3. MATRIMONIAL ACTIONS

MATRIMONIAL ACTIONS 2013

By:

Jenifer M. Wharton, Esq.
Gordon, Tepper & DeCoursey, LLP
Socha Plaza South
113 Saratoga Rd., Rt. 50
Glenville, NY 12302
(518) 399-5400
jwharton@gtdlaw.com

Thank you to **Joan Adams, Esq**. who allowed me to use some of her prior materials on this topic; **Eric A. Tepper, Esq**. who authored the fault-based divorce grounds and defenses materials, and **Nicole H. Helmer, Esq**. who also assisted in preparing these materials.

MATRIMONIAL ACTIONS
OUTLINE

I. GENERALLY- PRELIMINARY CONSIDERATIONS

A. DRL §230- Residence Requirements of Parties
B. Jurisdiction
(1) *In rem* jurisdiction
(2) *In Personam* Jurisdiction
a. New York Domiciliary
b. Non-Domiciliary
(3) Consent of the parties

II. PAPERS, PARTIES AND PROCEDURE

A. Filing and Service of Summons
(1) DRL section 211 Filing of summons before service
(2) DRL Section 232 Contents and Form of Summons: Proof of Service
(3) Personal Service Requirements CPLR section 308 and DRL section 232
a. Personal Delivery
b. Pursuant to Manner Directed by Court- Service by Publication
c. Service by Mail
d. Electronic Service
e. Waiver by the Defendant
f. Default Judgments- Failure to Appear
B. Filing of summons before service
C. Parties
(1) Co-Respondent as a Party
(2) Special considerations for certain types of parties
a. Infants
b. Incompetents
c. Incapacity

III. GROUNDS FOR DIVORCE, SEPARATION, ANNULMENT AND DISSOLUTION/DEFENSES

A. Divorce
(1) No fault statute DRL section 170 (7) grounds

a. Sufficient pleadings; summary judgment and entitlement to a trial
b. Can you at least get summary judgment under the no fault statute to dispense with a trial on grounds?
c. No-fault: Two actions pending or old action still pending

(2) Additional Grounds for a divorce

a. Adultery
i. Statutory Authority
ii. Statutory Definition
iii. Single Act Sufficient
iv. Criminal Nature
v. Act of Adultery During Pendency of Divorce Action

b. Cruelty
i. Statutory Authority
ii. Key Statutory Elements
iii. Course of Conduct
iv. Long Term vs. Short Term Marriage
v. Long Term ("Vintage") Marriage
vi. Exception: Long Term Marriage
vii Short Term Marriage
viii. Specific Types of Conduct—Cruelty
ix. Conduct Which is Insufficient

c. Abandonment
i. Statutory Authority
ii. Core Element
iii. Actual Abandonment
iv. Lock Out Cases
v. Refusal To Relocate
vi. Constructive Abandonment
vii. Lack of Social Companionship

B. <u>Defense Issues Pertaining to Adultery, Cruelty and Abandonment</u>

1. Adultery Defense Issues
a. Statutory Authority
b. Cases and Practice Tips
i. Procurement or Connivance
ii. Forgiveness
iii. Statute of Limitations
iv. Adultery By The Accusing Spouse

2. Cruelty: Statute Of Limitations [DRL 210]:
    a. Five Years Prior to Date of Commencement
    b. Continuous Course of Conduct
    c. Conduct Subsequent to the Commencement
d. Cruelty: Lure and Attraction Of a Paramour
3. Abandonment: Consent and Justification

C. Imprisonment as Grounds for Divorce
D. Other "no fault" divorce options
1) Living Separate and Apart for More than One Year Following Execution of a Written Separation Agreement
2) Living Separate and Apart for More than One Year Pursuant To A Judgment or Decree of Separation
E. Difference of relief available; divorce and separation actions
F. Other less common matrimonial actions
1. Annulments/Declaration as to the Nullity of a Marriage
2. Dissolution (Enoch Arden Law)

IV. COURT RULES, CERTIFICATION AND VERIFICATION REQUIREMENTS IN MATRIMONIAL ACTIONS

A. New York Trial Court Rules
i. 22 NYCRR 202.5 – Papers filed in Court
ii. 22 NYCRR 202.6- Request for Judicial Intervention
ii. 22 NYCRR 202.7- Affirmation of Good Faith
iii. 22 NYCRR 202.16 – Matrimonial Action
iv. 22 NYCRR 202.16 (e)
v. 22 NYCRR 130-1.-1a-
vi. 22 NYCRR 202.16a- Automatic Orders
B. Verification Requirements

V. FORMS

(1) Application for Index Number
(2) Summons with Notice
(3) Summons with Notice marked up
(4) Notice of Appearance
(5) Limited Notice of Appearance
(6) Complaint
(7) Verified Answer
(8) Verified Answer with Counterclaims

(9) Verified Reply
(10) Affidavit of Service
(11) Admission of Service
(12) Service by Mail
(13) Motion for alternate means of service
(14) Default divorce papers

I. GENERALLY- PRELIMINARY CONSIDERATIONS

A matrimonial action is a proceeding which involves an issue of **marital status** and includes: annulment proceedings; a proceeding for a declaration of the nullity of a void marriage, an action for a divorce; an action for a separation; or an action seeking a declaration of the validity or nullity of a foreign judgment of divorce. McKinney's CPLR §105 (p). Not every legal proceeding between spouses is considered a matrimonial action. For example, an action to set aside a separation agreement or other matrimonial agreement is not a matrimonial action. It is a contract action which requires a plenary action to determine the validity of the underlying agreement. Similarly, Family Court proceedings between spouses involving family offenses, support or custody are not matrimonial actions.

Inconsistent forms of matrimonial actions may be pled by a party or interposed by the defendant. For example, the plaintiff may sue for a divorce or in the alternative, a separation. The defendant in an annulment action may countersue for a divorce. See, Carinha v. Carinha, 178 Misc.2d 635, 679 N.Y.S.2d 901 (Westchester County New York, 1998). In fact, the Civil Practice Law and Rules permit the defendant in a matrimonial action to bring any counterclaim, even non-matrimonial ones, against the plaintiff.

McKinney's Civil Practice Law and Rules §3019(a); Id. However, inconsistent relief clearly may not ultimately be granted by the court.

It is important to distinguish matrimonial actions from other forms of litigation because they are subject to unique residency and jurisdictional rules and substantive concerns. Accordingly, prior to commencing a matrimonial action, or when defending a matrimonial action, the attorney must be familiar with these rules and concerns to avoid making mistakes which may lead to malpractice claims. Some of the initial considerations include:

a. Does New York have sufficient interest in the marriage to make a determination as to its status?

b. Are there ancillary issues which can't be determined unless the court has personal jurisdiction over the defendant?

c. How does one properly commence the action so as to protect the client's interests?

d. How does one properly serve the defendant so as to protect the client's interests and permit the entry of a default judgment should the defendant not appear in the action?

e. Does the client have grounds for the matrimonial action and how does that impact the ancillary issues that are of concern for the client?

The first part of the written materials will discuss New York residency and jurisdiction prerequisites for matrimonial actions as well as the procedural considerations. The second part of the materials will discuss the various grounds for matrimonial actions, and particularly the action for divorce. This

will also include a discussion of defenses for matrimonial actions. Finally, at the conclusion of the written materials, several useful and commonly needed forms for matrimonial actions are attached for the reader's consideration in drafting.

A. DRL §230- Residence Requirements of Parties

Certain residency requirements exist to insure that New York entertains a matrimonial action only if it has a reasonable enough interest in the marriage. For certain types of matrimonial actions, one of five such requirements must be met in order for the action to proceed in New York. Specifically, these are actions which seek a) an annulment, or b) declaration of the nullity of a void marriage, or c) an action for divorce, or d) an action for separation. The five possible residency requirements are set forth in New York Domestic Relations Law §230 as follows:

> a. The parties were married in the state and either party is a resident when the action is commenced and has been a resident for a continuous period of one year immediately preceding the action. Domestic Relations Law §230 (1)
>
> b. The parties have resided in the state as husband and wife and either party is a resident when the action is commenced and has been a resident for a continuous period of one year immediately preceding the action. Domestic Relations Law §230 (2)
>
> c. The cause occurred in New York State and either party has been a resident for a continuous period of at least one year immediately preceding the action. Domestic Relations Law §230 (3)

d. The cause occurred in the state and both parties are residents at the time of commencement. Domestic Relations Law §230 (4)

e. Either party has been a resident of this state for at least two years immediately preceding the commencement of the action. Domestic Relations Law§ 230 (5).

See McKinney's Domestic Relations Law §230 (1) – (5).

Residence for purposes of DRL §230 has been interpreted as either an individual's residence or domicile. Heydt-Benjamin, 84 A.D3d 1167, 923 N.Y.S.2d 350 (2d Dep't 2011); Guedes v. Guedes, 45 A.D.3d 533, 845 N.Y.S.2d 416 (2d Dep't 2007); Wittich v. Wittich, 210 A.D.2d 138, 620 N.Y.S.2d 351 (1st Dep't 1994); Unanue v. Unanue, 141 A.D.2d 31, 532 N.Y.S.2d 769 (2d Dep't 1988). Also see P.C. v. K.K., 30 Misc.3d 1211 (A), 924 N.Y.S.2d 310 (Kings Cty. SC, 2011). Domicile has been defined as the place where a person has the intention of making it one's fixed and permanent home. Cocron v. Cocron, 84 Misc. 2d 335, 375 N.Y.S.2d 797 (N.Y. Sup. Ct. 1975). Residence has been defined as the place where a person is physically living. Even if the person is physically living out of state, so long as the intention is to maintain New York as the domicile, New York will remain the domicile. See Unanue, *supra*.

Evidence of intent to maintain New York as one's domicile may include maintenance of a home in New York State; children's attendance at schools in New York State, maintenance of bank accounts in New York State; or

acquisition of and maintenance of a New York drivers license and New York voter registration. See Bourbon v. Bourbon, 259 A.D.2d 720, 687 N.Y.S.2d 426 (2d Dep't 1999). Unanue v. Unanue, 141 A.D.2d 31, 532 N.Y.S.2d 769 (2d Dep't 1988). Mere conclusory statements that a party had the intent to make New York a party's domicile is not sufficient, especially in the absence of not obtaining a drivers license or voting in the state or other evidence of intent. See Esser v. Esser, 277 A.D.2d 926, 716 N.Y.S.2d 257 (4th Dep't 2000).

Residency is a much broader term referring to the location where a person is physically located without regard to whether the intent to make New York his or her residence. In fact, a person may maintain more than one residence and spouses may have different residences from one another. McKinney's Domestic Relations Law §231. Unlike domicile which requires proof of intent, the residency requirement may be met by mere physical presence in the state for the requisite time period, and in fact, that physical presence may not necessary have to be continuous, especially where parties to a marriage maintain active or "international" lifestyles. Weslock v. Weslock, 280 A.D.2d 278, 719 N.Y.S.2d 653 (1st Dep't 2001) motion for leave to appeal dismissed 96 NY 2d 824, 754 N.E. 2d 203, 729 N.Y.S. 2d 443 (2001). Wildenstein v. Wildenstein, 249 A.D.2d 12, 671 N.Y.S.2d 227 (1st Dep't 1998). In Weslock, *supra*, the First Department held that the durational residency requirements were met where the parties, although not continuously present in the state of New York for two years

prior to commencement, regularly returned to their New York apartment during that time period, and where "there was no other place to which they returned to as frequently or with regularity."

The residency requirements only seek to establish New York's "reasonable interest" in the marriage. They do not limit the subject matter jurisdiction of the court. Accordingly, if the court makes an error in determining that the residency requirements have been met, that error is not the same as an error relating to the court's subject matter jurisdiction. Thus, an error as to residency does not provide a basis to vacate a judgment of divorce under CPLR §5015 on the grounds that the court lacked subject matter jurisdiction. See Lacks v. Lacks, 41 N.Y.2d 71, 359 N.E.2d 384, 390 N.Y.S.2d 875 (1976); leave to reargue denied, 41 N.Y.2d 862, 362 N.E.2d 261, 393 N.Y.S.2d 710 (1977). However, a pre-trial motion to dismiss may be successfully brought based on the failure to satisfy the residency requirement. See e.g. Bourjolly v. Mouscardy, 85 A.D.3d 627, 925 N.Y.S.2d 821 (1st Dep't 2011) and Heydt-Benjamin v. Heydt-Benjamin, 84 A.D.3d 1167, 923 N.Y.S. 2D 350 (2d Dep't 2011).

Likewise, satisfaction of one of the residency requirements does not obviate the need to satisfy the requirements for personal jurisdiction over the parties for economic issues, nor does it obviate the need for *in rem* jurisdiction over the marital status of the parties. Casey v Casey, 39 A.D. 3d 579, 835 N.Y.S 2d 277 (2d Dep't 2007).

Finally, some matrimonial actions are not subject to the residency requirements. These include an action for a declaratory judgment as to the validity of a foreign judgment of divorce or an action for equitable distribution following a foreign judgment of divorce.

B. Jurisdiction

(1) *In rem* jurisdiction

Marital status is deemed a thing or a "*res*" which is found in New York whenever at least one of the spouses is domiciled in New York and New York then can exercise *in rem* jurisdiction over the issue of marital status. Carr v. Carr, 46 N.Y.2d 270, 385 N.E.2d 1234, 413 N.Y.S.2d 305 (1978). When a spouse dies, the marriage is terminated, as does the court's *in rem* jurisdiction. Id. The Carr case is illustrative of why marital status is important for estate issues as well. In Carr, the husband died leaving two wives. The first wife brought a proceeding for the court to declare her marriage to Mr. Carr valid so that she could preserve her inheritance claims. She did not obtain personal jurisdiction over Mr. Carr's second wife in the proceeding, but she argued that same was not required as New York had *in rem* jurisdiction at least to adjudicate the validity of the marriage. The Court of Appeals disagreed and held that when Mr. Carr died the marital status ceased to exist and thus New York's *in rem* jurisdiction ceased to exist.

Matrimonial actions, as defined in CPLR §105(p), are *in rem* actions. Lieb v. Lieb, 86 Misc.2d 75, 381 N.Y.S.2d 757, aff'd 53 A.D. 2d 67, 385 N.Y.S.2d 569 (1976). Accordingly, for purposes of adjudicating the marital status, the presence of the defendant in New York is not necessary, and defendant may be personally served out of state with notice of the matrimonial action in such manner as he may be personally served within the state. McKinney's Civil Practice Law and Rules § 314(1) and §313. However, the *in rem* jurisdiction of the court extends only to the issue of the marital status and not to economic issues between the parties. See McKinney's Civil Practice Law and Rules §314 (1). Economic issues between spouses cannot be determined unless the court has also obtained personal jurisdiction over the defendant. McCasland v. McCasland, 110 A.D.2d 318, 494 N.Y.S.2d 534 (3d Dep't 1985), reversed on other grounds 68 N.Y.2d 748, 506 N.Y.S.2d 329 (1986).

(2) *In Personam* Jurisdiction

Awards of spousal maintenance, support, and equitable distribution are considered ancillary matters to the marital status, and therefore, the court must acquire personal jurisdiction over a litigant in order to determine such matters. How do you get personal jurisdiction?

a. New York Domiciliary

Personal jurisdiction may be obtained over a domiciliary of New York by personal service upon him either in or outside the State of New York.

b. Non-Domiciliary

Personal jurisdiction over a non-domiciliary may be obtained by:

i. Personal service upon the Defendant in the State of New York.

In this circumstance, minimum contacts with the State of New York are not necessary. In addition, it is not necessary for the Defendant to be a domiciliary or a resident of the State of New York so long as he or she is personally served in the State. Burnham v. Superior Court of California, 495 U.S. 604, 110 S.Ct. 2105 (1990).

ii. Personal service outside of the State pursuant to long arm jurisdiction.

In order to acquire personal jurisdiction by service outside of the State of New York, the Defendant must have been a domiciliary or resident of New York at one time. In addition, a separate basis for long arm jurisdiction must exist. (See below).

The long arm jurisdictional provisions are as follows:

The party seeking jurisdiction must be a resident or domiciliary of New York and one of the following:

a. **New York was the matrimonial domicile of the parties before they separated**.

There is no uniformity among the four departments of the Appellate Division for purposes of defining or satisfying the requirement of matrimonial domicile. Both the First and Second Departments have interpreted the same as requiring domicile in New York at the time of the separation or "within the recent past". Klette v. Klette, 167 A.D.2d 197, 561 N.Y.S.2d 580 (1st Dep't 1990); Lieb v. Lieb, 53 A.D.2d 67, 385 N.Y.S.2d 569 (2d Dep't 1976). The Fourth Department utilizes a "relatively recent" criteria while the Third Department has rejected any time limit finding the same not supported in the statue. Levy v. Levy, 185 A.D.2d 15, 592 N.Y.S.2d 480 (3d Dep't 1993), appeal dismissed 82 N.Y.2d 707, 601 N.Y.S.2d 587 (1993); Paparella v. Paparella, 74 A.D.2d 106, 426 N.Y.S.2d 610 (4th Dep't 1980).

For an example where CPLR 302(b) jurisdiction was not found because the couple had not been in State for some time, see Julien v. Julien, 78 A.D.3d 584, 912 N.Y.S.2d 42 (1st Dep't 2010). In Julien, the action had been dismissed for lack of personal jurisdiction where the parties had lived in New York State as husband and wife from 2001 to 2002. Thereafter, for a period of five years, the parties rented an apartment in Florida, and had moved their possessions and pets to Florida and listed Florida as their residence on federal and New York State tax returns. Apparently their residency in New York was far too remote to

satisfy the requirements under this statute. Also see Liddle v. Liddle, 30 Misc.3d 1207(A), Nassau County, 2010).

b. Defendant abandoned the Plaintiff in New York.

c. The claim for support, alimony, maintenance, distributive awards or special relief accrued under the laws of New York State.

d. The claim for support, alimony, maintenance, distributive awards or special relief accrued pursuant to an agreement executed in the State of New York.

See e.g. Deutsch v. Deutsch, 166 A.D.2d 345, 561 N.Y.S.2d 13 (1st Dep't 1990; and Meng v. Allen, 31 Misc.3d 1211(A) (Sup. Ct New York County, 2011). : CPLR §302 (a)(1) jurisdictional basis (transaction of business in New York) established where parties negotiated and executed separation agreement in New York. *However, note that long arm jurisdiction provision 302(b) only requires the execution of the agreement not the negotiation of the agreement as well.*

The long arm provisions set forth in CPLR 302(b) are only available for its enumerated matrimonial proceedings.

A party may also affirmatively consent to personal jurisdiction:

(3) Consent of the parties

A party can waive a personal jurisdiction issue by submitting himself or herself to the jurisdiction of the court or by not timely raising it as a defense.

Plaintiffs consent to personal jurisdiction over themselves by commencing an action or proceeding. This likely cannot be revoked by the Plaintiff discontinuing the action thereafter, especially when the proceedings have advanced. See e.g. Peng v. Hsieh, 31 Misc. 3d 528, 918 N.Y.S.2d 285 (Sup. Ct. N.Y.Cty. 2011).

A defendant's failure to raise the lack of personal jurisdiction in either a pre-answer motion or in the answer can also result in a waiver and deemed as "consent". See CPLR §3211(e) A party may also affirmatively consent to personal jurisdiction. To prevent a default but preserve a personal jurisdiction issue, consider using a Limited Notice of Appearance.

II. PAPERS, PARTIES AND PROCEDURE

A. Filing and Service of Summons

(1) DRL section 211 Filing of summons before service

In most matrimonial actions, ancillary relief is desired and thus it will be necessary to acquire personal jurisdiction over the Defendant. The old rules provided that an action was commenced by service on the Defendant. All that changed in 1992 and presently the Civil Practice Law and Rules provide that actions are commenced by filing the summons or filing the summons and complaint with the county clerk. McKinney's Civil Practice Law and Rules

§304. Service on the Defendant is still required; however, service now is undertaken only after the index number is purchased and the Summons is filed. This is also true for commencement of matrimonial actions. McKinney's Domestic Relations Law §211. A matrimonial action may be commenced either by filing a summons with notice **or** a summons and verified complaint. McKinney's Domestic Relations Law §211.

(2) DRL Section 232 Contents and Form of Summons: Proof of Service

Statutory Notices Required

If only a summons is initially filed without a complaint, it must contain certain statutory notices and it is called a "summons with notice". McKinney's Domestic Relations Law §232. Specifically, the summons must contain, in legible handwriting or printing, the matrimonial relief requested such as "Action to annul a marriage"; "Action to declare the nullity of a void marriage", "Action for a divorce" or "Action for a separation." These notices are intended to provide a defendant with notification that an alteration of marital status is being sought. Failure to include such language will preclude the entry of a default judgment based on the defendant's failure to appear. In addition, the notice should appear directly underneath the caption of the action and above the text of the summons. See Commentary to McKinney's Domestic Relations Law §232 and also Markoff v. South Nassau Community Hospital, 61 N.Y.2d 283, 473 N.Y.S. 766 (1984).

Ancillary Relief

If the summons is served without a complaint, the summons must specify, in general terms, the nature of any ancillary relief being sought by the plaintiff. McKinney's Domestic Relations Law §232(a). Ancillary relief includes custody, child support, counsel fees, expert fees, equitable distribution, declarations of separate property, maintenance, life insurance, health insurance, exclusive use and occupancy of marital property and declaration of title and possession of property. While the nature of the relief must be identified on the summons, it need only be identified in general terms. It is not necessary, therefore, for the plaintiff to specify the amount of support being sought, the term and amount of spousal support being sought, the custody arrangements being sought, or the exact property distribution being sought. O'Riley v. O'Riley, 210 A.D.2d 554, 620 N.Y.S.2d 142 (3d Dep't 1994).

