4. MOTIONS AND PRETRIAL INTERVENTION

MOTIONS AND PRE-TRIAL INTERVENTION IN MATRIMONIAL ACTIONS

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TABLE OF CONTENTS

Page

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PENDENTE LITE APPLICATIONS

Typically, the earliest applications made to the Court during the pendency of a divorce proceeding seek immediate and temporary financial relief, counsel/expert fees and/or are related to custodial and parenting issues. However, it is also common for the parties to seek orders pertaining to exclusive occupancy of the marital residence, or protective orders where acts of harassment or threats of harm can be demonstrated. These applications are called *pendente lite* or interim applications. It is not uncommon for *pendente lite* applications to be filed shortly after, or even simultaneously with, a Summons with Notice for Divorce or a Summons and Complaint.

However, prior to engaging in motion practice, it is often advantageous to pursue a negotiated settlement of the issue(s) in dispute. By doing so, you will save clients unnecessary fees as well as time and it will allow you to focus on the most important issues in the case. It is also often said the settlements reached by the parties are more likely to be adhered to as compared with orders imposed upon them. Before making a motion make a telephone call to your adversary.

A. TEMPORARY MAINTENANCE, CHILD SUPPORT AND CUSTODY

1. §202.16 Of The Uniform Court Rules

22 NYCRR §202.16(k): **Motions for Alimony, Maintenance, Counsel Fees, *Pendente Lite* and Child Support (Other Than Under Section 237(c) or Section 238 of the Domestic Relations Law):**

22 NYCRR §202.16(k)(1): **General:** *Pendente lite* motions should be made before or at the preliminary conference, if practicable. It is important to note that this is not always practicable and courts will review applications for *pendente lite* relief when they are appropriate which may be after the preliminary conference. Often, in a highly litigated matter, *pendente lite* applications are made throughout the action up to, and until, the commencement of a trial.

22 NYCRR §202.16(k)(2): **A Statement of Net Worth Must Be Attached To The Application:** No motion shall be heard unless the moving papers include a statement of net worth in the official form prescribed by 22 NYCRR §202.16(b). 22 NYCRR §202.16(b) requires the form of the Statement of Net Worth to comply with the form contained in appendix A of the rules.

22 NYCRR §202.16(k)(4): **Opposition Papers:** Any facts set forth in the moving papers that are not specifically denied in the opposing motion papers will be deemed admitted "for purposes of the motion, but not otherwise." The facts contained in moving papers, or even exhibits such as a Statement of Net Worth, annexed thereto, can be denied using a Statement of Net Worth and other Affidavits or sworn statements.

22 NYCRR §202.16(k)(5): **Failure to Comply With 22 NYCRR §202.16:** The rules are very specific with regard to the form and content of applications for *pendente lite* relief. The failure to comply with the provisions of 22 NYCRR §202.16 allows the judge presiding, at his or her discretion, either:

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

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

See Deutsch v. Deutsch, 209 A.D.2d 359, 618 N.Y.S.2d 800 (1st Dep't 1994); K.S. v. I. G. S., 2001 N.Y. Misc. 545 (N.Y. Sup.), 2001 N.Y. Slip Op. 40082U.

22 NYCRR §202.16(k)(6): **The Form of the Notice of Motion:** The Notice of Motion submitted with the application for *pendente lite* relief must contain a list of the relief being sought. This holds true even if the application is brought by Order to Show Cause. Attached as **Exhibit A** to these materials are examples of the form of Order to Show Cause filed in connection with applications for and in opposition to *pendente lite* relief. This section also indicates that motions for *pendente lite* relief "shall be determined within 30 days after the motion is submitted for decision." In practice this is very often not the case.

The failure of a practitioner to comply with the requirements of 22 NYCRR §202.16 may lead to the embarrassing and costly dismissal or denial of an application for lack of documentation or specific information in the supporting papers.

2. GENERALLY

i. Purpose of *Pendente Lite Maintenance and Child Support*:

- Tide over the more needy party, not to determine the ultimate distribution.

- Provide relief during the pendency of the litigation.

- Ensure the needy party has sufficient funds to support his or her "reasonable" needs while accommodating the financial ability of the other spouse.

- Not intended to influence the final determination of maintenance or child support, if any, to be awarded after trial.

