Agreements Before and During Marriage

By Joel R. Brandes [1]

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This publication is designed for the lawyer who, in the age of electronic communications, is relegated to practice law under demanding time schedules. It is intended to ease the pressure by equipping the reader with a clear and concise explanation of the current law applicable to each provision in an “agreement of the parties.” As you negotiate your agreement you will be guided along the way with “Settlement Considerations” and “Drafters Notes.” You will be able to quickly find and review the law applicable to each provision, and by following the simple steps in the program, you will effortlessly compose a sophisticated legal document that you can be proud to call your work product.

The sections entitled “Settlement Considerations” offers you practical advice as to what and why you should or should not negotiate for certain language in your agreement. "Drafters Notes" contain suggestions for the wording you should use in composing the individual provisions of your agreement. "Case Law You Should Know" contains a discussion of the law you should know with regard to each specific provision, as well as a brief synopsis of the important Court of Appeals and recent appellate decisions related to that provision of the agreement. Where there is no discussion of case law it means that there is no significant law related to the contractual provision that you should know. The Appellate Division is a single Statewide court divided into departments for administrative convenience and, therefore, the doctrine of stare decisis requires trial courts in one department to follow precedents set by the Appellate Division of another department until the Court of Appeals or the Appellate Division of the trial court pronounces a contrary rule. Such considerations do not pertain to the Appellate Division. While it should accept the decisions of sister departments as persuasive it is free to reach a contrary result and sometimes does (Mountain View Coach Lines, Inc. v. Storms (102 A.D.2d 663, 476 N.Y.S.2d 918 [2 Dept. 1984]). “Case Law You Should Know” guides you through the conflicting Appellate Division rules, explaining the distinctions, so that your agreement will be tailored to the needs of the parties. It also updates the seasoned practitioner on the latest development in New York Divorce and Family Law.

While we believe that this publication covers everything necessary to enable the new lawyer as well as the experienced litigator to easily negotiate and draft an agreement of the parties, it is not a treatise on agreements of the parties. For that we refer you to Volume 3, Law and the Family New York, 2d Edition Revised (Thomson Reuters Westlaw) by Joel R. Brandes.

PREAMBLE

SETTLEMENT CONSIDERATIONS:

A marital agreement should have a preamble, just like any other contract, reciting the names and addresses of the parties and the phrases used throughout the agreement to refer to them individually and jointly, if necessary.

DRAFTERS NOTES:

The preamble lists the date of the agreement, the names of the parties to the agreement and their addresses.

CASE LAW YOU SHOULD KNOW:

Throughout this work we refer to an “agreement of the parties” by the several different names attorneys and courts use to refer to such agreements. They are typically called antenuptial agreements, property settlements, marriage settlements, post-nuptial agreements, separation agreements, stipulations of settlement and “opting-out” agreements. Unless we indicate otherwise about a particular type of agreement, the discussion that follows the reference to an agreement applies to all every “agreement of the parties.” Very often we simply refer “an agreement of the parties” to encompass all of the agreements discussed in this manual.

Before the enactment of the New York Equitable Distribution Law on July 19, 1980 New York law governing the validity of an agreement between a husband and wife was embodied in General Obligations Law 5-311 entitled “Certain agreements between husband and wife void.” It prohibited a husband and wife from contracting to alter or dissolve the marriage, or to the husband from supporting his wife, and prohibited a wife from contracting to absolve herself from supporting her husband where she had sufficient means and the husband was incapable of supporting himself and was likely to become a public charge.

Separation agreements may be defined as contracts between a husband and wife contemplating their living separate and apart. These agreements have long been recognized in New York as being valid and binding. Two competent adults who actually separated could enter into a valid separation agreement, placing financial responsibility according to their desires and means (Vandemortel v. Vandemortel, 204 Misc. 536, 120 N.Y.S.2d 112 [1953]). A similar arrangement could be made between the parties where they had not yet actually separated, but in contemplation of the separation.
A separation agreement did not fall within the proscription of General Obligations Law §

5-311 unless it contained an express provision requiring the dissolution of the marriage (Rosen v. Goldberg, 28 A.D.2d 1051, 283 N.Y.S.2d 804 [3d Dep't 1967]), order aff'd, 23 N.Y.2d 791, 297 N.Y.S.2d 298, 244 N.E.2d 869 [1968]). Where the spouses were already separated or contemplating separation, mere references in their separation agreement to contemplated divorce proceedings or to what their rights will be in the event such proceedings are instituted, not by way of inducement but out of realistic regard for the situation, would not invalidate the agreement as long as the benefits and terms were absolute. (Hartigan v. Hartigan, 30 Misc. 2d 949, 219 N.Y.S.2d 92 [Sup 1961], judgment aff'd, 16 A.D.2d 145, 226 N.Y.S.2d 31 [1st Dep't 1962]; Koehler v. Koehler, 30 Misc. 2d 381, 219 N.Y.S.2d 440 (Sup 1961)].

A prenuptial agreement is an agreement made between prospective spouses in contemplation of marriage. In it, prior to 1980, they defined their rights and obligations in the event that the marriage was dissolved and how their property would be distributed (Re Carnevale's Will, 248 App Div. 62, 289 N.Y.S. 185 [1936]). The General Obligations Law provides that a contract made between persons in contemplation of marriage remains in full force after the marriage takes place (General Obligations Law § 3-303, reenacted without change former Dom Rel L 53 (repealed General Obligations Law § 19-101). Under former law, until 1980, the parties could not contract in an antenuptial or separation agreement to relieve the husband of his support obligations. Antenuptial agreements were primarily concerned with property settlements and could not contain provisions for alimony due to former General Obligations Law Section 5-311.

The Equitable Distribution Law, effective on July 19, 1980 enacted Domestic Relations Law 236 [B][3], which refers to an “Agreement by the Parties.” The parties may enter into them where there has or has not been a separation, as long as the requirements of Domestic Relations Law 236 [B][3] are complied with. Generally speaking there are two kinds of agreements of the parties that will be “valid and enforceable in a matrimonial action.” The first kind are those agreements that are made before the marriage of the parties. They are usually called pre or antenuptial agreements, sometimes called property or marriage settlements. The second kind of agreements of the parties are post-nuptial agreements, which traditionally has been the "separation agreement" that was entered into after the parties had actually separated or when separation was imminent. In addition there is the stipulation of settlement and the “opting-out” agreement.

Today, prenuptial agreements are treated the same as separation or postnuptial agreements. Domestic Relations Law § 236 [B][3] applies the same basic rules to prenuptial agreements, as to postnuptial agreements. The same rules apply, and their scope is identical. Under current law, the parties may not contract "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 is therefore likely to become a public charge." (See Gregg v. Gregg, 133 Misc. 109, 231 N.Y.S. 221 (Sup Ct. 1928); Height v. Height 18 Misc. 2d 1023, 187 N.Y.S.2d 260 (Sup Ct. 1959); General

Obligations Law § 5-311, as amended by Laws 1980, ch 281, § 19, effective July 19, 1980).

The Equitable Distribution Law, effective on July 19, 1980, enacted Domestic Relations Law § 236 [B][3], which created “nuptial” or “opting-out” agreements, in addition to separation agreements, which the parties may enter into where there has been no separation, but the requirements of Domestic Relations Law 236 [B][3] are complied with. Domestic Relations Law § 236 [B][3] applies the same basic rules to prenuptial agreements, as to postnuptial agreements.

Separation agreements serve a special function under Domestic Relations Law §170. The parties’ separation for a year or more pursuant to a written agreement of separation, and substantial compliance with the agreement, is grounds for a divorce in New York (Gleason v Gleason, 26 N.Y.2d 28, 308 N.Y.S.2d 347, 256 N.E.2d 513 [1970]). The written agreement must be "subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded" (Domestic Relations Law § 170(6)). The agreement, or a memorandum thereof, must be filed with the county clerk before commencement of the divorce action and the plaintiff must have substantially performed the terms of the agreement. The statute specifically refers to "a written agreement of separation," thus excluding other kinds of agreements. In Christian v. Christian (42 N.Y.2d 63, 396 N.Y.S.2d 817, 265 N.E.2d 849 [1977]) it was held that if the agreement was not entirely void the invalidity of some of its independent terms, or the fact that the agreement was voidable, did not preclude it from serving as the predicate for divorce on the "living separate and apart" ground.

Domestic Relations Law § 236 [B][3], entitled “Agreement of the parties” requires that an agreement by the parties be in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded, to be valid and enforceable in a matrimonial action. The subject matter of an agreement of the parties includes: "(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) a 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 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 Domestic Relations Law § 240. (Domestic Relations Law § 236 [B][3]).

Domestic Relations Law § 236[B][3] provides:

> "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 or 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 entry of the 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.

Although the permissible subject matter of an agreement of the parties has been greatly expanded there are limitations as to the contractual terms of antenuptial and postnuptial agreements. Domestic Relations Law § 236[B][3] permits limited freedom of contract.

An agreement by the parties, made before or during the marriage, may include ... 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 the final judgment (Domestic Relations Law § 236[B][3], Subdivision 3). There are further public policy limitations as to provisions which alter or significantly effect the incidents of marriage, such as the mutual duty of fidelity. An agreement providing that one or both parties may have an "open marriage," presumably would be against public policy. An agreement that the wife would not bear children, and, if she became pregnant, she would have an abortion, would not be sustained or enforced. Any term which violates or undermines the usual incidents of marital status probably is suspect if not invalid.

Basic Principals of Contract Law Applicable to Marital Agreements

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.[2] “A contract is a drawing together of minds until they meet and an agreement is made to do or not to do some particular thing. It may be express, or it may be implied or inferred from circumstances, and this implication is but the result of the ordinary and universal

[2] Restatement (Second) of Contracts § 1 (1981)

experience of mankind. "[3]

The term "contract" includes both "bilateral" and "unilateral contracts". A bilateral contract exists when both parties exchange mutual or reciprocal promises. [4] The promise of each party is consideration supporting the promise of the other. A mutual agreement means a reciprocal agreement, or one that requires something to be done or forborne by either party for the other. [5] A unilateral contract is a contract in which performance is based on the wish, will, or pleasure of one of the parties. Ordinarily, in a unilateral contract, there is no bargaining process or exchange of promises by parties as in a bilateral contract. A unilateral contract occurs when there is only one promisor and the other party accepts, not by mutual promise, but by actual performance or forbearance. The performance or forbearance constitutes both acceptance of a promisor's offer and consideration. [6]

A "void" contract has been defined as a promise, "the breach of which the law neither gives a remedy nor otherwise recognizes a duty of performance by the promisor." Such a promise is not a contract at all. The "promise" or "agreement" is void of legal effect.[4] For example, contracts between married persons which violate General Obligations Law §5-311 are void. It is titled "Certain agreements between husband and wife void" and reflects the public policy of the State of New York with regard to matrimonial agreements. It prohibits and declares void agreements between spouses which "alter" the marriage relationship, which "dissolve" the marriage, and agreements which "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 is therefore likely to become a public charge".

A "voidable" contract is a contract which one or more parties to the contract have the power to avoid by electing to do so; or to extinguish the power to avoid the contract by ratifying it. [5] Where a contract is voidable on both sides, the transaction is not void, since the claim or defense must be asserted to avoid the contract, and since the

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[3] Mccoun v. New York Central and Hudson River Railroad Company, 50 N.Y. 176, 1872 WL 9998 (1872)

[4] 1 Williston on Contracts § 1:17 (4th ed.)

[5] Grossman v Schenker, 206 N.Y. 466 (1912)

[6] 1 Williston on Contracts § 1:17 (4th ed.)

[4] Comment A, Restatement (Second) of Contracts § 7 (1981)

[5] Restatement, Contracts, § 13; Matter of Rothko's Estate, 43 NY2d 305, 323-24 (1977)

contract is capable of ratification, the contract affects the legal relations of the parties until it is avoided.[6] The question of whether there has been an abandonment or abrogation of a contract is usually one of fact.[7]

An executed contract is a contract that has been fully performed by both parties. An executory contract is a contract that remains wholly unperformed or for which there remains something still to be done on both sides, often as a component of a larger transaction, and sometimes memorialized by an informal letter agreement, by a memorandum, or by oral agreement.[8]

Interpretation and Construction of An Agreement of the Parties

A separation agreement and stipulation are to be interpreted just like any other agreement (Clayburgh v. Clayburgh, 261 N.Y. 464, 185 NE 701 [1933]; Baker v. Baker, 33 A.D.2d 812, 305 N.Y.S.2d 395 [3d Dep't 1969]); Hardy v. Hardy, 96 A.D.2d 743, 465 N.Y.S.2d 329 [4th Dep't 1983]). The interpretation of the agreement is measured by the understanding of the parties as expressed in the agreement (Krieger v. Krieger, 162 Misc. 930, 296 N.Y.S. 261 [1937]). It has been held that a separation agreement cannot be extended beyond its fair intendment (Re Tankelowitz Will, 162 Misc. 474, 294 N.Y.S. 754 [1937]). Thus, it has been said that a separation agreement cannot be regarded as a waiver of any of a spouse's legal rights beyond the express terms of the agreement (Re Griffith's Estate, 167 Misc. 366, 3 N.Y.S. 2d 925 [1938]). Where the terms of a separation agreement are clear, and only one reasonable interpretation can be given, that construction will be adopted (Re Brown's Estate, 153 Misc. 282, 274 N.Y.S. 924 [1934]; See also, Nichols v. Nichols, 306 N.Y. 440, 119 N.E.2d 351 [1954]). The words employed in such an agreement should be given their natural, ordinary and familiar meaning (Re Embiricos' Estate, 184 Misc. 453, 52 N.Y.S.2d 425 [1944]; Re Brown's Estate, 153 Misc. 282, 274 N.Y.S. 924 [1934]), particularly where the agreement shows evidence of having been prepared by skillful lawyers who used care in selecting appropriate words (Re Ide's Will, 131 N.Y.S.2d 381 [Sur. Ct. 1954]), unless it appears from the expressed intent of the parties, or from their conduct or the circumstances, that a special meaning was intended. Courts should not go beyond the bounds of interpretation and into the realm of creation (Re Brown's Estate, 153 Misc. 282, 274 N.Y.S. 924 [1934]).

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[6] 1 Williston, Contracts (3d ed.), § 15, pp. 28-29; Matter of Rothko's Estate, 43 NY2d 305, 323-24 (1977)

[7] Green v. Doniger, 300 N.Y. 238, 245, 90 N.E.2d 56, 59; Matter of Rothko's Estate, 43 NY2d 305, 323-24 (1977)

[8] Blacks Law Dictionary (9th ed. 2009)

An agreement of the parties, be it a separation agreement, stipulation or post nuptial agreement, is a contract subject to principles of contract interpretation (Rainbow v Swisher, 72 N.Y.2d 106, 531 N.Y.S.2d 775, 527 N.E.2d 258 [1988]; Clayburgh v Clayburgh, 261 N.Y. 464, 185 N.E. 701 [1933]). Where the contract is clear and unambiguous on its face, the intent of the parties must be gleaned from within the four corners of the instrument, and not from extrinsic evidence interpretation (Rainbow v Swisher, 72 N.Y.2d 106, 531 N.Y.S.2d 775, 527 N.E.2d 258 [1988]; Clayburgh v Clayburgh, 261 N.Y. 464, 185 N.E. 701 [1933]). When the terms of a written contract are clear and unambiguous, the intent of the parties must be found therein (Nichols v Nichols, 306 N.Y. 490, 119 N.E.2d 351 [1954]; Hartigan v. Casualty Co. of America, 227 N.Y. 175, 179, 124 N.E. 789, 790 [1919]; Brainard v. New York Cent. R. Co., 242 N.Y. 125, 133, 151 N.E. 152, 154 [1926]. Where the terms of an agreement are clear, and only one reasonable interpretation can be given, that construction will be adopted. (See Nichols v. Nichols, 306 N.Y. 440, 119 N.E.2d 351 (1954)). This fundamental rule applies to all prenuptial and post nuptial agreements and stipulations (Galusha v. Galusha, 116 N.Y. 635, 646, 22 N.E. 1114, 1117, 6 L.R.A. 487 [1889]; Stoddard v. Stoddard, 227 N.Y.13, 124 N.E. 91 [1919]; Goldman v. Goldman, 282 N.Y. 296, 26 N.E.2d 265 [1940]; Schmelzel v. Schmelzel, 287 N.Y. 21, 38 N.E.2d 114 [1941]; Rainbow v Swisher, 72 N.Y. 2d 106, 531 N.Y.S.2d 775, 527 N.E.2d 258 [1988]). Courts may not imply a condition which the parties chose not to insert in their contract (Raner v. Goldberg, 244 N.Y. 438, 442, 155 N.E. 733, 734 [1927].

When interpreting a contract, the construction arrived at should give fair meaning to all of the language employed by the parties, to reach a practical interpretation of the parties' expressions so that their reasonable expectations will be realized (W.W.W. Assoc. v. Giancontieri, 77 N.Y.2d 157, 162, 565 N.Y.S.2d 440, 566 N.E.2d 639 [1990]; McCabe v. Witteveen, 34 A.D.3d 652, 654, 825 N.Y.S.2d 499 [2d Dep't 2006]).

The terms of a contract are clear and unambiguous when the language used has a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion (See Breed v. Insurance Co. of N. Am. , 46 N.Y.2d 351, 355, 413 N.Y.S.2d 352, 385 N.E.2d 1280 [1978]; 173 Broad St., LLC v. Gulf Ins. Co., 37 A.D.3d 126, 131, 832 N.Y.S.2d 1 [1 Dept. 2006]). Conversely, contract language is ambiguous when it is "reasonably susceptible of more than one interpretation," and extrinsic or parol evidence may be then permitted to determine the parties' intent as to the meaning of that language (Chimart Assoc. v. Paul, 66 N.Y.2d 570, 572-573, 498 N.Y.S.2d 344, 489 N.E.2d 231 [1986]); See Mercury Bay Boating Club v. San Diego Yacht Club, 76 N.Y.2d 256, 267, 557 N.Y.S.2d 851, 557 N.E.2d 87 [1990]; Vuono v. Interpharm Holdings, Inc., 55 A.D.3d 825, 826, 865 N.Y.S.2d 676 [2d Dep't 2008]).

Evidence of the parties' conversations, negotiations, and agreements prior to or contemporaneous with the execution of their contract may explain the ambiguities in the contract (67 Wall St. Co. v. Franklin Nat. Bank, 37 N.Y.2d 245, 371 N.Y.S.2d 915

[1975]). In determining the intent of the parties, the finder of fact examines the objective manifestations of their shared intent.

Contra proferentum is known as the rule against the draftsman. The axiom "contra proferentum," advises that any ambiguity in a document is resolved against its drafter. This rule is applied as a last resort after all other aids to construction have been employed but have failed to resolve the ambiguities (Albany Savings Bank, FSB v. Halpin, 117 F.3d 669, 674 [2d Cir. 1997]; Schering Corp. v. Home Ins. Co., 712 F.2d 4, 10 [2d Cir. 1983]; Fernandez v Price, __AD3d___, 880 N.Y.S.2d 169 [2 Dept. 2009]). The Court of Appeals stated in 67 Wall St. Co. v. Franklin Nat. Bank, (37 N.Y.2d 245, 371 N.Y.S.2d 915 [1975]): "Supreme Court properly referred to the rule that in cases of doubt or ambiguity, a contract must be construed most strongly against the party who prepared it and favorably to a party who had no voice in the selection of its language." This rule only permits the court to adopt a construction that can be reached by a fair interpretation of the evidence (Koslowski v. Koslowski, 297 A.D.2d 784, 747 N.Y.S.2d 583, [2 Dept. 2002]). The rule is not applicable where the other party contributes to the selection of the language used in the settlement (Fernandez v Price, __AD3d___, 880 N.Y.S.2d 169 [2 Dept. 2009]).

Unacknowledged Marital Agreements

In Matisoff v Dobi[9] the Court of Appeals observed that to be valid and enforceable in a matrimonial action, Domestic Relations Law § 236(B) (3) requires that a nuptial agreement must be signed and duly acknowledged (or proven in the manner required to entitle a deed to be recorded). It held that there are no exceptions and specifically rejected the argument that the Legislature intended some agreements, though unacknowledged, to be enforceable, observing that the history of Domestic Relations Law § 236(B) (3) did not reflect such an intent. The Court noted that Domestic Relations Law § 236(B) does not incorporate the Statute of Frauds. Rather, "it prescribes its own, more onerous requirements for a nuptial agreement to be enforceable in a matrimonial action. In particular—by contrast to the Statute of Frauds–Domestic Relations Law § 236(B) (3) mandates that the agreement be acknowledged." The Court of Appeals observed that the formality of acknowledgment underscores the weighty personal choices to relinquish significant property or inheritance rights, or to resolve important issues concerning child custody, education and care. It held that "by clearly prescribing acknowledgment as a condition, with no exception, the Legislature opted for a bright-line rule. It concluded that an unacknowledged agreement is invalid and unenforceable in a matrimonial action. "

Yet, in a recent divorce action, where the wife sought to enforce a written and signed prenuptial agreement which required the payment of money to the bride from the

[9] Matisoff v. Dobi, 90 N.Y.2d 127, 659 N.Y.S.2d 209 (1997).

groom, [10] the Supreme Court, upon the authority of Matisoff v Dobi, [11] held that the agreement was not enforceable in the matrimonial action because it was not acknowledged as required by Domestic Relations Law § 236[B] [3]. However, the Court correctly observed that the wife could bring a separate plenary action seeking enforcement of the unacknowledged agreement as an independent contract. Allowing a party to an unsigned or unacknowledged marital agreement to enforce it as an independent contract in a separate plenary action, but not allowing that party to enforce it in a matrimonial action, appears to be an anomaly created by the Legislature when it specified in Domestic Relations Law § 236[B] [3] that only agreements that complied with its provisions "shall be valid and enforceable in a matrimonial action." In this article we will explain which prenuptial and nuptial agreements may be enforced in a separate plenary action, even though they are not signed or acknowledged, and not "valid and enforceable in a matrimonial action." [12]

To be valid certain agreements between engaged couples and spouses must be in writing and acknowledged. For example, a waiver or release of all rights in the estate of the other spouse, or a waiver or release of a right of election against any last will or testamentary provision, must be in writing, subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property. [13] Other types of agreements between such persons need not be acknowledged. Conveyances and contracts concerning real property must be in writing, but need not be acknolwedged.[14] An estate or interest in real property, other than a lease for not more than one year, cannot be assigned, "unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the person . . . assigning . . . the same, or by his lawful agent, authorized by writing."[15]

In a breach of contract action by a former wife against her former husband, the Appellate Division, Second Department held that the parties' unacknowledged separation agreement was enforceable as an independent contract, although it would not be enforceable as an "opting out" agreement in a matrimonial action, because the action was commenced to recover damages, *inter alia*, for breach of contract. [16] Since the wife's companion action for divorce was dismissed prior to the trial of the breach of contract action, the Appellate Division found there was no impediment to enforcement of

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10 Mojdeh M. v. Jamshid A., **2012 WL 2732169 (N.Y.Sup.)**

11 Matisoff v. Dobi, supra

12 Domestic Relations Law § 236[B] [3].

13 EPTL 5–1.1(f) (2), and 5-1.1A (e) (2).

14 See General Obligations Law § 5-703 (1) and (3).

15 Real Property Law § 291.

16 Singer v Singer, 262 AD2d 531, 690 NYS2d 621 (2d Dept 1999)

the agreement's provisions in a contract action insofar as it concerned the parties' personal property and certain monetary obligations.

In Matter of Sbarra,[17] the Appellate Division, Third Department rejected the former wife's argument on appeal that the parties' unacknowledged separation agreement was unenforceable as a waiver of her rights to the former husband's pension plan and other assets. It held that while a separation agreement must be properly acknowledged in order to be enforceable in a matrimonial action, since the former wife did not deny that she signed the separation agreement, and it survived the judgment of divorce, the agreement was enforceable in other actions despite the alleged insufficiency of the acknowledgment.

Thus, an agreement between a husband and wife, or persons engaged to be married, which is not signed and acknowledged in the form to entitle a deed to be recorded, may be valid and enforceable in a breach of contract or partition action, even though it is not "valid and enforceable in a matrimonial action." However, these agreements must meet the other requirements imposed by law, such as a writing or memorandum.

Any agreement for support between the parties must be reduced to writing and submitted to the Family Court or to a support magistrate for approval. [18]

A waiver by a spouse of her rights under an employee's ERISA employee benefit plan is not effective unless, among other things, it is in writing, and is witnessed by a plan representative or a notary public, among other requirements.[19] The waiver is effectuated by the participant electing to designate a beneficiary or beneficiaries other than the spouse. Such election, however, will only be enforceable if the spouse of the participant consents in writing to the election, the election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and the spouse's consent acknowledges the effect of the election and is witnessed by a plan representative or a notary public.[20]

The Statute of Frauds in General Obligations Law §5-701 (a) provides, in part,

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[17] 17 A.D.3d 975, 794 N.Y.S.2d 479 [3 Dep't. 2005]

[18] Family Court Act §425. Emerson v. Emerson, 83 A.D.2d 971, 442 N.Y.S.2d 815 (3d Dep't 1981) (reversal of an original support order was required where the husband was not advised of his right to counsel, and no agreement was reduced to writing and submitted for court approval.)

[19] 29 USCA § 1055 (2); Alfieri v. Guild Times Pension Plan, 446 F.Supp.2d 99 (E.D.N.Y.2006) (Waiver of surviving spouse benefits was not valid under ERISA, where surviving spouse signed waiver at home, notary signed waiver at employer's office but not in presence of surviving spouse, there was no acknowledgment in notarization, and surviving spouse's signature was not witnessed by plan representative or notary public.)

[20] ERISA Sec. 205(c) (2) (A)-(iii).

that “a. Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking: . . . 2. Is a special promise to answer for the debt, default or miscarriage of another person; 3. Is made in consideration of marriage, except mutual promises to marry; 5. Is a subsequent or new promise to pay a debt discharged in bankruptcy; . . . 9. Is a contract to assign or an assignment, with or without consideration to the promisor, of a life or health or accident insurance policy, or a promise, with or without consideration to the promisor, to name a beneficiary of any such policy . . .”

Thus, an agreement between a husband and wife, that the husband will pay the debts of the wife or name the wife the beneficiary of any life or health or accident insurance policy must be in writing, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent.

A antenuptial agreement appears to be enforceable in actions other than a matrimonial action even though it is not in writing and acknowledged in accordance with Domestic Relations Law § 236[B][3]. Prior to the adoption of Domestic Relations Law §236[B][3], the validity of an antenuptial agreement was determined by the Statute of Frauds, which provides that an agreement “made in consideration of marriage,” other than mutual promises to marry, is void unless “some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith.” [21] For example, an oral agreement to make a will in consideration of marriage violates of the Statute of Frauds and is unenforceable. [22] However, oral agreements that violate the Statute of Frauds are enforceable where the party to be charged admits they have entered into the contract. [23]

The requirement in General Obligations Law §5-701(a) that antenuptial property settlements be in writing, can be satisfied where the terms are set forth in letters between the parties. It does not matter that the entire agreement is not contained in one letter. All of the letters together may be considered for the purpose of ascertaining what the agreement is, provided the letters are all connected and related to each other. [24]

Additionally, an agreement may consist of signed and unsigned writings. [25] The Statute of Frauds is also satisfied where the writing constituting the antenuptial

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[21] General Obligations Law § 5–701[a] [3]; see, Matter of Goldberg, 275 N.Y. 186, 9 N.E.2d 829.

[22] Re Goldberg’s Estate, 275 NY 186, 9 NE2d 829 (1937)

[23] See Cohon & Co. v. Russell, 23 N.Y.2d 569, 574, 297 N.Y.S.2d 947; General Obligations Law 5-701 (3) (b)

[24] Peck v Vandemark, 99 NY 29, 1 NE 41 (1885).

[25] Crabtree v. Elizabeth Arden Sales Corporation, 305 N.Y. 48, 55, 110 N.E.2d 551 (1953); Rupert v. Rupert, 245 A.D.2d 1139, 667 N.Y.S.2d 537 (4th Dep't 1997)

agreement is signed by duly authorized agents of the prospective spouses in their presence. [26]

An agreement between former spouses who are not married at the time they execute the agreement, such as an agreement modifying the provisions of their separation agreement, is enforceable in all kinds of actions including a matrimonial action, even if it is not acknowledged. There is no requirement that the former spouses agreement comply with Domestic Relations Law §236 [B] [3] since that statute only governs agreements between persons who are married to one another.[27]

General Obligations Law § 15-301 (1) provides: "1. A written agreement or other written instrument which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought or by his agent." However, the case law prior to 1997 holds that a marital agreement can be modified by an oral agreement which has been fully executed [28] because the Statute of Frauds in General Obligations Law §15-301(1) [29] does not preclude proof of executed oral modifications, even where the agreement contains a clause prohibiting oral modifications.[30] The subsequent determination of the Court of Appeals in Matisoff v Dobi[31] appears to abrogate that rule in a matrimonial action.

RECITALS

SETTLEMENT CONSIDERATIONS:

Although the recitals are not a part of the agreement, it is a good idea to carefully draft the recitals that relate to the intentions of the parties. If the agreement is deemed to be ambiguous a court construing the agreement may consider them in resolving the ambiguity.

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[26] Hurwitz v Hurwitz , 216 App Div 362, 215 NYS 184 (1926)

[27] Penrose v Penrose, 17 A.D.3d 347, 793 N.Y.S.2d 579 (3d Dep't 2005).

[28] Hadden v Dimick, 48 NY 661 (1872) ; Leidy v Procter, 226 App Div 322, 235 NYS 101 (1929); Vandemortel v Vandemortel, 204 Misc 536, 120 NYS2d 112 (1953).

[29] General Obligations Law § 15-301 (1).

[30] Savino v Savino, 146 App Div 2d 766, 537 NYS2d 247 (2d Dept 1989); Scally v Scally,151 App Div 2d 869, 542 NYS2d 844 (3d Dept 1989).

[31] Matisoff v. Dobi, 90 N.Y.2d 127, 659 N.Y.S.2d 209 (1997)

DRAFTERS NOTES:

An agreement should recite the date of the parties' marriage, the names and dates of birth of their children, whether the children were born or adopted, whether the parties expect to have any more children, whether they are living together or are separated and the purpose of the agreement. It may also contain a statement of the representations, if any that the parties are making to one another and an expression of the intention of the parties in entering into the agreement. The recitals are at the beginning of the matrimonial agreement before the statement of the consideration and are not part of it, although a court construing the agreement may consider them.

CASE LAW YOU SHOULD KNOW:

CONSIDERATION

SETTLEMENT CONSIDERATIONS:

All agreements must have consideration. It is important to recite the consideration in the agreement and it should not be left out.

DRAFTERS NOTES:

All contracts must have some consideration. That is both parties must have obligations to the other. If there is no consideration for an agreement the agreement will usually not be valid because it will amount to nothing more than a promise to make a gift, which is not enforceable until the gift is given. Such an agreement must be supported by sufficient consideration; otherwise it is unenforceable (Tillinghast v. Tillinghast, 258 App Div 350, 16N.Y.S.2d 863 [1940], reh and app den 259 App Div 761, 18 N.Y.S.2d 2). The consideration for marital agreements are the mutual promises contained in the agreements. The consideration for one spouse's agreement to pay a specified sum of money to the opposite spouse is his or her release from the liability otherwise existing for the support of the opposite spouse or for a share of marital property.

CASE LAW YOU SHOULD KNOW:

Consideration is a prerequisite to a valid contract,[32] except in those cases where it is not required by statute. A party must receive something of value in the bargain.

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[32] Weiner v McGraw-Hill, Inc., 57 N.Y.2d 458, 457 N.Y.S.2d 193 (1982); Williston on Contracts § 7:2 (4th ed.)

The consideration must actually be provided. If a party fails to provide promised consideration, there is a failure of consideration.[33]

Consideration has been defined by the Court of Appeals as follows: “A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. Courts will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to anyone. It is enough that something is promised, done, forborne or suffered by the party to whom the promise is made as consideration for the promise made to him. In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise. Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise.‘ Consideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first.”[34]

Under the contemporary definition of consideration it is enough that something is promised, done, forborne or suffered by the party to whom the promise is made as consideration for the promise made to him”. “Mutuality”,or reciprocity, is not necessary when a promisor receives other valid consideration. The value of the thing forborne or promised is not crucial so long as it is acceptable to the promisee. The detriment suffered or the thing promised need be of no benefit to the one who agreed to it.[35] A promisee who has incurred a specific, bargained for legal detriment may enforce a promise against the promisor, notwithstanding the fact that the latter may have realized no concrete benefit as a result of the bargain.[36]

Certain contracts are exempt, by statute, from the requirement of consideration. For example, an agreement, promise or undertaking to change or modify, or to discharge in whole or in part, any contract, obligation, lease, or mortgage or other security interest in personal or real property, is not invalid because of the absence of consideration. However, it must be in writing and signed by the party against whom it is

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[33] Fugelsang v. Fugelsang, 131 A.D.2d 810, 517 N.Y.S.2d 176 (2d Dep't 1987).

[34] Hammer v Sidway, 124 N.Y. 538, 27 N.E. 256 (1891)

[35] Weiner v McGraw-Hill Inc., 57 N.Y.2d 458443 N.E.2d 441 (1982)

[36] Holt v Feigenbaum, 52 N.Y.2d 291, 419 N.E.2d 332, 437 N.Y.S.2d 654 (1981)

sought to be enforced, or by his agent.[37] A spouse may waive or release a right of election against a last will or a testamentary substitute made by the other spouse, and may waive or release all rights in the estate of the other spouse, without consideration. However, the waiver or release must be in writing and subscribed by the maker, and acknowledged or proved in the manner required for the recording of a conveyance of real property. [38]

An Antenuptial agreement is a contract also subject to ordinary principals of contract interpretation. To the extent that an antenuptial agreement is executory, it must be supported by sufficient consideration.[39] Generally, the marriage itself constitutes ample consideration for the promises of a future spouse. [40] However, there may be other valuable consideration, such as mutual promises. [41] Where the marriage is invalid and void ab initio, there is a failure of consideration and the agreement is unenforceable.[42] Where the marriage is subsequently declared void, an antenuptial agreement conditioned on marriage is unenforceable on the theory that the consideration failed.[43]

Under the traditional principles of contract law, the parties to a contract are free to make their bargain, even if the consideration exchanged is grossly unequal or of dubious value.[44] Absent fraud, the adequacy of consideration is not a proper subject for judicial

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[37] General Obligations Law § 5-1103, titled. Written agreement for modification or discharge

[38] EPTL 5-1.1 (f); EPTL 5-1.1-A (e)

[39] Peck v. Vandemark, 99 N.Y. 29, 1 N.E. 41 (1885); Whitmore v Whitmore, 8 A.D.3d 371, 778 N.Y.S.2d 73 (2d Dept, 2004).

[40] In re Phillips' Estate, 293 N.Y. 483, 58 N.E.2d 504 (1944); Zagari v. Zagari, 191 Misc. 2d 733, 746 N.Y.S.2d 235 (Sup 2002)

[41] Colello v. Colello, 9 A.D.3d 855, 780 N.Y.S.2d 450 (4th Dep't 2004); In re Phillips' Estate, 293 N.Y. 483, 58 N.E.2d 504 (1944); In re Shapiro's Will, 154 Misc. 55, 276 N.Y.S. 560 (Sur. Ct. 1935)

[42] Hosmer v. Tiffany, 115 A.D. 303, 100 N.Y.S. 797 (1st Dep't 1906); Brunel v. Brunel, 64 N.Y.S.2d 295 (Sup 1946)

[43] Ranieri v. Ranieri, 146 A.D.2d 34, 539 N.Y.S.2d 382 (2d Dep't 1989).

[44] See Hamer v Sidway, 124 NY 538; 3 Williston, Contracts § 7:21, at 390 [Lord 4th ed]

scrutiny.[45] It is enough that something of "real value in the eye of the law" was exchanged. [46]

Separation agreements, stipulations and postnuptial agreements are contracts subject to ordinary principles of contract interpretation.[47] However, in Christian v Christian [48] the Court of Appeals distinguished them from other contracts because "[a]greements between spouses, unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith." It held that a separation agreement may be set aside on grounds that would be insufficient to vitiate an ordinary contract. No actual fraud need be shown. Relief will be granted if the settlement is manifestly unfair to a spouse because of the other's overreaching.[49] Agreements between spouses, which are manifestly unfair or unconscionable, are voidable, except where the contract is severable, which a question of intention, to be determined from the language employed by the parties, viewed in the light of the circumstances surrounding them at the time they contracted. The parties have a right to expressly stipulate that if any provision of the agreement be held invalid or unenforceable, all other provisions shall continue in full force. They may make such an agreement divisible within reasonable limits.[50]

Separation agreements differ from other marital agreements in that they are contracts between a husband and wife contemplating their living separate and apart.[51] Domestic Relations Law § 236 [B][3] applies the same basic rules to antenuptial agreements, as to separation and postnuptial agreements. Although the permissible subject matter of an agreement of the parties has been greatly expanded there are still limitations as to the contractual terms of antenuptial and postnuptial agreements. [52] Domestic Relations Law § 236[B][3] permits limited freedom of contract.[53]

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[45] Spaulding v Benenati, supra, at 423

[46] Apfel v Prudential-Bache Sec., 81 NY2d 470, 476 (1993)

[47] Rainbow v Swisher, 72 NY2d 106, 109 (1988); Matter of Meccico v Meccico 76 N.Y.2d 822, 559 N.Y.S.2d 974 (1990)

[48] Christian v Christian, 42 NY2d 63 (1977).

[49] Christian v Christian, supra

[50] Christian v Christian, supra

[51] Ballentine's Law Dictionary (3d ed.) p 1186.

[52] See Domestic Relations Law § 236 [B][3]

[53] See P.B. v L.B., 19 Misc 3d 186, 188 (Sup Ct 2008) (The following provision in a separation agreement was held to violate public policy and was void: " It is agreed that

Marital agreements which are regular on their face are binding on the parties, unless and until they are set aside. [54] If such an agreement is voidable for fraud, duress coercion, mistake, overreaching by the other party, manifest unfairness or overreaching, it may be set aside under principles of equity in an action in which such relief is sought by the complaint, or by way of affirmative defense or by counterclaim.[55]

As a general rule, a separation agreement is valid only if made at a time when the parties are already living apart,[56] and the agreement is invalid and void where the parties are not living apart when it is executed.[57] The validity of a separation agreement may be sustained, even though executed at a time when the parties were living in the same household, where it appears that an immediate separation was contemplated and, in fact, occurred. [58] While the separation must be immediate, the meaning of the term "immediate" depends upon the circumstances of the case. [59]

Like other contracts, a Separation Agreement must be supported by sufficient

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the husband shall not pursue a divorce against the wife for a period of five years from the signing of this agreement except by prior written consent of the wife.")

[54] Re Brown's Estate, 153 Misc 282, 274 NYS 924 (1934); Re Tierney's Estate, 148 Misc 378, 266 NYS 51 (1933); Smith v Smith, 39 NYS2d 330 (Dom Rel Ct 1943).

[55] Christian v Christian, supra; Cordero v Cordero, 200 AD2d 491, 606 NYS2d 655 (1st Dept 1994) ; Frieland v Frieland, 200 AD2d 484, 606 NYS2d 654 (1st Dept 1994); Kallman v Kallman, 60 App Div 2d 863, 400 NYS2d 860 (2d Dept 1978); Gamble v Gamble, 59 App Div 2d 549, 397 NYS2d 414 (2d Dept 1977); Darragh v Darragh, 163 App Div 2d 648, 558 NYS2d 695 (3d Dept 1990); Kellman v Kellman, 162 App Div 2d 958, 559 NYS2d 49 (4th Dept 1990)

[56] Garlock v Garlock, 279 NY 337, 18 NE2d 521 (1939)

[57] Whedon v Whedon, 247 App Div 463, 286 NYS 664 (1936); Re Hughes' Will, 225 App Div 29, 232 NYS 84 (1928), affd 251 NY 529, 168 NE 415; Stevralia v Stevralia, 182 Misc 1050, 48 NYS2d 646 (1944); Stahl v Stahl, 221 NYS2d 931 (Sup. Ct 1961), mod on other grounds (1st Dept) 16 App Div 2d 467, 228 NYS2d 724.

[58] La Montagne v La Montagne (1933) 239 App Div 352, 267 NYS 148, affd 264 NY 552, 191 NE 560; Re Estate of Dail (1960) 29 Misc 2d 809, 209 NYS2d 115, affd (1st Dept) 14 App Div 2d 850, 218 NYS2d 528.

[59] Re Estate of Dail, 29 Misc 2d 809, 209 NYS2d 115 (1960), affd (1st Dept) 14 App Div 2d 850, 218 NYS2d 528.

consideration - otherwise it is unenforceable. [60] The Court of Appeals has stated that: "The consideration for an agreement of separation fails, and the contract is avoided when separation does not take place; or where, after it has taken place, the parties are reconciled and cohabitation resumed. [61]

Separation Agreements which are entered into while the parties are still living together, have been held void as against public policy, since it is an essential part of a separation agreement that the parties should thereafter separate. Where the parties are separated and the separation is not produced by the contract, the consideration for the husband's agreement to pay support is his release from liability for the support of his wife. It has been said that the consideration for a separation agreement is the mutual promises.[62]

The consideration for a spouse's agreement to pay a specific amount of money to the other spouse as maintenance is his or her release from the liability that would otherwise exist for the support of that spouse. [63] However, where a spouse's promise to make support payments is revocable and performance is optional and cannot be enforced, the contract is unenforceable for lack of consideration.[64] Where a spouse is already married to another person at the time the separation agreement is entered into, there is a failure of consideration. [65]

In order to be enforceable, an executory contract between husband and wife must be based upon a valuable consideration. A meretricious consideration is not sufficient.[66] A court of equity will not enforce an agreement between a husband and wife which is not founded upon consideration unless the agreement has been fully performed

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[60] Tillinghast v Tillinghast, 258 App Div 350, 16 NYS2d 863 (1940); Abrams v Abrams, 150 Misc 660, 270 NYS 841 (1934).

[61] Galusha v Galusha, 116 NY 635, 22 N.E. 1114 (1889)

[62] Winter v Winter, 191 NY 462, 470 (1908)

[63] Winter v Winter, 191 NY 462, 84 NE 382 (1908); Carpenter v Osborn, 102 NY 552, 7 NE 823 (1886); Dunn v Dunn, 26 Misc 2d 22, 213 NYS2d 96 (1960).

[64] Tillinghast v Tillinghast, 258 App Div 350, 16 NYS2d 863 (1940)

[65] Abrams v Abrams, 150 Misc 660, 270 NYS 841 (1934)

[66] Minor v. Parker, 65 A.D. 120, 72 N.Y.S. 549 (1st Dep't 1901); In re Koretzky's Estate, 180 Misc. 108, 40 N.Y.S.2d 928 (Sur. Ct. 1943).

by both parties. [67]

Where a spouse signs a postnuptial agreement which does not recite any consideration, and does not contain any mutual promises, there is no consideration for the agreement. Where a spouse released her claims to the husband's business property, but he does not relinquish any rights to any of her property or give her anything in return there is no consideration for the agreement. The continuation of the marriage does not provide adequate consideration. [68]

Failure of consideration gives the injured party the right to rescind the contract. A contract may be rescinded where that which was undertaken to be performed in the future was so essential that the failure of it must be considered as destroying the entire consideration for the contract, or was so indispensable that the contract would not have been made without the condition. [69]

Fuselgang v Fuselgang [70] is a classic case of failure of consideration. The parties separation agreement provided that the wife would have custody of the parties' six children, and would have exclusive use and occupancy of the marital residence until her election to vacate, her remarriage, or the emancipation of all of the children, whichever event occurred first, at which time the home would be sold, with the net proceeds divided between the parties. At the time the parties appeared in the Supreme Court, each seeking a judgment of divorce, they amended the separation agreement by stipulating that the marital residence would be immediately placed on the market, with the proceeds of the sale divided between the parties. The stipulation also provided that the plaintiff husband would have custody of the parties' children commencing with the closing of title to the marital residence. The judgment of divorce incorporated the agreement and the stipulation, to survive, and provided that the terms of the original separation agreement regarding custody, maintenance and child support would remain in full force and effect until the sale of the marital residence. After the divorce the marital residence was not sold. The wife continued to live there. The husband never took custody of the parties' children. Eight years later the wife moved for a money judgment for support arrears and the husband cross-moved for the appointment of a receiver to sell the former marital residence. Supreme Court ordered that the marital home be appraised and placed on the market.

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[67] Hendricks v. Isaacs, 117 N.Y. 411, 22 N.E. 1029 (1889); In re Koretzky's Estate, 180 Misc. 108, 40 N.Y.S.2d 928 (Sur. Ct. 1943).

[68] Whitmore v Whitmore, 8 A.D.3d 371, 778 N.Y.S.2d 73 (2d Dept , 2004)

[69] Lauer v. Raymond, 190 A.D. 319, 180 N.Y.S. 31 (1st Dep't 1920).

[70] Fuselgang v Fuselgang, 131 A.D.2d 810, 517 N.Y.S.2d 176 (2d Dept 1987)

The Appellate Division reversed the decision of the Supreme Court in Fuselgang. It found that the emancipation of 5 of the 6 children over the past eight years had made it impossible for the husband to perform that part of the stipulation respecting custody which was the consideration for the wife's agreeing to amend the provision relating to exclusive occupancy of the marital home. Since the wife could not receive what she bargained for, there was a failure of consideration. The Appellate Division held that failure of consideration exists wherever one who has promised to give some performance fails, without his or her fault, to receive in some material respect the agreed quid pro quo for that performance. Failure of consideration gives the disappointed party the right to rescind the contracts. The wife could no longer receive the benefit she bargained for because of the passage of time and the subsequent emancipation of 5 of her 6 children. Therefore, she had the right to opt to rescind the stipulation amending the separation agreement.[71]

PURPOSE OF AGREEMENT

SETTLEMENT CONSIDERATIONS:

Where you have negotiated an agreement which you do not feel is clear on issues related to your client, and your adversary refuses to make the language clearer (hoping for ambiguity) it is important to clearly express in the body of the agreement, rather than in a recital, what their intentions are regarding its provisions. This way, the expressions of intent will be a part of the agreement to be considered by the court if it is called upon to consider an ambiguous provision in the agreement.

DRAFTERS NOTES:

The agreement might recite that it has been entered into between the parties to resolve all issues between the parties except certain specified issues.

CASE LAW YOU SHOULD KNOW:

SEPARATE RESIDENCE

SETTLEMENT CONSIDERATIONS:

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[71] Fuselgang v Fuselgang, 131 A.D.2d 810, 517 N.Y.S.2d 176 (2d Dept 1987)

If the agreement is a separation agreement, it must contain a provision stating that the parties have separated or intend to separate immediately upon the execution of the separation agreement.

DRAFTERS NOTES:

The agreement should clearly state that the parties are living separate and apart, or intend to separate immediately after the execution of the agreement, and will live separate and apart as if they were single and unmarried.

CASE LAW YOU SHOULD KNOW:

The only effect of a separation or matrimonial agreement is to modify the customary rights and duties of the spouses in the manner and extent provided in the agreement (Clayburgh v Clayburgh, 261 N.Y. 464, 185 NE 701 [1933]; Re Brown's Estate, 153 Misc. 282, 274 N.Y.S. 924 (1934). The marriage remains in full force and effect, with the minor modifications of the rights of maintenance, support and consortium (Re Griffith's Estate, 167 Misc. 366, 3 N.Y.S.2d 925 [1938]). A separation agreement does not authorize either of the parties to engage in adultery, which is still a crime in New York.