BEST PRACTICE TIP: It is extremely important that any ancillary relief that may possibly be sought be so noted in the summons, even if ultimately such relief is not pursued later on. Ancillary relief such as equitable distribution may be waived if not sought in the underlying matrimonial action. This can have unintended and unfair results especially where equitable distribution may provide a better result than application of ordinary property principles. See McCoy v. McKoy, 120 Misc. 2d 83, 465 N.Y.S.2d 639 (1983). In McCoy, the wife commenced an action and served a summons. The

summons indicated that the only ancillary relief sought was "such other relief as this court may deem just and proper." No reference was made to property determinations or equitable distribution. The defendant defaulted and the plaintiff proceeded with an uncontested divorce which dissolved the marriage. Plaintiff, thereafter, moved to vacate the defendant's default in order to obtain equitable distribution of certain real property. The trial court denied her application and thus she lost her opportunity to seek equitable distribution. In this case, she was relegated to seeking partition on any property held by tenancy in common or seeking her one half share of jointly held property. Had she preserved her equitable distribution claims **by merely referencing that she was seeking the same on her summons**, she may have been able to secure a greater than 50% award in the property. In equitable distribution, the court can distribute property in any fashion it deems appropriate. The Wife in McCoy may have been able to convince the court that she was deserving of a larger than 50% equitable distribution award, but she lost that right by failing to request equitable distribution in her initial matrimonial action.

In addition, child support and maintenance awards are retroactive to the date of "application therefore." See DRL 236 B6 (a) and DRL 240 (1). "Application therefore" has been interpreted to mean mere reference in the summons (or for the defendant, in the Notice of Appearance if ancillary relief is requested in that document). Since the filing of the summons commences the

action, it also fixes the earliest possible date that the court can intervene and direct the payment of child support or alimony. Therefore, requesting specific forms of ancillary relief in the summons permits the plaintiff to seek the longest period of retroactivity once a permanent support order is made at the conclusion of the proceedings.

Failure to include ancillary relief in the summons is not cured automatically by including a request for such relief in the complaint or by requesting ancillary relief by motion. Instead, a motion must be made to amend the summons as soon as possible. However, provided that no prejudice to the defendant is demonstrated, such applications are routinely granted.

At least one court has held that in default or uncontested divorce situations, provided that the Defendant was served with a Summons with Notice, a complaint need not be filed. Torkel v. Torkel, 144 Misc.2d 364, 544 N.Y.S.2d 962 (Sup. Ct. Queens Cty. 1989).

Venue, Date of Filing and Index Number

The summons must contain the index number assigned to the action, the date that the summons was filed, and the basis for venue. McKinney's Civil Practice Law and Rules §305 (a). If venue is based on the plaintiff's address, that address must also be indicated on the summons. Id.

Grounds for Divorce, Separation or Annulment

Is it necessary that the summons identify the grounds for the divorce, separation or annulment? The answer is no. However, most matrimonial practitioners do at least identify the grounds for divorce in the summons, or set forth the statutory provisions upon which the action is based. As far as the acts and specific misconduct leading to the grounds are concerned, these will be more fully set forth in the complaint.

Signature and Identification of Counsel

The summons must be signed by the plaintiff's attorney, and must contain a valid address for the attorney so that the defendant has an address for the forwarding of the notice of appearance. McKinney's CPLR §2101 (d)

(1) Automatic Orders (See also 22 NYCRR 202.16-a)

Domestic Relations Law §236 imposes certain automatic orders on the parties. The administrative rules require that a notice in writing be served that states legibly that automatic orders have been entered and that a failure to comply may be deemed a contempt of court. The Orders provide as follows:

(1) Neither party shall sell, transfer, encumber, conceal, assign, remove or in any way dispose of, without the consent of the other party in writing, or by order of the court, any property (including, but not limited to, real estate, personal property, cash accounts, stocks, mutual funds, bank accounts, cars and boats) individually or jointly held by the parties, except in the usual course of business, for customary and usual household expenses or for reasonable attorney's fees in connection with this action.

(2) Neither party shall transfer, encumber, assign, remove, withdraw or in any way dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401K accounts, profit sharing plans, Keough accounts, or any other pension or retirement account, and the parties shall further refrain from applying for or

requesting the payment of retirement benefits or annuity payments of any kind, without the consent of the other party in writing, or upon further order of the court.

(3) Neither party shall incur unreasonable debts hereafter, including, but not limited to further borrowing against any credit line secured by the family residence, further encumbrancing any assets, or unreasonably using credit cards or cash advances against credit cards, except in the usual course of business or for customary or usual household expenses, or for reasonable attorney's fees in connection with this action.

(4) Neither party shall cause the other party or the children of the marriage to be removed from any existing medical, hospital and dental insurance coverage, and each party shall maintain the existing medical, hospital and dental insurance coverage in full force and effect.

(5) Neither party shall change the beneficiaries of any existing life insurance policies, and each party shall maintain the existing life insurance, automobile insurance, homeowners and renters insurance policies in full force and effect.

(6) These automatic orders shall remain in full force and effect during the pendency of the action unless terminated, modified or amended by further order of the court or upon written agreement between the parties.

(7) The failure to obey these automatic orders may be deemed a contempt of court.

Note that the provisions were modified in December of 2012 to clarify that the provisions, if violated, may be punishable by contempt of court. These automatic orders are not signed by any judge. They are binding on the plaintiff in a matrimonial action immediately upon filing of the summons with notice or filing of the summons with complaint. They are binding on the defendant once the defendant is served with a copy of these orders with the summons.

These automatic orders remain in full force and effect during the pendency of the matrimonial action unless they are sooner modified or terminated by a further order of the court which is based either on a written

agreement of the parties which must be duly executed and acknowledged or upon a motion of one of the parties. See McKinney's Domestic Relations Law §236 PART B 2(b)

If these Orders are violated, it is clear now that enforcement measures, including contempt can be pursued. However, enforcement by contempt in matrimonial actions is more difficult to attain as there is a requirement that the movant demonstrate first that other less harsh remedies are not available to address the violation of the Order. See e.g. Sykes v. Sykes, 35 Misc. 3d 591, 940 N.Y.S.2d 474 (Sup. Ct New York County, Cooper, J. 2012).

(3) Personal Service Requirements CPLR section 308 and DRL section 232

The summons must be served on the defendant within 120 days of the filing. McKinney's Civil Practice Law and Rules §306-b. The statute provides that if service is not made upon defendant within 120 days of filing, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, the court shall extend the time for service.

Practice tip: Diary, Diary, And Diary: Diary the last day you have to serve; 30 and 60 days before time runs out, etc.

In matrimonial actions, the summons with notice (or summons with complaint) must be served by:

-Personal delivery to the defendant

-or else in such manner as a court order may direct.

a. Personal Delivery

Personal service is accomplished by physically delivering the summons within New York State to the defendant. McKinney's Domestic Relations Law §308(1). Acceptance is not necessary so long as the summons is tendered to the defendant in such manner as to sufficiently apprise the defendant that service was intended to be made. Matter of Bonesteel, 16 A.D.2d 324, 228 N.Y.S.2d 301 (3d Dep't 1962). This can be demonstrated by tender of the summons in plain site which can be readily seen versus tender in an envelope which obscures the summons. Id.

PRACTICE TIP: Personal delivery is the norm in matrimonial actions; nail and mail is not sufficient unless you have an order of the court first. Make sure your process server knows the ins and outs of appropriate service for matrimonial actions.

Service for purposes of acquiring personal jurisdiction over the defendant may be made on the defendant out of the state of New York only if that person is a domiciliary of New York or is subject to the jurisdiction of the courts of the State of New York pursuant to sections 301 or 302 of the Civil Practice Law and Rules. McKinney's CPLR §313. If the defendant is not a domiciliary of New York or otherwise subject to the jurisdiction of New York courts, and

notwithstanding personal delivery to the defendant out of state, the court will be limited to its *in rem* jurisdiction to determine marital status, and will not be able to determine ancillary matters. See McKinney's CPLR §314.

b. Pursuant to Manner Directed by Court- Service by Publication

Where personal service cannot be obtained by due diligence, the court may direct an alternate means of service including service by publication.

Service by publication is authorized by §232 (a) of the Domestic Relations Law and by §315 and 316(a) of the Civil Practice Law and Rules. It is disfavored and viewed as a manner of service of "last resort." See, McKinney's Practice Commentaries, §232 of the Domestic Relations Law.

Service by publication requires a court order, made after a motion supported by an affirmation of the attorney and proof that personal delivery or other means authorized by §308 of the CPLR, could not be made with due diligence. Once the order is obtained, the order, and the summons or the summons and complaint are published in a newspaper, in the English language, for at least once a week for three successive weeks. Unless dispensed with by the court, a copy of the summons must also be mailed to the person being served or else jurisdiction may be lacking. See Civil Practice Law and Rules §316(b).

Service by publication may only confer upon the court *in rem* jurisdiction if the defendant is not a domiciliary of New York, or otherwise subject to the jurisdiction of the court. But see, Gross v. Gross, 56 Mis

674 (Sup. Ct. Kings Cty. 1968) where service on "absent resident" effectuated by publication and mailing to husband in care of his father was deemed sufficient to give court jurisdiction to direct payment of alimony.

c. Service by Mail

A defendant may consent to service by mail provided certain requirements are met. First the summons must be mailed to the defendant by first class mail. McKinney's Civil Practice Law and Rules §312-a. Second, the defendant must be supplied a written acknowledgement to complete and sign and return to the plaintiff or his or her attorney within 30 days of receipt of the summons by mail. Id. §312-a sets forth the form that must be used for the acknowledgement. Id.

The acknowledgement constitutes proof of service which must be filed no later than 120 days after the action is commenced. Id . However, infants, incompetents and conservatees may not be served by mail.

d. Electronic Service

The court may direct any manner of service which meets with the due process requirement that service is undertaken in such a manner reasonably calculated to give notice of the proceedings to the defendant. In Hollow v. Hollow, the court was convinced by the unique facts and circumstances that service by email was appropriate. Hollow v. Hollow, 747 N.Y.S.2d 704, 193 Misc.2d 691 (Sup. Ct. Oswego County 2002). The husband had moved to Saudi Arabia. He worked and resided there in a company owned compound which

was protected by a security force. Mr. Hollow only communicated with Ms. Hollow by email. Ms. Hollow tried to have Mr. Hollow served personally in Saudi Arabia, but was unable to effectuate personal service. She made an application to serve Mr. Hollow by email and the court granted the application, finding "…the defendant has in essence, secreted himself behind a steel door, bolted shut, communicating with the plaintiff and his children exclusively through e-mail"… Id. At 705. See also Snyder v. Alternate Energy, Inc., 19 Misc.3d 954, 857 N.Y.S.2d 442 (N.Y. City Civil Ct. 2008).

e. Waiver by the Defendant

The defendant may waive any personal jurisdictional issues by appearing in the action without raising the jurisdictional defect and participating in the litigation. See Casey v. Casey, 39 A.D.3d 579, 835 N.Y.S.2d 277 (2d Dep't 2007) and Frantz v. Frantz, 92 A.D.2d 950, 460 N.Y.S.2d 668 (3d Dep't 1983).

f. Default Judgments- Failure to Appear

A judgment cannot be rendered in favor of the plaintiff based upon the default of the defendant in appearing (service of Notice of Appearance) or pleading (service of Answer) unless:

a. The summons and a copy of the complaint were personally delivered to the defendant

Or

b. A copy of the summons was either personally delivered to the defendant or served in accordance to an order directing the method of service of the summons pursuant to section 308 or 315 of the CPLR.

To obtain a default judgment in matrimonial actions, the plaintiff must prove service. Plaintiff is required to file an affidavit or certificate which must state affirmatively that the document served contained the required notice either written or printed on the face of the copy of the summons, what knowledge the server had that the person served was in fact the defendant, and how the server acquired that knowledge. McKinney's Domestic Relations Law §232 (b).

PRACTICE TIP: File the affidavit of service as soon as received and diary that you have received a date stamped copy back from the county clerk.

Once a Defendant appears in an action by serving a Notice of Appearance, he/she cannot be found in default unless he/she subsequently defaults (respond to a later pleading, is found in default as a result of failing to respond to discovery demands , or fails to appear at trial.) It is not uncommon for parties to consent to the grounds for divorce early on and agree that the Defendant may waive the right to serve an answer while preserving his/her rights to ancillary relief. Provided the Defendant has served an initial Notice of Appearance and has fully participated in court conferences and not otherwise defaulted, a stipulated waiver of service of an answer should not serve as grounds for default.

S.H.M. v. S.M, 40 Misc.3d 1220(A), 2013 WL 3942864, 2013 N.Y. Slip Op. 51247(U) (Sup. Ct New York County, 2013). Nonetheless, the better practice is to serve an Answer and then execute a stipulation consenting to grounds and preserving rights to ancillary relief.

B. Filing of summons before service

New York matrimonial actions are commenced upon the filing of the summons either with or without a complaint with the county clerk. Generally, to be accepted for filing, the summons also includes an application for an index number and tender of the requisite filing fee (currently $210.00) which together are presented to the appropriate county clerk's office. The summons is then date-stamped and an index number is assigned to the action. The index number identifies the action throughout the proceeding. The index number and the date of filing are indicated on the summons which is then in turn served upon the defendant either with or without a complaint as more fully discussed above. Some counties employ the use of a prefix "MAT" with the matrimonial actions to distinguish them from non-matrimonial actions.

The date of filing of summons (or summons with complaint) constitutes the "date of commencement" of the matrimonial action but does not constitute the date that the marriage is dissolved, deemed null, nor does it constitute a legal separation. The alteration or dissolution of the marriage does not actually occur until such time as the appropriate judgment is rendered, entered in the clerk's

office and served on the parties. Nonetheless, the date of commencement has great significance for the parties in divorce actions as it frequently serves as the date of valuation of non-passive assets (i.e. active assets), and further since it stops the accrual of marital property.

In addition, some grounds for divorce or separation have statutes of limitations requiring that they be commenced within certain time frames. For example, an action for cruel and inhuman treatment must be commenced within (5) years of the conduct constituting cruel and inhuman treatment, although the continuous course of treatment doctrine may permit the inclusion of more "aged" allegations. See. McKinney's Domestic Relations Law §210; Habib v. Habib, 278 A.D.2d 277, 717 N.Y.S.2d 317 (2d Dep't 2000).

C. Parties

1. Co-Respondent as a Party

For divorce actions in which adultery is alleged, either party may serve a copy of his or her pleading on the co-respondent, who is the alleged paramour. McKinney's Domestic Relations Law §172 (1). If so served, the respondent then has twenty days to appear to defend the action insofar as it may affect him or her. Id. If no service on the co-respondent has been made, the co-respondent named in a pleading may make a written demand on any party for a copy of the summons and the pleading naming the co-respondent. The party naming the co-

respondent then has ten (10) days to serve such items on the co-respondent, and the co-respondent shall have the right to appear in the action and defend. Id.

The co-respondent has the right to serve a Demand for a Bill of Particulars or demand a jury trial. Van Patten v. Van Patten, 79 Misc.2d 613, 360 N.Y.S.2d 588 (Sup.Ct. Saratoga County 1974).

A co-respondent is not entitled to recovery of legal fees, even if the action naming him or her is frivolous. The only costs that may be recovered by a co-respondent is a bill of costs against the person that named him or her as the co-respondent, which consists of the sum allowed by the court as a trial fee, as well as disbursements. McKinney's Domestic Relations Law §172 (2). Further adding insult to injury, the co-respondent may only receive that limited recovery in the event "none of the allegations" against him or her are proven. Id.

2. Special considerations for certain types of parties

In addition to jurisdictional requirements which must be met, there are a number of special conditions and requirements that may pertain to the parties to a matrimonial action:

a. Infants

For purposes of matrimonial actions, an infant is any individual under the age of 18. An infant prosecutes or defends a matrimonial action through a guardian ad litem, if appointed by the court, or by the guardian of his or her property, the parent or agency having legal custody, or if married, by an adult

spouse residing with the infant. See McKinney's Civil Practice Law and Rules §1201. An infant cannot prosecute or defend an action in person or by an attorney. Id.

A marriage involving an infant is voidable at the option of the infant, and thus can serve as a basis for an annulment proceeding. McKinney's Domestic Relations Law §140 (b). If the infant is a domiciliary or resident of New York, and marries prior to the age of 18 in a state with a lower age of majority, the marriage is still considered voidable. If the infant thereafter attains the age of legal consent and voluntarily cohabits with the other party freely, an annulment is not available. Id.

An action to annul the marriage on the grounds that one or both of the parties had not attained the age of legal consent may be maintained by the infant or by the infant's parent or guardian, or by "any person as the next friend of the infant". See DRL §140(b)

b. Incompetents

Actions for annulment are statutorily derived. Actions for annulment exist where one or more of the parties alleges: infancy, mental retardation, mental illness, consent by force, duress or fraud or incurable mental illness for five years. Individuals who have been adjudicated incompetent may not bring an action for an annulment.

An action to annul the marriage on the grounds that one party was mentally retarded may be maintained during the life time of either party by any relative of the mentally retarded person who has an interest to avoid the marriage. Relatives who have an interest to avoid the marriage typically are relatives who would have a financial interest if the marriage was annulled such as receiving a larger inheritance. However a person of sound mind cannot bring an action for an annulment on the ground of the other spouse's mental retardation. See DRL §140(c).

An action to annul the marriage on the ground that one of the parties was a mentally ill person may be brought at any time during the continuance of the mental illness or after the death of the mentally ill person and during the life of the other party to the marriage, by any relative of the mentally ill person who has an interest to avoid the marriage. See e.g. Kaminster v. Foldes, 51 A.D.3d 528, 859 N.Y.S.2d 412 (1st Dep't 2008) in which daughter brought proceeding under Article 81seeking to set aside some financial transactions and sought declaration of void marriage involving her father.

An action may also be maintained by the party of sound mind at any time during the continuance of the other party's mental illness provided that the plaintiff did not know of the mental illness at the time of the marriage. See DRL §140(c).

Where an incurable mental illness exists and has lasted for at least five years, either party may bring an action for annulment. See DRL §140 (f)

An action for divorce may only be initiated against a mentally incompetent or insane individual if their conduct gave rise to an action for divorce before they became mentally incompetent or insane.

There are conflicting Court of Appeals cases dealing with the ability of a person declared incompetent to maintain a divorce or separation action. A person legally declared incompetent may maintain an action for separation through a duly authorized representative. Kaplan v. Kaplan, 256 N.Y. 366, 176 N.E.426 (1931). In this circumstance, the Court of Appeals interpreted legislative intent and did not believe under any circumstance that the legislature intended to deny incompetents protection of the law. The Court was clearly sympathetic to the rights of incompetents to obtain support and other economic relief in a separation action.

However, twelve years later, the Court of Appeals held that a mentally incompetent person may not maintain an action for divorce in New York absent statutory authority. Mohrmann v. Kob, 291 N.Y.181, 51 N.E.2d 921 (1943). In so holding, the Court of Appeals noted that the decision to divorce is of such a personal nature in which volition is implicit. Id. The Court of Appeals noted that in a divorce proceeding, the end to a marital relationship is sought. Clearly, the Court was uncomfortable extending to a guardian the right to make such a

personal decision as to whether to divorce or not. Note that the marriage did not apparently occur during the period of incompetency.

c. Incapacity

An action to annul a marriage on the grounds of physical incapacity of entering into the marriage may be brought by either party provided that the incapable person was unaware of the incapacity at the time of marriage or unaware that it was incurable. The incapacity must continue, be incurable and the action must be commenced within five years of the marriage. See DRL §140 (d)

III. GROUNDS FOR DIVORCE, SEPARATION, ANNULMENT AND DISSOLUTION

A. Divorce

1. No fault statute DRL section 170 (7) grounds

A relatively new section of the Domestic Relations Law creates the "irretrievable breakdown" ground for divorce in New York. At least one party needs to state under oath that the marital relationship "has broken down irretrievably for a period of at least six months". The final decree or judgment of divorce however will not be made and entered until all ancillary issues are determined by the Court or by agreement of the parties. The no fault provisions

are found at New York Domestic Relations Law section 170 (7). Its provisions apply to actions started on or after **October 12, 2010**.

Notwithstanding the legislative intent to streamline and eliminate the necessity for grounds based trials and hearings, we have already had litigation over the new "no fault provisions". The case law unfortunately is clear as mud.

a. Sufficient pleadings; summary judgment and entitlement to a trial

How much specificity is required in a complaint where the ground for divorce is based on section 170(7) and further, is it necessary to allocate blame on one of the spouses for the breakdown in the marriage?

NOT MUCH SPECIFITY REQUIRED AND NO BLAME NEEDED: Vahey v. Vahey, 35 Misc.3d 691, 940 N.Y.S.2d 824 (Sup. Ct. Nassau Co. Palmieri, J. February 3, 2012) Defendant-wife's motion to dismiss no fault complaint for failure to comply with specific factual allegations normally required by CPLR 3016 (c) was denied; "Nothing in the DRL section 170(7) requires any allegations of fault or responsibility for the breakdown in the marriage… Nor does CPLR 3016 (c) apply since its provisions only apply to allegations of misconduct. No fault, by its very nature, does not involve misconduct. " Accordingly, a litigant's sworn statement that the marriage has been irretrievably broken for a period of six months or more is all that is required.

The epitome of brevity for a divorce pleading: A litigant's self-serving declaration that the marriage has been irretrievably broken for a period of six months of more is all that will be required, but that statement is not needed until the final judgment of divorce is ready to be rendered. A. C v. D.R, 32 Misc.3d 293, 927 N.Y.S.2d 496 (Nassau County Sup. Ct. 2011 Falanga, J.). Also see: Townes v. Coker, 35 Misc. 3d 543, 943 N.Y.S.2d 823 (Nassau County Sup. Ct. Bruno, J.)

SPECIFITY REQUIRED BUT NO BLAME:

The Strack case also contains holdings relevant to pleading specificity requirements and statute of limitations defenses. The Court determined that the five year statute of limitations defense was applicable to irretrievable breakdown divorce cases, but was not dispositive in the present case as the Plaintiff's complaint contained allegations of marital discord that occurred within the five year period of time. Strack v. Strack, 31 Misc 3d 258, 916 N.Y.S.2d 759 (Sup Ct. Essex County, 2011). Furthermore, "…to the extent that some instances of marital discord occurred more than five years ago, the Court finds such instances to be a part of a continuing course of conduct…" Id.

