such place or places as each of the parties may see fit, without restriction.

ARTICLE IV

CHANGE OF ADDRESS

The parties hereby agree that each will notify the other, by certified mail, of any change of address and/or telephone number within five (5) days of the date of such change so long as any of the terms of this Stipulation remain to be performed in total or in part.

ARTICLE V
SEPARATE OWNERSHIP

Except as otherwise expressly set forth herein, each party shall own, free of any claim or right of the other, all of the items of property, real, personal and mixed, of any kind, nature or description and wheresoever situate, which are now in his or her name, control or possession with full power, to him or to her to dispose of the same as fully and effectually in all respects and for all purposes.

ARTICLE VI
PENDING LITIGATION

The parties hereby acknowledge that an action for divorce is pending in the Supreme Court, County of Bronx, and State of New York. The Husband/Defendant has appeared in said action by Jane Martinez, Esq., and consents to a Judgment of Divorce in favor of the Plaintiff on the grounds of DRL Sec. 170 (2) – the constructive abandonment of the Plaintiff by the Defendant, pursuant to the terms to this Stipulation of Settlement.

ARTICLE VII
MUTUAL RELEASE AND DISCHARGE
OF GENERAL CLAIMS

Subject to the provisions of this Stipulation, each party has remised, released and forever discharged, and by these presents does for himself or herself, and his or her heirs, legal representatives, executors, administrators, and assigns, remise, release and forever discharge the other of and from all cause or causes of action, claims, rights or demands whatsoever, in law or in

equity, which either of the parties hereto ever had or now has against the other, except any or all cause or causes of action for divorce or separation and any defenses either may have to any divorce or separation brought by the other, and except any cause or causes of action based upon rights and obligations established by the terms of this Stipulation.

ARTICLE VIII
MUTUAL RELEASE AND DISCHARGE OF CLAIMS IN ESTATES

Each party hereby releases, waives and relinquishes any and all right that he or she may have, or may hereafter acquire, as the other party's spouse, under the present or future laws of the jurisdiction,

(a) to share in the estate of the other party upon the latter's death; and

(b) to act as executor or administrator of the other party's estate.

This provision is intended to and shall constitute a mutual waiver by the parties to take against each other's Wills now or hereafter in force, under the present or future laws of any jurisdiction whatsoever. The consideration for each party's waiver and release is the other party's waiver and release. The parties intend by the aforedescribed waiver and release to relinquish any and all rights in and to each other's estate, including the rights of set-off now provided in Section 5-3.1 of the Estates, Powers and Trust Law of the State of New York, an and all distributive shares presently provided in Section 4-1.1 of the Estates, Powers and Trust Law, and all right of election presently provided for in Section 5-1.1 of said law, or any prior or subsequent similar provision of law of this or any other jurisdiction.

Notwithstanding any of the foregoing, it is agreed that either party may serve as executor of the estate of the other or may accept a specific bequest if provision is made in the other party's Will.

However, the foregoing shall not bar a claim on the part of either party against the other for money damages for any cause or causes arising out of a breach of their Stipulation during the lifetime of the deceased party against whose estate such claim may be made.

ARTICLE IX
ALLOCATION OF MARITAL PROPERTY

1. The parties have evaluated their marital property and have arrived at an allocation they mutually deem to be a satisfactory equitable distribution thereof.

2. It is specifically understood and agreed that the parties have heretofore divided their personal property between themselves, and each of the parties hereby waive any claims that they may have to any personal property in the other's possession.

3. Each of the parties hereby represent that they have not incurred any debts against the credit of the other, other than those which are specifically mentioned in this Stipulation which shall be apportioned as hereinafter described, and each of the parties represent that they shall indemnify and hold the other harmless from any debts that they may have contracted against the credit of the other.

4. The Parties agree that the Plaintiff will retain exclusive use and possession of all household furnishings, currently located 1111 Ward Avenue, #4M, Bronx, New York 10472.

5. The Husband and Wife hereby covenant that each shall execute any and all contracts, deeds, instruments, or documents which may be required or requested of him or her in connection

with the transfer of title of property or automobiles as herein provided. This obligation of the parties under this clause of the Stipulation, entitled "Allocation of Marital Property", may be specifically enforced.

6. For her financial contributions to the marital property in Mexico, the husband shall pay the wife the sum of $1,000.00 as follows: commencing on September 11, 2009 the husband shall make to the wife five (5) bi-weekly installments of $200.00 each.

ARTICLE X
EXCLUSIVE OCCUPANCY AND OCCUPANCY OF THE MARITAL RESIDENCE

The parties agree that the Plaintiff shall retain exclusive occupancy and possession of the former marital residence, located at 1111 Ward Avenue, #4M, Bronx, New York 10472.

ARTICLE XI
FIVE (5) YEAR COMPLETE STAY AWAY ORDER OF PROTECTION

1. Plaintiff has a final Order of Protection against the Defendant issued in Bronx County Family Court on April 16, 2008 and effective until April 15, 2010, Docket No.:

O-00000-07. Said Order directs the Defendant to stay away from Angelica DOE, JOSELYN DOE, LUIZ DOE, ADELIN DOE, MARIANA DOE, and EDUARDO DOE and to refrain from assaulting, stalking, harassment, aggravated harassment, menacing, reckless endangerment, disorderly conduct, intimidation, threats or any criminal offense against Plaintiff, Jane Doe.

2. The parties hereby agree that said Final Order of Protection shall be extended an additional 5 five years from its expiration date of April 15, 2010. The parties further agree to the issuance of a new Final Order of Protection, in favor of Plaintiff and the children and against Defendant, with all the same provisions, which shall be effective through April 15, 2015.

ARTICLE XII

CUSTODY AND VISITATION

1. The parties agree that the wife shall have sole legal and physical custody of the minor children of the marriage, to wit: JOSELYN DOE, LUIZ DOE, ADELIN DOE, MARIANA DOE, and EDUARDO DOE.

2. The husband waives visitation or any parenting time with the minor children.

ARTICLE XIII

CHILD SUPPORT

1. As and for the support of the minor children, the husband shall pay to the wife statutory child support in the sum of $122.50 weekly, commencing the Friday following the execution of this Stipulation.

2. The parties represent that they have been advised by their respective attorneys of the provisions of New York Domestic Relations Law Section 240 (1-b)(h) and the Family Court Act Section 413 (1) "Child Support Standards Act." The parties are aware that under the Child Support Standards Act, the non-custodial parent may be required to pay to the custodial parent thirty-five (35) percent of his income.

COMPLIANCE WITH THE CSSA

3. In accordance therewith, the parties have been advised that pursuant to amendments made to the CSSA under Chapter 41 of the Law of 1992, the "basic child support obligation" provided in D.R.L.240 (1-b) and F.C.A. 413(1)(b) would presumptively result in the correct amount of child support for the children herein, unless the Court were to find such amount to be

unjust or inappropriate and that the Court must award child support in the numerical sum of the "basic child support obligation" that is computed from the application of a formula set forth therein unless such award would be unjust or inappropriate. The parties acknowledge that, under the CSSA, the basic child support obligation for their children should be at least thirty-five (35) percent of the first One Hundred Sixty-Three Thousand ($163,000.00) Dollars of the parties' combined parental income, shared by the parties pro rata and in the discretion of the court, a percentage of any additional combined parental income.

4. The parties acknowledge that the husband, who is the non-custodial parent, had a gross income in the year 2008 in the sum of $18, 270.00 with no Medicare or Social Security deductions, yielding income for the purposes of the Child Support Standards Act in the sum of $18,270.00. The wife, who is the custodial parent, had income in the year 2008 in the sum of $ 0.00, yielding income for the purposes of the Child Support Standards Act of $0.00.

5. The CSSA requires that the Court award as child support an amount calculated by applying a formula set forth therein, unless the Court has determined that it is appropriate to vary the support amount resulting from the application of the formula.

6. Pursuant to the within Stipulation, the following calculation is based upon the total combined minimum income of both parents.

7. The calculation of the "basic child support" obligation in accordance with the CSSA is as follows:

a. The applicable child support percentage for five children is 35%;

b. The parties acknowledge and agree that their "combined parental income" for 2008 is $18,270.00, and that the basic child support obligation based upon the parents' total combined income is $ 6,370.00 per year, or $ 122.50 per week;

c. The Father's adjusted gross income for 2008 is approximately $ 18,270.00, representing 100% of the combined parental income;

d. The Mother's adjusted gross income for 2008 is approximately $ 0.00, representing 0% of the combined parental income;

e. The Father's pro rata share amounts to $ 6,370.00 per year, or $ 122.50 per week.

8. The parties acknowledge that the amount of child support agreed upon conforms with the basic child support obligation as mandated by the CSSA. The parties desire to enter into this Stipulation with all the terms hereof including child support.

9. The Husband shall be responsible to make the necessary arrangements so that said payments shall be deposited directly into the Wife's bank account at JP Morgan Chase Bank, N.A., Account Number xxxxx, so that such payments shall be received by the Wife's bank on the Friday of each week, commencing on the Friday following the execution of this Stipulation. The father's obligation to pay child support shall continue until emancipation of the minor children.

10. The parties hereby agree that the Wife shall be entitled to a cost-of-living-adjustment (COLA) every three years.

EMANCIPATION EVENT

The children shall be deemed, for purposes of this Stipulation, to have become emancipated as contemplated by article entitled "Medical Insurance" contained in this Stipulation, upon the earliest happening of any of the following events:

1. Attaining the age of twenty-one (21) years or the completion of four (4) academic years of college education, vocational or trade school, whichever last occurs, but in no event beyond the date on which the child attains the age of twenty-two (22) years. However, "emancipation" shall be deemed to be defined as extending beyond the twenty-first (21) birthday of the child only if and so long as the child continuously pursues a college education on a full-time basis and with reasonable diligence; but in no event beyond the date on which the child attains the age of twenty-three (23) years.

2. Marriage of the child, even though such marriage may be void or voidable, and despite any subsequent annulment thereof.

3. Permanent residence away from the residence of the residential parent. A residence at boarding school, camp, vocational or trade school, college, or active duty in the military service is not to be deemed a residence away from the residential parent sufficient to constitute emancipation.

4. Death of the child or the non-custodial parent if the non-custodial parent is obligated under this Stipulation to make child support payments.

5. Entry into the Armed Forces of the United States, to continue only so long as the child is a member of the Armed Forces before attaining majority, so that in the event of discharge before attaining majority, the child shall not be deemed to have been fully emancipated.

6. Engaging in full-time employment upon and after the attainment by the child of the age of eighteen (18) years, except that engaging by the child in partial, part-time, or sporadic employment during vacations and summer periods, shall not be deemed emancipation. Emancipation stemming from employment shall be deemed terminated and nullified upon the

cessation by the child for any reason, from full-time employment and the period, if any, for any termination until the earliest of any of the other events herein set forth shall, for all purposes under this Stipulation, be deemed a period prior to the occurrence of such emancipation.

7. However, the obligation of the parent making child support payments to support the child may continue beyond the majority of the child if and in the event any child is or becomes physically handicapped or mentally deficient or otherwise handicapped and unable to support him/herself as a result thereof.

ARTICLE XIV
SUPPORT MODIFICATION

1. The parties hereto acknowledge and represent that the support figures contained herein are based upon the current financial circumstances of the parties, the current value of the dollar and the current ages of the five children, and that further circumstances have not been considered.

2. The parties specifically agree that the support provisions contained herein are subject to modification as deemed appropriate by a court of competent jurisdiction in light of changes in the financial circumstances of the parties, the value of the dollar, and the ages of the five children. The Wife shall have the right to seek a cost-of-living-adjustment (COLA) every three years. In addition, the Wife shall retain the right to seek upward modification of the child support terms of this Stipulation upon a change of circumstances resulting in the Wife's paying ancillary expenses of the children, including but not limited to unreimbursed medical expenses and work-related child care expenses, which she does not currently incur.

3. The Husband acknowledges that downward modification shall not be granted where a reversal of his financial circumstances is brought about by his own actions or inactions.

A. COMPLIANCE WITH CSSA

The Parties agree that they have been advised of the provisions of Domestic Relations Law § 240(1-b), as amended (the "CSSA"), and that they have reviewed the provisions of said statute, understand them, and have had a full opportunity to discuss them with counsel. The parties further understand that in the absence of this Stipulation the provisions of the CSSA would govern the determination of the amount of the Child support obligation to be paid by the Husband to the Wife. The parties further acknowledge that they have been advised that the "basic Child support obligation" determined pursuant to the CSSA would presumptively result in the correct amount of Child support to be awarded to the Wife. Further, the CSSA requires that if the Child support provisions of this Stipulation deviate from such "basic Child support obligation", there be specified in this Stipulation the amount that such "basic Child support obligation" would have been and the reason that this Stipulation does not provide for payment by the Husband of his pro rata share of such amount. Such statutory requirement may not be waived by either party or their respective counsel. Accordingly, the parties understand that the sole purpose of this Paragraph is to comply with the foregoing statutory requirement.

The CSSA requires that the Court award as Child support an amount calculated by applying a formula set forth therein, unless the Court has determined that it is appropriate to vary the support amount resulting from the application of the formula.

Pursuant to the within Stipulation, the following calculation is based upon the total combined minimum income of both parents.

MODIFICATION

Under DRL § 236B(9)(b) (and Family Court Act § 451) Parties have the right to seek a modification of a Children support order upon a showing of (i) a substantial change in circumstances; or (ii) that 3 (three) years have passed since the order was entered, last modified or adjusted; or (iii) there has been a change in either party's gross income by 15% (fifteen) percent or more since the order was entered, last modified or adjusted. The Parties have not elected to opt out of any of the above subparagraphs. The Parties acknowledge that future modifications of Children support shall be governed by the CSSA.

ARTICLE XV
COST OF LIVING INCREASE

The wife shall have the right to seek a Cost of Living adjustment of the child support set forth herein every three (3) years.

ARTICLE XVI
MEDICAL INSURANCE FOR THE CHILDREN

The Wife hereby agrees to continue to maintain the present medical and health insurance coverage for the benefit of the children.

ARTICLE XVII
MANDATORY ADDS-ON

Should the wife incur any mandatory ancillary expenses for the minor children, such as unreimbursed medical expenses for the children, school or work related child care expenses or after school expenses for the minor children, the Husband shall pay his pro-rata share of said costs. This shall include child care expenses necessitated by the Wife's attendance at a school or vocational school to learn English and/or a vocation, as detailed in Article XVIII below.

ARTICLE XVIII

VOCATIONAL TRAINING

In the event the wife enrolls in a job training program that will enable her to be employable and enter the job market, the Husband shall pay his pro-rata share of child care and/or after school expenses for the minor children.

ARTICLE XIX

WIFE'S INDEPENDENT INCOME

Regardless of whatever income the Wife may now or hereafter have or the source thereof, whether earned or unearned, the same shall in no way affect or limit the obligation of the Husband to provide for the support of the children as herein required.

ARTICLE XX

SPOUSAL SUPPORT AND MAINTENANCE

1. The Husband shall pay to the Wife the sum of $50.00 per week as and for her support and maintenance for a period of 5 (five) from the date of this Stipulation. The Husband shall be responsible to make the necessary arrangements so that said payments shall be deposited directly into the Wife's bank account at JP Morgan Chase Bank, N.A., Account Number xxxxxxx, so that such payments shall be received by the Wife's bank on the Friday of each week, commencing on the Friday, August 15, 2009, following the execution of the within Stipulation of Settlement, and shall continue until the earliest happening of one of the following events:

a. August 15, 2014;

b. Death of either party;

c. Remarriage of the Wife;

d. Cohabitation by the Wife with an unrelated adult male for thirty consecutive days in any twelve (12) month period.

2. The payments to be made by the Husband as provided for herein for maintenance shall be taxable to the Wife and tax deductible to the Husband.

3. Considering the Husband's age, health, duration of marriage, prior working experience, present employment and potential earning capacity, the Husband hereby unqualifiedly waives and renounces any and all claim or rights against the Wife for any support or maintenance, for himself of any kind in any amount whatsoever, now or at any time, directly or indirectly demand, sue or apply therefore, except as otherwise provided in this Stipulation.

ARTICLE XXI
HEALTH INSURANCE

1. The parties have been given notice pursuant to Section 177 of the Domestic Relations Law, setting forth that once a Judgment of Divorce is entered, a person may, or may not, be eligible to be covered under his or her spouse's health insurance plan, depending on the terms of the plan. Each Party acknowledges that he or she may be entitled to purchase health insurance on his or her own through a COBRA option, if available. Otherwise, each Party understands that he or she may be required to secure his or her own health insurance.

2. Each Party shall be responsible for their respective health care costs not covered by any medical insurance plan.

ARTICLE XXII
DISTRIBUTIVE AWARD

There shall be no distributive award, as said term is defined in Section 236, Part B of the Domestic Relations Law of the State of New York, paid by either party to the other in view of the acknowledgement of both parties that there is a distributable marital asset.

ARTICLE XXIII
EDUCATION EXPENSES OF THE CHILDREN

The parties shall, depending upon their financial ability to do so at the time, share in the costs of the children's' college education based upon tuition, room and board costs at a State University. Costs as used herein shall constitute application fees, tuition, room and board, university fees and books.

ARTICLE XXIV
EQUITABLE DISTRIBUTION

The parties intend this Stipulation to constitute an agreement pursuant to Section 236 (B) (3) of the Domestic Relations Law of the State of New York. They intend this Stipulation and its provisions to be in lieu of each of their respective rights, pursuant to all aspects of Domestic Relations Law Subsection 236 (b). Accordingly, except to the extent provided for in this Stipulation, the parties mutually waive their rights and release each other from any claims for maintenance, distribution of marital property, distributive awards, special relief of claims regarding separate property or increase in the value thereof.

ARTICLE XXV
LEGAL REPRESENTATION

1. The Parties have sought and obtained legal advice independent of one another; that they have been duly appraised of their respective rights and remedies; that all of the provision of this Stipulation as well as all questions pertain-ing thereto have been fully and satisfactorily explained to them;

2. The wife has consulted and has obtained the advice, counsel and representation of Isabelle L. Roe, Esq., the counsel of her choice with regard to her rights, remedies, privileges and obligations pursuant to this Stipulation.

3. The husband has consulted and has obtained the advice, counsel and representation of Jane Martinez, Esq., the counsel of his choice with regard to his rights, remedies, privileges and obligations pursuant to this Stipulation.

4. It is expressly agreed and understood that each of the parties shall pay their own respective counsel fees in connection with the preparation and negotiation of this Stipulation, as well as any counsel fees that may be incurred with respect to proceedings for an uncontested divorce as previously provided herein.

ARTICLE XXVI
FULL DISCLOSURE

The parties acknowledge that they are entering into this Stipulation freely and voluntarily; that both the legal and practical effects of this Stipulation in each and every respect has been explained fully to each party by their respective independent counsel; that they have ascertained and weighed all of the facts and circumstances likely to influence their judgment herein; that they have sought and obtained legal advice independently of each other; that they have been duly apprised of their respective legal rights; that they have had full and complete opportunity to independently investigate and ascertain the income and assets of the other party and that they have

both independently investigated and ascertained the income and assets of the other party to their respective satisfaction and each party waives any further proceedings to investigate the assets and income of the other including, but not limited to, the furnishing of any papers, affidavits or documents in connection therewith; that all the provisions hereof, as well as questions pertaining thereto, have been explained to their satisfaction; that they have given due consideration to such provisions and questions, and that they clearly understand and assent to all the provisions hereof which they believe to be fair, just, adequate and reasonable and that this Stipulation is not the result of any fraud, duress or undue influence exercised by either party upon the other or by any person or persons upon either.

ARTICLE XXVII
ENTIRE UNDERSTANDING

This Stipulation contains the entire understanding of the parties, who hereby acknowledge that there have been and are no representations, warranties, covenants or undertakings other than those expressly set forth herein.

ARTICLE XXVIII
PARTIAL INVALIDITY

In the event that any provision of this Stipulation shall be held to be contrary to, or invalid under, the law of any country, state or jurisdiction, such illegality or invalidity shall not affect, in any way, other provisions thereof, all of which shall continue nevertheless in full force and effect. Any provision which is held to be illegal or invalid in any country, state or jurisdiction shall, nevertheless, remain in full force and effect in any country, state or jurisdiction in which such provision is legal and valid.

ARTICLE XXIX
MODIFICATION AND WAIVER

Neither this Stipulation, nor any provision hereof, shall be amended or modified, except by an Stipulation in writing, duly subscribed and acknowledged with the same formality as this Stipulation. Any waiver by either party of any provision of this Stipulation, or any right or option thereunder, shall not be deemed a continuing waiver and shall not prevent or stop such party from thereafter enforcing such provision, right or option, and the failure of either party to insist in any one or more instances upon the strict performance of any of the terms or provisions of this Stipulation by the other party shall not be construed as a waiver or relinquishment for the future of any such term or provision, but the same shall continue in force and effect.

Notwithstanding the provisions of Domestic Relations Law Section 236, Subsection B(9)(b), the parties agree that no order of a court of competent jurisdiction, which supersedes the terms of this Stipulation, will deny either party the right to enforce the terms of this Stipulation and to obtain a money judgment for arrears that might have accumulated pursuant to the terms of this Stipulation.

ARTICLE XXX
LEGAL INTERPRETATION AND GOVERNING LAW

This Stipulation is made and shall be executed and en-tered into in the State of New York, and it is the intention and understanding of the Parties that the validity, interpretation and effect of this Stipulation, and of any and all of the rights of the Parties hereunder, shall be governed by, construed and inter-preted in accordance with the laws of the State of New York, entirely independent of the forum where it may come up for enforcement or construction.

ARTICLE XXXI
STIPULATION TO SURVIVE DIVORCE DECREE

Each Party agrees that the provisions of this Stipulation shall be submitted to any court in which either Party may seek a judgment or decree of divorce and the provisions of this Stipulation shall be incorporated in such Judgment or decree with such a specificity as the Court shall deem permissible and by reference as may be deemed appropriate under the law and under the rules of the Court. However, notwithstanding such incorporation, the obligations and covenants of this Stipulation shall survive any decree or judgment of divorce and shall not merge therein, and this Stipulation may be entered independently of such decree or judgment.

ARTICLE XXXII
IMPLEMENTATION

The Husband and the Wife shall, at any and all times upon the request of the other party or his or her legal representatives, make, execute and deliver any and all such other and further instruments as may be necessary or desirable for the purpose of giving full force and effect to the provisions of this Stipulation, without charge thereof.

ARTICLE XXXIII
NO MOLESTATION

Neither party shall in any way molest, disturb or trouble the other, or interfere with the peace and comfort of the other, or compel or seek to compel the other to associate, cohabit or dwell with him or her by any action or proceeding for restoration of conjugal rights or by any means whatsoever.

ARTICLE XXXIV
DUPLICATE ORIGINALS

This Stipulation shall be executed by the Parties in four (4) original counterparts, and each Party shall retain an original in his or her possession for safekeeping. Each counter-part of this Stipulation shall be deemed the original document for all purposes and shall constitute but one and the same document.

ARTICLE XXXV
INDEPENDENT COVENANTS

Each of the respective rights and obligations of the parties hereunder shall be deemed independent and may be enforced independently, irrespective of any of the other rights and obligations set forth herein.

ARTICLE XXXVI
DEFAULT

In the event that either party, or his or her estate, shall be adjudged by a court of competent jurisdiction to have defaulted in the performance of the terms or provisions of this Stipulation, the party so adjudged, or his or her estate, shall be liable for and shall pay to the other party, or other person having right of enforcement hereunder, reasonable attorney's fees incurred in enforcing such performance. For the purposes of this Stipulation, it is understood and agreed that in the event a party shall institute a suit or other proceeding against the other party to enforce any of the terms or conditions of this Stipulation, and after institution of such action or proceeding and before judgment is or can be entered, the party sued shall comply with the terms or conditions of the Stipulation, then, and in that event, the suit by the suing party shall be deemed to have resulted in a judgment, decree or order in favor of the suing party. Then, and in that event, the sued party shall be responsible for reasonable attorney's fees that have been incurred by or on behalf of the suing party for purposes of the enforcement of the terms of this Stipulation.

ARTICLE XXXVII

GENERAL PROVISIONS

1. This Stipulation and all of the terms and obligations there under shall bind the Parties hereto, their heirs, adminis-trators, executors, legal representatives and assigns and shall inure to the benefit of their respective heirs, executors, administrators, legal representatives and assigns. Unless otherwise specifically provided in this Stipulation, each of the respective rights and obligations of the parties hereunder shall be deemed independent and may be enforced. Independently irrespective of any of the other rights and obligations set forth herein. No modification, rescission or amendment of this Stipulation shall be effective unless in writing signed by the Parties hereto, in the form and manner required by the Domestic Relations Law of the State of New York.

2. In the event that any term, provision, paragraph or ar-ticle of this Stipulation is declared illegal, void, or unenforce-able, the same shall not affect or impair any other terms, provi-sions, paragraphs or articles of this Stipulation.

3. Each Party shall at all times advise the other party of his or her current residence address or any prospective changes thereof.

4. Both Parties acknowledge that this is a fair Stipulation and is not the result of any fraud, duress, coercion, pressure or undue influence exercised by either Party upon the other or by any other person or persons upon either. The Parties further acknowledge that the provisions hereof are fair and reasonable, after due consideration of all the factors which a court is obliged to consider pursuant to the law of the State of New York.

5. This Stipulation and its provisions merge any prior Stipulations, if any, of the parties and is the complete and entire Stipulation of the parties.

6. Each of the parties hereto, without cost to the other, shall at any time and from time to time hereafter, execute and deliver any and all other future instruments and assurances and perform any acts that the other party may reasonably request for the purpose of giving full force and effect to the provisions of this Stipulation.

7. The parties acknowledge that they are entering into this Stipulation freely and voluntarily; that they have ascertained and weighed all the facts and circumstances likely to influence their judgment herein; that they have sought and obtained legal advice independently of each other; that they have been duly apprised of their respective legal rights; that all the provisions hereof as well as questions thereto, have been fully and satisfactorily explained to them; that they have given due consideration to such provisions and questions and that they clearly understand and assent to all the provisions thereof.

8. No representations or warranties have been made by either party to the other, or by anyone else, except as expressly set forth in this Stipulation and this Stipulation is not being executed in reliance upon any representation or warranty not expressly set forth herein. Without limiting the foregoing, no representations or warranties have been made to the Wife, or by anyone else to the Wife, with respect to the past, present and future income or assets of the Husband, and without limiting the foregoing, no representations or warranties have been made by the Wife to the Husband, or by anyone else to the Husband with respect to the past, present and future income and assets of the Wife.

9. Each of the parties has read this Stipulation prior to the signing thereof.

ARTICLE XXXVIII
RECONCILIATION AND MATRIMONIAL DECREE

1. This Stipulation shall not be invalidated or otherwise affected by a reconciliation between the parties thereto, or a resumption of marital relations between them unless said reconciliation or said resumption be accompanied by a written statement executed and acknowledged by the parties (in the same manner as this Stipulation) with respect to said reconciliation and resumption, and, in addition, setting forth that they are cancelling this Stipulation, and this Stipulation shall not be invalidated or otherwise affected by any decree or judgment of separation or divorce made by any court in any action which may presently exist or may hereafter be instituted by either party against the other for a separation or divorce and the obligations, covenants and promises contained in this Stipulation shall survive any decree or judgment of separation or divorce and shall not merge therein.

2. In any action now pending or which may hereafter be instituted by either of the parties against the other for divorce or separation in this State or any other jurisdiction, and in any decree or judgment of divorce or dissolution which may be entered in such action, it is agreed that:

3. Neither party shall cause to be inserted, nor request that there be inserted, in the final decree or judgment in such action, any provision inconsistent with any of the provisions of this Stipulation;

4. The terms and provisions of this Stipulation shall be incorporated in and become part of any final decree or judgment in such action, and the terms and provisions of Stipulation with respect to maintenance and child support and custody may be incorporated and adopted in express terms in such decree; such judgment or decree shall be in conformity with the provisions of this Stipulation and shall in no respect impair or modify same; and

5. This Stipulation shall not be extinguished by merger as the result of incorporation in any decree or judgment or otherwise, but shall in all events and for all purposes survive such decree or judgment and be binding and conclusive upon the parties and the terms of this Stipulation shall be the paramount obligation of each of the parties thereto.

THIS STIPULATION shall be effective as of the date endorsed upon the first page thereof.

STATEMENT SECTION 255 OF THE DOMESTIC REALTIONS LAW

I, JANE DOE, fully understand that upon the entrance of this divorce Stipulation, I may no longer be allowed to receive health coverage under my former spouse's health insurance plan. I may be entitled to purchase health insurance on my own through a COBRA option, if available, otherwise I may be required to secure my own health insurance.

Section 8.1 of this Stipulation contains the provisions relating to medical insurance.

I, JOHN DOE, fully understand that upon the entrance of this divorce Stipulation, I may no longer be allowed to receive health coverage under my former spouse's health insurance plan. I may be entitled to purchase health insurance on my own through a COBRA option, if available, otherwise I may be required to secure my own health insurance.

Section 8.1 of this Stipulation contains the provisions relating to medical insurance.

IN WITNESS WHEREOF, the Parties have hereunto set their re-spective hands and seals on the day and year below written.

_____
JANE DOE

_____
JOHN DOE

STATE OF NEW YORK)

)s.s.:

COUNTY OF BRONX)

On this day of ,2009, before me, the undersigned personally came and appeared JANE DOE, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and duly acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____

NOTARY PUBLIC, STATE OF NEW YORK

STATE OF NEW YORK)

)s.s.:

COUNTY OF BRONX)

On this day of ,2009, before me, the undersigned personally came and appeared JOHN DOE, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and duly acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____

NOTARY PUBLIC, STATE OF NEW YORK

MATRIMONIAL INQUEST

JURIDICTIONAL QUESTIONS

1. Are you a resident of the State of New York?
2. How long have you been a resident of the State of New York?
3. Were you married to the {Plaintiff} {Defendant} _____?
4. When were you married?
5. Where were you married?
6. Was it a civil or religious ceremony?

IF IT WAS A CIVIL CEREMONY SKIP TO QUESTION 8

7. You have taken or will take all steps necessary and within your power to remove any and all barriers to your spouse's remarriage; is that correct?
8. There is no other action pending for the relief sought in this action in any other court of competent jurisdiction anywhere in the world; is that correct?
9. No other decree of divorce, annulment or separation has been granted in this court or any other court of competent jurisdiction anywhere in the world; is that correct?
10. Are there any children of the marriage? {yes} {no}

IF THERE ARE NO CHILDREN PROCEED TO THE SERIES OF QUESTIONS THAT RELATE TO YOUR CAUSE OF ACTION.

IF THERE ARE CHILDREN, PROCEED TO QUESTION 11

11. What are their NAMES, AGES and DATES OF BIRTH?

ASK ENOUGH QUESTIONS TO ASCERTAIN ALL 3 ELEMENTS OF THE ABOVE QUESTION. THIS IS EXTREMELY IMPORTANT.

At this point, having established the jurisdiction of the Court, proceed to the questions relating to the appropriate cause of action you have pled, on which you want the divorce, separation, or annulment to be granted.

ABANDONMENT

1. On the _____ day of _____ 20 ____ did your spouse remove {himself} {herself} from the martial home?
2. Your spouse has not returned to live in the marital home since that time; is that correct?

3. You have not cohabited or lived as husband and wife since the time your spouse left the marital home; is that correct?
4. You have asked your spouse to return to the martial home as husband and wife; is that correct?
5. Your spouse has refused to return to live in the marital home as husband and wife; is that correct?

CONSTRUCTIVE ABANDONMENT

1. Have you always been a loving and dutiful {husband} {wife}?
2. Since in {on} or about _____ has your spouse refused to have sexual relations with you prior to this action been commenced did you?
3. Have you continuously asked {him} {her} to resume sexual relations with you since last time?
4. Has {he} {she} continuously denied sexual relations to you since that time?
5. There is not now and there never has been any physical reason why either of you could have sexual relations since that time; is that correct?

CRUEL AND INHUMAN TREATMENT

1. On the _____ day of _____ 20_____ did something happen in the marital home or someplace else?
2. Tell the Court what happened.

REPEST QUESTIONS ONE AND TWO AT LEAST ONE MORE TIME.
THIS IS EXTREMELY IMPORTANT

3. Are those but _____ of a course of events that has rendered it unsafe and unfit you to continue to cohabit with your spouse?
4. Have you always been a good, dutiful and faithful spouse?

SEPARATION AGREEMENT

1. On theday of 20 did you and your spouse sign an agreement of separation, subscribed and acknowledged in the form required to entitle a deed to be recorded?
2. I show you this document and ask you if it is your agreement of separation. Is it?
3. Do you recognize the signatures on that agreement?
4. Whose signatures are they?
5. Are you asking the court to incorporate the separation agreement in the judgment of divorce to survive and not to merge therein?
6. Are you asking for a divorce?

IRRETRIEVEABLE BREAKDOWN

1. Has your relationship broken down irretrievably for a period greater than six months?
2. Have the ancillary issues, including financial issues and equitable distribution of the marital property, been resolved?

WHEN YOU REACH THIS POINT, PROCEED TO THE CLOSING STATEMENTS AND MOTIONS.

CLOSING STATEMENTS AND MOTIONS

You have now reached the point in the inquest where the time has come to complete the record.

If you have no further questions, and if you followed this outline you should not have any, state that you have no further questions. The court will offer your adversary, if you have one, an opportunity to cross-examine. If there is no cross- examination, and there shouldn't be if you followed this outline, the witness will be excused by the court.

If there is some discrepancy between the pleading and the proof presented, a MOTION TO CONFIRM THE PLEADINGS TO THE PROOF would be in order. If there is no discrepancy, don't clutter the record with an unnecessary motion.

If an answer has been interposed, or if you are seeking judgment on a counterclaim and a reply has been interposed, your adversary should withdraw it at this time. If you are proceeding on a counterclaim, the causes of action in the complaint may be withdrawn at this time as well.

Having completed all of the above, the time has come to move for a judgment of {divorce}, {separation} or {annulment}. Simply state:

"YOUR HONOR, I MOVE FOR JUDGEMENT"

After the Court grants judgment as to the fault portion of the inquest, the parties should be allocuted as to their understanding of any stipulation dividing the marital estate, custody and related matters.

The court may want to do the allocution in its own words or may request that you do it. If you do it, it should be in the following form:

3. Have you heard the stipulation that was placed on the record?
4. Do you understand each and every part of it?
5. Do you have any questions of the court or of either counsel regarding any part of the stipulation or proceeding that has just taken place?
6. Have we discussed this stipulation and negotiated its terms over a period of time?
7. Are you satisfied with the divorce settlement as best you can be satisfied it was entered on the record today {as it is incorporated in this document into evidence}?

8. Do you agree to live up to the settlement as entered?
9. Are you satisfied with the representation you have received?
10. Are you under the influence of drugs or alcohol at the present time?
11. After both parties have been allocated by their respective counsel or by the Court, {a motion should be made to have the STIPULATION SURVIVE AND NOT MERGE WITH THE JUDGMENT OF DIVORCE, except to be incorporated by reference therein.
12. At this time, if your client wishes to resume use of her maiden name, it would be appropriate to make a motion to that effect. If that motion is granted by the court, place the maiden name {SPELL IT} on the record.

At this point the court will terminate the proceeding.

The proceeding having been terminated, the following will be submitted to the Motion Support Office, Room 119, 60 Centre Street, Attn: Matrimonial Clerk:

1. Note of issue, it has not been previously submitted
2. Pleadings
3. Proposed Findings of Fact, Conclusions of Law
4. Form of proposed Judge of Divorce, Separation or Annulment
5. A copy of the Minutes of the Proceeding obtained from the Court Reporter.
6. UCS111
7. Certificate of Dissolution
8. Self-addressed stamp postcard

The above form has been prepared by

EUGENE A. SATTLER, C. S. R.
Chief Court Reporter
Supreme Court – Civil Branch
60 Centre Street
New York, New York 10007

TRIAL OUTLINE

Trial Outline (Due as least one month before trial date)

Name of Client_____ Judge:

Opposing party _____ Trial date:

Issues at trial: _____

State which party goes first:_____

Theory of the case:

Facts that Support our Theory:

Witnesses to call (For each witness list their admissible testimony and testimony that may have admissibility problems and/or potential impeachment problems List in order of how you think you will call).

Evidence to introduce (List by witness, include potential evidentiary problems and your arguments)

Potential Facts that Hurt our Theory

Opponent's Anticipated Theory

Opponent's Potential Witnesses (Describe possible witnesses, testimony, theory of cross, how you can impeach and/or object to witness/admissibility of testimony)

Potential Evidence (How could you try to keep out)

Subpoenas (Indicate which are needed and status)

Next step: Draft questions for direct and cross (include answers)

EVIDENTIARY OBJECTIONS

OBJECTIONS TO QUESTIONS

1. calls for irrelevant answer
2. calls for immaterial answer
3. witness is incompetent
4. violates the best evidence rule
5. calls for privileged information
6. calls for a conclusion
7. calls for an opinion (by incompetent witness)
8. calls for a narrative
9. calls for hearsay answer
10. leading
11. repetitive (asked and answered)
12. beyond the scope (of the direct, cross, redirect)
13. assumes facts not in evidence
14. confusing/misleading/ambiguous/vague/unintelligible
15. speculative
16. compound question
17. argumentative
18. improper characterization
19. misstates evidence/misquotes witness
20. cumulative
21. improper impeachment

OBJECTIONS TO ANSWERS

1. irrelevant
2. immaterial
3. privileged
4. conclusion
5. opinion
6. hearsay
7. narrative
8. improper characterization
9. violates parole evidence rule
10. unresponsive/volunteer

OBJECTIONS TO EXHIBITS

1. irrelevant
2. immaterial
3. no foundation
4. no authentication
5. violates original documents (best evidence) rule
6. contains hearsay/double hearsay
7. prejudice outweighs its probative value
8. contains inadmissible matter (mentions insurance, prior convictions, etc.)