The general rule is that a separation agreement is valid only when made at a time when the parties are already living apart, and the agreement is invalid and void where the parties are not living apart when it is executed (Whedon v Whedon, 247 App Div 463, 286 N.Y.S. 664 [1936]; Re Hughes' Will, 225 App Div 29, 232 N.Y.S. 84 [1928], affd 251 N.Y. 529, 168 NE 415; Stevralia v Stevralia, 182 Misc 1050, 48N.Y.S.2d 646 (1944); Stahl v Stahl, 221 N.Y.S.2d 931 (1961, Sup), mod on other grounds [1st Dep't] 16 A.D.2d 467, 228N.Y.S.2d 724). However, this rule is not extended beyond the reason that supports it so as to a husband and wife from making a valid separation agreement while both of them are living at the marital residence. The validity of a separation agreement may be sustained, even though executed at a time when the parties were living in the same household, where it appears that an immediate separation was contemplated, not in consequence of the agreement and in fact occurred La Montagne v La Montagne, (239 App Div 352, 267 N.Y.S.148 [1933], affd 264 N.Y. 552, 191 NE 560), held that a separation agreement was not invalid as one for future separation where at the time the agreement was executed both parties had independent income and independent apartments, although the husband was living in the wife's apartment and continued to live there for some time thereafter. The court found that the separation agreement was entered into in good faith. The husband stayed in the apartment only for the sake of appearances and because of the serious illness of the wife that, shortly thereafter, caused her removal to a hospital where she died. Usually, the separation must be immediate, although the meaning of the term "immediate" depends upon the circumstances of the particular case (Re Estate of Dail, 29 Misc. 2d 809, 209 N.Y.S.2d 115 [1960], affd, 14 A.D.2d 850, 218 N.Y.S.2d 528 (1 Dept.).

In Markowitz v Markowitz, (NYLJ, June 4, 1975, p. 19, cols. 5–8; p. 20, col. 1 (Co. Ct., Ribaudo, J.)), the husband sued for a conversion divorce under Domestic Relations Law §170(6), based on living apart for one year, pursuant to a separation agreement containing provisions for distribution of the parties' property, support and custody of the parties' children and a waiver of support by the wife. The wife contended that the parties lived together as husband and wife in the same house for over seven months after the agreement's execution and that they cohabited as husband and wife during this time. The court, evaluating the credibility of the wife's testimony as against the husband's denials, chose to believe the wife, held the agreement void and unenforceable as against public policy, and refused to permit the husband to use it as a basis for a conversion divorce. It held that for a separation agreement to be valid, it must be executed after the parties are separated or an immediate separation must be contemplated by the parties. Thus an agreement to separate executed while the parties are living together is contrary to public policy and void unless the separation takes place within a reasonable time. The Appellate Division (52 A.D.2d 521, 381 N.Y.S.2d 678 [1st Dep't 1976]), reversed the decision of the trial court and remanded the case for a rehearing on the facts. It held that mere cohabitation between spouses after the execution of a separation agreement does not destroy its validity, but there also must be an intent to reconcile. (See also Whedon v Whedon, 247 App Div 463, 286 N.Y.S. 664 [1936]); Dowie v De Winter, 203 App Div 302, 197 N.Y.S. 54 [1922]; Pugliese v Pugliese, 220 N.Y.S.2d 67 [Sup Ct 1961].)

NON-MOLESTATION

SETTLEMENT CONSIDERATIONS:

Sometimes the parties' separation is not amicable and one spouse is so vengeful that he or she will not leave the other alone after they have separated. In these situations the disgruntled spouse may harass the other by making repeated telephone calls to the other, stalking the other or his or her significant other, or sending vexatious letters. In such a situation is good idea to have a non-molestation provision.

DRAFTERS NOTES:

This clause should require each spouse to leave the other alone during the parties' separation and not to interfere with the other or sue to compel a resumption of cohabitation. Specify that the spouses will be left alone, and that, besides the usual provisions, neither will stalk, make derogatory comments about the other spouse, hold the other spouse up to public ridicule nor publicize their marital difficulties. There appears no reason why this provision cannot be extended to the family of each spouse

and his or her significant others.

CASE LAW YOU SHOULD KNOW:

A provision against molestation in a separation agreement is an independent condition, and its breach does not terminate the agreement or relieve the other spouse from his or her obligations (Borax v. Borax 4 N.Y.2d 113, 172 N.Y.S.2d 805, 149 N.E.2d 326 [1958]).

Notwithstanding the fact that a separation agreement contains a provision that neither party shall molest the other nor try to compel the other to dwell or cohabit with him or her, and a provision that default in any part of the agreement may be deemed a default under the entire agreement, the breach by a spouse of the clause against molestation will not warrant the other spouse's refusal to comply with the support provisions of the agreement (Shedler v. Shedler, 32 Misc 2d 290, 223 N.Y.S.2d 363 [1961], affd 15 A.D.2d 810, 225 N.Y.S.2d 495, affd 12 N.Y.2d 828, 236 N.Y.S.2d 348, 187 N.E.2d 361). The breach by a wife of a provision not to hold her husband up to public ridicule and not to publicize their marital difficulties was held not to constitute a defense to her action to recover support due under the agreement where the husband had publicized their marital difficulties (City Bank Farmers Trust Co. v. Macfadden 131 N.Y.S. 232 [Sup Ct 1954]).

SEPARATE OWNERSHIP

SETTLEMENT CONSIDERATIONS:

An agreement should specify what property each party is to retain or receive, even if it is their own separate property, and even if they have already divided or distributed their property to their own satisfaction. Where the parties have already distributed their property, the agreement should provide that other than specifically provided in the agreement, each party will retain all property of any kind, in his or her possession, custody or control. Such a provision will fill any gaps in case some kind of property is not mentioned in the agreement forgotten or inadvertently left out of the agreement, and will prevent a claim to that property later by the spouse who does not have possession, custody or control of it.

DRAFTERS NOTES:

The agreement provision should state that subject to the provisions of the agreement, each party will own all of the items of property, which are now owned by him

or her, or which are now in his or her name, possession, custody or control, or to which he or she is, or may be beneficially entitled, or which may hereafter belong to or come to him or her.

CASE LAW YOU SHOULD KNOW:

DEBTS OF THE PARTIES

SETTLEMENT CONSIDERATIONS:

Debts incurred by the parties during their marriage, no matter which spouse incurred the debt, are "marital debts" and like marital property, they must be equitably distributed by the parties. In the negotiation of the agreement counsel must identify all of the parties' individual and joint debt and agree who is responsible for each such debt.

DRAFTERS NOTES:

The agreement should specify who is the party responsible for past, present and future debts. This clause specifies the division of the parties obligations incurred during the marriage as well as their individual debts. The parties should represent to each other that except as provided in the agreement, neither party will incur any debt or liability for which the other party or his legal representatives or his property or estate may become liable, In addition each party should agree to hold the other harmless, and indemnified from any past debts and any debts thereafter contracted by him or her. There should be a provision for the payment of liquidated damages because of a breach of these provisions. The drafter should be careful to avoid a penalty clause.

CASE LAW YOU SHOULD KNOW:

Liquidated damages are in effect, an estimate, made by the parties at the time they enter into their agreement, of the extent of the injury that would be sustained as a result of breach of the agreement. The distinction between liquidated damages and a penalty is well established. A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced (Truck Rent-A-Ctr. v. Puritan Farms 2nd, 41 N.Y.2d 420, 425, 393 N.Y.S.2d 365, 361 N.E.2d 1015 [1977]; See also JMD Holding Corp., 4 N.Y.3d at 380, 795 N.Y.S.2d 502, 828 N.E.2d 604 [2005]; Weiss v. Weiss, 206 A.D.2d 741, 742-743, 615 N.Y.S.2d 468 [3d Dep't 1954]; Willner v. Willner, 145 A.D.2d 236, 241, 538 N.Y.S.2d 599 [2d Dep't 1993]).

In Chumsky v Chumsky (__ A.D.3d ___, 881 N.Y.S.2d 774 [4th Dep't 2009]), the parties' stipulation provided that, in the event that any installment payment was more than 15 days overdue, but less than 30 days overdue, the plaintiff was obligated to pay 9% interest on the balance due at the time of the late payment. The Appellate Division held that the provision of the postjudgment order imposing interest as a consequence of a payment less than 30 days late constituted an unenforceable penalty. It held that whether a contractual provision 'represents an enforceable liquidation of damages or an unenforceable penalty is a question of law, giving due consideration to the nature of the contract and the circumstances. Where, as here, the stipulation provided for an amount to be paid as a consequence of a breach that is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced.

In Willner v Willner (145 A.D.2d 236, 538 N.Y.S.2d 599 [2d Dep't 1989]), in settlement of a postjudgment enforcement proceeding the parties stipulated that in the event of a default of seven days after written notice on any payment of arrears or child support the husband shall pay an additional sum of $110 per week as maintenance (or child support if she remarried) retroactive to March 2, 1984. As part of that stipulation the wife waived $4,000 in arrears and alimony in order to insure the husband's timely payments. The Appellate Division affirmed the Order of the Supreme Court that held that the liquidated damage clause in issue was a penalty and unenforceable as against public policy. A single default could trigger a "liquidated damages" payment of $54,750. Such damages were clearly out of proportion to the actual damages, which would be caused by the husband's breach. It held that a liquidated damage clause will be upheld "if (1) the amount fixed is a reasonable measure of the probable actual loss in the event of breach, and (2) the actual loss suffered is difficult to determine precisely." "However, if the liquidated damages do not bear a reasonable proportion to the loss actually sustained by a breach, they will constitute an unenforceable penalty."

In Weiss v Weiss, (206 A.D.2d 741, 615 N.Y.S.2d 468 [3d Dep't 1994]), the parties' separation agreement provided for the wife to convey her interest in the marital residence to the husband in return for a promissory note secured by a mortgage. The note was in the principal sum of $7,500 payable at the rate of 15 percent per year and provided that interest would be waived if said sum was fully paid on July 19, 1991, or upon sale of the premises, whichever occurs first. The waiver of interest was in consideration of, and conditioned upon, the defendant's waiver of support of their son. The husband failed to pay the amount due on July 19, 1991 and the wife made a demand for payment of principal and accumulated interest. He tendered payment of $7,500 on August 1, 1991. In accordance with the terms of the note, the wife applied this payment first to interest due on the note, which at the rate of 15 percent per year totaled $7,749.14. She then commenced this action to recover the principal sum of $7,500 with $249.14 in interest unpaid as of August 1, 1991. The Appellate Division found merit in the husband's contention that the waiver of interest clause constituted a liquidated damage clause so disproportionate to actual damages as to render it unenforceable. The Court held it was beyond question that the wife received the benefit of her bargain

since her child support obligations were waived by the husband. Enforcement of the interest clause would result in the husband's payment of an additional amount in excess of $8,000, a sum clearly disproportionate to the actual loss sustained by the wife under the circumstances. Therefore the court held that the waiver of interest clause constituted an unenforceable penalty as a matter of law. The wife was limited to recovering the unpaid interest occurring between July 19, 1991 and August 1, 1991 with costs.

In Lauter v Howe, (158 A.D.2d 393, 551 N.Y.S.2d 513 [1st Dep't 1990]), the Supreme Court held that a provision that defendant would pay plaintiff $75,000 (in exchange for a deed to certain real property) in the event payment of $70,000 was not received within four weeks did not constitute a liquidated damages clause nor did it constitute an unenforceable penalty.

In Melnick v Melnick, (211 A.D.2d 521, 621 N.Y.S.2d 64 [1st Dep't 1995]), the Appellate Division affirmed an order of the Supreme Court which granted the wife a money judgment of $250,833.35 for spousal support owed to her by the husband pursuant to the parties' judgment of divorce. The court rejected the husband's claim that he should not be bound by the default provisions of the parties' agreement whereby he agreed that if he defaulted on his maintenance obligations then all future rescheduled maintenance payments would become immediately due to the wife. The court found nothing unconscionable about this provision under the circumstances ofthis case. The husband was a sophisticated, successful businessman with a history of nonpayment in the protracted (nearly 15 years) divorce litigation who was represented by capable counsel in negotiating this clause who knowingly consented to it nearly 8 months before he first defaulted.

Where the penalty provision may be severed from the remaining valid portions of the separation agreement, the remainder will be sustained. (Kroll v. Kroll, 4 Misc 2d 520, 158 N.Y.S.2d 930 (1956).

MUTUAL RELEASES AND GENERAL RELEASE

SETTLEMENT CONSIDERATIONS:

Finality should be accorded the parties' agreement. The attorney negotiating an agreement should make every effort to resolve all issues between the parties and not leave any loose ends for future litigation. The parties should agree that all issues between them are resolved and mutually release each other from any past or existing claims they may have against each other.

DRAFTERS NOTES:

The agreement should provide that each party releases and discharges the other, his or her heirs, executors, and representatives, from all past claims against the other, which either of the parties ever had or now have. If the parties contemplate a divorce in the near future they should except from this provision, any or all cause or causes of action for dissolution, divorce or separation, and any defenses either may have to any divorce or separation action now pending, or brought by the other in the future. A general release clause is the standard format for this provision.

CASE LAW YOU SHOULD KNOW:

The Court of Appeals, in Boronow v. Boronow, (71 N.Y.2d 284, 286, 525 N.Y.S.2d 179, 519 N.E.2d 1375 [1988]), held that "a party to a concluded matrimonial action, who had a full and fair opportunity to contest title to the former marital home, is barred by res judicata principles from subsequently and separately reopening that issue." This view was considered consistent with the modern application of the doctrine of res judicata, which tempers the rule that joinder of claims is permissive by recognizing that all claims arising out of a transaction or occurrence are barred once any of them is actually litigated. "In a matrimonial action, where the essential objective is to dissolve the marriage relationship, questions pertaining to important ancillary issues like title to marital property are certainly intertwined and constitute issues which generally can be fairly and efficiently resolved with the core issue. The courts and the parties should ordinarily be able to plan for the resolution of all issues relating to the marriage relationship in the single action ... Fragmentation in this area would be particularly inappropriate and counterproductive ... [A] continuation of the relationship and of the conflict among parties to a matrimonial litigation would be particularly perverse and the inevitable cloud on titles should also not be allowed to hang over the alienability of the property."

Subsequently, in Rainbow v. Swisher, (72 N.Y.2d 106, 110, 531 N.Y.S.2d 775, 527 N.E.2d 258 [1988]), an action involving a separation agreement incorporated into a judgment of divorce, the Court of Appeals stated that "A party who has obtained a judgment of divorce is entitled to be secure that all issues relating to events which occurred during the marriage have been finally resolved without the threat of an ever-present mythical "Sword of Damocles" suspended over his or her head. This conclusion is supported by the forceful rule that "a final judgment of divorce issued by a court having both subject matter and personal jurisdiction has the effect of determining the rights of the parties with respect to every material issue that was actually litigated or might have been litigated." The Court went on to point out that" in general, a final judgment of divorce issued by a court having both subject matter and personal jurisdiction has the effect of determining the rights of the parties with respect to every material issue that was actually litigated or might have been litigated in the action.

In Chen v Fischer (12 A.D.3d 43, 783 N.Y.S.2d 394 [2d Dep't 2004]), the

Appellate Division Second Department adopted a “single action rule.” It pointed out that interspousal tort actions relating to title to property, commenced subsequent to and separate from an action for divorce, are precluded by the doctrine of res judicata, on the theory that the issues could have been litigated in the prior divorce action between the parties. It stated that “Societal needs, logic, and the desirability of bringing spousal litigation to finality” compelled it to expand upon the rule and hold that an interspousal tort action seeking to recover damages for personal injuries commenced subsequent to, and separate from, an action for divorce is barred by claim preclusion. The Court was cognizant that, unlike the equitable nature of the division of marital property in a divorce action, the aims of a tort claim are the assignment of fault and the award of damages. Marital fault is relevant in New York divorce actions with regard to the issue of equitable distribution in instances where it is egregious enough to warrant its consideration. It is, therefore, reasonable to expect a spouse to assert a cause of action seeking to recover damages for personal injuries caused by the actions or course of conduct of his or her spouse during the marriage within the divorce action, where the same tortious activity would constitute grounds for divorce. The Second Department adopted the reasoning of the Supreme Court of New Jersey in Tevis v Tevis, (79 N.J. 422, 400 A.2d 1189) that a spouse's "civil claims for monetary compensation against [his or her spouse], and [the] contingent liability therefor, would seem a relevant circumstance affecting the parties' financial status in the context of a matrimonial controversy" As such, a tort action seeking recovery for personal injuries sustained during the marital relationship should be brought in conjunction with an action for divorce between the parties, "in order to lay at rest all their legal differences in one proceeding and avoid prolongation and fractionalization of litigation.”

MUTUAL WAIVER AND DISCHARGE OF RIGHTS IN ESTATES

SETTLEMENT CONSIDERATIONS:

Under former law a divorce did not revoke many revocable dispositions ("testamentary substitutes"), such as lifetime revocable trusts (including Totten Trusts), life insurance policies, or joint tenancies (including joint bank accounts). A divorce did not revoke a power of attorney given to a former Spouse under provisions of the General Obligations Law. EPTL 5-1.4 was added which provides that a divorce or annulment will revoke any revocable disposition or appointment of property to a former Spouse, including a disposition or appointment by will, by beneficiary designation, or by revocable trust (including a bank account in trust form). It also revokes any revocable provision conferring a power of appointment on the former spouse and any revocable nomination of the former Spouse to serve in a fiduciary or representative capacity, such as nomination of the former Spouse as a personal representative, executor, trustee, guardian, agent, or attorney-in-fact. A divorce would sever joint tenancies between former Spouses (including joint bank accounts) and transform them into tenancies in

common. According to the Sponsor's Memorandum the statute does not change the New York case law concerning the effect of divorce on tenancies by the entirety. (See Laws of 2008, Chapter 173, 2, effective July 7, 2008; Kahn v Kahn, 43 N.Y. 2d 203, 401 N.Y.S.2d 47 [1977]; Anello v Anello, 22 A.D.2d 694, 253 N.Y.S. 2d 759 [2d Dep't 1964].)

DRAFTERS NOTES:

Each party should waive the right to take an elective share against the estate of the other and to act as administrator or executor of the estate of the other, including the right to inherit from the other pursuant to a previously executed will. As the caption indicates, rights to a claim in the estate of the other party are waived. This provision does not in any way eliminate or reduce the rights of children.

CASE LAW YOU SHOULD KNOW:

An agreement by the parties, made before or during the marriage, may include ... (1) a contract to make a testamentary provision of any kind, or a waiver or any right to elect against the provisions of a will. (Domestic Relations Law § 236[B][3], Subdivision 1).

The Court of Appeals has held that where property is held in a tenancy by the entirety in which a husband and wife own real property as if they were one person and one spouse dies, the surviving spouse takes the entire estate not because of any right of survivorship but because that spouse remains seized of the whole. It noted that a tenancy by the entirety may, while both spouses are alive, be converted into a tenancy in common by certain definitive acts: a conveyance of the property in which both spouses join; a judicial decree of separation, annulment or divorce; or execution of a written instrument that satisfies the requirements of New York General Obligations Law §3-309, which permits division or partition of real property held in a tenancy by the entirety if clearly expressed in such an instrument (Re Estate of Violi, 65 N.Y. 2d 392, 492 N.Y.S.2d 550, 482 N.E.2d 29 [1985]).

CUSTODY AND VISITATION

SETTLEMENT CONSIDERATIONS:

If custody and visitation with children under the age of eighteen can not be agreed upon the court will make a determination establishing these rights. There is no prima facie right to custody in either parent. The guiding principle is the best interest of the child. Children are wards of the court and the courts are mandated to provide for their custody as justice requires. This policy is expressed in of the Domestic Relations Law §240 which provides that in actions where the custody of or right to visitation with

any child of a marriage is at issue, "the court must give such direction, between the parties, for the custody, care, education and maintenance of any child of the parties, as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child." Visitation has been regarded as the mutual right of the parent and the child. There is a presumption that the child and parent are entitled to regular and frequent visitation (Weiss v Weiss, 52 N.Y. 2d 170, 436 N.Y.S. 2d 862, 418 N.E.2d 377 [1981]).

DRAFTERS NOTES:

Since New York law does not define custody the custody provisions of a marital agreement should establish is one parent is going to have sole legal and physical custody of the child or children or if the parties will share joint legal or physical custody of the children and explain how it will be shared. The agreement should also contain a visitation, parenting or access schedule and make provision for telephone access to the children as well as internet, text messaging, instant messaging, or e-mail communication. The agreement should specify who picks up and returns the child, and specify when and where the child is to be picked up and returned. Other provisions that are commonly found in New York agreements are provisions that indicate if the child may be known by any other name; provisions which provide for immediate notification to the non-custodian parent of any emergencies or change of location; and provisons for access to the child by both parents when the child is ill.

Details as to dates and times of pick-up and return of the child must be spelled out and may cover, for example: weekend parenting to the non-custodian (Friday night through Sunday night); weekday dinner or visit or overnight visit; alternate public and religious holidays, school recesses, summer vacation, father's day, mother's day; the child's birthday, and the parent's birthdays. The agreement should indicate if a parent may or may not relocate to another state or city, and if the custodial parent is to be restricted to a state or mile radius.

The custody and visitation provisions of agreements often provide that the parties will "consult" with regard to certain issues. If the agreement does not state that they will consult and agree with regard to certain issues, then the custodial parent makes the ultimate decision when the parties are unable to agree. Areas to consider include education, religion, health, and religious confirmations.

CASE LAW YOU SHOULD KNOW:

An agreement may include ...(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 the Domestic Relations Law. (Domestic Relations Law § 236[B][3], Subdivision 4).

Children are not parties to parental agreements, even though they may be third

party beneficiaries (See Forman v. Forman, 17 N.Y.2d 274, 270 N.Y.S.2d 586, 217 N.E.2d 645 [1966]; Ferro v. Bologna, 31 N.Y.2d 30, 334 N.Y.S.2d 856, 244 N.E.2d 244 ([1972]).

In Baranek v Baranek, (54 A.D.3d 789, 864 N.Y.S.2d 94 [2d Dep't 2008]), a plenary action to set aside the stipulation of settlement between the plaintiff and the defendant the Appellate Division held that Supreme Court erred in awarding the defendant summary judgment dismissing the complaint on the ground that the parties' minor children were necessary or indispensable parties who should have been joined in the action. The children were not parties to the contract whose rights may be prejudiced by its rescission.

Custody and visitation terms are expressly subject to Domestic Relations Law Section 240. Domestic Relations Law § 236 [B][3], subdivision 4, does not give the right to do whatever they chose, even though they are encouraged to reach an agreement. The state has not abandoned its power to safeguard the best interests of children.

"Custody" is not defined in the Domestic Relations Law. We define sole custody as the right of a parent or other person to have physical custody of a child, to the exclusion of all others, subject to reasonable rights of visitation, and the right to make all decisions regarding the health, education, welfare and religion of the child.

Visitation is a limited form of custody. In Matter of Ronald FF. v. Cindy GG.,(70 N.Y.2d 141, 517 N.Y.S.2d 932 [1987]), the Court of Appeals noted that "visitation is a subspecies of custody," but explained that the two relational categories differed fundamentally in degree.

"Joint legal custody," sometimes called "divided" custody or "joint decision making," gives both parents a shared responsibility for and control of a child's upbringing. It may include an arrangement between the parents in which they alternate physical custody of the child. Where there is "joint physical custody," the child lives alternatively with both parents. The daily child-rearing decisions are usually made by the parent with whom the child is then living, while the major decisions, such as those involving religion, education, medical care, discipline, or choice of school and camp, are jointly made. There is a distinction between "legal joint custody," which usually involves sharing in all the important decisions concerning the child, and "physical joint custody," which involves sharing time with and physically caring for the child.

"Joint custody" is generally used to describe joint legal custody or joint decision making, as opposed to expanded visitation or shared custody arrangements. Joint custody reposes in both parents a shared responsibility for and control of a child's upbringing."

Although there is no consensus as to a precise definition of "joint custody," the Court of Appeals commented that "joint custody" is generally used to describe joint legal

custody or joint decision making, as opposed to expanded visitation or shared custody arrangements (Bast v Rossoff, 91 N.Y.2d 723, 675 N.Y.S.2d 19 [1998]). The Court of Appeals described joint custody as "reposing in both parents a shared responsibility for and control of a child's upbringing." (Bast v Rossoff, 91 N.Y.2d 723, 675 N.Y.S.2d 19 [1998]).

There is no statute authorizing awards of joint custody, although it may be awarded by the court, where the parents can co-operate with one another and are not hostile toward each other. As a practical matter, an award of sole custody to one parent may be so qualified that it is tantamount to an award of "joint custody." For example, a court may direct the parties to share equally their time with the child and consult with each other and agree upon major decisions affecting the child such as education, medical care and religion, so as to make the award nearly indistinguishable from "joint custody." It appears that nothing in New York's law prevents a court from making any reasonable allocation of the parental rights and obligations, so long as the determination is in the best interest of the child.

Although a parent's visitation is subordinate to the best interests of the child, and visitation may be terminated or suspended by the court, courts are reluctant to do so unless there is a hearing and the introduction of clear and convincing evidence that the visitation is detrimental to the child (Strahl v. Strahl, 66 A.D.2d 571, 414 N.Y.S.2d 184 [2d Dep't 1979], order aff'd, 49 N.Y.2d 1036, 429 N.Y.S.2d 635, 407 N.E.2d 479 [1980]). Only in unusual circumstances is visitation denied to the noncustodial parent. A termination or suspension of visitation is viewed as a drastic remedy.

Custody and visitation provisions of agreements are limited by case law as custody may be modified whenever there is a substantial change of circumstances. In Freiderwitzer v Freiderwitzer, (55 N.Y.2d 89, 447 N.Y.S.2d 893, 432 N.E.2d 765 [1982]), the Court of Appeals stated: "Extraordinary circumstances are not a sine qua non of a change in parental custody of a child, whether the original award of custody is made after plenary trial or by adoption of the agreement of the parties, without contest, and without merging the agreement in the judgment." ..."The only absolute in the law governing custody of children is that there are no absolutes. ..[N]o one factor, including the existence of the earlier decree or agreement, is determinative of whether there should, in the exercise of sound judicial discretion, be a change in custody.

In Matter of Nehrer v Uhler, (43 N.Y.2d 242, 251, 401 N.Y.S.2d 168, 372 N.E.2d 4 [1977]), the Court of Appeals, addressing the significance of a provision for custody in an agreement, wrote: "Priority, not as an absolute but as a weighty factor, should, in the absence of extraordinary circumstances, be accorded to the first custody awarded in litigation or by voluntary agreement' ... whereas of lesser priority will be the abduction, elopement or other defiance of legal process as well as the preferences of the child.

Domestic Relations Law section 240 requires that the courts consider the best interest of the child in making a custody award. As a general rule the parent seeking

custody must establish that it is in the best interest of the child that he or she be awarded custody because he is the more fit parent or that the other parent is unfit.

The Court of Appeals has established a "totality of the circumstances" approach to all custody determinations,(Freiderwitzer v Freiderwitzer, 55 NY2d 89, 447 NYS2d 893. Esbach v Esbach, 56 NY2d 167, 451 NYS2d 658). Under the "totality of the circumstances" rule, no one factor is determinative in making an award of custody. Determining what is in the child's best interest requires that consideration be given to many factors, such as: the effect of a separation of siblings; the wishes of the child, if of sufficient age; the length of time the present custody arrangement has continued; abduction or abandonment of the child or other defiance of legal process; the relative stability of the respective parents; the care and affection shown to the child by the parents; the atmosphere in the homes; the ability and availability of the parents; the morality of the parents; the prospective educational probabilities; the possible effect of a custodial change on the children; the financial standing of the parents; and the parents' past conduct; the refusal of a parent to permit visitation and/or the willingness of a parent to encourage visitation, (Young v Young, 212 AD2d 114, 628 NYS2d 957 [2d Dept., 1995]); unauthorized relocation of the parent and child to a distant domicile (Entwhistle v Entwhistle, 92 AD2d 879, 459 NYS2d 862); and making unfounded accusations of child abuse (Young v Young, supra).

The court must consider the corrosive impact of domestic violence and the increased danger to the family upon dissolution and into the foreseeable future. Where either party alleges that the other party has committed an act of domestic violence against the alleging party or a family or household member of either party, and the allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child (Domestic Relations Law § 240(1).

The court may interview the child in camera and ascertain its wishes but it is not error to fail to ascertain the wishes of a child of tender years. (Cohen v. Cohen, 70 AD2d 925, 417 NYS2d 755 [2d Dept., 1979]).

The Court of Appeals has adopted a "best interest of the child" approach to allowing a custodial parent to relocate with the child. The Court concluded that cases in which a custodial parent's desire to relocate conflicts with the desire of a noncustodial parent to maximize visitation opportunities are too complex to be resolved by a mechanical analysis that prevents or interferes with a simultaneous weighing and comparative analysis of all the relevant facts and circumstances. The Court concentrated its appreciation on both the need of the child and the right of the noncustodial parent to have regular and meaningful contact. (Tropea v Tropea and Browner v Kenwood, 87 NY2d 727, 642 NYS2d 575 [1996]).

SUPPORT AND MAINTENANCE

SETTLEMENT CONSIDERATIONS:

A husband (and in rare case, a wife) is liable for the support of his spouse. If the parties cannot agree upon an amount or its duration, then the Court will determine this issue. The amount of the maintenance award is based on a consideration of several factors. The objective of maintenance is to enable a former spouse to maintain the pre-separation standard of living. Maintenance may be awarded for a fixed or unlimited period of time, but must terminate upon the remarriage of the recipient. (See Domestic Relations Law § 236[B][6].)

In actions commenced on or after October 12, 2010 but before January 23, 2016, maintenance is defined as (1) payments provided for in such amounts as justice requires having regard for the standard of living of the parties established during the marriage; (2) in a valid agreement between the parties, or an award by the Court; (3) which may be at fixed intervals; and may be for a definite or indefinite time; (4) which terminates upon death of either party; upon the recipient's valid or invalid marriage; and upon modification under Domestic Relations Law, Section 248 (i.e., living with someone else).

The court may order temporary or permanent maintenance unless you have already made an agreement providing for maintenance. It must consider the standard of living of the parties established during marriage. It may consider the circumstances of the case and of the parties. It may consider whether the party who is getting the award lacks sufficient property and income to provide for his/her reasonable needs and whether the party has sufficient property and income to provide for the other.

The Twenty Factors

In actions commenced on or after October 12, 2010 or before January 23, 2016 the court must consider twenty factors in determining the amount and duration of maintenance. [72] The statute provides:

In determining the amount and duration of maintenance the court shall consider:

(1) the income and property of the respective parties including marital property

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[72] Laws of 2010, Ch 371, §2. The amendments took effect immediately except for sections one, two and four, which all take effect on October 12, 2010, and apply to matrimonial actions commenced on or after the effective date of such sections. Laws of 2010, Ch 371, § 6.

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 another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;

(8) the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor;

(9) reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage;

(10) the presence of children of the marriage in the respective homes of the parties;

(11) the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity;

(12) the inability of one party to obtain meaningful employment due to age or absence from the workforce;

(13) the need to pay for exceptional additional expenses for the child/children, including but not limited to, schooling, day care and medical treatment;

(14) the tax consequences to each party;

(15) the equitable distribution of marital property;

(16) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;

(17) the wasteful dissipation of marital property by either spouse;

(18) the transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;

(19) the loss of health insurance benefits upon dissolution of the marriage, and the availability and cost of medical insurance for the parties; and

(20) any other factor which the court shall expressly find to be just and proper.[73]

In any decision made pursuant to this subdivision the court must, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three, on the twelve factors (Domestic Relations Law § 236 [B][6][d]).

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[73] Domestic Relations Law §236(B)(6)(a).

DRAFTERS NOTES:

A key to drafting this provision is to be explicit concerning the amount and duration of maintenance. This may be or may include a weekly or monthly cash allowance which separates maintenance from child support for income tax purposes. The termination events should be clear and specific since absent a terminating event the agreement the agreement may be construed to provide for the payment of maintenance after the remarriage of the recipient. The agreement should provide that maintenance ceases upon the remarriage of the wife. Generally, maintenance continues during the payor's lifetime until either the death or remarriage of the recipient, whichever is earlier, or the termination of the obligation period to pay maintenance. To assure that the maintenance payments are deductible to the payor spouse and includible in the income of the recipient the agreement must provide that the payments terminate on the death of the recipient.

Elements of support that should not be forgotten to include automobile expenses, costs of operating and repairing the marital residence, exclusive occupancy of the marital residence, the continued use of credit cards, cobra and medical, hospital, psychiatric, orthodontic, pharmacy and dental expenses and/or insurance coverage.

CASE LAW YOU SHOULD KNOW:

An agreement may include (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, ...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 the final judgment. (Domestic Relations Law § 236[B][3], Subdivision 3).

Fair and Reasonable and Not Unconscionable

The requirement of "fair and reasonable" is a more stringent and broader concept than is that of not "unconscionable." "Unconscionable," at a minimum, implies egregious unfairness or unreasonableness, or an unprincipled taking of advantage which shocks the conscience of the court.

The term, "unconscionable," was imported adapted to agreements between the parties in Christian v. Christian (42 N.Y.2d 63, 396 N.Y.S.2d 817, 365 N.E.2d 849 [1977]). The Court of Appeals' emphasized that close scrutiny was called for in all transactions between spouses, especially in the case of separation agreements, and that such agreements may be held void on grounds insufficient to vitiate an ordinary contract. The opinion observed that Courts have "made it their business" to ensure that separation agreements "are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress and are willing to set aside or refuse to enforce those

born of and subsisting in inequity." The Court continued, saying that to justify intervention by equity, there need be no proof of actual fraud if the agreement between them is manifestly unfair to one spouse because of the overreaching of the other. However, merely getting the worst of the bargain or the subsequent occurrence of events which should have been anticipated, does not make the agreement unfair or unreasonable. In contrast, "unconscionable" is far different in degree if not in kind. It involves conduct "so strong and manifest as to shock the conscience "and confound the judgment of any person of common sense." It involves a bargain that "no person in his senses and not under delusion would make on the one hand, and as no honest and fair person would accept on the other."

In Christian v Christian the Court of Appeals found that the separation agreement, except as to one clause, was fair and reasonable. However, the property distribution clause was void as "unconscionable." Because the agreement had a "severability" clause the agreement was only partially invalid and could subsist by striking the invalid clause. The Court held that despite its partial invalidity, the remaining part of the agreement could serve as the predicate for a conversion divorce under Domestic Relations Law Section §170 (6). The void clause that was held to be "unconscionable" provided for the equal division of all of the securities owned by the parties. The wife, who did not have the advice of independent counsel, had securities worth $900,000 and the husband's holdings were only worth $200,000. The discrepancy between their respective contributions was deemed to make an equal division "unconscionable." The lack of counsel and the disparity between the bargaining positions of the parties, as well as the disproportion of their respective contributions, emanated an aura of overreaching and imposition.

Since the decision in Christian, some courts held that where the entire agreement is void it cannot serve as a predicate for a conversion divorce. In Angeloff v. Angeloff, (56 N.Y.2d 982, 453 N.Y.S.2d 630, 439 N.E.2d 346 [1982]) the Court of Appeals held that a conversion divorce may not be granted if the agreement is void ab initio as a result of fraud, duress or incapacity.

The decisions since Christian have made it clear that the advice of independent counsel and equality in bargaining position are important factors in resolving issues relating to fairness, fraud, duress, and overreaching. Christian does not mean that a mere improvident bargain is unconscionable. It must be a bad deal. To be unconscionable, there must have been an egregious overreaching, a taking of unfair advantage.

In Battista v. Battista, (105 A.D.2d 898, 899, 482 N.Y.S.2d 63 [3d Dep't 1984]), the court held that the fact that plaintiff was not represented by counsel did not, by itself, invalidate the agreement, but it is a "significant factor to be taken into consideration in determining whether the separation agreement was freely and fairly entered into." The court noted: "However, the attorney testified that relevant facts and the legal ramifications of certain clauses in the agreement were not fully discussed with or

disclosed to plaintiff.... Nor could he recall if he explained the Equitable Distribution Law to plaintiff and the benefits of her husband's employment, which she relinquished. For her part, plaintiff testified that she did not comprehend her right to equitable distribution of the marital property. Finally, the financial status of both parties was not disclosed to the attorney to enable any meaningful discussion. In sum, there was sufficient evidence to sustain the trial court's finding."

The presence or absence of independent counsel is a significant factor in determining whether there is overreaching in the execution of an agreement, (See Levine v. Levine, 56 N.Y.2d 42, 451 N.Y.S.2d 26, 436 N.E.2d 476 [1982]; Jaus v Jaus 168 A.D.2d 487, 562 N.Y.S.2d 727 [2d Dep't 1990]), as well as the history of the bargaining that led to the agreement, the length of the negotiations, and the extent of the financial disclosure. A substantially disproportionate allocation of the property was an important factor to be considered in the Christian case. As Christian held, the particular result the parties reached may warrant an inference of overreaching, even though the party alleging overreaching has the burden of proof on that issue.

In Weinstock v Weinstock, (167 A.D.2d 394, 561 N.Y.S.2d 807 [2d Dep't 1977]), the Appellate Division affirmed an Order of the Supreme Court that denied the husband's application for a conversion divorce and set aside the parties' separation agreement. The court held that the parties' separation agreement entered into in 1988 was patently unconscionable because the wife, having been married for 22 years, waived all rights with respect to equitable distribution, thereby relinquishing any share in the husband's assets, which were estimated to be in excess of $2,000,000. Pursuant to the agreement, the wife's receipt of maintenance was conditioned on her being employed and simultaneously taking at least six college credits. It further limited the husband's obligation by providing that, despite meeting the stringent requirements imposed, the husband's liability was limited to paying the difference between the wife's other income and the sum of $15,000 per year. Further evidence of unconscionability were the terms of the agreement, requiring the wife must transfer her share of the jointly held marital home to the husband and to grant to him an irrevocable power of attorney, allowing him to sign her name to any documents, checks, deeds, leases, etc. After the agreement was signed, the husband induced the wife to sign a loan agreement for a mortgage of $85,000 on a second home purchased by him. Thereafter, he maintained for himself all of the proceeds from the transaction. The wife's psychiatrist, who testified at the hearing characterized the wife's being very trusting of the husband and emotionally dependent on him. The husband's direct testimony indicated a fatal lack of disclosure concerning his financial affairs. The record was also replete with evidence of the wife's diminished capacity due to her periods of dependence upon valium and alcohol. The Appellate Division held that the agreement was so manifestly unfair and the apparent product of coercion and overreaching on the part of the husband that it was properly set aside. The court concluded the agreement was void, ab initio, and that it could not serve as the predicate for a conversion divorce.

Battista v Battista, (105 A.D.2d 898, 482 N.Y.S.2d 63 [3d Dep't 1984]), held that the terms and circumstances of a separation agreement are generally subject to a more intensive scrutiny as to overreaching than ordinary agreements because of the fiduciary relationship between the spouses. The court also said that to warrant the intervention of equity, a plaintiff does not have to show actual fraud but must establish that the agreement is "manifestly unfair due to defendant's overreaching." The wife had suffered from depression for years, had no independent legal advice, did not understand her rights to equitable distribution, and relevant facts were not disclosed. The agreement provided that the wife receive only $25 a week for maintenance and child support, although the husband's salary was $37,000 a year.

In Arrow v Arrow, (133 AD 2d 960, 520 N.Y.S.2d 468 [3 Dept. 1987]), the Appellate Division affirmed a judgment of Supreme Court rescinding a 1982 separation agreement and reopening a 1982 divorce action for equitable distribution. One attorney represented both parties; the agreement failed to distribute the husband's masonry business, and the husband received the marital residence. The wife did not receive maintenance. The case reflected a manifestly unfair settlement agreement in favor of the husband. The wife apparently never spoke with the attorney separately. The attorney, for reasons best known to him, failed to consider defendants' business a marital asset to which plaintiff had a claim. The agreement effectively gave the defendant the parties' only substantial assets.

In Yuda v Yuda, (143 AD 2d 657, 533 N.Y.S.2d 75 [2 Dept. 1988]), the Appellate Division declared an open court stipulation, and order and judgment based, on it null and void as unconscionable. The husband, age 63, appeared pro se and agreed to give the wife exclusive occupancy of the marital premises until its sale at her sole discretion, 50% of the net proceeds of such sale, $800 a month maintenance for life after he vacated the premises, and 50% of his pension benefits when he retired. The court held that the economic provisions were unconscionable and that it was shocking that after the husband retires he would have to pay $800 per month plus half his sole income from his pension of $416 a month, for a total of $1,008 per month. The wife controlled the parties' primary asset for life, and it was possible that the husband may never realize any income from this property. Further, the pressure placed on the husband by the court was improper.

In Thomas v Thomas, (145 A.D.2d 477, 535 N.Y.S.2d 736 [2 Dept. 1988]), a 23 year marriage, the Appellate Division held that a purported postnuptial agreement was properly set aside as "unconscionable." "This agreement would have resulted in a distribution of marital assets to the wife which were worth approximately 10 times the value of the assets being retained by the husband. The facts surrounding the execution of the agreement were highly suspicious as the defendant's testimony was repeatedly shown to be unreliable." The court stated that it was not convinced that the husband ever even executed the undated document, which in its original form was totally one sided in favor of the wife.

In Clermont v Clermont, (198 A.D.2d 631, 603 N.Y.S.2d 923 [3 Dep't 1993]), prior to their marriage in 1979, the parties entered into an antenuptial agreement. In 1979 they executed a "post-nuptial reaffirmation." That document provided that the antenuptial agreement survived anything said or in connection with the marriage ceremony. They executed a postnuptial addendum in 1987 reciting that certain real property purchased only with the husband's funds and in both their names would become the sole and exclusive property of the husband if the parties divorced. In 1991 they executed a third postnuptial document whereby the wife revoked all prior powers of attorney given to her by the husband. In the action for divorce, commenced by the wife in 1991, the husband set forth a defense that the agreement and its reaffirmation constituted an affirmative defense to equitable distribution. The Supreme Court granted the wife summary judgment dismissing the defense, holding the agreements unconscionable because paragraph 4B of the agreement entitled the wife, upon dissolution of the marriage, to such property as the husband might periodically deem to designate during that event and provided that otherwise she would get nothing. The Appellate Division stated that the disputed paragraph of the agreement provided that each party's individual income and property, even though acquired during the marriage, will retain its characterization as separate property. Subparagraph (a) declared that the house and land already titled to the husband would remain his separate property. Subparagraph (b), however, would give the husband all real and personal property belonging to the wife at the time of the marriage or acquired thereafter unless the wife demanded a writing from the husband within 30 days of her acquisition of such property which acknowledged that the property was hers. The provision granted the husband all of the wife's property acquired before the marriage but not solely in her name and all property acquired by her subsequently but not acknowledged by the husband to be her property. The Court held that the provision which would grant the husband all marital property even if purchased with the wife's separate income was unconscionable and struck it out, as no rational person would agree to such an arrangement. The Court also held that the same reasoning applied to paragraph 6 of the agreement which dealt with the assets and property rights and interests of the wife covered by paragraph 4.

In Tartaglia v. Tartaglia, (260 A.D.2d 628, 689 N.Y.S.2d 180 [2 Dept 1999]), the Appellate Division held that the maintenance provision of the Separation Agreement which provided for payment by the husband of $52,000 per year until the earliest of 4 conditions was unconscionable. The wife received the bulk of the marital assets and the husband was left with an income of $7,860 per year from which he was to pay medical and life insurance premiums for the wife and the children. The Appellate Division held that an Agreement which resulted in an award of substantially all of the marital assets to one party while burdening the other party with a substantial economic obligation is patently unconscionable. Additionally, the husband was in risk of becoming a public charge.

In Gibson v Gibson, (284 A.D.2d 908, 726 N.Y.S.2d 195 [4 Dept 2001]) the Appellate Division held that wife was entitled to order setting aside agreement on the grounds it was manifestly unfair. The wife received no share of the business that was

the sole source of income for both parties and received no share of the parties' net assets of approximately $235,000. While the husband assumed the liabilities, they provided him with future benefits, such as business contracts that generated revenue over and above their cost. Under the agreement the wife was left with no resources and no source of income or other means of support.

Amount and Duration of Maintenance

In fixing the amount and duration of maintenance the pre-divorce standard of living is a mandatory factor for the courts' consideration. In Hartog v Hartog, (85 N.Y. 2d 36, 623 N.Y.S.2d 537 [1995]), the Court of Appeals held that the Legislature intended that the pre-divorce standard of living be a mandatory factor for the courts' consideration in determining the amount and duration of the maintenance award, and that the Appellate Division erred in failing to consider the wife's pre-divorce standard of living. It pointed out that New York Domestic Relations Law §236, as amended in 1986, directs that when the court is considering an award of maintenance, it must "hav[e] regard for the standard of living of he parties established during the marriage." The purpose of the amendment was to "require . . . The court to consider the marital standard of living" in making maintenance awards. Generally the lower courts' failure to analyze each of the statutory maintenance factors in New York Domestic Relations Law §236(B)(6)(a) will not alone warrant appellate alteration of the award because it suffices for a court to set forth the factors it did consider and the reasons for its decision. However the pre-divorce standard of living has been placed by the Legislature in a markedly distinct category, rendering the general rule inapplicable. It held that the Appellate Division's assertion of the wife's ability to become self-supporting with respect to some standard of living in no way obviated the need for the court to consider the pre-divorce standard of living; and did not create a per se bar to lifetime maintenance. Correspondingly, a pre-divorce "high life" standard of living guarantees no per se entitlement to an award of lifetime maintenance. "The lower courts must consider the payee spouse's reasonable needs and pre-divorce standard of living in the context of the other enumerated statutory factors, and then, in their discretion, fashion a fair and equitable maintenance award accordingly. . .."

In Sperling v Sperling, (165 A.D.2d 338, 567 N.Y.S.2d 538 [2 Dept 1991]), the Appellate Division established the rules regarding the duration of maintenance awards. The Appellate Division stated the rule with regard to awards of "lifetime" versus "durational" maintenance, concluding that every case must be determined on its unique facts: "The amount and duration of maintenance is a matter committed to the discretion of the trial court. See, Petrie v Petrie (1986, 3d Dep't) 124 A.D.2d 449, 507 N.Y.S.2d 550, reh den (App Div, 3d Dep't) 511 N.Y.S.2d 558 and app dismd without op 69 N.Y. 2d 1038, 517 N.Y.S.2d 1030, 511 N.E.2d 89: "Where lifetime maintenance has been awarded, the recipient spouse has almost invariably been older than Charlotte, often in impaired health. Furthermore, the supporting spouse was in far better financial condition than Raymond. Thus, lifetime maintenance was directed in Reingold v Reingold, 143 A.D.2d 126 [wife, 52, never worked, husband earned over $100,000 per year];

Iacobucci v Iacobucci, 140 A.D.2d 412 [husband owned a successful insurance business, wife never worked] Formato v Formato, 134 A.D.2d 564 [wife, 46, had no business skills, husband earned $72,000 per year]; Jones v Jones, 133 A.D.2d 217 [wife, 50, had psychiatric problems; husband earned $58,000 a year]; Shahidi v Shahidi, 129 A.D.2d 627 [husband's expectations were promising, wife had limited potential earning capacity]; Kerlinger v Kerlinger, 121 A.D.2d 691 [wife, 50, no special skills, no high school diploma]; Delaney v Delaney, 114 A.D.2d 312 [wife, 47, husband, president of Consolidated Edison, earned $100,000 a year]; Murphy v Murphy, 110 A.D.2d 688 [wife, 47, no special skills or training] and Antis v Antis (1985, 2d Dep't) 108 A.D.2d 889, 485 N.Y.S.2d 770 [wife mentally ill and severely disfigured, husband earned $49,700]; but cf., Pottala v Pottala, 112 A.D.2d 553, where the spouse seeking support is relatively young and healthy, however, and is not required to care for young children, durational maintenance has more commonly been awarded. See, Eli v Eli, 123 A.D.2d 819; Coffey v Coffey, 119 A.D.2d 620; Armando v Armando, 114 A.D.2d 875; Hillman v Hillman, 109 A.D.2d 777; see also, Behan v Behan, 163 A.D.2d 505)." The court noted that although it had determined that the wife could be rehabilitated, it could not hope to "rehabilitate" the wife in the dictionary definition of the term, since lost opportunities of youth could not be recaptured. Rather, the more realistic function of durational maintenance is to allow the recipient spouse an opportunity to achieve independence. Thus, "the award should be in an amount and for a time period sufficient to give her a reasonable period of time [in which] to learn or update [her] work skills and to enter the employment market with a view to being self-supporting." The court pointed out that the statutory factors for the court to consider set forth in New York Domestic Relations Law §236(B)(6) revealed legislative concern pertaining to the earning capacity of the parties and to the equitable or meritorious nature of the application for maintenance. Moreover, it held that equity "requires that the parties' marital standard of living must be considered in gauging the ability of the recipient spouse to become self-supporting, and the amount of maintenance to be awarded. For example, while a recipient spouse with earning capacity of $20,000 per year may be considered self-supporting in a given case, that same income may be deemed insufficient in the case of a spouse who had enjoyed a higher marital standard of living." With these guidelines in mind, the court found that an award of $200 a week for the first four years decreasing to $100 a week for the next four years would be more realistic to enable her to rehabilitate herself. In its decision, the court recognized that the payment would require "financial sacrifice on the husband's part." It justified this by stating "that sacrifice is justified by the 20 years Charlotte devoted to being primary parent and homemaker, while struggling to meet family obligations, working at one low-paying job after another, without planning for the economic independence she now lacks and did not anticipate she would require. That two cannot live as cheaply as one in the context of divorce is exemplified by this family of modest means. The limited financial resources that caused financial strife during marriage commonly result, postdivorce, in circumstances more closely resembling actual economic suffering for both parties. In cases such as this, we can only seek to balance the level of their opportunity and deprivation."