The Strack court did not hold that section 3016 of the Civil Practice Law and Rules was inapplicable to no fault grounds. The Strack court found the no-fault pleadings in its case were sufficient under the specificity requirements. The pertinent allegations are as follows:

"…The relationship between husband and wife has broken down such that it is irretrievable and has been for a period of at least six months. For a period of time greater than six months, Defendant and Plaintiff have had no emotion in their marriage, and have kept largely separate social schedules and vacation schedules. Each year Plaintiff and Defendant live separately throughout most of the winter months. Though they share the residence for several months out of the year, Plaintiff and Defendant have not lived as husband and wife for a period of time greater than six months. Plaintiff believes the relationship between she and Defendant has broken down such that it is irretrievable and that the relationship has been this way for a period of time greater than six months… Strack at 916 N.Y.S.2d 759, 762.

b. Can you at least get **summary judgment** under the no fault statute to dispense with a trial on grounds?

YES, BUT ONLY IF EVERYTHING ELSE IS RESOLVED:

Summary judgment granted where all ancillary issues determined under post-nuptial agreement and grounds for divorce was no fault. Townes v. Coker, 35 Misc. 3d 543, 943 N.Y.S.2d 823 (Nassau County Sup. Ct. 2012 Bruno, J.) "The Legislature did not enact a defense to this cause of action and courts cannot employ statutory construction to enact an intent that the Legislature did not express."

See also Tuper v. Tuper, 98 A.D.3d 55, 946 N.Y.S.2d 719 (4th Dep't 2012). Palermo v. Palermo, 35 Misc.3d 1211, 950 N.Y.S.2d 724 (Sup. Ct. Monroe Co. 2011 Dollinger, J.): "The new no fault statute is a 'no trial on

fault' edict. Grounds cannot be disputed" . aff'd on appeal (100 A.D.3d 1453 4th Dep't 2012).

If all issues have been resolved under a pre-existing Separation Agreement, summary judgment may be possible on the divorce while preserving issues of non-compliance for trial: See e.g.: Burger v. Burger, 36 Misc.3d 752, 951 N.Y.S.2d 332, (Sup. Ct Nassau County, 2012): That branch of the Wife's motion seeking summary judgment for a divorce under 170(7) where there is a pre existing separation agreement granted. All issues were resolved except for the parties' respective claims for non-compliance with the Agreement. Wife's sworn statement that marriage was irretrievably broken sufficient; Court is not authorized to add or insert requirements to no fault provisions. Id.

NO SUMMARY JUDGMENT BECAUSE YOU HAVE TO FIRST RESOLVE ALL OF THE ANCILLARY ISSUES (BUT AT LEAST YOUR NO FAULT PLEADING CAN BE BRIEF):

Nassau County Supreme Court (Falanga, J.) held that summary judgment on a no fault divorce was not proper for a Plaintiff despite also finding that … "A plaintiff's self-serving declaration about his or her state of mind is all that is required for the dissolution of marriage on grounds that it is irretrievably broken…" A. C v. D.R, 32 Misc.3d 293, 927 N.Y.S.2d 496 (Nassau County Supreme Court 2011 Falanga, J). In so doing, Judge Falanga also vacated his prior order directing a bifurcated trial. Bifurcation is a manner of dividing a trial

into segments which are then tried separately. The issue of fault was often bifurcated from other issues in a divorce action with the thought being that absent grounds, other issues such as equitable distribution would not need to be reached.

NO SUMMARY JUDGMENT AND THERE IS A RIGHT TO A TRIAL ON IRRETRIEVABLE BREAKDOWN:

On February 3, 2011, the Essex County Supreme Court (Muller, J.) held in Strack v. Strack , among other things, that "a genuine issue of material of fact existed as to whether the relationship between husband and wife had broken down irretrievably for a period of at least six months…". Strack v. Strack, 31 Misc.3d 258, 916 N.Y.S.2d 759 (Sup. Ct Essex County, 2011). The defendant in Strack had made a pre-trial motion to dismiss and in the alternative had asked the Court to treat the motion as one for summary judgment on the issue of irretrievable breakdown in marriage. Id. Apparently this was the third divorce action that the Plaintiff had commenced during the marriage and she had voluntarily discontinued the two prior actions and apparently the Defendant did not agree there was an irretrievable breakdown. Id. The Defendant apparently felt that his beliefs as to the viability of the marriage warranted summary judgment in his favor, but the Court disagreed and set the matter down for an "immediate" trial on the issue of whether there had been an irretrievable

breakdown in the marriage. Id. The Court held that it, and not the parties, was the one to decide whether there was an irretrievable breakdown. Id.

Also see: Schiffer v. Schiffer, 33 Misc. 3d 795, 930 N.Y.S.2d 827 (Sup. Ct Dutchess County, 2011) – Summary judgment on no fault ground denied because unresolved issues of custody and equitable distribution remained. Also, the legislature "has not removed a defendant's basic right to contest grounds".

c. No-fault: Two actions pending or old action still pending

Not all pre-October 12, 2010 actions for divorce have found their way through to settlement, trial or appeal. For such actions that were commenced prior to the availability of no fault grounds, the litigants may be desirous to take advantage of the new no fault provisions. Why?

To avoid expensive and uncertainty of a fault trial;

To take advantage of presumptive temporary maintenance guidelines that are also in effect for actions commenced after October 12, 2010;

To take advantage of presumptive counsel fee awards that are also in effect for actions commenced after October 12, 2010;

To keep an earlier valuation date which would be lost if the "older" action was discontinued.

However the no fault provisions and presumptions technically apply to actions commenced on or after October 13, 2010 . So does this mean a

Defendant cannot avail himself of the no fault statute or presumptive guidelines?

Judge Falanga in the first A.C. v. D.R. case said no. Basically in that case the husband had commenced an action for divorce in July, 2010 but was not able to serve the wife until October 26, 2010. (Was she ducking service perhaps?) In the meantime, the wife commenced a divorce action on October 22, 2010 and was able to get the husband served asap. In any event husband moved to consolidate the two actions arguing that similar relief and issues were at play and that his action should take priority since his action was commenced first (remember under the present rules action is commenced not by service but by filing for and obtaining an index number). The wife opposed and argued that consolidation would be prejudicial to her since it would deprive her of her rights under the new maintenance and counsel fee guidelines. She convincingly argued that the applicable law relative to interim awards is different for pre October 12th, 2010 and post October 12, 2010 actions and that a joint trial should be ordered. The court agreed with the wife, opining that full consolidation would be prejudicial to her rights as she would not be able to avail herself of the new guidelines and a joint trial would allow the husband to still utilize his earlier commencement date for purposes of valuation and establishment of grounds. See A.C. v. D.R., 31 Misc.3d 517, 921 N.Y.S.2d (Sup. Ct Nassau County, 2011, Falanga, Jr.)

The commencement of a matrimonial action prior to October 12, 2010 does not prohibit the Defendant from asserting a counterclaim based on irretrievable breakdown of marriage. Heinz v. Heinz, 31 Misc.3d 601, 920 N.Y.S.2d 870 (Nassau County Supreme Court 2011); A.C. v. D.R., *supra* and Granger v. Granger, 31 Misc3d 1210 (A), 927 N.Y.S.2d 816 (Sup. Ct Queens County, 2011). Nor would it preclude the Plaintiff from bringing a subsequent action for divorce on the no-fault grounds even if the pre-no fault matter is still pending. Rinzler v. Rinzler , 97 A.D.3d 215, 947 N.Y.S.2d 844 (3d Dep't 2012).

Finally, dismissal of a fault based divorce action for failure to make out a prima facie case does not preclude a subsequent no-fault action. Dayanoff v. Dayanoff, 96 A.D.3d 895, 946 N.Y.S.2d 624(2d Dep't 2012).

(2) Additional Grounds for a divorce

The enactment of a no fault ground for divorce in New York has reduced substantially the number of fault based divorce filings. Although fault actions are becoming less frequent, it is still advisable to be familiar with the fault provisions. Included in these materials is a review of the three most commonly used fault grounds for divorce in New York: adultery, cruelty and abandonment. There will then be a discussion concerning imprisonment as grounds for divorce, as well as the other no fault grounds for divorce. This section of the materials

will conclude with a discussion concerning Annulment and Dissolution of Marriage proceedings.

a. ADULTERY

i. Statutory Authority

DRL 170 provides, in part, the following:

An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:

(4) The commission of an act of adultery, provided that adultery for the purposes of articles ten, eleven, and eleven-A of this chapter, is hereby defined as the commission of an act of sexual intercourse, oral sexual conduct or anal sexual conduct, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant. Oral sexual conduct and anal sexual conduct include, but are not limited to, sexual conduct as defined in subdivision two of section 130.00 and subdivision three of section 130.20 of the penal law.

Penal Law 130.00 (2) which is referred to in DRL 170(4) provides the following:

2. (a) "Oral sexual conduct" means conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus, or the mouth and the vulva or vagina.

(b) "Anal sexual conduct" means conduct between persons consisting of contact between the penis and anus.

Penal Law 130.20 (3) which is referred to in DRL 170(4) provides the following:

A person is guilty of sexual misconduct when:

3. He or she engages in sexual conduct with an animal or a dead human body.

Note—there are various defenses to adultery which are discussed later in this outline.

ii. Statutory Definition—What's Included and What's Not Included

Contrary to what many people think, not all sexual conduct constitutes adultery. Essentially, adultery includes sexual intercourse, oral sex and anal sex. It does not include such things as kissing or fondling. A person can have a relationship with another adult, and if they kiss, or even of they touch each other, that conduct, alone, will not constitute adultery as strictly defined in DRL 170(4). Note---such conduct may, however, constitute cruel and inhuman treatment.

iii. Single Act Sufficient

A single act of adultery is sufficient to establish the adultery cause of action. Salomon v. Salomon, 102 Misc.2d 427, 423 N.Y.S.2d 605 (Sup. Ct. Suffolk County, 1979). The "single act" rule is in stark contrast to the cruel and inhuman treatment cause of action which, by in large, requires some course of wrongdoing and not merely one single act of misconduct.

iv. Criminal Nature

Adultery is still a crime in New York (Penal Law 255.17). It is a Class B misdemeanor subject to a two year statute of limitations.

v. Act of Adultery Occurring During Pendency of Divorce Action

Litigants often ask their attorneys whether it is "safe" to have sexual relations with someone else after a divorce action has been commenced, and whether such conduct would constitute adultery. In light of a 2005 Third Department case, the answer is no and yes—it is not "safe" to have sex with someone else during the pendency of an action because such conduct may constitute adultery. Golub v. Ganz, 22 A.D.3d 919, 802 N.Y.S.2d 526 (3d Dep't 2005). Likewise, in Dougherty v. Dougherty, 256 A.D.2d 714, 680 N.Y.S.2d 759 (3d Dep't 1998), a husband never set forth a cause of action for adultery in his divorce complaint. At trial, however, the proof established that the wife had engaged in adultery with a female paramour. The court granted the husband a divorce on the grounds of adultery and noted that, where there is a variance between a pleading and proof admitted at trial, the court may take it upon itself to amend the pleadings to conform to the proof so long as "no prejudice has been demonstrated."

b. CRUELTY:

i. Statutory Authority

DRL 170 provides, in part, the following:

An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:

(1) The cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental wellbeing of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant.

ii. Key Statutory Elements

In order to establish a cruelty cause of action, one must show three key elements: Conduct, Causation and Effect.

- Conduct—the acts themselves ---cruel and inhuman;
- Causation—the acts must endanger plaintiff's physical or mental wellbeing;
- Effect—the acts must render it unsafe ***or*** improper for the parties to cohabit together.

iii. Course of Conduct

Unlike adultery which, as previously noted, can be established with merely one act, cruel and inhuman treatment generally requires a course of conduct. See Milone v. Milone, 266 A.D.2d 363, 698 N.Y.S.2d 173 (2d Dep't 1999); and Breen v. Breen, 272 A.D.2d 425, 708 N.Y.S.2d 326 (2d Dep't 2000).

iv. Long Term vs. Short Term Marriage—A Sliding Scale

Whether a divorce will be granted on the grounds of cruel and inhuman treatment depends, in part, on the length of the marriage. The longer the marriage, the more proof which is needed. While the establishment of certain conduct may, in a one or two year marriage, justify the awarding of a divorce on

the grounds of cruel and inhuman treatment, the establishment of those identical facts in a twenty year marriage may be insufficient to warrant the award of a divorce on cruelty grounds.

v. Long Term ("Vintage") Marriage

A high degree of proof is required for cruelty grounds in a "vintage" (long-term) marriage.

Key cases:

- Hessen v. Hessen, 33 N.Y.2d 406, 353 N.Y.S.2d 421 (1974) — Conduct which may be considered cruel and inhuman treatment in a short term marriage may not be held to the same standard when introduced to establish divorce grounds in a longer term marriage.
- Brady v. Brady, 64 N.Y.2d 339, 486 N.Y.S.2d 891 (1985) — Held that whether a plaintiff has established a cause of action for a cruelty divorce depends, in part, on the duration of the marriage. The court noted that, "conduct must be viewed in the context of the entire marriage, including its duration, in deciding whether particular actions can properly be labeled as cruel and inhuman." Id. at 894.

See also: Nichols v. Nichols, 19 A.D.3d 775, 797 N.Y.S.2d 139 (3d Dep't 2005); E.D. v. M.D., 7 Misc.3d 1013, 801 N.Y.S.2d 233 (Sup. Ct. Suffolk County, 2005); Ridley v. Ridley, 275 A.D.2d 941, 714 N.Y.S.2d 396

(4th Dep't 2000); Arunas v. Arunas, 227 A.D.2d 424, 644 N.Y.S.2d 520 (2d Dep't 1996); Palin v. Palin, 213 A.D.2d 707, 624 N.Y.S.2d 630 (2d Dep't 1995).

vi. **Exception: Long Term Marriage -- Little Time Living Together**

Generally, a seventeen year marriage would be considered of long duration, and a high burden of proof would be required to demonstrate misconduct serious enough to support the granting of a divorce on the grounds of cruel and inhuman treatment. However, in view of the brief period of co-residence during the fourteen years immediately preceding the commencement of the action, the court found the plaintiff's burden of proof to be that which would be required in a short term marriage. H.B. v. J.B.,13 Misc.3d 1215, 824 N.Y.S.2d 754 (Sup. Ct Nassau County, 2006).

vii. **Short Term Marriage**

In a marriage of shorter duration, lesser conduct may constitute cruel and inhuman treatment. Miller v. Xiao Mei, 295 A.D.2d 144, 743 N.Y.S.2d 103 (1st Dep't 2002). See also, Shou-Tsung Lin v. Straub, 282 A.D.2d 234, 722 N.Y.S.2d 546 (1st Dep't 2001); Reiss v. Reiss, 170 A.D.2d 589, 566 N.Y.S.2d 365 (2d Dep't 1991); Rieger v. Rieger, 161 A.D.2d 227, 554 N.Y.S.2d 613 (1st Dep't 1990); Steiner v. Steiner, N.Y.L.J., 4/8/85, p. 14, col. 5 (Sup. Ct Richmond County).

Query—What constitutes a long or short term marriage for purposes of cruel and inhuman treatment?

In Israel v. Israel, 242 A.D.2d 891, 663 N.Y.S.2d 460 (4th Dep't 1997), the Fourth Department held that a 9 year marriage was not a "long-term" marriage for purposes of cruel and inhuman treatment grounds.

On the other hand, in Sim v. Sim, 241 A.D.2d 660, 659 N.Y.S.2d 574 (3d Dep't 1997), the Third Department held that a high degree of proof was necessary to establish cruel and inhuman treatment in an 11 year marriage.

viii. Specific Types of Conduct—Nature of Cruelty Required

a. Physical Violence, Verbal Abuse or the Threat of Violence

Divorces were granted in the following cases on the grounds of cruel and inhuman treatment due to a sufficient showing of physical violence, verbal abuse or threats of violence:

i. Allen vs. Allen, 6 Misc.3d 1039, 800 N.Y.S.2d 341 (Sup. Ct. Bronx County, 2005) where the court granted a divorce, even without medical proof. The court noted the following:

> "The legislature of the State of New York does not yet require proven acts of domestic violence to be considered in matrimonial actions like this one, where custody and visitation are not at issue. Here, however, domestic violence has been proven and two Courts have found it would be unsafe for the parties to cohabit. As a result, judges of those Courts issued orders of protection to prevent it. It is this Court's opinion that in situations such as these, domestic violence constitutes cruel and inhuman treatment per se. To not recognize such proven domestic violence in divorce actions as prima facie proof of cruel and inhuman treatment is to minimize the dangers of domestic violence. Moreover, by issuing orders of protection to the plaintiff and her child, the criminal and family Courts have each independently concluded the defendant's conduct endangered their well being. Thus, it is academic that in addition to being a violation of those orders, it would be improper and unsafe for the parties to cohabit."

b. One Violent Episode Such As Severe Beating

i. One violent episode may amount to cruel and inhuman treatment. Rojek v. Rojek, 234 A.D.2d 1011, 651 N.Y.S.2d 813 (4th Dep't 1996); Pompa v. Pompa, 259 A.D.2d 338, 687 N.Y.S.2d 25 (1st Dep't 1999). Several years of the husband making false, denigrating accusations towards the wife and one episode of violence which caused the wife to suffer chest pains, palpitations and anxiety held to be sufficient to warrant a divorce on the grounds of cruel and inhuman treatment. See also Jones v. Jones, 289 A.D.2d 983, 734 N.Y.S2d 796 (4th Dep't 2001).

For contrary results, see the following cases:

i. Palin v. Palin, 213 A.D.2d 707, 624 N.Y.S.2d 630 (2d Dep't 1995); Melville v. Melville, 29 A.D.2d 970, 289 N.Y.S.2d 416 (2d Dep't 1968). Wenderlich v. Wenderlich, 34 A.D.2d 726, 311 N.Y.S.2d 797 (4th Dep't 1970); Concetto v. Concetto, 50 A.D.2d 883, 377 N.Y.S.2d 164 (2d Dep't 1975).

c. Emotional Abuse

i. The husband's lack of communication with his wife, isolation of her, name calling, controlling behavior and refusal to end his 'friendship' with his alleged paramour and to attend marriage counseling were all deemed acts which demonstrated that continued cohabitation was improper. The Third Department upheld the lower court's determination that defendant's

conduct amounted to a "systematic pattern of emotional neglect." Freas v. Freas, 33 A.D.3d 1069, 822 N.Y.S.2d 798 (3d Dep't 2006).

ii. In Xiaokang Xu v. Xiaoling Shirley He, 24 A.D.3d 862, 804 N.Y.S.2d 867, (3d Dep't 2005), a husband was granted a divorce in a 16-year, childless marriage (deemed to be "long-term" by the court). The Third Department found that the following was evidence of the wife's cruel and inhuman treatment: during verbal disagreements, the wife summoned the police for the purpose of scaring and upsetting the husband. When the husband's parents were staying with the parties, the wife verbally attacked them, threatened to have them arrested, damaged personal property, and forced them to leave house on a cold, winter day, thereby humiliating husband. The wife made unfounded accusations against the husband to his family, sent harassing e-mails to the husband, left him threatening phone messages, and confronted him at work, all of which caused him to experience stress, anxiety, sleeplessness, depression, and thoughts of suicide.

iii. Nichols v. Nichols, 19 A.D.3d 775, 797 N.Y.S.2d 139 (3d Dep't 2005)--Evidence supported a finding in divorce proceedings that the husband's treatment of the wife was cruel and inhuman, even though the parties had been married for over thirty years. The court credited the wife's testimony that the husband had been cruel, authoritarian and demeaning throughout entire

period, and that his behavior during last five years of marriage caused the wife to seek treatment for serious clinical depression.

Sexual Infidelity and Disclosure of Adultery to Spouse

Note---Proof of adultery can, itself, constitute cruel and inhuman treatment.

i. Evidence of a wife's extramarital relationship provided a sufficient basis to grant the husband a divorce on the ground of cruel and inhuman treatment, even though the wife maintained that she did not pursue the extramarital relationship until after she had left marital residence. Gentner v. Gentner, 289 A.D.2d 886, 736 N.Y.S.2d 431 (3d Dep't 2001).

ii. In Fladell v. Fladell, 274 A.D.2d 413, 711 N.Y.S.2d 780 (2d Dep't 2000), the Second Department reversed the lower court's denial of a divorce on the grounds of cruel and inhuman treatment. It noted that a divorce may be granted on the grounds of cruel and inhuman treatment where the defendant's conduct renders cohabitation improper, though not necessarily unsafe. Here, considering all of the circumstances of the case, including but not limited to evidence that the defendant engaged in an open adulterous affair, the plaintiff was deemed to have established a prima facie case for cruel and inhuman treatment.

iii. Evidence that a spouse engaged in an extramarital affair was deemed sufficient to warrant a divorce on cruelty grounds, even

without medical proof of the effect of the cruelty. Rauchway v. Kotyuk, 255 A.D.2d 885, 680 N.Y.S.2d 361 (4th Dep't 1998).