F. Final Papers

REQUIRED DOCUMENTS CHECKLIST:

CONTESTED CASES AFTER SETTLEMENT, INQUEST, OR TRIAL

The following final documents must be submitted to the court:

- ❑ **Her Justice Fee Waiver Letter *(Copy)*** *This is submitted to waive the fees associated with filing the Note of Issue or the filing of a Written Stipulation.*
- ❑ **Note Of Issue *(Original & 2 copies)*** *This is submitted where it has not previously been filed, for example, when the divorce is settled at a conference. The fees for the Note of Issue will be waived via the Fee Waiver Letter. At times, the Court will provide an Order permitting the late filing of the Note of Issue. This order must be submitted along with the other final papers.*
- ❑ **Summons With Notice*** (*Copy)*
- ❑ **Verified Complaint/Answer/Counterclaim/Reply* *(Original if not already Submitted)*** *File unless withdrawn at inquest.*
- ❑ **Affidavit of Service** *This is filed only if there has been no appearance and judgment has been based on default, established at inquest.*
- ❑ **Affirmation Of Regularity** *Required if there has been no inquest or trial (matter concluded via written stipulation).*
- ❑ **Plaintiff's/Defendant's Affidavit*** *This is filed only if there has been no inquest or trial (matter proceeded via written stipulation) and is not required if an inquest or trial was held.*
- ❑ **NYS Case Registry Form** *(if there are children of the marriage AND child support is paid directly to the client) OR* **Support Collection Unit Information Sheet** *(if there are children of the marriage and child support is paid through SCU).*
- ❑ **Sworn Statement of Removal of Barriers To Remarriage/With Copy of Affidavit Of Service*** *This is submitted in a religious ceremony, only where it has not yet been served and has not been addressed on the record at an inquest or trial.*
- ❑ **Proposed Findings Of Fact And Conclusions Of Law*** *This is submitted, with* **Notice of Settlement***, at least 5 days' notice to the other party, allowing 5 days for mailing, with the date the document will be signed reflected on the Notice. Complete and file an Affidavit of Service of service by mail.*
- ❑ **Proposed Judgment Of Divorce*** *This is submitted, with* **Notice of Settlement***, and* **Minutes/Transcript***,* **if applicable***, on at least 5 days' notice to the other party, allowing 5 days for mail, with the date the document will be signed reflected on the Notice. Complete and file an Affidavit of Service of service by mail. Must include the correct preamble, parties' and children's social security numbers, recital of granted Grounds of Divorce section, resumption of prior surname clause, incorporation by reference to stipulation clause, child custody and child support award clauses, maintenance clauses, if applicable, and service of Judgment with Notice of Entry within 20 days hereof clause. Avoid restating the terms of the stipulation.*

- ❑ **Certificate of Dissolution** *This Department of Health Form must be completed in all divorces and may be found and completed online. The parties' social security numbers, the Wife's maiden name and the attorney's signature must be set forth.*
- ❑ **UCS 111-Child Support Summary Form** *Complete and file where there is a child support awards.*
- ❑ **Qualified Medical Child Support Order** *This is applicable where health insurance premiums must be garnished from a party's employer.*
- ❑ **Qualified Domestic Relations Order** *This should be submitted along with the Judgment of Divorce and final papers for signature. Attach the approval letter from the Pension Plan administrator.*
- ❑ **Income Deduction Order** *Signed by the Judge, this will provide for immediate wage withholding (garnishment) of support and maintenance from the support payor's wages.*
- ❑ **Minutes/Transcript of Inquest** *A certified copy of the minutes is obtained from the Court reporter for a fee, this sets forth the jurisdictional bases, the client's grounds, and the relief requested and granted by the Court. May contain an oral stipulation placed on the record. Do not include the plastic cover. Serve with the Findings of Fact and Conclusions of Law.*
- ❑ **Written Stipulation/Settlement Agreement (if applicable)** *This will fully resolve all the issues in the divorce and must be annexed to the final papers. It must be properly acknowledged. The fee for filing the Stipulation will be waived with a No Fee Letter. The Findings of Fact and Conclusions of Law and the Judgment of Divorce should be fully consistent with and reflect the terms of the parties' agreement. Do not reiterate the terms of the stipulation within the Findings of Fact and Judgment.*
- ❑ **Adoption of Oral Stipulation** *This is signed and acknowledged by the parties and required by the Court where an oral stipulation is placed on the record.*
- ❑ **Affirmation of Lateness** *This must be submitted when the attorney is settling and filing final papers beyond the 60-day time period past the case being decided.*
- ❑ **Family Court Orders** *When continued within or otherwise relevant to the judgment, certified copies must be submitted along with the Judgment of Divorce.*
- ❑ **POSTCARD** *stamped, self-addressed, with title of action and index number*

*** Document must be attached to a litigation back**

NOTE OF ISSUE – CONTESTED DIVORCE

For use when there are children under the age of 18 who are subject to the matrimonial action.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----------x

XXXXXXXXXX	:	Index No. _____
	:	
Plaintiff	:	
against	:	
	:	
XXXXXXXXXX	:	
Defendant	:	

----------x

NO TRIAL

FILED BY:	My Law Office, Inc. Attorneys for Plaintiff
DATE SUMMONS FILED:	June 24, 2022
DATE SUMMONS SERVED:	August 28, 2022
DATE ISSUE JOINED:	JOINED September 30, 2022
NATURE OF ACTION:	CONTESTED DIVORCE
RELIEF:	ABSOLUTE DIVORCE

Plaintiff --

Gender: Female	Prior Name(s): XXXX
Date of Birth: 01/01/19XX	Race/Ethnicity:
Present Address:	123 Main Street. New York, NY 12345
Address history past 3 years:	123 Main Street. New York, NY 12345
Phone No.:	917-555-5555
e-mail address (if available):	

Defendant--

Gender: male	Prior Name(s): none
Date of Birth: 02/02/19xx	Race/Ethnicity:
Present Address:	123 Washington Ave. Bronx, NY 10000
Address history past 3 years:	123 Washington Ave. Bronx, NY 10000

Child(ren), even if not the subject of the current matrimonial action --

Name - Gender - Date of Birth

-XXXXXX male – May 1, 19xx

Dylan Advocate, Esq.
My Law Office, Inc.
Attorneys for Plaintiff
123 Main Street
New York, NY 10000
(212) 123-4567
Fax No.:

NOTICE OF SETTLEMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

JAMIE DOE	:	Index No. _____
Plaintiff	:	
against	:	**NOTICE OF SETTLEMENT**
LEE DOE	:	
Defendant	:	

PLEASE TAKE NOTICE that the annexed Findings of Fact and Conclusions of Law and Proposed Judgment of Divorce of which the within is a true copy, will be presented for signature to the Supreme Court King's County Clerk, at Supreme Court Building, 360 Adams Street, Room 189, Brooklyn, New York 11201, on March 19, 2022.

Dated: New York, New York
March 19, 2022

_____

Dylan Advocate, Esq.
My Law Office, inc.
123 Main Street
New York, NY 10000
(212) 123-4567
Attorneys for Plaintiff

TO: James P. Lawyer,
Counsel for Defendant
123 Court Street
Brooklyn, NY 12345

JUDGEMENT OF DIVORCE – STIPULATION

At the Matrimonial/IAS Part__ of the New York Supreme Court at the Courthouse, Bronx County, on the ___ day of _____, 20__.

Present:

Hon. _____ Justice/Referee

----------x Index No. _____

JAMIE DOE:

: Calendar No.

Plaintiff :

against :

: **JUDGEMENT OF DIVORCE**

LEE DOE :

Defendant :

----------x

EACH PARTY HAS A RIGHT TO SEEK A MODIFICATION OF THE CHILD SUPPORT ORDER UPON A SHOWING OF: (I) A SUBSTANTIAL CHANGE IN CIRCUMSTANCES; OR (II) THAT THREE YEARS HAVE PASSED SINCE THE ORDER WAS ENTERED, LAST MODIFIED OR ADJUSTED; OR (III) THERE HAS BEEN A CHANGE IN EITHER PARTY'S GROSS INCOME BY FIFTEEN PERCENT OR MORE SINCE THE ORDER WAS ENTERED, LAST MODIFIED OR ADJUSTED; HOWEVER, IF THE PARTIES HAVE SPECIFICALLY OPTED OUT OF PARAGRAPH (II) OR (III) OF THIS PARAGRAPH IN A VALIDLY EXECUTED AGREEMENT OR STIPULATION, THEN THAT BASIS TO SEEK MODIFICATION DOES NOT APPLY.

NOTE: (1) THIS ORDER OF CHILD SUPPORT SHALL BE ADJUSTED BY THE APPLICATION OF A COST OF LIVING ADJUSTMENT AT THE DIRECTION OF THE SUPPORT COLLECTION UNIT NO EARLIER THAN TWENTY-FOUR MONTHS AFTER THIS ORDER IS ISSUED, LAST MODIFIED OR LAST ADJUSTED, UPON THE REQUEST OF ANY PARTY TO THE ORDER OR PURSUANT TO PARAGRAPH (2) BELOW. UPON APPLICATION OF A COST OF LIVING ADJUSTMENT AT THE DIRECTION OF THE SUPPORT COLLECTION UNIT, AN ADJUSTED ORDER SHALL BE SENT TO THE PARTIES WHO, IF THEY OBJECT TO THE COST OF LIVING ADJUSTMENT, SHALL HAVE THIRTY-FIVE (35) DAYS FROM THE DATE OF MAILING TO SUBMIT A WRITTEN OBJECTION TO THE COURT INDICATED ON SUCH ADJUSTED ORDER. UPON RECEIPT OF SUCH WRITTEN OBJECTION, THE COURT SHALL SCHEDULE A HEARING AT WHICH THE PARTIES MAY BE PRESENT TO OFFER EVIDENCE WHICH THE COURT WILL CONSIDER IN ADJUSTING THE CHILD SUPPORT ORDER IN ACCORDANCE WITH THE CHILD SUPPORT STANDARDS ACT.

(2) A RECIPIENT OF FAMILY ASSISTANCE SHALL HAVE THE CHILD SUPPORT ORDER REVIEWED AND ADJUSTED AT THE DIRECTION OF THE SUPPORT COLLECTION UNIT NO EARLIER THAN TWENTY-FOUR MONTHS AFTER SUCH ORDER IS ISSUED, LAST MODIFIED OR LAST ADJUSTED WITHOUT FURTHER APPLICATION BY ANY PARTY. ALL PARTIES WILL RECEIVE A COPY OF THE ADJUSTED ORDER.

(3) WHERE ANY PARTY FAILS TO PROVIDE, AND UPDATE UPON ANY CHANGE, THE SUPPORT COLLECTION UNIT WITH A CURRENT ADDRESS, AS REQUIRED BY SECTION TWO HUNDRED FORTY-B OF THE DOMESTIC RELATIONS LAW, TO WHICH AN ADJUSTED ORDER CAN BE SENT, THE SUPPORT OBLIGATION AMOUNT CONTAINED THEREIN SHALL BECOME DUE AND OWING ON THE DATE THE FIRST PAYMENT IS DUE UNDER THE TERMS OF THE ORDER OF SUPPORT WHICH WAS REVIEWED AND ADJUSTED OCCURRING ON OR AFTER THE EFFECTIVE DATE OF THE ADJUSTED ORDER, REGARDLESS OF WHETHER OR NOT THE PARTY HAS RECEIVED A COPY OF THE ADJUSTED ORDER.

This action was submitted to this Court for inquest on the 25th day of September 2022.

The Defendant was served personally within the State of New York.

The Plaintiff presented a Summons With Notice and inquest testimony constituting the facts of the matter.

The Defendant has appeared and waived his right to answer.

The parties settled the ancillary issues by written stipulation.

The Court accepted written proof of non-military status.

The Plaintiff's address is 123 Morris Avenue, Apt. A, Bronx, NY 10000, and social security number is xxx-xx-xxxx. The Defendant's address is 123 Court Avenue, Apt. B, Bronx, NY 10000, and social security number is xxx-xx-xxxx.

The parties have executed a Stipulation of Settlement, dated September 25, 2022.

Now on motion of Dylan Advocate, Esq., of My Law Office, Inc., the attorneys for the Plaintiff, it is:

ORDERED AND ADJUDGED that the Referee's Report, if any, is hereby confirmed; and it is further

ORDERED, ADJUDGED AND DECREED that the marriage between Jamie Doe,

Plaintiff, and Lee Doe, Defendant, is hereby dissolved by reason of: the relationship between the Plaintiff and Defendant has broken down irretrievably for a period of at least six months, pursuant to DRL Section 170 subd. (7), and the Plaintiff has so stated under oath in the Affidavit of Plaintiff; and

The requirements of DRL Section 240 1 (a-1) have been met and the Court having considered the results of said inquiries, it is further

ORDERED AND ADJUDGED that the Plaintiff shall have exclusive custody and control of the unemancipated children of the marriage, i.e.:

Name - Social Security No. - Date of Birth

Eric Doe - xxx-xx-xxxx - June 1, 19xx

Katherine Doe - xxx-xx-xxxx - April 1, 19xx

The requirements of DRL Sec. 240 1 (a-1) have been met and the Court having considered the results of said inquires, it is further

ORDERED AND ADJUDGED that there is no award of maintenance; and it is further

ORDERED AND ADJUDGED that the Defendant shall pay to the Plaintiff as and for the support of the parties' unemancipated children, namely:

Name - Date of Birth

Eric Doe - June 1, 19xx

Katherine Doe - April 1, 19xx

the sum of Twenty Five Dollars ($25) per month, commencing on September 1, 2022 and on the first day of each month thereafter, which shall be paid to the Plaintiff through the Support Collection Unit, P.O. Box 15363, Albany, NY 12212-5363, in accordance with the parties' Stipulation. Said Stipulation is in compliance with DRL Sec. 240(1-b) (h) because:

The parties have been advised of the provisions of DRL Sec. 240(1-b); the unrepresented party, if any, has received a copy of the Child Support Standards Chart promulgated by the Commissioner of Social Services pursuant to Social Services Law Section 111-i; the basic child support obligation, as defined in DRL Sec. 240(1-b), presumptively results in the correct amount of child support to be awarded; the agreed upon amount substantially conforms to the basic child support obligation attributable to the non-custodial parent; and the amount awarded is neither unjust nor inappropriate, and the Court has approved such award through the Findings of Fact and Conclusions of Law; and it is further

ORDERED AND ADJUDGED that the relative legally responsible to supply health insurance benefits is the Defendant, and it is further

ORDERED AND ADJUDGED that the relative legally responsible to supply health insurance benefits is eligible under the following group health insurance plan or plans:

Group Health Plan:

Address:

Identification Number:

Plan Administrator:

Type of Coverage:

The Defendant has no other group health plans.

And the relative legally responsible to supply health insurance benefits shall provide health insurance coverage to the Child until the age of 21 years, and it is further

ORDERED AND ADJUDGED that a separate Qualified Medical Child Support Order shall be issued simultaneously herewith or as soon as practical, and it is further

ORDERED AND ADJUDGED that Equitable Distribution and ancillary issues shall be

resolved in accordance with the Stipulation of Settlement, dated September 25, 2022, which references certain terms of the Preliminary Conference Order, dated January 29, 2022, as follows: The property located at xxxx of the District of xxxxx, number xxof the Municipality of xxxx, Providence of Santiago, Dominican Republic, protected under the Title Certificate number xx, issued September of 1998 to Lee Doe (the "Property"), is marital property. The Property shall be sold and the net proceeds from such sale shall be held in escrow by My Law Office, Inc., to be distributed pursuant to the terms of the September 25, 2022 Stipulation of Settlement, which incorporates the Preliminary Conference Order, dated January 29, 2022. Expenses incurred in connection with the sale shall be deducted from the proceeds prior to distribution. After deducting such expenses, the sale proceeds shall be divided equally between the parties, with Defendant's share to be increased, and Plaintiff's share to be reduced, in the amount of $2000; and it is further

ORDERED AND ADJUDGED that the Stipulation dated September 25, 2022, which incorporates the January 29, 2022 Preliminary Conference Order, a copy of which is on file with this Court and incorporated herein by reference, shall survive and not be merged into this Judgment, and the parties hereby are directed to comply with all legally enforceable terms and conditions of said Stipulation as if such terms and conditions were set forth in their entirety herein, and this Court retains jurisdiction of this matter concurrently with the Family Court for the purposes of specifically enforcing such of the provisions of said Stipulation as are capable of specific enforcement to the extent permitted by law with regard to maintenance, child support, custody and/or visitation and of making such further judgment as it finds appropriate under the circumstances existing at the time of application for that purpose is made to it, or both; and it is further

ORDERED AND ADJUDGED that any applications brought in the Supreme Court to enforce the provisions of said Stipulation of Settlement or to enforce or modify the provisions of this Judgment shall be brought in a county wherein one of the parties resides, provided that if there are minor children of the marriage, such application shall be brought in a county wherein one of the parties or the child or children reside, except, in the discretion of the judge, for good cause. Good cause applications shall be made by motion or order to show cause. Where the address of either party and any child or children is unknown and not a matter of public record, or is the subject of an existing confidentiality order pursuant to DRL Sec. 254 or FCA Sec. 154-b, such applications may be brought in the county where this Judgment was entered; and it is further

ORDERED AND ADJUDGED that the marital property shall be equitably

distributed as set forth in the aforesaid Stipulation of Settlement as an equitable distribution pursuant to Section 236B of the Domestic Relations Law. The aforesaid distribution shall be in full and complete satisfaction of all claims either party shall have against the other under Section 236B of the Domestic Relations Law, and each party is declared and adjudged to be the owner of the aforesaid assets free and clear of any claim that either party may assert against the other, and it is further

ORDERED AND ADJUDGED that either party may resume the use of a prior surname; and it is further

ORDERED AND ADJUDGED that Plaintiff is authorized to resume use of the prior surname Poe; and it is further

ORDERED AND ADJUDGED that the Defendant or the Defendant's attorneys shall be served with a copy of this Judgment, with notice of entry, by the Plaintiff, within 20 days of such entry.

Dated:_____

ENTER:

_____

J.S.C./Referee

_____

CLERK

(Form UD-11)

FINDINGS OF FACT AND CONCLUSIONS OF LAW – STIPULATION

At the Matrimonial/IAS Part of the New York Supreme Court at the Courthouse, Bronx County, on the ___ day of _____, 20___.

Present:

Hon. _____ Justice/Refree

----------x Index No. _____

XXXXXXXXX : Calendar No.

:

Plaintiff :

against : **FINDING OF FACT AND**

: **CONCLUSIONS OF LAW**

XXXXXXXXX :

Defendant :

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The issues of this action having been heard at an inquest before the Honorable Judge

Judy at Part 28 hereof on September 25, 2022, a written Stipulation of Settlement signed by the parties and their attorneys on September 25, 2022, and having considered the allegations and proofs of the respective parties, and due deliberation having been had thereon.

NOW, after reading and considering the papers submitted and after an inquest having been held, I do hereby make the following find-ings of essential facts which I deem established by the evidence and reach the following conclusions of law.

FINDINGS OF FACT

FIRST: The Plaintiff and Defendant were both eighteen (18) years of age or over this action was commenced.

SECOND: This court has jurisdiction to hear this action for divorce. The Plaintiff has

resided in New York State for a continuous period in excess of two years immediately preceding the commencement of this action.

THIRD: The Plaintiff and Defendant were married on December 21, 1985, in Santiago,

Dominican Republic, in a civil ceremony.

FOURTH: No decree, judgment or order of divorce, annulment or dissolution of

marriage has been granted to either party against the other in any Court of competent jurisdiction of this state or any other state, territory or country, and there is no other action for divorce, annulment or dissolution of marriage by either party against the other pending in any Court.

FIFTH: This action was commenced by filing the Summons With Notice with the County Clerk on May 9, 2021. The Defendant was served personally with the Summons With Notice, Notice of Automatic Orders, Notice of Continuation of Healthcare Coverage and Notice of Guideline Maintenance. The Defendant appeared and waived the right to file an answer.

SIXTH: The Defendant is not in the military service of the United States.

SEVENTH: There are three children of the marriage, namely:

Name & Social Security No. Date of Birth Address

Hector Carlos H, xxx-xx-5670 - October 7, 19xx - xxxx Grand Concourse, Apt. xxx, Bronx, NY 10457

Eric Antonio H, xxx-xx-2200 - June 25, 19xx - xxx Morris Avenue, Apt. xx, Bronx, NY 10451

Katherine Nidia H, xxx-xx-8852 - April 24, 19xx - xxx Morris Avenue, Apt. xx, Bronx, NY 10451

Hector Juan H is an adult, 21 years of age or older.

There is no other child as a result of this marriage, and no other child is expected.

There

is no other action or proceeding pending in any other court wherein the custody of said children is an issue; there are no other person or persons not a party to this action who claim to have any custody or visitation rights with respect to said children; and the Plaintiff has not participated in any other action or proceeding as a witness, party or otherwise concerning the custody or visitation of said children.

EIGHTH: The grounds for divorce were proved as follows: Irretrievable Breakdown of the Relationship for at Least Six Months (DRL Sec. 170(7)): The relationship between the Plaintiff and Defendant has broken down irretrievably for a period of at least six months. The Plaintiff has so stated under oath.

NINTH: A sworn statement as to the removal of barriers to remarriage is not required because the parties were married in a civil ceremony.

TENTH: Neither party is seeking maintenance from the other.

ELEVENTH: The Plaintiff is entitled to exclusive custody and control of the unemancipated children of the marriage, Eric Antonio H, born on June 25, 2001, and Katherine Nidia H, born on April 24, 2003.

TWELFTH: Equitable Distribution and ancillary issues shall be resolved in accordance with the Stipulation of Settlement, dated September 25, 2022, which incorporates the Preliminary Conference Order, dated January 29, 2022, as follows:

The property located at xxxxx of the District of xxxx, number 11 of the Municipality of Licey, Providence of Santiago, Dominican Republic, protected under the Title Certificate number xx, issued September of 1998 to Hector Antonio H (the "Property"), is marital property. The Property shall be sold and the net proceeds from such sale shall be held in escrow by Law Firm LLP, to be distributed pursuant to the terms ofthe September 25, 2022 Stipulation of Settlement, which references certain terms of the Preliminary Conference Order, dated January 29, 2022. Expenses incurred in connection with the sale shall be deducted from the proceeds prior to

distribution. After deducting such expenses, the sale proceeds shall be divided equally between the parties, with Defendant's share to be increased, and Plaintiff's share to be reduced, in the amount of $2000.

THIRTEENTH: The award of child support is based upon the following:

(A) The children of the marriage entitled to receive support are:

Name	Date of Birth
Eric Antonio H	June 25, 20xx
Katherine Nidia H	April 24, 20xx

(B) The parties have entered into a Stipulation, dated September 25, 2022, wherein the Defendant agrees to pay Twenty Five Dollars ($25) per month child support to Plaintiff through the Support Collection Unit, effective September 1, 2022. Said agreement recited the following in compliance with DRL Sec. 2401-b(h): The parties have been advised of the Child Support Standards Act. There are no arrears due to the plaintiff. The basic child support obligation for two children is 25% of parental income. The basic child support obligation presumptively results in the correct amount of child support. Plaintiff earns approximately $750 per month child support income and Defendant earns approximately $695 per month child support income. The presumptive amount of child support attributable to the non-custodial parent is $25 per month. The amount of child support agreed to conforms with the non-custodial parent's share of the basic child support obligation.

FOURTEENTH: The Plaintiff's address is xxx Morris Avenue, Apt. xx, Bronx, NY10451, and social security number is xxx-xx-xxxx. The Defendant's address is xxxxx Grand Concourse, Apt. xxx, Bronx, NY 10457, and social security number is xxx-xx-xxxx.

The parties are covered by the following group health plans:

Plaintiff

Group Health Plan: healthfirst (Medicaid)

Address: 25 Broadway, New York, NY 10004

Identification Number: xxxxx (Member ID)

Plan Administrator: healthfirst

Type of Coverage: Medical HMO Plan

Defendant

Group Health Plan: unknown

The parties have agreed that the Plaintiff shall be the legally responsible relative and that the unemancipated children shall remain enrolled in her group health plan as specified above until the age of twenty-one (21) years or until the children are sooner emancipated.

FIFTEENTH: Plaintiff may resume use of the prior surname: P.

SIXTEENTH: Compliance with DRL Sec. 255 has been satisfied as follows: The parties entered into a Preliminary Conference Stipulation, dated January 29, 2022, which complies with the requirements of DRL Sec. 255(2).

SEVENTEENTH: Registry checks were completed pursuant to DRL Sec. 240 1(a-1).

CONCLUSIONS OF LAW

FIRST: Residence as required by DRL Sec. 230 has been satisfied.

SECOND: The requirements of DRL Sec. 255 have been satisfied.

THIRD: The requirements of DRL Sec. 240 1(a-1) have been satisfied.

FOURTH: The requirements of DRL Sec. 240(1-b) have been satisfied.

FIFTH: The requirements of DRL Sec. 236(B)(2)(b) have been satisfied.

SIXTH: The requirements of DRL Sec. 236(B)(6) have been satisfied.

SEVENTH: DRL Sec. 170 subd. (7) is the ground alleged, and all economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses, as well as custody and visitation with infant children of the marriage, have been resolved by the parties or determined by the Court and incorporated into the Judgment.

EIGHTH: The Plaintiff is entitled to a judgment of divorce on the grounds of DRL Section 170 subd. (7) - the relationship between the Plaintiff and Defendant has broken down irretrievably for a period of at least six months, and granting the incidental relief awarded.

Dated:

_____

J.S.C./Referee

(Form UD-10)

JUDGEMENT OF DIVORCE – TRIAL

At the Matrimonial/IAS Part of the New York Supreme Court at the Courthouse, Bronx County, on the ___ day of _____, 20___.

Present:

Hon. _____ Justice/Referee

JAMIE DOE	:	Index No:
	:	Calendar No:
	:	Social Security No.:
Plaintiff	:	
against	:	
	:	**JUDGEMENT OF DIVORCE**
LEE DOE	:	
Defendant	:	
	:	

EACH PARTY HAS A RIGHT TO SEEK A MODIFICATION OF THE CHILD SUPPORT ORDER UPON A SHOWING OF: (I) A SUBSTANTIAL CHANGE IN CIRCUMSTANCES; OR (II) THAT THREE YEARS HAVE PASSED SINCE THE ORDER WAS ENTERED, LAST MODIFIED OR ADJUSTED; OR (III) THERE HAS BEEN A CHANGE IN EITHER PARTY'S GROSS INCOME BY FIFTEEN PERCENT OR MORE SINCE THE ORDER WAS ENTERED, LAST MODIFIED OR ADJUSTED; HOWEVER, IF THE PARTIES HAVE SPECIFICALLY OPTED OUT OF PARAGRAPH (II) OR (III) OF THIS PARAGRAPH IN A VALIDLY EXECUTED AGREEMENT OR STIPULATION, THEN THAT BASIS TO SEEK MODIFICATION DOES NOT APPLY.

NOTE: (1) THIS ORDER OF CHILD SUPPORT SHALL BE ADJUSTED BY THE APPLICATION OF A COST OF LIVING ADJUSTMENT AT THE DIRECTION OF THE SUPPORT COLLECTION UNIT NO EARLIER THAN TWENTY-FOUR MONTHS AFTER THIS ORDER IS ISSUED, LAST MODIFIED OR LAST ADJUSTED, UPON THE REQUEST OF ANY PARTY TO THE ORDER OR PURSUANT TO PARAGRAPH (2) BELOW. UPON APPLICATION OF A COST OF LIVING ADJUSTMENT AT THE DIRECTION OF THE SUPPORT COLLECTION UNIT, AN ADJUSTED ORDER SHALL BE SENT TO THE PARTIES WHO, IF THEY OBJECT TO THE COST OF LIVING ADJUSTMENT, SHALL HAVE THIRTY-FIVE (35) DAYS FROM THE DATE OF MAILING TO SUBMIT A WRITTEN OBJECTION TO THE COURT INDICATED ON SUCH ADJUSTED ORDER. UPON RECEIPT OF SUCH WRITTEN OBJECTION, THE COURT SHALL SCHEDULE A HEARING AT WHICH THE PARTIES MAY BE PRESENT TO OFFER EVIDENCE WHICH

THE COURT WILL CONSIDER IN ADJUSTING THE CHILD SUPPORT ORDER IN ACCORDANCE WITH THE CHILD SUPPORT STANDARDS ACT.

(2) A RECIPIENT OF FAMILY ASSISTANCE SHALL HAVE THE CHILD SUPPORT ORDER REVIEWED AND ADJUSTED AT THE DIRECTION OF THE SUPPORT COLLECTION UNIT NO EARLIER THAN TWENTY-FOUR MONTHS AFTER SUCH ORDER IS ISSUED, LAST MODIFIED OR LAST ADJUSTED WITHOUT FURTHER APPLICATION BY ANY PARTY. ALL PARTIES WILL RECEIVE A COPY OF THE ADJUSTED ORDER.

(3) WHERE ANY PARTY FAILS TO PROVIDE, AND UPDATE UPON ANY CHANGE, THE SUPPORT COLLECTION UNIT WITH A CURRENT ADDRESS, AS REQUIRED BY SECTION TWO HUNDRED FORTY-B OF THE DOMESTIC RELATIONS LAW, TO WHICH AN ADJUSTED ORDER CAN BE SENT, THE SUPPORT OBLIGATION AMOUNT CONTAINED THEREIN SHALL BECOME DUE AND OWING ON THE DATE THE FIRST PAYMENT IS DUE UNDER THE TERMS OF THE ORDER OF SUPPORT WHICH WAS REVIEWED AND ADJUSTED OCCURRING ON OR AFTER THE EFFECTIVE DATE OF THE ADJUSTED ORDER, REGARDLESS OF WHETHER OR NOT THE PARTY HAS RECEIVED A COPY OF THE ADJUSTED ORDER.

This action was submitted to the Court for trial on July 16, August 10, and September 29, 2022. The issues of the validity of marriage, grounds, equitable distribution, child support and maintenance were resolved pursuant to the Decision After Trial, dated January 20, 2023.

On December 21, 2021, Plaintiff filed a Verified Complaint and Affidavit of Plaintiff constituting the facts of the matter.

The Defendant was served personally within the State of New York.

Plaintiff presented a Verified Complaint and Affidavit of Plaintiff constituting the facts of the matter.

The Defendant appeared in this action by his attorney and submitted an Answer dated April 7, 2022.

The Plaintiff's address is confidential, c/o Dylan Advocate, My Law Firm LLP 123 Main Street, New York, NY 10000, and social security number is _____. The Defendant's address is 315 XXXX, Brooklyn, NY 11220 and social security number is ____.

The matter was set down for trial on grounds, child support, maintenance, and equitable distribution on July 16, August 10, and September 24, 2022. The parties appeared before me and presented their written and oral proof.

The Court issued a Decision After trial on January 20, 2023.

Now on motion of My Law Firm LLP, the attorneys for Plaintiff, it is:

ORDERED, ADJUDGED AND DECREED that the marriage between JAMIE DOE , Plaintiff, and LEE DOE, Defendant, is hereby dissolved by reason of: the cruel and inhuman treatment of Plaintiff by Defendant, pursuant to DRL §170(1); and it is further

ORDERED AND ADJUDGED that Plaintiff shall have cus-tody of the minor children of the marriage, i.e.:

Name	Date of Birth	Social Security No.
CHILD DOE	XX-XX-XXXX	XXX-XX-XXXX

and it is further

ORDERED AND ADJUDGED that the Defendant shall pay to the Plaintiff, a distributive award in the amount of $722.14 within 60 days of notice of the entry of the judgment of divorce, and as for the marital assets to which Plaintiff is entitled, consisting of the total balance in three bank accounts (Citibank, HSBC and TD Bank) at the time of the commencement of the action, and it is further

ORDERED AND ADJUDGED that Defendant shall pay non-durational maintenance in the amount of One-Hundred Twenty-Five dollars ($125) per week, pursuant to DRL § 236(B)(6)(c), which shall be paid to Plaintiff through the Kings County Support Collection Unit at PO Box 831, Canal Street Station, New York, NY 10013. This award of non-durational

maintenance is retroactive back to December 21, 2021. As of March 26, 2023, the total amount of maintenance owed by Defendant to Plaintiff is equal to the sum of $14,750.00 (118 weeks x $125.00 per week). Defendant shall also pay the amount of ten ($10) dollars per week until the $14,750.99 in maintenance arrears has been paid-in-full and Defendant is not in arrears on maintenance due on or after April 2, 2023, and it is further

ORDERED AND ADJUDGED that Defendant shall pay child support in the amount of One-hundred Forty dollars ($140) per week pursuant to the guidelines set forth in DRL § 240(1-b), and as and for the support of the parties' children, namely:

Name	Date of Birth
CHILD DOE	XX-XX-XXXX

until the child reaches the age of 21 or is otherwise legally emancipated, and to be paid to the Kings County Support Collection Unit at PO Box 831, Canal Street Station, New York, NY 10013. This award of child support is retroactive back to May 12, 2022. The total amount of Defendant's child support obligation from May 12, 2022 through March 30, 2023 is $6,440.00 (__ weeks x $140 per week). Since May 12, 2022, Defendant has paid the sum of $2,800.00 in child support pursuant to this Court's January 22, 2022 Pendente Lite Order. The total amount of child support arrears owed by Defendant as of March 30, 2022 is $3,640.00. Defendant shall also pay the amount often ($10) dollars per week until the $3,640.00 in child support arrears has been paid-in-full and Defendant is not in arrears on child support due on or after April 6, 2023, and it is further

ORDERED AND ADJUDGED that if no health insurance coverage is available through Defendant's employer, Plaintiff shall apply for the state's child health insurance plan pursuant to Title one-A of article twenty-five of the public health law, and the medical assistance program established pursuant to title eleven of article five of the social services law; and should health

insurance coverage be or become available to either party, within the meaning of N.Y. D.R.L. §240(l)(b), the party shall immediately enroll each eligible child to receive such coverage and shall notify the support collection unit of the extent and availability of existing or new benefits and thereafter shall notify the support collection unit of any changes in health insurance coverage, and it is further

ORDERED AND ADJUDGED that the Plaintiff may resume use of her prior surname: M , and it is further

ORDERED AND ADJUDGED that the Family court shall have concurrent jurisdiction with the Supreme Court with respect to any further issues of custody, visitation and support, and it is further

ORDERED AND ADJUDGED that Defendant shall be served with a copy of this judgment, with notice of entry, by Plaintiff within 20 days of such entry.

And file an affidavit of said service with the county clerk.

Dated: ENTER:

_____

J.S.C.

_____

(Form UD-11) CLERK

FINDINGS OF FACT AND CONCLUSIONS OF LAW – STIPULATION

At the Matrimonial/IAS Part of the New York Supreme Court at the Courthouse, County of Kings, on the ___ day of _____, 20___.

Present:

Hon. _____ Justice/Referee

----------x Index No. _____

JAMIE DOE : Calendar No.

:

Plaintiff :

against : **FINDING OF FACT AND**

: **CONCLUSIONS OF LAW**

LEE DOE :

Defendant :

----------x

The issues of this action having been heard before me as one of the Justices of this Court at Part IDV1 hereof, held in and for the County of Kings on July 16, 2022. August 10, 2022 and September 24, 2022, and this Court having issued a written Decision After Trial dated January 20, 2023, on the issues of the marriage's validity, grounds, custody, spousal maintenance, child support and equitable distribution, and having considered the allegations and proofs of the respective parties, and due deliberation having been had thereon.

NOW, after hearing the testimony, I do hereby make the following findings of essential facts which I deem established by the evidence and reach the following conclusions of law.

FINDINGS OF FACT

FIRST: The Plaintiff and Defendant were both 18 years of age or over when this action was commenced.

SECOND: The cause of action occurred in New York State and both parties were residents thereof at the time of the commencement of this action.

THIRD: The Plaintiff and Defendant were married on November 5, 1988, in City of Kouba Oulunga, Country of Chad; in a religious ceremony. A Chadian marriage certificate was issued on June 2, 1992.

FOURTH: No decree, judgment or order of divorce, annulment or dissolution of marriage has been granted to either party against the other in any court of competent jurisdiction of this state or any other state, territory or country, and there is no other action for divorce, annulment or dissolution of marriage by either party against the other pending in any court.

FIFTH: This action was commenced by filing the Summons and Verified Complaint with the County Clerk on December 21, 2021. Defendant was served personally with the above stated pleadings. Defendant filed an answer.

SIXTH: The Defendant is not in the military service of the United States of America, the State of New York or any other state or territory.

SEVENTH: There is one (1) children of the marriage. Their names, social security numbers, addresses and dates of birth are:

Name	**Soc. Sec. No.**	**Date of Birth**	**Address**
CHILD DOE	XXX-XX-XXXX	XX-XX-XXXX	CONFIDENTIAL

There is no other child as a result of this marriage, and no other child is expected.

VALIDITY OF THE MARRIGE

EIGHTH: The parties were legally married in Chad on November 5, 1988. A Chadian marriage certificate was issued on June 2, 1992. The certificate was authenticated pursuant to C.P.L.R. 4542 by the Chadian Ambassador to the United Nations.