In McSparron v McSparron, (87 N.Y.2d 275, 639 N.Y.S.2d 265, 662 N.E.2d 745 [1995]), the Court of Appeals held that a professional degree or license which has been used by the licensee to establish and maintain a career, does not "merge" with the career or ever lose its character as a separate, distributable asset. The Court of Appeals cautioned that care must be taken to ensure that the monetary value assigned to the license does not overlap with the value assigned to other marital assets that are derived from the license, and that courts must also be meticulous in guarding against duplication in the form of maintenance awards that are premised on earnings derived from professional licenses.

In general, a provision in a judgment in a matrimonial action for maintenance does not survive the death of the payor (Wilson v. Hinman, 182 N.Y. 408, 75 NE 236 [1905]); Johns v. Johns, 44 App Div 533, 60 N.Y.S. 865 (1899), affd on op below 166 N.Y. 613, 59 NE 1124), nor of the recipient (Faversham v. Faversham, 161 AD 521, 146 N.Y.S. 569 [1914]; Keller v. Coben, 5 Misc 2d 962, 162 N.Y.S.2d 546 [1957]). The support obligation does not survive the death of the husband in the absence of an agreement by the parties (Ehrler v. Ehrler, 69 Misc 2d 234, 328 N.Y.S.2d 728 [1972]), and upon the death of either spouse the obligation of support and maintenance ceases (Field v. Field, 66 How Pr 346, 5 Civ Proc 34, affd 15 Abb NC 434). However, by agreement of the parties, alimony payments may be extended beyond the death of the obligor so as to be enforceable against his or her estate (Wilson v. Hinman, 182 N.Y. 408, 75 NE 236 [1905]); Re Baratta's Estate199 Misc 246, 102 N.Y.S.2d 766 [1951], affd 279 App Div 992, 112 N.Y.S.2d 493). This can only be done by agreement of the parties and not by direction of the court.

The Court of Appeals has held that where a wife's second marriage has been declared a nullity or annulled by a decree, the obligation of the first husband to pay alimony to his former wife is not revived. (Gaines v. Jacobsen, 308 N.Y. 218, 124 N.E.2d 290, 48 ALR2d 312 [1954]).

Post Divorce Maintenance Guidelines in Actions Commenced on or after January 23, 2016

Domestic Relations Law § 236 [B][6] was amended in 2015 by establishing post-divorce maintenance guidelines and a statutory formula for determining the guideline amount of post-divorce maintenance awards, with factors for deviation upward or downward, where the award is unjust or inappropriate. Laws of 2015, Ch 269 amended Domestic Relations Law §236 [B][1][a], Domestic Relations Law §236 [B][5][d][7], Domestic Relations Law §236 [B][6], Domestic Relations Law § 248, Domestic Relations Law §236 [B][9][b][1], and Family Court Act § 412, effective January 23 , 2016. Laws of 2015, Ch 269 amended Domestic Relations Law § 236 [B] [5-a], effective October 25, 2015. See Laws of 2015, Ch 269, Section 8, which reads as follows:

The application of the post-divorce maintenance guidelines is mandatory. In any matrimonial action the court must make its award for post-divorce maintenance pursuant to the provisions of Domestic Relations Law § 236[B] [6], except where the parties have entered into an agreement pursuant to Domestic Relations Law § 236 [B] [3] providing for maintenance. Domestic Relations Law § 236[B] [6] [a].

There are two formulas to be used in calculating maintenance: one where child support will be paid and where the post-divorce maintenance payor is also the non-custodial parent for child support purposes; and one where child support will not be paid, or where it will be paid but the post-divorce maintenance payor is the custodial parent for child support purposes. Laws of 2015, Ch 269 amended Domestic Relations Law §236 [B] [1] [a], and Domestic Relations Law §236 [B] [6], effective January 23, 2016.

Those formulas are as follows:

a. With child support where the post-divorce maintenance payor is also the non-custodial parent for child support purposes: (i) subtract 25% of the maintenance payee's income from 20% of the maintenance payor's income; (ii) multiply the sum of the maintenance payor's income and the maintenance payee's income by 40% and subtract the maintenance payee's income from the result; (iii) the lower of the two amounts will be the guideline amount of maintenance; Domestic Relations Law § 236[B] [6] [c].

b. Without child support, or with child support but where the post-divorce maintenance payor is the custodial parent for child support purposes: (i) subtract 20% of the maintenance payee's income from 30% of the maintenance payor's income; (ii) multiply the sum of the maintenance payor's income and the maintenance payee's income by 40% and subtract the maintenance payee's income from the result; (iii) the lower of the two amounts will be the guideline amount of maintenance. Domestic Relations Law § 236[B] [6] [d].

An income cap of $175,000 cap applies to post-divorce maintenance awards. Domestic Relations Law § 236[B] [6] [b] [4]. The definition of income for post-divorce maintenance was modified to include income from income-producing property that is being equitably distributed. Domestic Relations Law § 236[B] [6] [b] [4]

Factors the court may consider in post-divorce maintenance awards now include termination of child support, Domestic Relations Law § 236[B][6][e][1][d]. and income or imputed income on assets being equitably distributed. Domestic Relations Law § 236[B][6][e][1][m].

There is an “advisory” durational formula for determining the duration of post-divorce maintenance awards. Domestic Relations Law § 236[B][6][f][1]. However,

nothing prevents the court from awarding non-durational, post-divorce maintenance in an appropriate case. Domestic Relations Law § 236[B][6][f][2]. In determining the duration of maintenance, the court is required to consider anticipated retirement assets, benefits and retirement eligibility age, if ascertainable at the time of the decision. Domestic Relations Law § 236[B][6][f][4].

The court may adjust the guideline amount of maintenance up to the income cap, upward or downward, where it finds that the guideline amount of maintenance is unjust or inappropriate after consideration of one or more factors, which must be set forth in the court's written or on the record decision. Where there is income over the cap, additional maintenance may be awarded after consideration of one or more factors, which must be set forth in the court's decision or on the record. Domestic Relations Law § 236[B][6][e].

The amendment requires one variation from the calculation of income under the Child Support Standards Act for purposes of calculating maintenance, namely that alimony or maintenance actually paid or to be paid to a spouse that is a party to the action should not be deducted from income. [74] This variation from the calculation of income under the Child Support Standards Act was necessary because otherwise the formula becomes circular by requiring deduction of the very amount that is being calculated. Domestic Relations Law § 236[B][6][b][3]. See New York Assembly Memorandum in Support of the legislation (Bill No. A07645)

Domestic Relations Law §236 [B] [1] [a] was amended to change the word “recipient” to “payee” in the definition of maintenance. It reads as follows: “The term "maintenance" shall mean payments provided for in a valid agreement between the parties or awarded by the court in accordance with the provisions of subdivisions five-a and six of this part, to be paid at fixed intervals for a definite or indefinite period of time, but an award of maintenance shall terminate upon the death of either party or upon the payee’s valid or invalid marriage, or upon modification pursuant to paragraph B of subdivision nine of this part or section two hundred forty-eight of this chapter.” Domestic Relations Law §236 [B][1][a] as amended by Laws of 2015, Ch 269, § 1, effective January 23 , 2016, to substitute the word “payee” for recipient.

REMARRIAGE OF THE WIFE

SETTLEMENT CONSIDERATIONS:

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Today, former spouses attempt to avoid the termination of support by living with someone without the benefit of marriage. To prevent this from happening the agreement can re-define the term “remarriage” to cover such a situation.

DRAFTERS NOTES:

The agreement can define "remarriage" as meaning the habitual living or residing of the Wife with a non-relative male or female for a specified period of time.

CASE LAW YOU SHOULD KNOW:

Where a final judgment of divorce or a final judgment of annulment or declaration of nullity has been rendered, which contains an alimony or maintenance award, the court, upon application of the obligor on notice, and upon proof of the marriage of the recipient after the final judgment, must annul the alimony or maintenance award (Domestic Relations Law § 248). Where a wife's second marriage has been declared a nullity or annulled by a judgment, the obligation of the first husband to pay alimony to his former wife is not revived (Gaines v. Jacobsen, 308 N.Y. 218, 124 N.E.2d 290, 48 ALR2d 312 [1954]).

The Court also has discretion to terminate a prior maintenance or alimony order "upon proof that the wife or former wife is habitually living with another man and holds herself out to be his wife, although not married to such man (Domestic Relations Law § 248)." In general, the alimony or maintenance provisions of an agreement which are incorporated into a dissolution judgment and not merged into it remain in effect even though relief is obtained pursuant to New York Domestic Relations Law, Section 248 (Leffler v. Leffler, 50 A.D.2d 93, 376 N.Y.S.2d 176 [1 Dept 1975]), affd. 40 N.Y. 2d 1036, 391 N.Y.S.2d 855).

Domestic Relations Law 248 provides that where a final judgment of divorce or a final judgment of annulment or declaration of nullity has been rendered, which contains an alimony award, the court, upon application of the obligor on notice, and upon proof of the marriage of the recipient after such final judgment, must annul such alimony award. This statute is applicable in a gender neutral fashion.

Domestic Relations Law, Section 248 grants the Court discretion to terminate a prior maintenance or alimony order "upon proof that the wife or former wife is habitually living with another man and holds herself out to be his wife, although not married to such man." In general, the alimony or maintenance provisions of an agreement which are not merged in a prior divorce judgment remain in effect even though relief is obtained pursuant to Domestic Relations Law, Section 248. (Leffler v. Leffler, 50 A.D.2d 93, 376 N.Y.S.2d 176 (1 Dep’t 1975), affd. 40 N.Y. 2d 1036, 391 N.Y.S.2d 855)

In Graev v Graev, (11 N.Y. 3d 262, 898 N.E.2d 909 [2008]), the Court of Appeals

rejected an interpretation of the term "Cohabitation" in the parties separation agreement as having a meaning which contemplates "changed economic circumstances," or, is necessarily determined by whether a "couple shares household expenses or functions as a single economic unit." It held that no plain meaning could be ascribed to the term in the parties agreement, which provided for the termination of maintenance upon the occurrence of any of four "termination events"; namely, the wife's remarriage or death, the husband's death, or "[t]he cohabitation of the Wife with an unrelated adult for a period of sixty (60) substantially consecutive days." The agreement did not define "cohabitation. The Court referred the matter back to the trial court to determine the meaning of the term after a hearing. Rather than articulating a "clear rule of law," which was hardly fair to those who may have used the word "cohabitation" in an extant separation agreement, intending the meaning ascribed to it by those Appellate Division cases requiring financial interdependence, it stated, in a footnote that the wisest rule is for parties in the future to make their intention clear by more careful drafting.

FUTURE HEALTH CARE COVERAGE

SETTLEMENT CONSIDERATIONS:

The provisions of Domestic Relations Law § 255 are mandatory.

Domestic Relations Law § 255 (1) provides that a court, prior to signing a judgment of divorce or separation, or a judgment annulling a marriage or declaring the nullity of a void marriage, shall ensure that both parties have been notified, at such time and by such means as the court shall determine, that once the judgment is signed, a party thereto may or may not be eligible to be covered under the other party's health insurance plan, depending on the terms of the plan. Provided, however, service upon the defendant, simultaneous with the service of the summons, of a notice indicating that once the judgment is signed, a party thereto may or may not be eligible to be covered under the other party's health insurance plan, depending on the terms of the plan, shall be deemed sufficient notice to a defaulting defendant.

Domestic Relations Law § 255, subdivision 2 provides that if the parties have entered into a stipulation of settlement or agreement resolving all of the issues between the parties, the stipulation of settlement or agreement must contain a provision relating to the health care coverage of each party. The provision must either: (a) provide for the future coverage of each party, or (b) state that each party is aware that he or she will no longer be covered by the other party's health insurance plan and that each party shall be responsible for his or her own health insurance coverage, and may be entitled to purchase health insurance on his or her own through a COBRA option, if available.

DRAFTING CONSIDERATIONS:

The parties should each represent to one another, in accordance with the provisions of New York Domestic Relations Law § 255, subdivision 2, whether either party: (1) has or does not have a health insurance plan, and has or has not been covered under the other spouse's health insurance plan. They should also represent and whether the agreement does or does not provide for the future health care coverage of each spouse and if so, the place in the agreement where it provides such coverage. The agreement should also provide that unless the agreement provides for the future health care coverage of either or both parties, each party is aware that he or she will no longer be covered by the other party's health insurance plan and that each party shall be responsible for his or her own health insurance coverage, and may be entitled to purchase health insurance on his or her own through a COBRA option, if available.

CASE LAW YOU SHOULD KNOW:

This statute is new. It was enacted in 2009 and there is no case law construing its provisions (See Laws of 2009, Ch 143).

CHILD SUPPORT AND MAINTENANCE

SETTLEMENT CONSIDERATIONS:

Child Support is defined as a sum paid by either or both parents; pursuant to Court order or decree of valid agreement; for the care, maintenance or education of any unemancipated child of the parties under the age of 21. It is available in any matrimonial action or in an independent action for child support (Domestic Relations Law § 240 (1-a).

Factors Which Must be Considered in Making Child Support Award:

The misconduct of either party may not be considered; the Child Support Standards Act (CSSA) mandates that the Court award as child support the numerical sum of the "Basic Child Support Obligation" that is computed from the application of the formula, unless the Court has determined that a variation of the support amount resulting from the application of the formula is appropriate. If the Court does not award the formula support amount, it is required to consider ten factors and set forth the factors it considered and the reasons for its variance from the formula level of support. This

formal explanation may not be waived by either party or counsel.

The ten factors the court must consider in determining that the non-custodial parents' pro-rata share of the basic child support obligation is unjust or inappropriate, are the following factors: (1) The financial resources of the custodial and non-custodial parent, and those of the child; (2) The physical and emotional health of the child and his/her special needs and aptitudes; (3) The standard of living the child would have enjoyed had the marriage or household not been dissolved; (4) The tax consequences to the parties; (5) The non-monetary contributions that the parents will make toward the care and well-being of the child; (6) The educational 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 the children of the non-custodial parent for whom the non- custodial parent is providing support who are not subject to the instant action and whose support has not been deducted from income pursuant to the CSSA, and the financial resources of any person obligated to support such children, provided, however, that this factor may apply only if the resources available to support such children are less than the resources available to support the children who are subject to the instant action; (9) Provided that the child is not on public assistance (I) extraordinary expenses incurred by the non-custodial parent in exercising visitation, or (ii) expenses incurred by the non-custodial parent in extended visitation provided that the custodial parent's expenses are substantially reduced as a result thereof; and (10) Any other factors the court determines are relevant in each case (Domestic Relations Law § 240(1-a)).

Application of the formula.

In applying the formula to determine the amount of child support, the Court is required to first determine the "Combined Parental Income" of both parents. This is the sum of their incomes. It must then calculate the "Basic Child Support Obligation" by multiplying the "Combined Parental Income" by the "Child Support Percentage." The "Child Support Percentage" is 17 percent for one child, 25 percent for two children, 29 percent for three children, 31 percent for four children and no less than 35 percent for five or more children. The Court is then required to apply this formula to the first $136,000.00 of the "Combined Parental Income" by multiplying the "Combined Parental Income" up to $ 136,000.00 by the appropriate child support percentage. Such amount must then be prorated in the same proportion as each parent's income is to the "Combined Parental Income." Where the combined parental income exceeds $136,000.00, the Court must then determine the amount of child support for the amount of combined parental income in excess of $136,000.00 through consideration of ten discretionary factors and/or the child support percentage. The Court is not required to award child support based upon the amount of combined parental income in excess of $136,000.00 but may do so in the proper exercise of its discretion

The application of the formula was explained by the Court of Appeals as follows: "[S]tep one of the three step method is the court's calculation of the "combined parental income" ... Second, the court multiplies that figure, up to $80,000,[75] by a specified percentage based upon the number of children in the household 17% for one child and then allocates that amount between the parents according to their share of the total income ..."Third, where the combined parental income exceeds $80,000 ... the statute provides that "the court shall determine the amount of child support for the amount of the combined parental income in excess of such dollar amount through consideration of the factors set forth in paragraph (f) of this subdivision and/or the child support percentage" ... After completing this three step statutory formula, under the CSSA the trial court must then order the non custodial parent to pay a pro rata share of the basic child support obligation, unless it finds that amount to be "unjust or inappropriate" based on a consideration of the "paragraph (f)" factors (Domestic Relations Law § 240[1 b][f]). ...Where the court finds the amount derived from the three step statutory formula to be "unjust or inappropriate," it must order payment of an amount that is just and appropriate (Domestic Relations Law § 240[1 b][g]). If the court rejects the amount derived from the statutory formula, it must set forth in a written order "the amount of each party's pro rata share of the basic child support obligation" and the reasons the court did not order payment of that amount (Domestic Relations Law § 240[1 b][g])" (Cassano v Cassano, 85 N.Y. 2d 649, 652,628 N.Y.S.2d 10 [1995]; Laws of 2009, Ch. 343 increased this amount to $136,000 as of January 31, 2012).

Income Defined.

"Income" is defined as gross (total) income as should have been or should be reported in the most recent federal income tax return. If an individual files his/her federal income tax return as a married person filing jointly, such person shall be required to prepare a form, sworn to under penalty of law, disclosing his/her gross income individually.

"Imputed income."

At the discretion of the court, the court may attribute or impute income from, such other resources as may be available to the parent, including, but not limited to: non-income producing assets, 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, fringe benefits provided as part of compensation for employment, and money, goods, or services provided by relatives and friends; an amount imputed as income based upon the parent's former resources or income, if the court determines that a parent has reduced resources or income in order

[75] This amount was originally $80,000. Laws of 2009, Ch. 343 increased this amount to $136,000 as of January 31, 2012 and it is adjusted every two years thereafter.

to reduce or avoid the parent's obligation for child support;

Additions to Income.

To the extent not already included in gross income, the following self-employment deductions attributable to self-employment carried on by the taxpayer:

any depreciation deduction greater than depreciation calculated on a straight-line basis for the purpose of determining business income or investment credits, and entertainment and travel allowances deducted from business income to the extent said allowances reduce personal expenditures;

Deductions from Income.

unreimbursed employee business expenses except to the extent said expenses reduce personal expenditures, alimony or maintenance actually paid to a spouse not a party to the instant action pursuant to court order or validly executed written agreement, alimony or maintenance actually paid or to be paid to a spouse that is a party to the instant action pursuant to an existing court order or contained in the order to be entered by the court, or pursuant to a validly executed written agreement, provided the order or agreement provides for a specific adjustment, in accordance with this subdivision, in the amount of child support payable upon the termination of alimony or maintenance to such spouse, child support actually paid pursuant to court order or written agreement on behalf of any child for whom the parent has a legal duty of support and who is not subject to the instant action, public assistance, supplemental security income, New York city or Yonkers income or earnings taxes actually paid, and federal insurance contributions act (FICA) taxes actually paid. (Domestic Relations Law § 240(1-a)).

The child support provision should state that the father or mother, as the case may be, will pay during his or her lifetime weekly child support in a specified amount. Likewise, it must state when child support terminates.

CSSA Requirements.

New York law requires that the parties must be advised of the provisions of the New York Child Support Standards Act ("CSSA") as contained in New York Domestic Relations Law § 240(1-b) and New York Family Court Act § 413(1)(b). They must also have been advised that a child support agreement which departs from the child support guidelines must provide that the parties have been made aware of the Child Support Standards Act (CSSA) and that the parties are aware that the application of the CSSA guidelines would result in the calculation of the presumptively correct amount of child support. The agreement must also include the dollar amount of the presumptively correct support that would have been calculated pursuant to the CSSA, and must state the parties' reasons for the parties' departure from the guidelines. Even an agreement

which does not opt-out of the CSSA guidelines is required to provide that the parties have been made aware of the CSSA and that they were aware that the application of the CSSA guidelines would result in the calculation of the presumptively correct amount of child support. The parties may expressly waive the provisions of the CSSA to the extent permitted by law.

The parties must have also been advised that the "basic child support obligation" provided in New York Domestic Relations Law § 240(1-b) and New York Family Court Act § 413(1)(b) would presumptively result in the correct amount of child support to be awarded. In the event that the settlement agreement or stipulation deviates from the "basic child support obligation," the foregoing statutes require this Agreement or Stipulation to specify the amount that such "basic child support obligation" would have been and the reason or reasons that such Agreement or Stipulation does not provide for payment of that amount, in order to assure that the parties are aware of their rights and obligations under the Child Support Standards Act and knowingly waive such rights. Such provision may not be waived by either party or counsel.

The Child Support Standards Act provides that nothing contained in § 240(1-b)(b)(h) and New York Family Court Act § 413(1)(h) shall be construed to alter the rights of the parties to 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 New York Domestic Relations Law § 240(1-b)(h) and New York Family Court Act § 413(1)(b)(h).

New York Domestic Relations Law § 240(1-b) and New York Family Court Act §413(1)(b) provide the court shall calculate the "basic child support obligation," and the non-custodial parent's pro rata share of the basic child support obligation. Unless the court finds that the non-custodial parent's pro rata share of the basic child support obligation is unjust or inappropriate, after considering ten enumerated factors, it must order the non-custodial parent to pay his or her pro rata share of the "basic child support obligation. In arriving at the "basic child support obligation" the Court must calculate the "combined parental income" and multiply it by the appropriate "child support percentage." The "child support percentage" is defined as: 17% of the combined parental income for one child; 25% of the combined parental income for two children; 29% of the combined parental income for three children; 31% of the combined parental income for four children; and no less than 35% of the combined parental income for five or more children. Where there are five or more children, the court must exercise its discretion as to the amount of the child support percentage.

Where the combined parental income exceeds $ 136,000.00 [76] per year, after the

[76] The commissioner of social services is required to publish a child support standards chart each year which must include: (i) the revised poverty income guideline for a single person as reported by the federal department of health and human services; (ii) the revised self-support reserved as defined in Domestic

court determines the non-custodial parent's share of the basic child support obligation, it must next determine the amount of child support for the amount of combined parental income in excess of $ 136,000.00. It may do so, in the exercise of its discretion, through consideration of ten discretionary factors and/or the child support percentage.

There are two additional items of support which are part of and which the court must consider in determining the "basic child support obligation" and two items it may consider in determining the non-custodial parent's share of the "basic child support obligation." When a custodial parent is working or receiving education leading to employment, reasonable child care expenses must be apportioned pro rata, in the same proportion as each parent's income is to the combined parental income. Health care expenses must also be apportioned pro rata in the same proportion as each parent's income is to the combined parental income. If the custodial parent is seeking work, child care expenses as a result thereof may be apportioned. Educational expenses may also be awarded. They need not be apportioned. These expenses are discretionary and not based on a percentage of $ 136,000.00. Child care expenses for seeking work and educational expenses need not be awarded in proportion to the combined parental income.

If a party is unrepresented party he/she is required to receive a copy of the Child Support Standards Chart promulgated by Commissioner of Social Services pursuant to New York Social Services Law Section 111-I. The parties may, in their agreement, waive the right to collect the child support payments by an income deduction order, and waive the right to enforce the provisions of the agreement through Child Support Enforcement Services.

Relations Law §240; (iii) the dollar amounts yielded through application of the child support percentage as defined in Domestic Relations Law §240 and Family Court Act §413 ; and (iv) the combined parental income amount. See Social Services Law §111-i 2 (a). The chart must be published on an annual basis by April first of each year and in no event later than forty-five days following publication of the annual poverty income guideline for a single person as reported by the federal department of health and human services. See Social Services Law §111-i 2 (c). The 2012 poverty income guideline amount for a single person as reported by the United States Department of Health and Human Services is $11,170 and the self-support reserve is $15,080. The Child Support Standards Chart may be downloaded from https://newyorkchildsupport.com/dcse/pdfs/cssa_2012.pdf

As of January 31, 2012 the combined parental income amount was $136,000. The adjusted combined parental income amount will be announced and available at January 31st (until such time as the revised Child Support Standards Chart is released for applicable years) at http:// www.childsupport.ny.gov.

Domestic Relations Law § 240(1-b)(b)(6) provides that the term “Self-support reserve” means 135 % of the poverty income guidelines amount for a single person as reported by the federal department of health and human services. On March first of each year, the self-support reserve is revised to reflect the annual updating of the poverty income guidelines as reported by the federal department of health and human services for a single person household.

Domestic Relations Law § 240(1-b) (d) provides that notwithstanding the provisions Domestic Relations Law § 240 (1-b) (c), where the annual amount of the basic child support obligation would reduce the non-custodial parent's income below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be twenty-five dollars per month. However, if the court finds that the basic child support obligation is unjust or inappropriate, based upon considerations of the factors set forth in Domestic Relations Law § 240 (1-b) (f) of this subdivision, the court must order the non-custodial parent to pay such amount of the child support as the court finds just and appropriate.

Domestic Relations Law § 240(1-b) (d) provides that notwithstanding the provisions of Domestic Relations Law § 240 (1-b) (c), where the annual amount of the basic child support obligation would reduce the non-custodial parent's income below the self-support reserve but not below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be fifty dollars per month or the difference between the non-custodial parent's income and the self-support reserve, whichever is greater, in addition to any amounts that the court may, in its discretion, order in accordance with Domestic Relations Law § 240 (1-b) (c), subparagraphs four, five, six and/or seven.

Domestic Relations Law § 240(1-b) (g) provides that where the court finds that the non-custodial parent's pro rata share of the basic child support obligation is unjust or inappropriate, the court shall order the non-custodial parent to pay such amount of child support as the court finds just and appropriate, and the court shall set forth, in a written order, the factors it considered; the amount of each party's pro rata share of the basic child support obligation; and the reasons that the court did not order the basic child support obligation. The written order may not be waived by either party or counsel. The Court may not find that the non-custodial parent's pro rata share of such obligation is unjust or inappropriate on the basis that the share exceeds the portion of a public assistance grant which is attributable to a child or children. Where the non-custodial parent's income is less than or equal to the poverty income guidelines amount for a single person as reported by the federal department of health and human services, unpaid child support arrears in excess of five hundred dollars may not accrue.

Minimum payment- Income Below Poverty Income Guidelines Amount

Where the annual amount of the basic child support obligation would reduce the non-custodial parent's income below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation must be twenty-five dollars per month.[77] However, if the court finds that the basic child support obligation is unjust or inappropriate, the court shall order the non-custodial parent to pay such amount of the child support as the court finds just and appropriate. The finding that the basic child support obligation is unjust or inappropriate must be based upon consideration of the factors set forth in Domestic Relations Law §240(1-b)(f) and Family Court Act §413(1)(f). [78] Those factors are: (1) The financial resources of the custodial and non-custodial parent, and those of the child; (2) The physical and emotional health of the child and his/her special needs and aptitudes; (3) The standard of living the child would have enjoyed had the marriage or household not been dissolved; (4) The tax consequences to the parties; (5) The non-monetary contributions that the parents will make toward the care and well-being of the child; (6) The educational 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 the children of the non-custodial parent for whom the non-custodial parent is providing support who are not subject to the instant action and whose support has not been deducted from income pursuant to subclause (D) of clause (vii) of subparagraph five of paragraph (b) of this subdivision, and the financial resources of any person obligated to support such children, provided, however, that this factor may apply only if the resources available to support such children are less than the resources available to support the children who are subject to the instant action; (9) Provided that the child is not on public assistance (i) extraordinary expenses incurred by the non-custodial parent in exercising visitation, or (ii) expenses incurred by the non-custodial parent in extended visitation provided that the custodial parent's expenses are substantially reduced as a result thereof; and (10) Any other factors the court determines are relevant in each case, the court shall order the non-custodial parent to pay his or her pro rata share of the basic child support obligation, and may order the non-custodial parent to pay an amount pursuant to paragraph (e) of this subdivision. In such case Family Court and Supreme Court are authorized to order payment of an amount it deems to be just and

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[77] Family Court Act §413(1)(b) (6); Domestic Relations Law §240(1-b)(6). Both sections provide that the court retains "discretion with respect to child support pursuant to this section."

[78] Domestic Relations Law § 240 (1-b)(d); Family Court Act, § 413 (1)(d), as amended by Laws of 2011, Ch 436. (Effective November 15, 2011, Laws of 2011, Ch 436, § 3.)

appropriate.[79]

Minimum payment- Income Below Self Support Reserve But Not Below The Poverty Income Guidelines Amount

Where the annual amount of the basic child support obligation would reduce the non-custodial parent's income below the self-support reserve but not below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation must be fifty dollars per month or the difference between the non-custodial parent's income and the self-support reserve, whichever is greater. [80] This amount is in addition to any amounts that the court may, in its discretion, order in accordance with subparagraphs four, five, six and/or seven of paragraph (c) of Domestic Relations Law § 240 (1-b)(d) and Family Court Act § 413 (1)(d).

CASE LAW YOU SHOULD KNOW:

Domestic Relations Law § 236[B][3], subdivision 4 states that provisions for care and maintenance of children are subject to the provisions of Domestic Relations Law § 240. The parties may not contract to the detriment of their children, although they may allocate, as between themselves, custody rights and child support, so long as their terms are not detrimental to the children's welfare. The Court of Appeals in Boden v. Boden, (42 N.Y.2d 210, 397 N.Y.S.2d 701, 366 N.E.2d 791 [1977]) and Brescia v. Fitts, (56 N.Y.2d 132, 451 N.Y.S.2d 68, 436 N.E.2d 518 [1982]), on remand [2 Dept] 89 A.D.2d 894, 453 N.Y.S.2d 458), confirmed this public policy.

The Child Support Standards Act, (Family Court Act § 413(1)(b); Domestic Relations Law § 240(1-b), which was enacted in 1989, requires the Supreme Court and Family court to award child support in accordance with its provisions unless the parties "opt out" of its provisions by executing a written agreement doing so. The statute states that it does not alter the rights of the parties to "voluntarily enter into validly executed

[79] Domestic Relations Law § 240 (1-b)(d); Family Court Act, § 413 (1)(d), as amended by Laws of 2011, Ch 436. (Effective November 15, 2011, Laws of 2011, Ch 436, § 3.)

[80] Domestic Relations Law § 240 (1-b)(d) and Family Court Act, § 413 (1)(d) (Laws of 2011, Ch 436.) (Effective November 15, 2011, Laws of 2011, Ch 436, § 3.)

agreements or stipulations." It specifically provides that the parties may agree that the child support standards"established by this subdivision" are not applicable to validly executed agreements or stipulations voluntarily entered into between the parties, "when executed." The court does, however, continue to retain discretion with respect to child support awards.(Family Court Act § 413(1)(h); Domestic Relations Law § 240(1-b)(h).

Such an agreement must be in writing, duly signed and acknowledged in the form to entitle a deed to be recorded. The section must be read in conjunction with Section 236[B][3] of the Domestic Relations Law, which requires that "an agreement by the parties..." with respect to custody and child support must be in such form in order to be "valid and enforceable" in a matrimonial action. (Domestic Relations Law § 236[B][3] and [4])

The 1992 amendments (See L 1992, Ch. 41, sec 145 and 148) to Domestic Relations Law § 240(1-b)(h) and Family Court Act § 413(1)(b)(h) require that an agreement which opts out of the CSSA contain a provision that the parties have also been advised of the provisions of Domestic Relations Law § 240(1-b)(h) and Family Court Act § 413(1)(b)(h) and that the "basic child support obligation" provided in Domestic Relations Law § 240 (1-b) and Family Court Act § 413(1)(b) "would presumptively result in the correct amount of child support to be awarded." It 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 or 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 reason 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.

In the event that the 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 reason or reasons that such Agreement or Stipulation does not provide for payment of that amount. This provision may not be waived by either party or counsel.

Thus, an opting-out agreement must provide (1) that the parties have been made aware of the Child Support Standards Act , (2) that they were aware that application of the CSSA guidelines would result in the calculation of the presumptively correct amount of support, (3) the amount of the presumptively correct support that would have been calculated pursuant to the CSSA, and (4) the parties' reasons for their departure from the guidelines.

The Child Support Standards Act requires that any Court order or judgment incorporating a validly executed agreement or stipulation which deviates from the "basic child support obligation" must set forth the Court's reasons for such deviation.

The failure to include all of the required clauses in an "opting-out" agreement is fatal. The absence of the provision will render it unenforceable in view of the mandatory nature of the provisions and the prohibitions against their waiver. Significantly, the law reflects an unwillingness of the system to permit parties to waive their rights without a thorough understanding of that which they stand to lose.

In Sloam v. Sloam, (185 A.D.2d 808, 586 N.Y.S.2d 65 [2 Dept 1992]), the Court held that a finding that either party was unaware of the CSSA would invalidate a child support agreement that doesn't comply with its mandate (See also Clark v. Clark, 198 A.D.2d 599, 603 N.Y.S.2d 245 [3 Dept 1993]); Gonsalves v. Gonsalves, 212 A.D.2d 932, 622 N.Y.S.2d 989 [3 Dept 1995]); Sievers v. Estelle, 211 A.D.2d 173, 626 N.Y.S.2d 592 [3 Dept 1995]).

In Cohen v. Rosen,(207 A.D.2d 155, 621 N.Y.S.2d 411 (3 Dept 1995]) , the parties 1983 separation agreement, which was incorporated in and survived their divorce, provided that the father would waive his rights to the marital home in exchange for a wavier by the mother of maintenance and child support arrearage and for reduced child support payments of $25 per child. It contained no provision for the post-secondary education of the parties two children. The Appellate Division affirmed an order which directed the father to pay 66% of his daughter's college education. The court held that the determination of post-secondary education expenses is a separate item in addition to the "basic child support obligation."

In Bill v Bill, (214 A.D.2d 84, 631 N.Y.S.2d 699 [2 Dept 1995]), the Second Department held that the child support provisions of a stipulation of settlement which does not award the custodial parent child care expenses is not an effective waiver and may not be enforced where it neither indicates that the parents were aware of the provisions of the CSSA or that they were knowingly waiving them. Shortly after the entry of the judgment of divorce the wife commenced a proceeding to require the husband to pay a share of the child care costs. The court stated that while an agreement need not expressly state that each potential supplement to the basic child support obligation has been considered, compliance with paragraph (h) demands, at a minimum, that an agreement demonstrate that the parties have been fully informed of

the provisions of the statute and the application of the guidelines in their individual circumstances. Compliance with paragraph (h) further mandates that the parties reach an agreement upon what their respective support obligations under the CSSA would be.

In Lepore v Lepore, (276 A.D.2d 677, 714 N.Y.S.2d 343 [2 Dept 2000]) the parties' stipulation of settlement did not recite: (1) that the parties had been made aware of the Child Support Standards Act (2) that they were aware that application of the CSSA guidelines would result in the calculation of the presumptively correct amount of support, (3) the amount of the presumptively correct support that would have been calculated pursuant to the CSSA, and (4) the parties' reasons for their departure from the guidelines (see, Domestic Relations Law § 240 (1-b)(h). The Second Department held that a party's awareness of the requirements of the CSSA is not the dispositive consideration under the statute. Domestic Relations Law § 240(1-b)(h) requires specific recitals which were not included in the parties' stipulation. It held that the child support provisions of the stipulation were not enforceable and must be vacated.

In Schaller v Schaller, (279 A.D.2d 525, 719 N.Y.S.2d 278 [2 Dept 2001]), the Appellate Division held that the father's child support obligation set forth in the agreement did not comply with the CSSA guidelines since his obligation should have been calculated based upon his "gross (total) income as should have been or should be reported in the most recent Federal income tax return" (Family Ct Act § 413(1-b)[5)(i)(1)(c). Therefore the parties' children were not receiving the presumptively correct amount of child support. It stated that parties are permitted to "opt out" of the provisions of the CSSA provided the decision is made knowingly. Where the agreement deviates from the basic child support obligation, the agreement must specify what the basic child support obligation would have been under the CSSA, and the reason the agreement does not provide for payment of that amount. The father failed to establish that the mother was aware of the correct amount of child support, based on his income of about $90,000, and that she knowingly agreed to a lesser amount. Moreover, the agreement did not set forth what the CSSA result would have been if it was calculated based on the father's true income in accordance with the statute.

In Jefferson v Jefferson,(21 A.D.3d 879, 800 N.Y.S.2d 612 [2 Dept 2005]) the child support provisions of the parties separation agreement deviated from the Child Support Standards Act in that the agreement failed to take into account the combined parental income in excess of $80,000. Domestic Relations Law § 240(1-b)(h) provides that a validly-executed support agreement which deviates from the basic child support obligation set forth in the CSSA must specify, inter alia, the amount that the basic child support obligation would have been under the CSSA and the reason or reasons that the agreement does not provide for payment of that amount. The agreement failed to set forth the presumptively correct amount of support that would have been fixed pursuant to the CSSA, and failed to articulate the reason the parties chose to deviate from the CSSA guidelines. Consequently, the child support provisions of the agreement were invalid and unenforceable.

In Bellinger v Bellinger, (46 A.D.3d 1200, 847 N.Y.S.2d 783 [3 Dept 2007]) Supreme Court partially granted defendant's motion prior to trial to set aside the child

support provisions of the parties stipulation because it did not indicate whether the amount of child support was presumptively correct or whether it represented a deviation from the Child Support Standards Act. The Appellate Division held that, Supreme Court correctly determined that the stipulation failed to comply with non-waivable requirements of the CSSA.

Thus, a cost of living (Cola) Child Support provision in an agreement has been interpreted as "Opting Out" of the CSSA guidelines thereby requiring the parties to indicate in their agreement their reasons for deviating. In Fasano v Fasano, (43 A.D.3d 988, 842 N.Y.S.2d 517 [2 Dept 2007]) the Appellate Division held that the child support provision which set the plaintiff's child support obligation at the sum of $3,333.33 per month was not invalid on the ground that it failed to calculate the presumptively correct amount of child support pursuant to the Child Support Standards Act. A provision stating the correct amount of the basic child support obligation under the CSSA is not required unless it is apparent that the parties have "opted out" of the basic child support obligation pursuant to the CSSA. Here, the child support obligation in the sum of $3,333.33 per month did not differ significantly from the correct amount as calculated by a strict application of the statute, and thus, such provision in the separation agreement cannot reasonably be interpreted as indicating that the parties intended to "opt out" of the basic child support obligation pursuant to the CSSA. However, the provision contained in the separation agreement, allowing for adjustments to his monthly child support obligation based on cost of living increases (the COLA provision), failed to comply with Domestic Relations Law § 240(1-b)(h). The annual increases in the child support obligation permitted under the COLA provision represented potential deviations from the basic child support obligation and, therefore, can be interpreted as providing for an "opting out" of the CSSA guidelines. Since the separation agreement failed to state the parties' reasons for deviating from the CSSA guidelines with respect to the potential COLA increases, the COLA provision violated Domestic Relations Law § 240(1-b)(h) and should have been set aside.

Prospective child support payments may be waived (See Matter of Grant v. Grant, 265 A.D.2d 19 [1st Dep't 2000]; Mitchell v. Mitchell, 170 A.D.2d 585, 585 [2 Dept 1991]; Matter of O'Connor v. Curcio, 281 A.D.2d 100 [2 Dept 2001]; Matter of Parker v. Parker, 305 A.D.2d 1077 [4 Dept 2003]).

In Williams v Chapman, (22 A.D.2d 1015, 803 N.Y.S.2d 260 [3 Dept 2005]) the Third Department held that prospective child support payments may be waived. It affirmed the Family Courts finding that the mother expressly waived prospective child support payments in the parties' agreement and denied her petition. The Third Department pointed out that a modification agreement 'is binding according to its terms and may only be withdrawn by agreement while a waiver requires no more than the voluntary and intentional abandonment of a known right and, to the extent that it remains executory, may be withdrawn without agreement. Thus, an agreement that does not satisfy the prerequisites of a legally binding modification agreement may nonetheless constitute a valid waiver.

In Daratany v Daratany, (18 A.D.3d 496, 795 N.Y.S.2d 601 [2 Dept 2005]) the

parties 1986 judgment incorporated but did not merge the terms of a 1986 oral stipulation of settlement. Both the stipulation and the judgment provided, inter alia, that the defendant pay the plaintiff maintenance and child support for the parties' three children, and provided for the immediate listing and sale of the former marital residence, for equal division of the net sale proceeds between the parties and that, pending sale thereof, the plaintiff would have sole occupancy of the former marital residence. They signed a modification agreement in 1994 which provided, in substance, that in exchange for the defendant's conveyance of his remaining interest in the former marital residence, his obligation for child support "past and future" was terminated. The defendant delivered a deed in July 1994 conveying his interest in the former marital residence to the plaintiff and her present husband. In 2003 the plaintiff asserted that she was owed child support arrears. In response, the defendant brought a motion. As to the defendant's support obligation which allegedly accrued before June 1994, the Judicial Hearing Officer determined that the conveyance pursuant to the modification agreement satisfied such obligation in toto. The Appellate Division held that here, as in Matter of O'Connor v. Curcio (281 A.D.2d 100, 103), the parties identified the consideration, to wit, the defendant's interest in the former marital residence, paid by the defendant to the plaintiff for the plaintiff's relinquishment of future child support. The 1994 modification agreement was not executory but fully performed and the parties were bound by its terms. Accordingly, the defendant's child support obligation should have been vacated as to the period after June 1994. Where each and every other statutory requirement is met, yet the basic child support obligation from which the deviation is sought is stated but miscalculated, that alone may not be enough to invalidate the agreement.

In Sullivan v Sullivan, (46 A.D.3d 1195, 853 N.Y.S.2d 176 [3 Dept 2007]), the parties settlement agreement was incorporated, but not merged, into a February 2005 judgment of divorce. When plaintiff moved to enforce the maintenance and child support provisions, defendant cross-moved to have them declared void. Supreme Court denied defendant's motion. The Appellate Division affirmed. It noted that the agreement indicated that the parties were advised of the Child Support Standards Act, the presumptive amount which would be awarded thereunder, albeit miscalculated, and the reasons why the parties sought to deviate therefrom. While agreeing that an omission of the non-waivable statutory requirements would render the agreement void, the Appellate Division held that where, as here, each and every other statutory requirement is met, yet the basic child support obligation from which the deviation is sought is stated but miscalculated, that alone may not be enough to invalidate the agreement. It was clear that the error emanated from the parties' failure to deduct the agreed upon maintenance from defendant's income prior to the calculation under the CSSA. The error resulted in defendant's agreement to pay child support of $1,500 when the presumptively correct CSSA amount would have been $1,548. With the settlement agreement providing that there will never be any upward modification of child support, only a downward modification based upon defendant's income, and that all of the enumerated tax benefits would enure to defendant, despite the fact that they would have been properly credited to plaintiff, the Appellate Court found no basis upon which it would void the otherwise valid child support provisions in the agreement. Moreover, with

Supreme Court having stated its reasons for allowing the deviation in its decision supporting the issuance of the judgment of divorce on the same date when it permitted the incorporation of the parties' agreement in the action for divorce, there was no viable challenge to the judgment.

In Matter of Savini v. Burgaleta, --- N.Y.S.2d ----, 2010 WL 114546 (N.Y.A.D. 2 Dept.) the Appellate Division held that as the child support provisions in the parties' judgment of divorce dated August 22, 1997, were vacated by an order of the Supreme Court, which affirmed, (Burgaleta v. Burgaleta, 51 AD3d 842), so much of the mother's petition as sought to enforce the child support provisions in the parties' judgment of divorce had to be dismissed. In a handwritten agreement dated April 19, 1997, the parties agreed, that starting with the January 28, 1998, payment the mother would accept $200 per week as child support. The agreement provided that the mother would not "file suit for any monies that would make up the difference between the child support percentage of 29% of [the father's] weekly income and the two hundred dollar weekly payment." The Appellate Division held that this agreement was a valid waiver by the mother of her right to file suit to recover child support above the sum of $200 per week while the waiver was in effect. Since the father complied with the agreement, no arrears accrued while it was in effect. The Appellate Division held that the mother validly withdrew from the agreement by filing her child support petition dated August 11, 2004.

EDUCATION EXPENSES

SETTLEMENT CONSIDERATIONS:

The court is required to determine if the present or future provision of post-secondary, private, special, or enriched education for the child is appropriate, and, if so, it may award "educational expenses." The noncustodial parent shall pay the educational expenses as awarded in the manner determined by the court, which may include direct payment to the educational provider. The standard for the exercise of the court's discretion is "regard for the circumstances of the case and of the respective parties, and in the best interests of the child and as justice requires" (Family Court Act § 413(1)(c)(7); Domestic Relations Law § 240(1-b)(c)(7). These payments may not be ordered after the child attains the age of 21, by limiting child support to children under that age (Family Court Act § 413(1)(b)(1); Domestic Relations Law § 240(1-b)(b)(1).)

DRAFTERS NOTES:

The parties should provide in the agreement, where they can agree, for private school, university or college, professional or graduate school for their children . Often the terms include the requirement of the payor's written advance consent to the choice of school, which consent will not be unreasonably withheld. Exactly what expenses are included and the provisions related to obtaining consent should be detailed in the Agreement.

CASE LAW YOU SHOULD KNOW:

There is no provision for the court to direct the custodial parent to pay educational expenses, or for the court to prorate such expenses. The court's discretion is guided by "regard for the circumstances of the case and of the respective parties, and in the best interests of the child and as justice requires."

It is an abuse of discretion to make such award in futuro, before the child's aptitude for such education can be evaluated by the court to determine if it is appropriate.

In Hamza v. Hamza, (247 A.D.2d 444, 668 N.Y.S.2d 677 [2 Dept 1998], the Appellate Division held that it was premature for the court to apportion the parties' obligation to contribute to the future college expenses of their children, in view of the fact that the children's entry into college was several years away, and no evidence was presented as to the children's academic abilities and interest, or possible choice of college, or what their expenses would be.