In light of the above cases, it is advisable that whenever attorneys plead an adultery cause of action, the same facts constituting the adultery should also be alleged as part of a cruel and inhuman treatment cause of action.

e. False Accusations of Infidelity

False accusations of a spouse's infidelity can also constitute cruel and inhuman treatment. For this proposition, see the following cases:

i. Xiaokang Xu v. Xiaoling Shirley He, 24 A.D.3d 862, 804 N.Y.S.2d 867 (3d Dep't 2005); Zhao v. Li, 300 A.D.2d 169, 750 N.Y.S.2d 856 (1st Dep't 2002); Viana v. Viana, 272 A.D.2d 916, 706 N.Y.S.2d 812 (4th Dep't 2000); Richardson v. Richardson, 186 A.D.2d 946, 589 N.Y.S.2d 624 (3d Dep't 1992); Wilbourne v. Wilbourne, 173 A.D.2d 289, 569 N.Y.S.2d 680 (1st Dep't 1991).

f. Alcohol and/or Drug Abuse

i. A husband was entitled to divorce on ground of cruel and inhuman treatment where the wife abused alcohol throughout marriage, used crack cocaine intermittently during last three years of marriage, was repeatedly admitted to rehabilitation centers and mental health facilities, and became aggressive when intoxicated. Shortly before the husband commenced his divorce action, the wife pursued him in a vehicle and purposely rammed her

vehicle into his, leading to criminal charges against her, and a stay away order of protection in the husband's favor. Holmes v. Holmes, 25 A.D.3d 931, 807 N.Y.S.2d 217 (3d Dep't 2006).

ii. Redgrave v. Redgrave, 759 N.Y.S.2d 233, 304 A.D.2d 1062 (3d Dep't 2003) – The husband's recurring episodes of anger and volatile conduct, precipitated by his excessive consumption of alcohol and other conduct as noted in the decision, presented a clear threat to the wife's physical and emotional well-being, rendering it unsafe for her to continue to cohabit with him.

g. Compulsive Gambling

i. In Reiss v. Reiss, 170 A.D.2d 589, 566 N.Y.S.2d 365 (2d Dep't 1991), *motion for leave to appeal denied*, 79 N.Y.2d 758, 584 N.Y.S.2d 446 (1992), the appellate division reversed the lower court's denial of a divorce to the husband on the grounds of cruel and inhuman treatment. The Second Department noted that the wife's compulsive gambling was a factor in granting a cruelty divorce. The appellate division paid credence to the husband's assertion that the wife's compulsive gambling had a deleterious impact upon the parties' relationship and, together with certain other acts committed by the plaintiff, created an oppressive and unsafe marital environment.

h. Surveillance or Wiretapping

i. K. v. B, 13 A.D.3d 12, 784 N.Y.S.2d 76 (1st Dep't 2004)—One of the factors cited by the First Department in granting the wife a divorce on the grounds of cruel and inhuman treatment was the husband's wiretapping and monitoring of her conversations without her knowledge. Other factors cited by the appellate division included false accusations of adultery, alleged marital rape, threats to ruin the wife's business, and the husband's "financial maneuvers."

ii. Gascon v. Gascon, 187 A.D.2d 955, 590 N.Y.S.2d 369 (4th Dep't 1992)—The wife was entitled to a divorce on grounds of cruel and inhuman treatment where the husband illegally tape-recorded and monitored her telephone calls over a five and one-half year period, and made use of the tape recordings to question the wife about her conduct.

i. Refusal to Engage In Sexual Relations In Conjunction With Other Factors

A spouse's refusal to engage in sexual relations for an extended period of time ordinarily is considered part of a constructive abandonment cause of action for divorce (see discussion later in this outline). However, some cases suggest that denial of sexual relations coupled with other misconduct, can constitute cruel and inhuman treatment.

i. In Conrad v. Conrad, 16 A.D.3d 794, 790 N.Y.S.2d 594 (3d Dep't 2005), the court noted that the parties' marriage began to disintegrate

in 1995 when the husband sought mental health counseling to address work-related issues. The proof established that the wife was unsupportive. She moved out of the marital bedroom in 1998, and the parties had no sexual relations since 1999. The husband had insomnia, depression and related disorders. Based on these factors, including the denial of sexual relations, the appellate division upheld the lower court's grant of a divorce to the husband on the grounds of cruel and inhuman treatment.

ii. In Stricos v. Stricos, 263 A.D.2d 659, 692 N.Y.S.2d 801(3d Dep't 1999), one of the factors cited by the appellate division in upholding the award of a cruelty divorce was the fact that the husband had "lost all interest and desire to engage in sexual relations" with the wife, and repeatedly indicated that he did not love her. The proof also showed that the husband verbally abused his wife and demeaned her. There was also one episode of physical violence.

iii. See also Moss v. Moss, 187 A.D.2d 775, 589 N.Y.S.2d 683 (3d Dep't 1992); Green v. Green, 127 A.D.2d 983, 513 N.Y.S.2d 49 (4th Dep't 1987).

ix. **Conduct Which Generally is Insufficient to Grant a Divorce on the Grounds of Cruelty**

a. **Mere Incompatibility of the Parties**

i. In Desbonnet v. Desbonnet, 34 A.D.3d 625, 826 N.Y.S.2d 327 (2d Dep't. 2006), the appellate division held that plaintiff's evidence did not rise to the level of cruel and inhuman treatment required to grant a divorce as "the marital misconduct must be distinguished from mere incompatibility and serious misconduct from trivial misconduct."

ii. See also: Cauthers v. Cauthers, 32 A.D.3d 880, 821 N.Y.S.2d 239 (2d Dep't 2006); . Martin v. Martin, 224 A.D.2d 597, 638 N.Y.S.2d 674 (2d Dep't 1996). ; Brady v. Brady, 64 N.Y.2d 339, 486 N.Y.S.2d 891 (1985); Hessen v. Hessen, 33 N.Y.2d 406, 353 N.Y.S.2d 421 (1974).

b. "Dead Marriage"

A "dead marriage" will not justify the granting of a divorce on the grounds of cruel and inhuman treatment. See William MM v. Kathleen MM, 203 A.D.2d 883, 611 N.Y.S.2d 317 (3d Dep't 1994); Andritz v. Andritz, 131 A.D.2d 529, 516 N.Y.S.2d 262 (2d Dep't 1987). Brady, supra at 891; Hessen, supra at 421.

c. Irreconcilable Differences

Similarly, and contrary to what many litigants think, the fact that the parties have "irreconcilable differences" does not equate with cruel and inhuman treatment. See Tsakis v. Tsakis, 110 A.D.2d 763, 488 N.Y.S.2d 51 (2d Dep't 1985) app'l dismissed 65 N.Y.2d 3 (1985).

d. Lack of Communication

i. E.D. v. M.D., 7 Misc.3d 1013, 801 N.Y.S.2d 233 (Sup. Ct Suffolk County, 2005)--Evidence of a "stressful relationship," verbal abuse, and a failure to communicate for periods of time does not, under controlling case law, constitute cruel and inhuman treatment, citing Brady v. Brady, supra; Hessen v. Hessen, supra.

e. Isolated Acts Standing Alone

i. E.D. v. M.D., supra-- A divorce was denied, in part, where the physical contact between the parties was ”isolated and minimal.”

ii. See also Wenderlich v. Wenderlich, 34 A.D.2d 726, 311 N.Y.S.2d 797 (4th Dep’t. 1970) and Melville v. Melville, 29 A.D.2d 970, 289 N.Y.S.2d 416 (2d Dep’t. 1968)---Isolated acts of violence do not constitute cruel and inhuman treatment.

f . Failure to Keep a Clean Home

i. Shortis v. Shortis, 274 A.D.2d 880, 711 N.Y.S.2d 578 (3d Dep’t 2000).

g. Absence with Good Reason

Quadvlieg v. Quadvlieg, 183 Misc.2d 86, 701 N.Y.S.2d 800 (Sup. Ct Queens County, 1999).

h. Embarrassment and Name Calling

i. In Omahen v. Omahen, 289 A.D.2d 890, 735 N.Y.S.2d 236 (3d Dep’t 2001), the evidence was insufficient to support the wife's claim of

cruelty where she acknowledged that her husband never subjected her to any physical abuse and never even swore at her prior to their physical separation. In overturning the lower court's grant of a divorce, the appellate division noted that, "mere unpleasant conduct, such as name calling, does not constitute cruel and inhuman treatment." The court also stated that the, "unhappiness and embarrassment did not have an apparent effect on plaintiff's physical or mental health. Thus it provides no basis for a finding that cohabitation with defendant would be either unsafe or improper."

ii. In Gerber v. Gerber, 15 A.D.3d 829, 790 N.Y.S.2d 282 (3d Dep't 2005), the Third Department reversed the lower court's grant of a cruelty divorce in just a nine year marriage. It noted that the husband presented no evidence that the wife's conduct caused any tangible physical or mental ailment, or caused a threat to his health or safety. The appellate division concluded that, "mere unpleasant conduct, such as name calling, does not constitute cruel and inhuman treatment."

i. Financial Demands and Manipulation of Assets

i. In Hearst v. Hearst, 40 A.D.3d 269, 835 N.Y.S.2d 158 (1st Dep't 2007), the First Department denied a divorce on the grounds of cruel and inhuman treatment where the proof focused on the wife's manipulation of assets and financial demands. Specifically, the husband, who suffered from debilitating ailments predating this 1990 marriage, failed to show that the further

deterioration of his already fragile physical and mental condition in the years preceding commencement of the action was in any way caused by the wife's alleged misconduct by placing the title of assets in her own name. Similarly, the husband's testimony that the wife's financial demands caused him stress showed mere martial discord, not misconduct that so endangered his health as to make it unsafe or improper to cohabit with her.

c. ABANDONMENT: ACTUAL AND CONSTRUCTIVE

i. Statutory Authority

DRL 170 provides, in part, the following:

An action for divorce may be maintained by a husband or wife to procure a judgment divorcing the parties and dissolving the marriage on any of the following grounds:

(2) The abandonment of the plaintiff by the defendant for a period of one or more years.

ii. Core Element

The core element of abandonment is a refusal to fulfill a fundamental obligation of the marriage contract, without justification, and without the consent of the spouse seeking the divorce on the abandonment ground. Schine v. Schine, 31 N.Y.2d 113, 335 N.Y.S.2d 58 (1972).

"To grant a divorce on the grounds of abandonment requires that one spouse not fulfill the basic obligations of the marriage relationship for a

period of one year or more and that said conduct be unjustified and without the consent of the abandoned spouse." See, e.g., Carpenter v. Carpenter, 278 A.D.2d 695, 718 N.Y.S.2d 105 (3d Dep't 2000). To establish abandonment, the evidence must also show a "hardening of resolve" by one spouse not to live with the other." Hage v. Hage, 112 A.D.2d 659, 492 N.Y.S.2d 172 (3d Dep't 1985).

A divorce cannot be granted on the ground of mutual abandonment since the result is internally and logically inconsistent. Pincus v. Pincus, 138 A.D.2d 687, 526 N.Y.S.2d 501 (2d Dep't 1988).

The case law establishes that there can be two types of abandonment: ***actual*** abandonment and ***constructive*** abandonment. Both will be discussed hereafter. It is important to note, however, that statutorily, there is simply an "abandonment" cause of action for divorce per DRL 170(2). The words "actual" and "constructive" do not appear in the statute.

iii. Actual Abandonment

Actual abandonment arises when one spouse departs from the marital residence for at least one year as of the time of commencement of the matrimonial action. The case law suggests that an actual abandonment based on a spouse's departure from the marital residence must have various elements. In addition to the requirement that it continue for at least one year, the departure must also be:

- Unjustified

- Voluntary
- Without the consent of the aggrieved spouse and against his or her will, and
- With an intention of the departing spouse not to return.

iv. Lock Out Cases

Abandonment can be established where one spouse locks the other out of the marital residence for more than one year against that party's will.

In Schine v. Schine, 31 N.Y.2d 113, 335 N.Y.S.2d 58 (1972), the Court of Appeals determined that a wife abandoned her husband when she changed the lock on the entrance door of the marital home, effectively excluding the husband from the home for a period of more than one year. The court determined that, while the wife may have initially changed the locks for innocent reasons, she acted in a conscious disregard of whether the husband would have access to the home.

Where the wife changed the locks to her residence, without giving her estranged husband a key, abandonment was established. Gleckman v. Kaplan, 215 A.D.2d 527, 626 N.Y.S.2d 549 (2d Dep't 1995).

Where the husband changed the locks on the marital residence without justification or consent, the wife was entitled to a divorce on the grounds of abandonment. Carpenter v. Carpenter, 278 A.D.2d 695, 718 N.Y.S.2d 105 (3d Dep't 2000).

Where the only lock that was changed by defendant was the remote controlled garage door opener, and where plaintiff still had access to the house, the act of changing the "lock" on the remote controlled garage door did not constitute abandonment. Lind v. Lind, 89 A.D.2d 518, 452 N.Y.S.2d 204 (1st Dep't 1982).

Where the wife barred her husband from the marital home by changing the locks because she feared for her life and safety due to the husband's conduct, her actions were deemed to be justified, and the court rejected the husband's claim that her "lock out" constituted an abandonment of him. Graves v. Graves, 177 Misc.2d 358, 675 N.Y.S.2d 843 (Sup. Ct Richmond County 1998).

In Soldinger v. Soldinger, 21 A.D.3d 469, 799 N.Y.S.2d 815, (2d Dep't 2005), *leave to appeal dismissed* 6 N.Y.3d 805, 812 N.Y.S.2d 442 (2006), a husband failed to establish a prima facie case of abandonment on the ground that his wife abandoned him for more than one year by locking him out of the marital residence without justification. The proof established that, in fact, the husband had not been excluded from the marital residence since he retained his own keys to the home, and the wife never changed the locks. The Second Department noted that "abandonment by lock out" occurs when one spouse changes the lock on the entrance door of the marital abode, or the place where he

or she is living, thus effectively excluding the other spouse, unless the act is justified.

Note---where the party seeking the divorce on the grounds of abandonment changes the locks at the marital residence, that act can prevent an abandonment divorce, even after a spouse moved out.

v. Refusal To Relocate

An unjustified refusal to relocate with a spouse can also constitute abandonment under DRL 170(2).

In Bazant v. Bazant, 80 A.D.2d 310, 439 N.Y.S.2d 521 (4th Dep't 1981), the Fourth Department determined that an unjustified refusal by one spouse to accompany his or her relocating spouse may constitute an abandonment. In order to establish abandonment on this basis, there must be a showing that the relocation was a matter of necessity (health, livelihood, compelling family obligation, etc.).

vi. Constructive Abandonment

Courts have determined that an unjustified failure or refusal of one spouse to engage in sexual relations with the other spouse for more than one year can constitute an act of abandonment. This is commonly referred to as "constructive abandonment."

Key Elements:

- The refusal to engage in sexual relations must persist for more than one year;
- The refusal to engage in sexual relations must be without the complaining spouse's consent---This requires a showing that the complaining spouse repeatedly requested a resumption of sexual relations;
- Defendant's refusal to engage in sexual relations must be unjustified.

i. A refusal to have sexual relations may constitute constructive abandonment in the eyes of the law per Diemer v. Diemer, 8 N.Y.2d 206, 203 N.Y.S.2d 829 (1960), if the refusal is unjustified, willful and continued despite repeated requests from the other spouse for resumption of sexual relations. Chase v. Chase, 208 A.D.2d 883, 618 N.Y.S.2d 94 (2d Dep't 1994); Wanser v. Wanser, 214 A.D.2d 611, 625 N.Y.S.2d 90 (2d Dep't 1995). See, also, Pascarella v. Pascarella, 210 A.D.2d 915, 621 N.Y.S.2d 821 (4th Dep't 1994).

Query—To establish constructive abandonment, must the one year lack of sexual relations occur immediately prior to commencement of the matrimonial action? In Czaban v. Czaban, 44 A.D.3d 894, 844 N.Y.S.2d 383 (2d Dept. 2007), the Second Department affirmed the grant of a divorce by the Nassau County Supreme Court on the grounds of constructive abandonment. The appellate division found that the husband had made out a prima facie case of constructive abandonment by testifying that from 1998 through 1999, his wife

had unjustifiably refused to engage in sexual relations with him despite his repeated requests. The court noted that DRL 170 “does not require that the abandonment have occurred immediately prior to the commencement of the action,” citing Froeb v. Froeb, N.Y.L.J., Aug. 4, 1994, at 24, col. 4 (Sup. Ct Suffolk County, Prudenti, J.)

vii. Lack of Social Companionship As Constructive Abandonment

In C.P. v. G.P., 6 Misc.3d 1034, 800 N.Y.S.2d 343 (Sup. Ct, Nassau County 2005), Justice Anthony J. Falanga, in denying defendant husband's motion to dismiss plaintiff wife's cause of action for abandonment, held that a cause of action for constructive abandonment was properly premised on the defendant's failure to engage in any "social intercourse" with the plaintiff for the requisite one year period.

In Michaelessi v. Michaelessi, 10 Misc.3d 1067, 814 N.Y.S.2d 562 (Sup. Ct Queens County 2005), the court held that an element that serves as a necessary, fundamental component of a marriage is the requirement that a married individual serve as a social companion to his or her spouse. A marriage in which one spouse refuses to engage in any social interaction, despite repeated requests, is just as much a "desertion or abandonment" of a "basic obligation springing from the marital contract" as one in which there are no sexual

relations." The Court followed the holding in C.P. v. G.P., supra, and granted a divorce on abandonment grounds.

B. Defense Issues Pertaining to Adultery, Cruelty and Abandonment

1. Adultery Defense Issues

a. Statutory Authority

DRL 171 sets forth statutory defenses to an adultery cause of action for divorce. The statute provides the following:

In either of the following cases, the plaintiff is not entitled to a divorce, although the adultery is established:

1. Where the offense was committed by the **procurement or with the connivance of the plaintiff.**

2. Where the offense charged has been **forgiven** by the plaintiff. The forgiveness may be proven, either affirmatively, or by the voluntary cohabitation of the parties with the knowledge of the fact.

3. Where there has been no express forgiveness, and no voluntary cohabitation of the parties, but **the action was not commenced within five years after the discovery by the plaintiff of the offense charged**.

4. **Where the plaintiff has also been guilty of adultery** under such circumstances that the defendant would have been entitled, if innocent, to a divorce (emphasis added).

b. Cases and Practice Tips

i. **Procurement or Connivance**

Procurement arises where the spouse bringing the adultery action has proximately caused the adultery of the other spouse. Connivance is the corrupt

consenting to the adultery and is shown by acts or omissions of the complaining party that tended to bring about the adultery or which reflect the complaining party's consent to the adultery. Santoro v. Santoro, 269 A.D.859, 56 N.Y.S.2d 539 (2d Dep't 1945); McAllister v. McAllister, 137 N.Y.S. 833 (Sup. Ct New York County, 1912). Said another way, if the spouse bringing the adultery cause of action actually arranged for the offense or consented to it, that party should not be permitted to bring the adultery action.

When the offense was committed with the procurement or connivance of the plaintiff, the plaintiff was not entitled to an adultery divorce. Armstrong v. Armstrong, 92 N.Y.S. 165 (Sup. Ct New York County, 1905).

The defense of procurement or connivance is an affirmative one which defendant must plead and prove. If not raised by the defendant, plaintiff will not have to disprove the defense in order to obtain a judgment. See, e.g., Maryon v. Maryon, 60 A.D.2d 623, 400 N.Y.S.2d 160 (2d Dep't 1977).

Bottom Line—This defense is rarely utilized. It is, indeed, rare where a party actually procures the adultery in an effort to use it as grounds for divorce. The defense is a hold over from prior law, before the Divorce Reform Act, where adultery was the only divorce ground and people, out of desperation, sometimes resorted to desperate measures such as procuring adultery in order to obtain a divorce.

ii. **Forgiveness**

Unlike the procurement/connivance defense which is rarely seen, the "condonation" defense is much more common. If a spouse condones or forgives the adultery, either expressly, or by voluntarily cohabiting with the other spouse while knowing of the adultery, then the condonation defense comes into play. Again, the defendant waives the defense if it is not affirmatively pled in the answer and if it is not proved at trial. Palin v. Palin, 213 A.D.2d 707, 624 N.Y.S.2d 630 (2d Dep't 1995).

Adultery will not be found where the adultery has been forgiven by the plaintiff. Forgiveness may be proven either affirmatively or by the voluntary cohabitation of the parties with knowledge of the adultery. A repetition of the adultery, after forgiveness, revives the action. Ryan v. Ryan, 132 Misc. 339, 229 N.Y.S. 511 (Sup. Ct Kings County, 1928).

iii. Statute of Limitations

A divorce action on the grounds of adultery must be commenced within five years of the **discovery** by the plaintiff of the offense charged. This is a point often overlooked by attorneys. The adultery, itself, need not have occurred within the five years prior to the commencement of the action. What is required is that the action be commenced within five years of the discovery of the adultery. Contrast this with the cruel and inhuman treatment cause of action discussed hereafter (DRL 210), where the statute runs from when the conduct occurs.

Practice Tip—With any of the DRL 171 statutory defenses, the failure to plead them as affirmative defenses in the answer can result in the inability to raise them at the time of trial. It is critical that the defenses be affirmatively set forth in the answer in order to preserve them for trial.

iv. Adultery By The Accusing Spouse

This defense is also called "recrimination." A plaintiff may be denied a divorce because of the plaintiff's own commission of adultery. To be successful in this defense, defendant must show that the defendant, if innocent, would be entitled to a divorce based upon the plaintiff's adultery. So, for example, if defendant forgave plaintiff's adultery, or if defendant arranged for or procured plaintiff's adultery, the recrimination defense fails.

Although a husband normally would have had adultery grounds against his wife, his recrimination barred such relief and it, likewise, barred the wife from obtaining an adultery divorce against the husband. Anonymous v. Anonymous, 57 A.D.2d 938, 395 N.Y.S.2d 103 (2d Dep't 1977).

Practice Tip—In light of the DRL 171(4) affirmative defense, it is best practice for attorneys to advise their clients not to engage in their own adultery, even if their spouse is guilty of adultery. Such conduct could undermine the client's adultery cause of action and give rise to the recrimination defense.

2. Cruelty: Statute Of Limitations [DRL 210]:

DRL 210 establishes a five year statute of limitations for actions brought

on the grounds of cruel and inhuman treatment. Specifically, the statute sets forth the following:

No action for divorce or separation may be maintained on a ground which arose more than five years before the date of the commencement of that action for divorce or separation except where:

(a) In an action for divorce, the grounds therefore are one of those specified in subdivision (2), (4), (5) or (6) of section one hundred seventy of this chapter.