GROUNDS FOR A DIVORCE

NINTH: The grounds for divorce which are alleged in the Verified Complaint were proved as follows: Cruel and Inhuman Treatment (DRL § 170(D): At the following times the Defendant engaged in conduct that so endangered the mental and physical well being of the Plaintiff, so as to render it unsafe and improper for the parties to cohabit (live together) as husband and wife:

a. Early in the parties' marriage, when the parties were living in Chad, Defendant physically abused the Plaintiff while she was three months pregnant with the parties' child. The Defendant beat her with a radio "wire," presumably an antenna, causing injury to her back. The Defendant's brother took the Plaintiff to the hospital for medical treatment following that beating. It took four to five days for her to recover,

b. Two months after the birth, the Defendant beat Plaintiff again, punching her in the eye with a closed fist, causing a permanent injury that still causes her pain. The Defendant himself took the Plaintiff to the hospital on that occasion. The Plaintiff called the police and the Defendant went to jail for three days.

c. The Defendant beat the Plaintiff with his shoes on more than one occasion.

d. The Defendant forced Plaintiff to have sexual intercourse against her will on numerous occasions

when they lived together in Chad, using a turban to tie her hands behind her so that he could force himself upon her.

e. After the Plaintiff came to the United States, on March 25, 2007, Plaintiff was taken to the hospital. Defendant tried to persuade hospital staff that the Plaintiff was mentally ill. The Plaintiff went to a domestic violence shelter from the hospital.
f. On two occasions, in 2007, the Defendant used physical force to make the Plaintiff have sexual intercourse with him against her will. Defendant insisted that he had "needs" and that she was obligated to have sexual relations with him. In May 2007, Defendant put the Plaintiff out of the house, and Plaintiff, spent the night sleeping in a mosque. The following day when she returned, the Defendant forced the Plaintiff to have sexual intercourse with him against her will. Plaintiff had been advised by a doctor not to have sexual relations at that stage of her pregnancy.
g. On June 3, 2007, Defendant slapped and pushed the Plaintiff, causing her to fall to the ground. She returned to the shelter where she had previously gone after the hospital incident. She gave birth to the parties' fourth child in a domestic violence shelter.
h. On May 29, 2008, the Defendant pled guilty to disorderly conduct and received a conditional

discharge. A two-year stay away order of protection was issued against the Defendant on behalf of the Plaintiff. The matter was subsequently dismissed and sealed pursuant to C.P.L. § 160.55.

The conduct of the Defendant was cruel and inhuman and so endangered the physical or mental well-being of the Plaintiff as to render it unsafe or improper for the Plaintiff to cohabit with the Defendant.

REMOVAL OF BARRIERS

TENTH: Pursuant to DRL § 253, Plaintiff has taken all steps solely within her power to remove all barriers to the Defendant's remarriage.

MAINTENANCE

ELEVENTH: Pursuant to this Court's Decision After Trial dated January 30, 2023, the Court has determined that Defendant shall pay non-durational maintenance in the amount of One-Hundred Twenty-Five dollars ($125) per week, pursuant to DRL § 236(B)(6)(c). This award of non-durational maintenance is retroactive back to December 21, 2021, the date that Plaintiff filed the Summons and Verified Complaint seeking maintenance. As of March 26, 2023, the total amount of maintenance owed by Defendant to Plaintiff is equal to the sum of $14,750.00 (118 weeks x $ 125.00 per week). Defendant shall also pay the amount of ten ($10) dollars per week until the $14,750.00 in maintenance arrears has been paid-in-full and Defendant is not in arrears on maintenance due on or after April 2, 2023. Payments to be made to the Kings County Support Collection Unit at PO Box 831, Canal Street Station, New York, NY 10013.

The award of maintenance is based upon the following:

a. Neither party has any substantial assets.

b. The Defendant is gainfully employed and can be expected to earn an income commensurate with his present income in the future.

c. The Defendant abandoned the Plaintiff and the parties' children in Chad and provided inadequate and intermittent financial support during the thirteen year period that the parties were separated. The Defendant has been ordered to pay child support since the commencement of this action,

d. The Defendant has a second family, and four children of another relationship that he is

obligated to support. The youngest child is an infant and the mother of those children, Ms. A , does not work outside the home.

e. The Plaintiff is dependent on public assistance and has no property. Although she received some compensation for doing custodial work for a brief, circumscribed period of time, there is no indication that this would lead to permanent employment,

f. Plaintiff's prospects for becoming fully self-supporting are poor because her future earning capacity is limited by her lack of education and experience in working outside the home, and the language barrier. The Plaintiff has been a homemaker and the sole caregiver of

the parties' children throughout the marriage. She never attended school and is unable to read and write, even in her native tongue.

CUSTODY

TWELFTH: The unemancipated child of the marriage, CHILD DOE, reside with Plaintiff. On consent of the Defendant, the Plaintiff shall continue to have sole legal and physical custody of the parties' unemancipated minor child. Pursuant to this Court's Decision After Trial dated January 20, 2023, the final order of custody shall be incorporated in the judgment of

divorce. There is no other action or proceeding pending in any other court wherein the custody of said children is an issue; there is no other person or persons not a party to this action who claim to have custody or visitation rights with respect to said children.

EQUITABLE DISTRIBUTION

THIRTEENTH: The issues of equitable distribution were resolved after a trial held on July 16, August 10, and September 24, 2022. Pursuant to this Court's Decision After Trial dated January 20, 2023, the Plaintiff is entitled to 100% of the marital assets.

The marital assets that exist consist of the total balance in three bank accounts which, as of the time of the commencement of the action, was $722.14. Defendant's Citibank account had a balance, immediately preceding the filing of the action in this case, of $568.03. On December 31, 2021, days after the commencement of the action, the remaining funds were withdrawn. Defendant's HSBC account balance, on December 27,2021, three days after the commencement of this action was $36.73. Defendant's TD Bank account balance, two weeks before the commencement of this action, was approximately $117.38.

The length of the marriage, the plaintiff's contribution to the marriage, including raising the defendant's children alone for thirteen years with nominal and inconsistent financial support from the husband, and the plaintiff's limited future earning prospects also weigh in favor of an unequal distribution. Additionally, egregious fault exists in this case, based on the history of marital rape, physical abuse, and degradation. See Havell v. Islam, 301 A.D.2d 339 (1st Dept. 2002) (court may consider "egregious fault" in determining equitable distribution); see also O'Brien v. O'Brien, 66 N.Y.2d 576 (1985) (recognizing that egregious fault, but not ordinary fault, may be considered in determining equitable distribution). Accordingly, a distributive award in the amount of Seven-Hundred Twenty-Two dollars and Fourteen cents ($722.14) shall

be paid by the defendant to the Plaintiff within 60 days' notice of the entry of the judgment of divorce.

CHILD SUPPORT

FOURTEENTH: The Defendant is responsible for supporting the child of this marriage until they reach the age of 21 or is otherwise legally emancipated. Pursuant to this Court's Decision After Trial dated January 30, 2023, the Court has determined that Defendant shall pay child support in the amount of One-Hundred Forty dollars ($140) per week pursuant to the guidelines set forth in DRL § 240(1 -b). This award of child support is retroactive back to May 12, 2021, the date that Plaintiff filed her Motion for Upward Modification of Pendente Lite Support. The total amount of Defendant's child support obligation from May 12, 2021 through March 30, 2023 is $6,440.00 (X weeks x $140 per week). Since May 12, 2022, Defendant has paid the sum of $2,800.00 in child support pursuant to this Court's January 22, 2021 Pendente Lite Order. The total amount of child support arrears owed by Defendant as of March 30, 2023 is $3,640.00, Defendant shall also pay the amount of ten ($10) dollars per week until the $3,640.00 in child support arrears has been paid-in-full and Defendant is not in arrears on child support due on or after April 6, 2023.

Payments to be made to the Kings County Support Collection Unit at PO Box 831, Canal Street Station, New York, NY 10013.

a. The children of the marriage entitled to receive support are:

Name	Date of Birth
CHILD DOE	XX-XX-XXXX

b. Pursuant to the Decision After Trial of this Court dated January 20, 2023, the adjusted gross income of the Plaintiff who is the custodial parent is $0.00 per year, and the gross

income of the Defendant who is the non-custodial parent is $30,500.00 per year. After deducting the statutory deductions pursuant to DRL § 240 and the $6,500 in annual maintenance granted herein, the Defendant's adjusted gross income is $24,000.00 per year. The combined parental annual income is $24,000.00. Pursuant to the Child Support Standards Act, the applicable child support percentage is 17%. The combined basic child support obligation attributable to both parents is $6,500.00 per year. The Plaintiff's pro rata share of the combined parental income is 0%, and the Defendant's pro rata share of the combined parental income is 100%. The non-custodial parent's pro rata share of the child support obligation shall be Zero dollars ($0) per year or Zero dollars ($0) per week. The non-custodial parent's pro rata share of the child support obligation shall be Six-Thousand Five hundred ($6,500.00) per year or One-hundred Forty dollars ($140.00) per week.

FOURTEENTH: Pursuant to this Court's Decision After Trial dated January 20, 2023, if no health insurance coverage is available through Defendant's employer, Plaintiff shall apply for the state's child health insurance plan pursuant to Title one-A of article twenty-five of the public health law, and the medical assistance program established pursuant to title eleven of article five of the social services law. Should health insurance coverage be or become available to either party, within the meaning of N.Y. D.R.L. §240(l)(b), the party shall immediately enroll each eligible child to receive such coverage and shall notify the support collection unit of the extent and availability of existing or new benefits and thereafter shall notify the support collection unit of any changes in health insurance coverage.

FIFTEENTH: The Plaintiff's address is Confidential c/o Dylan Advocate, My Law Firm LLP, 123 Main Street, New York, NY 10000. Defendant's address is 321 Bay Ridge Ave., Brooklyn, N Y 11111.

SIXTEENTH: Plaintiff may resume use of the prior surname: xxxxxx .

SEVENTEENTH: The Family court shall have concurrent jurisdiction with the Supreme Court with respect to any further issues of custody, visitation and support.

EIGHTEENTH: Compliance with DRL §§ 255 (1) and (2) has been satisfied as follows: each party has been provided notice as required by DRL § 255(1).

CONCLUSIONS OF LAW

FIRST: Residency as required by DRL § 230 has been satisfied because both parties are residents of New York State,

SECOND: The requirements of **DRL** § 255 have been satisfied because the parties have been notified in accordance with the statute.

THIRD: The requirements of DRL § 240 1 (a-1) have been satisfied because the statuses of the marital children have been verified.

FOURTH: The requirements of DRL § 240 1 (a) have been satisfied because the Court has conducted an appropriate review with respect to custody and visitation.

FIFTH: Plaintiff is entitled to a judgment of divorce on the grounds of DRL § 170 subd. (1) - the cruel and inhuman treatment of the Plaintiff by Defendant - and granting the incidental relief awarded

Dated:

_____

Judge Judy, J.S.C.

DECISION AFTER TRIAL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART IDV1

XXXXXXXX	:	
	:	
Plaintiff	:	
against	:	**DECISION AFTER TRIAL**
	:	Index No.:
XXXXXXXX	:	
Defendant	:	

Appearances: My Law Firm, LLP
123 Main Street
New York, NY 10000

105 Court Street, Suite 402
Brooklyn, NY 11201

I. Procedural History

This is an action for divorce filed by AA (hereinafter "the plaintiff) on December 24, 2007. According to the plaintiff, the parties were married in an Islamic religious ceremony in Chad in 1988. a/k/a (hereinafter "the defendant") takes the position that the parties were never legally married. The parties have four children, Fatima, also known as Eliyeh (d.o.b. 8/30), AH (d.o.b. 12/15), Rozi (d.o.b. 4/22) and Amine (d.o.b. 6/29).

A final order of custody of the three minor children was awarded, on consent, to the plaintiff, on July 16, 2009. That order shall be incorporated in the judgment of divorce. The eldest child is married and resides with her husband in Paris, France. The two youngest children reside with the plaintiff. The second child, Ali, now eighteen years old, is residing in Canada with a cousin. Ali, who was still a minor at the time, went to Canada without the plaintiff's

knowledge or consent, during the pendency of the proceedings. Ali had been living with the defendant pursuant to court order at the time of the relocation. A motion seeking return of the child and contempt against the defendant and his former attorney was filed by the plaintiff on June 27, 2008, promptly after the plaintiff learned of the child's relocation. The basis of the contempt motion was the failure to comply with the court's order, entered prior to the child's unauthorized departure for Canada, that the defendant turn Ali's passport over to the defendant's attorney. Consistent with Ali's wishes and after a thorough court-ordered social work investigation and a report on Ali's living conditions in Canada, the plaintiff withdrew her application seeking Ali's return. The motion for contempt against the defendant and his former attorney remains pending, and has been stayed pending resolution of the trial, on consent of the plaintiff.

Pursuant to the court's order of January 22, 2008, entered on consent, the defendant was ordered to pay plaintiff $300 per month as and for child support, with leave to seek an upward modification of child support and/or an award of maintenance after discovery was complete. By motion filed June 12, 2009 and returnable July 16, 2009, the plaintiff moved for an upward modification of the *pendente lite* child support award, as well as an award of *pendente lite* maintenance, alleging that the defendant had misrepresented his income in his statement of net worth. Plaintiff asked the court to impute income of $75,000 to $80,000 per year. Based on that income, the plaintiff requested child support in the amount of $1,812.50 to $1,933.33, pursuant to the Child Support Standards Act, and $500 per month for spousal maintenance. The defendant opposed the motion. Since the trial in chief was commenced on the return date, decision on the motion was deferred to trial with the understanding that any upward modification or *pendente lite* maintenance would be effective from the date of filing of the motion.

A trial on the existence of a valid marriage, grounds and economic issues was held on July 16, August 10, and September 24, 2009. A post-trial brief was filed by the plaintiff on November 6, 2009. Defendant waived the opportunity to submit a post-trial brief but made an oral summation.

The plaintiff testified and called , the owner of News and Comics, Inc., and Halime , who identified herself as the defendant's wife, as witnesses. The defendant did not testify and presented no evidence. The plaintiff and Ms. testified with the assistance of an Arabic interpreter[1].

The following exhibits were offered in evidence on consent: 1099-MISC forms for the defendant for 2004, 2006, and 2007 issued by News and Comics, Inc.; defendant's statement of net worth dated January 18, 2008; bank records from Citibank, HSBC, Chase, and TD Bank; and Western Union transfers. In addition, over the objection of the defendant, the court admitted in evidence a marriage certificate dated April 25, 2008, authentication of the marriage certificate and certification of the attested copy of a foreign marriage record, pursuant to C.P.L.R. 4542. The court reserved decision regarding defendant's objection to the admission of Toyota lease documents offered in evidence by the plaintiff. After reviewing the certification attached to those records, the court finds that the certification does not comply with C.P.L.R. § 3122-a. The defendant's objection is therefore sustained and those records are not admitted.

In addition, on consent, the court took judicial notice of the disposition in a criminal matter against the defendant.

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[1] Despite efforts to obtain a court-certified interpreter in Chadian Arabic, none were available. The interpreter used during the proceedings was from Sudan and represented that the Northern Sudanese dialect is very close, but not identical to, the Chadian dialect. In order to ensure accurate interpretation, where the witness or the interpreter was unable to understand a word, the interpreter would rephrase or ask the witness to rephrase, to ensure an accurate interpretation. A record was made whenever this was necessary

The Court has had a full opportunity to consider the evidence presented with respect to the issues in this proceeding, including the testimony offered and the exhibits received. The Court has further had an opportunity to observe the demeanor of the witnesses called to testify and has made determinations on issues of credibility with respect to these witnesses. The Court now makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

I. Validity of the Marriage

The court credits the testimony of the plaintiff, which was uncontroverted by the defendant, who elected not to testify, that the parties were married by an Imam in an Islamic ceremony in Chad on November 5, 1988. Based on the plaintiff's testimony, the marriage was agreed upon between the parties' respective fathers when the plaintiff was approximately nine years old and the defendant was approximately fifteen years old. They were married at the ages of approximately sixteen and twenty-two, respectively, by an Imam, in the presence of family and friends.[2] The defendant presented the plaintiff with a camel, as dowry, and also made monetary payments and other gifts to the plaintiff's father, mother and uncle, in recognition of the marriage.

A Chadian marriage certificate was issued on June 2, 1992. The certificate, which is authenticated pursuant to C.P.L.R. 4542 by the Chadian Ambassador to the United States, was admitted in evidence over the defendant's objection. The court accepted a color photocopy based on representations of counsel for the plaintiff, as an officer of the court, concerning the inadvertent loss of the original certificate and accompanying authentication, which were part of plaintiff s response to an earlier motion by the defendant seeking to dismiss the action based on

[2] According to the marriage certificate in evidence, the plaintiff was born in approximately 1970, making her approximately 18 at the time of the marriage. According to the criminal court orders of protection, the defendant's date of birth is June 15, 1966.

the lack of a valid marriage, which was subsequently withdrawn by the defendant. In addition, the court finds no irregularity in the authentication. While defendant suggested that different spellings of the Ambassador's name indicated that the authentication was fraudulent, the court notes that translations of Arabic to English can result in different spellings of names since the languages use different alphabets and spelling may be phonetic. In addition, the separation of the authentication from the certificate was a result of the manner in which the evidence binders were prepared by plaintiff's counsel's office.

The parties lived together as husband and wife in Chad and had three children together before the defendant moved to the United States in 1993. Thereafter, the plaintiff did not see the defendant for thirteen years, until she came to the United States in 2006 with the parties' two sons, Ali and Rozi. The defendant paid the airfare for the plaintiff and the two children. When the plaintiff and the children came to United States, they moved into the defendant's home in Brooklyn. The parties' fourth child, Amine, was born in the United States.

Halime testified that she and the defendant are husband and wife. She testified that they married in 1999 and "made the marriage certificate in 2008." Ms. was aware of the defendant's prior marriage to the plaintiff but testified that, in their religion, a man can have four wives. Ms. and the defendant have four children, one of whom was born during the pendency of these proceedings.

It is unclear when Ms. , also a native of Chad, came to the United States but it appears, based on the Ms. 's testimony that her father sent money to her and the defendant in 2000 and 2001, that she was already residing with the defendant when the plaintiff and her two children came to the United States. There is nothing in the record as to whether the plaintiff moved into the same apartment where Ms. A and her children were already living with the

defendant, but it appears that the apartment in which the defendant and Ms. A presently live, which is a one-bedroom apartment, is the same apartment where the plaintiff and defendant resided after the plaintiff came to the United States.[3]

II. Grounds

The plaintiff is approximately 39 years old and the defendant is 43 years old. At the time of the commencement of this action, both plaintiff and defendant were residents of the State of New York, and both had continuously resided in the State of New York for a period in excess of one (1) year. Neither the plaintiff nor the defendant are in the military service of the United States, and there is no judgment or decree of divorce, separation or annulment granted with respect to this marriage by this Court or any other court of competent jurisdiction and no other actions are pending at the present time. There exists no barrier, religious or otherwise, affecting the ability of either party to remarry subsequent to a divorce being granted by this Court.

The plaintiff asserts cruel and inhuman treatment as grounds for divorce. The defendant offered no evidence to refute the testimony of the plaintiff. Based on the credible testimony of the plaintiff, the court finds as follows:

The defendant physically abused the defendant throughout the marriage, except during the lengthy period of their separation, when they had no contact. The first incident occurred early in the parties' marriage, when the parties were living in Chad. When the plaintiff was three months pregnant with the parties' eldest child, Eliyeh, the defendant's father died. The plaintiff disobeyed the defendant's direction that she not go with him to see his father's body. The defendant beat her with a radio "wire," presumably an antenna, causing injury to her back. The

[3] In her *pendente lite* order to show cause, filed in January 2008, the plaintiff alleged that the defendant rented a second apartment but did not state whether Ms. and her children resided in that apartment. There was no evidence at trial regarding a second apartment. The same order to show cause also alleged that the defendant was, as of January 2008, supporting a second family in Chad. There was no evidence at trial regarding support of another family in Chad and it is unclear whether the family referred to was Ms. 's, or a third family.

defendant's brother took the plaintiff to the hospital for medical treatment following that beating. It took four to five days for her to recover.

Two months after Eliyeh's birth, the defendant beat her again, punching her in the eye with a closed fist, causing a permanent injury that still causes her pain. The defendant himself took the plaintiff to the hospital on that occasion. The plaintiff called the police and the defendant went to jail for three days. He also beat the plaintiff with his shoes on other occasions.

The plaintiff also testified credibly that the defendant forced her to have sexual intercourse against her will on numerous occasions when they lived together in Chad, using a turban to tie her hands behind her so that he could force himself upon her.

After the plaintiff came to the United States, another incident occurred on March 25, 2007, when the plaintiff was pregnant with Amine. Although the testimony is not entirely clear, according to the plaintiff, the defendant told her and the parties' children that the plaintiff was crazy and insisted that she go to the hospital. It is unclear why the defendant wanted her to go to the hospital, whether for medical attention related to the pregnancy or to address a purported mental health issue, but the plaintiff was taken to the hospital against her will and the defendant tried to persuade hospital staff that the plaintiff was mentally ill. According to the plaintiff, an Arabic interpreter at the hospital told the defendant that the plaintiff was not crazy and that if he persisted in saying so, the police would be called. The defendant apologized to the plaintiff and asked for her forgiveness, so that they could go home. However, apparently after the apology, the defendant beat the plaintiff, at the hospital. The plaintiff went to a domestic violence shelter from the hospital. Thereafter, the defendant called the plaintiff’s mother, who instructed the plaintiff that she must return to her husband. The plaintiff did so at her mother's behest.

On two occasions during her pregnancy with Amine, the defendant used physical force to make the plaintiff have sexual intercourse with him against her will. According to the plaintiff, another woman by the name of Hidaya, whom Ms. A described as her "friend," was living with the plaintiff and defendant at the time. According to Ms. , Hidaya was staying with them at the time of trial because she and the defendant were "helping" her. According to the plaintiff, however, Hidaya left the home at some point during the time that the plaintiff was residing with the defendant, and it is at that time that the defendant forced the plaintiff to have sexual intercourse, insisting that he had "needs" and that she was obligated to have sexual relations with him.

On another occasion, in May 2007, the plaintiff was watching television with Hidaya, in the wee hours of the morning. The plaintiff asked Hidaya to turn off the television so that she could go to sleep. After that incident, the defendant put the plaintiff out of the house and asked Hidaya to stay. The plaintiff, who was eight months pregnant at the time, spent the night sleeping in a mosque. The following day when she returned, the defendant forced the plaintiff to have sexual intercourse with him against her will. According to the plaintiff, she had been advised by a doctor not to have sexual relations at that stage of her pregnancy.

On June 3, 2008, another incident occurred which caused the plaintiff to leave the defendant permanently. The defendant had called the parties' son-in-law, who was residing in Paris with his wife, the parties' eldest daughter, to ask him to come get the plaintiff. The plaintiff was eight-a-half months pregnant at that time. The son-in-law refused, under the circumstances, but agreed to come get her after the baby was born. The defendant then told plaintiff that she could not stay in the house and slapped and pushed the plaintiff, causing her to fall to the ground. The defendant then tried to take the plaintiff's hand, apparently to reconcile. The plaintiff refused

and left the home. She returned to the shelter where she had previously gone after the hospital incident. She gave birth to the parties' fourth child in a domestic violence shelter and continues to reside in a shelter.

The court took judicial notice of the disposition in a criminal court proceeding against the defendant wherein, on May 29, 2008, the defendant pled guilty to disorderly conduct, a violation, and received a conditional discharge and a two-year stay away order of protection was issued against the defendant on behalf of the plaintiff. The matter was subsequently dismissed and sealed pursuant to C.P.L. §160.55.

III. Economic Issues

In his statement of net worth dated January 18, 2008, the defendant reports an annual income of $16,800 per year ($1,400 monthly) as a newspaper distributor. He reports no assets other than an HSBC bank account with a balance of $436.71, as of the date of his net worth statement and liabilities of $7,500 to "various friends" for sums borrowed in January 2008 to pay attorneys' fees. He reports monthly expenses of $ 1,460.95, including rent in the amount of $771.95 per month. This amount does not include the $300 per month *pendente lite* child support award. For the reasons discussed below, the court does not credit the defendant's representations in his statement of net worth regarding his income and assets.

Although 1099 forms for 2004, 2006 and 2007 from News and Comics, Inc. show income ranging from $14,700 to $15,900, roughly commensurate with the income reported in defendant's January 2008 statement of net worth, the testimony of , the owner of News and Comics, Inc., establishes that, the defendant has received commissions, in addition to the income reflected in the 1099s. According to Mr. A , the defendant is an independent contractor selling publications such as the Daily News and the New York Post to vendors. He

receives a base pay of $350 per week and the use of a van, whose operating expenses, including gas and insurance, paid for by the News and Comics, to deliver the publications and also earns a commission on each paper sold. Mr. testified the commission is actually a profit retained by the independent contractor, who sells each copy of a publication to a vendor for a certain price, and pays News and Comics a set amount for copy, and retains the rest, after paying for any of his own expenses. According to Mr. , since the commissions are retained by the defendant from the proceeds of each publication sold and not paid to the defendant by News and Comics, that income did not appear on the 1099; it was the defendant's obligation to then report the commission income on his tax returns.

Mr. testified that, due to the elimination of certain incentives previously provided by the publications, the defendant no longer receives per copy commissions and receives only the $350 weekly base salary. The court does not find this aspect of Mr. 's testimony credible. It is unlikely that the defendant would accept a substantial reduction in his compensation. Moreover, the defendant's role is not only to deliver the publications but to sell them to vendors, and commission-based compensation is the norm in sales since it creates an incentive to maximize sales. No objective support for Mr. 's claim was offered and he provided conflicting time frames for when this change went into effect, initially claiming that the commissions ended in July or August of 2008, then testifying that it was in February 2009. Even if true, the court notes that Mr. d, who is a friend of the defendant, could have artificially reduced the defendant's compensation for the purpose of helping the defendant to avoid support obligations.

Mr. was a reluctant witness who failed to appear pursuant to subpoena until a contempt motion was filed. As noted above, the court did not find him wholly credible. There

was reason to believe, based upon Mr. 's own testimony, that the relationship between the defendant and Mr. was more than what Mr. represented. Mr. acknowledged that he lent the defendant substantial sums of money-between $6,000 and $8,000--for attorney's fees, that those monies had not been repaid, that there was no formal loan agreement and the funds used were business not personal funds. Mr. acknowledged that the defendant co-signed a lease for a vehicle with News and Comics in 2002, apparently before the defendant was working for News and Comics. Copies of checks offered in evidence show several payments on the defendant's personal credit card were made by News and Comics, totaling more than $1,600 in 2005. However, the plaintiff failed to adduce affirmative evidence that the defendant had an ownership interest in News and Comics and, notably, the plaintiff has not made any claim for equitable distribution relating to the business. Further, while Mr. 's claimed ignorance of what profit the defendant was earning on the publication sales, what the defendant was charging vendors or whether he employed others to do the work strained credulity, the plaintiff failed to adduce that information from any other source. Notably, neither party called the defendant.

Although Mr. was less than forthright, he did provide some information that gives an indication of the volume of sales and some insight into the defendant's income. According to Mr. 's testimony, the defendant sold 3,000-4,000 copies of the Daily News per month in 2007 and sold 4,400 copies in January 2007. He sold more than 10,000 copies, and sometimes as many as 20,000 copies of the New York Post per month. Although Mr. did not testify regarding sale of any other publications, checks written on the defendant's account to USA Today suggest that the defendant may have been selling that publication, as well.

The plaintiff has sought to establish that the defendant's "commission" was nine cents per paper sold, based upon the difference between the cover price (25 cents for the Daily News) and

the amount the defendant had to pay News and Comics per copy (16 cents for the Daily News, when "commissions" were still being paid) and extrapolate the defendant's income on that basis. Thus if, for instance, the defendant sold 20,000 copies of the New York Post and 4,000 copies of the Daily News in a month (which would represent a strong sales month for the defendant, based on Mr. 's testimony) at a rate of 9 cents, he would earn $2,160 that month, in addition to the $350 per week salary. However, the court does not find that this represents a fair estimate of the defendant's actual income. It appears that the defendant's role was not to sell the publications to the end consumer but to sell them to newsstands and other vendors who presumably would also need to make a profit on each sale. Mr. testified that, although he could state what the cover price was, what the amount the defendant paid to News and Comics for each copy was, and how many copies of each publication were sold in a particular time period, he could not say what price the defendant charged the vendor, or whether the defendant employed other people to distribute or sell on his behalf. Nonetheless, the estimate above, of $2,160 per month, provides a reasonable guidepost for a maximum monthly commission.

In addition to the testimony of Mr. , bank records provide additional information relevant to determining the defendant's income. The evidence offered at trial revealed the existence of three bank accounts whereas the defendant only disclosed one on his statement of net worth. The HSBC bank records in evidence show that in 23 months from January 2006 through November 2007, the defendant made deposits totaling approximately $48,000, or approximately $2,090 per month.[4] In some months, the defendant made substantial deposits: in September 2006, the defendant deposited more than $6,000 and in September 2007, he deposited nearly $9,500. However, in the first five months of 2006, he deposited nothing and, although the

[4] The December 2007 statement is not in evidence and appears to have been omitted from the record.

defendant had a substantial balance, over $11,500 in the account in January 2006, his ending balance on December 27, 2007, three days after the commencement of this action was $36.73. Prior to that, in the year preceding the filing of the action, the account typically had an ending balance each month of a few hundred dollars and some months had only a few dollars. As of November 28, 2007, the account actually had a negative balance of $28.17. The HSBC bank records in evidence only cover the period through January 2008, when the balance in the account was $266.36.

Checks drawn on the defendant's HSBC checking account to BMCC (Borough of Manhattan Community College), along with a memorandum from the office of the bursar at BMCC show that the defendant made tuition payments totaling over $ 10,000 to the college between August 2006 and August 2007, apparently on behalf of an individual named Sanda , Two other checks totaling over $800 to "ALCC," bear a notation "Sanda " or "Mr. Sanda ," The plaintiff testified that Sanda was a friend of defendant whom the defendant gave money to for the plaintiff's airfare to the United States.[5]

Other checks written on the HSBC account in 2006 and 2007 included a $3,500 retainer to the law firm of Hochheiser & Hochheiser, L.L.P. on September 5, 2007. The defendant paid over $1,700 in parking tickets in 2006 and 2007 from the HSBC account. In addition, there was a check to "Maury and Irina, Inc." for $2,141, and two checks to "Irina's " for $1,600 and $708. There is no information as to the nature of these expenditures.

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[5] In his affidavit in opposition to plaintiff's motion for upward modification of child support, the defendant represented that was the daughter of a friend who resided with
him for a period of time and that her family provided funds for her support. The defendant did
not present a case and no evidence was presented by the plaintiff that demonstrates the source of funds used to pay the BMCC tuition or other expenditures for or, indeed, the source of
any funds deposited in the defendant's accounts. The defendant also claimed, in the opposition papers to the upward modification that he kept other people's money in his account for safekeeping and did not have beneficial access to the funds. He offered no evidence to support that claim.

During the same time period, the defendant had another account with Citibank, with a balance, in January 2006, of over $14,500. That sum was untouched for an extended period of time until, in late September 2007, most of the money, $14,000, was withdrawn from the account. The court notes that this coincides roughly with the commencement of the criminal action against the defendant on September I, 2007. The balance immediately preceding the filing of this action was $568.03. On December 31, 2007, days after the commencement of the action, the remaining funds were withdrawn.

TD Bank statements for a personal checking account in the defendant's name covering January to May 2003 show a zero balance in January 2003 and closing balance of approximately $2,700 in May 2003. Monthly deposits ranged from approximately $1,750 to $6,100 during that time period. Between June and December of 2003, the defendant made very large monthly deposits to the account, averaging approximately $17,300 per month and ranging from approximately $12,000 to more than $23,500. The deposits totaled approximately $ 121,000 over seven months. During the same period, the defendant made monthly withdrawals ranging from approximately $6,500 to more than $30,000, totaling approximately $104,500 over the same period. The closing balance on the account in December 2003 was almost $16,000. After December 2003, no deposits were made until January 2006, when a $3,300 deposit was made. In August and September 2006, an additional $10,000 total was deposited into the account. No other deposits were made, according to records through November 2008. The account was depleted over time. As of August 2006, there was approximately $2,300 in the account. Fifteen hundred dollars was withdrawn on October 4, 2007, a month after the commencement of the criminal action against the defendant. Another S500 was withdrawn on November 13, 2007. By December 10, 2007, two weeks before the commencement of this action, there was only

approximately $117.38 left in the account. That balance remained unchanged through November 2008. The records do not identify the source of the deposits and, except for some small checks for to utility and phone companies, almost all the withdrawals were in cash. The defendant, who did not put on a case, offered no explanation at trial of the source of funds in this account or how the funds withdrawn were used.

Apart from his four children with the plaintiff, the defendant has four other children with Ms. , who reside with him and whom he supports. The children were 9 years, 8 years, 5 years, and eight months old, as of the time of trial. Ms. is a full-time homemaker. She was previously employed in retail sales earning $200 per week. Ms. originally testified that she had not worked since 2005, then revised her testimony, indicating that she had stopped working after the birth of her fourth child. She testified that the family began receiving $640 per month in food stamps in April 2009. Her father had provided financial assistance in the past, sending $5,000 to $6,000, twice a year. However, according to Ms. , he had not sent any money since 2001. Ms. acknowledged that her brother had paid the airfare for her and the children to visit Chad in 2006 or 2007. Finally, Ms. testified that she had gold jewelry in a bank safe deposit box, including twenty-four bracelets, three necklaces, two pairs of earrings and four rings. These were gifts of her mother in 2008.

Based on the foregoing, the court imputes income to the defendant in the amount of $30,500. The court arrives at this figure based on the total deposits in all defendant's accounts the two years preceding the commencement of the action, from January 2006 to December 2007, which was $61,000, or $30,500 per year. While the court recognizes that it would be preferable to rely on more recent information, the court does not find that the bank deposits subsequent to the filing of the action accurately reflect the defendant's income. The record does not contain

bank records from HSBC after January 2008 and the other two accounts became inactive after the commencement of the action, even though, according to Mr. , the defendant was receiving at least his base salary after that time. The statement of net worth of defendant in evidence dates back to January 2008, immediately after the commencement of the action.[6] Moreover, Mr. 's testimony to the contrary notwithstanding, the court is unpersuaded that the defendant suddenly stopped receiving commissions for his work and has no other evidence to conclude that the defendant's income has changed substantially since that time. The figure of $30,500 is consistent with the defendant earning a base salary of $18,200 per year (based on $350 per week) and commissions of $12,300 per year (a little over $1,000 per month). This is a realistic figure in light of Mr. 's testimony regarding the volume of sales made by the defendant during that time and assuming the defendant shared the nine cent per copy commission with the vendor. While the court recognizes that there was a seven-month period in 2003 when the defendant was making much larger deposits, it is remote in time and is not consistent with the more recent pattern. The court does not impute to the defendant income based on financial assistance allegedly provided by Ms. Adberaman's father since that assistance, according to Ms. , has not been ongoing. The court notes that the defendant resides in a one-bedroom apartment with Ms. and their four children, and another woman Hadiya. Their lifestyle is extremely modest and, although the defendant was certainly less than forthright about his income and failed to disclose all his bank accounts, contrary to the plaintiff's suggestion, there is no indication that the defendant has significant hidden assets.

The plaintiff was a full-time homemaker and never worked outside the home prior to coming to the United States. For the first seven months after he came to the United States,

[6] The defendant failed to file an updated statement of net worth prior to trial and the court sustained the plaintiff's objection to defendant's efforts to admit an updated statement at trial, when the plaintiff had not had an opportunity to review it prior to trial.

leaving the plaintiff and children behind in Chad, the defendant would send the plaintiff $70 per month. Thereafter, he did not send money on a regular basis, but occasionally sent money at the behest of a friend, who told the defendant that the family was struggling and needed financial assistance. According to the plaintiff, she sold her gold jewelry to feed the children. For three or four years, she and the children went to her parents' home in the desert and "lived with the camels" and drank milk from the camels.

Since arriving in the United States, the plaintiff has relied on public assistance. She presently has no other source of income. She has not worked, except for a brief period of time when she was given gift cards in exchange for helping to clean at the school where she was attending English as a Second Language classes. She had earned $300 in gift certificates in three weeks and expected to earn another $300 over the next three weeks. This "employment" was scheduled to terminate after that and she had no further prospects for employment.

The defendant never attended school in Chad and is unable to read or write in Arabic. Asked if she could read or write in English, the plaintiff testified that she was learning to write "a little bit" in English, such as her name and names of her family members.

CONCLUSIONS OF LAW

I. Validity of the Marriage

The plaintiff provided uncontroverted proof that the parties were legally married in Chad on November 5, 1988. While it appears that the defendant was married to another woman, Halime , while still married to the plaintiff, and this fact has important implications for the validity of the defendant's marriage to Ms. , this does not undermine the validity of the defendant's first marriage to the plaintiff On the contrary, it appears that Ms. was aware of the defendant's marriage to the plaintiff and that this was acceptable to

her because, she testified that their religious customs in Chad permit a man to have as many as four wives. It is unclear whether Ms. or either party was aware that polygamy is impermissible in the United States.

II. Grounds for Divorce

The plaintiff is entitled to a divorce on the ground of cruel and inhuman treatment. The uncontroverted evidence offered by the plaintiff demonstrates that, since the inception of the marriage, the defendant has engaged in numerous acts of domestic violence and marital rape against the plaintiff. The defendant severely beat the plaintiff on two occasions when she was pregnant with their first child, requiring medical treatment and causing permanent injury. Thereafter, the defendant came to the United States, abandoning the plaintiff and the parties' three children in Chad, and providing virtually no financial support for a period of thirteen years. The plaintiff had no formal education and had never been employed outside the home. She and the children survived in the desert by drinking camel's milk.

When the parties were reunited in the United States, the physical abuse resumed. In addition, the defendant emotionally abused and degraded the plaintiff. On one occasion, the defendant forced the plaintiff, eight months pregnant with the parties' fourth child, to leave the marital home, and she had to take shelter in a local mosque. On numerous occasions throughout the marriage, including late in the plaintiff's last pregnancy and against medical advice, the defendant used physical force and/or restraint to force the plaintiff to engage in sexual intercourse against her will. Ultimately, the plaintiff fled to a domestic violence shelter with the children, where she continues to reside.

III. Equitable Distribution

The plaintiff seeks equitable distribution of marital property and maintains, based on egregious fault, that an unequal distribution of assets is warranted. In determining equitable distribution, the court is mandated, pursuant to Domestic Relations Law §236B(5)(d) to consider 15 factors in making its decision as to the equitable distribution of the marital property: 1) the income and property of the parties, 2) the duration of the marriage 3)age and health of the parties; 4) the need of custodial parent to occupy or own the marital residence; 5) the loss of inheritance and pension rights; 6) an award of maintenance; 7) direct and indirect contributions of each party; 8) the liquid or non-liquid character of the property; 9) Future financial circumstances of the parties; 10) the difficulty of valuing marital assets; 11) the tax consequences to each party; 12) the wasteful dissipation of assets; 13) transfer of assets in contemplation of the action;14) acts of domestic violence and 15) any other factors.