In Gilkes v. Gilkes, (150 A.D.2d 200, 540 N.Y.S.2d 808 (1 Dept 1989]) the Appellate Division deleted the provision in the judgment imposing on the husband sole responsibility for all tuition and costs for a 4 year program in a college or university for each child, with leave to renew. It held that there was no evidence as to the academic abilities of the parties' 13 and 11 year old daughters, their interests their likely choices and preferences as to college education the likely cost of a college education for them and the like. Without such evidence a directive that the husband pay for college was premature. The wife should have the opportunity to seek payments for college on a later motion for upward modification when details are available. It also held that the trial court properly considered all pertinent factors and made appropriate provisions for private religious grade school and high school, since religion had been an integral part of the family lifestyle.

In Walls v. Walls, (221 A.D.2d 925, 633 N.Y.S.2d 905 [4 Dept 1995]), the Appellate Division held that there was no merit to the wife's argument that the court should have apportioned the husband's obligation to contribute to the college expenses of the parties' younger son. Such an order would have been premature in light of the fact that the youngest son had not yet decided upon a college and no evidence was presented concerning his academic interest ability or his future expenses.

In LaBombardi v. LaBombardi, (220 A.D.2d 642, 632 N.Y.S.2d 829 [2 Dept

1995]), the husband appealed from a judgment which directed him to pay for all college education expenses for the child. The Appellate Division deleted the husband's obligation to pay for college tuition and college expenses. The parties' daughter was only 10 years old. The provision of the judgment directing the husband to pay the child's college tuition and expenses was premature.

In Tan v. Tan, (260 A.D.2d 543, 688 N.Y.S.2d 597 [2 Dept 1999]), the Appellate Division held that the trial court erred in directing the husband to pay 70% of the child's future college expenses. At the time of trial, the child was 11 years old and was not attending college. There was no evidence as to his academic interest, ability, possible choice of college or what his expenses might be. Consequently, the award for future college expenses was premature.

The contractual obligations of a separation agreement cannot bind the court from fulfilling its duty to see that parents meet their support obligations and it is not bound by the provisions of such an agreement but may make an order as it deems adequate for the support of the child (Maki v Straub, 167 A.D.2d 589, 563 N.Y.S.2d 218 [3 Dept 1990).) Thus, where the agreement provides that the father should not be responsible for the tuition expenses for college, the court may disregard the limitation and make an award in an appropriate case (Haimowitz v Gerber, 153 A.D.2d 879, 545 N.Y.S. 2d 599 [2 Dept 1989]) . While the Supreme Court cannot modify the child support obligations of a separation agreement as a contract, it may modify the support obligations of its own order or judgment, (Schelter v Schelter, 159 A.D.2d 995, 552 N.Y.S. 2d 477 [4 Dept 1990]), or make its own order where there is no order or judgment to modify (Arnold v Fernandez, 184 A.D.2d 805, 584 N.Y.S. 2d 231 [3 Dept 1992]).

In Manno v Manno (196 A.D.2d 488, 600 N.Y.S.2d 968 [2 Dept 1993]), the Appellate Division held that with the enactment of subdivision (7) "the court may properly direct a parent to contribute to a child's private college education, even in the absence of special circumstances or a voluntary agreement of the parties, so long as the court's discretion is not improvidently exercised in that regard. In determining whether to award educational expenses, the court must consider the circumstances of the case, the circumstances of the respective parties, the best interests of the children, and the requirements of justice." In reversing the award, the Appellate Division considered that the husband's take home pay was $2,745 per month. By directing the husband to pay $1,776.25 per month, the trial court allocated more than half of his take home pay in basic child support. The Appellate Court noted that in making an award, the trial court must take into account the need of a parent to maintain a separate household and have money to live on after support payments are made and any tax consequences for liquidating assets. Since it was clear that after payment of the basic child support awarded by the trial court the former husband would not be financially able to pay educational expenses in the amount awarded, the matter was remitted to the Supreme Court for a recomputation of the husband's basic child support obligation and a new determination as to whether an additional award for educational expenses was appropriate.

In Cohen v Cohen (NYLJ, 4-22-94, P. 25 Col. 5 ,___A.D. 2d___ [2d Dept, 1994])

the Appellate Division affirmed an order of the Supreme Court which, among other things, directed the former husband to pay his daughter's college expenses in the sum of $15,000. The parties' separation agreement, which was incorporated in and survived the judgment of divorce, was silent on the issue of the children's college expenses. The former husband claimed that in the absence of a voluntary agreement between the parties as to college costs, and, further, because the wife failed to meet her burden of showing "special circumstances," he was not required to pay any of his daughter's expenditures at Tufts University. The Second Department held that where a stipulation or agreement does not provide for either party to pay for the children's college expenses the court has the authority to increase a parent's child support obligation to include college expenses upon a showing of "special circumstances" assuming the burden of Brescia or Boden is overcome. It stated that a "parent's statutory duty to provide for his child's reasonable needs, including educational expenses where the circumstances warrant it, cannot be evaded by means of a provision in the parents' separation agreement which states that the father should not be responsible for tuition, books, fees, room and board and any expenses that may be required to send any of the children to any institution of higher education or post-high school education." While the terms of a separation agreement may bind the parents, a child is not so bound and a modification proceeding can properly be commenced despite the existence of the provision for support in the separation agreement. However, unless the petitioner's request is predicated on the child's right to receive adequate support, it is necessary to demonstrate an unanticipated and unreasonable change in circumstances to justify an increase.

In Cassano v Cassano, (203 A.D.2d 563, 612 N.Y.S.2d 160 [2 Dept 1994]), order aff'd, 85 N.Y.2d 649, 628 N.Y.S.2d 10, 651 N.E.2d 878 [1995]), the Appellate Division, Second Department granted the father's objection to that portion of the order which directed him to pay 64.4% of his son's private school tuition and as such modified it. The Court noted that the relevant provision of the Child Support Standard Act with respect to educational expenses is New York Domestic Relations Law § 240(1-b)(c)(7) and that prior to the enactment of the statute, the rule had been that absent voluntary agreement a parent was not obligated to pay for the costs of the child's private schooling unless special circumstances are found. It reiterated the rule that the relevant factors in making such a determination were: (1) the educational background of the parents, (2) the child's academic ability, and (3) the parties' financial ability to provide the necessary fund. The court then went on to state that while it is true that under Manno v Manno it was held that the court may properly direct a parent to contribute to a child's private college education, even in the absence of special circumstances, "neither the statute nor the Manno decision confers an unfettered discretion to a court." The Appellate Division referred to its language in Manno that in determining whether to award educational expenses "the court must consider the circumstances of the case, the circumstances of the respective parties, the best interests of the children, and the requirements of justice." The Second Department held that the factors which comprised the "special circumstances" test were in effect, subsumed by the factors set forth in Manno. The factors which the court must consider have changed, and now the court is required to

consider the factors set forth in Manno in making a determination. In short, there must be a reason for requiring a payment of educational expenses consistent with the statute and the Manno decision. Although the special circumstances test has been replaced there must nevertheless be a balancing of several factors including but not limited to those which were essential to the traditional "special circumstances" test. One of the factors which must be considered of this nature is whether and to what extent, there exists a real difference in quality between the education furnished by the public schools, on the one hand, and that which is available at the private school which the child in question attends or plans to attend, on the other . . The Appellate Division found that the record did not indicate the existence of any circumstances which would justify the court's ruling. There was nothing to indicate that the circumstances of the respective parties would justify the result nor was there anything which would lead the court to believe that the best interests of the child required that the father should provide educational funds for private high school education. Moreover, there was nothing in the record which would indicate that the education provided by the private school in question was of a better quality than that provided by the public schools. The court held that it would be improper to conclude that public schools are automatically presumed to be inferior to private schools. Furthermore, the court felt that there was no basis in the lower court's determination that merely because one of the children had attended private school for a portion of her education that it would automatically be beneficial to the other child to be provided a like education. It said that each child is different and that it would be improper to assume that whatever is good for one child is automatically good for the other children in the family. The Second Department concluded that it was clear that neither the Child Support Standards Act nor Manno v Manno was meant to represent an entire shift away from the traditional rule of "special circumstances."

In Romans v Romans, (203 A.D.2d 549, 612 N.Y.S.2d 164 [2 Dept 1994]), the Second Department definitively stated that the "special circumstances test" is a standard which no longer applies to a proceeding to compel a spouse to contribute to the cost related to the post-secondary education of the parties' children. In its brief memorandum decision the Appellate Division stated that although the parties "prior separation agreement was silent as to the costs of college, this does not necessarily mean that an agreement was reached pursuant to which college costs would not constitute a component of the parent's obligation to pay child support, particularly in light of the fact that the child support provision contained in the agreement applied only until the children reach the age of 18 years. . .Thus, the appropriate standard by which the former husband's application should be reviewed is the discretionary one found in New York Domestic Relations Law § 240(1-b)(c)(7).

CHILD CARE

SETTLEMENT CONSIDERATIONS:

The Domestic Relations Law requires consideration of the custodial parent's present child care needs when the custodial parent is working, or receiving elementary or secondary education or vocational training which the court determines will lead to employment, and incurs child care expenses as a result thereof. "Reasonable" child care expenses are to be determined by the court in the exercise of its discretion, considering all of the circumstances, and then, where incurred, they must be prorated in the same proportion as each parent's income is to the total combined parental income. There is no room for the exercise of discretion insofar as pro-rating is concerned. Each parent's pro rata share of child care expenses must then be separately stated and added to the previously determined child support obligation to determine the total yearly support obligation of the non-custodial parent. (Family Court Act § 413(1)(c)(4); Domestic Relations Law § 240(1-b)(c)(4). The statute does not define what is included within the phrase "child care" expense, nor does it provide criteria for the court to determine whether the educational training will lead to employment.

Where the court determines that the custodial parent is seeking work and incurs child care expenses as a result of seeking work, it may determine which, if not all, of such expenses are reasonable child care expenses thereafter apportioning the expenses between the custodial and the non-custodial parent. The non-custodial parent's share of such must be separately stated by the court and paid in a manner determined by the court (Family Court Act § 413(1)(c)(6); Domestic Relations Law § 240(1-b)(c)(6). The application of this provision is discretionary with the court. There is no provision requiring the court to prorate such expenses in the same proportion as each parent's income is to the combined parental income.

DRAFTERS NOTES:

The agreement should state that so long as the child is under a specified age, the payor spouse will pay for all or a specific portion of the reasonable child care expenses, which should be defined, such as a babysitter, housekeeper or caregiver. It should provide that the person who shall be the babysitter, housekeeper or caregive shall be mutually chosen by the parties and consented to by the payor, in advance, in writing and that such consent shall not be unreasonably withheld.

CASE LAW YOU SHOULD KNOW:

The components of "reasonable" child care expenses are within the exercise of the court's discretion. In Mitnick v. Rosenthal, (260 A.D.2d 238, 688 N.Y.S.2d 150 [1 Dept 1999]), the Appellate Division affirmed the Supreme Court's award of unspecified or "open ended" child support for medical expenses and camp, tutoring, school tuition, recreation, and transportation to be fixed on the basis of annual accountings by the wife, not to exceed $6,000 a month. The Appellate Division also agreed with the Supreme

Court's exclusion of housekeeping as a child care expense.

It has been held that summer camp expenses constituted child care expenses within the meaning of DRL § 240(1-b)(c)(4) (Cohen-Davidson v. Davidson, 255 A.D.2d 414, 680 N.Y.S.2d 564 ([2 Dept 1998]). In Polizzi v. Polizzi,(270 A.D.2d 471, 706 N.Y.S.2d 878 [2 Dept 2000]), the Appellate Division affirmed a judgment which directed the husband to pay 75% of the cost for a full time babysitter It held that under the circumstances of this case, the cost of a full time babysitter was a reasonable childcare expense.

SUMMER CAMP

SETTLEMENT CONSIDERATIONS:

In more affluent families the parties consider summer camp, teen tour, or summer activities for the children to be additional child support expenses, even though they are not "add-ons." Where the parties have this kind of lifestyle requests for the payment of these expenses should be part of the bargaining process.

DRAFTERS NOTES:

This clause should provides for the payor to pay for all or part of the cost of a summer camp, teen tour, or summer activity, provided the payor is consulted in advance about the choice of the camp, teen tour or summer activity ,and consents in advance, in writing to the choice of camp or activity. It is important to specify which expenses will be paid and should specify that they include, camp tuition, registration fees, activity fees, required clothing and equipment, room and board, and reasonable travel expenses to and from the camp, teen tour or summer activity.

The agreement should provide that prompt payment of the deposit and tuition shall be made directly to the provider of the service upon presentation of a bill or statement from the provider of the service. It should also provide, that the spouse paying the expense shall be (1) consulted a specified period in advance of the start of the activity with regard to the selection of the camp; and (2) that, by a specific date, he consent in writing to the selection of the camp, "which consent shall not be unreasonably withheld."

CASE LAW YOU SHOULD KNOW:

In Mitnick v. Rosenthal, (260 A.D.2d 238, 688 N.Y.S.2d 150 [1Dept 1999]), the

Appellate Division affirmed the Supreme Court's award of unspecified or "open ended" child support for medical expenses and camp, tutoring, school tuition, recreation, transportation to be fixed on the basis of annual accountings by the wife, not to exceed $6,000 a month.

MEDICAL, HOSPITAL, PSYCHIATRIC, ORTHODONTIC, PHARMACY AND DENTAL EXPENSES AND INSURANCE COVERAGE

SETTLEMENT CONSIDERATIONS:

The current Health Care debate is evidence of the need of all Americans for health care coverage.

Health Care Not Covered by Insurance.

New York Domestic Relations Law § 236(B)(8) provides: 8. Special relief in matrimonial actions.

a. In any matrimonial action the court may order a party to purchase, maintain or assign a policy of insurance providing benefits for health and hospital care and related services for either spouse or children of the marriage not to exceed such period of time as such party shall be obligated to provide maintenance, child support or make payments of a distributive award. The court may also order a party to purchase, maintain or assign a policy of insurance on the life of either spouse, and to designate either spouse or children of the marriage as irrevocable beneficiaries during a period of time fixed by the court. The interest of the beneficiary shall cease upon the termination of such party's obligation to provide maintenance, child support or a distributive award, or when the beneficiary remarries or predeceases the insured.

Mandatory Award of Health Care Expenses - In General

Former Domestic Relations Law § 240 (1-b) (c) (5), and Family Court Act § 413, subdivision 1 (c) (5), which were amended in 2009, required the court to prorate each parent's share of the reasonable health care expenses of the child, where such expenses are not covered by insurance, in the same proportion as each parent's income is to the combined parental income. They provided that the noncustodial parent's pro rata share of such health care expenses was to be paid in a manner determined by the court, including direct payment to the health care provider. Laws of 2009, Ch 215 § 2. See also Family Court Act 413, subdivision 1 (c) (5), Laws of 2009, Ch 215 § 1.

Former Domestic Relations Law § 240(1)(d) (Laws of 2009, Ch 215 §8) and Family Court Act § 416(f), (Laws of 2009, Ch 215 § 7) which provided for the proration of costs between the parties where private health insurance is ordered, were amended at the same time to provide that the cost of private health insurance, or the cost of any premium, family contribution, or health expense incurred as a result of enrollment in the State Child Health Insurance Program or Medical Assistance program shall be deemed "cash medical support." Each parent's contribution to the cost of such coverage is to be determined under the amended provisions of and Domestic Relations Law § 240 (1-b) (c) (5) and Family Court Act § 413, subdivision 1 (c) (5). Laws of 2009, Ch 215 § 7 & 8.

Family Court Act §§ 514 and 545, respectively, were amended to provide that the necessary expenses incurred by or for the mother in connection with her pregnancy, confinement and recovery shall be deemed a cash medical support obligation and the court must determine the obligation of either or both parties to contribute to the cost pursuant to Family Court Act § 413. Laws of 2009, Ch 215, §§ 7 & 8.

According to the New York Assembly Legislative Memorandum these amendments bring New York into compliance with federal mandates set forth in the final medical support regulations for the child support enforcement program, released by the federal Department of Health and Human Services on July 21, 2008. The federal regulations require each state to define when private health insurance benefits, an element of support, are "reasonable in cost" and when such health insurance shall be considered "reasonably accessible." See NY Legis Memo 215 (2009).

These amendments allow New York to comply with the federal final rules (45 CFR 302.56; 303.31) pertaining to medical support, which requires states to define the terms "reasonable in cost" and "reasonably accessible" in relation to the availability of private health insurance, and also the federal mandate to set a reasonable income-based numeric standard for determining when cash medical support should be ordered. Under federal regulations, private health insurance is considered "available" when it is reasonable in cost and reasonably accessible as those terms are defined by a state. In the event that private health insurance is not "available", the regulations mandate that states seek an order for "cash medical support" until such time as private health insurance becomes available. Additionally, the final medical support regulations allow states to define when it is appropriate to seek cash medical support in addition to private health insurance benefits. See NY Legis Memo 215 (2009).

Former Domestic Relations Law § 240 (1-b), subdivision (c) (5) was repealed and a new Domestic Relations Law §240 (1-b) (c) (5) was added. It provides, in part, that:

" The court shall determine the parties' obligation to provide health insurance

benefits pursuant to this section and to pay cash medical support as provided under this subparagraph." Domestic Relations Law § 240 (1-b) (c) (5), Laws of 2009, Ch 215 § 2. See also Family Court Act § 413, subdivision 1 (c) (5)), Laws of 2009, Ch 215 § 1).

"Cash medical support" means an amount ordered to be paid toward the cost of health insurance provided by a public entity or by a parent through an employer or organization, including employers or organizations which are self insured, or through other available health insurance or health care coverage plans, and/or for other health care expenses not covered by insurance. Domestic Relations Law § 240 (1-b), (c) (5), Laws of 2009, Ch 215 § 2. See also Family Court Act § 413, subdivision 1 (c), (5)), Laws of 2009, Ch 215 § 1.

It also provides, in part:

(v) In addition to the amounts ordered under clause (ii), (iii), or (iv), the court shall pro rate each parent's share of reasonable health care expenses not reimbursed or paid by insurance, the medical assistance program established pursuant to title eleven of article five of the social services law, or the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law, in the same proportion as each parent's income is to the combined parental income, and state the non-custodial parent's share as a percentage in the order. The non-custodial parent's pro rata share of such health care expenses determined by the court to be due and owing shall be support arrears/past due support and shall be subject to any remedies provided by law for the enforcement of support arrears/past due support. In addition, the court may direct that the non-custodial parent's pro rata share of such health care expenses be paid in one sum or in periodic sums, including direct payment to the health care provider. Domestic Relations Law § 240 (1-b) (c) (5) (v).(See also Family Court Act § 413, subdivision 1 (c)(5)(v)).

(vi) Upon proof by either party that cash medical support pursuant to clause (ii), (iii), (iv), or (v) of this subparagraph would be unjust or inappropriate pursuant to paragraph (f) of this subdivision, the court shall:

(A) order the parties to pay cash medical support as the court finds just and appropriate, considering the best interests of the child; and

(B) set forth in the order the factors it considered, the amount calculated under this subparagraph, the reason or reasons the court did not order such amount, and the basis for the amount awarded. Domestic Relations Law § 240 (1-b) (c) (5) (vi). See also Family Court Act § 413, subdivision 1 (c)(5)(vi).

Private Health Insurance Benefits - Available - Obligation to Exercise Option

Every order directing the payment of support must provide that if either parent currently, or at any time in the future, has health insurance benefits" available that may be extended or obtained to cover the child, that parent is required to exercise the option of additional coverage in favor of the child and execute and deliver any forms, notices, documents or instruments necessary to assure timely payment of any health insurance claims for the child. Domestic Relations Law § 240(1)(a), as amended by Laws of 2002, Ch. 624.

“Available health insurance benefits" means any health insurance benefits that are reasonable in cost and that are reasonably accessible to the person on whose behalf the petition is brought. Health insurance benefits that are not reasonable in cost or whose services are not reasonably accessible to such person shall be considered unavailable. Domestic Relations Law 240, subdivision 1 (b) (2) as added by Laws of 2009, Ch 215, §4. See also Family Court Act 416 (d)(2) as added by Laws of 2009, Ch 215,§3.

Private Health Insurance - Available - Mandatory Orders

When the person on whose behalf the petition is brought is a child, the court must consider the availability of health insurance benefits to all parties and must take the following action to ensure that health insurance benefits are provided for the benefit of the child. Domestic Relations Law § 240, subdivision 1(c).

If the child is presently covered by health insurance benefits, the court must direct in the order of support that the coverage be maintained, unless either parent requests the court to make a direction for health insurance benefits pursuant to Domestic Relations Law § 240 subdivision1, (c) (2). Domestic Relations Law § 240, subdivision 1(c).

Private Health Insurance - Unavailable - Obligation to Pay Cash Medical Support

If the child is not presently covered by health insurance benefits and if only one parent has available health insurance benefits, the court must direct in the order of support that such parent provide health insurance benefits. Domestic Relations Law § 240, subdivision 1(c).

If the child is not presently covered by health insurance benefits, and if both parents have available health insurance benefits, the court must direct in the order of support that either parent or both parents provide such health insurance. Domestic Relations Law § 240, subdivision 1(c).

The court must make its determination based on the circumstances of the case,

including, but not limited to, the cost and comprehensiveness of the respective health insurance benefits and the best interests of the child. Domestic Relations Law § 240, subdivision 1(c).

If neither parent has available health insurance benefits, the court must direct in the order of support that the custodial parent apply for the state's child health insurance plan and the medical assistance program. If eligible for such coverage, the court must prorate the cost of any premium or family contribution in accordance with Domestic Relations Law § 240, subdivision 1(d). A direction issued under Domestic Relations Law § 240, subdivision1 (c) does not limit or alter either parent's obligation to obtain health insurance benefits when they become available, as required pursuant to Domestic Relations Law 240, subdivision 1(c). Domestic Relations Law § 240, subdivision 1(c).

The cost of providing health insurance benefits pursuant to Domestic Relations Law § 240, subdivision 1(c) must be prorated between the parties in the same proportion as each parent's income is to the combined parental income. Domestic Relations Law § 240, subdivision 1(d).

If the custodial parent is ordered to provide such benefits, the noncustodial parent's pro rata share of such costs must be added to the basic support obligation. If the noncustodial parent is ordered to provide such benefits, the custodial parent's pro rata share of such costs must be deducted from the basic support obligation. Domestic Relations Law § 240, subdivision 1(d).

Where the court find that such proration is unjust or inappropriate, the court must: 1) order the parties to pay such amount of the cost of health insurance benefits as the court finds just and appropriate; (2) add or subtract the amount so that the noncustodial parent's pro rata share of the costs is added to the basic support obligation. If the noncustodial parent is ordered to provide the benefits, the custodial parent's pro rata share of such costs must be deducted from the basic support obligation; and (3) set forth in the order the factors it considered, the amount of each party's share of the cost and the reason or reasons the court did not order such pro rata apportionment. Domestic Relations Law § 240, subdivision 1(d).

Where health insurance benefits are determined by the court to be unavailable, the court must order the non-custodial parent to pay cash medical support. Domestic Relations Law § 240, subdivision (1-b), (c)(5)(v)(C), Laws of 2009, Ch 215, §2. See also Family Court Act § 413, subdivision 1, (c)(5)(v)(C), Laws of 2009, Ch 215, §1.

In addition, the court must pro rate each parent's share of reasonable health care expenses not reimbursed or paid by insurance, the medical assistance program, or the state's child health insurance plan, in the same proportion as each parent's income is to the combined parental income. The court must state the non-custodial parent's share as a percentage in the order. Domestic Relations Law § 240 (1-b), (c) (5) (v), Laws of 2009, Ch 215, §2. See also Family Court Act § 413, subdivision 1, (c)(5)(v), Laws of 2009, Ch 215, §1.

The non-custodial parent's cash medical support obligation may not exceed five percent of his or her gross income, or the difference between the non-custodial parent's income and the self-support reserve, whichever is less. Domestic Relations Law § 240 (1-b), (c) (5), Laws of 2009, Ch 215, §2. See also Family Court Act § 413, subdivision 1 (c)(5), Laws of 2009, Ch 215, §1.

If either party establishes that cash medical support would be unjust or inappropriate pursuant to Domestic Relations Law § 240 (1-b) (f), the court must order the parties to pay cash medical support as the court finds just and appropriate, considering the best interests of the child. Domestic Relations Law § 240 (1-b), (c) (5) (vi)(A),Laws of 2009, Ch 215, §2. See also Family Court Act § 413, subdivision 1 (c)(5)(vi)(A),Laws of 2009, Ch 215, §1.

Private Health Insurance Benefits - Determination of Availability

In order to be deemed “available” private health insurance benefits must be "reasonable in cost" and "reasonably accessible.” Domestic Relations Law § 240, subdivision 1 (b) (3), Laws of 2009, Ch 215, § 4. See also Family Court Act § 416 (d)(3), Laws of 2009, Ch 215, § 3.

Private health insurance benefits are presumed to be "reasonable in cost" where the cost of premiums and deductibles for private health insurance attributable to the child(ren) is not more than 5 % of the combined parental gross income. Benefits will not be considered "reasonable in cost" if the cost to a parent of extending coverage to the child(ren) would reduce the income of that parent below the self support reserve. The presumption of cost reasonableness may be rebutted if the court finds that the cost borne by a parent is unjust or inappropriate. This finding must be based on the circumstances of the case, the cost and comprehensiveness of the health insurance benefits for which the child or children may otherwise be eligible, and the best interests of the child or children. Domestic Relations Law §240, subdivision 1 (b) (3) as added by Laws of 2009, Ch 215, §4. See also Family Court Act § 416 (d)(3) as added by Laws of 2009, Ch 215, §3.

The cost of health insurance benefits refers to the cost of the premium and deductible attributable to adding the child or children to existing coverage or the difference between the costs for self-only and family coverage. Domestic Relations Law 240, subdivision 1 (b) (3) as added by Laws of 2009, Ch 215, §4. See also Family Court Act 416 (d)(3) as added by Laws of 2009, Ch 215,§3.

Private health insurance benefits are presumed to be "reasonably accessible" where the child lives within the geographic area covered by the plan or lives within thirty minutes or thirty miles of services covered by the health insurance benefits or through benefits provided under a reciprocal agreement. Domestic Relations Law § 240, subdivision 1 (b) (3) as added by Laws of 2009, Ch 215, § 4. See also Family Court Act § 416 (d)(3) as added by Laws of 2009, Ch 215,§ 3.

The presumption of accessibility may be rebutted for good cause shown which may include, but is not limited to, a consideration of the special health needs of the child. The court must set forth its finding and the reasons for its finding in the order of support. Domestic Relations Law § 240, subdivision 1 (b) (3). See also Family Court Act § 416 (d)(3).

Where health insurance benefits are determined by the court to be available, the cost of providing health insurance benefits must be prorated between the parties in the same proportion as each parent's income is to the combined parental income. If the custodial parent is ordered to provide such benefits, the non-custodial parent's pro rata share of such costs must be added to the basic support obligation. If the non-custodial parent is ordered to provide the benefits, the custodial parent's pro rata share of such costs must be deducted from the basic support obligation. Domestic Relations Law § 240(1-b) (c) (5) (ii), Laws of 2009, Ch 215 § 2. (See also Family Court Act § 413, subdivision 1, (c) (5)(ii)), Laws of 2009, Ch 215 § 1.

Private Health Insurance - Availability

In order to be deemed “available” private health insurance benefits must be "reasonable in cost" and "reasonably accessible.” Domestic Relations Law § 240, subdivision 1 (b) (3), Laws of 2009, Ch 215, § 4. See also Family Court Act § 416 (d)(3), Laws of 2009, Ch 215, § 3.

Private Health Insurance - Payment for Share of Reasonable Cash Medical Support Expenses for Additional Unreimbursed Expenses

If the child covered by private health insurance incurs additional unreimbursed health care expenses, the court must order the non-custodial parent to pay his or her pro

rata share of the reasonable cash medical support expenses. When combined with the cost to the parent for private health insurance or public coverage, the total payment for cash medical support may not cause his or her income to fall below the self-support reserve. Domestic Relations Law § 240 (1-b) (c) (5) (ii), as added by Laws of 2009, Ch 215, §2. See also Family Court Act § 413, subdivision 1 (c)(5), Laws of 2009, Ch 215, § 1.

Private Health Insurance - Not Available - Cash Medical Support

When private health insurance benefits are unavailable, the custodial parent must be directed to apply for State Child Health Insurance Program or Medical Assistance. The prior language allowing the court to apportion the cost of any premium, family contribution, or health expense associated with participation in such plan or program was repealed. Domestic Relations Law § 240(1)(c)(2)(iii), Laws of 2009, Ch 215, § 6. See also Family Court Act § 416 (e)(2)(iii), Laws of 2009, Ch 215, § 5.

The state Medical Assistance program is promulgated in Social Services Law Article 5, Title 11. The State Child Health Insurance Program is promulgated in Public Health Law, Article 25, Title 1A.

The cost of providing health insurance benefits or benefits under the state's child health insurance plan or the medical assistance program, pursuant to Domestic Relations Law § 240, subdivision 1(c), is deemed cash medical support. The court must determine the obligation of either or both parents to contribute to the cost of providing health insurance benefits or benefits under the state's child health insurance plan or the medical assistance program, pursuant to Domestic Relations Law § 240 (1-b). Domestic Relations Law § 240(1)(c)(2)(iii) ,Laws of 2009, Ch 215, § 8 . See also Family Court Act § 416 (e)(2)(iii), Laws of 2009, Ch 215 § 7.

Private Health Insurance - Cash Medical Support Determined Under Domestic Relations Law § 240 (1-b)(c) (5). Domestic Relations Law § 240, subdivision 1 (d), Laws of 2009, Ch 215, § 8. See also Family Court Act § 416 (f), Laws of 2009, Ch 215, § 7.

The cost of private health insurance, or the cost of any premium, family contribution, or health expense incurred as a result of enrollment in the child health insurance plan or the medical assistance program is deemed cash medical support and each parent's contribution must be determined under the provisions of Domestic Relations Law § 240 (1-b)(c) (5). Domestic Relations Law § 240, subdivision 1 (d), Laws of 2009, Ch 215, § 8. See also Family Court Act § 416 (f), Laws of 2009, Ch 215, § 7.

Private Health Insurance Benefits - Not Available - Application for State Child Health Insurance Program or Medical Assistance Program

Where private health insurance benefits, pursuant to Domestic Relations Law § 240 (1-b) (1) (c) (2) (i) and (ii) are not available the custodial parent will be ordered to pay cash medical support. Domestic Relations Law § 240 (1-b) (c) (5) (iii), Laws of 2009, Ch 215, §2. See also Family Court Act § 413, subdivision 1 (c)(5)(iii), Laws of 2009, Ch 215, §1.

Private Health Insurance - Not Available - Cash Medical Support - Application for State Child Health Insurance Program or Medical Assistance Program - Managed Care Coverage

For children authorized for managed care coverage under the Medical Assistance program, the non-custodial parent's obligation towards the portion of cash medical support for public coverage or benefits is the lesser of the amount that would be required as a family contribution under the State Child Health Insurance Plan, for the child or children if there were in a two-parent household with income equal to the combined income of the parents, or the actual amount paid by the Medical Assistance program, on behalf of the child or the children, to the managed care plan. The court must separately state the monthly obligation of the non-custodial parent for the portion of cash medical support associated with public coverage. The non-custodial parents cash medical support under this clause may not exceed 5 % of his or her gross income, or the difference between his or her income and the self-support reserve. Domestic Relations Law § 240 (1-b) (c) (5) (iii) (A), Laws of 2009, Ch 215, §2 . See also Family Court Act § 413, subdivision 1 (c)(5) (iii) (A), Laws of 2009, Ch 215, §1.

Private Health Insurance - Not Available - Cash Medical Support - Application for State Child Health Insurance Program or Medical Assistance Program - Fee for service coverage.

For a child or children authorized for fee-for-service coverage under the medical assistance program (who are not authorized for managed care coverage), the court must determine the non-custodial parent's maximum annual cash medical support obligation. It is equal to the lesser of the monthly amount that would be required as a family contribution under the state's child health insurance plan for the child or children if they were in a two- parent household with income equal to the combined income of the non- custodial and custodial parents times twelve months or the number of months that the child or children are authorized for fee-for-service coverage during any year. The court must separately state in the order the non-custodial parent's maximum annual cash medical support obligation. Domestic

Relations Law § 240 (1-b), (c) (5) (iii) (B). Laws of 2009, Ch 215, §2. See also Family Court Act § 413, subdivision 1 (c)(5)(iii)(B), Laws of 2009, Ch 215, §1.

The total annual amount that the non-custodial parent is ordered to pay under this clause shall not exceed five percent of his or her gross income or the difference between the non-custodial parent's income and the self-support reserve, whichever is less. Domestic Relations Law § 240 (1-b), (c) (5) (iii) (B). Laws of 2009, Ch 215, §2. See also Family Court Act § 413, subdivision 1 (c)(5)(iii)(B), Laws of 2009, Ch 215, §1.

Upon proof to the court that the non-custodial parent, after notice of the amount due, has failed to pay the public entity for incurred health care expenses, the court must order the non-custodial parent to pay such incurred health care expenses up to the maximum annual cash medical support obligation. These amounts are support arrears/past due support subject to any remedies as provided by law for the enforcement of support arrears/past due support. Domestic Relations Law § 240 (1-b), (c) (5) (iii) (B). Laws of 2009, Ch 215, §2. See also Family Court Act § 413, subdivision 1 (c)(5)(iii)(B), Laws of 2009, Ch 215, §1.

Private Health Insurance - Not Available - Cash Medical Support - Child Eligible Under State Child Health Insurance Program

Where health insurance benefits pursuant to Domestic Relations Law § 240 (1-b), (1)(c) (2) (I) and (ii) are determined by the court to be unavailable, and the child or children are determined eligible for coverage under the state's child health insurance plan the court must prorate each parent's share of the cost of the family contribution required under the child health insurance plan in the same proportion as each parent's income is to the combined parental income, and state the amount of the non-custodial parent's share in the order. The total amount of cash medical support that the non-custodial parent is ordered to pay may not be more than 5 % of his or her gross income, or the difference between the non-custodial parent's income and the self-support reserve, whichever is less. Domestic Relations Law § 240 (1-b) (c) (5) (iv), Laws of 2009, Ch 215, §2. See also Family Court Act § 413, subdivision 1 (c)(5)(iv), Laws of 2009, Ch 215, §1.

Private Health Insurance - Not Available - Reasonable Health Care Expenses Not Covered by Insurance

In addition, the court must pro rate each parent's share of reasonable health care expenses not reimbursed or paid by insurance, the medical assistance program, or the state's child health insurance plan, in the same proportion as each parent's income is

to the combined parental income. The court must state the non-custodial parent's share as a percentage in the order. Domestic Relations Law § 240 (1-b) (c) (5) (v), Laws of 2009, Ch 215, §2. See also Family Court Act § 413, subdivision 1 (c)(5)(v), Laws of 2009, Ch 215, §1.

The court may direct that the non-custodial parent's pro rata share of the health care expenses be paid in one sum or in periodic sums, including direct payment to the health care provider. Domestic Relations Law § 240 (1-b) (c) (5) (v), Laws of 2009, Ch 215, §2. See also Family Court Act § 413, subdivision 1 (c)(5)(v), Laws of 2009, Ch 215, §1.

The non-custodial parent's pro rata share of health care expenses determined by the court to be due and owing is support arrears/past due support subject to any remedies provided by law for the enforcement of support arrears/past due support. Domestic Relations Law § 240 (1-b) (c) (5) (v), Laws of 2009, Ch 215, §2. See also Family Court Act § 413, subdivision 1 (c)(5)(v), Laws of 2009, Ch 215, §1.

Private Health Insurance - Not Available - Cash Medical Support - Unjust or Inappropriate

If either party establishes that cash medical support would be unjust or inappropriate pursuant to Domestic Relations Law § 240 (1-b) (f), the court must order the parties to pay cash medical support as the court finds just and appropriate, considering the best interests of the child. Domestic Relations Law § 240 (1-b) (c) (5) (vi)(A), Laws of 2009, Ch 215, §2. See also Family Court Act § 413, subdivision 1 (c)(5)(vi)(A), Laws of 2009, Ch 215, §1. The Court must also set forth in the order the factors it considered, the amount calculated under this subparagraph, the reason or reasons the court did not order such amount, and the basis for the amount awarded. Domestic Relations Law § 240 (1-b) (c) (5) (vi)(B), Laws of 2009, Ch 215, §2. See also Family Court Act § 413, subdivision 1 (c)(5)(vi)(B), Laws of 2009, Ch 215, §1.

Requirements for child support orders - Directions for health insurance

The court must provide in the order of support that the legally responsible relative immediately notify the other party, or the other party and the support collection unit when the order is issued on behalf of a child in receipt of public assistance and care or in receipt of services pursuant to Social Services Law § 111-g, of any change in health insurance benefits, including any termination of benefits, change in the health insurance benefit carrier, premium, or extent and availability of existing or new

benefits. Domestic Relations Law § 240, subdivision 1(e).

Where the court determines that health insurance benefits are available, the court must provide in the order of support that the legally responsible relative immediately enroll the eligible dependents named in the order who are otherwise eligible for the benefits without regard to any seasonal enrollment restrictions. Domestic Relations Law § 240, subdivision 1(f).

The order must also direct the legally responsible relative to maintain the benefits as long as they remain available to that relative, and direct the legally responsible relative to assign all insurance reimbursement payments for health care expenses incurred for his or her eligible dependents to the provider of the services or the party actually having incurred and satisfied the expenses, as appropriate. Domestic Relations Law § 240, subdivision 1(f).

If the court finds that a legally responsible relative willfully failed to obtain health insurance benefits in violation of a court order, that relative will be presumptively liable for all health care expenses incurred on behalf of the dependents from the first date the dependents were eligible to be enrolled to receive health insurance benefits after the issuance of the order of support directing the acquisition of such coverage. Domestic Relations Law § 240, subdivision 1(I).

When the court issues an order of child support or combined child and spousal support on behalf of persons other than those in receipt of public assistance and care or in receipt of services pursuant to Social Services Law § 111-g, the court must also issue a separate order which must include the necessary direction to ensure the order's characterization as a qualified medical child support order as defined by section 609 of the employee retirement income security act of 1974 (29 U.S.C.A. 1169). Domestic Relations Law § 240, subdivision 1(h).

The order must: (i) clearly state that it creates or recognizes the existence of the right of the named dependent to be enrolled and to receive benefits for which the legally responsible relative is eligible under the available group health plans, and shall clearly specify the name, social security number and mailing address of the legally responsible relative, and of each dependent to be covered by the order; (ii) provide a clear description of the type of coverage to be provided by the group health plan to each such dependent or the manner in which the type of coverage is to be determined; and (iii) specify the period of time to which the order applies. The court may not require the group health plan 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 medical child support described in 42 U.S.C.A. 1396g.

Domestic Relations Law § 240, subdivision 1(h).

Requirements for child support orders - Social Security Number

The court must include in an order for support the social security number of the obligor. The purpose of this requirement is to facilitate enforcement of the order. Domestic Relations Law § 240, as amended by Laws of 1998, c. 214, 58. Family Court Act § 416, as amended by Laws of 1998, c. 214, 57.There is a provision in Family Court Act § 416 (c), which refers to the "legally responsible relative", rather than "parent", and it is almost identical. See Laws of 2002. Ch. 624.

Qualified Medical Child Support Order

The Omnibus Reconciliation Act of 1993 requires plan administrators of group health plans to comply with a Qualified Medical Child Support Order. A Qualified Medical Child Support Order is a child support judgment or order, including an order approving a settlement agreement, that creates or recognizes the existence of an alternate recipient's rights to receive benefits for which a participant or beneficiary is eligible under a group health plan. Only a child can be an alternate participant under a Qualified Medical Child Support Order. Qualified Medical Child Support Orders place responsibility on a plan administrator to enroll a child in the employee's health plan. They can require that the child of a participant be provided with health coverage even if the child is not otherwise eligible for coverage under the plan. For example, if the plan normally requires the child to be a tax dependent of the plan participant or if the child is required to reside with the participant. See Domestic Relations Law § 240(2)(b); Family Court Act § 440(1)(b); and Civil Practice Law and Rules Rule 5241(b)(2).

Medical child support orders must be "qualified" before a plan is required to honor them. A Qualified Medical Child Support Order must state: (1) the name and last known mailing address of the plan participant; (2) the name and last known mailing address of each alternate recipient covered by the order; (3) a reasonable description of the coverage to be provided by the plan or the manner in which the type of coverage is to be determined; (4) the period to which the order applies; and (5) each plan the order covers. A Qualified Medical Child Support Order may order a child be covered by a plan even if the child would not otherwise be eligible for coverage. Section 908 of the Social Security Act provides that a child cannot be denied coverage on the grounds that he or she was born out of wedlock or is not the tax dependent of the plan participant or does not reside with the plan participant or in the insurer's service area. The plan participant and the alternate recipient must be promptly notified by the plan administrator of the receipt of a medical child support order and the plan's procedures for determining whether the medical child support order is a Qualified Medical Child Support Order. Within a reasonable period after receipt of the order, the plan

administrator must determine whether the medical child support order constitutes a Qualified Medical Child Support Order and notify the plan participant and the alternate recipient of the determination. A child who is an alternate recipient under a Qualified Medical Child Support Order is considered a beneficiary under the plan for purposes of ERISA. The child is entitled to summary plan descriptions and other disclosures to which a plan participant is entitled and has standing to bring actions under ERISA. See Domestic Relations Law § 240(2)(b); Family Court Act § 440(1)(b); and Civil Practice Law and Rules Rule 5241(b) (2).

Execution for Medical Support Enforcement.

To enforce the health insurance provisions of Domestic Relations Law §240(1) and Family Court Act § 416, the Domestic Relations Law and Family Court Act authorize the issuance of an execution for medical support enforcement", pursuant to Civil Practice Law and Rules 5241, in accordance with the provisions of the order of support. Laws of 1993, Ch. 59.

Civil Practice Law and Rules 5241 authorizes an “execution for medical support enforcement," which may be issued by the support collection unit, the sheriff, the clerk of the court or the attorney for a creditor. Civil Practice Law and Rules 5241(b)(2).

Civil Practice Law and Rules 5241 defines “health insurance” benefits as any medical, dental, optical and prescription drugs and health care services or other health care benefits which may be provided for dependents, through an employer or organization, including employers or organizations which are self insured." Civil Practice Law and Rules 5241(a)(1).

The debtor" is any person who is directed to make payments by the order of support. Civil Practice Law and Rules 5241(a)(2).

Where the order of support directs the debtor to provide health insurance benefits to specific dependents, an execution for medical support enforcement may be issued by the support collection unit, by the sheriff, by the clerk of the court, or by the attorney for the creditor as an officer of the court subject to certain exceptions. Civil Practice Law and Rules 5241(b)(2).

The execution for medical support enforcement may require the debtor's employer or organization to purchase on behalf of the debtor and the debtor's dependents the “available health insurance benefits” which are directed by the order of support. Civil Practice Law and Rules 5241(b)(2).

The execution for medical support enforcement may require the debtor's employer, organization or group health plan administrator to purchase on behalf of the debtor and the debtor's dependents “available health insurance benefits.” Civil

Practice Law and Rules 5241(b)(2)(I), effective Oct. 9, 2009.

The execution must, consistent with the order of support, direct the employer or organization to provide to the issuer of the execution any identification cards and benefit claim forms and to withhold from the debtor's income the employer's share of the cost of such health insurance benefits. Civil Practice Law and Rules 5241(b)(2).

The execution must direct the employer, organization or group health plan administrator to provide to the dependents for whom the benefits are required to be provided or the dependents' custodial parent or legal guardian or social services district on behalf of persons applying for or in receipt of public assistance any identification cards and benefit claim forms. It must also direct the employer, organization or group health plan administrator to withhold from the debtor's income the employee's share of the cost of the health insurance benefits, and to provide written confirmation of such enrollment indicating the date such benefits were or become available or that such benefits are not available and the reasons therefor to the issuer of the execution. Civil Practice Law and Rules 5241 (b) (2)(I), effective Oct. 9, 2009.

When the court issues an order of child support or combined child and spousal support on behalf of persons other than those in receipt of public assistance or in receipt of services pursuant to Social Services Law § 111-g, the medical execution must be in the form of a separate qualified medical child support order. The separate qualified medical child support order is provided by Family Court Act § 416 (j) and Domestic Relations Law § 240, subdivision 1 (h). Civil Practice Law and Rules 5241 (b) (2)(I), effective Oct. 9, 2009.

An execution for medical support enforcement may not require a debtor's employer, organization or group health plan administrator to purchase or otherwise acquire health insurance or health insurance benefits that would not otherwise be available to the debtor by reason of his or her employment or membership. Nothing in CPLR 5241 may be deemed to obligate any employer, organization or group health plan administrator responsible for an option exercised by the debtor in selecting medical insurance coverage by an employee or member. Civil Practice Law and Rules 5241 (b) (2)(I), effective Oct. 9, 2009.

An execution for medical support enforcement may not require a debtor's employer or organization to purchase or otherwise acquire health insurance or health insurance benefits that would not otherwise be available to the debtor through his employment or membership. Nothing in the statute is deemed to obligate any employer or organization responsible for an option exercised by the debtor in selecting medical insurance coverage by an employee or member. Civil Practice Law and Rules

5241(b)(2).

Where the child support order requires the debtor to provide health insurance benefits for specified dependents, and where the debtor provides such coverage and then changes employment, and the new employer provides health care coverage, an amended execution for medical support enforcement may be issued by the support collection unit, or by the sheriff, the clerk of the court or the attorney for the creditor as an officer of the court without any return to court. Civil Practice Law and Rules 5241 (b) (2)(ii).

The issuance of the amended execution transfers notice of the requirements of the order and the execution to the new employer, organization or group health plan administrator, and has the same effect as the original execution for medical support issued pursuant to CPLR 5241 unless the debtor contests the execution. Civil Practice Law and Rules 5241 (b) (2)(ii).

Any inconsistent provisions of this or any other law notwithstanding, in any case in which a parent is required by a court order to provide health coverage for a child and the parent is eligible for health insurance benefits as defined in CPLR 5241 through an employer or organization doing business in the state (including those which are self-insured), , the employer or organization must, in addition to implementing the provisions of a medical support execution:

(I) permit the parent to immediately enroll under the health insurance benefit coverage any dependent who is otherwise eligible for the coverage without regard to any seasonal enrollment restrictions (Civil Practice Law and Rules 5241 (b) (2) (I), effective Oct. 9, 2009);

(ii) if the parent is enrolled but fails to make application to obtain coverage of the dependent child, immediately enroll the dependent child under the health benefit coverage upon application by the child's other parent or by the office of temporary and disability assistance or social services district furnishing medical assistance to the child, (Civil Practice Law and Rules 5241 (b) (2) (ii)), and (iii) not disenroll, or eliminate coverage of, the child unless:

(A) the employer or organization is provided with satisfactory written evidence that the court order is no longer in effect, or the child is or will be enrolled in comparable health coverage through another insurer which will take effect not later than the effective date of such disenrollment, or

(B) the employer or organization has eliminated health insurance coverage for all similarly situated employees. Civil Practice Law and Rules 5241 (b) (2) (iii).

An execution for medical support enforcement must contain the caption of the order of support and specify the date that the order of support was entered and the court in which it was entered. Civil Practice Law and Rules 5241(b)(2)(c).

