

**MATRIMONIAL AGREEMENTS**  
**Including an Introduction to the**  
**Child Support Standards Act (CSSA)**

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Mastery of the art of drafting a comprehensive marital agreement that clients can understand and follow years later is one of the most important skills a matrimonial attorney can have. The majority of matrimonial cases settle eventually - most litigants will agree that it is far better to reach a negotiated agreement than to be ordered to do something; and most attorneys will agree that it is more cost effective to reach an agreement than to go to trial.

A separation agreement is the one place where you can address specific issues that a judge may not address and your one opportunity to make sure that the language is tailored to meet your client's needs and desires.

This article focuses on the statutory requirements for an enforceable and valid agreement and offers some practice tips.

## **I. WHAT IS A MARITAL AGREEMENT?**

The statutory definition of “marital agreement” is contained in DRL §236, Part B, 3. In order to be enforceable, an agreement between the parties must be (1) “made before or during the marriage”, (2) “in writing” and (3) “subscribed by the parties and acknowledged or proven in the manner required to entitle a deed to be recorded.”

## **II. What Can Marital Agreements Do?**

DRL §236, Part B (3) provides:

Such an agreement may include (1) a contract to make a testamentary provision of any kind, or a waiver of any right

to elect against the provisions of a will; (2) provision for the ownership, division or distribution of separate and marital property; (3) provisions for the amount and duration of maintenance or other terms and conditions of the marriage relationship, subject to the provisions of section 5-311 of the General Obligations Law, and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment; and (4) provision for the custody, care, education and maintenance of any child of the parties, subject to the provisions of section two hundred forty of this chapter. Nothing in this subdivision shall be deemed to affect the validity of any agreement made prior to the effective date of this subdivision”.

The statute details some of the matters that can be resolved by agreement of the parties. Pursuant to DRL §236, Part B (3), an agreement may include:

*1) A contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will*

You can provide that a former spouse, receive property or provide that a spouse cannot get anything by way of inheritance. You can do likewise with respect to the children of the parties. They can be guaranteed a portion of the estate, or guaranteed nothing. Once the marriage is terminated, a party can dispose of his or her estate as he or she chooses, except as to property covered by the specific provisions set forth in the marital agreement.

*2) Provision for the ownership, division or distribution of separate and marital property*

The parties can determine without court intervention just how they are going to divide everything they possess, whether “marital” or “separate”. They can agree what property is “marital” property and what property is “separate” property. They can choose to divide property in kind (i.e., the husband keeps his pension and the wife the marital residence). They can make up for monetary deficiencies (asset divisions where there are differences in value) by selling certain assets and dividing the proceeds in such a way that the overall division is in the proportion they decide is fair and reasonable. They can divide property taking into consideration tax impact; they can consider the basis and whether property is likely to be sold or retained. The advantages of such an agreement are, of course, obvious: Informal appraisals as compared to formal appraisals. No testimony by the experts with its concomitant expense. Reduced attorneys’ fees. Less tension and worry as to what the judge will ultimately do. Indeed, the uncertainty about what a judge may do frequently causes the parties to settle.

*3) Provision for the amount and duration of maintenance or other terms and conditions of the marriage relationship, subject to the provisions of section 5-311 of the general obligations law, and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment.*

Obviously, both parties will benefit from an agreement on the exact amount of maintenance and the duration of maintenance. The issue of if and how long maintenance is awarded is intertwined with the equitable distribution of property and each must be taken into consideration when reaching an agreement. *See Kaplan v. Kaplan*, 82 NYS2d 300 (1993). *See also Grunfeld v. Grunfeld*, 94 NY2d 696 (2000). If ample property is distributed to a spouse, perhaps no maintenance should be awarded. However, with little property to distribute, a higher or longer maintenance award may be justified. If the property distributed is not liquid, maintenance may still be awarded. Since there are statutory guidelines, but not hard and fast rules with respect to maintenance, an agreement is a far better alternative than a trial for all concerned. Both parties will benefit from a resolution. One should also bear in mind that in New York, maintenance provided in a non-merged agreement which survives the judgment of divorce is also more difficult to modify.

The parties may also agree to waive or modify application of the temporary maintenance guidelines (DRL §236, Part B (5-a)) in a marital agreement.

*4) provision for the custody, care, education and maintenance of any child of the parties, subject to the provisions of section two hundred forty of this chapter*

At first blush, the need for an agreement with respect to child support would seem less necessary than with respect to maintenance. That is, until you read and

digest DRL §240 (1-b) with all its mandatory additions and subtractions, and its permissible additions and subtractions. The parties may only agree on the basic support computed on their salaries. Other “additions” and “deductions” are frequently disputed.

Notwithstanding the foregoing, you are limited in what can be put into an agreement by New York’s public policy (such as the policy reflected in GOL §5-311) and any other statutory prohibitions in the areas you wish to include in the agreement. Also you cannot put in provisions that would be deemed “inherently vicious, wicked or immoral, and shocking to the prevailing moral sense”. (*See Greschler v. Greschler*, 51 NY2d 368, 434 NYS2d 194 (2d Dep’t 1980).

The following are provided as examples to show you areas where you might be called upon to draft provisions. Many of the provisions you are called upon to draft can’t be found in this or any other collection of forms. However, should you be called upon to draft a particular provision, your job isn’t finished until you add the newly drafted article or paragraph to your collection of forms. If you took the time to properly draft the provision or paragraph, reviewed the applicable law, redrafted the paragraph or article until you were satisfied with the language used, it is imperative that you add it to your collection of forms.

For example, the statute doesn’t talk about nor can the court direct that the parties follow a particular religion (separation of church and state). Yet, the parties

can agree that children be raised in a particular religion, follow certain religious customs and rituals, and participate in certain religious events (communion, confirmation, bar/bat mitzvah, etc.). The court will enforce such provisions (*see Jabri v. Jabri*, 193 A.D.2d 782, 598 N.Y.S.2d 739 (2d Dep't 1993)) unless it is proven that enforcement would not be in the best interest of the child.

The parties can provide for automatic future modifications as to the terms of the agreement. The Court cannot, for the most part, make "in futuro" orders (*see Baja v. Baja*, 129 A.D.2d 988, 514 NYS2d 156 (4<sup>th</sup> Dep't 1987); as with all else, there are exceptions).

You can provide that issues which may subsequently arise between the parties be resolved by arbitration in lieu of going back to Court. *In re Lauren S. v. Ira S.*, 25 A.D.3d 526, 811 NYS2d 1 (1<sup>st</sup> Dep't 2006); *Stillman v. Stillman*, 55 NY2d 653, 446 NYS2d 942 (1981). The courts favor arbitration over litigation (see *Nationwide Insurance v. Investors*, 37 NY2d 91, 371 NYS2d 463 (1975); *Matter of Weinrott*, 32 NY2d 190, 344 NYS2d 848 (1973). Even agreements which provide for the parties to arbitrate before a Beth Din have been upheld. *Yeger v. Yeger*, 21 A.D.3d 549, 799 N.Y.S.2d 916 (2d Dep't 2005).

However, not all issues are subject to arbitration; you cannot arbitrate custody and visitation (*Cohen v. Cohen*, 195 A.D.2d 586, 600 NYS2d 996 (2d Dep't 1993); *Glauber v. Glauber*, 192 A.D.2d 94, 600 NYS2d 740 (2d Dep't 1993)).



### **III. TYPES OF MARITAL AGREEMENTS**

DRL §236 Part B, 3 specifically states that agreements may be “made before or during the marriage”. This implies there are two types, but there are actually three types of marital agreements.

While all the agreements come under the general category of marital agreements, they have different names. Agreements entered into before the parties actually marry are called “Antenuptial” or “Prenuptial” agreements -- the names are interchangeable. These agreements are made at a time when the parties can hopefully be fairer and open with each other than they would be when contemplating a divorce or separation. These agreements are made in contemplation of the marriage and become effective upon the parties entering into the marriage.

Agreements that are entered into after the marriage but in contemplation of a matrimonial action are generally referred to as “Separation Agreements.” Other names for these types of agreements are “Property Settlement and Separation Agreement” or “Separation and Opting Out Agreement.” These types of agreements are distinguishable from a “Stipulation of Settlement,” which is an agreement entered into after litigation has been commenced that settles all of the parties’ differences and the overall divorce proceeding.

Finally, there are “postnuptial” agreements, which are agreements entered into after the marriage, but where the parties intend to stay together and wish to resolve potential problems. “Postnuptial” agreements are therefore the third type of agreement you may be called upon to draft/review, although they are only a variation of the separation agreement. When a party comes to you and requests that a postnuptial agreement be drafted, but that he or she intends to continue to live with the other spouse, it is not appropriate to simply weigh what should be in the agreement by the traditional test of “what would happen in court”. A “postnup” must satisfy the parties and achieve the particular goals that the parties set; also, the negotiations should not be so heated as to cause the separation or divorce. Basically, where the parties intend to stay together, only the parties can determine whether the final agreement is “fair and reasonable.” Generally, it is best to get a disclaimer letter with these agreements, as well as include in the agreement an acknowledgment that the agreement is fair, reasonable, and not the product of fraud, duress or undue influence.

Are there differences between agreements entered into before and after marriage? Yes, but those differences are not set forth in the statute.

**1. Pre-Marital Agreements:** The Courts have, **in the past**, differentiated between agreements entered into before the marriage and those entered into after the marriage. (*See Panossian v. Panossian*, 172 A.D.2d 811, 569 NYS2d

182; *Eckstein v. Eckstein*, 129 A.D.2d 552, 514 NYS2d 47 (2d Dep't 1987); *Hoffman v. Hoffman*, 100 A.D.2d 704, 474 NYS2d 621 (3d Dep't 1984); *Miller v. Miller*, 97 A.D.2d 581, 467 N.Y.S. 2d 581 (3d Dep't 1983); *Matter of Estate of Sunshine*, 40 NY2d 875, 389 NYS2d 345 (1976), as well as *Matter of Davis*, 20 NY2d 70, 281 NYS2d 767, 228 N.E.2d 768; *Costanza v. Costanza*, 199 A.D.2d 988; *Clanton v. Clanton*, 189 A.D.2d 976, 583 NYS2d 553). In the past, the Courts have generally found two reasons to differentiate between agreements entered into prior to a marriage and agreements entered into after a marriage. First, with prenuptial agreements, the courts have previously found that there is no fiduciary relationship prior to the marriage. The parties have no close relationship that may cause them to rely upon each other in financial transactions. However, if there is financial disclosure, it must state that it is accurate and complete. The second difference is that there is no marital property prior to the marriage. Therefore, neither party has any legal or equitable right or claim to anything.

This thinking was radically changed by the Court of Appeals in *Matter of Greiff*, 92 NY2d 341 (1998). In *Greiff*, the Court of Appeals substantially altered the status of prenuptial agreements. The Court said:

A party seeking to vitiate a contract on the ground of fraud bears the burden of proving the impediment attributable to the proponent seeking enforcement. This rubric also applies to controversies involving prenuptial agreements. Indeed, as an incentive toward the strong public policy favoring individuals ordering and deciding their own interests through contractual arrangements, including prenuptial agreements, this

Court has eschewed subjecting proponents of these agreements to special evidentiary or freighted burdens.

Importantly, however, ...[T]his Court has held, in analogous contractual contexts, that where the parties to an agreement find or place themselves in a relationship of trust and confidence at the time of execution, a special burden may be shifted to the party in whom the trust is reposed....to disprove fraud or overreaching. *Matter of Greiff, supra*, at 345 (citations omitted).

Citing *Matter of Gordon v. Bialystoker Ctr. & Bikur Cholim*, 45 NY2d 692, the

Court went on to say:

“Whenever...the relations between the contracting parties appear to be of such a character as to render it certain that...either on the one side from superior knowledge of the matter derived from a fiduciary relations, or from an overmastering influence, or on the other from weakness, dependence, or trust justifiably reposed, **...it is incumbent upon the stronger party to show affirmatively that no deception was practiced, no undue influence was used and that all was fair, open, voluntary and well understood.**” [*Gordon, supra* at 698-699. (*Emphasis added*)]. *Matter of Greiff, supra*, at 345.

The Court concluded:

Thus, whichever spouse contests a prenuptial agreement bears the burden to establish a fact-based particularized inequity before a proponent suffers the shift in burden to disprove fraud or overreaching. *Matter of Greiff, supra*, at 346.

The *Greiff* decision clearly requires those involved in the negotiation and preparation of prenuptial agreements to exercise great care in representing their clients. Clearly, prenups have been found to involve a fiduciary relationship warranting greater scrutiny by the Courts than other contracts.

**2. Post-marital Agreements:** With respect to agreements after the marriage, each party has an “unvested,” “contingent” and “undefined” interest in the marital property acquired (that property acquired from the date of the marriage to the date that service of a summons for dissolution is made). Upon marriage, you have a nebulous interest in something that the law defines as “marital property”. However, until more happens, you merely have a concept or an “expectation”. This interest is “nonvested” until a summons is served; if a summons is never served, no interest ever “vests.” You have a nonvested interest in marital property, i.e., property acquired between the date of the marriage and the date that a summons for dissolution is served. As with a pension, prior to vesting, there is no entitlement. After the marital property “vests,” its existence is still “contingent” on a court granting a divorce. You may know what the marital estate is composed of, but you may never get it until the marriage is dissolved. Without grounds sufficient to cause a dissolution, there can be no equitable distribution. The interest is “undefined” in that neither party knows what their specific interest is in the whole until determined by a judge or the parties reach an agreement. The function of the Judge is to decide each party’s specific interest in each of the marital assets.

In simple terms, you are entitled to full disclosure and the utmost good faith after a marriage in that both spouses already have an interest in something defined as “marital property.” This interest may never mature into something tangible.

The parties know that they have “something” and the law protects them from giving it away or having it taken away from them by fraud, duress, or undue influence, and protects them from the proverbial “unconscionable” agreement. The parties have a fiduciary responsibility to one another.

#### **IV. FORMAL ACKNOWLEDGMENT REQUIREMENTS - DRL § 236(B)(3)**

As previously mentioned, §236(B)(3) of the Domestic Relations Law provides in pertinent part as follows:

3. Agreement of the parties. An agreement by the parties, made before or during the marriage, **shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the matter to entitle a deed to be recorded.** (*Emphasis supplied*).

This provision is the “Statute of Frauds” for parties entering into agreements before or after a marriage concerning the subject matter set forth in the remainder of Section 236 (B)(3). It is not the common law standard for an agreement to be enforceable, namely, “in writing and signed by the party to be charged.” As we will see, the Courts strictly enforce DRL § 236(B)(3) ... except when they don’t.

In *Matisoff v. Dobi*, 90 NY2d 127 (1997), the Court of Appeals held that without the proper acknowledgment, a marital agreement is unenforceable. The Courts will not be permitted to enforce agreements that, although signed, that do not

comply with the strict requirements of being acknowledged in a manner required to entitle a deed to be recorded.

In *Matisoff*, the Plaintiff Wife and the Defendant Husband were married on April 13, 1981. Because Defendant had been divorced twice before, Plaintiff wanted to protect her assets and insisted upon a postnuptial agreement approximately one month after the marriage. At the time of the agreement, each party was working and earning approximately \$40,000.00. Plaintiff was a real estate sales person and Defendant was an employee of the City of New York.

The agreement provided for mutual waivers of estate rights and a mutual waiver of rights with respect to any property, real and personal, the parties owned at the time of the agreement and any property either party subsequently obtained. The agreement was drafted by an attorney friend of the Plaintiff. It was undisputed that the agreement was never acknowledged.

Throughout thirteen years of marriage, the parties maintained separate finances, divided the costs of the household, vacations and all entertainment expenses. The Defendant Husband completed his Ph.D. dissertation during the marriage (all course work had been completed prior to the marriage). He also obtained an MBA during the marriage. He obtained employment as a stock market research analyst for a New York City investment firm. In September of 1992, when the divorce action was commenced, Plaintiff Wife was still earning \$40,000.00 per year

and the Husband was earning \$400,000.00 per year. Defendant, not surprisingly, asserted the postnuptial agreement as a bar to any claim by the Plaintiff for any entitlement based upon his income or his property. Plaintiff claimed the agreement was invalid and unenforceable by reason of the failure to comply with DRL Section 236(B)(3). Both parties admitted signing the agreement and neither claimed any fraud or duress. The trial court agreed with the Plaintiff, ruling that signatures alone could not validate the unacknowledged agreement.

The Appellate Division reversed, stating that the statute was designed to prevent fraud and overreaching in marital agreements, and that there was no allegation of fraud or duress. The Court ruled that the terms of the agreement “...were acknowledged and ratified in the daily activities of the parties and the property relations of the parties through the marriage.” Finally, the Court said that Plaintiff was the party who insisted upon the agreement and whose friend drafted the agreement; finding, in effect, that she could not now be heard to avoid the agreement.

The Court of Appeals reversed, holding:

Under the Appellate Division analysis, the enforceability of an unacknowledged nuptial agreement would vary with the original motivation of the party challenging the agreement and whether the couple’s behavior during the marriage was consistent with the terms of the agreement. Such uncertainty is contrary to the plain language of Domestic Relations Law §236(B)(3), which recognizes no exception to the requirement of formal acknowledgment. We therefore reverse, holding that the requisite formality explicitly specified in Domestic



Relations Law §236(B)(3) is essential. *Matisoff, supra* at pp. 131, 132.

The latest pronouncement by the Court of Appeals on the issue of acknowledgment of marital agreements is *Galetta v. Galetta*, 991 N.E.2d 684, 21 N.Y.3d 186, 969 N.Y.S.2d 826 (2013). At issue in that case was the validity of a prenuptial agreement that was signed approximately one week before the parties' wedding. Neither party was present when the other signed the prenu. The wife's acknowledgment met all three requirements of DRL § 236 (B)(3), but the husband's did not...it failed to state that the notary public confirmed the husband's identity, or that the husband was the individual described in the prenu. The record contained no evidence of how this error occurred. Relying on *Matisoff v. Dobi*, the Court of Appeals concluded that the certificate of acknowledgment was defective and that therefore the prenuptial agreement was invalid.

The Court then considered the argument that the defect could be "cured" by the subsequent testimony of the notary that it was his custom to ascertain the identity of persons whose signatures he acknowledged, and of the parties, who admitted that the signatures were valid and the agreement was not the product of fraud or duress. In *Matisoff*, where there was no acknowledgment at all, the Court of Appeals had found that even if the absence of an acknowledgment could be cured, the testimony from the parties was not the functional equivalent of an acknowledgement. In *Galetta*, the acknowledgment was there, but it was defective.

The Court stated

A compelling argument can be made that the door should be left open to curing a deficiency like the one that occurred here where the signatures on the prenuptial agreement are authentic, there are no claims of fraud or duress, and the parties believed their signatures were being duly acknowledged but, due to no fault of their own, the certificate of acknowledgment was defective or incomplete.

The Court declined to leave the door open in *Galetta* because it found that the notary public's proof was insufficient. He did not state that he knew the husband prior to acknowledging his signature, nor did he recall having done so. Merely stating that it was his "custom" to confirm that the person signing the document was the same person named in it was not enough.

In *Mojdeh M. v. Jamshid A.*, 36 Misc.3d 1209(A), 2012 WL 2732169 (Supreme Ct., Kings County 2012), a "mehrieh" (a written contract pursuant to which a sum of money and other valuable items are gifted by the groom to the bride) was signed by the parties at their wedding ceremony in Iran. The officiant and three members of the parties' families witnessed their signatures on the mehrieh. Subsequently, the husband refused to pay the wife. The wife testified at trial that the mehrieh was a valid contract in Iran, and argued that it should be considered a valid contract in New York because the US government accepted it as a legitimate document when it issued a green card to the wife. The husband argued that it was a religious document, not a legal document, and thus it was not

enforceable.

Relying on *Matisoff v. Dobi*, the Supreme Court found that the mehrieh was not enforceable because it was not “acknowledged or proven in the manner required to entitle a deed to be recorded.” However, the Court noted that “the wife may bring a separate plenary action in a civil proceeding, seeking enforcement of the mehrieh as an independent contract.”

This decision highlights an anomaly in matrimonial law -- DRL § 236(B)(3) provides that marital agreements must comply with all of its provisions to be valid and enforceable, yet unacknowledged agreements may be enforceable under ordinary tenants of contract law.

In *Kudrov, Kudrov*, 6 Misc.3d 1030A, 800 N.Y.S.2d 349 (Supreme Ct., Kings County 2005), the defendant sought to enforce certain provisions of the parties’ postnuptial agreement. The plaintiff opposed the motion arguing that the agreement was unenforceable and void because it was not properly acknowledged. The acknowledgment was made in the State of Florida before a New York notary public. Acknowledgments of the conveyance of real property situated in New York state can be made in another state only by certain officers, which include either a notary qualified in the State of Florida, or a commissioner of deeds appointed pursuant to the laws of New York State to take acknowledgments outside of the state. “No evidence has been presented to this court that the New York

notary who received and certified the acknowledgment in this case was, at the time, either qualified as a notary public in the State of Florida, or qualified in New York State as a commissioner of deeds entitled to take out of state acknowledgments.” The Court held that because the agreement had not been properly acknowledged, it was invalid and unenforceable. It was of no moment that the parties had “acknowledged” and “ratified” their agreement “throughout the eight years” it had been in effect.

