Summer Meeting 2018

Family Law Section

July 12 - 15, 2018

The Equinox Resort and Spa

Machester, VT

Thank You! This program is made possible by the generous donation of time and expertise by members and volunteers. Thank you to our volunteers—and to you, for choosing NYSBA Programs.

This program is offered for educational purposes. The views and opinions of the faculty expressed during this program are those of the presenters and authors of the materials, including all materials that may have been updated since the books were printed or distributed electronically. Further, the statements made by the faculty during this program do not constitute legal advice.

MCLE INFORMATION

Program Title: **Family Law Section Summer Meeting 2018**
Dates: July 12-15, 2018 Location: Manchester, VT

Evaluation: https://nysba.co1.qualtrics.com/jfe/form/SV_0x0FBKUkrTzSXhX
This evaluation survey link will be emailed to registrants following the program.

Total Credits: **6.0 New York CLE credit hours**

Credit Category:
1.0 Diversity, Inclusion and Elimination of Bias
5.0 Skills

The Skills portion of this program is approved for credit for **both** experienced attorneys and newly admitted attorneys (admitted to the New York Bar for less than two years). **Attorneys admitted 2 years or less are not eligible to receive credit in the Diversity, Inclusion and Elmination of Bias category.**

Attendance Verification for New York MCLE Credit

In order to receive MCLE credit, attendees must:

1) **Sign in** with registration staff

2) Complete and return a **Verification of Presence form** (included with course materials) at the end of the program or session. For multi-day programs, you will receive a separate form for each day of the program, to be returned each day.

Partial credit for program segments is not allowed. Under New York State Continuing Legal Education Regulations and Guidelines, credit shall be awarded only for attendance at an entire course or program, or for attendance at an entire session of a course or program. Persons who arrive late, depart early, or are absent for any portion of a segment will not receive credit for that segment. The Verification of Presence form certifies presence for the entire presentation. Any exceptions where full educational benefit of the presentation is not received should be indicated on the form and noted with registration personnel.

Program Evaluation

The New York State Bar Association is committed to providing high quality continuing legal education courses, and your feedback regarding speakers and program accommodations is important to us. Following the program, an email will be sent to registrants with a link to complete an online evaluation survey. The link is also listed above.

Additional Information and Policies

Recording of NYSBA seminars, meetings and events is not permitted.

Accredited Provider

The New York State Bar Association's **Section and Meeting Services Department** has been certified by the New York State Continuing Legal Education Board as an accredited provider of continuing legal education courses and programs.

Credit Application Outside of New York State

Attorneys who wish to apply for credit outside of New York State should contact the governing body for MCLE in the respective jurisdiction.

MCLE Certificates

MCLE Certificates will be emailed to attendees a few weeks after the program, or mailed to those without an email address on file. **To update your contact information with NYSBA**, visit www.nysba.org/MyProfile, or contact the Member Resource Center at (800) 582-2452 or MRC@nysba.org.

Newly Admitted Attorneys—Permitted Formats

In accordance with New York CLE Board Regulations and Guidelines (section 2, part C), newly admitted attorneys (admitted to the New York Bar for less than two years) must complete **Skills** credit in the traditional live classroom setting or by fully interactive videoconference. **Ethics and Professionalism** credit may be completed in the traditional live classroom setting; by fully interactive videoconference; or by simultaneous transmission with synchronous interactivity, such as a live-streamed webcast that allows questions during the program. **Law Practice Management** and **Areas of Professional Practice** credit may be completed in any approved format.

Tuition Assistance

New York State Bar Association members and non-members may apply for a discount or scholarship to attend MCLE programs, based on financial hardship. This discount applies to the educational portion of the program only. Application details can be found at www.nysba.org/SectionCLEAssistance.

Questions

For questions, contact the NYSBA Section and Meeting Services Department at SectionCLE@nysba.org, or (800) 582-2452 (or (518) 463-3724 in the Albany area).

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6.0 MCLE Credits
5.0 Skills
1.0 Diversity, Inclusion and Elimination of Bias

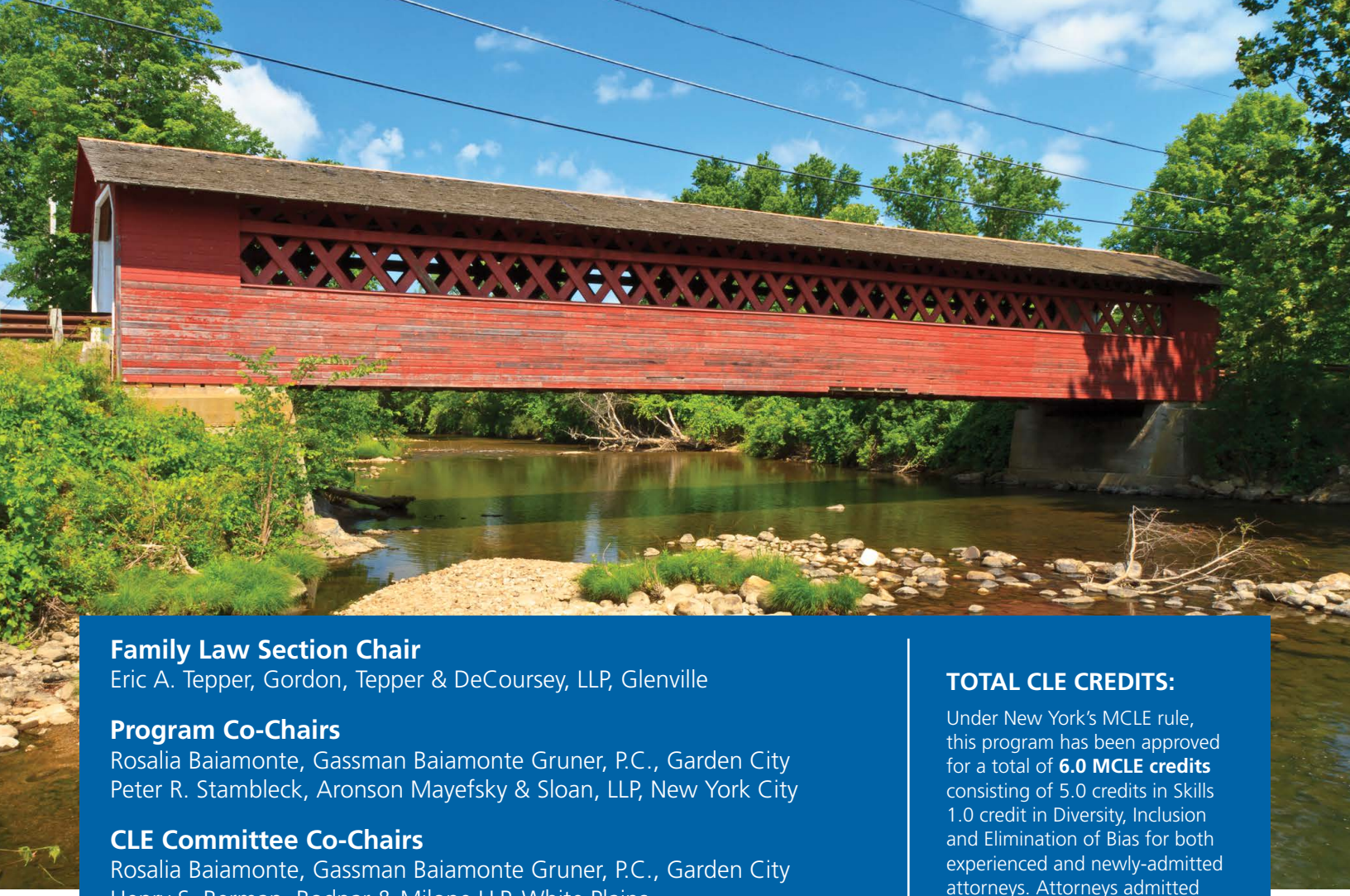
Summer Meeting 2018

Vermont

July 12-15, 2018

The Equinox Resort and Spa
Manchester, Vermont

www.nysba.org/Family2018



Family Law Section Chair
Eric A. Tepper, Gordon, Tepper & DeCoursey, LLP, Glenville

Program Co-Chairs
Rosalia Baiamonte, Gassman Baiamonte Gruner, P.C., Garden City
Peter R. Stambleck, Aronson Mayefsky & Sloan, LLP, New York City

CLE Committee Co-Chairs
Rosalia Baiamonte, Gassman Baiamonte Gruner, P.C., Garden City
Henry S. Berman, Bodnar & Milone LLP, White Plains
Charles P. Inclima, Inclima Law Firm, PLLC, Rochester
Peter R. Stambleck, Aronson Mayefsky & Sloan, LLP, New York City
Bruce J. Wagner, McNamee, Lochner, Titus & Williams, P.C. Albany
Brett S. Ward, Blank Rome LLP, New York City

TOTAL CLE CREDITS:

Under New York's MCLE rule, this program has been approved for a total of **6.0 MCLE credits** consisting of 5.0 credits in Skills 1.0 credit in Diversity, Inclusion and Elimination of Bias for both experienced and newly-admitted attorneys. Attorneys admitted 2 years or less are not eligible to receive credit in the Diversity, Inclusion and Elimination of Bias category.

SCHEDULE OF EVENTS

Thursday, July 12

9:00 a.m. – 10:30 a.m.	**Officers' Meeting** – Bennington
12:00 p.m.	**Registration and Exhibits** – Rockwell
2:00 p.m. – 4:30 p.m.	**Executive Committee Meeting**
4:00 p.m.	Kids' Camp registration and release form submissions for children participating in kids' camp. All children and a parent must be present for registration.
5:00 p.m. – 10:00 p.m.	**Kids' Dinner and Activities** – Shuttle will leave from front of hotel.
6:15 p.m.	Buses will leave for the reception at Hildene – they will do a continuous loop.
6:30 p.m. – 8:30 p.m.	**Cocktail Reception** – Hildene Substantial hors d'oeuvres will be served, along with coffee and dessert.
8:30 p.m. – 11:00 p.m.	**Hospitality with Live Music** – Dormy Grill Join us on the deck of the Dormy Grill over looking the 18th hole, for an after-dinner gathering with drinks, desserts and music.

SCHEDULE OF EVENTS

Friday, July 13

7:30 a.m. – 8:30 a.m. **Committee Breakfast Meetings: Child Custody/Family Court; Continuing Legal Education; Legislation; OCA Matters/Bench & Bar Relations**

7:30 a.m. **Registration and Exhibits** – Rockwell Foyer

7:30 – 9:00 a.m. **Breakfast with the Exhibitors** – Rockwell Foyer
Everyone, including spouses and guests, is invited.

8:00 a.m. – 12:00 p.m. **Kids' Camp** – Shuttle will leave from front of hotel.

8:30 a.m. – 11:30 a.m. **GENERAL SESSION** – Rockwell

8:30 a.m. – 8:45 a.m. **Welcome Remarks: Overview of Events**
Eric A. Tepper, Section Chair

NYSBA Welcome – Michael Miller, NYSBA President
Program Introduction – Peter R. Stambleck, Program Co-Chair

8:45 a.m. – 11:30 a.m. **The Trial of a Matrimonial Action: Strategies, Techniques and Examinations** (3.0 credits Skills)
Speaker: Stephen Gassman, Gassman Baiamonte Gruner, P.C., Garden City

10:00 a.m. – 10:15 a.m. **Refreshment Break** – Rockwell

6:00 p.m. Buses will leave for the reception at Southern Vermont Arts Center – they will do a continuous loop.

6:15 p.m. – 7:45 p.m. **Cocktail Reception** – Southern Vermont Arts Center
Dinner on your own

8:30 p.m. – 11:00 p.m. **Hospitality with Live Music** – Dormy Grill
Join us on the deck of the Dormy Grill over looking the 18th hole, for an after-dinner gathering with drinks, desserts and music.

ACTIVITIES-Friday, July 13
Additional information on p. 6.
Registration required.

10:30 – 11:30 a.m. Glass Blowing Class

12:30 p.m. Golf Tournament

1:00 – 3:00 p.m. Guided Hike

2:00 – 3:00 p.m. Falconry

Saturday, July 14

7:30 a.m. – 8:30 a.m. **Committee Breakfast Meetings: Finance & Funding Requests; Diversity/Long Range Planning Membership; LGBT**

7:30 a.m. **Registration and Exhibits**

7:30 a.m. – 9:00 a.m. **Breakfast with the Exhibitors** – Rockwell Foyer
Everyone, including spouses and guests, is invited.

8:00 a.m. – 12:00 p.m. **Kids' Camp** – Shuttle will leave from front of hotel.

9:00 a.m. – 12:00 p.m. **GENERAL SESSION** – Rockwell

9:00 a.m. – 9:15 a.m. **Welcome Remarks: Overview of Events**
Eric A. Tepper, Section Chair

Program Introduction
Rosalia Baiamonte, Program Co-Chair

9:15 a.m. – 10:05 a.m. **Interactive Evidence** (1.0 credit in skills)
Moderator: Stephen Gassman, Gassman Baiamonte Gruner, P.C., Garden City

Panelists: Hon. Jeffrey S. Sunshine, Supreme Court Kings County, Brooklyn
Hon. Christine M. Clark, Appellate Division, Third Department, Schenectady

10:05 a.m. – 10:55 a.m. **Breaking Through Implicit Biases** (1.0 credit in diversity, inclusion and elimination of bias)

Speakers: Marsha Haygood, StepWise Associates, LLC, Yonkers
Hon. Andrew A. Crecca, New York Supreme Court, Central Islip

10:55 a.m. – 11:10 a.m. **Refreshment Break** – Rockwell Foyer

11:10 a.m. – 12:00 p.m. **Matrimonial Case Updates: The Year in Review** (1.0 credit in skills)
Speaker: Bruce J. Wagner, McNamee Lochner PC, Albany

6:30 p.m. – 7:30 p.m. **Cocktail Reception at the Equinox Resort**

7:30 p.m. – 8:30 p.m. **Lobster Bake at the Equinox Resort**

8:30 p.m. – 11:00 p.m. **Festivities continue with Live music by the Lustre Kings**

ACTIVITIES-Saturday, July 14
Additional information on p. 6.
Registration required.

10:30 – 11:30 a.m. Glass Blowing Class

1:00 p.m. Golf (Reserve your own tee times by calling the pro-shop at 802-362-7870)

2:00 – 4:00 p.m. Fly Fishing Class

2:00 – 4:00 p.m. Land Rover School

BIOGRAPHIES

Eric A. Tepper, Family Law Section Chair

Eric A. Tepper is a partner in the law firm of Gordon, Tepper & DeCoursey, LLP, located in Glenville, NY. He practices matrimonial and family law throughout the Capital District, Saratoga Region and New York State. He's a graduate of Hamilton College and George Washington University Law School. Mr. Tepper is currently Chair of the New York State Bar Association Family Law Section. He serves on the Unified Court System's Matrimonial Practice Advisory and Rules Committee chaired by the Hon. Jeffrey A. Sunshine and was part of the working group which helped to formulate the current maintenance guidelines. He's a member of the Saratoga County Bar Association, Capital District Women's Bar Association, and is Chair of the matrimonial committee for the Schenectady County Bar Association. Among his many speaking engagements, Mr. Tepper has lectured extensively for NYSBA CLE programs throughout New York State. He's also lectured on matrimonial law at Judicial Education Seminars ("judge school") on numerous occasions. He's lectured on divorce and family law for the Appellate Division, Third Department, the Association of Justices of the Supreme Court of the State of New York, the New York State Council on Divorce Mediation, the Nassau County Bar Association, the Suffolk Academy of Law and for various other organizations. He's been selected for inclusion in The Best Lawyers in America as well as New York Super Lawyers every year for more than a decade. Mr. Tepper was named the Family Law "Lawyer of the Year" in the Albany area by Best Lawyers in both 2017 and 2013. AVVO previously selected him as one of the top 10 divorce lawyers in New York State.

Rosalia Baiamonte, Program Co-Chair

Ms. Baiamonte was admitted to the Bar in January, 1994. Since her admission, she has been engaged exclusively in the practice of matrimonial and family law. Ms. Baiamonte is a graduate of Brandeis University and Syracuse University College of Law. In March, 1996, Ms. Baiamonte became an associate of Stephen Gassman, Esq., a renowned leader in the field of matrimonial and family law, and she was named a member of his firm on August 1, 2007. Ms. Baiamonte is a Fellow of the American Academy of Matrimonial Lawyers; she has served as a member of the Board of Directors for the Nassau County Bar Association, as well as a Chair of the Association's prestigious Judiciary Committee and Matrimonial Law Committee. She has served as an Arbitrator in the Early Neutral Evaluation Program and a Discovery Referee in Nassau County Supreme Court; she has served as a Receiver in Nassau County's Supreme and Surrogate's Courts; and as a Part 137 Fee Arbitrator for the 10th Judicial District. She is a frequent lecturer on various matrimonial and family law topics for State and local bar groups and is a guest lecturer at various law schools.

Peter R. Stambleck, Program Co-Chair

Peter is a partner with Aronson Mayefsky & Sloan, LLP in New York. His practice is focused on providing counsel in a wide range of matrimonial and family law matters including divorce, child custody and access, spousal and child support, paternity, prenuptial, postnuptial and separation agreements. Prior to joining the Firm, Peter worked as a Certified Public Accountant at Pricewaterhouse Coopers. His background in finance and accounting provides him with a skill set and perspective unique in the practice of family law. Peter is a Fellow of the American Academy of Matrimonial Lawyers and a member of the Family Law Section of the American Bar Association. Peter earned his B.S. in finance and accounting from Indiana University and his Juris Doctor from Brooklyn Law School. He is admitted to the New York and Connecticut State Bars.

Hon. Christine M. Clark, Speaker

Judge Clark attended Columbia University and Albany Law School. She began her career in public service in the Schenectady County District Attorney's Office, first as the DWI prosecutor and then in the general felony bureau. She became the sex crimes/child abuse prosecutor and was then promoted to become the first Bureau Chief of the Special Victims Unit. In that role, she helped establish Schenectady County's Child Advocacy Center. In 2004, Schenectady's then mayor appointed her to the position of Schenectady City Court Judge, and she then won election to that position for a full ten-year term. In November 2010, Judge Clark was elected as Schenectady County Family Court Judge. In November 2012, she was elected to the Supreme Court for the Fourth Judicial District of New York. Judge Clark was the second woman ever elected as a Supreme Court Justice in that district, and the first Democrat to win election without a second party line. In April 2014, Governor Andrew Cuomo appointed Judge Clark to the Appellate Division, Third Department. She has two daughters, ages 15 and 11.

Hon. Andrew A. Crecca, Speaker

Andrew A. Crecca is the Supervising Judge of the Matrimonial Parts in the Tenth Judicial District, Suffolk County, New York. In addition to his duties as Supervising Judge, he is the presiding Justice of Suffolk County's Integrated Domestic Violence Court, and has served in that position since January of 2007. He was first elected to the bench in 2004 as a County Court Judge and presided over felony criminal cases in a dedicated trial part. In January of 2007 he was appointed an Acting Justice of the Supreme Court. In 2010 he was elected Justice of the New York State Supreme Court for the 10th Judicial District.

Stephen Gassman, Speaker

Senior partner in the firm of Gassman Baiamonte Gruner, PC, Garden City, N.Y. which limits its practice to matrimonial and family law. He is a graduate of the University of North Carolina and New York Law School. Mr. Gassman is a Fellow of the American Academy of Matrimonial Lawyers; has served as President of the Bar Association of Nassau County, New York and Chair of the Family Law Section of the New York State Bar Association. He is a member of the statewide Matrimonial Practice and Rules Committee of the Unified Court System of the State of New York. He has also served as Chair of the Matrimonial & Family Law Committee of the Nassau County Bar Association, as President of the Nassau County Bar Association, and as an Adjunct Professor of Law at Touro Law School, teaching Advanced Family Law. Mr. Gassman has also served as a member of the Judicial Hearing Officer Screening Committee for the Second Judicial Department, a member of the Advisory Board of the Safe Center, and a member of the Law Guardian Advisory Committee for the Tenth Judicial District.

Marsha Haygood, Speaker

Author, Talent Development Expert and Empowerment Coach are a few of the many hats that President of StepWise Associates, Marsha Haygood, wears. Former corporate executive and active contributing editor to national publications, Marsha has a rich multicultural understanding of individuals and organizations that she incorporates in her coaching and presentations. With a Bachelors of Arts degree from Lehman College in New York and a Training and Development Certification from New York University, Marsha ensures that her entire life and mission is dedicated to the success of others.

Hon. Jeffrey S. Sunshine, Speaker

Supervising Judge for Matrimonial Matters, Supreme Court, Kings County having been appointed in March of 2007. He is the first jurist ever appointed to that position in Kings County. In June 2014, he was named by the Chief Administrative Judge, Hon. A. Gail Prudenti, as Chair of the newly formed Chief Administrative Judge's Matrimonial Practice Advisory and Rules Committee. He sat in the matrimonial part in Richmond County Supreme Court from January 2001 – February 2003 (where he eliminated a multi- year back log in the matrimonial parts) and has sat in Kings County Supreme Court since February 2003. Prior to sitting in Supreme Court, Judge Sunshine sat in Kings County Family Court term in a hybrid custody/child protective part. Previously [October 2013 to May 2014], he served as Co-Chair of the OCA Matrimonial Practice Advisory Committee.

Bruce J. Wagner, Speaker

Chair of the Family Law Practice Group at McNamee Lochner P.C., Albany, NY, and is a principal and shareholder in that law firm. His primary areas of practice are matrimonial law and appeals. He is a 1982 graduate of Cornell University and a 1985 graduate of Albany Law School of Union University. In September 2002, he was appointed as a Town Justice in the Town of Schodack (pronounced sko'-dak), Rensselaer County, was elected in November 2002, and re-elected in 2006, 2010 and 2014. He is designated on a regular basis by the Administrative Judge of the Third Judicial District to serve as an Acting City Court Judge in the Criminal and Civil Parts of the District's City Courts. Mr. Wagner is immediate Past President of the Rensselaer County Magistrates' Association, having also served a prior two year term as President in 2010-2011, and is a member of the New York State Magistrates' Association. In October 2016, he was selected by his peers as a Diplomate of the American College of Family Trial Lawyers, a select group of 100 of the top family law trial lawyers from across the United States. He is listed in all editions 1999 through 2018 of The Best Lawyers in America (Woodward-White) and has a peer rating of AV® Preeminent™ in Martindale-Hubbell. Based on peer voting, Mr. Wagner was named to all editions 2007 through 2017 New York Super Lawyers - Upstate, and has placed in the top 25 in the Hudson Valley for 10 of the last 11 years, including 2017.

CLE INFORMATION

Under New York's MCLE rule, this program has been approved for a total of 6.0 MCLE credits consisting of 5.0 credits in Skills 1.0 credit in Diversity, Inclusion and Elimination of Bias for both experienced and newly-admitted attorneys. Attorneys admitted 2 years or less are not eligible to receive credit in the Diversity, Inclusion and Elimination of Bias category.

Discounts and Scholarships

New York State Bar Association members and non-members may receive financial aid to attend this program. Under this policy, anyone who required financial aid may apply in writing, not later than ten working days prior to the start of the program, explaining the basis of the hardship, and if approved, can receive a discount or scholarship, depending on the circumstanced. For more details, please contact: Lisa Bataille at lbataille@nysba.org

Accommodations for Persons with Disabilities

NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact Lisa Bataille at 518-487-5680 or lbataille@nysba.org.

ACTIVTIES

Glass Blowing at Manchester Hot Glass
Make your own blown glass, bowl, or vase! You will be able to pick glass colors, handle molten glass, then blow and shape it to make your own, one-of-a-kind pint glass, or perhaps a wavy bowl or a flower vase.

Orvis Fly Fishing School
Pick up a fly rod, and our instructors will show you how to best set up, select your fly, tie knots and more on our fully stocked casting ponds and the Battenkill River.

Land Rover Driving Experience
Learn the technique of off-road driving in all conditions through the beautiful Green Mountains. Participants go through several challenges on different types of terrain based on their skill level

Green Mountain Falconry School
Take advantage of the rare opportunity to handle a trained hawk and learn about the art of falconry from master falconer Rob White. Individuals must be 12 years of age or older to handle birds.

Guided Hike
Explore the trails of scenic Mt. Equinox within walking distance from the resort. The famous Appalachian and Long Trails are also just four miles away. Nearby Merck Forest offers 2,900 acres of woodlands, meadows, ponds, and streams.

Golf Tournament
Prizes will be awarded to the three teams with the lowest scores without regard to handicap. We will mix up teams so everyone has an equal chance at winning. Each golfer will receive a package that will include two mulligans, one tee shot off the fairway and one throw. There will be one hole in which from drive through putting, golfers will only be able to use their 7 iron. Four drives will have to be used by each golfer and if a threesome five drives from each golfer. After each shot (except when ball is on the green) the best one SHALL be used and the person whose ball is used does not get to hit (as that person will step aside). Everyone putts. Prizes will also be awarded to male and female longest drive, male and female closest to the pin and to a male and female golfer who distinguishes himself or herself on the golf course (nominees to be made directly to the golf chair). If you would like to play with someone, please send your request as soon as possible to the golf chair at fjs@srkfamlaw.com. We will do our best to accommodate you. But remember, this is a great opportunity to get to spend time with someone you do not know. Full rules for the tournament will be distributed at the commencement of play.

KIDS' DAY CAMP Ages 3 to 11
Kids camp organized by Pam Malone, a professional child care provider for over 2 decades! Pam has an incredible fun play center at her home 1 mile from the hotel. She offers a variety of fantastic field games, crafts, popular offering: Bounce house, water fun/ water balloons, bikes for all ages, face paint, Legos, etc. Shuttle will leave/return at the front of the hotel.

KIDS' DAY CAMP SCHEDULE

Thursday, July 12, 2018
6:00 p.m. – 10:00 p.m. Kids' Dinner and Activities

Friday, July 13, 2018
8:00 a.m. – 12:00 p.m. Day Camp
6:00 p.m. – 10:00 p.m. Kids' Dinner and Movie Night

Saturday, July 14, 2018
8:00 a.m. – 12:00 p.m. Day Camp

CANCELLATION POLICY:

Contact Adriana Favreau at afavreau@nysba.org to cancel your hotel reservation and meeting registration.

- Notices received prior to June 1, 2018: receive a full refund for both the hotel and the registration fees.
- Notices received as of June 2 but prior to June 25, 2018: receive a 50% refund of registration fees and 100% of Hotel fees.
- As of June 26, 2018: Registration fees will not be refunded and one hotel night plus taxes will be charged.

HOTEL GUEST ROOM DESCRIPTIONS:
Standard rooms: located in the same building as the meetings.
Townhouses are not connected to the main hotel, they are a short outdoor walk to the meeting space.
Townhouse Superior: Queen bed, bathroom with tub and a limited view.
Townhouse Deluxe: King bed, bathroom with tub, double vanity sink with back patio that faces the mountains.
Townhouse Suite: King bedroom, Pullout couch, dining area with small kitchen and back deck that faces the mountains.

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The Trial of a Matrimonial Action: Strategies, Techniques and Examinations

Stephen Gassman
Gassman Baiamonte Gruner, P.C., Garden City

THE TRIAL OF A MATRIMONIAL ACTION

STRATEGIES, TECHNIQUES, FOUNDATIONS

STEPHEN GASSMAN
Gassman Baiamonte Gruner, P.C.

5 ROLES OF TRIAL LAWYER

- OPENING STATEMENT
- VOIR DIRE
- CROSS EXAMINATION
- DIRECT EXAMINATION
- CLOSING STATEMENT

INTRODUCTION

- DISCLAIMERS
- THEMES

INTRODUCTION

- Non-jury trial
- Sloppy
- Lack of drama, suspense, coherent presentation

TOXIC BOREDOM

"Judges are human, and not immune from psychological and unconscious influences." *People v. Best*, 19 NY3d 739, 744 (2012).

- Trial is a microcosm of human nature

TELL A STORY

CONSIDERATIONS – ALL TRIALS

- THEME TO CASE
- BIG PICTURE CASE
- BUILDING BLOCK PROOF
- THINK LIKE THE TRIBUNAL

CONSIDERATIONS ALL TRIALS

- *THE BIG "3"*
  - UNDERSTANDABLE CASE – we like what we know.
  - "LIKEABILITY" OF CLIENT
  - CREDIBILITY (client's and you).

JURY TRIAL v. BENCH TRIAL

BUILDING BLOCK PROOF

- INTRODUCE STORY IN OPENING
- WITNESSES AND DOCUMENTS – BUILD STORY
- SUMMATION – ENDS AND SUMMARIZES STORY
- STORY TELLER PROFICIENCY
- DIFFERS FROM "HOLLYWOOD" PORTRAYALS

CONSIDERATIONS – ALL TRIALS

- TRIAL LANGUAGE
  - TO COURT
  - TO WITNESS

CONSIDERATIONS – ALL TRIALS

- ANTICIPATING EVIDENTIARY ISSUES
- ORGANIZATION
- PATENT WEAKNESS IN CASE
- OPENING & CLOSING DOORS

LISTS, LISTS, LISTS

- EXHIBIT LIST
- TRIAL PREPARATION CHECKLIST
- WITNESS LIST
- POINTS TO PROVE
- DENIAL LIST (*Hull v. Littauer*, 162 NY 569 (1900)
- SUBJECT TO CONNECTION LIST

ATTORNEY PROTOCOLS

- THINK LIKE THE TRIBUNAL
- SECOND CHAIR ROLE

CLIENT PROTOCOLS

- 3 INEXORABLE RULES
- TAKE NOTES
- BEHAVIOR DURING RECESSES

WITNESS PROTOCOLS

- EXPLAIN PROCEDURES
- OBJECTIONS
- INSTRUCTIONS RE: ANSWERS

KNOWING WHEN TO STOP

- "A measure of a great trial lawyer is what the lawyer leaves in the briefcase."

  Edward Bennett Williams

ALL TRIALS – CONT'D

- OBJECTIONS
- SEQUESTRATION OF WITNESSES
  - *Levine*, 83 AD2d 606 (2d Dept. 1981)
  - *Strategy*
- WILDCARD FACTOR
- 2 CARDINAL RULES

INTRODUCING AN EXHIBIT

- Exhibit marked for I.D.
- Exhibit Shown to Witness
- Witness Identifies Exhibit
- Lay Foundation
- Offer Exhibit into Evidenc
- Shown to Adversary (may voir dire
- Ruling from Court
- Once Marked and Admitted, testimony re: exhibit

TRIAL PREPARATION

- MOTION IN LIMINE
- TRIAL NOTEBOOK
- COMPUTER-ASSISTED PREPARATION
- TRIAL MEMO
- LIFE STYLE ANALYSIS

"Preparation transforms nervousness into confidence." Anonymous

MOTIONS IN LIMINE

- Definition
- Examples
- Value

A RULE TO CONSIDER

OVER PREPARE
UNDER TRY

COMPUTER ASSISTED PREPARATION

- Matlaw
- Family Law Software
- Finplan (a/k/a Divorce Planner)
- Case Map
- Time Map (Appendix “F”)
- Text Map
- Divorce Math

TRIAL MEMO

- Not just facts, but how to get facts and data into evidence
- EBT Digest (Appendix “G”)
- Verbatim testimony used incorporated into trial memo
- Exhibit Sheet (Appendix “D”)
- Trial Notes
- Life Style Analysis

TAPE RECORDINGS

- STATUTE – CPLR 4506
  - Ilegal Eavesdropping
  - One party consent
- MOTION TO SUPPRESS
- CPLR – DISCOVERY OF OWN STATEMENT

MISCELLANEOUS

- VOICE
- STAGE FRIGHT

CHAPTER 3

OPENING STATEMENT

OPENING STATEMENT

- DO NOT WAIVE!!!
  - "You don't get a second chance to make a first impression."
  - Unique Opportunity

OPENING STATEMENT "RULES"

- Do not read!
- Telling your story and themes for first time
- Take the sting out of obvious bad evidence
- Language of Opening Statement
- Personalize your client
- Order transcript of adversary's opening
- Biggest mistake – over promising

OPENING STATEMENTS

- What can you leave out?
  - The Power of Less
- Painting a picture of your client's story
- Persuasive Story
  - Cinematic → Memorable
  - Memorable → Persuasive

OPENING STATEMENT - INCLUDE

- Facts necessary to win
- Bad facts that must be answered or you look shady.
- Foreshadowing of great facts

FORESHADOWING

"If in the first act you hung a pistol on the wall, then in the following one it should be fired. Otherwise don't put it there."

Anton Chekhov

ASKING QUESTIONS

- Keeps suspense
- Engages the trier of fact as investigator
- Lets the case build as evidence unfolds
- Gives you an out

IMPACTFUL START OF OPENING

One way:

"The parties were married in 1995. Both were 25 years old at the time of the marriage. Neither had been married previously. At the time of the marriage, the Wife was a financial advisor and the Husband an associate at a prominent New York City law firm. They have 3 children…."

MORE IMPACTFUL START

This is a case about sacrifice and contributions. The personal sacrifices made by the plaintiff-wife to better the family unit; the herculean contributions she has made as the primary caretaker of the 3 children, while simultaneously being at her Husband's side, and frankly at his beck and call, to aid in the advancement of his illustrious professional career and financial success. This is about a woman who subjugated her career; …

WORDSMITH YOUR OPENING

- Use key words and phrases that conform with your theme
- "Unlike most of us, he needed no ATM machine. He had his own - unreported cash income."
- Case involving child abuse – "preyed on them like a vulture"

STAPLE APPROACH

- Start and end strong
- Tell a story
- Address weaknesses
- Pictures/Visual Aids
  - Power Point – recent case
  - Underuse
- Law – briefly
- Entertain – make it interesting

Chapter 4

DIRECT EXAMINATION

DIRECT EXAMINATION

- CONTRASTED WITH CROSS-EXAMINATION
- DIRECTOR v. STAR

4 BASIC GOALS

- CLEAR
- MEMORABLE
- CREDIBLE
- INVULNERABLE

PREPARING WITNESS

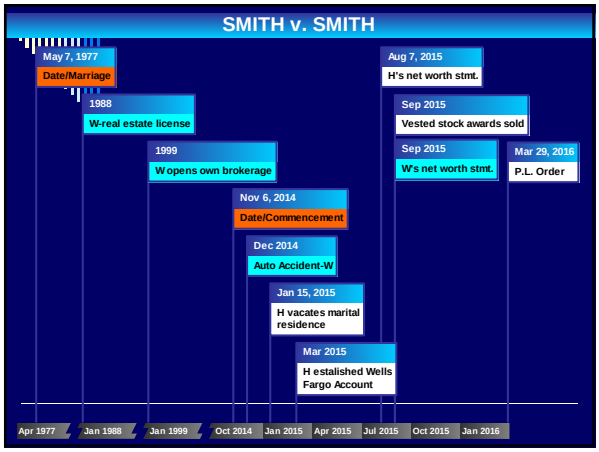
- FEAR AND ANXIETY
- PREPARE FOR DIRECT & CROSS
- COURTROOM PROTOCOLS

STAGE POSITION

- ANALOGOUS TO STAGE RIGHT OR LEFT
- BEHIND LECTURN
- cf. CROSS EXAMINATION, OPENING, CLOSING
- POSTION OF PODIUM

ASPECTS OF DIRECT

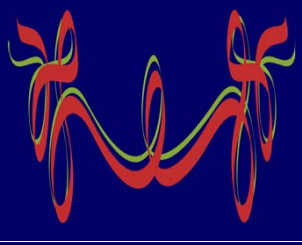
- LISTEN TO ANSWER
- BEGINNING – EASY QUESTIONS
- LEADING WHEN CAN
- COVER ONLY WHAT IS NECESSARY
- CHRONOLOGY



NON-LEADING QUESTIONS

- CLOSED QUESTIONS
- LOOPING
- ADVERSARY ASLEEP AT WHEEL?
- DEALING WITH NON-RESPONSIVE WITNESS

LOOPING



REPETITION

- ADVANTAGE
- OBSTACLE – “ASKED AND ANSWERED”
- STRATEGIES

TRANSITION PHRASES

- DIRECTOR INTRODUCING A NEW SCENE
- DURING AND AFTER COVER A SPECIFIC TOPIC
- EXAMPLES

COMMANDS

- SPECIFIC DIRECTIONS TO WITNESS REGARDING ANSWER GIVEN OR TO BE GIVEN
- WHEN TO USE

WHEN LEADING PERMISSIBLE ON DIRECT

- INTRODUCTORY MATTER
- UNDISPUTED FACTS
- YOUNG CHILD, FEEBLE MINDED
- HOSTILE WITNESS
- ADVERSE PARTY – HOSTILE *PER SE*
- *VOIR DIRE* INTERRUPTION ON DIRECT

REFRESHING RECOLLECTION

- WHAT CAN BE USED?
- PROCEDURE
- COMPARED WITH PAST RECOLLECTION RECORDED
- RIGHTS OF OPPOSING PARTY

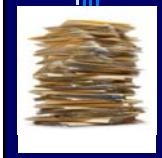
DIRECT EXAMINATION (CONT'D.)

- ANTICIPATE & NEUTRALIZE CROSS-EXAMINATION
- KEY PART OF TESTIMONY
- UNEXPECTED ANSWER OR NON-ANSWER
- "MEMORY" QUESTIONS

"PAT" QUESTIONS

- MEET WITH OPPOSING ATTORNEY?
- HERE VOLUNTARILY OR BY SUBPOENA?
- DISCUSS TESTIMONY WITH OTHER SIDE?
- COMPENSATED FOR YOUR TIME IN COMING TO COURT?
- HOW GET TO COURT TODAY?

VOLUMINOUS RECORD RULE



- FINANCIAL TESTIMONY
- SUMMARY STATEMENTS
- REQUIREMENTS

KEY PARTS OF TESTIMONY

- CHANGE PACE
- CHANGE PLACE
- CHANGE INTONATION
- CRAFT QUESTION WITH PRECISION

ORDER OF WITNESSES

- INITIAL WITNESS – SET THEME
- "LESS THAN BRILLIANT" CLIENT
- CALL OPPOSING PARTY?
- EXPERTS
- TAKING ADVANTAGE OF WITNESSES "OUT OF TURN"

OFFER OF PROOF

- RELEVANCE
- PROTECT RECORD FOR APPEAL
- SEEK REVERSAL OF RULING
- SHORTEN TRIAL
- PROCEDURE

DEPOSITION TRANSCRIPTS AT TRIAL

- CPLR 3117
  - PARTY v. NON-PARTY
  - READING ONLY A PART OF TRANSCRIPT

USING LAY OPINION TESTIMONY

- GENERALIZED MEDICAL CONDITION
- VALUATION
  - OWNER OF PROPERTY
  - HANDWRITING

ATTORNEY DEMEANOR

- HIGH ENERGY
- WIMBLETON EFFECT
- DON'T WRITE QUESTIONS
- WRITE TOPICS AND ANSWERS

COMMON MISTAKES

- LISTEN TO ANSWER
- PROPERLY INTRODUCE WITNESS
- USE OF LEGALESE
- QUESTIONS CALLING FOR EXACTITUDE
- "FOR THE RECORD"
- "PLEASE NOTE MY OBJECTION"
- NEUTRALITY QUESTIONS

EXPERTS ON DIRECT

- TESTIFY SERIATIM
- TEACHER
- LANGUAGE
- "TOO COMFORTABLE" EXPERT
- DOSE OF HUMILITY

DEMONSTRATIVE EVIDENCE; SUMMARIES

- CHARTS
- SPREADSHEETS
- PHOTOS/VIDEOS
- TAPES
- TIME LINES

DIRECT OF VALUATION EXPERT

- QUALIFICATIONS
- FACTS RE: RETENTION
- APPRAISAL ASSIGNMENT
- DOCUMENTS AND STEPS TO CARRY OUT APPRAISAL ASSIGNMENT
- METHODS OF VALUATION
- REPORT, CHARTS, CONCLUSION
- OTHER USES OF EXPERT

XYZ EQUIPMENT CORP.
Annual Sales and Income (2002-2013)

Table 18

Year	Annual Sales	Operating Income / (Loss)
2002	35,975,000	(1,203,000)
2003	38,664,000	(2,421,000)
2004	25,005,000	(3,335,000)
2005	32,478,000	(617,000)
2006	39,121,000	18,000
2007	30,156,000	(837,000)
2008	37,496,000	1,406,000
2009	37,964,000	2,520,000
2010	48,000,000	2,902,000
2011	35,465,000	674,000
2012	31,504,000	(1,076,000)
2013	33,094,000	(1,003,000)

Compound Annual Growth Rate (Annual Sales)	
2002-2013	-0.76%
2009-2013	-3.37%

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BASES OF EXPERT TESTIMONY

- PERSONAL KNOWLEDGE
- FACTS IN RECORD
- PROFESSIONAL RELIABLE HEARSAY

PROFESSIONALLY RELIABLE HEARSAY

- PART OF BASIS OF EXPERT TESTIMONY
- ELEMENTS
- NOT PRINCIPAL BASIS
- INDEPENDENT REQUIREMENT OF RELIABILITY v. DEEMED RELIABLE IN PROFESSION
- TESTIMONY RE: OUT-OF-COURT DATA (*Peo. v. Goldstein)*

COLLATERAL SOURCES

Straus v. Strauss, 136 AD3d 419 (1st Dept. 2016). "Moreover, where the proponent of the report intends to call witnesses at a future custody hearing, anyone to whom the evaluator spoke, thereby rendering the declarants subject to cross-examination, it renders admissible any opinion evidence based on their statements. "To the extent that any hearsay declarants are not cross-examined, those portions of the report containing inadmissible hearsay should be stricken or not relied upon." (Emphasis added)

5 MINUTE CONTEMPT CASE

5 MINUTE CONTEMPT CASE

- JUDICIAL NOTICE (ORDER)
- VOLUMINOUS RECORD RULE (ARREARS)
- NO NEED TO SHOW LESS DRASTIC REMEDIES
- SHIFTING OF BURDEN

USE OF HEARSAY ON DIRECT

- USE EXCEPTIONS
- BUSINESS RECORD RULE
- STATE OF MIND
- ADMISSIONS
- PRIOR INCONSISTENT STATEMENTS

ENDING OF DIRECT

- RULE OF RECENCY
- EMOTIONAL IMPACT
- EXAMPLES

CROSS EXAMINATION

CROSS-EXAMINATION

- PURPOSE OF CROSS-EXAMINATION
- GOAL – ESTABLISH CONTROL
  - LEADING QUESTIONS
  - TAG LINES
  - ONE FACT PER QUESTION
  - NO COMPOUND QUESTIONS
  - NO QUESTIONS CALLING FOR EXPLANATION

CROSS-EXAMINATION - TOPICS

- ORDER OF IMPEACHMENT
- WHEN NOT TO CROSS
- ONE ADVERSE WITNESS AGAINST THE OTHER
  - DISCREPANCIES
  - SCRIPTED
- WIN, WIN QUESTIONS
- OVERNIGHT TO PREPARE (EXPERT)
- BUILD-UP METHOD

CROSS v. DIRECT EXAMINATION

- FOCAL POINT
- TYPES OF QUESTIONS
- NARRATIVE v. MONOSYLLABIC ANSWERS
- ATTORNEY'S ROLE

DIRECT CROSS

- ASSAULT ON SUBSTANTIVE TESTIMONY
  - LAY WITNESS
  - EXPERT WITNESS

COLLATERAL CROSS

- LAY WITNESS
- EXPERT WITNESS
- DISCLAIMERS IN REPORT

MAJOR THEMES OF CROSS EXAMINATION

- CONTROL
- PATIENCE
- DOORS – WHICH TO OPEN; WHICH TO CLOSE
- REASONABLE EXPECTATIONS

REASONABLE EXPECTATIONS

"if you attack the King, you best kill him or you will soon be dead yourself"

Emerson

YOUNGER'S COMMANDMENTS

BE BRIEF

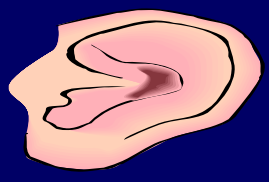
SHORT QUESTIONS, PLAIN WORDS

ASK ONLY LEADING QUESTIONS

- TYPES OF QUESTIONS
  - OPEN-ENDED
  - LEADING
  - DECLARATIVE QUESTIONS

NEVER ASK A QUESTION TO WHICH YOU DO NOT KNOW THE ANSWER

LISTEN TO THE ANSWER!!!



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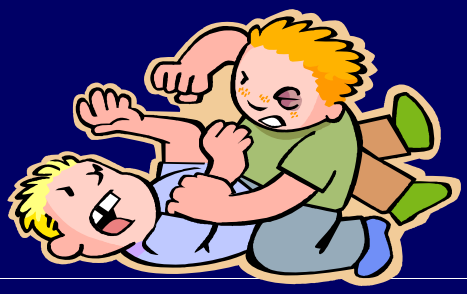
DO NOT QUARREL WITH THE WITNESS



DO NOT PERMIT THE WITNESS TO EXPLAIN

DON'T HAVE THE WITNESS REPEAT DIRECT

AVOID THE ONE QUESTION TOO MANY

- DON'T GUILD THE LILY
- ABRAHAM LINCOLN
- CLAUS VON BULOW
- EBT EXAMPLE

STEP 1

COMMITTMENT TO DIRECT EXAMINATION

STEP 2

ESTABLISH CIRCUMSTANCES AND IMPORTANCE OF THE PRIOR INCONSISTENT STATEMENT WITHOUT DIVULGING THE STATEMENT

STEP 3

IMPEACH WITH PRIOR INCONSISTENT STATEMENT

SAVE THE EXPLANATION FOR SUMMATION

ADDITIONAL COMMANDMENTS

WHEN NOT TO CROSS EXAMINE

"The phrase, "No questions, Your Honor" is the hallmark of a seasoned pro. It takes more experience, courage and self-confidence to use this phrase than to follow the natural impulse to dive in."

F. Lee Bailey, To Be a Trial Lawyer

PREPARATION, PREPARATION, PREPARATION

ORGANIZE

DON'T BE OVER-SCRIPTED

NOTES ON DIRECT

ORDER OF CROSS EXAMINATION

- SEQUENCE
- RULE OF PRIMACY
- RULE OF RECENCY

DON'T SWEAT THE SMALL STUFF

DON'T SHOOT EVERY MOSQUITO

ETIQUETTE OF CROSS-EXAMINATION

AVOID GLEE

WITNESSES NOT TO CALL

THE BAD PARTS DON'T GO AWAY

EVERY WITNESS IS NOT A LIAR

SENSITIVE WITNESSES

COURTESY COPY TO COURT

SILENCE IS GOLDEN

SUMMATION

YOUR OWN STYLE

"WIN WIN" QUESTIONS

RULES OF PRIMACY & RECENCY

PRIMACY

- WHAT WE HEAR FIRST, WE TEND TO BELIEVE
- START STRONG

RECENCY

WHAT WE HEAR LAST WE TEND TO REMEMBER

PECKING ORDER OF CROSS EXAMINATION

- START WITH STRONG POINT
- OTHER POINTS - STRONGEST TO WEAKEST
- END WITH STRONGEST POINT

STRATEGIC USE OF RECESSES

TRILOGIES



VERBAL AND BODY LANGUAGE

WHAT NOT TO DO

- OPENING SALUTATIONS
- NEGATIVE ENDINGS
- POMPOUS VOCABULARY
- “LET ME ASK YOU THIS QUESTION…”
- DIFFERENTIAL AND UNCERTAIN WORDS
- REPEATING THE PREVIOUS ANSWER

WHAT TO DO

- ONE FACT/QUESTION
- MEMORABLE WORDS OR PHRASES
- ADVERSE WITNESS – STATES, CLAIMS – DOES NOT TESTIFY
- POSITIVE ENDINGS TO QUESTIONS
- CONTEXTUAL SIGNIFICANCE TO QUESTIONS

WHAT TO DO (Cont'd.)

- CHALLENGE WITNESS ON HEDGE WORDS
- PERSONALIZE YOUR WITNESS
- YOU, NOT WITNESS READ DAMAGING STATEMENTS

BODY LANGUAGE

- WHERE TO STAND
- WHEN TO MOVE
- EYE CONTACT
- LOSE PROPS
- IN THE WITNESS' FACE
- POKER-FACED

MODES OF IMPEACHMENT

- BIAS, INTEREST, MOTIVE,

DEPOSITION AND CROSS-EXAMINATION

- CONFLICTING VIEWS OF PURPOSE OF DEPOSITION
- TRADITIONAL VIEW
- THE USE OF OPEN-ENDED QUESTIONS
- "FEEL" OF THE WITNESS

OTHER MODES

- IMPLAUSIBILITY
- BAD REPUTATION IN COMMUNITY FOR TRUTH AND VERACITY
- PRIOR CRIMINAL CONVICTION
- LACK OF KNOWLEDGE
- PERCEPTION, MEMORY
- RIDE THE LIE
- IMPEACHMENT BY OMISSION

PATIENCE AND PACING

REPETITION

- USAGE OF THE SUBSTANCE OF THE DAMAGING TESTIMONY AS THE BEGINNING OF A SERIES OF SUBSEQUENT QUESTIONS

TYPES OF CROSS EXAMINATION

- DESTRUCTIVE v. CONSTRUCTIVE
- PURE CROSS v. COLLATERAL CROSS
- COLUMBO CROSS
- BLANK "INCRIMINATING" DOCUMENT

ADVERSE PARTY AS WITNESS

- EXTENT OF CROSS EXAMINATION
- cf. VOUCHING RULE
- DISCRETION OF COURT
- STRATEGY – WHEN TO CALL ADVERSE PARTY AS YOUR WITNESS

AMNESIAC WITNESS

- "I don't know"; "I don't remember"
- RIDE IT OUT
- TEST LACK OF MEMORY

CLOSING ESCAPE HATCHES

- CARDINAL PRINCIPLE OF CROSS EXAMINATION

OBJECTIONS

- BEYOND THE SCOPE
- SPECULATION
- ARGUMENTATIVE
- ASSUMES FACTS NOT IN EVIDENCE
- MISCHARACTERIZES FACTS IN EVIDENCE
- REPETITIVE
- HEARSAY
- LACK OF FOUNDATION
- PRIVILEGED
- RELEVANCE
- COMPETENCE

DEALING WITH OBJECTIONS

- WHEN TO WITHDRAW AND REPHRASE
- AVOID OBJECTIONABLE QUESTIONS
- RELEVANCY OBJECTION - OFFER OF PROOF
- SUBJECT TO CONNECTION

CROSS EXAMINATION OF EXPERTS

CROSS OF EXPERTS

- GENERAL CONSIDERATIONS
- QUALIFICATIONS – *VOIR DIRE*
- CREDENTIALS
- *Wells v. Wells*, 177 AD2d 779 (3d Dept. 1991)

VOIR DIRE - QUALIFICATIONS

PROCEDURE

WHEN TO CHALLENGE

STRATEGIES

DISCLAIMERS

- STATEMENT OF LIMITING CONDITIONS
- USUALLY IN BACK OF REPORT

"We have based our valuation on figures presented by management without a certified statement, nor have we performed an audit of the figures. We have assumed for the purpose of this appraisal that the figures provided by management are correct."

"[ABC Appraisal Co.] will not express any form of assurance on the likelihood of achieving the forecast/projection or on the reasonableness of the used assumptions, representations and conclusions."

HYPOTHETICAL QUESTIONS

- CPLR 4515
- WHEN USE
- FAIRLY INFERABLE FROM THE EVIDENCE
- EXAMPLE

EXPERT WITNESS ATTACKS

- PROFESSIONAL STANDARDS AND GUIDELINES
- JACK OF ALL TRADES
- PROFESSIONAL WITNESS
- HYPOTHETICAL QUESTIONS – CPLR 4515

CROSS EXAMINATION BY LEARNED TREATISE

- OPINION IN PUBLICATION
- ADMISSION BY WITNESS THAT PUBLICATION AUTHORITATIVE
- USED FOR IMPEACHMENT PURPOSES ONLY

EXPERT REPORTS

→ ADMISSIBILITY
→ MOTION IN LIMINE
→ COLLATERAL SOURCES

MURPHY v. WOODS, 63 AD3d 1526 (4th Dept. 2009); *STRAUS v. STRAUSS*, 136 AD3d 419 [1st Dept. 2016])

EXPERT REPORTS (Cont'd.)

- Did expert independently verify any of the key performance indicators underlying the valuation
- Was a draft submitted to attorney prior to finalization of report
- Bring entire file to Court

APPRAISERS – CROSS EXAMINATION

- Did testifying witness prepare the report
- Sign off on report without being person who did the substantive analysis
- Did witness prepare the report
- Peer review – methods and analysis

RE-DIRECT EXAMINATION

- ONLY TO EXTENT NECESSARY
- OPENS DOOR TO FURTHER CROSS

CLOSING

- WRITTEN OR ORAL
- WHY THE FACTS AS EMERGED AT TRIAL MEAN YOU WIN
- ARGUMENT, NOT REGURGITATION

SUMMARY

ACTION	DIRECT	CROSS
Types of Questions	Can be Open-Ended Letting Witness Explain	Leading Questions Only
Answers	Narrative Permitted	Monosyllabic
Where Stand	Behind Lecturn	Peripatetic
Voice	Steady; Changes with Important Part	Vary Inflections, Intonations

EVIDENTIARY TOOLS & STRATEGY

AUTHENTICATION

- **THE PROFFERED EVIDENCE IS WHAT THE PROPONENT CLAIMS IT TO BE**

BUSINESS RECORDS – CPLR 4518 - 3 METHODS

- TRADITIONAL FOUNDATION
- SELF-AUTHENTICATING RECORDS
- CERTIFICATION OF BUSINESS RECORDS – CPLR RULE 3122-a; 3120

TRADITIONAL FOUNDATION BUSINESS RECORD RULE

- Record Made in Regular Course of Business
- It is the regular course of business to make the record
- Contemporaneous Entry
- Each entrant – business duty (*Mtr. of Leon RR*, 48 NY2d 117 [1979])

CERTIFICATION OF BUSINESS RECORDS

- CPLR Rule 3122-a
- CPLR 3120
- Certification Affidavit with Service of Subpoena *Duces Tecum*
- 30 days before trial – notice of intent to offer records at trial
- At least 10 days before trial – file objections

JUDICIAL NOTICE- Business Record Rule

- A record or document is so patently trustworthy as to be self-authenticating
- Judicial notice forms the foundation
- *Elkaim*, 176 AD2d 116 (1st Dept. 1991); *Merrill Lynch Bus. Financial Serv., Inc. v. Trataros Constr., Inc.,* 30 AD3d 336 (1st Dept. 2006)
- cf. *Peo. v. Ramos*, 13 NY2d 914 (2010)

WEIGHT ACCORDED BUSINESS RECORDS

- PRIMA FACIE PROOF OF THEIR CONTENTS
- BURDEN OF PROVING RECORDS FALSE OR INACCURATE SHIFTS TO THE OTHER SIDE

FOUNDATIONS

- AUDIOTAPES
- PHOTOGRAPHS
- VIDEOTAPES
- VOICE IDENTIFICATION

FOUNDATIONS (CONT'D.)

- HANDWRITING
- VOLUMINOUS RECORD RULE
- TELEPHONE CALL
- VOICE IDENTIFICATION

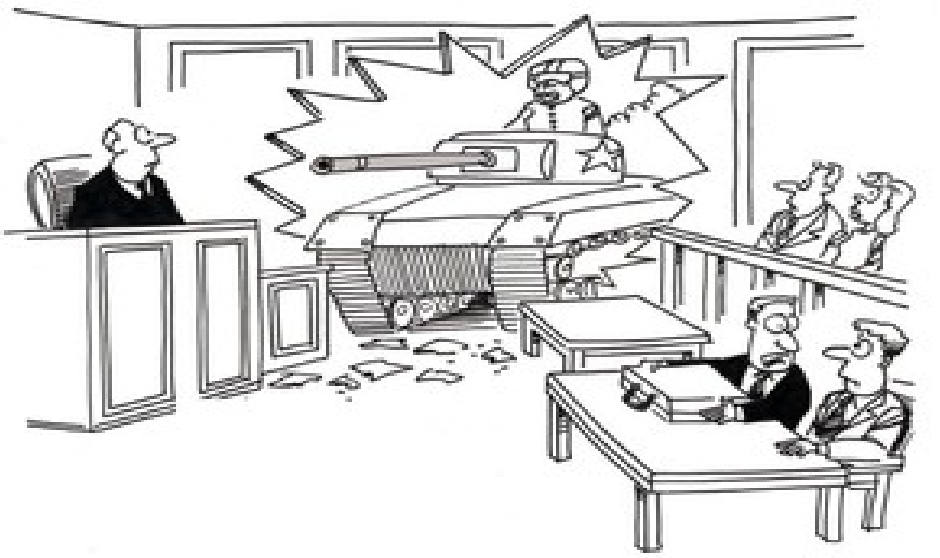
THE TRIAL OF A MATRIMONIAL ACTION

Strategies, Techniques, Examinations

NEW YORK STATE BAR ASSOCIATION

FAMILY LAW SECTION SUMMER MEETING

July 13, 2018



"I thought your wife wasn't contesting the divorce."

STEPHEN GASSMAN, ESQ.
GASSMAN BAIAMONTE GRUNER, P.C.
GARDEN CITY, NY

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1

INTRODUCTION

Considerations in all Trials

I. Overriding Considerations

A. Understandable case – we like what we know.
B. "Likeability" of client.
1. Discretion in Domestic Relations Law §236.
C. Credibility (client's and you).
D. A trial is a microcosm of human nature.
E. Judges are human.[1]
F. Continuous Reassessment throughout trial **–** what is proven, what is not proven; risk/reward analysis; what doors to keep closed, what doors to open.
G. Every case is a story.

II. Theme to Case

A. Limited Number – best if one theme, one sentence – Examples:
1. Plaintiff can never become self-supporting;
2. Defendant's contributions to the marriage are *de minimus*;
3. Plaintiff is the parent who is child-minded and sensitive and responsive to the needs of the children;
4. The parties' lavish lifestyle was made possible by unreported income.

B. Theory of case – why you should win (herculean contributions of your client; parties basically led separate financial lives).

[1] "We accept that judges are human". Linda Greenhouse, *NY Times*, 3/29/18.

C. Hammer home in motions, conferences, pretrial, opening.

III. Jury v. Bench Trial

A. Debate – There are some that believe that drama, suspense, theatrics of any kind are inappropriate in a bench trial.

B. Just as you argue to jurors; argue to judge.

1. While held to a higher level of discipline, judges and lay witnesses both react to stimuli, demeanor, and body language.

2. Judges are human - "Judges are human, and not immune from psychological and unconscious influences." *People v. Best*, 19 NY3d 739, 744 (2012).

C. Advantage of Bench Trial

1. Know trier of fact.
2. If don't know, find out.

IV. Try to make case interesting

A. Judge Cardozo while on the Court of Appeals (before sitting on the Supreme Court) was asked "how come you get all the interesting cases?" He responded: "Are you kidding? They are the most boring cases in the world until I get them, and I make them interesting."

B. Avoiding Boredom

1. Pace.
2. Financial data in organized summary form.

V. Big Picture Case

A. Corollary to Theme.

B. Avoid minutiae.

C. Better to lose a skirmish or two and win the war.

VI. Building Block Proof of Case

A. A story about the theme(s) of your case – every case has to have one

B. Introduce story in opening; end story in summation – building blocks for themes in between

C. Reason not to waive opening – Preview (trailer)

D. Taglines:

1. "Isn't that correct?", "Correct?", "True?", "Isn't it a fact?"
2. Use but not to excess.

E. Patience and preparation

F. Discipline

G. Different from “Hollywood” portrayals

VII. Think Like the Tribunal, not the Client

A. Stated otherwise, if I was the judge, what would I think?

B. Don’t ask client if more questions

C. Corollary – control your client (sticky notes; jumping up).

VIII. Trial Language

A. To Court – Rule is to guide and persuade the court in your direction, not to *tell* the court.

1. Eschew “You must find…”; “I think…”
2. Human nature results in an exactly opposite reaction and a competitive refusal to be controlled by someone else. Instead, we acknowledge the power of the court to make any ruling they wish, but offer the reason why they should rule in your favor. Acknowledging the power of the other person to control their decisions encourages a more compliant attitude.
3. Use “We submit the evidence shows…”
4. The idea is for the court not to lose face.
5. When reciting law: “As the court well knows…”
6. Do not say to Judge: “I hear what you say” (means you get the point, disagree with it and think little of it).
7. Don’t tell the court what to think, show the court what to think.

B. To Witnesses

1. Always be polite, but firm.
2. Your witness - start with easy questions.
3. Develop a cadence.
4. On direct have the witness tell the story in his own words.
5. Avoid fill-ins such as “a ha”, “right”, “okay”, “so”
    a. Any time you hear “So,” at the beginning of question, probably conclusory and leading or a mini-summation – lawyer testifying or leading.
6. Do not repeat the last answer before the next question.

IX. Anticipating Evidentiary Issues

A. Directly related to extent of preparation. The better prepared you are the more you will be able to anticipate the evidentiary issues you face before trial and those that your adversary

faces. Preparation involves not just what to prove, but how to prove it.

B. Anticipating your evidentiary issues and the other side's evidentiary issues

C. Particularly important with hearsay and exceptions to hearsay rule

D. Be armed with authorities and arguments

E. Example: Business Record Rule – 3 ways (CPLR 4518)

X. Organization; Tidiness

A. Tidiness

B. Use a carefully organized trial notebook.

XI. Patent Weakness in Case

A. Not going to go away by avoiding it

B. Steal the thunder from cross-examination

C. Mention in Opening Statement

D. If shocking, repeat so many times becomes almost mundane and humdrum

XII. Lists, Lists, Lists

A. Need to rely on lists, particularly if no second chair

B. Attention span, level of concentration, and mental acuity are tested to the limit while on trial

C. Trial Preparation List (See Appendix "C")

D. Exhibit List (See Appendix "D")

E. Witness List

F. Denial List – If the testimony of a witness "is not contradicted by direct evidence, nor by any legitimate inferences from the evidence, and it is not opposed to the probabilities, nor, in its nature, surprising or suspicious, there is no reason for denying to it conclusiveness." *Hull v. Littauer, 162 NY 569, 572 (1900); Sagorsky v. Malyon, 307 NY 584 (1954).*

G. Subject to Connection List

H. Points to Prove

FACT[2]	**ISSUE**	**HOW TO PROVE**	**FOUNDATION/ AUTHENTICATION**	**OBJECTIONS/ RESPONSES**
Stay-at-home mom	Maintenance/ Equitable distribution	Wife's testimony	N/A	None
Husband's salary	Maintenance/ Equitable distribution	Employer records; W-2	Business Record Rule	Hearsay

I. Points Covered on Direct (reference tool for when cross examiner exceeds scope of direct examination).

XIII. Opening and Closing Doors **[More Mindset]**

A. Has a great deal to do with who has burden of proof.
1. Always think "whose burden is it" and tailor your case accordingly.
2. Effect on order of proof

B. If burden of proof is on the other side, keep as many doors closed as possible
1. Re-direct examination – only if absolutely necessary and only to the extent absolutely necessary.
2. If cross examination on a particular area may expose a danger point to your case which was not brought out on direct, don't cross on that subject.

XIV. Protocols

A. Counsel table – client, associate, paralegal – know their place and function.

B. Client should stay seated, mouth shut, taking notes, no gesticulations or gestures.

C. Recesses – conversations with and around court personnel.

D. Witness – explain in advance the procedures; just answer question; what to do when objection made.

XV. Knowing When to Stop

A. Allied to doors analogy

B. Don't gild the lily; single death rule.

C. Applies to direct and cross-examination.

[2] Peskind, Steven N., *One Hundred Days Before Trial*, 2015 A.B.A. Pub.15.

D. Edward Bennett Williams's remark: "A measure of a great trial lawyer is what the lawyer leaves in the briefcase."

E. Don't prove a minor point or corroborate a fact already established at the risk of opening the door to damaging testimony or at the risk of giving your opponent another bite at the apple.

XVI. Objections

A. Ask yourself, "Does it hurt?"

1. Beware the default mindset that if the other side wants it in, you want it out.

B. The flipside of "does it hurt you" is when you are considering evidence you are trying to have admitted, ask "do you really need it?"

XVII. Preparation

A. Over prepare, under try - Less is More Principle.

B. If you prepare properly, you can anticipate at least 80% of what the other side will do.

XVIII. Sequestration of Witnesses

A. *Levine v. Levine*, 83 AD2d 606 (2d Dept. 1981), reversed on other grounds, 56 NY2d 42 (1982)"The practice of excluding witnesses from the courtroom except while each is testifying is to be strongly recommended."

B. Distinguished by *People v. Santana*, 80 NY2d 92, 587 NYS2d 570, 600 NE2d 201 (1992), where the court found that defense counsel had a right to talk with his own expert while he is cross-examining the opposing expert. Holding that "the presence in the courtroom of an expert witness who does not testify to the facts of the case but rather gives his opinion based upon the testimony of others hardly seems suspect and will in most cases be beneficial, for he will be more likely to base his expert opinion on a more accurate understanding of the testimony as it evolves before the jury" *(Morvant v. Construction Aggregates Corp.,* 570 F2d 626, 629-630 [6th Cir], *cert dismissed* 439 US 801; *see, United States v Kosko,* 870 F2d 162, 164 [4th Cir]). Although not binding, Fed.R.Evid. 615 further support this holding.

C. Federal Rules - "Fed.R.Evid. 615 provides that a district court may sequester witnesses to prevent them from hearing the testimony of other witnesses. Rule 615(3) provides an exception for "a person whose presence is shown by a party to be essential to the presentation of the party's cause." The advisory committee notes specify that the exception contemplates "an expert needed to advise counsel in the management of the litigation." Fed.R.Evid. 615(3) advisory committee notes.

D. Strategy.

XIX. Wildcard Factors

A. “Any other factor which the court shall expressly find to be just and proper.”

B. Avenue to argue any fact(s) of case which strengthens your equitable arguments.

C. Applicable to equitable distribution, maintenance, child support.

XX. Second Chair Role

A. Not a secretary, more like an understudy.

B. Do everything – preparation, note taking, correcting mistakes, organizing and tracking exhibits.

C. What did the leader miss, correct; don't wait to be asked.

D. Arrangement of Exhibits – instant access.

E. Loyalty to first chair.

XXI. Two Cardinal Rules of Litigation

A. Rule #1- Never sacrifice your credibility.
1. Client has one case; you live to fight another day.
2. Credibility is paramount (Advantage of matrimonial practice).

B. Rule #2 – Never violate Rule #1.

XXII. Introducing Exhibit

A. Eight (8) Steps

1) Exhibit marked for I.D.

2) Exhibit Shown to Witness

3) Witness Identifies Exhibit

4) Lay Foundation

5) Offer Exhibit into Evidence

6) Shown to Adversary (may voir dire)

7) Ruling from Court

8) Once Marked and Admitted, testimony re: exhibit

2

TRIAL PREPARATION

"Preparation transforms nervousness into confidence." Anonymous
"Failing to prepare is preparing to fail." John Wooden

I. Motions in Limine

A. Definition - preliminary application usually made before or at the beginning of a trial, that certain evidence, claimed to be inadmissible and prejudicial, not be referred to or offered at trial.