Before the court determines how any assets should be distributed, the court must first determine what marital assets exist. In her post-trial brief, the plaintiff claims the following as marital assets: 1) "thousands of dollars" worth of jewelry; 2) furniture of unspecified value; and 3) four bank accounts in which almost $200,000 was deposited over a five year period. The court does not find that the jewelry in question is marital property. It is solely the property of Ms. , gifted to her by members of her family. With respect to the furniture in the marital home, while that furniture is marital property, the plaintiff has not asked for any of those items and there was no testimony or other evidence regarding their value. The plaintiff, as the party seeking equitable distribution, bears the burden of establishing value. *See e.g., Iwahara* v. *Iwahara,* 226 A.D.2d 346 (2d 1996). The plaintiff having failed to meet her burden in this respect, the court is unable to equitably distribute these assets.

With respect to the bank accounts, although the plaintiff claims an interest in four bank accounts, one of the accounts, a Chase Mastercard account, is not a deposit account but rather a credit card account. What plaintiff refers to as "deposits," in the chart prepared by plaintiff's counsel and attached to her post-trial brief, are credits and payments to the credit card account and are not capable of distribution. The plaintiff does not argue that the charges to that account, which include many charges at department stores, clothing stores, toy stores, and home improvement stores, were not for household expenses.

With respect to the other three accounts, the records in evidence show that the total balance in the three remaining accounts as of the time of the commencement of the action was $722.14 (36.73 + 568.03 + 117.38). The plaintiff takes the position that she is entitled to equitable distribution of funds previously deposited into the accounts, even though those funds are no longer in the accounts, on the theory that the defendant either wastefully dissipated or secreted the money deposited in those accounts over the last five years. First, the court notes that plaintiff somewhat overstates the total bank account deposits since she included credit card payments as deposits. However, even using plaintiff's estimate of $200,000, this is not an extraordinary sum for a period of five years.

The bulk of the deposits, approximately, $121,000, occurred during a seven month period in 2003, when the plaintiff was living in Chad. Most of the withdrawals, over $104,500 during the same period, were in cash, so little can be determined from the bank records as to how those resources were spent. These are very substantial sums, and not consistent with either party's position as to the defendant's income. The defendant claims that he earns $350 per week, or $18,200 per year,[7] and plaintiff asks the court to impute income of $55,000 per year. Moreover,

[7] Although the defendant's statement of net worth reports a smaller annual income, it appears to be based on converting the weekly salary to a monthly amount, based on the incorrect assumption that there are 4 weeks in a month.

the defendant's lifestyle, as testified to by both the plaintiff and Ms, , has been very modest and not consistent with the conclusion that these funds were put to personal use.

Inasmuch as the defendant elected not to put on a case, he failed to substantiate at trial his claim in his opposition papers to the request for upward modification of child support and spousal maintenance that the source of funds in his accounts was Ms. 's father (although Ms. acknowledged, when called by the plaintiff on her case, that her father had provided financial assistance, her uncontroverted testimony was that he last provided money in 2002), and other individuals, including people who gave money to the defendant for safekeeping. Another plausible explanation is that the large deposits reflect collections from the sale of publications and that the large withdrawals reflect, at least in part, the remittance to News and Comics, of the cost of the publications. The fall-off in the size of the deposits and withdrawals might reflect a change in procedure if the collections stopped, for whatever reason, being run through the account. Whatever the case may be, the court does not find that the pattern of deposits during that time period accurately reflects the defendant's income now or at that time. Certainly, the plaintiff has not established that the funds were put to any specific, non-marital use.

As previously noted, the deposits in subsequent years were far more modest and totaled $61,000 over the two year period from January 2006 to December 2007, when the defendant was providing support for three adults and five children living with him after the plaintiff and the parties two sons joined him in the United States in 2006; During the same time period, the defendant made withdrawals from his accounts totaling over $83,000.

The plaintiff has not demonstrated that the defendant made any specific expenditures during that time period, other than for household expenses, with two notable exceptions: 1) the

payment of a retainer of $3,500 to a law firm following his arrest in 2007 and 2) tuition and other expenses totaling approximately $ 10,800 paid on behalf of an individual by the name of Sanda . With respect to the attorney's fees, the court finds that the source of those funds was money loaned to him by Mr. . While the plaintiff argues that the defendant paid two $7,500 retainers to two different attorneys retained in this matter, the court notes that the plaintiff neither requested that the court take judicial notice of those retainer agreements nor offered them in evidence. Consequently, they are not part of the record at trial. In any event, inasmuch as it appears that the defendant borrowed additional monies for additional attorney's fees, the court would not conclude that marital funds were used for the defendant's legal fees. With respect to the expenses paid on behalf of , while the defendant failed to demonstrate that these expenses were paid with non-marital funds or to substantiate, specifically, his claim that the father of gave him money for those expenses, the court notes that the plaintiff has not asked for a credit for these expenditures. In short, the court does not find that the record substantiates the plaintiff's claim that the $200,000 in deposits over five years are marital assets which were dissipated or secreted.

Based on the foregoing, the only property subject to equitable distribution is the balance in the defendant's bank accounts at the time of the commencement of the action. While marital fault is not generally a factor in determining equitable distribution, where there is egregious fault, it is appropriate to consider such fault in determining equitable distribution. Havell v. Islam, 301 A.D.2d 339 (1st Dept. 2002) (court may consider "egregious fault" in determining equitable distribution); see also O'Brien v. O'Brien. 66 N.Y.2d 576 (1985) (recognizing that egregious fault, but not ordinary fault, may be considered in determining equitable distribution). To constitute "egregious fault," there must be conduct that "shocks the conscience" and implicates

an "important social principle." Havell, 301 at 345-46. As the aQ court recognized in Brancovenu v. Brancovenu, 145 A.D.2d 395 (2d Dept. 1988), "there are situations where the marital misconduct is so egregious and shocking to the court that it is compelled to invoke its equitable power so that justice may be done between the parties." The court finds that egregious fault does exist in this case, based on the history of marital rape, physical abuse, and degradation. The length of the marriage, the plaintiff's contribution to the marriage, including raising the defendant's children alone for thirteen years with nominal and inconsistent financial support from the husband, and the plaintiff's limited future earning prospects also weigh in favor of an unequal distribution. Under the circumstances and in view of the very limited amount of marital property subject to distribution, the court finds that the plaintiff is entitled to 100% of the marital assets. A distributive award in the amount of $722.14 shall be paid by the defendant to the plaintiff within 60 days of notice of entry of the judgment of divorce.

IV. Spousal Maintenance

In awarding spousal maintenance, the court has considered the following factors as enumerated in Domestic Relations Law §236 F(6)(a):l) the income and property of the respective parties including marital property distributed; 2) the duration of the marriage and the age and health of both parties; 3) the present and future earning capacity of both parties; 4) the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefore; 5) reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment or career opportunities; 6) the presence of children of the marriage in the respective homes of the parties; 7) The tax consequences to each party; 8) 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; 9) wasteful dissipation of marital property; 10) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; and 11) any other factor(s).

The plaintiff is dependent on public assistance and has no property. Although she received some compensation for doing custodial work for a brief, circumscribed period of time, there is no indication that this would lead to permanent employment. As previously discussed, the court has determined, based on the evidence adduced at trial, that the defendant understated his income in his statement of net worth and that his imputed income is $30,500. Neither party has any substantial assets.

Although the parties were separated for a substantial part of their marriage, the marriage is of long duration. The plaintiff and defendant are approximately 39 and 43, respectively. The defendant has not asserted any health problems. The plaintiff testified credibly that she suffered permanent injury as a result of abuse at the hands of the defendant. Nevertheless, although the plaintiff faces other significant barriers to employment, discussed below, there was no evidence that she is physically disabled in a manner that would preclude her from having gainful employment in the future.

The defendant is gainfully employed and can be expected to earn an income commensur-ate with his present income in the future. The plaintiff's future earning capacity is limited by her lack of education and experience in working outside the home, and the language barrier. The plaintiff has been a full-time caregiver since the parties' marriage and never attended school. Even in her native tongue, the plaintiff is unable to read and write. While the plaintiff has taken steps to learn English and gain literacy, it will likely be an extended period of time before

she becomes proficient. Although she may eventually be able to earn some income in a domestic or in an unskilled trade, her prospects for becoming fully self-supporting are poor.

Sixteen-year-old Rozi and two-year-old Amine reside with the plaintiff and she is their full-time caregiver. The defendant has never met Amine and has no formal visitation with Rozi, at the defendant's request.

The plaintiff has been a homemaker and the sole caregiver of the parties' children throughout the marriage. The defendant abandoned the plaintiff and the parties' children in Chad and provided inadequate and intermittent financial support during the thirteen year period that the parties were separated. The defendant has been ordered to pay child support since the commencement of this action.

The plaintiff failed to prove wasteful dissipation of assets by the defendant. While withdrawal of funds from some of the defendant's accounts coincided with the defendant's arrest on domestic violence charges, it is not clear from the record whether these withdrawals were made in contemplation of the matrimonial action and may well have been made to pay for his criminal defense attorney and other expenses related to the criminal action or for household expenses. There was no evidence that tax consequences are a significant consideration in this matter.

The court is cognizant that the defendant has a second family, and four children of another relationship that he is obligated to support. The youngest child is an infant and the mother of those children, Ms. , does not work outside the home.

In view of the foregoing, and taking into account both the plaintiff's limited prospects of becoming self-supporting even with training, the lengthy training that is likely to be necessary before she can become employable in any capacity, as well as the defendant's modest income and

financial obligation to the children of his second family, and the plaintiff's role as sole caregiver for the parties' children throughout the marriage and the defendant's failure to provide adequate financial support during the parties' thirteen year separation, the court finds the plaintiff's modest request for $125 per week in non-durational maintenance to be reasonable and appropriate. This shall be effective from the date of filing of the plaintiff s motion for maintenance, June 12, 2009. Arrears due as a result of this order shall be paid at a rate of $10 per week until fully paid. Payment of spousal support and arrears due thereon shall be payable through the support collection unit.

V. Child Support

The defendant is responsible for supporting his three unemancipated children, All, Rozi, and Amine, until each reaches the age of 21 or is otherwise legally emancipated. In setting the amount of child support, the court has considered the guidelines set forth in D.R.L. §240(1-b) as well as the grounds for deviating therefrom. The court finds that the amount required by the guidelines is just and appropriate in this case. The amount of child support is calculated as follows: The defendant's gross income is $30,500. Since the defendant is an independent contractor whose employer does not withhold FICA and New York City taxes and the defendant did not provide copies of his taxes returns in discovery and offered no evidence that he has paid those taxes, no adjustment for those tax payments is appropriate. The gross income, however, is reduced by the amount of court-ordered maintenance, $6,500 annually. The defendant's adjusted gross income is $24,000. The plaintiff's adjusted gross income is zero. Their combined adjusted gross income is $24,000. The applicable child support percentage is 29%. The support obligation is therefore $6,960 per year, or $140 per week, for which the defendant is solely responsible. This award shall be effective from the date of filing of the plaintiff's motion for upward

modification, June 12, 2009. Arrears due as a result of this order shall be paid at a rate of $10 per week until the arrears are fully paid. Payment shall be made through the support collection unit.

The court is aware that these orders will leave the defendant with limited resources to support his second family. However, the defendant can no longer sacrifice his obligations to the plaintiff and his children with her in favor of his second family. Regrettably, in view of the defendant's limited income and the large number of children, all will be living below the poverty line. The amount left does, however, exceed the self-support reserve for the defendant. The defendant's statement of net worth lists very modest expenses which, with the assistance of food stamps which the family now receives, but was not receiving at the time of defendant's statement of net worth, should be covered by the defendant's remaining income.

VI. Medical Expenses

No evidence was offered at trial by either party concerning the availability of health insurance coverage for the children through the defendant's employer. If no health insurance coverage is available through the defendant's employer, unless she has already done so, the plaintiff shall apply for the state's child health insurance plan pursuant to Title one-A of article twenty-five of the public health law, and the medical assistance program established pursuant to title eleven of article five of the social services law. Should health insurance coverage be or become available to either party, within the meaning of D.R.L. §240(l)(b), the party shall immediately enroll each eligible child to receive such coverage and shall notify the support collection unit of the extent and availability of existing or new benefits and thereafter shall notify the support collection unit of any changes in health insurance coverage.

Nothing in this decision shall preclude the Department of Social Services from seeking reimbursement or enforcement remedies available under the law relating to public assistance and/or medical expenses in the Family Court.

Settle judgment on notice, consistent with this decision within 60 days of the date of this decision. A date for a hearing on the motion for contempt shall be set unless otherwise resolved at the January 20, 2010 court appearance.

Dated: January 20, 2010

PATRICIA E. HENRY Acting
Supreme Court Justice

QUALIFIED MEDICAL CHILD SUPPORT ORDER

At the Matrimonial/IAS Part of the New York Supreme Court at the Courthouse, Nassau County, on the ___ day of _____, 20___.

Present:

Hon. _____ Justice/Referee

----------x Index No. _____

JAMIE DOE	:	Calendar No.
	:	
Plaintiff	:	
against	:	**QUALIFIED MEDICAL CHILD SUPPORT ORDER**
	:	
LEE DOE	:	
Defendant	:	

----------x

NOTICE: YOUR WILLFUL FAILURE TO OBEY THIS ORDER MAY, AFTER COURT HEARING, RESULT IN YOUR COMMITMENT TO JAIL FOR A TERM NOT TO EXCEED SIX MONTHS, FOR CONTEMPT OF COURT.

Pursuant to DRL Sec. 240(1). This Qualified Medical Child Support Order (QMCSO) orders and directs that the unemancipated dependent named herein:

Name	SSN	DOB	Address
Sarah Doe	XXXXX	10/09/06	XXXXX

is entitled to be enrolled in and receive the benefits for which the legally responsible relative named below is eligible, under the group health plan named herein in accordance with Section 609 of the Federal Employee Retirement Income Security Act.

The Participant (legally responsible relative) is:

Name	Social Security No.	Mailing Address
JAMIE DOE	XXXXXX	XXXX

The Dependents' Custodial Parent or Legal Guardian who is to be provided with any identification cards and benefit claim forms on behalf of dependents:

Name SSN - Mailing Address

LEE Doe XXXXX XXXXXXX

The group health plan subject to this order is:

Group Health Plan: Empire Blue Cross Blue Shield
Address: PO Box 1407 Church Street Station
New York, NY 10008-1407
Identification Number: XXXXX
Plan Administrator:
Type of Coverage: medical and hospital

The Defendant has no other group health plans.

ORDERED that coverage shall include all plans covering the health, medical, dental, pharmaceutical, and optical needs of the aforementioned Dependent named above for which the Participant is eligible.

ORDERED that said coverage shall be effective as of

_____, ___ , and shall continue as available until the age of 21 years.

Dated:

ENTER:

_____

J.S.C.

TO: Empire Blue Cross Blue Shield
PO Box 1407 Church Street Station
New York, NY 10008-1407

NOTICE: Pursuant to Section 5241(g)(4) of the Civil Practice Laws and Rules, if an employer, organization or group health plan fails to enroll eligible dependents or to deduct from the debtor's income the debtor's share of the premium, such employer, organization or group health plan administrator shall be jointly and severally liable for all medical expenses incurred on behalf of the debtor's dependents named in the execution while such dependents are not so enrolled to the extent of the insurance benefits that should have been provided under such execution.

The group health plan is not required to provide any type or form of benefit or option not otherwise provided under the group health plan except to the extent necessary to meet the requirements of a law relating to child support described in Sec- tion 1396(g-1) of Title 42 of the United States Code.

SUPPORT COLLECTION UNIT INFORMATION SHEET AND CLIENT AFFIDAVIT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JAMIEDOE	:	Index No.:
	:	
Plaintiff	:	
against	:	**SUPPORT COLLECTION UNIT INFORMATION SHEET**
	:	
LEE DOE	:	
Defendant	:	

The following information is required pursuant to Section 240(1) of the Domestic Relations Law.

PLAINTIFF: JAMIE DOE

Address: Address Confidential

Date of Birth: August 22, 1977

Social Security No.: Confidential

DEFENDANT: LEE DOE

Address: 999 Avenue B, Basement Apt., Brooklyn, New York 11223

Date of Birth: March 12, 1974

Social Security No.: 222-22-2222

Date of Marriage: March 20, 2000

Place of Marriage: the City of New York, Kings County and the State of New York

The wife is the custodial parent and is receiving public assistance.

UNEMANCIPATED CHILDREN:

Name	Date of Birth
Leslie Lovelost	May 5, 2001

SUPPORT:

Maintenance: None

Child Support: Two Hundred and Twenty-five dollars ($225.00) every other week (bi-weekly)

Child support payments are to be made to the Commissioner of Social Services through the Support Collection Unit for New York County.

Total Support: $5,850.00 per year.

Name and address of non-custodial parent's employer: Lub-a-Dub Car Shop, 535 Atlantic Avenue, Brooklyn, NY 11203

Dated: June 5, 2023

(Form UD-8a – 5/99)

ATTORNEY CERTIFICATION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JAMIE DOE	:	Index No.:
	:	
Plaintiff	:	
against	:	**CERTIFICATION BY ATTORNEY**
	:	
LEE DOE	:	
Defendant	:	

CERTIFICATION: I, Dylan Advocate, Esq of My Law Firm LLP, am an attorney duly admitted to the practice of law in the State of New York, and I hereby certify that all of the papers that I have served, filed or submitted to the court in this divorce action are not frivolous as defined in subsection (c) of Sec. 130-1.1a of the Rules of the Chief Administrator of the Courts.

Dated: _____

_____
Dylan Advocate
Attorney for Plaintiff

(Form UD-12 - 5/99)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____
----------X

_____,

Index No. _____

Plaintiff,

AFFIDAVIT OF LATE FILING

-against-

_____,

Defendant.

----------X

STATE OF NEW YORK)
) ss.:
COUNTY OF _____)

_____, being duly sworn, hereby affirms under penalty of perjury the truth of the following facts:

1. My name is _____. I am over the age of eighteen, and reside at _____. I am the Plaintiff in this action for divorce.

2. I make this Affidavit to explain why the accompanying proposed Domestic Relations Order is being filed on Notice of Settlement _____ years after the Judgment of Divorce.

3. Defendant _____and I married on _____. During our marriage, he worked for _____and was a member of the _____ Pension Plan. _____retired and began receiving his pension from _____ in [MONTH AND YEAR].

4. On [DATE], I filed for divorce. I was represented by _____, Esq.

5. On [DATE], the Defendant and I entered into a Stipulation of Settlement. We agreed that, effective [DATE], I would receive one-half of the marital portion of his pension. We also agreed that my interest in the marital portion of the pension would run from [DATE], (the date of our marriage), to [DATE], (the date the Defendant retired/the date this action was commenced/the date of our separation, etc.). He would also be solely responsible for any pension loans outstanding at the time of his retirement.

6. The Stipulation also stated that a Domestic Relations Order (DRO) would be prepared and submitted to the Plan so I could receive my share of the pension. The Defendant and I were supposed to share the cost of the drafting and filing of the DRO.

7. Judge _____ signed the Judgment of Divorce on [DATE], and it was entered on [DATE].

8. When I asked my lawyer about the pension, he only told me that it would be "taken care of," but nothing ever happened. I tried to hire a lawyer to draft the DRO, but the Defendant refused to pay his portion of the cost. I was unable to afford to pay for it myself and I had no idea where else to turn. I am also raising our two children. As a result, I was not able to have a DRO drafted any sooner.

9. In the spring of 2017, I learned that the Mid-Atlantic Pension Counseling Project prepares DROs for free. An attorney from the Project drafted the DRO that is being submitted and obtained a letter dated [DATE], from the Plan stating the DRO is acceptable. A copy of that letter is attached as an exhibit to the DRO.

10. I have acted as diligently and as quickly as possible in drafting the proposed DRO. I do, however, apologize to the Court and to the Defendant for the delays that have occurred. I now respectfully ask the Court to accept the late filing of the DRO.

11. The DRO is being submitted after appropriate notice to the Defendant.

_____
[NAME OF AFFIANT]

Sworn to before me this ___
day of _____, 20__.

_____
NOTARY PUBLIC

POSTCARD

SUPREME COURT: COUNTY OF NEW YORK

Lu Lovelost vs. Lee Lovelost Index No.654321/09

[ ] Submitted divorce papers insufficient. Go to the County Clerk's Office to review papers for corrections and bring new post card.

[ ] Judgment of Divorce signed _____. Go to the County Clerk's Office to obtain certified copy.

[ ] Judgment of Divorce signed. Call _____ for instructions on how to retrieve papers for filing with the County Clerk's Office.

You must mail or deliver to the clerk a Post Card – Matrimonial Action containing the information set forth above, with postage affixed and your name and address on the reverse side.

Note: this postcard is not required in e-filed cases. You will receive an email notification when an e-filed case is processed.

NOTICE OF ENTRY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

JAMIE DOE	:	Index No.:
	:	
Plaintiff	:	
against	:	**NOTICE OF ENTRY**
	:	
LEE DOE	:	
Defendant	:	

STATE OF NEW YORK, COUNTY OF _____, ss.

PLEASE TAKE NOTICE that the attached is a true copy of a Judgment of Divorce in this matter that was entered in the Office of the County Clerk of _____ County, on [*Insert:* date of entry].

Dated: _____

_____
Abby Attorney, Esq.
Law Firm, LLP
Attorneys for Plaintiff
123 Fifth Ave.
New York, NY 10001
(212) 555-1212

TO: LEE DOE
Defendant
789 Battery St.
Bronx, NY 11365

G. Retirement Accounts

RETIREMENT BENEFITS CHECKLIST

See Instructions for each line number. Italicized terms are defined in the Instructions.

1. *Participant*

   Name:

   Address:

   Social Security Number:

   Date of Birth:

2. *Alternate Payee*

   Name:

   Address:

   Social Security Number:

   Date of Birth:

3. Marital information

   Date of Marriage

   Date of commencement of divorce

   Date of divorce judgment

   Is there a separation agreement/property stipulation?

   - ❑ Yes
   - ❑ No

4. Employment information

   Name of Employer(s)

   Date of hire

   Date of termination

   Compensation for past 5 years

5. Plan information

Name: _____

Address: _____

Type of Plan:

- ❑ ERISA
- ❑ Non-ERISA
- ❑ Defined Benefit
- ❑ Defined Contribution

6. Plan Documents to obtain:

- ❑ Summary Plan Description (SPD)
- ❑ Plan's DRO processing procedures
- ❑ Plan's model DRO

7. Benefit Information

Months of Credited Service during marriage: _____

Total Months of Credited Service (if known): _____

Payment status of retirement benefits

- ❑ Not yet in pay status
- ❑ Being paid

Amount of benefits paid (if applicable): $_____

Form in which benefits are being paid (if applicable):

- ❑ Single-life annuity
- ❑ Joint & survivor annuity

Beneficiary name and relationship to Participant:

_____

- ❑ Normal Retirement
- ❑ Early Retirement
- ❑ Disability
- ❑ Other

Is there an earlier DRO for a previous spouse?

- ❑ Yes
- ❑ No

8. Protecting the non-employee spouse's rights

Is a stay appropriate to prevent the employee spouse from withdrawing funds, taking a loan against the funds, retiring, or selecting a particular form of payment?

- ❑ Yes
- ❑ No

9. Method of distribution

- ❑ Lump sum (cash): $_____
- ❑ In exchange for another asset
- ❑ Equitable distribution
- ❑ Set amount: $_____
- ❑ Formula:

10. Survivor Rights

- ❑ Pre-retirement survivor annuity

To full extent or to *Majauskas* share? (circle one)

- ❑ Post-retirement (joint and survivor) annuity

To full extent or to *Majauskas* share? (circle one)

Survivor annuity adjustments:

- ❑ Will the non-employee's share of benefits paid during employee spouse's lifetime be calculated as a share of the reduced joint and survivor annuity or
- ❑ Will the non-employee spouse's share of pension during employee-spouse's lifetime be calculated as though the employee-spouse had elected an option providing for the highest payment so the non-employee's share would not be impaired (but the employee's share would be impaired)
- ❑ Other survivor benefits:

E.g., employer-provided life insurance

11. Timing Issues

Commencement of Alternate Payee's benefits:

- ❑ As soon as Participant is eligible
- ❑ When Participant collects

Duration of benefits

- ❑ Lifetime of Participant
- ❑ Lifetime of Alternate Payee
- ❑ Term certain (e.g., 24 months): _____

12. Additions to benefits

- ❑ Cost of Living Adjustments or other *ad hoc increases*
- ❑ *Subsidies or supplements*

13. Reductions

Optional forms of benefits

Will the Participant be required by stipulation or otherwise to elect a particular option?

- ❑ Yes
- ❑ No

If yes, what is the option? _____

Will the Alternate Payee's share be determined prior to any actuarial reduction for an optional form of payment?

- ❑ Yes
- ❑ No

Loans

Does the plan provide for loans

- ❑ Yes
- ❑ No

Has the Participant taken out a loan

- ❑ Yes
- ❑ No

If so, when and how much: _____

Will the Alternate Payee's share be determined prior to any reduction for any loan

- ❑ Yes
- ❑ No

Withdrawals of employee contributions

Does the plan provide for withdrawal of employee contributions

- ❑ Yes
- ❑ No

If yes:

- ❑ Provide that the Alternate Payee will receive a pro rata share of the refund of employee contributions;
- ❑ Or forbid the Participant from obtaining refund of contributions/withdrawing from the plan

14. Taxes

Will Alternate Payee be responsible for taxes on their share of benefits

- ❑ Yes
- ❑ No

Christopher Dagg
Staff Attorney
Brooklyn Legal Services
Mid-Atlantic Pension Counseling Project
105 Court Street
Brooklyn, NY 11201
Tel: (646) 442-3304
Fax: (646) 442-3305
E-mail: cdagg@lsnyc.org

INSTRUCTIONS AND DEFINITIONS

1. ***Participant:*** the spouse whose employment has entitled or may entitle them to retirement benefits.

2. ***Alternate payee:*** the non-participant spouse who may be eligible to a portion of the Participant's retirement benefits under the Domestic Relations Law.

3. Marital information

In drafting a Domestic Relations Order or a Qualified Domestic Relations Order that assigns a share of retirement benefits to an Alternate Payee, the drafter is normally confined to the terms of a separation agreement or judgment of divorce.

4. Employment information

Note that a participant may have had several jobs during the marriage. Each one might have its own retirement benefits. List every job. Dates of employment and compensation may determine the value of the benefits.

5. Plan information

There may be more than one retirement benefits plan. Some employers offer more than one plan (e.g., a defined benefit plan and a 401k), or the Participant may have held different jobs during the marriage. IRAs and employer-provided health insurance might also be part of the marital assets, even though they are not distributable by a DRO or QDRO.

ERISA Plans are maintained by private employers either alone or as a result of collective bargaining agreements with unions. By law, these plans must provide survivor benefits to nonparticipant spouses (unless the spouse waives that right). Domestic relations orders that assign a portion of the retirement benefits to an alternate payee must be "qualified" by the plan.

Non-ERISA Plans include government plans for civil servants and plans maintained by religious organizations that have not elected to be subject to ERISA. Although these plans are not required to provide surviving spouse benefits, they usually do, though the spouse's consent to an option that doesn't so provide is not required.

Defined Benefit Plans are traditional pension plans that usually provide a monthly benefit check calculated according to a formula. There is no separate account maintained for the participants. In New York (and New Jersey), Defined benefit plan benefits are often distributed according to the *Majauskas* formula. *Majauskas v. Majauskas*, 61 N.Y.2d 481 (1984).

Defined Contribution Plans include 401k plans, profit sharing plans, etc. In these plans, the amount of the contribution made by the employer is defined (e.g., matching contributions; 7% of salary). Individual accounts are often maintained and the value of the benefit can be seen as an account balance. Instead of using the *Majauskas* formula, divorcing parties frequently stipulate to a sum certain (e.g., $15,000) or a percentage of the marital portion (the amount accrued during the marriage plus interest and investment returns).

6. Plan Documents

You should obtain the Plan's operating documents, Domestic Relations Order procedures and sample DROs (if available). Chris has a library of plans, or use the authorization form at Appendix A to obtain them from the Plan's administrators. If the Participant is not willing to authorize the Alternate Payee to obtain this information, you may need a subpoena. If the plan is subject to ERISA, the Alternate Payee has the right to this information upon written request but many plans don't know this. See 29 C.F.R. § 2520.104a-8.

7. Benefit information

Months of Credited Service may differ from total months of employment. A Participant need not be vested during the marriage for benefits to be subject to equitable distribution so long as the Participant eventually does vest.

Single-life annuity is a pension payable for the lifetime of the participant. All benefits stop upon the death of the participant. This provides the maximum amount of benefits to the participant.

A joint and survivor annuity is also payable for the lifetime of the participant, but a survivor benefit is also payable to the *beneficiary* if the participant dies first. The amounts are usually reduced to take into account the fact that benefits are payable for a longer period. The amount of the survivor benefit may be a fraction of the amount paid to the participant (e.g., 50% of the amount paid to the participant during their joint lives). The *beneficiary* is the recipient of the survivor benefits, either by designation or by operation of law (e.g., for ERISA plans, a participant's spouse is entitled to survivor benefits unless they are waived in writing). An Alternate Payee can be the designated beneficiary.

Disability benefits are also subject to equitable distribution to the extent of the portion attributable to deferred compensation; the portion related to personal injury is considered the separate property of the disabled participant. As always, the parties can stipulate differently.

If all of part of the participant's benefits are already subject to a previous DRO, those benefits cannot be assigned to the client.

8. **Protective Orders**

To protect the pension asset, it might be necessary to have the court issue a restraining order prohibiting the withdrawal of funds, taking a loan against the accrued benefits, or commencing payment of benefits in a particular form (e.g., with no survivor benefits).

9. Method of distribution

Lump-sum (cash) or in exchange: For defined contribution plans, determining the amount available is a matter of looking at the account balance as of the valuation dates, e.g., the date of the filing of the action for divorce less the amount in the account on the date of the marriage. In the case of defined benefit plans, the help of an actuary to determine the present value of the benefits may be required if he plan administrator won't do it for you.

Equitable distribution of retirement benefits under *Majauskas* can be by formula (e.g., "50% of the marital share") as determined by the court or stipulation, or a set amount ("$100.00 a month for life"). Sample language is found in Appendix B.

The *marital share* is typically the amount of benefits that accrued *during the marriage*, but the parties may stipulate to something else.

"During the marriage" is usually from date of marriage to the commencement of the divorce action, but the parties can stipulate otherwise.

10. Survivor Rights

Pre-retirement survivor annuity provides a survivor benefit in the case of a participant who dies prior to retirement. This benefit is usually payable only when the participant could have begun collecting (e.g., on date when participant would have turned normal retirement age).

Joint and survivor annuity is paid to the participant for their lifetime and to the surviving spouse for their lifetime.

If the participant is already collecting benefits in a form that does not provide survivor benefits, it's usually not possible to change the form. Try instead to negotiate for them to maintain a life insurance policy for the alternate payee.

If the participant has not yet started collecting benefits, try to stipulate that they will select an option that provides survivor benefits and designate the alternate payee as beneficiary. The DRO can direct the plan administrator not to pay in any other form or to any other beneficiary.

Extent: The Alternate Payee can be the survivor for purposes of the *Pre-retirement survivor annuity* and/or the *joint and survivor annuity* either to the same extent as if the parties had remained married or only to the extent of the formula established for payment of benefits.

Other benefits may include insurance policies, burial payments, etc.

11. Timing Issues

Note that if the Alternate Payee's benefits begin before Participant begins collecting, the alternate payee might forfeit subsidized benefits or the increase in benefits that would come with additional years of service if the Participant continues working/

Government plans usually do not allow the Alternate Payee to start collecting until the Participant starts collecting.

12. Additions to benefits

Cost of Living Adjustment ("COLA") is an increase in the amount of a benefit to offset inflation.

Supplements or subsidies come in different types. Examples include early retirement benefits that pay a full pension that is not actuarially reduced.

An Alternate Payee will be eligible for COLAs or *supplements or subsidies* only if expressly provided for in the DRO. Most government plans routinely provide COLAs. COLAs are rare in ERISA plans, but because plans can always be amended in the future to provide them, they should be included in negotiations as a possible asset.

13. Reductions

Either provide for the consequences in the event of a reduction in benefits or forbid the Participant from making and the plan from honoring such an election.

Loans that are not paid back by the time benefits commence may lead to a permanent reduction in benefits.

Withdrawals of employee contributions may end participation in the pension plan, particularly in the case of a government plan.

14. **Taxes**

Retirement benefits are taxable by federal government; state/local benefits not taxable by New York State if the recipient is a New York resident.

If the alternate payee is the spouse or former spouse of a participant, payments to the alternate payee are taxed to the alternate payee. If the alternate payee is the participant's child or dependent, the participant is taxed.

If distributions to an alternate payee may be "rolled over" to another pension plan or an IRA, taxes are generally deferred until withdrawn.

NAMES AND ADDRESSES OF RETIREMENT PLANS

PUBLIC PLANS:

Most N.Y.C. employees are covered by one of the following Pension Plans:

New York City Employees' Retirement System (NYCERS)
335 Adams Street, Suite 2300
Brooklyn, New York 11201-3751
(347) 643-3912
Jodie Nagel, Counsel
Sonya Grant, Assistant Director

New York City Board of Education Retirement System
65 Court Street
Brooklyn, New York 112 01
Attn: Christine Bailey, Exec. .Director
Todd Rubinstein, Counsel (718) 935-4268

The Cultural Institutions Retirement System
c/o Buck Consultants
500 Plaza Drive, 8th Fl.
Secaucus, NJ 07096-1533
(212) 524-2477
(212) 524-2485

New York City Fire Department Pension Fund
250 Livingston Street
Brooklyn, New York 11202-5884
Board of Trustees

New York City Police Pension Fund
Legal Division
233 Broadway 25th Floor
New York, NY 10038-1497
(212) 233-7633
Fax (212) 233-3759
Pension Legal Department (212) 374-5400
Rhonda Cavagnaro, Counsel

Manhattan and Bronx Surface Transit Operating Authority (MABSTOA)
MABSTOA Pension Plan
370 Jay Street
Brooklyn, New York 11201

(718) 330-3000
Ed Boden, (718) 243-8840

Teachers Retirement System of the City of New York
55 Water Street
New York, NY 10041
1-888-8NYC-TRS
Additional Contact:
Carolyn Lawler, (212) 386-5288, fax (212) 386-5380

In addition to their pension, many N.Y.C. employees are covered by a deferred compensation plan, or additional annuity plan:

City of New York Deferred Compensation Plan
The City of New York 457 Deferred Compensation Plan
40 Rector Street, Third Floor
New York, New York 10006
(212) 306-7707 Fax (212) 306-7376
Dorothy A. Wolfe, Director of Employee Benefits Program
Additional Contact: Roseann Amenguel, Assistant Director, (212) 306-7352

The employees of the following agencies are not eligible for participation in the City of New York Deferred Compensation Plan, and have their own deferred compensation plans:

- Health and Hospitals Corporation
- CUNY
- Board of Education
- O.T.B.
- Metropolitan Transit Authority
- N.Y.C. Transit Authority
- MABSTOA

City University of New York Deferred Compensation Plan
Travelers Tax Sheltered Annuity Plan
The Copeland Companies
80 Grasslands Road
Elmsford, New York 10523
Ruby Lambert, Regional Manager (914) 345-8233

The Metropolitan Transportation Authority of the State of New York
MTA Deferred Compensation Plan
FAS Corp
8515 East Orchard Road
Englewood, CO 80111

Attn: Correspondence 6T2
1-866-682-7565,
fax 303-737-4861

O.T.B.
Off Track Betting Deferred Compensation Plan Under:
The Deferred Compensation Plan for Employees of the State of New York and Other Participating Public Jurisdictions
The Copeland Companies
(The Administrative Service Agency)
Two Tower Center
P.O. Box 1063
East Brunswick, New Jersey 08816
Norma Hall
Fax (732) 514-2062

New York City Board of Education Deferred Compensation Plan
Section 403-B Plan for those in Education Service
Board of Education Retirement System Tax Deferred Annuity
65 Court Street
Brooklyn, New York
(718) 935-5400
Christine Bailey, Executive Director
Todd Rubinstein, Counsel

In addition to their pensions, and deferred compensation plans, some N.Y.C. employees are covered by an annuity through their unions:

N.Y.C. Corrections Officers Benevolent Association Compensation Accrual Fund (or NYC Corrections Officers[1] Benevolent Annuity Fund)
200 Park Avenue South, Suite 1200
New York, New York 10003
(212) 505-5105

Annuity Fund of the Detectives Endowment Association
Police Department of the City of New York
26 Thomas Street
New York, New York 10007
(212) 587-9120
Sharon Robinson, Fund Manager

Annuity Fund of the Police Benevolent Association
40 Fulton Street, 2nd Floor
New York, New York
(212) 349-7560

Annuity Fund of the Captains' Endowment Association
New York City Transit Police Officers Annuity Trust Fund
Metlife
Retirement and Savings Center
P.O. Box 46516
Denver, Colorado
80201-6516 (800) 962-8320

Annuity Fund of the New York Sergeants' Endowment Association
35 Worth Street
New York, New York 10013
Attn: Glenn Finddlemen

Uniform Sanitationmens Association Compensation Accrual Fund
25 Cliff Street
New York, New York 10038-2898
(212) 964-8900
Administrator ~ Francine Mohink

Uniform FireFighters Association Compensation Accrual Fund
204 East 23 Street, 3rd Floor
New York, New York 10010-4611
(CIGNA)

Other Governmental Pensions/Retirement Plans:

N.Y.S. Employees:
New York State and Local Retirement System
110 State Street Albany, NY 12233

New York State Employees' Deferred Compensation Plan
N.Y.S. Deferred Compensation Plan
Administrative Service Agency, PW-03-01
P.O. Box 182797
Columbus, OH 43218-2797

New York State Teachers' Retirement System
10 Corporate Woods Drive
Albany, New York 12211-2395
1(800)356-3128 or 518-447-2666
Federal Employees are covered under either the Federal Employees Retirement System (FERS) or the Civil Service Retirement System (CSRS):

Federal Employees Retirement System or Civil Service Retirement System
U.S. Office of Personnel Management

Court Ordered Benefits Section
Post Office Box 16
Washington, D.C. 20044-0016
(202) 606-0222 in blue book
Associate Director for Retirement and Insurance

United States Office of Personnel Management
Office of Retirement & Insurance Service
Theodore Roosevelt Building
1900 E Street, NW
Washington, D.C. 20415-0001

To get pension records of postal workers in N.Y.C., send authorization to

U.S. Postal Service
Employees Benefits
JAF Building, Room 4516 G
380 W. 33rd Street
New York, New York 10199-9421

Federal Employees may also be covered under a Thrift Savings Plan:

THRIFT SAVINGS PLAN for Federal Employees (TSP)
Thrift Savings Plan Service Office
National Finance Center
P.O. Box 61500
New Orleans, Louisiana 70161-1500
Eileen K. Hamblen, Head Thrift Savings Plan Service Office

Army National Guard Retirement System (and other Uniformed Services)
Defense Finance and Accounting Service
Cleveland Center
Garnishment Operations
P.O. Box 998002
Cleveland, Ohio 44199-8002

PRIVATE PLANS:

Verizon
Verizon
100 Half Day Road
P.O.Box 1457
Lincolnshire, Illinois 60069 1-866-998-8777

CITIGROUP INC. EMPLOYEES
Citigroup Pension Plan
Citicorp Retirement Services
Attn: Qualified Order Team
P.O. Box 1433
Lincolnshire, IL 60069

CON EDISON EMPLOYEES
The Consolidated Edison Retirement Plan for Management Employees
The Consolidated Edison Pension and Benefits Plan
The Con Ed. Thrift Savings Plan
Ceridian Benefits Services Inc.
Attn: Con Edison QDRO Dept.
One Independence Way
P.O. Box 2023
Princeton, New Jersey 08543-2023
(609) 734-9461 Fax (609) 734-9477
For Pension Information:
Con Edison Employee Benefits
Office E
4 Irving Place
New York, New York 10003
(212) 780-8000

DELTA AIRLINES EMPLOYEES
Delta Family Care Retirement Plan Hartsfield Atlanta International Airport Atlanta, Georgia 30320-6001

Union Plans:
Building Service 32B-J Pension Fund
101 Avenue of the Americas, 16th Floor
New York, New York 10013 (212) 388-3800
Attn: Mary Ellen Boyd, Administrator, (212) 388-2144

The 1199 Health Employees Pension Fund
310 West 43rd Street
New York, New York 10036-6498
Bruno Sam, Assistant Director (212) 465-4862

Iron Workers Locals 40, 361 and 417 Pension Fund
Iron Workers Locals 40, 361 and 417 Annuity Fund
Iron Workers Locals 40, 361 and 417 Topping Out Fund
451 Park Avenue South
New York, New York 10016

Joint Industry Board of the Electrical Industry
(Plan names: Pension Trust Fund of the Pension, Hospitalization and Benefit Plan of the Electrical Industry, Annuity Plan of the Electrical Industry, Deferred Salary Plan of the Electrical Industry, Additional Security Benefits Plan of the Electrical Industry)
158-11 Harry Van Arsdale Jr. Ave
Flushing, New York 11365
Tel. (718) 380 591-2000 Fax (718) 380-7741
Marsha Collock, Ass't Benefits Manager

APPENDIX B

SAMPLE SETTLEMENT LANGUAGE

From Karen Greenberg, Esq., A Basic Guide to Pensions, Deferred Compensation Plans and Other Retirement Benefits for Matrimonial Attorneys (Dec. 2005)

1. NYCERS pension; 50% distribution to client of marital share of opposing party's benefits:

   The client shall be awarded an irrevocable interest in the opposing party's pension benefits under the N.Y.C.E.R.S. pension plan pursuant to the formula set forth in Majauskas as follows: The client shall be entitled to 50% of a fraction of the opposing party's monthly pension, the numerator of which fraction is "a", representing the number of months the opposing party was in the pension plan during the marriage and the denominator of which fraction is "b", representing the total number of months that the opposing party has been covered in the pension plan at the time of his retirement.