In *Kudrov v. Kudrov*, 12 Misc.2d 205 (2005), because Executive Law section 142-1 provides, in relevant part, that “any defect regarding the notary shall not apply after the expiration of six months from the date of the act of the notary public”. Since the plaintiff in *Kudrov* “had failed to raise any issue regarding the defective acknowledgment for over eight years and may not now be permitted to raise any such infirmity in defense of the defendant’s motion to enforce the separation agreement as incorporated into the judgment of divorce. The Court further stated:

In addition, although not raised in either the underlying motion or the motion to reargue, the defendant may be precluded from contesting that the separation agreement was not, in fact, a stipulation of settlement, as characterized in the judgment of divorce. Both the First and Second Department have held that an agreement which settles a matrimonial action is exempt from statutory formalities of DRL section 236(B)(3) and will be upheld and valid and enforceable if it complies with CPLR section 2104.

In *Vega v. Papaleo*, 85 A.D.3d 1363, 925 N.Y.S.2d 699 (3d Dep’t 2011), the parties’ memorandum of understanding (MOU) that provided for distribution of

marital assets was a final enforceable agreement because it was in writing, subscribed by the parties, and properly acknowledged, despite the wife's claim that it contemplated the parties' subsequent execution of an "opting-out agreement", where the MOU contained a provision that any additional terms and agreements to be contained within the opting-out agreement would not alter or change any of the terms or conditions set forth in the MOU.

In 1997, the form of the certificate of acknowledgment required by the N.Y. Real Property Law for a deed to be recorded was amended, effective September 1, 1999. *See* New York Property Law § 309-a. Is a matrimonial agreement executed after September 1, 1999 containing the "old" certificate of acknowledgment existing prior to September 1, 1999 valid and enforceable? In *Weinstein v. Weinstein*, 36 A.D.3d 797, 830 N.Y.S.2d 179 (2<sup>nd</sup> Dep't 2007), the Second Department reversed the lower court's ruling that the parties' prenuptial agreement was invalid and unenforceable due to the use of the acknowledgment language in existence prior to the 1997 statutory amendment.

The Second Department stated:

Contrary to the wife's argument, there is no requirement that a certificate of acknowledgment contain the precise language set forth in the Real Property Law. Rather, an acknowledgment is sufficient if it is in substantial compliance with the statute [citations omitted]. "There are two aspects to an acknowledgment: the oral declaration of the signer of the document and the written certificate, prepared by one of a number of public officials, generally a notary public" [citations omitted]. Since both aspects were satisfied here, the

acknowledgment substantially complied with the requirements of the Real Property Law.

## V. OPEN COURT STIPULATIONS

Whether it is a recommended practice or not, there are times when a matter is resolved in the courtroom, and a stipulation or “agreement” between the parties is placed on the record.

CPLR 2104 provides:

An agreement between the parties or their attorneys relating to any matter in an action, *other than one made between counsel in open court*, is not binding upon a party unless it is in writing subscribed by him or his attorney or reduced to the form of an order and entered.

With respect to Stipulations of settlement and notwithstanding the form of the stipulation of settlement, the terms of such stipulation shall be filed by the defendant with the county clerk.

This provision would seem to provide that a stipulation containing the terms of an agreement between the parties, which is set forth on the record terminating a divorce proceeding, would be binding. This provision appears to be in direct conflict with the acknowledgment provision of Domestic Relations Law §236(B)(3) which was enacted in 1980, well after Rule 2104.

The Appellate Division’s First and Second Departments have sustained the validity of in-court stipulations and held that they need not comply with the formal requirements of opting out agreements because in-court stipulations are viewed as agreements terminating a judicial action and not an opting out agreement.

*Sanders v. Copley*, 151 A.D.2d 350 (1<sup>st</sup> Dep't 1989) and *Harrington v. Harrington*, 103 A.D.2d 356 (2d Dep't 1984). As the Court in *Harrington* stated:

It was not the intent of the Legislature to discourage or impede the accepted and expeditious practice of entering into stipulations in open court to settle matrimonial disputes without the necessity of a full trial.

The Appellate Division, First and Second Departments, have reaffirmed their positions, notwithstanding the Court of Appeals decision in *Matisoff v. Dobi*. Both Departments take the position that *Matisoff* is limited to its facts and that it does not apply to in-court stipulations that terminate litigation. See *Rubinfeld v. Rubinfeld*, 279 A.D.2d 153 (1<sup>st</sup> Dep't 2001) and *Nordgren v. Nordgren*, 264 A.D.2d 828 (2d Dep't 2000).

The Appellate Division Third and Fourth Departments disagree and have consistently held that such stipulations must meet the requirements of Domestic Relations Law §236(b)(3). See *Giambattista v. Giambattista*, 154 A.D.2d 920 (4<sup>th</sup> Dep't 1989); *Lischynsky v. Lischynsky*, 95 A.D.2d 111 (3d Dep't 1983) and *Hanford v. Hanford*, 91 A.D.2d 829 (4<sup>th</sup> Dep't 1982). In the Fourth Department, after the stipulation is placed on the record, the parties sign what is called an "Affidavit of Appearance and Adoption of Oral Stipulation," which is signed and acknowledged in the manner required to entitle a deed to be recorded. The transcript of the stipulation is then "so-ordered" and the Affidavit of Appearance

and Adoption of Oral Stipulation is attached.<sup>1</sup> The ongoing conflict between the Departments will have to be resolved by the Court of Appeals.

## **VI. LEGAL CRITERIA FOR MATRIMONIAL AGREEMENTS**

### **A. GOL §5-3.11: Certain Agreements Between Husband and Wife Void**

Except as provided in section two hundred thirty-six of the domestic relations law, a husband and wife cannot contract to alter or dissolve the marriage or to relieve either of his or her liability to support the other in such a manner that he or she will become incapable of self-support and therefore is likely to become a public charge. An agreement, heretofore or hereafter made between a husband and wife, shall not be considered a contract to alter or dissolve the marriage, unless it contains an express provision requiring the dissolution of the marriage or provides for the procurement of grounds of divorce.

This section prohibits specific things: The parties cannot relieve each other of their obligation to support the other to the extent that one spouse may become a “public charge.” Before the general public has to support a party who was married (or separated), that party’s former spouse will be required to bear the burden. This is the primary reason that lump sum support payments are disfavored. If the party receiving the lump sum payment were to lose everything in a year and become a public charge, the party requiring financial aid could and will obtain same from their spouse or ex-spouse before the state has to support him or her.

The second part of this law provides that the parties may not include a

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<sup>1</sup> In Westchester, it is not uncommon for a judge to direct the parties to submit a fully executed stipulation of settlement within a time certain after the bare-bones outline of the agreement is placed on the record. If they fail to do so, the transcript of the outline of the settlement is then “so-ordered” and becomes the final agreement.



provision agreeing to divorce as part of the marital agreement. Therefore, resist the temptation to include grounds for a divorce, or that one party will withdraw his or her answer in an agreement. A number of authorities opine that you can agree to withdraw an answer to a complaint as part of an agreement without running afoul of GOL §5-311. A review of the history of matrimonial law would indicate otherwise. There was a time when the only ground for divorce in the State of New York was adultery. Many people entered into “side” agreements to divorce and those agreements generally consisted of “withdrawing” an answer to a cause of action for adultery. Since adultery was the only ground for divorce, collusion ran rampant. Parties were not permitted to admit adultery [CPLR §4502(a)]. In short, the parties can do anything they wish, but they can’t include a provision to divorce.

In *Charap v. Willett*, 84 A.D.3d 1003, 925 N.Y.S.2d 94 (2d Dep’t 2011), the parties entered into a stipulation whereby the husband agreed to pay the wife \$65,000 over and above a future equitable distribution award and to pay her counsel fees of \$10,000, and the wife agreed, in exchange, to promptly prepare an amended answer in the husband's matrimonial action and counterclaim for divorce alleging cruel and inhuman treatment, was void as against public policy because it expressly required the wife to seek a dissolution of marriage and provided for procurement of the grounds for divorce.

**B. *Christian v. Christian*: The Court of Appeals’ View of Marital Agreements**

“A separation agreement is a contract subject to the principles of contract construction and interpretation” (*Rainbow v. Swisher*, 72 N.Y.2d 106, 109 (1988)). Where the contract is clear and unambiguous on its face, the courts must determine the intent of the parties from within the four corners of the instruction. (*Nichols v. Nichols*, 306 N.Y. 490, 496, reh. denied 307 N.Y.S.2d 974 (1954)).”

**PRACTICE TIP:** If you are the attorney preparing the agreement, you need to draft the language carefully because ambiguities are construed against the drafter. *See e.g., Saranac Cent. Sch. Dist. v. Sweet Assocs.*, 253 A.D.2d 566, 686 N.Y.S.2d 869 (3d Dep’t 1998). Since it is likely that your adversary will seek to have changes made to the agreement, you may want to consider including a provision that neither attorney shall be considered the “drafter,” or language providing that any rule of construction to the effect that any ambiguity or ambiguities is/are to be resolved against the party who drafted the agreement shall not apply with respect to the interpretation of the agreement.

Although a separation agreement is a contract subject to the principles of contract construction and interpretation, the parties to a marital agreement are said to be held to a higher standard than parties to other contracts. As stated in the oft-quoted *Christian v. Christian*, 42 N.Y.2d 63, 396 N.Y.S.2d 817 (1977):

Agreements between spouses, unlike ordinary business contracts, involve a fiduciary relationship requiring the utmost of good faith (*Ducas v. Guggenheimer*, 90 Misc. 191, 194- 195, affd sub nom. *Ducas v. Ducas*, 173 A.D. 884). There is a strict surveillance of all transactions between married persons, especially separation agreements (*Hendricks v. Isaacs*, 117 NY 411, 417, *supra*; *Benesch v. Benesch*, 106 Misc. 395, 402; 2 Lindey, Separation Agreements and Ante-Nuptial Contracts [rev ed], §37, subd. 4, p. 37-9). **Equity is so zealous in this respect that a separation agreement may be set aside on grounds that would be insufficient to vitiate an ordinary contract** (*Hungerford v. Hungerford*, 161 N.Y. 550, 553, *supra*; *Cain v. Cain*, 188 App Div 780, 782; *Crowell v. Crowell*, 135 Misc. 530, 532, affd 229 App Div 771). **These principles in mind, courts have thrown their cloak of protection about separation agreements and made it their business, when confronted, to see to it that they are arrived at fairly and equitably, in a manner so as to be free from the taint of fraud and duress, and to set aside or refuse to enforce those born of and subsisting in inequity.** (*Scheinberg v. Scheinberg*, 249 N.Y. 277, 282- 283; *Hungerford v. Hungerford*, 161 N.Y. 550, 552, *supra*; *Matter of Smith*, 243 App Div 348, 353; *Ducas v. Guggenheimer*, 90 Misc. 191, 194, affd sub nom. *Ducas v. Ducas*, 173 App Div 884, *supra*; *Montgomery v. Montgomery*, 170 NYS 867, affd 187 App Div 882; see Validity of Separation Agreement as Affected by Fraud, Coercion, Unfairness or Mistake, Ann.; S ALR 823, 827).

**To warrant equity's intervention, no actual fraud need be shown, for relief will be granted if the settlement is manifestly unfair to a spouse because of the other's overreaching** (2 Lindey, Separation Agreements and Ante-Nuptial Contracts [rev ed], §37, subd. 5, p. 37-12; cf. *Matter of Baruch*, 205 Misc. 1122, 1124, affd 286 App Div 869; *Pegram v. Pegram*, 310 Ky 86, 89-90). **In determining whether a separation agreement is invalid, courts may look at the terms of the agreement to see if there is an inference, or even a negative inference, of overreaching in its execution. If the execution of the agreement, however, be fair, no further inquire will be made.** *Christian*, *supra*, at 72-73 (Emphasis added).

*Christian v. Christian* makes it clear that parties to a separation agreement will be held to a much higher standard than those to other contracts. “No actual fraud need be shown” if the agreement is “manifestly unfair to a spouse”. *Christian*, *supra*, at 73. The Court may simply look to the terms of the agreement to see if there is “an inference, or even a negative inference, of overreaching in its execution”. The Court went on to say “an unconscionable bargain has been regarded as one ‘such as no [person] in his [or her] senses and not under delusion would make on the other hand, and as no honest and fair [person] would accept on the other’” (*Hume v. United States*, 132 U.S. 406,411), “the inequality being ‘so strong and manifest as to shock the conscience and confound the judgment of any [person] of common sense” (*Mandel v. Liebman*, 303 N.Y. 88, 94). “Unconscionable conduct is something of which equity takes cognizance, when warranted” (see *Weirfield Holding Corp. v. Pless & Seeman*, 257 N.Y. 536; *Graf v. Hope Bldg. Corp.*, 254 N.Y. 1, 4; *Howard v. Howard*, 122 Vt. 27; 27 Am Jur 2d Equity, §24, pp. 549-550; cf. 2 Pomeroy’s Equity Jurisprudence [4 ed], §873, p. 1804).”

*Christian*, *supra* at 71.

While the Courts will hold that an “unconscionable agreement” is unenforceable, it takes more than just “conclusory allegations to create an inference of fraud, duress, overreaching or unconscionability” *Korngold v. Korngold*, 26

A.D.2d 358, 810 N.Y.S.2d 206 (2d Dep't 2006).

**C. Fair and Reasonable Standard of §236(B)(3) of the Domestic Relations Law**

DRL§236(B)(3) provides in part:

Such an agreement may include (1) a contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will; (2) provision for the ownership, division or distribution of separate and marital property; **(3) provision for the amount and duration of maintenance or other terms and conditions of the marriage relationship, subject to the provisions of section 5-311 of the General Obligations Law, and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment;** and (4) provision for the custody, care, education and maintenance of any child of the parties, subject to the provisions of section two hundred forty of this chapter. Nothing in this subdivision shall be deemed to affect the validity of any agreement made prior to the effective date of this subdivision.” (Emphasis supplied).

Initially, after the enactment of the Equitable Distribution Law, the language *“and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment”* was viewed as having incorporated the principles of the *Christian* decision and that the same had become statutorily applicable to all provisions of an agreement subject to DRL §236(B)(3), without reference as to whether or not the same pertained to support or property. It is clear at this juncture that the Courts are interpreting the *“fair and reasonable at the time of the making of*

*the agreement are not unconscionable at the time of entry of final judgment*” language as applying only to the support provisions of the agreement and that the *Christian* decision and rationale will apply to the other provisions of agreements. See *DeSantis v. DeSantis*, 182 A.D.2d 1107 (4<sup>th</sup> Dep’t 1992), *Oberstein v. Oberstein*, 93 A.D.2d 374 (1<sup>st</sup> Dep’t 1983).

***D. Petracca v. Petracca and Cioffi-Petrakis v. Petrakis: Are Pre-nups and Early Post-Nups Dead?***

Most experienced matrimonial practitioners advise their clients that prenuptial and “early postnuptial agreements” (i.e., those signed early in the marriage, before the parties have acquired substantial marital assets) are virtually impossible to set aside, given New York’s strong public policy favoring individuals who determine their own issues through contracts and the difficulties in proving fraud, undue influence, unconscionability, etc. Two recent Appellate Division, Second Department decisions have caused some in the matrimonial bar to question the continued validity of this longstanding premise.

In *Petracca v. Petracca*, 101 A.D.3d 695, 956 N.Y.S.2d 77 (2d Dep’t 2012), the parties signed a post-nup after approximately three months of marriage. The wife waived any claim to (i) a share of the husband’s business interests (including future appreciation); (ii) any claim to the jointly-owned marital

residence, which had been purchased after the marriage; and (iii) any right to maintenance other than as set forth in the agreement (between \$24,000 and \$36,000 per year, depending on the duration of the marriage). At the time the post-nup was signed, the husband valued his business interests at over \$10 million. Both parties waived their respective rights of inheritance.

The wife testified that the husband presented her with the post-nup shortly after her forty-second birthday and shortly after she had suffered a miscarriage. The husband allegedly bullied the wife into signing by stating that he would not have a child with her (something that was very important to the wife) and that the marriage would be over unless she signed. The wife further testified that she did not understand the agreement's terms but did not consult an attorney.

The husband denied knowledge of the miscarriage and testified that he wanted the post-nup to protect his son from a prior marriage. He testified that he believed his wife had consulted an attorney, but admitted that she had not told him the attorney's name.

Most important, the evidence revealed that at the time the post-nup was signed, the husband had undervalued the extent of his business holdings by at least \$11 million.

The Appellate Division emphasized the parties' fiduciary relationship and relied on *Christian v. Christian* and other existing case law in affirming the

Supreme Court's decision to set the post-nup aside on the ground that its terms were "manifestly unfair given the nature and magnitude of the rights she waived, particularly the relinquishment of her property rights in the marital residence and her waiver of all of her inheritance rights, in light of the vast disparity in the parties' net worth and earnings." (citations omitted).

In *Cioffi-Petrakis v. Petrakis*, 103 A.D.3d 766 (2d Dep't 2013), *lv to appeal denied*, --- N.E.2d ----, 2013 WL 3214454, 2013 N.Y. Slip Op. 77996 (N.Y. Jun 27, 2013), the Appellate Division upheld the lower court's order setting aside a prenuptial agreement after finding that the husband fraudulently induced the wife to sign it. This case received extensive media attention and was heralded as the death knell of the pre-nup. Is it?

As in *Petracca*, the Appellate Division's decision relied on existing legal precedent, specifically *Christian v. Christian*, for the proposition that "an agreement between spouses or prospective spouses may be invalidated if the party challenging the agreement demonstrates that it was the product of fraud, duress, or other inequitable conduct." Unfortunately, the decision sets forth no facts supporting the finding of fraudulent inducement, but states that the Supreme Court "reasonably found" that the husband's credibility was suspect due the "patent evasiveness" of his testimony, whereas the wife's testimony was "credible," "convincing," and "unequivocal."



A review of the Supreme Court's decision in *E.C-P. v. P.P.*, 33 Misc.3d 1233(A), 946 N.Y.S.2d 66 (Table), 2011 WL 6155727 (Supreme Court, Nassau County 2011), 2011 NY Slip Op. 52221(U), reveals the Appellate Division's rationale. The pre-nup, which the wife signed against her attorney's advice, specifically provided that there were no oral representations other than those set forth in the agreement, that the agreement set forth the "entire understanding" of the parties, and that the agreement and its provisions merge any prior agreement, and that neither party was relying on any promises not set forth in the agreement. Despite this strong contractual language, common to all marital agreements, the Court found after a hearing that the wife had been fraudulently induced into signing the pre-nup because she relied on the husband's oral promise to tear it up after the parties had a child. The husband denied this, but the Court found his testimony to be evasive and not credible.

The husband had also promised to place the marital residence into joint names, and in fact the parties had gone to a bank to sign a deed to that effect, but in fact title was never transferred. The Supreme Court found that:

"it is not unreasonable to surmise that the husband , in an attempt to mollify the wife, had a deed prepared, signed and arranged to have it notarized in the presence of the wife, and then retained it without recording same, intending therefore to never convey an proprietary interest in the property to the wife. Such conduct is consistent with, and additional corroborative evidence of the husband having made promises to the wife pertaining to the prenuptial agreement on the eve of their marriage which he never intended to keep."

Further, if upheld, the pre-nup would have limited the wife to no more than \$25,000 for each year of the marriage and a one-third interest in one of the husband's businesses.

**Query:** The wife had counsel, who advised her not to sign the pre-nup. Further, the wife and her attorney could have insisted in including a provision in the pre-nup that declared it null and void upon the birth of a child, but didn't. Should these facts suggest a different result?

The result in *Petracca v. Petracca* and *Cioffi-Petrakis v. Petrakis* is not surprising given the husbands' evasive testimony, demonstrated shady dealing where the wives were concerned, and the one-sidedness of the marital agreements. It has been suggested that the precedential value of *Cioffi-Petrakis v. Petrakis*, if any, is that the usual contractual disclaimer and merger provisions may not be enough to protect assets from equitable distribution. I suggest instead that clients should be advised not to make any oral promises regarding the pre-nup in order to induce the other party to sign, that financial disclosure be complete and honest, and that the agreement be fair and reasonable. None of these is a "new" concept.

In *C.S. v. L.S.*, NYLJ July 10, 2013, the Supreme Court, Nassau County relied on *Cioffi-Petrakis v. Petrakis* and *Petracca v. Petracca* in rescinding a pre-nup. In that case, the wife, who was a single mother without significant assets, had told the husband during their discussions about marriage that she would "sign

any piece of paper you put in front of me and I won't even read it." Days before their wedding, the husband gave the wife a pre-nup that had been prepared by his attorney. The wife was never told that she should hire her own attorney to review the agreement; instead, the husband hired an attorney for the wife who had been chosen by his attorney. The wife's lawyer was told in advance that the pre-nup was not negotiable. Of course, the pre-nup heavily favored the husband, to the point that, according to the Court, "upon the parties' divorce Wife will be left no home, no assets, no bank accounts and no maintenance," whereas the husband was a successful business owner with assets of several million dollars and an annual income in excess of \$1,000,000.