Note-- DRL 210 specifically provides that the five year statute of limitations is not applicable to grounds under DRL 170 subsections 2,4,5 and 6 (abandonment, adultery, and living separate and apart pursuant to a written matrimonial agreement or judgment of separation).

a. **Five Years Prior to Date of Commencement**

DRL 210 precludes granting a divorce on cruelty grounds which arose more than five years before the action was commenced.

A cruelty divorce action may not be maintained based on allegations which arose more than five years before the action was commenced. I.S. v. R.S., 117 A.D.2d 780, 499 N.Y.S.2d 106 (2d Dep't 1986).

b. **Continuous Course of Conduct**

Under evolving case law, there now is an exception to the five year cruelty statue of limitations. Specifically, where plaintiff can demonstrate a "continuous course of conduct," allegations beyond the five year statute can be alleged in the complaint.

Testimony regarding incidents which fall outside of the five-year period may be relevant where a continuing course and pattern of cruel and inhuman treatment is alleged. Habib v. Habib, 278 A.D.2d 277, 717 N.Y.S.2d 317 (2d Dep't 2000); Vestal v. Vestal, 273 A.D.2d 461, 712 N.Y.S.2d 359 (2d Dep't 2000).

In Sanacore v. Sanacore, the Appellate Division, Third Department, affirmed denial of partial summary judgment motion seeking dismissal of certain portions of the verified complaint which concerned allegations which were beyond the statute of limitations. Those allegations, when part of a general course of cruel and inhuman treatment, are admissible. Sanacore v. Sanacore, 74 A.D.3e 1468, 904 N.Y.S.2d 234 (3d Dep't 2010).

c. Conduct Subsequent to the Commencement of the Divorce Action

Query---At trial, can a court consider conduct which occurred subsequent to the commencement of a divorce action?

i. Improper to consider

In CP vs. GP, 6 Misc. 3d 1034, 800 N.Y.S.2d 343 (Sup. Ct Nassau County, 2005), an amended verified complaint set forth acts that occurred subsequent to the commencement of the action. The court held that because the date of the commencement cuts off a defendant's rights to marital assets, in a case where a plaintiff does not have grounds for divorce as of the date of the commencement of an action, it would be improper to permit such plaintiff leave

to re-plead misconduct that occurred after the commencement date (citing Klein v. Klein, 4 Misc.3d 1026, 798 N.Y.S.2d 345[Sup. Ct Nassau County, 2004]; Hallingby v. Hallingby, 159 Misc.2d 988, 607 N.Y.S.2d . 555 [Sup. Ct New York County, 1993]).

Proper to Consider As Part Of Defense

i. Cauthers v. Cauthers, 32 A.D.3d 880, 821 N.Y.S.2d 239 (2d Dep't 2006)-- Evidence that the parties' relationship was, at times, strained, tense, and unpleasant, but that the parties continued to cohabit after divorce action was commenced, including sleeping in the same bed and eating most meals together, and continued to attend family and social functions together, was insufficient to merit granting a divorce on the grounds of cruel and inhuman treatment.

d. Cruelty: Lure and Attraction Of a Paramour

Unlike the DRL 171 defenses for adultery, there are no statutory defenses to cruel and inhuman treatment with the exception of the DRL 210 statute of limitations defense.

Nevertheless, a spouse defending a cruelty action can present proof that the real reason plaintiff is pursing the divorce action is because there is "someone else involved," i.e. a girlfriend or boyfriend. This concept is known as the "lure and attraction of a paramour."

Thus, evidence of plaintiff's adultery has been deemed to be material to a divorce action brought on the grounds of cruel and inhuman treatment. See e.g.

Bloom v. Bloom, 52 A.D.2d 1030, 384 N.Y.S.2d 281 (4th Dep't 1976); Trombley v. Trombley, 64 A.D.2d 993, 408 N.Y.S.2d 568 (3d Dept. 1978).

Similarly, in Trombley v. Trombley, supra, the Third Department held that, while there is no recriminatory defense in a divorce action brought on the grounds of cruel and inhuman treatment, the defendant may show that plaintiff's misconduct such as "lure and attraction of a paramour" is the real reason that plaintiff is seeking the divorce, rather than defendant's alleged cruelty (citing Bloom, supra).

Cruelty: Forgiveness and Plaintiff's Cruelty Are NOT Defenses:

The DRL 171 defenses are only applicable to an adultery cause of action. They are not applicable to a cruel and inhuman treatment cause of action. This is yet a further reason why a party, pleading adultery, should re-plead the same allegations as cruel and inhuman treatment. While plaintiff's adultery grounds could be barred by one of the DRL 171 defenses, plaintiff, conceivably, could succeed on the cruelty cause of action with the very same proof since the DRL 171 defenses would be inapplicable.

The affirmative defenses of condonation or forgiveness are not available in a divorce action based on cruelty. See Volkell v. Vokell, 102 A.D.2d 889, 477 N.Y.S.2d 60 (4th Dep't 1981) and Fritz v. Fritz, 88 A.D.2d 778, 451 N.Y.S.2d 519 (2d Dep't 1984). Further, the affirmative defense of recrimination

is not available in a divorce action based on cruelty. Mante v. Mante, 34 A.D.2d 134, 309 N.Y.S.2d 944 (2d Dep't 1970).

There are some cases suggesting that "provocation" may be a defense under certain circumstances, where one party's otherwise cruel actions could be justified based on the other party's conduct. See, e.g., Raynore v. Raynore, 186 A.D.2d 1082, 588 N.Y.S.2d 230 (4th Dep't 1992); Passantino v. Passantino, 87 A.D.2d 973, 450 N.Y.S.2d 98 (4th Dep't 1982). In other words, if plaintiff alleges that defendant acted in a cruel manner, defendant could assert that he or she was forced to act in such a manner and was justified in doing so due to provocation.

As a general rule, however, defendant cannot raise or assert plaintiff's own cruelty as a defense to plaintiff's cruel and inhuman treatment cause of action. To the contrary, the fact that plaintiff engaged in cruel conduct simply gives defendant the right to assert cruel and inhuman treatment as a counterclaim for divorce.

3. Abandonment: Consent and Justification

As previously noted in Topic A(3), to establish a cause of action based on actual abandonment, the departure from a residence must have been:

- Unjustified
- Voluntary

- Without the consent of the aggrieved spouse and against his or her will, and
- With an intention of the departing spouse not to return.

To establish a cause of action based on constructive abandonment:

- The refusal to engage in sexual relations must have persisted for more than one year;
- The refusal to engage in sexual relations must be without the complaining spouse's consent---and the complaining spouse must have repeatedly requested a resumption of sexual relations; and
- Defendant's refusal to engage in sexual relations must be unjustified.

The way to defeat an abandonment action is to show that plaintiff failed to prove the various required elements of the cause of action.

There are no statutory defenses to an abandonment action. As previously noted, the DRL 171 defenses only apply to adultery actions. Further, unlike for adultery and cruel and inhuman treatment, there is no statute of limitations for abandonment.

In Walis v. Walis, 192 A.D.2d 598, 596 N.Y.S.2d 167 (2d Dep't 1993), the appellate division noted that the DRL 210 five year statute of limitations for divorce actions does not apply to abandonment causes of action. Accordingly, the court ruled that the husband's abandonment action was not time barred.

To the extent that a plaintiff consented to defendant's abandonment, whether actual or constructive, the abandonment claim will be defeated. Moreover, defendant can seek to defeat the abandonment cause of action (both actual and constructive) by showing that the vacating of the marital residence or the denial of the sexual relations was, somehow, justified.

In P.K. v. R.K., 12 Misc.3d 1167, 820 N.Y.S.2d 844 (Sup. Ct Nassau County, 2006), the wife sued the husband on the grounds of abandonment and cruel and inhuman treatment. The husband moved to dismiss both grounds. The proof established that he did, in fact, leave the marital residence. However, he alleged that he moved out because of the wife's admitted affair and that, therefore, his departure was "justified." Justice Falanga noted that:

> "…generally, the issue of whether a defendant abandoned a plaintiff is a question of fact not amenable to summary resolution (see, Silbert v. Silbert, 22 A.D.2d 893). The law is well settled, however, that a defendant who has grounds to divorce a plaintiff, is justified in departing the marital home (see, Johnson v. Johnson, supra). In the case at bar, if the husband can demonstrate, as a matter of law, that he had grounds to divorce the plaintiff as of the date he moved out of the marital residence, his departure would be justified, as a matter of law, and the plaintiff's cause of action for divorce on the ground of abandonment would not be viable. There is a plethora of cases holding that a defendant spouse who dates, professes romantic affection for a person other than a spouse, and or reveals that he or she is involved in intimate relations with someone other than his or her spouse, engages in a course of conduct rendering it unsafe or improper for the parties to continue to cohabit, entitling a plaintiff spouse to a divorce on the ground of cruel and inhuman treatment (see, Rauchway v. Kotyuk, 255 A.D.2d 885; Haydock v. Haydock, 222 A.D.2d 554; Guneratne v. Guneratne, 214 A.D.2d 871; Clarkson v. Clarkson, 103 Ad2d 964; Hendery v. Hendery, 101 A.D.2d 624; Fritz v. Fritz, 88 A.D.2d 778). Here, the wife's admitted revelation to the husband in April 2003, that she was involved in an on-going long term sexual and emotional extramarital relationship, as a matter of law, constituted cruel and inhuman treatment of the husband by the wife and justified the husband's departure from the marital residence in January 2004… As the husband has demonstrated, as a matter of law, that he had grounds to divorce the wife as of January 2004, he has established that his departure from the marital residence was justified."

"Justification" is a defense to abandonment. Defendant bears the burden of pleading and proving the affirmative defense. "A subjective belief of justification, even if mistaken, will be a sufficient defense." Carpenter v. Carpenter, 278 A.D.2d 695, 718 N.Y.S.2d 105 (3d Dep't 2000). See also Delgado v. Delgado, 51 A.D.2d 741, 379 N.Y.S.2d 479 (2d Dep't 1976).

A spouse cannot obtain a divorce on abandonment grounds if he or she is guilty of misconduct sufficient to provide the other with grounds for divorce and, therefore, cannot establish that the absence was unjustifiable. McNair v. McNair, 262 A.D.2d 1048, 692 N.Y.S.2d 273 (4th Dep't 1999).

A wife's temporary and intermittent absences from the marital residence over a five year period when she served as her mother's primary caretaker did not constitute "abandonment," as alleged by the husband. The absences were justified as her mother had Alzheimer's, and the wife showed an intention to return and in fact, returned home several times a year to prepare and freeze meals for the husband. Quaedvlieg v. Quaedvlieg, 183 Misc.2d 86, 701 N.Y.S.2d 800 (Sup. Ct Queens County. 1999).

If the abandoning party makes an offer to return or reconcile, it will defeat an abandonment cause of action provided that the offer is made in good faith within a reasonable time after the departure. Nicit v. Nicit, 181 A.D.2d 1046, 583 N.Y.S.2d 858 (4th Dep't 1992).

But see, Haymes v. Haymes 221 A.D.2d 73, 646 N.Y.S.2d 315 (1st Dep't 1996)—A reconciliation involving brief and isolated resumption of cohabitation and sexual relations, did not necessarily preclude an action for divorce on abandonment grounds which had already been commenced.

C. Imprisonment

Domestic Relations Law §170(3) permits an action for divorce to be maintained on the ground that the Defendant is confined in prison for a period of at least three years after the marriage. McKinney's Domestic Relations Law §170 (3).

The confinement must take place after the marriage. In Scheu v. Vargas, a divorce action based on confinement was dismissed where the parties were married after the period of incarceration had commenced. Scheu v. Vargas, 4 Misc.3d 375, 778 N.Y.S.2d 663 (Sup.Ct Rensselaer County, 2004).

The key to establishing confinement is to show that actual confinement occurred for the requisite period, whether in a prison or in jail, prior to commencement of the action. Pergolizzi v. Pergolizzi, 59 Misc.2d 1027, 301 N.Y.S.2d 366 (N.Y.Sup. Ct Kings County, 1969). Actual confinement is not established if the individual is "out on bail" or merely convicted: rather, it is the date that the individual is physically confined that serves as the measuring date. In addition, the confinement must be continuous and without a break for at least three years.

A cause of action based on the imprisonment ground is subject to a statute of limitations of five years. McKinney's Domestic Relations Law §210. The Court of Appeals has held that a cause of action for divorce on the imprisonment ground continues to arise anew each day the defendant spouse remains in prison for three or more years until the defendant is released whereupon the limitations period begins to run. Covington v. Walker, 3 N.Y.3d 287, 819 N.E.2d 1025, 786 N.Y.S.2d 409 (2004). In this case, the parties were married in 1983. In 1985, the husband was convicted of murder and sentenced to a prison term of 25 years to life. The wife waited 16 years before commencing a divorce action on imprisonment grounds. However, at the time she commenced the action, the husband was still incarcerated. The Court of Appeals ruled that the five year statute of limitations only began to run once Defendant was released from confinement and therefore, the wife was not time barred from commencing her divorce action on imprisonment grounds.

D. Other "no fault" divorce options

i) Living Separate and Apart for More than One Year Following Execution of a Written Separation Agreement

There are two other "no fault" grounds available in New York for divorce. However, they require either a pre existing written separation agreement or a judgment of separation. McKinney's Domestic Relations Law §170 (5) and (6). In addition, there must be substantial performance of all the

terms and conditions of the judgment or agreement by the plaintiff-spouse. Id. The parties also have to be physically separated.

Before the 2010 no fault provisions, the main no fault divorce was founded on the existence of a written separation agreement and this would form the basis for what was often referred to as a "conversion" judgment of divorce. McKinney's Domestic Relations Law §170 (6). However, neither a few scribbles on a napkin, nor an email exchange is sufficient to constitute a written separation agreement. Rather, the agreement must be in writing, subscribed by the parties and acknowledged or proved in the same manner as would entitle a deed to be recorded. Id.

In addition, the written separation agreement or a memorandum of the agreement must be filed in the Office of the Clerk of the County wherein either party resides to meet the requirements for a conversion divorce. Id. The filing must occur prior to the commencement of the divorce action. Id.

A period of at least one year must pass from the execution of the agreement and the parties must maintain separate residences during that period of time. Separation agreements can be voided by a reconciliation of the parties, although occasional cohabitation or resumption of marital relations may not be sufficient to constitute reconciliation. Zelnik v. Zelnik, 169 A.D.2d 317, 573 N.Y.S.2d 261 (1st Dep't 1991). Courts will also examine whether the conduct of the parties manifested a repudiation of the agreement or whether they continued

substantially to comply with the agreement. See Pugsley v. Pugsley, 288 A.D.2d 284, 733 N.Y.S.2d 125 (2d Dep't 2001).

Finally, substantial (not total) performance of all of the terms and provisions of the agreement on the part of the plaintiff must be established. Occasional failure to permit visitation, even for as long as three months, has not been found as sufficient to defeat a conversion divorce action. See Zambito v. Zambito, 171 A.D.2d 918, 566 N.Y.S.2d 789 (3d Dep't 1991) appeal dismissed 78 N.Y.2d 1125, 578 N.Y.S.2d 881, 586 N.E.2d 64 (1991). However, the failure to pay support for significant periods of time resulting in substantial arrears may preclude a finding of substantial compliance. Berman v. Berman, 72 A.D.2d 425, 424 N.Y.S.2d 899 (1st Dep't 1980), affirmed 52 N.Y.2d 723, 436 N.Y.S.2d 274, 417 N.E.2d 568 (1980).

Query: What happens if one or more clauses in the separation agreement are void but the other clauses are not? Can one party still seek a divorce under DRL §170(6)?

Answer: Yes, especially if the agreement contains a severability clause. Laura WW v Peter WW, 51 AD 3d 211, 856 N.Y.S. 2d 258 (3d Dept. 2008).

Query: Can the parties agree to lengthen the period of separation that must exist before a conversion divorce is sought?

Answer: Probably not as such would be void, as against public policy. See P.B. v L.B., 19 Misc. 3d 186, 855 N.Y.S. 2d 836 (Sup. Ct Richmond County 2008).

Query: What if the entire agreement is void?

Answer: If the agreement is void at the inception, it cannot serve as a basis for a conversion divorce. Angeloff v. Angeloff, 56 N.Y.2d 982, 453 N.Y.S.2d 630, 439 N.E.2d 346 (1982).

ii) Living Separate and Apart for More than One Year Pursuant To A Judgment or Decree of Separation

Where a judgment of separation serves as the basis for a subsequent divorce action, there must be a specific judgment or decree directing the parties to live separate an apart. Actions for separation are extremely rare.

An Order of Protection or orders granting other ancillary relief do not qualify as such a separation decree. See Wechter v. Wechter, 50 A.D.2d 826, 376 N.Y.S.2d 180 (2d Dep't 1975) affirmed 40 N.Y.2d 964, 390 N.Y.S.2d 920, 359 N.E.2d 428 (1976); Becker v. Becker, 44 A.D.2d 676, 353 N.Y.S.2d 796 (2d Dep't 1974) affirmed 36 N.Y.2d 787, 369 N.Y.S.2d 697, 330 N.E.2d 646 (1975).

Parties must also maintain separate homes for at least one year following issuance of the decree or judgment. If a judgment or decree of separation is made, reconciliation does not vacate the order, rather, a joint application by the

spouses must be made to revoke the decree or judgment of separation. See Domestic Relations Law §203.

Contrary to what many clients may think, a divorce is not automatic after one year has passed from the time that a separation agreement is signed or after one year has passed from the time that a decree of separation is made. Rather, an action for divorce must be commenced.

E. Difference of relief available; divorce and separation actions

Article Eleven of the Domestic Relations Law provides the grounds for an action for separation. A separation action does not dissolve the marriage; rather it separates the parties as to bed and board. McKinney's Domestic Relations Law §200. The existence of a valid separation agreement which makes provisions for support bars an action for separation. Borax v. Borax, 4 N.Y.2d 113, 172 N.Y.S.2d 805, 149 N.E.2 326 (1958).

The grounds for a separation action are:

a. The cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental wellbeing of the plaintiff as renders it unsafe or improper to cohabit with the defendant. McKinney's Domestic Relations Law §200 (1). Note-- this is identical to Domestic Relations Law §170(1) which is the

cruelty ground for divorce. See the grounds materials above for a comprehensive discussion of cruelty grounds.

b. The abandonment of the plaintiff by the defendant. McKinney's Domestic Relations Law §200 (2). Note --there is no requirement that the abandonment last for at least one year, in contrast to the abandonment ground for divorce. The intent to not return must be coupled with the absence. See the grounds materials above for a comprehensive discussion of abandonment as a ground for divorce.

c. The neglect or refusal of the defendant-spouse to provide for the support of the plaintiff spouse where the defendant-spouse is chargeable with such support under the provisions of section 232 of the Domestic Relations Law or section 412 of the Family Court Act. McKinney's Domestic Relations Law §200 (3). This is the only ground for separation which does not also serve as a ground for divorce.

d. The commission of adultery. McKinney's Domestic Relations Law §200 (4). See the grounds for divorce materials above for extensive discussion of substantive issues surrounding the adultery cause of action for divorce.

e. The confinement of the defendant in prison for a period of three or more consecutive years after the marriage. McKinney's Domestic

Relations Law §200 (5). See the grounds for divorce materials above for extensive discussion of substantive issues and concerns to establish this cause of action.

Note— One cannot obtain equitable distribution in an action for separation. Because the proof required to establish grounds in a separation action is nearly identical to the proof required in a divorce action, practitioners rarely bring separation actions since equitable distribution is not available in such an action.

F. Other less common matrimonial actions

1. Annulments/Declaration as to the Nullity of a Marriage

a. VOID MARRIAGES

Certain marriages are considered void due to the status of the parties, or their ages, at the time of the marriage. See McKinney's Domestic Relations Law §5 and 6. These include bigamous marriages, marriages considered "incestuous," or marriages with persons under the age of fourteen. An incestuous or bigamous marriage is not valid and one does not need a judicial declaration that it is not valid. See McCullen v. McCullen, 162 A.D. 599, 147 N.Y.S. 1069 (1st Dep't 1914). However, while such marriages are void at the inception, there are proceedings that can be brought for a judicial declaration to formalize and memorialize that the marriage was indeed null and void. Such proceedings are actions seeking a declaration as to the nullity of the marriage. Provisions authorizing these types of proceedings are contained in

§140 of the Domestic Relations Law and other sections of the Domestic Relations Law, and are as follows:

a. Bigamous Marriage- §6 of the Domestic Relations Law prohibits marriages where a former spouse is alive, and the former marriage has not been dissolved or annulled. §140 of the Domestic Relations Law authorizes a proceeding to annul a bigamous marriage. {Note: Where two spouses have proof of their marriages, there is a presumption that the first marriage was dissolved by death, divorce or annulment, but such is a rebuttable presumption, which if rebutted, renders second marriage void *ab initio* and thus the second marriage cannot be ratified by a subsequent dissolution of the first marriage. See e.g. Mack v. Brown, 82 A.D.2d 133, 919 N.Y.S.2d 166 (2d Dep't 2011).}

b. Marriage with a person under 14- §15-a of the Domestic Relations Law prohibits a marriage where a party is under the age of 14. §140 of the Domestic Relations Law authorizes a proceeding to annul a marriage due to capacity caused by age.

c. Incestuous marriage- §5 of the Domestic Relations Law declares that marriages between parents and children, aunts and nephews, uncles and nieces and brothers and sisters are void; the statute

further provides sanctions and penalties for the parties to the marriage.

b. VOIDABLE MARRIAGES

Other marriages may be voidable due to the capacity of the parties to marry, or other circumstances existing at the time of the marriage. These may include marriages involving persons between the ages of 16 and 18, or persons with physical or mental disabilities. McKinney's Domestic Relations Law §7. Voidable marriages are considered valid marriages unless and until an action is brought for an annulment, and the court grants the annulment. In annulment proceedings, the court retains discretion to determine whether or not a voidable marriage should be annulled. In fact, spouses may ratify an otherwise voidable marriage by voluntary cohabitation after knowledge of the facts that led to the voidability of the marriage. The grounds for annulment are set forth in §140 of the Domestic Relations Law and are as follows:

i. Former husband or wife is still alive

A bigamous marriage is a void marriage. An action declaring the bigamous marriage void can be brought by either of the parties during the life-time of the other spouse or by the former husband or wife.

ii. One party to a marriage was under the age of consent

The age of consent in New York for marriage is 18. McKinney's Domestic Relations Law §7 (1). A marriage in which one of the parties is under

the age of 14 is illegal and void. McKinney's Domestic Relations Law §15-a. Parental consent is required when a minor between 16 and under 18 years of age wishes to marry, and court approval is also required if the minor is over the age of 14 but under the age of 16 at the time of marriage. McKinney's Domestic Relations Law §15.