3. TEMPORARY MAINTENANCE

i. **Generally (THE NEW LAW)**

(a) **Domestic Relations Law §236 Part B was amended in August, 2010 (effective October 12, 2010 and only applicable to actions commenced on or after that date) by adding a new subdivision 5-a, which sets forth guidelines for temporary maintenance awards**

(1) In making a temporary support award, the Court must determine the "guideline amount" of temporary maintenance after determining the income of the parties [income is as defined by the CSSA], where the payor's income is up to and including the "income cap" [which is defined as $524,000 with a COLA, as follows:

(a) The lesser of:

(i) 30% of the income of the payor up to the cap less 20% of the income of the payee; or

(ii) 40% the sum of the payor's income up to and including the cap and all of the payee's income less the income of the payee.

(2) If the presumptive guideline amount would be zero or less then the presumptive temporary maintenance award would be zero.

(3) Where the guideline amount would reduce the payor below the self-support reserve, the presumptive amount will be the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there is a rebuttable presumption that no maintenance should be awarded.

(4) Where the income of the payor exceeds the cap, the Court must determine the guidelines amount for up to and

including the cap, as set forth above. For the excess income, the Court must determine any additional guideline amount of support by considering the following factors (and the decision must set forth the factors considered by the Court, as well as the reasons for the decision):

(a) length of the marriage

(b) substantial differences in the income of the parties

(c) marital standard of living

(d) age and health of the parties

(e) present and future earning capacities of the parties

(f) need of one party to incur education or training expenses

(g) wasteful dissipation of marital property

(h) transfer or encumbrance made in contemplation of a matrimonial action made without fair consideration

(i) existence and duration of a pre-marital joint household or a pre-divorce separate household

(j) acts by one party against the other that have or continue to inhibit a party's earning capacity or ability to obtain meaningful employment, including, but not limited to, domestic violence

(k) availability and cost of medical insurance for the parties

(l) care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has or continued to inhibit a party's earning capacity or ability to obtain meaningful employment

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

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

(o) tax consequences to each party

(p) marital property subject to distribution

(q) reduced or lost earning capacity of the party seeking temporary maintenance as a result of having forgone or delayed education, training, employment or career opportunities during the marriage

(r) contribution and services of the party seeking temporary maintenance as spouse, parent, wage earner and homemaker and to the career or career potential of the other party

(s) any other factor that the Court deems just and proper

(5) The guideline duration of temporary maintenance must be determined by considering the length of the marriage. Temporary maintenance must also terminate upon the issuance of a final award of maintenance or the death of either party, whichever shall first occur.

(6) Where a Court finds that the presumptive award of temporary maintenance is unjust or inappropriate and the Court adjusts the presumptive award accordingly, the Court must set forth in a written order the amount of the unadjusted presumptive award, the factors it considered, and the reasons that the Court adjusted the presumptive award. The written order cannot be waived by parties or counsel.

(7) The Court must also consider the following factors in adjusting the presumptive award:

(a) marital standard of living

(b) age and health of the parties

(c) earning capacities of the parties

(d) need of one party to incur education or training expenses

(e) wasteful dissipation of marital property

(f) transfer or encumbrance made in contemplation of a matrimonial action made without fair consideration

(g) existence and duration of a pre-marital joint household or a pre-divorce separate household

(h) acts by one party against the other that have or continue to inhibit a party's earning capacity or ability to obtain meaningful employment, including, but not limited to, domestic violence

(i) availability and cost of medical insurance for the parties

(j) care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has or continued to inhibit a party's earning capacity or ability to obtain meaningful employment

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

(m) tax consequences to each party

(n) marital property subject to distribution

(o) reduced or lost earning capacity of the party seeking temporary maintenance as a result of having forgone or delayed education, training, employment or career opportunities during the marriage

(p) contribution and services of the party seeking temporary maintenance as spouse, parent, wage earner and homemaker and to the career or career potential of the other party

(q) any other factor that the Court deems just and proper

(8) If one or both parties are unrepresented, the Court may not enter a temporary maintenance order unless the unrepresented party has been informed of the presumptive award of temporary maintenance.

(9) A *pendente lite* stipulation as to temporary maintenance to be incorporated into an order must include a provisions that the parties have been advised of the guidelines and that the presumptive award results in the correct amount of temporary maintenance. If the amount agreed upon deviates from the presumptive amount, there must be a provision in the stipulation that sets forth the amount of the presumptive award and the reason(s) why there was deviation. These requirements cannot be waived by either party or counsel.