The medical support execution must include the name and address of the employer or organization and include:

(I) a notice that the debtor has been ordered by the court to enroll the dependents in any available health insurance benefits and to maintain such coverage for such dependents as long as such benefits remain available;

(ii) a notice inquiring of the employer or organization as to whether such health insurance benefits are presently in effect for the eligible dependents named in the execution, the date such benefits were or become available, or that such benefits are not available and the reasons therefor and directing that the response to such inquiry immediately be forwarded to the issuer of such execution;

(iii) a statement directing the employer or organization to purchase on behalf of the debtor any available health insurance benefits to be made available to the debtor's dependents as directed by the execution, including the enrollment of such eligible dependents in such benefit plans and the provision to the dependents or such dependents' custodial parent or legal guardian or social services district on behalf of persons applying for or in receipt of public assistance of any identification cards and benefit claim forms;

(iv) a statement directing the employer or organization to deduct from the debtor's income such amount which is the debtor's share of the premium, if any, for such health insurance benefits for such dependents who are otherwise eligible for such coverage without regard to any seasonal enrollment restrictions;

(v) a notice that the debtor's employer must notify the issuer promptly at any time the debtor terminates or changes such health insurance benefits;

(vi) a statement that the debtor's employer or organization shall not be required to purchase or otherwise acquire health insurance or health insurance benefits for such dependents that would not otherwise be available to the debtor by reason of his employment or membership;

(vii) a statement that failure to enroll the eligible dependents in such health insurance plan or benefits or failure to deduct from the debtor's income the debtor's share of the premium for such plan or benefits shall make such employer or organization jointly and severally liable for all medical expenses incurred on the behalf of the debtor's dependents named in the execution while such dependents are not so enrolled to the

extent of the health insurance benefits that should have been provided under the execution;

(viii) the name and last known mailing address of the debtor and the name and mailing address of the dependents; provided however, that the name and mailing address of a social services official may be substituted on behalf of such dependents;

(ix) a reasonable description of the type of coverage to be provided to each dependent, or the manner in which such type of coverage is to be determined;

(x) the period to which such execution applies; and

(xi) a statement that the debtor's employer or organization shall not be 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 medical child support described in section one thousand three hundred ninety-six-g-1 of title forty-two of the United States Code. Civil Practice Law and Rules 5241 (b) (2) (c).

If an employer, organization or group health plan administrator is served with an execution for medical support enforcement, the employer, organization or group health plan administrator must take the following steps:

(i) purchase on behalf of the debtor any health insurance benefits which may be made available to the debtor's dependents as ordered by the execution, including the immediate enrollment of such eligible dependents in such benefit plans;

(ii) provide the dependents for whom such benefits are required, or a social services official substituted for such dependents, identification cards and benefit claim forms;

(iii) commence deductions from income due or thereafter due to the debtor of such amount which is the debtor's share of the premium, if any, for such health insurance benefits. However, the deduction, when combined with deductions for support may not exceed the limitations set forth CPLR 5541 (c) (1) must be consistent with the priority provisions set forth in CPLR 5541 (h); and

(iv) provide a confirmation of enrollment indicating the date the benefits were or become available or that the benefits are not available and the reasons therefor to the issuer of the execution. Civil Practice Law and Rules 5241 (c) (3).

Except as otherwise provided by law, this does not obligate an employer or organization to maintain or continue an employee's or member's health insurance benefits. Civil Practice Law and Rules 5241 (c) (3).

If the employer, organization or group health plan administrator fail to enroll the eligible dependents or to deduct from the debtor's income the debtor's share of the premium, the employer, organization or group health plan administrator will be jointly and severally liable for all medical expenses incurred on behalf of the debtor's dependents named in the execution while the dependents are not enrolled, the extent

of the insurance benefits that should have been provided under the execution. Civil Practice Law and Rules 5241 (c) (4).

Except as otherwise provided by law, this does not obligate an employer, organization or group health plan administrator to maintain or continue an employee's or member's health insurance benefits. Civil Practice Law and Rules 5241 (c) (4).

A levy pursuant to CPLR 5241 or an income deduction order pursuant to CPLR 5242 takes priority over any other assignment, levy or process. Deductions to satisfy current support obligations shall have priority over deductions for the debtor's share of health insurance premiums which shall have priority over any additional deduction authorized by CPLR 5241 (g). Civil Practice Law and Rules 5241 (h) as amended by Laws of 2009, Ch 215,§ 12, effective Oct. 9, 2009.

DRAFTERS NOTES:

The agreement should provide that if there is medical, dental, opthalmic or hospital insurance in effect it will be maintained with the broadest available coverage, or like coverage if available through present or future employment or otherwise, for the benefit of each unemancipated child. It should also provide that the payor will pay all reasonable and necessary medical, dental and hospital expenses for the unemancipated child. This may or may not include cosmetic or elective treatment or surgery, or opthalmic expenses. Sometimes the agreement will require that the payor shall be consulted in advance and agree in advance to elective cosmetic surgery or elective treatments.

The agreement must insure that the custodial parent comply with all requests by the noncustodial parent for documentation. The agreement will usually provide that, except for emergencies, the custodial parent must obtain the payor's approval before committing the child to any course of treatment or care for which the expenses might reasonably be expected to exceed a fixed dollar amount, and that this consent will not unreasonably be withheld. ”

The spouse not required to provide coverage should be required to advise of any medical coverage which may be furnished to him or her by an employer in order that the parties not duplicate coverage of the children. If the custodial parent is required to pay for such coverage of the children, the agreement should give the payor spouse the option to elect to utilize such coverage for the children and promptly pay for or reimburse the custodial parent such expense; or to provide his own coverage.

The agreement should cover all reasonable and necessary medical, dental, ophthalmic and psychiatric expenses incurred on behalf of the unemancipated children which are not covered by insurance.

The parties should be obligated to fill out, execute and deliver to the other party all forms and provide all information in connection with any application he or she may make for reimbursement of medical, dental and drug expenses under any insurance policies which he or she may have. It should provide that if either party advances monies for expenses which are covered by insurance and for which a recovery is made for insurance claims filed for such expenses, the payment by the insurance carrier shall belong to the one advancing the monies and any checks or drafts or proceeds thereof from the insurance carrier shall be promptly turned over to the one advancing the monies.

The parties should be obligated to furnish to each other promptly upon request documentation and other proof of his compliance with the provisions relating to medical insurance, and each party should be authorized to obtain direct confirmation of compliance or non-compliance from any insurance carrier or employer.

All of the medica expenses that are going to be covered by the provision should be defined in the agreement. Medical expenses can include prescription drug expense; psychiatric care; cosmetic expense; dental expense; and optometry expense. Dental expenses can include: Normal dental expenses, Orthodontic expenses and Periodontal expenses. Optometry expenses can include: Prescription eyeglasses, Contact lenses and Eye examinations Psychiatric care can include: Psychiatrist, Psychologist, Psychiatric social worker; and other provider of psychological counseling.

CASE LAW YOU SHOULD KNOW:

In Recuppio v. Recuppio, (246 A.D.2d 342, 667 N.Y.S.2d 365 [1 Dept 1998]), the Appellate Division held that the IAS court erred in failing to direct, in its final order, that defendant be responsible for maintaining health and medical insurance coverage and for reimbursement of deductibles and reasonable uncovered health expenses for his son until he is emancipated. Such direction is mandated by Domestic Relations Law §§ 240(1) and 240(1- b)(c)(5) where, as here, defendant was provided with family health care by his employer. The Court noted that defendant was already providing the coverage voluntarily. It also held that the court should have directed an obligation on defendant's part to provide life insurance coverage for his son until he is emancipated, and for plaintiff. As with the health insurance, defendant had voluntarily assumed such obligation to his son. However, despite the extent of his support obligation to plaintiff, he had undertaken no life insurance coverage for her. Such protection was clearly warranted by the circumstances and was consistent with Domestic Relations Law §236(B)(8)(a). Coverage in the amount of $100,000 was appropriate for plaintiff and $50,000 was appropriate for the son.

In Cohn v Cohn,(102 A.D.2d 859, 477 N.Y.S.2d 48 (2 Dept 1984]) , the separation agreement provided in part: "Except as hereinabove provided, the "Husband shall not be obligated to pay the costs for sleep-away camp for the Children,

unless his prior written consent is obtained, which consent shall not be unreasonably withheld. The financial status of the Husband shall not be considered in determining whether the Husband's refusal to consent is unreasonable in the event his consent is withheld, and the parties agree that an 'ability to pay test' will not be used in determining 'unreasonably withheld.'" The Appellate Court concluded that the husband's refusal to consent was unreasonable. It found that the wife sought the husband's consent to pay full sleep-away camp expenses and that the husband had unreasonably withheld his consent. Since the agreement provides that "the husband's consent shall not be unreasonably withheld," the burden was on him to supply a reason for his failure to consent. His vague and conclusory reasons as to a business recession and his wife's "refusal to purchase things" did not suffice. The agreement "specifically precludes consideration of the husband's financial status" in the decision as to whether his refusal was reasonable.

Shafer v Shafer (1983, 1st Dept) 96 App Div 2d 790, 466 NYS2d 17, held that there was no reason to require the defendant husband to go to the expense of buying a new health policy, since the plaintiff wife already had insurance coverage for their child through her employment.

In Jerkovich v Jerkovich (1984, 2d Dept) 100 App Div 2d 575, 473 NYS2d 507, the husband appealed from portions of a judgment of Special Term that directed him to name his children as dependents on his health insurance policy without specifying when the coverage may be terminated. The Appellate Division modified the judgment, holding that while Supreme Court was expressly authorized to direct the husband to maintain both his health insurance policy and his life insurance policy for the benefit of his minor children, it had erred in failing to fix the duration of such policies.

In Oneida County Dept. of Social Services ex rel. Heidi S. v. Paul S., 41 A.D.3d 1189, 837 N.Y.S.2d 456 (4th Dep't 2007), leave to appeal denied, 9 N.Y.3d 810, 844 N.Y.S.2d 786, 876 N.E.2d 515 (2007), petitioner commenced a proceeding to modify a support order, and respondent consented to the modification by agreeing to pay $50 per month for child support. The Support Magistrate's order set forth that health insurance "is not available and affordable at this time." Petitioner filed an objection, contending that the Family Court Act and the Domestic Relations Law both require support orders to contain language directing any legally responsible relative to provide health insurance benefits when such coverage becomes available if such coverage is not presently available. Family Court determined that, although petitioner was correct that the language with respect to health insurance benefits was mandatory, the decision whether benefits were available, i.e., reasonable in cost, should be made by the court, and the Support Magistrate had in fact determined that health insurance benefits were not available. The court therefore granted the objection to the extent of providing that the parties shall notify petitioner "in writing regarding any change in

health insurance benefits available to them." The court further ordered that petitioner "shall not issue a medical execution without a determination made by a court of competent jurisdiction that the health insurance benefits are available' " within the meaning of Family Court Act 416(d)(2). The Appellate Division rejected petitioner's argument that the court erred in limiting petitioner's authority to issue a medical execution pursuant to CPLR 5241(b)(2)(I). CPLR 5241(b)(2)(I) provides that, "[w]here the court orders the debtor to provide health insurance benefits for specified dependents, an execution for medical support enforcement may . . . be issued by the support collection unit." Pursuant to Family Court Act 416(h), the court shall direct the legally responsible relative to enroll the eligible dependents to receive health insurance benefits where the court determines that health insurance benefits are available. Available health insurance benefits' are any health insurance benefits that are reasonable in cost and that are reasonably accessible to the person on whose behalf the petition is brought (FCA 416[d][2]). The Support Magistrate determined that health insurance benefits were not available, and respondent was not ordered to provide such benefits. Thus, the prerequisite for the issuance of a medical execution, i.e., an order directing a debtor to provide health insurance benefits (see CPLR 5241[b][2][I]), had not been met. The court properly determined that petitioner lacked authority pursuant to CPLR 5241(b)(2)(I) to issue a medical execution in the absence of a determination by the court that health insurance benefits are available.

EMANCIPATION

SETTLEMENT CONSIDERATIONS:

Under New York law the child support obligation ends when the child attains the age of 21 years, unless extended by the agreement of the parties. The agreement you negotiate should provide the age at which child support payments terminate if after the age of 21. Where an agreement makes provision for the support of the children of the marriage, the paying spouse's obligation for each child, respectively, terminates upon each child attaining age 21. Child support obligations beyond age 21 cannot be compelled unless the contract provides that a parent's obligation of support will continue to a later date. Since the child support obligation continues to the age of 21 a parent may not relieve himself or herself from this obligation by providing that it will end earlier, such as when the child attains the age of 18, unless the child is emancipated.

An agreement provision which relieves a parent of the child support obligation when the child is employed, but not economically independently of his or her parents, even though not living at home, will not be enforced. An emancipation clause in an agreement, based upon the child working full time should provide: 7. Engaging in full-time employment, such that the child is self-supporting ,

DRAFTERS NOTES:

An agreement usually contains a provision providing that child support will terminate upon the emancipation of the child.

The customary emancipation events are the following:

1. Attaining the age of twenty-one (21) years. However, it is customary, but not required, that the agreement provide that the emancipation shall be deemed to be defined as extending beyond the twenty-first (21st) birthday of the child, only if, and so long as, the child continuously pursues a college education on a full-time and continuous basis, and with reasonable diligence; but in no event beyond the date on which the child attains the age of twenty-two (22) years. "College education" does not normally include the pursuit of courses in the evening.

2. Marriage of the child, even though such marriage may be void or voidable, and despite any subsequent annulment thereof.

3. Permanent residence of the child away from the custodial parent. Residence at a boarding school, camp, or college or travel during holiday, summer, and other school or college recesses is usually not deemed to be a permanent residence.

4. Death of the child, the Mother or the Father.

5. Judgment of a Court giving exclusive custody of the child to the parent who, at the time of the execution of the agreement, is the non-custodial parent.

6. Entry of the child into the military service. Usually the parties provide that such emancipation shall continue only as long as the child is active in such military service, and in the event of discharge prior to the happening of another emancipation event, the child shall again be deemed to be unemancipated until the occurrence of another emancipation event.

7. Engaging in full-time employment. Usually the parties provide that (1) engaging by the child in part-time employment (less than 25 hours per week) shall not constitute emancipation and (2) engaging by the child in full-time employment during vacation and summer periods and school and college intersessions and while fully matriculated at college and other recesses shall not be deemed emancipation. Emancipation stemming from employment is usually deemed terminated upon the cessation by the child from full-time employment before any other emancipation event. In such event the child is usually deemed to be unemancipated until the happening of another emancipation event.

CASE LAW YOU SHOULD KNOW:

The mutual parental duty of child support is not absolute. It may be suspended or terminated before age twenty-one if the child is sooner emancipated. Children are "emancipated" if they become economically independent of their parents through employment, by marriage or entry into the military service. They may be deemed

constructively emancipated if they are guilty of egregious misbehavior, such as makes it inequitable to enforce the support obligation, or if without cause, they withdraw from parental control and supervision (Alice C. v Bernard G. C. ,193 AD2d 97, 602 NYS2d 623 (2 Dept 1993]).

In Roe v Doe (29 NY2d 188, 324 NYS2d 71, 272 NE2d 567 [1971]) the Petitioner was the court-appointed guardian for a 20-year-old student at the University of Louisville who had been fully supported by her father, until April of 1970. After living in the college dormitory for a time, the daughter, contrary to the father's prior instructions and without his knowledge, took up residence with a female classmate in an off-campus apartment. Upon learning of this deception, the father cut off all further support and instructed her to return to New York. Ignoring her father's demands, the daughter sold her automobile, which had been a gift from her father and finished the school year, living off the proceeds realized from the sale. During the following summer, the daughter enrolled in summer courses at the university and upon her return to New York chose to reside with the parents of a female classmate on Long Island. The Court of Appeals held that where "a minor of employable age and in full possession of her faculties, voluntarily and without cause, abandons the parent's home, against the will of the parent and for the purpose of avoiding parental control she forfeits her right to demand support." The Court of Appeals stated that to hold otherwise would be to allow a minor of employable age to deliberately flout the legitimate mandates of her father while requiring that the latter support her in her decision to place herself beyond his effective control.

In Parker v Stage (43 NY2d 128, 400 NYS2d 794, 371 NE2d 513 [1977]), the Commissioner of Social Services commenced a proceeding to compel the father to contribute toward the support of his 18-year-old daughter, who, voluntarily and against his wishes, left his house to live with her paramour, gave birth to a child out of wedlock, and then obtained public assistance. After her parents were divorced the girl remained in her father's custody. She did not return to school in the fall of 1974. In October, shortly after her 18th birthday, she left home while her father was at work. After the father located her she returned home and for several months intermittently resided with her father. For long periods of time she would "disappear." On each occasion her father accepted her back and continued to support her. He arranged for her to return to school. He continuously urged her to resume her schooling but she refused. She also refused to discuss her goals with him. He helped her to obtain a job, but she quit after four weeks. In the spring of 1975 she took up permanent residence with her paramour who was also unemployed, and in the fall of 1975 she gave birth to a child out of wedlock. She then applied for aid to dependent children and obtained public assistance for her child and for herself, as the mother of an eligible child. In February, 1976 the Commissioner of Social Services commenced a support proceeding against the father in the Family Court, pursuant to New York Social Services Law §101-a(3) which authorizes a social services official to institute a support proceeding against a parent or other responsible relative if the applicant or recipient of public assistance "fails" to do so. On appeal the Commissioner admitted that the daughter "willfully abandoned her home with her father" and thus would be unable to compel him to

support her if she had brought the suit on her own behalf. The Commissioner argued however, that when the suit is brought by a social welfare official pursuant to section 101 of the Social Services Law, the duty to support "is absolute upon a showing of sufficient ability on the part of the parent. There is no other qualification or exception in the statute." The Court of Appeals affirmed the dismissal of the petition, holding that the courts below could properly refuse to compel the father to pay for her support even though she was receiving public assistance. The Court of Appeals held that the policy enunciated in Roe v Doe applies when the suit is brought by a public welfare official to compel a father to support a child who would otherwise become a public charge. While it was once the policy of this State to place the financial burden of supporting needy individuals upon designated relatives, rather than the public, in order to reduce the amount of welfare expenditures, in recent years, however, the Legislature relented and the laws were amended to relieve individuals of the obligation to support grandchildren, adult children and parents who were unemployed and destitute. Thereafter the burden passed to the public. The Court of Appeals did not agree with the Commissioner that whenever an older child chooses to leave home, for any reason, the parents must pay for the child's separate maintenance or contribute support if the child applies for public assistance. The courts have discretion 19 and must still consider the impact on the family relationship and the possibility of injustice in the particular case. The fact that the child is eligible for public assistance may permit her to avoid her father's authority and demands, however reasonable they may be. But it does not follow that the parent must then finish what has been begun by underwriting the lifestyle which his daughter chose against his reasonable wishes and repeated counsel.

In Alice C. v Bernard G. C., (193 AD2d 97, 602 NYS2d 623 [2 Dept 1993]) the Second Department held that a child who left his father's home following a heated argument about living with his mother and thereafter had little contact with his father had not emancipated himself. The parties' 1984 divorce judgment, which incorporated to survive their 1984 stipulation of settlement, gave custody of the parties' two youngest daughters to the mother and custody of the parties' 13-year-old son, Joseph, to the father. No provision for Joseph's support was included in either the stipulation of settlement or the judgment of divorce. In May, 1986 when Joseph was 15 years old, he and his father became involved in a "confrontation," and as a result, Joseph left his father's home to live with his mother and sisters. Following this change in physical custody, the father began voluntarily making payments of $650 per month directly to Joseph, who turned these funds over to his mother to use for his support. The father ceased these payments when Joseph was 18 years old. The mother responded by filing a petition to modify the parties' divorce judgment by requiring the husband, inter alia, to pay $250 per week each for the support and maintenance of the two youngest children, Alexandra and Joseph. At the hearing, the father testified that Joseph's academic performance deteriorated progressively during the winter of 1986, and, " one evening in May 1986 when he and Joseph began to quarrel over a school homework assignment the argument was on the point of turning into a physical confrontation

when he advised Joseph that he was going to call the police. While his father telephoned the police precinct, Joseph put on his coat and prepared to leave. As Joseph left the residence, his father warned him, "you go out that door, do not come back." On appeal, the father argued that Joseph emancipated himself by his conduct, which included leaving the father's home "voluntarily," making no effort to return to his father's residence, and not speaking to his father following the May 1986 argument. The father also argued that Joseph's wasteful and irresponsible use of a $41,000 personal injury award established his emancipation. The Appellate Division rejected the argument that Joseph was emancipated because he was economically independent of his parents, as the record contained insufficient evidence to justify a finding that Joseph was self-supporting. At the time of the hearing, Joseph was unemployed, was living with his mother, and was attending a local community college as a full-time student. Nor did his dissipation of the personal injury settlement he received when he reached the age of 18 render him emancipated because a parent is not entirely relieved of support obligations merely because the child has been awarded a sum of money as compensation for a personal injury. The Appellate court then found that the evidence presented at the hearing did not establish that Joseph left his father's home without cause to avoid parental control. During the course of the heated argument, the father told the son that he was calling the police, and warned him that if he left the house, he should not return. When asked at the hearing whether he would have permitted Joseph to reside with him following the altercation, the father responded, "[i]n the presence of the police he would have been allowed back in the house." It found that although the mother did not formally apply for a change in custody, it was clear that after the argument, the father did not want Joseph to live with him, and he effectively consented to the new custodial arrangement by executing a consent form to allow Joseph to change schools. Under these circumstances, the court could not conclude that Joseph left his father's home, or remained away from the home, against his father's will. The father also maintained that Joseph abandoned him because, in the wake of the argument which led to the change in custody, he never contacted him or visited him. The court found this was a case in which the father was responsible for abandoning his son because the record was virtually devoid of any evidence to demonstrate that the father made a serious effort to visit or establish a relationship with Joseph after he left his home. In contrast, Joseph testified that he still loved his father, and that, to the best of his knowledge, his father had never attempted to contact him.

Where an agreement makes provision for child support, the paying spouse's obligation ordinarily terminates upon the children becoming emancipated or reaching their majority (Harwood v. Harwood, 182 Misc 130, 49 N.Y.S.2d 727 [1944], affd 268 App Div 974, 52 N.Y.S.2d 573), which is 21 in New York, unless the contract provides that his or her obligation of support will continue after the age of 21 or the emancipation of the child (Nichols v. Nichols, 306 N.Y. 490, 119 N.E.2d 351 [1954]). The fact that a child has been inducted into the Armed Forces does not release the paying parent from the performance of his or her obligation under the terms of a separation agreement to make specified payments for the support of the child. The

fact that children have been emancipated before reaching age 21 does not release the paying parent from his or her obligation to support them under the terms of a marital agreement, unless the agreement provides that emancipation will have such effect. (Harwood v. Harwood, 182 Misc 130, 49 N.Y.S.2d 727 [1944] , affd 268 App Div 974, 52 N.Y.S.2d 573.)

Parents can not contract away their children's right to receive adequate support. They never could. A separation agreement cannot eliminate or diminish either parents duty to support their child. The initial adequacy of an agreement may be challenged at any time. The terms of an inadequate child support provision in an agreement do not bind the court or the child and cannot support a civil action for breach of contract (Maki v Straub, 167 A.D.2d 589, 563 N.Y.S.2d 218 [3 Dept 1990]). An agreement to waive the right to initially seek or obtain a modification of child support violates public policy and is void (Harriman v Harriman, 227 A.D.2d 839, 642 N.Y.S. 2d 405 [3 Dept 1996]); See also Strenge v Bearman, 228 A.D.2d 664, 645 N.Y.S. 2d 315 [2 Dept 1996]), holding that an action to enforce an agreement in which a parent purports to contract away his/her child support obligation contravenes public policy.)

In Thomas B v Lydia B.,--- N.Y.S.2d ----, 2009 WL 3127737 (N.Y.A.D. 1 Dept.) the First Department held that two parents may not, by written agreement, terminate the child support obligation because of the child's full-time employment, without a simultaneous showing of the economic independence of the child. The parties stipulation provided for child support until the child was 21 or emancipated. It defined emancipation as, inter alia, "the Child's engaging in fulltime employment; fulltime employment during a scheduled school recess or vacation period shall not, however, be deemed an emancipation event." The Court held that the agreement violated public policy. Economic independence from the child's parents is not established by merely working a standard, full-time work week. During the time in question the child was working 35 hours per week and living in a halfway house as part of his treatment for substance abuse, and he received financial support from the mother in addition to her payment of 100% of his unreimbursed medical expenses. The Court held that even where a child is working but still relies on a parent for significant economic support such as paying for utilities, food, car insurance, medical insurance and the like, the child cannot be considered economically independent, and thus is not emancipated. This is true even where the child is residing with neither of the parties, so long as the child is still dependent on one of the parties for a significant portion of his or her support. (Matter of Cellamare v. Lakeman (36 AD3d 906 [2007]), Moreover, as the parties cannot contract away the duty of child support the emancipation provision was invalid.

In Drumm v Drumm, --- N.Y.S.2d ----, 2011 WL 4975452 (N.Y.A.D. 3 Dept.) the parties' separation agreement defined “emancipation” as, among other things, a "child establishing a permanent residence away from his or her custodial parent. The Third Department held that a parent is statutorily obligated to support his or her child until the

age of 21 (see Family Ct Act 413[1]) unless the child is sooner emancipated, which occurs, insofar as was relevant here, when the child attains economic independence through employment. The fact that a child may work full time is not determinative, as a child cannot be deemed economically independent if he or she still relies upon a parent for significant economic support. This remains true even where, as here, the child in question no longer resides with one of the parties, for long as the child is still dependent on one of them for a significant portion of his or her support. Here, although the father testified that the daughter went to work full time after graduating from high school, the father failed to establish that she had achieved economic independence. Notably, there was no documentation of her salary or expenses or the degree to which she continued to receive financial support from her mother. Accordingly, the Support Magistrate's determination that she was emancipated could not stand. In a footnote the Court pointed out that to the extent that the parties' separation agreement defined emancipation as, among other things, a "child establishing a permanent residence away from his or her custodial parent," it noted that "the parties cannot contract away the duty of child support" (citing Matter of Thomas B. v. Lydia D., 69 A.D.3d 24, 30 [2009]).

Where a separation agreement makes provision for the support of the children of the marriage, the paying spouse's obligation thereunder ordinarily terminates upon the children reaching their majority, and cannot thereafter be enforced,(Harwood v. Harwood, 182 Misc 130, 49 N.Y.S.2d 727 [1944]) , affd 268 App Div 974, 52 N.Y.S.2d 573), unless the contract provides that his or her obligation of support will continue thereafter (Nichols v. Nichols, 306 N.Y. 490, 119 N.E.2d 351 (1954).

Under Domestic Relations Law § 240 (1-b)(b)(2) and Family Court Act § 413 (1)(b)(2)), child support is defined as a sum to be paid by either or both parents, pursuant to court order or agreement, for an unemancipated child under the age of twenty-one. The parties may expand their obligations and agree that child support shall continue beyond the age of 21, (See Genther v. Genther, 180 A.D.2d 662, 574 N.Y.S.2d 777 [2 Dept 1992]), or that support obligations survive the death of either of them (Cohen v. Cronin, 39 N.Y.S.2d 42, 382 N.Y.S.2d 724 [1976]). Unless the contract provides otherwise, it is not a defense to an action to enforce the provisions of an agreement providing for the support of a parent and child, that the child is no longer living with her, or is living with the paying spouse. (Nichols v Nichols, 306 N.Y. 490, 119 N.E.2d 351 [1954]); Rehill v Rehill, 306 N.Y. 126, 116 N.E.2d 281 [1954]).

In Nicohols v Nichols, (306 N.Y. 490, 119 N.E.2d 351 [1954]) , the husband was obligated to continue to pay sum provided for in separation agreement despite daughter's reaching majority where the agreement specified a single sum periodically for support of wife and two children.

In Tuchrello v Tuchrello, (204 A.D.2d 1020, 613 N.Y.S.2d 86 [4 Dept 2004]), the

Appellate Division held that Supreme Court erred in granting defendant's application to modify the child support provisions of the parties' stipulation that was incorporated into but not merged with the judgment of divorce. Defendant sought an order directing plaintiff to pay child support. It held that contrary to Supreme Court's determination, the change in residence of one child from plaintiff's residence to defendant's residence, did not, under the circumstances of the case, constitute an unanticipated and unreasonable change in circumstances because the parties' stipulation contemplated that possible change in residence.

In Winnert-Marzinek v Winnert, (291 A.D.2d 921, 737 N.Y.S.2d 200 [4 Dept 2005]), the stipulation was silent as to the effect of a change of residence of a child. The Appellate Division held that Supreme Court properly determined that the change of residence of the parties' child from plaintiff's home to defendant's home constitutes "a change of circumstances warranting a departure from the parties' stipulation and requiring application of the Child Support Standards Act standards “where, as here, the parties' stipulation is silent with respect to the effect of such a change of residence on child support.” The parties' stipulation provided for termination of defendant's obligation to pay child support "as the children reach emancipation or age 21." Because the stipulation was "tellingly silent" on the effect of a child's change of residence on child support, the Appellate Division concluded that such an occurrence constitutes an unanticipated change of circumstance. Unless an agreement provides otherwise, the fact that children become emancipated before reaching twenty-one does not operate to release the paying parent from his or her obligation to support them under the terms of an agreement.

Where, under the terms of a separation agreement the father was obligated to support his child "until the said child marries", the court said that the fact of the marriage of the child, while she was yet under age and without the consent of her mother or father, was not such a marriage as is contemplated within a realistic construction of such clause (Ziluck v. Ziluck, 23 Misc 2d 323, 200 N.Y.S.2d 78 [1960] , revd on other grounds (1st Dep’t) 12 A.D.2d 764, 209 N.Y.S.2d 1008).

Where the children change their name that is not an emancipation event, absent a provision in the agreement providing otherwise. In Merl v Merl, (67 N.Y.2d 359, 493 N.E.2d 936, 502 N.Y.S.2d 712 [1986]), the parties separation agreement that was incorporated into but not merged with the judgment of divorce obligated defendant to pay child support and obligated him to bequeath two thirds of his estate to the children. The wife, Merl who was given custody of the children remarried. She and her children resided with her new husband, Ken Zimmerman. Defendant sought a modification of the support obligations enuring to his two sons and the obligation to bequeath a part of his estate to them contending that they had abandoned him by legally changing their surname to Zimmerman and refusing to visit with, speak to, or maintain any relationship with him. The Court of Appeals pointed out that the case law distinguishes between modification of a separation agreement and that of a divorce decree. A separation agreement that is incorporated into but not merged with a divorce decree is an independent contract binding on the parties unless impeached or challenged for some cause recognized

by law. "Courts of this State enjoy only limited authority to disturb the terms of a separation agreement.” Since the separation agreement was neither been impeached nor challenged for any cause recognized by law the court held that defendant's request for modification of the support obligations, based on his sons' legal change of their surname, was not a valid basis on which to make the modification as requested.

PROPERTY DISTRIBUTION - EQUITABLE DISTRIBUTION AND/OR DISTRIBUTIVE AWARD

SETTLEMENT CONSIDERATIONS:

New York is an "Equitable Distribution State" and upon the dissolution of a marriage, the Court must distribute "Equitably" (not necessarily equally) all marital property, and determine each spouses right to his or her separate property. In equitably distributing marital property, the Court is required by the provisions of New York Domestic Relations Law, § 236 [B][6] to consider fourteen factors. There must be a determination as to the equitable distribution of marital property and a determination as to the ownership of the separate property of each party. The are issues decided at the trial (See Domestic Relations Law § 236[B][5]).

Separate Property Defined.

Separate Property is defined as: Property acquired before marriage; Property acquired by bequest, devise, descent or gift from a party other than the spouse; Compensation for personal injuries; Property acquired in exchange for or the increase in value of separate property; Property described as separate property pursuant to written agreement of the parties.

(2) Exception - the increase in value of separate property (or property acquired in exchange for separate property)is separate property, to the extent that the appreciation is due in part to the contributions or efforts of the other spouse.

In Price v Price, (69 N.Y. 2d 8, 511 N.Y.S.2d 219, 503 N.E.2d 684 [1984]), the Court of Appeals held that under the Equitable Distribution Law an increase in the value of the separate property of one spouse, occurring during the marriage and prior to the commencement of matrimonial proceedings, which is due in part to the indirect contributions or efforts of the other spouse as homemaker and parent, should be considered marital property. Tthe court stated that the amount of that appreciation should be added to the sum of marital property for equitable distribution. Whether assistance of a nontitled 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 spousal. If such efforts were aided in the time devoted to the enterprise, at least in part, by the indirect contributions of the nontitled spouse, the appreciation should, to the extent it was produced by the efforts of the titled spouse, be considered a product of the marital partnership and hence marital property. As a general rule, however, where the appreciation is not due in any part to the efforts of the titled spouse but to the efforts of others or to unrelated factors—including inflation or other market forces, as in the case of a mutual fund, an investment in unimproved land, or in a work of art—the appreciation remains separate property, and the nontitled spouse has no claim to a share of the appreciation.

The question under New York Domestic Relations Law § 236(B)(1)(b)(3) as to indirect contributions of the nontitled 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 appreciation during that period is considered a product of the marital partnership over which the trial court retains the flexibility and discretion to structure a distributive award equitably. The nature and measure of the services performed by the nontitled spouse as parent and homemaker and the degree to which they may have indirectly contributed to the appreciation of separate property are matters to be weighed and decided by the trial court. This is in contrast to the initial determination as to whether or not the appreciation is marital property. In this regard, the Court of Appeals rejected the Appellate Division formula for determining whether to treat the appreciation in separate property as marital property.

The Court of Appeals, in Price, established a two prong test, in accordance with the "product of the marital partnership" theme to determine whether a nontitled spouse should share in the appreciation in value during the marriage of the titled spouse's separate property. Under this test, the nontitled spouse must demonstrate that (1) the property appreciated in value during the marriage due, in part, to efforts or contributions of the titled spouse in time, money or energy; and (2) he or she contributed, in part, to such appreciation as a homemaker or parent by giving the titled spouse the time to devote to the enterprise. Under this analysis, where an asset appreciates passively during the marriage due solely to the efforts of others or market conditions, the nontitled spouse can not share in the appreciation, because the titled spouse did nothing to contribute to its increase in value, and thus, it can not be established that the nontitled spouse gave the titled spouse the time to devote to the enterprise.

In Hartog v Hartog, (85 N.Y.2d 36, 623 N.Y.S.2d 537, 647 N.E.2d 749 [1995]), the Court of Appeals addressed the issue, left unresolved by Price, whether in determining if the non-titled spouse contributed to the appreciation of separate property, he or she was required to establish a substantial, almost quantifiable connection between the titled spouses efforts and the appreciated value of the

property. It answered this question in the negative. The Court of Appeals held that requiring a non-titled spouse to show a substantial, almost quantifiable, connection between the titled spouse's efforts and the appreciated value of the asset would be contrary to the letter and spirit of New York Domestic Relations Law § 236(B)(1)(c), (B)(1)(d)(3), (B)(5)(c), (B)(5)(d)(6). New York Domestic Relations Law § 236(B)(1)(d)(3) expressly provides that appreciation in separate property remains separate property, "except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse." It reasoned that New York Domestic Relations Law § 236(B)(5)(d)(6) explicitly recognizes that indirect contributions of the non-titled spouse (e.g., services as spouse, parent and homemaker, and contributions to the other party's career or career potential) are relevant in the equitable disposition calculations just as direct contributions are. 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. 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 husband's exacting causation prerequisite. While reiterating the rule it enunciated in Price that 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 contributions, some nexus between the titled spouse's active efforts and the appreciation in the separate asset is required, the court recognized that it was time for it to realistically come to grips with the problem that when the titled spouse has only limited, yet active, involvement concerning a separate asset of non-passive character, it may be difficult, if not impossible, to link limited, specific efforts to quantifiable, tangible results and would be difficult to prove a direct causal link between the activity and the resulting appreciation.

Marital Property Defined.

Marital Property is defined as all property acquired by either or both parties; during the marriage; before execution of a separation agreement; before the commencement of a matrimonial action; regardless of the form title is held.

Distributive Award Defined.

A Distributive Award is defined as payments Provided for in a valid agreement between the parties; or Awarded by the Court; or In lieu of or to supplement of facilitate or effectuate the division or distribution of property in a matrimonial action. Payable to either party. In a lump sum or over a period of time in fixed amounts. A distributive award does not include payments which are treated as ordinary income under Internal Revenue Code.

Disposition of Property is available in an action where all or part of the relief granted is: Divorce, Dissolution, Annulment, Declaration of nullity, a proceeding to obtain a distribution of marital property following a foreign divorce.

The Court is required to Determine the respective rights of parties in their separate and marital property; and Provide for disposition of such property in the final judgment.

How is property to be distributed?

Separate property remains separate property; Marital property must be distributed equitably between the parties.

The fourteen factors.

The fourteen factors that must be considered by the court in making an equitable distribution are: (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 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; (14) any other factor which the court shall expressly find to be just and proper (Domestic Relations Law § 236 [B][5][1-14]).

In addition, where appropriate, the court must consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three, on the

fourteen factors. (Domestic Relations Law 236 [B][5][h]) .

Availability of Distributive Award.

A Distributive Award is available in lieu of equitable distribution where the Court determines an Equitable Distribution is appropriate but would be Impractical, or Burdensome, or Contrary to law (business, corporation or profession); In the courts discretion to supplement, facilitate or effectuate a distribution of marital property. The Court, in addition and without regard to title, may make an order regarding use and occupancy of the marital home and its household effects (See Domestic Relations Law § 236[B][5]).

DRAFTERS NOTES:

Equitable distribution is a tax-free distribution not included in the income of the recipient or deductible to the payor. Pension and retirement funds can be transferred to the recipient by a Qualified Domestic Relations Order ("QDRO"), leaving its retirement nature intact while avoiding violation of the anti-alienation provisions of ERISA, with its resultant penalties and taxes to the transferor. Likewise, the recipient will take the transferor's basis in any real property, recognizing the gain only at the time of the sale to a third party and only to the extent it has appreciated since the time of purchase (not the date of transfer). The transfer of appreciated property is considered a gift for income tax purposes.

Other items to consider are:

Art work and sculpture. Must be itemized. Indicate its description, purchase price, market value, and present location.

Automobiles and boats. Indicate whether the recipient is (or is not) responsible for all expenses attendant to the operation and upkeep of the automobile or boat, including insurance, oil, gasoline, dockage, and repairs.

Cash. Consider an installment payment arrangement versus a lump sum payment. Assuming a lump sum arrangement is preferred, be specific as to he date it is to be given and its form (check, wire transfer or change of title on account).

Exclusive Occupancy of the marital residence. Be sure that the occupant is obligated to remove himself or herself by a date certain. If the residence is to be sold, he or she must agree to leave the premises a certain number of days from the execution of a contract for sale of the premises. Specify who is responsible for any expenses attendant to operating the home during the period of exclusive occupancy. Make provisions for liquidated damages upon the occupants failure to leave the

premises by the specified date or event. Consider who will pay the moving costs of the occupant and who will arrange for the move. Make provisions to access the premises for inspection or otherwise prior to sale. Photographing or videotaping the premises before leaving the premises is wise to have evidence of its then condition.

Jewelry. Must be itemized. Indicate its description, purchase price, market value, source of funds to acquire, separate or personal and total value.

Personal Property. Make lists of who gets what. The knickknacks, bric-a-brac, crystal, china, furniture and the like are nightmarish to divide, so forgotten items may be gone forever.

Pension Plans and Retirement Funds. Generally, transferring a portion of these funds to the spouse as part of the Equitable Distribution is advantageous. The transferee receives the retirement funds on a tax-free basis. They continue to accumulate tax free until distribution to him or her from the retirement plan. The transferor makes the transfer tax-free and has no penalty. It is important to net out the value of this tax free exchange in calculating the Equitable Distribution.

Real Property. Indicate if title and possession are to be transferred to the husband or wife or sold. Specify who pays the cost of the transfer tax stamps. If a joint tenancy or tenancy in common and title is transferred to one spouse, provide for the relinquishment of all claims and rights to the property and release the transferor from all notes and obligations attributable to the property. A hold harmless clause should be employed, as well as an agreement for a party to use his or her best efforts to have her or him removed as an obligor under the notes, mortgages and obligations attributable to the property. If the property is to be sold, specify the details of the sale, including, but not limited to the sale price, costs, brokers fees, expenses, and legal fees.

Real Estate Considerations in General. Properties held jointly revert to the survivor should one party die before the dissolution of the marriage. To alter this situation you may change the manner in which title is held immediately upon execution of the Agreement, but you must specifically provide for this in the Agreement. It is recommended to have the transfer documents executed simultaneously with the execution of the Agreement. All real property transferred, if any, must provide for the tax consequences, costs of sale and carrying costs.

Stocks and Bonds. Be sure the value placed on the stocks and bond has a specific date, an approximate value and an understanding that fluctuations in valuation are not a basis for claiming fraud.

CASE LAW YOU SHOULD KNOW:

An agreement by the parties, made before or during the marriage, may include ... (2) provision for the ownership, division or distribution of separate and marital property. (Domestic Relations Law § 236[B][3], Subdivision 2)

Presumption as to Marital Property.

A spouse seeking a share of the other spouses property has the burden of establishing that an asset is "marital property" and the value of this properly before the court can award a distributive award of a portion of it. If he or she fails to meet that burden it is error to make a distributive award. The rationale behind this rule is that the court must know the value of the property it is distributing before making an equitable distribution or distributive award, in order to determine the amount being awarded each spouse (Davis v Davis, 128 A.D.2d 470, 513 N.Y.S.2d 405 [1 Dept 1987]), [pension and keogh]; Tabriztchi v. Tabriztchi, 130 A.D.2d 652, 515 N.Y.S.2d 582 [2 Dept 1987] [no proof of value of husbands pension]; Seckler-Roode v Roode, 36 AD3d 889, 830 N.Y.S.2d 211 [2 Dept 2007] [husband not entitled to share of wife's pension where he failed to prove its value]; D'Amato v D'Amato, 96 A.D.2d 849, 466 N.Y.S.2d 23 [2 Dept 1983]; LaBarre v. LaBarre, 251 A.D.2d 1008, 674 N.Y.S.2d 235 [4 Dept 1998] [Husband failed to sustain his burden to prove that stocks and bonds in his vault were gifts from his parents that would not be subject to equitable distribution, particularly since husband admittedly commingled alleged gifts with marital assets]; Hartog v. Hartog, 194 A.D.2d 286, 605 N.Y.S.2d 749 [1Dept 1993])

Unless a spouse proves otherwise, all property obtained by either spouse or both spouses during their marriage is considered to be marital property, regardless of who holds the legal title to that property (Heine v. Heine, 176 A.D.2d 77, 580 N.Y.S.2d 231 [1 Dept 1992]).

Burden of Proof and Presumptions

The burden of proving that property is separate property is on the spouse who claims the property is separate (Sclafani v Sclafani, 178 A.D.2d 830, 577 N.Y.S.2d 711 ([3 Dept 1991]).

The term "marital property" is broadly interpreted. The term "separate property" is narrowly interpreted. The reason for this is to give effect to the economic-partnership concept of the marriage relationship. In Helen A. S. v Werner R. S.(166 A.D.2d 515, 560 N.Y.S.2d 797 [2 Dept 1990]) the Appellate Division held that the term "marital property" is to be broadly construed while the term "separate property" is to be narrowly construed. In Sarafian v Sarafian (140 A.D.2d 801, 528 N.Y.S.2d 192 [3 Dept 1988]) the Court held that the term "marital property" is to be broadly construed while the term "separate property" is to be narrowly construed. Where a party fails to trace the source of property claimed to be separate, the court is justified in treating it

as marital. Although defendant was unable to specifically trace the source of the moneys he used for purchase of $500,000 in treasury bonds, the conclusion was inescapable that they were purchased with his separate property. There is a presumption that assets which are combined or mixed in with property that was gotten during the marriage are marital property. The spouse seeking to rebut or disprove that presumption must adequately trace back to the source of the funds or asset he/she is claiming is separate property.

There is a presumption that assets commingled with other property acquired during the course of the marriage are marital property. The party seeking to rebut that presumption must adequately trace the source of the funds (Pullman v Pullman, 176 A.D.2d 113, 573 N.Y.S.2d 690 [1st Dept 1991]; Lischynsky v Lischynsky, 120 A.D.2d 824 [3d Dept 1986]; Sarafian v Sarafian, 140 A.D.2d 801, 528 N.Y.S.2d 192 [3d Dept 1988]; Di Nardo v Di Nardo, 144 A.D.2d 906, 534 N.Y.S.2d 25 [4th Dept 1988]).

Separate property which is commingled with marital property or subsequently titled in both names is presumed to be marital property. Once converted to marital property the property does not resume its status as separate, even if all the marital funds are removed from the account (Chiotti v Chiotti, 12 A.D.3d 995, 785 N.Y.S.2d 157 [3d Dept 2004]).

Separate property that is commingled, for example, in a joint bank account, loses its character of separateness and a presumption arises that each party is entitled to a share of the funds (see Banking Law 675[b]). That presumption, may be overcome by “clear and convincing evidence”, either direct or circumstantial, that the account was created only as a matter of convenience (Crescimanno v Crescimanno, 33 A.D.3d 649, 822 N.Y.S.2d 310 [2d Dept 2006]).

A spouse seeking a share of the other spouses business or a share of the amount of the appreciation of the other spouses separate property has the burden of proving its values at the relevant dates. If that spouse fails to meet the burden of proof in establishing the value of the real estate, a business or any other asset he/she is not entitled to a distributive award instead of a share of it.

In Capasso v. Capasso (129 A.D.2d 267, 517 N.Y.S.2d 952 [1st Dept 1987]) the court held that the burden was on wife to prove extent of husband's business' appreciation during marriage, a burden which necessarily required the wife to prove the value of business as of the beginning of the marriage, which she did not do, for purposes of distribution of property pursuant to divorce.

In Morrow v Morrow (19 A.D.3d 253, 800 N.Y.S.2d 378 [1st Dept 2005]) the Appellate Division held that while defendant was entitled to a share in the appreciation of her husband's separate property business during the marriage, owing to her own contributions thereto, she nonetheless failed to satisfy her burden of establishing "the baseline value of the business and the extent of its appreciation, and affirmed the

denial of any award thereof.

In Stavans v. Stavans (207 A.D.2d 392, 615 N.Y.S.2d 712 [2d Dept 1994]) the Appellate Division held that it was not an improvident exercise of discretion to refuse to grant the husband credit for his alleged separate property contributions on the ground that the husband's claims were not established by “clear and convincing evidence.”

A spouse seeking a share of the other spouses business or the appreciation of that spouse’s separate property has the burden of proving its values at the relevant dates. If that spouse fails to meet the burden of proof in establishing its value he or she is not entitled to a distributive award in lieu of a share of it (Hirschfeld v. Hirschfeld 96 A.D.2d 473,464 N.Y.S.2d 789 [1st Dept 1983]; Antoian v. Antioan 215, A.D.2d 421, 626 N.Y.S.2d 535 [2nd Dept 1995]; Chew v. Chew 157 Misc2d 322, 596 N.Y.S.2d 950 (Sup Ct, N.Y. Co, Silberman, J.); Iwahara v. Iwahara 226 A.D.2d 346, 640 N.Y.S.2d 217 [2nd Dept 1996][medical license]; Rodgers v Rodgers 98 A.D.2d 386, 470 N.Y.S.2d 401 [2d Dept 1983]).

In Davis v Davis (128 A.D.2d 470, 513 N.Y.S.2d 405 [1st Dept 1987]) the court held that as the wife failed to establish the value of her husband's medical practice which he started five years prior to the marriage; failed to prove the appreciation was marital property and failed to establish the value of his retirement plans, she was not entitled to an equitable share of them.

In Capasso v Capasso (119 A.D.2d 268, 506 N.Y.S.2d 686 [1st Dept 1986], appeal after remand [1st Dept] 129 A.D.2d 267, 517 N.Y.S.2d 952) the court held that "absent" unusual circumstances, making valuation unnecessary or unfeasible " ... consideration of the total value of the marital property is essential to the fashioning of a plan of distribution, for it is this total, after all, which has to be apportioned." Since the distribution there was made without reference to such value (and the court is required to sufficiently state the reasons for its decision in distributing property) it reversed the judgment, remanded for additional findings and held the appeal in abeyance. It stated that it simply insufficient for the court's decision merely to fix value without making further findings to disclose how the value fixed was ascertained. The court must state the facts and figures deemed essential in valuation. Here the court below did not fix the value of defendant's law practice.