Interestingly, the Court anticipated criticism of its decision to set the pre-nup aside and explained it as follows:

In so holding, this Court does not mean to imply that Husband was wrong to desire to enter into an agreement that would clearly spell out the parties' rights upon a termination of the marriage or his death. Such agreements are commonplace and serve understandable and laudable goals, particularly where, as here, the marriage is not the parties' first. Nonetheless, there are tight ways and wrong ways to go about such things. To those who fear that setting aside agreements such as the one in this case will lead to uncertainty in the law and an inability to confidently manage one's affairs, one need only look to the multitude of decisions upholding marital agreements. One can predict with confidence that if each spouse retains a lawyer of his or her own choosing, is provided with a proposed agreement with sufficient time to give due consideration to the serious consequences of the proposed terms, is given fair and adequate disclosure, and is presented with an agreement that does not scream inequity or will leave one party practically destitute, it will be upheld. Unfortunately, that was not the

case here and this Court cannot turn back the clock and make it so.

### **E. Ambiguous, Invalid or Inconsistent Language**

Ambiguous, invalid or inconsistent language in a marital agreement can lead to the expense and trauma of post-judgment litigation for the parties and a possible malpractice action for the agreement's drafters. The following cases are cautionary tales:

1. In *Graev v. Graev*, 11 NY3d 362 (2008), the Court of Appeals determined that the use of the term "cohabitation" in a provision of a separation agreement that provided for the termination of spousal maintenance was ambiguous. It held that a hearing was required to determine the intentions of the parties.

2. Marital agreements are subject to the principles of contract interpretation. Where there is an inconsistency between a specific provision and a general provision, the specific provision prevails. *DeWitt v. DeWitt*, 62 A.D.3d 744, 879 N.Y.S.2d 516 (2d Dep't 2009).

3. Effect of Absence of Language in Divorce Judgment as to Merger/Non-Merger of Agreement. In *Makarchuk v. Makarchuk*, 59 A.D.3d 1094, 874 N.Y.S.2d 649 (4<sup>th</sup> Dep't 2009), the agreement provided that it would "survive any decree of divorce . . . [and would] not merge in[ ] nor be superseded by any divorce decree or judgment." Although the subsequent judgment of divorce

expressly incorporated the agreement, it did not contain a nonmerger clause. The

Court found:

It is well settled that “[a] separation agreement that is incorporated into but not merged with a divorce decree is an independent contract binding on the parties unless impeached or challenged for some cause recognized by law” (*Merl v Merl*, 67 NY2d 359, 362 [1986]). Furthermore, such an agreement cannot be modified by a change to the divorce decree “absent a clear expression by the parties of such an intent” (*Kleila v Kleila*, 50 NY2d 277, 283 [1980]). Here, the parties expressed no such \*1095 intent. It is of no consequence that the decree did not contain a nonmerger clause inasmuch as the parties' intent to incorporate and not merge the agreement in the decree is clear from the language of those instruments (*see Rainbow v Swisher*, 72 NY2d 106, 109-110 [1988]; *Merrick v Merrick*, 181 AD2d 503 [1992]). We thus conclude that plaintiff retained the right to enforce the agreement....

Also, the action on the contract is not necessarily time barred since damages occurring within six years from the commencement of the action may be sought.

4. Effect of Lack of Conformity Between Domestic Relations Order and Agreement. In *Rosenberger v. Rosenberger*, 63 A.D.3d 898, 882 N.Y.S.2d 426 (2d Dep't 2009), since the stipulation provided that the wife would receive her “marital coverture portion” of the husband’s accident disability pension she was entitled to receive such portion even though it otherwise would have been his separate property.

In *Smith v. Smith*, 59 A.D.3d 905, 874 N.Y.S.2d 300 (3d Dep't 2009), “The provisions of a domestic relations order must be consistent with the terms

of the agreement between the parties and a court may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing.”

In *Page v. Page*, 39 A.D.3d 1204, 834 N.Y.S.2d 764 (4<sup>th</sup> Dep’t 2007), since there was no provision in the parties’ stipulation of settlement for the wife to receive any share of survivor benefits arising from the husband’s retirement benefits the domestic relations order should not have granted any portion of such benefits to the wife. Also a mistake in the number of months to be used as the numerator of the fraction in dividing the retirement benefits in the domestic relations order should have been corrected by the court.

5. Modification of Child Support Provisions in a Non-Merged Agreement. In *Krup v. Fehr*, NYLJ 8/7/09, p. 27 (Sunshine, J. Kings Cty, Sup.Ct.) – the Decision provides a thorough discussion of factual basis required to support an application for a downward modification of child support provision contained in a stipulation of settlement subsequently incorporated and not merged into a judgment of divorce.

6. Effect of a Violation of Independent Covenants in an Agreement upon Other Covenants, Egregious Behavior and Forfeiture of Rights in Agreement. In *Weiner v. Weiner*, 56 A.D.3d 293, 869 N.Y.S.2d 391 (1<sup>st</sup> Dep’t 2009), a no-molestation clause is an independent covenant in a separation

agreement and the violation of such a clause will not cause the forfeiture of other benefits pursuant to the agreement. Egregious behavior towards a party to a separation agreement may in certain circumstances result in the forfeiture of rights pursuant to the agreement.

7. Effect Upon Agreement of Invalid Provision for Spousal Maintenance. In *Santini v. Robinson*, 57 A.D.3d 877, 870 N.Y.S.2d 434 (2d Dep't 2009), although the spousal maintenance provisions of an agreement which provided for lifetime escalating spousal support which did not terminate upon remarriage were manifestly unfair the entire agreement should not be set aside.

8. Effect of Lack of Legal Representation Upon Validity of Agreement. *Ricca v. Ricca*, 57 A.D.3d 868, 870 N.Y.S.2d 419 (2d Dep't 2009). Lack of legal representation in connection with the execution of a separation agreement is not in itself sufficient to invalidate it especially when the party without legal representation knows the other party had benefited from legal representation and was informed of his right to counsel and was urged to obtain counsel. In order to set aside a separation agreement which is fair on its face a party must establish fraud, duress, overreaching or unconscionability while improvidence is not sufficient.

9. Plenary Action Required to Modify Agreement.

a. *Reiter v. Reiter*, 39 A.D.3d 616, 835 N.Y.S.2d 240 (3d Dep't 2007). Since a stipulation of settlement that does not merge into a judgment of divorce is a contract, a proceeding to modify the stipulation must be brought by a plenary action rather than by a motion.

b. *Barany v. Barany*, 71 A.D.3d 613, 898 N.Y.S.2d 520 (2d Dep't 2010). Second Department held that Supreme Court erred in sua sponte vacating the child support provisions of the parties' separation agreement incorporated but not merged in their judgment of divorce. The proper challenge to such an agreement is either by commencing plenary action to vacate the agreement or by motion within the context of an enforcement proceeding. **Author's Note:** Is there something magical about an enforcement proceeding that permits such a challenge to an incorporated agreement within the context of such a proceeding?

10. Reformation or Rescission of Agreement Due to Fraudulent Misrepresentation. In *Etzion v. Etzion*, 62 A.D.3d 646, 880 N.Y.S.2d 79 (2d Dep't 2009), *lv. dismissed*, 13 N.Y.3d 824, 918 N.E.2d 950, 890 N.Y.S.2d 437 (2009), a former wife sufficiently stated causes of action against her former husband for fraudulent misrepresentation, for reformation and/or rescission of stipulation of settlement and to impose a constructive trust because the wife



claimed that the husband had concealed the fact that there was an existing agreement for the sale of certain real property at the time the stipulation of settlement was entered into.

However, in *Kojovic v. Goldman*, 35 A.D.3d 65, 823 N.Y.S.2d 35 (1<sup>st</sup> Dep't 2006), *lv. denied*, 8 N.Y.3d 804, 831 N.Y.S.2d 106, 863 N.E.2d 111 (2007), the former wife sought to set aside a separation agreement on the grounds of fraud and overreaching. The wife had agreed to relinquish her claims to the former husband's minority interest in a closely held corporation based upon the husband's representation that his shares were non-liquid, and she waived her right to conduct further discovery into the value of his interest. One month after the agreement was signed, the husband sold his interest for \$18 million. The wife asserted that the husband knew of the imminent sale at the time the agreement was entered into and had an obligation to disclose the value and potential sale to her. The Supreme Court denied the former husband's motion to dismiss. The Appellate Division reversed, finding that because the husband fully disclosed the full extent of his minority interest, the former wife was precluded from challenging the validity of the settlement agreement. Given her professional background and the advice furnished by her counsel and accountant, she should have been aware of the distinct possibility that the subject company would be sold.

*Petrozza v. Franzen*, 109 A.D.3d 650 (2d Dep't 2013) also involved the attempted rescission of a separation agreement. However, the alleged fraudulent act was the wife's failure to tell the husband during the negotiation of the agreement that she had terminal cancer. The wife died after the separation agreement was executed but before judgment of divorce was entered. The husband claimed that he would not have settled the case at all had he known that the wife was likely to die soon; instead he would have waited and obtained the entire marital estate when she died. The husband did not challenge the manner of the equitable distribution or the fairness of the separation agreement. The Court found that the wife's alleged misrepresentation or omissions regarding her health were not material to the husband's decision as to whether to enter into a separation agreement with her, and thus "would not warrant the equitable remedy of rescission." The Court continued:

To hold otherwise would be to recognize, contrary to public policy favoring settlement and fair dealing, that the plaintiff was entitled to a "fair" opportunity to stall in settling the action with the goal of retaining all of the marital assets upon the wife's death. Equity is not served by permitting the plaintiff to rescind the separation agreement for lack of this opportunity.

Furthermore, because the plaintiff does not dispute the fairness of the division of the marital assets to which the parties agreed, he will not be heard to complain that his decision to fairly settle the matrimonial action, in reliance upon his incorrect notion of the wife's good health, operated to his detriment. [*Citations omitted*]

**QUERY:** do you agree that the wife's omissions about the state of her

health were not material? Do you think that the court simply found the husband's argument to be abhorrent in the face of his former wife's death?

11. Reformation of Agreement Due to Mutual Mistake of Fact. *True v. True*, 63 A.D.3d 1145, 882 N.Y.S.2d 261 (2d Dep't 2009). In order to reform a contract on the basis of mutual mistake of fact such mistake must be material (i.e., it must involve a fundamental assumption of the contract). Proof of a mutual mistake of fact must be of the highest order and must show clearly and beyond doubt that there has been a mistake and it must show with equal clarity and certainty the exact and precise form and import that the instrument ought to be made to assume. In a reformation action, the parol evidence rule and the statute of frauds are inapplicable.

In *Simkin v. Blank*, 19 N.Y.3d 46, 945 N.Y.S.2d 222, 968 N.E.2d 459 (2012), the Court of Appeals held that a former husband was not entitled to reformation of his settlement agreement with his ex-wife predicated on a mutual mistake between the parties, after one of the unspecified brokerage accounts he had been permitted to retain under the agreement was revealed to be part of Bernard Madoff's infamous fraudulent Ponzi scheme. The Husband claimed that there had been a mutual mistake, relying on *True v. True*, among other cases, and asserting that the parties believed they had an account, but that the Madoff account was "nonexistent" at the time the agreement was entered into because it was a fraud.

The Court of Appeals found that there was no mutual mistake because (i) the account existed at the time the agreement was entered into because the husband had made withdrawals from it, and in fact could have redeemed all or part of his investment in the Madoff account up until the Ponzi scheme began to unravel, which did not occur until more than two years after the property division was completed; and (ii) the separation agreement did not specifically identify or value the Madoff account, much less “evince an intent to divide the account.” The Court reasoned:

Viewed from a different prospective, had the Madoff account or other asset retained by husband substantially increased in worth after the divorce, should wife be able to claim entitlement to a portion of the enhanced value? The answer is obviously no. Consequently, we find this case analogous to the Appellate Division’s precedents denying a spouse’s attempt to reopen a settlement agreement based on post-divorce changes in asset valuation.

#### **F. Violations of Public Policy: An Interesting Case**

In *Diosdado v. Diosdado*, 97 Cal.App.4<sup>th</sup> 470, 118 Cal.Rptr.2d 494 (Court of Appeal, Second District, Div. 4, 2002), the parties entered into a postnuptial agreement providing for the payment of liquidated damages of \$50,000 over and above any property settlement or support obligations in the event one of them was sexually unfaithful to the other and the marriage was terminated as a result. A California appellate court held that such an agreement is unenforceable because it is contrary to the public policy

underlying California's no-fault statute:

The family law court may not look to fault in dissolving the marriage, dividing property, or ordering support. Yet this agreement attempts to penalize the party who is at fault for having breached the obligation of sexual fidelity, and whose breach provided the basis for terminating the marriage. This penalty is in direct contravention of the public policy underlying no-fault divorce.

**QUERY:** How would a New York court decide?

## **VII. SPECIAL RULES FOR CSSA OPT-OUTS-DRL §240(1-b)(h) and FCA §413(1)(h)**

The Child Support Standards Act (DRL §240(10b) and FCA §413) permit the parties to “opt out” of the requirements of the act. However, in order to do so, there are very specific requirements. Failure to meet each and every one will cause those particular provisions in the agreement to be excised (if there is a severability clause) or for the entire agreement to be vacated (if there isn't). These possibilities are more than simply embarrassing; they may constitute malpractice at worst, and would certainly not help you collect a fee balance due or insure recommendations from former clients at best. To play it safe, the “opt out” requirements should be satisfied even if you believe that you are complying with the basic monetary provisions of the statute. Frequently, different ratios are used for payment of medical insurance or child care expenses than the

proportional ratio. This is a deviation from the presumptive ratio of the statute and there should be reasons provided.

What are the mandatory requirements of an “opt out” agreement? They are found in both of the aforementioned statutes, but we will only deal with DRL §240(1-b) in these materials. The requirements are found in DRL §240(1-b)(h).

Said section provides:

(h) A validly executed agreement or stipulation voluntarily entered into between the parties after the effective date of this subdivision presented to the court for incorporation in an order or judgment shall include a provision stating that the parties have been advised of the provisions of this subdivision, and that the basic child support obligation provided for therein would presumptively result in the correct amount of child support to be awarded. In the event that such agreement or stipulation deviates from the basic child support obligation, the agreement or stipulation must specify the amount that such basic child support obligation would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount. Such provision may not be waived by either party or counsel. Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the basic child support obligation provided such agreements or stipulations comply with the provisions of this paragraph. The Court shall, however, retain discretion with respect to child support pursuant to this section. Any court order or judgment incorporating a validly executed agreement or stipulation which deviates from the basic child support obligation shall set forth the Court’s reasons for such deviation.

Therefore, the following **must** be included:

1. The parties must have been advised of the provisions of subdivision (h) of DRL §240(1-b) and, more specifically, of the Child Support Standards Act. The

parties must be advised that the CSSA provides for a percentage of combined parental income less FICA/Medicare (and New York City and Yonkers income taxes, if applicable) to the custodial parent and that the percentages are based upon the number of children.

2. The parties must be advised that this formula would result in the presumptively correct amount. Basically, they must be told that absent unusual circumstances, the monetary amount resulting from the formula will be what they can expect to pay/receive after a trial.

3. If a party is not represented by counsel, that party must be provided with a copy of the Child Support Standards Chart promulgated by the Commissioner of Social Services pursuant to Social Services Law Section III-i.

4. The parties must be advised that “in the event that such agreement or stipulation deviates from the basic child support obligation, the agreement or stipulation must specify the amount that such basic child support obligation would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount”. In short, the agreement must include the amount that each parent earned based upon their last filed income tax return and any income which the statute requires to be used as income for child support purposes, e.g. voluntary contributions to a 401(k) plan. See DRL §240 (1-b), (b)(5)(I)-(vi). Similarly, the agreement must also include the exclusions from income for the

purposes of the child support calculation, e.g., alimony or maintenance actually paid to a spouse not a party to the action. See DRL §240 (1-b), (b)(5)(vii). The child support based on the formula must be included in the agreement. Each parent must see the number (dollar amount of child support) that would have resulted from the strict application of the formula. It would be advisable to include the formula amount for combined parental income in excess of \$141,000 even though child support on combined parental income in excess of \$141,000 is discretionary with the court (they may use the “factors” or the formula<sup>2</sup> (*Cassano v. Cassano*, 85 NY2d 649, 727, 628 NYS2d 10). Regardless of which method is used on income over \$141,000, reasons must be set forth for choosing the formula method or the factors method and, of course, the factors method itself is an explanation as to the amount of the child support being set if different than the formula. Therefore, it would be wise to put in a paragraph indicating the fact that with **“combined parental income” in excess of \$141,000 either method may be used, reasons are required and that the parties are unable to agree on what a court would actually award, but believe that the amount arrived on for child support would be the correct amount if the court determination contained all the same provisions contained in the instant agreement.**” This information should be

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<sup>2</sup> Note that the child support “cap” on combined parental income was formerly \$80,000, but pursuant to the enactment of the Child Support Modernization Act on January 31, 2012, the cap was raised to \$136,000. Beginning January 31, 2014 and every two years thereafter, the cap will increase by multiplying it by the average percentage change in the CPI-U for the previous two year period. As of January 31, 2014, the cap was increased from \$136,000 to \$141,000, where it remains currently.



included in addition to the amount of child support based upon \$141,000 of combined parental income.

A mere miscalculation of the presumptive amount will not invalidate the child support provisions if every other requirement has been fulfilled. *Sullivan v. Sullivan*, 46 A.D.3d 1195 (3d Dep't 2007); see also *Usenza v. Swift*, 52 A.D.3d 876 (3d Dep't 2008).

5. In the event of any deviation from this number (dollar amount of child support), the reasons for the deviation (up or down) must be specifically set forth in the agreement. You are required to say why the parties have agreed to a different amount. The purpose of this provision is to insure proper future review. In the event that application is made at some future time, the judge can determine whether those reasons are still viable. Failure to do so will render the child support provisions invalid; see, e.g., *Cheruvu v. Cheruvu*, 59 A.D.3d 876 (3d Dep't 2009).

Remember to also address each party's pro-rated share of child care and the reasonable health care expenses of the child(ren) not covered by insurance. These payments are also mandatory and, therefore, any deviation from the ratio (the percentage each must contribute to the support of a child based upon the relationship of their child support payment to the total child support computed for both parents) is a deviation from the Child Support Standards Act.

These rules are set up to insure that children are adequately supported. They therefore favor the children and, by implication, the custodial parent. If the rules set forth above are not strictly adhered to in drafting agreements, the agreements will not stand up to court scrutiny if attacked. For an example of a failure to follow the rules, one must read *Matter of Bill v. Bill*, 214 A.D.2d 84, 631 NYS2d 699 (2d Dep't 1995):

Since Domestic Relations Law §240(1-b) (4) and (h) are both part of the same subdivision, it is clear that the statutory intent is to ensure that a party be aware of all of the relevant provisions of the CSSA, including his or her right to receive a pro rata share of child care expenses, in order to knowingly and intelligently waive those rights. While an agreement need not expressly state that each potential supplement to the basic support obligation has been considered, compliance with the newly amended paragraph (h) demands, at minimum, that an agreement demonstrate that the parties have been fully informed of the provisions of the statute, and of how the guidelines would operate in their individual circumstances. Compliance with paragraph (h) further mandates that the parties reach an agreement upon what their respective support obligations under CSSA would be, which can be an issue of contention where, as here, the parties' combined income exceeds the \$80,000 statutory cap, making application of the statutory formula to excess income discretionary. Thus, compliance with paragraph (h) would have avoided the very situation presented at bar, where the husband claims that he agreed to pay a greater amount of support than he would have been required to pay under the guidelines because his negotiated support obligation was intended to encompass a contribution toward child care expenses, while the wife asserts that the level of support which the parties agreed upon was, in reality, slightly less than that which would have been required under the statutory formula."

*See also, Farca v. Farca*, 271 A.D.2d 482, 705 NYS2d 402 (2d Dep't 2000);

*Burnside v. Somerville*, 202 A.D.2d 1064, 609 NYS2d 127 (4th Dep't 1994).

The definition of the basic child support obligation as set forth in DRL §240(1-b)(b)(1) clearly includes the “add ons” of child care expenses and health related expenses not covered by insurance by referencing the paragraphs of the statute in which these items are contained. Subparagraph (h) of DRL §240(1-b) references the basic child support obligation. Therefore, the “opting out” requirement of subparagraph (h) applies to all components of the basic child support obligation. See also, *Phillips v. Phillips*, 245 A.D.2d 457 (2d Dep’t 1997); *Schaller v. Schaller*, 279 A.D.2d 525 (2d Dep’t 2001). The Second Department has even held that a college expense provision in a separation agreement can be found to deviate from the CSSA if it is unjust. See *Cimons v. Cimons*, 53 A.D.3d 125 (2d Dep’t 2008).

The bottom line is quite simple. If the agreement does not comply with the statutory provisions relating to the conditions under which the party can deviate from any of the components of the basic child support obligation, there is a de novo right to review and the remedy is to bring the order into conformity with the presumptive amount of child support and/or the proper prorated share of child support “add-ons.”