(10) When a party has defaulted or if the Court is presented with insufficient evidence to determine gross income, the Court must order the temporary maintenance award based upon the needs or the payee or the standard of living of the parties prior to commencement, whichever is greater. Such an order may be retroactively modified upward without a showing of change in circumstances based upon a showing of newly discovered or obtained evidence (DRL **§**236 B(5-a)(g).

ii. Supporting Case Law

Khaira v Khaira, 93 AD3d 194, (1st Dep't 2012) - - in the absence of a specific reference to the carrying charges for the marital residence, we consider it reasonable and logical to view the formula adopted by the new maintenance provision as covering all the spouse's basic living expenses, including housing costs as well as the costs of food and clothing and other usual expenses.

Scott M. Ilona M., 31 Misc. 3d 353, 915 N.Y.S.2d 384 (Sup. Ct. Kings County, 2011) -- The Court deviated from the guidelines and awarded $24,677/yr of taxable temporary maintenance to the wife where the husband earned $143,677/yr and the wife earned $30,435/yr. The deviation, a 1/3 reduction, was based upon the ability of the husband to meet his pre-divorce household expenses and taking into account the parties' expenses, child care costs and net available resources. In calculating child support, the CSSA was applied but capped at $130,000 of combined income. $17,591/yr in child support awarded, plus approx. 80% of add-ons. Counsel fees awarded of $5,000 where the wife sought $10,000 and the Court held that, due to the

support award, the husband would no longer be considered the "monied spouse."

Margaret A. v. Shawn B., 2011 N.Y. Slip Op. 21090, 2011 WL 893015 (Sup. Ct. Westchester County, 2011) -- The Court applied the guidelines and awarded $74,609/yr of taxable temporary maintenance to the wife where the court **imputed** income to the husband of $248,698/yr and the wife earned no income. In calculating child support, the CSSA was applied with no cap. $50,486/yr in child support awarded. Counsel fees awarded of $5,000 where the wife sought $7,500 and the Court held that, due to the support award, the husband would no longer be considered the "monied spouse."

J.H. v. W.H., 31 Misc. 3d 1203(A), 2011 N.Y. Slip. Op. 50471U (Sup. Ct. Kings County, 2011) -- The Court applied the guidelines and awarded $26,708/yr of taxable temporary maintenance to the wife where the husband earned $96,553/yr and the wife earned $11,289/yr. In calculating child support, the CSSA was applied. $20,255/yr in child support awarded. N counsel fees awarded where the Court held that the parties, after the above award, are now similarly situated.

A.C. v. D.R., 2011 N.Y. Slip. Op. 21113, (Sup Ct. Nassau County, 2011) -- The Court deviated from the guidelines and awarded $130,767/yr of taxable temporary maintenance to the wife where the husband earned $529,857/yr and the wife earned $8,516/yr. The deviation, a 12% reduction, was based upon the husband's payment of carrying charges and limited the support award to disposable income. In calculating child support, the CSSA was not applied. $36,000/yr in child support awarded, plus 60% of add-ons. Counsel fees awarded of $25,000 where the wife sought $50,000 and the Court held that the award was based upon the parties' income, assets, and liabilities as contained in their respective net worth statements. No discussion of burden shifting.

H.K. v. J.K., NYLJ, 7/11/11, (Sup Ct. New York County, 2011) -- The Court applied the guidelines and awarded $210,600/yr of taxable temporary maintenance to the wife where the husband earned in excess of $1M/yr and the wife earned no income. The Court awarded $12,500/mth based upon his income up to $500,000/yr and $5,050/mth based upon his income in excess of $500,000/yr. Both parties

argued that the presumptive amount was unjust and inappropriate, for different reasons, in support of their respective positions but the Court held otherwise. The husband was paying for the wife's health insurance and all of their child's expenses. The wife was directed to pay for 100% of her unreimbursed medical and therapy expenses and 100% of the cost of the nanny that she is required to have when the parties' children reside with her. The wife was further directed to pay for the carrying charges associated with her apartment. Counsel fees awarded of $20,000 where the wife sought $25,000.

iii. Generally (THE OLD LAW, to the extent still applicable)

(a) Pursuant to New York's Domestic Relations Law §236 Part B(6) a court may order temporary maintenance in a matrimonial action. A temporary maintenance award should reflect "such an amount as justice requires, having regard for the standard of living of the parties established during the marriage…" DRL §236(6). In making an award of maintenance at trial, a court must consider the following eleven factors:

(1) the income and property of the respective parties including marital property distributed pursuant to subdivision five of this part;

(2) the duration of the marriage and the age and health of both parties;

(3) the present and future earning capacity of both parties;

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

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

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

(7) the tax consequences to each party;

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

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

(10) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; and

(11) any other factor which the court shall expressly find to be just and proper.