Presumption of Equality of Spousal Contributions.

Equitable distribution encompasses a partnership. The wife's marital contributions as a homemaker are presumed equal in value to the husband's contribution as an income earner. The Court of Appeals has endorsed the concept that indirect spousal contributions as a spouse, parent and homemaker "should ordinarily be regarded as equal" to those of the breadwinner.

In Conner v Conner (97 A.D.2d 88, 468 N.Y.S.2d 482 [2d Dep’t 1983]) the

court held that equitable distribution encompasses a partnership, no matter what the proportionate share of capital advances and personal services and the wife's marital contributions as a homemaker are presumed equal in value to the husband's contribution as an income earner.

In O'Brien v O'Brien, (66 N.Y.2d 576, 498 N.Y.S.2d 743, 489 N.E.2d 712 [1985]) the Court of Appeals endorsed the concept that indirect spousal contributions as a spouse, parent and homemaker "should ordinarily be regarded as equal" to those of the breadwinner and cited with approval prior decisions so holding. Understanding the concept of "marital property" .

In O'Brien v O'Brien, (66 N.Y. 2d 576, 498 N.Y.S.2d 743, 489 N.E.2d 712 [1985], on remand [2d Dep't] 120 A.D.2d 656, 502 N.Y.S.2d 250) the Court of Appeals held that Mrs. O'Brien, the doctor's wife, was entitled to 40 percent ($188,800) of the present value of her husband's medical license because of the substantial contributions she made to its acquisition. The trial court had no difficulty determining the present value of the doctor's license was $472,000 because it accepted the methodology of the wife's expert who was the only expert to testify. That figure was arrived at by comparing the average net income of a college graduate and a general surgeon 29 between 1985, when Dr. O'Brien was to complete his residency, and 2012, when he would reach age 65. After considering federal income taxes, an inflation rate of 10 percent and a real interest rate of 3 percent, the expert capitalized the difference in average earnings and reduced the amount to a present value of $472,000. The Court of Appeals noted that "marital property" is a term of art and created a new species of "property" that was not anchored in common law property concepts or affected by decisions in other states having a different statutory definition. The Court of Appeals held that the enhanced earning capacity attributable to an interest in a profession or a professional career potential "(ie. a physician's license) is marital property subject to equitable distribution." Subsequent cases have extended the concept of property to academic degrees and professional licenses as well as certain careers.

EXCLUSIVE OCCUPANCY OF THE MARITAL RESIDENCE

SETTLEMENT CONSIDERATIONS:

Domestic Relations Law § 234, provides, in part, that "in any action for divorce, for a separation, for an annulment or to declare the nullity of a void marriage, the court may . . . (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 from time to time before or subsequent to final judgment, or by both such order or orders and final judgment."

In addition, Domestic Relations Law § 236(B)(5)(f) , enacted as part of the Equitable Distribution Law, provides that in actions governed by Domestic Relations Law § 236(B), in addition to making a disposition of separate and marital property as set forth in § 236(B)(5), "The court may make such order regarding the use and occupancy of the marital home and its household effects as provided in section two hundred thirty-four of this chapter, without regard to the form of ownership of such property."

Thus, the court, without regard to title, may make an order regarding use and occupancy of the marital home and its household effects. The decision to make such an award is discretionary with the court.

DRAFTERS NOTES:

If one spouse is given the right to reside in the marital residence or any other residence owned by the parties, until a certain date or the happening of an event, such as its sale, the agreement should provide that such spouse shall have exclusive occupancy of the premises. It should provide what expenses that spouse will be responsible for during the period of such exclusive occupancy (such as mortgage amortization and interest, tax escrow, fuel, insurance and utility charges, water, routine repairs and maintenance to the premises. It might provide that the spouse is obligated to pay all of the carrying charges, including but not limited to maintenance, tax, fuel, insurance and utility charges, and water. The agreement should provide for the circumstances under which that spouse may remove herself and her effects from the property, and provide who and in what amounts the parties will be responsible for those expenses which are necessary to protect and preserve the value of the property.

CASE LAW YOU SHOULD KNOW:

Where the parties are childless and healthy, there is no compelling need to award exclusive occupancy to the marital home to either party. In Ierardi v Ierardi (151 A.D.2d 548, 542 N.Y.S.2d 322 [2d Dept 1989]), the Appellate Division held that where the parties are childless and healthy there is no compelling reason to award exclusive occupancy of the marital residence to either party. However, there is also no compelling reason to direct its sale to a third party. When only one of the parties expresses an interest in continuing to live in the marital residence, a court should give that party the option of purchasing the other spouse's equitable share of the residence's value. In such a case, absent unusual or extenuating circumstances, unless title to the marital home is awarded to either spouse, the marital home should be ordered sold in the final judgment of dissolution.

The presence of young children in the marital home is an extenuating circumstance, and ordinarily exclusive occupancy of the marital home is awarded to the spouse who is awarded custody of the parties' children (Wojtowicz v Wojtowicz,

171 A.D.2d 1073, 569 N.Y.S.2d 248 [4th Dep't 1991]; See also, Tanner v Tanner, 107 A.D.2d 980, 484 N.Y.S.2d 700 [3d Dep't 1985]; Flanagan v Flanagan, 118 A.D.2d 681, 500 N.Y.S.2d 34 [2d Dep't 1986]).

In Knapp v Knapp (105 A.D.2d 1019, 483 N.Y.S.2d 461 [3d Dep't 1984]), the court held that exclusive occupancy is usually given to the custodial parent.

In Marano v Marano (200 A.D.2d 718, 607 N.Y.S.2d 359 [2d Dep't 1994]), the court held that the need of the wife, as custodial parent of the parties' two children, to occupy the marital residence, outweighed the parties' need to sell it and there was no evidence that the wife was unable to financially maintain it.

In Leabo v Leabo (203 A.D.2d 254, 610 N.Y.S.2d 274 [2d Dep't 1994]) there was no evidence that the wife could obtain comparable housing for herself and the children at a lower cost, that she was financial incapable of maintaining the marital residence, or that either party was in immediate need of his or her share of the sale proceeds. The court held that courts favor allowing the custodial parent to remain in the marital residence, at least until the youngest child reaches 18 or is sooner emancipated.

Extenuating circumstances have been held to include severe financial difficulties. Even though there are minor children, the immediate sale of the marital home has been directed in the judgment of divorce where the expenses of maintaining it are wastefully extravagant or where the parties are financially incapable of maintaining it after the dissolution, and lower cost housing is available. The marital home is usually ordered to be sold where the financial need of the parties for their share of the proceeds of its sale outweigh the need of the custodial parent to occupy the home (Stolow v Stolow, 149 A.D.2d 683, 540 N.Y.S.2d 484 [2d Dep't 1989]); Behrens v Behrens, 143 A.D.2d 617, 532 N.Y.S.2d 893 [2d Dep't 1988]); Blackman v Blackman 131 A.D.2d 801, 517 N.Y.S.2d 167 [2d Dep't 1987]).

In Lauer v Lauer (145 A.D.2d 470, 535 N.Y.S.2d 427 [2d Dep't 1988]) the Appellate Division held that th e need of the wife, as the custodial parent, to occupy the home was outweighed by the financial need of the parties to sell it. The yearly carrying costs of $34,000 exceeded the wife's income of $30,000. Although the husband earned $136,000 as of January 31, 2012 a year, it would be unduly burdensome for him to bear the cost of maintaining this home in view of his child support payments and other financial obligations and expenses. Moreover, the proceeds of the sale could be applied to the parties' substantial debts and f uture living expenses.

LIFE INSURANCE

SETTLEMENT CONSIDERATIONS:

Special Relief Defined.

Special Relief is defined as a direction to a spouse to maintain life, health, accident, medical and dental insurance for his spouse and/or children. It is available in any matrimonial action. The insurance may be in effect during a period of time fixed by the Court but the insurance must end upon the termination of the spouse's obligation to pay maintenance, child support, a distributive award, or when the beneficiary remarries or predeceases the insured. (See Domestic Relations Law § 236[B][8]).

Special relief may include a direction to: (1) Purchase, maintain or assign a policy of insurance for health and hospital care and related services for either spouse or children; Insurance cannot be for longer than party is obligated to pay maintenance, child support or a distributive award; (2) Purchase, maintain or assign a policy of insurance on the life of either spouse and designate either spouse or children of the marriage as irrevocable beneficiary (See Domestic Relations Law § 236[B][8]).

Requirements for Life Insurance.

Where an irrevocable beneficiary of any insurance policy is designated, the Insurance Law requires an insurance company to prohibit the policy holder from borrowing from the cash value of the policy or changing the name of the beneficiary of the insurance policy without the written consent of the irrevocable beneficiary, and provide written notification to the irrevocable beneficiary in the event that the policy is scheduled to lapse due to non-payment of premium. The insurance policy owner must, pursuant to an order of separation or divorce, designate his or her spouse or children as the irrevocable beneficiary of the policy of insurance, and a copy of the order must be served, by registered mail, on the home office of the insurer, specifying the name and mailing address of the spouse or children (See Domestic Relations Law § 236[B][8]).

DRAFTERS NOTES:

Generally, a spouse purchases or maintains an existing policy of life insurance for the benefit of the wife or child in an agreed upon amount usually sufficient to cover the maintenance obligations to the wife and child support obligations for the child, unless otherwise provided by will. It is not unusual for decreasing term life insurance to be purchased or maintained for the payor's maintenance obligations or obligations to pay out a cash sum over a period of time. The agreement must contain a provision that will enable the other spouse to verify that the insurance remains in effect and that the premiums are paid. If the spouse is to maintain existing policies of insurance they should be identified by insurance company, policy number and face amount. The agreement should require that the spouse not pledge, hypothecate or encumber, the

policy of life insurance insuring his life in the minimum face amount of $_____ or such lesser amount and should indicate that the other spouse will be named as sole primary beneficiary or irrevocable beneficiary thereof, as permitted by the insurance company. The spouse whose life is insured should be required to furnish whatever documents which may be necessary for the other spouse to be assured of full compliance with these provisions and the agreement should authorize the other spouse to be informed by the insurance carrier or insurance provider with respect to the status of the insurance policy and the payments of premiums, dues and assessments. The agreement should require the person providing the insurance to pay or cause to be paid all premiums, dues and assessments on the insurance policy a specified period of time prior to the end of the grace period for making payments. He should also be required to obtain an endorsement of the policy requiring that the other spouse be given prior notice of any termination or cancellation of the policy. The agreement should indicate who is entitled to any dividends on the policy and give the other spouse the right to pay the premiums and obtain reimbursement for the payment, in the event of his failure to pay any of the premiums, dues or assessments that may become due. It is important that the agreement provide that if the spouse fail to maintain the insurance policy or policies, such insurance as may not be in effect at the time his death shall be charged against that spouses estate and shall be a lien against any insurance proceeds paid to his estate.

CASE LAW YOU SHOULD KNOW:

Domestic Relations Law § 236(B)(8) authorizes the court to make an order directing a party to purchase, maintain or assign life insurance on his or her life on pendente lite applications and in the final judgment in a matrimonial action. The purpose of subdivision (8)(a), therefore, is to make certain that the payment of maintenance, distributive awards and child support are made as ordered.

In Merrick v Merrick (154 Misc 2d 559, 585 N.Y.S.2d 989 [Sup Ct 1992] , affd [1st Dep't] 190 A.D.2d 516, 593 N.Y.S.2d 192), the court directed the husband to obtain life insurance coverage of $1 million naming the wife as irrevocable beneficiary. It noted that New York Domestic Relations Law § 236(B)(8)(a) authorizes the court to direct a party to obtain life insurance and to designate the other spouse as irrevocable beneficiary. The statute was enacted to remedy the prior law under which courts were not authorized to order insurance coverage (citing 2 Foster, Freed and Brandes, Law and the Family, 2d Ed, §12:1, p. 490.). "The purpose of subdivision (8)(a), therefore, is to make certain that the payment of maintenance, distributive awards and child support are made as ordered." It noted that the statute had been applied to pendente lite support awards as well as to final determinations.

In Zerilli v Zerilli (110 A.D.2d 634, 487 N.Y.S.2d 373 [2d Dep't 1985]), the Appellate Division held that in view of the wife's lack of income and assets, the trial court should have granted the parts of her omnibus motion seeking from her husband life insurance coverage and all dental and drug expenses for herself and the infant

children of the marriage pendente lite.

In Reed v Reed (55 A.D.3d 1249, 865 N.Y.S.2d 414 [4th Dep't 2008]) the Appellate Division held that it was error to fail to provide for a reduction in the amount of the life insurance policy as the child support and maintenance obligations decreased.

INCOME TAX RETURNS AND REFUNDS

SETTLEMENT CONSIDERATIONS:

Alimony and separate maintenance payments under a decree of divorce or separate maintenance or a written instrument incident to such a decree, a written separation agreement, or a decree requiring a support or separate maintenance are deductible by the payor and includible in the income of the payee. If six requirements are met, a payment received by or on behalf of the payee spouse (or former spouse) will qualify as an alimony or separate maintenance payment. (1) The payment must be in cash. (2) The payment must not be designated as a payment that is nondeductible by the payor and nonincludible in income by the payee. (3) If the parties are separated under a decree of divorce or legal separation, they must not be members of the same household at the time payment is made. (4) The payor must not have any liability to make any such payment (or any substitute for such payment) after the death of the payee, and the divorce or separation instrument must state that there is no such liability. (5) The payment must not be treated as child support. (6) Payments must be made in each year of a defined 6 consecutive post-separation calendar year period in order for annual payments during this period in excess of $10,000 to qualify as alimony or separate maintenance payments (See IRC §71(a); IRC §215(a) and IRC §71(b).

The spouses may designate that payments, otherwise qualifying as alimony or separate maintenance payments, shall be nondeductible by the payor and excludible from gross income by the payee by so providing in a divorce or separation instrument. If the spouses have executed a written separation agreement, any writing signed by both spouses, which designates otherwise qualifying alimony or separate maintenance payments as nondeductible and excludible and which refers to the written separation agreement, will be treated as a written separation agreement (and thus a divorce or separation instrument) for the purposes of the preceding sentence. If the spouses are subject to temporary support orders (as described in §71(b)(2)(C)), the designation of otherwise qualifying alimony or separate payments as nondeductible and excludible must be made in the original or a subsequent temporary support order. A copy of the instrument containing the designation of payments as not alimony or separate maintenance payments must be attached to the payee's first filed return of tax (Form 1040) for each year in which the designation applies (Reg §1.71-IT 8.)

The general rule as to child support is that payments fixed in the divorce or separation instrument as child support are not deductible by the payor and not included in the recipient's gross income. If a payment specified in the divorce or separation instrument will be reduced on the happening of a contingency specified in the instrument relating to a child of the payor spouse, such as attaining a specified age, marrying, dying, leaving school, or a similar contingency or at a time which can be clearly associated with a contingency of a kind specified in Internal Revenue Code § 72(c)(2)(A), an amount equal to the amount of such reduction will be treated as an amount fixed as payable for the support of the children of the payor spouse (IRC § 72(c)(2). Spouse includes a former spouse (IRC § 71(d). The section does not apply if the spouses file a joint return with each other (IRC § 71(e).

If payments are first applied to child support. If any payment is less than the amount specified in the instrument, then so much of the payment as does not exceed the sum payable for child support is considered a payment for child support (IRC §71(c)(3).

A noncustodial parent may claim the exemption for a dependent child only if the noncustodial parent attaches to his/her income tax return for the year of the exemption a written declaration from the custodial parent stating that he/she will not claim the child as a dependent for the taxable year beginning in such calendar year (Reg §1.152-4T 2. IRS form 8332 may be used for this purpose.)

The exemption may be released for a single year, for a number of specified years (for example, alternate years), or for all future years, as specified in the declaration. If the exemption is released for more than one year, the original release must be attached to the return of the noncustodial spouse and a copy of such release must be attached to his/her return for each succeeding taxable year for which he/she claims the dependency exemption (Reg §1.152-4T 4).

DRAFTERS NOTES:

The income tax provisions of the Internal Revenue Code that apply to maintenance, child support, property distribution and the sale of the marital residence can be complex and in many cases it may be beyond the knowledge and ability of counsel attorney to advise the client with regard to the tax consequences of the provisions of the agreement. In anything other than the most simple case, it is suggested that counsel should advise the client to obtain tax advice from a competent profession. In such case, the agreement should recite that the attorneys have not given the client tax advice, and that the attorney has recommended that the client obtain tax advice from a competent professional.

The agreement should provide who is responsible for errors, omissions, penalties, assessments, and interest on previously filed joint income tax returns and the costs associated with opposing or defending an audit or assessment, including

accounting fees. So long as the parties remain married, and the “innocent spouse” rule is applicable, it may be a good idea for them to file joint income tax returns. Such a decision should be based upon the advice of the parties accountant. If there is going to be a refund the agreement should contain a provision indicating how the refund, if any, is going to be distributed. The agreement should contain provision as to who claims the child(ren) as an exemption. Unless provided otherwise in writing, the custodial parent is entitled to the exemption. The custodial parent must sign IRS form 8332 to entitle the non-custodial parent to claim the exemption.

CASE LAW YOU SHOULD KNOW:

It is within the sound discretion of the Supreme Court pursuant to IRS Temporary Regulations §1-71-IT(a) to provide that maintenance payments be neither deductible to the husband nor taxable to the wife (Lasry v Lasry, 180 A.D.2d 488, 579 N.Y.S.2d 393 [1st Dep’t 1992]).

LEGAL REPRESENTATION AND FINANCIAL DISCLOSURE

SETTLEMENT CONSIDERATIONS:

In order to avoid a successful challenge to the validity of the agreement it should indicate that the parties were represented by counsel of their own choosing, and contain language indicating that they were fully informed with regard to their rights and obligations of the parties, when they signed the agreement.

In order to avoid a successful challenge to the validity of the agreement on the grounds of fraud, where the parties are waiving all or part of their rights to financial disclosure, the agreement should recite what financial documents have been exchanged and that the spouses are relying on the representations contained in those documents in entering into the agreement. It is suggested, that at a minimum, each party provide to the other a sworn net worth statement which is referred to in the body of the agreement, and that the agreement contain a representation that net worth statements have been exchanged and that each spouse has relied upon the representations in the net worth statement of the other spouse in the execution of the agreement. It has been held that language in an agreement that there was no duress, coercion or fraud is insufficient to establish the agreement was free from coercion.

DRAFTERS NOTES:

The agreement should include the name and address of the attorneys who represented each of the parties and a statement that each counsel was chosen freely

and competently represented his or her client.

The parties should acknowledge the extent of the financial disclosure provided and, if there was no formal financial disclosure, the opportunities each party had for disclosure of the assets, liabilities and income of each party. The agreement should provide that each of the parties has delivered to the other party a sworn statement of net worth and a copy of it should be annexed to the agreement. The agreement should recite that each of them has accurately represented to the other the state of their finances in the statement , including their income, assets and liabilities, and upon which each of the parties has relied in executing the Agreement.

CASE LAW YOU SHOULD KNOW:

During marriage spouses are subject to the special duties imposed by their confidential relationship. The spirit of the Equitable Distribution Law requires full disclosure of all financial information, unless there is an intelligent waiver of the right to disclosure. New York court rules require the parties to exchange statements of net worth, and liberal discovery procedures on financial matters are available (See Domestic Relations Law §236[B][4], CPLR 3111, 3134; Roussos v. Roussos, 106 Misc 2d 583, 434 N.Y.S.2d 600 [Sup Ct 1980]).

Although some decisions have sustained the validity of an agreement where there has been an intelligent waiver and full disclosure was not made, on the basis that there was no duty to disclose future events that may or may not happen, it invites trouble. Courts ordinarily are wary of waivers of full disclosure. In Kojovic v Goldman (35 A.D.3d 65, 823 N.Y.S.2d 35 [1st Dep't 2006]), after the parties signed an agreement the wife commenced an action for fraud, reformation, breach of contract and rescission of the settlement agreement, claiming that it was procured through fraud based on her husband's affirmative representations as to the non-liquidity of his Capital IQ shares. She asserted an obligation on the husband's part to have disclosed to her the value and potential sale of his Capital IQ shares. The Appellate Division held that the action was barred by precedents from it and other courts. It relied upon it's decision in DiSalvo v Graff (227 A.D.2d 298 [1996]),where it held that a party may not challenge the validity of a settlement agreement based on a claim that she undervalued assets which, the record showed, were disclosed by her former spouse and known to her at the time. It was uncontroverted that the wife, highly educated and intelligent, with professional experience as a securities analyst, counseled by experienced matrimonial attorneys and an accountant she had retained to conduct an independent review, determined that she required no further information about Capital IQ. Moreover, by her own admission, the wife resisted her husband's first attempt at a quick divorce, which showed that she was under less pressure to rush to settlement than was the wife in DiSalvo. Thus, there was no basis, factually or legally, to distinguish DiSalvo from the case. The wife had only herself to blame for her failure to

inquire further. Such failure is not, however, a basis upon which to vacate the settlement.

It has been held that where a spouse is not afforded any discovery, and was not represented by counsel it creates a rebuttable inference of overreaching (Levine v. Levine, 56 N.Y.2d 42, 451 N.Y.S.2d 26, 436 N.E.2d 476 [1982]); Goodison v. Goodiso-n, 48 N.Y.2d 786, 423 N.Y.S.2d 922, 399 N.E.2d 952 ; Tuck v. Tuck, 129 A.D.2d 792, 514 N.Y.S.2d 782 [2d Dep't 1987]; Culp v. Culp, 117 A.D.2d 700, 498 N.Y.S.2d 846 [2d Dept 1986]; Freimour v. Freimour, 78 A.D.2d 896, 433 N.Y.S.2d 219 [2d Dep't 1980]).

Fraud that taints an agreement of the parties must be material. It usually will be fraud in the inducement but for which the agreement would not have been executed. The party alleging fraud has the burden of proof in that regard (King v King, 79 A.D.2d 1083, 435 N.Y.S.2d 818 [4th Dep't 1981]; Re Estate of Miller, 97 A.D.2d 581, 467 N.Y.S.2d 922 [3d Dep't 1983]).

In Dayton v Dayton (175 A.D.2d 427, 572 N.Y.S.2d 487 [3d Dep't 1991]), an action to set aside a stipulation of settlement on the ground of fraud, the Appellate Division reversed an Order of the Supreme Court that determined after a hearing that the husband had fraudulently misrepresented his employment situation and modified the parties' stipulation of settlement, which had been incorporated into the divorce judgment by increasing the maintenance provision from $200 per week to $300 per week retroactive to the date of the stipulation. The Appellate Division stated that, while a divorce settlement tainted by fraud, is void ab initio, the husband's conduct in misrepresenting his income amounted to nondisclosure rather than fraud and nondisclosure is not the equivalent of fraud. "A husband's failure and refusal to disclose his financial circumstances when the agreement is executed is not sufficient to void an agreement fair on its face, particularly when the wife was represented by counsel during the negotiation and execution of the agreement."

In Gaines v Gaines (188 A.D.2d 1048, 592 N.Y.S.2d 204 [4th Dep't 1992]) , the Appellate Division affirmed an order of the Supreme Court setting aside the parties' separation agreement on the ground of fraud in the inducement. The original separation agreement provided that each party would have an interest in the other's pension. That agreement was incorporated without merger into the judgment of divorce. The husband fraudulently convinced the wife to release her claim to his pension by stating that he intended to take early retirement, but could only do so if he received his entire pension. After the wife agreed to amend their agreement, the husband quit his job and took another related, higher-paying job. The evidence showed that this was the husband's intention all along. The husband had a duty to disclose his present intentions. The concealment of those present intentions was designed to produce a false impression and to mislead the wife and such conduct

constituted actionable fraud.

In Perl v Perl (126 A.D.2d 91, 512 N.Y.S.2d 372 [1st Dep't 1987]) , the wife asserted, in an action by the husband to enforce a 1982 stipulation of settlement, that she agreed to an unfair settlement because of husband's duress and coercion in withholding a "get" unless she agreed to his "terms." The Appellate Division reversed the grant of summary judgment to the husband and recited that the language in the stipulation that there was no duress, coercion or fraud is insufficient to establish the Agreement was free from coercion.

COUNSEL FEES AND EXPENSES

SETTLEMENT CONSIDERATIONS:

The court may award counsel fees only in certain actions where specifically authorized by statute, and then the statute is to be strictly construed.

Domestic Relations Law § 237(a) provides that (a) In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to declare the validity or nullity of a judgment of divorce rendered against a spouse who was the defendant in any action outside the State of New York and did not appear therein where such spouse asserts the nullity of such foreign judgment, (5) to obtain maintenance or distribution of property following a foreign judgment of divorce, or (6) to enjoin the prosecution in any other jurisdiction of an action for a divorce, the court may direct either spouse or, where an action for annulment is maintained after the death of a spouse, may direct the person or persons maintaining the action, to pay counsel fees and fees and expenses of experts directly to the attorney of the other spouse to enable the other party to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties.

Domestic Relations Law § 237(a) (Counsel Fees and Expenses) provides that there shall be a rebuttable presumption that counsel fees shall be awarded to the " less monied spouse. "

In exercising the court's discretion, under Domestic Relations Law § 237 the court is required to seek to assure that each party is adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis pendente lite, so as to enable adequate representation from the commencement of the proceeding.

In addition the court is specifically authorized to order expert fees to be paid by one party to the other to enable the party to carry on or defend the action.

The parties and their attorneys are required to submit an affidavit to the court with financial information to enable the court to make its determination. The monied spouse is required to disclose how much he has agreed to pay and how much he has paid his attorney. The affidavit must include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses.

Payment of any retainer fees to the attorney for the petitioning party shall not preclude any awards of fees and expenses to an applicant which would otherwise be allowed under this section.

Prior law placed an onus upon the party in a matrimonial action seeking counsel fees pendente lite, to show why the interests of justice require it. The burden is now on the "more-monied" spouse to show why, in the interests of justice, a counsel fee award should not be made.

Neither Domestic Relations Law § 237 nor Domestic Relations Law § 238 define the term **"less monied spouse".**

Applications for counsel fees in enforcement proceedings are governed by the Uniform Rules, (22 New York Code Rules and Regulations § 202.16).

"Expenses" is defined in Domestic Relations Law § 237(d) and includes, but is not limited to, accountant fees, appraisal fees, actuarial fees, investigative fees and other fees and expenses as the court may determine to be necessary to enable a spouse to carry on or defend one of the actions or proceedings designated in section 237(a).

The court, in awarding counsel fees under Domestic Relations Law § 237 may, inter alia, determine the reasonable value of the services rendered by the attorney for a party and direct the other spouse to pay all or a portion of the amount requested.

DRAFTERS NOTES:

If one party is to contribute, partially or wholly, to the legal fees of the other, it is generally best for the payor to contribute a lump sum amount on behalf of the recipient's legal fees on or before a specified date, if not simultaneously with the execution of the agreement. The agreement should state that the amount is in

payment of the legal fees of that spouse attributable to litigation or for the negotiation of the agreement, and any subsequent action for dissolution. The recipient should hold the payor harmless from any other claims for any other legal fees from any prior attorney of the recipient, and the recipient's lawyer should be required to waive all other claims for the legal fees for the agreement or dissolution proceedings against the payor. If the payment is being made directly to the attorney for the spouse, the agreement should provide that the attorney is a third party beneficiary of the agreement, so that the amount can not be modified and so that the attorney may have the right to bring a plenary action to enforce this provision. If the agreement provides for the payment of the counsel fee to the attorney sometime in the future, such as upon the sale of the marital residence, provision should be made in the agreement so that the attorney is entitled to be kept informed as to the status of the matter and given notice of the date and time of the closing.

CASE LAW YOU SHOULD KNOW:

In exercising its discretionary power to award counsel fees pursuant to Domestic Relations Law § 237 a court is instructed to review the financial circumstances of both parties together with all the other circumstances of the case, which may include the relative merit of the parties' positions (De Cabrera v. De Cabrera, 70 N.Y. 2d 879, 524 N.Y.S.2d 176, 518 N.E.2d 1168 [1987]). Under Domestic Relations Law § 237(a), the fixation and determination of counsel fees is within the discretion of the Court, taking into consideration the circumstances of the case and of the respective parties. Some of the factors courts are required to consider in the fixation and determination of counsel fee awards in matrimonial actions are: the nature and extent of the services rendered; the actual time spent; the necessity for the services; the nature of the issues involved; the professional standing of counsel, including his experience and background; the results achieved; the income and assets and financial circumstances of the parties; a party's obstructionist tactics; and the amount of the distributive award. (Re Potts' Estate, 213 App Div 59, 209 N.Y.S. 655 [1925]; Re Estate of Freeman, 34 N.Y. 2d 1, 355 N.Y.S.2d 336, 311 N.E.2d 480 [1974]; W. v. W., 89 Misc 2d 681, 392 N.Y.S.2d 957 [1977]; Silver v. Silver, 63 A.D.2d 1017, 406 N.Y.S.2d 352 [2d Dep't 1978]; Fabrikant v. Fabrikant 19 N.Y. 2d 154, 278 N.Y.S.2d 607, 225 N.E.2d 202 [1967]).

Domestic Relations Law § 237 was designed to address the economic disparity between the monied spouse and the non-monied spouse. The award may cover the entire course of the matter, from retention of counsel through the trial and appeal, including awards for legal services for fee hearings. It is a matter of discretion, to be exercised in appropriate cases, to further the objectives of parity, and to prevent the more affluent spouse from wearing down or financially punishing the opposition by recalcitrance or by prolonging the litigation. (O'Shea v O'Shea, 93 N.Y.2d 187, 689 N.Y.S.2d 8 [1999]).

The Court may award counsel fees in order to level the legal playing field

between husbands and wives of disparate means. It has been held that, where the husband engaged in dilatory and obstructionist tactics, such conduct warranted his payment of all of the legal fees incurred as a result thereof (Silverman v. Silverman, 304 A.D.2d 41, 756 N.Y.S.2d 14 [1st Dep't 2003]; Stern v Stern, 282 A.D.2d 667, 723 N.Y.S.2d 514 [2d Dep't 2001]; Katzman v Katzman, 284 A.D.2d 160, 725 N.Y.S. 2d 849 [1st Dep't 2001]; Smith v Smith, 277 A.D.2d 531, 532, 711 N.Y.S.2d 508 [3rd Dep't 2000]).

RELIGIOUS DIVORCE

SETTLEMENT CONSIDERATIONS:

If the parties were married by a clergyman and their agreement contemplates a future divorce or dissolution action in New York State this provision should be in the agreement. Domestic Relations Law § 253 requires a party to a proceeding to annul a marriage, or for a divorce, to allege under oath that he or she has taken, or will take, prior to the entry of final judgment, all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce. The section applies only to a marriage solemnized in this state or in any other jurisdiction by a person specified in Domestic Relations Law § 11(1).

Domestic Relations Law § 11(1) provides that: No marriage shall be valid unless solemnized by either: 1. A clergyman or minister of any religion, or by the senior leader, or any of the other leaders, of The Society for Ethical Culture in the city of New York, having its principal office in the borough of Manhattan, or by the leader of The Brooklyn Society for Ethical Culture, having its principal office in the borough of Brooklyn of the city of New York, or of the Westchester Ethical Society, having its principal office in Westchester county, or of the Ethical Culture Society of Long Island, having its principal office in Nassau county, or of the Riverdale-Yonkers Ethical Society having its principal office in Bronx county, or by the leader of any other Ethical Culture Society affiliated with the American Ethical Union.

Any party to a marriage married by one of the persons specified in Domestic Relations Law §11(1) who commences a proceeding to annul the marriage or for a divorce must allege in his or her verified complaint: (i) that, to the best of his or her knowledge, he or she has taken or will take, prior to the entry of final judgment, all steps solely within his or her power to remove any barrier to the defendant's remarriage following the annulment or divorce; or (ii) that the defendant has waived in writing the requirements of this subdivision. No final judgment of annulment or divorce may thereafter be entered unless the plaintiff shall have filed and served a sworn statement: (i) that, to the best of his or her knowledge, he or she has, prior to the entry of such final judgment, taken all steps solely within his or her power to remove any

barriers to the defendant's remarriage following the annulment or divorce; or (ii) that the defendant has waived in writing the requirements of this subdivision.

In any action for divorce based on Domestic Relations Law §170(5) and (6) (living apart for a year after a separation judgment or written separation agreement) in which the defendant enters a general appearance and does not contest the requested relief, no final judgment of annulment or divorce may be entered unless both parties file and serve sworn statements: (i) that he or she has, to the best of his or her knowledge, taken all steps solely within his or her power to remove all barriers to the other party's remarriage following the annulment or divorce; or (ii) that the other party has waived in writing the requirements of this subdivision.

The writing attesting to any waiver of the requirements of Domestic Relations Law § 253 must be filed with the court prior to the entry of a final judgment of annulment or divorce.

No final judgment of annulment or divorce may be entered, notwithstanding the filing of the plaintiff's sworn statement prescribed by § 253, if the clergyman or minister who solemnized the marriage certifies, in a sworn statement, that he or she has solemnized the marriage and that, to his or her knowledge, the plaintiff has failed to take all steps solely within his or her power to remove all barriers to the defendant's remarriage following the annulment or divorce, provided that the said clergyman or minister is alive and available and competent to testify at the time when final judgment would be entered.

DRAFTERS NOTES:

Both parties should agree to this provision if they were married in a religious ceremony because it is required by law in New York. The agreement should make provision for obtaining the religious divorce by a specific date, for the payment of the costs and fees of obtaining it, and to require that both spouses cooperate with the religious authority.

CASE LAW YOU SHOULD KNOW:

In Shapiro v Shapiro (168 App Div 2d 491, 562 NYS2d 733 [2d Dept 1990] the Appellate Division denied the wife's cross-motion to stay enforcement of all financial provisions contained in the divorce judgment in favor of the husband, until he delivered her a valid Orthodox GET. The Appellate Division held that the wife's conclusory assertions that the GET, which the husband attempted to obtain, failed to satisfy New York Domestic Relations Law § 253(3) were unsupported by any documentary proof. Accordingly, these assertions did not defeat the husband's statement pursuant to New York Domestic Relations Law §253(3) that he had done all in his power to remove any barriers to the wife's remarriage.

In Megibow v Megibow (161 Misc 2d 69, 612 NYS2d 758 [Sup Ct 1994]), the court held that Domestic Relations Law § 253 was applicable to the wife's motion to compel the husband to furnish her with a Jewish religious divorce. Domestic Relations Law §253 requires that where a marriage has been solemnized by a clergyman, a party who commences a matrimonial action must verify that he or she has acted to remove all barriers to remarriage. The husband contended that the parties' marriage was solemnized by a Rabbi affiliated with the Reform Branch of Judaism and that since the tenets of reformed Judaism do not require its adherence to obtain a Get, he need not be required to give the former wife a Get. The Supreme Court disagreed, holding that while reformed Judaism may not require that a Get be issued to dissolve a religious marriage performed by one of its clergy, the withholding of this voluntary act of giving a Get by the former husband would, by statutory definition, constitute a barrier to remarriage if the former wife perceived herself to require a Get in order to remarry. It directed the former husband to co-operate in all phases of obtaining a get on behalf of the former wife.

In Kaplinsky v Kaplinsky (198 AD2d 212, 603 NYS2d 574 [2d Dept 1993], the Appellate Division held that the Supreme Court properly held the husband in contempt of court for his failure to deliver the former wife a Get pursuant to the parties' stipulation of settlement incorporated in the judgment of divorce, in which he agreed to remove any and all barriers to the wife's remarriage. The issue of whether Domestic Relations Law § 253 is unconstitutional was not preserved for appellate review. The Court also held that the Supreme Court had the authority to enforce its contempt order by imposing a term of imprisonment and withholding all economic benefits from the former husband until he purged himself of his contempt.

In Schwartz v. Schwartz, 235 A.D.2d 468, 652 N.Y.S.2d 616 (2d Dep't 1997) the Appellate Division affirmed a judgment which held that the husbands interest in the Jewish Press, Inc., was forfeited by his conduct involving the granting of a Get (a Jewish religious divorce) and did not constitute an impermissible interference with religion. The court made no determination regarding religious doctrine. Rather, the court found that the defendant initially withheld the delivery of the Get which he ultimately gave in Israel solely to extract economic concessions from the plaintiff.

MUTUAL WAIVERS OF OTHER ASSETS AND MAINTENANCE

SETTLEMENT CONSIDERATIONS:

In order to avoid any claims after the agreement is executed, by a dissatisfied spouse for maintenance or certain property, it is suggested that the agreement contain waivers of maintenance, if it is waived by either or both spouses, and waivers of the right to any property not distributed by the agreement.

DRAFTERS NOTES:

The agreement should state that “Except as provided in the agreement”, each spouse waives all rights and interests, if any, to the other's businesses, licenses, professional degrees and other assets, real and personal, in that party's possession, custody or control, whether or not mentioned in the agreement. If maintenance is not being paid there should be mutual waivers of maintenance, so that an application may not be made for maintenance after the parties are separated or divorced. The same holds true with regard to retirement benefits, pensions and counsel fees.

CASE LAW YOU SHOULD KNOW:

In order to be enforceable and to "opt out" of the statutory system, the agreement of the parties must not violate the declaration of public policy expressed in General Obligations Law Section 5-311, which provides that a except as provided in section two hundred 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 a public charge. grounds of divorce." This means that the parties are not free to contract away or to waive their mutual duty to provide support for the other in the public assistance situation. It should be noted, however, that where it would be inequitable to impose the support duty, under the circumstances, a court may refuse to do so under Social Services Law § 101 and Family Court Act § 415 (See Parker v. Stage, 43 N.Y.2d 128, 400 N.Y.S.2d 794, 371 N.E.2d 513 [1977]).

RECONCILIATION

SETTLEMENT CONSIDERATIONS:

Prior to the enactment of the Equitable Distribution law in 1980 case law held that an agreement would be repudiated where the parties reconcile and resume cohabitation. However, with the enactment of Domestic Relations Law 236 [B][3] parties may reconcile and, if they chose, their agreement can still maintain its validity, as an “opting-out” agreement, during the period of their reconciliation. In order to prevent a repudiation of the agreement upon the happening of a reconciliation, it is suggested that the agreement provide what circumstances will constitute a reconciliation and repudiation of the agreement.

DRAFTERS NOTES:

The agreement should provide that it shall not be invalidated or otherwise affected by a reconciliation between the parties or by a resumption of the marital

relations between them, unless the reconciliation or resumption is documented by a written statement signed and acknowledged by the parties.

CASE LAW YOU SHOULD KNOW:

In Aiello v Aiello (34 A.D.3d 1, 827 N.Y.S.2d 82 [2 Dep't 2006]), the parties executed a separation agreement in 2000 which provided, inter alia, that all property "now owned by him or her ... or which may hereafter belong to" either party was free of any claim of the other, "with full power ... to dispose of the same ... as if he or she were unmarried" and that any reconciliation by the parties would not invalidate the agreement unless they executed a written document acknowledging their reconciliation and expressly indicating their intent to cancel it. In December 2001 the parties reconciled but did not acknowledge their reconciliation in writing. After their reconciliation ended an action for a divorce was commenced. The Appellate Division held Supreme Court did not err in enforcing the agreement according to its terms.

In Sifre v Sifre, (__A.D.3d__, ___ N.Y.S.2d ___, 2009 WL 1150156 (N.Y.A.D. 3 Dep't.) the Appellate Division noted that while reconciliation is a defense to an action for a divorce pursuant to Domestic Relations Law § 170 (6), mere sporadic cohabitation and sexual relations are not enough to vitiate a separation agreement; there must be intent to reconcile and intent to abandon the agreement. The parties separation agreement stated that none of its provisions "shall be changed or modified, nor shall this Agreement be discharged or terminated in whole or in part, except by an instrument in writing." The parties therefore required that a termination of the separation agreement, an abandonment of it, must be in writing. While the parties' affidavits raised questions of fact concerning whether they reconciled, that issue was irrelevant in the face of the contract language requiring a written termination of the agreement. Based upon the language of the agreement and the lack of any writing evidencing the parties' intent to abandon or terminate the agreement, plaintiff was entitled to dismissal of the reconciliation defense.

VOLUNTARY EXECUTION

SETTLEMENT CONSIDERATIONS:

This is another boilerplate provision intended to insure that the agreement will not be subsequently challenged on the grounds of coercion and duress.

DRAFTERS NOTES:

The agreement should acknowledge that each party had full knowledge and understanding of all of its provisions, and an opportunity to question his or her attorney with regard to the provisions of the agreement. The parties should acknowledge that the terms of the agreement have been explained to them and that

they believe it is fair, and was freely entered into, and is not the result of any fraud, duress or undue influence exercised by either party upon the other.

It is a common practice of practitioners of matrimonial law to insert clauses in agreements that contain self-serving declarations that each party has made full financial disclosure to the other, that their respective counsels fully explained to each of them the legal and practical effect of the terms of the agreement, and that the circumstances surrounding the preparation and execution of the agreement were fair, and not the result of fraud, duress or undue influence. Such clauses have become routine and may be of questionable value. Courts have disregarded the "boilerplate" in many cases where there is substantial proof that the circumstances were other than as described in the agreement and the equities warrant it.

CASE LAW YOU SHOULD KNOW:

In refusing to set aside an agreement the Court attached significance to a clause stating that the parties acknowledged that each of them had disclosed his or her financial status to the other, that their respective counsel explained to them the legal and practical effect of every aspect of the agreement, and that the circumstances surrounding the preparation and execution of the agreement were fair, and not a result of fraud, duress or undue influence (Wile v. Wile,100 A.D.2d 932, 474 N.Y.S. 2d 821 [2d Dep't 1984]).

PENDING ACTIONS

SETTLEMENT CONSIDERATIONS:

If there is an action for dissolution or family court proceeding pending between the parties at the time the agreement is being executed and the action or proceeding is going to be settled in accordance with the terms of the agreement, it should contain a provision indicating what is going to happen with the pending action.

DRAFTERS NOTES:

The agreement should provide for the withdrawal an discontinuance of any other pending actions between the parties, with prejudice. If the parties intend to obtain a divorce or dissolution, the agreement should provide that one of the parties will withdraw his or her complaint, answer counterclaim or reply, as the case may be, and not oppose the other party from proceeding to obtain a dissolution in the pending action. The parties may not specifically agree to a divorce as General Obligations Law § 5-311 prohibits them from contracting to alter or dissolve the marriage.

CASE LAW YOU SHOULD KNOW:

In order to be enforceable and to "opt out" of the statutory system, the agreement of the parties must not violate the declaration of public policy expressed in General Obligations Law Section 5-311. It provides: "Certain agreements between husband and wife void. Except as provided in section two hundred 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 a public charge. An agreement, heretofore or hereafter made between a husband and wife, shall not be considered a contract to alter or dissolve the marriage unless it contains an express provision requiring the dissolution of the marriage or provides for the procurement of grounds of divorce."

The parties may not agree to alter or dissolve the marriage. However, the agreement will not be considered a contract to alter or dissolve the marriage unless it "contains an express provision requiring the dissolution of the marriage or provides for the procurement of grounds of divorce." A provision in an agreement that the parties "shall proceed" with a divorce on the ground of abandonment is violative of General Obligations Law 5-311 as an express provision obligating the parties to obtain a divorce (Taft v. Taft, 156 A.D.2d 444, 548 N.Y.S.2d 726 [2d Dep't 1989] (The parties by a "severability" clause in the agreement intended that the clause be severed from the rest of the agreement, in case it was deemed void).

In Charap v Willett, --- N.Y.S.2d ----, 2011 WL 1902605 (N.Y.A.D. 2 Dept.) the Appellate Division held that the parties May 7, 2007, stipulation was void as against public policy, since it expressly required the former wife to seek dissolution of the marriage and "provides for the procurement of grounds of divorce" (General Obligations Law 5-311). As the offending provision represented the only consideration provided by the former wife for the agreement, which did not contain a severability provision, the stipulation was void in its entirety (cf. Taft v. Taft, 156 A.D.2d 444).

SUBSEQUENT ACTION TO SET ASIDE OR MODIFY AGREEMENT

SETTLEMENT CONSIDERATIONS:

The parties may agree that in the event that either party brings an action or proceeding to cancel or set aside the agreement, or applies to any court for an extension or upward modification of either or both the maintenance and child support provisions of the agreement, whether successful or not, he/she will reconvey all assets he/she received under the agreement. The purpose of this clause is, obviously, to prevent a challenge to the agreement, and it will not be enforced if the court holds that

the agreement is void.

DRAFTERS NOTES:

This provision should be as mutual as possible. Care should be taken not to stray far from the specific holding in the Kromberg case, to avoid the clause being void as a penalty. The agreement should provide that in the event that, at any future time, the wife or the husband institutes an action or proceeding to cancel or set aside the agreement, or applies to any court for an increase or decrease, extension or modification, as the case may be, of any of the support provisions set forth in the agreement, whether successful or not, she or he, as the case may be, agrees to and shall, simultaneously with the institution of such action, proceeding or application, reconvey the property and/or all of the other assets he or she has received pursuant to the terms of this agreement. It should contain a provision for monetary compensation in the event that the property has already been sold or transferred to a third party.

CASE LAW YOU SHOULD KNOW:

In Kromberg v Kromberg, (56 A.D.2d 910, 392 N.Y.S.2d 907 [2d Dep't 1977], affd 44 N.Y.2d 718, 405 N.Y.S.2d 451, 376 N.E.2d 923), the parties entered into a separation agreement in 1971 whereby the husband agreed to make support payments to his wife based upon a sliding scale geared to his net taxable income. In addition, the agreement contained a recitation that "[t]he Husband has conveyed to the Wife, by deed executed and delivered simultaneously herewith, the property which was the former home of the parties and in which the wife now resides." The paragraph also provided: "This conveyance is made in consideration of the Wife's acceptance of the other provisions herein for her support. If, at any future time, the Wife brings action to cancel this agreement or applies to any court for increase in her support payments, she hereby agrees to convey the said premises to herself and the Husband as tenants in common." Following the wife's successful suit for a divorce and to set aside the support provision of the agreement, the husband brought an action to compel his former wife to convey title to the real property to him in accordance with the separation agreement. The Court of Appeals in affirming an order that granted the husband summary judgment held that the issue of the validity of the provision in the separation agreement, calling for the wife to reconvey to the husband his interest in the marital residence should she seek to cancel the agreement or apply for an increase in support, was foreclosed by res judicata. However, it stated: "Were the issue not foreclosed by the doctrine of res judicata, however, plaintiff husband would still be entitled to reconveyance. Affording the wife the alternatives of adequate support or sole ownership of the marital residence does not unlawfully contract away the husband's obligation of support (see, generally, New York General Obligations Law §5-311; Haas v Haas (1948) 298 N.Y. 69, 71–72, 80 N.E.2d 337, 338–39, 4 ALR2d 726. That the reconveyance was perhaps phrased as a penalty, does not alter the fact that at all times the wife had a choice."

SEVERABILITY

SETTLEMENT CONSIDERATIONS:

If a material provision or dependent clause of an agreement that does not have a severability clause is held void, the entire agreement may be declared void. To avoid this potential problem it is wise to include a provision making the offending provision severable from the rest of the agreement.

DRAFTERS NOTES:

The agreement should state that if any part of the agreement is held void or unenforceable, the balance of the agreement will remain in full force and effect.