Attorneys should additionally be aware that the standard for modifying the child support provisions of a separation agreement incorporated but not merged into a judgment of divorce (meaning that the judgment of divorce provides that the agreement will survive entry of the judgment) was changed by an amendment to

Domestic Relations Law Section 236(B)(9)(b), effective October 13, 2010. Prior to this amendment, it was more difficult to obtain a modification (upward or downward) of the child support provisions of a separation agreement incorporated but not merged in a judgment of divorce as opposed to a child support order or judgment entered after a trial or hearing (i.e., where no settlement between the parties was reached). The standard to modify a child support order without an incorporated agreement of the parties has always been a “substantial change in circumstance” (see DRL Section 236 (B)(9)(b)), while the higher standard to modify the child support provisions of an agreement incorporated into a court order or judgment of divorce previously had been demonstration of an unforeseen change in circumstances and a concomitant showing of need for the child (*see Boden v. Boden*, 42 NY2d 210, 366 NE2d 791 (1977)) or that the child’s needs were not being met (*see Brescia v. Fitts*, 56 NY2d 132, 436 NE2d 518 (1982)). However, due to the 2010 amendment to Domestic Relations Law Section 236(B)(9)(b), the standard for obtaining a modification of an order of child support, whether or not the order or judgment contains an incorporated agreement, is demonstration of a substantial change of circumstances.

In addition, the same 2010 amendment to 236(B)(9)(b) provides that **UNLESS** the parties opt out in a validly executed agreement or stipulation, a party may obtain a modification of a child support order (or child support provisions of a

judgment of divorce) where three years have passed since the order or judgment was last modified or adjusted, or there has been a 15% change in either party's gross income since the order or judgment was entered. A reduction in income will not be considered as a ground for a modification unless it was involuntary and the party has made diligent efforts to secure employment. Thankfully, the legislature has provided an opportunity for parties to control their own destinies by opting out of this provision concerning a modification after three years or a 15% fluctuation in income.

**PRACTICE TIP:** The Family Court lacks subject matter jurisdiction to vacate as illegal to child support provisions of an agreement incorporated but not merged into a judgment of divorce, and to determine the issue of child support de novo. The legality of child support provisions may only be determined by the Supreme Court. *Savini v. Burgaleta*, 34 A.D.3d 686 (2d Dep't 2006).

## **VIII. DRAFTING PROVISIONS FOR THE PAYMENT OF COLLEGE EXPENSES**

DRL §240 (1-6)(c)(7) provides:

Where the court determines, having regard for the circumstances of the case and of the respective parties and in the best interests of the child, and as justice requires, that the present or future provision of post-secondary, private, special or enriched education for the child is appropriate, the court may award educational expenses. The non-custodial parent shall pay educational expenses, as awarded, in a

manner determined by the court, including direct payment to the educational provider.

Recent decisions indicate that the Courts are taking an active interest in provisions in marital agreements for the payment of college expenses. When drafting such provisions, carefully consider the following:

**A. Define “College Expenses”**

An open-court stipulation placed on the record providing that the father is “responsible for the payment of the college education costs of the two (2) youngest children of the parties.” The father refused to pay for one child’s ninth and tenth semesters, arguing that the child had attained the age of 21, even though the child’s college education had been interrupted by academic difficulties and recuperation from serious injuries. The Court found that the agreement did not restrict the obligation to pay because no age limit or limitation on the number of semesters was provided, nor was there a requirement that the child attend college for consecutive semesters. *Attea v. Attea*, 30 A.D.3d 971 (4<sup>th</sup> Dep’t 2000). However, in the same case, the Court found that the father was not obligated to pay for the child’s medical school expenses. The father’s counsel had stated on the record that the father did not want to be obligated to pay for graduate school. In a dissenting opinion, two justices found that the father should be obligated to pay for the child’s medical school expenses because he had paid for the law school expenses of two older

children, and the agreement provided that the father would pay the expenses of an “education comparable to those educations comparable to those educations which were paid for by the parties for the older children.” *See also, Hejna v. Reilly*, 88 A.D.3d 1119 (3d Dep’t 2011).

**B. Define the Parties’ “Means”**

In *L.L. v. R.L.*, 2012 WL 2466971 (Supreme Ct., Monroe County 2012), the parties’ separation agreement provided that they would finance their children’s’ college education “according to their respective means at the time the child attends college, after grants and scholarships have been taken into consideration.” At issue was the meaning of the term “respective means.” The Court argued with the parties that the term is not ambiguous, but found no common law or statutory definition. The Court interpreted the term “means” to be:

An amount of contribution by each parent that will support the child’s college education, but not unduly overburden either parent while maintaining a reasonable lifestyle. Thus, the amount of each parent’s contribution will depend on their “respective” incomes, expenses, and assets.

The Court added that absent an express provision in the agreement, it could not require the parents to take out loans to pay for college.

**C. Define “Pro Rata” if Providing for Payment of Pro Rata Shares**

In *Ayers v. Ayers*, 92 A.D.3d 623 (2d Dep’t 2012), the parties’ stipulation of settlement provided that they would pay college expenses “on a pro rata basis in accordance with their income and assets.” The father subsequently calculated the parties’ pro rata shares by deducting the amount of child support payments he made from his income and adding that amount to the mother’s income. Five years later, the mother figured this out and sought a reimbursement for amounts she had allegedly overpaid. The Supreme Court denied her motion, finding that the mother’s overpayments were “voluntary.” The Appellate Division reversed, finding that there was no provision in the agreement permitting the father’s formula. Moreover, that formula in effect gave the father a “room and board” or “Rohrs credit” for tuition payments as well as room and board payments. The Court further found that a provision for pro rata shares of necessity means that the parties must exchange W-2 statements and tax returns.

**PRACTICE TIP:** Limit the exchange of income information to W-2, 1099 and for K-1 statements in order to avoid disclosure or inclusion of step-parent income. Define “income” as the term is defined in the CSSA.



**D. Provide for an Adjustment of Child Support While a Child is Attending College**

The so-called “room and board credit,” “shelter allowance,” or “Rohrs credit” (from *Rohrs v. Rohrs*, 297 A.D.2d 317 (2d Dep’t 2002)) must be specifically included in a separation agreement. If the agreement is silent, no credit will be given. *See, e.g., Trester v. Trester*, 92 A.D.3d 949 (2d Dep’t 2012); *Matter of Holbrook v. Holbrook*, 302 A.D.2d 595 (2d Dep’t 2003); *Matter of Maurer v. Erdheim*, 292 A.D.2d 455 (2d Dep’t 2002); *Matter of Filosa v. Donnelly*, 94 A.D.3d 760 (2d Dep’t 2012).

**E. Provide that the Parties Must Approve of the Child’s Selection of College**

In *Matter of Filosa v. Donnelly*, 94 A.D.3d 760 (2d Dep’t 2012), the non-custodial father opposed the mother’s petition seeking to apportion 50% of college expenses to him. He argued that his child should have attended a less expensive college. The Court rejected this argument because the separation agreement did not provide for parental consent to the child’s choice of college, not did it limit the tuition amount for which the parties were responsible.

**F. Provide that the Child is Obligated to Take Out Loans**

In *Matter of Frank v. Frank*, 88 A.D.3d 1123 (3d Dep’t 2011); the parties’ agreement provides that they “shall contribute toward payment of the reasonable educational expenses...on an equal basis.” The father argued that

the child should be obligated to contribute to his own expenses through student loans or other means. The Court disagreed because there was no such requirement in the agreement. [NOTE: query – would such a requirement be enforceable against the child, who is not a party to the agreement?]

### **G. Limit the Parents' Obligation to Pay for College Expenses**

DRL §240(1-b)(c)(7) does not provide any formula or limitation on calculating the parties' obligation to pay for college expenses. The most popular limitation is the so-called "SUNY cap," which limits the parents' obligation to the cost of a SUNY school. It is entirely a creation of case law.

If an agreement is silent as to a "SUNY cap," do not assume that a court will impose one...the determination will be made on a case-by-case basis, with consideration for the parents' means and the child's educational needs. *Tishman v. Bogatin*, 94 A.D.3d 621, 942 N.Y.S.2d 516 (1<sup>st</sup> Dep't 2012). In that case, the Court stated that a blanket rule imposing a SUNY cap would be inconsistent with DRL §240(1-b)(c)(7). Moreover, the child in question had attended an elite public high school and had sound reasons for preferring a private college over SUNY. The parties had attended private colleges and law school, and had the means to pay the private college's tuition.

In *Berliner v. Berliner*, 33 A.D.3d 745 (2d Dep't 2006), the Appellate Division reversed the Supreme Court's imposition of a SUNY cap because the

children attended private boarding school.

In *R.E. v. S.E.*, NYLJ 4/30/10, p.26 (Supreme Ct., New York County 2010), Justice Matthew F. Cooper noted that when a stipulation of settlement is silent as to the payment of college tuition, in addition to the provisions of DRL §240(1-b)(c)(7),

... the First Department has further specified that prior to directing such payment, the court must consider the parties' financial circumstances, the child's relationship with the parties, the child's academic endeavors and abilities, that type of college that would be suitable for the child, and the parents' educational background. *Rosado v. Hughes*, 23 A.D.3d 318, 319 (1<sup>st</sup> Dep't 2005); *Connolly v. Connolly*, 83 A.D.3d 136, 140 (1<sup>st</sup> Dep't 1981).

The defendant father was directed to pay half of the child's sophomore, junior and senior years at Brown. The Court further held, however, that it could not direct the father to contribute to the child's freshman year, which had already been completed prior to the lawsuit, because child support relative to college costs may only be awarded retroactively to the date of application therefor.

Justice Cooper also rejected using a SUNY cap in dramatic fashion in *Pamela T. v. Marc B.*, 33 Misc. 3d 1001 (Supreme Ct, New York County 2011), finding that:

...the SUNY cap – to the extent that it stands for the proposition that before a parent can be compelled to contribute towards the cost of a private college there must be a showing that a child cannot receive an adequate education at a state college – is a doctrine that in many cases is harmful to the children of divorced parents, acts to discriminate against them, and is largely

unworkable.

The child in question had been accepted at two SUNY schools, but chose to enroll at Syracuse University. The defendant father argued that he could not afford to contribute to private college, and that his child could receive as good an education at SUNY.

Justice Cooper traced the genesis, history and application of the SUNY cap. He praised the high caliber of the SUNY system, but stated:

But there is one thing the SUNY system should not be. Contrary to what proponents of a wide and liberal application of the SUNY cap might urge, the SUNY system should not be the assumed destination of children of divorce.  
33 Misc. 3d 1001, 1013.

Justice Cooper rejected the father's contention that he could not afford to pay for his share of the child's college expenses at Syracuse, finding that "a financial burden is not the same as an inability to pay." 33 Misc. 3d 1001, 1015. He directed the father to pay 40% of the child's college expenses, in recognition of other support he had rendered to the family post-divorce.

#### **H. If You're Going to Use a SUNY Cap, Define it Accurately**

In *Fersh v. Fersh*, 30 A.D.3d 414 (2d Dep't 2006), the parties' stipulation of settlement limited the father's share of the child's college expenses to the "maximum that is charged by SUNY." The child enrolled in the Cornell University School of Industrial and Labor Relations, which is one

of three “land-grant” colleges and as thus affiliated with SUNY. The Court found, however, that the tuition there is charged by and paid to Cornell, not SUNY, and that therefore the father need not pay the slightly higher expenses of the Cornell ILR School.

**PRACTICE TIP:** define the SUNY cap to include the cost of the land-grant colleges of Cornell University.

## **IX. CONCLUSION**

The majority of matrimonial cases you handle will be settled by agreements. It is the one document your clients will show to other prospective clients when they are “sharing their experience” with others going through a divorce. The matrimonial attorney is far more likely to be judged by clients by the agreements that he or she drafts than anything else. These agreements are your work product, and they are a reflection of you and your professional standing.

As in drafting any contract, it is extremely important to remember that the failure to make provisions in an agreement or stipulation for issues which would prove to benefit your client’s interests may constitute malpractice. Further, all attorneys must endeavor to anticipate and to provide for future events which could occur and adversely affect their client’s rights or responsibilities. Working with your client and understanding their sense of what may come to pass in their future or

the future of his/her spouse and/or children will help in identifying those events which need to be considered and dealt with in an agreement.

You can refer to various drafts of clauses you may have received in other cases. However, you must be careful to tailor your clauses to each particular situation. Be sure that in using the language in these agreements, it fits your particular situation. In addition, just because a clause may be “boilerplate” does not excuse you from reading it. Don’t assume that you know what the clause says because it looks familiar. Some attorneys have multiple clauses for the same topic and only a word or two are changed in the various clauses. It is up to you to read each word and make sure that you understand the document so that you can explain any questions to your client.

An attorney should review the contents of any proposed agreement with the client in addition to responding to the client’s specific questions. Explanations should be given to the legal effect of the language used (e.g. “merger and non-survival” of child support provisions as opposed to “non-merger and survival”). The possibility of future modifications to portions of the agreement should be reviewed (e.g. custody and visitation; child support; and spousal maintenance). The client needs to understand the necessity to reduce any future agreements between the parties to writing and executed and acknowledged in the same manner as the original agreement. By doing so, the client will better understand

what the agreement does and doesn't do, and will be less likely to make a claim in the future that "My lawyer never told me that" or "I was never warned about that."

## **X. SAMPLE PROVISIONS<sup>3</sup>**

### **A-1 Form: Statement of Reasons For Joint Decision Making in a Shared Custody Situation:**

Having considered all relevant factors and the ages, well-being and best interests of the Children, the parties agree that the parties shall have joint legal custody/decision-making of the Children with the Wife having residential custody of them, subject to the Husband's right to spend time with the Children pursuant to paragraph \_\_\_\_ of this Article.

### **A-2 Form: Joint Decision Making in a Shared Custody Situation – Alternative A:**

All decisions affecting a Child's health, education, welfare, growth and development, including but not limited to religious education, choice of school, course of study, extent of travel away from home, choice of camp, major medical treatment, music or sports lessons or activities, other "extra-curricular activities", psychotherapy, psychoanalysis or like treatment, part or full-time employment, purchase or operation of a motor vehicle, hazardous sports or activities and decisions relating to actual or potential litigation involving a Child directly or as

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<sup>3</sup> The majority of this section was originally prepared by Schlissel Ostrow Karabatos & Poepplein, PLLC.

beneficiary, other than custody, shall be considered major decisions and such major decisions shall be considered, discussed and jointly decided by both parents.

**A-3 Form: Joint Decision Making in a Shared Custody Situation – Alternative B:**

The parties shall have joint legal custody of the Children which means that, except as expressly set forth herein, they shall discuss and jointly decide all issues concerning the Children's religion, education, development, extracurricular activities, summer camp and other summer activities (after discussion with each child), grooming, bedtime, homework completion, curfew and social activity, child care givers and sitters and general welfare. To effectuate the provisions of this paragraph, the parties shall consult with each other with respect to such issues and attempt to come to a mutually agreeable decision. On the occasions that either party seeks, in good faith, to consult with the other party by telephone (confirmed by email), email, facsimile, mail, certified mail or overnight delivery at the party's home or business in order to come to a mutual agreement about decisions regarding the Children or a Child, said party being consulted has the obligation to respond promptly, but not later than seven (7) business days from the date notice is sent. In the event the party consulted does not respond within such 7-day period and the decision requires a timely response, the other party may make the decision unilaterally, provided, however, that such decision shall not establish a precedent for the purposes of this Stipulation. In the event the parties are unable to come to a



mutually agreeable decision with respect to a particular issue, both parties reserve their respective rights to make an appropriate application to a court of competent jurisdiction.

**A-4 Form: Joint Decision Making in a Shared Custody Situation – Tie Break Provision – Alternative A (Is this Enforceable?):**

In the event the parties are unable to agree on a major decision (as herein defined) concerning any child, they shall submit the dispute to \_\_\_\_\_ whose decision shall be final and binding.

**A-5 Form: Joint Decision Making in a Shared Custody Situation – Tie Break Provision – Alternative B:**

In the event the parties are unable to agree on a major decision concerning any child, the Mother shall have the final decision-making authority.

**A-6 Form: Joint Decision Making in a Shared Custody Situation By “Spheres of Influence” or Areas for Decision Making – Alternative A:**

The parties shall have decision-making authority as set forth hereafter. The parties shall consult with one another with respect to all such decisions in an effort to make a joint decision. If, after a good faith effort to consult, as set forth in paragraph \_\_\_\_ of this Article, has been made, the parties cannot agree as to a particular decision, the Mother shall have the right to make the final decision as to which decision shall be made based upon the Children’s best interests, and the Father shall have the right to make the final decision as to, which decision shall

also be based upon their best interests.

**A-7 Form: Joint Decision Making in a Shared Custody Situation By “Spheres of Influence” or Areas for Decision Making – Alternative B:**

After and only after discussion between the parties, should the parties fail to reach a mutual agreement upon a decision affecting the health, education, religion and/or welfare of the Children, including but not limited to the issues set forth in paragraph \_\_\_ of this Article \_\_\_, such decisions shall be made in accordance with the following provisions:

A. Religion - The parties hereby agree that the Children have been and shall continue to be raised in the faith. Any modification or change to the foregoing provisions shall require the joint and mutual agreement of both parties. Absent such agreement, no modifications or changes shall be permitted. Each parent shall be entitled to complete, detailed information directly from any individual or entity giving religious instruction to the Children or a Child, to be furnished with copies of all notices, reports and test results given by them or any of them to the other parent and to attend any of the Children's conferences, consultations, meetings and/or religious events or activities. Each party shall have the obligation of providing the other party with any and all notices, reports, test results, report cards, schedules and the like given to them by any entity or individual giving religious instruction to the Children or a Child.

B. Extracurricular activities and camp/summer activities - All decisions with respect to extracurricular activities and summer camp or other summer activities shall be made jointly by the parties with the paramount consideration being the Children's expressed interests and desires. The parties shall, to the extent practicable, abide by the Children's wishes and desires with respect to extracurricular activities and summer camp or other summer activities. After and only after consultation with the Father, the Mother shall be responsible for registration of the Children in all extracurricular activities, summer camp and other summer activities. The Mother shall provide the Father with copies of all registration forms and documents immediately upon her receipt of same and shall list the Father and his contact information on all such forms and documents and provide such information to the activities and/or camps. In the event the parties disagree as to a particular decision with respect to an extracurricular activity or summer camp or other summer activity, the Mother shall have the right to make the final decision which shall be made primarily based on the Children's wishes.

C. Non-Emergency Medical Care

(i) The Father shall select the Children's general, non-specialist physicians, including but not limited to, primary care physicians, pediatricians, general eye care professionals, dentists and gynecologists provided that the Father shall only be permitted to select medical providers who participate in the health

insurance plan which covers the Children. In the event the Father selects a health care professional to treat the Children or a Child who does not participate in the health insurance plan covering the Children, the Father shall be responsible for 100% of said professional's fees and any other fees not covered by the insurance plan.

(ii) The Father shall inform and apprise the Mother of the names, locations and telephone numbers of any and all medical health professionals treating the Children or Child. The Father shall further inform and apprise the Mother of any and all scheduled medical, dental, optical, therapy or any other health related appointments for the Children. The Mother shall have the complete and unfettered ability to speak to, meet with and otherwise communicate with any medical health professional treating or who has treated the Children or a Child and shall be entitled to review or obtain any records or documentation maintained by any medical health professional treating or who has treated the Children or a Child. Both parties shall have the right to attend any health related appointments of the Children or a Child.

(iii) The Mother shall have the absolute right to take the Children or a Child for a second opinion to a medical health professional of his choosing in the event the Mother believes same is necessary. Should the Mother choose to exercise this right, she shall so advise the Father and shall further advise her of his reason for obtaining a second opinion, the name and telephone number of the medical health

professional who will be providing the second opinion, the date on which any appointments are scheduled and the outcome of such appointments. Upon the obtainment of a second opinion, the parties shall mutually decide an appropriate course of treatment, including the doctor with whom such treatment shall be had. In the event the parties are unable to make such mutual decision, the Father shall have the right to make the final decision.

(iv) In the event that a Child is diagnosed with a chronic or serious medical condition, the parties shall jointly and mutually agree as to the selection of a treating specialist and an appropriate course of treatment. In the event the parties are unable to make such joint and mutual decision, the Father shall have the right to make the final decision.

D. Other: All other decisions with respect to any other issue involving the Children or a Child shall be made jointly by the parties. In the event the parties are unable to come to a mutual decision on any one issue, each party reserves his or her right to make an appropriate application to a Court of competent jurisdiction.

**A-8 Form: Mechanisms for Consultation – Alternative A:**

The parties shall fully and completely consult and confer with one another in good faith so as to be able to effectively make all major decisions delineated in subparagraph 1(b) of this Article jointly, and prior to making any such decisions,

the parties shall consult with one another regarding same. This shall include their conferring, either personally or by telephone or e-mail, to discuss all major decisions concerning their Children. If the parties, after full consultation, cannot agree on an issue they are required to jointly decide, they shall submit the issue to a relevant and appropriate professional who is qualified or works in the area of the issue at hand, and to the extent possible, is familiar with the parties and Child, and each shall have the opportunity to make a full presentation, with rebuttal, to that professional. After said professional has given their opinion as to the resolution of the matter, if the parties still cannot agree on said issue, either one may seek judicial intervention. It is agreed and stipulated that if judicial intervention is sought, the party bringing said action must affirmatively state to the Court in the pleadings that the parties have sought the advice of such a professional, naming said professional and must disclose the advice that said professional had suggested. There shall be prohibition against any such professional being called as a witness, or submitting an affidavit on a motion. The cost of such professionals' actions shall be split, initially, but the parties, subject to potential reallocation by the Court.