(b) The Eleven Enumerated Factors Do Not Apply To *Pendente Lite Maintenance Awards*

- The eleven enumerated factors do not have to be taken into consideration when fixing a temporary maintenance award.

See Brenner v. Brenner, 52 A.D. 3d 322, 860 N.Y.S. 2d 58 (1st Dep't 2008); Clemente v. Clemente, 16 Misc. 3d 769, 842 N.Y.S.2d 276 (Sup. Ct. N.Y. Co. 2007); Strong v. Strong, 142 A.D.2d 810, 530 N.Y.S.2d 693 (3d Dep't 1988); Basch v. Basch, 114 A.D.2d 829, 494 N.Y.S. 2d 740 (2d Dep't 1985); Lueker v. Lueker, 72 A.D.3d 655, 898 N.Y.S.2d 605 (2d Dep't. 2010) .

- However, while the court is not required to consider the eleven enumerated factors, it is required to set forth the factors it considered and the reasoning underlying its determination. Quilty v. Quilty, 169 A.D.2d 979, 564 N.Y.S.2d 877 (3d Dep't 1991).

- However, *see* Lowe v. Lowe, 211 A.D.2d 595, 622 N.Y.S.2d 26 (1st Dep't 1995) --the lower court properly considered enumerated factors including the financial status of the respective parties, the nature and duration of the marriage, the future capacity of wife to be self-supporting and the fact that husband, prior to the application being made by wife, paid wife three years of tax-free allowance money.

(c) Basis For *Pendente Lite* Maintenance

- *Pendente Lite* maintenance should reflect an accommodation between the reasonable needs of the moving spouse and the financial ability of the other spouse. *Pendente Lite* awards are based upon the lower court's discretion in analyzing allegations of the parties contained in written sworn statements, including the Statement of Net Worth, tax returns, W-2s, K-1s and other financial statements and exhibits.

(d) Tax Implications

- *Pendente lite* support payments made pursuant to a Court order (or agreement by the parties) are deductible from the payor's gross income and constitute taxable income to the recipient.

- However, a Court may exercise its discretion to direct in an order that maintenance payments are not taxable to the recipient nor deductible to the payor.

- "If the spouses are subject to a temporary support order (as described in Section 71(b)(2)(C)), the designation of otherwise qualifying alimony or separate payments as nondeductible and excludible must be made in the original or a subsequent temporary support order." Treas. Reg. Section 1.71-1T, A-8.

  Lasry v. Lasry, 180 A.D.2d 488, 579 N.Y.S.2d 393 (1st Dep't 1992) -- "Finally, it was within the sound discretion of the IAS court, pursuant to Internal Revenue Service Temporary Regulation (26 CFR) § 1.71-1T (a) to provide that the maintenance payments be neither deductible to him nor taxable to plaintiff."

(e) Effect of Denial Of *Pendente lite* Relief

The fact that temporary maintenance is denied during the pendency of the action does not preclude an award of retroactive maintenance in the final order.

See DeBergalis v. DeBergalis, 156 A.D.2d 963, 551 N.Y.S.2d 704 (4th Dep't 1989).

(f) Imputing Income

- In cases where a money earning spouse has purposefully avoided employment in order to avoid paying maintenance or where the parties' lifestyle far exceeds a parties' income, the Court can impute income to a party.

  See Felton v. Felton, 175 A.D.2d 794, 572 N.Y.S.2d 926 (2d Dep't 1991) --Upon application for *pendente lite* relief, husband's claims were rendered unbelievable by the parties' lifestyle and the husband's acquisition of real and personal property in the years immediately before the commencement of the action, and thus the court was justified in imputing to the husband an income far higher than that which he was willing to admit.