CASE LAW YOU SHOULD KNOW:

One invalid provision of a separation agreement does not necessarily invalidate the entire agreement (See Christian v Christian, 42 N.Y. 2d 63, 396 N.Y.S. 2d 817, 365 N.E.2d 849 [1977]; Seligman v Seligman, 78 Misc 2d 632, 356 N.Y.S. 2d 978 [1974]; Stahl v Stahl, 16 A.D.2d 467, 228 N.Y.S. 2d 724 [1st Dep't 1962]); Carluccio v Carluccio, 22 Misc 2d 854, 198 N.Y.S. 2d 596 [1960]; Cohen v Cohen 88 N.Y.S. 2d 483 [Sup Ct 1949]). For example, the invalidity of the provision in a separation agreement executed before July 19, 1980 for the support of the wife because it relieved the husband from his obligation to support her was held not to invalidate the remainder of the agreement [Schiff v Schiff, 270 App Div 845, 60 N.Y.S. 2d 318 [1946]; Hoops v Hoops, 266 App Div 512, 42 N.Y.S. 2d 635 [1943], revd on other grounds 292 N.Y. 428, 55 N.E.2d 488; Colla-Negri v Colla-Negri, 19 Misc 2d 496, 191 N.Y.S. 2d 996 [1959]; Cohen v Cohen, 88 N.Y.S. 2d 483 [Sup Ct 1949];. Re Brenner's Will, 44 N.Y.S. 2d 447 [Sur Ct 1943], affd 268 App Div 1001, 52 N.Y.S. 2d 792.)

The same rule is applicable to the child support provisions of the agreement. The invalidity of a provision in a separation agreement providing for a penalty in case of default in making the periodic support payments does not invalidate the agreement in toto where such provision is readily severable from the remainder of the agreement (Kroll v Kroll, 4 Misc 2d 520, 158 N.Y.S. 2d 930 [1956]). There may, however, be circumstances where the provision for support is so much an integral part of the agreement that it cannot be set aside without annulling and canceling the entire agreement (Johnson v Johnson, 206 N.Y. 561, 100 NE 408 [1912]) .

Where rescission is granted, the entire agreement becomes null and void unless the offending provision is severable and the agreement can stand without it. Whether a contract is severable is a question of intention, to be determined from the language employed by the parties, viewed in the light of the circumstances surrounding them at

the time they contracted. The parties have a right to expressly stipulate that if any provision of the agreement be held invalid or unenforceable, all other provisions shall continue in full force. They may make an agreement divisible within reasonable limits.Christian v Christian, 42 NY2d 63, 73 (1977) (citing New Era Homes Corp. v Forster, 299 NY 303, 306-307; *Coppedge v Leiser,* 71 Idaho 248, 251-253; see *United States v Bethlehem Steel Corp.,* 315 US 289, 298.

The severability doctrine applies with equal effect where the offending provision is an economic provision, Christian v Christian, 42 NY2d 63 (1977), or agreement is one which alters the marriage status. Stahl v. Stahl, 16 A.D.2d 467, 469, 228 N.Y.S.2d 724; Taft v Taft, 156 AD2d 444, 445 (2d Dept 1989); Charap v Willett, 84 AD3d 1003, 1004 (2d Dept 2011) ("stipulation is void as against public policy, since it expressly required the former wife to seek dissolution of the marriage and "provides for the procurement of grounds of divorce" (General Obligations Law § 5–311). As the offending provision represents the only consideration provided by the former wife for the agreement, which does not contain a severability provision, the stipulation is void in its entirety (*cf. Taft v. Taft,* 156 A.D.2d 444, 548 N.Y.S.2d 726).

BINDING EFFECT

SETTLEMENT CONSIDERATIONS:

This is a "boilerplate" provision intended to insure that the agreement will be binding upon the heirs, executors and assigns of the parties to the agreement.

DRAFTERS NOTES:

The agreement should contain a provision stating that, except as otherwise stated in the agreement, all the provisions of the agreement shall be binding upon the respective heirs, next of kin, executors and administrators of the parties.

CASE LAW YOU SHOULD KNOW:

CHANGE OF ADDRESS

SETTLEMENT CONSIDERATIONS:

As long as the parties have rights and obligations toward one another, or children who are unemancipated, they must be able to communicate with one another. The agreement should require them to keep the means of communication open by

obligating each of them to provide the other with his or her current address and telephone number.

DRAFTERS NOTES:

The agreement provide that the parties shall notify each other of their change of address and telephone number, within a specified period of time from such change, so long as they have obligations to one another pursuant to the terms of their agreement.

CASE LAW YOU SHOULD KNOW:

NOTICES

SETTLEMENT CONSIDERATIONS:

The agreement should contain a provision indicating the addresses to send any future notices required by the agreement. This may be essential in order to start the time running to perform an act required by the agreement.

DRAFTERS NOTES:

The agreement should provide that all notices sent to either spouses shall be sent to them at the address set forth on the first page of this agreement, or sent to their attorneys or both. There should be provision for confirming that it the notice has been sent, such as requiring it be sent by registered or certified mail, return receipt requested or by overnight delivery service. The agreement should also provide that in the event of either party moving to a new residence, notice shall be sent to any new place of permanent residence, provided that notice of the new residence shall have been given to the other party in writing.

CASE LAW YOU SHOULD KNOW:

In Dallin v. Dallin (225 A.D.2d 728, 640 N.Y.S.2d 196 [2d Dep't 1996]) the former wife sought enforcement of the support provisions of the agreement and counsel fees pursuant to the terms of the separation agreement, which provided that, in order to receive counsel fees, she was required to send to the husband written notice of default. The separation agreement also stated that all notices were to be sent by registered or certified mail, return receipt requested. The former wife failed to adhere to this notice requirement and the Appellate Division held that she was not entitled to counsel fees for failure to comply with this provision.

MODIFICATION AND WAIVER

SETTLEMENT CONSIDERATIONS:

In order to prevent future claims by either of the parties that provisions of the agreement have been modified or waived the agreement should contain a provision specifying the formalities with which the parties must comply to amend or modify the agreement or waive any of its terms. It is submitted that the agreement should state that its provisions shall not be amended, modified or waived unless there amendment, modification or waiver is contain in a writing which is duly executed and acknowledged.

Domestic Relations Law § 236 [B](9)(b)(2)(ii) and Family Court Act § 451 (2)(b) provide that (ii) unless the parties have specifically opted out of the following provisions in a validly executed agreement or stipulation entered into between the parties, the court may modify an order of child support where: (A) three years have passed since the order was entered, last modified or adjusted; or (B) there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted.

DRAFTERS NOTES:

Any modification of the agreement must comply with the provisions of Domestic Relations Law § 236 [B] [3] to assure that it will be valid and enforceable in a matrimonial action. This means is should be in writing, signed by the parties and acknowledged in the form to entitle a deed to be recorded.

Suggested opting out clause:

In accordance with the provisions of Domestic Relations Law § 236 [B](9)(b)(2)(ii) and Family Court Act § 451 (2)(b) the parties to this (agreement) (stipulation) have specifically opted out of the provisions of Domestic Relations Law § 236 [B](9)(b)(2)(ii) and Family Court Act § 451 (2)(b) which provide that “the court may modify an order of child support where: (A) three years have passed since the order was entered, last modified or adjusted; or (B) there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted.

CASE LAW YOU SHOULD KNOW:

The parties have the right to modify the agreement by altering, removing or

adding provisions, regardless of self-imposed limitations, since the power to modify or alter the agreement cannot be controlled or fettered by any stipulation to the contrary in the original agreement (Edwards v Edwards, 53 A.D.2d 1006, 386 N.Y.S. 2d 481 [4th Dep't 1976]; Salinas v Salinas, 187 Misc 509, 62 N.Y.S. 2d 385 [1946], affd 271 App Div 917, 67 N.Y.S. 2d 692).

In Berretta v Berretta (201 A.D.2d 886, 608 N.Y.S. 2d 34 [4th Dep't 1994]), the Appellate Division held that it is well established that the modification of a contract results in the establishment of a new agreement between the parties that pro tanto supplants the affected provisions of the original agreement while leaving the balance of it intact.

It is not within the power of either party to modify the agreement unilaterally, without the consent of the other party (Schmelzel v Schmelzel, 287 N.Y. 21, 38 N.E.2d 114 [1941]; Goldman v Goldman 282 N.Y. 296, 26 N.E.2d 265 [1940]).

In Meinwald v Meinwald (56 A.D.2d 565, 391 N.Y.S.2d 872 [1st Dep't 1977]) , the Appellate Division held that a stipulation entered into by the parties in open court, was effective to modify a prior separation agreement entered into by the parties, even though such agreement provided that it could be modified "only by a written agreement signed by both parties." An agreement may be modified by an oral agreement which has been fully executed (Hadden v Dimick, 48 N.Y. 661 (1872); Leidy v Procter, 226 App Div 322, 235 N.Y.S.101 [1929]; Vandemortel v Vandemortel, 204 Misc 536, 120 N.Y.S. 2d 112 [1953]).

In Savino v Savino (146 A.D.2d 766, 537 N.Y.S. 2d 247 [2d Dep't 1989]), the court held that General Obligations Law §15-301(1) does not preclude proof of executed oral modifications.

In Klein v Klein (169 A.D.2d 817, 565 N.Y.S. 2d 186 [2d Dep't 1991]), app gr 78 N.Y. 2d 853, 573 N.Y.S. 2d 467, 577 N.E.2d 1059 and revd 79 N.Y. 2d 876, 581 N.Y.S. 2d 159, 589 N.E.2d 382), the parties written stipulation of settlement and divorce judgment provided for joint custody of the children alternating every two weeks and granted the husband exclusive occupancy of the marital residence. In 1988, the parties attempted to reconcile, but their attempts failed and the husband left the former marital residence. The wife and children remained in the marital home. The parties orally agreed that the wife and children would remain there upon mutually agreed upon terms. Thereafter, the husband moved to appoint a receiver to proceed with the immediate sale of the house and to direct the wife to pay the mortgage, interest and expenses of the house until she vacates the premises. The Supreme Court granted the husband's application for the appointment of a receiver. The Appellate Division granted a stay of that provision and reversed. Addressing the issue of whether or not the parties modified the provisions of the stipulation relating to their rights to their house, the court held that the parties' conduct was "unambiguously referable" to their oral modification. Their negotiation and adherence to the modified agreement for

almost one year was not compatible with any option contained in their stipulation or divorce judgment. The wife and children relied on the modification of the stipulation, and the husband agreed to and acted under the modification for more than one year. Accordingly, the court found that the provisions sought to be enforced had been modified by mutual agreement. Pursuant to the modified agreement, the husband lost his right to reside in the marital residence and the wife could remain there until the house was required to be sold pursuant to the stipulation.

Waiver requires proof of a voluntary and intentional relinquishment of a known and otherwise enforceable right (Peck v. Peck, 232 A.D.2d 540, 649 N.Y.S.2d 22 [2d Dep't 1996]; Haberman v Haberman, 216 A.D.2d 525, 629 N.Y.S.2d 65 [2d Dep't 1995]). It may arise by either an express agreement or by such conduct or a failure to act as to evince an intent not to claim the purported advantage. A waiver "is not created by negligence, oversight, or thoughtlessness, and cannot be inferred from mere silence" (Golfo v. Kycia Associates, Inc., 845 N.Y.S.2d 122, 124, 45 A.D.3d 531, 531 [2 Dept 2007]).

Waiver may be express or implied. It may be written or verbal. It may be established by express statement or agreement, by act or conduct manifesting an interest and purpose not to claim the alleged advantage or from which an intention to waive may be reasonably inferred, or by so neglecting and failing to act as to induce a belief that it was the intention and purpose to waive. While a waiver may result from acquiescence, it cannot be inferred from mere silence (Morris v Morris, 74 A.D.2d 490, 428 N.Y.S.2d 10 [1st Dep't 1980]; Miller v Miller, 156 A.D.2d 164, 548 N.Y.S.2d 209 [1st Dep't 1989]).

INDEPENDENT COVENANTS

SETTLEMENT CONSIDERATIONS:

The agreement should contain a provision indicating which provisions, if any, of the agreement are dependant and which are independent of and may be enforced independently of any other clause. This prevents a repudiation and permits enforcement of the balance of the agreement even after the breach of a particular provision,. A party who has breached a portion of the agreement may continue to seek enforcement of the balance of the agreement.

DRAFTERS NOTES:

The agreement should state that each clause of the agreement is independent of and may be enforced independently of any other clause, or state which, if any clauses are dependant.

CASE LAW YOU SHOULD KNOW:

One spouse's breach of a provision in an agreement may be a defense to that spouse's action for enforcement. Alimony and maintenance provisions have always been considered to be “dependant” covenants of an agreement of the parties unless the parties provide otherwise. Thus, it has been held that a former wife’s breach of provisions of separation agreement requiring her "to maintain a proper home for children, to make payments on the mortgage upon the former marital home and to make payments on a chattel mortgage upon the station wagon, did not preclude her from recovering support payments provided for" by independent covenant of the agreement (Walker v Walker, 23 App Div 2d 764, 258 NYS2d 585 [2d Dep’t 1965]); Seligmann v Mandel, 16 Misc 2d 1026, 185 NYS2d 484 [1959] , supp op 19 Misc 2d 418, 190 NYS2d 388. Benesch v Benesch, 106 Misc 395, 173 NYS 629 [1919]; Stuberfield v Pomerance150 NYS2d 652 [Sup Ct 1956]).

Where a husband breaches a dependant covenant of a separation agreement, such as by defaulting in making the payments of support, the wife has two remedies. She could affirm the contract, relying on the agreement for her support, and sue in a plenary action to recover the amount due, (Woods v Bard, 285 NY 11, 32 NE2d 772 [1941]; Cavellier v Cavellier 4 App Div 2d 600, 168 NYS2d 65 [1st Dep’t 1957]; Ascher v Ascher, 213 App Div 183, 210 N.Y.S. 515 [1925], since the act of repudiation by one of the parties does not terminate the agreement. By commencing an action to recover payments due under a separation agreement, the wife elects to affirm the contract and she loses her right to disaffirm until a new breach occurs on the part of the husband (Ascher v Ascher 213 App Div 183, 210 N.Y.S. 515 [1925]). In addition, inasmuch as the contract had been repudiated by the husband, the wife could elect to repudiate it (Woods v Bard 285 NY 11, 32 NE2d 772 [1941]; Cavellier v Cavellier 4 App Div 2d 600, 168 N.Y.S.2d 65 [1st Dep’t 1957]), thus dissolving the contract by mutual consent (Randolph v Field 165 App Div 279, 150 NYS 822 [1914]). In such event, she could assert her marital right to be supported by her husband. The result is that insofar as past due support payments are concerned, the wife’s election to repudiate and terminate the separation agreement does not prevent her from recovering them (Sockman v Sockman, 252 App Div 914, 300 N.Y.S. 187 [1937]; Breiterman v Breiterman, 239 App Div 709, 268 N.Y.S. 628 [1934], but she forfeits, as of that date, her right to any future payments which might become due thereafter under the agreement (Cavellier v Cavellier, 4 App Div 2d 600, 168 NYS2d 65 [1st Dep’t 1957]; O’Brien v O’Brien, 252 App Div 427, 299 NYS 511 [1937]; Pinkus v Pinkus, 230 App Div 791, 244 N.Y.S. 652 [1930]; Duchini v Duchini, 179 Misc 1061, 43 NYS2d 552 [1931]; O’Hara v O’Hara, 68 NYS2d 649 [Sup Ct 1947]).

It should be noted that alimony or maintenance can be awarded to her under Domestic Relations Law §236, even though she otherwise fails to secure the relief sought in the matrimonial action. (Eylman v Eylman, 23 App Div 2d 495, 256 NYS2d 264 [2d Dep’t 1995]).

Where a wife repudiates or breaches an agreement by not conforming to its terms, the husband might also repudiate it and refuse to pay the amount due, provided

the breach was substantial or material and had been committed in bad faith. In Jones v. Jones, (232 A.D.2d 313, 648 N.Y.S.2d 585 [1st Dep't 1996]), the Appellate Division affirmed an order of the Supreme Court which denied the wife's motion to vacate an order awarding the husband sole and complete title, use and ownership of all remaining marital property. The parties entered into a partial stipulation on the record in open court in 1990 settling the wife's right to maintenance and certain equitable distribution issues. Other items were left open for future agreement or determination by the court in the event the parties fail to agree. The stipulation was incorporated but not merged into the parties' divorce decree entered in 1991 and the wife now sought to enforce her rights under the judgment. The Appellate Division held that the Supreme Court properly refused such enforcement. The wife repudiated the stipulation of settlement when she cashed in the parties' bonds and disposed of 100 percent of the proceeds. She did not seek court intervention in relation to the husband's purported failure to pay maintenance in accordance with the stipulation and her attempted self help which resulted in a material breach of stipulation entitled the husband to its recision which was the effect of the April 1992 order.

In Manning v Manning (97 A.D.2d 910, 470 N.Y.S.2d 744 [3d Dep't 1983]), the Appellate Division noted that plaintiff's action in moving to set aside the open stipulation on the ground of defendant's material breach due to his failure to make several of the $300 per week maintenance and support payments indicated plaintiff's belief in the existence of a valid contract. Nonetheless, it rejected defendant's contention that plaintiff was not entitled to rescission. It pointed out that the right to rescission generally exists as an alternative remedy to an action for damages where there has been a material breach of a contract. The trial court found, and defendant freely admitted, that he failed to make the $300 weekly payment at least five times between January 19, 1982, when the agreement was made, and April 23, 1982, when plaintiff moved to set aside the stipulation. Plaintiff's motion to recover arrears did not require dismissal of her action for rescission. As the stipulation was executory, plaintiff was not limited to her remedy at law, but could seek rescission.

LEGAL INTERPRETATION OR GOVERNING LAWS

SETTLEMENT CONSIDERATIONS:

Usually the construction of an agreement is governed by the law of the place of the contract. To avoid any problems in the event that either or both parties move to another state or country the agreement should contain a provision setting forth the law which shall apply to the interpretation and construction of the agreement in the event of a legal dispute.

DRAFTERS NOTES:

The agreement should state that it and all of the rights and obligations of the parties under it will be construed according to the laws of the State of New York or any

other state that the parties choose.

CASE LAW YOU SHOULD KNOW:

In the absence of anything evincing a contrary intention of the parties or violating the public policy of the forum, the validity, effect, and construction of an agreement is governed by the law of the place where the contract was made, particularly where this place and the matrimonial domicile are the same (Re Phillipson's Estate, 21 Misc 2d 721, 196 N.Y.S.2d 384 [1959]; De Landa v. Lucom, 208 Misc 394, 143 N.Y.S.2d 696 [1955], affd 2 Misc 2d 170, 154 N.Y.S.2d 678.) This rule is not affected by the fact that both or one of the spouses, moves to another state (Kaufman v Kaufman, 62 N.Y.S.2d 472 [Mun Ct 1946]), particularly where the circumstances indicated an intention that the parties intended all of the contractual obligations to be performed in the place where the contract was made (Chase Nat. Bank v. Central Hanover Bank & Trust Co., 265 App Div 434, 39 N.Y.S.2d 541 [1943]).

The intention of the parties as to the law governing the validity, construction, and effect of a separation agreement will be respected in the absence of anything violating the public policy of the state. However, a court may apply its own law, despite a provision in the separation agreement that the law of another state shall govern its operation and effect, where the question at issue has never been determined in that state, it being assumed that the law of that state is the same as the law of the forum (Gaines v. Jacobsen,308 N.Y. 218, 124 N.E.2d 290, 48 ALR2d 312 [1954]).

In Friedman v Roman, 65 A.D.3d 1187, 885 N.Y.S.2d 740 (2 Dept 2009) the Appellate Division held that generally, courts will enforce a choice-of-law clause so long as the chosen law bears a reasonable relationship to the parties or the transaction (citing Welsbach Elec. Corp. v. MasTec N. Am., Inc., 7 N.Y.3d 624, 629, 825 N.Y.S.2d 692, 859 N.E.2d 498). As the Supreme Court properly determined that the New Jersey choice-of-law provision contained in the parties' marital agreement would be enforced the matter had to be analyzed pursuant to New Jersey law.

In Lupien v Lupien, 68 A.D.3d 1807, 891 N.Y.S.2d 785 (4 Dept, 2009) the Appellate Division held that Supreme Court properly denied plaintiff's motion seeking an order determining that the parties' premarital agreement was not valid and enforceable as an opting out agreement pursuant to Domestic Relations Law § 236 (B)(3). The premarital agreement, which was signed by the parties in Massachusetts at a time when both parties resided there, contained a choice of law clause providing that “the validity and construction of this Agreement shall be determined in accordance with the laws of the Commonwealth of Massachusetts." It observed that it is well settled that courts will enforce a choice of law clause so long as the chosen law bears a reasonable relationship to the parties or the transaction' " (citing Friedman v. Roman, 65 A.D.3d 1187, 1188, 885 N.Y.S.2d 740, quoting Welsbach Elec. Corp. v. MasTec N. Am., Inc., 7 N.Y.3d 624, 629, 825 N.Y.S.2d 692, 859 N.E.2d 498). The court saw no reason to disregard the parties' intent to apply the law of Massachusetts,

the state in which the parties resided when they signed the agreement and the state in which they signed it.

In Auten v Auten, 308 N.Y. 155, 124 N.E.2d 99, 50 ALR2d 246 (1954) , the Court of Appeals held that absent a contractual provision, such matters are governed by the law of the place which has the most significant contacts with the matter in dispute.

FURTHER INSTRUMENTS

SETTLEMENT CONSIDERATIONS:

In order to assure that the provisions of the agreement are promptly complied with the agreement should contain a provision that each party will execute and deliver all documents and take all further steps as are necessary to effectuate the terms of the agreement, usually at no cost to the other party.

DRAFTERS NOTES:

The agreement should indicate that each of the parties, upon request by the other party or his or her attorneys, will promptly make, execute and deliver any other instruments as may be necessary or desirable for the purpose of giving full force and effect to the provisions of the agreement. It should state that this will be done at no cost to the other party.

CASE LAW YOU SHOULD KNOW:

In Bullard v Bullard (185 A.D.2d 411, 585 N.Y.S.2d 616 [3d Dept 1992) the parties separation agreement provided that the West Orchard, titled in Bullard Orchards, Inc., was to be conveyed to the wife, free and clear of all mortgages and liens. The wife obtained an order and judgment of Supreme Court compelling the husband to convey title to West Orchard to her and the husband appealed. The Appellate Division held that it was clear that the husband's agreement to the disposition of the corporate property to the wife and further promise to "make, execute and deliver any and all further instruments, papers or things * * * [necessary to give] full effect to [the separation agreement's terms], covenants and provisions" required him to use his best efforts to bring about a conveyance of West Orchard property to the wife or, that failing, to pay her an amount equal to the unencumbered value of the property.

ENTIRE UNDERSTANDING

SETTLEMENT CONSIDERATIONS:

In order to avoid any future claims that the parties had additional verbal agreements that were part of their written agreement there should be a representation that there are no other agreements or unwritten understandings of the parties.

DRAFTERS NOTES:

The agreement should state that it is the entire and complete agreement between the parties, and that there are no side deals, and no representations, other than as set forth in the agreement, that are relied upon by either party.

CASE LAW YOU SHOULD KNOW:

In McCaughey v McCaughey (205 A.D.2d 330, 612 N.Y.S.2d 579 [1st Dep't 1994]) , the Appellate Division affirmed an order of the Supreme Court which granted the wife's motion for partial summary judgment on her second cause of action for arrears. The parties separated and negotiated and executed, with the aid of independent counsel, a separation agreement. Two years later the wife brought the action for divorce, maintenance, child support and tuition arrears, alleging that the husband had defaulted under the agreement. The wife moved for a partial summary judgment on the cause of action for arrears which the husband opposed on the grounds that the separation agreement was the product of fraud, overreaching, and that its terms were unconscionable. The Appellate Division found that the husband, a sophisticated investment banker, entered into the agreement after lengthy negotiations with the aid of his attorney and then defaulted. He expressly represented in the agreement that it was not the result of fraud or duress, but signed voluntarily, that it constituted the entire understanding of the parties, and that there were no promises other than those expressly set forth in the agreement. The husband set forth conclusory allegations that he signed the agreement because he was induced by the wife's promises of reconciliations and threats regarding visitation. The assertions of his attorney were similarly lacking in evidentiary value.

EFFECT OF INCORPORATION OF AGREEMENT INTO JUDGMENT

SETTLEMENT CONSIDERATIONS:

The parties may provide that the provisions of the agreement shall be

incorporated into a judgment of divorce, separation, or annulment or a court order. Sometimes the agreement will provide that it be incorporated by reference into a judgment of divorce, separation or annulment or a court order. The agreement should indicate the intent of the parties and indicate whether the agreement survives or merges into a subsequent judgment of dissolution. If it survives, modification and enforcement will be limited by state law. If it merges, enforcement will be limited by state law.

DRAFTERS NOTES:

The agreement should specify whether it will be incorporated, in whole or in part, in any court order or judgement of divorce, separation or annulment, and whether it will survive or merge into it.

CASE LAW YOU SHOULD KNOW:

Contractual terms as to property settlements ordinarily are not subject to judicial change. Courts will not "rewrite" the maintenance provisions agreement unless there is a finding of existing hardship under Domestic Relations Law § 236[B][9][b].

Under Domestic Relations Law § 236 Part A, which is the law applicable to agreements executed before July 19, 1989, the advantage to the monied spouse if the agreement survives is that ordinarily it precluded an upwards modification of alimony/maintenance (due to a change in circumstances) so that his financial obligation was relatively fixed and certain, unless the former spouse became destitute and was a candidate for public assistance (See McMains v. McMains, 15 N.Y. 2d 283, 258 N.Y.S.2d 93, 206 N.E.2d 185 [1965], later app [2d Dep't] 23 A.D.2d 889, 260 N.Y.S.2d 251 and compare Goldman v. Goldman, 282 N.Y. 296, 26 N.E.2d 265 [1940]; See also, Schmelzel v. Schmelzel, 287 N.Y. 21, 38 N.E.2d 114 [1941]) and Galusha v. Galusha, 116 N.Y. 635, 22 NE 1114 [1889] (ovrld Wilson v. Hinman, 182 N.Y. 408, 75 NE 236); Galusha v. Galusha, 138 N.Y. 272, 33 NE 1062 [1883]).

Where it is the intention of the parties to a stipulation or agreement of the parties that its provisions be incorporated in a judgment of divorce, dissolution or annulment, to survive or merge, it is error for the court not to make such provision in the judgment and it is improper for the court to sign a counter-judgment containing provisions not in accord with the stipulation (Bono v Bono 157 A.D. 2d 763, 550 N.Y.S.2d 370 [2d Dept 1990]).

In Lamberti v Lamberti (158 A.D. 2d 449, 551 NYS2d 46 [2d Dept 1990]) the court held that absent the defendant's consent and as long as the agreement remained unimpeached, Supreme Court could not alter or modify its terms. Supreme Court could not impair the defendant's existing contractual rights by modifying the

divorce judgment to provide for defendant to pay a portion of the heat and electric bills on the marital residence.

Where the judgment does not contain a provision incorporating the terms of an agreement or stipulation, notwithstanding the contrary intent of the parties, it is proper to resettle or amend the judgment (Roll v Roll, 143 App Div 2d 651, 532 NYS2d 884 [2 Dept 1988]; Prince v Prince ,149 App Div 2d 979, 540 NYS2d 116 [4 Dept 1989]).

Weather an agreements stills exist as a separate enforceable contract or was merged into a court judgment depends upon the intention of the parties as expressed in the agreement (See McMains v. McMains, 15 N.Y. 2d 283, 258 N.Y.S.2d 93, 206 N.E.2d 185 [1965], later app [2d Dep't] 23 A.D.2d 889, 260 N.Y.S.2d 251). It is error for a court to provide in a divorce judgement that a stipulation shall survive and not be merged in the judgment, where there is no reservation in the stipulation that it should survive after entry of the judgment (Nicoletti v Nicoletti, 43 A.D.2d 699, 349 N.Y.S.2d 794 [2d Dep't 1973]).

In Fishman v Fisher (77 A.D.2D 596, 430 N.Y.S.2d 11 [2d Dep't 1980], an unsigned stipulation which was dictated into the record contained no statement by the court or either counsel that it was to survive such incorporation. The judgment of divorce set forth, in separate decretal paragraphs, all of the agreed-upon provisions without mention of the stipulation, based "upon the findings of fact and conclusions of law heretofore signed herein." The Second Department held that under the circumstances there was a merger of the stipulation with the divorce decree.

For a merger to have occurred, there must be a positive showing that the parties intended a merger to occur (Murray v. Murray, 278 App Div 183, 104 N.Y.S.2d 44, affd 303 N.Y. 700, 103 N.E.2d 59 [1951]; Re Nichols' Estate, 201 Misc 922, 107 N.Y.S.2d 311 [Sur Ct 1951]).

The rule in the Second Department is that where the agreement is silent on the question of merger or survival the agreement merges into the judgment (Nicholetti v. Nicholetti, 43 A.D.2d 699, 349 N.Y.S.2d 794 [2d Dep't 1973]).

The Fourth Department has followed the rule of the Second Department. It has held that merger occurs unless the agreement expressly provides otherwise. In Cooper v Cooper (179 A.D.2d 1035, 578 N.Y.S.2d 800 [4th Dep't 1992]), the Appellate Division held that because the parties' agreement was silent as to merger or survival, it must be deemed to merge into the divorce judgment and did not survive as a separate and independent contract. It stated that "merger occurs unless the parties' agreement expressly stipulates against it."

The Third Department has held that merger occurs unless the parties' agreement expressly stipulates against it." In Steinard v Steinard (221 A.D. 2d 835, 633 N.Y.S. 2d 435 [3d Dep't 1995], the Third Department agreed with the Fourth Department when it affirmed an order of the Supreme Court which granted the wife's motion for summary judgment enforcing the financial provisions of the parties' 1989

open court stipulation. Both the judgment of divorce and the stipulation were silent as to whether the stipulation was to be incorporated and survive or merged into the parties' judgment of divorce. The Third Department stated that "it is well settled that merger occurs unless the parties' agreement expressly stipulates against it. However, it appears to have subsequently adopted the presumption that an agreement or stipulation is presumed to survive.

In Von Schaaf v Von Schaaf (257 A.D.2d 296, 693 N.Y.S. 2d 315 [3d Dep't 1999]), the Third Department rejected the Second Department's rule and adopted the presumption that an agreement or stipulation is presumed to survive. The Third Department held that where a judgment of divorce is silent as to whether the underlying separation agreement is to survive or merge therein, the court must, consistent with basic principles of contract interpretation, attempt to glean the parties' intent from within the four corners of the agreement itself. If the agreement is clear and unambiguous on its face, the inquiry is at an end. Should an ambiguity be evident, a factual hearing should be held where extrinsic evidence may be received in an effort to determine the parties' intent. The court held that in the event that no extrinsic evidence is available, or a review of such evidence fails to resolve the issue of the parties' intent, the separation agreement is presumed to survive the resulting decree. In a footnote the court stated, "to the extent that this court's prior decision in Steinard v Steinard (221 A.D.2d 835) holds to the contrary, we reject the reasoning employed therein." In its view, a review of the separation agreement plainly evidenced the parties' intent that the agreement was to survive the resulting judgment of divorce, that the separation agreement remained a separate and enforceable contract upon which plaintiff could seek relief, and provided the Supreme Court with a valid basis for exercising subject matter jurisdiction over this dispute.

Effect of Agreement Which in Incorporated in and Merges in Judgment of Dissolution on Enforcement of Maintenance and Child Support Provisions of Agreement.

The significance of having an agreement be incorporated into a judgment of dissolution or court order and merge into it is that while the court-ordered provisions of the agreement which are incorporated into the judgment or order are enforceable pursuant to the provisions of Domestic Relations Law 243, 244 and 245, as well as CPLR 5141 and 5142, the agreement no longer exists as an independent contract and becomes part of the judgment, separate from the contract, subject to all the rules and regulations respecting such a judgment (Staehr v. Staehr, 237 App Div 843, 261 N.Y.S. 103 [1932]; Holahan v. Holahan, 234 App Div 572, 255 N.Y.S. 693 [1932]; Kunker v. Kunker, 230 App Div 641, 246 N.Y.S. 118 [1930]; Goldfish v. Goldfish, 193 App Div 686, 184 N.Y.S. 512 [1920], affd 230 N.Y. 606, 130 N.E. 912).

Effect of Agreement executed before July 19, 1980 Which in Incorporated in and Survives a Judgment of Dissolution on Modification of Maintenance Provisions of

Agreement

Any application which seeks a modification of an agreement, judgment or order made in an action commenced prior to July 19, 1980, is heard and determined in accordance with Domestic Relations Law, Section 236, Part A. See Domestic Relations Law, Section 236 [B][2].

Where there is a surviving agreement executed on or before July 19, 1980, the rule is that our Courts would not compel the husband to support his wife in a greater sum than provided in the agreement, unless the sum agreed upon was plainly inadequate or unfair when made (Galusha v. Galusha, 138 NY 272, 33 NE 1062 [1893]; Goldman v. Goldman, 282 NY 296, 26 NE2d 265 [1940]). If the parties had legal capacity to contract, the subject of the settlement was lawful, and the contract without fraud or duress, the Court would not interfere (Galusha v. Galusha, 116 NY 635, 22 NE 1114 [1889]). The Court could not reform a separation agreement (Vranick v. Vranick, 41 AD2d 663, 340 NYS2d 566 [2d Dep't 1973]; Corcoran v. Corcoran, 73 A.D. 2d 1037, 425 N.Y.S.2d 402 [4th Dep't 1980], but could modify its own judgment based upon its inherent power over its orders and Judgments.

In Goldman v. Goldman, (272 NY 296, 26 NE2d 265 [1940]) , the Court of Appeals held that where a separation agreement, which was valid and unimpeached, was incorporated in a divorce judgment and survived, the Supreme Court in the exercise of its statutory powers, could modify the alimony provisions of the judgment downward, based upon a substantial change in the husband's financial circumstances , without impeding the contractual provision of a surviving agreement. The agreement could not limit the statutory power of the Court and could not confer power. The downward modification of the judgment did not affect the rights of the wife to recover in an action to enforce the agreement. As it was not modified and was still an enforceable contract, the wife could sue on the contract for the difference between the contract amount and the reduced amount set by the modified judgment (See also King v. Schultz, 29 NY2d 718, 325 NYS2d 754, 275 NE2d 336 [1971]; Morse v. Morse, 45 AD2d 370, 357 NYS2d 534 [1st Dep't 1974]);But see Mackey v. Mackey, 58 AD2d 806, 396 NYS2d 257 [2d Dep't 1977]).

In McMains v. McMains (15 NY2d 283, 258 NYS2d 93, 206 NE2d 185 [1965], later app [2d Dept] 23 AD2d 889, 260 NYS2d 251), the Court of Appeals held that the Supreme Court could modify the alimony provisions of the judgment upward, where the former wife "is actually unable to support herself on the amount heretofore allowed and is in actual danger of becoming a public charge." It was held that, notwithstanding a valid separation agreement, a wife who had not remarried may obtain a modification of the alimony provision contained in a divorce judgment where it was necessary to prevent her from becoming a public charge, on the theory that the modification of the Court's alimony award was independent of and did not vary the terms of the agreement, but merely was a recognition of the husband's statutory duty imposed by Section 5-311 of the General Obligations Law. The Court reasoned that if it had the

power to modify the judgment downward, it had the power to modify it upward to prevent the wife from becoming a public charge (See also Gardner v. Gardner 40 AD2d 153, 338 NYS2d 639 [4th Dept] affd 33 NY2d 899, 352 NYS2d 626, 307 NE2d 823).

In Schmelzel v. Schmelzel, (287 NY 21, 38 NE2d 114 [1941]), the Court of Appeals held that where an agreement was incorporated in and survived a judgment and was sustained by the Court as free of fraud and duress and the Defendant was not in default under the agreement, nor had he abandoned or acquiesced in the efforts of the other spouse to repudiate the agreement, and no question of inadequacy arises, as in McMains , the separation agreement is in full force and effect and the Court cannot increase the amount provided therein for alimony or receive counsel fees. Although the husband's income and finances had improved, the Court could not modify the alimony provisions of the judgment upward.

Effect of Agreement executed on or after July 19, 1980 Which in Incorporated in and Survives Judgment of Dissolution on Modification of Maintenance Provisions of Agreement.

Domestic Relations Law § 236 [B][9][b], applies to modification all agreements, orders and judgments entered into or made in actions commenced on or after July 19, 1980, provides that a Court-ordered provision for maintenance may be modified upwards or downwards upon a showing of the recipients 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.

Domestic Relations Law,§ 236, Part B, Subdivision 9(b) authorizes the Court to modify maintenance awarded on or after July 19, 1980 upwards or downwards, where there is a surviving agreement, and provides that the modified judgment supersedes the terms of the prior agreement and judgment for such period of time and under such circumstances as the Court determines. The criteria upon which such modification may be ordered is "extreme hardship on either party." This is a much stricter criteria than "a substantial change of circumstances, including financial hardship", which is applied where there is no surviving agreement, and less stringent than the "public charge" test applied under Part A of Domestic Relations Law 236 (See Foster v. Foster, 122 Misc2d 67, 470 NYS2d 94 [Fam Ct 1983]; Pintus v. Pintus, 104 AD2d 866, 480 NYS2d 501 [2d Dep't 1984]; See also, Seeds v. Seeds 112 AD2d 155, 491 NYS2d 60 [2d Dep't 1985]).

Effect of Agreement executed on or after July 19, 1980 Which Merges into Judgment of Dissolution on Modification of Child Support Provisions of Agreement

Domestic Relations Law § 236[B][9][b] does not extend the modification power to child support. The modification provision of the statute does not mention child support.

The significance of a Court-ordered provision for child support is that it may be modified at any time based upon a showing of a change of circumstances. Where a Court makes an award directing a parent to pay support for his/her child, and there is no surviving agreement, the Supreme Court is empowered to modify that award based upon a showing of the recipient's inability to be self-supporting, or a substantial change of circumstances, including financial hardship. (Domestic Relations Law, Section 236 [B][9][b]; Knights v. Knights, 71 NY2d 865, 527 NYS2d 748, 522 NE2d 1045 [1988]; Flanter v. Flanter, 123 AD2d 626, 506 NYS2d 780 [2d Dep't 1986]; Harvey v. Harvey, 127 AD2d 819, 512 NYS2d 215 [2d Dep't 1987]; Dorn v. Dorn, 135 Misc 2d 837, 516 NYS2d 872 [1987]).

Effect of Agreement executed on or after July 19, 1980 Which is Incorporated into and Survives the Judgment of Dissolution on Modification of Child Support Provisions of Agreement

An agreement executed by the parties, which is fair and adequate when made, which provides support for children confines the obligation of the non-custodial parent to that which is set forth in the agreement. Unless and until the agreement is set aside or modified, no other award made be made for child support (Reimer v. Reimer, 25 AD2d 956, 299 NYS2d 318 [2d Dep't 1969], aff'd 31 NY2d 881, 340 NYS2d 185.) Unless the agreement provision is void, a court is barred from awarding temporary child support, but such a determination would have to be made after a hearing (Bennett v. Bennett,56 AD2d 782,393 NYS2d 457 [1st Dept. 1977]).

The parties cannot by agreement eliminate or diminish either parent's duty to support a child of the marriage. A child is entitled to support, maintenance and education in accordance with his parent's financial means and ability (Boden v. Boden, 42 NY2d 210 [1977]; Bresca v. Fitts, 56 NY2d 132, 451 NYS2d 68 [1982]).

Family Court Act § 461(a) provides that a separation agreement does not diminish a parents duty to support his child, and the initial adequacy of the provisions of a separation agreement for the child may be challenged at any time.

Where a separation agreement or stipulation is incorporated in or survives a judgment of divorce, modification of the child support provisions was initially limited by the Court of Appeals in Boden v. Boden, (42 NY2d 210, 397 NYS2d 701, 366 NE2d 791 [1977]). In an opinion for a unanimous court, Judge Wachtler restated the general rule that the child is not bound by the terms of a separation agreement pertaining to child support and that an action may be commenced against the father for child support, despite the existence of the agreement. In finding that the Appellate Division abused its discretion by increasing the child support provisions of the separation agreement, the Court of Appeals set forth the rule that "... [a]bsent a showing of unanticipated and unreasonable change in circumstances, the support provisions of the agreement should not be disturbed ... Unless there has been an unforeseen

change in circumstances and a concomitant showing of need, an award for child support in excess of that provided for in the separation agreement should not be made solely on an increase in cost where the agreement was fair and equitable when entered into ..." (citations omitted).

The Court of Appeals qualified Boden in Brescia v. Fitts (56 NY2d 132, 451 NYS2d 68, 436 NE2d 518, on remand [2d Dept] 89 Ad2d 894, 453 NYS2d 458). The Court held that the principles of Boden did not alter the scope of Family Court's power to order support where the dispute concerns the child's right to receive adequate support and that the principles set forth in Boden apply only when the dispute is directed solely to readjusting the respective obligations of the parents to support their child. The Court of Appeals held that a different situation was presented where it is the child's right to receive adequate support that is being asserted. In Brescia, Family Court had the power to properly order an increase in child support if petitioner demonstrated a change of circumstances. The petitioner introduced evidence tending to show that the combination of her own income and the payments contributed by respondent did not adequately meet the children's needs. Specific items of expense were detailed, as well as petitioner's and respondent's respective financial circumstances. The Court of Appeals held that whether the evidence shows a change of circumstances sufficient to order a modification is a question best left to the discretion of the lower Courts whose primary goal is ... to make a determination based upon the best interests of the children ..." The Court stated that considering both the circumstances as they existed at the time of the prior award and at the time the application is made, several factors may, in a proper case, enter into a determination, including the increased needs of the children due to special circumstances or to the additional activities of growing children, the increased cost of living insofar as it resulted in greater expense for the children, a loss of income or assets by a parent, or a substantial improvement in the financial condition of a parent, and the current and prior lifestyles of the children. Consideration of such factors in a given case may lead to the determination that the children's best interests require an upward modification in the child support. In Brescia, the mother demonstrated that her own income and the support provided by the father did not adequately meet the needs of the children. An increase, therefore, was justified despite the amount stipulated in the agreement.

The Child Support Standard Acts amended the Domestic Relations Law to provide that "the termination of child support awarded pursuant to Section 240 of this Article" is an additional basis for a modification of a maintenance or child support award (Laws of 1980, Ch. 645, Sec. 2, 3, Laws of 1989, Ch 567, Sec. 5, as amended by Laws of 1992, Ch. 41, Sec. 140, amending DRL 236 (B)(9)(b). The Family Court Act has not been similarly amended. The statute provides in part:

> "Upon application by either party, the Court may annul or modify any prior order or judgment as to maintenance or child support, upon a showing of the recipient's inability to be self-supporting or a substantial change in circumstance or termination of child support awarded pursuant to Section

Two Hundred Forty of this Article, including financial hardship. Where, after the effective date of this Part, a separation agreement remains in force no modification of a prior 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. Provided, however, that no modification or annulment shall reduce or annul any arrears of child support which have accrued prior to the date of application to annul or modify any prior order or judgment as to child support ... The provisions of this Subdivision shall not apply to a separation agreement made prior to the effective date of this part.")

This applies to awards made without an underlying agreement, after trial or a hearing or where an agreement providing for maintenance or child support merges into an order or judgment.

Modification of Child Support since 2010 under the Low Income Support Act

In 2010 the legislature enacted the "Low Income Support Obligation and Performance Improvement Act," (2010 N.Y. Laws ch. 182 §1, effective October 13, 2010) which, inter alia, amended Domestic Relations Law §236[B][9][b] and Family Court Act §451 to create a uniform statutory standard for modifying child support awards. The legislature added subdivision 2 (now subdivision 3) to Family Court Act § 451. It provides that the court "may modify an order of child support, including an order incorporating without merging an agreement or stipulation of the parties, upon a showing of a substantial change in circumstances" and adds two new bases for modification of an order of child support: (1) the passage of three years since the order was entered, last modified, or adjusted; or (2) a 15% change in either party's gross income since the order was entered, last modified or adjusted provided that any reduction in income was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability and experience.

Domestic Relations Law §236[B](9)(b)(2)(i) and FCA §451(3)(b) allow the parties to specifically opt out of the two additional bases for modification in a validly executed agreement or stipulation, in which event the provisions of subdivisions (i) or (ii) do not apply.

The "Child Support Standards Act" allows the parties to "opt out" of its provisions regarding the basic child support obligation by executing a written agreement doing so. The statute states that it does not alter the rights of the parties to "voluntarily enter into validly executed agreements or stipulations." It specifically provides that the parties may agree that the child support standards "established by this subdivision" are not applicable to validly executed agreements or stipulations

voluntarily entered into between the parties, “when executed.” DRL §240(1-b)(h); FCA §413(1)(h). However, a validly executed agreement or stipulation that “opts-out” of the child support standards act which is presented to the court for incorporation in an order or judgment must include a provision that the parties have been advised of the provisions of Domestic Relations Law §240(1-b) and FCA §413(1)(b). An agreement which opts out of the law must also contain a provision that the parties have been advised that the “basic child support obligation” provided in Domestic Relations Law §240(1-b) and FCA §413(1)(b) “would presumptively result in the correct amount of child support to be awarded.” In the event that the Agreement or Stipulation deviates from the “basic child support obligation,” the Agreement or Stipulation must specify the amount that the “basic child support obligation.” would have been and the reason or reasons that such Agreement or Stipulation does not provide for payment of that amount. These provisions may not be waived by either party or counsel. DRL§240(1-b)(h); FCA §413(1)(h). The failure to include such a clause in an “opting-out” agreement is fatal. See Sloam v. Sloam, 185 A.D.2d 808, 586 N.Y.S.2d 651 (2d Dep't 1992).

Unlike the provisions of the Child Support Standards Act, Domestic Relations Law §236[B](9)(b)(2)(ii) and FCA §451(3)(b) permit the parties to “opt out” of the three year or 15% threshold for modification of a child support order “in a validly executed agreement or stipulation,” without a provision that the parties have been advised of any specific provisions of the Domestic Relations Law or Family Court Act. Moreover, there is no requirement that the Agreement or Stipulation must specify the reason or reasons that they are opting out of the provisions of Domestic Relations Law §236[B](9)(b)(2)(ii) and FCA §451(3)(b).

An example of an opting out clause that should comply with the statute is as follows:

In accordance with the provisions of Domestic Relations Law §236 [B](9)(b)(2)(ii) and Family Court Act §451 (3)(b) the parties to this (agreement) (stipulation) have specifically opted out of the provisions of Domestic Relations Law §236 [B](9)(b)(2)(ii) and Family Court Act §451 (3)(b) which provide that the court may modify an order of child support where: (A) three years have passed since the order was entered, last modified or adjusted; or (B) there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted. In the event that the provisions of Domestic Relations Law §236 [B](9)(b)(2)(ii) and Family Court Act §451 (3)(b) are subsequently modified to add additional grounds or requirements for modification of an order of child support, this opting out provision shall apply to such additional grounds or requirements, and shall remain in full force and effect, to the extent permitted by law.

The first sentence of Domestic Relations Law §236[B](9)(b)(2) and FCA§451(2)(b) each provide that the “court may modify an order of child support, including an order incorporating without merging an agreement or stipulation of the

parties, upon a showing of a substantial change in circumstances." It appears from this language and the New York State Assembly Memorandum1 in support of the legislation, that it was the intention of the legislature to, in effect, overrule Boden v Boden, 42 N.Y.2d 210, 397 N.Y.S.2d 701, 366 N.E.2d 791 (1977) and Brescia v Fitts, 56 N.Y.2d 132, 451 N.Y.S.2d 68, 436 N.E.2d 518 (1982) where the parties do not opt-out of the provisions of Domestic Relations Law §236[B](9)(b)(2) and FCA §451(2)(b), and to allow the court to readjust the parties' respective child support obligations in those situations where there is a surviving agreement, even where the child is being adequately supported, based upon a "substantial change of circumstances" or one of the two additional bases for modification, the passage of three years or a 15 percent change in a party's gross income.
Where the parties opt-out of the provisions of Domestic Relations Law §236[B](9)(b)(2) and Family Court Act §451(2)(b), existing statutory and case law, including Boden v Boden and Brescia v Fitts, still applies to prohibit the court from readjusting the parties' respective child support obligations in those situations where there is a surviving agreement, and where the child is being adequately supported.