2. ERISA pension; 50% distribution to the client of marital share of opposing party's benefits:

   The client shall be awarded an irrevocable interest in the opposing party's pension benefits under [name of plan] as follows: The client shall receive 50% of the opposing party's vested and accrued benefit as of the benefit commencement date, multiplied by a fraction, the numerator of which is "a", representing the number of months of the opposing party's credited service in the plan during the marriage, and the denominator of which is "b", representing the total number of months of the opposing party's credited service as of the benefit commencement date, which is the date of the opposing party retirement, or the date the client elects to begin to receive their pension share, whichever occurs first.

Excerpt from Stipulation

EQUITABLE DISTRIBUTION

1. In consideration of other provisions of this Stipulation, the following property shall be divided as follows: All marital property has been distributed to the parties' satisfaction, except the Husband's retirement plans, the New York City Police Pension Fund and the Deferred Compensation Plan for Employees of the City of New York, which shall be divided as set forth below.

Retirement, Defined Benefit, and/or Deferred Compensation Plans

2. Except as otherwise provided for in this Stipulation, the Husband shall retain and have all right, title, and interest as to any and all savings and checking accounts, businesses, securities, investments, IRAs, annuities, profit sharing plans, deferred compensation plans, etc., which are now in his name, control or possession, or held jointly with another or others or in trust for him or for another. The Wife specifically waives any claim to any interest in the foregoing.

3. Except as otherwise provided for in this Stipulation, the Wife shall retain and have all right, title, and interest as to any and all savings and checking accounts, businesses, securities, investments, IRAs, annuities, profit sharing plans, deferred compensation plans, etc., which are now in her name, control or possession, or held jointly with another or others or in trust for her or for another. The Husband specifically waives any claim to any interest in the foregoing.

i. New York City Police Pension Fund

4. A Qualified Domestic Relations Order (QDRO) shall be entered to effectuate the division of the defendant's Police Pension Fund pension according to the terms set forth below.

5. The husband's retirement benefits with the New York City Police Department, to the extent to which they have accrued during the marriage as hereinafter set forth, are marital property. This shall include the monthly pension benefit payable under the Pension Fund and any improvements, adjustments, or Cost of Living Adjustments (COLA), and shall also include any Variable Supplement Fund payments.

6. The term "Retirement Allowance" means the total monthly benefit payable to the husband by the Plan pursuant to the terms of the Plan, and shall be deemed to include any lump sum refund of contributions, post-retirement improvements, Cost of Living Adjustments (COLA), Variable Supplement Fund payments, and any early retirement subsidiary which is now, or may hereinafter be available or offered to the husband.

7. The wife's share shall be calculated based on the husband's full retirement allowance prior to any reduction for any option that may be selected by the husband.

8. The wife's share shall not be diminished on account of any outstanding pension loan balance that the husband may have at the time of his retirement, including but not limited to any pension loans outstanding as of February 25, 2008, and any such loans shall be repaid solely by the husband unless he brings a post-Divorce Judgment motion and establishes that the monies for those loans were used for the benefit of the wife during the marriage.

9. Should the husband retire on a disability pension, the wife shall receive a share of the disability pension attributable to the husband's earnings and years of credited service only. Said share shall be calculated in the same manner as a normal service pension would be calculated without any reduction for early termination of employment. This calculation shall be performed even if the husband has not yet attained vested status at the time of such disability retirement.

10. The term "Coverture Fraction" shall be defined to mean a fraction which represents that portion of the husband's retirement allowance acquired during the parties' marriage. The numerator of said fraction is 125 months (representing the number of months of the husband's credited service during the marriage), and the denominator of said fraction is the total number of months of the husband's credited service as of the date of the husband's retirement, termination of employment, or death.

11. At such time as the husband has retired from and is actually receiving a Retirement Allowance from the New York City Police Department Pension Fund, Article IIA, the said New York City Police Department Pension Fund, Article IIA, in accordance with the formula devised in the case of Majauskas v. Majauskas, 61 N.Y.2d 481 (1987), shall pay to the wife that portion of the husband's monthly Retirement Allowance which is equal to fifty percent (50%) of the product obtained by multiplying the total amount of the monthly Retirement Allowance due the husband, by the Coverture Fraction. The wife shall be entitled to receive the same percentage of the annual Variable Supplement Fun benefit if it becomes available to the husband.

12. The husband is hereby directed to designate the wife as the beneficiary of the husband's pre-retirement survivor benefit, so that in the event the husband dies prior to his retirement, the wife shall receive a portion of the pre-retirement death benefit, calculated pursuant to a fraction, the numerator of which is 125 months, and the denominator shall be the total service credit as the date of the husband's death, multiplied by 50%, and then multiplied by the pre-retirement survivor benefit. Within 15 days after the QDRO is signed by the Court, the husband shall complete and submit all necessary Designation of Beneficiary forms as required by the Fund to ensure that this provision is complied with. Within 15 days after said Designation of Beneficiary have been filed with the Fund, the husband shall provide copies of the Designation of Beneficiary forms (time stamped by the Fund) to both the wife and her attorney, via Certified Mail.

13. In the event that the husband's employment is terminated prior to the time that he becomes vested in a retirement benefit, and he becomes eligible to receive a return of his accumulated annual contributions plus interest, the wife shall receive a pro rata share of said return of accumulated annual contributions plus interest accrued on the date of termination. The wife's share shall be fifty percent (50%) of the amount determined by multiplying the total return by the Coverture Fraction.

14. The husband shall designate the wife as beneficiary of the husband's pension with the Fund. At the time of his retirement, the husband shall choose Option 4, Annuity so that in the event the husband dies while the pension is in pay status the wife shall receive a monthly annuity in the same amount as calculated under the Coverture Fraction formula hereinafter set forth. In the event that by choosing the retirement option 4, there is a reduction in the maximum pension which the husband will receive, the amount of that

reduction shall be charged only to the wife's share of the pension. The parties shall divide the reduction evenly from each of their shares of the pension.

15. The husband shall have the right to choose the "Pop-Up" Option Modification so that in the event the wife dies while the pension is in pay status, the retirement allowance reverts back to the maximum retirement allowance. The "Pop-Up" may only be applied to Option numbers 2, 3 and 4 Annuity.

16. Should the law or regulations of the Fund or its rules and procedures regarding the acceptance and implementation of Domestic Relations Orders be modified or otherwise revised subsequent to the acceptance of this Domestic Relations Order so that the provisions herein are binding and obligating to the husband, may also be made a binding obligation on the Fund, then this Domestic Relations Order shall automatically become a binding obligation on the Fund.

17. The Fund is to withhold from the husband's Retirement Allowance for equitable distribution payments to the wife the amount computed pursuant to the QDRO. For so long as the husband begins to receive a Retirement Allowance from the Fund, the wife is entitled to receive a monthly benefit payable until the death of the husband or the death of the wife. If the husband predeceases the wife, and at the time of the husband's retirement, he chose a death benefit option naming the wife as beneficiary, the benefits shall continue to the wife under said option.

18. In the event the wife dies after commencement of benefits to her, the husband shall have full benefits paid to him and shall choose any pension option available and this Domestic Relations Order shall be void.

19. Nothing contained in the QDRO shall be construed to require the Pension Fund or Pension Fund Administrator to:

(a) provide any form, type or amount of benefit, or any portion, not otherwise provided for under the Pension Fund;

(b) provide increased benefits determined on the basis of actuarial value; and require the payment of benefits to the wife which are required to be paid to another wife under another order previously determined to be a Domestic Relations Court Order.

20. The Pension Fund shall have no obligation or responsibility as a consequence of this action apart from the specific directions contained in the QDRO.

21. The Fund Administrator shall issue separate checks to the husband and the wife for their respective interests in the Fund and the Variable Supplement Fund at the time the benefits become payable.

22. In the event that the Plan Trustee inadvertently has paid or shall pay to the husband any benefits that are assigned to the wife pursuant to the terms of the QDRO, the husband shall immediately reimburse the wife to the extent that he has received such benefit payments, and shall forthwith pay such amounts so received directly to the wife within ten (10) days of receipt.

23. This Court shall retain jurisdiction to implement and supervise the payment of retirement benefits as provided herein should either party of the Pension Fund Administrator make such application, and the Court determines such to be appropriate and necessary.

ii. Deferred Compensation Plan for Employees of the City of New York

24. The parties agree that the wife shall be entitled to a portion of the husband's 457 Deferred Compensation Plan for Employees of the City of New York pursuant to a Qualified Domestic Relations Order (QDRO), to be determined as follows.

25. The husband's account in the Plan, to the extent to which it accrued during the marriage, is marital property.

26. The Plan Administrator shall establish a separate 457 account in the name of the wife, in the amount of 50% of the husband's contributions to the 457 account from September 30, 1997 until February 25, 2008, together with earnings and/or losses from the date of the marriage, until such time as the account is established for the wife. The wife's share of the plan shall not be diminished by any loans or withdrawals the husband may have taken, including but not limited to a loan issued to the husband in December 2005 for $5,686, and any such loans shall be repaid solely by the husband unless he brings a post-Divorce Judgment motion and establishes that the money for that loan was used for the benefit of the wife during the marriage. The wife shall be eligible for distribution upon the creation of the separate account even if the husband has not separated from service with the City of New York provided the rules of the plan so provide.

27. The husband shall not make any type of withdrawal or take any loan after the date of signing of this stipulation and before the establishment of the wife's separate account which will cause the account balance to fall below the amount awarded to the wife. In the event that the husband made any withdrawal or took any loans from the plan prior to the signing of this Stipulation which caused the account balance to fall below the

amount awarded to the wife, he shall be responsible for reimbursing the wife for any shortfall, directly to the wife, from the husband's own separate assets.

28. Nothing contained in the QDRO shall, in any way, require the Plan to provide any form, type or amount of benefits not otherwise available by law.

29. The Plan shall have no obligation or responsibility as a consequence of the instant action apart from the specific direction contained in the QDRO.

30. In the event of a change of address of said wife, the wife shall immediately notify, in writing, the Plan at 40 Rector Street, 3rd Floor, New York, New York 10006.

31. The order shall not require the Plan to pay any benefits to another wife.

32. Taxes shall be withheld from any distributions to the husband and the wife, and reported for tax purposes, in accordance with the applicable laws in effect at the time of distribution, however, if by reason of the distribution caused by the QDRO taxes are due, then the wife shall be responsible for payment of all of those taxes. **The parties shall divide the taxes attributable to the distribution equally.**

33. The Court shall retain jurisdiction to enforce, revise, modify or amend the QDRO.

34. The death of the husband shall have no effect on the payment of the benefit assigned by the QDRO to the wife.

35. In the event of the death of the wife prior to distribution from the Plan of the amount set forth above, such amount shall be payable to the estate of the wife, if this is permitted by the Plan, provided that once benefits have begun to be paid to the wife the

form of benefit elected shall determine if any additional amounts shall be paid on the wife's death.

36. In the event that the Plan Trustee inadvertently pays to the husband any benefits that are supposed to be paid to the wife pursuant to the terms of this Order, the husband shall immediately reimburse the wife to the extent that he has received such benefit payments, and shall forthwith pay such amounts received directly to the wife within ten (10) days of receipt.

iii. Other Pension or Retirement Funds

37. The husband represents that the Plans described above are the only pension or retirement funds in which he has an interest. The wife expressly reserves her right to no less than 50% of the share to which the husband is entitled that accrued from September 30, 1997 through February 25, 2008, including any refund of contributions and calculated prior to any option modification of any other pension or retirement fund in which the husband has an interest that is discovered after the date of signing of this Stipulation.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

WIFE,

Plaintiff,

-against-

HUSBAND,

Defendant.

----------X

Index No.

STIPULATED QUALIFIED DOMESTIC RELATIONS ORDER

WHEREAS the parties were married to each other on [DATE} in the Town of [TOWN], County of [COUNTY], State of [STATE], and a Judgment of Divorce was entered by this Court on [DATE]; and

WHEREAS, this Court has personal jurisdiction over all parties and jurisdiction over the subject matter of this Order;

WHEREAS, this Order is entered pursuant to Section 236B of the Domestic Relations Law of the State of New York to enforce the marital rights of Plaintiff, as the Former Spouse; and

WHEREAS, the parties and the Court intend that this Order shall be a Qualified Domestic Relations Order ("QDRO") as defined in Section 414(p) of the Internal Revenue Code of 1986, as amended (the "Code"), and Section 206(d) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") that assigns certain benefits in the [NAME OF FUND] Pension Fund as specifically set forth in this Order; and

WHEREAS, the parties have stipulated that the Court shall enter this Order;

NOW, it is ORDERD and ADJUDGED as follows:

1. The "Participant" is Defendant [HUSBAND'S NAME]. The Participant's last known address is [ADDRESS]. The Participant's Social Security Number is [SS#]. The Participant's date of birth is [DOB].

2. The "Alternate Payee" is Plaintiff [WIFE'S NAME], the Former Spouse of Participant. The Alternate Payee's address is [ADDRESS]. The Alternate Payee's Social Security Number is [SS#]. The Alternate Payee's date of birth is [DOB].

3. This Order applies to benefits under the Plan Document and Summary Plan Description (the "Plan") of the [NAME OF PENSION] Pension Fund (the "Fund").

4. The "Plan Administrator" is the Board of Trustees of the Fund.

5. The Alternate Payee's interest under the Plan is to be determined as follows: Alternate Payee is awarded from the Fund as her sole and separate property {formula or set amount} of each benefit payment that the Fund makes to the Participant. The balance of each benefit payment that the Fund makes to the Participant is to be the sole and separate property of the Participant.

The Fund is hereby ordered to pay directly to the Alternate Payee the benefit under the Plan as set forth above from all future payments to the Participant as soon as such payments to the Participant are made and the QDRO has been approved.

6. In the event of the death of the Participant before benefits are in pay status, no payments will be made to the Alternate Payee unless the Alternate Payee is entitled to a portion of the qualified pre-retirement survivor annuity. In the event of the death of the

Participant after benefits are in pay status, payments will cease to the Alternate Payee, subject to the pension option chosen by the Participant. If the Participant chooses a pension option whereby payments continue to a joint pensioner or beneficiary after the Participant's death, payments to the Alternate Payee will continue in accordance with paragraph 5 and based on the amount of the payment to the joint pensioner or beneficiary. Payments to the Alternate cease when payments to the joint pensioner or beneficiary cease. In making this calculation the benefit will be calculated without regard to any early retirement subsidies unless the Participant is already retired with an early retirement subsidy. If the Participant is already retired or simultaneously retiring when the Alternate Payee commences payments from the Plan and the Participant is eligible for an early retirement subsidy, then the Alternate Payee's benefit will be calculated to include such early retirement subsidy. The balance of the Participant's accrued benefit in the Fund is to be the sole and separate property of the Participant.

7. In the event of the death of the Alternate Payee before benefits are in pay status, payment to the Alternate Payee shall be forfeited. In the event of the death of the Alternate Payee after benefits are in pay status, the amount of payment to the Alternate Payee shall no longer be subtracted from the Participant's benefit payment and the full amount of the benefit will be padi to the Participant.

8. The Alternate Payee shall receive payments from the Fund of the benefits assigned to the Alternate Payee under this Order (including, in accordance with the Fund's QDRO policy, payments attributable to the period in which the issue of whether this Order is a qualified domestic relations order is being detained) commencing as soon as practicable after this Order has been determined to be a qualified domestic relations order,

or, if later, on the date the Participant commences receiving benefit payments from the Fund. Payment to the Alternate Payee shall cease on the earlier of {insert date of future event, such as the Alternate Payee's remarriage} or the date that payments from the Fund with respect to the Participant cease.

SELECT APPROPRIATE PARAGRAPH 9 FROM THESE THREE:

Alternate Payee Treated as Spouse for All Spousal Survivor Benefits:

9. The Alternate Payee shall be treated as the Participant's spouse under the Plan for purposes of §§ 401(a)(11) and 417 of the Code with respect to the {50% or 100% - pick one} qualified joint and survivor annuity and the qualified pre-retirement survivor annuity.

Alternate Payee Treated as Spouse for a Portion of the Spousal Survivor Benefits:

9. The Alternate Payee shall be treated as the Participant's spouse under the Plan for purposes of §§ 401(a)(11) and 417 of the Code with respect to {% of benefit or formula} of the {50% or 100% - pick one} qualified joint and survivor annuity and {% of benefit or formula} of the qualified pre-retirement survivor annuity. {NOTE: State "0%" if the Alternate Payee will receive none of <u>one</u> these annuities, but if the Alternate Payee will receive <u>none</u> of the qualified joint and survivor annuity <u>and</u> none of the qualified pre-retirement survivor annuity, use the paragraph 9 listed under "Alternate Payee Not Treated as Spouse"}.

Alternate Payee Not Treated as Spouse

9. The Alternate Payee shall not be treated as the Participant's spouse under the Plan.

10. The Participant and the Alternate Payee are required to furnish any documents and information that the Plan Administrator, in its sole and absolute discretion, deems necessary.

11. Nothing contained in this Order shall be construed to require the Fund or Plan Administrator:

a. To provide to the Alternate Payee any type or form of benefit or any option not otherwise available to the Participant under the Plan, or to provide the Alternate Payee with a joint and survivor annuity with respect to the Alternate Payee and her subsequent spouse;

b. To provide to the Alternate Payee increased benefits (determined on the basis of actuarial value) not available to the Participant; or

c. To pay any benefits to the Alternate Payee that are required to be paid to another alternate payee under another order determined by the Plan Administrator to be a QDRO before this Order is determined by the Plan Administrator to be a QDRO.

12. In the event the Plan Administrator does not approve the form of this Order, then each party will cooperate and do all things reasonably necessary to devise a form of Order acceptable to the Plan Administrator.

13. The Court retains jurisdiction to enforce, revise, modify or amend this Order insofar as necessary to establish or maintain its qualification as a QDRO or to amend this

Order for other reasons, provided, however, neither this Order nor any subsequent revision, modification, or amendment shall require the Fund to provide any amount of benefits not otherwise provided for under the Plan.

ENTER:

HON.

_____

JUSTICE SUPREME COURT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

WIFE,

Plaintiff,

-against-

HUSBAND,

Defendant.

----------X

Index No.

STIPULATED QUALIFIED DOMESTIC RELATIONS ORDER

WHEREAS, the parties were married to each other on [DATE], in the City of [CITY], State of [STATE], and a Judgment of Divorce was entered by this Court on [DATE]; and

WHEREAS, this Court has personal jurisdiction over all parties and jurisdiction over the subject matter of this Order;

WHEREAS, this Order is entered pursuant to Section 236B of the Domestic Relations Law of the State of New York to enforce the marital rights of Plaintiff, as the Former Spouse; and

WHEREAS, the parties and the Court intend that this Order shall be a Qualified Domestic Relations Order ("QDRO") as defined in Section 414(p) of the Internal Revenue Code of 1986, as amended (the "Code"), and Section 206(d) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") that assigns certain benefits in the [NAME OF PENSION] Pension Fund as specifically set forth in this Order; and

WHEREAS, the parties have stipulated that the Court shall enter this Order;

NOW, it is ORDERED and ADJUDGED as follows:

1. The "Participant" is Plaintiff [HUSBAND'S NAME]. The Participant's last known address is [ADDRESS]. The Participant's Social Security Number is [SS#]. The Participant's date of birth is [DOB].

2. The "Alternate Payee" is Defendant [WIFE'S NAME], the Former Spouse of Participant. The Alternate Payee's address is [ADDRESS]. The Alternate Payee's Social Security Number is [SS#]. The Alternate Payee's date of birth is [DOB].

3. This Order applies to benefits under the Plan Document and Summary Plan Description (the "Plan") of the [NAME OF PENSION] Pension Fund (the "Fund").

4. The "Plan Administrator" is the Board of Trustees of the Fund.

5. a. The Alternate Payee's interest under the Plan is to be determined as follows:

Alternate Payee is awarded from the Fund as her sole and separate property:

One-half of that fraction of the Participant's vested accrued benefit under the Plan, all calculated as of the Determination Date (as defined below), which fraction shall be determined by the formula (a/b), where

a = 20.75 years; and

b = the number of years of vested Service Credit, including any Credited Past Service earned by the Participant under the Plan, in total, up to the date the Alternate Payee elects in accordance with Plan procedures and this Order to commence receiving her

share of the Participant's vested accrued benefit under the Plan ("Determination Date")

The balance of the Participant's accrued benefit in the Fund is to be the sole and separate property of the Participant.

b. The payments that are required to be made to the Alternate Payee are based on the life expectancy of the Alternate Payee. The death of the Participant shall have no effect on the payment of the benefit assigned by this Order to the Alternate Payee.

c. In the event of the death of the Alternate Payee before benefits are in pay status, the Alternate Payee's interest shall revert to the Participant. In the event of the death of the Alternate Payee after benefits are in pay status, further benefits shall be paid in accordance with the optional form of benefit that the Alternate Payee elects.

6. The following procedure shall be followed to compute the benefit of the Alternate Payee when the Participant commences a Disability Pension Benefit. If the Participant receives a Disability Pension Benefit, the Alternate Payee's portion shall be determined as delineated below. Payments to the Alternate Payee under this provision will be made in a shared payment manner. Payment to the Alternate Payee shall commence to the Alternate Payee at the same time as benefits commence to the Participant and shall be payable for as long as the Participant is receiving Disability Pension Benefits from the Plan. The amount to be paid to the Alternate Payee shall be determined as follows:

One-half of that fraction of the Participant's vested accrued benefit under the Plan, all calculated as of the Determination Date (as defined below), which fraction shall be determined by the formula (a/b), where

a = 20.75 years; and

b = the number of years of vested Service Credit, including any Credited Past Service earned by the Participant under the Plan, in total, up to the date Disability Pension Benefits to the Participant commence ("Determination Date")

If payments to the Participant are suspended due to the Participant no longer being disabled, the payments to the Alternate Payee shall also be suspended. Upon attaining age 65, any Disability Pension Benefits being paid to the Participant will cease. At that time the Alternate Payee will have the right to commence payments of her separate interest benefit provided in paragraph 5.

7. The Alternate Payee may elect to receive payment from the Fund of the benefits assigned to the Alternate Payee under this Order in any form in which such benefits may be paid under the Plan to the Participant (other than in the form of a joint and survivor annuity with a subsequent spouse), but only if the form elected complies with the minimum distribution requirements of § 401(a)(9) of the Code. Payments to the Alternate Payee pursuant to this Order shall commence on any date elected by the Alternate Payee and such election shall be made in accordance with the terms of the Plan, but not earlier than the earliest date that the Participant could begin receiving benefits under the Plan ("the earliest retirement age") if the Participant separated from service.

In making this calculation the benefit will be calculated without regard to any early retirement subsidies unless the Participant is already retired with an early retirement subsidy. If the Participant is already retired or simultaneously retiring when the Alternate

Payee commences payments from the Plan and the Participant is eligible for an early retirement subsidy then the Alternate Payee's benefit will be calculated to include such early retirement subsidy. The balance of the Participant's accrued benefit in the Fund is to be the sole and separate property of the Participant.

8. The Alternate Payee shall be treated as the Participant's spouse under the Plan for purposes of §§ 401(a)(11) and 417 of the Code with respect to the 100% qualified joint and survivor annuity and the qualified pre-retirement survivor annuity. Any survivor annuity will be calculated based on the Participant's remaining interest in the accrued benefit only. The Alternate Payee's interest in the Fund as calculated in Paragraph 5 will not be included for purposes of calculating any survivor annuity.

9. The Participant and the Alternate Payee are required to furnish any documents and information that the Plan Administrator, in its sole and absolute discretion, deems necessary.

10. Nothing contained in this Order shall be construed to require the Fund or Plan Administrator:

a. To provide to the Alternate Payee any type or form of benefit or any option not otherwise available to the Participant under the Plan, or to provide the Alternate Payee with a joint and survivor annuity with respect to the Alternate Payee and her subsequent spouse;
b. To provide to the Alternate Payee increased benefits (determined on the basis of actuarial value) not available to the Participant; or

c. To pay any benefits to the Alternate Payee that are required to be paid to another alternate payee under another order determined by the Plan Administrator to be a QDRO before this Order is determined by the Plan Administrator to be a QDRO.

11. In the event the Plan Administrator does not approve to devise a form of Order, then each party will cooperate and do all things reasonably necessary to devise ade form of Order acceptable to the Plan Administrator.

12. The Court retains jurisdiction to enforce, revise, modify or amend this Order insofar as necessary to establish or maintain its qualification as a QDRO or to amend this Order for other reasons, provided, however, neither this Order nor any subsequent revision, modification, or amendment shall require the Fund to provide any amount of benefits not otherwise provided for under the Plan.

ENTER:

HON.

_____

JUSTICE SUPREME COURT

DEFINED BENEFIT PLAN STIPULATION SAMPLES

1. New York City Police Pension Fund

A Qualified Domestic Relations Order (QDRO) shall be entered to effectuate the division of the defendant's Police Pension Fund pension according to the terms set forth below.

The husband's retirement benefits with the New York City Police Department, to the extent to which they have accrued during the marriage as hereinafter set forth, are marital property. The term "Retirement Allowance" means the total monthly benefit payable to the husband by the Plan pursuant to the terms of the Plan, and shall be deemed to include any lump sum refund of contributions, post-retirement improvements, Cost of Living Adjustments (COLA), Variable Supplement Fund payments, and any early retirement subsidiary which is now, or may hereinafter be available or offered to the husband.

The wife's share shall be calculated based on the husband's full retirement allowance prior to any reduction for any option that may be selected by the husband.

The wife's share shall not be diminished on account of any outstanding pension loan balance that the husband may have at the time of his retirement, including but not limited to any pension loans outstanding as of February 25, 2008, and any such loans shall be repaid solely by the husband unless he brings a post-Divorce Judgment motion and establishes that the monies for those loans were used for the benefit of the wife during the marriage.

Should the husband retire on a disability pension, the wife shall receive a share of the disability pension attributable to the husband's earnings and years of credited service only. Said share shall be calculated in the same manner as a normal service pension would be

calculated without any reduction for early termination of employment. This calculation shall be performed even if the husband had not yet attained vested status at the time of such disability retirement.

The term "Coverture Fraction" shall be defined to mean a fraction which represents that portion of the husband's retirement allowance acquired during the parties' marriage. The numerator of said fraction is 125 months (representing the number of months of the husband's credited service during the marriage), and the denominator of said fraction is the total number of months of the husband's credited service as of the date of the husband's retirement, termination of employment, or death.

At such time as the husband has retired from and is actually receiving a Retirement Allowance from the New York City Police Department Pension Fund, Article IIA, the said New York City Police Department Pension Fund, Article IIA, in accordance with the formula devised in the case of Majauskas v. Majauskas, 61 N.Y.2d 481 (1987), shall pay to The wife that portion of the husband's monthly Retirement Allowance which is equal to fifty percent (50%) of the product obtained by multiplying the total amount of the monthly Retirement Allowance due the husband, by the Coverture Fraction. The wife shall be entitled to receive the same percentage of the annual Variable Supplement Fund benefit if it becomes available to the husband.

The husband is hereby directed to designate the wife as the beneficiary of the husbands pre-retirement survivor benefit, so that in the event the husband dies prior to his retirement, the wife shall receive a portion of the pre-retirement death benefit, calculated pursuant to a fraction, the numerator of which is 125 months, and the denominator shall

be the total service credit as the date of the husband's death, multiplied by 50%, and then multiplied by the pre-retirement survivor benefit. Within 15 days after the QDRO is signed by the Court, the husband shall complete and submit all necessary Designation of Beneficiary forms as required by the Fund to ensure that this provision is complied with. Within 15 days after said Designation of Beneficiary have been filed with the Fund, the husband shall provide copies of the Designation of Beneficiary forms (time stamped by the Fund) to both the wife and her attorney, via Certified Mail.

In the event that the husband's employment is terminated prior to the time that he becomes vested in a retirement benefit, and he becomes eligible to receive a return of his accumulated annual contributions plus interest, the wife shall receive a pro rata share of said return of accumulated annual contributions plus interest accrued on the date of termination. The wife's share shall be fifty percent (50%) of the amount determined by multiplying the total return by the Coverture Fraction.

The husband shall designate the wife as beneficiary of the husband's pension with the Fund. At the time of his retirement, the husband shall choose Option 4, Annuity so that in the event the husband dies while the pension is in pay status the wife shall receive a monthly annuity in the same amount as calculated under the Coverture Fraction formula hereinafter set forth. In the event that by choosing retirement option 4, there is a reduction in the maximum pension which the husband will receive, the amount of that reduction shall be charged only to the wife's share of the pension. The parties shall divide the reduction evenly from each of their shares of the pension.

The husband shall have the right to choose the "Pop-Up" Option Modification so that

in the event the wife dies while the pension is in pay status, the retirement allowance reverts back to the maximum retirement allowance. The "Pop-Up" may only be applied to Option numbers 2, 3 and 4 Annuity.

The Fund is to withhold from the husband's Retirement Allowance for equitable distribution payments to the wife the amount computed pursuant to the QDRO. For so long as the husband begins to receive a Retirement Allowance from the Fund, the wife is entitled to receive a monthly benefit payable until the death of the husband or the death of the wife. If the husband predeceases the wife, and at the time of the husband's retirement, he chose a death benefit option naming the wife as beneficiary, the benefits shall continue to the wife under said option.

In the event the wife dies after commencement of benefits to her, the husband shall have full benefits paid to him and shall choose any pension option available and this Domestic Relations Order shall be void.

Nothing contained in the QDRO shall be construed to require the Pension Fund or Pension Fund Administrator to:

(a) provide any form, type or amount of benefit, or any portion, not otherwise provided for under the Pension Fund;

(b) provide increased benefits determined on the basis of actuarial value; and require the payment of benefits to the wife which are required to be paid to another The wife under another order previously determine to be a Domestic Relations Court Order.

The Pension Fund shall have no obligation or responsibility as a consequence of this

action apart from the specific directions contained in the QDRO.

The Fund Administrator shall issue separate checks to the husband and the wife for their respective interests in the Fund and the Variable Supplement Fund at the time the benefits become payable.

In the event that the Plan Trustee inadvertently has paid or shall pay to the husband any benefits that are assigned to the wife pursuant to the terms of the QDRO, the husband shall immediately reimburse the wife to the extent that he has received such benefit payments, and shall forthwith pay such amounts so received directly to the wife within ten (10) days of receipt.

This Court shall retain jurisdiction to implement and supervise the payment of retirement benefits as provided herein should either party of the Pension Fund Administrator make such application, and the Court determines such to be appropriate and necessary.

1. ERISA Defined Benefit Plan Separate Interest Award Language

The Husband is employed by _____. Husband is a participant in said Corporation's pension plan. The specific name of the Plan is _____. For the purposes of the division of marital property, the Wife shall receive an irrevocable interest in the Husband's retirement benefits under the Plan(s) as follows:

The Wife shall be known as the alternate payee and shall be assigned a portion of the

Husband’s defined benefit retirement plan in an amount equal to fifty percent (50%) of the marital portion of the Husband's benefits under the plan. Said marital portion to be determined by multiplying the benefits by a fraction, the numerator of which shall be the number of months of the Husband’s participation in the defined benefit retirement plan between the date of the marriage or the Husband’s plan participation date, whichever is later, and the commencement of this action for a divorce, that being _____, and the denominator of which shall be the total number of months of the Husband’s participation in the defined benefit retirement plan, until the date of his retirement, termination, death, or the date that benefits commence to the alternate payee. Hereinafter known as the pro-rata share.

The Wife shall also receive a pro-rata share of any postretirement cost of living adjustments or other economic improvements made to the Husband’s benefits on or after the date of his retirement, if permitted by said plan.

The Wife may elect to commence her share of the benefits under the plan as of the earliest retirement date on which the Husband is eligible to commence benefits under the plan. The Wife may elect to receive her benefits under any one of the allowable benefit distribution options permitted under the terms and provisions of the plan. The form of benefits elected by the Wife is to be based on her life expectancy and any actuarial adjustment that might be necessary to convert the Wife's benefits to one based on her lifetime should be applied to her share of the benefits.

In the event that the Husband predeceases the Wife and neither the Wife nor the Husband has commenced their benefits under the Plan, the Wife shall be considered the

designated beneficiary and/or the surviving spouse of the Husband for purposes of establishing the Wife's entitlement to receive a pro-rata share of the preretirement surviving spouse benefit. In the event that the costs associated with providing this preretirement benefit coverage are not fully subsidized by the Husband's employer, then the Husband must make an affirmative election for such preretirement surviving spouse coverage in a timely manner and in accordance with the Plan's election procedures.

2. ERISA Defined Benefit Plan Shared Interest Award Language

The Administrators of the Husband's pension plan shall pay to the Wife a share of all payments hereafter made to the Husband equal to fifty percent of the amount paid multiplied by a fraction, the numerator of which shall be the number of months of the marriage between December 4, 1997 (the date of marriage) and May 6, 2008 (the date of commencement of this action) during which the Husband accrued benefits in the pension plan, and the denominator of which shall be the number of months during which the Husband was a participant in the plan and accrued benefits up until May 6, 2008.

NB: No survivor benefits, etc., are awarded.

The denominator is usually the total number of months during which the Husband was a participant in the plan and accrued benefits up until the date payment of benefits begins.

The QDRO in this example must be a Shared Interest QDRO.

3. **ERISA Defined Benefit Plan Shared Interest Award Language**

The Husband's pension plan shall be split 50/50 as to the marital portion and paid out as the 50% QJSA. Payments shall start on the date of the Husband's retirement, and both surviving spouse benefits and death benefits shall be granted to the Wife.