If one party is between the age of 14 and 18 at the time of the marriage, that marriage may be voidable at the option of the minor, although the court makes a discretionary determination concerning whether an annulment is appropriate. However, if cohabitation freely continues once the minor attains the age of majority, the marriage cannot be annulled on these grounds. McKinney's Domestic Relations Law §140 (b)

A marriage occurring outside of the State of New York with a minor who is a resident or domiciliary of New York is still voidable. Cunningham v. Cunningham, 206 N.Y. 341, 99 N.E. 845 (1912).

An action for an annulment based on these grounds may be maintained by the minor, by a parent of the minor, the minor's guardian or a person that the court permits to proceed as the minor's "next friend." McKinney's Domestic Relations Law §140 (b).

iii. One party is mentally retarded or mentally ill

An action to annul a marriage may be brought by any relative of a mentally retarded person who "has an interest to avoid the marriage" during the

lifetime of either party to the marriage. McKinney's Domestic Relations Law §140 (c). Note that only a relative who "has an interest to avoid the marriage" has standing to bring the action. For example, this could be a relative who may receive a greater inheritance should the marriage be annulled. See e.g. Farnham v. Farnham, 227 N.Y. 155, 124 N.E. 894 (1919).

An action to annul a marriage may be brought by any relative of a mentally ill person who has an interest to avoid the marriage during the continuance of the mental illness, or after the death of the mentally ill person so long as the other party is still alive. The mentally ill person may also bring an action if he/she is restored to "sound mind" unless there is voluntary cohabitation after the restoration to sound mind. McKinney's Domestic Relations Law §140 (c)

If a party was not aware that his/her spouse was mentally ill at the time of the marriage, the spouse of sound mind may bring an action for an annulment during the continuance of the other spouse's mental illness. McKinney's Domestic Relations Law §140 (c)

iv. Physical incapacity

An action for an annulment may be brought on the grounds that one of the parties was physically incapable of entering into the marriage. Such action may be brought by the spouse who does not have the incapacity provided the spouse was not aware of the incapacity. McKinney's Domestic Relations Law §140 (d).

An action may also be brought by the incapacitated spouse provided that the incapacitated spouse was unaware of his or her incapacity, or if aware, unaware that same was incurable. McKinney's Domestic Relations Law §140 (d)

Such actions also require that the incapacity continue, be incurable and the action must be commenced before five years have expired from the date of the marriage. McKinney's Domestic Relations Law §140 (d)

v. Consent to marriage procured by force, duress or fraud

The party against whom force, duress or fraud was perpetrated may bring an action for annulment. Annulment actions based on fraud are subject to the statue of limitations for actions based on fraud pursuant to the CPLR. See Civil Practice Law and Rules §214 (7).

The "injured" spouse's parent, or guardian or any relative of the inured spouse who has an interest to avoid the marriage may also bring such action, provided same is timely pursuant to the statute of limitations. If cohabitation voluntarily takes place after the fraud is discovered or after the duress or force, the annulment action cannot be brought. McKinney's Domestic Relations Law §140 (e) See e.g. Wu v. Wu, which held that, "departure is mandated upon acquiring full knowledge of fraud." 173 Misc.2d 883, 661 N.Y.S.2d 918 (1997).

vi. Incurable Mental Illness

Either party to a marriage may bring an action for annulment on the ground that one of them for a period of five years or more has been incurably

mentally ill. McKinney's Domestic Relations Law §140 (f). The disabled spouse must be adjudicated mentally ill by three (3) physicians who are mental health experts. McKinney's Domestic Relations Law §141(2).

Where a marriage is annulled on the grounds of a spouse's mental illness, the court may provide for the support of the disabled spouse during life from the property or income of the other spouse, including directing the posting of security, and the court may also make provisions for recovery against the non-disabled spouse's estate. McKinney's Domestic Relations Law §141.

2. Dissolution (Enoch Arden Law)

New York authorizes a special proceeding by which a spouse can seek a dissolution of the marriage on the ground that the other spouse is absent or has disappeared. The proceeding is brought by a petition which must contain specific elements. The procedural and substantive requirements for dissolution proceedings are set forth in Domestic Relations Law §220 and §221.

Substantively: a) the absence must be for at least the last five successive years during which time the petitioning spouse had no knowledge that the absent spouse was alive; b) the petitioning spouse must believe the other spouse to be dead; and c) a diligent search must have been made to discover evidence that the absent spouse is living. McKinney's Domestic Relations Law §221.

The applying spouse, deemed the "petitioner," must meet one of two jurisdictional grounds:

a. That he/she is a New York resident for one year immediately proceeding the commencement of the special proceeding. McKinney's Domestic Relations Law §220 (1) -or-

b. New York was the matrimonial domicile at the time the absent spouse disappeared. McKinney's Domestic relations Law §220(2).

§221 of the Domestic Relations Law authorizes notice by publication for dissolution proceedings. Specifically, notice of the proceeding is published in a newspaper for three consecutive weeks. McKinney's Domestic Relations Law §221. The newspaper should be one in an area where the couple was best known. Matter of Schulz, 187 Misc. 919, 65 N.Y.S.2d 575 (Sup. Ct Nassau County, 1946). The statute sets forth the particular wording which must be included in the notice. Id.

IV. COURT RULES, CERTIFICATION AND VERIFICATION REQUIREMENTS IN MATRIMONIAL ACTIONS

A. New York Trial Court Rules

The practitioner is well-advised to familiarize herself with the Uniform Rules for New York State Trial Courts as these rules are also applicable in many

instances to matrimonial actions. These rules are found under Part 202 of the NYCRR. Following are highlights from the provisions frequently encountered in matrimonial actions:

i. 22 NYCRR 202.5 – Papers filed in Court

The party filing the first paper pays and obtains the index number and that number shall be communicated to all other parties to the action and used in any communication and filing with the County Clerk's number.

ii. 22 NYCRR 202.6- Request for Judicial Intervention

A "RJI" can be filed any time after service of process and it will result in an action being assigned a judge. However, a "rji" can be filed as well for an action that is being commenced simultaneously with the filing of an Order to Show Cause seeking interim relief.

iii. 22 NYCRR 202.7- Affirmation of Good Faith

This section provides a template for a Notice of Motion. In addition, disclosure motions require affirmations that good faith attempts were made to resolve the issues first. An affirmation of good faith may not be required if an application is being made for *ex parte* relief, and is not required if an order of protection is being sought under section 240 of the Domestic Relations Law.

iv. 22 NYCRR 202.16 – Matrimonial Action

This is the section of the New York rules that are specifically applicable to all matrimonial actions. Its provisions cover multiple topics including the

formalities required for Statements of Net Worth; when Requests for Judicial Intervention must or should be filed; certification requirements for papers; rules regarding preliminary conferences; motions; and trial matters.

v. 22 NYCRR 202.16 (e)

"Every paper served on another party or filed or submitted to the court in a matrimonial action shall be signed as provided in section 130-1.-1a of this Title".

vi. 22 NYCRR 130-1.-1a-

This section requires every pleading, motion or other paper served on another party or submitted to the court to be signed by the attorney (or by a party if the party is pro se) and the name of the attorney shall be clearly printed or typed directly underneath the signature. Failure to comply with this section provides that the document "shall" be stricken absent good cause.

In addition, by signing a paper, the attorney or the party is certifying that to the best of his/her knowledge that the presentation of the paper and/or its contents are not frivolous. If the paper is an initiating pleading, one is further certifying that the matter was not obtained through illegal conduct or if it was, the attorney or the other persons responsible for the illegal conduct are not participating in the matter or sharing in the fee collected.

vii. 22 NYCRR 202.16a- Automatic Orders

The provisions of this section apply to all matrimonial actions and proceedings authorized by section 236 (2) of the Domestic Relations Law. These are the automatic stay provisions which are more fully set forth above under "The Papers".

B. Verification Requirements

A verification is a "statement under oath that the pleading is true to the knowledge of the deponent, except as to matters alleged on information and belief, and as to those matters he believes it to be true." McKinney's Civil Practice Law and Rules section 3020 and 3021.

The complaint in a matrimonial action must be verified. McKinney's Domestic Relations Law Section 211. Pleadings are almost always verified by the party, not the attorney, although verification by an attorney is permitted in certain instances such as litigation involving an infant. A notary public must witness a party signing the verification.

If the initial pleading is verified, then generally all responsive and subsequent pleadings must be verified. If the initial pleading is not verified, a responsive pleading may nonetheless contain separately verified counterclaims. McKinney's Civil Practice Law and Rules section 3020.

If the Plaintiff fails to verify his/her pleading, the Defendant can treat the lack of verification as grounds to disregard the pleading as a nullity, but only

after giving the Plaintiff due notice and only if the pleading needed to be verified in the first place. McKinney's Domestic Relations Law section 3022. Likewise if a responsive pleading fails to contain a required verification, the plaintiff can treat the same as a nullity, subject to notice to the Defendant.

Special note concerning an answer or reply to a cause of action alleging adultery: a party does not need to verify his or her answer or reply to that cause of action. However, if the defendant, while denying a cause of action founded upon adultery, elects to bring a counterclaim, he/she must verify that counterclaim. McKinney's Domestic Relations Law section 211.

V. FORMS

I. Application for Index Number
II. Summons with Notice
III. Summons with Notice marked up
IV. Notice of Appearance
V. Limited Notice of Appearance
VI. Complaint
VII. Verified Answer
VIII. Verified Answer with Counterclaims
IX. Verified Reply
X. Affidavit of Service
XI. Admission of Service
XII. Service by Mail
XIII. Motion for alternate means of service
XIV. Default divorce papers

Application For Index Number

INDEX NUMBER

DO NOT WRITE IN THIS SPACE

SARATOGA COUNTY CLERK

Application for INDEX NUMBER
Pursuant to CPLR §8018(a).
FEE $210.00

Spaces below to be TYPED OR PRINTED by applicant.

Title of Action or Proceeding

Plaintiff,

vs.

Defendant.

TYPE BELOW NAME AND ADDRESS OF ATTORNEY(S) FOR PLAINTIFF(S)

GORDON, TEPPER & DECOURSEY, LLP
Socha Plaza South
113 Saratoga Road
Glenville, New York 12302
(518) 399-5400

TYPE BELOW NAME AND ADDRESS OF ATTORNEY(S) FOR DEFENDANT(S)

INDEXED AND ENTERED
(CLOCK DATE)

UNKNOWN

Indexed and Entered

DO NOT WRITE ON LINE ABOVE

Title of Action or Proceeding to be TYPED or PRINTED by applicant.

INDEX NUMBER

SUPREME COURT, SARATOGA COUNTY

FEE

$210.00

Endorse This INDEX NUMBER On All Papers and advise your adversary of the number assigned

INDEXED AND ENTERED
(CLOCK DATE)

,

Plaintiff,

vs.

,

Defendant.

EXAMPLE OF UNFILED SUMMONS WITH NOTICE

SUPREME COURT OF THE STATE OF NEW YORK Index No.
COUNTY OF ALBANY

Date Summons filed:
Plaintiff designates Albany County as the place of trial.
The basis of the venue is Plaintiff resides in county.

DAFFNEY DUCK,
Plaintiff,
-against-

Summons with Notice

BUGS BUNNY,
Defendant.

Plaintiff resides at 123 Duluth Drive
Schenectady, NY 12303
County of Albany

ACTION FOR DIVORCE

To the above named Defendant:

You are hereby summoned to serve a Notice of Appearance, on the Plaintiff's attorneys within twenty (20) days after the service of this Summons, exclusive of the day of service (or within thirty (30) days after the service is complete if this Summons is not personally delivered to you within the State of New York); and in case of your failure to appear, judgment will be taken against you by default for the relief demanded in the notice set forth below.

Dated: _____, 2012

GORDON, TEPPER & DeCOURSEY, LLP

By: _____
Jenifer M. Wharton, Esq.
Attorneys for Plaintiff
Office & P.O. Address
Socha Plaza South - 113 Saratoga Road
Glenville, New York 12302
Tel.: (518) 399-5400

NOTICE: The nature of this action is to dissolve the marriage between the parties, on the grounds of* irretrievable breakdown in relationship.

The relief sought is,

A judgment of absolute divorce in favor of the plaintiff dissolving the marriage between the parties in this action. The nature of the ancillary relief demanded is*

- ☒ Maintenance of reasonable amount*
- ☒ Custody of one (2) infant children of the marriage, as follows: W. Coyote; P. Pig
- ☒ Child support of reasonable amount*
- ☒ Counsel fees
- ☒ Title to furniture and personal property of Plaintiff
- ☒ Declaration of separate property of Plaintiff
- ☒ Health insurance for Plaintiff
- ☒ Equitable distribution of marital property
- ☒ Distributive award of reasonable amount
- ☒ Title to Plaintiff's separate property
- ☒ Title to marital home
- ☒ Declaration of marital property
- ☒ Purchase, maintain, or assign life insurance or beneficiary designation on life or either spouse to ensure maintenance, child support, distributive award
- ☐ Incorporation of Separation Agreement into Judgment
- ☒ Wife to resume use of maiden name, to wit: Quacken
- ☐ Other

NOTICE TO LITIGANTS – DRL §255:

All parties to divorce actions are hereby given notice, pursuant to Domestic Relations Law Section §255, that once a judgment of divorce is entered, a person may, or may not, be eligible to be covered under his or her spouse's health insurance plan, depending upon the terms of the plan, but may be entitled to purchase health insurance through a COBRA option or may be required to secure health insurance on his or her own.

NOTICE OF ENTRY OF AUTOMATIC ORDERS (D.R.L. 236) Rev. 1/13
FAILURE TO COMPLY WITH THESE ORDERS MAY BE DEEMED
A CONTEMPT OF COURT

PURSUANT TO the Uniform Rules of the Trial Courts, and DOMESTIC RELATIONS LAW §236, Part B, Section 2, both you and your spouse (the parties) are bound by the following **AUTOMATIC ORDERS**, which have been entered against you and your spouse in your divorce action pursuant to 22 NYCRR §202.16(a), and which shall remain in full force and effect during the pendency of the action unless terminated, modified or amended by further order of the court or upon written agreement between the parties:

(1) ORDERED: Neither party shall transfer, encumber, assign, remove, withdraw or in any way dispose of, without the consent of the other party in writing, or by order of the court, any property (including, but not limited to, real estate, personal property, cash accounts, stocks, mutual funds, bank accounts, cars and boats) individually or jointly held by the parties, except in the usual course of business, for customary and usual household expenses or for reasonable attorney's fees in connection with this action.

(2) ORDERED: Neither party shall transfer, encumber, assign, remove, withdraw or in any way dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401K accounts, profit sharing plans, Keogh accounts, or any other pension or retirement account, and the parties shall further refrain from applying for or requesting the payment of retirement benefits or annuity payments of any kind, without the consent of the other party in writing, or upon further order of the court; except that any party who is already in pay status may continue to receive such payments thereunder.

(3) ORDERED: Neither party shall incur unreasonable debts hereafter, including, but not limited to further borrowing against any credit line secured by the family residence, further encumbrancing any assets, or unreasonably using credit cards or cash advances against credit cards, except in the usual course of business or for customary or usual household expenses, or for reasonable attorney's fees in connection with this action.

(4) ORDERED: Neither party shall cause the other party or the children of the marriage to be removed from any existing medical, hospital and dental insurance coverage, and each, and each party shall maintain the existing medical, hospital and dental insurance coverage in full force and effect.

(5) ORDERED: Neither party shall change the beneficiaries of any existing life insurance policies and each party shall maintain the existing life insurance, automobile insurance, homeowners and renters insurance policies in full force and effect.

IMPORTANT NOTE: After service of the Summons with Notice or Summons and Complaint for divorce, if you or your spouse wishes to modify or dissolve the automatic orders, you must ask the court for approval to do so, or enter into a written modification agreement with your spouse duly signed and acknowledged before a notary public.

"Insert the grounds for the divorce:
DRL § 1 70(l) - cruel and inhuman treatment
DRL § 170(2) - abandonment
DRL § 170(3) - confinement in prison
DRL § 170(4) - adultery
DRL § 170(5) - living apart one year after judgment of separation
DRL § 170(6) - living apart one year after execution of a separation agreement
DRL § 170(7) – irretrievable breakdown in relationship

STATE OF NEW YORK SUPREME COURT, COUNTY OF SARATOGA

Plaintiff,

INDEX NO.

-against-

Defendant.

ACTION FOR DIVORCE

STATE OF NEW YORK
COUNTY OF _____
CITY OF _____

_____, being duly sworn, deposes and says that she/ he resides in the Town of _____, County of _____, State of New York; is over the age of eighteen years; is not a party to the above entitled action.

Deponent further says that he served the Summons with notice in the above entitled action upon, _____ the Defendant above-named, at _____ _____, New York On the _____ day of _____, 2008, by delivering to and leaving with her personally a true copy of same; that he knew the person so served to be the defendant herein, said defendant having admitted to him that he/she is the defendant herein, and that the plaintiff was then _____, her/his lawfully wedded husband; that the summons so served upon the defendant was endorsed on the face thereof with the words, **ACTION FOR DIVORCE.**

Deponent states upon information and belief that said person so served is not in the Military service of the State of New York or of the United States as the term is defined in either the State or Federal Statutes.

Deponent further states that she/he describes the person actually served as follows:

Sex	**Skin Color**	**Hair Color**	**Age (Approx.)**	**Height (Approx.)**	**Weight (Approx.)**
☐ Male ☐ Female	☐ Black ☐ White ☐	☐ Light ☐ Med. ☐ Dark ☐			

Other Identifying Features:

_____
(PRINT NAME BELOW SIGNATURE)

Sworn to before me, this
_____ day of _____, 20___.

_____
NOTARY PUBLIC-COMMISIONER OF DEEDS

STATE OF NEW YORK
SUPREME COURT COUNTY OF _____

, Plaintiff, -against- Defendant.	**NOTICE OF LIMITED APPEARANCE** Index No.

To the Clerk of this Court and all parties of record:

PLEASE TAKE NOTICE, that the Defendant, _____, hereby appears in the above-entitled action, and that the undersigned has been retained as Attorneys for said Defendant for the limited purpose of contesting personal jurisdiction. I certify that I am admitted to practice in this Court.

Dated:

_____
_____, Esq.
GORDON, TEPPER & DeCOURSEY, LLP
Attorneys for Defendant
Socha Plaza South
113 Saratoga Road, Route 50
Glenville, NY 12302
Tel.: (518) 399-5400
www.gtdlaw.com

TO: Opposing Counsel Information

TATE OF NEW YORK
SUPREME COURT COUNTY OF _____

, Plaintiff, -against- Defendant.	**NOTICE OF APPEARANCE AND RETAINER** Index No.

SIR/MADAM:

PLEASE TAKE NOTICE, that the Defendant, _____, hereby appears in the above-entitled action, and that the undersigned has been retained as Attorneys for said Defendant, and demands that a copy of the Complaint and all papers in this action be served upon the undersigned at the office and post office address stated below. Take further notice that the Defendant requests that following ancillary relief:

☒ Maintenance of reasonable amount
☒ Custody of the infant children of the marriage, as follows: (names of children)

☒ Child support of reasonable amount
☒ Counsel fees
☒ Title to furniture and personal property of Defendant
☒ Declaration of separate property of Defendant
☒ Health insurance for Defendant
☒ Equitable distribution of marital property

☒ Distributive award of reasonable amount
☒ Title to Defendant's separate property
☒ Title to marital home
☒ Declaration of marital property
☒ Purchase, maintain, or assign life insurance or beneficiary designation on life or either spouse to ensure maintenance, child support, distributive award
☐ Incorporation of Separation Agreement into Judgment
☒ Wife to resume use of maiden name, to wit:
☐ Other

Dated:

_____
_____, Esq.
GORDON, TEPPER & DeCOURSEY, LLP
Attorneys for Defendant
Socha Plaza South
113 Saratoga Road, Route 50
Glenville, NY 12302
Tel.: (518) 399-5400

TO: Opposing Counsel Information

STATE OF NEW YORK
SUPREME COURT COUNTY OF SCHENECTADY

Plaintiff, -against- Defendant.	**VERIFIED COMPLAINT** Index No.

Plaintiff, complaining of the Defendant, by and through his/her attorneys, _____, respectfully alleges as follows:

1. That at all time hereinafter mentioned, Plaintiff was and continues to be a resident of the County of Saratoga and State of New York, and has been a resident of the State of New York for more than two (2) years immediately preceding the commencement of this action.

2. That upon information and belief, and at all times hereinafter mentioned, the Defendant was and continues to be a resident of the County of Saratoga and State of New York, and has been a resident of the State of New York for more than two (2) years immediately preceding the commencement of this action.

3. That Plaintiff and Defendant are husband and wife, having been married on _____in the Town _____, County of _____ and State of New York.

4. That there are _____ children born of this marriage, to wit: _____

5. That the relationship between Plaintiff and Defendant has broken down irretrievably for a period of at least six (6) months.