**A-9 Form: Mechanisms for Consultation – Alternative B:**

The parties recognize that from time-to-time they may not agree on decisions regarding the Children or a Child, and in that regard, agree to the following mechanisms to facilitate dispute resolution: (a) regarding medical

treatment, if a Child develops a condition or illness that requires a specialist, they will seek a recommendation of a specialist from the Child's then-current pediatrician, and if treatment is required they will utilize the recommendation of the Child's pediatrician; (b) regarding orthodontia, the parties will utilize the recommendation of the Child's then-treating dentist if they do not agree otherwise; (c) regarding education-related issues, such as course selection and academic tutoring, the parties will consult with the Child's classroom teacher and/or guidance counselor from the Child's school, and if tutoring is required or a particular course or testing is recommended, they will utilize the recommendation of the classroom teacher or guidance counselor; and (d) regarding the selection of college, the parties and the Child to be attending college will consult with the school guidance counselor and educational consultant or college counselor, and the selection of college for each Child will be made with the input of the guidance counselor, expert, Child and the parties.

**A-10 Form: Joint Decision Making in a Shared Custody Situation -  
Child's Input Required:**

Any and all decisions as to the welfare of the Children shall be agreed upon by the Husband, Wife, and the Child. In the event of a disagreement between the Husband and Wife, the Child's wishes shall be controlling.

**A-11 Form: Joint Decision Making in a Shared Custody Situation – Child’s Input A Consideration:**

Any and all decisions affecting all of the Children shall be agreed upon by the Husband and Wife, with the input of the particular Child. Such decisions shall include, but shall not be limited to, their schooling, vacation and travel plans, and physical and emotional well-being.

**A-12 Form: Participation with Parent Coordinator or Therapist:**

The parties shall have joint legal and shared custody of the children which shall be defined as follows: the parties shall attempt to jointly make all major decisions concerning the Children’s’ health, education, religion and extra-curricular activities. In the event the parties are not able to reach a decision on any such major issue, then the parties agree to mediate the resolution of the issue with Dr. whose address is the parties shall meet Dr. as required but in no event more than one time per month. The bill for Dr.’s time shall be shared equally by the parties. If after one session addressing an issue with Dr. no resolution is reached, then the Father shall have the absolute right to make the full, final and binding determination on that particular issue in the best interests of the Children. The requirement to mediate a not agreed upon issue with Dr. shall not apply in the case of any emergency situation.



**A-13 Form: Participation in Parent Education Program:**

The parties agree that each of them shall participate in a parent education program to attempt to foster a more meaningful relationship between them and to address any difficulties encountered in such relationship so as to ensure that neither party shall do anything which may estrange the children from the other or injure the opinion of the children as to the parties or which may hamper the free and natural development of the children's love and respect for each of the parties. The parties shall mutually select a parent education program for this purpose. In the event that the parties cannot agree on the choice of a counselor, either party may request that the Court make the selection.

**A-14 Form: Comprehensive Shared Custody Article (Without Support Provisions):**

1. The parties agree that, subject to the terms and conditions hereof, they shall have joint shared legal and physical custody of the three (3) children born of the marriage. The Children shall reside with the Mother and Father for the periods of access for each set forth herein.

2. The parties agree that they will each consult, confer and discuss with one another concerning decisions regarding the health, education and welfare of the Children. Such consultation, conference and discussion shall take place sufficiently in advance and with reasonable notice so that each party may have ample opportunity to express his or her views and opinions. It is the intention and desire of

each party that they shall both have meaningful input in making all such decisions, unless the party whose input is sought chooses not to discuss same. For the purposes of this Stipulation, the categories of decisions for which it is suggested that there be discussion include the selection of camp, the selection of college and other educational issues, extra-curricular activities, the selection of new health care personnel, including but not limited to pediatricians and other medical doctors, dentists, therapists and the like, medical, dental or psychiatric/psychological treatment other than ordinary or common care (except in emergencies where immediate medical attention is required and it is not possible to contact the other party); and religious education and participation.

3. After consultation between the parties, should the parties fail to reach a mutual agreement, or if the party whose input is sought opts not to discuss such major decisions affecting the health, education, welfare, safety and other major decisions and issues affecting the Children, including, but not limited to, the issues set forth in paragraphs 2, 3A and 3B of this Article:

(a) The Mother shall have the right to make the final decision with respect to routine health decisions involving the Children and the Children's extra-curricular activities, unless such activities impact upon the Father's time with and access to the Children, in which case the Father's written consent must be obtained prior to registering the Children for said activity. The Mother agrees not to

intentionally schedule activities solely on her time for the purpose of not having to obtain his approval. The Father's consent shall not be unreasonably withheld and his failure to respond in writing within five (5) days of having received written notice from the Mother shall be deemed his consent. Notice shall be faxed or mailed to the Husband's business and the Husband's home, or alternate place where he designates in writing. Notwithstanding the foregoing, if it is a new activity in which the children have not previously engaged in, there shall be no deemed consent. All other major decisions including, but not limited to, decisions concerning non-routine health (except for psychotherapy), camp, religion, employment, college and education shall be made by the Father. In the event that either parent wants any of the Children to see a psychologist/psychiatrist and the other parent disagrees, the decision as to whether or not that Child goes to therapy will be decided by the pediatrician, the Child's school guidance counselor, or the mediator selected by the parties pursuant to paragraph 21 of this Article. The choice of therapist shall be made by the professional recommending it.

(b) Recurrent, routine, day-to-day decisions affecting the Children (including travel with the Children by the parent having the Children) shall be made by the parent with whom the Children are with on that day, subject to a standard of reasonableness.

4. In the event of any serious injury or illness of a Child that constitutes an emergency, the party with whom the Child is residing at the time of such emergency, injury or illness shall attempt to promptly contact the other party so that the parties may consult with respect to any decision involving the Child's care. However, if time does not permit such consultation with the other party, the party who is with the Child shall be free to retain the services of any surgical, medical, or dental specialist as either party may select and designate, and shall be free to unilaterally make any other decision with respect of the Child until the other party can be contacted and consulted. The parent present with the injured Child shall immediately contact the other parent.

5. Upon the termination of the Father's periods of access, the Father or other responsible adult ("Father"), including a caregiver hired by the Father, shall drop off the children at school, camp or the home of the Mother or other responsible adult ("Mother"), including a caregiver hired by the Mother, and the Mother or other responsible adult shall be at the home of the Mother or other responsible adult to receive the Children. Upon the commencement of the Father's period of access, the Father or other responsible adult ("Father"), including a caregiver hired by the Father, shall be at school, camp or the home of the Father or other responsible adult to receive the Children. Pick up and return of the Children shall be as set forth in paragraph 19 of this Article.

6. The parties shall affirmatively urge and encourage the children to be with the other parent during their periods of access, and they shall refrain from intentionally scheduling recurring activities for the Children which conflict with the other parent's periods of access. Moreover, if a child does have an activity which is during the Father's period of access, e.g., religious school or other lessons, birthday party, an extracurricular activity or event scheduled by a school, soccer game, or the like, the Father or other responsible adult shall pick up the Child(ren) to and from all such events and he shall have the right to attend such event if it is appropriate for parents to attend such event. The Father shall have the right to enroll the Children in any activities which are scheduled to occur during his time with the Children. In the event either parent wants to enroll the children in activities which are scheduled to occur during the other parent's time with the Children, the party seeking to enroll the children in such activity shall first obtain the written consent of the other party. Such consent shall not be unreasonably withheld. Notwithstanding the foregoing, the parties agree that the children shall participate in Little League baseball if they wish to do so. In the event that any of the children wish to participate in Little League baseball, the Father shall notify the Mother in advance of his registering them and provide her with all Little League information. If a car pool has been set up for any activity, it will remain in effect on both parents' time to provide continuity for the Children, provided that the third parties in the car

pool so agree. Each party shall, upon receipt of any invitation or notice regarding the Children's or a Child's activities immediately inform the other of such event or activity by telephone, e-mail or fax, of the time, date and place of such event or activity (or any cancellation thereof) so that the other has similar notice of same together with a copy of such invitation or notice. For school, camp and the like, both parents' residences shall be listed on all information sheets, applications, registrations and the like. The parent signing such forms shall be responsible for listing both addresses and pertinent information.

7. During each party's scheduled time with the Children, that party shall take them to all of their activities including, without limitation, sport or other lessons, birthday parties, Bar/Bat Mitzvah parties, or the like. The children's music lessons shall be scheduled such that they shall be at the Mother's house one week, the Father's house the following and shall continue to alternate in the same manner. The parties presently use \_\_\_\_\_ as the children's music teacher. It is hereby agreed that \_\_\_\_\_ will alternate the Children's music lessons between the parties' respective houses each week. If modifications to the weekly schedule are necessary, the party requesting such modification shall speak directly with the music teacher, or any substitute music teacher thereafter. The Mother agrees to provide the name, telephone number and address of or any substitute music teacher to the Father. In the event that there is a cancellation of an activity

(i.e. Hebrew School or other lesson), each party shall forthwith provide the other with immediate notice of such cancellation upon learning of same during that parent's time with the Children. In addition to providing each party with advance notice of all such events as hereinabove discussed, each party shall be entitled to complete information pertaining to the Children from any school, teacher, tutor, athletic coach, third party giving instruction to the Children, or any physician, therapist or other health care provider or institution, including, without limitation, report cards, and any other written records pertaining to the Children's health records pertaining to the Children's health, education and general welfare that the provider or institution makes available to parents in the normal course.

8. Both parents agree to maintain clothing for the children in their own residence and shall cooperate with each other in providing and returning equipment and other necessary items.

9. Each parent shall have the right to inform the teacher, school, physician, or other such provider of his/her entitlement to the information and/or documents pertaining to a Child. If only one parent has direct contact with such provider, that parent shall advise the teacher, school, physician or other such provider of the other parent's name, address, telephone number, and shall instruct the provider to make the information or document available to him or her. If for any

reason a provider fails or refuses to provide information or documents to one parent, then, upon notice, the parent who receives the information or documents shall promptly provide the other with copies as soon as practicable.

10. The parties agree that it is in the Children's best interests to encourage the natural development of the Children's love and respect for both parents and to ensure that they enjoy the benefit of shared activities with both parents. To this end, the parties agree not to disparage the other party in the presence of a Child, nor shall the parties discuss the issue of legal custody or the facts of their matrimonial action with the children. The Mother shall also encourage the children to have normal socialization with the children's friends on the Father's time. At the Father's request, the Mother agrees to provide the Father with all appropriate information necessary for the children to see their friends on the Father's time, including but not limited to, providing him with the names and phone numbers of the children's friends with whom they regularly socialize.

11. Each party shall have the right to attend every special event pertaining to and/or involving the Children, including, without limitation, school activities, including parent-teacher conferences and extracurricular activities in which parents are permitted or invited to attend, athletic and cultural events, graduation ceremonies, religious ceremonies, visiting day at camp, and any other similar events. The parties agree that each shall immediately provide the other with all



notices regarding such extracurricular activities and any school notices about extracurricular school activities not on the school calendar, if such notice is brought home by the Child or otherwise.

12. Pursuant to the terms of this Stipulation, it shall be the obligation of the parent who enrolls the Children in a school, a camp, an extracurricular activity or program, or a religious activity or program to provide such institution with the name, address and telephone number of the other parent, and to request that the other parent receive the same notice of events as the enrolling parent. In addition, the Mother shall provide the Father, in the Fall, Winter, Spring, and Summer with a list of all the children's activities prior to enrolling the Children in those activities. After the Fall if the Children's activity schedule remains the same for the following session, the Wife shall notify the Husband of that fact in writing. The Mother will also, on the first of each month hereafter, provide a list of any parties or other events the Children or a Child will be involved in and as soon as any notices of such parties are received if the party or event is within the month. If there are any changes in the Children's scheduled activities, the Mother shall provide such changes to the Father as soon as she receives notice of same. Both parties shall advise the other in advance of any activity in which they intend to enroll any of the children which differs from that which they participated in previously.

13. When any special event occurs during one party's regularly scheduled time with the Children, that party shall provide for the Child's transportation to and from the event, unless the event takes place directly after school on school grounds, or unless otherwise agreed between the parties.

14. Each parent shall have the right to communicate with the Children by telephone on a daily basis when the Children are with the other parent and both parents agree not to interfere with such communication. Each parent further agrees to encourage frequent (i.e., no less than one (1) time a day) telephone and other communication between the Children and the other parent; the children shall be encouraged by each party to call the other nightly between 8:00 - 9:00 p.m. and at any other time during the day. Each party shall maintain an answering machine for the other party to leave messages for the children daily. If either parent travels with the Children for more than three days, that party shall, two weeks in advance, provide the phone numbers, flight and address and hotel information, and all other information which will make communication with the Children possible during such vacation or travel time. If the period away from the parents' residence is more than one day in duration but less than three days, then only two days prior notice shall be required to provide the phone number and address of where the children are staying. Contact with the Children during such travel/vacation time shall be at a mutually convenient time but not less than once a day, if possible, but both

parents shall make sure that two days do not pass without the other parent speaking to the Children. To effectuate the foregoing, each parent shall install a working facsimile machine in their home and fax notices to the other's home as required in this Stipulation. Further, the parties shall provide one another with second and/or summer residence address and telephone number.

15. (a) In the event of any serious illness or injury of the Child requiring confinement outside of the home, e.g., at a hospital, both of the parties shall have the right of daily visitation at the place of confinement, regardless of which parent would, but for the Child's illness, have the right to reside with the Child.

(b) In the event of the death or emergency of a family member, either parent shall be entitled to have the Children at that time for a reasonable period of time, e.g. to attend a funeral and/or Shiva.

16. From the date of the execution of this Stipulation through and including December 31, 2004, the Mother and Father shall share time with the children pursuant to the parenting schedule attached hereto as Exhibit A and made a part hereof. Thereafter, the parties shall continue to share time with the children in the same manner and pursuant to the Schedule set forth in Exhibit A and as further detailed in paragraphs 17 and 18 in this Article, it being the express intention of the parties that the time after December 31, 2004 shall be shared in a manner

consistent with and pursuant to Exhibit A (with alternating holidays and vacations from the previous year).

17. Commencing January 1, 2005, the parties shall share time with the Children pursuant to the following 28 day Schedule (“M” indicating mother and “F” indicating Father):

SUN	MON	TUES	WED	THURS	FRI	SAT
1 M	2 M before school F after school	3 F before school M after school	4 M	5 M	6 M before school F after school	7 F
8 F	9 F before school M after school	10 M	11 M before school F after school	12 F	13 F before school M after school	14 M
15 M	16 M before school F after school	17 F before school M after school	18 M	19 M	20 M before school F after school	21 F
22 F	23 F before school M after school	24 M	25 M before school F after school	26 F	27 F before school M after school	28 M

18. The parties shall share the following holidays with the Children in accordance with the following schedule, terms and conditions which schedule shall supersede the 28 day cycle schedule as set forth in paragraph 17 of this Article in case of any conflict:

Recitals

A. The “Easter Period”, “President’s Week”, and the “Christmas Period” are respectively defined as the period commencing on the day school ends for a recess period and ending on the morning of the recommencement of the next regular school session.

B. “Civil Holidays” shall be defined as commencing immediately after school on the day school ends for the holiday and ending on the morning of the recommencement of the next regular school session.

C. “Mother’s Day”, “Father’s Day”, “Mother’s Birthday” and “Father’s Birthday” shall take precedence over any other regular scheduled visitation period as provided for in this Stipulation.

D. “Civil” and “Religious” Holiday periods shall take precedence over any other regular scheduled visitation as provided for in this Stipulation and Schedule A.

E. The parties agree to abide by the following alternate holiday access schedule. Any holidays not specifically set forth herein will also be alternated. All

Jewish holidays shall include overnights, even if it falls during a school recess unless the parent who has the vacation wishes to go away with the Children, thereby causing the holiday not to be overnight, and, if such, 15 day notice shall be provided by the parent who intends to go away with the Children. In that event, the holiday will be observed with the Children and the parent not going away shall have the children for a minimum of five (5) hours. Moreover, said parent will only be able to cancel the overnight if the holiday falls after the recess was commenced. If the holiday falls in the beginning of the recess, the overnight will stay and the vacationing parent will leave the following day. The alternate holiday access schedule is to be as follows:

<b>MOTHER*</b>	<b>FATHER*</b>
Mother's Birthday every year - from 11 a.m.	Father's Birthday-every year - from 11 a.m.
Child's Birthday - 3 hours every year	Child's Birthday - 3 hours every year
President's Week - odd	President's Week - even
Easter Period - even	Easter Period - odd
First Night of Passover - odd	Fist Night of Passover - even
Second Night of Passover - even	Second Night of Passover - odd
Memorial Day Weekend - odd	Memorial Day Weekend - even
July 4th - even (if not Mon. or Fri.)	July 4th - odd (if not Mon. or Fri.)

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\* On three day holiday weekends, if the parent is going away and gives one week prior notice that parent will be able to take the children the Thursday night immediately preceding the weekend.

Labor Day Weekend - odd	Labor Day Weekend - even
First Night and Day of Rosh Hashanah - even	First Night and Day of Rosh Hashanah - odd
Second Night and Day of Rosh Hashanah - odd	Second Night and Day of Rosh Hashanah - even
Erev Yom Kippur - odd (overnight)	Erev Yom Kippur - even (overnight)
Yom Kippur - even (overnight)	Yom Kippur - odd (overnight)
Thanksgiving Weekend - even (Wednesday through Sunday)	Thanksgiving Weekend - odd (Wednesday through Sunday)
Christmas Period - odd	Christmas Period - even

F. Summer period commencing with Summer 2007

(i) The parties acknowledge and represent that the time available to spend with the Children in the summer, assuming the Children attend camp, consists of two blocks of time as follows:

(a) the period of time commencing on the day of the last full day of school for the Child whose school year ends the latest and ending on the day camp begins for the summer; and

(b) the period of time commencing on the day camp ends for the summer and ending on the day school resumes for the next academic year.

(ii) The parties shall share equally these two blocks of time. In odd-numbered years, the Father shall spend time with the Children during the first half of the block of time described in subparagraph (i) (a) above. The Father shall pick up the Children from school on their last day of school and shall return them

to the Mother after one-half of said block of time has passed. The Children shall remain with the Mother until their first day of camp and the Mother shall take the Children to camp or the camp bus stop on their first day of camp and the Father shall have the right to be there also. In odd-numbered years, the Father shall also spend time with the Children during the first half of the block of time described in subparagraph (i)(b) above. The Father shall pick up the Children from camp on their last day of camp and shall return them to the Mother after one-half of said block of time has passed.

In even-numbered years, the Mother shall spend time with the Children during the first half of the block of time described in subparagraph (i)(a) above. The Mother shall pick up the Children from school on their last day of school and shall bring them to the Father after one-half of said block of time has passed. The Children shall remain with the Father until their first day of camp and the Father shall take the Children to camp or the camp bus stop on their first day of camp and the Mother shall have the right to be there also. In even-numbered years, the Mother shall also spend time with the Children during the first half of the block of time described in subparagraph (i)(b) above. The Mother shall pick up the Children from camp on their last day of camp and shall bring them to the Father after one-half of said block of time has passed. The Children shall remain with the Father until the first day of school and he shall take them to school on that day.



(iii) During those time periods when the Children are in camp in the summer, the access schedule set forth in paragraph 17 of this Article shall continue.

(iv) In the event the Children or any child does not attend day camp, sleep away camp or a summer program away from home and/or summer job (camp counselor) during the summer, with respect to that Child or Children, the parties shall equally share time with that Child or Children in the summer alternating one (1) week blocks beginning on the first Friday after regular school or any program ends and alternating thereafter until the Thursday before the Labor Day Weekend. The parent who has fourth of July weekend shall select that week as one of the one week blocks.

(v) The parties shall split the time during the Parents' Weekend at camp in the following manner:

(a) in even-numbered years, the Father shall be with the Children from Thursday at 5:00 p.m. until Saturday at 5:00 p.m., and the Mother shall be with the Children from Saturday at 5:00 p.m. when camp recommences Monday morning; and

(b) in odd-numbered years, the Mother shall be with the Children from Thursday at 5:00 p.m. until Saturday at 5:00 p.m., and the Father shall be with the Children from Saturday at 5:00 p.m. when camp recommences Monday

morning.

19. To effectuate the provisions of this Article, each parent shall be responsible for dropping off and picking up the Children from school or camp during his or her access periods with the Children. In the event that the Children are not in camp or school, the parents shall share equally the responsibility for transporting the Children to and from one another's primary local residences. To effectuate the foregoing, in odd-numbered months, the Mother shall drop off the Children at the Father's residence at the commencement of each of his access periods if they are not at school or camp, and the Father shall drop off the Children at the Mother's residence at the conclusion of each of his access periods if they are not at school or camp. In even-numbered months, the Father shall pick up the Children from the Mother's residence at the commencement of each of his access periods if they are not at school or camp, and the Mother shall pick up the Children from the Father's residence at the conclusion of each of his access periods if they are not at school or camp.