NB: This language is sufficient to award a survivor annuity, and it implicitly refers to the Majauskas formula, though the drafter will need to review the plan documents to understand "survivor benefits" as opposed to "death benefits."

DEFINED CONTRIBUTION PLAN STIPULATIONS

1. Deferred Compensation Plan for Employees of the City of New York

The parties agree that the wife shall be entitled to a portion of the husband's 457 Deferred Compensation Plan for Employees of the City of New York pursuant to a Qualified Domestic Relations Order (QDRO), to be determined as follows.

The husband's account in the Plan, to the extent to which it accrued during the marriage, is marital property.

The Plan Administrator shall establish a separate 457 account in the name of the wife, in the amount of 50% of the husband's Contributions to the 457 account from September 30, 1997 until February 25, 2008, together with earnings and/or losses from the date of the marriage until such time as the account is established for the wife.

The wife's share of the plan shall not be diminished by any loans or withdrawals the husband may have taken, including but not limited to a loan issued to the husband in December 2005 for $5,686, and any such loans shall be repaid solely by the husband unless he brings a post-Divorce Judgment motion and establishes that the money for that loan was used for the benefit of the wife during the marriage.

The wife shall be eligible for distribution upon the creation of the separate account even if the husband has not separated from service with the City of New York provided the rules of the plan so provide.

The husband shall not make any type of withdrawal or take any loan after the date of signing of this stipulation and before the establishment of the wife's separate account which will cause the account balance to fall below the amount awarded to the wife. In the event that the husband made any withdrawal or took any loans from the plan prior to the

signing of this Stipulation which caused the account balance to fall below the amount awarded to the wife, he shall be responsible for reimbursing the wife for any shortfall, directly to the wife, from the husband's own separate assets.

Nothing contained in the QDRO shall, in any way, require the Plan to provide any form, type or amount of benefits not otherwise available by law.

The Plan shall have no obligation or responsibility as a consequence of the instant action apart from the specific direction contained in the QDRO.

In the event of a change of address of said the wife, the wife shall immediately notify, in writing, the Plan at 40 Rector Street , 3rd Floor, New York, New York 10006.

The order shall not require the Plan to pay any benefits to another wife.

Taxes shall be withheld from any distributions to the husband and the wife, and reported for tax purposes, in accordance with the applicable laws in effect at the time of distribution, however, if by reason of the distribution caused by the QDRO taxes are due, then the wife shall be responsible for payment of all of those taxes. **The parties shall divide the taxes attributable to the distribution equally.**

The Court shall retain jurisdiction to enforce, revise, modify or amend the QDRO.

The death of the husband shall have no effect on the payment of the benefit assigned by the QDRO to the wife.

In the event of the death of the wife prior to distribution from the Plan of the amount set forth above, such amount shall be payable to the estate of the wife, if this is permitted by the Plan, provided that once benefits have begun to be paid to the wife the form of benefit elected shall determine if any additional amounts shall be paid on the wife's death.

In the event that the Plan Trustee inadvertently pays to the husband any benefits that are supposed to be paid to the wife pursuant to the terms of this Order, the husband shall immediately reimburse the wife to the extent that he has received such benefit payments, and shall forthwith pay such amounts received directly to the wife within ten (10) days of receipt.

2. ERISA Defined Contribution Plan Award Language

The Wife shall be awarded fifty percent (50%) of the total vested balance of the Husband's (*Insert specific plan name)* account, determined as of _____, hereinafter referred to as the "Determination Date". The amount awarded to the Wife by this order shall be separately accounted for, and shall be adjusted for earnings and losses as specified by the terms of the Plan, in the same manner as other accounts held in the Plan, from _____, until the benefits are distributed to Wife.

The benefit shall be distributed to the Wife as a lump-sum payment as soon as administratively practicable after the Domestic Relations Order has been qualified by the Plan. At such time as the Wife's portion of the account is actually distributed to the Wife, said amount may be made as a "Direct Rollover" transfer into an IRA or similar account as designated by the Wife. Such rollover shall be made in accordance with the terms of the Plan and applicable law. The Wife shall provide all necessary information and fill out all necessary documents as required by the Plan Administrator to effectuate such transfer. In the event the Wife dies prior to the time that the allocated portion of the Plan account has been transferred to an account in her name, or prior to the actual distribution to the Wife, this benefit shall be payable to her designated beneficiaries or if she has not designated

any beneficiaries, to her estate.

A Qualified Domestic Relations Order (QDRO), shall be prepared in accordance with the terms of this agreement and shall be submitted to the Plan Administrator for processing. The parties agree to cooperate in having the aforesaid order qualified, shall execute and deliver necessary documents, and shall take whatever steps that are required to have the order qualified. Said Domestic Relations Order shall be deemed incorporated and made a part of this agreement, as if set forth at length herein.

If for any reason the QDRO is not in place at the time benefits reach pay status, the Wife shall be entitled to her share of the benefits as defined in this agreement and in the Domestic Relations Order. Said benefit shall be payable to the Wife directly from the Husband.

It is the parties' intention that the Court shall retain jurisdiction to clarify, correct or expand its order to effectuate the intent of the parties, as set forth in this Agreement. The parties acknowledge and represent that the language of said order may be changed from that which is in this agreement to facilitate acceptance of said order as a QDRO, upon the consent and cooperation of the parties.

The Order shall be binding on the Husband and the Husband's estate and the Husband or his estate shall pay over to the Wife the moneys called for in the order whether or not same is honored by the plan administrators as a QDRO, should the plan not pay the Wife directly.

The Husband represents that there are no outstanding loans against his pension plan or other retirement benefits, and shall not take out any loans, nor in any way encumber said plans.

Nothing in this Agreement shall be construed to limit the remedies of the Wife in obtaining her portion of the Husband’s Plan(s) in the event the QDRO(s) is/are not entered or in the event a DRO does not attain the status of a QDRO. The parties hereby acknowledge and represent that the Wife is unequivocally entitled to share in the Husband's benefits under the plan(s) to the extent required in this agreement.

DRAFTING QDROS OUTLINE

I. Name(s) and address(es) of the Plan(s) in which the Participant participated during the marriage

A. The Stipulation or JOD might not identify the Plan or it might not give the Plan's correct name

B. Tracking down the correct name and address of various pension and retirement plans can be difficult

1. Many union plans are named after the Local
2. Many single-employer plans are named after the employer
3. Form 5500s contain a wealth of information and can be obtained for free at:
   a) Free ERISA: https://freeerisa.benefitspro.com
   b) EBSA: https://www.efast.dol.gov/portal/app/disseminate?execution=e1s1

II. Once you have identified the Plan, obtain information about it and the participant's membership in it.

A. The Plan will provide the following information to the Alternate Payee or authorized representative with a written (notarized) release from the Alternate Payee:

1. SPD;
2. Procedures for determining the qualified status of a purported QDRO;
3. Model QDROs;
4. Whether a proposed draft QDRO meets the Plan's criteria for qualification or acceptability

B. Most Plans will not release information about the Participant without a signed (preferably acknowledged) authorization or subpoena. This includes:

1. Participant's dates of participation
2. Value of Participant's accrued benefit;
3. Designated beneficiaries (if not your client)

III. Is the Plan a defined benefit plan or a defined contribution plan?

IV. Is the Plan an ERISA or non-ERISA Plan?

V. What does the Separation Agreement, Stipulation of Settlement, Judgment of Divorce, or other court order award to the Alternate Payee?

A. The agreement or order controls what the Alternate Payee is entitled to.
B. The QDRO must conform in substance to the agreement/court award.

C. The QDRO is meant to enforce and effectuate the agreement, and not add new substantive terms in it.

1. What constitutes a "new substantive term" can be complicated. See handout on Terms that can Be Included in a QDRO.

D. If the Stipulation of JOD awards something unlawful or that is not available under the plan, refer the case to your client's divorce attorney to renegotiate the terms of the agreement and/or re-open the divorce case.

VI. QDRO requirements:

A. For NYC and NYS plans, there are no statutory requirements or formal guidelines as to the content of the DRO. The DRO must just be acceptable to the plan.

1. The NYC and NYS Plans require some language that is similar to that required for ERISA plans.

2. Some of the Plans will give you samples or provide them on their websites. (e.g. NYCERS).

B. Federal statutes and regulations apply to court orders which divide benefits under CSRS, FERS, TSP, and the Military Pension.

1. The websites for the Office of Personnel Management, which administers CSRS and FERS, TSP, and Defense Finance and Accounting Service for the Military Pension give the rules and sample language.

C. For ERISA plans, an order is a DRO until it is deemed qualified by the plan and then it becomes a QDRO. A QDRO must meet technical statutory requirements. (IRC §414(p)). It can also contain additional provisions to effectuate the parties' agreement.

1. The technical statutory requirements for a DRO to be qualified as a QDRO are:

a) The Order must relate to the provision of "child support, alimony payments, or marital property rights to a spouse, former spouse, child or other dependent of a participant".

b) The DRO must be made pursuant to State domestic relations law.

c) The DRO must create or recognize the existence of an alternate payee's right to receive, or assign to an alternate payee the right to receive, all or a portion of the benefits payable with respect to a participant under a plan.

d) The DRO must clearly specify "the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order."

(1) It can be difficult to locate the opposing spouse;

(2) One of the parties might have an order making his or her address, etc., confidential. Do not write it in the DRO

e) The DRO must clearly specify "the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined".

f) The DRO must clearly specify "the number of payments or the period to which such order applies"

(1) E.g., until the death of the participant, or until the death of the alternate payee

g) The DRO must clearly specify "each plan to which such order applies.

h) The DRO must "not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan"

(1) Stipulations or Judgments of Divorce sometimes improperly attempt to require the plan to do something it is not required to do by law or the terms of the plan itself

i) The DRO must "not require the plan to provide increased benefits (determined on the basis of actuarial value)."

j) The DRO must "not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order".

(1) A potential problem if one party has been previously married

VII. Some provisions that may, in certain cases, be included in a QDRO (examples are in the Sample QDROs):

A. "Separate Interest" provisions:

1. Only for ERISA plans where the participant is not already receiving benefits;

2. A allows payment to be made to the alternate payee before a participant retires or terminates employment, as long as such payments are made after the participant's "earliest retirement age." (usually 55):

3. Payments to the AP are for the AP's lifetime;

4. Payments to the alternate payee are calculated as if the participant retired on the date payments are to the alternate payee, and are actuarially adjusted based on the AP's life expectancy.

B. A provision treating the AP as the surviving spouse for purposes of all or some of the survivor benefits;

C. COLAs

D. Effect of outstanding loans against the pension or retirement account

E. Effect of reduction due to option selection

F. Arrears

G. Disability pensions

VIII. Preparation of DROs.

A. Have all the information regarding the plan and participant's membership, including the Summary Plan Document, before you draft the DRO.

1. Ideally, this information was obtained before the Stipulation was drafted

B. Check with Plan if they have written QDRO Processing Procedures and any sample QDROs.

1. But be careful not to adopt a sample blindly, where they may be substantively different than what you have agreed to, or what you intend the non-employee spouse to receive. Sometimes the form QDRO favors the participant.

2. BLS has many samples

C. Use the terms "Participant" and "Alternate Payee" in the body of the QDRO, rather than "plaintiff" and "defendant".

D. Ask the plan administrator to review the draft QDRO before filing it.

1. Most counties are now requiring "pre-approval" of all DROs.
2. There is no obligation for the plan to unofficially "approve"
3. A minority of plans will not pre-approve DROs
   a) The Federal pension system does not pre-approve DROs.
4. It can take several months to receive a pre-approval letter
5. If the Plan does not pre-approve proposed DROs you may have to submit an Affirmation regarding your attempts to secure plan pre-approval.

IX. Service and Filing of proposed DROs (see sample forms)

A. Time may be of the essence.

1. There can be dire consequences from delay. (e.g. lump sum withdrawal by participant; death of participant and your client is no longer deemed to be the surviving spouse because the judgment of divorce has already been granted).

B. Notice of Appearance

1. can be filed before filing the DRO

C. QDRO Packet

1. Notice of Settlement
   a) Return date must be at least ten days after mail service on opposing counsel/opposing party
2. proposed DRO

3. Pre-approval letter as "Exhibit A"

4. Blueback

5. Affirmation or Affidavit of Service of proposed DRO, NOS, pre-approval letter

a) service by mail is acceptable

D. Wait for the Court to sign and enter the DRO

1. Court appearances are very rare

a) usually only where a counter-DRO is filed or the JOD was issued long ago

X. Once the DRO is signed

A. obtain at least one court-certified copy of the signed DRO

1. Send this to the plan administrator for final review

B. Serve a photocopy of the signed DRO on opposing party/counsel on "Notice of Entry"

1. Affirmation/Affidavit of Service

C. File copy of NOE with signed DRO and proof of service with court clerk

D. Qualification of the signed DRO by the plan

E. depending on the type of retirement plan and the parties' ages, the plan will either begin payments to the Alternate Payee or implement the DRO at a later date

1. ask plan for benefits statement

2. if the AP is awarded a portion of the P's DBP that will not be immediately payable, the benefits statement may be speculative or not provided

.

401(k) Plan QDRO

At the Matrimonial Term, Part , of the Supreme Court of the State of New York, County of Kings, located at 360 Adams Street, Brooklyn, New York, on the _____ day of _____, 20___.

P R E S E N T: HON. , J.S.C.

----------X

Index No.

,

Plaintiff, **DOMESTIC RELATIONS ORDER**

-against-

,

Defendant.

----------X

Upon the Judgment of Divorce granted by the Honorable , Justice, on the ____ day of _____, 20___, and upon the terms of the Stipulation of Settlement executed by the parties on the 22nd day of June, 2016, awarding Plaintiff an interest in Defendant retirement benefits under the 401K and Profit Sharing Plan, with a Qualified Domestic Relations Order to be entered thereon;

NOW, on motion of ,

IT IS HEREBY ORDERED AS FOLLOWS:

1. **Effect of this Order as a Qualified Domestic Relations Order**: this Order creates and recognizes the existence of an Alternate Payee's right to receive a portion of the Participant's benefits payable under a defined contribution plan that is qualified under Section 401 of the Internal Revenue Code (the "Code") and the Employee Retirement Income Security Act of 1974 ("ERISA"). It is intended to constitute a Qualified Domestic Relations Order ("QDRO") under Section 414(p) of the code and Section 206(d) (3) of ERISA.

2. **Participant Information.** The name, last known address, date of birth, and Social

Security Number of the plan "Participant" are:

Name:
Address:

Date of Birth:
Social Security Number:

3. **Alternate Payee Information:** the name, last known address, date of birth, and Social Security Number of the "Alternate Payee" are:

Name:
Address:

Date of Birth:
Social Security Number:

The Alternate Payee shall notify the Plan Administrator in writing of any changes in her mailing address subsequent to the entry of this Order.

4. **Plan Name:** The name of the Plan to which this Order applies is the hereinafter referred to as the "Plan"). The address of the Plan is:

5. **Pursuant to State Domestic Relations Law:** This Order is entered pursuant to the authority granted in the Domestic Relations Law, Section 236B of the State of New York, which relates to marital property rights as defined therein, between spouses and former spouses in an action for divorce.

6. **For Division of Marital Property:** This Order relates to the division of marital property as a result of a Judgment of Divorce granted on the ____ day of _____, 20__, and in accordance with the Stipulation of Settlement of the parties executed on the 22nd day of June, 2016.

7. **Commencement Date and Form of Payment to Alternate Payee:** The Alternate Payee's benefits under the Plan shall commence the first day after this Order is served upon the Plan, and benefits shall be paid as soon as administratively feasible after qualification of this Order

by the Plan Administrator.

8. **Savings Clause:** This Order is not intended, and shall not be construed in such a manner as to require the Plan:

(a) to provide to the Alternate Payee any type or form of benefit option not otherwise provided under the terms of the Plan;

(b) to provide increased benefits determined on the basis of actuarial value not available to the Participant; or

(c) to require the payment of any benefits to the Alternate Payee that are required to be paid to another alternate payee under another order that was previously determined to be a QDRO.

9. **Division of Account Amount and Form of Payment of Alternate Payee's Benefit:** The Alternate Payee is awarded from the plan as her sole and separate property 100% (one hundred per cent) of the value of the Participant's total vested account balance accumulated under the Plan as of September 11, 2014, or the closest valuation date thereto, together with all earnings and/or losses from September 11, 2014, until such time as a separate account is established for the Alternate Payee. The aforesaid amount shall be transferred to said separate account in the name of the Alternate Payee from the Participant's total vested account balance in the Plan. The Alternate Payee shall be eligible for distribution upon the creation of said separate account pursuant to the terms and provisions of the Plan.

10. **Death of Participant**: The death of the Participant shall have no effect on the payment of the benefit assigned by this Order to the Alternate Payee.

11. **Death of Alternate Payee**: In the event of the death of the Alternate Payee prior to distribution from the Plan of the amount set forth above, such amount shall be payable to the estate of the Alternate Payee, if this is permitted by the Plan, provided that once benefits have begun to be paid to the Alternate Payee, the form of benefit elected shall determine if any additional amounts

shall be paid on the Alternate Payee's death.

12. **Tax Treatment of Distributions Made Under This Order:** For purposes of Sections 402(a)(1) and 72 of the Internal Revenue code, any Alternate Payee who is the spouse or former spouse of the Participant shall be treated as a distributee of any distributions or payments made to the Alternate Payee under the terms of this Order, and as such, will be required to pay the appropriate federal income taxes on such distribution.

13. **Loans or Withdrawals by Participant:** The Alternate Payee's share shall not be diminished by any loans or other withdrawals by the Participant.

14. **Constructive Receipt:** In the event that the Plan Trustee inadvertently pays to the Participant any benefits that are assigned to the Alternate Payee pursuant to the terms of this Order, the Participant shall immediately reimburse the Alternate Payee to the extent that he has received such benefit payments, and shall forthwith pay such amounts received directly to the Alternate Payee within ten (10) days of receipt.

15. **Continued Jurisdiction:** The Court shall retain jurisdiction to enforce, revise, modify or amend this Order as necessary to maintain its qualified status and the original intent of the parties pursuant to their Stipulation of Settlement or the Judgment of Divorce.

16. **Actions by Participant:** The Participant shall not take any actions, affirmative or otherwise, that can circumvent the terms and provisions of this Order or that could diminish or extinguish the rights and entitlements of the Alternate Payee as set forth herein. Should the Participant take any action or inaction to the detriment of the Alternate Payee, he shall be required to make sufficient payments directly to the Alternate Payee to the extent necessary to neutralize the effects of his actions or inactions and to the extent of her full entitlements hereunder.

E N T E R :

_____

Justice

QDRO FOR FEDERAL PENSIONS – CSRS or FERS

At a Matrimonial Part of the Supreme Court of
the State of New York, in and for the County of ____,
on the ___ day of _____, 20___.

Present:

Hon. _____ Justice/Referee

xxxxxxxxxx	:	Index No. _____
	:	
Plaintiff	:	
against	:	FINDING OF FACT AND
	:	CONCLUSIONS OF LAW
xxxxxxxxxx	:	
Defendant	:	

Upon the Judgment of Divorce granted by the HON. «judge», on the «day» day of «month», 200«year» and upon the «written Stipulation of Settlement» «oral Stipulation of Settlement spread across the record» between the parties «date», and it appearing to the court as follows:

1. That the parties hereto are formerly husband and wife, having been married on «date».
2. That this Order is made pursuant to the Judgment of Divorce granted on «date», which

Judgment of Divorce incorporated but did not merge the provisions of a «written Stipulation» «Stipulation of Settlement» entered into between the parties on «date».

3. The Judgment of Divorce which incorporates the Stipulation of Settlement provides that

the «plaintiff/defendant», «name», shall receive an irrevocable interest in the pension annuity benefits of the «plaintiff/defendant», «name», under the Federal Employees Retirement System (hereinafter referred to as “FERS”).

4. «Plaintiff/Defendant», «name», (Social Security Number «soc. sec. no.»), hereinafter referred

to as employee, is employed by the United States Postal Service and is a member of the Federal Employees' Retirement System (FERS).

5. The current and last known mailing address of «plaintiff/defendant», «name», Social Security Number «soc. sec. no.»), is «address». «His/Her» date of birth is «date».

6. The current and last known mailing address of «plaintiff/defendant», «name», Social Security Number «soc. sec. no.», is «address». «His/Her» date of birth is «date».

7. To accommodate the marital property distribution between the parties, it is hereby

ORDERED, «plaintiff/defendant» is or will be eligible for retirement benefits under the Federal Employees Retirement System ("FERS") based on employment with the United States Postal Service; and it is further

ORDERED, that the «plaintiff/defendant», «name», is entitled to a share of the «plaintiff/defendant», «name», gross annuity computed as follows:

«Plaintiff/Defendant» shall receive a «percentage» interest in the «plaintiff's/defendant's» gross annuity to be paid pursuant to the formula set forth in *Majauskas v. Majauskas*, 62 NY 2nd 281, multiplied by a fraction, the numerator «number of months» months, (the number of months of the marriage during which pension rights accrued; date of marriage «date» and date divorced action commenced «date», and the denominator of which shall be the total number of months that «plaintiff/defendant» accrued pension rights in FERS at the time of retirement, and that the United States OPM is directed to pay the «plaintiff's/defendant's» share directly to the «plaintiff/defendant»; and it is further

ORDERED, that the «plaintiff/defendant» shall be entitled to a pro-rata share of any refund of employee contributions, and that the United States OPM is directed to pay the «plaintiff's/defendant's» share directly to the «plaintiff/defendant»; and it is further

ORDERED, under Section 8445 of Title 5, United States Code, «plaintiff/defendant» is awarded a former spouse survivor annuity under the Federal Employees Retirement System in the same amount to which the «plaintiff/defendant» would have been entitled if the divorce had not occurred; and it is further

ORDERED, that the United States OPM is directed to pay the «plaintiff's/defendant's» share of the spouse survivor annuity directly to the «plaintiff/defendant»; and it is further

ORDERED, that in the event «plaintiff/defendant» dies before «plaintiff/defendant», then the full amount of «plaintiff's/defendant's» annuity shall be restored to «plaintiff/defendant»; and it is further

ORDERED, that the OPM is directed to make all payments due to «plaintiff/defendant» at «his/her» present mailing address «address», or at any future address designated by «plaintiff/defendant.»

Dated: «Merge Record #»

E N T E R:

_____

J.S.C.

QDRO – FEDERAL THRIFT SAVINGS PLAN

At a Matrimonial, Part {Merge Record #}of the Supreme Court of the State of New York, in and for the County of {Merge Record #}, located at {Merge Record #} day of {Merge Record #}

Present:

Hon. _____ Justice/Referee

----------x	Index No. {Merge Record #}
xxxxxxxxxxx :	
:	
Plaintiff :	
against :	**DOMESTIC RELATIONS ORDER**
:	
xxxxxxxxxx :	
Defendant :	
----------x	

Upon the Judgment of Divorce granted by the HON. «Merge Record #», on the «Merge Record #» day of «Merge Record #», and upon the terms of the written Stipulation of the parties dated «Merge Record #», and it appearing to the court as follows:

1. That the parties formerly husband and wife.
2. That this order is made pursuant to the Judgment of Divorce granted on «Merge Record #»,

and pursuant to the written Stipulation of the parties dated «Merge Record #», copies of which are on file with the court.

3. That this order is directed to the Federal Retirement Thrift Investment Board of the United

States Postal Services,

4. The Thrift Savings Plan for Employees of the United States Postal Service is hereafter referred

to as the “Plan”

5. The «Merge Record #» whose social security number is «Merge Record #», and whose date

of birth is «Merge Record #», is hereinafter referred to as the "Participant" in the Plan.

6. The «Merge Record #», whose social security number is «Merge Record #», and whose date of birth is «Merge Record #», is hereinafter referred to as the "Payee" in the Plan.

7. The current and last known mailing address of the Participant is «Merge Record #».

8. The current and last known mailing address of the Payee is «Merge Record #».

9. This order pertains to that portion of the Participant's benefits under the Plan which accumulated during the marriage and up to «Merge Record #», the date of the commencement of the action for divorce.

NOW, upon motion of JOAN L. BERANBAUM, ESQ. «Merge Record #», of Counsel, for a Domestic Relations Order, to accommodate the distribution of marital property between the parties, it is hereby

ORDERED, that the Federal Retirement Thrift Investment Board release fifth (50%) percent of the total as of «Merge Record #» from the Thrift Savings Plan account currently maintained by Participant, «Merge Record #», whose social security number is «Merge Record #», and whose current and last known mailing address is «Merge Record #» and transfer to Payee, «Merge Record #», whose social security number is «Merge Record #», and whose current and last known mailing address is «Merge Record #»; and it is further

ORDERED, that the Plan shall have no obligation or responsibility as a consequence of this action apart from the specific direction contained in this order.

E N T E R

_____

J.S.C./SPECIAL REFEREE

_____

CLERK

SHARED INTEREST WITH NO SURVIVOR BENEFITS

At the Matrimonial IAS Part ___ of the Supreme Court of the State of New York held in and for the County of the _____, at the Courthouse located at _____, _____, New York, on the ___ day of _____, 20___.

P R E S E N T : HON. _____, J.S.C.

----------X

_____,

Index No. _____

Plaintiff,

DOMESTIC RELATIONS ORDER

-against-

_____,

Defendant.

----------X

This Order is directed to the Administrator of the_____ Pension Plan.

WHEREAS, the parties hereto were married on _____; and

WHEREAS, this action for divorce commenced with the filing of a Summons and Verified Complaint in this Court on the ____ day of _____, 20___; and

WHEREAS, the parties entered into a Stipulation of Settlement on the ____ day of _____, 20____; and

WHEREAS, a Judgment of Divorce was issued by this Court on _____, and entered by the Clerk of the Court on _____; and

WHEREAS, this Court has personal jurisdiction over all parties and jurisdiction over the subject matter of this Order; and

WHEREAS, this Order is entered pursuant to Section 236B of the Domestic Relations Law of the State of New York to enforce the marital rights of the Defendant _____, as the Former Spouse of the Plaintiff; and

WHEREAS, it is the intent of the Court that this Order shall operate as an effective assignment of the Participant's interest in the _____ Pension Plan set forth below to the Alternate Payee under both state and federal laws, for all purposes, and constitute a Qualified Domestic Relations Order ("QDRO") in compliance with Section 414(p) of the Internal Revenue Code of 1986, as amended (the "Code"), and Section 206(d)(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA");

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

1. Plan: This Order shall apply to the _____ Pension Plan (the "Plan"), subject to the limitations and restrictions on benefits as set forth under Code Sections 415 and 401(a)(17). The Plan Administrator is the Board of Trustees, with offices located at _____, _____, New York _____.

2. The Plan Participant is: _____
   Mailing Address: _____
   _____
   Social Security Number: _____

Date of Birth: _____

3. The Alternate Payee is: _____

Relation to Participant: Former Spouse
Mailing Address: c/o _____, Esq.
LAW FIRM
_____
_____10004

Social Security Number: _____
Date of Birth: _____

4. This Order assigns to the Alternate Payee the right to receive that portion of the pension benefit provided by the Plan to the Plan Participant as described in the following paragraphs.

5. The Alternate Payee is hereby assigned a pension benefit of 100% (one hundred percent) of the Plan Participant's benefit accrued as of the benefit commencement date. The Plan shall pay the Alternate Payee a *pro rata* share of any cost of living adjustments, benefit increases, or other *ad hoc* benefit improvements.

6. The Alternate Payee shall commence her portion of the pension benefit as soon as administratively possible. Payments to the Alternate Payee of her portion of the pension benefit will continue until the earlier of the Plan Participant's death or the Alternate Payee's death.

7. In the event of the Alternate Payee's death prior to the Plan Participant, the Alternate Payee's portion of the pension benefit shall revert back to the Plan Participant.

8. All benefits payable under the Plan other than those payable to the Alternate Payee shall be payable to the Plan Participant in such manner and form as the Plan Participant may elect in his sole discretion, subject only to Plan requirements.

9. While it is anticipated that payment of the pension benefit awarded to the Alternate Payee will be made directly to the Alternate Payee, the Plan Participant is designated a constructive trustee to the extent he receives any benefits under the Plan that are due to the Alternate Payee but are paid to the Plan Participant. In the event of such payment, the Plan Participant is ordered and decreed to pay the benefit defined above directly to the Alternate Payee.

10. Nothing contained in this Domestic Relations Order ("DRO") shall be construed to require the Plan or the Plan Administrator:

a. To provide to the Alternate Payee any type or form of benefit, or any option, not otherwise available under the Plan; or

b. To pay any benefits to the Alternate Payee which are required to be paid to another alternate payee under another DRO previously determined to be a Qualified Domestic Relations Order ("QDRO"); or

c. To require the Plan to provide increased benefits (determined on the basis of actuarial value) not available to the Plan Participant.

11. Payment from the Plan to the Alternate Payee pursuant to this Order shall be includable in the Alternate Payee's gross taxable income.

12. In the event of a conflict between the terms of this Order and the terms of the Plan, the terms of the Plan shall prevail.

13. This Order shall be incorporated by reference into any final judgment and decree of divorce as if each and every paragraph herein was specifically set forth therein and shall be enforceable by contempt.

14. This Order shall continue to be effective with respect to any successor or transferee plan, including any plan into which the Plan is merged. In the event of a change in the processing of QDROs or an amendment to the Plan, the Alternate Payee shall receive the same written notification as other beneficiaries.

15. The Plan Administrator may unilaterally modify any term of this Order to the extent necessary to comply with applicable law. However, should any portion of this Order be rendered invalid, illegal, unconstitutional, or otherwise incapable of enforcement, or should any of the procedural matters herein ordered need to be adjusted to accomplish the objectives of this Order, the Court reserves jurisdiction to make such adjustment in this Order as will effect the intent of the parties as manifested herein.

16. The parties herein shall notify the Plan Administrator in writing of any changes in legal name or mailing address.

17. The Alternate Payee shall serve a Court-certified copy of this Order upon the Plan Administrator.

E N T E R :

_____

HON. _____, J.S.C.

ERISA PLAN: SEPARATE INTEREST WITH SURVIVOR BENEFITS

At a Matrimonial/IAS Part ___, held in and for the County of _____, at the Courthouse located at ____ _____, New York, on the ___ day of _____, 20___.

P R E S E N T : HON. _____, J.S.C.
Justice Presiding

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_____,

Index No. _____

Plaintiff,

DOMESTIC RELATIONS ORDER

-against-

_____,

Defendant.

----------X

This Order is directed to the Administrator of the ABC Pension Plan.

WHEREAS, the parties were married to each other on _____; and

WHEREAS, this action commenced with the filing of a Summons and Complaint in _____ County on _____; and

WHEREAS, a Judgment of Divorce was entered by this Court on _____; and

WHEREAS, this Court has personal jurisdiction over all parties and jurisdiction over the subject matter of this Order; and

WHEREAS, this order is entered pursuant to Section 236B of the Domestic Relations Law of the State of New York to enforce the marital rights of Defendant, as the Former Spouse; and

WHEREAS, it is intended that this Order shall be a Qualified Domestic Relations Order ("QDRO") as defined in Section 414(p) of the internal Revenue Code of 1986, as amended (the "Code"), and Section 206(d) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), that assigns certain benefits in the ABC Pension Plan as specifically set forth in this Order; and

WHEREAS, counsel for Defendant has moved for entry of this Order;

NOW, THEREFORE, IT IS ORDERED AND ADJUDGED AS FOLLOWS:

It is the intent of the Court that the provisions of this Domestic Relations Order ("Order") operate as an effective assignment of the Participant's interest in the ABC Pension Plan as set forth below to the Alternate Payee under both state and federal laws, for all purposes, and constitute a Qualified Domestic Relations Order ("QDRO") in compliance with Section 414(p) of the Internal Revenue Code of 1986, as amended (the "Code") and Section 206(d)(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA").

1. Plan: This Order shall apply to the ABC Pension Plan (the "Plan"), subject to the limitations and restrictions on benefits as set forth under Section 415 and Section 401(a)(17) of the Code. The Plan Administrator is the Board of Trustees, ABC Pension Plan, with offices located at _____, New York, New York 1_____.

2. The Plan Participant is: _____
   Mailing Address: _____
   _____
   Social Security No.: _____

Date of Birth: _____

3. The Alternate Payee is: _____
   Relation to Participant: Former Spouse
   Mailing Address: _____
   _____
   Social Security No.: _____
   Date of Birth: _____

4. This Order assigns to the Alternate Payee the right to receive that portion of the pension benefit provided by the Plan to the Plan Participant as described in the following paragraphs.

5. The Plan shall pay the Alternate Payee a pension benefit based upon the following formula:

Total # of Months Married While Participant in Plan / Total # of Months Participant In Plan up to Benefit Commencement Date	X 50% X	Accrued Benefit through Benefit Commencement Date	=	Alternate Payee's Portion

   Date of Marriage: _____

   Date of Commencement of Divorce Action: _____

   Date of Judgment of Divorce: _____

   The Plan shall pay the Alternate Payee a *pro rata* portion of any cost of living adjustments, benefit increases, or other *ad hoc* benefit improvements.

6. Benefit Commencement Date: The Alternate Payee shall have the right to elect to receive benefit payments on or after the date on which the Plan Participant attains or would have attained the "earliest retirement age" as that term is defined by the Code Section 414(p)(4), (but taking into account only the present value of benefits actually

earned and not taking into account the present value of any employer subsidy for early retirement.) The Alternate Payee's benefit shall be determined based upon the Plan Participant's benefit as of the date contained in paragraph 5 above. The Alternate Payee's benefit shall be actuarially adjusted to provide for a benefit payable over the Alternate Payee's lifetime. The Alternate Payee is required to properly execute and return election forms as required by the Plan on or after the date the Participant attains the "earliest retirement age." Payments shall commence as soon thereafter as administratively possible.

7. If the Participant receives a Disability Pension Benefit, the Alternate Payee's portion shall be determined following the formula set forth in paragraph 5. Payment of Disability Pension Benefit to the Alternate Payee shall commence at the same time as benefits commence to the Participant and shall be payable for as long as the participant is receiving Disability Pension Benefits from the Plan. If payments to the Participant are suspended due to the Participant no longer being disabled, the payments to the Alternate Payee shall also be suspended. Upon attaining age 65, all Disability Pension Benefits being paid to the Participant will cease. At that time the Alternate Payee will have the right to commence payments of her separate interest benefit provided in paragraph 5.
8. In the event of the Alternate Payee's death prior to the Alternate Payee's commencement of benefits, the Alternate Payee's portion of the benefit shall revert back to the Participant.
9. In the event of the Participant's death prior to the Alternate Payee, the Alternate Payee shall be treated by the Plan as a "surviving spouse" of the Participant for

purposes of any pre-retirement benefit and joint and survivor annuity payable to the surviving spouse under the Plan with respect to the Participant's interest in the Plan.

10. The benefits assigned shall be distributed to the Alternate Payee in any form permitted under the Plan in its present form other than a husband and wife pension and a joint and survivor annuity, or as subsequently amended, which is selected by the Alternate Payee prior to the Alternate Payee's benefit commencement date, provided that the form selected does not affect, in any way, the amount or the selection by the Plan Participant of a form of payment.

    In the event that the Participant elects to retire from the Plan prior to normal retirement age and by reason of such early retirement the Plan provides an early retirement subsidy, then the Alternate Payee's benefit shall be re-computed to provide the Alternate Payee with a proportionate share of such subsidy percentage applicable to the accrued benefit assigned to the Alternate Payee hereunder.

11. The benefits hereby assigned to the Alternate Payee may be paid to the Alternate Payee upon the Participant's earliest retirement age, notwithstanding the Participant's continued employment.

12. All benefits payable under the Plan other than those payable to the Alternate Payee shall be payable to the Participant in such manner and form as the Plan Participant may elect in his sole discretion, subject only to Plan requirements (and Section 9 above if the Alternate Payee is designated the surviving spouse with respect to the Plan Participant's interest.)

13. While it is anticipated that payment of the benefit awarded to the Alternate Payee will be made directly to the Alternate Payee, the Plan Participant is designated a

constructive trustee to the extent that he receives any benefits under the Plan that are due to the Alternate Payee but paid to the Plan Participant. In the event of such payment, the Plan Participant is ordered and decreed to pay the benefit defined above directly to the Alternate Payee within ten business days of receipt.

14. Nothing contained in this Domestic Relations Order ("DRO") shall be construed to require the Plan or the Plan administrator:
    a. To provide to the Alternate Payee any type or form of benefit, or any option, not otherwise available under the Plan; or
    b. To pay any benefits to the Alternate Payee which are required to be paid to another alternate payee under another domestic relations order ("DRO") previously determined to be a Qualified Domestic Relations Order ("QDRO"); or
    c. To require the Plan to pay increased benefits (determined on the basis of actuarial value.)
15. Payment from the Plan to the Alternate Payee pursuant to this Order shall be includable in the Alternate Payee's gross taxable income.
16. In the event of a conflict between the terms of this QDRO and the terms of the Plan, the terms of the Plan shall prevail.
17. This QDRO shall be incorporated by reference into any final judgment and decree of divorce as if each and every paragraph herein was specifically set forth therein and shall be enforceable by contempt.
18. This QDRO continues to be effective with respect to any successor of transferee plan, including any plan into which the Plan is merged. In the event of a change in the

processing of QDROs or amendments to the Plan, the Alternate Payee shall receive the same written notifications as other beneficiaries.

19. The Plan Administrator may unilaterally modify any term of this QDRO to the extent necessary to comply with applicable law. However, should any portion of this Order be rendered invalid, illegal, unconstitutional or otherwise incapable of enforcement, or should any of the procedural matters herein ordered need to be adjusted to accomplish the objectives of this order, the Court reserves jurisdiction to make such adjustment in this Order as will effect the intent of the parties and the Court as manifested herein.
20. The Alternate Payee shall serve a certified copy of this Order upon the Plan Administrator by first-class mail.