B. Examples

1. Application in limine to allow 6-year-old to testify in fault and custody portion of trial denied. (*Reed v. Reed*, 189 M2d 734, 734 NYS2d 806 (S.Ct., Richmond Co., Sunshine, J. 2001)).

2. In limine application on permissible scope of cross-examination concerning a non-party's prior misdeeds (*Peo. v. Scott*, 134 M2d 224, 510 NYS2d 413 (Sup.Ct., Kings Co., 1986)).

3. Assets subject to distribution - "whether a particular marital asset, such as the enhanced earning capacity attributable to a particular career, is subject to equitable distribution is an issue that can be decided prior to trial" (*Hougie v. Hougie*, 261 AD2d 161, 689 NYS2d 490 (1st Dept., 1999)).

4. Classification of assets – *Block v. Block*, 258 AD2d 324, 685 NYS2d 443 (1st Dept. 1999); proper for court to consider before trial "... that the contingency fee cases defendant had commenced prior to the commencement of the instant divorce action are part of his firm's assets or value, and therefore constitute marital property…"

5. Bifurcation – *Enker v. Enker*, 261 Ad2d 433, 687 NYS2d 903 (2d Dept. 1999).

6. Partial Summary Judgment – *Moll v. Moll*, 187 M2d 770, 722 NYS2d 732 (S.Ct. Monroe Co., Lunn, J., 2001) – Pre-trial determination of issue [whether clients served by defendant at Morgan Stanley Dean Witter constitute his "book of business" which is a marital asset subject to equitable distribution] is appropriate by remedy of partial summary judgment.

7. Fix Valuation Date (Domestic Relations Law §236(B)(4)(b)).

II. Trial Notebook

A. Contents

1. Marked pleadings
2. Court Orders
3. Opening Statement Outline
4. Asset Schedule
5. Income Tax summaries
6. Settlement memos
7. Deposition digests
8. Notes for Direct Examination of Witnesses
9. Copies of Exhibits
10. Cross examination notes for opposing witnesses
11. Copy of Domestic Relations Law §236(B)
12. Net Worth Statements
13. Copy of Revenue Ruling 59-60; Revenue Ruling 68-609
14. Expert Witnesses – Professional Standards and Guidelines
15. Expert Reports and outlines
16. Child support and maintenance guidelines charts
17. Insurance schedules
18. Cost of Living Schedules
19. Cash Flow charts
20. Tax impacting charts
21. Arrears chart
22. Law Section

III. Computer-Assisted Trial Preparation

A. Matlaw

B. Family Law Software

C. Finplan (a/k/a Divorce Planner)

D. Case Map

1. Database for trial preparation

2. Links Facts, Objects, Issues, Research

E. Time Map – time lines – (See Appendix "F")

F. TextMap – deposition transcripts; NoteMap - deposition

G. Divorce Math
1. Pension value
2. Present value calculations
3. Alimony recapture
4. House sale- capital gain
5. Social Security tax calculations
6. Mortgage Amortization Schedules

IV. Writing the Trial Memo

A. Basic Thought Process
a. Try the case from the memo
b. Not enough to just relate facts of case

B. Not just what to prove but how to prove it

C. EBT transcript - reproduce section in trial memo
1. Identify page and lines
2. Ask reporter for digital copy of transcript

D. EBT Digest (See Appendix "G")
1. Header - EBT of ___; Date
2. To left, page and line numbers; center-topic

E. Document reference - reproduce part of document to be used

F. Photo - when taken; who can identify and authenticate; what purports to show

G. If part of affidavit of opposing party to be used, incorporate sections to be used with date of affidavit and page and paragraph number

H. Evidentiary Issues

1. If hearsay, see if there is an applicable exception
    a. Admission, state of mind, declaration against interest etc.

2. Not offered for proof of facts asserted

I. Not writing an affidavit; writing a trial guide

J. As many lists as possible, as opposed to narrative sentences

K. Statement of Proposed Disposition - client sign office copy

L. Income taxes filled in on statement of net worth

M. Exhibit sheet (See Appendix "D")
1.Typed periodically
2. Dates, names of reporters

N. Trial Notes
1. To be typed daily
2. Header - e.g., Direct testimony of ____; (Date)

O. Separate trial testimony notebook

V. Life Style Analysis

A. Checks, credit card statements

B. Photographs (e.g, sumptuous home)

C. Separate non-recurring and capital improvements

D. Cost a factor

VI. Tape Recordings

A. Statute- CPLR 4506(3) - "An aggrieved person who is a party in any civil trial, hearing or proceeding...may move to suppress the contents of any overheard or recorded communication, conversation or discussion or evidence derived therefrom on the ground that: (a) the communication, conversation, or discussion was unlawfully overheard or recorded;..."

B. Motion to Turn Over Tape Recordings - CPLR 3101(e) - a party may obtain a copy of

his own statement.

VII. Trial Preparation Checklist (See Appendix "C")

VIII. Miscellaneous Considerations

A. Voice – Warm up
1. Deep breath and fully exhale
2. Stage fright makes us hold our breath
3. Talk to empty courtroom

B. Stage Fright
1. Get to Court early
2. Clerk, rest rooms

3

OPENING STATEMENT

"You don't get a second chance to make a first impression."

I. Do not waive

A. Do not reserve (if Defendant)

B. Only chance in trial to tell your story as follows:
1. Without interruption from court or adversary;
2. Unfettered in content and style;
3. Without regard for rules of evidence.

II. Importance

A. Generally, gets only cursory treatment, but is underrated and underused in matrimonial litigation.

B. Importance – Human nature confirms that we make quick judgments about who was right or wrong in our everyday life.

C. Map for Judge - crafting a lens through which the judge will see the evidence.
1. Preview of evidence as you want the Judge to see it.

III. Sequence of Trial

A. Opening – commit to what the evidence will show

B. Witnesses – show it

C. Closing – drive home the promise you have kept

IV. Do not "Read" Opening Statement (or Closing Statement)

A. Your focus and loyalty is to the person you are trying to persuade; not to words on a pad.

B. Use outline to remind of topics, key words (highlight).

C. Commit as much as possible to memory and use notes to look down on occasion when necessary.

1. As few notes as possible; no notes optimal; most of us need an outline.
    a. Notes or an outline limits eye contact with the judge.
2. Better to forget something than to get up there and be wedded to a notebook or legal pad when you are flipping through pages.

V. Other Considerations

A. Establish theme and tell a persuasive story

B. Take the sting out of the worst evidence in your case

C. Strong, not long, but with ardor

D. Language – "The evidence will show…", "We will learn…", "We intend to prove…", "Documentary evidence will reveal…"

E. Where appropriate, tell the story in present tense
1. No: He walked into the room.
2. Yes: He walks into the room (thinking of what happens next).

F. Rehearse (mock practice with colleagues).

G. Personalize your client

H. Order transcript of adversary's opening.

VI. Impactful start to Opening

<u>One way:</u>

"The parties were married in 1995. Both were 25 years old at the time of the marriage. Neither had been married previously. At the time of the marriage, the Wife was a financial advisor and the Husband an associate at a prominent New York City law firm. They have 3 children…."

<u>Alternative – Embodying Principle of Primacy</u>

This is a case about sacrifice and contributions. The personal sacrifices made by the plaintiff-wife to better the family unit. The herculean contributions she has made as the primary caretaker of the 3 children, while simultaneously being at her Husband's side, and frankly at his beck and

call, to aid in the advancement of his illustrious professional career and financial success. This is about a woman who subjugated her career, her opportunity to bask in professional and financial success to the benefit of her Husband and children. This case is about a woman who thought her efforts would bring perpetual happiness and success for her family until her Husband, to her great surprise and chagrin, announced he was no longer happy and issued the parting shot: "See you in court."

VII. ***Biggest Mistake***

A. Over promising - stretching the truth, trying to make something that is not.
1. You lose credibility and when you lose credibility, you lose the power to persuade.

VIII. What Not to Include

A.What is omitted is as important as what is included.

B. Not a laundry list of all of the facts you intend to prove. Opening paints the dispute and your client's position in broad strokes. The closing argument provides the specific evidence that was admitted that proved your client's position.

C. Instead of reciting conclusions, tell enough facts to lead trier of fact to the conclusion. Show, not tell, the conclusion you want the fact finder to reach. Make the facts speak for themselves. People want to reach their own conclusions, not be told what to conclude.

1. Outrageous conduct – don't label it; tell some of the incidents. The conclusion will follow. It makes the trier of fact an investigator of your case; creates curiosity, suspense.

Opening #1 – The evidence will show that the plaintiff has been guilty of egregious parental alienation. This is manifested by her cavalier disregard of the father's rights, her preemption of the parenting role to the exclusion of the father, and her denigration of the father to the child and to whomever will listen.
Opening #2 – The evidence will show that plaintiff has embarked upon a course of conduct, including but not limited to, failing to advise the father of the child's activities, planning outside activities for the child unilaterally and during the father's periods of access, listing her mother as the emergency contact after herself for the child's school, and encouraging the child to call her boyfriend "daddy."

2. Example: inconsistent statement - Instead of just reciting story "A" and story "B", ask questions: "Is what the defendant wrote about this event at the time consistent with what he says now? If he has a new version, when and how did it change? And most importantly, why?"

D. Advantages of Question
1. Gives you an out
2. Keeps suspense
3. Engages trier of fact as investigator
4. Let the case build as evidence unfolds

5. Lessens ennui

E. Details that pile on unneeded technical facts

F. Killer facts that the other side has trouble answering. (Foreshadow instead with facts.)

IX. Preparation of opening statement

A. Weeks before the trial commences; not the morning of trial

X. Aspects of Opening

A. Establish theme and tell a story

1. Make the story interesting

a. Make case interesting – Judge Cardoza while in the Court of Appeals (before the Supreme Court) was asked "how come you get all the interesting cases. Mr. Martin" he said," are you kidding? They are the most boring cases in the world until I get them, and I make them interesting."

2. Create a memorable theme, not a factual theme but a story theme.

B. Foreshadow your favorable facts; details in testimony.

C. Take the sting out of the worst evidence in your case.

1. Tell a story that covers the good, the bad, and the ugly
2. Obvious bad facts that must be answered or you look shady
3. Dealing with bad facts - facts are in three categories: good, neutral, bad
4. Spend time trying to make the bad facts good or at least having diminished impact; play Devil's Advocate, i.e., embrace any weak points, and try to explain why they don't matter.
5. Bring out in opening statement
6. If have to deal with bad facts, do so near end of direct examination so the court does not hear all the favorable testimony through a prism unfavorable to the witness.

D. Make client come alive and as sympathetic as possible

E. Order transcript of adversary's opening – for closing; corollary: don't overpromise, you will be called on it

F. Wording and Language

1. Use descriptive phrases and analogies

a. "Unlike most of us, he needed no ATM machine. He had his own - unreported cash income."

b. Case involving child abuse – "preyed on them like a vulture"
c. Parental alienation; psychological parent
d. Sacrifice of career
e. Child-centered life

f. Lying has become a way of life

2. Use of words; Vocabulary

a. Study: if you use a word someone does not understand, your audience will miss the next 7 words you say as the brain tries to assimilate what you have just said.

G. Refute the points you know the other side will rely upon

1. "Your Honor, in a few minutes my adversary most certainly will tell you "X" and this is why it is not so…"

H. Where applicable, universalize your case. This case transcends and is bigger than *Jones v. Jones*, and explain.

I. STAPLE approach

Start and end strong

Tell a story

Address weaknesses

Pictures/Visual Aids

- Power Point – recent case
- Underused

Law – briefly

Entertain – make it interesting

XI. Sample Opening Statements (See Appendix "E")

4

DIRECT EXAMINATION

I. Direct Examination – General Considerations

A. The 3 "Mosts"
1. Most *overlooked* trial skill
2. Most *important* part of case
3. Most *difficult* part of case

B. Misconception
1. Most lawyers incorrectly assume this task is easy, and thus the lack of preparation shows. Many lawyers just tell witnesses to walk into the courtroom, tell the truth, and don't worry about anything else. Then they ask the witness to "tell the Court what happened". The train wreck then begins.

II. Versus Cross-Examination

A. Art of construction v. Art of destruction.

B. Examiner is the conductor; witness is the virtuoso.

C. Cf. cross examination – if effective, attorney is really testifying.
1. On direct examination, lawyer asks some open-ended questions and lets the witness do the testifying.

III. Four Basic Goals of Direct Examination

A. The testimony must be *clear*.

B. The testimony must be *memorable*.

C. The testimony must be *credible*.

1. Nothing is more destructive of credibility than the woodenness of testimony from prepared script.

2. Long narrative answers destroy credibility by turning the witness into an advocate, not a teller of truth.

D.The testimony must be *invulnerable.*

IV. How to Achieve Goal

A. Testimony must be delivered in digestible bites without advocacy from the witness.

B. To achieve clarity and memorability you need to ask a lot of questions; written scripts destroy clarity and memorability.

C. In making notes about what you want to ask on direct examination, write an outline of the answers you want, not the questions.

D. If testimony is not understood it will not be remembered; what is not remembered later is useless later.

V. Difficulties with Witness Preparation

A. Direct examination is unlike any of the conversation we have in real life.

1. Witness is scared to death

2. Gallup runs a poll each year and asks Americans to identify the top fears. Public speaking is routinely number one – beats out death, snakes, drowning etc**.**

3. Need to prepare witness not only for direct examination but cross-examination as well.

4. The key to successful direct examination is preparation. If properly prepared, it should generally go smoothly.

B. Education of Witness – Eliminate surprises

1. Details of what courtroom looks like
2. Dress; jewelry
3. Eye contact – with whom
4. To whom they should address their answers
5. What to do when objection made

VI. "Stage Position"

A. Direct – stage right or left.

1. Stay behind lectern – covers over 50% of body.

2. During a good direct examination, attention should ordinarily be focused on the witness and *not* the examining lawyer. The examining lawyer should be relatively unobtrusive. The goal is to have the witness simply tell his own story in his own honest, natural and thorough manner.

B. The lawyer is the conductor, director, stage manager, not the script writer.

C. Opening, Closing and Cross Examination – stage center – you are the star.

D. Placement of podium – by moving away from the witness box, forces the witness to speak loudly.

E. Observe Sunday Preachers.

VII. Listen; Appear Interested

A. Do not peer at notes for next question, and not listen to answer.

B. Listening to answer leads to next question - fallacy of script.

C. Look at the witness – communicating.

VIII. Some Aspects of Questioning

A. Start with easy questions
1. When were you married? –let witness relax.
2. Examination peppered with easy questions – when, who, where.

B. Do not rely upon the witness to tell his story. You must get the details you need for your questioning. To the extent you can get away with leading questions, do so.

C. Use imagery in your questioning to emphasize your theme. Look for opportunities to connect the similarities of your witness's testimony with a previous witness in order to corroborate facts.

IX. Cover only what is necessary

A. Remember burden of proof – preponderance of the evidence (51%).

B. The longer you go the more fodder you provide for cross- examination.

X. Chronology

A. Try to take things chronologically within the theme.
1. Easier to follow for the witness and the listener
2. Use of timeline

B. Cf. cross examination – not in chronological order.

XI. Non-Leading Questions

A. Nonleading

1. Short, specific questions with one fact to direct the witness to the exact information you need.

2. Who, what, why, when, where, how.

B. Specific Non-Leading Question

C. Leading without Leading - Closed Questions - limits the range of the witness' answers

1. Example: did you commence employment on a Monday or a Wednesday?

2. Word Choice - The witness is given reasonable choices

a. Instead of "Was the man tall?" ask "Was the man tall, short or average height?" Was the defendant wearing a long-sleeved shirt, T-shirt, or sweatshirt?

b. Instead of "Were you in New York on June 4th?" ask "Do you recall whether or not you were in New York on June 4th?"

3. Yes/No Choice – was the man tall?

4. The use of "if any" in the question

a. "What, if any, derogatory comments did you hear the defendant state?"

D. Piggyback (looping) – (direct or cross examination)

1. Technique of repeating a portion of the witness's previous answer in your next question. The purpose is to remind the trier of fact of the answer and build on it for the next question.

2. Take a fact that has been established with the witness and is favorable to your theme and embody it in the next question

3. Advantage of repetition and greater control over witness as using as part of your question a concession witness has already made

4. Looping – fitting each answer into the last each question ties into the last answer so that a tongue and groove or looping effect achieved.

Q*: You told us at the time in question the defendant was drunk?*
Q: When the defendant was drunk (looped the 1st answer) was he in the presence of his 2 children?
Q: When the defendant was drunk did he have physical contact with his 2 children?
Q: How long did you observe the drunken defendant having physical contact (looping 2 answers) with his children?

E. Failure to Adversary to Object to Leading Questions

1. Adversary asleep at the wheel.

2. Limit use of leading questions as affects quality of testimony.

F. Dealing with Non-responsive Witness

1. "I apparently did not make myself clear. Let me rephrase the question" "I apologize, the question was confusing. I will reword it.

G. Repetition

1. It is essential that important material be heard more than once.
2. Obstacle – objection "Asked and answered."
    a. Interestingly, we never use that objection for the repetition of helpful testimony; only hurtful testimony.

H. Getting around Asked and Answered Objection
1. Looping – repeating the last answer in the form of the next question.
2. Asking for the details of an event through narrowly constructed questions.
    a. Break it down in small parts
    b. Use many close questions showing corroborative detail of the event. In other words, play it out.
3. Use of charts and illustrative aids – generally we take the oral details first and then invoke the charts and illustrative aids later. Achieves repetition.

I. Transition phrase
1. To change a topic; signal to everyone where you are going.

> *Q: Let me turn your attention to the night of December 12.*
>
> *Q: Now that we discussed your prior employment, let's move on to your current employment….*
>
> *Q: Mr. Jones, so we have talked about the financial documents and affidavits that you reviewed in the course of your appraisal assignment. Now I want to turn your attention to the interviews with the principals of the company…[Note: slightly leading as suggests that the appraiser did interview principals but most courts permit as it helps the flow of testimony.]*

2. Not improper leading as improper leading occurs when the questions not only suggest the subject but also suggest the desired answer.
3. Transition questions – not really questions and thus they cannot be leading. They are the hallmark of experienced lawyers. Smooths out and bridges testimony.

J. Commands
1. Direction to a witness on how better to answer the question you're previously asked or are going to ask. Don't feel you are stuck with the witness's initial answer.
2. Whenever the witness fails to give important details, ask follow-up questions.

> *Q: Let me stop you there. What did you mean when you said you had to quit your job?*
> *Q: Explain in more detail your decision to leave the marital residence.*

XII. When Leading Question Permissible on Direct Permissible

A. When they relate to introductory matter or undisputed facts. *Cope v. Sibley*, 12 Barb. 521, 523 (NY App. Div. 1850).

1. Includes introductory and uncontested matters or to call the witness's attention to particular circumstances as, e.g., when another witness made a prior inconsistent statement.

B. When witness' recollection is exhausted, or the witness is a young child, feeble minded, or otherwise unable to testify without assistance *Cheeney v. Arnold*, 18 Barb. 434, 1854 NY App. Div. (App. Term Sept. 12, 1854) affd. 15 NY 345.

1. Child's testimony in a sexual abuse case so the child's testimony can be clarified or expedited if the child is apparently unwilling to testify freely (*see Peo. v. Wasley*, 249 AD2d 625, 671 NYS2d 767, lv. Den. 91 NY2d 1014, 676 NYS2d 142); *see also Peo. v. Martina*, 48 AD3d 1271, 852 NYS2d (4th Dept. 2008).

2. In sexual abuse case, not error to allow leading questions in direct examination of child witness/victim in view of the intimate and embarrassing nature of the crimes. *Peo. v. Martina*, 48 AD3d 1271, 852 NYS2d 527 (4th Dept. 2008).

C. When the witness is hostile or biased *(Becker v. Koch* 104 NY 394 [1887]); the court properly allowed the prosecutor to use leading questions in her direct examination of defendant's wife because the witness was patently reluctant and hostile (*see Peo. v. Clark*, 181 AD2d 1028, 586 NYS2d 538, lv. Den. 80 NY2d 895, 587 NYS2d 925); a hostile witness may be cross-examined and leading questions may be put to him by the party calling him, on the ground that he is adverse, and that the danger from such a mode of examination by the party calling a friendly witness does not exist. *Wiener v. Mayer*, 162 AD 142, 147 NYS 289 (1st Dept. 1914).

D. When the witness is the adverse party

1. A party who calls adverse party as witness, should not be bound by witness's answers and should be permitted to lead and cross-examine, because he is obviously a hostile witness. *Mtr. of Arlene W. v. Robert D.*, 36 AD2d 455, 456, 324 NYS2d 333 (4th Dept. 1971); *see also Cornwell v. Cleveland*, 44 AD2d 891, 355 NYS2d 679 (4th Dept. 1974).

2. *Jordan v. Parrinello*, 144 AD2d 540, 534 NYS2d 686 (2d Dept. 1988) – "...when an adverse party is called as a witness, it may be assumed that such adverse party is a hostile witness, and, in the discretion of the court, direct examination may assume the nature of cross-examination by the use of leading questions. However, a party may not impeach the credibility of a witness whom he calls (*see Becker v. Koch*, 104 NY 394) unless the witness made a contradictory statement either under oath or in writing (*see* CPLR 4514)." (*See also Ostrander v. Ostrander,* 280 AD2d 793, 720 NYS2d 635 (3d Dept. 2001), holding that under facts of the case, sustaining objection to use of leading questions during direct examination of adverse party was proper); *see also Fox v. Tedesco,* 15 AD3d 538, 789 NYS2d 742 (2d Dept. 2005).

3. The general rule prohibiting a party from impeaching his or her own witness does not preclude a hostile witness from being impeached by prior statements made either under oath or in writing (*see* CPLR 4514); *Ferri v. Ferri*, 60 AD3d 625, 878 NYS2d 67(2d Dept. 2009).

4. A party in a civil suit may be called as a witness by his adversary and, as a general proposition, questioned as to matters relevant to the issues in dispute. A plaintiff in a medical malpractice case can call the defendant-doctor as his/her witness as to both "fact" and "opinion". *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 NY2d 20, 255 NYS2d 65 (1964).

E. Friendly Witness – Not permitted

1. Leading questions are not permitted on cross examination during the course of an examination of a *friendly* witness. FRE 611(c).

a. When cross examination is in form only and not in fact as e.g., the cross examination of a party by his own counsel after being called by the adverse party. (Farrell, *Prince-Richardson Evidence*, §6-230).

XIII. Forgetful Witness – Refreshing Recollection

A. What can be used?

1. Any writing or object may be used to refresh the recollection of a witness while testifying irrespective of its source, accuracy, authorship, or time of making. (*McCarthy v. Meaney*, 183 NY 190 [1905]).

2. Where plaintiff reviewed notes for the express purpose of preparing for his testimony at trial, and although plaintiff never used the words "refresh my recollection" relative to the notes, it was clear that the sole object and ultimate goal of reading the notes immediately prior to trial was to refresh his memory, and thus defendant was entitled to have the diary containing the notes made available to him for inspection and use upon cross-examination. *Chabica v. Schneider*, 213 AD2d 579, 624 NYS2d 271 (2d Dept. 1995).

3. 911 tape used to refresh witness' recollection – court found nothing improper with the use of a sound recording as the refreshing recollection device. The fact that the tape itself was inadmissible did not preclude its use as a refreshing recollection device. Other cases have held that where a writing itself is inadmissible; it can still be used as a refreshing recollection device. The reasoning is that it is not the writing or sound recording being offered into evidence, but it is merely used as a tool to refresh recollection. *Seaberg v. North Shore Lincoln-Mercury*, 85 AD3d 1148, 925 NYS2d 669 (2d Dept. 2011).

4. The refreshing recollection doctrine applies where a witness reviews a document prior to testifying at a deposition for refreshing recollection purposes if the document was reviewed for the purpose of refreshing recollection and the testimony is based, at least in part, on that document. Merely looking at a document prior to a deposition would not necessarily trigger disclosure. *Fernekes v. Catskill Regional Med Ctr.*, 75 AD3d 959, 906 NYS2d 167 (3d Dept. 2010).

5. The witness's independent recollection must first be exhausted as a precondition to use of memory stimulant. (*Peo. v. Reger*, 13 AD2d 63, 213 NYS2d 298 [1st Dept. 1961]).

B. Distinction with Past Recollection Recorded

1. *Howard v. McDonough*, 77 NY 592, 593 (1879) outlined the New York rule and delineated the important distinction between the present recollection refreshed and past recollection recorded:

a. A witness may, for the purpose of refreshing his memory, use any memorandum, whether made by himself or another, written or printed, and when his memory has thus been refreshed, he must testify to facts from his own knowledge.

b. When a witness has so far forgotten the facts that he cannot recall them, even after looking at a memorandum of them, and he testifies that he once knew them and made a memorandum of them at the time or soon after they transpired, which he intended to make correctly, and when he believes to be correct, such memorandum, in his own handwriting, may be received as evidence of the facts therein contained, although the witness has no present recollection of them.

C. Rights of Opposing Party

1. Once the witness has used a writing or object to refresh present recollection, the opposing party has the right to inspect it; to use it on cross-examination, and to introduce it into evidence. *People v. Gezzo*, 307 NY 385 (1954); *People v. Reger*, 13 AD2d 63, 213 NYS2d 298 (1st Dept. 1961). Although the decisional law is somewhat unclear, it appears that, at least in civil cases, the same right vests in the opposing party where the witness has used a writing or object to refresh recollection before testifying, *see* Richardson on Evidence, § 467.

D. Privilege

1. The attorney work product privilege is not waived when a privileged document is used to refresh the recollection of a witness prior to testimony. (*Beach v. Touradji Capital Mgt.*, 99 AD3d 167, 949 NYS2d 666 (1st Dept. 2012).

XIV. Anticipate and Neutralize Cross Examination

A. Anticipate and steal the thunder of the "pat" cross-examination questions.

B. Sample Questions that Cross Examiner asks:

Are you here today because you were served with a subpoena to appear in court?
Did you meet with Mr. Smith's attorney (opposing attorney) prior to testifying today? [witness' often lie – think it is wrong that spoke to opposing attorney before]
Did you discuss with Mr. Smith's attorney the subject matter of your direct testimony prior to testifying on direct examination?
Did you discuss with the plaintiff the subject matter of your direct testimony prior to testifying on direct examination?...
Isn't it true that the Plaintiff drove you to court this morning?
That was about a 45-minute trip, true?
At no time during that trip did you discuss this case or your testimony?

C. What should you ask on direct?

Are you here because you were served with a subpoena to appear in Court and testify?

Did you talk to me about your testimony prior to coming to court today?
When and where did that conversation take place?
Did I ask you certain questions about this case?
Did you answer them?
Did I suggest in any manner what your answers should be?

D. Expert – terms and amounts of payment; being paid for your time (not testimony) in Court today?

XV. Important Part of Testimony

A. Do something different – modulation of voice; walk toward witness, change pace of question.

B. Pause after a favorable answer (let it sink in).

C. Craft important foundational questions in advance with precision.

Lack of Emphasis on Key Point

Q. In normalizing the earnings of the business, what if anything did you ascertain regarding reported income?
A: It was understated year after year to the tune of approximately $150,000 and we added that back to income for our analysis.
Q: What comprised the understatement of income?
A: Personal expenses were written off to the business.

Emphasis on Key Point

Two (2) Questions above plus:
Q: Tell the court the categories of personal expenses that were charged to the defendant's business
A: Employees that were paid by the business but performed no work for the business, dining out that was not related to a business purpose, and entertainment expense enjoyed by Mr. and Mrs. Thomas that were similarly unrelated to the business.
Q: With respect to the employees you just mentioned, who are they?
A: The parties' daughter is in the payroll of the company for $30,000 per year. She is a student at the University of Arizona and my investigation revealed she does not work for the business. Additionally, the housekeeper employed by the parties in their home is on the payroll of the business for $35,000 per year and she similarly does not work for the business.
[Continue to provide specifics of each of the categories]

XVI. Unexpected Answer or Non-answer

A. When witness misses an important fact on direct, avoid constant entreaties and numerous ways to get it in. Try to come back to it and ask question in a different way.

XVII. Some Questions to Commit to Memory

A. Expert Opinion - Do you have an opinion with a reasonable degree of psychiatric (or other discipline) certainty as to whether…?

1. Although *a reasonable degree of certainty* is the preferred standard for expert testimony, it is not the only language sufficient to establish the foundation for such testimony where it is reasonably apparent that the expert signifies a probability supported by some rational basis. (*McKilligan v. McKilligan*, 156 AD2d 904, 550 NYS2d 121 [3d Dept. 1989])

2. Court not required to "certify expert," it is sufficient that the witness testify as to his or her qualifications and the Trial Judge instructs the jury as to the method of evaluating expert testimony. (*Peo. v. Grajales*, 294 AD2d 657, 742 NYS2d 687 [3d Dept. 2002]).

B. Photograph in Evidence – "Does this photograph fairly and accurately portray the (whatever the scene may be) on or about (Date)? Has the photograph been altered in any manner?

C. Net Worth Statement – If you were asked to testify to each and every entry in this statement of net worth, would your testimony conform to the entries on this statement?

1. Response: "Without conceding the truth or accuracy of the statement and subject to cross examination, I have no objection."

D. Conversation with Spouse

Did you have a conversation with your spouse regarding this matter? *Where did the conversation take place?* *When did the conversation take place?* *Tell us in words or substance what you said to her and what she said to you during this conversation?*

XVIII. Calling Adverse Party as Witness on Direct Case

A. Strategy – when to call

1. Bombshell testimony
2. Adverse party unprepared

XIX. Corroboration

Seek opportunities to connect the similarities of your witness' testimony with a previous witness in order to corroborate facts.

XX. Presenting Financial Testimony - Voluminous Record Rule

A. Exception to Best Evidence Rule

B. Allows the use of summaries where the originals are so numerous so they cannot reasonably be examined in court.

C. Requirements

1. Voluminous records.

2. Originals must be admissible for the summaries based on the originals to be admissible.

3. Summaries may not include information not contained in or computed from the originals.

4. Originals or duplicates of voluminous records must be made available to the other side for examination or copying (*Ed Guth Realty, Inc. v. Gingold*, 34 NY2d 440, 358 NYS2d 367 [1974]).

D. Examples

1. Computer printouts were admissible under the "voluminous writing" exception to the best evidence rule. *(Ed Guth Realty, Inc*. v. *Gingold*, 34 NY2d 440, 358 NYS2d 367 [1974]).

2. Summaries or balances of accounts may be produced to prove aggregate profits or receipts without the need to produce those documents which set forth the underlying dates. Business summaries have been deemed to be independent from the writings or documents upon which they are drawn. *R & I Electronics, Inc. v. Neuman*, 81 AD2d 832, 438 NYS2d 832 (2d Dept., 1981).

3. Error to refuse to permit use of charts which summarized accountant's voluminous work-papers where the latter were in evidence. (*Herbert H. Post & Co*. v. *Bitterman*, 219 AD2d 427, 649 NYS2d 21 (2d Dept., [1996]).

E. Interplay with Business Record Rule - *Peo. v. Weinberg*, 183 AD2d 932, 586 NSY2d 132 (2d Dept. 1992).

XXI. Experts

A. If feel your expert is superior, consider asking judge to take experts seriatim.

1. In non-jury case, latitude in taking witnesses out of turn.

B. View and present your expert not as a hired gun, but as a valuable teacher.

C. Dealing with Qualifications.

D. Language – explain in lay terms.

E. Degree of Certainty – "reasonable degree of [medical] certainty" or other words which convey the equivalent assurance that the opinion was not based on either supposition or speculation *Matott v. Ward*, 48 NY2d 455 (1979).

F. Avoid and chastise the "too comfortable" expert

1. Sits back, cavalier answers, attempt at humor.

G. A dose of humility

XXII. Exclusion of Evidence – Offer of Proof

A. The other side of the objection coin. Just as an objection preserves error in admitting evidence for review, an offer of proof preserves error in excluding evidence.

B. Protection of Record on Appeal

1. Offers of proof create a solid record for appellate review of the evidentiary exclusion *see Devito v. Katsch*, 157 AD2d 413, 556 NYS 2d 649 (2nd Dept. 1990).

2. "It is a cardinal and well settled principle that offers of proof must be made clearly and unambiguously" (*People v. Williams,* 187 N.Y.S.2d 750, 159 N.E.2d 549). "Where there is a bona fide objection to the offer of certain evidence, the proponent of such evidence must take advantage of the opportunity to make an offer of proof in order to demonstrate the relevance of the disputed evidence." (*People v Billups*, 132 AD2d 612, 518 NYS2d 9 (2d Dept. 1987).

3. Proponents of excluded evidence are in a weak position to later argue on appeal the value of the excluded evidence if fail to make an offer of proof.

C. Attempt to convince trial court to change its ruling**.** You are giving the court additional information in an effort to persuade court to change its mind.

D. Shorten Trial

1. *Porter v. Porter*, NYLJ, 12/12/2001, p. 22 col.2 (S.Ct., Richmond Co., Sunshine, J.) "Offer of proof" is not a term of art but it's generally accepted meaning ... is to summarize the substance or content of the evidence." *People v. Williams,* 81 NY2d 303, 314, 598 NYS2d 167 (1993) (offer of proof requirement of CPL 60.42[5]). Accepting offers of proof are "a busy court's attempt to keep the respective parties focused upon a succinct presentation of evidence relevant to the issues to be decided." *Douglas v. Douglas*, 281 AD2d 709, 722 NYS2d 87 (3rd Dept. 2001)."

2. "…while the court may not deprive a party of the right to inquire into matters "directly relevant to the principal issues of the case against him"... it may, in the proper exercise of discretion, restrict inquiry into collateral matters …or prohibit unnecessarily repetitive examination…" *Feldsberg v. Nitschke*, 49 NY2d 636, 427 NYS2d 751 (1980).

E. Procedure

1. Ask permission to make an offer of proof.
    a. Witness removed from courtroom.
2. State what the witness would have testified to if the objection was not sustained.
3. Explain the purpose and relevancy of the proposed testimony and why the evidence is admissible.

XXIII. Using Deposition Testimony to Prove Facts

A. CPLR 3117

1. Transcripts of non-party – contradict or impeach.
2. Transcript of party – can be used for <u>any</u> purpose – means to contradict or impeach or as evidence in chief.

B. CPLR 3117 – General

1. CPLR 3117(a)(1) - All or part of a deposition may be used by any party to contradict or impeach the testimony of the deponent as a witness.

2. CPLR 3117(a)(2) - All or part of a deposition of a party may be used for any purpose (including evidence in chief of the facts in the deposition testimony) by any party having an adverse interest to the deponent.

3. Trial judge has the discretion to determine when the deposition may be read.

4. CPLR 3117(A)(3) – Unavailability Situations

a. Deposition of any person (including own party) may be used by any party for any purpose if:

b. Witness is dead;

c. Witness is at a greater distance than 100 miles from the place of trial or is out of the state (unless collusively out of state);

d. Witness is unable to attend or testify because of age, sickness, infirmity or imprisonment;

e. Party offering the deposition has been unable to procure the attendance of the witness by diligent efforts; or

f. On motion or notice, the use is justified due to special circumstances in the interests of justice.

C. Reading Only Part of a Deposition Transcript

1. If a party reads only part of the deposition testimony, the other party may read in other parts that are of importance to them and which reflect on the matter read in by the first party.

2. The court has broad discretion over controlling this procedure. (*Reape v. City of New York*, 228 AD2d 659, 645 NYS2d 499 [2d Dept. 1996]).

3. *See Villa v. Vetuskey*, 50 AD2d 1093, 376 NYS2d 359 (4th Dept. 1975) – a party seeking to cross-read his own deposition should await his own case to do so and not ordinarily be permitted to do it on the heels of adversary's reading of his deposition in the middle of the adversary's case.

4. CPLR 3117(b) thus permits a party to read in relevant portions of his own deposition only after an adverse party has made use of it.

5. The failure to raise a substantial evidentiary objection to a question at a deposition session is not a waiver of the objection. (CPLR 3115(a),(d)).

D. Inconsistent Deposition Testimony of a Party

1. A party is not bound by the contents of his deposition testimony and may introduce evidence at trial inconsistent with such testimony.

2. Converse is not permitted, i.e., a party may not use his own deposition testimony to impeach his trial testimony. (*See Mravlja v. Hoke*, 22 AD2d 848, 254 NYS2d 162 [3d Dept. 1964]).

E. Use of Party's Deposition

1. The deposition of a party may be used for any purpose by adverse party. CPLR 3117(a)(2).

2. If only part of a deposition is read at trial by a party, the other party may read any other part of the deposition which fairness requires ought to be considered in connection with the part which was read. CPLR 3117(b).

3. A party does not make the adverse party his/her own witness by reading the adverse party's deposition, or part thereof, at trial. CPLR 3117(d); *Carr v. U.S. Mattress Corp.*, 166 AD2d 172, 564 NYS2d 67 (1st Dept., 1990).

a. *See Yeargans*, 24 AD2d 280, 265 NYS2d 562 (1st Dept. 1965) "[i]t was also prejudicial error to exclude the motor vehicle report offered by the defendant when the report tended to contradict the version of the accident given by the defendant in a deposition before trial. CPLR 3117(d) specifically provides "at the trial, any party may rebut any relevant evidence contained in a deposition, whether introduced by him or by any other party." It may be noted that the deposition was first used by the plaintiff in his case in chief and was not used to contradict or impeach the defendant deponent who had not yet testified. (*See* CPLR 3117(d))."

b. Not error in refusing to allow introduction of defendant's deposition testimony at trial as evidence in chief as defendant, by voluntarily leaving the state and refusing to return for trial, procured her own absence and thus failed to satisfy CPLR 3117(a)(3)(ii). *Dailey v. Keith*, 1 NY3d 586, 774 NYS2d 105 (2004).

4. Deposition Corrections

a. Deposition corrections submitted in conformity with the requirements of CPLR 3116(a) "could not properly be considered" where the witness "failed to offer an adequate reason for materially altering the substance of his deposition testimony" *Ashford v. Tannenhauser*, 108 AD3d 7365 (2d Dept. 2013*).* In addition, an affidavit contradicting deposition testimony "appear[s] to raise the feigned issues of fact to avoid the consequences of the prior testimony and, thus, w[as] insufficient to defeat summary judgment" *Kadisch v. Grumpy Jack's Inc.*, 122 AD3d 788 (2d Dept. 2013).

XXV. Proving Facts by Opinion Testimony of Lay Witnesses

A. A lay witness must confine his testimony to a report of the facts, and may testify in the form of inferences or opinions only when from the nature of the subject matter no better or more specific evidence can be obtained.

1. Lay witnesses usually restricted to relating what they perceived, e.g. saw, heard, touched, smelled, tasted.

2. By contrast, a witness qualified as an expert with respect to a particular issue is permitted to testify as to his or her opinion. *Morehouse v. Mathews*, 2 NY 514, 515-516 (1849).

3. "[F]or at least the last century, lay persons have been permitted to give opinion evidence only when the subject matter of the testimony was such that it would be impossible to accurately describe the facts without stating an opinion or impression (*see* Richardson, Evidence §363, 366 [10th Ed, Prince]; Fisch, New York Evidence §361 [2nd Ed])." *Kravitz v. Long Island Jewish-Hillside Medical Ctr*., 113 AD2d 577, 497 NYS2d 51 (2d Dept. 1985).

B. Error, albeit harmless on facts of case, to admit into evidence a 911 tape on which one of the witnesses could be heard voicing her opinion that the Defendant drove purposely into the victim. *People v. Haynes*, 36 AD3d 562, 833 NYS2d 193 (2d Dept. 2007).

C. Lower court properly excluded testimony by defendant's wife as to effects of Prozac on defendant. *People v. Gatewood*, 91 NY2d 905, 668 NYS2d 1000 (1998).

D. Disability; Medical Condition

1. Error to permit plaintiff to testify as to the nature, extent, and effect of his injuries, as such matters require support from expert medical witness. *Razzaque v. Krakow Taxi, Inc*., 238 AD2d 161, 656 NYS2d 208 (1st Dept. 1997).

2. Cf. "Considering all of the evidence..., including the testimony of the plaintiff concerning her disability, we conclude that ...maintenance should continue for a period of 10 rather than 6 years. *Rindos v. Rindos*, 264 AD2d 722, 694 NYS2d 735 (2d Dept. 1999).

3. Individual seeking spousal maintenance is entitled to submit general testimony regarding a medical condition, where the effect of that condition on the person's ability to work is readily apparent without the necessity of expert testimony. A decision of the Social Security Administration may serve as some evidence of a disability, but it is not prima facie evidence thereof. *Knope v. Knope*, 103 AD3d 1256, 959 NYS2d 784 (4th Dept. 2013).

E. Identification

1. Lay witness not permitted to testify that the substance was marijuana. *People v. Kenny*, 30 NY2d 154, 331 NYS2d 392 (1972).

F. Emotional state of people

1. *Pearce v. Stace*, 207 NY 506 (1913); *see Falkides*, 40 AD2d 1074, 339 NYS2d 235 (4th Dept. 1972) (while a layman cannot testify that a person is of unsound mind, irrational or emotionally disturbed, he can describe the acts of a person and state whether those acts impressed him as being irrational); *see also Gomboy v. Mitchell*, 57 AD2d 916, 395 NYS2d 55 [2d Dept. 1977]).

2. Lay witnesses cannot properly give an opinion as to the mental capacity of an individual; they are free to "state the impressions which the acts and declarations of the individual produced upon their minds at the time, and as to whether they were rational or irrational." *Mayr v. Alvarez*, 130 AD3d 1199, 1201, 14 N.S.3d 530 (3d Dept. 2015).

G. Estimated speed of an automobile

1. *People v. Heyser*, 2 NY2d 390, 161 NYS2d 36 [1957]; *Guthrie v. Overmyer*, 19 AD3d 169, 797 NYS2d 203 [4th Dept. 2005]).

H. Whether a person appeared to be intoxicated, feeble or ill.

1. Lay witness may testify that person appeared intoxicated or sober based upon observation and experience. *People v. Leonard S.*, 8 NY2d 60, 201 NYS2d 509 (1960).

2. "A lay witness is competent to testify that a person appears to be intoxicated when such testimony is based on personal observation and consists of a description of the person's conduct and speech (*see Ryan v Big Z Corp*., 210 AD2d 649, 651);" (*Rivera v. City of New York*, 253 AD2d 597, 677 NYS2d 537 [1st Dept. 1998]).

I. Handwriting

1. So long as foundation established that witness is familiar with handwriting of person who purportedly wrote the exhibit in question. *People v. Corey*, 148 NY 476 (1896).

2. The familiarity cannot be obtained for the purpose of litigation. *Peo. v. Arroyo*, 273 AD2d 85, 709 NYS2d 71 (1st Dept. 2000).

J. Valuation

1. "New York courts ... have permitted qualified lay witnesses to present their opinions as to the value of property ... before and after the act complained of" (Fisch, New York Evidence § 372, at 255 [2d ed]). While a lay witness testifying as to value must have some acquaintance with the particular property at issue, as well as knowledge of its market value, that does not mean that he must therefore qualify as an expert (*see* Fisch, New York Evidence § 372, at 256 [2d ed]; 58 NY Jur 2d, Evidence and Witnesses, §§626, 693, at 259-260, 343-344). Therefore, plaintiff may be able to prove damages through the use of lay opinion testimony provided such witnesses are found competent to testify.

2. Because property valuation is not strictly a subject for expert testimony, opinion testimony by a lay witness is competent to establish the value of the property if the witness is acquainted with the value of similar property. *Peo. v. Sheehy,* 274 AD2d 844, 711 NYS2d 856 (3d Dept. 2000).

K. Owner of Property

1. Additionally, it has been recognized that the owner of property can testify as to its value regardless of any showing of special knowledge as to the property's value (*see* Fisch, New York Evidence § 372, at 89 [2d ed, 1988-1989 Supp]; 58 NY Jur 2d, Evidence and Witnesses, §705, at 355). (*Tulin v. Bostic*, 152 AD2d 887, 544 NYS2d 88 (3d Dept. 1989)); *Levine v. Levine*, 37 AD3d 553, 830 NYS2d 250 (2d Dept. 2007) (Supreme Court properly credited defendant husband's value with regard to certain items because he was familiar with those items and plaintiff wife could not refute his testimony).

2. "On questions of value, a witness must often be permitted to testify to an opinion as to value, but the witness must be shown to be competent to speak upon the subject. He must have dealt in, or have some knowledge of the article concerning which he speaks..." *Teerpenning v. Corn Exchange Ins. Co.*, 43 NY 279, 282 (1871).

3. The general rule requiring that a proper foundation be laid to show the witness has knowledge upon a subject before the witness can testify as to the market value does not apply where the witness is the owner, and as the owner of property is presumed to be familiar with its value by reason of inquiries, comparisons, purchases and sales; owner's testimony regarding the purchase price of the property may be probative on the issue of value so long as the property is of the sort not subject to prompt depreciation or obsolescence, e.g., jewelry. *Peo. v. Womble*, 111 AD2d 283, 489 NYS2d 521 (2d Dept. 1985).

L. Application to equitable distribution cases

1. "The Supreme Court properly credited the plaintiff's testimony as to the value of certain jewelry and tools, since he was familiar with the items, and the defendant did not challenge the testimony at trial..." *Cuozzo v. Cuozzo*, 2 AD3d 665, 768 NYS2d 636 (2d Dept. 2003); *see also Levine v. Levine*, 37 AD3d 553, 830 NYS2d 250 (2d Dept. 2007).

2. Valuation of marital residence based on plaintiff's testimony concerning her knowledge of the recent sale of a neighbor's house which was of similar design to the marital residence. *Del Vecchio v. Del Vecchio*, 131 AD2d 536, 516 NYS2d 700 (2d Dept. 1987).

XXIV. Attorney's Demeanor

A. Your cross-examination demeanor and your direct examination demeanor should be equally high-energy. Many lawyers are sleepwalking through the direct examination.

B. Wimbledon Effect on direct examination – trier of fact has his head swinging back and forth between the attorney and the witness.

C. The skillful advocate controls the examination. He is not the presenter of his pad of questions; he does not hold the pencil, checking off as he "covers" his questions or makes his points. The advocate uses questions to control the pace of the examination, determining the amounts of the information he wants from the witness on a particular topic, and avoiding boredom.

D. Review: to maintain control, leading without leading questions to monitor the subject matter, closed and open questions to regulate the amount of information released on the subject, and transition questions to glide smoothly from one subject to another.

E. Writing down questions

1. Do not write the question you're going to ask, but instead write out topics and facts you need.
    a. You are not asking the court to watch a play.
2. No examiner can ever write down the number of questions necessary to script all the questions to make the back-and-forth of the testimony into a smooth, flowing presentation, rather than a herky-jerky episodic implantation of points into the record. There are also always gaps to fill and no written questions fill that.
3. In truth, most of us write down questions not to remind us of what the witness will say; rather, we write the questions because we fear we will not have the words of art needed to elicit the information from the witness.

XXV. Sequence of Witnesses

A. One of the most difficult considerations in trial work.
1. One problem is that in the real world we don't always have the choice. We take a witness when the witness is available.

B. Initial Witness – set the theme.
1. The first went there should be one who helps you, but hurts the least. Rule of Primacy.
2. Never put a witness on first who is vulnerable on cross-examination as your whole case will lose credibility. Consider testimonial protection that one witness gives to the other.

C. When to call the "less than brilliant" client.

D. Witnesses on same theme seriatim – better flow.
1. Non-titled spouse's contribution

2. Declining health

E. As a general rule, the benefits of a witness's direct testimony should substantially outweigh the harm that could be done on cross-examination. Otherwise the witness should not be called.

F. Conventional theories

1. Chronology
2. The biggest slice of the case first
3. Key witnesses first and last – primacy and recency
4. The client should go on first or last.

XXVI. Common Mistakes

A. Failure to Listen to the Answer

1. Do not peer at notes for next question, and not listen to answer.
2. Listening to answer leads to next question - fallacy of script.
3. Look at the witness – communicating – eye contact.
   Noted pauses
   Flashes of anxiety
   Dryness of mouth
   Moistening of lips
   Hesitations; discomfort
   Uncalled for repetition of coached material
   Stammer and needless reference by the witness to counsel's name
4. Listen carefully to the words of the witness and the words of the question will automatically follow.
5. In short, notes should focus on answers.

B. Failure to Properly Introduce a Witness

1. Who is this witness? Is she a steady, reliable person, or a flake? Served in armed forces? Pillar of the community?

C. Failure to constantly evaluate the quality and sufficiency of the answer.

1. Vague phrases – numerous vacations, lots of cash, etc.
2. Break it down; quantify
3. Easier to do with short questions and answers

D. Failure to simplify the testimony to the trier of fact.

1. Legalese
   a. "Execute the agreement"
2. Psychobabble

E. Avoiding Exactitude – Giving the witness wiggle room.

1. Inexperienced lawyers tend to overprove and get too detailed. They strive for exactitudes and precisions and as a result the witness is a target when it comes to cross-examination.

2. A proper examination shows the witness has given sufficient detail taking into account the passage of time and one's memory. Words like "in substance" or "indicate" are friendly words for your witness.

F. Statements – "For the Record;" "Please note my objection."

1. Comment to judge – "for the record."

a. Euphemistic way of saying that the judge will find against me and really speaking to the court that sits in review.

b. Generally useless except when it is used to create repetition through speech by counsel.

2. After argument on counsel's objection, and adverse ruling, avoid stating "Please note my objection."

a. Not necessary – your objection protects the record.

G. Showing neutrality of a witness - a few simple questions at the beginning of the testimony.

> *Do you know the plaintiff?*
> *Do you know the defendant?*
> *Do you have any financial interest in the outcome of this case?*

XXVII. Preparation of Witness

A. Prepare in themes, not a prepared script.

1. Witness should know the facts and understand the significance, testify in themes rather than in phrases, is aware of the order of the questioning, and able to defend the position he is taking is a properly prepared witness.

2. When preparing themes, it is not necessarily chronological order. Facts must be grouped together to make points, and this often requires moving widely time – separated events.

B. Prep witness that she met with opposing counsel and reviewed testimony prior to trial. Let the witness know it is standard procedure to meet with counsel and prepare to testify.

> *"Did we discuss the topics of our testimony?"*
>
> *"Did I tell you what your answers should be?"*

C. Teaching Witness to defend on cross examination.

1. Teach witness to resist demands for "Yes" or "No" answer where not fitting.

a. Witness states in effect that she cannot answer with one word and be consistent with her oath.

2. Inform witness that has right to view a supporting document if applicable to the question.

3. Inform witness that it is okay to have a clearer recollection of an event at the time of trial than 6 or 12 months earlier when she gave a statement without the benefit of documents she subsequently reviewed.

4. Inform witness that can repudiate a prior inconsistent statement on the ground that she was nervous and anxious at the time.

XXVIII. Exhibits

A. Two basic purposes of exhibits:

1. To put information in the record.

2. To corroborate oral testimony so as to give the testimony greater weight in the direct examination and make cross-examination more difficult.

B. At times you should corroborate even unimportant details with exhibits to show the credibility of the witness. If the witness says she was in New Orleans on May 11, produce the canceled ticket, or the hotel bill.

C. To use exhibits effectively, there are two prerequisites:

1. Total understanding of how to lay a foundation for the exhibit; and

2. Exhibits and copies of the exhibits should be organized in the chronological order that you will use them so that pace is preserved.

a. Little worse than conducting an examination with a bunch of binders and legal pads and counsel expending time looking for exhibits in them.

D. Laying a foundation, or authenticating of exhibit, is simply showing that the exhibit is what its proponent claims it to be.

1. Example – tape-recorded conversation – all that is required is a participant or an over-hearer, be prepared to testify that she has listened to the recording and it is a fair and accurate recording of the conversation that she participated in or overheard.

Q: Now you told her she participated in the conference call with A and B on June 12?
A: Yes, that is true.
Q: I now show you what has been marked as Plaintiff's Exhibit "4". Have you listened to the conversation on that drive?
A: Yes.
Q: Is that a fair and accurate recording of the conversation which you yourself participated in on June 12?
A: Yes.
COUNSEL: I offer it in evidence.

2. Old-fashioned blowup - not only clarifies but gives you the advantage of repetition.

E. Lack of Emphasis on Key Points

XXIX. Use of Charts and Visual Aids

A. Advantages

1. Helps make the case understandable.
2. Helps organize the examination so the trier of fact can see where you are going.
3. Helps you control the witness so that the witness cannot evade your questions.
4. Physically interact with the chart.

B. Power Point presentations, white board, blown up charts, films, photos, spreadsheets

1. *People v. Williams*, 29 NY3d 84, 52 NYS3d 286 (2017).

a. There is no inherent problem with the use of a PowerPoint presentation as a visual aid in connection with closing arguments.

b. The PowerPoint materials must be limited to characterizations of facts that are "within the four corners of the evidence" and not allow jurors to draw conclusions which are not fairly inferable from the evidence.

c. If counsel is going to superimpose commentary to images of trial exhibits, the annotations must accurately represent the trial evidence.

2. *People v. Anderson*, 29 NY3d 69, 52 NYS3d 256 (2107).

a. PowerPoint slides depicting an already admitted photograph with captions accurately tracking prior testimony might reasonably be argued as relevant and fair commentary on the evidence.

C. Chart

1. Arrears
2. CSSA and Maintenance Guidelines
3. Timelines (Part of making your case understandable)
4. Cash flow at different levels of maintenance, child support, distributive award
5. Tax Impacting
6. Life Insurance Policies

D. Photos; Videos

1. Standard of
2. Custody Case – photos of activities with children
3. Day-in-life film
4. Abuse
5. Cash

E. Tape recorded conversations – have transcript prepared

F. Spreadsheets & summaries – Voluminous Record Rule

XXX. Free Narrative Questions v. Specific Questions

A. Free Narrative (Open Questions)

B.

1. Letting witness to generally recount what he saw and heard and give narrative testimony.

Describe what took place *What happened next?* *Tell us in your own words what transpired*

2. These questions turn the examination over to the witness. The witness can pour out as much or as little as he wishes. "What happened next?" invites the narrative.

3. When we use the narrative form of direct examination, we transfer the responsibility for argument of our case to the witness.

4. Where there are long narrative answers, the trier of fact's head is stuck in one place. There is no Wimbledon effect.

5. Really the opposite of the leading question.

a. Leading question gives the examiner control over the witness.

6. Narrative testimony gives the witness too much freedom to respond as a witness sees fit and creates a risk about testimony on inadmissible matters.

7. When to Use Free Narrative

a. A good witness will generally appear more honest and be more impressive when allowed to tell the story in his or her own way.

b. Effective often when you have a witness who was intelligent and has been well prepared.

c. Also has the advantage of giving the opposing side little advance notice of where the witness is going and making it difficult and sometimes impossible for opposing counsel to head off inappropriate testimony with a timely objection.

d. The use is discretionary with the trial court.

B. Specific Questions

1. Desirable to ensure the presentation of complicated testimony.

2. Good with a nervous witness and to prevent dull testimony.

3. The advocate uses questions to break up points in small digestible pieces so that the trier of fact does not choke on chunks of information.

4. The advocate uses questions to dwell on areas he wishes to dwell on and to obtain the repetition of significant portions of the testimony, often with illustrative aids.

XXXI. Direct Examination that Anticipates Cross Examination

A. Patent Weakness in Case

1. Not going to go away by avoiding it.
2. Come out front; steal the thunder from cross-examination.
3. Mention in Opening Statement.
4. If shocking, repeat so many times becomes almost mundane and humdrum.
5. Other attorney may look foolish if he or she tries to cover the same ground.

a. You also prevent a damaging cross-examination by being the first attorney to bring out bad information about a witness and thus you control how the testimony is presented.

B. Expert Witnesses

1. Terms and amounts of payment.
   a. Establish fees as being customary, ordinary and non-contingent.
   b. Try to have expert paid up to date when taking stand.
2. Being paid for your time, not testimony in court today.

XXXII. Confused or Nonresponsive Witness

A. Take onus off witness

1. Wrong: "You don't understand the question?"
2. Correct: "I am sorry, I worded that question poorly, allow me to rephrase it."

XXXIII. The 5 Minute Prima Facie Contempt Case

A. Court Order – Judicial Notice

B. Arrears – Voluminous Record Rule

C. Shifting of Burden – *Powers v Powers*, 86 NY2d 63 (1995).

D. No longer need to show, resort to less drastic remedies.

1. Such application [contempt] may also be made without any previous sequestration or direction to give security or any application for enforcement by any other means. 2016 Sess. Law News of N.Y. Ch. 365 (S. 5189) (McKinney's).

XXXIV. Use of Hearsay on Direct Examination

A. Try to prove as much of your case with admissible hearsay (hearsay exceptions) as possible as the evidence so adduced has the obvious advantage of not being subject to cross examination.

B. Examples
1. Business record rule – most common and most important
2. Present sense impression

3. Excited utterance
4. Past recollection recorded
5. State of mind – intent, reliance, etc
6. Physician can testify to patient's out-of-court statement if related to diagnosis or treatment
7. Admission – direct, vicarious
8. Declaration against interest
9. Dying declaration
10. Prior Inconsistent statement

XXXV. Outline for Direct Examination of a Business Appraiser

A. Qualification of Expert

B. Facts re: Retention:
- By whom?
- Retainer Agreement
- Terms of Compensation

C. Appraisal Assignment:
- Fair Market Value or some other standard of value
- Entity being appraised
- Appraisal Date

D. Documents Revised to Carry Out Appraisal Assignment:
- Tax Returns
- Financial Statements
- Books of Account
- Financing Applications
- Other Appraisals
- Restrictive Agreements
- Audit Reports by taxing authorities
- Depositions (both parties)
- Affidavits
- Trade Journals
- Internet Research

E. Other Steps Taken
- Interviews with principals, employees
- On-site inspection
- Independent research – Industry data, statistics, comparables

F. Explain Method(s) of Valuation
- Explain various methods – cost, income, market
- Revenue Ruling 59-60; 68-609
- Method Utilized and why
- Sanity Checks

G. Report Prepared
Go through methodologies
Go through calculations

H. Charts and Exhibits

I. Conclusion
Reasonable Degree of Certainty

J. Other Uses of Expert
Double Dipping – stream of income
Cash Flow charts
Tax effect of pension benefits, property distribution

XXXVI. Bases of Expert Opinion

A. General

1. Where an expert states his conclusion without reliance on any facts or data, his testimony should be given no probative force whatsoever (*Kaluga v. Korytowsky*, 269 AD2d 566, 704 NYS2d 507 [2d Dept. 2000]).

2. The opinion of an expert must be based on facts in the record or personally known to the witness. An expert may not reach a conclusion by assuming material facts not supported by the evidence, and may not guess or speculate in drawing a conclusion. *Interstate Cigar Co.* v. *Dynaire Corp.*, 176 AD2d 699, 574 NYS2d 789 (2d Dept. 1991).

3. An expert opinion "unencumbered by any trace of facts or data…should be given no probative force whatsoever," *Amatulli v. Delhi Constr. Corp.*, 77 NY2d 525, 533-534, 569 NYS2d 337 (1991).

B. Proper Basis – General

1. To be properly admitted, expert opinion evidence must generally be based upon facts either found in the record, personally known to the witness, derived from a "professionally reliable" source, or from a witness subject to cross-examination, *McAuliffe v. McAuliffe*, 70 AD3d 1129, 895 NYS2d 228 (3d Dept. 2010).

C. Proper Basis - Personal Knowledge

1. Facts personally known to the expert by virtue of observation or examination. *Hambsch v. New York City Transit Auth.*, 63 NY2d 723, 480 NYS2d 195 (1984); *Cassano* v. *Hagstrom*, 5 NY2d 643, 187 NYS2d 1(1959); *Peo. v. Keough*, 276 NY 141, 145 (1937); *Comizio v. Hale*, 165 AD2d 823, 824 (2d Dept. 1990).

2. "Nor do we find any error committed by the Family Court in permitting a pediatrician, who only saw the child professionally on one occasion, but saw the child socially on a regular basis, to express his expert professional opinion on the basis of those observations. There is nothing in the rules of evidence which would prevent a qualified expert from giving a

professional opinion on the basis of direct observations, no matter how they arose." *Matter of Faith Z.*, 92 AD2d 990, 461 NYS2d 488 (3d Dept. 1983).

3. In custody case, the testimony of the expert was admissible since the expert opinion was primarily based upon direct knowledge derived from psychiatric interviews of the parties and their children, alone and in combination. Although the expert's report and testimony may have incorporated inadmissible hearsay, the admissible evidence in the record was sufficient to support the trial court's conclusion. Although the court should have stricken the hearsay aspects of the expert's written report, admitting it did not constitute reversible error. *Lubit v. Lubit*, 65 AD3d 954, 885 NYS2d 492 (1st Dept. 2009).

D. Proper Basis - Facts in Evidence

1. Facts received in evidence prior to the time that the expert renders his or her opinion from the witness stand. *Hambsch* v. *New York City Transit Auth.*, *supra*; *Cassano* v. *Hagstrom, supra*; *Admiral Ins. V. Joy Contrsc.*, 119 NY3d 448, 948 NYS2d 862 (2012).

a. Although an expert may rely on facts within his or her personal knowledge which are not contained in record, expert must testify to those facts before opinion is rendered. *Mandel* v. *Geloso*, 206 AD2d 699, 614 NYS2d 645 (3d Dept. 1994).

2. *Jill S. v. Steven S.*, 43 AD3d 724, 842 NYS2d 401 (1st Dept. 2007) – Court properly precluded petitioner's expert witness as the proposed testimony was both irrelevant and not based on facts in evidence but rather hearsay (documents not admitted into evidence at the hearing).

3. If an opinion is given and cross-examination reveals it to be based on facts not in evidence, the opinion should be stricken (*Lopato* v. *Kinney Rent-A-Car*, 73 AD2d 565, 423 NYS2d 42 [1st Dept. 1979]).

4. How based on facts in record

a. Hypothetical Question

b. Expert reviews testimony and exhibits

c. Expert sits in during trial

XXXVII. Professionally Reliable Hearsay Exception

A. *Wagman v. Bradshaw*, 292 AD2d 84, 739 NYS2d 421 (2d Dept. 2002): "It is well settled that, to be admissible, opinion evidence must be based on one of the following: first, personal knowledge of the facts upon which the opinion rests; second, where the expert does not have personal knowledge of the facts upon which the opinion rests, the opinion may be based upon facts and material in evidence, real or testimonial; third, material not in evidence provided that the out-of-court material is derived from a witness subject to full cross-examination; and fourth, material not in evidence provided the out-of-court material is of the kind accepted in the profession as a basis in forming an opinion and the out-of-court material is accompanied by evidence establishing its reliability....The Court of Appeals has held that an expert witness may testify that he or she relied upon specific, inadmissible out-of-court material to formulate an opinion, provided (1) it is of a kind accepted in the profession as reliable as a basis in forming a professional opinion, and (2) there is evidence presented establishing the reliability of the out-of-court material referred to by the witness (*see* Hambsch v New York City Tr. Auth., 63 NY2d 723)....In addition to our holding that the "professional reliability" exception does not permit an expert witness to offer opinion testimony based upon out-of-court material, for the truth of the

matter asserted in the out-of-court material, we also take this opportunity to reiterate the requirement that, "in order to qualify for the 'professional reliability' exception, there must be evidence establishing the reliability of the out-of-court material" (Hambsch v New York City Tr. Auth., supra at 726). Indeed, "reliability of the material is the touchstone; once reliability is established, the medical expert may testify about it even though it would otherwise be considered inadmissible hearsay" (*Borden v Brady*, 92 AD2d 983, 984 [Yesawich, J., concurring])."

B. "The court properly permitted defendant's vocational rehabilitation expert to give opinion testimony based upon a labor market survey he conducted by telephone with prospective employers. The general rule that opinion evidence " 'must be based on facts in the record or personally known to the witness' " (Hambsch v New York City Tr. Auth., 63 NY2d 723, 725, quoting Cassano v Hagstrom, 5 NY2d 643, 646, rearg denied 6 NY2d 882) is subject to an exception where, as here, the opinion is based upon data "of a kind accepted in the profession as reliable in forming a professional opinion" (People v Sugden, 35 NY2d 453, 460, 363 NYS2d 923 [1974]; see, Serra v City of New York, 215 AD2d 643, 644, 627 NYS2d 699 [2d Dept. 1995]; Nandy v Albany Med. Ctr. Hosp., 155 AD2d 833, 834, 548 NYS2d 98 [3d Dept. 1989]). The contention of plaintiffs that the market survey is not the kind of evidence considered by the profession to be reliable is belied by the fact that their own vocational rehabilitation expert based his opinions upon similar hearsay information." *Greene v. Xerox Corp.*, 244 AD2d 877, 665 NYS2d 137 (4th Dept. 1997).

C. In determining loss of future income, economist could rely on letter from plaintiff's employer describing plaintiff's potential for advancement where economist testified that the letter was the type of document relied upon in the field of economics. *Tassone v. Mid-Valley Oil Co., Inc.*, 5 AD3d 931, 773 NYS2d 744 (3d Dept. 2004).

D. Deemed Reliable in the Profession

1. The proponent's burden of showing acceptance in the profession may be met through the testimony of a qualified expert, whether or not that expert is the same one who seeks to reply on the out-of-court material. (*Peo. v. Goldstein*, 6 NY3d 119, 810 NYS2d 100 [2005]).

2. When determining what materials may serve as the basis for an expert's opinion, the court will not automatically accept any given expert's opinion with respect to whether any particular material is relied upon in the profession, and if such material appears inherently unreliable, or there are conflicting opinions from other experts as to what material is properly relied upon, the court may reject an expert's testimony in this regard; however, the expert's view of what is properly relied upon by experts in his profession is highly relevant, and it may, in a proper case, be deemed determinative. *State v. J.R.C.*, 47 M3d 969, 7 NYS3d 866 (Supreme Court, Livingston Co., 2015, Wiggins, J.)

3. *Omar B. v. Diane S.*, 175 AD2d 834, 573 NYS2d 301 (2d Dept. 1991) (It was proper to permit the court-appointed psychiatrist to express his opinion based in part on medical records that were not admitted into evidence at the hearing to terminate parental rights of natural mother, but were clearly the kind of materials accepted in the profession as reliable in forming an opinion); *see also Holshek* v. *State*, 122 AD2d 777, 505 NYS2d 664 (2d Dept. 1986); *Moors* v. *Hall*, 143 AD2d 336, 532 NYS2d 412 (2d Dept. 1988) (plaintiff's expert, to prove value of household services, could rely upon official publications of statistics and other data gathered

where such extraneous material is of a kind accepted in the profession as reliable in forming a professional opinion).

4. *Peo.* v. *Sugden*, 35 NY2d 453, 363 NYS2d 923 (1974) -- Two instances where an expert may use inadmissible evidence as the basis for his testimony are when the evidence is of a type "accepted in the profession as reliable in forming a professional opinion," regardless of whether otherwise admissible, or when the declarant testifies at trial.