MR v. TA, 6 Misc. 3d 1018 (Supr. Ct. Kings Cty. 2005) -- The court awarded *pendente lite* to the wife and children equivalent to voluntary support the husband was paying for 4½ years post-separation. The husband cut the payments because of an alleged financial crisis, however, his last available net worth showed assets of over $5 Million. Even though the husband had net income of $7,684 per month and voluntarily paid $7,792 per month to his wife; the court believed his monthly income was higher than reported to the court and directed the payment of similar amount in light of pre-separation life style.

(g) Residency In Same Household

- The mere fact that the parties are residing together in the same household after commencement of a matrimonial action does not preclude temporary maintenance or child support. Such awards are designed to insure that reasonable needs are met during the pendency of matrimonial actions.

  Salerno v. Salerno, 142 A.D. 2d 670, 531 N.Y.S. 2d 101 (Dep't 1988); Koerner v. Koerner, 170 A.D. 2d 297, 566 N.Y.S. 2d 23 (1st Dep't 1991); Harari v. Davis, 59 A.D. 3d 182, 871 N.Y.S. 2d 907 (1st Dept 2009).

(h) Additional Supporting Case Law

Tobin v. Tobin, 13 Misc. 3d 1229(A), 831 N.Y.S.2d 357 (N.Y. Sup. 2006) -- the purpose of temporary awards is to permit the parties to meet their reasonable needs during the pendency of matrimonial litigation.

Silver v. Silver, 46 A.D.3d 667, 847 N.Y.S.2d 596 (2d Dep't 2007) --the purpose of an award of *pendente lite* relief is to tide over the more needy party, not to determine the correct ultimate distribution. *See also*, Iannone v. Iannone, 31 A.D.3d 713, 820 N.Y.S.2d 86 (2d Dep't 2006)

Kolin v. Kolin, 131 A.D.2d 639, 516 N.Y.S.2d 721 (2d Dep't 1987) --The purpose of temporary maintenance and child support awards is not to influence a final determination of such awards, if any, at trial. *See also*, Grossman v. Grossman, 132 A.D.2d 645, 517 N.Y.S. 2d 705 (2d Dep't 1987).

Coons v. Coons, 161 A.D. 2d 924, 557 N.Y.S. 2d 492 (3d Dep't 1990) -- Application for *pendente lite* relief properly denied where the parties still reside in the marital residence and plaintiff has failed to establish that temporary support or maintenance is necessary inasmuch as defendant continues to pay for her reasonable needs.

iv. Additional Supporting Case Law

Bernstein v. Bernstein, 143 A.D.2d 168, 531 N.Y.S.2d 810 (2d Dep't 1988) -- Defendant was entitled to monthly maintenance and child support of $8,600 as well as carrying charges for the apartment on Central Park South where defendant demonstrated a clear inability to support herself and the children and plaintiff's income was $15,000,000 after taxes and his statement of net worth showed personal assets of $18,000,000.

Zahr v. Zahr, 149 A.D.2d 504, 539 N.Y.S.2d 984 (2d Dep't 1989) -- Court award of $7,000 per month maintenance in addition to third party payments ranging from $16,000 to $18,000 per month was excessive where defendant asserted that she only required $16,800 to meet her monthly needs. Although the standard of living previously enjoyed by the parties is a relevant consideration, the predominant factor when determining maintenance should be the applicant's actual financial need.

Miller v. Miller, 24 A.D.3d 521, 807 N.Y.S.2d 106 (2d Dep't 2005) --Where the record supported a finding that husband's *pendente lite* maintenance obligation exceeded his after-tax income and wife's claimed expenses were either inflated or undocumented, husband's *pendente lite* maintenance obligation was modified downward.

Brenner v. Brenner, 52 A.D.3d 322, 860 N.Y.S. 2d 58 (1st Dep't 2008) -- Lower Court did not improvidently exercise its discretion by not applying the eleven enumerated factors of DRL §236(B)(6) when awarding *pendente lite* maintenance

McCarthy v. McCarthy, 156 A.D.2d 346, 548 N.Y.S.2d 298 (2d Dep't 1989) -- *Pendente Lite* maintenance will generally be awarded to the extent necessary in order to allow a party to be self-supporting, even where the marriage was a brief one. The financial need of the spouse requesting *pendente lite* maintenance is a primary consideration, and the other factors governing the determination of permanent maintenance, such as the duration of the marriage, need not be considered on an application for *pendente lite* maintenance.