E N T E R :

_____

_____, J.S.C.

NYCERS WITH ARREARS

At the Civil Term, Part ____ of the Supreme Court of the State of New York held in and for the County of Bronx at the Courthouse located at 851 Grand Concourse, Bronx, New York, on the ___ day of _____, 20___.

P R E S E N T : HON

----------X

Plaintiff,

-against-

Defendant.

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Index No.

DOMESTIC RELATIONS ORDER

WHEREAS, this Court having granted a Judgment of Divorce on the day of December, 20 , by the Hon. , J.S.C., and duly entered in the Bronx County Clerk's Office on the th day of January, 20 ; and it appearing to the Court as follows:

1. The parties hereto were formerly husband and wife, the date of marriage being the th day of June, 20 .

2. This action for divorce commenced on the day of December, 20 .

3. This Order is made pursuant to the Judgment of Divorce granted on the day of , by the Hon. , J.S.C., and duly entered in the Bronx County Clerk's Office on the , pursuant to the Stipulation made between the parties on the , and pursuant to Section 236, Part B, Subdivision 5(d) of the Domestic Relations Law of the State of New York which governs the equitable distribution of the marital property of former spouses.

4. , is hereafter referred to as the PARTICIPANT in the New York City Employees' Retirement System ("NYCERS").

5. , is hereafter referred to as the ALTERNATE PAYEE in NYCERS.

6. The current and last known residential address of the PARTICIPANT is , and his last known mailing address is . His date of birth is , and his Social Security Number is .

7. The current and last known mailing address of the ALTERNATE PAYEE is , and her Social Security Number is . Her date of birth is .

NOW, THEREFORE, to accommodate the marital property distribution between the parties, it is hereby

ORDERED, that the pension benefits earned by the PARTICIPANT with the New York City Employees' Retirement System ("the Plan"), to the extent to which they have accrued during the marriage, are marital property; and it is further

ORDERED, that the benefits to be divided by this Order include pension benefits and improvements, adjustments, and Cost of Living Adjustments (COLA); and it is further

ORDERED, that the term "retirement allowance" as used herein, shall be deemed to include any annuity as well as any supplemental retirement allowance including variable supplement benefits fund payment, if any, and any refund of contributions which is paid by said Plan to the PARTICIPANT; and it is further

ORDERED, that the Plan administrator issue separate checks to the PARTICIPANT and ALTERNATE PAYEE for their respective interests in the Plan at the time the benefits become payable; and it is further

ORDERED, that at such time as the PARTICIPANT has retired from and is actually receiving a retirement allowance from NYCERS, NYCERS, in accordance with the Equitable Distribution Law set forth in Section 236, Part B, Subdivision 5(d) of the Domestic Relations Law of the State of New York, and in accordance with the formula devised in the case *Majauskas v. Majauskas*, 61 N.Y.2d 481, 463 N.E.2d 15, 474 N.Y.S.2d 699 (1984), is directed to pay to the ALTERNATE PAYEE from the PARTICIPANT'S retirement allowance, Fifty Percent (50%) of a fraction of the PARTICIPANT'S monthly retirement allowance; and it is further

ORDERED, that the numerator of said fraction shall be the number of months of service credit accrued during the period of cohabitation during the marriage, from April 12, 2013, or the date of membership, whichever is later, until March 8, 2015, and the denominator shall be the total number of months of service credit in NYCERS which the PARTICIPANT has at the time of retirement, termination of employment, or death. "Credited Service" shall be determined by NYCERS and shall be exclusive of any "breaks in service" as determined by NYCERS; and it is further

ORDERED, that the ALTERNATE PAYEE'S portion of the pension benefits shall not be diminished on account of any outstanding pension loan balance that the PARTICIPANT may have at the time of his retirement, and any such loans shall be repaid solely by the PARTICIPANT; and it is further

ORDERED, that the ALTERNATE PAYEE'S share shall be calculated based on the PARTICIPANT'S full retirement allowance prior to any reduction for any option that may be selected by the PARTICIPANT; and it is further

ORDERED, that in the event that the PARTICIPANT has already commenced receiving benefits from the New York City Employees' Retirement System at the time of implementation of this Order, the New York City Employees' Retirement System shall make retroactive payments owed to the Alternate Payee for the period starting on the date benefit payments commenced, and ending on the date of this Order's actual implementation by the New York City Employees' Retirement System , from the Participant's retirement allowance to the Alternate Payee, at the rate of fifty per cent of the amount determined payable to the Alternate Payee pursuant to this Order per month until the entire amount of arrears owed to the Alternate Payee is paid in full; and it is further

ORDERED, that the Plan is to withhold from the PARTICIPANT'S retirement allowance for equitable distribution payments to the ALTERNATE PAYEE the amount computed pursuant to this Order. For so long as the PARTICIPANT receives a retirement allowance from the Plan, the ALTERNATE PAYEE is entitled to receive a monthly benefit payable until the death of the ALTERNATE PAYEE; and it is further

ORDERED, that in the event the ALTERNATE PAYEE dies after commencement of benefits to her, the PARTICIPANT shall have full benefits paid to him; and it is further

ORDERED, that in the event that the Plan Trustee inadvertently has paid or shall pay to the PARTICIPANT any benefits that are assigned to the ALTERNATE PAYEE pursuant to the terms of this Order, the PARTICIPANT shall immediately reimburse the ALTERNATE PAYEE to the extent that he has received such benefit payments, and shall forthwith pay such amounts so received directly to the ALTERNATE PAYEE within ten (10) days of receipt.

ORDERED, that nothing contained in this Order shall, in any way, require NYCERS to provide any form, type, or amount of benefit not otherwise available by law; and it is further

ORDERED, NYCERS shall have no obligation or responsibility as a consequence of this action apart from the specific direction contained in this Order; and it is further

ORDERED, that in the event of a change of address of said ALTERNATE PAYEE, she will immediately notify, in writing, the New York City Employees' Retirement Systems, 30-30 47th Avenue, 10th Floor, Long Island City, New York 11101; and it is further

ORDERED, that this Order shall not require NYCERS to pay any benefits to an alternate payee, including Defendant herein, which are required to be paid to another alternate payee; and it is further

ORDERED, that the PARTICIPANT and ALTERNATE PAYEE shall, at any and all times, upon request by the other party or by the Plan, take any and all steps to make, execute and deliver any and all further instruments and assurances as may be necessary or desirable for the purpose of giving force and effect to the provisions of this Order; and it is further

ORDERED, that this Order is to be deemed appropriate to effectuate the division of the retirement benefits earned by the PARTICIPANT, pursuant to his participation in NYCERS; and it is further

ORDERED, that this Court retains jurisdiction to implement and supervise the payment of retirement benefits as provided herein should either party or the Plan Administrator make such application, and the Court determines such to be appropriate and necessary.

E N T E R :

_____

A NOTE ON DOCUMENTS REGARDING PENSIONS AND OTHER RETIREMENT BENEFITS

A special thanks to Christopher Dagg, Senior Staff Attorney in the Workers' Rights and Benefits Unit at Brooklyn Legal Services, for permission to reprint and distribute the following materials located throughout this Manual:

A. Retirement Benefits and Divorce
B. Private Sector Retirement Plans
C. Public Retirement Systems
D. Authorization and Release for Plan Information
E. Retirement Benefits Checklist
F. DCP & DBP Stipulation Language

Brooklyn Legal Services

105 Court Street

Brooklyn, NY 11201

AUTHORIZATION TO RELEASE PLAN INFORMATION

From Landis Olesker, How to Write Successful Qualified Domestic Relations Orders (New York State Bar Assoc. 1996)

AUTHORIZATION TO RELEASE PLAN INFORMATION

TO: [Name of Administrator of Pension Benefit Plan]

You are hereby authorized and directed to release and provide to [name and address of attorney for nonparticipant spouse] the following information regarding [name and SSN of participant spouse] (the "Participant"):

1. A complete copy of the Plan, including all amendments adopted since the Plan was established or last restated.
2. The Plan's Summary Plan Description, a description of all material modifications which are not included in the SPD and any other printed materials (for example, brochures) which describe the terms of the Plan.
3. A statement whether the Plan is a qualified plan under the Internal Revenue Code of 1986, as amended.
4. The Participant's employer-provided accrued benefit under the Plan and, if applicable, their employee-provided accrued benefit and rollover benefit. If the Plan is an individual account plan, also provide a description and the value of each separate account and sub-account maintained by the Plan for the Participant.
5. A statement of the Participant's vested interest in their accrued benefit under the Plan. If the Participant is not fully vested in their accrued benefit, provide a statement as to when full vesting will occur.
6. A statement and description of all optional forms of benefit which may be available to the Participant under the Plan.
7. The Participant's normal retirement date under the Plan and any earlier date when (a) the Participant is or may be entitled to receive their Plan benefits and (b) distribution of a portion of the Participant's benefits could be made under a qualified domestic relations order ("QDRO").
8. If the Participant has previously withdrawn or borrowed funds from the Plan, provide the gross amount (before tax withholding or any other deductions) and the date of each payment made by the Plan to the Participant. Identify the nature of each such payment (e.g., plan loan, hardship withdrawal, etc.)
9. Whether the alternate payee under a QDRO is entitled to the same rights as the Participant under the Plan as to (a) the designation of beneficiaries to receive benefits payable after death, (b) the direction of the investment of Plan account and sub-account balances, (c) loans from the Plan, and (d) withdrawals from the Plan.
10. The Plan's procedures for dealing with the qualification of domestic relations order, including (a) any forms of QDROs which will be acceptable to the Plan, and (b) any

information which has been developed on behalf of the Plan for the use of nonparticipant spouse, other potential alternate payees and the representatives of any of them.

_____, 20__ _____

(Signature of Participant)

CERTIFICATE OF SUBSCRIBING WITNESS

State of New York)
) ss.:
County of)

On the ___ day of _____ in the year 20__, before me, the undersigned, a Notary Public in and for said State, personally appeared…, the subscribing witness to the foregoing instrument, with whom I am personally acquainted, who, being by me duly sworn, did depose and say that they reside in….. (if the place of residence is in a city, include the street and street number, if any, thereof); that they know …. to be the individual described in and who executed the foregoing instrument; that said subscribing witness was present and saw said … execute the same; and that said witness at the same time subscribed their name(s) as a witness thereto.

(Signature and office of individual taking proof.)

SAMPLE SETTLEMENT LANGUAGE

FROM SHULMAN & KELLEY, DIVIDING PENSIONS IN DIVORCE, 2008 CUM. SUPP.

Defendant is a participant under the [official name of plan] (the "Plan"). For the purposes of marital property division, Plaintiff is hereby granted a portion of Defendant's retirement benefits under the Plan as designated below. Their ownership interest in the specified portion of Defendant's retirement benefits shall become effective on the Assignment Date, which shall be the date this Separation Agreement is filed with the court.

Amount of Plaintiff's Benefits: Accordingly, effective as of such Assignment Date, Plaintiff shall be assigned a portion of Defendant's retirement benefits in an amount equal to the actuarial equivalent of fifty percent (50%) of the Marital Portion of the Defendant's Accrued Benefit under the Plan as of the Defendant's benefit commencement date, or Plaintiff's benefit commencement date, if earlier. The Marital Portion shall be determined pursuant to *Majauskas v. Majauskas* by multiplying Defendant's Accrued Benefit by a fraction (less than or equal to 1.0), the numerator of which is the number of months of Defendant's credited service in the Plan earned during the marriage [from date to date], and denominator of which is the total number of months of the Defendant's credit service in the Plan as of earliest of their date of cessation of benefit accruals or the date that Plaintiff commences their share of the benefits hereunder.

Post-Retirement Cost-of-Living Adjustments: In addition, Plaintiff shall receive a pro rata share of any post-retirement cost of living adjustment or other economic improvements to Defendant's benefits on or after the date of their retirement. Such pro rata share shall be calculated in the same manner as Plaintiff's share of Defendant's retirement benefits is calculated as set forth above.

Commencement Date and Form of Payment to Plaintiff: Plaintiff may elect to commence their share of the benefits under the Plan as of the earliest retirement date on which Defendant is eligible to commence benefits under the Plan. Plaintiff may elect to receive their benefits in any one of the allowable benefit distribution options permitted under the terms and provisions of the Plan, other than a Qualified Joint & Survivor Annuity with any subsequently married spouse as the beneficiary.

The form of benefit elected by Plaintiff is to be based on their life expectancy. Any actuarial adjustment that might be necessary to convert Plaintiff's benefits to one based on their lifetime should be applied to their share of the benefits.

NB: If the Plan does not permit Plaintiff to receive their benefits in the form of an actuarially equivalent life annuity based on their life expectancy, then the form of benefits shall be based on the life expectancy of the Defendant. Additionally, Defendant shall be required to elect their

benefits in the form of a reduced joint and survivor annuity in order to provide Plaintiff with post-retirement survivorship protection.

Further, should any early commencement reduction be necessary in the event Plaintiff commences their benefits prior to Defendant's Normal Retirement Date under the Plan, then such reduction shall be applied to Plaintiff's benefits in accordance with applicable Plan provisions.

Early Retirement Subsidy: Plaintiff shall be entitled to a pro rata share of any employer-provided early retirement subsidy provided to Defendant on the date of their retirement, and in the event Plaintiff has already commenced their share of the benefits on the date of Defendant's retirement, then the amounts payable to Plaintiff shall be increased in accordance with the Plan Administrator's practices and the Plan's actuarial principles in order to provide Plaintiff with a pro rata share of such early retirement subsidy. Such pro rata share shall be calculated in the same manner as Plaintiff's share of Defendant's retirement benefits is calculated pursuant to this section of the Separation Agreement.

Early Retirement Supplements: Plaintiff shall be entitled to a pro rata share of any early retirement supplements, interim supplements or temporary benefits payable to the Defendant. The Plaintiff's share of said benefit shall be calculated in the same manner as the Plaintiff's share of Defendant's retirement benefits is calculated pursuant to this section of the Separation Agreement.

Pre-Retirement Survivorship Protection for Plaintiff: In order to secure Plaintiff's ownership right in the assigned portion of Defendant's retirement benefits under the Plan, in the event that Defendant predeceases Plaintiff and neither Plaintiff nor Defendant has commenced their benefits under the Plan, such Plaintiff shall be designated as the surviving spouse of Defendant for purposes of establishing Plaintiff's entitlement to receipt of this monthly pre-retirement surviving spouse annuity.

The designation applies to the Marital Portion of Defendant's Accrued Benefit as set forth above. In the event that the costs associated with providing this pre-retirement death benefits coverage are not fully subsidized by Defendant's employer, then Defendant must make an affirmative election for such pre-retirement surviving spouse coverage in a timely manner and in accordance with their employer's election procedures.

Tax Treatment of Distributions Made to Plaintiff under the Qualified Domestic Relations Order: For purposes of Sections 401(a)(1) and 72 of the Internal Revenue Code, Plaintiff shall be treated as the distribute of any distribution or payments made to them under the terms of the QDRO and as such will be required to pay the appropriate federal, state, and local income taxes on such distribution.

Constructive Receipt: In the event that the Plan Trustee inadvertently pays to Defendant any benefits that are assigned to Plaintiff pursuant to the terms of the QDRO, Defendant shall immediately reimburse Plaintiff to the extent that they have received such benefit payments, and shall forthwith pay such amounts so received directly to Plaintiff within ten (10) days of receipt.

A QDRO Shall Issue: In order to effectuate the Assignment provisions of this Separation Agreement regarding the divisions of Defendant's retirement benefits under the Plan, a Qualified Domestic Relations Order ("QDRO") shall be prepared in accordance with the terms of this Agreement and submitted to the Plan Administrator for processing. Notwithstanding the previous sentence, in the even that Defendant predeceases the Plaintiff prior to the date that a QDRO is officially approved by the Plan Administrator, it is hereby agreed that the terms and provisions of this Agreement shall, in and of itself, be deemed a QDRO by such Plan Administrator and processed pursuant to the survivor language stated above.

Continued Jurisdiction: The court shall retain jurisdiction to amend the provisions contained herein in order to establish and/or maintain the qualified status of the QDRO under ERISA, and to effectuate the original intent of the parties. The court shall also retain jurisdiction to enter such further orders that are just, equitable and necessary to enforce, secure and sustain the benefits awarded to the Plaintiff, in the event that the Defendant and/or the Plan Administrator fail to comply with any or all of the provisions contained herein. Such further orders may also include, but not be limited to, nunc pro tunc orders or orders that "recharacterize" the benefits awarded under the Plan to apply to benefits earned by the Defendant under another plan, as applicable, or orders that award spousal or child support, to the extent necessary to carry out the intentions and provisions of this Order.

Actions by Defendant: Defendant shall not take any actions, affirmative or otherwise, that can circumvent the terms and provisions of this Agreement or the QDRO, or that could diminish or extinguish the rights and entitlements of Plaintiff as set forth herein or under the terms of the QDRO. Should Defendant take any action or inaction to the detriment of Plaintiff, Defendant shall be required to make sufficient payments directly to Plaintiff to the extent necessary to neutralize the effects of their actions or inactions and to the extent of Plaintiff's full entitlements hereunder.

From Karen Greenberg, Esq., DC-37 MELS

A. Wife shall receive an irrevocable interest in the marital share of Husband's pension under XXX Pension Plan pursuant to the formula set forth in Majuaskas v. Majauskas, to wit; Wife shall receive 50% of the Husband's vested and accrued benefits as of the date of commencement of benefits multiplied by a fraction, the numerator of which fraction is X representing the number

of pension credits Husband accrued during the marriage (from "a" date to "b" date) and the denominator of which is "y", representing the total number of Husband's pension credits at the time at his retirement, or Wife's election to receive her retirement benefits, whichever first occurs.

B. Wife's share of the pension shall be calculated prior to any reduction for any pension option that may be chosen by Husband. Wife shall have the right with respect to her pension share, to receive benefits for her life time and any actuarial adjustment necessary shall be deducted from her share. The death of the Husband after Wife has commenced her benefit shall have no effect on the Wife's receipt of her share herein.

C. In the event that Husband dies prior to the date Wife begins to receive her pension share as set forth herein, the Wife shall be deemed entitled to the pre-retirement surviving spouse annuity.

D. Wife shall pay all taxes due on the pension benefit she receives.

E. A (Qualified) Domestic Relation s Order shall be granted upon 10 days Notice of Settlement to effectuate the pension distribution as set forth herein.

F. Wife shall be responsible for the preparation of the required DRO.

NYC Deferred Compensation Plan Sample 1:

Deferred Compensation Plan, to the extent to that it has accrued during the marriage, is marital property. The account was opened on November 16, 2007, and the balance of the account on December 31, 2007, immediately preceding the January 10, 2008 filing of the divorce, was $580.16. The opposing party shall therefore pay the client one half (50%) of the marital portion of the plan, or $290 ($580/2) by money order or personal check sent care of the wife’s attorney.

NYC Deferred Compensation Plan Sample 2:

1. The Plan Administrator shall establish a separate 457 account in the name of the wife, in the amount of 50% of the husband's Contributions to the 457 account from September 30. 1997 until February 25, 2008, together with earnings and/or losses from the date of the marriage until such time as the account is established for the wife. The wife's share of the plan shall not be diminished by any loans or withdrawals the husband may have taken, including but not limited to a loan issued to the husband in December 2005 for $5,686, and any such loans shall be repaid solely by the husband unless he brings a post-Divorce Judgment motion and establishes that the money for that loan was used for the benefit of the wife during the marriage. The wife shall be eligible for distribution upon the creation of the separate account even if the husband has not separated from service with the City of New York provided the rules of the plan so provide.

2. The husband shall not make any type of withdrawal or take any loan after the date of signing of this stipulation and before the establishment of the wife's separate account which will cause the account balance to fall below the amount awarded to the wife. In the event that the husband made any withdrawal or took any loans from the plan prior to the signing of this Stipulation which caused the account balance to fall below the amount awarded to the wife, he shall be responsible for reimbursing the wife for any shortfall, directly to the wife, from the husband's own separate assets.

STIP - ERISA PENSION

A. Wife shall receive an irrevocable interest in the marital share of Husband's pension under XXX Pension Plan pursuant to the formula set forth in Majauskas v. Majauskas, to wit; Wife shall receive 50% of the Husband's vested and accrued benefits as of the date of commencement

of benefits multiplied by a fraction, the numerator of which fraction is X representing the number of pension credits Husband accrued during the marriage (from "a" date to “b" date) and the denominator of which is Y, representing the total number of Husband's pension credits at the time of his retirement, or Wife's election to receive her retirement benefits, whichever first occurs.

B. Wife's share of the pension shall be calculated prior to any reduction for any pension option that may be chosen by Husband. Wife shall have the right with respect to her pension share, to receive benefits for her life time and any actuarial adjustment necessary shall be deducted from her share. The death of the Husband after Wife has commenced her benefit shall have no effect on the Wife's receipt of her share herein.

C. In the event that Husband dies prior to the date Wife begins to receive her pension share as set forth herein, the Wife shall be deemed entitled to the pre-retirement surviving spouse annuity.

D. Wife shall pay all taxes due on the pension benefit she receives.

E. A (Qualified) Domestic Relations Order shall be granted upon 10 days Notice of Settlement to effectuate the pension distribution as set forth herein.

ARTICLE 15

RETIREMENT BENEFITS

I. A. The Wife shall receive an irrevocable interest in the marital share of the pension benefits of the Husband to which he is entitled by virtue of his membership in the New York City Retirement System (NYCERS). The parties acknowledge that the Husband has been a member of

NYCERS since July 22, 1990. The Wife therefore shall receive an irrevocable interest in 50% of that portion of the Husband's pension with the New York City Employees Retirement System, which accrued during the marriage and prior to the commencement of the divorce action, pursuant to the formula set forth in *Majauskas v. Majauskas*, to wit: At the time of Husband's retirement, Wife shall receive fifty percent (50%) of the amount of the Husband's retirement allowance, multiplied by a fraction, the numerator of which is 127 (representing the number of months of Husband's creditable service from July 18, 1992 (date of marriage) to February 18, 2003) and the denominator of which is "y" (representing the total number of months of the Husband's creditable service at the time of his retirement). The Wife's share shall be calculated to any reduction for loan repayment outstanding at the time of Husband's retirement. The Wife shall also be entitled to receive the same *pro rata* share of any refund of contributions, adjustments, COLAs (cost of living adjustment), and variable supplement benefit fund payments applicable to the pension, if any. The Wife shall be entitled her *pro rata* share of the pre-retirement pension death benefit, to wit, a fraction of the death benefit equal to "x"/"y" where 127 representing the number of months of credited service during the marriage and "y" is the total number of months of creditable service at the time of Husband's death. Husband agrees to at all times, designate and maintain Wife as beneficiary of the *pro rata* share of the pension death benefit as set forth herein. Husband agrees that at the time of his application for retirement, he shall elect Option 2, (25% Joint and Survivor Option), designating Wife as the beneficiary thereof, so that in the event of his death after retirement, Wife shall receive a retirement allowance equal to 25% of Husband's benefit for the rest of her lifetime. The terms of this pension provision shall be embodied in a "Domestic Relations Order" ("DRO") which shall be granted upon twenty (20) days notice of settlement and which

shall be served upon the pension plan, to effectuate compliance with the terms of this Article, and to effectuate payment of the Wife's share of the Husband's retirement benefits directly to the Wife.

B. Wife shall be responsible for the preparation of the required DRO.

C. Wife shall be responsible for the payment of all income taxes due on the retirement benefits she receives.

D. In the event that Wife dies prior to Husband's retirement, Wife's benefits due hereunder shall revert to Husband, and husband may choose any option he wishes at the time of his retirement.

II. A. Husband shall receive an irrevocable interest in the marital share of the pension benefits of the Wife, to which she is entitled by virtue of her membership in the Board of Education Retirement System, of the City of New York (BERS). The parties acknowledge that the Wife has been a member of BERS since November 17, 1998. The Husband therefore shall receive an irrevocable interest in 50% of that portion of the Wife's pension which accrued during the marriage and prior to the commencement of the divorce action, pursuant to the formula set forth in *Majauskas v. Majauskas*, to wit; At the time of Wife's retirement, Husband shall receive fifty-percent (50%) of the amount of the Wife's retirement allowance, multiplied by a fraction, the numerator of which fraction is 51 (representing the number of months of Wife's credited service from November 17, 1998 to February 18, 2003) and the denominator of which is "y" (representing the total number of Wife's creditable service at the time of her retirement). The Husband's share shall be calculated prior to any reduction for loan repayment outstanding at the time of Wife's retirement. The Husband shall be entitled to receive the same *pro rata* share of any refund of contributions, adjustments, COLAs (cost of living adjustment), and variable supplement benefit

fund payments applicable to the pension, if any. The Husband shall be entitled to receive a *pro rata* share of the pre-retirement death benefit, to wit, a fraction of the death benefit equal to "x"/"y", where "x" is 51, and "y" is the number of months of creditable service at the time of Wife's death. Wife agrees to at all times designate and maintain Husband as beneficiary of the *pro rata* share of the pension death benefit as set forth herein. Wife agrees that at the time of her application for retirement, she shall elect Option 2 (25% Joint and Survivor Option), designating Husband as the beneficiary thereof, so that in the event of her death after retirement, Husband shall receive a retirement allowance equal to 25% of Wife's benefit. The terms of this pension provision shall be embodied in a "Domestic Relations Order" (DRO) which shall be granted upon twenty (20) days notice of settlement and which shall be served upon the pension plan, to effectuate compliance with the terms of this Article, and to effectuate payment of the Husband's share of the Wife's retirement benefits directly to the Wife.

B. Husband shall be responsible for the preparation of the required DRO.

C. Husband shall be responsible for the payment of all income taxes due on the retirement benefits he receives.

D. In the event that Husband dies prior to Wife's retirement, Husband's benefits due hereunder shall revert to Wife, and Wife may elect any option she wishes at the time of her retirement.

THE CITY OF NEW YORK DEFERRED COMPENSATION PLAN

1. Wife shall receive an irrevocable interest in a share of husband's City of New York Deferred Compensation Plan, (457 and 401(k)) to wit, Wife shall receive one-half of total amount in husband's account currently maintained by husband as of the commencement of this action

(January 8, 2004) or the next closest valuation date, plus all investment earnings and gains thereon, up to the date of payment to Wife of her share or segregation of Wife's share in a separate account, pursuant to a Domestic Relations Order.

2. Calculation of Wife's share shall be made prior to reduction for any outstanding loan on that date.

3. Until such time as DRO is deemed qualified by the plan, Husband shall maintain Wife as the beneficiary of at least one-half of husband's individual annuity account.

4. Husband represents that there are sufficient funds presently in his account to cover the amount awarded herein. Husband further represents that he will not take any further loans or withdrawals which would impair Wife's rights under the DRO to be entitled.

5. A Domestic Relations Order shall be granted upon 20 days Notice of Settlement to effectuate the retirement account distribution as set forth herein.

ARTICLE 11

RETIREMENT BENEFITS

A. The Husband is presently a member of the New York City Employees Retirement System ("NYCERS"), having commenced membership in NYCERS on November 6, 1985, with service bought back to May 6, 1985. The marital share of Husband's pension has been appraised by Lexington Pension Consultants, Inc, at $208,784.62, as of the date of commencement of the divorce action, i.e. December 15, 2006. Husband has not yet retired.

B. The Wife is presently a member of the New York City Employees Retirement System ("NYCERS"), having commenced membership in NYCERS on April 11, 1990. The marital share of Wife's pension has been appraised by Lexington Pension Consultants, Inc. at $93,068.81, as of the date of commencement of the divorce action, i.e, December 15, 2006. Wife has not yet retired.

C. The parties agree that each is entitled to 50% of the other's pension. To effectuate the equal division of the parties' pensions, 50% of the marital share of. Wife's pension ($46,534.00) shall be offset against 50% of the marital share of Husband's pension ($104,392.00), and the difference shall be paid to Wife by giving her a proportionately reduced share of Husband's pension pursuant to the formula set forth in Majauskas v. Majauskas by Domestic Relations Order against Husband's pension, and Husband receiving no share of Wife's pension. The parties agree that after such offset, Wife's interest in Husband's NYCERS pension shall be 28% of a fraction of Husband's monthly retirement allowance, the numerator of which fraction is the total number of months of Husband's credited service in NYCERS during the marriage (from August 2, 1969 to December 15, 2006), and the denominator of which fraction is the total number of months of Husband's credited service in NYCERS at the time of his retirement Wife's share of Husband's monthly retirement allowance shall be enhanced by the same *pro rata* share of any Cost of Living Adjustment ("COLA") or other supplement that Husband may become entitled to in the future, and Wife shall receive the same *pro rata* share of any refund of contributions. Husband represents that he has not taken any loans against his pension. In the event that any loans are outstanding at the time of Husband's retirement, then the reduction in the monthly retirement allowance on account of such loans shall be taken solely from Husband's share, and shall not affect Wife's share.

D. Husband shall designate the Wife as beneficiary of the same *pro rata* share of his pre-retirement pension death benefit. At the time of his retirement the Husband agrees to elect Option 2 (25% Joint and Survivor) with Wife named as the beneficiary thereof, so that in the event he dies after retirement, the Wife shall receive a survivor benefit equal to 25% of the retirement allowance payable to the Husband during his lifetime.

E. Husband, not less than fifteen days prior to formally exercising his retirement option election, must provide to Wife the completed, original signed form evidencing the fact that Husband is about to exercise the above referenced option in Paragraph D. Husband must then submit this option election form to the New York City Employees Retirement System. Husband must promptly provide to the Wife, an original statement from the New York City's Employee Retirement System acknowledging and accepting the retirement election.

F. Additionally, no form, application or instrument involving the retirement benefits of the Husband may be submitted to the New York City Employees Retirement System prior to such form or instrument being made available to the Wife not less than fifteen days prior to the date of submission of any form, application agreement or instrument to the New York City Employees Retirement System.

G. The parties agree that a Domestic Relations Order (“DRO") encompassing the provisions set forth herein, shall be granted upon 10 days notice of settlement to Husband's attorney. Annexed hereto as Exhibit A is the DRO that the parties agree accurately reflects the parties' agreement, subject only to modifications required by NYCERS.

BROOKLYN
Legal
Services NYC
DEMAND JUSTICE

AUTHORIZATION AND RELEASE

I, _____, hereby authorize the release from the _____Pension Plan, its administrators, actuarial consultants, etc., of any papers and information requested by counsel from Brooklyn Legal Services and its representatives, and to speak in person, by telephone, or other means of communication about any matters relevant to my benefits under the Plan.

Signature: _____

Address: _____

_____

Telephone: _____

Sworn to before me this ____
day of _____, 20___.

_____
NOTARY PUBLIC

Brooklyn Legal Services | 105 Court Street, 4th Floor, Brooklyn, NY 11201
Phone: 718-237-5500 | Fax: 718-855-0733 | www.LegalServicesNYC.org
Hon. Betty Staton, President | **Tanya Wong**, Project Director
Deborah Howard, Board Chair

CONSENT TO RELEASE INFORMATION

TO: The United Federation of Teachers
Welfare Fund
52 Broadway
New York, NY 10004
718-379-6200

This is to authorize Dylan Advocate, Esq. or any attorney with My Law Office, Inc., to obtain any records and information from The United Federation of Teachers, including any pension, retirement plan or 401(k) accounts, or health care plan, or emergency or welfare fund or any other benefits I may have now, or may have had in the past, in connection with my membership in The United Federation of Teachers.

This release also authorizes Dylan Advocate, Esq. or any attorney with Her Justice, Inc., to discuss with any representative or employee of The United Federation of Teachers any benefit I may have in connection with my membership in the above union.

_____

Opposing Party
S.S. No.: XXXX

STATE OF NEW YORK)
COUNTY OF) SS.:

On this day of , 2022, before me personally came Opposing Party, to me known and known to me to be the individual described in and who executed the foregoing release, and he acknowledged to me that he executed the same.

_____

Notary Public

PRIVATE SECTOR PENSION PLANS

I. Overview

A. Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 et seq., and parallel provisions in Internal Revenue Code govern
B. Coverage of ERISA – private sector
   a. Does not cover: government plans or most church plans
C. Plan Defined: Any plan, fund or program that provides retirement income to employees or results in deferral of income by employees for periods extending to termination of covered employment or beyond
D. Written Instrument Requirement:
   1. Plan must be established and maintained pursuant to a written instrument, ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1)
   2. Includes all legally operative documents, including plan, Summary Plan Description, cash balance account, trust agreement, and other governing instruments, e.g., insurance policies and Collective Bargaining Agreements
E. Summary Plan Description (SPD)
   1. Must provide the following:
      a. Name of plan
      b. Accurate reflection of plan
      c. Participation, vesting, benefit accrual, breaks in service, joint and survivor benefits, and normal retirement age provisions
      d. Circumstances that can cause benefits to be lost, offset, reduced, forfeited or suspended 29 C.F.R. 2520.102-3(l)
      e. Claims procedures
      f. Legal rights to receive documents and to initiate litigation
      g. List of Department of Labor office for assistance about participant's rights
      h. Circumstances under which the plan can be terminated, and the benefits, rights and obligations of participants upon termination 29 C.F.R. 2520.102-3(m)
      i. Whether the plan is insured by the PBGC
      j. Name, address and telephone number of plan administrator
      k. Agent for service of legal process
      l. Names, address, and titles of plan trustees
      m. Date of end of plan year
      n. ID number used by plan
      o. Information about sponsorship and financing of plan

II. Types of Plans
A. Single-Employer Plans
   1. Maintained by one employer ("sponsor")
B. Multi-Employer plans ("Taft-Hartley Plans")
   1. Industry wide

2. Negotiated between employers and union pursuant to Collective Bargaining Agreement (CBA)
3. Board of trustees: employer representatives and union representatives

C. Defined Benefit Plans (DBP)
1. Formula that provides for a definitely determinable benefit amount at retirement age, usually as annuity
2. Formula for amount of benefit usually based on years of service and average salary
3. Sponsor(s) make actuarially-determined contributions to fund on behalf of all participants
4. But vesting rules mean not all participants will receive benefits
5. Investment risk on employer
6. Insured by PBGC
7. Subject to minimum funding standards

D. Defined Contribution Plans (DCP):
1. Examples:
   a. 401(k) and 403(b) plans,
   b. Profit sharing plans,
   c. Stock bonus plans
   d. Money purchase plan
   e. Target benefit plan
2. Plan sets amount employer and/or employees to contribute (e.g., % of salary) and how allocated among participants
3. But does not specify ultimate benefit
4. Individual accounts usually established
5. Benefit is account balance which participant can use to buy annuity, roll over to another DCP or take in lump sum
6. Investment risk on employee
7. Mobile
   No PBGC guaranty

E. Cash Balance Plans a/k/a "hybrid plans"

F. Welfare Plans: Health and Disability Benefits
1. Generally, vesting and participation standards do not apply

III. Disclosure Rules

A. Upon written request, plan administrator must provide
- most recent SPD and amendments,
- annual report ("Form 5500") and actuarial report,
- cash balance account,
- trust agreement, contract, other instruments under which plan is established or operated (including collective bargaining agreements, third party administrative agreements and administrative manuals),
- statement of vested benefits

1. Must be provided within 30 days

2. Penalties up to $110.00/day of noncompliance

B. Individual benefits statements:

1. Upon request annually
2. For Defined Benefit Plans:

a. pension benefit statement at least once every three years or provide annual notice that they are available upon request

b. statements must provide:

(1) total benefits accrued

(2) nonforfeitable pension benefits that have accrued (or earliest date on which they will accrue)

(3) whether SSA or other benefits offset the pension

3. Must be provided to each participant who separates from service with deferred vested benefit
4. Estimates (so designated) of future benefits are just that
5. Defined Contribution Plans

a. If participant can direct investments, must be automatically provided quarterly

b. If participant cannot direct investments, must be provided automatically annually

c. For individual account plans, statements shall include:

(1) value of each investment;

(2) any limitations or restrictions of right to direct investments;

(3) an explanation of importance of a well-balanced and diversified investment portfolio

C. Notice and explanation of joint and survivor benefits

1. Must be provided before participant's retirement date, explaining rights of spouse, waiver of survivor benefits, revocation of waiver
2. Other information to obtain:
3. Plan's QDRO processing procedures
4. Plan's model QDRO, if any

IV. Vesting Rules

A. General rule: once pension rights are vested, they cannot be lost, even if participant leaves employment prior to Normal Retirement Age

B. When does Participant vest:

1. Participant is always fully vested in his or her own contributions to pension plan, if any (e.g. 401(k), 403(b))
2. Participant fully vests upon reaching Normal Retirement Age while working in covered employment, IRC 411(a)(8)
3. Upon plan termination, Code 411(d)(3)
4. Upon meeting vesting schedule

C. Vesting Schedules for DBPs
   1. ERISA and IRC set ceilings; plans can be more generous
   2. Two types: cliff vesting vs. graded vesting
   3. Cliff vesting:
      a. Pre ERISA: Look to plan then in effect
      b. For single-employer pension plan years beginning on or after Jan. 1, 1989: 5 years to vest 100%;
      c. Between Jan. 1, 1976 and Dec. 31, 1988: 10 years to vest 100%
      d. Exception for employees in a multi-employer plan who are in a collective bargaining unit:
         (1) For plan years beginning prior to 1997: 10 years;
         (2) for plan years beginning after 1997: 5 years
   4. Graded Vesting:
      a. Pre-ERISA: look to plan in effect
      b. Jan. 1, 1976 - Dec. 31, 1988: "5-15" Rule:
         (1) 0-5 Years: 0% vesting
         (2) 5 Years: 25% Vested
         (3) 6 - 10 Years: 5% each additional year
         (4) 11 - 15 Years: 10% each additional year
      c. Jan. 1, 1989 forward: 7 year gradual vesting:
         (1) 3 years, must vest at least 20% of accrued benefit; increase by 20% for each year service after; must be 100% after 7 years service

	yrs svc	% vested
(a)	3	20
(b)	4	40
(c)	5	60
(d)	6	80
(e)	7	100
(f)		

D. Vesting Schedule for DCPs, effective Jan. 1, 2002: can be either:
   1. 3 year cliff vesting; or
   2. 6 year graded vesting:
      a. 0% vesting until completion of 2 years
      b. 20% vested, with 20% additional vesting for years 3 through 6
      c. 100% vested at 6 years

V. Accrual rules: amount of benefit
   A. Generally, no minimums required; the amount can be just about anything
   B. Defined contribution plans: plan and SPD state amount the employer will contribute to participant's account, e.g., 2% of compensation
   A. Common defined benefit plan designs/formulas for determining amount
      1. FAS Method:
         a. Final average salary of final few years service X a fixed number

based on units
b. e.g. FAS x 1% for each year of service
2. CAP method:
a. Career average plan: based on % of pay earned each year
3. Flat benefit/fixed dollar: e.g. $10 for each year service
a. Defined Benefit Plans must provide "definitely determinable benefits"

VI. When benefits are payable
A. Generally, benefits are payable to participants who have terminated service with the sponsor and have reached Normal Retirement Age (no older than 65)
1. DBPs usually don't permit collection until NRA even if participant is no longer in covered employment
2. DCPs often allow distribution upon termination of employment
B. Cash-outs: if present value of accrued benefit in a defined benefit plan is less than $5000, plan can distribute to participant without participant's consent
C. Distributions prior to retirement age require spousal consent unless benefit is less than $5000
D. Benefits must commence when participant reaches age 70 ½

VII. Form of Payment
A. DBP must offer annuity form payable in regular instalments no less than once a year for lifetime of participant (or joint lives of married couple in a QJSA, infra),
B. Single life annuity: monthly benefits for life of participant; no benefits payable after participant's death
C. Qualified Joint and Survivor Annuity (QJSA)
1. Monthly benefit for life of participant and if participant predeceases, at least 50% of that amount to surviving spouse for his/her life
2. Required default form of payment for married participants under Retirement Equity Act of 1984, effective for participants with at least one hour of service on or after Aug. 23, 1984
D. Qualified Preretirement Survivor Annuity (QPSA)
1. Vested participant who dies prior to commencement of benefits
2. Surviving Spouse receives at least 50% of what participant would have received had he/she been receiving benefits on date of death
3. If participant was no longer in covered employment, amount to surviving spouse is at least 50% of what participant would have received had he/she been receiving benefits as of date of separation from service
4. Required default form of payment for married participants under Retirement Equity Act of 1984 ("REA"), effective Aug. 24, 1984
E. Waiver of QPSA or QJSA requires spouse's consent after receiving information in writing of benefits being waived
F. Plans for New York City and State employees do **not** require spousal consent to election of something other than a QJSA or the designation of someone else as beneficiary

G. Plans may impose a one-year marriage eligibility requirement for QJSA and QPSA waiver rules to apply

VIII. Families and employee benefits

A. Survivor benefits under QPSAs and QJSAs discussed above

B. Qualified Domestic Relations Order ("QDRO")

1. As exception to anti-alienation provisions
   a. Originally a common law exception
   b. Codified in REA in 1984 (the same year as the *Majauskas* decision)
2. Court order directing distribution of retirement benefits to non-participant spouse, former spouse, child or other dependent
   a) General formula: look to period during marriage when pension credits accrued and divide by entire time during which benefits accrued Majauskas v. Majauskas, 61 N.Y.2d 481 (1987)
   b) Property Settlements can use different formulas
   c) Survivor benefits - must be explicit in order, decree, judgment, stipulation and QDRO
3. "shared interest/payment" QDROs
   a) Non-employee spouse (the "alternate payee") receives share of the pension if, as, and when the employee-spouse ("participant") does
4. separate payment/interest QDROs
   a) alternate payee may begin collecting share of pension at participant's earliest retirement age, even if participant is not collecting or is still working
   b) separate interest pays benefit for the life of the alternate payee

C. Technical requirements in QDROs:

1. Order must relate to marital property rights, alimony, child support, for spouse, ex spouse child or dependent: a.k.a. "alternate payees";
2. Must state name and last known address of participant and alternate payee
3. Must specifically describe rights of alternate payee ,
   a. Can be a set amount, or formula
4. Must state period payments will be made
5. Provide name of plan
6. State whether alternate payee is treated as "surviving spouse"
7. Order may not order plan to provide greater benefits than ordinarily provided, require plan to pay in form not otherwise available; pay to alternate payee benefits the plan is already required to pay to another alternate payee
   a. an otherwise qualified DRO can be issued after, or revise, another QDRO
   b. A DRO can be issued at any time and still be a QDRO (including posthumously) under ERISA

AUTHORIZATION TO RELEASE PLAN INFORMATION

I, _____, hereby authorize you to release and provide to _____ the following information regarding my retirement benefits upon request:

I. A complete copy of the Plan, including all amendments adopted since the Plan was established or last restated.

II. The Plan's Summary Plan Description, a description of all material modifications which are not included in the SPD and any other printed materials (for example, brochures) which describe the terms of the Plan.