5. *Cristiano v. York Hunter Services, Inc.*, NYLJ, Sept. 27, 2010, p.29 col.1, S.Ct., Kings Co., Kramer, J. – Plaintiff directed to appear for a FCE test (Functional Capacity Test), often used by physicians when making determinations on a patient's ability to return to work as an FCE report has been deemed to be the type of out of court materials accepted as reliable by experts in the medical profession and thus do not constitute impermissible hearsay.

6. Supervising pharmacist's testimony concerning chemical composition of pills proper where relied in part on package inserts and pharmaceutical reference manuals not in evidence, as reliance on such information was customary among pharmacists. *Peo. v. Czarnowski*, 268 AD2d 701, 702 NYS2d 398 (3d Dept. 2000).

E. Requirement of Reliability

1. Preliminary showing - "In order to qualify for the "professional reliability" exception, there must be evidence establishing the reliability of the out-of-court material" (*Hambsch v New York City Tr. Auth*., 63 NY2d 723).

a. The reliability of information is primarily a question for the trial court, rather than the expert, in determining whether to apply the professional reliability exception to the rule that opinion evidence must be based on facts in the record or personally known to the expert witness. *State v. William, F.*, 44 Misc.3d 338, 985 NYS2d 862 (Sup. Ct., NY Co., 2014, Conviser, J.).

2. *Velez v. Svehla*, 229 AD2d 528, 645 NYS2d 842 (2d Dept. 1996): ...if an expert relies on out-of-court material, "there must be evidence establishing the reliability of the out-of-court material" (*Hambsch*, 63 NY2d at 726; *People v. Sugden*, 35 NY2d 453, 460-461). In the instant case, the basis for the statistical testimony provided by the defendant's expert was not revealed. Therefore, there was no indication that the testimony was reliable and not mere speculation. Without an adequate foundation, that testimony was inadmissible (*see Vetere v Garcia*, 211 AD2d 631). The proponent's burden of showing acceptance in the profession may be met through the testimony of a qualified expert, whether or not that expert is the same one who seeks to reply on the out-of-court material. (*Peo. v. Goldstein*, 6 NY3d 119, 810 NYS2d 100 [2005]).

3. Written report prepared by a nontestifying doctor interpreting a biopsy of patient's prostate should not have been introduced into evidence in action to recover damages for medical malpractice and wrongful death, and plaintiff's experts should not have been allowed to base their opinions, at least in part, upon contents of the report, absent proof that report was reliable. A written report prepared by a nontestifying doctor interpreting the results of a medical test is not admissible into evidence. *D'Andraia v. Pesce*, 103 AD3d 770, 960 NYS2d 154 (2d Dept. 2013).

F. Declarant Testifies

1. When the evidence does not qualify "under the professional test", the expert may rely upon the evidence, but the declarant must testify and be subject to cross-examination.

(*Hambsch v. New York City Tr. Auth*., 63 NY2d 72363 NY2d at 723, *Peo.* v. *Stone*, 35 NY2d 69, 76, 358 NYS2d 737 [1974]).

2. An expert may base his opinion on an out-of-court written statement of a witness who testified at trial. *Flamio* v. *State*, 132 AD2d 594, 517 NYS2d 756 (2d Dept. 1987).

XXXVIII. Collateral Sources

A. *Straus v. Strauss*, 136 AD3d 419, 24 NYS3d 76 (1st Dept. 2016)

1. It is permissible for the forensic report to not rely to a significant extent on hearsay statements where the primary source of the report's conclusions are the evaluator's firsthand interviews with the parties. Moreover, where the proponent of the report intends to call witnesses at a future custody hearing, anyone to whom the evaluator spoke, thereby rendering the declarants subject to cross-examination, it renders admissible any opinion evidence based on their statements. "To the extent that any hearsay declarants are not cross-examined, those portions of the report containing inadmissible hearsay should be stricken or not relied upon." (Emphasis added).

B. In visitation modification proceeding, Family Court erred in permitting a "licensed mental health counselor" to offer an opinion that was based in part upon his interviews with collateral sources where there was no evidence that the out-of-court material was of a kind accepted in the profession as reliable in forming a professional opinion, nor was such material from a witness subject to full cross-examination on the trial. *Murphy v. Woods*, 63 AD3d 1526, 879 NYS2d 648 (4th Dept. 2009).

XXXIX. Tips for Mental Health Professional on Direct Examination

A. Stay within confines of order of referral

B. Put studies and research in report

1. *Frey* case
2. *Straus* case
    a. Lack of citations on cross examination

C. MMPI-2 Computer scoring and interpretation

1. Give attribution to narrative

D. Cross Examination

1. Admit obvious error
2. Steal thunder of cross examination
3. Trying to justify the unjustifiable digs deeper hole

E. Use of collaterals

F. Lay terms

G. Stipulation not to call as witness
1. Issue: court's role as *parens patriae.*

H. *Tarasoff* case (529 P.2d 553 [1974]).

1. Inability to predict dangerous behavior.
2. Duty to warn changed to duty to report.

XL. Ending of Direct Examination

A. Strong Finish – Principle of Recency

B. Emotional where fitting:

Q: Ms. Thompson, have you been subpoenaed to testify in this case?
A: No.
Q: Has anyone, including my client or myself or anyone from my firm pressured you to testify?
A: *No. not at all.*
Q: Do you work full-time?
A: Yes.
Q: Are you taking time off from work to be here today and testify?
A: Yes.
Q: Are you being compensated for taking this day off?
A: No.
Q: Then, Ms. Thompson, can you tell us why you are here?
A: [Strong soliloquy about how she believes in your client's cause.]

5

CROSS EXAMINATION

"To ask the cross examiner how he succeeds is to ask the artist how do you mix paints." Emory Buckner

I. Introduction

A. Who can cross examine

1. All of us can become good cross examiners.
2. A chosen few, by dint of innate ability, can be great.

B. Cross Examination v. Direct Examination

1. Star of the Show
2. Types of Questions
3. Voice Tone and Inflection; where to stand

C. Dangerous Territory

1. It is a generally accepted principle that testimony on cross examination, when it is hurtful to the cross-examiner's case, will make a stronger impression that what was said on direct.

2. Lack of Focus – Don't know what really want to get out of cross examination. All over the place.

3. If just amplifying direct, sit down.

D. Control

1. The cardinal concept of cross examination is that you take control of the witness and lead the witness to where you want the witness to go.

2. Tools to Keep Control

a. Leading questions

b. Speed – It is infinitely more difficult to fabricate a story when the cross examiner affords one little or no time for the witness to do so. Liars need time to reflect and

formulate their prevarication.

c. Exception to speed – damaging or clearly incredible answer.

3. One fact per question.
4. No compound questions.
5. No questions calling for explanations.

E. Aspects of Control

1. Control *topics* of cross examination.
2. Control *length* of cross examination.
3. Control *sequence* of cross examination.

II. Direct v. Collateral Cross

A. Pure (Direct) Cross – attacking substantive direct testimony and credibility of witness.

B. Collateral Cross – not making an attack on the substance of testimony, but rather showing that for extrinsic reasons, testimony is not to be relied upon.

COMMANDMENTS AND RULES

I. Be Brief

A. *"Never cross examine any more than is absolutely necessary. If you don't break your witness, he breaks you."* Rufus Choate

B. "In trial, less may be more, and more may be a bore, or worse." James McComas, *Dynamic Cross Examination, p. 342 (2011).*

C. Not necessary or desirable to cover all matters brought out on direct.

D. Think commando raid **–** go in, get what you need, get out.

E. Low ceiling for oral testimony

F. Framing questions – taglines

1. Helps avoiding explanation by witness
2. Avoid excessive use
3. If use, vary **–** Correct? True? Fair Statement?
4. Declarative statement as question

G. No neutral questions.

II. Short Questions, Plain Words

A. Two rules:

1. Leading questions
2. One fact/question – leaves little or no wiggle room for the answer, makes impeachment with prior inconsistent statement easier, and eliminates the ability of witness to argue.

B. Plain words

1. Wrong: "So the basis of your opinion is specious and spurious?"
2. Alternative: "So there is no factual basis for your opinion?"

C. Rapid questioning

D. Transitions – without repeating damaging direct

III. Ask Only Leading Questions

A. Greatest weapon in arsenal of cross examination

B. Control

C. Three types of questions

1. Open ended – tell us, how, what, explain
   a. Ask for a narrative
   b. Used on direct
2. Leading questions
3. Declarative questions (type of leading question)

D. When to jettison the leading question

1. Not for neophytes.
2. When sure you know the answer; can deal with unexpected answer.
   a. Dramatic effect is increased by the words spewing from the mouth of the witness rather than "Yes" or "No" after declarative question.
3. Still frame question without opportunity for witness to expound.

Example

Doctor, how many times have you testified as an expert?
Doctor, how much money did you make in the last year testifying as an expert witness?
Doctor, how long has it been since you treated a patient?
Doctor, how many times did you sit for the exams that lead to board certification in adult psychiatry?
How many times did you pass the exams?

IV. Never Ask a Questions to which you do not know the Answer

A. Cross examination – not a discovery tool.

B. Not a fishing expedition.

1. "Fishing expeditions in a courtroom rarely land a great catch. You're more likely to experience a perfect storm."

C. In a prepared cross examination, not looking for information, looking for confirmation (or facts you state in your leading declarative question).

D. Exception – nothing to lose – dart board approach.

V. Listen to Answer and Observe Witness

A. Rule often breached

1. See violated more than any other rule.
2. Often a function of being over scripted.
3. Lawyer often so wrapped up in what questions to ask and how the lawyer appears that does not listen carefully to the answer which can lead the examiner to something better than initially expected.

B. Rule applies equally to direct examination

1. L.P. Stryker – the trial lawyer should "rivet his eyes on the quarry during direct examination; do not, as most of us do, sit there, eyes down, making notes."

C. Listening – not only to words.
1. Eye contact
2. Observe manner of answer
3. Body language
4. Leans back
5. Avoids eye contact
6. Tone of voice
7. Different from other answers

D. Most witnesses are trying to guess what the ultimate point of your questions is and how to avoid the outcome. In such a state, the witness will often inflate the truth or try to distract you from a weakness in his testimony. Only by constantly looking at the witness can you perceive when this occurs.

VI. Do Not Quarrel with the Witness

A. "*Cross examination is not the art of examining crossly*." – Horace Rumpole (John

Mortimer's *Rumpole of the Bailey*).

B. Passion is effective advocacy; anger rarely is.

1. Your anger is a sign that you have lost control.
2. If fight with witness, appears you are bullying witness.

C. Do not overlap with the witness

1. Appears you are trying to cut off the witness.
2. Studies have shown that the witness is then perceived as having greater control than the lawyer ((Duke University), William O'Barr, *Linguistic Evidence*).

D. You cause and encourage arguments with witness when ask questions such as:

"Wasn't it unusual for you…"
"Would it not have been more prudent of you…"

E. Conversely, never say thank you.

F. The Intractable Witness

1. Wants to tell you his story regardless of your question; resists directly answering your question.
2. What not to do:
    a. At onset – just answer "Yes" or "No"
    b. Ask court for assistance – truly a last resort
3. What to do:
    a. Maintain steady eye contact
    b. Say something like:

Sir, my question is slightly different from the one you have chosen to answer. *Sorry I confused you, let me try again.* *Can you try to answer my question?* *You told us you came here to tell the truth. If the simple truth is "Yes", please just tell us "Yes".* *So, the answer is "Yes?"* *I know you wanted to say that sir, but my question is...*

    c. If not successful: Repeat question, starting with witness' name, and repeat question very slowly.
    d. Reverse repetition

Q: Did you speak to the defendant again?
A: It was not necessary.
Q: My question is slightly different from the one you have chosen to answer. Did you speak to the defendant again?
A: I told you it was not necessary.
Q: Are you telling this Court that you had a second conversation with the defendant?
A: No.
Q: You never spoke to him again?
A: Yes.

4. If witness' answer is patently absurd, let it stand.

VII. Do Not Permit the Witness to Explain

A. If short, leading, one fact/question – no opportunity.

B. Avoid asking "How," "Why." "What caused…", "For what reason…", etc.

C. The "May I explain?" Witness

1. How respond

a. Sir, when I am finished, your attorney may ask you to explain; right now, please answer my question. (Repeat, state his name; slowly)

b. If no answer, "may the witness be directed to answer Yes or No?"

VIII. Don't have the Witness Repeat Direct

A. Sad fact of cross – Too often, cross examination buttresses, supplements, or reinforces direct than impeaches the witness.

B. No witness lies about every fact upon which they testify; facts which can't be impeached should not be repeated.

IX. Avoid the One Question Too Many

A. Observe the single death rule.

B. Score your point; stop that point; go on to another point that is important.

C. Abe Lincoln, Claus Von Bulow.

D. Example: Father claims he is the primary caretaker of child.

Q: *Your son spends the night at his mother's home?*
A: Yes.
Q: She gets him up in the morning?
A: Yes.
Q: She fixes his breakfast?
A: Yes.
Q: She bathes him?
A: Yes.
Q: She dresses him?
A: Yes.
Q: She has him ready for you when you pick him up at 10:00 am?
A: Yes
Q: You bring him home at 4:00 pm?
A: Yes
Q: She feeds him dinner?
A: Yes.
Q: She spends the evening with him?
A: Yes.
Q: She gets him ready for bed?
A: Yes.
Q: She puts him to bed?
A: Yes.
Q: If he wakes up in the night, she takes care of him?
A: Yes.
Q: If he is sick, she looks after him?
A: Yes.
Then, Stop. Do not ask: "So you still claim that you are the primary custodial parent?"

X. Prior Inconsistent Statement – Direct Testimony contradicts Deposition Testimony

A. Contradiction must be on something significant. Avoid nitpicking tiny inconsistencies that bore and irritate everyone.

1. "*The only completely consistent people are the dead."* Aldous Huxley
2. If the contradiction doesn't concern a fact intrinsically important to the case outcome, then the only reason to bring out the inconsistency is part of a witness-destroying cross. At the outset of the cross examination, you must determine if you have enough important material to render this witness so self-contradictory as to be unworthy of belief.

B. If you want the initial statement to be the operative statement, give the witness a graceful way to save face and adopt the earlier version.

Q: You had just forgotten what you said before?
Q: When I reminded you about it just now, that refreshed your memory?
Q: You just misspoke earlier on direct examination?

C. Where witness concedes prior statement was untrue, don't let witness off the hook. Ask a series of questions like:

Q: So, what you said before was untrue?
Q: You knew it was untrue when you said it?
Q: It wasn't a mistake?
Q: It was a choice to tell a lie?
Q: The oath that you took to swear to tell the truth on that prior occasion – that didn't matter to you?
Q: The reason you told a lie was that you wanted to mislead the person you were talking to?
Q: You wanted that person to believe it was true, even though you knew it was not true?
Q: You thought it would help you to tell a lie?
Q: Now today, you want the court to believe what you are saying is true?
Q: It would help your position if the court decides what you are saying today is true?

D. Deposition - Seal testimony at the close of the deposition.

Q: Anything else you can tell us about the event?
Q: You understand that we are here today to try to obtain your complete recollection about the event?
Q: If you think of anything else, you will let your lawyer know and he will let us know?
Q: Is there anything you have not seen (photo, document, etc.) that might bring more details of this to mind?

E. Steps in Impeaching with Prior Inconsistent Statement

1. Commit the witness to reaffirmation of the direct testimony.
2. Establish circumstances of prior inconstant statement and importance of circumstances (without revealing statement).

You have given prior sworn testimony in this case, correct? You appeared in my office on June 12 for a deposition?
You knew weeks in advance of June 12 that you were going to appear in my office for the deposition?
You discussed your deposition testimony with your attorney prior to coming to my office, correct?
You arrived at my office with your attorney?
Your attorney sat by your side throughout the testimony?
You saw a court reporter in the room?
The court reporter took down every word that was stated?
The court reporter administered an oath to you, true?

You raised your right hand and swore to tell the truth?
Did you tell the truth? (Win, win question.)
Now, I draw your attention to page 23 of the transcript of your deposition, beginning at line 12, where I asked you the following question and you gave the following answer . . .

3. Impeach Witness with Prior Inconsistent Statement
a. Before: Approach the witness; change intonation.
b. After: Walk slowly back to lectern; stall a few moments ("Your honor, May I have a moment?"); let the inconsistency sink in; let the witness squirm.
c. Avoid saying something like "So, Mr. Smith, when did you lie under oath, at your deposition or on your direct testimony?"- Invites wiggle room. **[**

F. Resumption of Questioning after Impeach Witness with Prior Inconsistent Statement

1. Different topic immediately – no opportunity for witness to rehabilitate.
2. Next topic should be one of importance as the witness is at the nadir of credibility.

XI. Save the Explanation for Summation

A. Get the facts you need from testimony; explain in summation.

B. "Mini summations" – objections.

ADDITIONAL COMMANDMENTS

I. When Not to Cross Examine

A. "*More cross examinations are suicidal than homicidal."* Emory Buckner

B. If not hurt on direct, just say: "No cross examination"; "We have no reason to cross examine this witness, your Honor."

C. Harmless witness (unless you can turn into your witness).

D. Repeat of direct.

E. Don't clarify the confusing - If direct discombobulated, don't clarify on cross examination.

F. Exception - getting killed – dart board approach – have absolutely nothing to lose.

G. Two-prong test:

1. Did the witness hurt our case on direct examination?
2. Is there anything unique the witness can provide that will materially help our case?

If answer is "yes" to either, cross examine.

II. Preparation, Preparation, Preparation

A. If properly prepared, know a great deal of cross examination before trial begins; the more you will anticipate what the other side will do.

B. Preparation allows a lawyer to go off script without throwing caution to the wind.

C. Additional Preparation

1. Google and Facebook every witness
2. Check websites of husband's company
3. Experts – written articles; prior testimony; other reports (example: capitalization rates)
4. People Search

D. Practice in advance

III. Organize

A. Process of collating, organizing facts relevant to the witness being examined

1. Example: Case Map.

B. Avoid fumbling through papers

1. Ruins pace, give witness time to think, circumvent, cajole.

C. Colored exhibit sheet

D. Use of deposition testimony

1. Get ASCII disk or email of transcript and cut and paste into trial memo.
2. Commercially available transcript programs.

E. Impeaching from a deposition transcript

F. Slave to note taking

1. Key words and phrases.
2. Miss body language of witness

IV. Don't be Over-Scripted

A. Security blanket

B. Tend not to listen to answer – violate that commandment

C. Use outline or checklist – some specific questions

V. Notes on Direct

A. No necessity to hit all areas of direct and should not

B. Areas outside direct – cross examination is more than combating what heard on direct

VI. Order of Cross Examination

A. Order should not follow direct
1. Witness prepped in certain order
2. Change sequence
3. Generally, don't start with last point on direct; freshest in mind of witness

B. If not successful – violate rule of primacy

C. Primacy and Recency
1. Must start and finish strong

VII. Telling a Story

A. A story about the theme(s) of your case

B. Introduce story in opening; end story in summation – building blocks for themes in between

C. Reason not to waive opening – Preview

D. Taglines – limit – storyteller, raconteur

VIII. Don't Sweat the Small Stuff

A. Cross examination and impeachment on insignificant matter
1. Only cross examination on substantive matters
2. Otherwise, trivialize your case

B. Try a Big Picture Case
1. Major themes
2. If lose a minor skirmish but win the war, good result.
3. Prioritize
4. Constant reevaluation during trial of where you are with respect to big picture

C. If your response to hearing something on direct is "So what," don't cross.

IX. Don't Shoot Every Mosquito

A. Corollary to big picture case – themes

B. Forget minutia unless have outright lie – then *falsus in uno, falsus in omnibus*

C. Short of that, limit or avoid totally the minutia

D. Some lawyers feel they have to cross examine on all points made on direct. Reasons why this is wrong:

1. Few if any witnesses lie on all aspects of their testimony;
2. Makes for an exhaustingly long cross examination;
3. Valid points are lost among the minutiae that ultimately will have no bearing on any issue.

X. Etiquette of Cross Examination

A. Don't talk above witness; don't raise voice in anger; don't be rude.

1. Message: don't want trier of fact to hear answer;
2. Sign of loss of control; and
3. Trier of fact resents a bully**.**

B. Francis Wellman*: "Hold your temper while you lead the witness to lose his."*

XI. Avoid Glee

A. You just scored big time, a searing, blistering blow.

B. Don't telegraph the exhilaration; don't gloat – consummate professional.

C. Next move – cross examine on a matter of substantial importance.

XII. Witnesses Not to Call

A. Witness that the opposing side must have necessity to call

1. Advantage of cross examination
2. If good witness for you, greater effect if turned witness around on cross examination than if testified for you on direct
3. If they don't call – choice to call on rebuttal or argue missing witness inference

XIII. The Bad Parts Don't Go Away

A. Not by avoidance

B. Minimize to extent you can

C. Steal thunder – bring out on direct case

XIV. Every Witness is not a Liar

A. Plenty of witnesses believe that their testimony is true and accurate.
1. There may, however, be errors of perception, memory, interpretation.

B. Don't come on like gang busters.

C. Also, even if a witness lies, does not mean lies about everything.

XV. Sensitive Witnesses

A. Kinder, gentler approach

B. Children, elderly, infirm, disabled
1. Slower, softer pace.
2. Even just a nice avuncular figure on direct – unless have explosive material, little softer approach.

XVI. Courtesy Copy to Court

A. Applies to cross examination and direct examination.

B. Any exhibit in evidence about which you are questioning witness, have a courtesy copy for court.
1. EBT transcripts
2. Complex financial spreadsheet

XVII. Silence is Golden

A. If there is a pregnant pause between question and answer, don't interrupt it ("Did you understand my question?" "Do you want me to repeat the question?").

B. Let the silence speak loudly.

C. Witnesses who take a long time to respond – less credible.

XVIII. Cross examination to "break the flow"

A. Use any possible objection.

B. Some possible objections:
- Form of question
- Compound question
- Assumes facts not in evidence
- Hearsay
- Calls for legal conclusion
- Speculation

XIX. Your Own Style

A. Can learn from others; your style must be you – if not, will show.

XX. Frame as Many "Win, Win" Questions as Possible

A. When you prepare, you will discover "win, win" questions.
1. Don't care if answer is "Yes" or "No"; you have the witness either way.

B. Example – Business Appraiser
1. Established universal use and role of Rev. Rul. 59-60.
2. Did you follow the Revenue Ruling in conducting your appraisal assignment?
    a. If no – attack nonuse
    b. If yes – show how did not in fact follow.

C. Example – Prior Deposition Testimony
1. "Were you telling the truth when you testified at that deposition?"

XXI. Primacy and Recency

A. Definitions
1. Primacy – what we hear first, we tend to believe.
2. Recency – what we hear last, we tend to remember.

B. Start cross examination and end cross examination strong

C. Pecking order
1. Strong point.
2. Other points – strongest to weakest.
3. Strongest Point.

D. Primacy
1. Unnerves witness at beginning; never recovers
2. Reason why not overuse "Isn't it a fact…"

3. Reason to skip the saccharine salutary introductions some lawyers use

E. Recency

1. Applies not only to end of examination but to end of court sessions (day, lunch break).
2. At times, may move you to cut short your planned cross examination.

XXII. Strategic Use of Recesses

A. Expert witness finished with direct – 4:15 p.m.

B. When Judge interrupts cross examination and asks would this be a good time to take a short recess.

XXIII. Trilogies

A. Use in all parts of trial – opening, direct and cross examination, summation.

B. Two is oppositional; four is too many to digest and remember.

VERBAL AND BODY LANGUAGE OF CROSS EXAMINATION

I. Verbal

A. Opening salutations – avoid

B. One fact/question.

C. Avoid:

1. Negative endings to questions – "did you not"; "have you not" – confusing
2. Pompous vocabulary
3. Let me ask you this question…
4. Differential and uncertain words – "Is it probable", "do you think…", "Is it possible…"
5. Starting question with repeating part of direct

D. Memorable words or phrases

1. When you *viciously* assaulted your spouse; when you *secretly* emptied the contents of the bank vault…

E. Adverse witness– don't say you "testified."

F. Positive as opposed to negative phrasing – designed to get a yes answer, not a no answer.

G. When necessary, give question contextual significance. Mr. Appraiser is DCF an accepted method of valuation… (Why ask); Mr. Appraiser, you are aware that the appraiser retained by the defendant used a DCF method to value defendant's business? Is that an accepted method?

H. Voice inflection

I. Qualifiers as Answers

1. Don't let witness get away with hedge words – "I think", "To the best of my recollection", "It seems…"
2. Prior to the answer to this pressing question, there was no such preface to the witness' answers – Answers like: Yes, No, definitely not.
3. Probe memory – on direct, asked questions about events four years ago; no hesitancy.

II. Body Language

A. Theatre Analogy

1. Like an actor, where you stand, when you move, where you move to all have significance. The courtroom is the stage.

B. Where to Stand
1. Direct Examination – Stand behind the lectern – lawyer not the star; is the director.
2. Cross examination - star, center stage
    a. Don't stay behind lectern – covers over 50% of body.
    b. Move to side, approach witness; draw back from witness; peripatetic.

C. Lose the pen or pencil in hand – distraction

D. Eye contact – crucial

E. In the face of the witness -

F. Detecting witness' discomfort or attempt to buy time

1. Beginning with "Uh", "mmm", "okay", "y'know", "like"
2. Eye contact with examiner lost
3. Hand covers mouth or part of it before answer or and partially covers eyes
4. A witness repeatedly crossing and uncrossing legs
5. Attempting to brush lint off his suit jacket when there is no apparent lint
6. Witness responds with "That is an excellent question" and then gives non-responsive answer; "Now would you please answer my excellent question?"
7. Witness often asking for the question to be repeated.

MODES OF IMPEACHMENT

I. Bias, Interest, Motive, Prejudice

A. Show any bias, interest, etc. at beginning of cross examination
1. Taints credibility for remainder of examination.

B. Play out relationship – friend, colleague, boss, relative

Employee of Adverse Party being cross examined:

You are employed by Mr. Anderson, correct?
You have been employed by him for eight years?
You like your job at the corporation Mr. Anderson owns?
You believe you are compensated fairly for your efforts?
You have no desire to lose your job?
You want to retain your job?
You support your family with the salary earned from this employment?
You were asked by Mr. Anderson to come to court today to testify?
You immediately replied in the affirmative?
You were not served with a subpoena to come to court, correct?
You came voluntarily after Mr. Anderson asked you to come?
Prior to coming to court, you met with Mr. Anderson's attorney, Mr. Dewey?
You met Mr. Dewey at his office?
You went to Mr. Dewey's office because Mr. Anderson asked you to do so?

Friend of Adverse Party being cross examined:

You are appearing here today voluntarily?
No subpoena was served upon you to appear in court?
You are here because Mrs. Smith asked you to be here?
She only had to ask you once and you agreed to come to court and testify?
To come to court today, you have missed a day of work? Are you paid for this missed day of work?
Is the missed day of work chargeable to your vacation time? Did you pay for child care to come to court today?
Did Mrs. Smith reimburse you for this expense or promise to reimburse you?
She he is a friend and neighbor of yours?
Your children are friends with her children?
They regularly play together?
Did Mrs. Smith drive you to the courthouse today?
Is she going to drive you home after the court session is over?
How long was the drive from your home to the courthouse?

Did you talk about the case during this 40-minute drive?
You have spoken to Mrs. Smith's attorney prior to coming to court today? (develop when, time spent, what was discussed, etc.)
Are you here today to be fair and unbiased?
Are you a partisan for Mrs. Smith?
You and I have spoken before this trial, correct?
I called you, introduced myself as Mr. Smith's attorney, and told you I wanted to ask you some questions?
You refused to speak to me?
You did not refuse to speak to Mrs. Smith's attorney?

C. Collateral evidence rule

D. Some experts spend most of their professional time testifying and may even advertise to get business.

E. Explore the history of testifying for a particular firm - hired gun approach.
1. Make sure that your own expert is not subject to the same criticism.

F. Primacy Effect - power of first impression. One tends to place more weight on information obtained sooner as opposed to information of equal or greater importance received later. Information received earlier in the deliberative process has greater impact than information received subsequently.

G. Custody Case - Evaluator should initially see both parents together.
1. In overly contentious cases, often afraid.

II. Implausibility

A. Good to get implausible answers – defies rule of probability

B. Examples Clarence Thomas; Bill Clinton

III. Bad Reputation in Community for Truth and Veracity

A. Applicable in civil cases and often overlooked in civil cases.

B. Not substantive testimony; just put witness on to state that he/she is aware of the reputation of an opposing witness in the community for truth and veracity, and that reputation is bad.
1. *Peo. v. Fernandez*, 17 NY3d 70 (2011) – family and friends can constitute the relevant community for this purpose.
2. Not deemed collateral.

IV. Prior Criminal Conviction

A. Civil *Sandoval* application (*Tripp v. Williams,* 39 M3d 318, 959 NYS2d 412 (Supreme Court, Kings co., 2013, Battaglia, J.)) - In a personal injury action involving the collapse of a masonry wall, plaintiff was precluded from impeaching defendant with evidence of his 25-year-old convictions of certain sex crimes, apparently committed against minors. CPLR 4513 does not deprive a trial court of all discretion in controlling the use of a criminal conviction for impeachment. The potential for the unfairness in the admission of prior crimes may be as great for a civil litigant, who has no control over the use of a criminal conviction and has no right not to testify, as for a criminal defendant. Here, due to the long passage of time since the convictions and the lack of evidence that the crimes involve forcible conduct, the probative value of the convictions was outweighed by the potential for prejudice to the defendant. The principles articulated in *Sandoval*, 34 NY2d 371, 357 NYS2d 849 (Ct. App. 1974) are applicable to civil, as well as criminal, actions.

B. Specific immoral, vicious or criminal act – to show moral turpitude

C. Must have reasonable grounds to inquire about specific misconduct and pursue the line of inquiry in good faith

D. If criminal charge and acquitted, can't ask

E. If call adverse party or if witness declared hostile, can't impeach on direct with criminal conviction

V. Cross Examination by Criminal, Immoral or Vicious Acts

A. Although a witness may be questioned about prior bad acts which bear upon his [or her] credibility, the questions must be asked in good faith and must have a basis in fact. *People v. Spirles*, 136 AD3d1315, 25 NYS3d 462 (4th Dept. 2016).

B. An adverse party or a hostile witness may not be impeached on direct examination by evidence of his or her criminal conviction. *Morency v. Horizon Transp. Servs., Inc.*, 139 AD3d 1021, 33 NYS3d 319 (2d Dept. 2016).

C. There is no bright-line rule of exclusion based upon age of conviction. *People v. Martin,* 136 AD3d 1218, 26 NYS3d 382 (3d Dept. 2016).

D. Civil judgments cannot be characterized as bad or immoral ... acts involving moral turpitude that would allow them to be used to question the defendant's credibility" *Quiroz v. Zottola,* 129 AD3d 698, 698, 11 NYS3d 194, 196 (NY App. Div. 2015).

E. Domestic Violence

1. Prior bad acts in domestic violence situations are more likely to be considered relevant and probative evidence because the aggression and bad acts are focused on one particular person, demonstrating the defendant's intent and motive. *People v. Pham*, 118 AD3d 1159, 987 NYS2d 687 (3d Dept. 2014).

F. Perjury

1. "We reject plaintiff's contention that Supreme Court erred in allowing cross-examination of her expert regarding an out-of-state conviction of contempt. That conviction was based upon lies told by the expert to a judge during the course of the expert's trial testimony. Although the conviction was in 1983, " '[c]ommission of perjury or other acts of individual dishonesty, or untrustworthiness . . . will usually have a very material relevance, whenever committed' " (*Donahue v Quikrete Cos.* [appeal No. 2], 19 AD3d 1008, 1009 [2005], quoting *People v Sandoval*, 34 NY2d 371, 377 [1974]) *Towne v. Burns*, 125 AD3d 1471, 3 NYS3d 844 (4th Dept.. 2015).

G. Interplay – Bad Acts and Collateral Evidence Rule

1. *Young v. Lacy*, 120 AD3d 1561, 993 NYS2d 222 (4th Dept. 2014) – In personal injury action, error for trial court to refuse to let defendant's attorney question plaintiff as to why she filed tax returns as head of household when she was married and living with her Husband at the time, and the number of dependents she claimed, as the questions raised the possibility of tax fraud which has some tendency to show moral turpitude and thus relevant on the credibility issue. However, defendant's attorney would have been bound by plaintiff's answers and could not resort to extrinsic evidence or other witnesses to refute plaintiff's answers because of the collateral evidence rule.

VI. Lack of Knowledge (Woody Allen Cross)

VII. Other Modes

A. Perception

B. Memory – cf. memory of more remote incidents on direct, with lack of memory of more recent incidents on cross examination

C. Coached or rehearsed answer – ask witness to repeat

VIII. Riding the Lie

A. Fine line – gilding the lily and maximizing the effect of a lie

B. Ride the lie – safe questions without giving witness opportunity to excuse the lie or explain the lie

Q: When you signed the false tax return, you knew it was false and misleading? *Q: When you signed the false tax return, you did not inform your accountant of the missing and misleading information?* *Q: After you filed the false tax return, you have never amended the return in the two years that have expired since the date of filing?*

Q: After you filed the false tax return, you annexed it as an Exhibit and submitted it to this Court, correct?...

C. Caught Witness in Lie, as, e.g., false financial statement to bank, then*:*

The lie was created by you?
You created the lie because it worked to your financial advantage?
It helped you make money?
You lie when it helps you make money?
Money is involved in this matrimonial action, correct?

IX. Impeachment by Omission

A. Impeach by what the witness failed to find or observe as opposed to what they did find or observe.

B. Example

1. Must lock down witness' testimony
2. Doctor, have you now told us all of the shortcomings of my client as a parent that you found from your clinical examination?
3. Reviewed report, etc.
4. Then bring out other aspects of parenting that were not included in his list of shortcomings
    a. Either overlooked – failure of examination.
    b. Favorable to your client.

Q: Doctor, you issued a report in this case?
Q: A 65-page single spaced report?
Q: It is a comprehensive report?
Q: You included all of the facts that you considered relevant in your evaluation?
Q: You reviewed the report before you submitted it to the Court?
Q: Reviewed it carefully?
Q: Actually, you reviewed it again in preparation for testifying here in Court today?
Q: Do you still believe it is comprehensive and states all the relevant facts?
Q: If a spouse has committed domestic violence, would this be a relevant factor in your evaluation? (WIN, WIN question]
[If no, pursue]
[If yes] Q: Dr., please direct the court's attention to the specific page in your report in which you discuss the <u>relevant</u> (LOOPING) factor of domestic violence?
A: It is not there.

X. Patience and Pacing (Build-up Method)

A. Patience – has to do with closing escape hatches

B. Example – Peer Review

Q: You are familiar with the peer review process?
Q: By peer, we are referring to people in your area of science?
Q: So, the peer review process involves a review of one's opinions of her scientific peers of colleagues?
Q: It allows one to get valuable feedback from other scientists about what they think of your opinions?
Q: It provides a sense of whether your opinions are generally regarded as supportable and reliable by other experts in your field?
Q: This can be very valuable in the scientific process, correct?
Q: One form of peer review involves standing up at meetings and sharing your views with peers of fellow colleagues?
Q: And you are discussing the bases of your opinions with them?
Q: This allows your peers to comment on the strengths or weaknesses of your opinions?
Q: You have been involved in this litigation for four (4) years, correct?
Q: You have never stood in front of a group of your fellow scientists to share with them the opinion you shared with this court on direct examination?
Q: Another form of peer review is publishing articles?
Q: When you submit an article to a professional journal, the article is peer reviewed before it is published?
Q: This, too, can be a valuable part of the scientific process?
Q: It might help weed out what is generally referred to as junk science?
Q: You have never submitted a manuscript stating your opinions as expressed to this court today to a journal for publication?...

C. Pacing

1. Generally, quick and crisp.
2. To help pace, ask questions not subject to valid objection.
3. Often, objection made when your cross examination is going well just to break the flow.
4. Exceptions to quick and crisp:
    a. Witness squirming, taking long time to answer.
    b. Crucial moment – act deliberately
        (1) The change of pace will be noted;
        (2) The change in the inflection and tone of voice will be noticed;
        (3) The change of your position in the courtroom will be noticed.

TYPES OF CROSS EXAMINATION

I. Direct Cross v. Collateral Cross

A. Starts long before the trial
1. Biggest decision - what to cross on; what not to cross on.

B. Direct cross - frontal challenge on the findings, conclusions, diagnoses (if any). Issue of battling the expert on his home turf; if do, thorough preparation and learning about the subject. Learn the underlying science of the expert's opinion.

1. Wrong tack – too often lawyers delude themselves believing that they can win an argument on the subject matter of the expert's opinion. This rarely succeeds. Better off to use low risk techniques.
2. Contrary to accepted theories of child development
3. Inaccurate conclusions re: factual data
4. Child doesn't separate from mother
    a. Attached
    b. Children separate more easily from parents with whom they feel secure with

C. Collateral Cross

1. Inadequate interviews
2. Did not interview key people
3. Failed to use psychological tests or used tests for which reliability is doubtful
4. No home study
5. Departures from Established Protocols
    a. List of things the expert did not do which should have been done
    b. Most disciplines have recognized protocols. It is a matter of identifying the protocol relevant to the opposing expert's discipline.
    c. Not limited to omissions. The affirmative conduct of the opposing expert can be fertile territory. He may have embarked upon a course of action that deviates from the established protocol.
6. No site visit of business
7. Confirmatory bias, primacy effect
8. Highlighting Expert's lack of information
    a. Marshal omissions and facts the expert does not know and provide no wiggle room by short, tight, leading questions.
        (1) Consider: Where expert does not know something that should know: You mean that after all that money, you don't know …?
    b. Also use where there is an uncertain state of the disciplines in which the expert operates.

9. Hired Gun Approach: bias, interest or prejudice
    a. Expert advertises in publications
    b. History of testifying for a particular lawyer or firm
    c. Being paid beyond the prevailing rate

10. Attacking Expert's Key Assumptions
    a. At times, if you can establish that only one of the assumptions of which the expert has constructed his analysis, the entire opinion can come crashing down.

II. Constructive v. Destructive Cross Examination

A. Destructive – obvious

B. Constructive – several forms – Goal is to elicit favorable testimony from a seemingly adverse witness, usually without the witness knowing she is giving favorable testimony

C. Formm of constructive cross examination

1. Use adverse witness to corroborate points that have been made or will be made by your witnesses (generally won't know doing that).
2. Have adverse witness concede points that are favorable to your case.
3. Play off one adverse witness against another.

D. The effect of having an adverse witness agree with your point is profound.

E. *The Verdict* – Paul Newman's expert shattered

F. Use adverse witness to corroborate points that have been made or will be made by your witnesses.

G. At times ask opposing expert… Isn't it correct that the degree of difference of opinion between your report and the other experts report is perfectly normal within this area of expertise, so that you cannot prove the other expert wrong?

III. Columbo Cross

IV. Blank "Incriminating" Document

A. Old trial lawyers' trick – still works sometimes

B. Witness for the Prosecution

V. Memory

You say you were in Albany having lunch with ____ on April 15th of last year?
You sure that lunch was April 15th?
You remember that now, about 1 ½ years later?
So, tell us with whom you had lunch on April 14th of that year?
On April 13th?
How about last month, June 13th?

VI. The "I Don't Remember," "I Don't Know Witness"

A. Good memory on direct; "amnesia" on cross examination

1. Offer examples of questions on direct examination when answered with alacrity and without hesitation. Contrast to cross examination.

B. Determine if legitimate or not – if it is, move on; if not, test.

C. Ride it out - The more times a witness says “I don’t remember”, “I don’t recall” to questions which common sense tell us should be remembered, the better.

1. Keep asking questions until you get a ridiculous list of “I don’t remember”

D. How to test memory or lack thereof. Compare memory on direct with lack of memory about more recent events that you raising on cross examination.

1. See if approximations trigger memory – more or less than 5, 10 etc. - amount of money.
2. Momentous moment in life.

E. Witness Refuses to Answer

1. Ask the same question again, slowly
2. Ask a third time, starting with the witness’ name
3. Then, “Is there something you do not understand about my question?” “Is there some reason you do not want to answer this question?”
4. Consider: “If that is what your answer is, if that is the best you can do, that’s fine.”
5. Go to the Judge as a last resort.

6

CROSS EXAMINATION OF EXPERTS

"An expert is one who knows more and more about less and less." Nicholas Murray Butler

I. General Considerations

A. Two killer features – preparation and language

B. Learn and Use the language of the expert

C. Reasonable Expectations

1. Punch holes
2. Marginalize the expert

D. Less is More Principle

1. You over prepare, you under try.
2. There is no correlation between the length of the cross examination and the effectiveness of the cross examination.
3. Commando raid cross examination – Like a guerilla fighter, you in and you're out. You know what points you want to make; jump in and make them, and get out.

E. Preparing your expert – Questions

1. Who is more experienced?
2. Our best point
3. Their best point
4. If you were on the other side, what would you attack and why?
5. How do we win this?

F. Writing Out Questions - This is one area where you are justified to write out some questions in advance so that you get the language correct

G. Advantages of cross examination of expert v. lay witness.

1. Aura - Hired gun – build upon this through cross examination
2. Report in advance – as opposed to lay witnesses
3. Family Law – soft sciences
    a. Discretion
    b. Judgment
    c. Impressions
    d. Observations
    e. Hypotheses
    f. A lot of subjectivity
    g. Often incapable of being measured or analyzed by scientific method

4."*Frye v United States* (293 F 1013 [DC Cir 1923]) does not require that a forensic report cite specific professional literature in support of the report's analyses and opinions. As the motion court noted, plaintiff could cross-examine the forensic evaluator regarding the lack of citations, and such an omission is relevant to the weight to be accorded to the evaluator's opinion, not to its admissibility (*Zito v Zabarsky*, 28 AD3d 42, 46 [2d Dept 2006]); *Straus v. Strauss*, 136 A.D.3d 419 (1st Dept. 2016).

H. Disadvantages of cross examination of an expert

1. Not afraid of the aura of the courtroom.
2. Battle tested and has refined her answers and is more intent on getting those answers in no matter what the question.
3. Unique knowledge about their area of expertise.

I. Control

1. More crucial than ever – cannot give the expert a chance to make speeches
2. Control – on cross examination, maintain control by being patient and persistent. You may have to ask the same question four times.

J. Decide: Direct v. Collateral Cross

K. Devastating Answer

1. Look unconcerned when you have a devastating answer you did not expect. It is an act that you must learn.
2. Don't allow the bleeding to continue.

L. What Not to Do - If direct discombobulated, confusing, - don't clarify on cross examination

M. File of Expert

1. Subpoena duces tecum for expert's file – drafts, work papers, correspondence, memoranda etc.
2. Seasoned experts – often don't bring entire file.

N. Strategies for Impeaching Witness

1. Area of expertise the witness claims
2. Education and training
3. Employment history
4. Disciplinary or criminal record
5. Acceptance among peers in the field
6. Prior retentions by party or party's attorney
7. Payment terms, significance; anything owe
8. Do you feel you will have a better chance to have your balance owed paid by defendant if you testify in his favor?

O. Evasive Expert

1. Consider letting the expert know you are content with his evasiveness. Say something like "If that is what your answer is, if that is the best you can do, that's fine."
2. When a witness does not answer the question, repeat the question until get a response. After several attempts, if the witness still won't answer the question that is ok.

II. Qualifications of Expert – Voir Dire

A. When to Challenge

1. Chance to punch holes in other side's expert during their direct case.
2. It is not a cross examination, but can be used as such.
3. Chance to cast a shadow on opposing expert before expert attempts to convince trier of fact.
4. Just to challenge qualifications – witness not competent to offer expert opinion testimony on the topic before the court.
    a. Some case law – courts haven't allowed a witness to testify (*Wells v. Wells*, 177 A.D.2d 779, 576 NYS2d 390 [3d Dept. 1991]).
5. Really a secondary motive:
    a. Remove halo – impressive Curriculum Vitae.
    b. Show lacks forensic experience.
    c. Not board certified.
    d. Hasn't treated a patient in 10 years.
    e. Spends more time theorizing than doing.
6. Often belonging to various impressive sounding academies, societies and the like involve little more than applying and paying a fee.

Q: There is no test taken or required to become a member of that organization? *Q: You simply pay a membership fee and annual dues and you are a member?*

Q: You are aware that Mr. _____, the opposing expert in this case, is board certified in your discipline? *Q: To become board certified, you must pass a test and peer review, correct:?* *Q: Is it also correct that you are not board certified?*

7. Generally – objection to witness testifying as expert – denied – qualifications go to "weight."

B. Voir dire – secondary function – challenge admission of

C. False or Exaggerated Qualifications – Set up questions

Q: You have stated your qualifications to the Court? *Q: They are accurate and complete?* *Q: You would not exaggerate or misstate your qualifications, would you?* *Q: To do so would be misleading and inappropriate, you agree?*

III. Attorney Demeanor and Presence

A. Where to stand

1. Cross – star, center stage – you are testifying; just getting confirmatory yes and no's from witness.
2. Don't stay behind lectern – covers 2/3 of body.
3. Move to side – approach witness; draw back from witness.
4. Sunday morning preachers – translucent lecterns and move from it.
5. When move from place to place, witness has to follow you rather than concentrate on next question or how to squirm.

B. Lose the pen or pencil in hand – distraction

C. Eye Contact is crucial. It says you mean business; this is not going to be easy; if want out, better tell me the truth. This can't happen if you are a slave to your notes or glued to a scripted cross.

D. In the face of the witness

1. Judge may or may not allow
2. Heightens anxiety of witness; goal is to have witness want to save face, make concessions and go home.

IV. Professional Standards and Guidelines

A. AICPA – Statement on Standards for Valuation Services

1. §43 – Subsequent Events – known or knowable.

B. American Psychiatric Assn.- "The American Psychiatric Association Guideline for Psychiatric Evaluation of Adults", 3d Ed.

C. American Academy Child and Adolescent Psychiatry – "Practice Parameters for Child Custody Evaluation "and "Practice parameters for Child and Adolescent Forensic Evaluations"

D. American Psychological Assn.

E. CPA – Prepared amended tax returns for husband – Licensed by IRS, Office of Prof.
1. IRS CIRCULAR 230 – Due diligence requirements if practice before tax court.

F. Close escape hatches - Consider the following Q & A:

Q*: Doctor, you have been practicing psychology for 20 years now?* *Q: During that period of time, you have been a member of the American Psychological Association?* *Q: In fact, you have been an active member, serving on various committees of that association?* *Q: You are familiar with the fact that the American Psychological Association promulgates guidelines for its members that are engaged in forensic psychology?* *Q: As a long-time active member of the American Psychological Association (notice looping), you are familiar with these guidelines?* *Q: You have employed these guidelines in your practice?* *Q: You have employed these guidelines in connection with the forensic evaluation in this case?* *[Develop specific guidelines that have not been followed…]*

V. Other Standards and Rulings

A. Business Valuation – Revenue Rulings
1. Rev. Ruling 59-60 (See Appendix "A")
2. Rev. Ruling 68-609 (See Appendix "B") – Capitalization of excess earnings – formula approach.

VI. Jack of All Trades Expert

A. Experts who value one type of business or industry – Many types of businesses and industries

B. SIC CODES – Standard Industrial Classifications – hundreds – classifies industries by 4-digit code

Q: Mr. Pencil, you are a CPA? *Q: You make your living doing forensic evaluations?* *Q: You do evaluations of businesses?* *Q: You also do evaluations of intangible assets?* *Q: Like intellectual property?* *Q: That includes patents, trademarks, copyrights and the like?* *Q: You do evaluations of enhanced earning capacity?* *Q: With respect to businesses, there are many types of businesses, correct?* *Q: There are retail businesses?* *Q: There are manufacturing businesses?*

Q: There are service businesses?
Q: You told us about your training in forensic accounting and business valuations?
Q: This is a complex field?
Q: No two businesses are exactly alike?
Q: No two industries are exactly alike?
Q: There are facts and nuances endemic to each business and industry?
Q: There are experts whose field of expertise is a single type of business?
Q: For example, there are experts that only value car dealerships?
Q: There are experts who only value patents?
Q: There are experts who only value certain types of retail businesses?
Q: Like apparel companies?
Q: There are experts who only value law practices?
Q: Dental practices?
Q: Medical practices?
Q: You are familiar with what is known as SIC Codes?
Q: SIC stands for Standard Industrial Classification, a system devised by the U.S. government to classify industries by 4-digit codes?
Q: And these codes appear on corporate and other business tax returns, correct?
Q: There are hundreds of codes, representing hundreds of different industries?
Q: If you and your firm were retained by any company within these hundreds of different industries to value the company, you would not hesitate to undertake the engagement?
Q: You value all and any of the business types and industry types that I have mentioned?

VII. Professional Witness

A. Total compensation

B. Relationship with law firm – works for opposing firm regularly; significant income

1. When to confront with relationship questions – after score good point with expert. For example, if impeached expert with prior inconsistent statement, then ask about how much being paid, how often hired and testifies for this firm, etc.

C. Example: University professor – supplements

Q: So, it is clear that you make a lot more money doing this consulting and testifying work then you make as a professor back at your university, true?
Q: You told us on direct that you have actually testified in court about 20 times in the last several years?
Q: For these 20 times you prepared a report?
Q: You did this impartially?
Q: Just like you would at the university, correct?
Q: In each instance you studied the matter independently and you reached a conclusion?
Q: Your conclusion in each case was that the party that was paying you was correct?
Q: *In not one of those cases did your report support the position of the party in the litigation that was not paying you?....*

VIII. Cross Examination by Disclaimers

A. Statement of Limiting Conditions (Euphemism)

1. *"We have based our valuation on figures presented by management without a certified statement, nor have we performed an audit of the figures. We have assumed for the purpose of this appraisal that the figures provided by management are correct."*
2. *"[ABC Appraisal Co.] will not express any form of assurance on the likelihood of achieving the forecast/projection or on the reasonableness of the used assumptions, representations and conclusions."*

IX. Cross Examination by Treatise

A. Special mode of impeachment – learned treatise
1. For impeachment, not substantive evidence.
2. Witness – must acknowledge authoritativeness of the particular treatise.
3. If witness relied upon treatise in testifying, okay to cross examination without anything further.

B. Old Lawyer's Trick – authority in briefcase

Q: Sir, you related to us your credentials on direct examination, correct?
Q: As part of your credentials you noted that you are an adjunct professor at Rockland Community College where you teach forensic accounting and business valuation?
Q: You have taught this course for a number of years, correct?
Q: In teaching these courses, do you assign certain textbooks as part of your course curriculum?
Q: You also maintain certain textbooks relative to these areas of expertise in your private office?
Q: And you subscribe to updates for these texts, correct?
Q: These texts are well-known in your profession?
Q: They are recognized as authoritative in the profession?
Q: You agree with me, sir, that one of these well-known texts in the area of your expertise is Shannon Pratt's text, entitled "Valuing a Business", 5th Edition?...
Q: You assign this book to your students and use it as a text book for your class, correct?

X. Hypothetical Questions on Cross Examination

A. Methodology – confront expert and ask witness to assume certain facts which are in evidence – "fairly inferable" from testimony (CPLR 4515).

B. Example

1. Earnings based method of valuation.
2. Sir, assume court...income per tax return not all the income…
3. Further assume ….(Writing off 3 car leases and all attendant expenses; Housekeeper being carried as an employee of his business entity; Artwork adorning the parties' living room paid by business and carried as a business asset…; Home electric bill paid by business, etc.

4. Would that affect your valuation? (Win, Win)

XI. Attacking the Expert's Report

A. Evidence issue - *Berrouet v. Greaves*, 35 AD3d 460, 825 NSY2d 719 (2d Dept. 2006), which holds that while trial courts are accorded wide discretion in making evidentiary rulings, professional reports constitute hearsay and therefore are not admissible without the consent of the parties.

B. Expert's report – study line by line – bound to find inconsistencies or downright misleading statements.

C. Lack of citations and authorities

1. "*Frye v United States* (293 F 1013 [DC Cir 1923]) does not require that a forensic report cite specific professional literature in support of the report's analyses and opinions. As the motion court noted, plaintiff could cross-examine the forensic evaluator regarding the lack of citations, and such an omission is relevant to the weight to be accorded to the evaluator's opinion, not to its admissibility (*Zito v. Zabarsky*, 28 AD3d 42, 46 [2d Dept 2006]); *Straus v. Straus,* 136 A.D.3d 419 (1st Dept. 2016).

D. Questions and Strategies

1. When first receive report – check carefully – inadmissible hearsay.
2. Who wrote report?
3. Who did grunt work? (Often not witness.)
4. Did associate write and witness signed off?
5. Drafts of report – was a draft sent to attorney before final report?
6. Work Papers.
7. Did expert independently verify any of the key performance indicators underlying the valuation?
8. Was a draft submitted to attorney prior to finalization of report?
9. Bring entire file to Court.
10. Peer review – methods and analysis.

E. Investigation of Opposing Expert

1. Transcripts, decisions – Westlaw and LexisNexis.
2. Go to expert's website, Facebook page, and scour the Internet for information.
3. Contact other attorneys, prior report.
4.Writings of experts.

XII. Bases of Expert Testimony

A. Can't really cross examine experts if don't know the proper bases of cross examination.

B. Three Bases:

1. Personal knowledge
2. Facts in evidence
3. Professional Reliability Test
    a. Accepted in profession, not by this witness
    b. Reliability (*Hambsch*)
    c. Cannot be principal basis (*Brady v. Bordon*), but a link in chain
    d. Examples: pension actuary; forensic mental health expert (collateral sources).

C. Collaterals

1. *Murphy v. Woods*, 63 A.Ad.3D 1526 (4TH Dept. 2009) – "… Family Court erred in permitting a "licensed mental health counselor," who examined the parties' child and was called as a witness by the mother, to offer an opinion that was based in part upon his interviews with collateral sources who did not testify at trial. There are two exceptions to the general rule requiring that opinion evidence be based on facts in the record or on facts personally known to the witness: if the opinion is based upon out-of-court material "of a kind accepted in the profession as reliable in forming a professional opinion or if it comes from a witness subject to full cross-examination on the trial" (*Hambsch v New York City Tr. Auth.*, 63 NY2d 723, 726 [1984] [internal quotation marks omitted]). Neither exception applies in this case."

2. *Straus v. Strauss*, 136 AD3d 419 [1st Dept. 2016] – "To extent that any hearsay declarants are not cross-examined, the motion court acknowledged that those portions of the report containing inadmissible hearsay should be stricken or not relied upon…"

D. Can have entire testimony stricken

XIII. Frye Standard

A. *Frye v. United States*, 293 F. 1013(1923) - When the questions involved does not lie within the range of common experience or common knowledge, but requires special experience or special knowledge, then the opinions of witnesses skilled in that particular science, art, or trade to which the question relates are admissible in evidence.

B. *Peo. v. Wernick*, 89 NY2d 111, 651 NYS2d 392 (1996) – The *Sugden* exception, i.e., permitting an expert to base an opinion on out-of-court evidence under certain conditions, specifically incorporates the customary admissibility test for expert scientific evidence (i.e., *Frye*), which looks to general acceptance of the procedures and methodology as reliable within the scientific community. (*Peo. v. Angelo*, 88 NY2d 217, 644 NYS2d 460).

C. Challenging Scientific Evidence

1. N.Y. Standard: Has underlying device, procedure or methodology been generally accepted within relevant scientific community. *People* v. *Wesley*, 83 NY2d 417, 611 NYS2d 97 (1994). See also, *People* v. *Angelo*, 88 NY2d 217, 644 NYS2d 460 (1996): Polygraph inadmissible in absence of proof that it had gained general acceptance.

2. People v. Wesley, 83 NY2d 417 (1994) - After the *Frye* inquiry, the issue then shifts to a second phase, admissibility of the specific evidence—i.e. the trial foundation—and elements such as how the sample was acquired, whether the chain of custody was preserved and how the tests were made.

7

CROSS EXAMINATION OF MENTAL HEALTH PROFESSIONALS

I. Right to Cross Examine

A. *Musumeci*, 267 AD2d 364, 700 NYS2d 71 (2nd Dept., 1999): "The Supreme Court improperly precluded the defendant from cross-examining the court-appointed forensics expert and from calling his own forensics expert (*see Matter of Friedel v. Board of Regents of University of State of N.Y.*, 296 N.Y. 347, 73 N.E.2d 545; *see also People v. Ramistella*, 306 N.Y. 379, 118 N.E.2d 566; *People v. Hill*, 161 A.D.2d 506, 556 N.Y.S.2d 286). Accordingly, the defendant was denied his right to properly present his case on the issue of custody."

B. Court has no right to receive and consider any evidence that you do not have the right to cross – examine.

C. Case re: probation department investigation after evidence closed
1. Sole exception - in camera interview

II. Forensic Report not Business Record (CPLR 4518)

A. *Palma S. v. Carmine S.*, 134 Misc.2d 34, 509 NYS2d 527 (Fam..Ct., Kings Co., 1986):

"Unlike Dr. Milani, Dr. Abbott never testified in any action between the parties and, of course, was never cross-examined. His report, were to be admitted, would be received solely as a business record under CPLR § 4518 and as set out in *Hessek*. In *Hessek*, however, the court limited the admissibility of the medical records to certain factual information contained in the reports which had some bearing on the factual issues to be resolved. In the case at bar, the reports of Dr. Abbott were prepared, not in the course of the parties' treatment, but at the request of this court so that Dr. Abbott could give his opinions, diagnosis and recommendations at the instant custody hearing. Therefore, any factual information which may be contained therein regarding the examination would be composed of Dr. Abbott's subjective descriptions of the parties or the contentions of the respective parties. Without Dr. Abbott's testimony his subjective descriptions cannot be admissible and the contentions of the parties which are merely incidental to the issues to be resolved by this court from all of the evidence and testimony at trial are not relevant outside of the framework of the doctor's expert opinion. This is especially true since Dr. Abbott was never cross-examined regarding the contents of his reports. Accordingly, CPLR § 4518 is inapplicable, and these reports will not be admitted even as a business record."

III. Pre-Trial Strategy - Forensic Report

A. Getting the Report (in advance of trial)
   1. Less of a problem today
   2. Sign a Stipulation
   3. New Form (Exhibit "A")

B. Raw test data - Special Circumstances Standard Rejected

1. The notes and raw data of a court appointed neutral forensic psychologist are relevant and material to the issue of custody and "special circumstances" need not be present to direct the release of such data. Accordingly, the forensic evaluator's raw data, recordings, notes, tests, test results, and all material relied upon and created during the evaluation process are discoverable by both parties and by the Attorney for the Children. Additionally, the parties themselves are allowed to read the report, as well as the raw data, albeit the parties shall not be provided with a copy of the report but will be allowed to review it and the raw data in their attorney's office with an attorney present. The parties will be permitted to take notes, but will be precluded from taking photos and/or copies of the report and/or the raw data. The evaluator is directed to maintain and provide copies of all the raw data materials to the Court, which in turn, will provide same to counsel upon the signing of a stipulation with the provisos set forth above. *J.F.D. v. J.D.*, 45 M3d 1212(A), 3 NYS3d 285 (S.Ct. Nassau Co., 2014, Goodstein, J.).

IV. Motion in Limine - Redact Impermissible Hearsay - Professionally Reliable Hearsay Exception

A. Examples
   1. Report itself
   2. Statements from "collaterals" (statements to evaluator by nonparty)
   3. Statements by litigants which are not admissions

4. Documents - school records, police reports, social services reports etc. - some may be business records, some may not

V. Confirmatory Bias (Distortion)

A. The inclination to seek information that will confirm an initially-generated hypothesis and the disinclination to seek information that will disconfirm that hypothesis,

B. Bolstering - Evaluator, motivated by desire to bolster a favored hypothesis, intentionally engages in selective reporting or skewed interpretation of data.

VI. Closing Escape Hatches

A. Cardinal principle of cross examination

1. "*Much depends upon the sequence in which one conducts the cross-examination of a dishonest witness. You should never hazard the important question until you have laid the foundation for it in such a way that, when confronted with the fact, the witness can neither deny or explain it."* Francis Wellman, *The Art of Cross Examination.*

B. Example: Cross examining with prior inconsistent statement –deposition transcript

C. Think of all the ways a witness can try to wiggle out and deny responsibility for the statement

D. Where witness' response is "Really did not understand the question"

1. Recall at beginning of examination, I stated "If you don't understand…"
2. When I asked you (question in issue) you did not tell me that you did not understand the question?
3. When I asked you the question, you did not ask me to repeat it?
4. You did not correct your answer when you returned the transcript with the errata sheet?

VII. Dealing with Objections During Cross Examination

A. Objections:
Beyond the Scope
Speculation
Argumentative. Not really valid - badgering the witness
Assumes facts not in evidence
Mischaracterization of the evidence
Compound Question
Repetitive. The question has been asked and answered.
Hearsay
Lack of Foundation.
Privileged

Relevance. Remember that questions which seek to elicit bias, prejudice or interest of the witness are permissible.
Competence. The witness is not competent to answer the question. Competence also refers to the inability of a witness to testify owing to age, infirmity, statutory authority (CPLR 4502(a))

B. If know it is an improper question, withdraw and rephrase when objection is made.

VIII. Combating the Hearsay Objection

A. Admitted not for truth

1. Hearsay is not involved as the question and proposed answer is offered not for the truth of the matter but for some other relevant purpose that you set forth

B. State of Mind

1. Hearsay is not a valid objection because the question and proposed answer is offered solely to show the state of mind of the declarant or hearer of the statement and state of mind is relevant.

C. Verbal Act

1. Hearsay is inapplicable as a verbal act is being shown;
    a. Words themselves have legal significance
    b. Help explain an otherwise equivocal or ambiguous act

D. Hearsay Exception

1. Albeit the question calls for hearsay, it fits within one of the recognized exceptions to the hearsay rule

IX. Other Areas of Inquiry

A. Obligated by ethical guidelines to test variable hypotheses

B. Discrepancy between contemporaneously-taken notes and final report

C. Documents which were made available and should have been utilized but were ignored

D. Choice of collaterals interviewed

E. Influence of Examiner

1. Acknowledgment that exceptional case where final conclusion based solely on methods that are independent of examiner's judgment
2. Limits and deficiencies of clinical judgment

3. Examiner exerts considerable effect on data obtained
4. Patients react differently when seen by different psychiatrists.

F. Evaluation almost always involves prediction.

1. Inability to predict future violent behavior - *Tarasoff v. the Regents of the University of California, 17 C.3d 425 (1975)* - brief of American Psychiatric Association.
2. The assumption that a psychiatrist can accurately predict dangerous behavior lacks any empirical support.

G. Conclusions based on invalidated and speculative theories of child development.

X. Guidelines

A. American Psychological Association, *Guidelines for Child Custody Evaluations in Divorce Proceedings* (American Psychological Association, 1994)

1. §11 - *"multiple methods of data gathering"* (convergent validity) - Important facts and opinions are documented from at least two sources whenever their reliability is questionable.
2. §12 - the psychologist interprets any data from interviews or tests as well as any questions of data reliability and validity, cautiously and conservatively, seek convergent validity.
3. Familiarity with Literature - §5B - Requires use of current knowledge of scientific and professional developments.

4. Person not evaluated - §13 - precludes opinions about any individual not personally evaluated, but does not preclude reporting what an evaluated individual has stated about such a person.

5. Record keeping - §16 - requires maintaining all records in accordance with APA Record Keeping Guidelines (APA, 1993), and states that "All raw data and interview information are recorded with an eye toward their possible review by other psychologists or the court where legally permitted."

XI. Psychological Testing - General

A. Methods of scoring and interpretation

1. Computer based
    a. Text in report lifted from computer read-out.
    b. Much of data relevant to reliability proprietary in nature and thus kept secret from particular evaluator.

B. Psychologist interprets

1. Treatises and manuals for guidance - integrates test data with other information

obtained through interviews and other methods.

2. Cross-examine re: interpretive strategy.

C. Reliability/Validity Analysis

1. Professional reliable hearsay rule
2. APA Ethical Principles and Code of Conduct (2002 - Effective 06-01-03)

a. 9.02(b) Psychologists use assessment instruments whose validity and reliability have been established for use with members of the population tested. When such validity or reliability has not been established, psychologists describe the strengths and limitations of test results and interpretation.

b. APA Ethical Principles and Code of Conduct (2002 - Effective 06-01-03) - 9.06 Interpreting Assessment Results - When interpreting assessment results, including automated interpretations, psychologists take into account the purpose of assessment as well as the various test factors, test-taking abilities, and other characteristics of the person being assessed, such as situational, personal, linguistic, and cultural differences, that might affect psychologists' judgments or reduce the accuracy of their interpretations. They indicate any significant limitations of their interpretations. (*See also* Standards 2.01b, c, Boundaries of Competence, and 3.01, Unfair Discrimination.)

c. APA Ethical Principles and Code of Conduct (2002 - Effective 06-01-03)

(1) 9.09 Test Scoring and Interpretation Services - Psychologists who offer assessment or scoring services to other professionals accurately describe the purpose, norms, validity, reliability, and applications of the procedures and any special qualification applicable to their use.

(2) Psychologists select scoring and interpretation services (including automated services) on the basis of evidence of the validity of the program and procedures as well as on other appropriate considerations. (*See also* Standard 2.01b and c, Boundaries of Competence)

(3) Psychologists retain responsibility for the appropriate application, interpretation, and uses of assessment instruments, whether they score and interpret such tests themselves or use automated or other services.

D. Flens, J.R., "The Responsible Use of Psychological Testing in Child Custody Evaluations," Journal of Child Custody, Vol. 1, Nos. 1 & 2 (2005) & simultaneously published in book form: Flens, J.R., Drozd, L, *Psychological Testing in Child Custody Evaluations*, (Haworth, 2005), p. 17: "A problem in the use of interpretive scoring programs provided by testing services is that the ethical criteria of 9.09(b) may be impossible to meet. Presently, the algorithms (i.e., the program logic and decision rules) used to generate the statements in the computer-generated test interpretations (CGTI) are proprietary secrets and not available for review by the evaluator. Therefore, it is not possible for evaluators to know how to answer important questions about how the program generates the statements found in CGTIs."

XII. MMPI-2

A. Most widely known and used standardized test of personality

1. Objective personality test (means demands a structured response; no free form association or a projection of subject's feelings into the test); as opposed to projective tests which are diagnostic tests in which the test material is unstructured so that responses will reflect aspects of the subject's underlying personality and psychopathology. (Rorschach)
2. 567 true-false questions
3. 9 validity scales
4. MMPI-2 - adults age 18 and over; MMPI-A - Adolescents - 14-18

B. Normative sample group - MMPI-2

1. 1462 women; 1138 men; randomly drawn from California, Minnesota, North Carolina, Ohio, Pennsylvania, Virginia, Washington state
2. Men: 82% white; Women: 81% white
3. Age range - 18-84
4. Mean educational level - 13 years

C. Validity and Reliability statistics

1. Reliability - degree to which a test produces results that are free of measuring errors, i.e., consistency of the results of a test.
2. Reliability coefficients - number that falls in a range of zero (for no reliability) to one (indicating perfect reliability).
3. Difficulties of personality assessments of people enmeshed in family custody disputes.