20. Neither party shall arbitrarily or unilaterally withhold from the other party access to the children as provided in this stipulation.

21. The parties agree to attend mediation sessions with, (Telephone number) once every six weeks to discuss issues concerning the Children and other appropriate matters. In addition, in the event that either party has a dispute

with respect to any issues concerning the Children or disputes concerning this Article or Exhibit A, prior to applying to the Court for relief, the parties agree to attempt to mediate such issue with. The cost of such mediation session as well as the once every six week sessions provided for in this paragraph shall be shared equally by the parties. If cannot act for any reason including either party's inability to work with her (however, there can be no more than two (2) changes by either party in a mediator in any year), then she shall designate his or her successor. The first of the once every six week meetings shall occur during the week of August 1, 2006. It is the intention of the parties that the mediation set forth herein is for problem resolution and is for settlement only and the parties shall act civilly to one another during the session.

22. Neither party shall arbitrarily or unilaterally withhold from the other party access to the children as provided in this stipulation.

23. The failure on the part of either parent to exercise his rights of access, as provided herein, on any particular occasion, shall not be deemed or construed to constitute a waiver of his/her right thereafter to full compliance with the provisions hereof.

24. The parties will make every effort to provide consistency in the Children's lives regarding study/homework time and house rules for the Children in each parent's household.

25. The parties shall at all times inform each other and/or the Children's caregivers of their respective residences, as well as each other's telephone numbers and pager numbers so that he or she can be reached in the event of an emergency. Each party shall have private, unrestricted telephone access to the Children and the Children shall have private, unrestricted telephone access to each party at all times. The Father, at his option, may install in each of the Children's bedroom at the Mother's residence a separate telephone number and line for his and the children's use. The Father shall provide the telephones for the line and he shall pay the cost of installing said telephone number, lines and all monthly charges for same. Said separate telephone number and lines shall be used only by the parties' Children to communicate with their Father and should not be used by anyone else in the house. The Mother shall fully cooperate with the Father. The Father shall arrange for the aforesaid installation. The Father may telephone the Children on the said separate telephone at any time, during reasonable hours.

26. Each parent shall be advised of any and all professional treatment given the Children and shall be entitled to direct contact with and complete, detailed information directly from any health care provider, including, but not limited to, any pediatrician, general physician, dentist, therapist, consultant, specialist, etc., attending to each Child for any reason whatsoever, and to be furnished with copies of any and all reports given by them to the other parent, upon request. Each parent may be

present at any health-related appointments of the Children and the party making such appointment shall promptly notify the other. Neither party shall instruct any such health care provider to refuse to speak with the other party or to withhold any information from the other party.

27. Each parent shall be entitled to complete, detailed information directly from any caregiver employed by the other parent. Neither party shall instruct any such caregiver to refuse to speak with the other party or to withhold any information from the other party.

28. Each parent shall exert every reasonable effort to maintain free access and unhampered contact between the Children and the other party, and will not do anything which would prohibit or interfere with the other's access to or contact with the Children. Each parent will foster a feeling of affection between the Children and the other party. Neither party shall do anything which may estrange the Children from the other party or which may hamper the free and natural development of the love and respect for the other party.

29. The parties shall communicate regularly to discuss the physical and emotional needs and progress of the Children and shall inform each other, before or at the time the Children change residence pursuant to the schedule set forth in this Article, of any significant events that will take place during the following week, including but not limited to school or extra-curricular activities and events,

medications and health-related needs.

30. To effectuate the shared custodial arrangement set forth herein, from and after the date hereof and until such time as the youngest child completes high school, the Children shall continue to attend school in the School District, and the Father shall maintain a School District residence. The Mother agrees to reside within the School District with the Children until June 30, 2008. Thereafter, the Mother may move out of the School District but no more than 10 straight line miles from the Marital Residence; provided, however, that the Wife may not move outside County even if such a move would be less than 10 straight line miles. In the event the Mother so moves, she shall be responsible for transporting the children to and from school, camp and related activities. For school purposes, the Father's residence shall be listed as the Children's primary residence and shall be used to register the Children in school.

31. Both parties acknowledge that the children are Jewish and have also been raised under the guidance of the Jewish faith and that they will continue to raise the children in the Jewish faith. The parties agree that the Children will continue to attend the Hebrew Congregation. The Mother shall continue to pay the dues to maintain the children's and her membership, and the Mother agrees to provide the high holy day temple tickets to the Father so he and the Children can attend temple on the Jewish holidays.

32. The Children shall not be known by or referred to by any other last name other than “ ”.

33. Neither party shall permit nor encourage a child to refer to any other person as "mother" or "father" or any derivative or substitute for such terms, it being expressly understood and agreed that only the parties to this action have the right to such designation or appellation.

34. The parties shall alternate taking the Children for haircuts on a monthly basis, with the Father taking them for haircuts in all odd numbered months and the Mother taking them for haircuts in all even numbered months.

35. The parties shall alternate sleep away camp visiting days, with the Father to get the first or primary such day in even years and the Mother to have such day in odd years, and the parties shall alternate thereafter. However, the parent who does not have the primary weekend day may go to camp on the other day of that weekend or such other time as scheduled by that parent.

36. At signing, the Mother shall provide to her attorneys, copies of all pictures, photographs, videotapes albums and the like taken during the marriage through the commencement of this action for divorce, of the family, children, and the Father, including, but not limited to baby pictures, pictures at the parties' former house, birthday parties, plays, sporting events, school events, etc. In addition, the Mother shall provide the Father with copies of videos and pictures of the

Children's school events and extracurricular activities since the commencement of the action. In order to effectuate the foregoing, prior to the signing of the Stipulation, the Mother shall produce to her attorney all such photographs and video tapes which shall be given to the Father's attorney, and the Father shall have an opportunity to review such pictures and video tapes at the Wife's attorney's office. The arrangements for the copying of such photos and video tapes shall be made by the attorneys for the Wife at the Father's sole cost and expense at the photography studio selected by the Father. The Mother and Father shall split equally the number of originals and copies returned to them with the intention of each person receiving a complete set of photos and videos. There are 73 folders of pictures. The Mother will get originals of 1 through 37 and copies of 38 through 73, and the Father will get originals of 38 - 73 and copies of 1 through 37.

**B. Parenting Schedule and Access Language**

**B-1 What words do you want to use?** Access, Parental Access, Time With Children, Time-Sharing Visitation? Discussion re: Benefits and Detriments of various terms.

**B-2 Form: Basic Time Sharing Schedule – Alternative A:**

1. The parties further agree that the Husband shall spend time with the Children pursuant to the following schedule:

(a) The Husband shall have the right to spend time with the



Children on one weekday evening (i.e. Monday through Thursday) each week, the particular day to be mutually agreed to by the parties at least one week in advance. Such parenting time shall be between the hours of 5:00 p.m. and 8:00 p.m. The Children shall be with the Wife at all other times, except as otherwise indicated herein.

(b) The Husband shall have the right to spend time with the Children on alternate weekends from Thursday at 5:00 p.m. until Monday to return the Children to school, or if no school, to the Wife's residence by 9:00 a.m., unless otherwise mutually agreed to in advance of such parenting time.

(c) All holidays, both religious and secular, including any school vacations or recesses, shall be divided equally between the parties in a fair manner as they shall mutually agree. The parties agree that, so as to accommodate their respective work schedules, they shall determine the time sharing arrangement for such holidays and school vacations/recesses at least three (3) months in advance of same. In the event the parties cannot reach an agreement with respect to the division of such holidays /school vacations / recesses, then the following schedule shall control: [A comprehensive holiday schedule should follow, such as that which is set forth below in B-4.]

**B-3 Form: Basic Time Sharing Schedule – Alternative B:**

The Husband shall have the right, at his option, to spend time with the children as set forth below:

1. Every Wednesday evening from 6:00 p.m. until 9:00 p.m.
2. In alternating weeks from Friday at 6:00 p.m. until Sunday at 9:00 p.m.
3. The night before or after each of the children's birthdays, at the Husband's option.
4. The month of July or the month of August, at the Husband's option, to be exercised in writing on or before April 15<sup>th</sup> of each year. Should the Husband fail to timely exercise his option, the Wife may select the month by April 30<sup>th</sup>.
5. Alternating Memorial Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving, Christmas Eve (December 24 at 5:00 p.m. until December 25 at 10:00 a.m.) and Christmas Day (December 25 at 10:00 a.m. until the next morning at 10:00 a.m.) holidays.
6. (a) Subject to paragraph 5 above, in alternating years, the first week of the children's school vacation at Christmas or the second week thereof;  
(b) In alternating years, either the children's Easter or the children's February school vacation.
7. Notwithstanding the foregoing, in each year the Husband shall have the

children with him from 10:30 a.m. to 9:00 p.m. on Father's Day and on his birthday.

**B-4 Form: More Extensive Time Sharing Schedule – Alternative A:**

1. The parties shall abide by the following schedule of parental access to the children:

A. Weekends: Commencing on , the children shall be with the Father on alternate weekends. Said alternate weekend time shall commence Thursday after school (including the Husband taking the children or a child to Hebrew school, if applicable) and conclude on Monday morning, when he will bring the children to school or to the bus stop. If there is no school scheduled on that Monday morning (and provided the Mother is not scheduled to be with the children pursuant to the Holiday and Recess Schedule set forth herein), then the Father will be with the Children on Monday, including overnight, and will bring the children to school on Tuesday morning.

B. Weekdays:

(a) Commencing on , the Children shall be with the Father on alternate Mondays. Said Monday time shall commence after school and end at 8:15 p.m. at which time the Mother shall pick up the Children from the Father's residence.

(b) Commencing on , the Children shall be with

the Father on alternate Wednesdays. Said Wednesday time shall commence after school and end at 8:15 p.m. at which time the Mother shall pick up the Children from the Father's residence.

C. Holiday and Recess Periods: Civil and Religious holiday periods and school recess periods shall take precedence over any other regularly scheduled parental access period as provided in this Stipulation, and the following conditions shall apply:

(a) The "Easter-Spring Recess Period", "President's Week-Winter Recess", and the "Christmas-Holiday Recess Period" are respectively defined as the period from the close of the regular school session of the school which the Child is attending to the morning of the recommencement of the next regular school session.

(b) Civil holidays shall be defined as the period from the close of the regular school session of the school which the Child is attending to the morning of the recommencement of the next regular school session.

(c) The “Summer Recess Period” is defined commencing on the first Monday immediately following the closing of the Spring semester of the Children’s school(s) to the morning of the opening of the school in the following Fall semester, less any time when a Child is attending a sleep-away camp program.

(d) “Mother’s Day”, “Father’s Day”, “Mother’s Birthday” and “Father’s Birthday” shall take precedence over any other regularly scheduled access periods, holiday or recess periods.

The parties shall abide by the following holiday and recess schedule:

	<b>MOTHER</b>	<b>FATHER</b>
Mother’s Day & Mother’s Birthday (8/24)	Every year	–
Father’s Day & Father’s Birthday (8/30)	-	Every year
Children’s Birthdays	Time when Child is not in school to be equally divided with Mother having first half of time in odd years and Father having first half of time in even years.	Time when Child is not in school to be equally divided with Mother having first half of time in odd years and Father having first half of time in even years.
Martin Luther King, Jr.’s Birthday & 3-Day Weekend	Odd years	Even years
Valentine’s Day	Even years	Odd years
President’s Week/Winter Recess	Even years	Odd years
Easter/Spring Recess	Odd years	Even years
Memorial Day Weekend	Even years	Odd years

July 4 <sup>th</sup>	See Summer Recess below	See Summer Recess below
Columbus Day Weekend	Even years	Odd Years
Halloween	Even years	Odd years
Veteran's Day	Odd years	Even years
Thanksgiving (Thursday through Sunday)	Odd years	Even years
Christmas/Holiday Recess (includes New Year's)	Even years	Odd years

Time when Child is not in school to be equally divided with Mother having first half of time in odd years and Father having first half of time in even years.

D. Summer Recess Period: The parties shall divide equally the summer recess period of the Children, in one (1) week intervals (defined as 7 consecutive days) starting with the Monday immediately following the closing of the Spring semester of the Children's school(s). In even years, the mother shall be with the Children for the first week interval, the Father shall be with the Children for the second week interval, and so forth on an alternating basis. In odd years, the first week interval shall belong to the Father and the second week interval shall belong to the Mother, and so forth on an alternating basis. During the week that one parent has the Children, the other parent may, if the Children are not away on

vacation, see the Children from 4:00 p.m. to 9:00 p.m. on Wednesday of that week. During the summer recess period, the parent with whom the Children are with on a given day shall be responsible for dropping off the Children at their camps or camp bus stops in the mornings and picking up the Children at their camps or camp bus stops in the afternoons on those days. Either parent shall have the option of vacationing out of town with the Children for up to a two week consecutive period upon advance notice to the other parent of such intention and the parties agreeing to said arrangement, said consent not to be unreasonably withheld.

E. Miscellaneous:

(a) On any school holiday or other day on which the Father is scheduled to be with the Children on which the Children do not have school (and provided the Mother is not scheduled to be with the Children pursuant to the Holiday and Recess Schedule set forth herein), the Children shall remain with the Father until the following morning at which time he shall bring them to school or the bus stop.

(b) At any time at which the Father picks up or drops off the Children at the Mother's residence, he shall be able to park his car in the driveway of the Mother's residence and ring the doorbell or knock on the door of the Mother's residence to pick up or drop off the Children. In no event shall the Father enter the Mother's residence without her express permission and consent.

(c) The Children shall have unrestricted and unlimited access to any and all of their belongings, including but not limited to, toys, bicycles, sporting goods, recreational equipment, Gameboys and related equipment and the like. In the event the Children are with the Father and wish to retrieve a belonging from the Mother's residence, the Mother shall bring said item or items to the Children or shall permit the Children (or either Child) to enter the Mother's residence (including the garage) to obtain the requested item(s) upon notice to the Mother. In the event the Children are with the Mother and wish to retrieve a belonging from the Father's residence, the Father shall bring said item or items to the Children or shall permit the Children (or either Child) to enter the Father's residence (including the garage) to obtain the requested item(s) upon notice to the Father.

(d) The Mother will allow the Father use and possession of the Children's footwear, formal clothing (including suits and special occasion dresses) and outerwear whenever necessary.

(e) The parties agree that the Mother shall be responsible for planning, making all arrangements for and paying for the Children's birthday parties in even-numbered years and the Father shall be responsible for planning, making all arrangements for and paying for the Children's birthday parties in odd-numbered years. Both parents shall have the absolute right to attend all of the Children's birthday parties each year regardless of which parent plans and pays for the parties



in any given year. In the event that either parent plans a party to which extended family members are invited, the parties agree that extended family members from both of their families shall be invited to the party regardless of which parent plans and pays for that party. The parent planning the parties in a particular year shall only plan a party during that parent's time with the Children according to the schedule set forth herein and shall promptly notify the other parent of the date and time of the party as soon as practicable after the arrangements have been made and the place for the party has been reserved.

(f) In the event either party spends two or more consecutive weekends with the Children due to the holiday or recess schedule as provided herein, the other party will spend the weekend immediately preceding and the first weekend following the holiday or recess with the Children and the parties shall thereafter alternate spending weekends with the Children.

(g) The parties shall share in the responsibility to transport the Children to and from each other's residences for their scheduled access periods with the Children. In the event of the Mother's relocation with the Children pursuant to the terms of Stipulation, the parties shall equally the transportation of the Children to and from their residences.

(h) It is agreed that the specific provisions for holidays, vacations, birthdays, Mother's Day and Father's Day and the like contained in this

Stipulation shall supersede and overrule, if a conflict exists, the general time sharing provisions set forth in paragraph 1 of this Article. The summer vacation provisions of this Stipulation shall supersede all other provisions.

(i) The parent who is with the Children on a school weeknight shall be responsible for feeding the Children dinner, supervising the Children's homework and study assignments, ensuring that the Children's work is completed for the following school day and ensuring that the Children are properly prepared for any tests.

(j) The Father shall participate in the car pool arrangements which the Mother has arranged with the parents of the Children's school mates and shall be able to make car pool arrangements on his own.

**B-5 Form: More Extensive Time Sharing Schedule - Alternative B:**

1. The Husband shall spend time with the Children pursuant to the following schedule:

(a) On alternating weekends from Thursday at 6:00 p.m. through Monday back to school, which time shall commence on the first weekend immediately following the execution of this Stipulation;

(b) On Mondays and Wednesdays of the week before the Husband has the Children for the weekend from 5:00 p.m. until return to school the next day;

(c) On the Tuesday before the weekend in which the Husband shall not be with the Children, from after school until return to school the next day;

(d) The Children shall be with the Husband during the following holidays and school recess periods during even-numbered calendar years (and with the Wife during odd-numbered calendar years):

(i) Martin Luther King Weekend, commencing the Friday immediately preceding Martin Luther King Day at 6:00 p.m. and ending on Martin Luther King Day at 6:00 p.m.;

(ii) Memorial Day Weekend, commencing the Friday immediately preceding Memorial Day at 6:00 p.m. and ending on Memorial Day at 6:00 p.m.;

(iii) Columbus Day Weekend, commencing the Friday immediately preceding Columbus Day at 6:00 p.m. and ending on Columbus Day at 6:00 p.m.; and

(e) The Children shall be with the Husband during the following holidays and school recess periods during odd-numbered calendar years (and with the Wife during even-numbered calendar years) :

(i) July 4<sup>th</sup> from 6:00 p.m. on July 3 until 10:00 p.m. on July 4;

(ii) Labor Day Weekend, commencing the Friday immediately

preceding Labor Day at 6:00 p.m. and ending on Labor Day at 6:00 p.m.;

(iii) The first night of Rosh Hashanah, commencing at 5:00 p.m. and ending at 5:00 p.m. the following day;

(iv) Thanksgiving, commencing the Wednesday immediately preceding Thanksgiving at 6:00 p.m. and ending the Sunday immediately following Thanksgiving at 6:00 p.m.; and

(v) The Christmas recess period, commencing at 6:00 p.m. on the day school ends for the recess period and ending at 6:00 p.m. on the day before school resumes following the recess period.

(f) The Husband shall be with the Children during every February recess period, commencing at 6:00 p.m. on the day school ends for the recess period and ending at 6:00 p.m. on the day before school resumes following the recess period. The Wife shall be with the Children during every Easter/Spring recess period, commencing at 6:00 p.m. on the day school ends for the recess period and ending at 6:00 p.m. on the day before school resumes following the recess period.

(g) Notwithstanding the foregoing, in each year:

(i) If the Children are not otherwise with the Husband pursuant to the schedules set forth in this Article, then the Husband shall be with the Children from 12:00 noon to 8:00 p.m. on the Husband's birthday unless the

Children are in school, in which event the Children shall be with the Husband for a reasonable time, of not less than three hours, after school;

(ii) The Wife shall be with the Children on the Wife's birthday unless the Children are scheduled to be with the Husband, in which event the Children shall be with the Wife from 12:00 noon to 8:00 p.m. of that day or, if the Children are in school on the Wife's birthday, for a reasonable time, of not less than three hours, after school;

(iii) The Husband shall be with each Child on that Child's birthday for a period of at least six (6) hours, if a weekend or non-school day, and at least three (3) hours if a school day if the Child is otherwise with the Wife on his or her birthday. The Wife shall be with each Child on that Child's birthday for a period of at least six (6) hours, if a weekend or non-school day, and at least three (3) hours if a school day if the Child is otherwise with the Husband on his or her birthday.

(iv) The Husband shall have the Children with him on Father's Day Weekend from 6:00 p.m. on the Friday immediately preceding Father's Day until 8:00 p.m. on Father's Day, and the Children shall be with the Wife on Mother's Day Weekend from 6:00 p.m. on the Friday immediately preceding Mother's Day until 8:00 p.m. on Mother's Day;

(h) During the summer, the Husband shall have the right to spend two

(2) weeks with the Children, which weeks shall not be consecutive. The Husband shall notify the Wife of his intention to exercise his two weeks with the Children at least 60 days prior to said weeks.

(i) The Husband shall spend such other, different and additional time with the Children as the parties may mutually agree.

2. The Husband shall pick up the Children at the Wife's residence at the commencement of his time with them and shall drop off the children at the Wife's residence at the conclusion of his time with them during each scheduled access period. All pick-ups and drop-offs of the Children by the Husband shall be curbside. The Husband shall not enter the Wife's residence under any circumstances without the Wife's express consent and permission.

**B-6 Form: More Extensive Time Sharing Schedule – Alternate C:**

1. The parties shall spend equal time with their children pursuant to the following schedule:

A. The parties shall alternate each week with the Children from Sunday at 8:00 p.m. until the following Sunday at 8:00 p.m. with the Children to be with the Father for the first such week after the execution of this agreement.

**B-7 Form: Shared Physical Custody – Parents to Live Close to one another:**

1. Having considered all relevant factors and the well-being and the best interests of the children, the parties agree that they shall have shared residential and

physical custody of the children as set forth below. It is understood and acknowledged that neither party is to be deemed the primary residential or physical custodial parent of the children, except that for school purposes only the children shall use the Mother's address so long as she is residing at the present marital residence.