-or-

5. That at all times hereinafter mentioned, the Defendant has always conducted himself/herself in a proper manner and as a loving and devoted husband/wife, and the Defendant did not do, nor cause to be done, any act or thing which would tend to disturb the

proper matrimonial relations existing between Plaintiff and Defendant; that Defendant has always conducted himself/herself as a faithful and loyal husband/wife toward the Plaintiff, managed the household affairs with propriety and economy, and treated the Plaintiff with kindness and forbearance, and said Plaintiff disregarded the solemnity of her marital vows and obligations, and treated the Defendant in a cruel and inhuman manner.

6. That said cruel and inhuman treatment of the Plaintiff by the Defendant consisted of the following:

(a) (list allegations)

7. That Plaintiff's conduct as aforesaid, and more particularly, her/his unkind, harsh, inconsiderate, capricious, belligerent and unsocial treatment of the Defendant constitutes conduct on Plaintiff's part such as to have impaired the health and safety of the Defendant and to have adversely affected the physical and mental well-being of the Defendant and such as to render it unsafe and improper for Defendant to continue to live and cohabit with Plaintiff.

8. That by reasons of all of the said cruel and inhuman treatment practiced by the Plaintiff towards the Defendant, it has become unsafe and improper for the parties to continue to live and cohabit together as husband and wife.

9. That Defendant neither has condoned nor forgiven the said acts of cruel and inhuman treatment.

10. That five (5) years have not elapsed since the commission of said acts of cruel and inhuman treatment.

-or-

5. That Defendant has failed and refused to engage in sexual relations with Plaintiff since _____.

6. That although Plaintiff made it known to Defendant that Plaintiff desired to engage in sexual relations with _____, the Defendant failed and refused to engage in sexual relations with Plaintiff for a continuous period since _____.

7. That Plaintiff did nothing on _____ part to warrant Defendant's failure and refusal to engage in sexual relations with _____.

8. That Defendant's refusal to engage in sexual relations with Plaintiff has been continuous for a period exceeding one year prior to commencement of this matrimonial action. That Defendant's conduct constitutes a constructive abandonment of Plaintiff.

-or-

5. That on the day of , , the Plaintiff and Defendant entered into a written Separation Agreement, subscribed by the parties thereto and acknowledged or proven in the form required to entitle a deed to be recorded.

6. That Plaintiff and Defendant have lived separate and apart pursuant to the terms of said written Separation Agreement for a period exceeding one (1) year from and after the date of execution of the written Separation Agreement.

7. That during the entire period of separation, the Plaintiff has at all times substantially performed all of the terms and conditions of said Separation on Plaintiff's part.

8. That the Separation Agreement was duly filed in the Office of the Clerk of the County of Saratoga on _____ prior to the commencement of the within matrimonial action.

9. That at the time the Separation Agreement was filed; the Plaintiff was resident of the County of Saratoga and State of New York.

-or-

5. That on or about and during , 20__, the Defendant, without cause or justification, vacated the marital residence and thereby abandoned the Plaintiff. That said abandonment has been continuous for a period exceeding one (1) year.

-or-

5. The Defendant has engaged in adulterous conduct since at least _____. More specifically, the Defendant engaged in acts of sexual intercourse with persons to whom the Defendant was not married: _____. Said acts of adultery were committed in _____.

6. The Plaintiff did not condone or forgive the adulterous acts of the Defendant.

7. That five (5) years have not elapsed since the commission of said acts of adultery.

8. That there are no other matrimonial actions between Plaintiff and Defendant pending at this time and there are no other actions pending in any other State or territory of the United States or in any foreign country.

9. That Plaintiff has taken, or will take, prior to the entry of final judgment, all steps solely within Plaintiff's power to remove any barriers to Defendant's remarriage following the divorce.

WHEREFORE, Plaintiff is entitled to a judgment of divorce, dissolving the bonds of matrimony heretofore existing between Plaintiff and Defendant, on the grounds that the relationship between Plaintiff and Defendant has broken down irretrievably for a period of at least six (6) months, thereby freeing the parties from the obligation of said marriage by reason

of the premises and pursuant to the provisions of the New York State Domestic Relations Law. Plaintiff, thereof, demands judgment against Defendant as follows:

a) That a Judgment of Divorce be granted to Plaintiff pursuant to the statutes in such cases made and provided;

OPTION ONE:

b) That the Judgment of Divorce incorporate, but not merge, all of the terms and provisions of the parties' written Separation Agreement dated _____; and,

OPTION TWO:

b) That Plaintiff be awarded sole custody of the minor children of the marriage, maintenance of a reasonable amount, health insurance for Plaintiff, child support of a reasonable amount pursuant to the Child Support Standards Act guidelines, counsel fees, expert fees, title to the furniture and personal property of the Plaintiff, declaration of separate property of the Plaintiff, equitable distribution of the marital property and debts, distributive award of a reasonable amount, title to Plaintiff's separate property, title to the marital home and real property, declaration of marital property, health insurance, life insurance of an amount necessary to insure the maintenance, child support and distributive award, and indemnification as to debts;

c) That Plaintiff be awarded such other, further and different relief as the Court may deem just and proper. together with the costs and disbursements of this action.

Dated: _____

GORDON, TEPPER & DeCOURSEY, L.L.P.

By: _____
_____, ESQ.
Attorneys for Plaintiff
Socha Plaza South
113 Saratoga Road, Route 50

Glenville, New York 12302
(518) 399-5400

VERIFICATION

STATE OF NEW YORK)
COUNTY OF SCHENECTADY) ss.:

, the above-named being duly sworn, deposes and says: I am the Plaintiff in the within action; that I have read and know the contents of the foregoing Complaint, that the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters, I believe it to be true.

_____
Plaintiff

Sworn to before me this
_____ day of _____, 2012.

_____
Notary Public

STATE OF NEW YORK
SUPREME COURT COUNTY OF SCHENECTADY

,

Plaintiff,

-against-

,

Defendant.

ANSWER AND COUNTER-CLAIM

Index No.
RJI No.

The Defendant, _____ , by and through his/her attorneys, _____, sets forth the following in Answer to the Complaint:

1. Denies each and every claim, statement and allegation set forth in paragraphs marked and designated _____.

2. Admits the allegations contained in paragraph marked and designated _____.

3. Denies knowledge or information sufficient to form a belief as the truth of the allegations set forth in paragraph marked and designated _____.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

4. Plaintiff fails to state a cause of action.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

5. The Complaint fails to comply with the requisites of CPLR 3016(c).

AS AND FOR A COUNTERCLAIM

6. The Defendant was and continues to be a resident of the County of Schenectady, State of New York, and has been a resident of the State of New York for a period of more than (1) year immediately preceding the commencement of this action.

7. That upon information and belief, and at all times hereinafter mentioned, the Plaintiff was and continues to be a resident of the State of New York and has been a resident of the State of New York immediately preceding the commencement of this action .

8. That Defendant and Plaintiff are husband and wife having been married on the _____ in the City and County of _____, State of New York.

9. There are _____ of this marriage, to wit: _____.

Insert Grounds For Your Counterclaim

10. That at all times hereinafter mentioned, the Defendant has always conducted himself in a proper manner and as a loving and devoted husband, and the Defendant did not do, nor cause to be done, any act or thing which would tend to disturb the proper matrimonial relations existing between Plaintiff and Defendant; that Defendant has always conducted himself as a faithful and loyal husband toward the Plaintiff, managed the household affairs with propriety and economy, and treated the Plaintiff with kindness and forbearance, and said Plaintiff disregarded the solemnity of her marital vows and obligations, and treated the Defendant in a cruel and inhuman manner.

11. That said cruel and inhuman treatment of the Plaintiff by the Defendant consisted of the following:

(a) (list allegations)

12. That Plaintiff's conduct as aforesaid, and more particularly, her unkind, harsh, inconsiderate, capricious, belligerent and unsocial treatment of the Defendant constitutes conduct on Plaintiff's part such as to have impaired the health and safety of the Defendant and to have adversely affected the physical and mental well-being of the Defendant and such as to render it unsafe and improper for Defendant to continue to live and cohabit with Plaintiff.

13. That by reasons of all of the said cruel and inhuman treatment practiced by the Plaintiff towards the Defendant, it has become unsafe and improper for the parties to continue to live and cohabit together as husband and wife.

14. That Defendant neither has condoned nor forgiven the said acts of cruel and inhuman treatment.

15. That five (5) years have not elapsed since the commission of said acts of cruel and inhuman treatment.

-or-

10. That Defendant has failed and refused to engage in sexual relations with Plaintiff since _____.

11. That although Plaintiff made it known to Defendant that Plaintiff desired to engage in sexual relations with _____, the Defendant failed and refused to engage in sexual relations with Plaintiff for a continuous period since _____.

12. That Plaintiff did nothing on _____ part to warrant Defendant's failure and refusal to engage in sexual relations with _____.

13. That Defendant's refusal to engage in sexual relations with Plaintiff has been continuous for a period exceeding one year prior to commencement of this matrimonial action. That Defendant's conduct constitutes a constructive abandonment of Plaintiff.

-or-

10. That on the day of , , the Plaintiff and Defendant entered into a written Separation Agreement, subscribed by the parties thereto and acknowledged or proven in the form required to entitle a deed to be recorded.

11. That Plaintiff and Defendant have lived separate and apart pursuant to the terms of

said written Separation Agreement for a period exceeding one (1) year from and after the date of execution of the written Separation Agreement.

12. That during the entire period of separation, the Plaintiff has at all times substantially performed all of the terms and conditions of said Separation on Plaintiff's part.

13. That the Separation Agreement was duly filed in the Office of the Clerk of the County of Saratoga on _____ prior to the commencement of the within matrimonial action.

14. That at the time the Separation Agreement was filed; the Plaintiff was resident of the County of Saratoga and State of New York.

-or-

10. That on or about and during , 20__, the Defendant, without cause or justification, vacated the marital residence and thereby abandoned the Plaintiff. That said abandonment has been continuous for a period exceeding one (1) year.

-or-

10. The Defendant has engaged in adulterous conduct since at least _____. More specifically, the Defendant engaged in acts of sexual intercourse with persons to whom the Defendant was not married: _____. Said acts of adultery were committed in _____.

11. The Plaintiff did not condone or forgive the adulterous acts of the Defendant.

12. That five (5) years have not elapsed since the commission of said acts of adultery.

-or-

10. That the relationship between Plaintiff and Defendant has broken down irretrievably for a period of at least six (6) months.

Then continue with paragraphs below

11. That no judgment of annulment, divorce or separation has been obtained, nor is there any such action now pending by the Plaintiff or the Defendant against the other in any court of this state or any other state of the United States or in any foreign country.

12. That Plaintiff has taken, or will take, prior to the entry of final judgment all steps solely within his/her power to remove any barriers to Defendant's remarriage following divorce.

*******DEFENDANT MAY ALSO PLEASE OTHER CAUSES OF ACTION NOT ARISING OUT OF THE MARRIAGE- I.E. BREACH OF CONTRACT; PERSONAL INJURY; SLANDER; LIBEL; CONSTRUCTIVE TRUST.

WHEREFORE, Defendant respectfully prays for the following relief:

(a) An Order dismissing Plaintiff's Complaint in its entirety.

(b) Defendant be awarded a Judgment of Divorce on the grounds of _____ as is more fully set forth in the counterclaim.

(c) That Defendant be awarded sole custody and physical possession of the children the marriage, maintenance, child support, distributive award, title to and declaration of Defendant's separate property, equitable distribution of the marital property, counsel fees, expert fees, title to the furniture, furnishings, contents and personal property in the marital home, title to the real property, declaration of marital property, life and health insurance for the infant issue of the marriage, and the Defendant.

(d) An Order awarding Defendant such other, further and different relief as the Court may deem just and proper.

Dated: ____ 20____.

Dated:

_____

_____, Esq.
GORDON, TEPPER & DeCOURSEY, LLP
Attorneys for Defendant
Socha Plaza South
113 Saratoga Road, Route 50
Glenville, NY 12302
Tel.: (518) 399-5400

TO: Opposing Counsel Information

VERIFICATION

STATE OF NEW YORK)
COUNTY OF SCHENECTADY) ss.:

_____, the above-named being duly sworn, deposes and says: I am the Defendant in the within action; that I have read and know the contents of the foregoing Answer and Counterclaim, that the same is true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters, I believe it to be true.

_____
Defendant

Sworn to before me this
_____ day of _____, 20__.

_____
Notary Public

STATE OF NEW YORK
SUPREME COURT COUNTY OF

, Plaintiff, -against- , Defendant.	**REPLY TO COUNTERCLAIM** Index No.

The Plaintiff, _____, by and through her/his attorneys, _____, sets forth the following as and for a Reply to the Counterclaim in the above-entitled action:

1. Denies each and every allegation contained in paragraphs numbered _____.
2. Denies knowledge or information sufficient to form a belief regarding the allegations in paragraphs numbered _____.
3. Admits the allegation contained in paragraph numbered _____.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

4. Defendant fails to state a cause of action.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

5. Defendant fails to comply with the requisites of CPLR §3016(c).

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

6. Defendant's allegations are barred by the statute of limitations.

WHEREFORE, Plaintiff respectfully requests that Defendant's Counterclaim for divorce be dismissed in its entirety and that Plaintiff be granted a Judgment of Divorce against

Defendant together with such other, further and different relief as the Court may deem just and proper.

Dated:

_____

_____, Esq.
GORDON, TEPPER & DeCOURSEY, LLP
Attorneys for Defendant
Socha Plaza South
113 Saratoga Road, Route 50
Glenville, NY 12302
Tel.: (518) 399-5400

TO: Opposing Counsel Information

STATE OF NEW YORK
SUPREME COURT COUNTY OF _____

Plaintiff, -against- Defendant.	**NOTICE OF MOTION** Index No. RJI No. Assigned Justice:

PLEASE TAKE NOTICE, that upon the annexed Affidavit of _____, sworn to the _____ day of _____, the undersigned will move this Court at an All Purpose Term to be held in and for the County of _____ before the Hon. _____, at the _____ County Courthouse, (*address)* , on _____, 20____, for an Order granting the Plaintiff/Defendant, _____, the following relief:

1. An Order directing service of the Summons with Notice upon _____, the Defendant, by publication pursuant to CPLR §315 and §316 in lieu of personal service of same and dispensing with service by mail as there is no known mailing address of the Defendant which can be ascertained by due diligence.

2. An Order granting the Plaintiff such other, further and different relief as the Court may determine just and proper.

DATED:

_____
By: _____, Esq.
GORDON, TEPPER & DeCOURSEY, LLP
Attorneys for Plaintiff
Socha Plaza South
113 Saratoga Road
Glenville, New York 12302
(518) 399-5400

STATE OF NEW YORK
SUPREME COURT COUNTY OF

Plaintiff,	*	
- against -	*	**AFFIDAVIT**
	*	Index No.
	*	RJI No.
,	*	Assigned Justice:
	*	Hon. Snow White
Defendant.	*	

STATE OF NEW YORK)
COUNTY OF SCHENECTADY) SS.:

_____, being duly sworn, deposes and says:

1. I am the Plaintiff in the above-captioned action and as such I am fully familiar with all the facts and circumstances concerning this matter.

2. I submit this Affidavit in support of my application for an Order permitting service of a Summons with Notice by publication in this matrimonial action.

3. The Defendant and I were married on _____ in _____, New York. We have _____ children, all of whom are emancipated/unemancipated (*add names & DOBs*).

4. I commenced this action by the filing of a Summons with Notice in the _____ County Clerk's Office on the _____ day of _____.

5. My wife/husband and I physically separated in or about _____, when she/he voluntarily left the residence. For a period of approximately two months she/he lived with her/his mother. I believe she/he then lived with a boyfriend/girlfriend, _____ in

_____, New York. In _____, she/he exercised visitation with our children. In _____, she/he telephoned our home.

6. Since _____, I have not seen or heard from my wife/husband. I do not know where she/he is residing or where she/he works. I know of no other family.

7. I have an Order of Custody and support from the _____ County Family Court. I have not received child support from my wife/husband since _____. I have exclusively provided for the care and custody of our children without contribution from my wife/husband.

10. It is clear that I have a good and meritorious cause of action for divorce on the grounds of abandonment and other grounds.

11. I respectfully request that the Court direct that I be permitted to serve my wife/husband by publication so that I may move this matter forward.

WHEREFORE, it is respectfully requested that all of the relief sought be granted, together with such other, further and different relief as the Court may determine just and proper.

_____
(name of client)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF

_____X

,

Plaintiff, Index No.:

-against- **AFFIDAVIT OF DEFENDANT IN ACTION FOR DIVORCE**

,

Defendant.

_____X

STATE OF NEW YORK, COUNTY OF _____ ss:

(Defendant's name), being duly sworn, says:

I am the Defendant in the within action for divorce, and I am over the age of 18. I reside at (insert Defendant's address).

1 I admit service of the *summons with notice* for divorce on _____, based upon the following grounds: _____.

2. I appear in this action. However, I do not intend to respond to the summons or answer the complaint and I waive the twenty (20) or thirty (30) day period provided by law to answer the summons. I waive the forty (40) day waiting period to place this matter on the calendar. I hereby consent to this action being placed on the uncontested divorce calendar immediately.

3. I am *not* a member of the armed forces of the United States, any State within the United States, or any other Country.

If in military: I am aware of my rights under the New York State Soldiers' and Sailors' Civil Relief Act; however, I consent that this matter be placed on the Uncontested Matrimonial calendar and waive any rights I may have under the Act.

4. I waive the service of all further papers in this action except for the Judgment of Divorce, provided that the Judgment of divorce incorporates, but does not merge, the terms and provisions of the Separation/Settlement/Stipulation Agreement entered into between the Plaintiff and I on _____.

5. I am not seeking equitable distribution *other than what was already agreed to in a written* Separation/Settlement/Stipulation Agreement dated _____. I understand that I may be prevented from further asserting my right to equitable distribution.

6. 1 will or have taken all steps solely within my power to remove any barriers to the plaintiff's remarriage.

I fully understand that upon the entrance of this divorce agreement, I may no longer be allowed to receive health coverage under my former spouse's health insurance plan. I may be entitled to purchase health insurance on my own through a COBRA option, if available, otherwise I may be required to secure my own health insurance.

_____
Defendant

STATE OF NEW YORK)
COUNTY OF) SS.:

On the ____ day of _____, 20___, before me the undersigned, personally appeared (Defendant's Name) personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her capacity and that by his/her signature on the instrument, the individual, or person upon behalf of which the individual acted, executed the instrument.

_____
NOTARY PUBLIC

STATE OF NEW YORK SUPREME COURT
COUNTY OF

_____

Index No.
RJI No.

Plaintiff,

– against – **NOTICE OF MOTION**

Defendant.

_____

PLEASE TAKE NOTICE, that,

upon the 's Affidavit in Lieu of Testimony, sworn to on the day of ;

upon the 's Domestic Relations Law Section 75j Affidavit, sworn to on the day of

upon the Affirmation of Regularity of _____ Esq., dated ,

upon the Exhibits annexed hereto, _____ will move before this Court at the County Court House on the day of , at o'clock in the _____noon of that day for an Order granting movant the following relief:

a. Granting, pursuant to Domestic Relations Law Section 211, a default divorce, together with all ancillary relief, to the _____ in the above-entitled action;

Permission to submit a supplemental affidavit if this motion is opposed or if Judgment is not entered by _____ ;

b. That the Court schedule an inquest to determine the relief to which is entitled;

Together with such other and further relief as to this Court may seem just and proper.

Pursuant to Section 2214(b) of the CPLR, answering affidavits, if any, are required to be served upon the undersigned at least seven (7) days before the return date of this motion.

Dated: Yours, etc.,

_____ Esq.
Gordon, Tepper & DeCoursey, LLP
Socha Plaza South
Attorney for Plaintiff
Socha Plaza South
113 Saratoga Road, Route 50
Glenville, NY 12302
(518) 399-5400

TO: Attorney for Defendant

STATE OF NEW YORK SUPREME COURT
COUNTY OF

_____

Index No.

Plaintiff,

- against -

AFFIDAVIT OF PLAINTIFF

Defendant.

_____

STATE OF NEW YORK)
ss:
COUNTY OF)

, being duly sworn, says:

1. The Plaintiff's address is , , , and social security number is . The Defendant's address is , , , and social security number is .

2. The Plaintiff has resided in New York State for a continuous period in excess of two years immediately preceding the commencement of this action.

   The Defendant has resided in New York State for a continuous period in excess of two years immediately preceding the commencement of this action.

   The Plaintiff has resided in New York State for a continuous period in excess of one year immediately preceding the commencement of this action, and:

   The parties were married in New York State.

   The parties have resided as married persons in New York State with the Defendant.

   The cause of action occurred in New York State.

   The cause of action occurred in New York State and both parties were residents thereof at the time of the commencement of this action.

3. I married the Defendant on in . The marriage was performed by a clergyman, minister or by a leader of the Society for Ethical Culture.

To the best of my knowledge I have taken all steps solely within my power to remove any barrier to the Defendant's remarriage.

I will take prior to the entry of final judgment all steps solely within my power to the best of my knowledge to remove any barrier to the Defendant's remarriage.

The Defendant has waived in writing the requirements of DRL § 253 (Barriers to Remarriage).

4. There are no children of the marriage under the age of 21:

There of the marriage under the age of 21:

Name:
SS Number: *DOB*:

The present address of each child and all other places where each child has lived within the last five (5) years is as follows:

Child:
Present Address:

Other Address Within Last 5 years:

The names(s) and present address(es) of the person(s) with whom each child has lived within the last (5) years is:

I have participated in other litigation concerning the custody of the minor of the marriage in this or another state.

( ) Yes ( ) No

I have information of a custody proceeding concerning the minor of the marriage pending in a court of this or another state.

( ) Yes ( ) No

I know of a person who is not a party to this proceeding who has physical custody of the minor *of the marriage* or claims to have custody or visitation rights with respect to such .