D. Quality of information suspect

1. Self-protection
2.Assert their lack of problems
3. General lack of appropriate measures for the family custody litigation setting
4. *See* Pope, Butcher, & Seelen, *The MMPI, MMPI-2 and MMPI-A in Court*, American Psychological Assn., 2002.

E. Computer-generated MMPI profiles

1. Q: In your written report, have you included any work, conclusion or words of others without acknowledging that these came from other sources?

F. Other questions

QUESTION	ANSWER
On the MMPI-2, at what level is a clinical score generally considered significant?	A score on a clinical scale is generally considered significant when it reaches or exceeds 65.
Did you administer the	Gave the instructions, personally monitored

MMPI-2?	the person, etc.
What instructions were given to the test taker?	Instructions about answering all questions (affects validity)
Who scored the test?	Compare scoring method used with method set forth in manual
By what method were the interpretive statements derived from the MMPI-2 scores and profiles?	The witness may have used a computer-generated scoring and interpretation service that provide a printout of the scores, profile and interpretation.

XIII. DSM V- American Psychiatric Association

A. DSM-V – Cautionary Statement

1. "However, the use of DSM-V should be informed by awareness of the risks and limitations of its use in forensic settings. When DSM-V categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis."

B. Classification and nomenclature for mental disorders

C. Example - 301.4 - Diagnostic criteria for *Obsessive-Compulsive Personality Disorder*

A pervasive pattern of preoccupation with orderliness, perfectionism, and mental and interpersonal control, at the expense of flexibility, openness, and efficiency, beginning by early adulthood and present in a variety of contexts, as indicated by *four (or more) of the following*:

- *is preoccupied with details, rules, lists, order, organization, or schedules to the extent that the major point of the activity is lost*
- *shows perfectionism that interferes with task completion (e.g., is unable to complete a project because his or her own overly strict standards are not met)*
- *is excessively devoted to work and productivity to the exclusion of leisure activities and friendships (not accounted for by obvious economic necessity)*
- *is over conscientious, scrupulous, and inflexible about matters of morality, ethics, or values (not accounted for by cultural or religious identification)*
- *is unable to discard worn-out or worthless objects even when they have no sentimental value*
- *is reluctant to delegate tasks or to work with others unless they submit to exactly his or her way of doing things*
- *adopts a miserly spending style toward both self and others; money is viewed as something to be hoarded for future catastrophe*

REDIRECT EXAMINATION

I. Only if really necessary– tends to highlight the areas you think are weakest in your witness.

II. Exception – when cross examination included an area not covered by direct.

SUMMATION

I. Work on at the end of each day of trial

A. Fresh in mind

B. Will keep you focused on the important themes of the case

C. Trick is to be within 80%

1. It has been said that once you prepare your case, you can outline your closing statement before the trial begins and if you're 80% accurate, you have prepared the case well.

II. Opening is the prediction of what the evidence will prove. Closing is a recitation of what actually occurred at trial.

A. Case coalesces in summation
1. Not one knockout punch

III. Speak in first person – "I think", "I feel", "I believe"

A. Do not be hesitant to give opinion about the evidence

B. Why the facts as they emerged in trial mean you win

IV. Closing is argument, not regurgitation

A. Marshal the relevant evidence

B. Not a seemingly endless recitation of all the facts; only those that support your position or refute your adversary's position.

C. Arguments based upon the evidence

V. Use of alliteration to emphasize points – makes a theme more memorable

8

AUTHENTICATION & EVIDENTIARY FOUNDATIONS

I. Meaning of Authentication

A. The proponent of evidence must prove authenticity as a condition to the admission of evidence by the laying of a proper foundation.

B. Proving authenticity involves proving that the proffered evidence (writing, tape, model, summary, etc.) is what the proponent claims it to be.

C. Laying the proper foundation does not assure admissibility as the document, object or testimony may be barred by means of some other evidentiary rule (e.g., hearsay).

D. Chain of Custody

1. A chain of custody is employed when the evidence itself is not patently identifiable or is capable of being replaced or altered (e..g, drugs) (*Peo. v. McGee*, 49 NY2d 48, 424 NYS2d 157 [1979]).

2. Mere identification by one familiar with the object, however, suffices when the evidence is nonfungible, unique and not subject to alteration. (*Peo. v. Taylor*, 206 AD2d 904, 616 NYS2d 116 [4th Dept. 1994].)

II. Best Evidence Rule

A. The Rule

1. When seek to prove the *contents* of a writing, recording or photograph, the original of the writing, recording or photograph is required. (*Schozer v. William Penn Life Ins.*

Co. of New York, 84 NY2d 639, 620 NYS2d 797 (1994); *Flynn v. Manhattan & Bronx Surface Transit Operating Authority*, 61 NY2d 769, 473 NYS2d 154 (1984).

2. Does not apply when seek to prove a fact that has an existence independent of a writing, photograph or recording, despite the fact that a writing, photograph or recording evidencing the fact sought to be proved exists.

a. Example - If a photograph is offered to illustrate the witness' testimony, not attempting to prove the contents of the photograph, the best evidence rule does not apply. If, however, offer photograph to prove contents of a particular scene, rule applies.

b. Example - A party seeking to prove payment of a debt may do so by testimony even though a receipt for payment was given. The payment, not the terms of the receipt, is the fact to be proven.

B. *See Ferraioli*, 295 AD2d 268, 744 NYS2d 34 (1st Dept. 2002): "[a]n original writing must be placed in evidence when a party seeks to establish the contents of such writing (Schozer v. William Penn Life Insurance Co. of N.Y., 84 N.Y.2d 639, 620 N.Y.S.2d 797, 644 N.E.2d 1353). If a writing is collateral to the issue to be proven, the best evidence rule does not require its production (*Grover v. Morris*, 73 N.Y. 473, 480). By the same token, a document is not subject to the best evidence rule although related to an original writing subject to the best evidence rule if it does not vary the terms of the original (*Kelly v. Crawford*, 5 Wall. 785, 72 U.S. 785, 789, 18 L.Ed. 562; VII Wigmore on Evidence 2104 [Chadbourn Rev. 1978]). A post-nuptial agreement which provides for specific equitable distribution and which meets certain statutory requirements is valid and enforceable (Domestic Relations Law 236[B][3]; *Matisoff v. Dobi*, 90 N.Y.2d 127, 132, 659 N.Y.S.2d 209, 681 N.E.2d 376). Plaintiff's statement of net worth did not vary the terms of the post-nuptial agreement. Defendant had not made any claim that plaintiff had failed to disclose or had concealed income or resources in connection with the post-nuptial agreement. Indeed, the trial court found plaintiff's statement of net worth only relevant to defendant's affirmative defense of duress. That defense, however, was unrelated to plaintiff's statement of net worth since it was premised on plaintiff's threat to "commence an ugly transatlantic divorce action, forcing defendant to return to New York to litigate unless defendant gave into" plaintiff's demands as incorporated into the post-nuptial agreement. While the terms of the post-nuptial agreement were relevant to this affirmative defense, the appended statement of net worth was incidental and collateral to defendant's claim of duress. The post-nuptial agreement should have been admitted into evidence."

C. Meaning of "Original"

1. First produced and operative document

2. Duplicate originals (*Sarashon v. Kamaiky*, 193 NY 203, 86 NE 20 (1908) (where a document is executed in counterpart, each part is regarded as an original).

3. Carbon Copies. *People v. Kolp*, 49 AD2d 139, 373 NYS2d 681 (3d Dept., 1975) - On such multi-copy forms, all duplicates are admissible as originals without the necessity of producing or accounting for the absence of other counterparts.

D. CPLR 4539 -. Accurate Reproductions in Regular Course of Business - If any business, institution, or member of a profession or calling, in the regular course of business or activity has made, kept or recorded any writing, entry, print or representation and in the regular course of business has recorded, copied, or reproduced it by any process which accurately reproduces

forms a durable medium for reproducing the original, such reproduction, when satisfactorily identified, is as admissible in evidence as the original, whether the original is in existence or not. (*See Peo.* v. *May*, 162 AD2d 977, 557 NYS2d 238 (4th Dept., 1990)).

E. Secondary Evidence

1. For secondary evidence to be admissible, the proponent must establish that the original writing has been in existence, that it is genuine (if authenticity is questioned), and that a proper excuse exists for its nonproduction (*Glatter v. Borten*, 233 AD2d 166, 649 NYS2d 677 (1st Dept., 1966)).

F. Reasons for Non-production of Original

1. The original is lost - *Harmon v. Matthews*, 27 NYS2d 656 (sup. Ct., 1941) - A reasonable search was exhausted; testimony of last custodian usually required.

a. If loss or destruction was result of fraudulent design, parol evidence not admissible.

b. Loss of the original may be established upon a showing of diligent search in the location where the document was last known to have been kept and through the testimony of the person who last had custody of the original. *Schozer* v. *William Penn Life Ins. Co.*, 84 NY2d 639, 620 NYS2d 797 (1994).

2. The document is outside the court's jurisdiction and cannot be obtained; or

3. The document is in the possession or control of the adverse party who, upon due notice, has failed to produce it (Serve notice to produce).

a. Lapidus v. *NYC Chapter of NYS Assn. for Retarded Children, Inc.*, 118 AD2d 122, 504 NYS2d 629 (1st Dept., 1986) -- "That plaintiff could not produce the written employment contract upon which he relies is not fatal to his claim. Since the record contains sworn testimony showing the existence of such a document and that it was in the possession of the Association, which was duly served with a notice to produce and has failed to do so, plaintiff may offer secondary evidence establishing its contents".

4. Other bona fides reasons

a. Not error in receiving photocopy of letter from father to mother in evidence where mother testified she had left original at home because she thought copy would suffice and father admitted that he had sent the letter *see LaRue v. Crandall*, 254 AD2d 633, 679 NYS2d 204 (3d Dept., 1998).

b. Where a reasonable excuse is offered for the nonproduction of the original of a separation agreement, a party can rely upon secondary evidence, i.e., a copy of the agreement, to prove the terms of the agreement. (Accepted excuse was that original on file with County Clerk) *Story v. Brady*, 114 AD2d 1026, 495 NYS2d 464 (2d Dept., 1986).

c. Use of document which contained figures taken from other documents not produced at trial was violation of best evidence rule, absent explanation for failure to produce original documents. *National States Elec.* v. *LFO Construction Corp.*, 203 AD2d 49, 609 NYS2d 900 (1st Dept., 1994).

G. Overriding Policy

1. The more important the document to the final outcome of the case, the stricter the requirement that an evidentiary foundation be established demonstrating the loss. *(Poslock* v. *Teachers' Ret. Board*, 209 AD2d 87, 624 NYS2d 574 (1st Dept., 1995)).

2. Not error for court to apply the best evidence rule to preclude the copy of a letter and file in a malpractice action from being admitted into evidence at trial, since plaintiff failed to meet the strict requirement of proving an evidentiary foundation establishing loss and lack of improper motive for the nonproduction of the originals. *Proner* v. *Julien & Schlesinger, P.C.*, 214 AD2d 460, 625 NYS2d 207 (1st Dept., 1995)

III. Audiotapes

A. *Peo. v. Ely*, 68 NY2d 510 - Clear and convincing evidence that the offered evidence is genuine and that there has been no tampering.

B. Chain of custody showing in *Peo. v. Ely*, 68 NY2d 520, 510 NYS2d 532 (1986).

1. "The inherent difficulty with fungible goods simply is not present when evidence of a conversation is sought to be introduced, for the conversation itself is unique and the participants are available to attest to its accuracy. Thus, a chain of custody is not required for the introduction of tape recordings such as those present here." *Peo. v. McGee*, 49 NY2d 48, 424 NYS2d 157 (1979).

2. Although not a requirement there is an alternate method - requires evidence regarding the making of the tapes and identification of the speakers, and that within reasonable limits those who have handled the tape from the time of its making to the production in court; identify it and testify to its custody and unaltered state.

C. Means of authentication *(Peo. v. Ely*, 68 NY2d 520, 510 NYS2d 532 [1986]).

1. Testimony of participant to a conversation that it is complete and accurate reproduction of the conversation and has not been altered *(Tepper* v. *Tannenbaum*, 65 AD2d 359, 411 NYS2d 588 [1st Dept., 1978]).

a. Court erred in admitting tape recording where proponent failed to establish by "clear and convincing proof" that the offered evidence is genuine and that there has been no tampering with it. *(Cross v. Davis*, 269 AD2d 837, 703 NYS2d 789 [4th Dept. 2002]).

b. Harry R. v. Esther R., 134 M2d 404, 510 NYS2d 792 (Fam. Ct., Bx. Co., 1986) - do not have to be an expert to use simple tape recorder and where father testified that recording device was operable, he was capable of using it and that recording was authentic, unedited and audible, and he identified speakers, thereby a sufficient foundation having been laid.

2.Testimony of a witness to the conversation or to its recording, such as the machine operator, to the same effect

3. Foundation Elements

a. The operator of the equipment was qualified.
b. The operator recorded a conversation at a certain time and place.
c. The operator used certain equipment to record the conversation.
d. The equipment was in good working order.
e. The operator used proper procedures to record the conversation.
f. The tape was a good reproduction of the conversation.

g. The operator accounts for the tape's custody between the time of taping the time of trial. (Optional).

4. Testimony of a participant to a conversation together with proof by an expert that upon analysis of the tapes for splices or alterations there was neither.

D. Audibility

1. If a recording is partly inaudible or intelligible, it is nonetheless admissible unless those portions are so substantial as to render the recording as a whole inadmissible; matter of discretion of trial judge. (*Peo. v. Graham*, 57 AD2d 478, 394 NYS2d 982 [4th Dept. 1977]). To be admissible, the tape should be at least sufficiently audible so that independent third parties can listen to it and produce a reasonable transcript. (*Peo. v. Lebow*, 29 NY2d 58, 323 NYS2d 829 [1971]).

2. Insubstantial defects in the overall quality of a recording affect its weight, not its admissibility (*Peo. v. Morgan*, 175 AD2d 930, 573 NYS2d 765 [2d Dept. 1991]).

E. Surreptitious Recordings

1. Error to hold that defendant was precluded from using any audio tapes at trial to impeach witnesses on the ground that the defendant secretly recorded conversations he had with the plaintiffs and nonparty witnesses; the tapes are admissible if they are relevant and material and their admission does not violate the rules of evidence. (*Breezy Point Coop. v. Young*, 234 AD2d 409, 651 NYS2d 121 [2d Dept. 1996]).

2. Illegal Eavesdropping

a. CPLR 4506(3): "An aggrieved person who is a party in any civil trial, hearing or proceeding...may move to suppress the contents of any overheard or recorded communication, conversation or discussion or evidence derived therefrom on the ground that: (a) the communication, conversation, or discussion was unlawfully overheard or recorded;..."

b. CPLR 4506 does not exclude evidence of conversations "freely heard" by an eavesdropper (*see Peo. v. Kirsh*, 176 AD2d 652, 575 NYS2d 306 (1991)).

c. One party to conversation must consent - *Berk*, 70 AD2d 943, 417 NYS2d 785 (2d Dept., 1979); *Pica*, 70 AD2d 931, 417 NYS2d 528 (2d Dept., 1979) - Where conversation between plaintiff and a male not her husband was recorded by her husband without the consent of either party, it was violative of §250.05 of Penal Law and must be suppressed pursuant to CPLR 4506. A second recorded conversation between plaintiff and defendant, recorded with the obvious consent of the latter, should not be received upon a pendente lite motion, and should await resolution at trial as the possibility exists that the contents of the conversation constitute a privileged, interspousal communication pursuant to CPLR 4502.; *Cronin*, 89 Misc2d 548, 392 NYS2d 530 (Monroe Co., 1976).

IV. Photographs

A. Two purposes of photographs

1. An illustration of other testimony; or
2. Substantive evidence of the facts portrayed in the photograph.

B. General foundation - the photograph is a fair and accurate representation of the place, person, scene or subject portrayed. *(Peo. v. Pobliner*, 32 NY2d 356, 354 NYS2d 482 [1973]).

1. "Short" version - Is this photograph marked as Exhibit "D" a fair and accurate representation of the condition of the bedroom in the marital residence as it existed on April 4, 2004?

C. Foundation Elements

1. The witness is familiar with the object or scene

a. Any person familiar with the scene or object depicted may verify the photograph. Not necessary to call photographer as witness, so long as someone can testify that the photograph accurately shows what it purports to show. (*Peo. v. Byrnes*, 33 NY2d 343, 362 NYS2d 913 [1974]; *Kowalski* v. *Loblaws, Inc.*, 61 AD2d 340, 402 NYS2d 681 [1st Dept., 1978]).

2. The witness explains the basis for his or her familiarity with the object or scene

3. The witness recognizes the object or scene in the photograph

4. The photograph is a "fair, "accurate", "true" or "good" depiction of the object or scene at the relevant time

5. The photograph has not been altered

V. Videotapes

A. General use

1. Day-in-life films

2. Surveillance films - *Tran v. New Rochelle Hosp. Med. Ctr.*, 99 NY2d 383, 756 NYS2d 509 (2003) – Plaintiff is entitled to surveillance videos prior to giving a deposition.

3. Standard of living

B. Relevancy

1. *In re Chase*, 264 AD2d 330, 694 NYS2d 363 (1st Dept. 1999) – In guardianship proceeding, video-taped by a professional production crew that was interviewing Mr. Chase, a Holocaust survivor, for the Steven Spielberg project documenting the Holocaust, where Mr. Chase states that he gave his property to his children, was relevant as the evidence would have substantiated Ms. Chase's testimony that, far from being motivated by a conflict of interest, her actions were consistent with her father's wishes for the management of his finances.

C. Foundation

1. Testimony from the videographer that he took the video, that it correctly reflects what he saw, and that it has not been altered or edited is normally sufficient to authenticate a videotape. When the videographer is not called, testimony, expert or otherwise, may also establish that the videotape truly and accurately represents that was before the camera *Zegarelli v. Hughes*, 3 NY3d 64, 781 NYS2d 488 (2004).

2. The proponent of videotape evidence "must show that the tape is a true, authentic and accurate representation of the event taped without any distortion or deletion. (*Peo. v. Curcio*, 169 M2d 276, 645 NYS2d 750 [Sup.Ct., St. Lawrence Co., 1996]).

D. Lost videotape

1. Best evidence rule precludes a witness from testifying to an altercation he observed on a surveillance videotape in the absence of the tape. (*Peo. v. Jimenez*, 8 M3d 803, 796 NYS2d 232 [Sup.Ct., Bronx Co., Cirigliano, J., 2005]).

2. Cf. *Schozer v. Wm. Penn Life Ins.*, 84 NY2d 639, 620 NYS2d 797 (1994) - Lost x-ray.

VI. Voice Identification - Generally

A. Applicable whether heard firsthand or through recording.

B. A person's voice can be identified by a witness having some familiarity with the voice, and the familiarity can be acquired either before or after hearing the voice to be identified.

C. Error to preclude plaintiff from testifying about two telephone conversations because plaintiff could not recognize the speaker's voice, as the identity of a party to a telephone conversation may be proven by circumstantial evidence. (*Vinciguerra v. Otis Elevator Co., Inc*., 254 AD2d 350, 678 NYS2d 670 [2d Dept., 1998]).

VII. Oral Statements - Telephone calls

A. Telephone Directory Doctrine - *Peo. v. Lynes*, 49 NY2d 286, 425 NYS2d 295 (1980) - Examples where witness unfamiliar with voice:

1. Placing of a call to a number listed in a directory or other similar responsible index of subscribers

2. Unforced acknowledgment by the one answering that he or she is the one listed

3. Some corroborating evidence

a. Substance of conversation furnishes confirmation of caller's identity, as, e.g., when subsequent events indicate that the party whose identity is sought to be established had to have been a conversant in the telephone conversation;

b. When the caller makes reference to facts of which he alone is likely to have knowledge.

VIII. Handwriting Foundation

A. Witness Familiar with Handwriting

1. Lay witness can identify handwriting with which he is familiar either by seeing the party write, writings acknowledged by the party to be written by him or receiving correspondence from the party in response to his own communication addressed to him, *Gross* v. *Sormani*, 50 AD2d 531, 189 NYS2d 522 (3d Dept., 1959); *Peo. v. Corey*, 148 NY 476, 42 NE 1066).

2. Must be based upon familiarity *not* acquired for purposes of litigation. (*Peo. v. Molineux*, 168 NY 264, 326: "writings created post litem motam are inadmissible against a party creating them.")

a. Exemplars created after a controversy has arisen for purposes of litigation are inadmissible as they are "created at a time when defendant had a motive to disguise his handwriting." (*Nelson v. Brady*, 268 AD 226 (1st Dept., 1944); *Peo. v. Perry*, NYLJ, Oct. 27, 2000).

b. Testimony is barred based on familiarity gained for purposes of litigation. (*Hynes* v. *McDermott*, 82 NY 41, 52-54).

B. Foundation Elements

1. The witness recognized the author's handwriting on the document.
2. The witness if familiar with the author's handwriting style.
3. The witness has a sufficient basis for familiarity.

C. Foundation - Trier of fact determination

1. A trier of fact can make his or her own comparison of handwriting samples in the absence of expert testimony on the subject (*Roman v. Goord*, 272 AD2d 695, 708 NYS2d 904 [3d Dept., 2000]; *Johnson v. Coombe*, 271 AD2d 780, 707 NYS2d 251 [3d Dept., 2000]).

2. *American Linen Supply Co. V. M.W.S. Enterprises, Inc.*, 6 AD3d 1079, 776 NYS2d 387 (4th Dept. 2004) - Handwriting exemplars of the president of a corporation where relevant and should have been admitted to purpose of comparison to his purported signature on a particular contract since his signing of a 1994 contract was an issue.

D. Foundation - Expert Testimony

1. Expert testimony - comparison of disputed handwriting and exemplars
2. CPLR §4536: "Comparison of a disputed writing with any writing proved to the satisfaction of the court to be the handwriting of the person claimed to have made the disputed writing shall be permitted."
3. Foundation Elements:
   a. The proponent authenticates the exemplars.
   b. The witness qualified as an expert the document examiner.
   c. The witness compares the exemplars and the document in question.
   d. Based on the comparison, the witness concludes that the same person who wrote the exemplars wrote the document in question.
   e. The witness specifies the basis for his or her opinion, i.e., the similarities between the exemplars and the questioned document.

IX. Reply Letter Doctrine

A. Based on assumption of reliability of mail service

B. Foundation Elements
1. The witness prepared the first letter.

2. The witness placed the letter in an envelope, addressed to the author (of the second letter), and properly stamped and mailed the envelope.

3. The witness thereafter received a letter, arriving in the due course of mail.

4. The second letter referred to the first letter or was responsive to it.

5. The second letter bore the name of the author. The witness recognizes the exhibit as the second letter.

6. The witness specifies the basis on which he recognizes the exhibit.

9

CROSS EXAMINATION OF MENTAL HEALTH PROFESSIONALS- Q&A's

CROSS-EXAMINATION OF FORENSIC PSYCHIATRIST

NONCOMPLIANCE WITH ORDER OF REFERRAL

Q: Doctor, your involvement in this case emanated from a court order by Justice Ashton?
A: Correct.
Q: And that order appointed you and set forth your assignment and obligations in connection with the forensic evaluation, correct?
A: Yes.
Q: That order by Justice Ashton set forth findings that you were required to make and findings which you were directed not to make, correct?
A: Yes.
Q: Doctor, and in performing this forensic evaluation you considered all of the relevant facts?
A: I believe I did.
Q: To the extent you did not do so, your evaluation would not be complete, true?
A: Yes.
Q: Your methodology was completed?
A: I believe it was.
Q: To the extent it was not complete, it would be wrong and less reliable?
A: Yes.
Q: Your investigation in methodology was fair?
A: I believe it was.
Q: To the extent it was not fair, it would be inappropriate?
A: Yes.
Q: In fact, Doctor, you note in your report on page 2, under the heading "reason for referral", the specifics of the court order of Justice Ashton?
A: I see that, yes.
Q: When you undertook this assignment, did you consider yourself bound by the order of Justice Ashton as to what you were to do?
A: Yes.
Q: Did he carry out that order in both the letter and in spirit?

A: Yes.
Q: For example, you are directed not to make a specific recommendation as to legal custody?
A: That is part of the order, correct.
Q: Justice Ashton directed you to address "suggested parent access times including overnight visits"?
A: Yes.
Q: Doctor, isn't it a fact that your 32 page, single-spaced report contains no "suggested parent access times including overnight visits" as directed by Justice Ashton?
A: In specific terms, no.
Q: You did not do that in any terms, isn't that correct, Doctor?
A: I guess you are right.
Q: The order of Justice Ashton also directed you to address "suggested decision-making roles of each parent", correct?
A: Yes.
Q: Again, Doctor, a perusal of your report fails to contain any suggested decision-making roles of each parent, true?
A: Let me see. It appears that way.
Q: The order of Justice Ashton also directs that you address "suggested spheres of influence"?
A: Yes.
Q: And your report fails to address that direction by Justice Ashton as well?
A: I guess so.
Q: Doctor, as a forensic evaluator appointed by a court pursuant to a court order, do you believe you have the right to ignore any of the directions made by the court in its order of referral question?
A: No.
Q: And yet, Doctor, we have just noted three areas that you were directed to address and which you failed to do so?
A: It appears that way.

PEER REVIEW

Q: You are familiar with the peer review process?
Q: By peer, we are referring to people in your area of science?
Q: So, the peer review process involves a review of one's opinions by her scientific peers of colleagues?
Q: It allows one to get valuable feedback from other scientists about what they think of your opinions?
Q: It provides a sense of whether your opinions are generally regarded as supportable and reliable by other experts in your field?
Q: This can be very valuable in the scientific process, correct?
Q: One form of peer review involves standing up at meetings and sharing your views with peers of fellow colleagues?
Q: And you are discussing the bases of your opinions with them?
Q: This allows your peers to comment on the strengths or weaknesses of your opinions?
Q: You have been involved in this litigation for four (4) years, correct?
Q: You have never stood in front of a group of your fellow scientists to share with them the opinion you shared with this court on direct examination?
Q: Another form of peer review is publishing articles?
Q: When you submit an article to a professional journal, the article is peer reviewed before it is published?
Q: This, too, can be a valuable part of the scientific process?
Q: It might help weed out what is generally referred to as junk science?
Q: You have never submitted a manuscript stating your opinions as expressed to this court today to a journal for publication?...

EXPERIENCE IN TESTIFYING

Q: In reciting your qualifications, Doctor, you told us you have testified on numerous occasions?
A: Yes.
Q: And many of those occasions involved the issue of the determination of child custody, correct?

A: Certainly.

Q: In many of those cases, Doctor, and unlike this case, there was no restraint placed upon you in making a recommendation that one parent or the other should be the sole custodian, or that the parent should be joint custodians, true?

A: Yes, with some judges I am free to make a recommendation.

Q: And there are occasions when you recommended sole custody, and occasions where you recommended joint custody?

A: Yes.

Q: Doctor after you testify in a case you leave the courtroom correct?

A: Correct.

Q: You don't stay in the courtroom to hear the rest of the testimony?

A: Generally, no.

A: I guess in some cases that is true.

Q: In some cases Doctor, do you even know if the court followed the recommendation you made or made some other custodial arrangement inconsistent with your recommendation?

A: I think in most cases I learn from one source or another, but there are some where I probably do not know.

Q: You keep no running record or statistics, do you Doctor, about when the court follows your recommendations or does not follow your recommendations?

A: No statistics or formal records.

Q: Doctor you have made recommendations on custody evaluations for a good number of years, am I correct?

A: Definitely.

Q: So where the court has followed your recommendations, the children subject to these proceedings have grown and presumably matured over the years?

A: Surely.

Q: Doctor, have you done any follow-up studies as to how the children have fared over the years, where the court has followed your recommendation?

A: No I have not.

Q: Conversely, have you done any follow-up studies as to how children have fared over the years where the court has not followed your recommendation?

A: No I have not.

Q: So, Doctor, we have no *quantitative or empirical* means of testing the *validity or efficacy* of your recommendations, as we don't know how these children have fared over the years?

A: Well, I guess you can say that.

Q: Doctor, whether you've testified 3 times or in excess of 30 times as you stated, we really haven't learned anything from your experience because of the lack of any empirical or other data as to the development of the children?

QUALIFICATIONS; BOARD CERTIFICATION; EXPERIENCE

Q: Doctor, at the commencement of your direct examination, you told the court of your qualifications and the court received into evidence your curriculum vitae, correct?
A: Yes.
Q: I note that you told the court that you are board certified in adult & child and forensic psychiatry?
A: Correct.
Q: Research has not demonstrated a relationship between Board certification and competence, has it?
A: Not to my knowledge.
Q: Has it been demonstrated through published scientific research that the conclusions of board-certified psychiatrists are more accurate than those of psychiatrists who lack Board certification?
A: I am not aware of any such research.
Q: Are there a number of publications and reputable psychiatric journals to the effect that there is no relationship between Board certification and competence has been established?
A: I am not aware of that either.
Q: Isn't Board certification defined by the Board as indicating only minimal competence in the field?
A: Well, you have to pass a test so I don’t think it is “minimal”.
Q: And Doctor, you are certified in forensic psychiatry as well?
A: Yes.
Q: This is a relatively new kind of certification, is it not?
A: Yes.
Q: Similarly, it has not been demonstrated, through research that such certification indicates a higher level of competence or accuracy of conclusions than for those not so certified, has it?
A: I am not aware of any such research.

PROFESSIONAL ASSOCIATION PROTOCOLS

Q: Doctor, you have been practicing psychiatry for many years now?
A: Yes.
Q: During that period of time, you have been a member of the American Academy of Child & Adolescent Psychiatry, correct?
A: I am a member, yes.
Q: In fact, you have been an active member, serving on various committees of that association?
A: Correct.
Q: You are familiar with the fact that the American Academy of Child & Adolescent Psychiatry promulgates guidelines for its members that are engaged in forensic psychiatry?
A: Yes.
Q: Specifically, the professional organization published a Summary of Practice Parameters for Child Evaluation?
A: Yes.
Q: As a long-time active member of this association, you are familiar with these guidelines?
A: In a general sense, yes.
Q: You have employed these guidelines in your practice?
A: I believe I have.
Q: You have employed these guidelines in connection with the forensic evaluation in this case?
A: Again, I believe I have.
Q: Doctor, in those parameters, it states, and I quote: “The evaluator should consider meeting with the parents together at least once if the parties consent to it.” It is a fact that you never met with the parents together and you did not seek consent to a joint meeting with the parents?
A: That is correct.
Q: It further states: “Explore any allegations parents make against each other,” correct?
A: Yes.
Q: Doctor, is it a fact that my client made a number of allegations against his wife, particularly with respect to her alcoholism, that you did not explore?
A: I believe I took up these allegations with the Mother.
Q: If you did that would be included in what you have described as a comprehensive report that you rendered to the court, correct?
A: Yes.
Q: Can you point to that part of the report, Doctor, which describes your exploration of my client’s allegations and specifically a discussion of same with the mother?
A: I believe inferentially it is discussed in my general discussion about the mother’s alcoholism.
Q: Doctor, those same practice parameters, in the section entitled “Structuring the Evaluation”, it tells the examiner to request all legal documents from both sides, reading them not for the truth of the contents but, rather, for insight into what the parties are charging and counter-charging, correct?
A: You seem to have them in front of you, so I am sure it is correct.
Q: Doctor, in the section of your report entitled "Review of Records", which goes from page 26 through 29 of your report, you list eight records that you reviewed, correct?
A: Yes.
Q: And you agree with me Doctor, that none of them include the legal documents from either or both sides of this controversy?
A: Yes.
Q: Doctor, those same practice parameters state that the examiner should "Consider interviewing extended family, friends, neighbors, and alternate caregivers, such as babysitters.", correct?
A: Again, I am sure it so states.
Q: You did not interview any extended family, friends or neighbors of either of the parents, true?
A: True.
Q: Doctor, although your report states (page 3) that the family had live-in help until one year ago, and there is a full-time sitter Monday through Friday with variable hours, you did not interview any such person, correct?
A: Correct.
Q: Those same parameters state “Consider whether a visit to one or both homes would be helpful.” Did you visit the home of the parties?
A: No, I did not believe that was necessary.

FAILURE TO CONTACT SCHOOL PSYCHOLOGIST FOR CHILD

Q: Doctor, in doing your forensic analysis is it important that you do as complete an analysis as possible?
Q: You want to gather as much pertinent information about the subject of your report as is possible, correct?
Q: Did you strive to do that in the present case?
Q: Doctor, there is an important difference between an expert opinion and a personal opinion?
Q: The defining attributes of an expert opinion is the procedures employed in formulating the opinion, and in using the body of knowledge that forms the foundation upon which those procedures were developed, correct?
Q: You agree, do you not, that if the accumulated knowledge in your field was not utilized, the opinion expressed would not be an expert opinion, but rather a personal opinion, albeit one being expressed by an expert?
Q: Forensic experts are expected to investigate the accuracy of information provided by those being evaluated, correct?
Q: You are court-appointed correct, Doctor?
Q: Would you agree as a general proposition that the fact that an expert is court-appointed does not guarantee either objectivity or impartiality?
Q: In attempting to do a complete analysis, would mental-health professionals who had interaction with Peter, Jr. be important persons to contact?
Q: Such a person will be deemed a collateral contact?
Q: If you did contact such person it would be noted in your report, correct?
Q: Doctor, in your report you note that Peter, Jr. is in a socialization program and sees school psychologist, Julia Cohen, weekly?
A: Yes.
Q: You agree with me Doctor that the school psychologist thereby has very frequent contact with Peter, Jr.?
A: I assume so, at least weekly as it states.
Q: And this frequent contact is in the school setting, correct?
A: Yes.
Q: And the school psychologist would presumably have access to information concerning: the child's school performance, interaction with his peers, input from the child's teachers, classroom behavior, test scores and grades for the child and other pertinent information that could bear upon your assessment in this case?
Q: Doctor, do you see in your report and I'm referencing page 19 and consecutive pages, you note the collateral contacts that you contacted and spoke with in connection with this case?
A: Yes.
Q: You note that you had a telephone conference with a psychologist who treated Peter, Jr. 3 years ago?
Q: You are aware that the school psychologist, Julia Cohen, sees Peter, Jr., weekly and on an ongoing basis, including at the present time?
Q: You also note that another collateral contact was a substance abuse counselor of the mother?
Q: You also note that he spoke with a Doctor Burke, who treated Peter, Jr. and other family members?
Q: This was done in private sessions outside of the school setting, correct?
Q: Doctor, you do not have any direct contact, by telephone or otherwise with the school psychologist of Peter, Jr., namely, Julia Cohen?
Q: Will you agree with me that the thoughts and observations of a school psychologist who saw the child weekly and had access to the child's school records and performance, and interaction with his peers, would be pertinent to a full and complete assessment of this child for the purposes of your forensic evaluation?
Q: In fact, you did not even attempt to contact the school psychologist, did you?
Q: So, at least in that respect your report is not as complete as it should have been or what you would have liked it to have been?
Q: And this court will not have the benefit of this pertinent information in making its assessment as to the custody of Peter, Jr.?
Q: In your initial interview with the mother (p.3), did she tell you that there is tremendous tension in the house because "there is little or no agreement between the parents about how to parent Peter, Jr."
Q: So the issue of parenting of Peter, Jr. was a major stressor to this entire family, correct?
Q: So collecting and analyzing all of the pertinent information about Peter, Jr. would be all the more important, correct?

LAW GUARDIAN (ATTORNEY FOR CHILD)

Q: Doctor, the report you issued in this case, was it a comprehensive report?
A: I believe so.
Q: You included all of the facts that you considered relevant in your evaluation?
A: Yes.
Q: You reviewed the report before you submitted it to the Court?

A: Yes.
Q: And you reviewed it again before you testified in Court today?
A: I reviewed it yesterday.
Q: Do you still believe it is comprehensive and states all the relevant facts?
A: Yes.
Q: You are aware that the Court appointed an attorney for the children, Mr. Prince?
A: Yes.
Q: In that capacity, you know that he regularly communicated with the children and acted as the children's advocate?
A: Yes.
Q: Mr. Prince then might have had important information to impart that would be relevant to your comprehensive evaluation?
A: Yes, he certainly might.
Q: There is no reference in your report, Doctor, to you having met with or conversed with Mr. Prince?
A: I guess there is not.
Q: So whatever relevant information he may have had, you were not privy to it?
A: No.
Q: And it was not contained in what you have described as a comprehensive report?
A: No.
Q: So collecting and analyzing all of the pertinent information about Peter, Jr. would be all the more important, correct?
A: Possibly.

CONFIRMATORY BIAS; PRINCIPLE OF PRIMACY

Q: Doctor, are you familiar with the term confirmatory bias?
A: Yes, I am.
Q: Confirmatory Bias is the tendency of clinicians, and people in general, to maintain beliefs despite the force of counter evidence, and to pay particular attention to evidence that supports their beliefs, misinterpret ambiguous or nonsupport of evidence as supporting their beliefs, and disregard or dismiss counter evidence, would that be a fair analysis of the term?
A: Yes.
Q: Doctor, you are familiar with the Principle of Primacy?
A: Yes I am.
Q: That principle basically means that when faced with conflicting stories that which we hear first we generally tend to believe?
A: That is the principle.
Q: In doing your clinical examination in this case, you first interviewed the mother for 2 hours, true?
A: That is correct.
Q: You then had a second interview with the mother, lasting 1.75 hours?
A: Yes.
Q: You then had a third interview, this one with the 3 children and the mother, which also lasted 1.75 hours, correct?
A: Yes.
Q: Accordingly, you spent 3.75 hours with the mother, and 1.75 hours with the children and the mother, before you ever met or spoke to the father, correct?
Q: Doctor in your meetings with the mother during this 3.75 hours, she told you many negative things about the father correct?
A: She did.
Q: For example, she told you:
Jr. did not have a good relationship with the father.
Father indulges Jr.'s passion for trains.
Father is unstructured with all of the children.
Father opposed to psychiatric treatment and psychotropic medication for Jr.
Father has little to do with the 2 younger children.
Father is rejecting of the daughter because he wanted a 3rd son.
Father does not have many friends.
When mother was in rehab, the nanny almost quit because of father's deplorable care of the children.
Father has a lot of the same issues as the oldest son and ignores the other two children.
Father definitely favors Jr., which the 2 younger children resent.
Relationship between Jr. and his father is dysfunctional in many ways.
Father has a laissez-faire attitude concerning the children socialization, bedtime, rules and structure.

Father shows no interest in Alan's enthusiasm for sports
He used my alcoholism as a weakness, not a disease (p.7)
He makes derogatory comments about my drinking in front of the children (p.7)
Q: Doctor from this information, is it true that you form some initial oppressions from the data that was presented to you?
A: It would generally be impossible not to.
Q: And is there some literature to the effect that psychiatrists frequently form diagnostic impressions very early in the clinical examination, sometimes in a matter of minutes?
A: That happens at times.
Q: What I want to know, Doctor, is there literature and research in your field that this occurs?
A: Yes.
Q: Is there a body of research showing that initial beliefs are often maintained, even in the face of counter evidence?
A: I have seen such research.
Q: Is there a body of literature indicating that once clinicians have taken a position or adopted a conclusion, that they apply very high standards of rigor about any contradictory evidence and will accept a much lower standard of rigor from any data that supports their position?
A: Some believe that.
Q: Doctor, are you familiar with the term "premature closure"?
A: Yes I am.
Q: Does that term refer to a tendency to form conclusions very early in the data collection process?
A: Yes.
Q: Does the literature show that this sometimes results in becoming resistant to data which might indicate that the initial conclusion was wrong?
A: Yes.
Q: And we've established that you heard the mother for 3 and three-quarter hours as the initial interviews in your forensic analysis?
A: Yes.
Q: Doctor, you not claiming that because you are a psychiatrist, that unlike other human beings, you are immune from the effects of confirmatory bias, premature closure, or the principal of primacy?
Q: In fact, Doctor, on page 7 of your report this section entitled "Mental status exam", in that section you present conclusions and findings and impressions about the mother correct?
A: Yes.
Q: This was based upon just 3 and three-quarter hours of interviews with her alone, and the additional time when she brought the children to see you, all before you ever met or spoke to the father?
A: That is the proper sequence.
Q: In fact, Doctor, you first saw the mother for the two-hour session on January 28, 2008, true? And then you saw her for a 2nd time on February 5, 2008, true?
A: True.
Q: It wasn't until 2 months after you first met the wife and have a two-hour session that you first met and spoke with the father?
A: That is about correct.
Q: Doctor, you care about the people involved in the cases in which you act as a forensic evaluator?
A: Of course.
Q: And even after you see an individual, you reflect upon the clinical examination, review your notes, think about impressions and possible conclusions?
A: Constantly.
Q: And you did this in the two-month interval between your initial interview with the mother and your initial interview with the father, correct?
A: I am sure I did.
Q: Doctor, you were the one who arranged the appointments in the sequence of events regarding the forensic evaluation?
A: I was.
Q: You determined who would be interviewed, the sequence of the interviews, the length of the interviews, the place of the interviews, the collateral sources that would be contacted and other aspects of the forensic assignment ordered by Justice Ashton?
A: Yes.
Q: You had the option, did you not, to see each parent on the same day for the same amount of time?
A: I guess I could have done that.
Q: You could have seen the mother for an hour and the father for an hour on the same date, correct?
A: As I said, that could have occurred.
Q: Had you done that you would have had input from both parents as part of the formulation of your initial impressions in

your initial data collection?
A: I presume so.
Q: Had you done this, you would have mitigated or ameliorated, if not eliminated, the effects of confirmatory bias, the principle of relevancy, and premature closure?
A: Again, presumably that could have occurred.

ALCOHOLISM

Q: Doctor, your report notes that the mother describes herself as a recovering alcoholic (p.4) and you quote her as saying: "I have been in recovery for 5 or 6 years with one relapse. I have been clean and sober for 3 years." correct?
A: Correct.
Q: You have concluded (p.31) that the mother's alcohol history does not seem pertinent in making a custody decision?
A: I have so concluded.
Q: So you are starting to this court that in making its decision, the mother's alcoholism is not a relevant or pertinent consideration?
A: I believe she has made a successful recovery and thus this issue should not be determinative.
Q: Doctor, I didn't ask you if it was determinative. I asked if her history of alcoholism is a relevant and pertinent consideration for the Court.
A: I don't believe it is particularly relevant.
Q: Particularly relevant, does that mean it is relevant to some degree?
A: I believe I have stated what I mean.
Q: On page 4 of your report, you note that she is between AA sponsors because of previous sponsor's relapse, correct?
A: Yes.
Q: So the person who was assisting her as a sponsor has relapsed?
A: Yes, that is what she told me.
Q: Her father was an alcoholic for most of her childhood, as you note on page 6 of your report?
A: Yes, that is what she related.
Q: A maternal aunt was an alcoholic?
A: Yes.
Q: Her father's male cousin is an alcoholic and former cocaine user who is in recovery?
A: Yes, again that is what she related to me.
Q: The Husband reported to you that after the death of her father, she and her mother began drinking, and her mother would bring jugs of wine to the home (page 8)?
A: That is what he related to me.
Q: Did you check this out factually in any manner?
A: No.
Q: You have not reported that the husband lied to you with this allegation, correct?
A: That is so.
Q: On page 28 of your report, you state: "Husband reports that she once got into a car accident while driving the two boys. She fled the scene with the two children which led to her arrest. I got her out of jail in June of 2002. Two weeks later she was diverted by the Committee on Physicians Health because the chairman of her department found her visibly intoxicated."
A: I am stating in my report what the husband alleged, correct.
Q: That is a very serious allegation, is it not?
A: Yes, very serious.
Q: If true, the two boys were placed in a potentially very dangerous situation?
A: Yes.
Q: Did you do anything to validate or corroborate this factual allegation?
A: Not really.
Q: Did you then accept it as true?
A: Yes.
Q: The father reported to you that she had been writing herself prescriptions for Toredol and Percocet (Page 8), and that she popped Percocet like candy (p.9)?
A: He so reported.
Q: Doctor, I am correct that you made no efforts to validate, corroborate or refute this information imparted to you by the father?
A: Other than my conversations with the parties, no.
Q: Did you specifically ask the mother if she denied these allegations made by the father?

A: No.
Q: In contrast, with respect to the father, you note "there is no family history of psychiatric illness, alcoholism or substance abuse", correct?
A: Yes.
Q: Doctor, you are aware that in 2005 the mother suffered a relapse and had to leave the marital home and went to a clinic for rehab?
A: Yes, she was quite upfront about that.
Q: Doctor, you cannot sit here and tell this court with any degree of medical certainty that she will not suffer a relapse again, as her immediate past sponsor has done?
A: No, that is not possible to state, although I do not think it would occur.
Q: And, as contained in your report, the mother often drives the children to the various extracurricular and other activities?
A: Yes.
Q: And you cannot predict with any degree of certainty that if she relapses she will not be driving a car with the children in the car?
A: No.
Q: You are aware that she had a previous DWI?
A: Yes, both parties told me that.
Q: You are aware that psychiatrists are ill-equipped to predict future dangerous behavior of people they examine or treat?
A: To a degree.
Q: In fact, Doctor, in your training I assume you are aware of the famous court case by the name of *Tarasoff v. The Regents of the University of California* (1977).
A: Yes, I am aware of that case.
Q: In that case, a young woman student was killed by a student who told a counselor he was seeing at the University that he intended to kill her. The therapist called the campus police, who felt the student appeared rational and no further action was taken. The young woman's parents sued the University because no one had warned the victim, alleging that the therapist had a duty to warn. Those are the basic facts, correct?
A: I am not aware specifically but that sounds correct.
Q: You are a member of the American Psychiatric Association, correct?
A: Yes.
Q: You are aware that the APA filed a brief in the *Tarasoff* case stating: that the duty to warn imposes an impossible burden on the practice of psychotherapy. *"It requires the psychotherapist to perform a function which study after study has shown he is ill-equipped to undertake, namely, the prediction of his patient's potential dangerousness?"*
A: I am aware of that position.
Q: So, applying that principle to this case, Doctor, you cannot tell this court if she will relapse again and if so, whether there will be danger to the children as a result of the relapse?
A: That is true.
Q: You agree with me Doctor that a prime function of us parents is to provide for the safety of our children?
A: Of course.
Q: Certainly, the physical safety is of the utmost concern?
A: Yes.

JOINT CUSTODY

Q: Doctor, you have stated, have you not, and specifically on page 31 of your report, that each parent is capable of providing suitable residential care for the children?
A: Yes.
Q: Would you also agree that both parents are loving and caring of their children?
A: Yes.
Q: And Doctor, would you agree with me that where you have two loving and caring parents, each capable of providing suitable residential care, it is best if both parents are intimately and extensively involved in the upbringing and entire maturation process of the children?
A: Unquestionably.
[ASK IF EACH ITEM BELOW IS INDICATIVE OF A POSSIBILITY OF JOINT CUSTODY BEING FEASIBLE CHOICE]
Q: Doctor as stated of page 31 of your report, and I quote: "both parties are capable of providing suitable residential care." Those are your words, correct?
A: Yes.
Q: Doctor, I am making reference to page 3 of your report where on you quote the mother stating as follows: "on weekends, we take care of the kids without the sitter". Doctor, will you concede that when the mother said that, the

reference to “we” meant herself and the father of the children?
A: Yes, I so quoted her.
Q: You reported to this court (p.14) that Jr. "has a good relationship with both parents”, correct?
A: Correct.
Q: You noted on page 15 of your report, and you highlighted it, that Jr. expressed no preference
A: Yes.
Q: You further noted that the son, Alan, believes it would be fair to split time with each parent, and quoted him as saying, "I am pretty organized so it would be no problem"?
A: Yes.
Q: You also noted (p. 17) that Alan was emphatic that the future arrangements would not be confusing to him and he could handle a physical custody split, which he thought to be the fairest?
A: I so noted.
Q: You noted, did you not, that there is strong agreement between the parents that Alan is a competitive, athletic, and assertive boy who was generally well-adjusted?
A: Yes.
Q: You also noted that there is a strong consensus between the parents about Beth's anxiety problems, psychological and interpersonal strengths and her array of age-appropriate interests?
A: Yes.
Q: You noted (top of p. 25) that “It is significant that there is a high degree of consensus between the parents concerning the nature of Peter's psychiatric problems, his social, emotional and behavioral symptoms and his strengths and weaknesses in terms of school, interest and socialization” it is so noted, correct?
A: I did.
Q: So you found that the parents agree as to these issues?
A: Yes I did.
Q: Doctor there are not many perfect parents, are there?
A: No.
Q: Many parents have some characteristics that are less than desirable, is that correct?
A: Certainly.
Q: In most cases, children manage to accomplish reasonably normal development anyway, is that not correct?
A: That is correct.
Q: Aside from Peter, Jr., who we know suffers from Asperger’s syndrome and PPD, the other children did not show any signs of any serious psychological problems, correct?
A: No they did not.
Q: And these children have been living with both parents all of their lives, true?
A: True.
Q: In fact, they are doing pretty well, considering the marital discord in the home, would you agree?
A: Yes.
Q: Would that suggest to you that the children are psychologically sound?
A: In a sense, but there are the problems that I have noted.
Q: And they would likely do all right with either of the parents, or with both of the parents in a joint custody arrangement, is that correct?
A: I do not believe that joint custody is feasible in this case. In a sense, I wish it was. However, there is a long history of the inability of these two parents to act in concert and harmony, even for the benefit of their children.
Q: And would joint custody be more fitting for adolescents who arrive at a point in life where parents are likely to have relatively less influence on their development and peer associations considerably more influence?
A: Possibly.

STRESSOR; EXAMINER EFFECT

Q: Doctor, you had multiple examinations of the parents and the children, correct? (recount visits) (clinical examinations)
Q: And when you did this, doctor, did you have any doubt in your mind that the children knew the purpose for which they were coming to your office?
Q: They knew that their parents were embroiled in a divorce action, which included the issue of which parent they would live with when the action was completed?
Q: Would you state that both the parents and the children, when they met with you, were under a certain amount of stress and anxiety because of the circumstances surrounding their visits with you?
Q: Doctor, is there a very substantial body of scientific and professional literature indicating that the general circumstances under which a forensic examination is conducted (the time, the place, the purpose) affects the kind of information or data that emerges in the examination?

Q: Doctor isn't there research showing that such factors affect the kind of information that is obtained in the interview?
Q: Isn't there described in the literature something known as situation effects?
Q: The pendency of a divorce and custody case could qualify as such a situational effect, correct?
Q: In fact, the DSM describes marital breakup as a psychosocial problem that can affect diagnosis and prognosis?
Q: The breakup of a marriage, particularly when children are involved, is a highly stressful situation for most normal people, both parents and children, right?
Q: The behavior observed under the circumstances may not be representative of the individual's behavior on the more normal, less highly stressful circumstances, true?
Q: Not only do we have the strain of the circumstances relating to the divorce and the issue of custody, but the additional strain of the circumstance of the clinical examination itself?
Q: Doctor, in addition to the psychological stress, or of a divorce and custody proceeding, is it not a fact that a clinical examination is also affected by the nature of the examiner himself or herself?
Q: The attitudes of the examiner, the personality of the examiner, the race or economic status of the subject and the examiner, all have an effect, correct?
Q: You have learned in your studies, Doctor, have you not, that some examiners with one theoretical orientation might get different data and record different data and interpret the data differently than an examiner of a different theoretical orientation, correct?
Q: Similarly, examiners with different personalities might get some distinct kinds of information from the people they examine, true?
Q: That is because people respond differently to several types of people, is that not so?
Q: What the examiner perceives, remembers and records is also subject to various influences?
Q: There may be distortion or bias due to the theoretical orientation of the examiner, the values and attitudes of the examiner, and other characteristics of the examiner?
Q: The interpretation of the data collected is subject to influence, distortion and bias due to the same factors, am I correct?
Q: In addition, forensic evaluation cases like this necessarily involve a prediction?
Q: And Doctor, isn’t it a fact that a prediction in this field is overwhelmingly speculative?
Q: And one examiner or clinician can base his/her conclusions on unvalidated and speculative theories of child development that differ from another examiner or clinician?
Q: There are different and competing theories of child development?
Q: And Doctor, what you have provided us with on your direct examination is what could be called to a clinical judgment, is that correct?
Q: And isn't there a substantial body of scientific and professional literature indicating that there are several serious flaws and problems with clinical judgment? (Lacks validity or cannot be relied upon)

FACTS FAVORABLE TO FATHER

Q: As noted on page 10 of your report, the father was subjected to four (4) CPS investigations?
A: Yes.
Q: All of the investigations concluded with an “unfounded” finding, correct?
A: Yes.
Q: He believes the referrals were one from the school and the rest from his wife or her mother, and he so told you?
A: Yes.
Q: Did you explore this allegation with the mother?
A: Not really.
Q: Would it be pertinent if she made false allegations of child abuse or neglect?
A: Of course.
Q: So in not exploring this allegation, your report is incomplete in another respect, correct?
A: Yes.
Q: With respect to the father, there is no family history of psychiatric illness, alcoholism or substance abuse (page 12)?
A: That is correct.
Q: You noted that the father "presents as pleasant, articulate and cooperative”?
A: I did.
Q: Peter, Jr. again mentions how much he enjoys building rockets which he shoots at a site in upstate New York?
A: Yes, he does
Q: With whom does he do this?
A: His father.
Q: You note in your report (p. 18) that Jr. seemed "closely identified to his dad as they share a love of trains and rockets,” Mr. Smith tries to reassure Jr. when he gets fixated on a particular issue which causes him to become anxious or angry?
A: I did.

Q: You also noted that Mr. Smith tried to diffuse the issue about summer camp in noting that he, too, must abide by the court ruling?
A: Yes, that was very appropriate.
Q: When Jr. argued that since he should be able to fire his Doctor, his father gently, but firmly, said that does not work that way to which Alan concurred, correct?
A: Yes.
Q: That also was an appropriate and proper way to handle the situation?
A: I believe so.
Q: You also noted (p.19) that "Mr. Jones stayed clear of any hot button issues involving himself and Carol, which showed good judgment on his part in front of the children?"
A: Yes, I so noted.
Q: As part of your psychological testing, you performed the MMPI-2 tests on the parents, correct?
A: Yes.
Q: And the results regarding the father showed no clinical diagnoses, true?
A: Yes.
Q: His clinical scales and content scores were within normal limits?
A: Yes, that is what the test revealed.
Q: With respect to Dr. Smith, the test revealed features of obsessive-compulsive, histrionic and sadistic personality attributes?
A: Yes.
Q: Doctor, if you would be good enough to turn to page 23 of your report, I notice that you put certain words in bold print; is that for emphasis to the reader?
A: Yes.
Q: Now, you bold type the words "open and cooperative manner" when you speak of Dr. Smith's approach to the testing, correct?
A: Yes.
Q: Two paragraphs later, you state that "Mr. Jones was cooperative with the examination, correct?
A: Yes.
Q: You chose not to put his cooperation with the tests in bold type, it is in regular type?
A: Yes.
Q: So you chose to emphasize the mother's cooperation but not the father's?
A: It appears so.
Q: On the same page, you put in bold type, and referring to the mother, the words "disciplined in nature, often appearing to be conscientious, dependable and persistent", correct?
A: Yes.
Q: Those are basically positive traits of the mother that you are emphasizing?
A: Correct.
Q: With respect to the sentence: "Dr. Smith did have features of obsessive-compulsive, histrionic and sadistic personality traits", you chose not to emphasize that sentence and therefore it was not in bold type?
A: Yes.
Q: That sentence portrays a basically negative statement about Dr. Smith, does it not?
A: It depends upon the degree of each of these traits, but generally speaking, they are not positive, albeit many very successful people have, for example, obsessive-compulsive personality traits.
Q: At the bottom of page 23 and carrying over to page 24, you put in bold type, and referring to the father, "Interpersonal relationships may be shallow in nature and there may be a tendency for such an individual to appear self-centered and exploitive or indifferent to the needs of others."?
A: I did place that in bold type.
Q: Again, for emphasis?
A: Yes.
Q: So, Doctor, you deliberately chose to put the father's negative findings in bold type for emphasis and the mother's positive findings in bold type for emphasis?
A: It appears that way.
Q: This is in spite of the fact that the findings from the psychological testing included positive and negative features about both parents, correct?
A: Yes.

AVAILABILITY

Q: Doctor, a parent's availability to be with the children as frequently as possible is a factor to be considered in a custody determination, do you agree?

A: Yes, it is one factor to consider.

Q: In this case, we have two working parents, both working full time, correct?

A: Yes.
Q: You noted in your report that occasionally the mother worked 24-hour shifts at the hospital, correct? (Page 2)
A: Yes.
Q: You are aware Doctor, are you not, that my client works a normal work week, namely, Monday through Friday?
A: Yes.
Q: You further noted that until a year ago, they had full-time help in the house and since that time a full-time sitter, Monday through Friday?
A: Correct.
Q: In your report you cited the mother's statement that on weekends, "we" take care of the kids without the sitter?
A: Yes.
Q: So, you would agree, would you not, that at least as work schedules are concerned, the father is available at least as much of the mother if not more so?
A: Yes.

PSYCHOLOGICAL TESTS

Q: Doctor, you performed psychological testing on both parents, correct?
A: Yes, the MMPI-2 and the Mellon Clinical Multiaxial Inventory-III.
Q: The psychological testing suggested some maladaptive personality disorder features of the mother, did it not?
A: Yes.
Q: This was in terms of certain personality traits?
A: Yes.
Q: Doctor, am I correct that a personality trait or attribute basically is a habitual pattern of behavior, thought and emotion?
A: Yes.
Q: And when the traits are inflexible, they can become maladaptive and cause significant functional impairment, and then they constitute disorders?
A: Yes.
Q: The mother, according to the psychological testing, did have features of obsessive compulsive, histrionic, and sadistic personality attributes or traits, correct?
A: Correct.
Q: Obsessive compulsive personality traits can manifest themselves in a variety of ways, correct?
A: Yes.
Q: Some features might be excessive orderliness, frugality and a cold mechanical quality in relationships with people, and being capable of a great amount of work but lacking flexibility and interpersonal warmth?
A: That can be part of it, yes.
Q: A person with histrionic traits can often be self-centered, immature, vain, and at times dramatic in behavior?
A: Yes.
Q: A sadistic personality trait can manifest itself by a lack of concern for people and deriving pleasure from harming or humiliating others?

A: That would fit the definition of a sadist, but that is not what the test found. It just suggested there might be such traits related to sadism. Q: p. 23 - the father was cooperative with the examination?

Q: The Father received no clinical diagnosis?

A: That is correct.

Q: His clinical scales and content scores were within normal limits?

A: Yes.

Q: These conclusions were reached because psychological personality testing was done under the supervision of a clinical psychologist, correct?

A: Yes.

Q: Not yourself?

A: No.

Q: You were not present when these tests were administered?

A: No.

Q: The tests were the MMPI – 2, and the Mallon Clinical Multiaxial Inventory – 3?

A: Yes.

Q: Doctor, it is true that the standard tests used were not designed for, and have not been validated for conventional custody issues?

A: That is true.

Q: In fact, your report indicates that the two tests administered are not designed to determine whether one parent is more suitable than another?

A: That is correct.

Q: And yet the psychological test results must have some relevance or you would not have had them administered, true?

A: Yes.

Q: Doctor, do you recall that previously I questioned you about the practice parameters promulgated by the American Academy of Child and Adolescent Psychiatry?

A: I do recall.

Q: Those parameters state, and I quote, "In most cases, psychological testing of the parents is not required. Psychological tests, such as the Minnesota Multiphasic Personality Inventory, the Thematic Apperception Test, and all the Rorschach were not designed for use in parenting evaluations. Their introduction into a legal process leads to professionals battling over the meaning of raw data and attorneys making the most of findings of "psychopathology," but has little utility for assessing parenting." Doctor, you had one of those tests administered to the parents, correct?

Q: That was the MMPI?

A: Yes.

Q: In fact the same parameters also state, and again I quote, "Certain tests have been advanced as having specific utility in assessing variables specific to a custody evaluation. These include the Bricking Perception of Relationships Test and the Ackerman-Steindorff Scales for Parent Evaluation of Custody." You did not have either of these tests administered, isn't that a fact?

A: Yes.

COLLATERAL SOURCES

Q: Doctor, would it be fair to say that you rely to a great extent upon the collateral contacts in this case?
A: I relied to some extent; I would not say great extent.
Q: You expend about four pages in your report discussing the collateral sources, true?
A: Yes.
Q: They included a clinical psychologist who treated Peter, Jr. about 3 years ago, Doctor Lois Lane? (p. 20)
A: Yes.
Q: Your only contact with her was a phone consultation on August 6, 2008, correct?
A: That is correct.
Q: You had no in person meeting with her?
A: No.
Q: How long did that telephone call last?
A: I don't recall specifically but maybe about 15 minutes or so.
Q: Did you take notes?
A: Yes.
Q: Do you have in court with you today the original notes?
(if not, explore)
Q: Would it be fair to say that after that phone conversation, it was clear to you that she liked the mother and disliked the father?
A: I don't know if she personalized it that way. She did have her views of the parents, however.
Q: Am I correct in saying you received no documents from her?
A: That is correct.
Q: You did not read or review any notes she took or may have taken during her sessions with Peter, Jr., or the parents, or any recordings she may have made?

A: No.
Q: So basically you took her word for what she said without any form of corroboration through original notes or other data?
A: I had no reason to doubt what she told me, which were her professional opinions and judgments.
Q: Did you ever know or converse with this clinician prior to that phone call?
A: No.
Q: Were you familiar with her reputation within the professional mental health community?
A: No.
Q: So whether she was an accomplished and highly respected mental health professional, or a quack, you had no way of knowing?
A: I believe I would have discerned if she was, to use your word, a “quack”.
Q: You also had a phone consultation with Doctor Trisha Burke on August 8, 2008?
A: Yes.
Q: How long did that conversation last?
A: Again, I am not sure, but probably about the same length as the phone call we just discussed.
Q: Did you ever meet in person with Doctor Burke about this case?
A: No.
Q: Did you receive any notes or documentation from Doctor Burke concerning her treatment of Jr.?
A: No.
Q: Again, did you take her word for what she said without any form of corroboration or validation?
A: I considered what she said along with all the other information that was imparted to me as part of this forensic assignment.
Q: You are aware that Doctor Burke and the father had differences of opinion as to the proper treatment for Peter, Jr., including drugs that were administered for his use?
A: Yes, I was made aware of that.
Q: These differences of opinion might have led to a bias on the part of Doctor Burke against the father and in favor of the mother?
A: I assume that is possible.
Q: But you would not know if such a bias existed or not, correct?
A: True.
Q: You don't advocate, do you, that every parent should blindly follow whatever advice a therapist gives if in apparent good faith there is reason to believe that the advice may be against the interest of the child?
A: No. Blind adherence is certainly not optimum.
Q: Am I correct in concluding that based upon the conversation with Doctor Burke, there is a general dislike between her and the father?
A: I would not know if it was on such a personal level, although they did have disagreements about treatment and drugs which were prescribed for Peter, Jr.
Q: In your recommendation section of the report, you state Doctor, that “the observations of Drs. L and G, who have worked with the family for several years, seem highly relevant to reaching a conclusion about custody, especially decision-making authority”?
A: I said that.
Q: It is clear then, Doctor, that you relied heavily upon the observations of doctors’ L and G in formulating your own conclusions?
A: It appears that way, yes.
Q: Doctor, while recognizing that you are not a lawyer, albeit you have had extensive courtroom experience, you are aware of what is known as hearsay evidence, true?
A: I have heard the term many times.
Q: Hearsay, to your understanding, is basically out-of-court statements to prove a relevant fact in the case, correct?
A: I believe that is what it is.
Q: And you agree with me that the portion of your report relating to the observations and statements of Doctor L and Doctor G are out-of-court statements which render opinions upon which you have relied?
A: To the extent I have previously said, yes.
Q: Doctor, we have you relying extensively on the substance of telephone conversations which first, are hearsay and, second, have not been corroborated or validated by you by even the acquisition of notes or other original data collection by them?
A: Yes.
Q: Do you believe that such extensive reliance on this type of material is conducive to the rendering of a comprehensive, accurate report to be submitted to a court to aid in the determination of a child custody dispute?
A: I believe on balance I have rendered such a report.

CONCLUSIONS

Q: Doctor, there is a segment of your report entitled "Summary and Conclusions", correct?
A: Yes, it is near the end of my report?
Q: And that section contains, does it not, your conclusions and opinions about the issues involved?
A: In part it does.
Q: Doctor, there is a difference between expert opinions and subjective opinions, correct?
A: Yes.
Q: You understand, Doctor, that in terms of professional opinions, it is implicit that the opinion be stated in terms of reasonable professional certainty?
A: That is my understanding of the standard.
Q: And to give an opinion based upon reasonable professional certainty, it must be grounded upon studies, research, literature in the field, and empirical data known to the mental health professional?
A: Yes.
Q: So what is known or relied upon by a mental health professional is that which is established empirically as reported in peer-reviewed professional literature, not what you as an individual may conclude idiosyncratically from intuition, or since personal value judgments?
A: Yes.
Q: In your extensive 32-page report, did you cite to the court any studies, literature, research or empirical data?
A: No.
Q: Doctor, would you agree with me that different theoretical backgrounds of psychiatrist predispose them to reach different conclusions based upon the same data?
A: That can be.