III. A statement whether the Plan is a qualified plan under the Internal Revenue Code of 1986, as amended.

IV. The Participant's employer-provided accrued benefit under the Plan and, if applicable, his/her employee-provided accrued benefit and rollover benefit. If the Plan is an individual account plan, also provide a description and the value of each separate account and sub-account maintained by the Plan for the Participant.

V. A statement of the Participant's vested interest in his/her accrued benefit under the Plan. If the Participant is not fully vested in his/her accrued benefit, provide a statement as to when full vesting will occur.

VI. A statement and description of all optional forms of benefit which may be available to the Participant under the Plan.

VII. The Participant's normal retirement date under the Plan and any earlier date when (a) the Participant is or may be entitled to receive his/her Plan benefits and (b) distribution of a portion of the Participant's benefits could be made under a qualified domestic relations order ("QDRO").

VIII. If the Participant has previously withdrawn or borrowed funds from the Plan, provide the gross amount (before tax withholding or any other deductions) and the date of each payment made by the Plan to the Participant. Identify the nature of each such payment (e.g., plan loan, hardship withdrawal, etc.)

IX. Whether the alternate payee under a QDRO is entitled to the same rights as the Participant under the Plan as to (a) the designation of beneficiaries to receive benefits payable after death, (b) the direction of the investment of Plan account and sub-account balances, (c) loans from the Plan, and (d) withdrawals from the Plan.

X. The Plan's procedures for dealing with the qualification of domestic relations order, including (a) any forms of QDROs which will be acceptable to the Plan, and (b) any information which has been developed on behalf of the Plan for the use of

nonparticipant spouse, other potential alternate payees and the representatives of any of them.

_____, 20___

_____
(Signature of Participant)

_____
(Print Name)

_____
(Street Address)

_____
(City, State, Zip Code)

_____
(Telephone Number)

_____
(Social Security Number)

_____
(Date of Birth)

Sworn to before me this ____
day of _____, 20____

_____
NOTARY PUBLIC

RETIREMENT BENEFITS AND DIVORCE

I. Retirement benefits such as pensions are a form of deferred compensation. Majauskas v. Majauskas, 61 N.Y.2d 481 (1984).

A. Retirement benefits, to the extent that they were acquired between the date of the marriage and the commencement of a matrimonial action or date of a separation agreement, are marital property subject to equitable distribution. Majauskas v. Majauskas, 61 N.Y.2d 481 (1984).

B. This holds even if the right to a pension has not vested at the time of the separation agreement or commencement of the matrimonial action, so long as it eventually does. Burns v. Burns, 84 N.Y.2d 369 (1994)

C. The non-employee spouse is generally not entitled to share in any part of the pension that was earned before or after the marriage

1. Moldofsky v. Moldofsky, 43 A.D. 3d 1011 (2d Dept' 2007) (amending order to exclude husband's pension earned prior to marriage)

2. DeLuca v. DeLuca 97 N.Y.2d 139 (2001) (Payments to compensate for post-divorce events not subject to equitable distribution)

3. Olivo v. Olivo, 82 N.Y.2d 202 (1993) (Wife who was entitled to share in husband's pension was not entitled to post-divorce early retirement incentive package, except for that portion of package that enhances pension benefits)

4. Jones v. Jones, 4 Misc.3d 552 (Sup. Ct. Orange Cty. 2004) (Parties stipulated that first ten years of pension would be considered marital property. Subsequent to divorce, employer offered retirement incentive package that provided additional credits. Held: this constitutes marital property, citing Olivo. Since neither party was (or could have been) aware of this package at time of divorce, a hearing is ordered

D. But the parties can always reach an agreement between themselves. See, e.g., Reed v. Reed, 180 A.D.2d 1006 (3rd Dep't 1992) (Husband and wife can agree as to how post-divorce pension benefits are to be divided)

II. The equitable share: Determining how much of the marital share of the pension goes to the non-employee spouse (the "Alternate Payee")

A. Parties may stipulate to the equitable share; or Court determination by applying criteria set forth in DRL 236[B]

B. AP frequently (but not always) receives 50% of the marital share of the pension

1. Equitable distribution could mean non-employee spouse receives no share of pension: Cherry v. Cherry, 34 A.D.3d 1186 (4th Dep't 2006) (Non employee spouse awarded no part of pension); Gasiorowski v. Gasiorowski, 267 A.D.2d 557 (3rd Dep't 1999) (although wife was awarded part of husband's pension, husband was not awarded any part of wife's pension).

III. Retirement benefits may be distributed to the non-employee spouse in one of two ways:

A. In cash payment from Participant, with or without offset against other property, that represents the equitable portion of the present value of the pension rights that were earned during the marriage; or

B. As a portion of each benefit payment upon maturity (either retirement of participant or earliest age at which participant could retire)

C. Where the non-employee spouse is not seeking a lump-sum distribution of the employee spouse's pension, it is not necessary to determine the pension's actuarial present value. The application of the Majauskas formula suffices. Matwijczuk v. Matwijczuk, 261 A.D.2d 784, 787-88, 690 N.Y.S.2d 343 (3d Dep't 1999); Church v. Church, 169 A.D.2d 851, 852, 564 N.Y.S.2d 572 (3d Dep't 1991); Mele v. Mele, 152 A.D.2d 685, 686-67, 544 N.Y.S.2d 25 (2d Dep't 1989); Van Housen v. Van Housen, 114 A.D.2d 411, 494 N.Y.S.2d 135 (2d Dep't 1985). But see Culnan v. Culnan, 142 A.D.2d 805, 806, 530 N.Y.S.2d 688 (3d Dep't 1988); Michalek v. Michalek, 114 A.D.2d 655, 656-67, 494 N.Y.S.2d 487 (3d Dep't 1985).

IV. Calculating the benefits:

A. The non-employee spouse has the right to share in the pension as it is ultimately determined. Olivo v. Olivo, 82 N.Y.2d 202, 210 (1993)

1. the employee-spouse is generally free to retire early and thereby reduce the amount of the non employee spouse's benefits. Id. at 209

2. On the other hand, an employee who engages in extended employment at progressively higher wages is not entitled to keep the 'excess' earned beyond what would have accrued at time of expected retirement. Id.

B. The non-employee may be awarded a fixed dollar amount or a portion of the pension determined by formula

1. the Majauskas formula a/k/a Coverture fraction,to calculate the non-employee spouse's share

2. generally, the non employee spouse is entitled to an equitable share of the percentage that the months they were married bears to the total number of months that the employee spouse was employed and accruing credits prior to retirement

3. If the Alternate Payee's (non-employee spouse) share of the marital portion of the pension is one-half, the formula would be expressed as follows:

$$\frac{\text{Number of months of pension credits earned during marriage}}{\text{Total number of months of pension benefits earned by participant}} \times 50\% = \text{Alternate Payee's share}$$

V. Distributive awards of pensions made pursuant to a Domestic Relations Order

A. DRO requirements

1. Public retirement systems require that the DRO provide specific information

2. Private employer plans must determine whether the DRO is "qualified" under ERISA's Qualified Domestic Relations Order ("QDRO") procedures, 29 U.S.C. § 1056

B. The DRO or QDRO can convey only those rights to which the parties stipulated or that the court decreed/

1. McCoy v. Feinman, 99 N.Y.2d 295 (2002) (divorce attorney negligent in failing to assert client's claim to pre-retirement survivor benefits in the stipulation or judgment; as a result, they cannot be included in QDRO)

VI. Survivor benefits

A. Pre- and Post- retirement survivor benefits are subject to equitable distribution, see, e.g., 29 USC § 1055

B. Common types of (survivor) benefits (not all are found in all plans – read the SPD to learn what is available)

1. Ordinary or Accidental Death Benefits: (government plans, mostly): lump sum benefit payable to designated beneficiary(ies)

a) Usually offered only if participant dies while employed

b) Can usually be allocated to several beneficiaries

c) No spousal protections under NYC or NYS plans

(1) But right of election

2. (Qualified) Pre-Retirement Survivor Annuity [(Q)PSA]

a) Participant dies prior to retirement

b) Beneficiary will receive lifetime benefit of at least 50% of benefit Participant would have received

c) Survivor Annuity payable at Participant's retirement age under the plan (usu. 65, possibly 55 early reduced amount)

3. Lump Sums

a) Defined Contribution Plans: amount that is in the account

b) Defined Benefit Plans: actuarially determined present value of the annuity

(1) Assumed interest rates and use of mortality tables

(2) On-line calculators are available for estimates, but expert opinions are admissible

4. Single Life Annuity/Straight Life Annuity/Maximum Option/No Option Option

a) Benefit paid to Participant for Participant's life only

b) No survivor benefits; all payments stop at Participant's death

c) Provides the Participant the largest payment

5. (Qualified) Joint & Survivor Annuity [(Q)JSA] -25%, -50%, -75%, -100%

a) Lifetime annuity paid to Participant

b) Surviving beneficiary receives lifetime annuity equivalent to percentages of amount paid to Participant during the parties' joint lives

c) Benefit paid during joint lives is actuarially "adjusted" -reduced- to reflect longer streams of payments

(1) The greater the survivor benefit, the greater the reduction

d) If beneficiary predeceases, Participant's monthly benefits do not increase (except see "Pop-Up" Options below)

e) 50% QJSA is default for married Participants, absent written spousal waiver (ERISA and federal plans only; not for NYS or NYC plans)

6. Term Certain

a) Participant receives lifetime annuity, no matter how long Participant lives after retirement

b) If Participant dies within the specified term, Beneficiary receives balance of payments for the term

c) Example: P elects 10-Year Certain (120 Months)

(1) If P lives another 20 years, will receive monthly payments until P dies

(2) If P dies within 10 years of retiring, Beneficiary will receive the same monthly amount until P's 10th anniversary of retirement

(a) P receives $1000/month and dies exactly 7 years after payments commenced; Beneficiary will stand in P's shoes and receive $1000/month for the remaining three years, when all payments stop

(3) Actuarial reduction is typically smaller than for Joint and Survivor Annuities

7. Pop-Up Options (NYS and NYC plans; some other plans)

a) Participant receives lifetime annuity (actuarially adjusted)

b) Surviving beneficiary receives 25%, 50%, 75%, 100% lifetime survivor annuity

c) But if Beneficiary predeceases Participant, the Participant's monthly benefit "pops up" to the maximum Single Life Annuity

8. General rule: Once the first benefit check is issued, the option elected and beneficiary designated cannot be changed – the decision becomes irrevocable

a) If Participant has already retired, it is not possible to change the option or beneficiary via DRO

9. Lump sum death benefits and term certain options can (sometimes) have more than one beneficiary and/or contingent beneficiaries

a) Joint and Survivor Annuities may have only one beneficiary, who is irrevocably designated

10. Lump sum death benefits can be paid on a pro rata basis to Alternate Payee

a) Survivor Annuities usually cannot, and must use the percentages offered in the plan

C. Court order or separation agreement may require employee spouse to provide non-employee spouse with survivor benefits

1. Westfall v. Westfall, 194 A.D.2d 960 (3rd Dep't 1993) (DRO could require employee spouse to elect an option that provides survivor benefits to non-employee former spouse)

2. McDermott v. McDermott, 119 A.D.2d 370 (2d Dep't 1986) (Court has authority to restrict the option employee spouse can select and to compel that non-employee spouse be irrevocably designated as beneficiary to extent of her interest)

3. Ponzi v. Ponzi, 45 A.D.3d 1327 (4th Dep't 2007) (It is within court's discretion to direct employee spouse to select a survivor pay-out option yet also direct that non-employee spouse's share of each payment be calculated as though employee spouse had selected an option providing for the highest payment so that non-employee spouse's share would not be impaired

D. Right to pre-retirement and post-retirement survivor benefits must each be explicitly provided for in separation agreement or judgment

1. Kazel v. Kazel, 3 N.Y.2d 331, 332 (2004) (Judgment of divorce and QDRO awarding an interest in employee spouse's pension do not automatically include pre-retirement death/survivor benefits; if the intent is to distribute such benefits, that must be separately and explicitly stated in the stipulation or decree and the QDRO)

2. Von Buren v. Von Buren, 252 A.D.2d 950 (4th Dep't 1998) (Where separation agreement was silent on death/survivor benefits and did not direct employee spouse to select a particular option that would provide them, the non-employee spouse was not entitled to them)

3. Janofsky v. Janofsky, 232 A.D.2d 457 (2d Dep't 1996) (Parties' stipulation to non-employee spouse receiving pre-retirement survivor benefits was silent on post-retirement survivor benefits; non-employee spouse held to have no right to benefits if employee spouse dies after retiring)

E. Tip: if Participant resists award of survivor benefits to Alternate Payee, it might help to offer:

1. The Pop-Up Option, so if AP predeceases, P's benefit reverts to maximum amount

2. AP can bear the cost of the survivor benefits, so Participant's remaining share is calculated based on the maximum/single life annuity prior to reduction for the option selected

3. Separate Interest QDRO (ERISA plans where Participant has not yet retired)

a) AP receives a lifetime benefit, so death of P inconsequential

VII. Cost of Living Adjustments (COLAs) and Variable Supplemental Funds

A. Supplemental Increases to pension benefits are subject to equitable distribution

1. Olivo v. Olivo, 82 N.Y.2d 202 (1993) (Wife who was entitled to share in husband's pension was entitled to post-divorce early retirement incentive package to the extent that it was an enhancement of the existing pension asset)

2. Condon v. Condon, 46 A.D.3d 596 (2d Dep't 2007) (Per quoted stipulation, non-employee spouse entitled to COLAs as long as the increases are limited to her portion of the pension)

B. It is not necessary to be explicit about supplements in stipulation or JOD

1. Pagliaro v. Pagliaro, 31 A.D.3d 728 (2d Dep't 2006) (COLA's and variable supplement funds are to be included in (Q)DRO even if not specifically

provided for in separation agreement or divorce decree because they are merely supplements to the existing pension)

2. Luongo v. Luongo, 50 A.D.3d 858 (2d Dep't 2008) (Non-employee spouse entitled to share in the pension as well as supplements such as variable supplement fund benefits

C. It might be the better practice to be explicit on AP's entitlement to these increases

VIII. Disability Pension Benefits

A. That portion of a disability pension that represents deferred compensation acquired during the marriage is marital property subject to equitable distribution Dolan v. Dolan, 78 N.Y.2d 463 (1991)

B. Presumption is that entire disability pension is marital (Palazzolo v. Palazzolo, 242 A.D.2d 688 (2d Dep't 1997)

C. Burden of proving what portion of a disability pension is marital and what portion is separate interest is on party claiming it's separate; where no reliable evidence as to what was separate, entire disability pension held to be marital property Parrish v. Parrish, 213 A.D.2d 928 (3rd Dep't 1995)

IX. Timing issues: when to file the DRO

A. Six-year statute of limitations

1. Duchamel v. Duchamel, 188 Misc.2d 754 (Sup. Ct. Monroe Cty. 2001) (six-year limitation period commences when employee spouse reaches pay status or has actually retired; 1986 judgment of divorce awarded non-employee spouse share of pension; employee spouse retires in 2001 and

non-employee spouse seeks entry of QDRO soon thereafter; entry permitted.)

2. Boylan v. Dodge, 42 A.D.3d 632 (3rd Dep't 2007) (QDRO issued pursuant to separation agreement 12 years after judgment of divorce and employee spouse's retirement; the late filing of QDRO is permissible; QDRO could also provide for payment of arrearages, but only six years' worth under SoL

B. Pension Plan Protection Act of 2006 – amends ERISA

1. an otherwise qualified DRO can be issued after, or revise, another QDRO

2. A DRO can be issued at any time and still be a QDRO

C. Best practice is to file DRO with the judgment or soon thereafter because delays can harm the non-employee spouse

1. Most plans will not permit the form in which benefits are paid to be changed once they commence. So, if the employee spouse retires and selects an option that, for example, does not provide for survivor benefits, the non-employee spouse may have lost his or her right to them.

2. see, e.g., Fodrowski v. Fodrowski, 227 A.D.2d 519 (2d Dep't 1996) (Stipulation of settlement provided that non-employee spouse to be survivor beneficiary but no had been QDRO filed when husband subsequently retired and named someone else as beneficiary; non-employee spouse then tried to file a QDRO that designated her as survivor; the plan administrator refused to recognize the QDRO because it did not permit substitution of annuitants. Non-employee spouse then moved for order designating her as survivor.

Motion was denied; her only remedy, if any, is to sue husband for breach of the stipulation

3. Winter v. Boskin, 181 A.D.2d 1000 (4th Dep't 1992) (Separation agreement gave non-employee spouse a share of employee spouse's pension; no QDRO ever filed and employee spouse withdrew funds; Held: employee spouse did nothing illegal; employee spouse can file QDRO but will receive only a share of remaining funds

4. Boylan v. Dodge, 42 A.D.3d 632 (3rd Dep't 2007) (QDRO issued pursuant to separation agreement 12 years after judgment of divorce and employee spouse's retirement; the late filing of QDRO is permissible; QDRO could also provide for payment of arrearages, but only six years' worth under SoL

5. but see Haydock v. Haydock, 254 A.D.2d 577 (3rd Dep't 1998) (Public retirement system; husband ordered to cooperate in passage of "one-man" bill to amend legislation to allow rescission of his election of single life annuity contrary to terms of settlement agreement and designate former spouse as survivor)

SECTION 4: APPENDIX

HER JUSTICE

NATIONAL Center on Domestic Violence, Trauma & Mental Health

EXCERPT FROM

Representing Domestic Violence Survivors Who Are Experiencing Trauma and Other Mental Health Challenges:

A Handbook for Attorneys

Written by

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On behalf of the

National Center on Domestic Violence, Trauma & Mental Health

Edited by

Carole Warshaw, MD

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Section One: Interviewing

Do Not Exacerbate the Harm or Risks

Lawyers working with survivors who are experiencing trauma and other mental health-related challenges should aim to ensure that their representation does not exacerbate the harm done to a client or create additional harms. Every domestic violence survivor faces risks. Some risks are batterer-generated; some risks are life-generated.[4] Survivors who are experiencing trauma or other mental health challenges may face additional risks when they come in contact with systems and individuals who are ill equipped to address their particular mental health needs. Thus, attorneys must take steps to ensure that their relationship with the client does not exacerbate the risks or further harm the mental health of the survivor.

Be Aware of the Signs of Trauma

Lawyers working with survivors of domestic violence should be aware of signs of trauma and mental health challenges, such as:

- The client does not talk about her experience(s) in a linear manner. She may go off on tangents or her speech may not seem coherent.
- What would seem to be highly emotional facets of her experience are expressed with little emotion both in terms of facial expression and body language, and in terms of the tone of her voice (sometimes referred to as "flat affect"). She may be intellectually present but emotionally detached.
- The client develops a deep, blank stare or an absent look during meetings with her; this could be a sign that she is dissociating.
- The client is unable to remember key details of the abuse.

If you notice any of the above signs, you will want to take steps to avoid triggering feelings that are disruptive to your client as you work together on her case. While an attorney cannot ensure that an individual remains present and does not dissociate or otherwise disengage, there are steps you can take to remove as many barriers as possible to help your client be psychologically present for her own advocacy.

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[4] *See* Jill Davies, Eleanor Lyon, and Diane Monti-Catania, *Safety Planning with Battered Women: Complex Lives/Difficult Choices* (Sage Publications 1998).

Survivor-Defined Representation When the Client is Living with Trauma-Related or Other Mental Health Conditions

Survivor-defined advocacy requires that attorneys tailor their advocacy approach to meet the individualized needs of survivors. For survivors facing mental health challenges, this means that lawyers must:

- Gain an understanding of the ways in which *this client's* challenges impact her ability to engage in the advocacy process, and
- Tailor interviewing and counseling approaches to meet the needs of and maximize the self-determination of each individual client.

Survivors facing mental health challenges will often require more time and resource-intensive advocacy than other survivors. To use their time and resources wisely, lawyers must consider how to tailor their advocacy approach to be responsive to the issues and needs of survivors experiencing trauma related conditions and mental health concerns.

Begin a Dialogue about the Survivor's Mental Health Needs

The lawyer should begin a dialogue with the survivor about her mental health needs as it relates to the lawyer/client relationship. This type of conversation provides a space for the survivor to explain her circumstances and for both lawyer and survivor to develop strategies for accommodating those challenges in the course of their relationship.

Lawyers need not, and should not, try to gather the client's entire mental health history at this stage in the process. Rather, these preliminary conversations about the client's mental health should focus upon how any mental health challenges affect her functioning. To get this conversation going, lawyers might ask, "Is there anything that I should know to help us work better together?" Or, "How can I, as your lawyer, accommodate what you need in this process?" For example, if the lawyer's office creates too much sensory stimulation or causes sensory overload, your client might suggest meeting somewhere else. If she has difficulty focusing for long periods of time, the attorney might suggest taking several breaks or scheduling shorter appointments.

It is best practice for lawyers working with survivors to take the time necessary to build relationships and trust with their clients. Trust is key to developing the type of lawyer-client relationship required for effective representation. There are times, however, when lawyers have a limited amount of time or are meeting clients just before a hearing. In these situations, you need to gather as much information as possible, as quickly as possible, in preparation for your case. It is important to know that, when working under such tight deadlines, your client may not feel comfortable enough yet to disclose details about trauma

and mental health conditions. In those situations, you are not likely to get complete and accurate information about this from your client. Under such circumstances, you may want to partner with an advocate who has been working with the survivor to assist in gathering this information and to provide you with the context necessary to understand and advocate for the comprehensive and individual needs of the survivor.

Techniques for Building Trust and Ensuring Informed Consent with Survivors Who Experience Trauma and/or Mental Health Symptoms

Survivor-centered interviewing skills are critical to providing comprehensive, individualized advocacy to survivors of domestic violence, whether or not a survivor has experienced trauma or mental health concerns. First, by offering a survivor the space to tell her own story, from her own perspective, an attorney can begin to lay the foundation for building trust. Second, when an attorney actively listens to a survivor's story, she gains a more comprehensive, contextual understanding of the survivor's needs. This rich understanding, when combined with a working relationship based on trust and respect for survivor agency, forms the basis of an effective survivor-attorney partnership that can work toward the expressed goals and objectives of the survivor.

Oftentimes in the lives of survivors, people were abusive or let them down, service providers responded ineffectively to them, and/or systems ignored or added to their pain. Each survivor has a unique perspective of these realities and lives with the effects of these negative experiences. A survivor's cultural background will also impact the way in which she perceives her prior experiences.

Many survivors who have experienced violence from an intimate partner and/or have trauma related concerns are often likely to accommodate what they think you want. This can play out in different ways. A client may ask you directly, "What do you think I should do?" Or, a client may intuitively pick up from your discussion with her what she believes you want her to do. You may think the survivor is making an informed decision when in fact she is trying to do what she thinks you want.

To overcome the distrust that survivors who are dealing with trauma-related or other mental health symptoms experience, lawyers must take steps to nurture a respectful working relationship with them. Lawyers should:

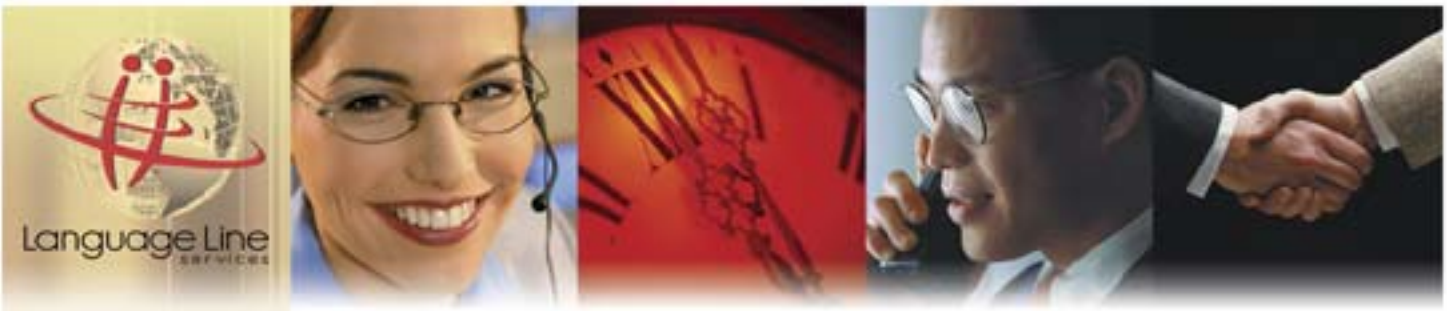
- Develop a basic understanding of trauma-related and mental health conditions that survivors may experience;
- Be skilled in listening and asking questions to understand a survivor's perspective and needs; and
- Know how to decide what information and options to offer to meet those needs.

It is within the context of a respectful relationship that lawyers can provide opportunities for survivors experiencing trauma and mental health challenges to access the resources they need and to exercise more control over their own lives.

Jill Davies has crafted a list of the ways in which advocates can offer concrete assistance to survivors who have experienced trauma resulting from multiple victimizations. Attorneys for survivors who are dealing with mental health challenges can assist clients by:

- Recognizing that survivors may be unable to access all of the details;
- Providing options and the time and space for survivors to make fully-informed decisions;
- Validating the survivor's feelings throughout the process;
- Being responsive to a survivor's requests for information and support, even if she asks for the same information several times;
- Partnering with survivors to identify alternative coping strategies, when they are engaging in self-harming behaviors;
- Finding supports for developing alternative or additional coping strategies;
- Connecting survivors who are experiencing a mental health crisis with a trusted mental health referral/resource; and
- Offering support to survivors who are using alcohol and/or drugs by safety planning and strategizing to the greatest extent possible at the time (including assessing risks and developing strategies that mitigate the risks posed by alcohol and drug use) and encouraging them to contact you again.[5]

[5] Adapted from Jill Davies, Helping Sexual Assault Survivors with Multiple Victimizations and Needs, A Guide for Agencies Serving Sexual Assault Survivors (July 2007).



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TIPS FOR WORKING WITH AN INTERPRETER

1. **BRIEF THE INTERPRETER -** Identify the name of your organization to the interpreter, provide specific instructions of what needs to be done or obtained, and let him/her know whether you need help with placing a call. If you need the interpreter to help you place a call to the Limited English Proficient (LEP) customer, you may ask the interpreter for a dial-out. There is a limited amount of time allotted for placing a dial-out once the interpreter is on the phone. Therefore, it is important that you provide a brief introduction and specific instructions to the interpreter in a timely manner.
2. **SPEAK DIRECTLY TO THE CUSTOMER -** You and your customer can communicate directly with each other as if the interpreter were not there. The interpreter will relay the information and then communicate the customer's response directly back to you.
3. **SPEAK NATURALLY, NOT LOUDER -** Speak at your normal pace, not slower.
   - SEGMENTS - Speak in one sentence or two short ones at a time. Try to avoid breaking up a thought. Your interpreter is trying to understand the meaning of what you're saying, so express the whole thought if possible. Interpreters will ask you to slow down or repeat if necessary. You should pause to make sure you give the interpreter time to deliver your message.
   - CLARIFICATIONS - If something is unclear, or if the interpreter is given a long statement, the interpreter will ask you for a complete or partial repetition of what was said, or clarify what the statement meant.
4. **ASK IF THE LEP UNDERSTANDS -** Don't assume that a limited English-speaking customer understands you. In some cultures a person may say 'yes' as you explain something, not meaning they understand but rather they want you to keep talking because they are trying to follow the conversation. Keep in mind that a lack of English does not necessarily indicate a lack of education.
5. **DO NOT ASK FOR THE INTERPRETER OPINION -** The interpreter's job is to convey the meaning of the source language and under no circumstances may he or she allow personal opinion to color the interpretation. Also, do not hold the interpreter responsible for what the customer does or does not say. For example, when the customer does not answer your question.
6. **EVERYTHING YOU SAY WILL BE INTERPRETED -** Avoid private conversations. Whatever the interpreter hears will be interpreted. If you feel that the interpreter has not interpreted everything, ask the interpreter to do so. Avoid interrupting the interpreter while he/she is interpreting.
7. **AVOID JARGON OR TECHNICAL TERMS -** Don't use jargon, slang, idioms, acronyms, or technical medical terms. Clarify unique vocabulary, and provide examples if they are needed to explain a term.
8. **LENGTH OF INTERPRETATION SESSION -** When you're working with an interpreter, the conversation can often take twice as long compared with one in English. Many concepts you express have no equivalent in other languages, so the interpreter may have to describe or paraphrase many terms you use. Interpreters will often use more words to interpret what the original speaker says simply because of the grammar and syntax of the target language.
9. **READING SCRIPTS -** People often talk more quickly when reading a script. When you are reading a script, prepared text, or a disclosure, slow down to give the interpreter a chance to stay up with you.
10. **CULTURE -** Professional interpreters are familiar with the culture and customs of the limited English proficient (LEP) customer. During the conversation, the interpreter may identify and clarify a cultural issue they may not think you are aware of. If the interpreter feels that a particular question is culturally inappropriate, he or she might ask you to either rephrase the question or ask the interpreter to help you in getting the information in a more appropriate way.
11. **CLOSING OF THE CALL -** The interpreter will wait for you to initiate the closing of the call. When appropriate, the interpreter will offer further assistance and will be the last to disconnect from the call. Remember to thank the interpreter for his or her efforts at the end of the session.

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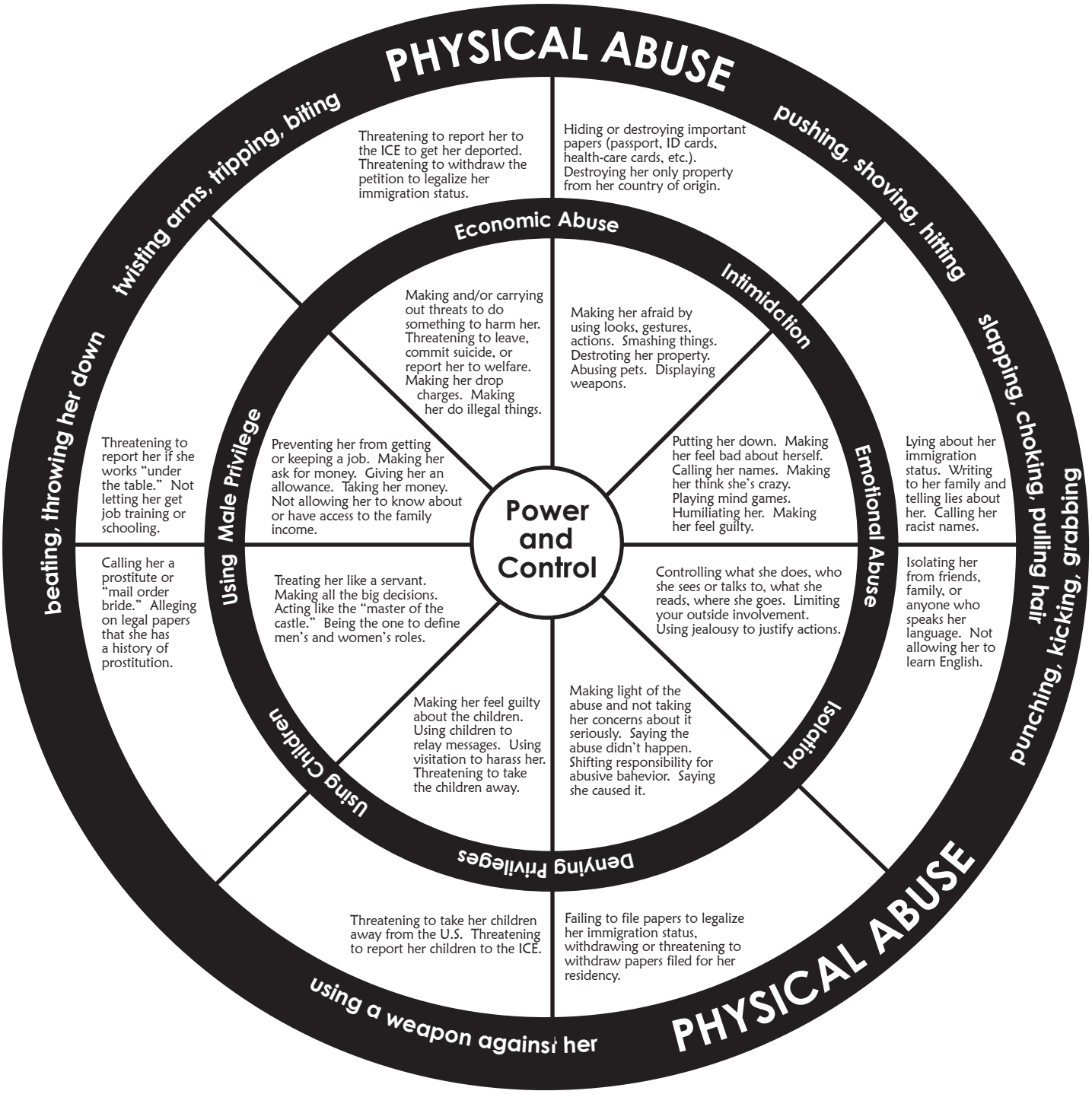

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Lawyer's Manual on Domestic Violence

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Supreme Court of the State of New York, Appellate Division, First Department

The New York State Judicial Committee on Women in the Courts

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New York State Judicial Committee on Women in the Courts
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Summary of Contents

Section 4 Children and Domestic Violence

Section 5 Protecting All Victims

Section 6 Employment, Housing and Benefits

Section 7 Offender Accountability