Clancy v. Clancy, 122 A.D, 2d 563, 505 N.Y.S. 2d 291 (4th Dep't 1986) -- It was not an abuse of discretion to deny *pendente lite* relief where parties were married less than a month prior to their separation and defendant is able to support herself.

Ritter v. Ritter, 135 A.D.2d 421, 522 N.Y.S. 2d 136 (1st Dep't 1987) -- While the standard of living previously enjoyed is a relevant consideration in assessing the reasonable needs of a temporary maintenance applicant, the predominant consideration is the movant's actual financial need and the plaintiff should not have been granted in temporary maintenance award equal to more than twice her previous allowance.

Aron v. Aron, 216 A.D. 2d 98, 628 N.Y.S. 2d 102 (1st Dep't 1989) -- While the prior standard of living is a relevant factor in determining a temporary award, the movant's actual financial need is also a significant factor.

Richardson v. Richardson, NYLJ, 8/11/95, p.26 col. 4 (S. Ct. N.Y. Co.), Saxe, J. -- In a matrimonial case involving a wealthy family, the court had the task of determining initially not just the basic needs of the spouse who has been supported, but the parties' usual and normal lifestyle, since *pendente lite* support must reflect that lifestyle. On the other hand, the court must take care that *pendente lite* support not go beyond such payments as are needed to maintain an established lifestyle, however luxurious; temporary support should not be a substitute for a pretrial distribution of assets for the supported spouse.

Baker v. Baker, 120 A.D.2d 374, 501 N.Y.S.2d 861 (1st Dep't 1986) -- In view of extraordinary income and assets of defendant, the lavish standard of living of the parties, and other household and maintenance items paid by the husband, temporary maintenance increased from $4,400 per week to $1,500 per week.

Schwartz v. Schwartz, 112 A.D.2d 154, 490 N.Y.S.2d 841 (2d Dep't 1985) -- In view of the conceded opulent standard of living enjoyed by the parties during their marriage of almost five years and defendant's wealth, it was not abuse of discretion to grant temporary maintenance in the sum of $2,000 per week.

Levi v. Levi, 175 A.D. 2d 460, 572 N.Y.S. 2d 512 (3d Dep't 1991) -- In view of parties' rather luxurious standard of living during their 12-year marriage, the vastly superior financial circumstances of the husband and the fact that the award will not prevent him from meeting his other financial obligations, it was not an abuse of

discretion to direct temporary maintenance payments in the sum of $10,000 per month.

Lolli-Ghetti v. Lolli-Ghetti, 165 A.D.2d 426, 568 N.Y.S.2d 29 (1st Dep't 1991) -- "The husband also argues that the wife should not have been awarded tax-free maintenance. However, since he is now a resident of Monaco and the bulk of his income is therefore not even subject to Federal, State, or local income taxes, he would not derive a substantial benefit if the maintenance payments were deductible by him and therefore taxable to her.

Lowe v. Lowe, 211 A.D.2d 595, 622 N.Y.S.2d 26 (1st Dep't 1995) -- IAS court did not err in awarding plaintiff *pendente lite* tax-free maintenance as it is within the discretion of the court, pursuant to the Internal Revenue Code (26 USC Sec. 71(b)(1)(B)) to provide that maintenance payments be neither income to the plaintiff nor deductible to the defendant for taxation purposes.

Finkelson v. Finkelson, NYLJ, 5/17/95, p.27 col. 1, (Sup. Ct. N.Y. Co.), Gangel-Jacob, J. -- Plaintiff awarded $3,000 per week as temporary maintenance, said sum to be considered neither income to plaintiff nor deductible to defendant.

Malkin v. Malkin, 200 A.D.2d 442, 607 N.Y.S.2d 239 (1st Dep't 1994) --the award of maintenance on a tax-free basis was an improvident exercise of discretion under the circumstances of the case.

Ansour v. Ansour, 61 A.D.3d 536, 878 N.Y.S.2d 17 (1st Dept. 2009) -- the duration of *pendente lite* maintenance is a factor in determining the duration of maintenance awarded at trial.

4. TEMPORARY CHILD SUPPORT

i. Generally

- Pursuant to New York Domestic Relation's Law §240 a court may order temporary child support or support in a matrimonial action.

- It is well settled that the purpose of a *pendente lite* child support award is to "ensure that the needy spouse is provided with funds or his or her support and reasonable needs and those of the children in his or her custody.