APPENDIX A
I.R.S. Revenue Ruling 59-60

Revenue Ruling 59-60

§4: Factors to Consider

(1) THE NATURE OF THE BUSINESS AND THE HISTORY OF THE ENTERPRISE FROM ITS INCEPTION
The history of a corporate enterprise will show its past stability or instability, its growth or lack of growth, the diversity or lack of diversity of its operations, and other facts needed to form an opinion of the degree of risk involved in the business. For an enterprise which changed its form of organization but carried on the same or closely similar operations of its predecessor, the history of the former enterprise should be considered. The detail to be considered should increase with approach to the required date of appraisal, since recent events are of greatest help in predicting the future; but a study of gross and net income, and of dividends covering a long prior period, is highly desirable. The history to be studied should include, but not be limited to, the nature of the business, its products or services, its operating and investment assets, capital structure, plant facilities, sales records and management, all of which should be considered as of the date of appraisal, with due regard for recent significant events. Events of the past that are unlikely to recur in the future should be discounted, since value has a close relation to future expectancy.
(2) THE ECONOMIC OUTLOOK IN GENERAL AND THE CONDITION AND OUTLOOK OF THE SPECIFIC INDUSTRY IN PARTICULAR
A sound appraisal of a closely-held stock must consider current and prospective economic conditions as of the date of appraisal, both in the national economy and in the industry or industries with which the corporation is allied. It is important to know that the company is more or less successful than its competitors in the same industry, or that it is maintaining a stable position with respect to competitors. Equal or even greater significance may attach to the ability of the industry with which the company is allied to compete with other industries. Prospective competition which has not been a factor in prior years should be given careful attention. For example, high profits due to the novelty of its product and the lack of competition often lead to increasing competition. The public's appraisal of the future prospects of competitive industries or of competitors within an industry may be indicated by price trends in the markets for commodities and for securities. The loss of the manager of a so-called "one-man" business may have a depressing effect upon the value of the stock of such business, particularly if there is a lack of trained personnel capable of succeeding to the management of the enterprise. In valuing the stock of this type of business, therefore, the effect of the loss of the manager on the future expectancy of the business and the absence of management- -succession potentialities are pertinent factors to be taken into consideration. On the other hand, there may be factors which offset, in whole or in part, the loss of the manager's services. For instance, the nature of the business and of its assets may be such that they will not be impaired by the loss of the manager. Furthermore, the loss may be adequately covered by life insurance, or competent management might be employed on the basis of the consideration paid for the former manager's services. These, or other offsetting factors, if found to exist, should be carefully weighed against the loss of the manager's services in valuing the stock of the enterprise.
(3) THE BOOK VALUE OF THE STOCK AND THE FINANCIAL CONDITION OF THE BUSINESS
Balance sheets should be obtained, preferably in the form of comparative annual statements for two or more years immediately preceding the date of appraisal, together with a balance sheet at the end of the month preceding that date, if corporate accounting will permit. Any balance sheet descriptions that are not self-explanatory and balance sheet items comprehending diverse assets or liabilities should be clarified in essential detail by supporting supplemental schedules. The statements usually will disclose to the appraiser (1) liquid position (ratio of current assets to liabilities); (2) gross and net book value of principal classes of fixed assets; (3) working capital; (4) long-term indebtedness; (5) capital structure; and (6) net worth. Consideration also should be given to any assets nor essential to the operation of the business, such as investments in securities, real estate, etc. In general, such nonoperating assets will command a lower rate of return than do the operating assets, although in exceptional cases the reverse may be true. In computing the book value per share in stock, assets of the investment type should be revalued on the basis of their market price and the book value adjusted accordingly. Comparison of the company's balance sheets over several years may reveal, among other facts, such developments as the acquisition of additional production facilities or subsidiary companies, improvement in financial position, and details as to recapitalizations and other changes in the capital structure of the corporation. If the corporation has more than one class of stock outstanding, the charter of certificate of incorporation should be examined to ascertain the explicit rights and privileges of the various stock issues including: (1) voting powers, (2) preference as to dividends, and (3) preference as to assets in the event of liquidation.

APPENDIX A

I.R.S. Revenue Ruling 59-60

(4) THE EARNING CAPACITY OF THE COMPANY

Detailed profit-and-loss statements should be obtained and considered for a representative period immediately prior to the required date of appraisal, preferably five or more years. Such statements should show (1) gross income by principal items; (2) principal deductions from gross income including major prior items of operating expenses and interest and other expense on each item of long-term debt, depreciation and depletion if such deductions are made, officers' salaries, in total if they appear to be reasonable or in detail if they seem to be excessive, contributions (whether or not deductible for tax purposes) that the nature of the business and its community position require the corporation to make, and taxes by principal items, including income and excess profits taxes; (3) net income available for dividends; (4) rates and amounts of dividends paid on each class of stock; (5) remaining amount carried to surplus; and (6) adjustments to, and reconciliation with, surplus stated on the balance sheet. With profit and loss statements of this character available, the appraiser should be able to separate recurrent from nonrecurrent items of income and expense, to distinguish between operating income and investment income, and to ascertain whether or not any line of business in which the company is engaged is operated consistently at a loss and might be abandoned with benefit to the company the percentage of earnings retained for business expansion should be noted when dividend-paying capacity is considered. Potential future income is a major factor in many valuations of closely-held stocks, and all information concerning past income which will be helpful in predicting the future should be secured. Prior earnings records usually are the most reliable guide as to the future expectancy, but resort to arbitrary five-or-ten year averages without regard to current trends or future prospects will not produce a realistic valuation. If, for instance, a record of progressively increasing or decreasing net income is found, then greater weight may be accorded the most recent years' profits in estimating earning power. It will be helpful, in judging risk and the extent to which a business is a marginal operator, to consider deductions from income and net income in terms of percentage of sales. Major categories of cost and expense to be so analyzed include the consumption of raw materials and supplies in the case of manufacturers, processors and fabricators; the cost of purchased merchandise in the case of merchants; utility services; insurance; taxes; depletion or depreciation; and interest.

(5) DIVIDEND-PAYING CAPACITY

Primary consideration should be given to the dividend-paying capacity of the company rather than to dividends actually paid in the past. Recognition must be given to the necessity of retaining a reasonable portion of profits in a company to meet competition. Dividend-paying capacity is a factor that must be considered in an appraisal, but dividends actually paid in the past may not have any relation to dividend-paying capacity. Specifically, the dividends paid by a closely-held family company may be measured by the income needs of the stockholders or by their desire to avoid taxes on dividend receipts, instead of by the ability of the company to pay dividends. Where an actual or effective controlling interest in a corporation is to be valued, the dividend factor is not a material element, since the payment of such dividends is discretionary with the controlling stockholders. The individual or group in control can substitute salaries and bonuses for dividends, thus reducing net income and understating the dividend-paying capacity of the company. It follows, therefore, that dividends are less reliable criteria of fair market value than other applicable factors.

(6) WHETHER OR NOT THE ENTERPRISE HAS GOODWILL

In the final analysis, goodwill is based upon earning capacity. The presence of goodwill and its value, therefore, rests upon the excess of net earnings over and above a fair return on the net tangible assets. While the element of goodwill may be based primarily on earnings, such factors as the prestige and renown of the business, the ownership of a trade or brand name, and a record of successful operation over a prolonged period in a particular locality, also may furnish support for the inclusion of intangible value. In some instances it may not be possible to make a separate appraisal of the tangible and intangible assets of the business. The enterprise has a value as an entity. Whatever intangible value there is, which is supportable by the facts, may be measured by the amount by which the appraised value of the tangible assets exceeds the net book value of such assets.

(7) SALES OF THE STOCK AND THE SIZE OF THE BLOCK OF STOCK TO BE VALUED

Sales of stock of a closely-held corporation should be carefully investigated to determine whether they represent transactions at arm's length. Forced or distress sales do not ordinarily reflect fair market value nor do isolated sales in small amounts necessarily control as a measure of value. This is especially true in the valuation of a controlling interest in a corporation. Since, in the case of closely-held stocks, no prevailing market prices are available, there is no basis for making an adjustment for blockage. It follows, therefore, that such stocks should be valued upon a consideration of all the evidence affecting the fair market value. The size of the block of stock itself is a relevant factor to be considered. Although it is true that a minority interest in an unlisted corporation's stock is more difficult to sell than a similar block of listed stock, it is equally true that control of a corporation, either actual or in effect, representing as it does an added element of value, may justify a higher value for a specific block of stock.

(8) THE MARKET PRICE OF CORPORATIONS ENGAGED IN THE SAME OR SIMILAR LINE OF BUSINESS

APPENDIX A

I.R.S. Revenue Ruling 59-60

HAVING THEIR STOCKS ACTIVELY TRADED IN A FREE AND OPEN MARKET, EITHER ON AN EXCHANGE OR OVER-THE-COUNTER.

Section 2031(b) of the Code states, in effect, that in valuing unlisted securities the value of stock or securities of corporations engaged in the same or similar line of business which are listed on an exchange should be taken into consideration along with all other factors. An important consideration is that the corporations to be used for comparisons have capital stocks which are actively traded by the public. In accordance with section 2031(b) of the Code, stocks listed on an exchange are to be considered first. However, if sufficient comparable companies whose stocks are listed on an exchange cannot be found, other comparable companies which have stocks actively traded on the over-the-counter market may also be used. The essential factor is that whether the stocks are sold on an exchange or over-the-counter there is evidence of an active, free public market for the stock as of the valuation date. In selecting corporations for comparative purposes, care should be taken to use only comparable companies. Although the only restrictive requirement as to comparable corporations specified in the statute is their lines of business be the same or similar, yet it is obvious that consideration must be given to other relevant factors in order that the most valid comparison possible will be obtained. For illustration, a corporation having one or more issues of preferred stock, bonds or debentures in addition to its commons stock should not be considered to be directly comparable to one having only common stock outstanding. In like manner, a company with a declining business and decreasing markets is not comparable to one with a record of current progress and market expansion.

Revenue Ruling 68-609

The purpose of this Revenue Ruling is to update and restate, under the current statute and regulations, the currently outstanding portions of A.R.M. 34, C.B. 2, 31 (1920), A.R.M. 68, C.B. 3, 43 (1920), and O.D. 937, C.B. 4, 43 (1921).

The question presented is whether the "formula" approach, the capitalization of earnings in excess of a fair rate of return on net tangible assets, may be used to determine the fair market value of the intangible assets of a business.

The "formula" approach may be stated as follows:

A percentage return on the average annual value of the tangible assets used in a business is determined, using a period of years (preferably not less than five) immediately prior to the valuation date. The amount of the percentage return on tangible assets, thus determined, is deducted from the average earnings of the business for such period and the remainder, if any, is considered to be the amount of the average annual earnings from the intangible assets of the business for the period. This amount (considered as the average annual earnings from intangibles), capitalized at a percentage of, say 15 to 20 percent, is the value of the intangible assets of the business determined under the "formula" approach.

The percentage of return on the average annual value of the tangible assets used should be the percentage prevailing in the industry involved at the date of valuation, or (when the industry percentage is not available) a percentage of 8 to 10 percent may be used.

The 8 percent rate of return and the 15 percent rate of capitalization are applied to tangibles and intangibles, respectively, of business with a small risk factor and stable and regular earnings; the 10 percent rate of return and 20 percent rate of capitalization are applied to businesses in which the hazards of business are relatively high.

The above rates are used as examples and are not appropriate in all cases. In applying the "formula" approach, the average earnings period and the capitalization rates are dependent upon the facts pertinent thereto in each case.

The past earnings to which the formula is applied should fairly reflect the probable future earnings. Ordinarily, the period should not be less than five years, and abnormal years, whether above or below the average, should be eliminated. If the business is a sole proprietorship or partnership, there should be deducted from the earnings of the business a reasonable amount for services performed by the owner or partners engaged in the business. *See Lloyd B. Sanderson Estate v. Commissioner*, 42 F. 2d 160 (1930). Further, only the tangible assets entering into net worth, including accounts and bills receivable in excess of accounts and bills payable, are used for determining earnings on the tangible assets. Factors that influence the capitalization rate include (1) the nature of the business, (2) the risk involved, and (3) the stability or irregularity of earnings.

The "formula" approach should not be used if there is better evidence available from which the value of intangibles can be determined. If the assets of a going business are sold upon the basis of a rate of capitalization that can be substantiated as being realistic, though it is not within the range of figures indicated here as the ones ordinarily to be adopted, the same rate of capitalization should be used in determining the value of intangibles.

Accordingly, the "formula" approach may be used or determining the fair market value of intangible assets of a business only if there is no better basis therefor available.

APPENDIX C

TRIAL PREPARATION CHECKLIST

APPENDIX C
Trail Preparation Checklist

TRIAL PREPARATION CHECK LIST

☐ Note of Issue Filed

☐ Statement of Proposed Disposition (or Counter Statement)

☐ Judge's Rules Obtained

☐ Marked Pleadings

☐ Updated Net Worth Statement

☐ Appraisals
- ☐ Marital Residence
- ☐ Pension
- ☐ Business
- ☐Jewelry, Fine Art, etc.
- ☐ Vocational Expert

☐ EBTs
- ☐ All conducted
- ☐ Transcripts obtained and served
- ☐ Errata Sheets done
- ☐ Digested

☐ Equitable Distribution Memo
- ☐Equitable Distribution Factors
- ☐Maintenance Factors

☐ Custody Outline (if applicable)

☐ List of Law Issues/Memo of Law

☐ Stipulations
- ☐Grounds
- ☐Custody & Visitation
- ☐Values
- ☐Counsel Fees determined on Affirmations

☐ Witnesses
- ☐List; subpoenas
- ☐Interviews held and Memos

☐ Subpoena Duces Tecum
- ☐List of Institutions, etc.
- ☐Served and documents received

☐ Subpoenas & Notice to Produce (party)

☐ Expert Demands
- ☐Service of Demand
- ☐Response to Demand

☐ Insurances
- ☐Schedule of Life Insurance – coverage and cash surrender
- ☐Medical Insurance Information

☐ CSSA Guideline Charts & Maintenance Guideline Charts

☐ Cash Flow Charts (with experts)

☐ Summary of Court Orders & Motions

☐ Trial Notebook completed

☐ Standard of Living
- ☐Summaries (checks, credit cards, etc.)
- ☐Memo

☐ Custody Cases
- ☐Forensic Report received/summarized
- ☐Subpoena – Forensic expert

☐ Arrears in Support
- ☐Schedule of Arrears
- ☐Domestic Relations Law §244-a Notice

☐Tax Return Summaries
- ☐Personal Returns
- ☐Corporate/Partnership Returns

GASSMAN BAIAMONTE GRUNER, PC

666 Old Country Road, Suite 801
Garden City, New York 11530

EXHIBIT SHEET

PLAINTIFF:	
DEFENDANT:	

COURT:	**INDEX NO:**
JUDGE:	**CHAMBERS #:**
PART #:	

TRIAL DATES	Reporter	Phone	TRIAL DATES	Reporter	Phone

APPENDIX D
Exhibit Sheets

	PLAINTIFF	ID	EV	DEFENDANT	ID	EV	
1							A
2							B
3							C
4							D
5							E
6							F
7							G
8							H
9							I
10							J
11							K
12							L
13							M
14							N
15							O

(Excerpt of Mr. Gassman's opening statement.)

THE COURT: Do you have an opening statement?

MR. GASSMAN: Yes, I do.

THE COURT: Go ahead.

MS. ZUCCARDY: Sorry, your Honor.

I'm not familiar with the practice of this Court. Opening statements are common in your custody matters?

COURT: Are you objecting?

MS. ZUCCARDY: I'm clarifying.

THE COURT: You may give an opening statement, if you would like.

MR. GASSMAN: If the Court pleases, as you know this case is about access, access to a ten-year-old child. Now all cases concerning child access are difficult and are taxing upon all concerned. This is particularly so, however, because the relief we are asking this Court is admittedly drastic. We are asking that there be no contact between the mother and the child going forward, as there has been none in the last 21 months. We do this because we submit that the evidence will show in an overwhelming manner that there has been drastic abuse and neglect of this child by the mother causing egregious and substantial harm, hopefully not irreparable.

You will hear, your Honor, from numerous witnesses, both lay, expert -- both lay witnesses and

expert witnesses, who will not only talk about what has happened in the past but the remarkable improvement that this child has made in the 21 months that have elapsed since the contact with the mother by court order was suspended.

We submit that the expert testimony of the court-appointed psychiatrist, Dr. K[redacted], and others will show that the mother suffers from severe psychiatric disorders, that she is in total denial as to her past conduct and has failed in any respect to take responsibility for the neglect and abuse of not only this child, but we will present evidence of her neglect and abuse of her other two children similarly born out of wedlock. We will show that because of her psychiatric condition and her failure to own up and take responsibility for her actions, it is the opinion of the experts involved in this case that she is not amenable to treatment or improvement because she hasn't even realized the problem. It is a problem.

We will also show through expert testimony and again through lay testimony, as well, that if there is a resurgence of conduct, there will be a screeching halt to the progress that this child has made and the danger of a severe retrogression in her development and maturation.

Now, I submit to the Court that the evidence will

also show that Mr. [redacted] has not taken this position of no access out of any animus, whim or desire to hurt the mother. He has done it because there is a pattern of emotional, psychological and physical abuse, all of which we will show through sworn testimony. We will show that for the first nine years of [redacted] life when she had regular contact with the mother, this child was traumatized. We will show that in the last roughly two years when contact had been suspended, she has shown remarkable improvement. Unfortunately, and only for the first application I made this morning regarding the New York Post article, the trauma of this child will continue. We know that through social media and the Internet today that this article will be thrown in the face of this child and so her socialization will be affected by it, and of course we raise the issue of safety, as well.

Now, as the Court knows, this hearing and this proceeding was brought about because of an order to show cause we brought in December of 2013, when Ms. [redacted], as a result of inhaling Dust-off, was found in her apartment in an almost unconscious state, inhaling Dust-off in front of witnesses. We will present written testimony about this. We will present verbal testimony of this, and we will present -- excuse me -- we will present a pictorial history of this. This was on tape. As a

result there was a neglect proceeding commenced in the Family Court of New York County, and we will show that although eventually her youngest child, [redacted], was returned to her, she admitted on the record to a finding of neglect in the Family Court of New York County, but I submit to the Court that the incident regarding the Dust-Off was not the beginning of the abuse and neglect and certainly didn't end the abuse and neglect. That was just the catalyst that brought us into court and caused the forensic examinations that have been held and this hearing. The total picture of this abuse and neglect has numerous components, and that will be presented through numerous witnesses and will form, I submit, a montage of abuse and neglect which is clear and convincing. It will show both in psychiatric terms of witnesses who will testify that she is narcissistically obsessed with her own well-being and not that of her children.

You will hear from not only expert witnesses. You will hear from her older son, [redacted], age 21, who has no relationship with his mother and who bears the scars of his mother's abuse and neglect until this date, scars that we seek to avoid imposing upon [redacted], and he will testify before this Court.

You will hear from Dr. [redacted] K[redacted] who will be our initial witness.

MS. ZUCCARDY: Objection, your Honor.

I object to him summarizing Dr. K[redacted] testimony before I have had an opportunity to test his credentials or the report. It is a way of back-dooring and getting it before your Honor.

MR. GASSMAN: Counsel misapplies the whole concept of the opening statement which is to give you a preview of what we intend to prove.

THE COURT: Continue. Overruled.

MR. GASSMAN: We will present evidence from Dr. K[redacted], who found the mother's deficit so serious that he not only warned of the danger to this child of resumption of access, but he advocates a termination of parental rights of the defendant. Certainly, a drastic conclusion written by, and I believe it will be stated on the stand, by someone who is highly respected, highly experienced and has testified in numerous cases of this nature.

You will hear from Dr. [redacted] G[redacted], who has been [redacted] therapist for many years, who will concur with Dr. K[redacted] finding that there should be no contact with this child.

You will hear from Dr. [redacted] P[redacted], a psychologist, who both parties chose as a parent coordinator in this case, who had vast contact with the mother, the father and the child and who will opine similarly in nature.

APPENDIX E

Opening Statement

You will hear from a series of lay witnesses who have had years and years of exposure to [redacted], including nannies, including other people who knew her and still know her very well, and you will hear from the experts that Ms. [redacted] has a serious personality disorder with strong anal-adaptive, histrionic, borderline and narcicisstic features. You will hear that she, to quote one expert, is shockingly ignorant about childcare practices, that she is an unfit parent and that her conduct had been so grave that the child appears traumatized -- Dr. K[redacted] words, not mine -- by her past experiences with the mother. As a result, we are asking for the cessation of conduct -- excuse me -- contact, and we will also show this Court that the mother has presented the persona of an actress; she, by training, seeks to be an actress and that she has been less than honest and forthright with any of the professionals that have interviewed her in connection with this case, that she had been guilty of substantial drug use which she has denied not only to experts in this case but to a place where she went to after the neglect proceeding was brought against her, to the Dunes out in Westhampton, and she denied drug use to them, and it is in a report that they offered previously in this case as an

exhibit to a motion. You will see her own admissions of substantial drug use. She only admitted it not because of some efficacious experience, your Honor, but when she was confronted with the video that we annexed to the court papers in December of 2013.

You will hear substantial testimony about the mother, when she did have access to the child, coached this child to lie to her father, to have secret codes that only she and the child would have and the father would not be privy to, to spend her time with the child, not forming play dates, not engaging in child-appropriate activities but in having the child rehearse what she would tell the father, all of which the experts will agree, I submit, cause tremendous anxiety upon the child and traumatized her to a great extent.

You will hear testimony about a role reversal where a child of tender years, [redacted], would see her mother in a stupor because of drugs, would take away cans of Dust-Off and would feel she was responsible to make her mother better, a burden that should not be carried by a child of such tender years.

You will hear from the witnesses, numerous witnesses, that [redacted] has acknowledged to both expert and lay witnesses that she had been the victim of corporal punishment, that when she had an enuresis problem, instead

of treating it properly, the mother spanked her and had her wear Pull-Ups and diapers until she was eight years of age. You will hear testimony about her infantizing the child by these Pull-Ups and diapers.

You will hear numerous witnesses, and we have 15 in all, who will talk about the poor parenting, the lack of attention to the child. You will hear from a nanny who went to Hawaii when the mother was living there with this child, and basically the mother ignored the child during the entire trip, causing tremendous disappointment to this child.

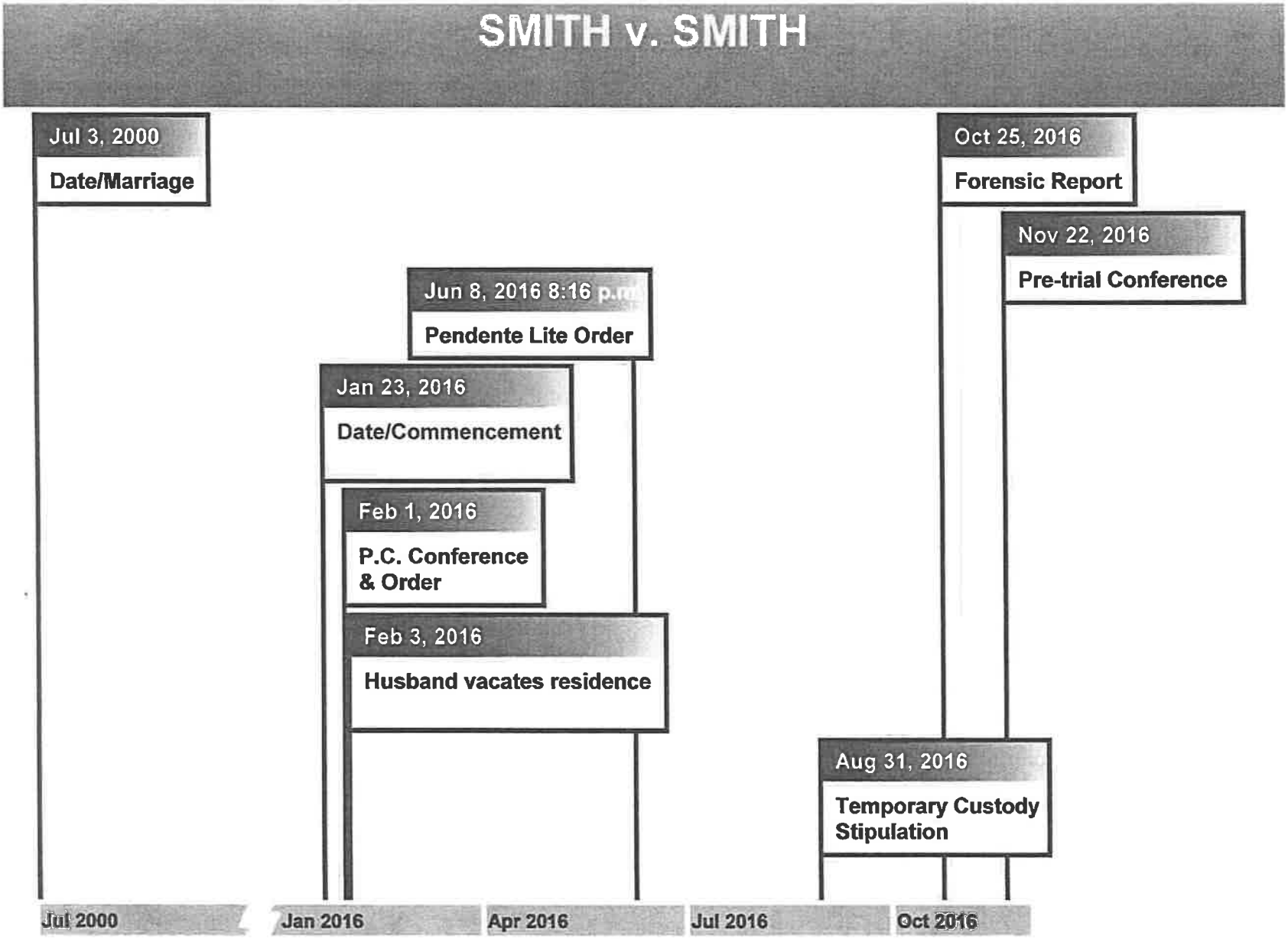
Thankfully, you will also hear about the vast improvement of this child in the last 21 months; the change from an anxious, diffident, almost frozen persona of this child, to someone who has solved her bedwetting problems, sleep issues, lives in a stable, child-centered, loving environment with an extended family, is able to have a wonderful relationship with her older half-brother, [redacted]. You will hear about her wonderful relationship with her stepsister, who is a year-and-a-half younger than her; her relationship with Mr. [redacted] wife, which is a healthy and proper relationship and one that inures the benefit of this child.

In some -- your Honor, we realize that we are seeking to impose what some may consider a hardship upon

the mother to cease all contact with her daughter, but no one has brought this about other than the mother, and if the best interest of the child which has become somewhat of a cliche but is still the standard that we are all guided by in these cases, if it means anything, it means that the interest, the safety and welfare of this child must trump all other considerations even if that imposes a hardship upon a parent.

Thank you, your Honor.

(Whereupon the trial continued but was not transcribed.)


SMITH v. SMITH
Jul 3, 2000
Date/Marriage
Jun 8, 2016 8:16 p.m
Pendente Lite Order
Jan 23, 2016
Date/Commencement
Feb 1, 2016
P.C. Conference & Order
Feb 3, 2016
Husband vacates residence
Oct 25, 2016
Forensic Report
Nov 22, 2016
Pre-trial Conference
Aug 31, 2016
Temporary Custody Stipulation
Jul 2000
Jan 2016
Apr 2016
Jul 2016
Oct 2016

EBT OF [redacted] EBT **Dated: April 18, 2016**

Page/Line Nos.	Subject Matter	Summary
7:6 – 8:10	H's residence	H resides at [redacted], NYC, on a lease that started on January, 2015 when he moved out of the marital residence. It has been extended since and he has the option to run it through the next three years.
8:21 – 9:6	Exhibit "A"	Lease for H's apartment in Manhattan. Referred to as the "[redacted] lease".
9:20- 10:11	H's residence	H pays $7,200 per month on his apartment; there was no security payment. He makes direct payment.
11:2 – 15	DOB	H was born on [redacted] in Kew Gardens, Queens. Date of Marriage in May 7, [redacted]; married at Holy Family Church in Hicksville, NY. They have three children.
12:4 – 13:24	Residences	After marriage, they lived in [redacted], Long Island where they rented for about two or three years. They then bought a house in New Hyde Park for approximately $79,000, and they had a mortgage.
14:7 – 15:9	Residences	They lived in NHP for five years, and then moved to [redacted] Lane in Manhasset, which they still own today. NHP house was purchased in joint names, as was Payne Whitney.
15:20 – 16:5	H's employment	At the time of PW purchase, H was working for [redacted] company as a training manager/training independent franchise bottlers.
16:11 - 17:4	H's residence	He moved in NYC in January, 2015, where he lives alone. [redacted]
17:11 – 19:16		H is currently dating [redacted] who lives in [redacted]. She has also stayed at his apartment in NYC, maybe once a month, but he has not tracked it. This would be for a day or two or three, depending on when it was, and he cannot recall the first time she stayed over.
19:17 – 20		He knows [redacted] for maybe three years.
20:14 – 21:6	Girlfriend	He has bought [redacted] things starting roughly in [redacted] when he bought her several things and he previously provided in discovery a list of those items. In [redacted], he knew she existed for approximately two years.
22:13 – 24:2	Girlfriend	He has bought her earrings, but he does not recall the cost. It was not a lot. Purchased on credit card/[redacted] prior to the commencement of divorce.

Interactive Evidence

Stephen Gassman (Moderator)
Gassman Baiamonte Gruner, P.C., Garden City

Hon. Jeffrey S. Sunshine
Supreme Court Kings County, Brooklyn

Hon. Christine M. Clark
Appellate Division, Third Department, Schenectady

INTERACTIVE EVIDENCE

New York State Bar Association

Family Law Section Summer Meeting

July 14, 2018

Hon. Christine M. Clark
Associate Justice
Appellate Division, Third Department

Hon. Jeffrey S. Sunshine
Supervising Judge for Matrimonial Matters
Kings County

Stephen Gassman, Esq.

EVIDENCE SCENARIOS

1. Defendant was prosecuted for assaulting his estranged wife's boyfriend. At trial, a detective testified that he spoke to the wife who did not testify as the People could not locate her. Without disclosing the conversation he had with the wife, the detective stated that as a result of the conversation, he focused his investigation on the Defendant. The Defendant's counsel objects and moves to strike the answer of the detective.

2. FACTS – Part "A"

Plaintiff calls defendant as her first witness. During the course of the examination, the defendant is asked a series of questions regarding his 2016 individual (married, filing separately) tax return, which includes Schedule C for his self-employed unincorporated business. The following question was posed to the defendant by Plaintiff's counsel: "The deductions you took on Schedule C for meals and entertainment were not business related, and were in fact personal expenses which you decided to deduct, correct? Defendant's counsel objects on the following grounds:

1. The question is leading.
2. Plaintiff has called defendant as her witness and is improperly attempting to impeach her own witness.

With respect to the objection of leading, sustained or overruled?

With respect to objection about impeaching her own witness, sustained or overruled?

FACTS – Part "B"

Assume defendant denies that any of his deductions were improper. Plaintiff's counsel now seeks to introduce photographs of Defendant and family members at a resort to show that no business-related people were being entertained for the deductions taken by the business for that trip. Defendant's counsel objects.

FACTS – Part "C"

Plaintiff's counsel now starts to read sworn deposition testimony of the Defendant wherein his states that the trip in question was a family vacation which they took every February during the children's winter school recess. Defendant's counsel objects.

3. During trial, plaintiff's counsel asks defendant to produce, pursuant to a subpoena duces tecum served upon defendant, emails purportedly relevant to the issue of defendant's alleged forgery of plaintiff's name on a deed to property which was owned by the parties jointly and then transferred by said deed to defendant's brother. Defendant testifies that he does not have the emails requested and that he destroyed the computer from which the emails in question was sent and received. He said he destroyed this computer at or about the time the commencement of the matrimonial action. Plaintiff's counsel asked for sanctions for spoliation including an adverse inference drawn against the defendant and dismissal of Defendant's answer to plaintiff's separate cause of action for a constructive trust on the subject property. Defendant's counsel

argues that although the emails were effectively destroyed, the plaintiff has failed to meet her burden of showing that the destroyed evidence was relevant to, or would have supported, plaintiff's claim for a constructive trust.

(a) Should the court draw an adverse inference against defendant?

If yes – vote overruled
If no - vote sustained

(b) Should the court dismiss defendant's answer?

If yes – vote overruled
If no - vote sustained

4. Plaintiff, upon cross examination by Defendant's attorney is asked about a transfer of property Plaintiff made two years prior to the date of commencement of the action, a topic not alluded to during direct examination. Defendant's attorney asks leading questions regarding this transfer to which Plaintiff's counsel objects.

5. FACTS – Part "A

In an action for partition of the former marital residence, the attorney for the former husband is cross-examining the former wife and he asks her if she filed tax returns for 2017. She answers yes. He then asks her if she claimed head of household filing status, and declared the children as dependents, although the children reside with the former husband, who has sole custody of the children, and she has a schedule of visitation with the children. Her attorney objects?

FACTS – Part "B"

Assume the former wife denies she claimed head of household status and declared the children as dependents. The attorney for the former husband then marks the wife's 2017 tax return for identification, has the former wife identify it, and offers it in evidence. The former wife's attorney objects.

6. During cross examination of the Husband in a child custody case, the wife's attorney asks the Husband "Is it not a fact, sir, that over the last ten years you have molested numerous women and paid them off to keep quiet about your sexual molestation"? The Husband's attorney objects and states: "This is a bad faith fishing expedition by counsel; he knows of no such conduct on the part of my client. Counsel should be admonished." The Court asks the wife's attorney if he has a good faith basis for asking the question, and the attorney replies that his client feels he may have engaged in such conduct.

7. The Wife and her mother consult with Able Advocate, a matrimonial attorney, They discuss the fact that the wife's mother paid for the marital residence of the wife and her husband, title to which was taken as tenants by the entirety, pursuant to a promise by the husband to convey his one-half title interest in the property to his mother-in-law if he ceased living in the marital

residence. She explores with Advocate a possible constructive trust action and the wife discusses a matrimonial action where the issue of occupancy and ownership of the marital residence is a key issue. At trial of the matrimonial action Advocate is subpoenaed to testify and when asked about the consultation he invokes the Attorney-Client privilege. The Husband's attorney argues that as the wife's mother was present during the entire consultation, the privilege has been waived.

8. During plaintiff's case, she testified that a parcel of real property was purchased during the marriage and was marital property. After her testimony, her attorney asked the Court to make a finding that the subject property was presumptively marital property based upon a statement by defendant's counsel during opening statement that defendant purchased the property during the marriage, though partially with money received from another source. Defendant's attorney objects to the finding of such presumption, arguing that what is said in opening statement is not evidence.

9. FACTS – Part "A"

In a child protective proceeding, the father's psychiatrist is called and is asked about an admission by the father of predatory sexual abuse he allegedly made to the psychiatrist for the purpose of treating his depression and suicidal ideation. The father's attorney objects and invokes the patient-physician privilege.

FACTS – Part "B"

The father is now on trial for criminal charges filed against him for the same acts. The same psychiatrist is called and asked about the same alleged admission. The father's attorney objects.

10. In a neglect proceeding, in response to the question, "what did the little girl say?", Dr. Fixbone, an orthopedist who treated the six-year old child's broken arm in the emergency room, is prepared to testify that the little girl said "Mommy didn't' mean to hurt me when she pushed me down." The Mother's attorney objects.

11. Plaintiff calls defendant as his witness on Plaintiff's direct case, the examination covering a multitude of issues. Upon completion of the examination, defendant's counsel conducts an examination of his client, utilizing leading questions on the ground that such questions are permitted upon cross examination. Plaintiff's counsel objects to the leading questions.

12. FACTS – PART "A"

In a child custody case, plaintiff-mother seeks to introduce the forensic report of the court-appointed mental health forensic expert as the expert is testifying. Plaintiff's counsel offers the report as a court exhibit and as an aid to the Court. Defendant's counsel objects to the offer on the ground that where there is a live witness, receipt of a report from such witness is neither necessary nor admissible.

FACTS – PART ‘B”:

A scrutiny of the report reveals that it contains no reference to any scientific professional literature or studies in support of the report’s analysis and opinions and thus does not comply the Frye v. U.S. (293 F. 1013) test applicable to New York cases and thus should not be admissible.

FACTS – PART “C”

Upon cross examination of the forensic evaluator by defendant’s counsel, the evaluator is asked if he is familiar with the publication Kapan & Sadock’s Synopsis of Psychiatry. He acknowledges that he is familiar with the publication. He is then asked if he regards the publication as an authoritative work in the field. The evaluator answers that while he uses the publication as a resource in his own practice and attempts to adhere to the guidelines in the publication, he could not say that it was authoritative. Defendant’s counsel then seeks to question witness was a passage from the publication which is at variance with the direct testimony of the witness. Plaintiff’s counsel objects.

13. In a divorce trial involving the issue of spousal maintenance, the wife calls Dr. Malcolm Practice as a witness. Dr. Practice is qualified as an expert and states that, although he did not personally examine the wife, he has carefully reviewed the x-rays and MRI films of the wife, and opines that based upon these diagnostic procedures, the wife has a permanent disability and is unable to undertake gainful employment that requires any substantial degree of physical movement or activity. The Husband’s attorney objects and moves to strike the opinion of the doctor.

14. FACTS – Part “A”

In a child custody case, plaintiff calls Joe Reliable, defendant’s best friend, as a witness and asks him if he heard the defendant tell the party’s three children that their mother was mean, did not care for them, and really did not want the children to live with her – she just wanted more money from the defendant. Reliable denies that he heard such a conversation. The plaintiff’s attorney then asks Reliable if he told Jill Yenta that he heard such a conversation. Defendant’s attorney objects.

FACTS – Part “B”

Plaintiffs’ counsel then lays the foundation to introduce a document signed by Reliable 6 months before trial where he alludes to the subject conversation and relates the substance of the conversation. He offers the document into evidence.

OBJECTION: Defendant’s attorney objects.

15. The forensic accountant retained by the defendant-husband to value his business interest testifies on direct examination that in normalizing the earnings of the business, he added back the sum of $40,000, representing the salary and payroll expenses of the parties’ daughter, a college student at the University of Arizona. Upon defendant’s direct examination, he is asked about his daughter’s employment and states that the forensic accountant he retained was in

error and that his daughter performed various business-related tasks for which she was fairly albeit not excessively paid. Plaintiff's counsel objects and moves to strike the answer, arguing that the defendant is bound by the admission made by the forensic accountant.

16. In an action seeking to set aside a prenuptial agreement based upon fraud in the inducement, i.e., that the husband promised to "tear up" the agreement when the parties had a child, testimony was adduced regarding a meeting attended by the prospective bride, prospective groom and each of their fathers as to whether such a promise was made at such a meeting. The husband testified that there was never any such promise and no mention of it was made at the meeting, and his father's testimony parroted that of the husband. The wife testifies in detail about the mention of the promise at the meeting but she fails to call her father as a witness, although he lives in proximity to her and she has a close relationship with him. The husband asked the court to draw a negative inference, i.e., that had the father of the wife testified, his testimony would not support her version of the facts.

ISSUE: Should the court draw such an inference based upon the principles of the missing witness charge.

If Yes – Overruled

If No - Sustained

17. In a custody case in which the mother has made allegations against the father of sexually abusing the parties' daughter and other children, the mother's attorney seeks to introduce a certified certificate of conviction of the father of sexual abuse of a minor female which occurred 20 years before the trial of this action.

OBJECTION: The father's attorney objects on the ground that the conviction is too remote to be relevant and would be unduly prejudicial to the father.

18. In a family offense proceeding involving an incident which occurred at the marital residence of the parties, petitioner-wife sought to present evidence of a police incident report prepared by the responding police officer wherein the officer records a statement made by the respondent – husband that "This is so unlike me. I am a calm guy. I guess I just lost it. She does that to me." Defendant objects and moves to strike the statement.

19. FACTS – Part "A"

In a divorce action, plaintiff's counsel had prepared and offered into evidence a spreadsheet reflecting all credit card and personal check payments of the parties for their personal lifestyle for a period of 2 years immediately preceding the commencement of the action. Plaintiff offered the spreadsheet into evidence pursuant to the business record rule contained in CPLR 4518(a).

OBJECTION: Defendant objects to the admission of the document.

FACTS – Part “B”

Plaintiff’s counsel renews the application to admit the spreadsheet but now bases the proffer upon the voluminous record rule. Defendant’s counsel objects.

20. During a contested child custody trial, plaintiff offered into evidence a report of the court – appointed forensic evaluator which includes sections containing interviews the evaluator held with ten collateral sources in addition to interviews with the parties and the children of the marriage. Defendant objects to the admission of the report on the basis that it is replete with inadmissible hearsay. Plaintiff argues that the hearsay is permissible under the professional reliability exception to the hearsay rule; that in any event plaintiff intends to call each of the collaterals as witnesses; and the principal basis of the expert’s opinion is based on interviews with the parties and the children.

21. FACTS- Part “A”

During a divorce trial, the wife alleges that the husband is under investigation for stock fraud and manipulation and that as a result of his actions, marital funds have been wasted by the husband for substantial legal fees and related costs, for which she seeks a credit in the distribution of marital property. The wife acknowledges that she is not privy to any of the details of the alleged stock fraud and manipulation. On the next day of trial, the judge informs the attorneys that he has done research on the Internet and has perused some newspaper articles concerning the allegations posited against the husband. The attorney for the husband immediately notes his objections to the actions of the judge and moves for a mistrial and recusal of the judge from this case.

OBJECTION: [If mistrial and recusal should be granted, SUSTAINED; if not, OVERRULED]

FACTS – Part “B”

During the same trial, upon the request of the defendant, the Court took judicial notice of employment information published on the U.S. Government web site.

OBJECTION: Plaintiff objects based on hearsay and unreliability.

*22. During a divorce trial in which the wife seeks spousal maintenance, she testifies regarding her medical condition, the symptoms that she experiences, and the daily physical limitations occasioned by her medical conditio*n. *Husband’s attorney objects, stating that expert testimony by a physician would be required and that the wife is not qualified to offer such testimony.*

23. FACTS – Part “A”

In a divorce action in which the wife’s forensic accountant is testifying, the wife’s attorney questions the accountant about a summary sheet of all sales made by the Husband, a commissioned sales person, during a three-year period. The accountant states that he created the summary sheet. The document is marked and offered into evidence as a business record.

OBJECTION: Husband’s attorney objects.

FACTS – Part “B”

Suppose the wife calls the Husband’s company’s bookkeeper who then testifies that she made the entries that comprise the computer printout after the husband reported each sale, as was the practice in the business, it was the regular course of business to make such entries, and that the entries were made based on regular submissions made at or about the time the sales were concluded. The computer printout, constituting a summary of the sales, is offered as evidence Husband’s attorney objects.

24. An expert witness’ qualifications are drawn out on direct. Once qualifications are given, the expert witness starts rendering opinions. The opponent objects because the witness has not been declared an expert.

25. FACTS – Part “A”

Witness (A) testifies on direct for plaintiff. On cross, Witness (A) is asked if he reviewed any documents prior to testifying. He answers “I reviewed a 5-drawer file cabinet full of reports related to this case.” Defendant’s counsel demands an opportunity to review the documents that the witness reviewed. The plaintiff’s counsel objects.

FACTS – Part “B”

Witness (B) testifies at the same trial for plaintiff. On cross, Witness (B) is asked if he reviewed any documents prior to testifying. He answers that “last night I perused some notes from my diary about a conversation I previously had with the Defendant”. Defendant’s counsel demands an opportunity to review the notes that the witness reviewed. The plaintiff’s counsel objects.

26. When the parties began experiencing marital difficulties, defendant contacted attorney Van Ryn and they exchanged e-mails discussing a strategy for defendant to gain advantage in future matrimonial and custody litigation. Plaintiff commenced a divorce action. At defendant's deposition, plaintiff's trial counsel questioned defendant about his e-mails with Van Ryn. Plaintiff apparently discovered a single page of one of the e-mails on defendant's desk and, while searching for the remainder of the letter, discovered the user name and password for defendant's e-mail account. She used the password to gain access to defendant's account, printed the e-mails between him and Van Ryn, and turned them over to her counsel. Plaintiff then amended the complaint to reflect that defendant conspired with Van Ryn to cause plaintiff anguish. Counsel subpoenaed Van Ryn for a deposition and to produce documents. Motions were then made to quash the subpoena, preclude plaintiff from using any privileged communications between defendant and Van Ryn, strike the portions of the amended complaint based on privileged information and disqualify plaintiff's counsel.

OBJECTION: If emails are privileged, SUSTAINED; if not privileged, OVERRULED

27. On the issue of whether the Husband assaulted the Wife, the Wife, in the divorce action, seeks to introduce the testimony of the arresting police officer to whom the Husband made an incriminating statement concerning an alleged act, later reduced to writing and ultimately suppressed during the course of a criminal proceeding because it was secured in violation of the Husband=s constitutional rights.

OBJECTION: The Husband's attorney objects and states that the statement must be suppressed in the divorce action as well.

28. In a child custody modification proceeding, the father testified to what the child of the parties said to him and his present wife, as well as statements made by a nurse to the petitioner=s wife, to explain why he and his wife took the child to the emergency room of a local hospital to be examined for possible abuse. The wife's attorney objects and moves to strike the testimony on the ground of hearsay.

29. In a proceeding to terminate parental rights, the Department of Social Services offers into evidence a report prepared in Georgia pursuant to the Interstate Compact on the Placement of Children. The respondent-father objects, claiming that the report should not be admitted unless the Department of Social Services demonstrates that all reporting parties referenced in the report were under a business duty to impart the information stated in the report.

30. Plaintiff-wife called to the stand her husband=s financial advisor/stockbroker, Mr. Churn, and plaintiff=s counsel inquired about what transpired when the husband opened a brokerage account with Mr. Churn=s employer, Pump and Dump Inc. Specifically, plaintiff=s counsel asked if the husband, in opening the account in the joint names of the parties, said anything to Mr. Churn as to the reason for joint names on the account. Mr. Churn immediately replied that the husband said the funds on deposit were funds he inherited from his late father and that he wanted the account to be in the joint names of he and his wife solely for convenience purposes. Plaintiff=s counsel then elicited from the witness his recollection about being deposed before trial at the attorney=s office, and the attorney then refers to page 22 of the transcript of the deposition, and begins to read lines 3 to 23 of that page of the transcript. The husband=s attorney objects, arguing that the wife=s attorney is now attempting to improperly impeach his own witness.

31. In a child support modification proceeding, wherein the father seeks to reduce his child support obligation based upon his claim that because of his psychiatric disorders, he cannot resume employment, the father offers into evidence his psychiatrist=s office records, consisting of a letter summarizing the doctor's diagnosis, treatment and opinions, supported by the statutory foundations for the admissibility of a business record rule pursuant to CPLR 4518(a). The mother objects to the offer.

32. In a matrimonial action, the husband was directed to sell his 100% stock interest in X Corp. In a contempt proceeding brought by his wife wherein she alleges that husband did not make that sale, husband claims he did but neither the sales contract nor the promissory note was produced and neither the alleged buyer nor the corporation's accountant appeared for depositions. As evidence that husband never sold the stock, wife seeks to introduce a printout from the corporation's website that shows husband listed as president?

33. FACTS – Part "A"

Wife seeks divorce from husband on grounds of adultery and cruel and inhuman treatment. She offers into evidence an e-mail from husband to Nancy Franklin wherein he recounts a romantic romp they had earlier that day. Wife printed out the e-mail from their home- PC she and her

husband share with a common password. She offers it into evidence and the Husband's attorney objects.

FACTS – Part "B"

Assume the Wife printed out the e-mail from her husband's laptop, provided to him by his employer for business use, accessing it when the husband left the computer at home and had not logged out. She offers it into evidence and the Husband's attorney objects.

FACTS – Part "C"

Assume the *Wife printed out the e-mail from her husband's laptop, provided to him by his employer for business use, accessing it by hiring a computer expert who "hacked" into the computer. Is the e-mail admissible?*

34. In an action for a divorce, the Wife is testifying on direct examination about her husband=s business and income, and the parties= expansive lifestyle. Her husband is the sole stockholder of a corporation that owns and operates four pizzerias. The wife=s counsel ask her if the husband has talked to her about the extent and nature of his income from the corporation. She replied that he did on several occasions, all of which took place during amorous moments and prior to the onset of the marital discord, and she relates the dates and places of such conversations. When asked to relate the substance of the conversations, she stated that her husband told her that in addition to his salary from the corporation, in the sum of $65,000 per year, he took more than $200,000 in cash each year which was not declared upon their income tax returns. The husband=s attorney objects and moves to strike the answer of the wife on the ground of the spousal privilege as set forth in CPLR 4501(b).

35. As part of a divorce judgment, the mother was granted custody of the parties= 5-year old daughter, Tracy. When the mother remarried to a man named Jenkins, the child=s father petitioned for a change of custody. At the hearing on his application, the child=s nanny was called as a witness by the father. Part of her testimony was as follows:

A. I told her [the child] that her mommy and Mr. Jenkins had got married, and she started to cry. She put her arms around me and said he [Jenkins] is mean to me, he pushes and hits me when mommy=s not home, and he touches me in places@.

Q. Does she say this to you often?

A. Yes. On numerous occasions, she tells me he is Amean@, that is the word she constantly uses in talking about him.

The mother=s counsel objects and moves to strike the testimony as inadmissible hearsay.

36. In a child custody proceeding, the mother subpoenaed the child=s treating therapist, a psychologist, to testify. The father=s attorney and the attorney for the child objected to the therapist testifying, arguing that the psychologist-client privilege precludes such testimony. The mother argues that in a custody case, privileges are waived. Is the objection to the testimony sustained or overruled?

37. In a proceeding by the mother of a child to terminate the visitation of the paternal grandparent of the child, the grandmother retained a forensic psychiatric expert, and through her counsel, invited the mother and the child to be interviewed by this expert prior to trial. The mother, through her counsel, and on behalf of herself and the child, declined the invitation. The expert=s pretrial disclosure revealed that while she did not interview the mother or the child, she based her opinion in this case upon her evaluation of the grandmother, a review of voluminous court filings and transcripts, correspondence and seven hours of taped telephone conversations between the grandmother and the child. The mother of the child objects to the expert witness testifying, proffering that such testimony is valueless where the expert has not seen the child or the mother.

38. In a custody modification proceeding, where the Father seeks to change custody of the children from the Mother to himself, a witness for the Father, a psychologist, testifies and opines that based upon his review of the report of the court-appointed forensic evaluator, and his interviews with the children and the Father, which interviews were conducted on a Saturday when the Father had visitation with the children, and without the knowledge of the Mother, the court-appointed evaluator=s opinion that the Mother should retain custody was in error, as the court-appointed evaluator failed to recognize the family dynamic of a classical case of Parental Alienation Syndrome (PAS), manifested by the Mother=s overt and subtle remarks and actions in denigration of the Father. The Mother=s attorney objects and moves to strike the entire testimony of this witness.

39. FACTS – Part “A”

In her sworn statement of net worth, received in evidence during the matrimonial trial, the wife listed her five pieces of jewelry and stated that they were acquired during the marriage and when the value of the jewelry was asked, she replied Aapproximately $30,000". No other proof or testimony was adduced by either side as to the wife=s jewelry or its value. At the close of the case, the husband asked the court to deem the wife=s jewelry as marital property and to fix its value at $30,000. The wife objects, claiming that the burden was on the husband, the non-titled spouse of the jewelry, to prove its value, and he has failed to do so, thereby waiving any claim to the jewelry.

FACTS – Part “B”:

Assume the same facts as above but in her net worth statement, instead of stating that the jewelry was worth Aapproximately $30,000", the wife merely put next to the value question Asubject to appraisal@. There is no other testimony or proof adduced regarding the jewelry during the trial. The wife requested the court to give her the jewelry without any credit to the husband.

If Wife retains jewelry without credit – Sustained

If wife does not retain jewelry without credit - Overruled

40. During the course of a matrimonial trial, the Wife is testifying and is attempting to prove that the husband has a bank account in Europe that he has not previously disclosed in his statement of net worth or elsewhere during pre-trial discovery. Her attorney marks a stack of bank

statements for identification, has the Wife identify the statements as those from her husband=s heretofore unidentified European account, and the statements are then offered into evidence. The husband=s attorney objects on the ground of hearsay.

41. In an action for divorce commenced by the Husband on the ground of cruel and inhuman treatment, the Husband offers to testify that, in order to save his marriage, he had dialed a number listed to the Wife=s paramour, who identified himself as the person the Husband believed him to be, and who proceeded to tell the Husband that he loved the [Husband=s} Wife, that she loved him and that unbeknownst to the Husband, he and the Wife had maintained this affair for the past five years, and that she sent him love letters and gave him gifts. The Wife=s attorney objects and moves to strike the testimony.

42. FACTS – Part “A”

In an action for divorce, the plaintiff-Wife testified that upon returning to the marital residence one day last month, she discovered an envelope on her desk, addressed to her in her Husband's handwriting, containing an audio tape. She further testified that she immediately played the tape and identified the voice on the tape as that of her Husband, and that the tape was a message to her from her Husband regarding the parties’ financial situation.The Wife's attorney then sought to play the tape. A series of objections are made on the following grounds:

Objection is made on the basis that there was no proper foundation for the playing of the audio tape. Overruled or sustained?

FACTS – Part “B”

After the Wife testified that the tape was a true and accurate record of the conversation she heard and that nothing had been deleted or added, objection is made on the basis that no testimony has been adduced relative to the <u>chain of custody</u> of the tape from last month, when the Wife discovered the tape, to the present. Overruled or sustained?

FACTS – Part “C”

Objection to the playing of the tape and its introduction into evidence is then made on the basis that the communication is subject to the spousal privilege, the Husband's attorney contending that if the tape is played, it will reveal the Husband asking the Wife for forgiveness and pleading with her to reconcile with him. The Wife's attorney argues, as an offer of proof, that if the tape is played it will reveal an admission by the Husband of a meretricious relationship. Overruled or sustained?

43. FACTS – Part “A”

During the pendency of a contested child custody proceeding, and while the Father had access with the children at his home, he tape recorded a number of telephone conversations the children had with the mother. At trial, the Father=s attorney has the tapes properly authenticated and when objection is made to the tapes based on relevancy, the Father=s attorney makes an offer of proof that the tapes will reveal the Mother=s inappropriate, profane and intemperate remarks to the children, particularly when she is talking to them about their father. The Mother=s attorney

further objects to the tapes based on lack of consent of one the participants to the conversation consenting to the taping. The Father=s attorney argues that as he is a parent of the children, and custody is not yet decided, he has authority to and did consent to the taping on behalf of the children, and that doing so was in their best interests as it revealed the remarks of the Mother which are germane to the proceeding. Ruling?

FACTS – Part "B"

After the foregoing objection was sustained, the Father=s attorney asked the Court to grant him permission to have the tapes sent to and listened by the Court-appointed forensic evaluator, alleging that the tapes contained highly relevant information and it was important for the evaluator to have as much information about the case as possible.

If permission granted – Sustained

If permission not granted - Overruled

44. In an action for divorce, the Wife calls as a witness a former employee of the husband who testifies about unreported cash sales in the husband=s business. On cross-examination, the husband=s lawyer suggests that the witness is biased against the husband because contrary to the direct testimony of the witness, instead of voluntarily leaving the employ of the husband, he was discharged because he misappropriated funds that belonged to the business. The witness denied that this occurred and stated he harbored no ill feelings toward the husband. On the husband=s case, a current employee of the husband, who knew the former employee who testified against the husband, took the stand and was asked what derogatory statements, if any, the former employee told him about the husband when he left the husband=s employ. The wife=s attorney objected, claiming that the husband=s attorney is seeking to introduce extrinsic evidence on a collateral matter; the wife=s attorney argued that he is entitled to show from one witness that another witness was biased against his client.

45. On the issue of custody of a six-year-old child, Wife testifies that she received a telephone call from her 17-year-old daughter who, with her brother, was visiting with her Father, and the daughter said, "Mom, you better come here right away. Dad is beating Billy pretty badly." Father's attorney objects and moves to strike the answer on the ground of hearsay.

46. During a divorce trial, the wife seeks to introduce a handwritten note of the husband that lists various offshore bank accounts he allegedly maintains. The husband testifies that this is not in his handwriting and he never saw the note before. There is no handwriting expert hired by either side, but the wife seeks to introduce a statement the husband wrote out on a MV 104 form around the same time in his own handwriting to show the judge it is his handwriting. Objection by the husband=s attorney because there is no expert to testify on handwriting.

47. During the course of settlement negotiations that occurred in the hallway of Supreme Court in a custody and order of protection case, the husband admitted that he did at times lose his temper and strike the wife about the arms and legs Abut never her face@. The negotiations failed

and the matter went to trial. At trial, counsel for wife sought to elicit that statement as an Aadmission@. The husband=s attorney objected. Do you sustain or overrule the objection?

48. In a trial of a divorce action, the wife serves a trial subpoena and calls as a witness a nurse employed in the husband=s dental office for the purpose of establishing that the nurse witnessed an assault of the wife by the husband when the wife unexpectedly came to the husband=s office about one year ago. In response to questions by the wife=s attorney, the nurse denies that she witnessed any such assault. The wife=s attorney then seeks to introduce into evidence a copy of a written deposition the witness purportedly gave to a police officer who was called to the scene of the alleged incident. Objection is made by the husband=s attorney that the wife is improperly attempting to impeach the credibility of her own witness.

49. FACTS – Part "A"

In an action for a divorce, the wife seeks a permanent award of spousal maintenance, claiming that because of her medical condition, she cannot work and therefore cannot become self-supporting. In support of her claim, she calls as a witness her internist who, after being qualified as an expert, testified that because of her continuous complaints of back pain and other symptoms, he referred her to a specialist. He further stated that he has an opinion as to whether she can undertake employment which opinion is based upon his recent review of her x-rays and MRI films which were taken by the specialist. When asked what was his opinion, there is an objection.

FACTS – PART "B"

After that court=s ruling, the doctor is asked if he is aware of what prescription medication the plaintiff-wife is taking, and he answers in the affirmative. After identifying the various medications, the doctor was asked if there is an authoritative text or treatise which sets forth the side effects of prescription drugs like those taken by the plaintiff. The doctor says there is and the book is the Physician=s Desk Reference (PDR). The attorney for the Wife then offers into evidence several segments from the PDR which list and discuss the side effects of the medications taken by the plaintiff.

50. In a constructive trust action by the wife against her husband, on cross-examination of the wife by the husband=s attorney, she was asked if at any time she received money from the Department of Social Services (DSS) to which she was not entitled. She answered ANo@. She was then shown a document which was a confession of judgment signed by her (she acknowledged her signature) and which indicated that she had received $3,000 from DSS and confessed judgment for that amount. When further questioned, over objection, she insisted that the money she had received was rightfully hers. She was then asked:

Q: Did you agree to pay back the money that you were not supposed to get?

A: I agreed to pay the money back, yes.

The husband=s attorney then offered the confession of judgment, containing a certification, in evidence. The Wife's attorney objects to the proffer.

51. FACTS – Part “A”

In a custody case, the court-appointed forensic expert, a psychologist, is called to the stand by the wife=s attorney. He testifies to his multiple interviews with the parties and the children, as well as interviews with collateral sources, including the children=s teachers and the father=s live-in paramour, Ms. Thirtysomething, as well as his review of voluminous court documents provided to him by the attorneys for the parties. He testifies that all of this information was utilized by him and formed the basis of his opinions in this case.The mother=s attorney asks if he has formulated , with a reasonable degree of medical certainty, an opinion as to a custodial arrangement that will serve the best interests of the child. He states that he has, and is asked to relate that opinion. Objection is made with the Father=s attorney arguing that the question calls for an answer which usurps the function of the court.

FACTS – Part “B”

In further questioning, the forensic evaluator is asked about his interview with the father=s live-in paramour, and specifically, he is asked what Ms. Thirtysomething said about her relationship with the oldest child of the parties. Objection is made on the basis of hearsay.

52. OPINION EVIDENCE

FACTS – Part “A”

In a custody contest where the Mother alleges that the Father sexually abused their child, the Mother offers the testimony of a certified social worker who, after satisfying the court as to her expert qualifications, and having preliminarily testified concerning the various interviews had with the child, she testifies that: AChildren do not have the skill at lying that adults do.” Father’s attorney objects

FACTS – Part “B”

Further testimony of same witness:

A*[T]he eye witness account provided by [the child] conformed well to the pattern and the content of accounts given by children who are known to have been sexually abused, so in my opinion she was providing an account which appeared to be any eye witness account of real events that happened to her.@* Objection.

FACTS – Part “C”

Further testimony of same witness:

There was no indication that the children were Acoached@ or Aprogrammed@. Objection.

Breaking Through Implicit Biases

Marsha Haygood
StepWise Associates, LLC, Yonkers

Hon. Andrew A. Crecca
New York Supreme Court, Central Islip

Unconscious Bias

Breaking Through Implicit Biases

Marsha Haygood
StepWise Associates, LLC
www.StepWiseAssociates.com

Breaking Through Implicit Biases

Objectives

- Increase awareness of unconscious biases and discuss how to break through them
- Enhance our interactions with diverse colleagues, team members and customers

What is unconscious bias? What does it mean?

An unconscious / implicit bias is a shortcut that the brain automatically takes to size up a situation based on assumptions that have not been fully thought through or proven.

It is a prejudice that one may not fully be aware of against a person or group compared with another that is considered to be unfair.

What opinion do *you* form when you see these three pictures?

What do *you* think when you hear these names or see them on a resume?

Shaniqua Brown

Angelina Gonzalez

Isaac Steinberg

Mohammed Hussain

In the workplace, this bias refers to attitudes that affect actions and decisions in an unconscious manner and may be hard to admit to or even recognize without intentional introspection.

Bias can be associated with many factors:

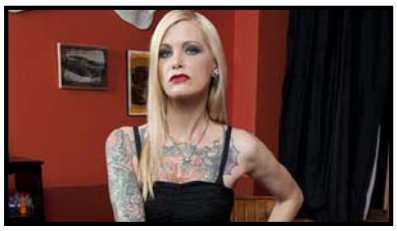
- Age
- Language
- Race
- Gender
- Sexuality
- Lifestyle
- Religion
- Health
- Image
- Size
- Education
- Financial Status
- Economic Background

Bias causes us to have feelings and attitudes about other people based on their characteristics and to form opinions that affects our behavior.

Would you hire any of these people? Why or why not?







How does bias show up in the workplace?

- **Hiring**
- **Promotions**
- **Development**
- **Exclusion**

What impact does bias have on a company's culture?

What can be done to minimize the effects that unconscious biases have on an organization?

What will be gained by making these changes?

What are some of the challenges of making these changes?

What's in it for you?

What can *you* do?

- Identify your bias- acknowledge that filters exist
- Monitor first thoughts- then take a moment to reflect
- Ask yourself questions without blame- how many people do I actually know that conform to my bias?
- Develop specific measurable behaviors that counter the bias you see- learn more about the individual or group

What can we do?

- We can all think of ways to create opportunities for positive exposure.
- Think of ways to be more inclusive
- Practice behavior that enhances relationships
- Question others when bias comments are made
- Take the online implicit test

https://implicit.harvard.edu/implicit/takeatest.html

- Research what other companies are doing
- Attend other sessions regarding this topic

Once people are made aware of their own implicit biases, they can begin to consider ways in which to address them.

•What ideas have we discussed today will you practice in the future?

_____
_____
_____
_____

•What, if any, changes will you make in your behavior?

_____
_____
_____

•Who might you share this information with?

_____
_____
_____

•What additional resources
•might you need to keep these ideas moving forward?

_____
_____

Resource List

- https://implicit.harvard.edu/implicit/takeatest.html
- http://execdev.kenan-flagler.unc.edu/blog/the-real-effects-of-unconscious-bias-in-the-workplace-0
- https://www.fastcompany.com/3036627/strong-female-lead/youre-more-biased-than-you-think

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Matrimonial Case Updates: The Year in Review

Bruce J. Wagner
McNamee Lochner PC, Albany

NEW YORK STATE BAR ASSOCIATION
FAMILY LAW SECTION
CONTINUING LEGAL EDUCATION

SUMMER 2018 MEETING

The Equinox Resort & Spa
Manchester, VT
July 14, 2018, 11:10 a.m. – 12:00 noon

"Matrimonial Update"

Outline

(September 4, 2017 - March 9, 2018))

Bruce J. Wagner
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These materials cover the period September 4, 2017 to March 9, 2018.

COURT OF APPEALS NOTES:

In Matter of Lisa T. v. King E.T., 2017 Westlaw 6454309 (Dec. 19, 2017), the Court of Appeals held, with two Judges dissenting, that where Family Court finds, following a hearing, that a respondent has violated a temporary order of protection, it may issue a new and final order of protection pursuant to Family Court Act 846 and 846-a as a disposition of such violation, even though the underlying family offense petition is dismissed.

In Forman v. Henkin, 2018 Westlaw 828101 (Feb. 13, 2018), a personal injury action, wherein plaintiff alleged that she was injured when she fell from a horse owned by defendant, suffering spinal and traumatic brain injuries resulting in cognitive deficits, memory loss, difficulties with written and oral communication, and social isolation, the Court of Appeals was "asked to resolve a dispute concerning disclosure of materials from plaintiff's Facebook

account." Defendant asserted that "the Facebook material sought was relevant to the scope of plaintiff's injuries and her credibility. In support of the motion, defendant noted that plaintiff alleged that she was quite active before the accident and had posted photographs on Facebook reflective of that fact, thus affording a basis to conclude her Facebook account would contain evidence relating to her activities. Specifically, defendant cited the claims that plaintiff can no longer cook, travel, participate in sports, horseback ride, go to the movies, attend the theater, or go boating, contending that photographs and messages she posted on Facebook would likely be material to these allegations and her claim that the accident negatively impacted her ability to read, write, word-find, reason and use a computer." Supreme Court directed plaintiff to produce all photographs of herself privately posted on Facebook prior to the accident that she intends to introduce at trial, all photographs of herself privately posted on Facebook after the accident that do not depict nudity or romantic encounters, and an authorization for Facebook records showing each time plaintiff posted a private message after the accident and the number of characters or words in the messages. Supreme Court did not order disclosure of the content of any of plaintiff's written Facebook posts, whether authored before or after the accident. Only Plaintiff appealed to the Appellate Division, which modified, with two justices dissenting, by limiting disclosure to photographs posted on Facebook that plaintiff intended to introduce at trial (whether pre- or post-accident) and eliminating the authorization permitting defendant to obtain data relating to post-accident messages, and otherwise affirmed. The Court of Appeals reversed and reinstated Supreme Court's order. The Court of Appeals held that "the Appellate Division erred in modifying Supreme Court's order to further restrict disclosure of plaintiff's Facebook account, limiting discovery to only those photographs plaintiff intended to introduce at trial. With respect to the items Supreme Court ordered to be disclosed (the only portion of the discovery request we

may consider), defendant more than met his threshold burden of showing that plaintiff's Facebook account was reasonably likely to yield relevant evidence. At her deposition, plaintiff indicated that, during the period prior to the accident, she posted 'a lot' of photographs showing her active lifestyle. Likewise, given plaintiff's acknowledged tendency to post photographs representative of her activities on Facebook, there was a basis to infer that photographs she posted after the accident might be reflective of her post-accident activities and/or limitations. The request for these photographs was reasonably calculated to yield evidence relevant to plaintiff's assertion that she could no longer engage in the activities she enjoyed before the accident and that she had become reclusive. It happens in this case that the order was naturally limited in temporal scope because plaintiff deactivated her Facebook account six months after the accident and Supreme Court further exercised its discretion to exclude photographs showing nudity or romantic encounters, if any, presumably to avoid undue embarrassment or invasion of privacy."