2. The parties acknowledge that despite their separation and/or divorce, they wish their children to have the normal father/daughter and father/son and mother/daughter and mother/son relationships and to spend, as far as practicable, equal amounts of time physically residing with each of their parents. Accordingly, the terms "shared residential and physical custody" shall mean that the parties shall abide by the schedule set forth below so that the children shall equally share their living time with their parents. To this end, the parties agree that they shall, until the time their last child graduates from the high school district the parties present reside in, both continue to reside in or within three miles of that school district, the mother agreeing to continue to reside in the present marital residence; it being understood that physical residence of both parties in or near the same school district is a critical element of their shared physical custody agreement.

**B-8 Form: Parents Non-Availability For Access Time - First Option is other parent:**

If either party is unable to utilize her or his time with the children as set forth in this Article, that time shall immediately be offered to and made available to the

other party prior to utilizing any third-party child care provider.

**B-9 Form: Nanny Lives With Children:**

The parties agree that the Children's current nanny, or any future nanny or similar child care provider, shall stay with whomever parent the Children are with pursuant to the access schedule set forth herein.

**B-10 Joint Access to School and Medical Records:**

Each parent shall have be entitled to complete, detailed information directly from any pediatrician, general physician, dentist, mental health professional, consultant, or specialist attending each child for any reason whatsoever and to be furnished with copies of any reports, test results, diagnoses, correspondence, etc. given by any such person to the other parent. Each parent shall, if requested, notify any such professional to provide the said information directly to the other parent. Each parent shall be entitled to complete, detailed information directly from any teacher, tutor, or school (including college or university) giving instruction to any child, or which any child may attend, and to be furnished with copies of all notices, reports, test results, correspondence, school calendar information, etc. given by them, or any of them, to the other parent. Each parent shall, if requested, notify such school or teacher to provide the said information directly to the other parent. Immediately upon receipt, each parent shall forward to the other parent any correspondence, notices,



memoranda, reports or similar materials referable to or received from the children's schools.

**B-11 Form: Requiring Exchange of Information Concerning Children's Activities:**

Each parent shall be entitled to complete, detailed information regarding any extracurricular activities and events, sporting activity, and religious education events that any of the children may participate in, and to be furnished with copies of all notices, correspondence, memoranda, etc. given to the other parent, including but not limited to schedules, invitations, itineraries and calendar information. Each parent shall, if requested, notify the appropriate person or entity to provide the said information directly to the other parent. Immediately upon receipt, each parent shall forward to the other parent any such correspondence, notices, memoranda, or similar materials referable to or received concerning such activities and events.

**B-12 Form: Both parents may attend all children's activities:**

Both parties shall have the right to attend all of the children's extracurricular activities and events, sporting activities, and religious education events provided that it is appropriate for parents to attend such activities, and to participate, to the extent that parental participation is permitted for such activity/event.

**B-13 Form: Summer Access**

**Schedule: Alternative A:**

(a) The “Summer Recess Period” is defined as commencing at 3:00 p.m. on the last day of the Spring semester of the Child’s school and ending at 3:00 p.m. on the day immediately preceding the commencement of the following Fall semester of the Child’s school.

(b) In the event the Child does not attend a sleep-away camp, each party shall have the right to vacation for two weeks with the Child during the Summer Recess Period, which weeks may be consecutive. In odd-numbered years, the Father shall be entitled to select his summer vacation period with the Child first and shall notify the Mother, in writing, of his choice of days no later than April 1 of each odd-numbered year and the Mother shall then select her summer vacation period with the child and shall notify the Father, in writing, of her choice of days no later than May 1 of each odd-numbered year. In the event the Father does not notify the Mother of his selection on or before April 1, he shall be deemed to have forfeited his right to select his summer vacation period first and the Mother shall then have the right to select her summer vacation period with the Child. In even-numbered years, the Mother shall be entitled to select her summer vacation period with the Child first and shall notify the Father, in writing, of her choice of days no later than April 1 of each even-numbered year and the Father shall then select his

summer vacation period with the Child and shall notify the Mother, in writing, of his choice of days no later than May 1 of each even-numbered year. In the event the Mother does not notify the Father of her selection on or before April 1, she shall be deemed to have forfeited her right to select her summer vacation period first and the Father shall then have the right to select his summer vacation period with the Child. With the exception of each parties' selected summer vacation periods with the Child, the access schedule set forth herein shall continue throughout the summer recess period.

(c) In the event the Child does attend a sleep-away camp, the parties shall equally divide the days during the summer recess period during which the Child is not attending such camp.

**Alternative B:**

With respect to the Child's Summer Recess, which is hereinafter defined to commence as the first full day after the spring school term at 9:00 a.m. and conclude at 8:00 p.m. on the evening prior to the first day of the fall school term, if the Child does not attend a sleep away summer camp or a comparable organized summer activity when the Child sleeps away from home, the parties will adhere to the ordinary weekly residential schedule as set forth herein. Notwithstanding the foregoing, each parent shall be entitled to two (2) consecutive weeks of uninterrupted time plus one (1) additional of time with the Child so that each party

may have an extended time with the Child. The parties agree that they will determine the time each will spend with the child during the Summer Recess on or before April 15<sup>th</sup> of each year and provide the other with written notification of the weeks selected. In the event the Child is attending sleep away summer camp or comparable organized summer activity whereby the child sleeps away from home, the parties shall divide equally the remainder of the Child's Summer Recess with the understanding that they will determine such time on or before April 15<sup>th</sup> of each year. During any uninterrupted times as herein provided, the parent with whom the Child is not on vacation shall be entitled to speak to the Child by telephone once a day.

**B-14 Form: Particular Religious Holidays – Christmas – no split:**

In even years, the Children shall be with the Father for the Christmas recess period (including Christmas Day and Christmas Eve), commencing at 6:00 p.m. on the day school ends for the recess period and ending at 6:00 p.m. on the day before school resumes following the recess period.

**B-15 Form: Particular Religious Holidays – Christmas – split:**

In odd numbered years, the Father shall have the Children on Christmas Eve commencing 6:00 p.m. until 10:00 a.m. Christmas morning. In even numbered years the Father shall have the Children on Christmas Day commencing at 10:00 a.m. until 8:00 p.m.

**B-16 Form: Particular Religious Holidays – Jewish Holidays:**

The father shall have the children on either the first or second Seder night of each Passover, and any four consecutive nights of Chanukah, provided that the father advises the mother by February 15<sup>th</sup> of each year of his choices. If he fails to do so, the mother will have her choice of Seder and Chanukah nights; provided, however, that in all cases, the children shall be with the mother on at least one Seder night and four nights of Chanukah. In addition, the parties shall alternate Yom Kippur, including the evening before, with the mother having the first Yam Kippur following the execution of this agreement.

**B-17 Form: Time on Children's Birthdays:**

The parties shall equally share all non-school time with the children on any child's birthday, such that when the child is not in school, the Mother shall have the first half of the time in odd years and the second half of the time in even years, and the Father shall have the first half of the time in even years and the second half of the time in odd years.

**B-18 Form: Time on Parent's Birthdays:**

Each of the parties shall have the right to spend three hours with the children on his or her birthday each year.

**B-19 Form: Time on Mother's Day and Father's Day:**

The father shall have the right to spend each year with all of the children on Father's Day, and the mother shall have the right to spend each year with all of the children on Mother's Day.

**B-20 Form: Specific Access Provisions Overrule General:**

It is agreed that the specific provisions for holidays, school recesses, birthdays, Mother's Day, Father's Day, and the like shall supersede and overrule, if a conflict exists with the general weekend and weekday time sharing provisions set forth herein.

**B-21 Form: No scheduling of activities on other parent's time:**

Neither party shall arrange or schedule activities for any of the children which are to occur during the other party's access time with them without that party's prior written consent.

**B-22 Form: Parent required to take children to activities during access time:**

Each of the parties shall be responsible for timely transporting the children to and from any of their scheduled activities, whether extracurricular, athletic, educational, social or otherwise that may occur during that party's time with the children.

**B-23 Form: Long Distance Cases – parental access:**

1. In light of the fact that the mother resides in New York with the children

with the father's consent, and the father lives in Florida, the father shall have the following rights of access to the children:

(a) On the third weekend of every odd numbered month, the father shall have the children with him in New York from Thursday at 6:00 p.m. through Sunday at 9:00 p.m.

(b) On the third weekend of every even numbered month, the father shall have the children with him in his place of residence from Thursday at 6:00 p.m. through Sunday at 9:00 p.m.

(c) The parties will alternate school holidays of more than three days duration, with the father having the children with him in New York on the first such school holiday following the execution of this Agreement. The place of the father's time with the children (i.e. New York, or the state of the father's residence) will alternate as well.

(d) The father shall have the children at his place of residence for either the month of July or August, his choice to be made known to the mother by April 15<sup>th</sup> of each year.

2. The father shall have full telephone access to each of the children on at least a daily basis.

3. All costs related to the father's time with the children, including, but not limited to, airfare, hotels, motels, long-distance telephone, etc. shall be

borne equally by the parties.

4. In the event that the parties ever reside within seventy-five miles of each other, then, at the father's option, he may exercise his time with the children as follows: [A typical access schedule such as that which is set forth above should follow.]

**B-24 Form: Long Distance – Virtual parenting (Can you hug a computer?):**

In light of the fact that the parties live at distant locales, in addition to the access schedule set forth herein, the Father shall have the right to communicate and interact with the Children via “virtual visitation” using tools such as personal video conferencing, a webcam, email, instant messaging (IM) and other wired or wireless technologies over the Internet or other communication media. Said “virtual visitation” between the Father and the Children shall be a supplement to his in-person parenting time and telephone access, and shall not be considered to be a substitute therefor.

**B-25 Form: Long-Distance Cases – equal sharing of delivery time:**

In light of the fact that the parties live at distant locales, they agree to equally share in all pick-ups and deliveries of the Children in order to implement the access schedule set forth herein. Thus, the Father shall pick up the Children at the commencement of his time with the Children at the Mother's residence, and the Mother shall pick up the Children at the Father's residence at the conclusion of his



time with the Children.

**B-26 Form: Older Children – no fixed time:**

In light of the advanced age of the child, no specific times and places are set forth herein, it being understood that time between the child and the father shall be on such occasions and at such places as the child and his father agree upon, subject to reasonable notice to the mother.

**B-27 Form: Access to Children:**

Each party shall be entitled to daily reasonable telephone (cellular and land-line) and e-mail access with the Children when they are with the other parent. Neither party shall monitor, supervise, interfere or in any other way stifle the telephone or e-mail communications between the Children and the other parent. Both parties shall advise the Children of any telephone messages and e-mails left for them by the other party and shall encourage the Children to return all such messages left for them. The parties shall use each other's telephone numbers and e-mail addresses for legitimate purposes only.

**C. DIRECT CHILD SUPPORT LANGUAGE**

**C-1 Form: Factors Utilized in Fixing Child Support:**

The parties hereto expressly represent and warrant that they are aware of their mutual obligation to provide for the support of the Children, and that they are aware of this state's child support guidelines. They are further aware that the guidelines

will be applicable despite this shared custody agreement. The parties have considered this fact, their respective present and anticipated future financial positions, and the present and anticipated future needs of the Children in setting forth the Husband's obligation for support hereunder. The Wife expressly acknowledges her obligation to provide for any and all support needed by the Children over and above the sums and other obligations of the Husband to support the Children as set forth herein. The sums and other obligations set forth herein as the Husband's obligations for the Children's support constitute and allocation of the obligation of each party for the support of the Children and an anticipation of the Children's future needs.

**C-2 Form: Direct Child Support – Alternative A:**

Notwithstanding the shared custodial arrangement set forth herein, commencing on the first day of the first month immediately following the execution of this Stipulation and continuing monthly on the first day of each month thereafter until the emancipation of the first child, the Husband shall pay to the Wife, as and for child support for the parties' two Children, the sum of \$1,500 a month. Said sum is inclusive of any obligation on the part of the Husband to contribute to any child care.

**C-3 Form: Direct Child Support – Alternative B:**

Given the time-sharing arrangement between the parties pursuant to which the parties shall spend substantially equal time with the Children, each party hereby waives the receipt of child support from the other party except as otherwise provided herein. Except as otherwise provided herein, each party shall be responsible for the expenses of the Children during the time that the Children are with him or her.

**C-4 Form: Direct Child Support – Fixed Periodic Increases:**

The child support being paid to the Mother by the Father shall be increased each year by 5% per year. By way of example but not by limitation, on the first day of the first month immediately following the one year anniversary of the execution of this Agreement, the Father's child support obligations shall increase by \$109 per month (5% of \$2,180) so that the Father will pay to the Mother as and for child support the sum of \$2,289 a month beginning on the first day of the first month following the one year anniversary of the execution of this Agreement and continuing for an additional eleven payments thereafter at which point the Father's child support obligations shall again increase by 5% or \$114.45 to \$2,403.45 per month. The 5% increases are intended to account for cost of living increases and shall be recalculated each year.

**C-5 Form: Direct Child Support – Increases Tied to Consumer Price Index:**

(a) It is the intention of the parties that the support provided in paragraph

1(a) of this Article V shall be recalculated every other year commencing with the payment to begin on January 1, 2008 in accordance with the cost of living as defined in the annual Consumer Price Index (the "Index"). To effectuate the foregoing, the following definitions shall apply:

(i) The term "Index" shall mean the Consumer Price Index - All Urban Consumers, New York, New York-Northeastern New Jersey, all items, as published by the Bureau of Labor Statistics of the U.S. Department of Labor;

(ii) The term "Base Index" shall mean the Index as of January 1, 2007;

(iii) The term "Applicable Period" shall mean the twenty-four month period ending December 31 in the year immediately prior to each Adjustment Date and each twenty-four month period thereafter;

(iv) The term "Current Index" with respect to an Applicable Period shall mean the Index as of the January 1 immediately following the Applicable Period;

(v) The term "Adjustment Date" shall mean January 1, 2008 and every other January 1 thereafter.

(b) To effectuate the foregoing adjustments, if, on an Adjustment Date, the Current Index exceeds the Base Index, then the basic monthly child support (as set forth in paragraph 1(a) of this Article V) shall be increased by the same percentage

by which the Current Index exceeds the Base Index as defined in subparagraph (2) above. Said calculation shall be made within thirty (30) days after January 1, 2008 and every other January 1 thereafter. Any increase due as of the date of the calculation shall be retroactive to January 1 and any sums due for such retroactive period shall be paid within fifteen (15) days of such calculation. For example, if on the Adjustment Date in the Year 2008, the Base Index is equal to 160 and the Current Index is equal to 165, then the monthly child support (\$4,167) shall be adjusted upward by 3% [3% being the percentage obtained by dividing the Current Index (165) by the Base Index (160)] so that commencing on January 1, 2008, the Husband shall pay to the Wife the sum of \$4,292 consisting of the original amount of \$4,167 + \$125, \$125 representing 3% of \$4,167. Assuming that the aforesaid calculation is made on February 1, 2008, then within fifteen (15) days thereof, the Husband shall pay to the Wife a sum equal to the increased amount due from January 1, 2008. Thereafter, until the next calculation on January 1, 2010, the Husband shall pay to the Wife the sum of \$4,292 per month. By way of further example, if as of the Adjustment Date in the Year 2010, the Current Index is 167, then the basic child support of \$4,167 will be increased by 4.38%, [4.38% being the percentage obtained by dividing the Current Index (167) by the Basic Index (160)] so that, commencing on January 1, 2010, the Husband shall pay to the Wife the sum of \$4,350 per month, consisting of the original \$4,167 + \$183, \$183 representing 4.38% of

\$4,167.

(c) If the U.S. Department of Labor ceases to publish the Consumer Price Index referred to in this Article, and if in such event the parties cannot agree on a substitute Index or other method for achieving the adjustment contemplated in this Article, then a substitute index shall be provided, or an appropriate adjustment from time to time shall be determined by arbitration by the then rules of the American Arbitration Association pursuant to the Arbitration Law of the State of New York.

(d) In the event that the parties cannot agree upon the Index calculation set forth in this paragraph, the parties shall jointly select a mutually-acceptable accountant to make such calculations, and the calculations of such accountant shall be binding upon the parties. If the parties are unable to agree upon an accountant, then each of them shall select an accountant, and the two accountants together shall mutually select a third, neutral accountant to make the calculations required under this Article V.

**C-6 Form: Termination of Child Support – Emancipation;**

**Alternative A:2**

(a) The Husband shall pay to the Wife, by check or money order, commencing on the first day of the first month immediately following the execution of this Stipulation and continuing monthly on the first day of each month

thereafter until the emancipation (as that term is herein defined) of the first Child, the sum of \$5,208 per month as and for child support for the two unemancipated children.

(b) Upon the emancipation of the first child, the Husband shall pay to the Wife, by check or money order, the sum of \$3,541 per month, said sum being seventeen/twenty-fifth's of \$5,208, on the first of each month commencing with the first day of the month immediately following the emancipation of the first Child and continuing until the emancipation of the last Child. When the last Child is emancipated, the Husband shall no longer have any obligation for child support.

**C-7 Form: Termination of Child Support – Emancipation;**

**Alternative B:3**

The Husband shall, during his lifetime and until the emancipation (as that term is defined herein) of each Child, pay the sum of one hundred dollars (\$100.00) per week per unemancipated Child. When the last Child is emancipated, the Husband's obligation for child support shall terminate.

**D. "ADD-ON" LANGUAGE**

**D-1 Definition of Add-Ons:**

As set forth in Domestic Relations Law §240, "add-ons" include only the following:

a. reasonable child care expenses when the custodial parent is working, or receiving elementary or secondary education, or higher education or vocational training which the court determines will lead to employment, and incurs child care expenses as a result thereof;

b. reasonable health care expenses of the child not covered by insurance;

c. reasonable child care expenses where the court determines that the custodial parent is seeking work and incurs child care expenses as a result thereof; and

d. educational expenses for post-secondary, private, special, or enriched education.

The first two “add-ons” are mandatory in that a Court must direct payment. The second two “add-ons” are discretionary in that a Court may direct payment.

**D-2 Form: Responsibility for Add-Ons – All to be paid by one parent:**

The Mother shall pay 100% of the following expenses of the Children:

a. reasonable and necessary unreimbursed or uncovered medical, dental, optical, surgical, therapeutic, psychiatric, psychological and orthodontic expenses, the cost of prescription drugs and/or any other expenses related to health care for the Children; and



b. the costs of CHILD 1's attendance at the ABC Day Care Center.

**D-3 Form: Responsibility for Add-Ons – Each parent pays a portion:**

Commencing upon the execution of this Stipulation and until the Children are emancipated as that term is defined herein, the Husband shall pay 55% and the Wife shall pay 45% of any unreimbursed or uncovered medical, dental, optical, surgical, orthodontic, therapeutic, psychiatric or psychological expenses, the cost of prescription drugs and/or any other expenses related to health care for the Children.

The parties agree that the Children shall use health-care providers who participate in the Wife's insurance plan except in the event of an emergency where such provider cannot be used or with the consent of both parties to use a non-participating provider which consent shall not be unreasonably withheld.

**D-4 Form: Provisions for Payment/Reimbursement of Add-Ons:**

**D-4a Alternative A:**

As and for additional child support, the Husband shall pay 100% of the Children's unreimbursed and/or uncovered medical, dental, optical, orthodontic, pharmaceutical, surgical and other health related expenses. To effectuate the provisions of this paragraph, the Husband shall reimburse the Wife for any out-of-pocket costs of such expenses incurred by her that are

unreimbursed and/or uncovered by health-care insurance within ten (10) days of being presented with evidence of such expenses by the Wife.

**D-4b Alternative B:**

The Husband shall pay for the foregoing expenses by either making payment directly to the service providers if possible or, if not possible or if the Wife advances payment for any of the foregoing expenses, by reimbursing the Wife for the amounts she has advanced within fourteen (14) days of the Wife presenting to the Husband documentation of such payments she has made as well as documentation of her submission of a claim for reimbursement to the medical insurance plan covering the children and proof that such claims have been denied, either in whole or in part, such that the Wife will not receive reimbursement, either in whole or in part, from the medical insurance plan covering the children. In the event it is the Husband who is maintaining medical insurance coverage for the Children, the Wife shall have no obligation to submit claims to the Husband's medical insurance company nor shall she be required to provide the Husband with documentation of her submission of a claim for reimbursement to said medical insurance company or proof that such claims have been denied, either in whole or in part, and the Husband shall be obligated to reimburse the Wife within fourteen (14) days of her presentation to him of documentation that she has advanced payment for any of the expenses listed in subparagraph (a) of this paragraph.

**D-5 Form: Continued use of same health care provider:**

Until the Children are emancipated as that term is defined herein, the Husband shall pay 100% of any unreimbursed or uncovered medical, dental, optical, surgical, therapeutic, psychiatric, psychological and orthodontic expenses, the cost of prescription drugs and/or any other expenses related to health care for the Children. The parties shall use health care professionals who participate in the medical insurance plan covering the Children except in the case of an emergency, or with the consent of both parties, such consent not to be unreasonably withheld, or in consideration of an existing relationship with a particular medical professional, including but not limited to Dr. Shrink (J's therapist), NHM (J's nutritionist), Dr. Kidz (pediatrician) and Dr. Mark (dermatologist).