( ) Yes ( ) No

The parties are covered by the following group health plans:

PLAINTIFF

Group Health Plan:
Address:

Identification Number:
Plan Administrator:
Type of Coverage:

DEFENDANT

Group Health Plan:
Address:

Identification Number:
Plan Administrator:
Type of Coverage:

No health plans are available to the parties through their employment.

5. The grounds for dissolution of the marriage are as follows:

Cruel and Inhuman Treatment (DRL § 170 (1)):

At the following times, Defendant committed the following act(s) which endangered the Plaintiff's physical or mental well-being and rendered it unsafe or improper for Plaintiff to continue to reside with Defendant.

Abandonment (DRL § 170 (2)):

Confinement to Prison (DRL § 170 (3)):

(a) That after the marriage of Plaintiff and Defendant, Defendant was confined in prison for a period of three or more years consecutive years, to wit: that Defendant was confined in prison on , and has remained confined to this date; and

(b) not more than five (5) years has elapsed between the end of the third year of imprisonment and the date of commencement of this action.

Adultery (DRL § 170 (4)):

(a) That on , at the premises located at , , , the Defendant voluntarily committed an act of sexual or deviant sexual intercourse with a person other the Plaintiff after marriage of Plaintiff and Defendant; and

(b) not more than (5) years elapsed between the date of said adultery and the date of commencement of this action.

Living Separate and Apart Pursuant to a Separation Decree or Judgment of Separation (DRL §170(5)):

(a) That the Court, County, rendered a decree or judgment of separation on , under Index Number ; and

(b) that the parties have live separate and apart for a period of one year longer after granting of such decree; and

(c) that the Plaintiff has substantially complied with all of the terms and conditions of such decree or judgment.

Living Separate and Apart Pursuant to a Separation Agreement (DRL § 170(6)):

(a) That the Plaintiff and Defendant entered into a written agreement of separation, which they subscribed and acknowledged on , in the form required to entitle a deed to be recorded; and

(b) that the agreement memorandum of said agreement was filed on in the Office of the Clerk of the County of , whereby Plaintiff Defendant resided; and

(c) that the parties have lived separate and apart for a period of one year or longer after the execution of said agreement; and

(d) that the Plaintiff has substantially complied with all terms and conditions of such agreement.

Marriage Irretrievably Broken (DRL § 170(7)):

The relationship between Plaintiff and Defendant has broken down irretrievably for a period of at least six months.

Plaintiff affirms that all economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with minor children of the marriage have been resolved by the parties by written Agreement

or are specified above and in the Summons with Notice or Summons and Complaint are to be determined by the court and incorporated into the judgment of divorce.

6. In addition to the dissolution of the marriage, I am seeking the following relief:

equitable distribution of marital property; marital property to be distributed pursuant to the annexed separation agreement / stipulation; I waive equitable distribution of marital property; and any other relief the court deems fitting and proper.

7. Defendant is not in the active military service of this state, nation or any other nation.

I know this because: she/he admitted it to *me / the process server* on .

I have submitted with these papers an *investigator's affidavit Defendant's affidavit* which states that Defendant is not in the active military service of this state nation or any other nation.

8. I am *not* receiving Public Assistance. To my knowledge the Defendant is *not* receiving Public assistance.

9. No other matrimonial action is pending in any other court, and the marriage has not been terminated by any prior decree of any court of competent jurisdiction.

10. *Annexed to the "Affidavit of Service" of is a photograph. It is a fair and accurate representation of the Defendant.*

11. I am not the custodial parent of the unemancipated of the marriage. I am the custodial parent of the unemancipated of the marriage entitled to receive child support pursuant to DRL § 236(b)(7)(b),

I request child support services through the Support Collection Unit which would authorize collection of the support obligation by the immediate issuance of an income execution for support enforcement. I am in receipt of such services through the Support Collection Unit. I have applied for such services through the Support Collection Unit. I am aware of but decline such services through the Support Collection Unit at this time. I am aware that an income deduction order may be issued

pursuant to CPLR § 5242(c) without other child support enforcement services and that payment of an administrative fee may be required.

Plaintiff's Defendant's prior surname is: .

Pursuant to DRL § 240(1)(a-1) – Records Checking Requirements:

I have been a party in an Order of Protection.

I have never been a party in an Order of Protection.

I have been a party in a Child Abuse/Neglect Proceeding (FCA Art. 10).

I have never been a party in a Child Abuse/Neglect Proceeding (FCA Art. 10).

I have registered under New York State's Sex Offender Registration Act.

I am not registered under New York State's Sex Offender Registration Act.

WHEREFORE, I , respectfully request that judgment be entered for the relief sought and for such other relief as the court deems fitting and proper.

Dated:

_____
, Plaintiff

Sworn to before me on this
_____ day of _____.

_____
NOTARY PUBLIC - STATE OF NEW YORK
Commission expires: __-__-__.

STATE OF NEW YORK
SUPREME COURT COUNTY OF SARATOGA

Plaintiff,

-against-

Defendant.

AFFIDAVIT PURSUANT TO §253 OF THE DOMESTIC RELATIONS LAW

Index No.

ACTION FOR DIVORCE

STATE OF NEW YORK)
COUNTY OF SCHENECTADY) ss.:

, being duly sworn, deposes and says:

1. I am the Plaintiff in the above-entitled matrimonial action and am fully familiar with all of the facts and circumstances concerning this matter.

2. I prepare this Affidavit pursuant to the requirements of §253 of the Domestic Relations Law.

3. To the best of my knowledge, I have, prior to the entry of final judgment, taken all steps solely within my power to remove all barriers to the Defendant's remarriage following the divorce.

WHEREFORE, I respectfully request that a Judgment of Divorce be entered which incorporates, but does not merge, all of the terms and provisions of the parties' Stipulation/Settlement/Separation Agreement, together with such other, further and different relief as the Court may deem just and proper.

Sworn to before me this
day of

NOTARY PUBLIC

GORDON, TEPPER & DECOURSEY, LLP
By: ESQ.
Attorneys for Plaintiff
Socha Plaza South
113 Saratoga Road, Route 50
Glenville, NY 12302
(518) 399-5400

STATE OF NEW YORK SUPREME COURT
COUNTY OF

_____

Index No.

Plaintiff,

- against -

AFFIDAVIT/
AFFIRMATION
OF REGULARITY

Defendant.

_____

STATE OF NEW YORK)
ss:
COUNTY OF)

The undersigned, being duly sworn, deposes and says:

I am *the attorney for* the Plaintiff herein.

This is a matrimonial action.

The *Summons with Notice Summons and Verified Complaint* were personally served upon the Defendant herein, *within outside* the State of New York as appears in the affidavit of service submitted herewith.

Defendant has appeared on her/his own behalf by the firm of and executed an affidavit agreeing that this matter be placed on the matrimonial calendar immediately. Defendant is in default for failure to serve a notice of appearance or failure to answer the complaint served in this action in due time, and the time to answer has not been extended by stipulation, court order, or otherwise.

WHEREFORE, I respectfully request that this action be placed on the undefended matrimonial calendar for trial.

I state under the penalties of perjury that the statements herein made are true, except as to such statements as are based on information and belief, which statements I believe to be true.

Dated:

_____
_____ Esq.

Sworn to before me this day
of

_____
NOTARY PUBLIC - STATE OF NEW YORK
Commission expires: __-__-__.

PRESENT: HON. _____, (Acting) Supreme Court Justice.

STATE OF NEW YORK
SUPREME COURT COUNTY OF SCHENECTADY

,	*	
S.S. # ,	*	
Plaintiff,	*	
	*	
- against -	*	***JUDGMENT OF DIVORCE***
	*	Index No.
,	*	RJI No. _____
	*	
S.S. # ,		
Defendant.	*	
	*	
ACTION FOR DIVORCE	*	
	*	

EACH PARTY HAS A RIGHT TO SEEK A MODIFICATION OF THE CHILD SUPPORT ORDER UPON A SHOWING OF: (I) A SUBSTANTIAL CHANGE IN CIRCUMSTANCES; OR (II) THAT THREE YEARS HAVE PASSED SINCE THE ORDER WAS ENTERED, LAST MODIFIED OR ADJUSTED; OR (III) THERE HAS BEEN A CHANGE IN EITHER PARTY'S GROSS INCOME BY FIFTEEN PERCENT OR MORE SINCE THE ORDER WAS ENTERED, LAST MODIFIED, OR ADJUSTED; HOWEVER, IF THE PARTIES HAVE SPECIFICALLY OPTED OUT OF SUBPARAGRAPH (II) OR (III) OF THIS PARAGRAPH IN A VALIDLY EXECUTED AGREEMENT OR STIPULATION, THEN THAT BASIS TO SEEK MODIFICATION DOES NOT APPLY.

NOTICE REQUIRED WHERE PAYMENTS THROUGH SUPPORT COLLECTION UNIT.

NOTE: (1) THIS ORDER OF CHILD SUPPORT SHALL BE ADJUSTED BY THE APPLICATION OF A COST OF LIVING ADJUSTMENT AT THE DIRECTION OF THE SUPPORT COLLECTION UNIT NO EARLIER THAN TWENTY-FOUR MONTHS AFTER THIS ORDER IS ISSUED, LAST MODIFIED OR LAST ADJUSTED, UPON THE REQUEST OF ANY PARTY TO THE ORDER OR PURSUANT TO PARAGRAPH (2) BELOW. UPON APPLICATION OF A COST OF LIVING ADJUSTMENT AT THE DIRECTION OF THE SUPPORT COLLECTION UNIT, AN ADJUSTED ORDER SHALL BE SENT TO THE PARTEIS WHO, IF THEY OBJECT TO THE COST OF LIVING ADJUSTMENT, SHALL HAVE THIRTY-FIVE (35) DAYS FROM THE DATE OF MAILING TO SUBMIT A WRITTEN OBJECTION TO THE COURT INDICATED ON SUCH ADJUSTED ORDER. UPON RECEIPT OF SUCH WRITTEN OBJECTION, THE COURT SHALL SCHEDULE A HEARING AT WHICH THE PARTIES MAY BE PRESENT TO OFFER EVIDENCE WHICH THE COURT WILL CONSIDER IN ADJUSTING THE CHILD SUPPORT ORDER IN ACCORDANCE WITH THE CHILD SUPPORT STANDARDS ACT.

(2) A RECIPIENT OF FAMILY ASSISTANCE SHALL HAVE THE CHILD SUPPORT ORDER REVIEWED AND ADJUSTED AT THE DIRECTION OF THE

SUPPORT COLLECTION UNIT NO EARLIER THAN TWENTY-FOUR MONTHS AFTER SUCH ORDER IS ISSUED, LAST MODIFIED OR LAST ADJUSTED WITHOUT FURTHER APPLICATION BY ANY PARTY. ALL PARTIES WILL RECEIVE A COPY OF THE ADJUSTED ORDER.

(3) WHERE ANY PARTY FAILS TO PROVIDE, AND UPDATE UPON ANY CHANGE, THE SUPPORT COLLECTION UNIT WITH A CURRENT ADDRESS, AS REQUIRED BY SECTION TWO HUNDRED FORTY-B OF THE DOMESTIC RELATIONS LAW, TO WHICH AN ADJUSTED ORDER CAN BE SENT, THE SUPPORT OBLIGATION AMOUNT CONTAINED THEREIN SHALL BECOME DUE AND OWING ON THE DATE THE FIRST PAYMENT IS DUE UNDER THE TERMS OF THE ORDER OF SUPPORT WHICH WAS REVIEWED AND ADJUSTED OCCURRING ON OR AFTER THE EFFECTIVE DATE OF THE ADJUSTED ORDER, REGARDLESS OF WHETHER OR NOT THE PARTY HAS RECEIVED A COPY OF THE ADJUSTED ORDER.

The above-entitled action having been brought by the Plaintiff for a Judgment of Divorce, dissolving the marriage heretofore existing between the parties hereto on the grounds that the relationship between Plaintiff and Defendant has broken down irretrievably for a period of at least six (6) months –or- constructive abandonment –or- abandonment –or- living separate and apart pursuant to a Separation Agreement –or- adultery, and the Defendant having been duly and personally served within the State of New York with the Summons with Notice on the ____ day of _____, 2010, and the Plaintiff having applied to this Term of the Court for judgment for the relief demanded in the Complaint, and the Plaintiff having presented her/her written/oral testimony before the Hon. _____, (Acting) Justice of the Supreme Court, wherein and whereby the Court finds that the Plaintiff has satisfactorily established the material allegations of the Complaint and Plaintiff is entitled to a Judgment divorcing the parties herein and dissolving the marriage between them upon the grounds of _____; and

The Court having searched the statewide registry of orders of protection, the sex offender registry and the Family Court's child protective records, and having notified the attorneys for the parties and for the child of the results of these searches;

NOW, on motion of Gordon, Tepper & DeCoursey, LLP, _____, Esq., of counsel, attorneys for Plaintiff, it is hereby

ORDERED AND ADJUDGED, that the Plaintiff is hereby granted judgment dissolving the bonds of matrimony heretofore existing between Plaintiff and Defendant, freeing the Plaintiff from the obligations thereof and permitting either of them to remarry; and it is further

ORDERED AND ADJUDGED, that the Separation/Settlement/Stipulation Agreement which was entered into between the parties on _____, a copy of which is attached to, and incorporated in this Judgment by reference, shall survive and shall not be merged in this Judgment, and the parties hereby are directed to comply with every legally enforceable term and provision of such Separation/Settlement/Stipulation Agreement as if such term or provision were set forth in its entirety herein, and the Court retains jurisdiction of the matter concurrently with the Family Court for the purposes of specifically enforcing such of the provisions of the Separation/Settlement/Stipulation Agreement as are capable of specific enforcement to the extent permitted by law, and of making such further judgment with respect to maintenance, support, custody or visitation as it finds appropriate under the circumstances existing at the time application for that purpose is made to it, or both; and it is further

ORDERED and ADJUDGED, the child support provisions set forth in the Stipulation/Settlement/Separation Agreement deviate from the guidelines of the Child Support Standards Act and the Court accepts the reasons for said deviation that are specifically stated in the Separation Agreement; - *or – comply with the Child Support Standards Act;* and it is further

ORDERED AND ADJUDGED, that as set forth in the Findings of Fact and Conclusions of Law, the parties are aware that after the divorce, they may no longer be

allowed to be covered under the other's health insurance and they shall cooperate for the other to obtain COBRA benefits, if available, pursuant to §255 of the Domestic Relations Law; and it is further

ORDERED AND ADJUDGED, that the Plaintiff and Defendant may resume the use of her or his former surname should she or he so desire, to wit: _____

SIGNED at Schenectady, New York, this _____ day of _____, 2____.

_____

HON. _____
(Acting) Supreme Court Justice

ENTER:

STATE OF NEW YORK
SUPREME COURT COUNTY OF

,

Plaintiff,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

-against-

,

Defendant.

ACTION FOR DIVORCE

The above-entitled action having come on before a Term of this Court and written/oral testimony having been presented before the Honorable , Supreme Court Justice, and the allegations and proof of the Plaintiff having been read/heard and considered, and satisfactory evidence having been produced by the Plaintiff demonstrating that there has been an irretrievable breakdown in the relationship for at least six months –or- constructive abandonment –or- abandonment –or- living separate and apart pursuant to a Separation Agreement –or- adultery, and one of the parties having so stated under oath, and proof of the

filing of the Summons with Notice in the County Clerk's Office on the _____ day of _____, 20___, having been read and filed, and proof of due service of the Summons with Notice upon the Defendant having been read and filed, indicating that the Summons with Notice was served personally within the State of New York upon the Defendant on the ____ day of _____, 20___, and the Plaintiff having proceeded with written proof in support of her/his Complaint;

NOW, on motion of Gordon, Tepper & DeCoursey, LLP, _____, of counsel, attorneys for the Plaintiff, and due deliberation having been had, I find and decide as follows:

FINDINGS OF FACT

1. That the parties are husband and wife, having been married on the day of , in , New York.

2. That Plaintiff has been a resident of the State of New York for more than two (2) years immediately preceding the commencement of this action. Upon information and belief, Defendant was and continues to be a resident of the State of New York and has been a resident of the State of New York for more than one (1) year immediately preceding the commencement of this action.

3. That there are ( ) children of the marriage.

4. That, on or about the day of , 20 , the Summons with Notice entitled "Action for Divorce" was filed in the _____ County Clerk's Office and on the day of , 20 , the Summons with Notice was served personally within the State of New York upon the defendant. Subsequent pleadings were exchanged. By written/oral Separation Agreement/Stipulation/Settlement Agreement dated the day of , 20 , Defendant withdrew any appearance in this action and consented to permit

Plaintiff to proceed with a divorce on a default basis. The Defendant has failed to produce any proof in opposition to the allegations of the plaintiff and is thereby in default.

5. That the relationship between Plaintiff and Defendant has broken down irretrievably for a period of at least six (6) months.

-or-

5. That said cruel and inhuman treatment of the Plaintiff by the Defendant consisted of the following:

(a) (list allegations)

7. That Plaintiff's conduct as aforesaid, and more particularly, her/his unkind, harsh, inconsiderate, capricious, belligerent and unsocial treatment of the Defendant constitutes conduct on Plaintiff's part such as to have impaired the health and safety of the Defendant and to have adversely affected the physical and mental well-being of the Defendant and such as to render it unsafe and improper for Defendant to continue to live and cohabit with Plaintiff.

8. That by reasons of all of the said cruel and inhuman treatment practiced by the Plaintiff towards the Defendant, it has become unsafe and improper for the parties to continue to live and cohabit together as husband and wife.

9. That Defendant neither has condoned nor forgiven the said acts of cruel and inhuman treatment.

10. That five (5) years have not elapsed since the commission of said acts of cruel and inhuman treatment.

-or-

5. That Defendant has failed and refused to engage in sexual relations with Plaintiff since _____.

6. That although Plaintiff made it known to Defendant that Plaintiff desired to engage in sexual relations with _____, the Defendant failed and refused to engage in sexual relations with Plaintiff for a continuous period since _____.

7. That Plaintiff did nothing on _____ part to warrant Defendant's failure and refusal to engage in sexual relations with _____.

8. That Defendant's refusal to engage in sexual relations with Plaintiff has been continuous for a period exceeding one year prior to commencement of this matrimonial action. That Defendant's conduct constitutes a constructive abandonment of Plaintiff.

-or-

5. That on the day of , , the Plaintiff and Defendant entered into a written Separation Agreement, subscribed by the parties thereto and acknowledged or proven in the form required to entitle a deed to be recorded.

6. That Plaintiff and Defendant have lived separate and apart pursuant to the terms of said written Separation Agreement for a period exceeding one (1) year from and after the date of execution of the written Separation Agreement.

7. That during the entire period of separation, the Plaintiff has at all times substantially performed all of the terms and conditions of said Separation on Plaintiff's part.

8. That the Separation Agreement was duly filed in the Office of the Clerk of the County of Saratoga on _____ prior to the commencement of the within matrimonial action.

9. That at the time the Separation Agreement was filed; the Plaintiff was resident of the County of Saratoga and State of New York.

-or-

5. That on or about and during , 20__, the Defendant, without cause or justification, vacated the marital residence and thereby abandoned the Plaintiff. That said abandonment has been continuous for a period exceeding one (1) year.

-or-

5. The Defendant has engaged in adulterous conduct since at least _____. More specifically, the Defendant engaged in acts of sexual intercourse with persons to whom the Defendant was not married: _____. Said acts of adultery were committed in _____.

6. The Plaintiff did not condone or forgive the adulterous acts of the Defendant.

7. That five (5) years have not elapsed since the commission of said acts of adultery.

8. That there are no other matrimonial actions between Plaintiff and Defendant pending at this time and there are no other actions pending in any other State or territory of the United States or in any foreign country.

Continue below:

6. There have been no other matrimonial actions between the Plaintiff and Defendant in the past, and there are no pending matrimonial actions between the Plaintiff and Defendant in any other state or territory of the United States or in any foreign country.

7. That the Stipulation/Separation/Settlement Agreement, which was entered into between the parties on or about the _____ day of _____, fairly and equitably distributes all of the real and personal property belonging to the parties and, otherwise, satisfies all of the conditions of the Domestic Relations Law § 236, of the State of New York. (****if applicable)** The Stipulation/Separation/Settlement Agreement also provides for the custody and support of the parties' _____ child(ren) . The child support

provisions in the Stipulation/Separation/Settlement Agreement deviate from the guidelines of the Child Support Standards Act and the Court accepts the reasons for the deviation that are set forth in the Agreement. –or- complies with the guidelines of the Child Support Standards Act.

8. That all the terms and provisions of the Separation Agreement/Stipulation/Settlement Agreement entered into between the parties on or about the day of , 20 , were fair and reasonable and not unconscionable at the time of the execution, and upon the default of the Defendant, the Court is willing to accept the representation of the plaintiff, that the same are fair and reasonable and not unconscionable at the time of the entry of the Judgment of Divorce.

9. That Plaintiff has taken, or will take, prior to the entry of final judgment, all steps solely within Plaintiff's power to remove any barriers to the Defendant's remarriage following divorce.

10. Each party has been provided notice as required by Domestic Relations Law §255, as set forth in their Separation Agreement, that they are aware that upon the entry of the Judgment, they may no longer be allowed to receive health coverage under the other's insurance plan and may be entitled to purchase health insurance through a COBRA option, if available.

CONCLUSIONS OF LAW

1. That the requirements of the Domestic Relations Laws have been fulfilled.

2. That the Plaintiff is entitled to a Judgment of absolute divorce from the Defendant, dissolving the marriage heretofore existing between them and freeing them from the obligations thereof.

3. That all of the terms and provisions of a written Stipulation/Settlement/Separation Agreement and/or Opting Out Agreement entered into between the parties in Court on _____, shall be incorporated, but not merged, into the Judgment of Divorce.

4. That either the Plaintiff or the Defendant may resume the use of her or his former surname should she or he so desire.

I direct judgment to be entered accordingly.

Signed at _____, New York, this ____ day of , 20 .

_____

_____

J.S.C.