I. ADOPTION

A. Vacated – Non Biological Parental Standing Found

In Matter of Maria-Irene D. 2017 Westlaw 153 AD3d 1203 (1st Dept. Sept. 28, 2017), the adoptive father appealed from a March 2017 Family Court order, which, upon granting reargument, adhered to its December 2016 order, which had granted the motion by the spouse of the genetic father to vacate his adoption of the subject child. On appeal, the First Department affirmed. Genetic father Marco D., and Ming, both British citizens, entered into a civil union in the United Kingdom (UK) in 2008, which they converted into a legal marriage in 2015, effective as of the date of their civil union. In 2013, they executed an egg donor and surrogacy agreement with the intention of becoming parents. The embryo fertilized by Marco was transferred to the surrogate and their daughter was born in September 2014. An October 2014 Missouri order

awarded Marco, as the genetic father, "sole and exclusive custody" of the child. Marco, Ming, and the child returned to Florida, where they lived as a family until October 2015, when Ming returned to the UK to seek employment. Around 2013, Marco entered a relationship with adoptive father Carlos A., and they moved to New York with the child after Ming went to the UK. In January 2016, Carlos commenced the subject adoption proceeding, alleging that Marco and Ming had not lived together continuously since 2012 and that Carlos and Marco had been caring for the child since her birth. Ming's role in the surrogacy process was not disclosed to Family Court, nor was any mention thereafter made of Ming's March 2016 Florida divorce action, in which he sought joint custody of the child. Family Court granted Carlos' adoption petition in May 2016. Ming moved to vacate the adoption, upon the ground he was entitled to notice thereof and that relevant facts had not been disclosed to Family Court. In affirming, the Appellate Division noted that the child was born "as the result of jointly executed surrogacy agreements, at a time when the couple was considered legally married, thus giving rise to the presumption that the child is the legitimate child of both Marco and Ming." The First Department found that "Marco, Ming and the child lived together as a family, and the couple took affirmative steps in the UK to establish Ming's parental rights in accordance with UK law." Given that the child "was born in wedlock, *** Ming was entitled to notice of the adoption proceeding" under DRL §111[1][b]. The Court concluded: "Under the Court of Appeals' most recent decision concerning parental standing (Matter of Brooke S.B. v Elizabeth A.C.C., 28 NY3d 1 [2016]), Ming's claim to have standing as a parent is even stronger."

II. AGREEMENTS

A. Enforcement – Enhanced Earnings

In Anderson v. Anderson, 153 AD3d 1627 (4th Dept. Sept. 29, 2017), the former

husband appealed from a June 2016 Supreme Court order, which denied his motion, made 9 years following the divorce, for a share of the value of the former wife's degree earned during the marriage. The Fourth Department reversed on the law, and remitted to Supreme Court for a hearing to determine the value of the degree and the former husband's interest therein. The parties' incorporated stipulation entitled the former husband to an interest in the former wife's master's degree, but there was no valuation of the degree or percentage assigned to the former husband. The former husband's motion included a valuation of $223,116, while the wife's expert countered with a value of $18,529. Supreme Court denied the motion on the ground that there was "no enforceable stipulation" with respect to the degree. In reversing, the Appellate Division held that the former wife "effectively conceded that the stipulation was enforceable when she asserted that the only questions before the court were the valuation of her master's degree and the extent of plaintiff's marital interest therein. Thus, we conclude that the court erred in denying plaintiff's motion on the ground that the stipulation was unenforceable."

B. Interpretation – Child Support Modification Standards

In Matter of Frederick-Kane v. Potter, 2017 Westlaw 5615984 (3d Dept. Nov. 22, 2017), the father appealed from a May 2016 Family Court order, which granted the mother's March 2015 petition to modify a 1999 stipulated order, incorporated into a November 2000 judgment of divorce, which required the father to pay $150 per week in child support for 2 children. Family Court found that the judgment of divorce failed to comply with the CSSA and remitted to the Support Magistrate for a de novo determination, which, following the father's objections, confirmed the father's obligation at $748.41 bi-weekly. The Third Department reversed, on the law, and remitted to Family Court. The Appellate Division held that Family Court erred, upon the ground that "the stipulation, as well as the order of support, recite that the parties had been

advised of and fully understood the child support provisions of the CSSA and that the application of the statute would result in the presumptively correct amount of child support to be awarded. The stipulation then sets forth the presumptive amount of child support that would be awarded under the CSSA and the agreed-upon figures used to calculate that amount, states that the parties are deviating from the presumptive amount and provides a detailed explanation of the reasons for the deviation therefrom. Thus, the opt out provisions of the stipulation fully comply with the CSSA. (Citations omitted). That the judgment of divorce does not explicitly set forth the CSSA recitals is not determinative, as the statute only requires the inclusion of such recitals in the 'agreement or stipulation . . . presented to the court for incorporation in an order or judgment' (Family Ct Act § 413 [1] [h]." The Court concluded: "the parties' 1999 stipulation expressly provides that either party may petition a court for a modification of child support based upon 'a change of circumstances.' Through this clear and unqualified language, the parties plainly expressed an intent to dispense with the 'unanticipated and unreasonable change of circumstances' standard in favor of a less burdensome 'change of circumstances' standard."

C. Interpretation – Cohabitation

In Campello v. Alexandre, 2017 Westlaw 5615725 (3d Dept. Nov. 22, 2017), the former husband appealed from a September 2016 Supreme Court order, which denied his motion to enforce the terms of the parties' stipulation incorporated into a September 2014 judgment. The stipulation provided that the husband's maintenance obligation would terminate if the wife cohabited "permanent[ly]" with a man who is not her spouse, and she and this individual must hold themselves out to be married pursuant to Domestic Relations Law §248 [payee is habitually living with another person and holding himself or herself out as the spouse of such other person, although not married to such other person] and *Northrup v Northrup* (43 NY2d 566 [1978]). The

Appellate Division affirmed, noting that "the record reveals that the wife resided with a man and that she had been described in a newsletter published by his employer as his 'partner' and that she "had co-signed a lease with her male companion and had listed him as the contingent beneficiary on her life insurance policy," but there "was no proof that she had described him as her spouse in these or any other instances." The Court concluded: "This proof does not rise to the level required to establish that the wife held herself out as another man's spouse within the meaning of *Northrup* and Domestic Relations Law §248."

D. Interpretation – Interest

In O'Donnell v. O'Donnell, 2017 Westlaw 4158945 (2d Dept. Sept. 20, 2017), the wife appealed from a March 2016 Supreme Court order which, among other things, denied her motion for statutory interest on a $1,000,000 distributive award. The parties' March 2015 judgment of divorce incorporated a March 2014 stipulation, which required the husband to "pay the Wife a lump sum of $1,000,000 on or before September 30, 2014." The wife moved on June 5, 2015 for a money judgment for $1,000,000, plus statutory interest at the rate of 9% per annum. The husband paid the $1,000,000 in full on June 19, 2015. Supreme Court denied interest on the $1,000,000, because the stipulation of settlement did not provide for such interest. The Second Department affirmed, holding that the wife "was not entitled to postjudgment interest, as the $1,000,000 distributive award was not explicitly set forth in the judgment of divorce, but, rather, was part of the stipulation of settlement that was incorporated by reference, but not merged, in the judgment of divorce. Though the plaintiff moved to reduce that award to a money judgment, the defendant paid the $1,000,000 distributive award while the plaintiff's motion was pending, thus avoiding postjudgment interest." The Appellate Division noted: "[t]here is no automatic entitlement to prejudgment interest, under CPLR 5001, in matrimonial litigation (citation

omitted). The general rule in matrimonial actions is that the determination of whether to award prejudgment interest is a discretionary determination with the trial court (citation omitted)." The Court recognized that DRL 244 provides for an award of interest upon a willful default, but where, as is here the case, "there was no finding of a willful default, and the amount was not reduced to a judgment, the denial of prejudgment interest was a provident exercise of discretion."

E. Modification – No Family Court Jurisdiction

In Matter of DeGennaro v. DeGennaro, 2018 Westlaw 846147 (2d Dept. Feb. 14, 2018), the father appealed from a February 2017 Family Court order, which granted the mother's motion to dismiss his petition for contempt for visitation violations and for downward modification of child support, and the mother appealed from so much of the same order which denied her request for counsel fees. The parties' March 2016 stipulation, which was incorporated into a July 2016 judgment of divorce, provided that: the father would have visitation "at any time he and the child mutually agreed"; the mother waived child support in exchange for a share of the father's retirement accounts; and the prevailing party was entitled to counsel fees for enforcement of the stipulation. The Second Department affirmed, noting that as to visitation, the father failed to establish that the mother willfully violated a clear and unequivocal order of the court. As to the father's request for downward modification, the Appellate Division held that Family Court lacked authority to modify the stipulated waiver of child support. As to the counsel fee issue, the Court held that Family Court's denial was proper, given that the mother, in responding to the father's motion, "was not seeking to enforce any rights under the stipulation."

F. Set Aside - Unfair & Unconscionable

In Tuzzolino v. Tuzzolino, 156 AD3d 1402 (4th Dept. Dec. 22, 2017), the husband

appealed from a July 2016 Supreme Court judgment, which, in his October 2015 divorce and rescission action, incorporated the parties' October 2013 separation agreement and a July 2014 modification agreement, and denied his motion to set aside the agreements. The Fourth Department, holding that the agreements were "unconscionable and were the product of overreaching" by the wife, reversed, on the law, granted the husband's motion, and remitted for further proceedings. The parties were married in 1978. The Appellate Division found that at the time of the agreements, the wife was represented by counsel and the husband was not, "which, while not dispositive, is a significant factor for us to consider," and that the agreements "did not make a full disclosure of the finances of the parties." The Court further noted that the wife had a master's degree in business administration, was a professor at a SUNY college, and would receive two pensions, neither of which was valued. Further, there was a gross disparity between the parties' incomes and despite the length of the marriage, while the modification agreement provided for maintenance to the husband, he was also required to transfer his interest in the residence to the wife, which resulted in the wife's assets being worth about $740,000 and the husband's property being valued at approximately $77,000.

G. Upheld

In Suchow v. Suchow, 2018 Westlaw 280866 (3d Dept. Jan. 4, 2018), the husband appealed from an October 2016 Supreme Court order, which denied his motion made in his February 2015 divorce action, seeking summary judgment and incorporation of the parties' 2012 separation agreement. The Third Department reversed, on the law, granted the husband's motion and remitted to Supreme Court for entry of a judgment of divorce. The parties were married in 1982 and negotiated the agreement through counsel and a social worker, who acted as a facilitator, over a period of 11 months. The wife, who, according to the Appellate Division,

received "meaningful benefits in the form of four vehicles, property in Las Vegas, and a total distributive award of $570,000, $405,000 of which was to be remitted upon signing of the agreement," challenged the agreement upon the grounds of fraud and duress, after all $570,000 were paid to her. The Court held that the wife "ratified the agreement and is estopped from challenging it."

III. CHILD SUPPORT

A. CSSA – Equally Shared Custody; Imputed Income

In Betts v. Betts, 156 AD3d 1355 (4th Dept. Dec. 22, 2017), the wife appealed from a February 2016 Supreme Court judgment which determined the issues of child support and equitable distribution. On appeal, the Fourth Department affirmed, holding that where neither party has custody of the children for a majority of the time, the party with the higher income, here, the wife, is deemed to be the noncustodial parent for child support purposes. The Appellate Division also upheld Supreme Court's determination to impute income to the husband in the sums of $32,000 for 2013 and $33,500 for 2014, finding the same to be based "upon his employment history and earning capacity as a truck driver." With respect to equitable distribution, the court rejected the wife's contention that she should have been granted a distributive award of more than $5,000 for her contributions to the husband's separate property (farm property and business), finding that the wife "did not meet her burden of establishing the manner in which her contributions resulted in an increase in value of the separate property or the amount of any increase that was attributable to her efforts."

B. CSSA – Imputed Income; Over the Cap

In Schorr v. Schorr, 154 AD3d 621 (1st Dept. Oct. 31, 2017), the husband appealed from a July 2016 Supreme Court judgment, which awarded child support, denied his separate property

credits, and directed the parties to repay a $124,000 loan from the wife's father. The First Department affirmed. The Appellate Division found that when "calculating the child support award, the court properly imputed income to defendant by including significant funds he received from his parents to pay his expenses (citation omitted).' The Court noted that the evidence at trial supported the finding "that defendant inflated his expenses on his tax returns so as to deflate his reported net income, and otherwise manipulated his income" and that he used funds from his father's estate to pay some of his personal expenses. The First Department held that Supreme Court "properly articulated its rationale for including combined parental income above the statutory cap, i.e., to maintain the standard of living provided the child during his parents' marriage and taking into account his reasonable needs." As to the loan from the wife's father, the Appellate Division found that Supreme Court "providently exercised its discretion in directing the parties to repay the loan from the proceeds of the sale of the marital residence, given that the father "testified credibly that $124,000 remained unpaid under two promissory notes for monies borrowed from him to purchase the marital residence." The First Department concluded that the husband was not entitled to a separate property credit, because he "failed to prove that his premarital assets that were admittedly commingled [for about one year] with marital funds were not marital property."

In Zappin v. Comfort, 2017 Westlaw 5578406 (1st Dept. Nov. 21, 2017), the father appealed from an August 2016 Supreme Court judgment, which granted the mother sole legal and physical custody, granted him supervised visitation, and granted a 5 year stay away order of protection. The First Department affirmed, noting that the determination finding that "it was in the child's best interests to award sole custody to defendant has a sound and substantial evidentiary basis" and "was based in part on the court's findings that plaintiff committed acts of

domestic violence against defendant, both during her pregnancy with the child and after the child was born, rendering joint custody impossible." The Appellate Division agreed that the evidence that the father "had physically and verbally harmed the child's mother, engaged in abusive litigation tactics, and lacked the emotional restraint and personality to look after the child's best interests provides a sound and substantial basis for the court's finding that unsupervised visitation would have 'a negative impact on the child's well-being.'" The Court further noted that the father "made repeated false allegations of abuse to the Administration for Child Services and the police, which rendered supervised visitation appropriate." The First Department determined that Supreme Court "detailed its reasons for issuing a five-year order of protection, and found that plaintiff committed numerous family offenses, including assault in the third degree ***and harassment in the second degree." The Court concluded that Supreme Court "was not required to make a finding of 'aggravating circumstances' before issuing the order of protection (*compare* Domestic Relations Law §252 *with* Family Court Act §842)." With respect to child support, the Appellate Division held that Supreme Court "properly imputed income to plaintiff based on his income in 2014. Although he presented no direct evidence of it, plaintiff claims that he was terminated from his position at his law firm because of the negative publicity he received after he had been sanctioned during these proceedings in 2015. (Citations omitted). Even if he was terminated for that reason, the sanctions — and therefore his unemployment — resulted from his own misconduct at trial, not from the court's conduct in sanctioning him or publicly releasing the sanctions order." As to income over $143,000, the First Department found: "In setting a child support income cap of $250,000, the court cited the parties' incomes in the mid- to high $200,000s and their upper-middle class lifestyle, and thus properly considered the parties' financial resources and the child's standard of living had the marriage not dissolved."

C. CSSA – Imputed Income - Rental, Subchapter S, Unpaid Parent Loan

In Matter of Worfel v. Worfel, 2017 Westlaw 4679943 (3d Dept. Oct. 19, 2017), the father appealed from a February 2016 Family Court order, which upheld the Support Magistrate's determination to impute income to him from: his rental properties, his shares in a family Subchapter S corporation, and an unpaid debt owed to his parents. The Third Department affirmed, rejecting the father's argument "that fire damage to one of his rental properties resulted in the rentals operating at a loss in 2013," given that he admitted that he had "consistently earned some money," the fire damage had been repaired, and the father offered no evidence "indicating that the rental income subsequently remained adversely affected." The father was employed as the manager of a hardware store, as to which his parents are the majority shareholders of the related subchapter S corporation. The father reported passive earnings on his 2013 tax return arising from his Subchapter S shares, but argued that this income "was improperly imputed to him as he never actually received this money." The Appellate Division upheld the imputed income finding, noting that while the father paid about $3,000 in taxes on Subchapter S earnings, he claimed to have "no clue" as to where the money was. Further, the Third Department found: "[t]he father failed to disclose his shares in his initial April 2014 financial disclosure affidavit. On a second affidavit submitted 11 months later, he disclosed that he had received 127 shares in 2013 and additional shares in 2014." With regard to the parental loan, there was a promissory note, but the father had not begun to repay the loan by its terms and also failed to list it on his financial disclosure affidavits. Family Court noted that "the parents had allegedly made a major loan while decreasing [the father's] pay, with knowledge of the ongoing contentious legal proceedings." The Appellate Division concluded: "Upon this record, we find no abuse of discretion in Family Court's determination to impute to the father the rental income reported in

his 2012 tax return (citations omitted) *** and "no abuse of discretion in the determination to impute the income he received from his shares in the family company (citations omitted), or to impute an amount equal to the unpaid monthly payments on the promissory note."

D. CSSA – Opt-Out Sufficient

In Matter of Frederick-Kane v. Potter, 2017 Westlaw 5615984 (3d Dept. Nov. 22, 2017), the father appealed from a May 2016 Family Court order, which granted the mother's March 2015 petition to modify a 1999 stipulated order, incorporated into a November 2000 judgment of divorce, which set the father's child support obligation for 2 children at $150 per week. Family Court found that the judgment of divorce failed to comply with the CSSA and remitted to the Support Magistrate for a *de novo* determination, which, following the father's objections, confirmed the father's obligation at $748.41 bi-weekly. The Third Department reversed, on the law, and remitted to Family Court. The Appellate Division held that Family Court erred, upon the ground that "the stipulation, as well as the order of support, recite that the parties had been advised of and fully understood the child support provisions of the CSSA and that the application of the statute would result in the presumptively correct amount of child support to be awarded. The stipulation then sets forth the presumptive amount of child support that would be awarded under the CSSA and the agreed-upon figures used to calculate that amount, states that the parties are deviating from the presumptive amount and provides a detailed explanation of the reasons for the deviation therefrom. Thus, the opt out provisions of the stipulation fully comply with the CSSA. (Citations omitted). That the judgment of divorce does not explicitly set forth the CSSA recitals is not determinative, as the statute only requires the inclusion of such recitals in the 'agreement or stipulation . . . presented to the court for incorporation in an order or judgment' (Family Ct Act § 413 [1] [h]." The Court concluded: "the parties' 1999 stipulation expressly

provides that either party may petition a court for a modification of child support based upon 'a change of circumstances.' Through this clear and unqualified language, the parties plainly expressed an intent to dispense with the 'unanticipated and unreasonable change of circumstances' standard in favor of a less burdensome 'change of circumstances' standard."

E. College and Health Insurance Contributions Denied

In Wallace v. Wallace, 2017 Westlaw 4680170 (3d Dept. Oct. 19, 2017)**,** both parties appealed from a February 2015 Supreme Court judgment, which, among other things, distributed marital property upon a decision of the Court. The parties were married in May 2000 and have a daughter born in 1995 and a son born in 2001. The wife commenced the divorce action in December 2011 and the parties resolved the issues of custody and personal property. The Third Department upheld Supreme Court's failure to credit the wife for the daughter's college expenses, finding: "Although the court made no express finding on this request, *** the parties otherwise have limited financial resources. The husband is paying $683.75 in child support and a payment in the same amount for arrears, and the parties incurred heavy debt to pay for their business. The daughter, who is estranged from the husband and, unbeknownst to him, had enrolled in a state university (later transferring to a local community college), paid her expenses with various loans, grants and financial aid, and the wife did not qualify for parental loans. Under all of the circumstances, including the husband's limited ability to pay, we decline to credit the wife for the daughter's college expenses (citations omitted)." As to the issue of health insurance, the Appellate Division noted "the wife testified that the children are covered through the Child Health Plus program at a cost to her of $30 each per month, and she has insurance through her employer, while the husband is enrolled in Medicaid. Supreme Court properly ordered the husband to pay his pro rata share (42%) of the children's future unreimbursed health-

related expenses and, when the children no longer qualify for this program, directed the wife to add them to her health insurance plan and the husband to pay the wife his 42% share of those costs. Given the child support award, minimal insurance costs under the program and the parties' financial circumstances, we do not find, as the wife urges, that the court abused its discretion in declining to credit her retroactively for the husband's share of health care costs (citations omitted).” As to the husband’s cross appeal, the Appellate Division modified, on the law, and remitted to Supreme Court. The business was purchased with a bank loan (partially secured by a mortgage on the marital residence), marital funds and loans from the parties' parents and had been listed for sale. The Third Department found: “Despite the wife's limited direct involvement in the business, the court ordered that the net proceeds be equally divided upon its sale, with certain adjustments related to the bank loan, and the parties were each held responsible to repay their respective parents. The husband argues that, given the equal distribution of the business asset, the court should have equally apportioned the outstanding credit card debt and 401(k) loans — reportedly totaling approximately $125,000 — that he incurred to directly support the business prior to the commencement of this action. He also requested credit for any payments made after the action was commenced. We agree. *** Thus, Supreme Court could have credited the husband for one half of the total debt amount and for payments made toward these debts after the action was commenced. Alternately, the court could have equally divided those debts and assigned them specifically to each party or ordered them to be paid out of the proceeds from the sale of the business. Supreme Court will need to address these matters upon remittal.” The Appellate Division concluded: “We similarly find that the husband should have been credited for his premarital contributions toward the purchase of the marital home in 1999. *** The husband offered uncontradicted testimony that, prior to the marriage, he contributed $17,575 from his

separate property toward the down payment and purchase of the parties' home, which was deeded to both parties, from funds that he obtained from his personal banking ($7,148) and 401(k) ($10,427) accounts. While he temporarily placed some of the withdrawn 401(k) funds in the parties' joint account, this was done for convenience and those funds were used at the closing on the marital residence the following week, and, under all of the circumstances, we find that they 'retained [their] character as separate property.' (Citations omitted)."

F. Modification – Agreement Interpretation – Gross Income

In Toscano v. Toscano, 153 AD3d 1440 (2d Dept. Sept. 27, 2017), the mother appealed from a June 2015 Supreme Court order, which denied her January 2015 motion to modify the father's child support obligation. The Second Department reversed, on the law, and remitted to Supreme Court. The parties' incorporated September 2011 agreement provided that the mother would pay the father $4,000 per month in spousal support for 36 months, $2,083.33 per month for 24 months, and then the obligation would cease. Given the father's lack of income in the year preceding separation, his child support obligation was set at $25 per month, subject to modification pursuant to the CSSA upon any of the DRL 236(B)(9)(b) grounds and the following enumerated events: (i) December 31st of any year in which the Father's earned income exceeds $25,000; (ii) December 31st of any year in which the Father's gross income from all sources exceeds $45,000; and (iii) the date on which each child becomes emancipated. The mother's motion alleged that during 2012 she paid $48,000 in spousal support to the father, and thus, for that year, the father's "gross income from all sources" exceeded $45,000, triggering a mandatory adjustment of the father's basic child support obligation. The father argued that there was no indication in the agreement that the spousal support paid to him was intended to be included in the calculation of his child support obligation and that it was "illogical that he would accept

spousal support from the mother, only to immediately pay her back with her own money." Supreme Court concluded that the parties' agreement did not intend for child support to be paid back to the mother by the father from the spousal support she paid to him. The Appellate Division held that "Supreme Court erred in concluding that the parties did not intend to include the spousal support paid by the mother to the father as part of the father's gross income from all sources used to determine whether his child support obligation should be modified. The use of the terms 'gross income from all sources,' each of which have a clear and plain meaning in and of themselves, coupled with the fact that the agreement distinguished between 'earned income' and 'gross income from all sources,' established that the parties contemplated a clear distinction between income the father earned and monies the father obtained from any sources, including spousal support, to support himself. *** Thus, the parties knew or should have known that the spousal support would be considered income to the father by any court called upon to modify his child support obligation."

G. Modification - 2010 Amendments

In Matter of Diaz v. Smatkitboriharn, 2018 Westlaw 988951 (2d Dept. Feb. 21, 2018), the father appealed from a November 2016 Family Court order, which denied his objections to an August 2016 Support Magistrate order, rendered after a hearing and which granted the mother's August 2015 petition for upward modification of child support. The Second Department affirmed. The parties have 3 children and entered into a March 2011 stipulation, which was incorporated into an October 2011 judgment of divorce and required the father to pay $200 per month in child support. The Appellate Division stated that since the parties' stipulation "was executed after the effective date of the 2010 amendments to Family Court Act §451, in order to establish an entitlement to an upward modification, the mother had the burden of

demonstrating a substantial change in circumstances," which may include "the increased needs of the children, the increased cost of living insofar as it results in greater expenses 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 (citations omitted)." The Court noted that "the mother presented uncontroverted testimony and other evidence as to specific expenses related to the care of the children, including specific increased expenses related to the children's extracurricular activities. In addition, she submitted her 2015 income tax return, which, together with her testimony and financial disclosure affidavit, revealed that even with the father's $200 child support contribution, the mother was financially unable to meet the needs of the children."

H. Needs - Where No Disclosure; Preclusion

In Matter of Villafana v Walker, 2018 Westlaw 443985 (2d Dept. Jan. 17, 2018), the father appealed from a September 2016 Family Court order, which denied his objections to a June 2016 Support Magistrate Order, made after a hearing, and which set his child support obligation for 2 children at $277 per week. The Second Department affirmed, noting that at the first appearance held in March 2016, the Support Magistrate directed the father to provide a financial disclosure affidavit and advised him that absent full financial disclosure, child support would be determined based upon the children's needs. The Support Magistrate issued a preclusion order in May 2016. The Appellate Division held that Family Court properly issued a preclusion order, FCA 424-a(b), and based child support on the children's needs, FCA 413(1)(k).

I. Suspension - Denied

In Matter of Harry T. v. Lana K., 2017 Westlaw 6375542 (1st Dept. Dec. 14, 2017), the mother appealed from an April 2017 Family Court order, which denied her affirmative defense

of alienation, after excluding the testimony and written report of a neutral forensic psychologist appointed during prior custody proceedings, and granted the father's support petition. On appeal, the First Department affirmed, noting that the mother "never offered it [the forensic report] into evidence at trial" and that the report was "completed more than two years before trial and prior to the parties' stipulation changing primary physical custody from respondent [mother] to petitioner," such that it would not be relevant to the child support proceeding. The Appellate Division concluded that a suspension of child support was not warranted, since the mother failed to show "deliberate frustration of and active interference with [her] visitation rights."

IV. COUNSEL & EXPERT FEES

A. After Trial

In Nadasi v. Nadel-Nadasi, 2017 Westlaw 4159147 (2d Dept. Sept. 20, 2017), both parties appealed from a September 2014 Supreme Court judgment, rendered upon a March 2014 decision after trial, which: awarded the wife a credit of $135,450, representing 15% of the value of the husband's interest in a business; failed to award her any credit related to a business apartment; awarded her maintenance of $12,000 per month for two years after she vacates the marital home, $11,000 per month for the following two years, and $10,000 per month for the following two years, to terminate sooner upon her remarriage or the death of either party; and directed the husband to pay 70% of the wife's attorney and expert fees. The Second Department modified, on the facts and in the exercise of discretion, by : (1) increasing the wife's share of the business to 25% or $225,750; (2) awarding the wife a credit of $90,000 related to the business apartment; and (3) increasing maintenance to 12 years, at the rates of: $12,000 per month for two years after the wife vacates the marital home, $11,000 per month for the following two years, $10,000 per month for the following two years, $9,000 per month for the following two

years, $8,000 per month for the following two years, and $7,000 per month for the following two years, to terminate sooner upon her remarriage or the death of either party. The parties were married in November 1989, and had 3 children. The husband is a 50% partner in a commodities brokerage firm, earning approximately $1.5 million per year. The wife stopped working in 1996 to be a homemaker and primary caretaker of the parties' children. The parties separated in May 2010 and the husband commenced the divorce action in July 2011. With regard to the percentage distribution of the husband's business, the Appellate Division increased the same to 25%, based upon the wife's "indirect contributions to the business as a homemaker and primary caretaker for the parties' three children in this long-term marriage, while forgoing her own career." As to the business apartment, the Second Department found that in connection with a July 1997 refinancing, the husband purchased an additional 13.33% interest therein, presumably with marital funds, and awarded the wife a credit in the sum of $90,000, representing one-half of the value of the husband's 13.33% increased interest therein. As to maintenance, the Appellate Division held that Supreme Court "improvidently exercised its discretion in failing to extend the award until the defendant reaches retirement age" (which age, and the wife's present age, were both unspecified), and increased maintenance to 12 years as set forth above. With respect to counsel fees, the Second Department concluded: "In view of the relative financial circumstances of the parties, including the defendant's substantial distributive award, the nature and extent of the services rendered, and the relative merits of the parties' positions at trial, the Supreme Court providently exercised its discretion in awarding the defendant 70% of her attorney and expert fees."

In Johnston v. Johnston, 2017 Westlaw 6519486 (3d Dept. Dec. 21, 2017), the wife appealed from a January 2017 Supreme Court judgment, which, after trial, decided the issues of

counsel fees, equitable distribution and maintenance. The parties were married in September 1989 and have two children, born in 1991 and 1995. The wife commenced the divorce action in April 2014 seeking a judgment of separation. The husband counterclaimed for divorce on irretrievable breakdown or abandonment, and the wife asserted a "counterclaim" for divorce on adultery or constructive abandonment. Supreme Court granted the husband a divorce on his no-fault counterclaim, awarded the wife $5,000 in counsel fees, $3,000 per month in maintenance until she begins to receive the husband's retirement benefits, the death of either party, the wife's remarriage or a subsequent modification by the court, directed an equal sharing of a home equity loan, and gave the husband a credit for payments made over and above rent received. The Third Department affirmed. As to the divorce, the Appellate Division held that "having determined that the husband established irretrievable breakdown pursuant to Domestic Relations Law §170(7), Supreme Court was under no obligation to grant the wife a judgment of divorce on the ground of adultery or constructive abandonment." The Court noted that "the parties had been renting out the marital residence for $1,300 per month" and that Supreme Court "awarded the husband a credit for one half of the payments that he made during the pendency of the action toward the portion of the mortgage that was not covered by the rental income." The Third Department rejected the wife's assertion that Supreme Court erred by concluding that the home equity loan taken on the marital residence was a marital debt and that the parties should equally share its repayment upon the sale of the residence, given "the absence of any evidence that the husband used the home equity loan to pay off his separate liabilities." With regard to maintenance, the Third Department noted that Supreme Court considered "the parties' long-term marriage, the 'comfortable lifestyle' that they enjoyed throughout the marriage, their respective property, income and potential earning capacities and its distributive award of marital property and debt."

The trial evidence established that the husband had been the primary wage earner and the wife managed the home, was the primary caretaker and educator of the children, who were home schooled for a majority of their childhoods. The Appellate Division held that Supreme Court "properly imputed an annual income of $30,000 to the wife based on her age, health, attainment of an Associate's degree in theology from an unaccredited institution and her work history, which included eight years of full-time employment at the United States Post Office prior to the marriage and two years of full-time employment at the United States Consulate General in Kazakhstan during the marriage." The Appellate Division upheld the $5,000 counsel fee award, holding that "Supreme Court appropriately considered, among other things, the $8,000 that the husband paid to the wife in interim counsel fees, the amount of temporary maintenance and child support received by the wife, and 'the tremendous expenditures made by the husband to keep the family and the marital residence afloat during the pendency of [the action].'" The Court concluded: "To the extent that the wife asserts that the proceedings were unfair because the husband allegedly spent more in legal fees, we note that the wife was free to use her temporary maintenance to supplement the interim and postjudgment counsel fee awards."

B. Custody

In McGinnis v. McGinnis, 2018 Westlaw 1188971 (1st Dept. Mar. 8, 2018), the mother appealed from a March 2016 Supreme Court judgment which: transferred sole custody of the child to the father; granted the mother 12 hours per week of supervised visits; and awarded counsel fees of $132,031 to the father. The First Department affirmed, holding: "The mother's lack of insight, poor judgment, efforts to minimize the father's relationship with the child and multiple, unsubstantiated claims of abuse — as well as her refusal to return to New York in violation of the parties' settlement agreement until compelled to do so by the court — all support

the IAS court's findings." The Appellate Division reiterated the principle that "[a] parent's repeated allegations of abuse are acts of interference with the parental relationship 'so inconsistent with the best interests of the child[]' that it raises a strong probability of unfitness" and found that "the mother is unwilling to ensure meaningful contact between the child and her father." As to the issue of counsel fees, the First Department concluded that the award was within Supreme Court's discretion and was "supported by the plain terms of the parties' settlement agreement."

V. CUSTODY

A. Domestic Violence

In Zappin v. Comfort, 2017 Westlaw 5578406 (1st Dept. Nov. 21, 2017), the father appealed from an August 2016 Supreme Court judgment, which granted the mother sole legal and physical custody, granted him supervised visitation, and granted a 5 year stay away order of protection. The First Department affirmed, noting that the determination finding that "it was in the child's best interests to award sole custody to defendant has a sound and substantial evidentiary basis" and "was based in part on the court's findings that plaintiff committed acts of domestic violence against defendant, both during her pregnancy with the child and after the child was born, rendering joint custody impossible." The Appellate Division agreed that the evidence that the father "had physically and verbally harmed the child's mother, engaged in abusive litigation tactics, and lacked the emotional restraint and personality to look after the child's best interests provides a sound and substantial basis for the court's finding that unsupervised visitation would have 'a negative impact on the child's well-being.'" The Court further noted that the father "made repeated false allegations of abuse to the Administration for Child Services and the police, which rendered supervised visitation appropriate." The First Department determined that

Supreme Court "detailed its reasons for issuing a five-year order of protection, and found that plaintiff committed numerous family offenses, including assault in the third degree ***and harassment in the second degree." The Court concluded that Supreme Court "was not required to make a finding of 'aggravating circumstances' before issuing the order of protection (*compare* Domestic Relations Law §252 *with* Family Court Act §842)." With respect to child support, the Appellate Division held that Supreme Court "properly imputed income to plaintiff based on his income in 2014. Although he presented no direct evidence of it, plaintiff claims that he was terminated from his position at his law firm because of the negative publicity he received after he had been sanctioned during these proceedings in 2015. (Citations omitted). Even if he was terminated for that reason, the sanctions — and therefore his unemployment — resulted from his own misconduct at trial, not from the court's conduct in sanctioning him or publicly releasing the sanctions order." As to income over $143,000, the First Department found: "In setting a child support income cap of $250,000, the court cited the parties' incomes in the mid- to high $200,000s and their upper-middle class lifestyle, and thus properly considered the parties' financial resources and the child's standard of living had the marriage not dissolved."

B. Forensic Discounted; Primary Custody Reversed

In Matter of Montoya v. Davis, 2017 Westlaw 5894114 (3d Dept. Nov. 30, 2017), the mother and the attorney for the now 11 year old child appealed from a May 2017 Family Court order which, after a hearing, modified a January 2012 default order granting custody to the mother and limiting the father to therapeutically supervised visitation. The father had 3 therapeutic visits before he filed a modification petition in October 2015. The order appealed from granted the father sole legal and primary physical custody and suspended the mother's parenting time with the child for a period of no less than six months. The Third Department

modified, on the law by reversing the award of sole legal and primary physical custody to the father, awarding the parties joint legal custody, with primary physical custody to the mother, and a detailed schedule of time to the father. The Appellate Division found: "*** although paid to conduct a neutral forensic custodial evaluation, the forensic evaluator failed to remain objective, abdicated her role as a neutral evaluator and, ultimately, became an overly zealous advocate for the father. *** [T]he forensic evaluator consistently denigrated the mother and her husband and offered broad-sweeping characterizations of the parties, which appeared to be mostly informed by the father's version of events and point of view. *** In contrast, the forensic evaluator regularly praised and defended the father, painting his failings — including his inconsistent and limited presence in the child's life over a period of at least three years — as being completely at the hands of the mother and through 'no fault' of the father." The Court further noted: "In its decision and order, Family Court recognized that the testimony given by the forensic evaluator 'demonstrated[,] at times[,] a little less than neutral tone' and that it was apparent from her testimony that she was 'challenged in her dealings' with the mother and her husband. Nevertheless, Family Court wholly adopted the forensic evaluator's factual assertions, opinions, conclusions and recommendations, without any perceivable independent consideration given to the best interests of the child. In doing so, the court improperly delegated its fact-finding role and ultimate determination to the forensic evaluator."

C. Mental Health Issues

In Matter of Agu v. Williams, 2017 Westlaw 4532200 (2d Dept. Oct. 11, 2017), the mother appealed from a June 2016 Family Court order, which, after a hearing, granted custody to the father. The Second Department affirmed, stating: "Here, the evidence presented at the hearing established that the mother had been diagnosed by at least two mental health experts as

suffering from ‘Psychotic Disorder NOS’ and/or ‘Personality Disorder NOS with Paranoid and Schizotypal Features,’ that the mother refused to obtain appropriate treatment for her serious mental health problems, and that these problems impaired her ability to function appropriately as a custodial parent (citations omitted). Accordingly, the Family Court's determination to award custody to the father, which was consistent with the opinion of the court-appointed forensic expert and the position of the attorney for the child, has a sound and substantial basis in the record and will not be disturbed.”

D. Modification – Joint to Sole

In Matter of Gangi v. Sanfratello, 66 NYS3d 622 (2d Dept. Jan. 10, 2018), the mother appealed from an August 2016 Family Court order, which, after a hearing, modified a June 2014 consent order providing for joint legal custody, with primary physical custody to her, so as to award the father sole legal and physical custody. The Second Department affirmed, finding: “Here, there was testimony at the hearing that the parties had failed to follow various terms of the order of custody, and had repeatedly engaged in heated verbal disputes in the presence of the child. In addition, since the time of entry of the order of custody, the child had been absent from school numerous times, his grades had dropped, and he had exhibited signs of depression. In light of this testimony, the Family Court properly determined that joint custody was no longer appropriate because the parents were unable to sufficiently communicate and cooperate on matters concerning the child (citations omitted). In addition, contrary to the mother's contention, the court's determination that the child's interests would be best served by awarding the father sole legal and physical custody of the child has a sound and substantial basis in the record and, therefore, will not be disturbed.”

E. Modification – Mother Arrested; Communication Breakdown

In Matter of Damiano v. Guzzi, 2018 Westlaw 280869 (3d Dept. Jan. 4, 2018), the mother appealed from an October 2016 Family Court order, which granted the father's petitions for modification of a 2014 consent order, under which she had sole legal and physical custody of their daughter born in 2013, by awarding joint legal custody with primary placement to the father. The Third Department affirmed, holding that the changed circumstances, which included "communication difficulties that the father asserted were impairing his visitation and the mother's arrest and ongoing interactions with the criminal justice system [,] *** warranted a best interests analysis." The Appellate Division noted that the father was living in an apartment attached his mother's residence (she assisted in child care) and that he "maintained the house and grounds while he searched for stable employment." The Court found that the mother, "in contrast, was unemployed, dependent upon distant relatives for financial support and facing an uncertain legal future with the potential to impact any child in her care," and also cited Family Court's determination that the mother was "entirely incredible" when she "feigned a lack of recall as to basic details surrounding her legal difficulties."

F. Modification – Religious Upbringing; Wishes of Child (10 y/o)

In Matter of Baalla v. Baalla, 2018 Westlaw 846199 (2d Dept. Feb. 14, 2018), the father appealed from a June 2016 Family Court order, which, after a hearing, granted the mother's petition to modify the parties' stipulation, incorporated into a 2009 divorce judgment, and which had provided for joint legal custody and primary physical custody to her, of the parties' child born in 2006. Family Court modified, by awarding the mother sole legal custody, and granting the father liberal visitation, including all major Muslim holidays. The father was Muslim, and the mother converted to Islam. After the parties' separation, the mother returned to Christianity. The stipulation provided that the parties "would consult with each other regarding the child's

religious training," but did specify in which religious tradition the child would be raised. At age 7 ½, the child told the mother that the father was pressuring her to adopt Muslim practices, and had threatened to abscond with her to his native Morocco, if she failed to follow Muslim practices and customs.. The Second Department affirmed, holding: "Here, the parties' inability to agree on the child's religious training, *** constituted a change in circumstances," as did "the change in the child's relationship with the father based on the child's fear of his displeasure if she were not a 'true Muslim,' and her belief that he threatened to abscond with her to Morocco." The Court concluded: "The child was 10 years old at the time of the hearing and, accordingly, the Family Court properly considered her wishes, weighed in light of her age and maturity (citation omitted)."

G. Modification – Sole to Father - Mother Grand Larceny; Joint Counseling Denied

In Hogan v. Hogan, 2018 Westlaw 1178385 (2d Dept. Mar. 7, 2018), the mother appealed from a February 2017 Supreme Court judgment, which awarded the father sole legal and physical custody of the parties' 14 year old child and declined to direct joint counseling sessions between the parties and the child. The Second Department affirmed. The father received temporary custody after the mother was incarcerated for failure to make restitution payments, required as part of a sentence upon her guilty plea to grand larceny, arising from her theft of funds from the PTA at the child's school. The Appellate Division held: "the mother's theft of the PTA funds, her poor decision-making about her failing business, certain postings on her blog and Flickr account, and unstable housing circumstances demonstrated poor caretaking ability and parental judgment. Additionally, the relationship between the mother and the then 14-year-old child had drastically deteriorated after the mother's arrest and later incarceration. The mother's unwise decision to seek election to the position of second vice president of the PTA at the child's

new school, and her subsequent election to that position, rekindled the negative publicity about her earlier theft of funds from the PTA at the child's former school. The unfavorable news articles prompted the mother to resign her position and further cemented the rift between the child and the mother. Additionally, the court-appointed forensic psychologist recommended that the father have sole legal and physical custody of the child. The attorney for the child supported that position (citation omitted) and informed the court that the child wished to reside with the father." With regard to counselling, the Second Department concluded that Supreme Court properly determined that "the parties' inability to communicate and cooperate on matters concerning the child, together with the child's strong position about the mother, rendered joint counseling sessions at that time unworkable and inappropriate under those circumstances."

H. Modification – Sole to Father - Mother's Unsubstantiated Abuse Allegations

In McGinnis v. McGinnis, 2018 Westlaw 1188971 (1st Dept. Mar. 8, 2018), the mother appealed from a March 2016 Supreme Court judgment which: transferred sole custody of the child to the father; granted the mother 12 hours per week of supervised visits; and awarded counsel fees of $132,031 to the father. The First Department affirmed, holding: "The mother's lack of insight, poor judgment, efforts to minimize the father's relationship with the child and multiple, unsubstantiated claims of abuse — as well as her refusal to return to New York in violation of the parties' settlement agreement until compelled to do so by the court — all support the IAS court's findings." The Appellate Division reiterated the principle that "[a] parent's repeated allegations of abuse are acts of interference with the parental relationship 'so inconsistent with the best interests of the child[]' that it raises a strong probability of unfitness" and found that "the mother is unwilling to ensure meaningful contact between the child and her father." As to the issue of counsel fees, the First Department concluded that the award was

within Supreme Court's discretion and was "supported by the plain terms of the parties' settlement agreement.

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I. Prospective Decision Reversed

In Matter of Jonathan A. v. Tiffany V., 2017 Westlaw 4782048 (1st Dept. Oct. 24, 2017), the mother appealed from a September 2016 Family Court order, which directed that the child be enrolled in school in Bronx County and that, if the mother moves to Queens in the future, the father be awarded primary physical custody, with visitation to the mother on three weekends each month. The First Department reversed, on the law and the facts, and vacated those two provision of the order, stating: "Because the mother's petition did not seek permission to relocate with the child, the Family Court's order that custody be modified to set a particular parenting time schedule in the event that the mother moved in the future lacked a sound and substantial basis in the record." The Court concluded: "There was also no basis for the Family Court to direct that the child be enrolled in school in Bronx County since the father was granted final decision-making authority on education issues."

J. Third Party – Grandparent – Standing Denial Reversed

In Matter of Monroe v. Monroe, 2017 Westlaw 4680065 (3d Dept. Oct. 19, 2017), the paternal grandparents appealed from a September 2015 Family Court order, which granted the mother's motion to dismiss their petition upon the ground of lack of standing. The two subject children were born in 2013 and 2015 and the parents were not married. In July 2015, the grandparents filed a petition seeking visitation. Supported by the attorney for the children, the mother moved to dismiss the grandparents' petition on the ground that they lacked standing to seek visitation. Family Court granted the mother's motion without a hearing and the Third

Department reversed. The Appellate Division found: “Here, the grandparents acknowledge that they do not have a close relationship with either grandchild; however, they aver that the mother has willfully and deliberately denied them any access to the children — without any reasonable cause for doing so — since their respective births. *** [T]he grandparents submitted a notarized letter. With regard to the oldest child, the grandparents aver that they were able to hold the child at the hospital on the day she was born. They aver that, since such time, they have not been allowed to have contact with the child and acknowledge that they have only seen the child four additional times — one of which was the result of them showing up unannounced to the parents' residence and, on another occasion, to the child's first birthday party. With regard to the youngest child, the grandparents aver that they went to the hospital on the day of the child's birth; however, after only briefly holding the child, the mother informed them that they were not welcome and security was called to escort them out of the hospital. They have not been able to see the child since. Two months later, the grandparents filed the instant petition seeking visitation.” The Third Department found “the proof adduced in support of the grandparents' petition to be sufficient to confer standing to seek visitation with their grandchildren ***” given “that the mother has made deliberate and immediate efforts to preclude the grandparents from having and/or developing any significant relationship with the subject children — since the very day they were born — without any stated reasonable justification for doing so (citation omitted). Further, given the young ages of the children and the brief amount of time that has elapsed between their respective births and the disruption of the grandparents' visitation, equity dictates that we not allow the lack of an established relationship be used as a pretext to prevent the grandparents from otherwise exercising their right to seek visitation.” The father did not oppose the relief sought by his parents on appeal. The Appellate Division remitted to Family Court to

conduct a hearing as to whether visitation by the grandparents is in the best interests of the children.

K. Third Party – Guardian by Will v. Life Partner

In Matter of Garnys v. Westergaard, 2018 Westlaw 988944 (2d Dept. Feb. 21, 2018), petitioner, the mother's life partner, appealed from a March 2017 Family Court order, which granted the motion of respondents, the child's maternal aunt and uncle, to dismiss her June 2016 petition, seeking visitation with the mother's child born in 2005, for lack of standing pursuant to DRL 70. In May 2015, the child's biological mother died of cancer; she was not married at the time and a second parent is not listed on the birth certificate. The mother executed a will designating respondents as the child's guardians, and they petitioned in January 2016 to be so appointed. The Second Department affirmed, stating: "The Legislature has clearly limited the right to seek visitation to noncustodial parents, grandparents, and siblings (*see* Domestic Relations Law §§70, 71, 72; citation omitted). The petitioner argues that she should be considered a 'parent' under Domestic Relations Law §70 because she moved in with the mother shortly before the child's birth, she played a role in the daily upbringing of the child from his birth until the mother became ill, and she and the mother considered each other 'life partners,' even though they never married or registered as domestic partners." Petitioner contended that she has standing to seek visitation "because the mother consented to the creation of a parent-like relationship between her and the child after conception." The Appellate Division found that "petitioner failed to demonstrate that the mother consented to anything more than the petitioner assisting her with child-rearing responsibilities." The Court concluded: "Most importantly, after the mother was diagnosed with terminal cancer, she executed a will providing that the

respondents be appointed the child's guardians."

L. Visitation – Modification – Directing no Corporal Punishment

In Matter of Fiacco v. Fiacco, 2018 Westlaw 1002891 (3d Dept. Feb. 22, 2018), the father appealed from an October 2016 Family Court order, which, following fact finding and Lincoln hearings, partially granted the mother's December 2015 petition to modify the visitation provisions of a 2013 judgment of divorce, pertaining to 3 children born in 2001, 2003 and 2007. The mother sought to have the father's visitation supervised, alleging that he used excessive corporal punishment on the children. Family Court directed the father to refrain from using corporal punishment or any other form of "intimidating punishment" to discipline the children. The Third Department affirmed, finding that "ample evidence was presented *** regarding the father's use of inappropriate methods of discipline on the children," including a December 2015 incident, when "the younger daughter refused to wash dishes or otherwise assist the family with household chores" and "the father instructed the child — who was barefoot — to stand outside and thereafter attempted to throw a pot of water at her feet." The Appellate Division noted that at another time, "the father struck this same child in the head and shoulder in an effort to discipline her," and that "the father freely acknowledged using 'scare tactics' — such as yelling, slapping and other physical contact — as a form of discipline, ***." The Third Department cited Family Court's express finding that the father's testimony was "evasive, wholly self-serving and lacking credibility" and that Court's conclusion "that the father lacked insight as to the impact that his threatening demeanor and punishment tactics have on the children."

M. Visitation – Modified to Therapeutic

In Matter of LaChere v. Maliszweski, 2018 Westlaw 343775 (2d Dept. Jan. 10, 2018), the father appealed from a November 2016 Family Court order, which, after a hearing upon the

mother's August 2015 petition, modified an August 2012 stipulated order (which provided her with 90 minutes per week of unsupervised visitation and 10 hours per week of supervised visitation), to the extent of awarding the mother therapeutic visitation with the parties' two children, born in 2005 and 2007. In 2013, the mother was convicted of criminal contempt in the second degree and the Court issued a 5 year stay away order of protection in favor of the children, "subject to any custody or visitation order of the Supreme Court or the Family Court. " The Second Department affirmed. The Appellate Division found that the mother "voluntarily entered an 11-month drug and alcohol rehabilitation program, that after she successfully completed that program she began participating in outpatient treatment and counseling, and that she was currently residing in a 'sober housing' facility where she had consistently tested negative on random drug tests *** and "had readily participated in therapy." The Court concluded that Family Court's determination was supported by the record and that while the children's views "should be considered, they are not controlling."

N. Visitation – Supervised – Violation

In Matter of Montalbano v. Babcock, 2017 Westlaw 5506681 (4th Dept. Nov. 17, 2017) , the father appealed from a July 2016 Family Court order, which awarded the mother sole legal custody of the subject child. The Fourth Department affirmed. The mother alleged that the father took the parties' son on a boat ride in violation of an order requiring that his visitation be supervised. The mother's petition included a screenshot of a Facebook post in which the father stated that the child himself had operated the boat for the first time, and had raced another boat at 70 miles per hour. The Appellate Division held that "the father's alleged conduct in allowing a 13-year-old child with no prior experience to operate a boat in that manner 'would support a finding of neglect' (citations omitted) and that the child's statements about the incident were

corroborated by the screenshot (citation omitted) which was properly admitted in evidence at the fact-finding hearing based on the mother's testimony that it accurately represented the father's Facebook page on the date in question and that she had communicated with the father through his Facebook page in the past." The Fourth Department concluded that "there is a sound and substantial basis in the record for the court's award of sole legal custody to the mother *** and that an award of sole custody to the mother was in the child's best interests."

O. Visitation – Third Party – Grandparent – Denied

In Matter of Tinucci v. Voltra, 2018 Westlaw 670063 (4th Dept. Feb. 2, 2018), the maternal grandmother appealed from a December 2016 Family Court order which, after a hearing, dismissed her petition for modification of an April 2003 order granting her "as agreed" visitation, and granted the father's petition to modify the same order by terminating her visitation. The Fourth Department affirmed, noting that following the mother's death, the grandmother had limited visitation for 2 years, and then no contact for the next 10 years. The Appellate Division concluded that Family Court properly determined that a change of circumstances had occurred which supported a termination of the grandmother's visitation.

VI. DISCLOSURE

A. Preclusion – Non-Compliance with FCA 424-a

In Matter of Villafana v Walker, 2018 Westlaw 443985 (2d Dept. Jan. 17, 2018), the father appealed from a September 2016 Family Court order, which denied his objections to a June 2016 Support Magistrate Order, made after a hearing, and which sett his child support obligation for 2 children at $277 per week. The Second Department affirmed, noting that at the first appearance held in March 2016, the Support Magistrate directed the father to provide a financial disclosure affidavit and advised him that absent full financial disclosure, child support

would be determined based upon the children's needs. The Support Magistrate issued a preclusion order in May 2016. The Appellate Division held that Family Court properly issued a preclusion order, FCA 424-a(b) and based child support on the children's needs, FCA 413(1)(k).

VII. DIVORCE

A. DRL 230 Residency Requirements Waived

In Gruszczynski v. Twarkowski, 57 Misc3d 662, NY Law Journ. Nov. 7, 2017 at 21, col. 1 (Sup. Ct. N.Y. Co., Cooper, J., Oct. 26, 2017), the parties traveled from Poland to be married in New York on December 6, 2013, and then returned to Poland. In September 2016, plaintiff commenced the within New York divorce action, seeking only a divorce pursuant DRL 170(7) and alleging that: there are no children, no assets to divide, and no request by either spouse for spousal maintenance. Plaintiff moved for an uncontested divorce. The Clerk rejected the papers, based upon the failure to meet the residency requirements. Plaintiff again moved for a divorce, requesting a waiver of the residency requirements, supported by affidavits from both parties, "describing how they traveled to New York City specifically to avail themselves of this state's right to marry, a right not afforded to them by their own country. They also set forth their need to avail themselves of New York's no-fault divorce law so that they can dissolve a marriage that neither party wishes to continue. They stress that if New York refuses to entertain the proceeding, they will face the prospect of being unable to find any forum in which they can be divorced." Supreme Court found: "Plaintiff, joined by defendant, makes a compelling argument that, under the circumstances presented here, a strict application of Domestic Relations Law § 230 is inequitable and discriminatory. Having accepted New York's invitation to come and exercise their right to marry as a same-sex couple, the parties now find that they are being deprived of the equally fundamental right to end the marriage. Thus, they face the unhappy

prospect of forever being stuck in their made-in-New York marriage, unable to dissolve it here or in their home country. Clearly, equity demands that the parties be spared such an excruciating fate (see Dickerson v Thompson, 88 AD3d 121, 124 [3d Dept 2011] [reversing trial court's dismissal of action to dissolve Vermont same-sex civil union and noting 'absent Supreme Court's invocation of its equitable power to dissolve the civil union, there would be no court competent to provide plaintiff the requested relief and she would therefore be left without a remedy']).” Supreme Court noted that “Poland *** refuses to recognize the relationship simply because the spouses are husband and husband rather than husband and wife.” The Court granted the motion and concluded that “the residency requirements found under the five subdivisions of Domestic Relations Law § 230 are elements of a cause of action for divorce and not a jurisdictional requisite” and that “it would be incumbent on defendant to raise the lack of residency as an affirmative defense to the action.” The Court noted that defendant “has joined in the request that the divorce be granted irrespective of the residency requirement.”

B. Grounds – No-Fault – Fault Grounds Not Considered

In Johnston v. Johnston, 2017 Westlaw 6519486 (3d Dept. Dec. 21, 2017), the wife appealed from a January 2017 Supreme Court judgment, which, after trial, decided the issues of counsel fees, equitable distribution and maintenance. The parties were married in September 1989 and have two children, born in 1991 and 1995. The wife commenced the divorce action in April 2014 seeking a judgment of separation. The husband counterclaimed for divorce on irretrievable breakdown or abandonment, and the wife asserted a “counterclaim” for divorce on adultery or constructive abandonment. Supreme Court granted the husband a divorce on his no-fault counterclaim, awarded the wife $5,000 in counsel fees, $3,000 per month in maintenance until she begins to receive the husband's retirement benefits, the death of either party, the wife's

remarriage or a subsequent modification by the court, directed an equal sharing of a home equity loan, and gave the husband a credit for payments made over and above rent received. The Third Department affirmed. As to the divorce, the Appellate Division held that "having determined that the husband established irretrievable breakdown pursuant to Domestic Relations Law §170(7), Supreme Court was under no obligation to grant the wife a judgment of divorce on the ground of adultery or constructive abandonment." The Court noted that "the parties had been renting out the marital residence for $1,300 per month" and that Supreme Court "awarded the husband a credit for one half of the payments that he made during the pendency of the action toward the portion of the mortgage that was not covered by the rental income." The Third Department rejected the wife's assertion that Supreme Court erred by concluding that the home equity loan taken on the marital residence was a marital debt and that the parties should equally share its repayment upon the sale of the residence, given "the absence of any evidence that the husband used the home equity loan to pay off his separate liabilities." With regard to maintenance, the Third Department noted that Supreme Court considered "the parties' long-term marriage, the 'comfortable lifestyle' that they enjoyed throughout the marriage, their respective property, income and potential earning capacities and its distributive award of marital property and debt." The trial evidence established that the husband had been the primary wage earner and the wife managed the home, was the primary caretaker and educator of the children, who were home schooled for a majority of their childhoods. The Appellate Division held that Supreme Court "properly imputed an annual income of $30,000 to the wife based on her age, health, attainment of an Associate's degree in theology from an unaccredited institution and her work history, which included eight years of full-time employment at the United States Post Office prior to the marriage and two years of full-time employment at the United States Consulate General in

Kazakhstan during the marriage." The Appellate Division upheld the $5,000 counsel fee award, holding that "Supreme Court appropriately considered, among other things, the $8,000 that the husband paid to the wife in interim counsel fees, the amount of temporary maintenance and child support received by the wife, and 'the tremendous expenditures made by the husband to keep the family and the marital residence afloat during the pendency of [the action].'" The Court concluded: "To the extent that the wife asserts that the proceedings were unfair because the husband allegedly spent more in legal fees, we note that the wife was free to use her temporary maintenance to supplement the interim and postjudgment counsel fee awards."

VIII. ENFORCEMENT

A. Agreement – Visitation – Contempt and Counsel Fees Denied

In Matter of DeGennaro v. DeGennaro, 2018 Westlaw 846147 (2d Dept. Feb. 14, 2018), the father appealed from a February 2017 Family Court order, which granted the mother's motion to dismiss his petition for contempt for visitation violations and for downward modification of child support, and the mother appealed from so much of the same order which denied her request for counsel fees. The parties' March 2016 stipulation, which was incorporated into a July 2016 judgment of divorce, provided that: the father would have visitation "at any time he and the child mutually agreed"; the mother waived child support in exchange for a share of the father's retirement accounts; and the prevailing party was entitled to counsel fees for enforcement of the stipulation. The Second Department affirmed, noting that as to visitation, the father failed to establish that the mother willfully violated a clear and unequivocal order of the court. As to the father's request for downward modification, the Appellate Division held that Family Court lacked authority to modify the stipulated waiver of child support. As to the counsel fee issue, the Court held that Family Court's denial was proper,

given that the mother, in responding to the father's motion, "was not seeking to enforce any rights under the stipulation."

B. Foreign Order – Registration Vacated – No Personal Jurisdiction

In Matter of Lorandos v. Karakatsiotis, 2017 Westlaw 6029513 (2d Dept. Dec. 6, 2017), the mother appealed from a November 2016 Family Court order, which denied her objections to an August 2016 Support Magistrate order, vacating her May 2016 registration of a 1995 default child support order issued by the First Instance Court of Athens, Greece, upon the ground of lack of personal jurisdiction. The Second Department affirmed, noting: "In order for the decree of a foreign court to be accorded recognition in this State, the court must have had in personam jurisdiction over the parties." The Appellate Division held that "Family Court properly denied the mother's objections to the Support Magistrate's order, which found that the Greek court failed to follow the requirements of the Hague Convention [on Service Abroad of Judicial and Extrajudicial Documents, 20 UST 361, TIAS No. 6638 (1969)] regarding personal jurisdiction. Hence, the foreign order was not entitled to comity by the courts of this State."

C. Income Execution – Modification of Percentage of Income

In Fishler v. Fishler, 2017 Westlaw 4799838 (2d Dept. Oct. 25, 2017), the father appealed from a July 2016 Supreme Court order, which denied his motion pursuant to CPLR 5240 to modify and limit a June 2013 order (which had directed a 65% income execution) to no more than 10% of his income. The Second Department reversed, on the law, and limited the aforesaid income execution to 40% of the father's disposable earnings, citing CPLR 5231(g) and 5241. Pursuant to a 1999 judgment of divorce and incorporated agreement, and subsequent litigation over the amount of arrears for combined spousal and child support, and in connection

with the aforesaid June 2013 order, the parties had stipulated to judgments stating that the father owed support arrears of approximately $1.6 million. Supreme Court at that time directed that, until all the judgments were satisfied in full, the father's earnings, including bonuses and commissions, would be subject to a 65% income execution. The Appellate Division noted that CPLR 5240 provides that a court "may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure." The Second Department found that: the father demonstrated that a 65% income execution was unduly prejudicial; since June 2013, the mother had received at least $511,000 toward the arrears; both children have become adults and attended college; only one of the adult children lives with the mother; the father showed that the 65% income execution provided the mother with a monthly payment of approximately $7,500, and that he received only about $3,000 per month after garnishment and other deductions; and the father established that his monthly expenses were approximately $5,000, which included $575 per month for student loan payments on behalf of one of the parties' adult children. The Court concluded: "In light of his substantial arrears, we find that the plaintiff is not entitled to have the income execution limited to only 10% of his disposable earnings. However, on this record, the plaintiff demonstrated that limiting the income execution to 40% of his disposable earnings is warranted."

D. Support – Willful Violation – Disability Not Proved

In Matter of Hwang v. Tam, 2018 Westlaw 668940 (4th Dept. Feb. 2, 2018), the father appealed from a December 2016 Family Court order, which confirmed a Support Magistrate's determination that he willfully violated a child support order and sentenced him to 6 months in jail if the arrears were not satisfied within a stated period of time. The Fourth Department

affirmed, noting that the father "failed to offer any medical evidence to substantiate his claim that his disability prevented him from making any of the required payments." The Court concluded that the father's receipt of Social Security benefits "does not preclude a finding that he was capable of working where *** his claimed inability to work was not supported by the requisite medical evidence."

E. Support – Willful Violation – Retirement Not Medically Mandated

In Matter of Rita FH v. Jesse MH, 2018 Westlaw 1003287 (1st Dept. Feb. 22, 2018), the husband appealed from a January 2016 Family Court order, which denied his objections to an October 2015 Support Magistrate order which found, after a hearing, that he had willfully violated a support order and dismissed his petition for downward modification. The former wife cross appealed from the same order, to the extent that it rejected her request that the husband be incarcerated or directed to post an undertaking. The First Department affirmed, finding that "the testimony of respondent's physician was inconsistent and, at times, contradictory regarding his treatment of respondent. In fact, the physician admitted that respondent's cardiac condition was stable at the time he recommended that respondent cease work" and that "respondent suffered from 'mild to moderate aortic insufficiency,' and such condition did not require a restriction of his activities." As to the modification petition, the Appellate Division held that "in light of the willfulness finding against respondent, the court acted within its discretion in denying his cross petition seeking a downward modification of his support obligation since he failed to establish that the reduction was unavoidable and not volitional" and noted "respondent's prolonged history of evading his support obligations and defrauding petitioner." With regard to the cross appeal, the First Department found that Family Court "providently exercised its discretion in declining to incarcerate respondent (citations omitted) or to direct him to post an undertaking. The parties are

in their mid-70s, and, *** the Support Magistrate's decision to garnish respondent's income was an appropriate remedy."

F. Visitation - Contempt

In Matter of Peay v. Peay, 156 AD3d 1358 (4th Dept. Dec. 22, 2017), the mother appealed from an April 2016 Family Court order, which found her to be in contempt of court. The Fourth Department modified, on the law, only to the extent of adding a decretal paragraph pursuant to Judiciary Law 770, stating that the mother's conduct "was calculated to, or actually did, defeat, impair, impede, or prejudice the rights or remedies" of the father. The Appellate Division held that the father met his burden on the contempt issue by "clear and convincing evidence," based upon his testimony that "the mother failed to bring one or more of the children for visitation on four scheduled dates in 2015, i.e., May 16, May 27, June 10, and June 13" and that "the father did not see the children between June 6, 2015 and March 8, 2016, the date of the hearing."

IX. EQUITABLE DISTRIBUTION

A. Debt – Equal; Rent Shortfalls Credited

In Johnston v. Johnston, 2017 Westlaw 6519486 (3d Dept. Dec. 21, 2017), the wife appealed from a January 2017 Supreme Court judgment, which, after trial, decided the issues of counsel fees, equitable distribution and maintenance. The parties were married in September 1989 and have two children, born in 1991 and 1995. The wife commenced the divorce action in April 2014 seeking a judgment of separation. The husband counterclaimed for divorce on irretrievable breakdown or abandonment, and the wife asserted a "counterclaim" for divorce on adultery or constructive abandonment. Supreme Court granted the husband a divorce on his no-

fault counterclaim, awarded the wife $5,000 in counsel fees, $3,000 per month in maintenance until she begins to receive the husband's retirement benefits, the death of either party, the wife's remarriage or a subsequent modification by the court, directed an equal sharing of a home equity loan, and gave the husband a credit for payments made over and above rent received. The Third Department affirmed. As to the divorce, the Appellate Division held that "having determined that the husband established irretrievable breakdown pursuant to Domestic Relations Law §170(7), Supreme Court was under no obligation to grant the wife a judgment of divorce on the ground of adultery or constructive abandonment." The Court noted that "the parties had been renting out the marital residence for $1,300 per month" and that Supreme Court "awarded the husband a credit for one half of the payments that he made during the pendency of the action toward the portion of the mortgage that was not covered by the rental income." The Third Department rejected the wife's assertion that Supreme Court erred by concluding that the home equity loan taken on the marital residence was a marital debt and that the parties should equally share its repayment upon the sale of the residence, given "the absence of any evidence that the husband used the home equity loan to pay off his separate liabilities." With regard to maintenance, the Third Department noted that Supreme Court considered "the parties' long-term marriage, the 'comfortable lifestyle' that they enjoyed throughout the marriage, their respective property, income and potential earning capacities and its distributive award of marital property and debt." The trial evidence established that the husband had been the primary wage earner and the wife managed the home, was the primary caretaker and educator of the children, who were home schooled for a majority of their childhoods. The Appellate Division held that Supreme Court "properly imputed an annual income of $30,000 to the wife based on her age, health, attainment of an Associate's degree in theology from an unaccredited institution and her work history, which

included eight years of full-time employment at the United States Post Office prior to the marriage and two years of full-time employment at the United States Consulate General in Kazakhstan during the marriage." The Appellate Division upheld the $5,000 counsel fee award, holding that "Supreme Court appropriately considered, among other things, the $8,000 that the husband paid to the wife in interim counsel fees, the amount of temporary maintenance and child support received by the wife, and 'the tremendous expenditures made by the husband to keep the family and the marital residence afloat during the pendency of [the action].'" The Court concluded: "To the extent that the wife asserts that the proceedings were unfair because the husband allegedly spent more in legal fees, we note that the wife was free to use her temporary maintenance to supplement the interim and postjudgment counsel fee awards."

B. Debt; Separate Property - Commingling

In Schorr v. Schorr, 154 AD3d 621 (1st Dept. Oct. 31, 2017), the husband appealed from a July 2016 Supreme Court judgment, which awarded child support, denied his separate property credits, and directed the parties to repay a $124,000 loan from the wife's father. The First Department affirmed. The Appellate Division found that when "calculating the child support award, the court properly imputed income to defendant by including significant funds he received from his parents to pay his expenses (citation omitted)." The Court noted that the evidence at trial supported the finding "that defendant inflated his expenses on his tax returns so as to deflate his reported net income, and otherwise manipulated his income" and that he used funds from his father's estate to pay some of his personal expenses. The First Department held that Supreme Court "properly articulated its rationale for including combined parental income above the statutory cap, i.e., to maintain the standard of living provided the child during his parents' marriage and taking into account his reasonable needs." As to the loan from the wife's

father, the Appellate Division found that Supreme Court "providently exercised its discretion in directing the parties to repay the loan from the proceeds of the sale of the marital residence, given that the father "testified credibly that $124,000 remained unpaid under two promissory notes for monies borrowed from him to purchase the marital residence." The First Department concluded that the husband was not entitled to a separate property credit, because he "failed to prove that his premarital assets that were admittedly commingled [for about one year] with marital funds were not marital property."