Existing statutory and case law distinguishes between modification of a child support provision in a court order or divorce judgment, where there is no surviving agreement, and modification of a child support provision in a court order or divorce judgment, where there is a surviving separation agreement or stipulation.

Where there is merely a court order or judgment ordering child support the rule is that in order to have an award modified so as to increase or decrease payments for child support, a substantial change of circumstances must be shown to have occurred since the time of the entry of the order. See former DRL §236[B](9)(b), which provided: "Upon application by either party, the court may annul or modify any prior order or judgment as to maintenance or child support, upon a showing of the recipient's inability to be self-supporting or a substantial change in circumstance or termination of child support awarded pursuant to section two hundred forty of this article, including financial hardship."

Thus, where the parties have not opted out of these provisions, a reduction in a party's income is not a basis for a downward modification of child support, unless the reduction in income is involuntary and the party whose income has been reduced has made diligent attempts to secure employment commensurate with his or her education, ability and experience. However, a 15% increase in a party's income is a basis for an upward modification of child support.

COUNSEL FEES IN EVENT OF DEFAULT

SETTLEMENT CONSIDERATIONS:

Courts are not authorized to award counsel fees to the successful party in an action for breach of contract. A provision in an agreement providing that the successful party in an action to enforce the agreement will be entitled to reasonable counsel fees or actual counsel fees will be enforced by the courts. Without such a provision, counsel fees can not be awarded in any plenary action to enforce the agreement.

Domestic Relations Law §§ 237 (b) and 238 (Expenses in enforcement and modification proceedings) provides that there shall be a rebuttable presumption that counsel fees shall be awarded to the " less monied spouse. "

Domestic Relations Law §237 (b) provides that upon any application to enforce, annul or modify an order or judgment for alimony, maintenance, distributive award, distribution of marital property or for custody, visitation, or maintenance of a child, made as in Domestic Relations Law §236 or § 240, or upon any application by writ of habeas corpus or by petition and order to show cause concerning custody, visitation or maintenance of a child, the court may direct a spouse or parent to pay counsel fees and fees and expenses of experts directly to the attorney of the other spouse or parent to enable the other party to carry on or defend the application or proceeding by the other spouse or parent as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties.

Domestic Relations Law § 238 provides that in any action or proceeding to enforce or modify any provision of a judgment or order entered in an action for divorce, separation, annulment, declaration of nullity of a void marriage, declaration of validity or nullity of a judgement of divorce rendered against a spouse who was the defendant in any action outside the state of New York and did not appear therein where such spouse asserts the nullity of such foreign judgment, or an injunction restraining the prosecution in any other jurisdiction of an action for a divorce, or in any proceeding pursuant to 243, 244, 245 or 246 of the Domestic Relations Law, the court may in its discretion require either party to pay counsel fees and fees and expenses of experts directly to the attorney of the other party to enable the other party to carry on or defend the action or proceeding as, in the court's discretion, justice requires having regard to the circumstances of the case and of the respective parties.

In exercising the court's discretion, under Domestic Relations Law §§ 237(b) and 238 the court is required to seek to assure that each party is adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis pendente lite, so as to enable adequate representation from the commencement of the proceeding.

In addition the court is specifically authorized to order expert fees to be paid by one party to the other to enable the party to carry on or defend the action.

“Expenses" is defined in Domestic Relations Law § 237(d) and includes, but is not limited to, accountant fees, appraisal fees, actuarial fees, investigative fees and other fees and expenses as the court may determine to be necessary to enable a spouse to carry on or defend one of the actions or proceedings designated in section 237(a).

The parties and their attorneys are required to submit an affidavit to the court with financial information to enable the court to make its determination. The monied spouse is required to disclose how much he has agreed to pay and how much he has paid his attorney. The affidavit must include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses.

Payment of any retainer fees to the attorney for the petitioning party shall not preclude any awards of fees and expenses to an applicant which would otherwise be allowed under this section.

Prior law placed an onus upon the party in a matrimonial action seeking counsel fees pendente lite, to show why the interests of justice require it. The burden is now on the “more-monied” spouse to show why, in the interests of justice, a counsel fee award should not be made.

Neither Domestic Relations Law § 237 nor Domestic Relations Law § 238 define the term **“less monied spouse”.**

Applications for counsel fees in enforcement proceedings are governed by the Uniform Rules, (22 New York Code Rules and Regulations § 202.16), which specifically exempt a motion made pursuant to section 237(c) and 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, from the requirement that an official form net worth statement and attorney’s affidavit.

New York Domestic Relations Law § 237(c) provides for a mandatory award of counsel fees in any action or proceeding for failure to obey any lawful order compelling payment of support or maintenance, or distributive award. The statute provides that the court shall, upon a finding that such failure was willful, order respondent to pay counsel fees to the attorney representing the petitioner. It also applies to New York, sister state and foreign orders or judgments. Where a default is wilful the Supreme Court is required to award a counsel fee pursuant to New York Domestic Relations Law §237(c). However, an evidentiary hearing must be held so that the extent and value of counsel’s services can be scrutinized in an adversarial context by the trial court and intelligently reviewed by the Appellate Division.

DRAFTERS NOTES:

The agreement should state that a party who is in default of his/her obligations under the agreement will be liable for the counsel fees and expenses of the other party incurred to enforce the agreement. It should provide that in the event that either party defaults with respect to any obligation under the agreement and the default is not remedied within a specified period of time of the sending of a written notice to the defaulting party specifying the nature of the default, that the defaulting party will reimburse him or her for, reasonable attorneys' fees, disbursements, and court costs incurred by the other party in bringing suit or other proceedings to enforce the agreement. Usually the parties provide that in order for fees to be recovered the suit must result in a judgment or order in favor of him or her. It is common for the agreement to provide that in the event either party institute an action or proceeding to enforce any of the terms of the agreement, and after the institution of the action or proceeding and before judgment is entered, the defaulting party complies with the term, or agrees to a compromise and settlement of the action or proceeding, then and in that event, the action or proceeding shall be deemed to have resulted in a judgment or order in favor of the non-defaulting party.

CASE LAW YOU SHOULD KNOW:

A showing of financial need is not a prerequisite for an award of counsel fees pursuant to New York Domestic Relations Law §237(c) (Stang v Stang, 173 A.D.2d 812, 572 N.Y.S.2d 633 (2d Dep't 1991).

Domestic Relations Law § 238 does not vest the court with discretionary power to require either party to pay counsel fees in a plenary action to enforce the terms or provisions of a separation agreement or stipulation. In Voss v Voss, (132 A.D.2d 545, 517 N.Y.S.2d 546 [2 Dept 1987]), the court held that Domestic Relations Law § 238 did not apply to an action to enforce a separation agreement.) However, where the agreement or stipulation is incorporated in or survives a domestic or foreign judgment of divorce which specifically orders the parties to comply with the terms of the agreement, the action to enforce the support provisions of the separation agreement is a proceeding to compel the payment of a sum of money required to be paid by a judgment or order entered in an action for divorce. Therefore, the court in its discretion has the power to award counsel fees and disbursements to enforce the agreement whether the agreement be in a domestic or foreign divorce judgment. (See Fabrikant v Fabrikant, 19 N.Y. 2d 154, 278 N.Y.S. 2d 607, 225 N.E.2d 202 [1967]; Galyn v Schwartz, 77 A.D.2d 437, 434 N.Y.S. 2d 1 [1st Dep't 1980], motion den, app dismd 53 N.Y. 2d 701, 439 N.Y.S. 2d 109, 421 N.E.2d 504 and mod 56 N.Y. 2d 969, 453 N.Y.S. 2d 624, 439 N.E.2d 340).

Where the agreement provides for counsel fees to be awarded to the successful party who has commenced an enforcement proceeding that provision will be enforced by the court. In Bonelli v Bonelli (189 A.D.2d 794, 592 N.Y.S. 2d 453 [2d Dep't 1993]), the Appellate Division reversed a judgment of the Supreme Court which limited the wife's counsel fees, with respect to an application to enforce the parties' separation

agreement, to counsel fees incurred in securing a pendente lite award of maintenance and child support. The matter was remitted to Supreme Court for a determination after receiving evidence of the amount of reasonable counsel fees to be awarded to the wife with respect to the extended litigation on her application to enforce the separation agreement. Pursuant to the terms of the parties' agreement, the wife was entitled to an award of reasonable counsel fees incurred in enforcing the husband's unfulfilled obligations under the agreement. Supreme Court awarded the wife $3,000 in counsel fees arising from her application for arrears in maintenance and child support accruing under a pendente lite order dated in 1988. That pendente lite order involved the same issue raised during the subsequent extended litigation to enforce the separation agreement, namely, whether the husband's financial obligations under the separation agreement terminated by reason of the wife's alleged violation of a non-cohabitation clause. The Court held that, in addition to the prior award for the counsel fees incurred in securing the pendente lite order, the wife was entitled to reasonable counsel fees incurred in connection with the extended litigation.

In Curiel v. Curiel (262 A.D.2d 639, 694 N.Y.S.2d 78 [2d Dep't 1999]), the parties' stipulation of settlement provided that the party who defaulted in the performance of any of the provisions of the stipulation was responsible for paying to the successful nondefaulting party the costs and expenses incurred, including attorney fees, in connection with a proceeding to enforce the stipulation. The father did not dispute that he defaulted in the performance of the provision of the stipulation requiring that he provide "responsible adult supervision during all visitation periods", when he drank to excess in the presence of the children and drove a vehicle in which the children were passengers while under the influence of alcohol. Therefore, pursuant to the stipulation he was responsible for paying the reasonable counsel fees incurred by the mother in this proceeding.

In Tito v. Tito (276 A.D.2d 559, 714 N.Y.S.2d 117 [2d Dep't 2000]), pursuant to the stipulation of settlement which was incorporated but not merged in the parties' judgment of divorce, if either party failed to perform his or her obligations under the stipulation, the defaulting party was to indemnify the nondefaulting party for "actual attorney fees" and/or expenses incurred in an enforcement proceeding. The Appellate Division held that Accordingly, upon finding after the hearing that the mother had violated the visitation provisions of the stipulation of settlement, the court properly directed the mother to pay the actual attorney's fees incurred by the father in connection with this proceeding to enforce his visitation rights.

In Rubio v Rubio, 894 N.Y.S.2d 146 (2 Dept, 2010) the parties' settlement agreement expressly provided that, in the event that either party defaulted in complying with its terms, the defaulting party would be required to reimburse the non-defaulting party for an attorney's fee incurred in enforcing the terms of the settlement agreement. The defendant established that the plaintiff defaulted in the performance of certain terms under the settlement agreement. Thus, the defendant was entitled to

an award of an attorney's fee in the total sum of $13,921.75.

In D'Amico v. D'Amico, 251 A.D.2d 616, 675 N.Y.S.2d 874 (2 Dept 1998) where the stipulation of settlement provided for counsel fees to be paid to the party who prevailed in the attempt to enforce that party's rights under the stipulation and each party prevailed on some issues and lost on others, the Appellate Division held that under these circumstances, neither party was entitled to an award of counsel fees.

In Bederman v Bederman, -- N.Y.S.2d ----, 2011 WL 749719 (N.Y.A.D. 2 Dept.) the Appellate Division held that the mother was not entitled to an award of an attorney's fee, as she did not prevail on all issues.(citing D'Amico v. D'Amico, 251 A.D. 2d 616; cf. Leiderman v. Leiderman, 50 AD3d 644).

ARBITRATION

SETTLEMENT CONSIDERATIONS:

If the parties want to avoid returning to Supreme Court to resolve any disputes after the execute the agreement they may provide that if a dispute arises in connection with the interpretation or enforcement of terms and provisions of the agreement they will submit the matter to an alternative forum or to arbitration. However, in New York not all disputes are arbitrable and not all forums have jurisdiction to resolve their disputes.

DRAFTING CONSIDERATIONS:

If the parties agree to submit the dispute to arbitration the agreement should follow the form provided by the American Arbitration Association if that is the organization the parties are going to use for any future arbitration. The agreement may provide for the number of arbitrators, may provide that the ward of the arbitrators shall be accompanied by a statement of the reasons upon which the award is based and may provide that the arbitrators shall decide the dispute in accordance with the substantive law of the state of New York.

CASE LAW YOU SHOULD KNOW:

Family Court is a court of strictly limited jurisdiction and cannot act beyond its express powers (Borkowski v. Borkowski, 38 A.D.2d 752, 330 N.Y.S.2d 106 [2d Dep't 1972]; Application of Matthew G., 184 A.D.2d 323, 323, 585 N.Y.S.2d 338, 338 [1st Dep't 1992]; Matter of H.M. v E.T. , ___ A.D.3d ___, 881 N.Y.S.2d 113 [2d Dep't 2009]), even where the parties consent to such acts (Department of Social Services v.

Gabriel, 100 Misc. 2d 757, 420 N.Y.S.2d 85 [Fam. Ct. 1979]). Family Court does not have subject matter jurisdiction with regard to construction of agreements and parties to an agreement may not, by their agreement, confer subject matter jurisdiction on the Family Court which it does not have. Since the Family Court does not have subject matter jurisdiction to resolve disputes between the parties relative to their agreement they can not confer jurisdiction on that court to resolve disputes between them relative to the agreement.

In Matter of Johna M.S. v Russell E.S. (10 N.Y.3d 364, 859 N.Y.S. 2d 594 [2008]), Petitioner wife and respondent husband executed a written separation agreement in 2003. No divorce action was commenced. The agreement provided that the husband would pay the wife $100 per week in spousal maintenance and $250 per week in child support. The section of the agreement pertaining to maintenance stated: "while this agreement will resolve these issues for the present time, the Wife shall not be foreclosed from seeking additional maintenance in negotiation with the Husband, or failing such negotiation, then filing in a court of appropriate jurisdiction for a modification of the present provisions concerning the payment of maintenance. Any application by the Wife shall be treated as a 'de novo' application to the court, since it is not possible to set future maintenance at this time because it is impossible to forecast the Wife's needs or the Husband's income/earning capacity." The wife commenced a Family Court Act article 4 proceeding seeking an upward modification of maintenance and child support. The Support Magistrate dismissed that portion of the wife's application seeking additional spousal maintenance for lack of jurisdiction. The court noted that no proof was offered that the wife was likely to become a public charge; thus, the parties were bound by the terms of the separation agreement on the issue of spousal maintenance. Family Court affirmed, as did the Appellate Division. The Court of Appeals affirmed. It held that Family Court is a court of limited jurisdiction that cannot exercise powers beyond those granted to it by statute. It generally has no subject matter jurisdiction to reform, set aside or modify the terms of a valid separation agreement. Nor can an agreement of the parties confer on Family Court the power to modify the terms of a separation agreement. A statutory exception to the rule prohibiting the modification of separation agreements, not applicable here, exists where a spouse "is likely to become in need of public assistance or care." Family Court lacked subject matter jurisdiction to entertain the wife's application for increased spousal maintenance. Although the parties' separation agreement purported to permit Family Court to treat any application by the wife as "de novo," such language cannot confer jurisdiction upon Family Court. The wife's petition to Family Court for increased maintenance expressly stated that it was "an application to the Court for an upward modification of spousal support," premised on the insufficiency of current maintenance due to a loss of certain Social Security benefits. In practical terms, the wife was not presenting a new, or "de novo," application for maintenance to Family Court. She was seeking increased maintenance from that provided under the separation agreement. Thus, because the wife was seeking a modification of a spousal maintenance award set forth in a separation agreement, Family Court was without jurisdiction to entertain

the petition and grant the requested relief.

Custody and visitation disputes may not be the subject of an arbitration clause (Glauber v Glauber, 192 A.D.2d 94, 600 N.Y.S.2d 740 [2d Dep't 1993]). The court may not delegate this authority.

Where an agreement, incorporated but not merged in the divorce judgment, contained detailed provisions as to support and educational costs but provided generally that in the event of disagreement, disputed issues would be referred to arbitration, the Court of Appeals held that "the rule is clear that unless an agreement to arbitrate expressly and unequivocally encompasses the subject matter of the parties dispute, a party cannot be compelled to submit to arbitration." The Court concluded that this arbitration clause was not intended to encompass the dispute in question [Bowmer v. Bowmer, 67 A.D.2d 8, 414 N.Y.S. 2d 340 [1st Dep't 1979], affd 50 N.Y. 2d 288, 428 N.Y.S. 2d 902, 406 N.E.2d 760. See also, Sheets v. Sheets, 22 A.D.2d 176, 254 N.Y.S. 2d 320 [1st Dep't 1964]).

Where the agreement expressly and unequivocally contains language providing for the arbitration of specific matters, however, each party may be compelled to arbitrate and to forego the right to seek judicial relief. In Avitzur v Avitzur (58 N.Y. 2d 108, 459 N.Y.S. 2d 572, 446 N.E.2d 136 [1983]), the Court of Appeals majority, in an opinion written by Chief Judge Wachtler, held that an arbitration clause contained in a ketubah was enforceable as a "secular term" for binding arbitration, even though the arbitration was to take place before a rabbinical tribunal (beth din). It was said that the relief sought was simply to compel the defendant to perform the secular obligation to which he contractually bound himself. This does not mean, that an arbitration clause is a defense to an action for arrears in maintenance or child support(Avery v. Avery, 81 A.D.2d 849, 438 N.Y.S.2d 853 [2d Dep't 1981]).

It has also been held by the Court of Appeals that an arbitration award which gave no support to a self-supporting former wife did not violate public policy (Hirsch v Hirsch, 37 N.Y. 2d 312, 372 N.Y.S.2d 71, 333 N.E.2d 371 [1975]).

Child support issues may be subject to arbitration. Arbitration of child support issues does not violate the objectives of the Child Support Standards Act because an arbitration award is subject to vacatur if it fails to comply with the CSSA and is not in the best interest of the child (Frieden v Frieden, 22 A.D. 3d 634, 802 N.Y.S.2d 727 [2d Dep't 2005]; See also Schneider v. Schneider, 17 N.Y.2d 123, 128, 269 N.Y.S.2d 107, 216 N.E.2d 318 [1966]; Sheets v. Sheets, 22 A.D.2d 176, 178, 254 N.Y.S.2d 320 [1st Dep't 1964]).

In Friedman v. Friedman (34 A.D.3d 418, 824 N.Y.S.2d 357 [2 Dep't 2006]), the Supreme Court granted pendente lite relief including an award of child support to the plaintiff. Subsequently, the parties executed an agreement to arbitrate all disputes relating to the dissolution of their marriage before a rabbinical court. The Appellate

Division held that when an agreement to arbitrate precedes any judicial intervention, compliance with that agreement should be compelled. Even the level of child support may be prospectively determined by an arbitration subject to vacatur on public policy grounds if it violates the Child Support Standards Act.

In Hirsch v. Hirsch (4 A.D.3d 451, 774 N.Y.S.2d 48 [2d Dep't 2004], the husband and the wife agreed to submit certain matrimonial claims to arbitration by a Bais Din in accordance with Jewish law. After the Bais Din issued an award the Supreme Court granted the wife's motion to vacate the award on the ground that its provisions violated public policy. The Appellate Division affirmed It pointed out that the Bais Din awarded joint custody of the children to the parties, with residential custody to the wife and liberal visitation to the husband, and that disputes concerning child custody and visitation are not subject to arbitration as "the court's role as parens patriae must not be usurped." Although the issue of child support is subject to arbitration, an award may be vacated on public policy grounds if it fails to comply with the Child Support Standards Act and is not in the best interests of the children. The award, which directed the husband to pay the sum of only $457 a month as support for the parties' six children, was not in the children's best interests, and was not made in compliance with the CSSA. The Family Court had previously directed the husband to pay support in the sum of $340 a week, based in part on his earning capacity. The Bais Din failed to consider the husband's earning capacity or any income available to him from the four businesses he owned in determining the amount of support.

BANKRUPTCY

SETTLEMENT CONSIDERATIONS:

There is very limited freedom to contract when it comes to drafting provisions designed to avoid the effect of the future bankruptcy of a spouse who has agreed to convey certain property, pay a sum of money or pay a debt on behalf of the other spouse.

DRAFTERS NOTES:

The agreement may state that as an award of maintenance not subject to discharge in bankruptcy that a spouse pay the joint obligations of both spouses.

CASE LAW YOU SHOULD KNOW:

It is improper to provide in a judgment of divorce a direction that in the event the husband declares bankruptcy, he shall remain personally liable on the joint obligations of the husband and wife, since the court may not interfere with the function of the

Bankruptcy Court. However, the judgment may provide as an award of maintenance not subject to discharge in bankruptcy that the spouse pay the joint obligations of both (Frommer v Frommer, 104 App Div 2d 726, 480 NYS2d 660 [4th Dept 1984]).

As a general rule, an award of equitable distribution is considered in non-community property states, such as New York State, to be a property settlement unless it is "in the nature of alimony, maintenance or support" within the meaning of 11 U.S.C. § 523(a)(5). However, 11 U.S.C. § 523(a)(5) gives the bankruptcy courts the authority to look behind the words of a divorce judgment or settlement agreement by providing that the debt must be "in the nature of alimony, maintenance or support in order to be found to be nondischargeable. State courts have concurrent jurisdiction with the bankruptcy courts to determine issues of dischargeability under 11 U.S.C. § 523(a)(5). The bankruptcy courts have exclusive jurisdiction to determine issues of dischargeability under 11 U.S.C. § 523(a)(15).

In New York State, a non-titled spouse does not acquire a vested interest in property until the judgment of divorce is entered. Once a divorce judgment becomes final, the property interests awarded are vested pursuant to the judgment. In re Hilsen (119 B. R. 435 [S. D. N. Y. 1990]) held that New York law did not give a divorcing spouse any interest in property subject to equitable distribution until the entry of a divorce decree. In re Frederes (141 B. R. 289 [Bank. W. D. N. Y. 1992]) the court held that neither debtor nor trustee had an interest in property titled in the non-debtor spouse in a case in which divorce proceedings were still pending at the time of the bankruptcy filing.

The provisions of the Bankruptcy Code allow a debtor-spouse to obtain a discharge of his financial obligations to his former wife and family (See 11 U.S.C.A. §523(a)(5), 11 U.S.C.A. §1328, and 11 U.S.C.A. §1141(d) (the latter section relates to reorganizations).

Under former 11 U.S.C. § 523(a)(5)(B), debts were not dischargeable to the extent that they are owed by a debtor "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that - ... such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance or support."

In re Duffy (231 B.R. 137 [Bankr. S. D. N. Y. 2005]), the wife waived maintenance but the parties stipulation of settlement which was made during the equitable distribution trial contained the following provision: Adjudged and Decreed that the Defendant [Duffy] shall pay monthly spousal maintenance to the Plaintiff [Taback] commencing July 1, 1997 in the sum of $2,000 per month payable in monthly installments which shall be made on the first day of each month for the term of ten (10) consecutive years, which payments shall be non-dischargeable in

bankruptcy and paid unconditionally to the Wife irrespective of her cohabitation or remarriage. The bankruptcy court held that this debt was dischargeable pursuant to 11 USC 523(a)(5), of the Bankruptcy Code which excepts from discharge any debt (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of a court of record, determination made in accordance with State or territorial law by a governmental unit, or property settlement agreement, but not to the extent that-- ...(B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support;...The Court held that the payments did not constitute alimony/maintenance within the meaning of Section 523(a)(5) of the Bankruptcy Code. The question whether obligations under a divorce decree constitute alimony/maintenance within the meaning of Section 523(a)(5), or equitable distribution of marital property not within subsection (5), is a question of bankruptcy law to be decided by the bankruptcy court on the basis of all the facts and circumstances, and the bankruptcy court must reject the characterization applied to the obligation by the divorce court or the parties if warranted by a consideration of all of the facts. The court found that payments were designated as "spousal maintenance" and treated as such by the parties at the suggestion of the trial court, not for the purpose of providing alimony but in order to facilitate the settlement of the wife's equitable distribution claim by reducing the net cost to the husband. Unlike alimony/maintenance, the payments were to continue for ten years regardless of the wife's cohabitation, which long predated the divorce, or remarriage, which was contemplated to occur and did shortly after the divorce judgment.

The general rule was that an individual debtor may not discharge a debt "To a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of each spouse or child, in connection with a separation agreement, divorce decree or property settlement agreement . . ." (11 U.S.C.A. §523(a)(5), which is incorporated into §1328).

The majority rule is that an agreement or court order to pay the other spouse's counsel fees, directly or to the spouse, is also in the nature of alimony, support and maintenance and not dischargeable in bankruptcy (See Re Spong 661 F2d 6 [2 Cir. 1981]).

It should be noted that this decision of the Second Circuit may not have finally resolved the issue as to the non-dischargeability of attorneys' fees (See In Matter of Ross v Sperow, 57 AD3d 1255, 871 N.Y.S.2d 736 [3d Dep't 2008]).

In Marcus, Ollman & Kommer v. Pierce (198 B.R. 665 [S.D.N.Y.1996]), attorney fees incurred in divorce were deemed a nondischargeable debt under the exception for support in order to provide each party with financial means to represent adequately that party's interest during the divorce proceedings. The Chapter 7 debtor's obligation to pay his former wife's attorney fees which were incurred in connection with the

divorce proceedings was nondischargeable support even though the wife's attorney agreed to limit his compensation to court ordered fees.

In re Lang (11 B.R. 428 [Bkrtcy.W.D.N.Y.1981]), the court held that payment of a counsel fee award to spouse in a divorce proceeding directly to his or her attorney is tantamount to an assignment by operation of law of the spouse's right to payment of the award to her attorney and a recovery by the attorney thereon, and thus the debtor's resulting obligations directly to the attorneys were discharged under the explicit provisions of the section stating that a debtor is discharged from a debt to spouse in connection with a divorce decree when such debt is assigned to another entity, voluntarily, by operation of law or otherwise.

In re Akamine (217 B.R. 104 [S.D.N.Y.1998]), the debtor's obligation for his own attorney fees, incurred in connection with pre-petition child support and custody litigation, was not incurred "in connection with" his separation agreement or judgment of divorce and, thus, was not excepted from discharge. Neither his separation agreement nor judgment of divorce imposed upon the debtor any new debt for legal fees. The attorney fee provision served only as commitment that neither the debtor nor his former wife would seek a fee award and, thus, it was the mere acknowledgment of a previously incurred contractual obligation.

In re Scalia (217 B.R. 104 [Bkrtcy. E.D.N.Y.1997], 214 B.R. 697), the court held that the Chapter 7 debtor's obligation to pay his former spouse's legal fees in connection with their divorce proceeding was in the nature of nondischargeable alimony, support, or maintenance, and was not a dischargeable property settlement; although the obligation did not terminate on the death or remarriage of the former spouse and was payable in a lump sum rather than in installments. The award appeared to balance the parties' disparate income, the divorce decree directed the debtor to make payment directly to his former spouse and not to a third party, the state court entered a money judgment in favor of the former spouse upon the debtor's default, and discharging the debt would jeopardize the quality of life enjoyed by parties' children, who resided with the former spouse.

A debt in conjunction with a division of property, as distinguished from alimony and maintenance, is dischargeable in bankruptcy. In Frommer v Frommer, 104 A.D.2d 726, 480 N.Y.S.2d 660 [4th Dep't 1984]) the Appellate Division held that the judgment of divorce may provide, as an award of maintenance, not subject to discharge in bankruptcy, that the spouse pay the joint obligations of both.

In Mooney v Van Vechten (139 Misc 2d 953, 526 N.Y.S.2d 704 [Sup Ct 1988]), the parties' 1986 divorce judgment directed the husband to assume exclusive responsibility for a marital debt of $3,600 to the Credit Union where both spouses were signatories. The defendant subsequently filed bankruptcy and the debt was discharged. The court granted plaintiff's motion to direct the defendant to reimburse her for the subsequent payments she made to the Credit Union and that he assume responsibility for the remainder of the debt. The court held that the discharge in

bankruptcy did not discharge them from his obligations under the decree. Further, the plaintiff was not listed in the schedule of creditors and there were no circumstances alleged that would discharge her as a normal creditor.

Where payments are made pursuant to an agreement, federal law is applied to determine the nature of the agreement, and the label attached by the parties to an agreement is not controlling, although it may be significant (Re Catlow, 663 F2d 960, 8 BCD 591 [(9th Cir.1981]). Courts look to see if the debt is in the nature of alimony, maintenance or support. In determining whether a debt is in the nature of alimony, maintenance or support, the court will look to its substance (Re Sarner, 22 BR 63 [BAP9 Cal 1982]). If the court finds that the parties' agreement intended one spouse would contribute to the support of his family by paying marital debts, the obligation will be nondischargeable (Re Young, 72 BR 450 [BC DC RI 1987]). In determining the nature of a spouse's obligation under a divorce decree, a court must conclude whether payments constitute alimony, maintenance or support pursuant to the bankruptcy laws rather than the state law (Re Goin, 808 F2d 1391(10th Cir. 1987); Re Singer, 787 F2d 1033 [6th Cir 1986]).

The labeling of an obligation or award is not determinative. If the bankruptcy court finds that the intent of the agreement was a property settlement, rather than maintenance or support, it will discharge the debt (Re Sullivan, 62 BR 465 [(BC ND Miss 1986]; Stout v Prussel, 691 F2d 859 [9th Cir 1982]). If it finds that a property settlement was in lieu of maintenance, it will find the debt nondischargeable (Re Ramey, 59 BR 527 [BC ED Ark 1986]; Re Bisbach, 36 BR 350 [BC WD Wis 1984]).

In determining whether an obligation to a former spouse is dischargeable, the majority position is that the court should not inquire into the relative financial positions of the parties and should disregard changes in the parties' financial circumstances after the entry of the divorce judgment (Forsdick v Turgeon, 812 F2d 801 [2d Cir 1987]).

In Re Raff (93 BR 41, 18 BCD 817 [BC SD N.Y. 1988]), the bankruptcy court held that a distributive award to the plaintiff wife of a percentage of a present value interest in her debtor-husband's medical degree and license was nondischargeable as spousal support. Although the New York Supreme Court characterized the award to the plaintiff as a distributive award pursuant to New York New York Domestic Relations Law §236(B)(5), the bankruptcy court held that a characterization of a divorce debt as a property settlement or support is a question of federal bankruptcy law for the purpose of 11 U.S.C.A. §523(a), and the bankruptcy court was not bound by the state court's characterization. Thus, "if it looks like a duck, walks like a duck and quacks like a duck," it may not be a duck for bankruptcy purposes. In Raff, the plaintiff, the debtor's former wife, sought a determination that the distributive award afforded her pursuant to New York New York Domestic Relations Law §236(B) was nondischargeable in compliance with 11 U.S.C.A. §523(a)(5). The debtor-husband argued that the distributive award was not in the nature of alimony, maintenance or

support, but was actually a property settlement that is dischargeable under 11 U.S.C.A. §523(a). This distributive award was based upon the present value of the husband's medical degree and license, which he pursued and obtained during his marriage with the plaintiff.

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (PL 109-8) amended the provisions of the Bankruptcy Law. Former 11 USC §523(a)(5), which exempted from discharge a debt for alimony, maintenance and child support has been deleted and replaced with the term "domestic support obligations" (Sec. 211 amending Bankruptcy Code §101). Domestic Support Obligation is defined in Section 101 of the Bankruptcy Code as a debt that accrues before, on, or after the date of the order for relief and it includes interest that accrues pursuant to applicable nonbankruptcy law. The term includes 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; or a governmental unit. To qualify as a domestic support obligation, the debt must be in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit), without regard to whether such debt is expressly so designated.

In Matter of Ross v Sperow (57 AD3d 1255, 871 N.Y.S.2d 736 [3d Dep't 2008]), in 2005, a petition for violation of a prior order of custody and visitation was filed by the mother and, in response, multiple cross petitions were filed by the father alleging violations by the mother and seeking modification of custody. In an August 2006 order resolving the parties' petitions, Family Court sustained the mother's motion for counsel fees and ordered that the father pay $5,000 of her counsel fees. The father subsequently filed for bankruptcy under chapter 7 of the Bankruptcy Code and listed the award of counsel fees as an unsecured debt. The father was discharged by the Bankruptcy Court in January 2007 and, the mother commenced a proceeding in Family Court for the violation of a court order based upon the father's failure to pay the counsel fees. Family Court concluded that the counsel fees were a nondischargeable domestic support obligation, denied the father's motion and found the father to be in violation of a prior order. The Appellate Division affirmed. It noted that state and federal courts have concurrent jurisdiction over the issue of the dischargeablity of a particular debt following the discharge of the debtor in bankruptcy. Under the Bankruptcy Code, "domestic support obligation[s]" are exempt from discharge in bankruptcy. As was relevant here, a domestic support obligation is a debt owed to or recoverable by a child of the debtor or such child's parent in the nature of support of the child of the debtor or such child's parent, without regard to whether such debt is expressly so designated, ... established by ... an order of a court of record .(11 USC 101[14A][A][i]; [B], [C][ii]). When determining the effect of a debtor's discharge in bankruptcy on a particular debt, the Court began with the well-established principle of bankruptcy law that dischargeability must be determined by the substance of the liability rather than its form. Here, while the award of counsel fees was not explicitly characterized as a support obligation in Family Court's order, family court judges cannot reasonably be expected to anticipate future bankruptcy among the parties to a

custody [or visitation] proceeding, and the inquiry into whether the debt at issue is in the nature of support is undertaken without regard to whether such debt is expressly so designated. It looked to not only to Family Court's order, but also to the record of the proceedings in determining the actual nature of the obligation. With this in mind, a review of the record revealed that the mother's initial petition commencing the proceeding clearly raised issues of financial need and hardship. Similarly, the mother's motion for counsel fees, which was sustained by Family Court in the August 2006 order, proposed consideration of her circumstances as one basis for an award of counsel fees. Also informing its conclusion was Family Court's acknowledgment in its order that Domestic Relations Law 237(b), which provides for consideration of "the circumstances of the case and of the respective parties" when awarding counsel fees to a parent in custody or visitation matters, furnished a basis for its award of fees. In light of the foregoing, and mindful that the term "in the nature of support" is to be given a broad interpretation in the context of the discharge of debt obligations in bankruptcy, it agreed with Family Court's determination that the award of counsel fees in its prior order was, in part, "in the nature of support" and, therefore, excepted from discharge in bankruptcy.

It must be established or subject to establishment before, on, or after the date of the order of relief pursuant to a separation agreement, divorce decree, or property settlement agreement; an order of a court of record; or a determination made in accordance with applicable nonbankruptcy law by a governmental unit. It does not apply to a debt assigned to a nongovernmental entity, unless it was assigned voluntarily by the spouse, former spouse, child, or parent solely for the purpose of collecting the debt (Sec. 211 amending Bankruptcy Code §101.)

TERMINATION OF MAINTENANCE

SETTLEMENT CONSIDERATIONS:

Agreements usually contain provisions for the direct payment by one spouse to the other of a dollar amount of maintenance, and may contain provisions for the payment of maintenance in the form of payments to third parties for, among other things, a spouses medical expenses, educational expenses, health insurance expenses, mortgage principal, interest and amortization expenses, homeowners insurance and expenses, and automobile expenses. In order to make sure that a spouse’s estate is not liable for any form of maintenance payments after the death of that spouse it is suggested that the agreement include a “catchall provision” which provides that any payments which are for the support, education, maintenance and benefit of the (Wife) (Husband terminate upon the death of that spouse.

DRAFTERS NOTES:

The agreement should provide that unless otherwise specifically provided in this agreement the liability of the (Husband) (Wife) to continue to make any of the payments which are designated for the support, education, maintenance or benefit of the (Husband) (Wife) shall cease in the event of the death of the (Husband) (Wife). It should also indicate that this provision will not bar a claim on the part of either party against the estate of the other party for money damages for any cause or causes arising out of a breach of this agreement during the lifetime of either party.

TERMINATION OF CHILD SUPPORT

SETTLEMENT CONSIDERATIONS:

Agreements usually contain provisions for the direct payment by one parent to the other of a dollar amount of child support, and may contain provisions for the payment of child support in the form of direct payment by one parent to the other , or indirect payment directly to the provider of services, for, among other things, a child's medical expenses, educational expenses, health insurance expenses, child care expenses, religious training expenses, tutoring expense, and after school or summer activity expenses. In order to make sure that a parents estate is not liable for any form of child support payments after the death of that parent it is suggested that the agreement include a "catchall provision" which provides that any payments which are for the support, education, maintenance, or benefit of the child terminate upon the death of that parent.

DRAFTERS NOTES:

The agreement should provide that unless otherwise specifically provided in this agreement the liability of the (Husband) (Wife) to continue to make any of the payments which are designated for the support, education, maintenance or benefit of any child of the marriage shall cease in the event of the death of the (Husband) (Wife). It should also indicate that this provision will not bar a claim on the part of either party against the estate of the other party for money damages for any cause or causes arising out of a breach of this agreement during the lifetime of either party.

SIGNATURES AND ACKNOWLEDGMENT

SETTLEMENT CONSIDERATIONS:

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 (Domestic Relations Law § 236[B][3]). In order to be enforceable in a matrimonial action and serve as a predicate for a divorce pursuant to Domestic Relations Law § 170(6), the agreement must be duly signed and acknowledged in the form to entitle a deed to be recorded.

If the parties do not want the agreement to serve as a predicate for a divorce it should not be acknowledged. However, this may prevent it from being enforceable in a matrimonial action.

DRAFTERS NOTES:

The Uniform form of certificate of acknowledgment within this state, should be used if the agreement is executed in New York.

RPL §309-a. Uniform forms of certificates of acknowledgment or proof within this state.

1. The certificate of an acknowledgment, within this State, or a conveyance or other instrument in respect to real property situate in this State, by a person, must conform substantially with the following form, the blanks being properly filled:

State of New York)
)ss.:
County of . . . . .)

On the . . . . . day of . . . . . in the year . . . . . before me, the undersigned, personally appeared . . . . . ., personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

(Signature and office of individual taking acknowledgment.)

If the agreement is executed in another state or foreign country the Uniform form of certificate of acknowledgment without this state should be used.

RPL § 309-b. Uniform forms of certificates of acknowledgment or proof without this state.

1. The certificate of an acknowledgment, without this State, of a conveyance or other instrument with respect to real property situate in this State, by a person, may conform substantially with the following form, the blanks being properly filled:

State, District of Columbia,)
Territory, Possession, or)ss.:
Foreign Country . . . . .)

On the . . . . . day of . . . . . in the year . . . . . before me, the undersigned, personally appeared . . . . . ., personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.
(Signature and office of individual taking acknowledgment.)

CASE LAW YOU SHOULD KNOW:

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 is unenforceable. The agreement provided that the parties waived any rights of election pursuant to the Estates, Power and Trusts Law "and other rights accruing solely by reason of the marriage" with regard to property presently owned or subsequently acquired by either party. It specified that "neither party shall have nor shall such party acquire any right, title or claim in and to the real and personal estate of the other solely by reason of the marriage of the parties." The agreement was drafted by an attorney friend of plaintiff and signed by both plaintiff and defendant. Both parties testified at trial that they had signed the agreement. The Court of Appeals determined that the agreement was contrary to Domestic Relations Law § 236[B][3], which recognizes no exception to the requirement of formal acknowledgment. The court concluded that it was bound to establish a bright-line rule. The parties' oral acknowledgment of the authenticity of their signatures, subsequently made on the record in open court, did not satisfy the statutory mandate. It therefore reversed, holding that the requisite formality explicitly specified in Domestic Relations Law § 236[B][3] is essential to the validity of the agreement.

In D'Elia v D'Elia (14 A.D.3d 277, 788 N.Y.S.2d 156 [2d Dep't 2005]) the court held that a spouse can not cure a defective acknowledgment of an antenuptial agreement by submitting a duly executed certificate of acknowledgment at trial.

Nevertheless, in subsequent cases it has been held an acknowledgment is not necessary on a modification agreement where the parties are not married.

In Penrose v Penrose (17 A.D.3d 347, 793 N.Y.S.2d 579 [3d Dep't 2005]), the parties 1985 separation agreement was incorporated but not merged into a judgment of divorce. By an "Agreement and Waiver" dated August 2, 1993, plaintiff waived all of her rights under the divorce decree in exchange for specific bequests as then set forth in a will executed by defendant that same day. In 2003, plaintiff brought an application for enforcement of certain terms of the divorce decree. The Appellate Division rejected plaintiff's contention that the 1993 agreement should have had a notarized acknowledgment in order to be valid since the parties were no longer married at the time of its execution. Nor is an acknowledgment necessary on a custody agreement.

In Kelly v Kelly (19 A.D.3d 1104, 797 N.Y.S.2d 666 [4th Dep't. 2005]), the Appellate Division held that the requirements of Domestic Relations Law § 236[B][3] pertain to stipulations which effect the equitable distribution of marital property, not provisions of the stipulation that pertained to custody, which was binding pursuant to CPLR 2104. While a separation agreement must be properly acknowledged in order to be enforceable in a matrimonial action where the defendant did not deny that she signed the separation agreement and it survived the judgment of divorce, the agreement was held to be enforceable in other types of actions despite the alleged insufficiency of the acknowledgment.

In Matter of Sbarra (17 A.D.3d 975, 794 N.Y.S.2d 479 [3 Dep't. 2005]), the Appellate Division rejected Respondent's assertion on appeal that, although she signed the separation agreement, she did not acknowledge her signature to the notary public who signed it later, making it unenforceable as a waiver of her rights to decedent's pension plan and other assets. It held that while a separation agreement must be properly acknowledged in order to be enforceable in a matrimonial action since respondent did not deny that she signed the separation agreement and it survived the judgment of divorce, the agreement was enforceable in other types of actions despite the alleged insufficiency of the acknowledgment .

Very frequently the parties, with the advice of their attorneys enter into a stipulation of settlement during a conference with the court or the trial of an action while they are in court. These agreements, which are governed by the provisions of CPLR 2104, must be placed on the record in open court in order to be valid.

In Trapani v. Trapani (147 Misc 2d 447, 556 N.Y.S.2d 210 [1990]), the Court held that an out of Court transcript taken during a deposition, containing a proposed stipulation of settlement in the transcript, was not a valid stipulation of settlement because it did not meet the requirements of Domestic Relations Law § 236 [B][3], nor did it comply with CPLR 2104.

CPLR 2104 provides:

An agreement between parties or their attorneys relating to any matter in an

action, other than one made between counsel in open court, is not binding upon a party unless it is in writing subscribed by him or his attorney or reduced to the form of an order and entered. With respect to stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk.

Since an agreement must be in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded there is a question as to their validity (Domestic Relations Law § 236 [B][3]). The Appellate Division, First Department, has sustained the validity of open court stipulations in lieu of formal agreements. In Sanders v. Copley (151 A.D.2d 350, 543 N.Y.S.2d 67 [1st Dep't 1989]), the Appellate Division affirmed an order of the Supreme Court which declined to vacate a stipulation of settlement, but directed a reference to determine the circumstances under which it was executed. It held that Domestic Relations Law § 236[B][3] should not be interpreted as proscribing an oral stipulation made in open court pursuant to CPLR 2104 and that a property settlement in conformance with CPLR 2104 need not comply with the formalities "required to entitle a deed to be recorded."

In Rubenfeld v. Rubenfeld (279 A.D.2d 153, 720 N.Y.S.2d 29 [1st Dep't 2001]), the Appellate Division held that the formalities of Domestic Relations Law § 236[B][3], by the statute's terms and its legislative intent, do not govern an oral agreement entered on the record in open court, during a matrimonial action, intended to settle that action. Insofar as there was no opting-out agreement, Domestic Relations Law § 236[B][3] does not apply. Since Domestic Relations Law § 236[B][3] is not triggered, its formalities did not govern what is only a stipulation, governed by CPLR 2104, settling the matrimonial action.

The Second Department has also sustained the validity of open court stipulations. In Harrington v. Harrington (103 A.D.2d 356, 479 N.Y.S.2d 1000 [2d Dep't 1984]), the court held that the fact that a stipulation of settlement of property issues, spread upon the record in open court, was not signed, did not impair its validity.

In Nordgren v Nordgren (264 A.D.2d 828, 695 N.Y.S.2d 588 [2d Dep't 1999]), the same court found that the agreement made in open court between counsel with the parties present. Therefore, there was no necessity that it be reduced to a writing and signed. It stated that "there is nothing in Matisoff v. Dobi, 90 N.Y.2d 127, 659 N.Y.S.2d 209, 681 N.E.2d 376, which indicates that the Court of Appeals intended to abrogate the well-settled law of Rule 2104 of the Civil Practice Law and Rules."

The Third Department the court has refused to recognize open court stipulations as valid where the agreement involved equitable distribution (Lischynsky v. Lischynsky, 95 A.D.2d 111, 466 N.Y.S.2d 815 [3d Dep't 1983]).

In Harbour v Harbour (243 A.D.2d 947, 664 N.Y.S.2d 135 [3d Dep't.1997]), a

stipulation was placed on the record in open court by plaintiff's attorney providing for the transfer to defendant of certain assets , including the wife's interest in the marital home, for which defendant would relinquish his interest in certain joint accounts and also pay plaintiff $38,000. Plaintiff moved to vacate the stipulation, contending that it was unenforceable due to the parties' failure to execute a valid "opting out" agreement as mandated by Domestic Relations Law § 236[B][3]. The Appellate Division held that in light of the decision in Matisoff v. Dobi, the Court of Appeals, applying the same statutory provision in a slightly different context, found compliance with the prescribed formalities, including written acknowledgment, indispensable to the creation of a valid, enforceable marital contract, without exception. It held that as the parties had not validly "opted out" of the statutory scheme governing the distribution of marital property, the stipulation was unenforceable and was set aside.

In Charland v. Charland (267 A.D.2d 698, 700 N.Y.S.2d 254 [3d Dep't 1999]), the Third Department relaxed its restrictive rule holding that the statute only applies to agreements which effect the equitable distribution of marital property. The court rejected defendant's assertion on appeal that reversal was mandated because the Supreme Court's determinations as to custody, child support and equitable distribution improperly relied on certain stipulations by the parties which did not conform to the requirement of Domestic Relations Law § 236[B][3] in that they were not "in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded." It found this assertion to be without merit, stating: "The requirements of Domestic Relations Law 236[B][3] pertain to stipulations which effect the equitable distribution of marital property (see generally, Matisoff v. Dobi, 90 N.Y.2d 127, 659 N.Y.S.2d 209, 681 N.E.2d 376, lv. denied 91 N.Y.2d 805, 668 N.Y.S.2d 560, 691 N.E.2d 632). Here, the parties' stipulations related to the value of certain marital property (and debt); equitable distribution, which was determined by the court; custody; and the manner in which child support was to be calculated. As such, their stipulations were not marital agreements within the meaning of Domestic Relations Law 236[B][3], but rather agreements by the parties, through their counsel in open court, within the purview of CPLR 2104.

The Fourth Department has followed the Third Department rule (Giambattista v. Giambattista, 89 A.D.2d 1057, 1058, 454 N.Y.S.2d 762 [4th Dep't 1982]; Hanford v. Hanford, 91 A.D.2d 829, 458 N.Y.S.2d 418 [4th Dep't 1982]).

In Tomei v Tomei (39 A.D.3d 1149, 834 N.Y.S.2d 781 [4th Dep't 2007], the parties placed an oral stipulation of settlement on the record that provided for the distribution of the marital property, including defendant's pension benefits. Neither party executed the stipulation. The Appellate Division held that because the unacknowledged oral stipulation of the parties failed to meet the statutory requirements, it was ineffective with respect to the pension benefits, and the court thus was required to distribute them (citing 236[B][5][a]). Because that did not occur, it reversed the order and remitted the matter to Supreme Court for distribution of defendant's pension benefits.