See Cooper v. Cooper, 7 A.D.3d 746, 778 N.Y.S.2d 44 (2d Dep't 2004); Pezza v. Pezza, 300 A.D.2d 555, 752 N.Y.S.2d 550 (2d Dep't 2002). *See also*, Pascale v. Pascale, 226 A.D.2d 439, 641 N.Y.S.2d 56 (2d Dep't 1996).

ii. CSSA Guidelines

- In New York, child support awards are premised upon the statutory formula of the Child Support Standards Act (hereinafter referred to as "CSSA").

- The statutory formula is based upon a percentage of the first $136,000 of the parties' combined gross income plus a discretionary percentage of the parties' combined gross income in excess of $136,000.

- The applicable percentage for one child is 17%; for two children is 25%; for three children is 29%; for four children is 31%; and for five or more children is no less than 35%. *See* DRL §240.

- In addition to the statutory formula, the court must also consider the following ten enumerated factors when awarding child support:

    (1) The financial resources of the custodial and noncustodial parent, and those of the child;

    (2) The physical and emotional health of the child and his/her special needs and aptitudes;

    (3) The standard of living the child would have enjoyed had the marriage or household not been dissolved;

    (4) The tax consequences to the party;

    (5) The nonmonetary contributions that the parents will make toward the case and well-being of the child;

    (6) The educational needs of either parent;

    (7) A determination that the gross income of one parent is substantially less than the other parents' gross income;

    (8) The needs of other children of the noncustodial parent for whom the noncustodial parent is providing support;

    (9) Extraordinary expenses of the noncustodial parent; and

    (10) Any other factor the court determines are relevant to each case.

iii. The CSSA Guidelines And Ten Enumerated Factors Do Not Apply To *Pendente Lite* Awards

- The CSSA legislation has not intended to be, and is not applicable to, requests for, and awards of, temporary child support.

- The court, in its discretion, may apply the CSSA Guidelines in calculating *pendente lite* child support; however, it is not required. Rizzo v. Rizzo, 163 A.D.2d 15, 558 N.Y.S.2d 12 (1st Dep't 1990); Rubin v. Salla, ___ A.D.3d __, (1st Dep't 2010).

- If the Court chooses to calculate *pendente lite* child support in accordance with the statutory formula set forth in the CSSA, the calculations must be accurate.

- In calculating the plaintiff's *pendente lite* child support obligation, the Supreme Court erroneously failed to deduct from the defendant's income the *pendente lite* maintenance which was awarded to the plaintiff. Additionally, in determining the plaintiff's future child support obligations, the Supreme Court erred in failing to draw a distinction between the combined parental income up to $80,000 and the combined parent income above $80,000 as required by CSSA, and did not state any reason for departing from the CSSA guidelines. Militana v. Militana, 280 A.D.2d 529, 720 N.Y.S.2d 188 (2d Dept. 2001).

- A modification of a *pendente lite* award of child support was warranted where child support calculations were based solely on defendant's 1995 income (artificially inflated due to a non-recurring payment). Additionally, the financial obligations imposed on defendant consumed most of his base salary and thereby prevented him from meeting his own financial obligations. O'Connor v. O'Connor, 241 A.D.2d 648, 660 N.Y.S.2d 173 (3d Dept. 1997).

- Moreover, if the Court chooses to apply the CSSA guidelines, it must have before it sufficient convincing financial and other data to determine the parties' gross income as defined in the statute. Langone v. Langone, 145 Misc. 2d 340, 546 N.Y.S.2d 535 (Sup. Ct. Nassau Co., 1989, McCaffrey, J.)

iv. The Court Is Not Required To Consider The CSSA Guidelines But It Must Set Forth The Factors It Considered When Rendering Its Award

LoMuscio-Hamparian v. Hamparian, 137 A.D.2d 500, 524 N.Y.S.2d 455 (2d Dep't 1988) --While the court is not obligated to consider the specific factors enumerated in DRL §240(b)(6)(a) and 7(a) in determining an application for *pendente lite* relief, it is obligated to set forth the factors it considered and the reasons underlying its determination in the decision.

v. An Award Of *Pendente Lite* Child Support Should Not Take Into Account Shelter Expenses If Shelter Expenses Are Also Being Ordered

- Shelter costs attributable to the child(ren) are inherent in the basic child support obligation.