C. Judicial Estoppel – Tax Returns – Charitable Contributions

In Melvin v. Melvin, 2017 Westlaw 4781198 (1st Dept. Oct. 24, 2017), the wife appealed from a May 2017 Supreme Court order, which granted the husband's motion to declare the wife judicially estopped from claiming that $1.5 million dollars in charitable contributions reported on the parties' joint 2011 through 2015 tax returns, which she stated were made without her consent, and of which she was unaware, constituted marital waste. The First Department affirmed, noting that the wife "does not deny that she signed the tax returns under penalty of perjury, that the charity receiving the contributions was a bona fide nonprofit organization, and that the marital estate received a benefit from the contributions in the form of tax deductions." With regard to the wife's claim of unawareness, the Appellate Division found that while she alleged she received only the signature page, "she had unfettered access to the complete returns from the parties' accountant" and "by signing the tax returns, she is presumed to have read and understood their contents." The Court noted further that "the wife does not argue that the husband received a financial gain from the donations, only that they were inherently wasteful in their excess." The First Department concluded that Supreme Court properly applied this rule: "A party to litigation may not take a position contrary to a position taken in an income tax return,"

citing Mahoney-Buntzman v Buntzman, 12 NY3d 415, 422 (2009).

D. Proportions – Business Debt (50%/50%); Separate Property Credit Granted

In Wallace v. Wallace, 2017 Westlaw 4680170 (3d Dept. Oct. 19, 2017)**,** both parties appealed from a February 2015 Supreme Court judgment, which, among other things, distributed marital property upon a decision of the Court. The parties were married in May 2000 and have a daughter born in 1995 and a son born in 2001. The wife commenced the divorce action in December 2011 and the parties resolved the issues of custody and personal property. The Third Department upheld Supreme Court's failure to credit the wife for the daughter's college expenses, finding: "Although the court made no express finding on this request, *** the parties otherwise have limited financial resources. The husband is paying $683.75 in child support and a payment in the same amount for arrears, and the parties incurred heavy debt to pay for their business. The daughter, who is estranged from the husband and, unbeknownst to him, had enrolled in a state university (later transferring to a local community college), paid her expenses with various loans, grants and financial aid, and the wife did not qualify for parental loans. Under all of the circumstances, including the husband's limited ability to pay, we decline to credit the wife for the daughter's college expenses (citations omitted)." As to the issue of health insurance, the Appellate Division noted "the wife testified that the children are covered through the Child Health Plus program at a cost to her of $30 each per month, and she has insurance through her employer, while the husband is enrolled in Medicaid. Supreme Court properly ordered the husband to pay his pro rata share (42%) of the children's future unreimbursed health-related expenses and, when the children no longer qualify for this program, directed the wife to add them to her health insurance plan and the husband to pay the wife his 42% share of those costs. Given the child support award, minimal insurance costs under the program and the parties'

financial circumstances, we do not find, as the wife urges, that the court abused its discretion in declining to credit her retroactively for the husband's share of health care costs (citations omitted).” As to the husband’s cross appeal, the Appellate Division modified, on the law, and remitted to Supreme Court. The business was purchased with a bank loan (partially secured by a mortgage on the marital residence), marital funds and loans from the parties' parents and had been listed for sale. The Third Department found: “Despite the wife's limited direct involvement in the business, the court ordered that the net proceeds be equally divided upon its sale, with certain adjustments related to the bank loan, and the parties were each held responsible to repay their respective parents. The husband argues that, given the equal distribution of the business asset, the court should have equally apportioned the outstanding credit card debt and 401(k) loans — reportedly totaling approximately $125,000 — that he incurred to directly support the business prior to the commencement of this action. He also requested credit for any payments made after the action was commenced. We agree. *** Thus, Supreme Court could have credited the husband for one half of the total debt amount and for payments made toward these debts after the action was commenced. Alternately, the court could have equally divided those debts and assigned them specifically to each party or ordered them to be paid out of the proceeds from the sale of the business. Supreme Court will need to address these matters upon remittal.” The Appellate Division concluded: “We similarly find that the husband should have been credited for his premarital contributions toward the purchase of the marital home in 1999. *** The husband offered uncontradicted testimony that, prior to the marriage, he contributed $17,575 from his separate property toward the down payment and purchase of the parties' home, which was deeded to both parties, from funds that he obtained from his personal banking ($7,148) and 401(k) ($10,427) accounts. While he temporarily placed some of the withdrawn 401(k) funds in

the parties' joint account, this was done for convenience and those funds were used at the closing on the marital residence the following week, and, under all of the circumstances, we find that they 'retained [their] character as separate property.' (Citations omitted)."

E. Proportions – Business (25%)

In Nadasi v. Nadel-Nadasi, 2017 Westlaw 4159147 (2d Dept. Sept. 20, 2017), both parties appealed from a September 2014 Supreme Court judgment, rendered upon a March 2014 decision after trial, which: awarded the wife a credit of $135,450, representing 15% of the value of the husband's interest in a business; failed to award her any credit related to a business apartment; awarded her maintenance of $12,000 per month for two years after she vacates the marital home, $11,000 per month for the following two years, and $10,000 per month for the following two years, to terminate sooner upon her remarriage or the death of either party; and directed the husband to pay 70% of the wife's attorney and expert fees. The Second Department modified, on the facts and in the exercise of discretion, by: (1) increasing the wife's share of the business to 25% or $225,750; (2) awarding the wife a credit of $90,000 related to the business apartment; and (3) increasing maintenance to 12 years, at the rates of: $12,000 per month for two years after the wife vacates the marital home, $11,000 per month for the following two years, $10,000 per month for the following two years, $9,000 per month for the following two years, $8,000 per month for the following two years, and $7,000 per month for the following two years, to terminate sooner upon her remarriage or the death of either party. The parties were married in November 1989, and had 3 children. The husband is a 50% partner in a commodities brokerage firm, earning approximately $1.5 million per year. The wife stopped working in 1996 to be a homemaker and primary caretaker of the parties' children. The parties separated in May 2010 and the husband commenced the divorce action in July 2011. With regard to the

percentage distribution of the husband's business, the Appellate Division increased the same to 25%, based upon the wife's "indirect contributions to the business as a homemaker and primary caretaker for the parties' three children in this long-term marriage, while forgoing her own career." As to the business apartment, the Second Department found that in connection with a July 1997 refinancing, the husband purchased an additional 13.33% interest therein, presumably with marital funds, and awarded the wife a credit in the sum of $90,000, representing one-half of the value of the husband's 13.33% increased interest therein. As to maintenance, the Appellate Division held that Supreme Court "improvidently exercised its discretion in failing to extend the award until the defendant reaches retirement age" (which age, and the wife's present age, were both unspecified), and increased maintenance to 12 years as set forth above. With respect to counsel fees, the Second Department concluded: "In view of the relative financial circumstances of the parties, including the defendant's substantial distributive award, the nature and extent of the services rendered, and the relative merits of the parties' positions at trial, the Supreme Court providently exercised its discretion in awarding the defendant 70% of her attorney and expert fees."

F. Proportions – Business (25%); Separate Property Credit Denied

In Culen v. Culen, 157 AD3d 926 (2d Dept. Jan. 31, 2018), the parties were married in August 1982 and the wife commenced the action in January 2009. The husband appealed from a May 2014 Supreme Court judgment, which awarded the wife 25% ($105,250) of the value of the husband's diving services business, denied the husband a $77,500 separate property credit for the marital residence, and awarded the wife 5 years of maintenance at $2,200 per month and 3 years at $1,000 per month. The Second Department affirmed, upholding the 25% award of the business to the wife, and determined that Supreme Court did not err in considering the

inheritance that the husband was to receive from his aunt as one factor in awarding maintenance, also finding that the amount and duration was an appropriate exercise of discretion. With regard to the separate property credit, the Appellate Division held that the husband's "self-serving trial testimony that his aunt gave him a check in the sum of $50,000, that his uncle gave him the sum of $10,000, and that he used those funds toward the down payment, was unsupported by documentary evidence, and insufficient to establish his entitlement to a separate property credit."

G. Proportions (60%/40%) – Criminal Conduct and Legal Fees

In Linda G. v. James G., 2017 Westlaw 5326824 (1st Dept. Nov. 14, 2017), the First Department stated the issue: "The primary issue on this appeal is whether there can be an unequal distribution of the marital home under the 'just and proper' standard set forth in Domestic Relations Law §236(B)(5)(d)(14) where a spouse's criminal conduct and subsequent incarceration impacts the family. We agree that Supreme Court providently exercised its discretion in awarding the wife the greater value of the marital residence. However, we modify the court's ruling to provide for a 60%/40% division rather than a 75%/25% division." The parties were married in June 1989 and have 2 children born in 1996 and 2001. The husband began working for Ernst & Young (E & Y) in 1991 and was made partner in 1996. In October 2007, due to an SEC insider trading investigation, the husband resigned, at a time when he was earning $1.25 million per year. The wife began employment with JPMorgan Chase in 1982 and left in 2000 to become a stay-at-home mother, at which time she was earning approximately $200,000 with annual bonuses nearing $500,000. In 2010, the husband was indicted on charges of conspiracy and insider trading. The husband maintained his innocence and claimed that a woman with whom he was having an affair stole his BlackBerry and used the information to engage in insider trading. He was found guilty and served a one year and one day sentence in

federal prison from May 2010 through January 2011. The SEC investigation and criminal trial depleted the joint assets of the parties. The divorce action was commenced on January 26, 2010. Both parties were unemployed from October 2007 through February of 2010, when the wife returned to JP Morgan, earning $300,000 with a bonus of $500,000. The husband began working at Sherwood Partners after his release from incarceration and testified that, as of 2013, his base salary was $226,000. Supreme Court distributed the marital home 75% to the wife and 25% to the husband and found that the wife was entitled to a 50% credit for the husband's criminal legal fees, because it is "not necessary to have a finding of marital waste" in order to impose financial responsibility on a party for the "expenses arising from his criminal activit[y]." Supreme Court took into account the husband's "adulterous and criminal behavior" in awarding the wife 75% of the marital home. The First Department found that "the husband's adulterous conduct is not sufficiently egregious and shocking to the conscience to justify making an unequal distribution of the marital home. However, we hold that the impact of the husband's criminal conduct on the family may be considered in making an unequal distribution." In modifying to a 60%/40% division in favor of the wife, the Appellate Division found: "The parties were required to spend down their savings from 2007 through 2010 when the husband was forced to resign due to the SEC investigation. He refused to take a plea bargain and insisted on going to trial, blaming a woman with whom he had an extramarital affair for his insider trading. He was convicted of a felony and lost his license to practice law. The husband's post-incarceration earnings at the time of the trial dropped significantly to less than 20% of his prior income. His income never returned to the level he earned prior to the conviction." The First Department concluded that "to hold the wife responsible for the accumulation of substantial legal fees for which she shares no culpability would be inequitable" and affirmed the portion of the judgment awarding the wife a 50% credit

for the legal fees arising from the husband's criminal activity.

H. Separate Property – Appreciation – Burden Met; Credit Granted

In Spencer-Forrest v. Forrest, 2018 Westlaw 1179339 (2d Dept. Mar. 7, 2018), both parties appealed from a November 2016 Supreme Court judgment which, among other things: awarded the wife $30,000 (20%) of the appreciation in the marital residence; provided the husband with a separate property credit of $105,000; and denied the wife's request for maintenance. The Second Department modified, on the law and in the exercise of discretion, by increasing the wife's share of the marital residence to $122,500 (50%), and otherwise affirmed. The parties were married in March 1984 and had no children together, but children from each of the parties' prior marriages resided with the parties. Both parties were employed for the majority of the marriage, and the wife provided care for the husband's children, who were younger and resided in the marital residence longer than her children. The husband purchased the marital residence prior to the marriage, and transferred the property into joint names in 1989. Both parties contributed to the household expenses, the husband more so than the wife, who retired in about 2007, 5 years before she commenced the divorce action in August 2012. The wife was 68 years old and the husband was 67 years old at the time of trial. The Appellate Division held that Supreme Court erred in awarding the wife 20% of the increase in value of the residence between 1989, when title was transferred to the parties jointly, and the commencement of the action, stating: "By placing the marital residence in both names, the defendant changed the character of the property to marital property (citations omitted). The court providently exercised its discretion in awarding the defendant a credit for his contribution of separate property toward the creation of the marital asset (citation omitted). However, given the plaintiff's contributions to the marital residence, financial and otherwise, during the period between the parties' marriage in 1984 and

1989, when title was transferred to both parties, the appreciation of the value of the marital residence during that period constituted marital property (citation omitted). Accordingly, the court should have utilized the valuation of the marital residence at the time of the marriage, or $105,000, as the sum of the defendant's separate property contribution. Moreover, although the defendant thereafter contributed a larger share of funds towards the maintenance of the residence, in light of the plaintiff's contributions to the residence, financial and otherwise, an award to her of 50% of the marital portion of the residence was warranted." With respect to maintenance, the Second Department concluded: "In light of the age of the parties and the plaintiff's distributive award, the Supreme Court providently exercised its discretion in denying the plaintiff an award of maintenance."

I. Separate Property – Appreciation – Burden Not Met

In Betts v. Betts, 65 NYS3d 842 (4th Dept. Dec. 22, 2017), the wife appealed from a February 2016 Supreme Court judgment which determined the issues of child support and equitable distribution. On appeal, the Fourth Department affirmed, holding that where neither party has custody of the children for a majority of the time, the party with the higher income, here, the wife, is deemed to be the noncustodial parent for child support purposes. The Appellate Division also upheld Supreme Court's determination to impute income to the husband in the sums of $32,000 for 2013 and $33,500 for 2014, finding the same to be based "upon his employment history and earning capacity as a truck driver." With respect to equitable distribution, the court rejected the wife's contention that she should have been granted a distributive award of more than $5,000 for her contributions to the husband's separate property (farm property and business), finding that the wife "did not meet her burden of establishing the manner in which her contributions resulted in an increase in value of the separate property or the

amount of any increase that was attributable to her efforts."

J. Separate Property – Insurance Proceeds – Jewelry

In Anonymous v. Anonymous, 2017 Westlaw 6001739 (1st Dept. Dec. 5, 2017), the husband appealed from a February 2017 Supreme Court order, which granted the wife's application for a declaratory judgment that she is entitled to retain as her separate property the insurance proceeds issued to replace the loss of her separate property jewelry, and directed the husband to cooperate so that such proceeds are paid directly to the wife, The First Department affirmed, holding that Supreme Court "properly determined that the wife was entitled to the insurance proceeds paid to the parties by joint check, notwithstanding that the claim was filed under a joint insurance policy." The Appellate Division noted that the insurance monies "were indisputably to compensate her for the loss of her separate property, as defined by the parties' prenuptial agreement," which stated that "any jewelry gifted by the husband to the wife constitutes the wife's separate property and not marital property."

X. EVIDENCE

A. Expert Cross Examination

In Montas v. Abouel-Ela, 154 AD3d 589 (1st Dept. Oct. 24, 2017), plaintiff appealed from an April 2016 Supreme Court judgment rendered upon a jury verdict in favor of defendant. The First Department affirmed, holding that plaintiff "has not demonstrated conduct by defendant's counsel that would warrant reversal. Defendant's counsel was properly permitted to cross-examine plaintiff's expert rebuttal witness about the circumstances surrounding his suspension from chiropractic school for falsely reporting that he had seen patients, a matter relevant to his credibility (citations omitted). Although the conduct was 30 years ago, the witness opened the door to its relevancy by claiming that his expert knowledge of biomechanics

came, in part, from his training as a chiropractor. Counsel's comments about the plaintiff's expert in summations were within the broad bounds of rhetorical comment."

B. Forensic (Custody) Report Excluded – Outdated

In Matter of Harry T. v. Lana K., 2017 Westlaw 6375542 (1st Dept. Dec. 14, 2017), the mother appealed from an April 2017 Family Court order, which denied her affirmative defense of alienation, after excluding the testimony and written report of a neutral forensic psychologist appointed during prior custody proceedings, and granted the father's support petition. On appeal, the First Department affirmed, noting that the mother "never offered it [the forensic report] into evidence at trial" and that the report was "completed more than two years before trial and prior to the parties' stipulation changing primary physical custody from respondent [mother] to petitioner," such that it would not be relevant to the child support proceeding. The Appellate Division concluded that a suspension of child support was not warranted, since the mother failed to show "deliberate frustration of and active interference with [her] visitation rights."

XI. FAMILY OFFENSE

A. Aggravating Circumstances; Duration of Supreme Court Orders

In Olson v. Olson, 67 NYS3d 461 (1st Dept. Jan. 25, 2018), the husband appealed from an August 2016 Supreme Court order which, after a hearing, granted the wife a final 5 year order of protection upon a finding of aggravating circumstances. The First Department affirmed, holding that the IDV Part's findings that the husband committed third-degree assault and second-degree harassment, "which caused the wife physical injury on two separate occasions, were supported by the record" and "warranted the issuance of a five-year final order of protection in plaintiff's favor as reasonably necessary to provide meaningful protection to plaintiff," citing Family Court

Act §§827[a][vii] and 842. The Appellate Division rejected the husband's contention that the existence of a temporary order of protection should have led the court to issue a shorter duration order, and noted further that Domestic Relations Law §§240 and 252 "do not, under these circumstances, prescribe any time limit for its duration."

B. Aggravating Circumstances – Harassment 1st and 2d; Sexual Abuse 3d

In Matter of Monwara G. v. Abdul G., 153 AD3d 1174 (1st Dept. Sept. 26, 2017), the husband appealed from an October 2016 Family Court order, which, upon a fact-finding determination that he committed a family offense, granted the wife a four-year order of protection. The First Department modified, on the law and the facts, to add to the order of protection a finding that "aggravated circumstances exist, including violent and harassing behavior by respondent toward petitioner, which constitute an immediate and ongoing danger to petitioner." The Appellate Division held that Family Court properly "credited the wife's testimony, which showed that the husband had engaged in a course of significant physical and sexual abuse over a 19-year period, which included hitting the wife, pulling her hair, and forcing her to engage in sex against her will, leaving her with bruises." The foregoing "sufficiently supported the allegations in the petition that the husband had committed the family offenses of harassment in the first and second degree *** and sexual abuse in the third degree." The Court concluded: "The Family Court provided for an extended period of protection beyond two years without setting forth any finding of aggravating circumstances, as required by Family Court Act §842. However, we find that the record amply supports a determination that aggravating circumstances, as defined in Family Court Act §827(a)(vii), exist, and therefore modify the order of protection to set forth this finding."

C. Assault 3d – Found; Aggravating Circumstances

In Matter of Antoinette T. v. Michael J.M., 2018 Westlaw 413521 (1st Dept. Jan. 16, 2018), the father appealed from a September 2016 Family Court order which determined, after a hearing, that he had committed attempted assault in the third degree and that there were no aggravating circumstances, and issued a 2 year order of protection. The First Department modified, on the law and the facts, finding that respondent had committed assault in the third degree and that aggravating circumstances exist, and granted a 5 year order of protection. The Appellate Division note that the element of "physical injury" is defined as "impairment of physical condition or substantial pain" (Penal Law § 10[9]) and that "substantial pain" requires "more than slight or trivial pain *** [and] need not, however, be severe or intense to be substantial." The Court found that petitioner's testimony showed "that on February 1, 2009, respondent inflicted a physical impairment and substantial pain upon petitioner when he punched her in the head and face with a closed fist, causing bruising and pain that lasted for two days and which she testified left a permanent mark on her nose. In a separate series of incidents, on June 6, 2010, respondent punched petitioner several times in her face and once on her left shoulder resulting in intense pain to the face and left shoulder. Later, respondent pushed petitioner down five concrete stairs, causing severe pain for approximately 24 hours, and requiring an overnight hospitalization where she was prescribed pain medication." The First Department concluded that "Family Court also improvidently exercised its discretion in declining to find aggravating circumstances based on physical injury (Family Ct Act § 827[a][vii])," which, in their view, warranted a 5 year order of protection.

D. Disorderly Conduct; Harassment 2d – Found

In Matter of Theresa N. v. Antoine A., 60 NYS3d 815 (1st Dept. Oct. 3, 2017), the father appealed from an April 2016 Family Court order, which found that he had violated an earlier

order of protection by committing the family offenses of harassment in the second degree and disorderly conduct. The First Department affirmed, holding that the findings that "the father committed the family offenses of harassment in the second degree (Penal Law §240.26[1]) and disorderly conduct (Penal Law §240.20) were supported by a fair preponderance of the evidence, including the mother's testimony that, inter alia, the father grabbed the mother in the lobby of her apartment building and cursed at her with the intent to alarm her through physical contact, and that his conduct had alarmed and annoyed the public."

E. Harassment 2d – Found

In Matter of Edward R. v. Elizabeth T., 2017 Westlaw 6001678 (1st Dept. Dec. 5, 2017), respondent appealed from an April 2016 Family Court order which, following a hearing, found that she had committed harassment in the second degree against petitioner and granted a two-year order of protection in favor of petitioner. The First Department affirmed, holding: "A fair preponderance of the evidence supports Family Court's finding that respondent committed the family offense of harassment in the second degree" as defined by Penal Law §240.26(3). The Appellate noted that "Petitioner was shocked, embarrassed and alarmed to be the subject of several emails sent by respondent, which placed his job in jeopardy and served no legitimate purpose, particularly considering that they were sent years after the parties' relationship had ended."

In Matter of Washington v. Washington, 2018 Westlaw 845756 (2d Dept. Feb. 14, 2018), the husband appealed from a February 2017 Family Court order which, after a hearing, found that he committed harassment in the second degree, when on two occasions in December 2016 and January 2017, he used "abusive and intimidating language directed at [his wife]" which "frightened her and served no legitimate purpose." The Second Department affirmed, holding

that the husband's intent to commit the offense was "properly inferred from [his] threatening conduct" and that Family Court's credibility determinations were supported by the record.

F. Harassment 2d – Found; Child Removed from Order of Protection

In Matter of Alquidamia E.R. v. Luis A., 2018 Westlaw 1190650 (1st Dept. Mar. 8, 2018), the husband appealed from an October 2015 Family Court order, which found that he committed harassment in the second degree, and granted a two-year order of protection in favor of the wife and her minor son. The First Department modified, on the law and the facts, to remove reference to the wife's son from the order of protection. The Appellate Division held that the wife "established by a preponderance of the evidence that respondent, her husband, committed the act of harassment in the second degree by physically shoving her and making threats of physical violence toward her while having the requisite intent to harass, annoy or alarm her." The Court concluded that "there is no evidence in the record to support extending the order to petitioner's son."

G. Harassment 2d - Found; Intimate Relationship

In Matter of Lorin F. v. Jason D., 156 AD3d 548 (1st Dept. Dec. 28, 2017), respondent appealed from a November 2016 Family Court order which, after a hearing, determined that he committed the family offense of harassment in the second degree. The First Department affirmed. While the Court noted that respondent's contention that there was no "intimate relationship," is unpreserved for appellate review, the Appellate Division found that "both parties testified that they were in a relationship on and off for at least four years, leaving no doubt that their relationship was intimate." The First Department determined: "Although the Family Court did not specify which family offense respondent committed, the parties addressed the offense of

harassment in the second degree (Penal Law §240.26[3]) in their summations, and respondent concedes that 'it can be inferred' from the court's findings of fact, which refer to elements of that offense, that the court found he had committed that offense." The Appellate Division concluded that "a preponderance of the evidence supports a determination that respondent committed the family offense of harassment in the second degree," concluding that "respondent's conduct was not an isolated incident, but a course of conduct over a period of time involving threats and demands for money, followed by postings of pictures on different sites."

H. Intimate Relationship; Harassment 2d and Menacing 3d Found

In Matter of Kristina L. v. Elizabeth M., 2017 Westlaw 6519537 (3d Dept. Dec. 21, 2017), respondent appealed from an October 2016 Family Court order, which found that she had committed the family offenses of Harassment in the Second Degree and Menacing in the Third Degree and granted a one year order of protection in favor of petitioner. The Third Department affirmed, rejecting respondent's contention that petitioner failed to establish that the parties were in an "intimate relationship" as defined by Family Court Act 812(1)(e). The Appellate Division found: "[I]n February 2016, petitioner moved into respondent's apartment for a period of two to three months. While the parties' testimony differed as to how petitioner came to reside with respondent, both testified that they had agreed that petitioner would live with respondent rent-free in exchange for acting as a nanny to respondent's seven-year-old daughter and helping with household chores. Specifically, petitioner was responsible for bringing the child to and from school and caring for the child overnight when respondent's job required her to travel. There was also some evidence that petitioner would cook meals and put the child to bed on nights when respondent was home. Additionally, the evidence adduced at the hearing, including text messages between the parties, demonstrated that the parties were each familiar with personal

details relating to the other. Significantly, respondent testified that bringing petitioner into her home was both a business transaction and an act of friendship. Although the parties' relationship certainly encompassed a business component, the parties' preexisting friendship, together with the frequency of their interactions while living together, on both a personal level and with respect to the child, take their relationship out of the categories of 'casual acquaintance' or 'ordinary fraternization between two individuals in business' that are excluded from the statutory definition of 'intimate relationship' (citations omitted). Considering the personal and close nature of the parties' relationship over a period of roughly six months, the frequency of their contact and the fact that respondent entrusted petitioner to act as a live-in nanny to her child, the evidence supports Family Court's determination that the parties were in an 'intimate relationship.'" As to the evidence regarding menacing, the Third Department found the same to be sufficient, noting that Family Court found respondent was not a credible witness and reviewing the testimony that "respondent became irate that her vacuum cleaner was not working well and, in her rage, threw it down some stairs. Petitioner stated that respondent then became upset with her about the condition of the home and, during a confrontation in the kitchen, threw a coffee mug in her direction. Petitioner testified that she avoided contact with the mug, which hit a door and broke, by moving to the side and that, had she not done so, it would have hit her in the face. According to petitioner, her encounter with respondent was an 'intimidating situation.'" With respect to harassment in the second degree, the Appellate Division cited as sufficient the evidence, that among other things, respondent sent petitioner text messages which alarmed her and which included: "You are a filthy human being and the police will punish you just like they punished your mother."

I. Weapons Surrender Reversed

In Matter of Rhoda v. Avery, 2017 Westlaw 5163013 (2d Dept. Nov. 8, 2017), respondent appealed from a December 2016 Family Court order of protection, made after a hearing, upon a finding that he committed harassment in the second degree against his mother in law, and which directed him to stay away from her until December 20, 2017, and to immediately surrender any and all handguns, pistols, revolvers, shotguns, and any other firearms owned or possessed to the police. The Second Department modified, on the law and the facts, by deleting the provision directing respondent to surrender the aforementioned firearms. The Appellate Division held that petitioner "established, by a fair preponderance of the evidence, that [respondent] committed acts which constituted the family offense of harassment in the second degree, warranting the issuance of an order of protection." The Court found that Family Court "erred in directing the appellant to surrender any firearms in his possession during the pendency of the order of protection. The direction that the appellant surrender any firearms he owned or possessed was not warranted inasmuch as the court did not find, nor did the evidence indicate, 'that the conduct which resulted in the issuance of the order of protection involved (i) the infliction of physical injury . . . , (ii) the use or threatened use of a deadly weapon or dangerous instrument . . . , or (iii) behavior constituting any violent felony offense (Family Ct Act §842-a[2][a]), or that there is a substantial risk that the [appellant] may use or threaten to use a firearm unlawfully against the person or persons for whose protection the order of protection is issued' (Family Ct Act §842-a[2][b])."

XII. Maintenance

A. Denied

In Spencer-Forrest v. Forrest, 2018 Westlaw 1179339 (2d Dept. Mar. 7, 2018), both parties appealed from a November 2016 Supreme Court judgment which: awarded the wife

$30,000 (20%) of the appreciation in the marital residence; provided the husband with a separate property credit of $105,000; and denied the wife's request for maintenance. The Second Department modified, on the law and in the exercise of discretion, by increasing the wife's share of the marital residence to $122,500 (50%), and otherwise affirmed. The parties were married in March 1984 and had no children together, but children from each of the parties' prior marriages resided with the parties. Both parties were employed for the majority of the marriage, and the wife provided care for the husband's children, who were younger and resided in the marital residence longer than her children. The husband purchased the marital residence prior to the marriage, and transferred the property into joint names in 1989. Both parties contributed to the household expenses, the husband more so than the wife, who retired in about 2007, 5 years before she commenced the divorce action in August 2012. The wife was 68 years old and the husband was 67 years old at the time of trial. The Appellate Division held that Supreme Court erred in awarding the wife 20% of the increase in value of the residence between 1989, when title was transferred to the parties jointly, and the commencement of the action, holding: "By placing the marital residence in both names, the defendant changed the character of the property to marital property (citations omitted). The court providently exercised its discretion in awarding the defendant a credit for his contribution of separate property toward the creation of the marital asset (citation omitted). However, given the plaintiff's contributions to the marital residence, financial and otherwise, during the period between the parties' marriage in 1984 and 1989, when title was transferred to both parties, the appreciation of the value of the marital residence during that period constituted marital property (citation omitted). Accordingly, the court should have utilized the valuation of the marital residence at the time of the marriage, or $105,000, as the sum of the defendant's separate property contribution. Moreover, although the defendant thereafter

contributed a larger share of funds towards the maintenance of the residence, in light of the plaintiff's contributions to the residence, financial and otherwise, an award to her of 50% of the marital portion of the residence was warranted." With respect to maintenance, the Second Department concluded: "In light of the age of the parties and the plaintiff's distributive award, the Supreme Court providently exercised its discretion in denying the plaintiff an award of maintenance."

B. Durational – Affirmed (Pension Eligibility); Imputed Income

In Johnston v. Johnston, 2017 Westlaw 6519486 (3d Dept. Dec. 21, 2017), the wife appealed from a January 2017 Supreme Court judgment, which, after trial, decided the issues of counsel fees, equitable distribution and maintenance. The parties were married in September 1989 and have two children, born in 1991 and 1995. The wife commenced the divorce action in April 2014 seeking a judgment of separation. The husband counterclaimed for divorce on irretrievable breakdown or abandonment, and the wife asserted a "counterclaim" for divorce on adultery or constructive abandonment. Supreme Court granted the husband a divorce on his no-fault counterclaim, awarded the wife $5,000 in counsel fees, $3,000 per month in maintenance until she begins to receive the husband's retirement benefits, the death of either party, the wife's remarriage or a subsequent modification by the court, directed an equal sharing of a home equity loan, and gave the husband a credit for payments made over and above rent received. The Third Department affirmed. As to the divorce, the Appellate Division held that "having determined that the husband established irretrievable breakdown pursuant to Domestic Relations Law §170(7), Supreme Court was under no obligation to grant the wife a judgment of divorce on the ground of adultery or constructive abandonment." The Court noted that "the parties had been renting out the marital residence for $1,300 per month" and that Supreme Court "awarded the husband a

credit for one half of the payments that he made during the pendency of the action toward the portion of the mortgage that was not covered by the rental income." The Third Department rejected the wife's assertion that Supreme Court erred by concluding that the home equity loan taken on the marital residence was a marital debt and that the parties should equally share its repayment upon the sale of the residence, given "the absence of any evidence that the husband used the home equity loan to pay off his separate liabilities." With regard to maintenance, the Third Department noted that Supreme Court considered "the parties' long-term marriage, the 'comfortable lifestyle' that they enjoyed throughout the marriage, their respective property, income and potential earning capacities and its distributive award of marital property and debt." The trial evidence established that the husband had been the primary wage earner and the wife managed the home, was the primary caretaker and educator of the children, who were home schooled for a majority of their childhoods. The Appellate Division held that Supreme Court "properly imputed an annual income of $30,000 to the wife based on her age, health, attainment of an Associate's degree in theology from an unaccredited institution and her work history, which included eight years of full-time employment at the United States Post Office prior to the marriage and two years of full-time employment at the United States Consulate General in Kazakhstan during the marriage." The Appellate Division upheld the $5,000 counsel fee award, holding that "Supreme Court appropriately considered, among other things, the $8,000 that the husband paid to the wife in interim counsel fees, the amount of temporary maintenance and child support received by the wife, and 'the tremendous expenditures made by the husband to keep the family and the marital residence afloat during the pendency of [the action].'" The Court concluded: "To the extent that the wife asserts that the proceedings were unfair because the husband allegedly spent more in legal fees, we note that the wife was free to use her temporary

maintenance to supplement the interim and postjudgment counsel fee awards."

C. Durational – Affirmed – Payor's Inheritance as Factor

In Culen v. Culen, 157 AD3d 926 (2d Dept. Jan. 31, 2018), the parties were married in August 1982 and the wife commenced the action in January 2009. The husband appealed from a May 2014 Supreme Court judgment, which awarded the wife 25% ($105,250) of the value of the husband's diving services business, denied the husband a $77,500 separate property credit for the marital residence, and awarded the wife 5 years of maintenance at $2,220 per month and 3 years at $1,000 per month. The Second Department affirmed, upholding the 25% award of the business to the wife, and determined that Supreme Court did not err in considering the inheritance that the husband was to receive from his aunt as one factor in awarding maintenance, noting that the amount and duration was an appropriate exercise of discretion. With regard to the separate property credit, the Appellate Division held that the husband's "self-serving trial testimony that his aunt gave him a check in the sum of $50,000, that his uncle gave him the sum of $10,000, and that he used those funds toward the down payment, was unsupported by documentary evidence, and insufficient to establish his entitlement to a separate property credit."

D. Durational – Duration Increased

In Nadasi v. Nadel-Nadasi, 2017 Westlaw 4159147 (2d Dept. Sept. 20, 2017), both parties appealed from a September 2014 Supreme Court judgment, rendered upon a March 2014 decision after trial, which: awarded the wife a credit of $135,450, representing 15% of the value of the husband's interest in a business; failed to award her any credit related to a business apartment; awarded her maintenance of $12,000 per month for two years after she vacates the marital home, $11,000 per month for the following two years, and $10,000 per month for the following two years, to terminate sooner upon her remarriage or the death of either party; and

directed the husband to pay 70% of the wife's attorney and expert fees. The Second Department modified, on the facts and in the exercise of discretion, by: (1) increasing the wife's share of the business to 25% or $225,750; (2) awarding the wife a credit of $90,000 related to the business apartment; and (3) increasing maintenance to 12 years, at the rates of: $12,000 per month for two years after the wife vacates the marital home, $11,000 per month for the following two years, $10,000 per month for the following two years, $9,000 per month for the following two years, $8,000 per month for the following two years, and $7,000 per month for the following two years, to terminate sooner upon her remarriage or the death of either party. The parties were married in November 1989, and had 3 children. The husband is a 50% partner in a commodities brokerage firm, earning approximately $1.5 million per year. The wife stopped working in 1996 to be a homemaker and primary caretaker of the parties' children. The parties separated in May 2010 and the husband commenced the divorce action in July 2011. With regard to the percentage distribution of the husband's business, the Appellate Division increased the same to 25%, based upon the wife's "indirect contributions to the business as a homemaker and primary caretaker for the parties' three children in this long-term marriage, while forgoing her own career." As to the business apartment, the Second Department found that in connection with a July 1997 refinancing, the husband purchased an additional 13.33% interest therein, presumably with marital funds, and awarded the wife a credit in the sum of $90,000, representing one-half of the value of the husband's 13.33% increased interest therein. As to maintenance, the Appellate Division held that Supreme Court "improvidently exercised its discretion in failing to extend the award until the defendant reaches retirement age" (which age, and the wife's present age, were both unspecified), and increased maintenance to 12 years as set forth above. With respect to counsel fees, the Second Department concluded: "In view of the relative financial circumstances

of the parties, including the defendant's substantial distributive award, the nature and extent of the services rendered, and the relative merits of the parties' positions at trial, the Supreme Court providently exercised its discretion in awarding the defendant 70% of her attorney and expert fees."

XIII. PATERNITY

A. Artificial Insemination; Equitable Estoppel; Presumption of Legitimacy

In Matter of Christopher YY v. Jessica ZZ, 2018 Westlaw 541768 (3d Dept. Jan. 25, 2018), the petitioner sperm donor appealed, by permission, from a November 2015 Family Court order which, after a hearing, denied the mother and her spouse's motion to dismiss his April 2015 paternity petition, upon the grounds of the presumption of legitimacy and equitable estoppel, and ordered genetic testing. The respondent mother and her wife were married prior to the mother giving birth to the subject child in August 2014. The child was conceived through informal artificial insemination in respondents' home using petitioner's sperm. There was a written agreement drafted by petitioner, that was signed by respondents and petitioner in the presence of his partner. There were no formalities or legal advice, and the agreement stated that petitioner "volunteered to donate his sperm so that respondents could have a child together, expressly waived any claims to paternity with regard to any child conceived from his donated sperm and further waived any right to custody or visitation, and respondents, in turn, waived any claim for child support from petitioner." Petitioner did not see the child until she was one or two months old. The Third Department reversed, on the law and the facts, holding: "As the child was born to respondents, a married couple, they have established that the presumption of legitimacy applies, a conclusion unaffected by the gender composition of the marital couple or the use of informal artificial insemination by donor." As to the issue of equitable estoppel, the Appellate

Division stated: “Having led respondents to reasonably believe that he would not assert — and had no interest in acquiring — any parental rights and was knowingly and voluntarily donating sperm to enable them to parent the child together and exclusively, representations on which respondents justifiably relied in impregnating the mother, it would represent an injustice to the child and her family to permit him to much later change his mind and assert parental rights.”

In Matter of Joseph O. v. Danielle B., 2018 Westlaw 988920 (2d Dept. Feb. 21, 2018), respondents Danielle B. and Joynell B., who were married in Connecticut in July 2009, appealed by permission from a January 2017 Family Court order, which denied their motion to dismiss Joseph O.'s June 2016 petitions for visitation with and paternity of their child, born to Danielle in April 2012 by artificial insemination. (Petitioner’s September 2015 petitions seeking the same relief were dismissed for failure to join Joynell). The Second Department reversed, on the law and the facts, and granted the motion to dismiss the visitation and paternity petitions. In February 2011, the parties entered into a "Three-Party Donor Contract," wherein they agreed that “the petitioner would provide the respondents with a semen sample for the purposes of artificial insemination, that he would have no parental rights or responsibilities in relation to any resulting children, and that he would not request or compel any guardianship or custody of, or visitation with, any child born from the artificial insemination procedure.” Respondents were both named as parents on the child’s birth certificate. The Appellate Division held that Family Court “properly concluded that the irrebuttable presumption of parentage afforded by Domestic Relations Law §73 is not applicable to the circumstances of this case, since the artificial insemination done here was not performed by a person duly authorized to practice medicine (*see* Domestic Relations Law §73[1]).” The Second Department determined that “respondents correctly contend that because the child was conceived and born to the respondents during their

marriage, there is a presumption that the child is the legitimate child of both respondents," citing DRL §24[1] and Family Court Act §417. The Court stated that while the presumption of legitimacy may be rebutted, "We need not decide here what proof might rebut the presumption of legitimacy in this case (*cf. Matter of Christopher YY. v Jessica ZZ.*, 2018 Westlaw 522068), as we find that the respondents were entitled to dismissal of the paternity petition on the ground of equitable estoppel." As to the issue of equitable estoppel, the Second Department concluded: "Here, it is undisputed that all of the parties intended that the petitioner would not be a parent to the child, even if they did contemplate some amount of contact after birth. The petitioner was not present at the child's birth, and was not named on her birth certificate. Despite the fact that he was undeniably aware of the child's birth and his possible claim to paternity, the petitioner waited more than three years to assert his claim of parentage. During that time, the child has lived with and been cared for exclusively by the respondents, each of whom has developed a loving parental relationship with her. Although the petitioner asserts that he has had some contact with the child, he does not claim that he has developed a parental relationship with the child or that she recognizes him as a father. Significantly, the petitioner acknowledges that he does not actually seek a parental role, only that he wants a legal right to visitation with the child. Under these circumstances, we find that a hearing was unnecessary, and it is in the child's best interests to dismiss the paternity petition on the ground of equitable estoppel."

XIV. PENDENTE LITE

A. Exclusive Use and Occupancy

In L.M.L. v. H.T.N., 57 Misc3d 1207(A), 2017 Westlaw 4507541, NY Law Journ. Oct. 20, 2017 at 21, col. 5 (Sup. Ct. Monroe Co. Oct. 3, 2017, Dollinger, A.J.) , the parties were married and have two sons, ages 12 and 9, and lived in the marital residence together. The wife

moved for exclusive possession, alleging that the husband's temper and the parties' verbal disputes make it unsafe for them to remain together. The Court noted that the parties' affidavits presented diametrically opposed versions of events. The attorney for the children supported the wife's motion, upon the children's statements that the environment was very stressful and unhealthy for them. Supreme Court granted the motion, subject to a hearing in 45 days, finding that a more enlightened view of "domestic strife" under DRL 234 mandates that the court consider constant verbal conflict between the parents in terms of its effect upon the children. The Court directed the husband to vacate in 15 days, and directed the wife, upon her prior consent, to make $10,000 available to the husband within 10 days so that he can relocate.

B. Temporary Maintenance Guidelines (Former); Carrying Charges; Upward Deviation

In Galvin v. Galvin, 2017 Westlaw 4679950 (3d Dept. Oct. 19, 2017), the wife appealed from a January 7, 2016 Supreme Court order, which directed the husband to pay $15,415 in monthly household expenses (for the marital residence and a Colorado condominium), plus $2,500 per month as temporary maintenance, where the husband's income exceeded the then $543,000 cap. The parties married in 1995 and have three children, one unemancipated. The husband commenced the divorce action in 2015 and both parties continued to reside in the marital residence. The wife claimed total monthly expenses in excess of $54,000 and had some income, the amount of which was unspecified. The presumptive amount of temporary maintenance payable to the wife was $160,331 per year, or $13,361 per month. On appeal, the wife contended "that Supreme Court erred by completely offsetting the presumptive award by the husband's payment of the household expenses" and that "he should be permitted to offset no more than 50% of the household expenses [$15,415 per month/2 = $7,707.50] against the

presumptive amount of temporary maintenance." The wife argued that in effect, the husband is paying her share of the household expenses ($7,705.50 per month), plus $2,500 = $10,207.50 per month, which is less than the presumptive guidelines amount ($13,361 per month). The Third Department agreed and modified, on the law, "to allow the wife to receive the properly calculated presumptive share of maintenance." The Appellate Division noted: "It is apparent that Supreme Court believed it was appropriate to award temporary maintenance in excess of the statutory cap, and the submissions provide ample support for this conclusion. Where, as here, the parties continue to reside together in the marital residence during the pendency of a divorce, we find that it is appropriate to credit the payor spouse with one half of the court-ordered carrying charges (citations omitted)." The Court concluded that "the wife is entitled to the presumptive award of $13,361 each month, plus $2,500 for the amount of the husband's income above the statutory cap, offset by one half of the household expenses, or a credit in the amount of $7,707.50 each month" and that "in addition to the defined household expenses, the monthly amount payable by the husband to the wife as temporary maintenance should be increased by $5,654, for a total of $8,154."

C. Temporary Maintenance Guidelines (Former); Carrying Charges; Reduced on Appeal; Remittal on CSSA

In Rouis v. Rouis, 2017 Westlaw 6519456 (3d Dept. Dec. 21, 2017), the husband appealed from an April 2016 Supreme Court order, which granted the wife's September 2015 motion for pendente lite relief. The parties were married in 1993 and have two children born in 1997 and 1999. The husband moved out of the home and the wife commenced the divorce action in August 2014. Supreme Court granted the wife temporary maintenance ($1,958 per month) and child support ($2,720 per month) and required the husband to pay the carrying costs and upkeep

of the marital residence ($4,859 per month), private school for the younger child ($848 per month), health insurance for the family ($1,921 per month), interim counsel fees ($10,000) and the wife's vehicle and fuel costs ($644 per month). The appeal was argued on November 15, 2017 and the parties informed the Appellate Division that the trial commenced in October 2017, but a final decision is not expected for several months. Departing from the general rule that the best remedy for any claimed inequity in a temporary order is a speedy trial, the Third Department stated: “However, given that Supreme Court's combined monthly awards amount to an annual award of $155,400 plus $10,000 in interim counsel fees, to be paid from the husband's annual gross income of $183,300.50 (for purposes of maintenance) as calculated by the court based upon his 2013 tax return, we agree that the temporary awards are excessive and should be modified.” The Appellate Division noted that Supreme Court “essentially credited the husband for one half of the carrying costs on the home ($2,429.50 per month) by reducing the presumptive maintenance award by that amount, resulting in a temporary maintenance award of $1,958 per month. *** When the wife's vehicle expenses are added ($644 per month), this results in a total combined monthly award of $7,461, plus tuition ($848 per month) and child support, discussed below.” The Court recognized that the husband correctly argued “that the statutory formula used to calculate the presumptive temporary maintenance award was intended to cover *all* of the nonmonied spouse's needs and basic living expenses, including the carrying charges on the home and her vehicle expenses (citations omitted).” The Third Department found that “the combined award for maintenance, carrying costs and the expenses of the wife's vehicle ($7,461 per month) — which is $3,073.50 per month *in excess of* the presumptive maintenance award ($4,387.50 per month) (without considering health insurance costs, child support or tuition) — is excessive. Accordingly, we deem it appropriate to reduce the husband's obligation to pay the

carrying costs on the marital home by approximately one half of that excess amount, or $1,540 per month, to $3,319 per month. The temporary maintenance award of $1,958 is not changed." As to temporary child support, the Court held that "Supreme Court miscalculated the parties' pro rata shares of child support. *** Accordingly, the matter must be remitted for immediate recalculation of the husband's temporary child support obligation. *** Finally, we note that the excess payments made by the husband under the court's temporary order may be considered at trial 'in appropriately adjusting the equitable distribution award' (citation omitted)."

XV. LEGISLATIVE & COURT RULE ITEMS

A. Automatic Orders – Case of First Impression

In Spencer v. Spencer, 2018 Westlaw 1075362 (2d Dept. Feb. 28, 2018), an action in which the parties were divorced by a judgment entered November 30, 2015, the husband appealed from a November 2016 Supreme Court order which, after a hearing, granted the wife's motion to hold him in civil contempt for violation of the automatic orders, and directed his incarceration, unless he paid a purge amount of $150,000 by December 16, 2016. The Second Department stayed enforcement of the order, pending hearing and determination of the appeal. Following entry of judgment, the wife learned that during the pendency of the action, the husband had sold a warehouse which constituted marital property, without her consent or court permission. The Appellate Division reversed, on the law, and denied the wife's motion for civil contempt. The Court found that while the automatic orders constitute "unequivocal mandates of the court" for contempt purposes, contempt is not an available remedy for violation thereof when contempt is sought after entry of a judgment of divorce.

B. CSSA Income Cap

The income cap has been adjusted to $148,000, **effective March 1, 2018**. The CSSA

chart has been revised. https://childsupport.ny.gov/dcse/pdfs/CSSA.pdf

C. Hourly Rates - Judiciary Law 35 & County Law 722-c

Pursuant to Administrative Order AO/446/17, dated December 19, 2017 and **effective January 1, 2018**, the hourly rates for court appointed non lawyer professionals pursuant to Judiciary Law 35 and County Law 722-c, last adjusted in 1992, were set as follows: physicians and psychiatrists ($250), certified psychologists ($150), certified social workers ($75) and licensed investigators ($55).

D. Maintenance Guidelines Income Cap

The income cap is adjusted to $184,000, effective January 31, 2018. OCA calculators have been revised accordingly

Dated: March 11, 2018
At: Albany, NY

NEW YORK STATE BAR ASSOCIATION
FAMILY LAW SECTION
CONTINUING LEGAL EDUCATION

SUMMER 2018 MEETING

The Equinox Resort & Spa
Manchester, VT
July 14, 2018, 11:10 a.m. – 12:00 noon

"Matrimonial Update"

Supplemental Outline

(March 12, 2018 – June 15, 2018)

Bruce J. Wagner
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NEW YORK STATE BAR ASSOCIATION
FAMILY LAW SECTION
CONTINUING LEGAL EDUCATION

SUMMER 2018 MEETING

The Equinox Resort & Spa
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July 14, 2018, 11:10 a.m. – 12:00 noon

"Matrimonial Update"

SUPPLEMENTAL OUTLINE

(March 12, 2018 – June 15, 2018)

Bruce J. Wagner **McNamee Lochner P.C.** **677 Broadway, 5th Floor** **Albany, New York 12207-2503**	**Telephone: 518-447-3329** **Facsimile: 518-867-4729** **e-mail: wagner@mltw.com**

These materials cover the period March 12, 2018 through June 15, 2018.

COURT OF APPEALS NOTE

In Keller-Goldman v. Goldman, 2018 Westlaw 2931052 (June 12, 2018), the Court of Appeals affirmed an Appellate Division order (149 AD3d 422 [1st Dept. 2017]), upholding Supreme Court's October 2015 judgment, which placed a cap on the college room and board credit to the husband under the parties' incorporated agreement, "in a manner that ensured adequate support to each unemancipated child, as the parties clearly intended" citing DRL 240(1-b)(h). CSSA child support for the 3 children with the mother was $5,000 per month; the parties deviated downward to $2,500 per month. The emancipation step down child support amount upon the emancipation of the first child was $2,150 per month. The husband was entitled to a room and board credit, and sought a $1,200 per month credit for the eldest child, which would have resulted in child support being reduced to $1,300 per month. Supreme Court capped the room and board credit at $350 per month, to match the step down amount of $2,150 per month.

I. AGREEMENTS

A. Interpretation – College Consultation

In Matter of Wheeler v. Wheeler, 2018 Westlaw 2751467 (4th Dept. June 8, 2018), the parties' agreement provided that the parties would contribute to their children's college education and would consult with each other and their children concerning the college selection process. A Support Magistrate found the father to be in violation for failing to contribute to his daughter's college costs, and Family Court's October 2016 order sustained his objection. The Fourth Department modified, on the law, by reinstating the Support Magistrate's order, holding that the father's agreement to contribute to his daughter's college expenses was not "conditioned on him being consulted regarding her choice of college" and did not "condition either party's duty to contribute to college expenses upon such consultation."

B. Prenuptial – Overreaching – Summary Judgment Denied

In Carter v. Fairchild-Carter, 159 AD3d 1315 (3d Dept. Mar. 29, 2018), the husband appealed from an August 2016 Supreme Court order, which, in his August 2014 divorce action, denied his motion for summary judgment to enforce the parties' 2008 prenuptial agreement. The Third Department affirmed. The parties were both represented by counsel, although the wife claimed that she was presented with the agreement "shortly before the wedding day," and the husband represented to her that revisions were made, such that she would receive half the value of the land and house in which they resided, and half of all marital acquisitions. Notably, the agreement only provided that the wife would get 50% of the value of the house to the extent that it exceeded $800,000. However, the home was assessed at $515,800 as of the date of the prenuptial agreement and appraised at $590,000 as of the date of the commencement of the divorce action. The wife further alleged that she did not have the time to read the revised

agreement, or take it back to her lawyer, and just signed it because she felt pressured. The Third Department held that "these facts, if credited, give rise to the inference of overreaching." Justice Rumsey concurred, expressing "concern that the majority's determination that the wife met her burden based upon allegations that she was pressured into signing the prenuptial agreement on the day prior to the wedding without reading it establishes a dramatically lower standard for challenging prenuptial agreements that contravenes our long-standing precedent. I would not find overreaching in this case but for the wife's allegation that the husband's affirmative misrepresentation of the value of a parcel of his separately-owned real property, in which she was to share any appreciation in value that occurred during the marriage, deprived her of the benefit of the prenuptial agreement."

II. CHILD SUPPORT

A. CSSA – Cap at $650,000; Nanny Denied; Private School Pro Rata

In M.M. v. D.M., 159 AD3d 562 (1st Dept. Mar. 22, 2018), both parties appealed from an August 2017 Supreme Court Judgment, awarding plaintiff wife child support and maintenance, awarding defendant husband a credit of $1 million for his separate property interest in the marital residence, distributing the parties' non-business marital assets 60% to plaintiff and 40% to defendant, awarding plaintiff a share of defendant's business interests valued as of January 2015, awarding credits for various post-commencement expenses, and allocating 65% of plaintiff's counsel fees to defendant. The First Department modified, on the law and the facts, to award defendant a credit of $71,000 for his Lehman Brothers retirement account, to delete the directive that defendant be solely responsible for the children's private school tuition and to direct instead that the parties share the children's private school tuition pro rata, to delete the directive that defendant contribute to the cost of a full-time nanny, and to remand for a determination of the

credit owed defendant for documented moving expenses, documented post-commencement contributions to his 401(k) account and for a recalculation of defendant's child support obligation, and his child support arrears, treating plaintiff's durational maintenance as income. The Appellate Division noted that the wife conceded that the husband's Lehman Brothers retirement account, valued at $71,000, is separate property and was erroneously distributed as a marital asset and that he is entitled to a credit in that amount. The First Department held that Supreme Court providently exercised its discretion in distributing the parties' non-business marital assets 60% to the wife and 40% to the husband, based upon the wife's contributions to the husband's career, at the expense of her own career, and the parties' probable future financial circumstances, in particular, defendant's far greater earning potential and family wealth. The Appellate Division agreed with the husband that the $1 million he received from his father toward the down payment on the marital residence was a gift structured as a "loan" to defendant alone, and was therefore defendant's separate property and that there "was no repayment using marital funds; indeed, there was no expectation of repayment." As to the husband's business interests, the First Department properly chose January 2015 as the valuation date, on the ground that he was forcibly hospitalized around that time and diagnosed with temporal lobe epilepsy, and subsequently had very little involvement in his family's business. The Court noted that while Supreme Court found that the husband's post-commencement contributions to his 401(k) were separate property, it was "not clear whether he was credited for his documented post-commencement contributions to that account," and remanded for a determination of the credit owed to him for those contributions. As to child support, the Appellate Division found that Supreme Court properly imputed income of $1.5 million to the husband and applied a CSSA income cap of $650,000, based upon "the lifestyle enjoyed by the children during the marriage,

which included country club membership, theater and other entertainment, and luxury vacations." The First Department further stated: "We also agree with defendant that the Referee erred in ordering him to contribute to the cost of a nanny, since plaintiff does not work, and the youngest child was 12 years old at the time of trial (*see* DRL §240[1-b][c][4])" and that Supreme Court failed to credit defendant for his documented moving expenses. With regard to maintenance, the Appellate Division held that Supreme Court properly awarded the wife maintenance "for six months or until she received her distributive share of the marital assets, on the ground that the cash flow from those assets would be sufficient to support her lifestyle without the need for additional maintenance from defendant. After a 15-year marriage in which she was primarily a homemaker, plaintiff surely would have been entitled to maintenance of a longer duration — if not for the equitable distribution to her of 60% of the non-business marital assets, which provided her with the means to be self-supporting." As to counsel fees, the First Department upheld the allocation of 65% of the wife's counsel fees to the husband, noting: "The parties' accrued counsel fees exceeded $7,000,000, and were paid mostly out of their liquid marital assets, although defendant was earning a substantial salary until 2015. *** Further, the Referee properly took into account that, although both parties engaged in needless litigation, plaintiff's trial positions were on the whole more successful (citation omitted). We note that even after the award plaintiff remained responsible for more than $1 million in legal fees."

B. CSSA – Income – Maintenance Inclusion

In Murray v. Murray, 2018 Westlaw 2751251 (4th Dept. June 8, 2018), the Fourth Department modified, on the law, an April 2016 Supreme Court judgment, which calculated child support in a split custody (1 child with each parent) situation without including in the mother's income the amount of maintenance paid to her, upon the ground that the 2015

amendments to the CSSA and maintenance guidelines were effective prior to the entry of the judgment. The Appellate Division further directed that the father's child support obligation would be modified to an upward amount certain upon the termination of his maintenance to the mother.

C. CSSA – Income – Veteran's Disability Benefits

In Matter of Nieves v. Iacono, 2018 Westlaw 2709829 (2d Dept. June 6, 2018), the father appealed from a March 2017 Family Court order, which denied his objection to so much of a January 2017 Support Magistrate order as included his veterans disability benefits as CSSA income, when granting his June 2016 petition for downward modification of child support. The Second Department affirmed, holding: "federal law does not prohibit the inclusion of veterans disability benefits as income in calculating a veteran's child support obligation. Although veterans benefits are exempt from many claims (*see* 38 USC §5301), 42 USC §659(a) specifically provides that this exemption does not apply to child support obligations." The CSSA provides that veterans benefits are income for child support purposes FCA §413[1][b][5][iii][E].

D. Modification – Termination – Child's Conduct

In Matter of Jones v. Jones, 160 AD3d 1428 (4th Dept. Apr, 27, 2018), the attorney for the child appealed from a January 2017 Family Court order, which granted the father's petition seeking modification of child support, by terminating his obligation for the eldest of the parties' 3 children (a daughter, age 18 at the time of the hearing), based upon the mother's conduct. The Fourth Department affirmed, but upon a different ground, noting: "Visitation with the father was subject to the wishes of the daughter (citations omitted) and the mother and daughter both testified unequivocally that the daughter refused to have anything to do with the father by her own choice and for her own reasons." The Appellate Division held that "Family Court

nevertheless properly relieved the father of his obligation to support the daughter on the ground that the daughter, by her conduct, forfeited her right to support." The Court concluded: "The father made consistent efforts to establish a relationship with the daughter by participating in counseling, inviting her to family functions, and giving her cards and gifts, but those efforts were rebuffed."

E. Modification – 2010 Amendments

In Gordon-Medley v. Medley, 160 AD3d 1146 (3d Dept. Apr. 12, 2018), the husband appealed from a May 2016 Supreme Court judgment which, among other things, modified a 2003 Family Court child support order pertaining to the parties' child born in 1996. The Third Department affirmed, holding that Supreme Court properly relied upon DRL 236(B)(9)(b)(2), as amended effective October 13, 2010, pursuant to which "[a] court may modify an order of child support where . . . three years have passed since the order was entered, last modified or adjusted," except that "if the child support order incorporated without merging a valid agreement or stipulation of the parties, the amendments regarding the modification of a child support order. . . shall only apply if the incorporated agreement or stipulation was executed on or after this act's effective date." The Appellate Division reasoned that "because the prior child support order was not incorporated into a later agreement, the statutory amendment was applicable. As the wife was entitled under the amendment to a modification of the child support order due to the passage of more than three years, without any requirement that she demonstrate a change in circumstances (*see* Domestic Relations Law §236[B][9][b][2][ii][A]; [citation omitted]) and the husband does not challenge Supreme Court's calculation of the amount of child support, we will not disturb the child support aspect of the judgment."

In Matter of Gratton v. Gratton, 2018 Westlaw 2751362 (4th Dept. June 8, 2018), the Fourth

Department affirmed a March 2017 Family Order, which upheld the Support Magistrate's determination that the father failed to establish changed circumstances sufficient to justify a downward modification of his child support obligation, as set forth in an April 2016 agreement incorporated into an August 2016 judgment of divorce. While the father was laid off from his job as a nuclear power plant contractor in May 2016, given that both this change and the resultant more than 15% decrease in his income occurred prior to August 2016, there was no change since the entry of the judgment. The Appellate Division noted further that the father "had no intention of returning to his occupation" and "intended to work on the family farm, despite the fact that it was not profitable for him to do so," which rendered him unable to show that he had made efforts "to secure employment commensurate with his … education, ability, and experience," as required by FCA 451(3)(b)(ii).

III. COUNSEL & EXPERT FEES

A. After Trial

In M.M. v. D.M., 159 AD3d 562 (1st Dept. Mar. 22, 2018), both parties appealed from an August 2017 Supreme Court Judgment, awarding plaintiff wife child support and maintenance, awarding defendant husband a credit of $1 million for his separate property interest in the marital residence, distributing the parties' non-business marital assets 60% to plaintiff and 40% to defendant, awarding plaintiff a share of defendant's business interests valued as of January 2015, awarding credits for various post-commencement expenses, and allocating 65% of plaintiff's counsel fees to defendant. The First Department modified, on the law and the facts, to award defendant a credit of $71,000 for his Lehman Brothers retirement account, to delete the directive that defendant be solely responsible for the children's private school tuition and to direct instead that the parties share the children's private school tuition pro rata, to delete the directive that

defendant contribute to the cost of a full-time nanny, and to remand for a determination of the credit owed defendant for documented moving expenses, documented post-commencement contributions to his 401(k) account and for a recalculation of defendant's child support obligation, and his child support arrears, treating plaintiff's durational maintenance as income. The Appellate Division noted that the wife conceded that the husband's Lehman Brothers retirement account, valued at $71,000, is separate property and was erroneously distributed as a marital asset and that he is entitled to a credit in that amount. The First Department held that Supreme Court providently exercised its discretion in distributing the parties' non-business marital assets 60% to the wife and 40% to the husband, based upon the wife's contributions to the husband's career, at the expense of her own career, and the parties' probable future financial circumstances, in particular, defendant's far greater earning potential and family wealth. The Appellate Division agreed with the husband that the $1 million he received from his father toward the down payment on the marital residence was a gift structured as a "loan" to defendant alone, and was therefore defendant's separate property and that there "was no repayment using marital funds; indeed, there was no expectation of repayment." As to the husband's business interests, the First Department properly chose January 2015 as the valuation date, on the ground that he was forcibly hospitalized around that time and diagnosed with temporal lobe epilepsy, and subsequently had very little involvement in his family's business. The Court noted that while Supreme Court found that the husband's post-commencement contributions to his 401(k) were separate property, it was "not clear whether he was credited for his documented post-commencement contributions to that account," and remanded for a determination of the credit owed to him for those contributions. As to child support, the Appellate Division found that Supreme Court properly imputed income of $1.5 million to the husband and applied a CSSA

income cap of $650,000, based upon "the lifestyle enjoyed by the children during the marriage, which included country club membership, theater and other entertainment, and luxury vacations." The First Department further stated: "We also agree with defendant that the Referee erred in ordering him to contribute to the cost of a nanny, since plaintiff does not work, and the youngest child was 12 years old at the time of trial (*see* DRL § 240[1-b][c][4])" and that Supreme Court failed to credit defendant for his documented moving expenses. With regard to maintenance, the Appellate Division held that Supreme Court properly awarded the wife maintenance "for six months or until she received her distributive share of the marital assets, on the ground that the cash flow from those assets would be sufficient to support her lifestyle without the need for additional maintenance from defendant. After a 15-year marriage in which she was primarily a homemaker, plaintiff surely would have been entitled to maintenance of a longer duration — if not for the equitable distribution to her of 60% of the non-business marital assets, which provided her with the means to be self-supporting." As to counsel fees, the First Department upheld the allocation of 65% of the wife's counsel fees to the husband, noting: "The parties' accrued counsel fees exceeded $7,000,000, and were paid mostly out of their liquid marital assets, although defendant was earning a substantial salary until 2015. *** Further, the Referee properly took into account that, although both parties engaged in needless litigation, plaintiff's trial positions were on the whole more successful (citation omitted). We note that even after the award plaintiff remained responsible for more than $1 million in legal fees."

B. After Trial – Denied – Billing Non-Compliance; No Expert Affidavit

In Greco v. Greco, 2018 Westlaw 2225194 (2d Dept. May 16, 2018), the husband appealed from a March 2015 Supreme Court order, which granted the wife's post-trial motion for counsel fees to attorney 1 ($70,000), attorney 2 ($37,500) and $12,700 in expert fees. The

Second Department modified, on the law and in the exercise of discretion, by reversing the awards to attorney 1 and the expert. The Appellate Division found that attorney 1 did not substantially comply with the requirement of billing every 60 days [22 NYCRR 1400.2, 1400.3(9)], and that the experts did not submit affidavits [Ahern v. Ahern, 94 AD2d 53, 58].

C. After Trial - Increased

In Sheehan v. Sheehan, 2018 Westlaw 2123737 (2d Dept. May 9, 2018), both parties appealed from a March 2016 Supreme Court judgment after trial, which, among other things, awarded the wife 26% ($199,837) of the appreciated value ($768,603) of the husband's business, distributed the appreciated net cash value of the husband's separate property life insurance policies, awarded the wife maintenance of $2,100 for 3 years, awarded $25,000 in counsel fees to the wife, and failed to award the wife a credit for funds used by the husband to pay his separate debt. The Second Department modified, on the law and on the facts, by (1) deleting the award to the wife of a portion of the appreciated net cash value of the husband's two life insurance policies, and (2) increasing the wife's counsel fee award to $40,000, and otherwise affirmed. The parties were married in July 2000, and have two children. The husband owned a business (gas station and auto repair center), in which the wife worked part-time as a bookkeeper while also being the primary caregiver for the children. The wife filed the divorce action in August 2012. Give the wife's "direct contributions to the business, as well as her indirect contributions as a homemaker and primary caregiver for the parties' children in this long-term marriage," the Appellate Division found that "the court's award of 26%, or $199,836.65, was a provident exercise of discretion." With respect to the husband's life insurance policies, the Second Department found that it was undisputed that they were obtained prior to the marriage and reasoned: "While it would have been appropriate to distribute the appreciated cash value of

the policies if the defendant had made contributions to them with marital funds (citations omitted), the evidence establishes that the premiums were not paid with marital funds. Therefore, the Supreme Court should not have awarded the plaintiff a portion of the appreciated net cash value of these policies ***." The Appellate Division held that Supreme Court "providently denied the plaintiff's request for a credit for an equitable share of funds used by the defendant to pay his separate debt during the marriage," because "the credible evidence established that the payments the defendant made toward his separate debt during the marriage were made with separate funds." The Second Department rejected both parties' challenges to the maintenance determination, noting that Supreme Court "limited the duration of the award to a reasonable time to allow the plaintiff to fulfill her plan to obtain her Associate's Degree and training that will enable her to be self-supporting and regain self-sufficiency." With regard to counsel fees, the Court concluded: "Considering the parties' relative circumstances and other relevant factors, the award of attorney's fees to the plaintiff in the sum of $25,000 was inadequate."

D. Appeal

In Greco v. Greco, 73 NYS3d 765 (2d Dept. May 16, 2018), the wife appealed from an April 2016 Supreme Court order, which granted her motion for counsel fees for her appeal from the financial aspects of a judgment of divorce, to the extent of $12,000. The Second Department affirmed, stating: "Under the circumstances, we find no basis to disturb the award."

IV. CUSTODY

A. Modification – Dismissal Reversed

In Matter of Kriegar v. McCarthy, 2018 Westlaw2752015 (4th Dept. June 8, 2018), the Fourth Department reversed, on the law, an August 2017 Family Court order, which dismissed

the mother's petition seeking modification of a prior order of joint legal custody, so as to award her sole legal custody. The Appellate Division held that the mother "adequately alleged a change in circumstances warranting a modification of the prior order, i.e., that the father has repeatedly and consistently neglected to exercise his right to full visitation and has endangered the children by exposing them to individuals who engaged in drug use." The Fourth Department reinstated the petition and remitted to Family Court for a hearing.