**E. EDUCATION AND COLLEGE LANGUAGE**

**E-1 Form: Decision Making on College:**

The parties agree that it is their express desire and intent that the child attends college. The parties agree that, with consultation with the child, the Father, Mother and child shall mutually consent to the selection of college which the child will attend, which consent shall not be unreasonably withheld and shall reflect the abilities, talents, desires of the child and the best interests of the child.

**E-2 Form: All College Expenses paid by one parent and use of**

**funds:**

The custodial accounts heretofore established for the benefit of the Children (ABC Bank Account Nos. 123 and 456 currently maintained by the Wife as custodian, XYZ Account No. 789 currently maintained by the Husband as custodian and XYZ Account Nos. 10 and 11 currently maintained by the Wife as custodian) and any State of Florida Bonds or savings bonds held by or on behalf of the Children shall be used first to pay for the cost of four (4) years of undergraduate college for each of the Children within the four (4) years of a Child's graduation from High School. When all such funds have been utilized, the Husband shall pay 100% of the remaining costs of four (4) years of undergraduate college for each Child within the four (4) years of a Child's graduation from High School. All custodial accounts listed in this paragraph shall be transferred to the Husband as custodian. The Husband shall forward to the Wife copies of any and all statements received by him with respect to the accounts being maintained by him for each Child.

**E-3 Forms: All College Expenses shared by parents and use of**

**funds:**

The current balances in any custodial accounts heretofore established by one or both parties for the benefit of each Child shall be used first to pay for the costs of that Child's undergraduate college education. The parties acknowledge

that such custodial accounts currently consist of the following:

Account A  
(Wife Cust. Child 1)    \$4,000 approx.

Account B  
(Wife Cust. Child 2)    \$5,000 approx.

Account C  
(Wife ACF Child 1)    \$6,000 approx.

Account D  
(Wife ACF Child 2)    \$6,000 approx.

All custodial and other accounts listed in this paragraph shall be transferred to the Husband to be held as custodian for the Children. The Husband shall forward to the Wife copies of any and all statements received by him with respect to the accounts being maintained by him for each Child. When all such funds have been utilized, the Husband shall pay 55% and the Wife shall pay 45% of the remaining costs of each Child's undergraduate college education.

**E-4 Form: College Expenses Defined – Alternative A:**

"College Expenses" are defined to be the expenses incurred in full-time day (the child's participating in evening classes or attendance during the evening sessions of summer school shall not amend the status of "full-time day" student) on a continuous basis with reasonable regular attendance and matriculated in a course of study leading to an undergraduate degree at an accredited college or university and includes the following: reasonable expenses for the child to visit potential schools,

tuition, room and board (which included dormitory room or off campus equivalent), books, laboratory fees and costs, supplies, SAT preparation courses and testing fees, application fees, school fees, a computer (or comparable device or other similar necessary equipment), reasonable transportation costs between the child's residence and college (not to be less than two [2] or more than four [4] round trips per semester) and other reasonable college expenses.

**E-5 Form: College Expenses Defined – Alternative B:**

For purposes of this Stipulation, the term “costs of each Child’s college education” shall be defined to include tuition, dormitory room or off-campus equivalent, board or a meal plan or off-campus equivalent, books, SAT prep courses and test fees, up to five application fees, registration fees, laboratory materials, school fees, and reasonable transportation to and from school to home for up to two round trips a year (assuming the Child is not living at home while attending school).

**E-6 Form: College Expenses – State School – Alternative A:**

Each party’s obligation to contribute to the costs of the Children’s undergraduate college education shall be limited to one-half of the costs of same at the State University of New York (SUNY) at Albany.

**E-7 Form: College Expenses – State School – Alternative B:**

Each party’s obligation to contribute to the costs of the Children’s undergraduate college education shall be limited to one-half of 150% of the costs of

same at the most expensive school in the State University of New York (SUNY) system.

**E-8 Form: Reduction in Direct Support while Child away at**

**College:**

During the period in which a Child is attending college, the Husband shall be entitled to a credit against his child support obligations as set forth in paragraph 2 of this Stipulation in Article \_\_\_ during any week in which a Child is residing away at college and for which the Husband is contributing to the payment of room and board expenses of that Child. Said credit shall be in an amount equal to the amount the Husband is paying for that Child's room and board. The Husband shall not be entitled to any credit against his child support obligations if a Child is not residing away at college or if the Husband is not paying for the room and board of the Child, including if payment is being made from that Child's custodial accounts. Any credit to which the Husband is entitled pursuant to this subparagraph shall be credited in equal monthly installments against his monthly child support obligations.

**E-9 Form: College Expenses – Children to Apply for Financial Aid, Grants, Loans:**

The parties agree that the Children shall apply for, and each will provide any necessary information required for, any scholarships, grants or stipends available. Any scholarships, grants or stipends received by either Child shall be applied first to the costs of that Child's college education prior to the Husband incurring an obligation

to pay for that Child's college education.

**E-10 Form: College Expenses – Use of Funds Set Aside for College**

**First:**

The parties shall equally share the cost of each Child's college education (defined to be tuition, room and board, lab fees, necessary or recommended computer hardware and software, activity fees, travel to and from college up to four times per year, and necessary textbooks) above maximum loans and grants. The parties acknowledge that each Child has \$50,000 set aside in accounts with the National Bank for the purpose of college education. Said funds shall first be utilized for each Child's college education before the parties shall be responsible to contribute to the same as set forth in the first sentence of this paragraph.

**E-11 Form: College Expenses, Comprehensive Language re: SUNY**

**Cap**

1. It is the parties' desire for their Children to attend college on a full time basis and be matriculated in a course of study leading to an undergraduate degree at an accredited college or university; provided that both parties shall approve of the educational institution, course of study, and living arrangements, which approvals shall not be unreasonably withheld or delayed.

2. The term "college" as used in this article shall include college, university, junior college, community college, technical or trade school, as the case



may be.

3. The parties shall each pay their pro rata shares, as that term is defined in this Article, as of the July of the academic year during which college expenses will be incurred, of all college expenses incurred for the college undergraduate education of the Child. "College expenses," as used herein, shall consist of tuition, room, board, registration fees, school and activity fees, application fees for each college or university to which the Child applies, testing fees, required books, supplies and laboratory material and fees, review courses for entrance tests, supplemental health insurance, and transportation between the Child's residence and the educational institution for four (4) round trips per academic year.

4. The parties further agree that their respective responsibility for the child's tuition at college shall be limited to the maximum cost of attending an undergraduate institution affiliated with the State University of New York (including any land-grant college of Cornell University) at the rate of a resident of the State of New York. Nothing herein shall be construed as limiting or restricting either or both parent's right to contribute additional sums towards the Child's college tuition. Should either parent decide to contribute such additional sums, the other parent shall not be compelled to do so.

5. Prior to either party being responsible to contribute to any such college costs and expenses incurred by the Child, the parties agree to first utilize

any funds which have been designated as “college funds” by either of them, whether held in trust for the Child or otherwise.

6. The term “pro rata share,” as used in this Article, shall be defined as follows: the proportion, as of the July of the academic year during which college expenses will be incurred, of a party’s annual gross income relative to the other party’s annual gross income. The term “gross income” shall be defined as the term “income” is defined in the Child Support Standards Act (DRL §240 1—b(b)(5)), except that capital gains shall be excluded from the definition. A copy of the Child Support Standards Act definition of “income” is annexed hereto as “Schedule A.” The parties agree to exchange W-2, 1099 and/or K-1 statements from their tax returns that were, or should have been, filed on April 15 of the academic year during which college expenses will be incurred.

7. The Father shall receive a dollar-for-dollar credit against his payment of basic child support pursuant to Article \_\_\_ for every dollar he contributes toward the child’s room and board at college or at a study-abroad program sponsored by the college. The Father shall be entitled to the credit only during those months when the child is attending and living at college, or at a study-abroad program sponsored by the college. Should the child be attending college or a study-abroad program for part of a month, child support shall be pro-rated to cover the time she is residing with either parent. In no event shall the Father’s credit

exceed his obligation to pay child support for that child. The Father's payment for room and board expenses from funds designated by him for the child's college expenses shall not entitle him to a credit.

8. If the Child should reside "off-campus," the parties shall be obligated to pay no more than for room and board as if the Child remained in "on campus" living accommodations.

**F. LANGUAGE FOR THE EXTRAS – COMPUTERS, SPORTS AND EQUIPMENT, LESSONS, SUMMER CAMP, TUTORING AND CARS** (and the parent paying direct support asks “What is child support for if I also have to pay for all of this also?”)

**F-1 Form: General Clauses – Without “Cap”:**

Until the Children are emancipated as that term is defined herein, the Husband shall pay 100% of the costs of the Children's attendance at summer camp or other summer activity to which he consents, his consent not to be unreasonably withheld. For purposes of this paragraph, the term “costs” shall be defined as tuition, clothing, equipment, uniforms and other items required by the camp, trunk dispatch, transportation, tips, camp trip fees, personal and canteen accounts subject to the Husband's discretion, and any other reasonable and necessary fees and expenses associated with the Children's attendance at camp.

Until the Children are emancipated as that term is defined herein, the Husband shall pay 100% of the costs incurred for the Children's extracurricular activities to which he consents, his consent not to be unreasonably withheld. For purposes of this paragraph, the term "costs" shall be defined as tuition or enrollment fees, any clothing attendant to the activity, sporting goods or other equipment which are required or recommended to participate in the activity and any other reasonable and necessary fees associated with the activity.

Until the Children are emancipated as that term is defined herein, the Husband shall pay 100% of any tutoring costs necessary for the Children which tutoring has been recommended by a teacher or other educational professional on behalf of the Children or a Child after consultation with the Wife and the Husband or which tutoring the parties mutually agree a Child or the Children should have.

Until the Children are emancipated as that term is defined herein, the Husband shall pay 100% of the cost for each Child to have a cell phone and the costs of a cell phone usage plan which the Husband shall choose in his discretion. The Husband shall additionally provide the Children with equipment for such phones such as chargers, hands free headsets and the like and pay other fees or expenses incurred by the Children to use their cell phones as is necessary and reasonable. The Wife shall have no obligation to pay for any expenses incurred by the

Children with respect to cell phones.

Until the Children are emancipated as that term is defined herein, the Husband shall be 100% of the costs associated with the 2004 BMW currently driven by the parties' Child, S. The Husband shall pay 100% of all costs associated with said vehicle, including but not limited to, monthly payments, insurance, gasoline, repairs and maintenance, EZ Pass, and any other expenses associated with such vehicle, subject to reasonable limitations.

The Husband shall pay 100% of the Children's Hebrew School tuition and temple dues provided such costs are substantially the same as those currently existing, including any normal inflation or cost of living increases. At such time as the child, A, is Bar Mitzvahed or, at such time as he reaches the age of thirteen, whichever comes later, the Husband shall have no further obligation to pay for A's Hebrew School tuition. At such time as the child, B is Bat Mitzvahed or, at such time as she reaches the age of thirteen, whichever comes later,

The Husband shall have no further obligation to pay for B's Hebrew School tuition. The Husband's obligation to pay the Children's temple dues shall continue until the emancipation of both children.

The Husband shall continue to pay the monthly payments due with respect to each Child's automobile provided that each Child is attending school (high school, college or vocational school) on a full-time basis and earns at least a C average at

all times. The Wife shall be solely responsible for any and all other costs, expenses and liabilities associated with the Children's automobiles.

**F-2 Form: General Clauses – With “Cap”:**

Commencing upon the execution of this Stipulation, the Husband shall pay 55% and the Wife shall pay 45% of the costs of the Children's attendance at summer camp to which he and she consent, such consent not to be unreasonably withheld. The Husband's obligation to contribute to the costs of the Children's attendance at summer camp shall be limited to a maximum of \$1,500 per Child per year. In no event shall the Husband have any obligation to contribute to the costs of a Child's attendance at summer camp after that Child attains the age of fifteen.

Commencing upon the execution of this Stipulation and until the Children are emancipated as that term is defined herein, the Husband shall pay 55% and the Wife shall pay 45% of the costs incurred for the Children's extracurricular activities to which he and she consent, such consent not to be unreasonably withheld. The Husband's obligation to contribute to the costs of the Children's extracurricular activities shall be limited to a maximum of \$500 per Child per year.

The Husband shall pay 100% of the costs of each Child's Bar and Bat Mitzvah limited solely to the costs of using the temple for the actual Bar and Bat Mitzvah ceremonies, sponsoring a Kiddush for each Child's Bar or Bat Mitzvah and any religious lessons for the Bar and Bat Mitzvahs which either Child may require in

addition to each Child's regular and normal Hebrew School education. The Husband shall have no obligation to pay for such additional lessons unless same are recommended by the Children's Rabbi. In no event shall the Husband's obligation to pay for each Child's Kiddush exceed the cost of \$3,500 per child.

**F-3 Form: Consultation required before expense incurred:**

Each party shall be responsible for payment of 50% of the costs of the Children's clothing and haircuts as well as for any orthodontic expenses for the Children. The parties shall consult with one another, jointly discuss and mutually agree with respect to the purchases of clothing for the Children and haircuts for the Children prior to making such purchases. Absent such consultation, discussion and agreement, the purchasing party shall not be permitted to seek reimbursement from the other party.

**G. LANGUAGE ON REGULATORY BEHAVIOR – RELIGIONS, LIFESTYLE AND RELATIONSHIPS, RELOCATION**

**G-1 Form: Religious Upbringing Fixed – Alternative A:**

The Child shall be raised in the Jewish religion, will attend Hebrew School through his Bar Mitzvah and will be Bar Mitzvahed. Each party shall, when he or she is with the Child, be responsible for transporting the Child to and from Hebrew School and any Bar Mitzvah activities.

**G-2 Form: Religion Upbringing Fixed – Alternative B:**

ABC Church is the Parish at which the Mother and Children are currently registered parishioners. Notwithstanding the foregoing, the Children may attend Sunday or Saturday evening services and Holy Days at a different Catholic Church at the discretion of the parent with whom the Children are with at that time. Before any change in the religious affiliation of the Children, the parents will consult in advance and attempt to reach an agreement with respect to any such change.

**G-3 Form: Religious Upbringing Left Unresolved:**

The parties acknowledge that the Mother is Jewish and the Father is Catholic and that the Child has been exposed to aspects of both religions during the marriage. Each party shall be free to continue to expose the Child to his or her religion, it being agreed between the parties that the Child shall not be raised exclusively in the Jewish religion or in the Catholic religion.

**G-4 Form: Exposure of Children to Each Parent's Religious Beliefs – Alternative A:**

The parties agree that until each Child has a Bar Mitzvah, that the Children shall be raised (by the Mother) in the Jewish faith. The Wife shall be responsible for all of the costs associated with said Bar Mitzvah. The wife shall have sole discretion and authority to make all decisions about the Bar Mitzvahs, including the guests to be invited and the number of guests to be invited. After the Children are Bar Mitzvahed, the Husband (when the Children are with him), may expose the Children



to his faith and may have the Children participate in that faith with him.

**G-5 Form: Exposure of Children to Each Parent's Religious Beliefs Alternative B:**

The Child shall be raised in the Jewish religion with the understanding that the Child may be exposed to the Father's Catholic religion by the father having access to and celebrating with the Child on Easter and Christmas. It is agreed that the Child will attend Hebrew School through his Bar Mitzvah and the parties will cooperate in ensuring his attendance thereat.

**G-6 Form: Restrictions on Children's Conduct on Religious Holidays:**

The Children shall spend each Shabbat and each Jewish holiday with the Wife who shall have the option of permitting the Children to spend Shabbat or a Jewish holiday with the Husband provided the Husband intends to observe such Shabbat or holiday appropriately and in accordance with the Orthodox Jewish religion.

**G-7 Form: Lifestyle and Relationships:**

**G-7a Form: No Exposure to Boyfriend/Girlfriend:**

Neither party shall permit the Children to be in the presence of or in contact with any boyfriend or girlfriend at any time without the express consent of the other party.

**G-7b Form: Explaining New Relationships to Children:**

When and if either party becomes involved in a relationship with a boyfriend or girlfriend to whom he or she wishes to introduce the Children, that party shall first advise the other party of such relationship and intent to introduce the boyfriend or girlfriend to the Children and the parties shall mutually determine the most appropriate way to effectuate said introduction, at which both parties may be present if they wish.

**G-7c Form: Living Restrictions with regard to new relationships:**

Both parties agree that no "boyfriend/girlfriend/ date/significant other" shall spend the night in either party's house while the children are present, unless the said person is the spouse of either party as a result of a remarriage.

**G-7d Form: Agreement not to influence child's sexual preference:**

The parties acknowledge and represent that they wish the Child to determine, for himself, his own sexual preference, free from interference or pressure from either party. Neither party shall attempt to persuade the Child to choose one sexual preference over another, both parties shall support and encourage the Child to select his own sexual preference, whatever it may be, and neither parent shall disparage or express disapproval of any particular sexual preference in the presence of or to the Child.

**G-8 Form: No right to relocate:**

Until such time as both Children are emancipated, the Wife shall not relocate the children from their current residence for any reason whatsoever.

**G-9 Form: No right to relocate without consent or Court Order:**

Until such time as both Children are emancipated, the Wife shall not relocate the Children from their current residence for any reason whatsoever, without the Husband's express written consent or order of a Court of competent jurisdiction.

The parties represent that it is their intention to continue to reside in the Manhasset area and that the Children continue to attend schools located in their current school district. Given the custodial and time-sharing arrangement set forth herein, in the event the Mother wishes to move outside of the Manhasset school district, she shall provide the Father with at least ninety (90) days advance notice of her intention to so move. In the event the Father does not agree to such a move, each party expressly reserves his and her rights to seek appropriate relief from a Court of competent jurisdiction. Until such time as an Order is issued granting the Mother wishing to move permission to move, she shall not so move and shall take no affirmative steps in furtherance of her proposed move including but not limited to, selling or marketing for sale his or her current residence; bidding on, purchasing or entering into a contract of sale for an alternate residence; enrolling the Children in a school district different from the one in which they currently attend school;

accepting a job which requires her to live in a school district other than the Children's current school district; and the like. Any such affirmative steps shall be deemed a factor weighing against permitting the Mother to relocate and shall be considered by a Court as such.

**G-10 Form: Listing of factors determining parental access in effort to restrict right to relocate:**

The Wife acknowledges that the day to day involvement of the Husband with the Children is of paramount importance. She further acknowledges that the Husband's shared time and regular contact with the Children is crucial to their further development. This provision for the Husband's shared time is a material condition in the making of this Agreement and this Agreement would not have been entered into were there no such provision.

Accordingly, for the purposes of further implementing and securing the Husband's shared time, the Wife shall not reside with the Children outside a 50 (fifty) mile radius from the Children's present residence. In no event shall the Wife relocate the Children beyond the radius without first obtaining an order from a court of competent jurisdiction in the State of New York on notice to the Husband of no less than thirty (30) days in order that the Husband may pursue whatever remedies are appropriate to enforce the provisions of this paragraph. The provisions of this Agreement concerning the Husband's shared time shall be given priority in determining the best interests of the Children in any proceeding. The

fact that the parties had made this Agreement concerning the Wife's right to seek a Court order providing for relocation shall not be deemed a concession by the Husband that any such relocation is appropriate or proper.

**G-11 Form: "Radius" Clauses:**

**G-11a Form: Simple Radius Clause:**

Until such time as the youngest child graduates from high school, the Wife shall not relocate the children's residence outside a fifteen (15) mile radius from the current marital residence, without the Husband's express written consent or order of a Court of competent jurisdiction. This restriction shall not apply if the Husband moves more than fifteen (15) miles from the current marital residence.

**G-11b Form: Detailed Radius Clause:**

(a) For so long as the schedules set forth in Paragraph 2 of this Article are in effect and subject to the terms and provisions of this paragraph, until such time as both Children reach the age of eighteen, the Mother shall not relocate the residence of the Children to an area other than a town/village located within the following school districts on Long Island: A, B, C, D, E, F, G, H, I or J. Notwithstanding the foregoing and in consideration of the fact that the quality of a particular school can change over time, the Mother shall be allowed to relocate to a town/village not within the foregoing school districts which school district is comparable to any of the districts listed in this paragraph, as determined by the school ranking

statistics issued by the New York State Department of Education.

(b) Notwithstanding the foregoing paragraph, in the event the Mother suffers from an unforeseen and unanticipated change in financial circumstances such that she is unable to afford to reside in any of the areas listed in paragraph (a) above, the Mother shall be able to move to another area not listed and the Father shall not initiate or pursue any litigation against the Mother due to such relocation provided the Father is given reasonable notice of such anticipated move. Such unforeseen and unanticipated change in financial circumstances shall include, but not be limited to, inability to work in her field through no fault of the Mother; significant increases in mortgage interest rates or housing prices in the areas listed in paragraph (a) above; failure of the Father to comply with his financial obligations as provided in this Stipulation; extraordinary expenses which do not allow the Mother to make her mortgage payments or a substantial decrease in the Mother's income through no fault of the Mother.

(c) In no event will the Mother relocate to a town/village not within the school districts listed in paragraph (a) above if such town/village is not within twenty-five miles of the Father's current residence, provided the Father is still residing at said residence, without the written consent of the Father or permission from a Court of competent jurisdiction.