B. Modification - Domestic Violence, Residence & School Changes

In Matter of Greene v. Kranock, 160 AD3d 1476 (4th Dept. Apr. 27, 2018), the mother appealed from a November 2016 Family Court order, which modified a prior order by granting the father primary physical placement of the subject child. The Fourth Department affirmed, holding that "there was a change in circumstances based on the undisputed evidence at the hearing of domestic violence in the mother's household (citations omitted), the mother's frequent changes of residence (citations omitted), and the child's repeated changes of school (citations omitted)."

C. Modification – Sole to Father; Mother Changes in Residence, Paramours, Sex Offender Contact; Facebook Posts

In Matter of Brent O. v. Lisa P., 2018 Westlaw 2048983 (3d Dept. May 3, 2018), the mother appealed from a January 2017 Family Court order, which, after a hearing, granted the father's November 2015 petition (and supplemental petitions) to modify a November 2013 stipulated order, which had conferred sole legal and primary physical custody of the parties' daughter born in 2005 to the mother, with visitation in North Carolina to the father, so as to grant him sole custody. Family Court also granted an order of protection prohibiting contact between the child and certain maternal relatives. The father subsequently moved to Oklahoma. There was

no dispute that changed circumstances warranted modification. The Appellate Division affirmed and found "that the child has spent nearly her entire life in the care of her mother and that the two enjoy a close relationship," but that Family Court's "grave concern for the child's well-being and stability while with the mother is well-founded and supported by the evidence." The Third Department noted: "The mother's own testimony established that, since the entry of the prior custody order, she has changed residences several times and moved from one relationship to another with relative alacrity, inviting several of these individuals to spend the night, or longer, at her home. At times, the mother's routine involved shuttling the child back and forth between her residence and that of her on-again, off-again paramour, regardless of whether the two were in a 'relationship' and with no apparent consideration as to the disruption this may cause the child. Of particular concern is the mother's conduct in permitting the child to be present at family gatherings with a family member she knew to be a convicted sex offender, as well as her decision to expose the child to a convicted murderer. Further, as the mother acknowledged, the child had been subjected to sexual abuse while under her care. The mother's Facebook page, which could be viewed by the public, contained provocative pictures of herself, a number of sexually explicit 'picture quotes' and lewd remarks and expletives that she admitted she would not want her children to see. When questioned as to whether she would cease using Facebook if ordered to do so by the court, the mother indicated that she would but that it would be a 'hardship.' Charitably stated, the mother's choices in this regard reflect a deficiency of reasonable parental judgment and a lack of insight as to the adverse impact that her conduct has upon the child." The Appellate Division cited testimony "that the child was failing core classes at school, yet the mother could not name one of the child's teachers" and evidence that "the mother engaged in a course of conduct designed to alienate the child from the father and to interfere with

the father-daughter relationship.". On at least one occasion, the mother changed residences with the child without informing the father or providing him with their new phone number, again in violation of the prior order. The Third Department found that "the evidence overwhelmingly establishes that he is far more willing and able to provide a stable and nurturing environment for the child. The father resides in a single-family home in Oklahoma with his wife of 10 years, who is gainfully employed as an executive for an airline company. Having retired from the United States Army in 2009, the father is able to care for the child whenever she is not in school. He has consistently exercised the parenting time afforded to him under the 2013 order, and has traveled to New York on multiple occasions to avail himself of additional visits with the child." On the implicit issue of relocation, the Appellate Division noted: "Although an award of custody to the father would necessarily result in the child's relocation to Oklahoma, upon balancing the *Tropea* factors (citation omitted), we are satisfied that the father met his 'burden of establishing, by a preponderance of the credible evidence, that the proposed relocation would be in the child's best interests.'"

D. Modification – Tri-Custody to Sole; Relocation (NC) Permitted

In Matter of Nadine T. v. Lastenia T., 2018 Westlaw 2139938 (1st Dept. May 10, 2018), Lastenia T. appealed from an April 2017 Family Court order which, after a hearing, granted Nadine T.'s petition to modify a 2007 order, which had granted joint "tri-custody" to the parties and the birth mother, so as to award sole custody to Nadine and permitted her to relocate to North Carolina with the now 15 year old child. The First Department affirmed, noting that it was Nadine "who has solely provided the child with a safe, stable and loving home and tended to all of his educational, medical and therapeutic needs," and that after the relationship between Nadine and Lastenia ended, "Lastenia made no contact with the child for months at a time and

made minimal efforts to participate in his upbringing." The Appellate Division held that with regard to the birth mother, "the record supports the finding that extraordinary circumstances existed so as to award custody to petitioner." The birth mother "handed over physical custody of the child to petitioner and Lastenia in 2003, when he was three months old, and, thereafter maintained very little contact with him." Further, the birth mother "has also taken no financial responsibility, or any other role in the child's care," which constitutes "an extended disruption of the birth mother's custody," such that Nadine has standing to litigate the child's best interests. With respect to relocation, the First Department found that Nadine "demonstrated that her economic situation would be improved by the move as she would be able to continue to work as a home health aide, earning more per hour, and would also be able to work more hours because her mother and sister would be able to care for the child while she was at work."

E. Parenting Coordinator – Diet and Food Restrictions

In Kesavan v. Kesavan, 2018 Westlaw 2727363 (1st Dept. June 7, 2018), the mother appealed from a March 2017 Supreme Court order which, after a trial, denied her motion seeking, among other things, to: implement the parenting coordinator's recommendation that each party be free to feed the subject child as he or she chooses during his or her parenting time; and amend the parenting agreement to give her final decision-making authority with respect to the child; and ordered that neither party shall feed or permit any other person to feed fish, meat or poultry to the child without the other party's consent. The First Department modified, on the law and the facts, to grant the mother's motion to implement the parenting coordinator's recommendation, and to vacate so much of the order that prohibits either party from feeding or permitting any other person to feed the child fish, meat, or poultry without the other's consent. The parties' 24-page parenting agreement provided that they would jointly determine all major

matters with respect to the child, including "religious choices," but did not otherwise mention the child's religious upbringing and makes no reference at all to dietary requirements. The Appellate Division determined: “Although the parenting coordinator found that the child's diet was a day-to-day choice within the discretion of each party, the trial court explicitly determined that the child's diet was a religious choice, and dictated the child's diet by effectively prohibiting the parties from feeding her meat, poultry or fish. This was an abuse of discretion. (Citation omitted).” To the extent defendant promised plaintiff, in contemplation of marriage, that she would raise any children they had as vegetarians, the promise is not binding (citation omitted), particularly in view of the parenting agreement, which omits any such understanding. Nor is there support in the record for a finding that a vegetarian diet is in the child's best interests.”

F. Relocation - Granted (Dutchess Co. to CT)

In Matter of Matsen v. Matsen, 2018 Westlaw 2425065 (2d Dept. May 30, 2018), the mother appealed from a June 2017 Family Court order which, after a hearing, denied her petition to relocate with the parties’ now 7 and 5 year-old children to Ridgefield, Connecticut, and granted the father’s petition to modify the June 2016 judgment of divorce (which contained a 40 mile radius clause from Millbrook) so as to award him sole legal and physical custody. The Second Department modified, on the law, by granting the mother’s petition for relocation and denying the father’s petition for modification, and remitted to establish a schedule for the father. The Appellate Division found that the mother’s sole motivation was not to ease her fiance’s commute, and that she showed educational and social opportunities for the children in Ridgefield, the inability of her fiancé to move his business from Norwalk, CT, and the feasibility of access for the father following such relocation. Further, the Second Department found that access to the children could be facilitated by the father’s flexible work schedule and the mother’s

plan to work only part-time upon relocation to Connecticut.

G. Right to Counsel – Supreme Court

In DiBella v. DiBella, 2018 Westlaw 2048993 (3d Dept. May 3, 2018), the mother appealed from a January 2016 Supreme Court judgment, which, in the mother's 2013 divorce action, granted sole legal custody of the parties' 2 children (born in 2006 and 2008) to the father, modifying a December 2011 Family Court consent order providing for joint legal custody and equally shared physical custody, an arrangement to which the parties had previously stipulated in a July 2010 Family Court order. The grounds for divorce were not contested, and there being no other requests for ancillary relief, the issues of custody, visitation and child support came on for trial over 8 nonconsecutive days from May 2014 to September 2015. The mother had counsel for the first 4 trial dates in May, June and July 2014, and she discharged her counsel on the 5th day in October 2014. Supreme Court set the 6th and 7th days for May 27 and June 3, 2015. On May 27, 2015, the mother appeared and explained she had retained new counsel, but he was unable to attend that day and requested the court to "extend" or "hold off" proceeding with the continuation of the trial until June 3, 2015. The Appellate Division found: "Supreme Court denied the mother's request for an adjournment, indicating that no notice of appearance had been filed by the mother's replacement counsel and that it could not rely solely upon her statement that she may be represented by counsel going forward. Supreme Court then proceeded with the trial, informing the mother that, under the circumstances, she was going to have to proceed pro se." The mother contended on appeal, among other things, that she was deprived of her statutory right to counsel (FCA 262[a]) when Supreme Court compelled her to proceed with the continuation of trial without counsel. The Third Department reversed, on the law, holding: "In the absence of the requisite statutory advisement of her right to counsel (*see* Family Ct Act §262 [a] [v]) or a

valid waiver of such right (citation omitted), we find that the mother was deprived of her fundamental right to counsel (*see* Family Ct Act §§261, 262 [a] [v]; Judiciary Law §35[8]; other citations omitted)." The Appellate Division remitted the action to Supreme Court for a new trial on the issues of custody, visitation and child support.

H. Third Party – Grandparent - Granted

In Matter of Mastronardi v. Milano-Granito, 159 AD3d 907 (2d Dept. Mar. 21, 2018), the mother and children appealed from a January 2016 Family Court order which, after a hearing, granted the visitation petition of the paternal grandparents, following the death of the father. The Second Department affirmed, holding that "Family Court properly determined that visitation between the paternal grandparents and the children was in the children's best interests" and that "the estrangement between the paternal grandparents and the children resulted from the animosity between the mother and the paternal grandparents, and the record supported the forensic evaluator's determination that the paternal grandparents' conduct was not the cause of the animosity."

I. Third Party - Grandparent – Visitation Granted; Child in Foster Care

In Matter of Weiss v. Weiss, 2018 Westlaw 2224871 (2d Dept. May 16, 2018), the maternal grandmother appealed from a December 2016 Family Court order, which, upon remittitur from the Appellate Division in August 2016, dismissed her petitions for custody and visitation with a child who has lived with foster parents for virtually her entire life, upon the ground of lack of standing. The mother's parental rights had been terminated and the child had been freed for adoption. The Second Department held that a biological grandparent has standing to seek custody and visitation, even after parental rights have been terminated and the child has been freed for adoption. While the Appellate Division agreed that it was not appropriate to award

custody to the grandmother, given that the grandmother "developed a relationship with the child early in her life and thereafter made repeated efforts to continue that relationship," supervised visitation was in the child's best interests. The Second Department modified, on the law, on the facts and in the exercise of discretion, and remitted for further proceedings before a different Family Court Judge to determine appropriate visitation.

J. Third Party – Granted to Non-Biological Father; Counsel Fees

In Matter of Renee' P.F. v. Frank G., 2018 Westlaw 2425251 (2d Dept. May 30, 2018), the biological father (Frank) of now 8 year old twins, born to the sister (Renee') of the non-biological father (Joseph) under a surrogacy contract, appealed from, among other things, a February 2017 Family Court order, which, after a hearing following the Second Department's order (142 AD3d 928 [2d Dept. Sept. 6, 2016]) determining that Joseph had standing to seek custody, granted custody to Joseph. The Appellate Division affirmed, holding that Family Court's order was in the children's best interests, where Frank refused to allow Joseph to have contact with the children as of May 2014 and then relocated with the children to Florida without informing Joseph. The Court also affirmed separate orders directing Frank to pay Joseph counsel fees of $25,000 and $15,000 in counsel fees to Renee'.

K. To Father – Factors

In Matter of Leonidez A. v. Sira L.R., 2018 Westlaw 2974539 (1st Dept. June 14, 2018), the First Department affirmed an August 2017 Family Court order, which, after a hearing awarded sole legal and physical custody of the parties' son to the father. The Appellate Division found that Family Court "properly determined that the child's welfare and happiness would be best served in the father's care (citation omitted), particularly given that the father has provided the child with unwavering stability (citation omitted). Since the child was very young, he has

spent the entirety of every weekend with the father and the paternal extended family, whereas, when with the mother during the week, in New York, the child spent much of his time with a babysitter, even when the mother was not working. By contrast, the father has been more of a hands-on parent, who spent as much time as he could with the child, and relied on family or caregivers as little as possible (citation omitted). The father has been active in the child's education, as well as in enriching him with extracurricular activities and excursions (citations omitted). Moreover, the father has greater financial stability, and the child has thrived in his care (citations omitted). Further, the father recognized and supported the child's need to maintain a relationship with the mother and his half-siblings and ensured that the child spent holidays with them while the child was in his care in New York and also visited them in Florida (citation omitted). The mother, on the other hand, has shown a disregard for the child's relationship with the father (citation omitted), having, among other things, absconded with the child to Florida without the father's knowledge or consent."

L. UCCJEA – NY Jurisdiction; Proceedings in Another State

In Matter of Beyer v. Hoffman, 2018 Westlaw 2075877 (4th Dept. May 4, 2018), the father appealed from an August 2016 Family Court order, which dismissed his petition seeking custody of the parties' twin daughters, upon the ground that Pennsylvania is the home state of the children and the mother had commenced a custody proceeding in Pennsylvania. The Fourth Department reversed, on the law, reinstated the petition, and remitted to Family Court for further proceedings. The children were born on June 5, 2015 and lived with both parties in New York until December 29, 2015, when the parties moved with the children to State College, Pennsylvania. In April 2016 the children and the mother moved to York, Pennsylvania without the father. The father returned to New York and filed for custody on June 6, 2016. The mother

commenced a custody proceeding in Pennsylvania on August 9, 2016. The Appellate Division determined that "Family Court had jurisdiction to make an initial custody determination at the time the father commenced the instant proceeding (*see* Domestic Relations Law §§75-a[7]; 76 [1] [a]; other citation omitted) and Pennsylvania had such jurisdiction at the time the mother commenced the proceeding in that state." The Fourth Department agreed "that Family Court erred in declining to exercise jurisdiction and dismissing the proceeding without following the procedures required by the UCCJEA (citation omitted)." Specifically, Family Court failed "either to allow the parties to participate in the communication (citations omitted) or to give the parties 'the opportunity to present facts and legal arguments before a decision on jurisdiction [was] made' (citations omitted)." The Appellate Division held that Family Court "did not articulate its consideration of each of the factors [DRL §76-f(2)(a)-(h)] relevant to the . . . petition . . . and we are unable to glean the necessary information from the record, [and] the court's [implicit] finding that New York was an inconvenient forum to resolve the [custody] petition is not supported by a sound and substantial basis in the record." The Fourth Department noted that "the events subsequent to the entry of the order we are reversing may be relevant to and can be considered on remittal."

In Matter of Colistra v. Colistra, 2018 Westlaw 2725772 (3d Dept. June 7, 2018), the father appealed from a May 2017 Family Court order, which denied his motion to dismiss the mother's petition for sole custody upon the ground of lack of jurisdiction under the UCCJEA. The parties are the parents of a child born in Pennsylvania in June 2016, where they lived until February 2017, when the mother relocated with the child to Tompkins County, allegedly to escape domestic violence. The father filed for custody in Pennsylvania, and the mother submitted objections on the basis that the Pennsylvania court was an inconvenient forum and moved for a

stay pending the New York proceedings. Family Court conducted a telephone conference with the Pennsylvania court pursuant to Domestic Relations Law §76-e (2), in which the courts agreed that, although Pennsylvania was the home state, Domestic Relations Law §75-a [7], New York was the more convenient forum. The Pennsylvania court relinquished jurisdiction to New York and dismissed the father's custody proceeding, and the father appealed from those orders in Pennsylvania. Family Court denied the father's motion to dismiss and exercised jurisdiction pursuant to Domestic Relations Law §76(1)(b). In February 2018, after the father's appeal in New York had been perfected, the Pennsylvania appellate court determined that the Pennsylvania trial court had not given the father the requisite opportunity to present evidence and argument in conjunction with the telephone conference, reversed the orders by which the Pennsylvania court had declined jurisdiction, and remanded the matter for a new jurisdictional determination in which the parties are allowed to submit evidence. The First Department held: "As a result of the reversal of the Pennsylvania orders that declined jurisdiction, the predicate upon which Family Court based its exercise of jurisdiction no longer exists. *** The new Pennsylvania jurisdictional determination, and any determination that Family Court may make thereafter, will determine the parties' rights and interests, which can no longer be affected by any determination this Court could make as to whether the earlier New York jurisdictional order was properly issued. Thus, the appeal is moot."

M. Violation – Found

In Matter of Mauro v. Costello, 2018 Westlaw 2750961 (4th Dept. June 8, 2018), the father appealed from a January 2017 Family Court order, which dismissed his petition alleging violations of a prior consent order pertaining to communication and visitation. The Fourth Department modified, on the law, and granted the violation petition. The Appellate Division

found: “In this matter, the terms of the consent order were unequivocal and the mother repeatedly violated the terms, particularly with respect to communication and visitation. The father struggled to maintain telephone contact with the child, because the mother's phone number frequently changed and she failed to notify the father of those changes. Indeed, at times the mother prevented the father from speaking with the child for weeks. Moreover, the consent order mandated that the father was to have Skype contact with the child one time per week, and the mother failed to comply with that directive. Thus, the father established by clear and convincing evidence that the mother violated the consent order (*see El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]), and the mother is therefore advised to abide by both her visitation and communication obligations.”

N. Visitation – As Agreed – Modification Dismissal Reversed

In Matter of Kelley v. Fifield, 159 AD3d 1612 (4th Dept. Mar. 23, 2018), the father appealed from a September 2016 Family Court order which, *sua sponte* and without a hearing, dismissed the father’s petition for modification of a prior order, which had granted him supervised visitation “as the parties can mutually agree. ”The father alleged changed circumstances, including that: the mother had not allowed him any contact in 3 years; the mother had alienated the child from him; and he had been incarcerated and was seeking correspondence and supervised visitation to reconnect with the child. The Fourth Department reversed, on the law, reinstated the petition and remitted for further proceedings. The Appellate Division held: “Where, as here, a prior order provides for visitation as the parties may mutually agree, a party who is unable to obtain visitation pursuant to that order ‘may file a petition seeking to enforce or modify the order’ (citations omitted). We agree with the father that the court erred in dismissing the modification petition without a hearing inasmuch as the father made ‘a sufficient evidentiary

showing of a change in circumstances to require a hearing' (citation omitted). *** [W]e conclude that the father adequately alleged a change of circumstances insofar as the visitation arrangement based upon mutual agreement was no longer tenable given that the mother purportedly denied the father any contact with the child (citation omitted). In addition, we note that, although the father is now incarcerated, there is a rebuttable presumption that visitation is in the child's best interests."

O. Visitation – In NY Only; No Unaccompanied Minor Travel

In Matter of Annalyn DCC v. Timothy R., 159 AD3d 560 (1st Dept. Mar. 22, 2018), the father appealed from a July 2017 Family Court order, which denied his request for modification of a prior order, granted the mother's request for modification and directed that the father's visitation be in New York State. The First Department affirmed, holding that Family Court "properly found that the father failed to demonstrate a change in circumstances to warrant, among other things, allowing the parties' six-year-old child to travel as an unaccompanied minor to the United Kingdom for parental access time" and that "the court properly ordered that the father's visitation with the child take place within the state of New York as in the child's best interest."

V. ENFORCEMENT

A. Child Support – Willful Violation

In Matter of Olivari v. Bianco, 2018 Westlaw 2224926 (2d Dept. May 16, 2018), the father appealed from a December 2016 Family Court order of commitment, which confirmed a September 2016 Support Magistrate order (made after a hearing and finding a willful violation of a 2015 order of child support), and remanded him to jail for 90 days for failure to pay a $15,000 purge amount. The Second Department affirmed, finding that the father failed to establish his

defense of inability to pay [FCA 455(5)], noting: “there was evidence at the hearing that the father chose to become indebted on a mortgage on a property in Florida and to pay his present wife's health and automobile insurance and rent, rather than paying the required child support. Thus, the evidence showed that the father diverted his income to these other expenses, including travel to Florida in connection with the property there, rather than comply with the order of support (citation omitted), and used personal expenses as business deductions, making his income appear lower (citation omitted). Furthermore, the father, a licensed attorney and insurance agent, failed to show any attempt to secure employment with a law firm or insurance agency.”

B. Visitation - Contempt

In Matter of Mendoza-Pautrat v. Razdan, 160 AD3d 963 (2d Dept. Apr. 25, 2018), the mother appealed from a July 2016 Family Court order which, after a hearing, dismissed so much of her petition as sought to hold the father in civil contempt for alleged violations of October 2014 custody and visitation orders (which awarded sole custody of 4 children to the mother and granted visitation to the father), upon the ground that said violations were not willful. The Second Department reversed, on the law, on the facts, and in the exercise of discretion, granted the petition to impose civil contempt sanctions against the father, and remitted to Family Court, to adjudicate the father in civil contempt and to impose an appropriate civil contempt sanction in the nature of a fine. The mother alleged that the father: “improperly withdrew three of the children from school early on the last day of classes in June 2015, and thereafter spent one week on vacation with the children”; “failed to timely provide her with notice of his planned summer vacation time with the children”; “failed to allow her daily phone contact with the children during the vacation”; and “failed to complete certain training for parents of a child with autism,

again in violation of the October 2014 orders." The Appellate Division held: "In order for contempt sanctions to be imposed pursuant to Judiciary Law §753(A), 'willfulness' need not be shown (citations omitted)." The Second Department found that the "record established that the father violated unequivocal mandates of the Family Court, of which he was aware," as alleged in the mother's petition, and that Family Court "should have held the father in civil contempt of court pursuant to Judiciary Law §753(A)."

VI. EQUITABLE DISTRIBUTION

A. License – Student Loan Debt; Life Insurance Trustee Designation

In Stubbs v. Facey, 159 AD3d 849 (2d Dept. Mar. 14, 2018), the wife appealed from a May 2015 Supreme Court judgment, which directed her to maintain a life insurance policy naming the parties' child as beneficiary and the husband as trustee of the policy funds, and awarded her only $294,400 as her share of the husband's enhanced earning capacity from his medical license. The parties were married in August 2001 and had one child, born in 2004. The Second Department affirmed, holding that "Supreme Court properly directed the plaintiff to maintain a life insurance policy naming the parties' child as beneficiary and the defendant as trustee of the insurance policy funds." With regard to the medical license, the Appellate Division determined that "Supreme Court properly took into consideration the marital portion of the defendant's student loan debt in determining his enhanced earning capacity."

B. Proportions - Business (26%); Separate Debt & Property

In Sheehan v. Sheehan, 2018 Westlaw 2123737 (2d Dept. May 9, 2018), both parties appealed from a March 2016 Supreme Court judgment after trial, which, among other things, awarded the wife 26% ($199,837) of the appreciated value ($768,603) of the husband's business, distributed the appreciated net cash value of the husband's separate property life insurance

policies, awarded the wife maintenance of $2,100 for 3 years, awarded $25,000 in counsel fees to the wife, and failed to award the wife a credit for funds used by the husband to pay his separate debt. The Second Department modified, on the law and on the facts, by (1) deleting the award to the wife of a portion of the appreciated net cash value of the husband's two life insurance policies, and (2) increasing the wife's counsel fee award to $40,000, and otherwise affirmed. The parties were married in July 2000, and have two children. The husband owned a business (gas station and auto repair center), in which the wife worked part-time as a bookkeeper while also being the primary caregiver for the children. The wife filed the divorce action in August 2012. Given the wife's "direct contributions to the business, as well as her indirect contributions as a homemaker and primary caregiver for the parties' children in this long-term marriage," the Appellate Division found that "the court's award of 26%, or $199,836.65, was a provident exercise of discretion." With respect to the husband's life insurance policies, the Second Department found that it was undisputed that they were obtained prior to the marriage and reasoned: "While it would have been appropriate to distribute the appreciated cash value of the policies if the defendant had made contributions to them with marital funds (citations omitted), the evidence establishes that the premiums were not paid with marital funds. Therefore, the Supreme Court should not have awarded the plaintiff a portion of the appreciated net cash value of these policies ***." The Appellate Division held that Supreme Court "providently denied the plaintiff's request for a credit for an equitable share of funds used by the defendant to pay his separate debt during the marriage," because "the credible evidence established that the payments the defendant made toward his separate debt during the marriage were made with separate funds." The Second Department rejected both parties' challenges to the maintenance determination, noting that Supreme Court "limited the duration of the award to a

reasonable time to allow the plaintiff to fulfill her plan to obtain her Associate's Degree and training that will enable her to be self-supporting and regain self-sufficiency." With regard to counsel fees, the Court concluded: "Considering the parties' relative circumstances and other relevant factors, the award of attorney's fees to the plaintiff in the sum of $25,000 was inadequate."

C. Proportions - (60/40); Separate Property Credit

In M.M. v. D.M., 159 AD3d 562 (1st Dept. Mar. 22, 2018), both parties appealed from an August 2017 Supreme Court Judgment, awarding plaintiff wife child support and maintenance, awarding defendant husband a credit of $1 million for his separate property interest in the marital residence, distributing the parties' non-business marital assets 60% to plaintiff and 40% to defendant, awarding plaintiff a share of defendant's business interests valued as of January 2015, awarding credits for various post-commencement expenses, and allocating 65% of plaintiff's counsel fees to defendant. The First Department modified, on the law and the facts, to award defendant a credit of $71,000 for his Lehman Brothers retirement account, to delete the directive that defendant be solely responsible for the children's private school tuition and to direct instead that the parties share the children's private school tuition pro rata, to delete the directive that defendant contribute to the cost of a full-time nanny, and to remand for a determination of the credit owed defendant for documented moving expenses, documented post-commencement contributions to his 401(k) account and for a recalculation of defendant's child support obligation, and his child support arrears, treating plaintiff's durational maintenance as income. The Appellate Division noted that the wife conceded that the husband's Lehman Brothers retirement account, valued at $71,000, is separate property and was erroneously distributed as a marital asset and that he is entitled to a credit in that amount. The First Department held that

Supreme Court providently exercised its discretion in distributing the parties' non-business marital assets 60% to the wife and 40% to the husband, based upon the wife's contributions to the husband's career, at the expense of her own career, and the parties' probable future financial circumstances, in particular, defendant's far greater earning potential and family wealth. The Appellate Division agreed with the husband that the $1 million he received from his father toward the down payment on the marital residence was a gift structured as a "loan" to defendant alone, and was therefore defendant's separate property and that there "was no repayment using marital funds; indeed, there was no expectation of repayment." As to the husband's business interests, the First Department properly chose January 2015 as the valuation date, on the ground that he was forcibly hospitalized around that time and diagnosed with temporal lobe epilepsy, and subsequently had very little involvement in his family's business. The Court noted that while Supreme Court found that the husband's post-commencement contributions to his 401(k) were separate property, it was "not clear whether he was credited for his documented post-commencement contributions to that account," and remanded for a determination of the credit owed to him for those contributions. As to child support, the Appellate Division found that Supreme Court properly imputed income of $1.5 million to the husband and applied a CSSA income cap of $650,000, based upon "the lifestyle enjoyed by the children during the marriage, which included country club membership, theater and other entertainment, and luxury vacations." The First Department further stated: "We also agree with defendant that the Referee erred in ordering him to contribute to the cost of a nanny, since plaintiff does not work, and the youngest child was 12 years old at the time of trial (*see* DRL § 240[1-b][c][4])" and that Supreme Court failed to credit defendant for his documented moving expenses. With regard to maintenance, the Appellate Division held that Supreme Court properly awarded the wife

maintenance "for six months or until she received her distributive share of the marital assets, on the ground that the cash flow from those assets would be sufficient to support her lifestyle without the need for additional maintenance from defendant. After a 15-year marriage in which she was primarily a homemaker, plaintiff surely would have been entitled to maintenance of a longer duration — if not for the equitable distribution to her of 60% of the non-business marital assets, which provided her with the means to be self-supporting." As to counsel fees, the First Department upheld the allocation of 65% of the wife's counsel fees to the husband, noting: "The parties' accrued counsel fees exceeded $7,000,000, and were paid mostly out of their liquid marital assets, although defendant was earning a substantial salary until 2015. *** Further, the Referee properly took into account that, although both parties engaged in needless litigation, plaintiff's trial positions were on the whole more successful (citation omitted). We note that even after the award plaintiff remained responsible for more than $1 million in legal fees."

D. Refinance Mandated; Separate Property Found, Credit Given

In Giannuzzi v. Kearney, 160 AD3d 1079 (3d Dept. Apr. 5, 2018), both parties appealed from a May 2016 Supreme Court judgment which directed equitable distribution in wife's 2013 divorce action. The parties were married in 1998 and had no children. The wife inherited over $1 million in IBM stock before the marriage and kept the same in accounts in her name throughout the marriage. The wife was a teacher, and the husband eventually became a financial planner and managed the wife's stock holdings. The parties acquired a primary residence in Broome County and seven Florida properties. Supreme Court determined that the wife's IBM stock was her separate property, awarded the former marital residence to the wife, awarded the commercial property and the property in Florida where he resided to the husband, and awarded the wife a credit of $115,000 for her contribution of separate property to the purchase and improvement of

the Florida property awarded to the husband. The judgment also directed the sale of the six remaining Florida properties, with the net proceeds to be distributed 60% to the wife and 40% to the husband. The Appellate Division rejected the husband's contention that Supreme Court should have found the IBM stock to be marital property under various theories of transmutation: (a) because the parties filed joint income tax returns reporting income derived from the IBM stock; (b) the parties utilized dividends received from the IBM stock to maintain the marital standard of living; and (c) the IBM stock was pledged as collateral to secure the loan used to purchase several of the Florida properties. The Third Department held: "Here, the wife's assertion that the IBM stock was her separate property was not contrary to any position that she had taken by reporting income derived from her IBM stock on the parties' joint income tax returns as dividends and capital gains (citation omitted). [Ed. note: read the decision for the remainder of the detailed legal analysis adverse to the husband's theories]. The Court concluded that "Supreme Court erred by making no provision for the release of her personal liability for the mortgage loan on that property," and directed the husband to refinance the mortgage or obtain a release of the wife's liability within 90 days. Failing those alternatives, the Third Department directed that the property be sold and the net proceeds be first applied toward any balance remaining due on the wife's $115,000 separate property credit.

VII. EVIDENCE

A. Expert Testimony – Sexual Abuse; Recordings

In Matter of Donald G. v. Hope H., 160 AD3d 1061 (3d Dept. April 5, 2018), the mother appealed from a July 2016 Family Court order, which, after a hearing, modified a 2015 consent order, pursuant to which the parties shared joint legal and physical custody of their child born in 2011, by granting sole legal and physical custody to the father with supervised visitation to the

mother. The father alleged that the child had been sexually abused, and that the mother had coached the child to claim that the father was the perpetrator. Family Court determined that the mother had coached the child to make sexual abuse allegations against the father and had repeatedly prevented the father from seeing the child during his scheduled time. The Third Department affirmed, rejecting the mother's contention that Family Court erred by "allowing the child's treating sexual abuse counselor, who was qualified as an expert in sexual abuse treatment, to opine upon the respective fitness of each parent as custodians." The Appellate Division noted that the counselor "had a Master's degree in social work, had over 23 years of experience as a psychotherapist and 'hundreds of hours of training' as a trauma specialist, had been specializing in the treatment of sexually abused children for about 10 years, and had been providing sexual abuse counseling at the child advocacy center where the child was treated for about five years." The counselor testified that she had conducted 17 treatment sessions with the child for the purpose of an "extended assessment" to determine whether an injury that the child had suffered had been caused by sexual abuse or by an accident. The mother participated in nine of these sessions and the father participated in two sessions. The Third Department noted further: "*** the counselor opined that the child had been sexually abused. She further opined that, although she could not determine who had abused the child, the father was not the perpetrator, and that the mother had coached the child to claim that the father had abused her. The counselor based her opinion regarding the coaching partially upon statements made by the child." As to the mother's argument that Family Court erred in receiving into evidence three audio recordings of various comments she made, the Appellate Division held that the claim was "waived as to two of the recordings — one of which was admitted for impeachment purposes, and one of which was admitted as factual evidence — as it was not preserved by an appropriate objection," but stated

that if "the contention had been preserved, we would have found that it lacked merit, as the mother identified the voice on each recording as her own and acknowledged that the recordings fairly represented statements that she had made." Family Court overruled the objection to the third recording on foundational grounds, and admitted the same for impeachment purposes, noting the mother had identified her voice and the conversation with the father. The Third Department noted that Family Court's adverse credibility findings made no reference to the third recording.

VIII. FAMILY OFFENSE

A. Harassment 2d - Found

In Matter of Doris M. v. Yarenis P., 2018 Westlaw 2139369 (1st Dept. May 10, 2018), Yarenis appealed from a June 2017 Family Court Order of protection, which, upon a fact-finding determination that she committed harassment in the first and second degree, directed that she stay away from the parties' shared apartment until June 30, 2018. The First Department modified, on the law, to vacate the finding of harassment in the first degree. The Appellate Division held that Family Court erred in determining that Yarenis' "actions of leaving water to boil over on the stove, burning the pots, allowing the bathtub to overflow on several occasions and screaming in the middle of the night while playing her music in a loud manner, constituted the family offense of harassment in the first degree, because there were no facts alleged in the family offense petition supporting such a finding." However, the First Department determined that Yarenis committed harassment in the second degree when she "summoned the police to the apartment and attempted to have [Doris] arrested about three times that day," which actions "served no legitimate purpose and only alarmed or seriously annoyed" Doris. The Court rejected Yarenis' argument that a less drastic remedy was in order, given Doris' testimony that she was

afraid in her own home, because Yarenis "continued leaving the stove on unattended in violation of the May 8, 2017 and June 1, 2017 temporary orders of protection."

B. Harassment 2d – Statements Outside Petition Disallowed

In Matter of Almaguer v Almaguer, 159 AD3d 897 (2d Dept. Mar. 21, 2018), the husband appealed from a May 2017 Family Court order of protection, made following a hearing upon a finding that he committed harassment in the second degree, and which directed him to stay away from the marital residence for 2 years. The Second Department reversed, on the law, and remitted to Family Court for a new hearing and determination, and reinstated the temporary order of protection. The wife alleged that the husband threatened to kill her if she filed for divorce. The Appellate Division held: "Family Court erred in considering and relying upon statements made by the husband during a preliminary conference and in proceedings prior to the hearing. Statements made during a preliminary conference are not admissible at a fact-finding hearing (*see* Family Ct Act §824). Moreover, the court may not rely upon evidence of an incident not charged in the petition in sustaining a charge of harassment."

C. Occurrences Outside NY; Remoteness in Time

In Matter of Rushane P. v. Boris L.R., 73 NYS3d 425 (1st Dept. May 10, 2018), petitioner appealed from an August 2017 Family Court order, which dismissed the family offense petition with prejudice. The First Department reversed, on the law, and reinstated the petition, holding that "Family Court erred in dismissing the petition, which alleged family offenses that occurred in New York, Pennsylvania, and Jamaica, on the ground that the only incident alleged to have occurred in New York happened in 2014, three years before the filing of the petition." The Appellate Division noted that subject matter jurisdiction is not "limited by geography" and Family Court may render findings of fact regarding acts which occur outside its

jurisdiction. The Court further reiterated the amendment to FCA §812(1), which provides that "a court shall not ... dismiss a petition[] solely on the basis that the acts or events alleged are not relatively contemporaneous with the date of the petition."

IX. MAINTENANCE

A. Durational – Affirmed

In Sheehan v. Sheehan, 2018 Westlaw 2123737 (2d Dept. May 9, 2018), both parties appealed from a March 2016 Supreme Court judgment after trial, which, among other things, awarded the wife 26% ($199,837) of the appreciated value ($768,603) of the husband's business, distributed the appreciated net cash value of the husband's separate property life insurance policies, awarded the wife maintenance of $2,100 for 3 years, awarded $25,000 in counsel fees to the wife, and failed to award the wife a credit for funds used by the husband to pay his separate debt. The Second Department modified, on the law and on the facts, by (1) deleting the award to the wife of a portion of the appreciated net cash value of the husband's two life insurance policies, and (2) increasing the wife's counsel fee award to $40,000, and otherwise affirmed. The parties were married in July 2000, and have two children. The husband owned a business (gas station and auto repair center), in which the wife worked part-time as a bookkeeper while also being the primary caregiver for the children. The wife filed the divorce action in August 2012. Give the wife's "direct contributions to the business, as well as her indirect contributions as a homemaker and primary caregiver for the parties' children in this long-term marriage," the Appellate Division found that "the court's award of 26%, or $199,836.65, was a provident exercise of discretion." With respect to the husband's life insurance policies, the Second Department found that it was undisputed that they were obtained prior to the marriage and reasoned: "While it would have been appropriate to distribute the appreciated cash value of

the policies if the defendant had made contributions to them with marital funds (citations omitted), the evidence establishes that the premiums were not paid with marital funds. Therefore, the Supreme Court should not have awarded the plaintiff a portion of the appreciated net cash value of these policies ***." The Appellate Division held that Supreme Court "providently denied the plaintiff's request for a credit for an equitable share of funds used by the defendant to pay his separate debt during the marriage," because "the credible evidence established that the payments the defendant made toward his separate debt during the marriage were made with separate funds." The Second Department rejected both parties' challenges to the maintenance determination, noting that Supreme Court "limited the duration of the award to a reasonable time to allow the plaintiff to fulfill her plan to obtain her Associate's Degree and training that will enable her to be self-supporting and regain self-sufficiency." With regard to counsel fees, the Court concluded: "Considering the parties' relative circumstances and other relevant factors, the award of attorney's fees to the plaintiff in the sum of $25,000 was inadequate."

B. Durational - Increased to Non-Durational; Health Insurance

In Greco v. Greco, 2018 Westlaw 2225174 (2d Dept. May 16, 2018), the wife appealed from an April 2015 Supreme Court judgment, which among other things, awarded her maintenance of $4,500 per month for 3 years, and failed to direct the husband to pay for her health insurance. The parties were married in 1999 and have 2 children. The husband commenced the divorce action in May 2010. The Second Department modified, on the law, on the facts and in the exercise of discretion, by: (1) awarding the wife $4,500 per month in maintenance until the earliest of the following events: the wife 's remarriage or cohabitation, the death of either party, or until the wife begins to draw Social Security benefits or reaches the age

of 67 or such age that she would qualify for full Social Security benefits, at which time the maintenance award will be reduced to $2,000 per month; and (2) directing the husband to pay her health insurance premiums until the earliest of such time as the defendant is eligible for Medicaid or Medicare, or she obtains health insurance through employment or remarriage or cohabitation. The Appellate Division held: “Here, the amount of maintenance awarded by the Supreme Court was consistent with the purpose and function of a maintenance award considering, among other things, the equitable distribution award and the absence of child-rearing responsibilities because the plaintiff was awarded full custody of the children. However, taking into consideration all the relevant factors, including the fact that the defendant is suffering from a psychiatric condition and was unable, for the foreseeable future, to be self-supporting, it was an improvident exercise of the court's discretion to limit the maintenance award to a period of three years.” The Court found that “Supreme Court improvidently exercised its discretion in failing to direct the plaintiff to pay the defendant's health insurance premiums.”

C. Durational – Until Receipt of Distributive Award

In M.M. v. D.M., 159 AD3d 562 (1st Dept. Mar. 22, 2018), both parties appealed from an August 2017 Supreme Court Judgment, awarding plaintiff wife child support and maintenance, awarding defendant husband a credit of $1 million for his separate property interest in the marital residence, distributing the parties' non-business marital assets 60% to plaintiff and 40% to defendant, awarding plaintiff a share of defendant's business interests valued as of January 2015, awarding credits for various post-commencement expenses, and allocating 65% of plaintiff's counsel fees to defendant. The First Department modified, on the law and the facts, to award defendant a credit of $71,000 for his Lehman Brothers retirement account, to delete the directive that defendant be solely responsible for the children's private school tuition and to direct instead

that the parties share the children's private school tuition pro rata, to delete the directive that defendant contribute to the cost of a full-time nanny, and to remand for a determination of the credit owed defendant for documented moving expenses, documented post-commencement contributions to his 401(k) account and for a recalculation of defendant's child support obligation, and his child support arrears, treating plaintiff's durational maintenance as income. The Appellate Division noted that the wife conceded that the husband's Lehman Brothers retirement account, valued at $71,000, is separate property and was erroneously distributed as a marital asset and that he is entitled to a credit in that amount. The First Department held that Supreme Court providently exercised its discretion in distributing the parties' non-business marital assets 60% to the wife and 40% to the husband, based upon the wife's contributions to the husband's career, at the expense of her own career, and the parties' probable future financial circumstances, in particular, defendant's far greater earning potential and family wealth. The Appellate Division agreed with the husband that the $1 million he received from his father toward the down payment on the marital residence was a gift structured as a "loan" to defendant alone, and was therefore defendant's separate property and that there "was no repayment using marital funds; indeed, there was no expectation of repayment." As to the husband's business interests, the First Department properly chose January 2015 as the valuation date, on the ground that he was forcibly hospitalized around that time and diagnosed with temporal lobe epilepsy, and subsequently had very little involvement in his family's business. The Court noted that while Supreme Court found that the husband's post-commencement contributions to his 401(k) were separate property, it was "not clear whether he was credited for his documented post-commencement contributions to that account," and remanded for a determination of the credit owed to him for those contributions. As to child support, the Appellate Division found that

Supreme Court properly imputed income of $1.5 million to the husband and applied a CSSA income cap of $650,000, based upon "the lifestyle enjoyed by the children during the marriage, which included country club membership, theater and other entertainment, and luxury vacations." The First Department further stated: "We also agree with defendant that the Referee erred in ordering him to contribute to the cost of a nanny, since plaintiff does not work, and the youngest child was 12 years old at the time of trial (*see* DRL § 240[1-b][c][4])" and that Supreme Court failed to credit defendant for his documented moving expenses. With regard to maintenance, the Appellate Division held that Supreme Court properly awarded the wife maintenance "for six months or until she received her distributive share of the marital assets, on the ground that the cash flow from those assets would be sufficient to support her lifestyle without the need for additional maintenance from defendant. After a 15-year marriage in which she was primarily a homemaker, plaintiff surely would have been entitled to maintenance of a longer duration — if not for the equitable distribution to her of 60% of the non-business marital assets, which provided her with the means to be self-supporting." As to counsel fees, the First Department upheld the allocation of 65% of the wife's counsel fees to the husband, noting: "The parties' accrued counsel fees exceeded $7,000,000, and were paid mostly out of their liquid marital assets, although defendant was earning a substantial salary until 2015. *** Further, the Referee properly took into account that, although both parties engaged in needless litigation, plaintiff's trial positions were on the whole more successful (citation omitted). We note that even after the award plaintiff remained responsible for more than $1 million in legal fees."

D. Modification – Hearing Granted; Payee Counsel Fees Reversed

In Isichenko v. Isichenko, 2018 Westlaw 2124041 (2d Dept. May 9, 2018), the former husband (husband) appealed from a December 2015 Supreme Court order, which, without a

hearing, denied his motion for, among other things, a downward modification of maintenance awarded in a July 2011 judgment of divorce, and granted the former wife's (wife) cross motion for costs in the form of attorney's fees of $15,000, upon the ground that the husband's motion "lacked a basis in law or fact." The Second Department modified, on the law, by (1) deleting the denial of the husband's motion for downward modification of maintenance, and (2) denying the wife's cross motion, and remitted to Supreme Court for further proceedings. The husband alleged, as changed circumstances: a loss of employment, which significantly reduced his annual income; and a substantial increase in the wife's income and net asset value. Supreme Court found that the husband's alleged income reduction "did not constitute a change of circumstances sufficient to warrant a downward modification of his maintenance *** obligation, and that a change in the [wife's] income could not be a basis for a reduction." Holding that Supreme Court erred by denying the husband's motion for maintenance modification without a hearing, the Appellate Division found that the husband "demonstrated, prima facie, that his gross annual income has been substantially reduced from the $750,000 in income that was imputed to him for the purpose of the spousal maintenance award in the parties' divorce judgment. Moreover, the plaintiff's statements that he was only able to obtain employment at a salary that is significantly lower than the salary he was earning shortly before the parties' divorce were supported by the sworn submissions of job recruiters, colleagues, and a vocational expert. This evidence established a genuine issue of fact as to whether the reduction in his income was based on a decline in his opportunities for employment, thereby presenting a substantial change in circumstances meriting a downward modification of his maintenance payments (citations omitted)." As to the $15,000 counsel fee award, the Second Department found that "Supreme Court's granting of the defendant's cross motion for an award of costs against the plaintiff in the

form of attorney's fees was improper, since the plaintiff's motion was not so lacking in merit as to justify such an award."

X. PENDENTE LITE

A. Counsel & Expert Witness Fees

In Trafelet v. Trafelet, 2018 Westlaw 2974211 (1st Dept. June 14, 2018), the husband appealed from June and July 2017 Supreme Court orders, which granted the wife's motion for interim counsel and expert fees in the amount of $3,500,000. The First Department affirmed, rejecting the husband's argument that Supreme Court failed to set forth the reasons for its decision, as required by 22 NYCRR §202.16(k)(7), and finding that Supreme Court "explained that the case involves 'expansive issues,' which include the validity of a $150 million trust and the alleged commingling of marital and non-marital assets within the trust, as well as equitable distribution issues that, given the scope and size of the assets in the marital estate, will necessarily entail legal, accounting, and property valuation expertise." The Appellate Division noted that Supreme Court "had presided over a seven-day pendente lite hearing, and its conclusions reflect its understanding of 'the circumstances of the case and of the respective parties,'" as required by Domestic Relations Law §237[a]. The Court stated further: "The record contains an exhaustive affidavit by plaintiff's forensic accountant addressing the complexity of the financial issues and indicating that a significant portion of plaintiff's fees were incurred in responding to or defending against litigation initiated by defendant, including the litigation over trust issues addressed on a prior appeal (*Trafelet v Trafelet*, 150 AD3d 483 [1st Dept 2017]). There is no basis in this record for finding those fees excessive or duplicative (citations omitted). The record also fails to substantiate defendant's contention that the award will only reward plaintiff for extreme litigiousness. Rather, it establishes that he has initiated at least as much of

the litigation as she has initiated. In addition, because the fees are subject to reallocation at trial, there is little incentive for either party to engage in frivolous litigation. Nor has defendant shown that the award covered fees incurred in furtherance of any 'meritless' litigation strategy on plaintiff's part."

XI. PROCEDURE

A. Arbitration – Religious Tribunal Confirmed

In Zar v. Yaghoobzar, 2018 Westlaw 2028166 (2d Dept. May 2, 2018) , the husband appealed from a July 2016 Supreme Court order, which denied his CPLR 7510 petition to confirm an August 2015 award of a Rabbinical Court, and for a judgment thereon pursuant to CPLR 7514, and which granted the wife's motion to vacate the award and to strike the husband's affirmative defense (the arbitration award) in her March 2015 divorce action, and directed both parties to file and exchange affidavits of net worth and retainer statements and to appear for a preliminary conference. The Second Department reversed, on the law, granted the husband's petition to confirm the arbitration award and for a judgment thereon, denied the wife's motion to vacate the award and strike the husband's affirmative defense, and remitted to Supreme Court for entry of an appropriate judgment. The parties were married in 1968 and have two adult children. The wife discontinued her April 2013 divorce action in August 2013, after the parties agreed to submit to binding arbitration before the Beit Din Tzedek Bircat Mordechai (hereinafter the Beit Din), "any matter relating to the dissolution of their marriage and divorce," including "any issues of division of property." Both parties participated in the arbitration. Supreme Court's July 2016 order determined that the Beit Din's award was "irrational, violative of public policy, and unconscionable on its face." The Court rejected the wife's contention that she was "coerced by the husband to sign the agreement to arbitrate and that she could not understand the agreement

because of her limited comprehension of English," because in the context of a proceeding to confirm an award, only "a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate" could raise such grounds under CPLR 7511[b][2][ii]. The Appellate Division noted: "Judicial review of an arbitration award is extremely limited," citing CPLR 7510 and 7511, and found that given the record, "Supreme Court lacked any basis upon which to conclude that the award was irrational." The Second Department held that Supreme Court erred by finding that "the award was per se violative of public policy because the arbitrator failed to apply Domestic Relations Law §236(B)," upon the ground that "public policy does not generally preclude spouses from charting their own course with respect to financial matters affecting only themselves." The Appellate Division concluded that "Supreme Court's determination that the Beit Din's award was unconscionable on its face *** is not a statutory ground upon which an arbitration award may be reviewed, let alone set aside (*see* CPLR 7511)."

B. Support Magistrate – Duties Upon Willful Violation

In Matter of Carmen R. v. Luis I., 2018 Westlaw 1720655 (1st Dept. Apr. 10, 2018), the mother appealed from a June 2017 Family Court order, which denied her objections to a March 2017 Support Magistrate order, finding that the father willfully violated a prior child support order, but deferred the issue of incarceration to a post-dispositional hearing. The First Department reversed, on the law, sustained the mother's objections, and remanded to the Support Magistrate for a final order of disposition. The Appellate Division held that "the Support Magistrate acted outside the bounds of his authority when, after issuing a written fact-finding order in which he determined that the father had willfully violated a child support order, he deferred the issue of a recommendation as to the father's incarceration to a 'post-dispositional hearing.'" The Court noted that this course of action "contravened Family Court Rule

§205.43(g)(3), which states that, upon a finding of willful violation, the findings of fact shall include 'a recommendation whether the sanction of incarceration is recommended,' and Rule §205.43(f), which requires that the written findings be issued within five court days after completion of the hearing." The First Department found that "the Support Magistrate improperly set the matter down for 'post-dispositional review' to commence on May 1, 2017, 54 days later. That hearing lasted several months. *** The Family Court then compounded the Support Magistrate's error of law by denying the mother's objections as premature [finding the order was not final], leaving her with no recourse to effectively challenge the further delay that ensued." The Appellate Division concluded: "Accordingly, the Family Court should have considered the mother's objections, and, upon doing so, should have exercised its authority to remand the matter to the Support Magistrate for an immediate recommendation as to incarceration, or to make, with or without holding a new hearing, its own findings of fact and order based on the record (Family Court Act §439[e])."

C. Support Magistrate – Proof Of Service of Objections

In Matter of Cynthia B.C. v. Peter J.C., 72 NYS3d 827 (1st Dept. May 3, 2018), the mother appealed from a May 2016 Family Court order, which denied her objections to a Support Magistrate's order. The First Department dismissed the appeal as taken from a nonappealable paper. Family Court denied the mother's objection because she did not file proof of service of a copy of her objection on the father, as required by FCA §439[e]. The Appellate Division held that this defect "is a failure to fulfill a condition precedent to filing timely written objections to the Support Magistrate's order, and consequently, a waiver of [the] right to appellate review."

XII. LEGISLATIVE AND COURT RULE ITEMS

A. Judgments of Divorce – Property Transfers

22 NYCRR 202.50(b) has been **amended, effective May 31, 2018** (AO/191/18) by adding a new subdivision (4), which provides that "every judgment of divorce, whether contested or uncontested, shall include language substantially in accordance with the following decretal paragraph:"

ORDERED AND ADJUDGED that pursuant to pursuant to the __ *parties' Settlement Agreement dated*_____ **OR** __ *the court's decision after trial,* all parties shall duly execute all documents necessary to formally transfer title to real estate or co-op shares to the __ *Plaintiff* **OR** __ *Defendant* as set forth in the __ *parties' Settlement Agreement* **OR** __ *the court's decision after trial*, including, without limitation, an appropriate deed or other conveyance of title, and all other forms necessary to record such deed or other title documents (including the satisfaction or refinance of any mortgage if necessary) to convey ownership of the marital residence located at _____, no later than _____; **OR** __ *Not applicable;* and it is further

The same administrative order promulgates revised forms and instructions for the Uncontested Divorce Packet.

The forms are at this link:

http://www.courts.state.ny.us/divorce/divorce_withchildrenunder21.shtml#ucdforms

The Judgment of Divorce is Form UD-11 (available in pdf and WordPerfect) and the new language above is at field 30 at the top of page 10 of the pdf.

Dated: June 17, 2018

At: Albany, NY

Speaker Biographies

Rosalia Baiamonte, Program Co-Chair

Ms. Baiamonte was admitted to the Bar in January, 1994. Since her admission, she has been engaged exclusively in the practice of matrimonial and family law. Ms. Baiamonte is a graduate of Brandeis University and Syracuse University College of Law. In March, 1996, Ms. Baiamonte became an associate of Stephen Gassman, Esq., a renowned leader in the field of matrimonial and family law, and she was named a member of his firm on August 1, 2007. Ms. Baiamonte is a Fellow of the American Academy of Matrimonial Lawyers; she has served as a member of the Board of Directors for the Nassau County Bar Association, as well as a Chair of the Association's prestigious Judiciary Committee and Matrimonial Law Committee. She has served as an Arbitrator in the Early Neutral Evaluation Program and a Discovery Referee in Nassau County Supreme Court; she has served as a Receiver in Nassau County's Supreme and Surrogate's Courts; and as a Part 137 Fee Arbitrator for the 10th Judicial District. She is a frequent lecturer on various matrimonial and family law topics for State and local bar groups and is a guest lecturer at various law schools.

Hon. Christine M. Clark, Speaker

Judge Clark attended Columbia University and Albany Law School. She began her career in public service in the Schenectady County District Attorney's Office, first as the DWI prosecutor and then in the general felony bureau. She became the sex crimes/ child abuse prosecutor and was then promoted to become the first Bureau Chief of the Special Victims Unit. In that role, she helped establish Schenectady County's Child Advocacy Center. In 2004, Schenectady's then mayor appointed her to the position of Schenectady City Court Judge, and she then won election to that position for a full ten-year term. In November 2010, Judge Clark was elected as Schenectady County Family Court Judge. In November 2012, she was elected to the Supreme Court for the Fourth Judicial District of New York. Judge Clark was the second woman ever elected as a Supreme Court Justice in that district, and the first Democrat to win election without a second party line. In April 2014, Governor Andrew Cuomo appointed Judge Clark to the Appellate Division, Third Department. She has two daughters, ages 15 and 11.

Hon. Andrew A. Crecca, Speaker

Andrew A. Crecca is the Supervising Judge of the Matrimonial Parts in the Tenth Judicial District, Suffolk County, New York. In addition to his duties as Supervising Judge, he is the presiding Justice of Suffolk County's Integrated Domestic Violence Court, and has served in that position since January of 2007. He was first elected to the bench in 2004 as a County Court Judge and presided over felony criminal cases in a dedicated trial part. In January of 2007 he was appointed an Acting Justice of the Supreme Court. In 2010 he was elected Justice of the New York State Supreme Court for the 10th Judicial District.

Stephen Gassman, Esq. is the founding member of Gassman Baiamonte Gruner, P.C., and has been practicing matrimonial and family law for over 40 years. Mr. Gassman has also served as an Adjunct Professor of Law at Touro Law School, chair of the Family Law Section of the New York State Bar Association, president of the Nassau County Bar Association, and as appellate counsel in the Appellate Division and the Court of Appeals. He is a fellow of the American Academy of Matrimonial Lawyers and a member of the Matrimonial Practice and Rules Committee of the Unified Court System of the State of New York. He has also served on the Law Guardian Advisory Panel to the Tenth Judicial District and as a member of the Judicial Hearing Officer Screening Committee of the Tenth Judicial District. Mr. Gassman is the co-author, with Timothy M. Tippins, Esq., of counsel to Gassman Baiamonte, Gruner P.C., of *Evidence for Matrimonial Lawyers* and *Matrimonial Valuation*. He has also authored *Cross Examination: A Primer for the Family Lawyer,* and has co-authored with his partner, Rosalia Baiamonte, *Library of New York Matrimonial Forms,* published by the New York Law Journal. He was designated as a diplomate of the American College of Family Trial Lawyers. Mr. Gassman received a B.A. from University of North Carolina at Chapel Hill and a J.D. from New York Law School.

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Marsha Haygood

StepWise Associates
moving forward with purpose

AUTHOR, TALENT DEVELOPMENT EXPERT, EMPOWERMENT COACH

Author, Talent Development Expert and Empowerment Coach are a few of the many hats that President of StepWise Associates, Marsha Haygood, wears. Former corporate executive and active contributing editor to national publications, Marsha has a rich multicultural understanding of individuals and organizations that she incorporates in her coaching and presentations. With a Bachelors of Arts degree from Lehman College in New York and a Training and Development Certification from New York University, Marsha ensures that her entire life and mission is dedicated to the success of others.

For organizations wishing to manage their internal and external changes in a proactive and positive way, or if your group needs an injection of inspiration, and knows that increased productivity will positively affect the bottom line, Marsha is the person to call. For individuals feeling stuck or unfulfilled, and wanting to jumpstart your life, Marsha is the person to meet.

Marsha's consulting and career development assignments are crafted in collaboration with clients to ensure that objectives are met. As a career and empowerment coach, motivational speaker and author, Marsha guides individuals on a journey of discovery; helping to facilitate and achieve goals, explore solutions and develop action plans so positive results can be realized.

Marsha is a highly-acclaimed thought leader who encourages success in individuals and corporations alike. Experienced in public speaking and corporate engagement, she knows how to translate leadership theory into practice. She has been featured as one of the elite in Speaking of Success, a book on building leadership, along with best-selling authors Stephen Covey, Ken Blanchard and Jack Canfield.

Co-author of The Little Black Book of Success: Laws of Leadership for Black Women, her wisdom and notes have been combined in a book that provides guidance and support for women. Published by Random House/One World Press in 2010 and dubbed as "A mentor in your pocket," The Little Black Book of Success was nominated for the esteemed NAACP Literary Award and has become a staple in homes across the United States. It has quickly become a favorite amongst women of diverse backgrounds that are serious about business, life and success.

Marsha Haygood has won numerous awards including the prestigious YMCA Black Achievement Award, The Network Journal's Influential Black Women in Business Award and The National Association of African Americans in Human Resources Trailblazer Award. She was recently honored with the Community Service Award for her continued commitment to the success of others and the community she serves. Marsha is a founding member of Black Women of Influence, a professional network across industry women with a mission of developing the next generation of influential women in business. She is also a member of the Board of Directors for YouthBridge NY, a non-profit high school leadership development organization, and formerly served as a Senior Advisory Board Member of the National Association of African Americans in Human Resources of Greater New York.

Marsha devotes her time to developing and facilitating coaching programs, workshops, speaking engagements and book signings throughout the country.

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Peter R. Stambleck, Program Co-Chair

Peter is a partner with Aronson Mayefsky & Sloan, LLP in New York. His practice is focused on providing counsel in a wide range of matrimonial and family law matters including divorce, child custody and access, spousal and child support, paternity, prenuptial, postnuptial and separation agreements. Prior to joining the Firm, Peter worked as a Certified Public Accountant at Pricewaterhouse Coopers. His background in finance and accounting provides him with a skill set and perspective unique in the practice of family law. Peter is a Fellow of the American Academy of Matrimonial Lawyers and a member of the Family Law Section of the American Bar Association. Peter earned his B.S. in finance and accounting from Indiana University and his Juris Doctor from Brooklyn Law School. He is admitted to the New York and Connecticut State Bars.

Honorable Jeffrey Sunshine, J.S.C., is an elected Supreme Court Justice. On June 1, 2018 he was appointed by the Chief Administrative Judge Lawrence Marks as the Statewide Coordinating Judge for Matrimonial Cases. He continues to be the Chair of the Chief Administrative Judge=s Matrimonial Practice Advisory and Rules Committee. He also serves as Chair Board of Advisors of the Center for Children, Families and the Law at the Maurice A. Deane School of Law - Hofstra University where he obtained his Juris Doctor degree in 1980. Judicial Assignments: Kings County Family Court 1998-2001; Richmond County Supreme Court January 2001 B February 2003; Kings County Supreme Court since February 2003.

A former President of the Brooklyn Bar Association, he served as Chair of the Family Law Section for over ten years. He was a member of the House of Delegates of The New York State Bar Association for many years and served as the Chair of the New York State Bar Association Special Committee on Judicial Discipline from 1996-1998. He is also a member of numerous other Bar Associations.

As a practicing attorney, he was a member of the Grievance Committee Second and Eleventh Judicial Districts and presently serves on the OCA Statewide Family Violence Task Force and the New York State Judicial Committee on Women in the Courts.

In 2003, he received the AEcumenical Award@ from the Catholic Lawyers Guild, Kings County, and in 2005, the Brooklyn Bar Association=s highest award, the AAnnual Award for Outstanding Achievement in the Science of Jurisprudence and Public Service.@ In 2009, he received the AIn the Trenches Award@ from the Lawyers Committee Against Domestic Violence. He was the sole recipient of the 2010 annual award of the New York Chapter of the American Academy - Matrimonial Lawyers. In 2015, he delivered the keynote address at the Annual Meeting of the Family Law Section of the State Bar. In March 2018, he was recognized by Hofstra Law School with a Distinguished Alumni On The Bench award. He also authored an article titled A2015-2016 Changes in Legislation and Rules for Matrimonial Matters@ which was published in the November 18, 2016 edition of the New York Law Journal. Over 110 of his decisions have been published and he has presented over 100 lectures/panels throughout New York.

He is married to the Hon. Nancy T. Sunshine, Esq., the County Clerk - Kings County.

Eric A. Tepper, Family Law Section Chair

Eric A. Tepper is a partner in the law firm of Gordon, Tepper & DeCoursey, LLP, located in Glenville, NY. He practices matrimonial and family law throughout the Capital District, Saratoga Region and New York State. He's a graduate of Hamilton College and George Washington University Law School. Mr. Tepper is currently Chair of the New York State Bar Association Family Law Section. He serves on the Unified Court System's Matrimonial Practice Advisory and Rules Committee chaired by the Hon. Jeffrey A. Sunshine and was part of the working group which helped to formulate the current maintenance guidelines. He's a member of the Saratoga County Bar Association, Capital District Women's Bar Association, and is Chair of the matrimonial committee for the Schenectady County Bar Association. Among his many speaking engagements, Mr. Tepper has lectured extensively for NYSBA CLE programs throughout New York State. He's also lectured on matrimonial law at Judicial Education Seminars ("judge school") on numerous occasions. He's lectured on divorce and family law for the Appellate Division, Third Department, the Association of Justices of the Supreme Court of the State of New York, the New York State Council on Divorce Mediation, the Nassau County Bar Association, the Suffolk Academy of Law and for various other organizations. He's been selected for inclusion in The Best Lawyers in America as well as New York Super Lawyers every year for more than a decade. Mr. Tepper was named the Family Law "Lawyer of the Year" in the Albany area by Best Lawyers in both 2017 and 2013. AVVO previously selected him as one of the top 10 divorce lawyers in New York State.

Bruce J. Wagner is Chair of the Family Law Practice Group at McNamee Lochner P.C., Albany, NY, and is a principal and shareholder in that law firm. His primary areas of practice are matrimonial law and appeals. He is a 1982 graduate of Cornell University and a 1985 graduate of Albany Law School of Union University. In September 2002, he was appointed as a Town Justice in the Town of Schodack (pronounced sko'-dak), Rensselaer County, was elected in November 2002, and re-elected in 2006, 2010 and 2014. He is designated on a regular basis by the Administrative Judge of the Third Judicial District to serve as an Acting City Court Judge in the Criminal and Civil Parts of the District's City Courts. Mr. Wagner is immediate Past President of the Rensselaer County Magistrates' Association, having also served a prior two year term as President in 2010-2011, and is a member of the New York State Magistrates' Association. In October 2016, he was selected by his peers as a Diplomate of the American College of Family Trial Lawyers, a select group of 100 of the top family law trial lawyers from across the United States. He is listed in all editions 1999 through 2018 of The Best Lawyers in America (Woodward-White) and has a peer rating of AV® Preeminent™ in Martindale-Hubbell. Based on peer voting, Mr. Wagner was named to all editions 2007 through 2017 *New York Super Lawyers - Upstate*, and has placed in the top 25 in the Hudson Valley for 10 of the last 11 years, including 2017. In October 2011, Mr. Wagner was named the Albany *Best Lawyers* Family Law Lawyer of the Year for 2012. Mr. Wagner was the subject of a profile entitled "From Constitutional Law to the Court of Appeals" in the 2011 New York-Upstate edition of *Super Lawyers*. From January 2005 to January 2007, he served as President of the 167 member American Academy of Matrimonial Lawyers, New York Chapter, which is part of a national organization of about 1,600 Certified Fellows. Mr. Wagner is also a Certified Fellow of the International Academy of Family Lawyers. He is a Past Chair (2010-2012) of the 2,700 member NYSBA Family Law Section, having previously served the section for 2 years each as Financial Officer, Secretary and Vice Chair. Mr. Wagner has served as a co-chair of the Continuing Legal Education Committee of the NYSBA Family Law Section since June 2000. Since 1998, he has been a representative from the 3rd Judicial District to what is now the Chief Administrative Judge's Matrimonial Practice Advisory and Rules Committee. In April 2015, he was appointed by the Chief Administrative Judge to the Third Department Judicial Hearing Officer Selection Advisory Committee. He is a member of the Rensselaer County, Albany County, New York State and American Bar Associations. Mr. Wagner is a frequent lecturer and author for continuing legal and judicial education programs which have been sponsored by the Albany, Broome, Columbia, Nassau, New York City, Onondaga & Oswego, Queens, Rensselaer, Schenectady and Westchester County Bar Associations, the NYS Bar Association, the American Academy of Matrimonial Lawyers, the Appellate Division (First and Third Departments), the NYS Judicial Institute (Judicial and Court Attorney Seminars), the Association of NYS Supreme Court Justices, the Capital District Women's Bar Association Legal Project, and other organizations. He has taught at the Advanced Judicial Education Program for Town & Village Justices and at the Basic Certification Course for newly elected Town & Village Justices. Mr. Wagner and his wife, Janet, reside in Schodack and have two children, both of whom work at the same NYC hospital, one in an administrative and training capacity and one as a registered nurse. He has served as: an Assistant Scoutmaster or Committee Member of Boy Scout Troop 53, Castleton and as a Merit Badge Counselor for Twin Rivers Council, Boy Scouts of America, since 2002; a Sunday School Teacher for the First United Methodist Church, East Greenbush; an assistant coach for the East Greenbush Girls' Softball League; Conductor of the former Hendrick Hudson Male Chorus, East Greenbush (1989-2003 and 2011-2016); a co-Conductor of the Yankee Male Chorus (1994-2013); President of the Mohawk-Hudson Male Chorus Association (2008-2016); and as Choir Director for the First United Methodist Church, East Greenbush (2010-2017).