- To avoid a "double dip" for shelter expenses, Courts must deduct the amount awarded for carrying charges from the payor spouse's income before determining the appropriate amount for child support.

See Mallary v. Mallary, 8 A.D.3d 20, 778 N.Y.S.2d 474 (1st Dep't 2004); Sicurelli v. Sicurelli, 285 A.D.2d 541, 727 N.Y.S.2d 479 (2d Dep't 2001); Ryder v. Ryder, 267 A.D.2d 447, 700 N.Y.S.2d 862 (2d Dep't 1999).

vi. Where the CSSA Guidelines Are Used, The Court Should Reduce The Payor's Gross Income By Any Award of Maintenance He or She May Be Obligated To Make Before Applying the CSSA Guidelines.

In calculating the plaintiff's *pendente lite* child support obligation, the Supreme Court erroneously failed to deduct from the defendant's income the *pendente lite* maintenance which was awarded to the plaintiff. Additionally, in determining the plaintiff's future child support obligations, the Supreme Court erred in failing to draw a distinction between the combined parental income up to $80,000 and the combined parental income above $80,000 as required by CSSA, and did not state any reason for departing from the CSSA guidelines. Militana v. Militana, 280 A.D.2d 529, 720 N.Y.S.2d 188 (2d Dep't 2001).

vii. Residency In Same Household

- The fact that the parties continue to live together during the pendency of the action does not bar the award of child support especially where it can be proven that such an award is necessary to maintain the reasonable needs of the child during the litigation. Koerner v. Koerner, 170 A.D.2d 297, 566 N.Y.S.2d 23 (1st Dep't 1991); Harari v. Davis, 59 A.D.3d 182, 871 N.Y.S.2d 907 (1st Dep't 2009) (Case No. 5187). Salerno v. Salerno, 142 A.D.2d 670, 531 N.Y.S.2d 101 (2nd Dep't 1988). Where both plaintiff and defendant continued to reside in the marital residence and the defendant claimed that he continued to pay all the bills and voluntarily pay plaintiff $150 per week maintenance, but defendant was not diligent in paying bills and was inconsistent in paying the voluntary maintenance, a *pendente lite* award of maintenance was not precluded. Furthermore, it did not warrant an award which would allow plaintiff and the children merely to "subsist," an

award of temporary maintenance is generally appropriate where one party lacks sufficient assets to provide for reasonable needs.

viii. Court Can Impute Income

Simeon v. Simeon, NYLJ, 12/14/89, p. 21, col. l (Sup. Ct. N.Y. Co.), Gangel-Jacob, J.-- Although not required to apply the CSSA to a motion for *pendente lite* relief, the statute must be kept in mind in arriving at a reasonable award. Where defendant's income was tax-free, court would impute a sum representing 20% more than his gross to arrive at a figure for purposes of calculating gross income for child support standards, pursuant to Domestic Relations Law, §240 1-b(b)(iv).

ix. Additional Supporting Case Law

Brice v. Brice, 16 A.D.3d 259, 790 N.Y.S.2d 873 (1st Dep't 2005) -- Temporary child support reduced to reflect the standard calculation under the CSSA.

Koerner v. Koerner, 170 A.D.2d 297, 566 N.Y.S.2d 23 (1st Dep't 1991) -- Husband's claim of indigency was not supported by the evidence and court did not err is failing to pro-rate his obligation to pay for the children's unreimbursed medical expenses with the wife in the Order.

Rentschler v. Rentschler, NYLJ, 3/8/91, p. 22 col. 1 (Sup. Ct. N.Y. Co.), Saxe, J. -- The application of the child support guidelines in a motion seeking *pendente lite* relief is not mandatory and would be inappropriate in case at bar where the bulk of the basic support expenses are being voluntarily paid by the plaintiff.

Rizzo v. Rizzo, 163 A.D.2d 15, 558 N.Y.S.2d 12 (1st Dep't 1990) -- It was not an error to employ the child support guidelines to determine the parties' respective obligation upon an application for *pendente lite* support, although consideration of such factors is not mandatory upon such application. *See also*, Asteinza v. Asteinza, 173 A.D.2d 515, 570 N.Y.S.2d 582 (2d Dep't 1991).

De Arakie De Arakie, 169 A.D.2d 660, 565 N.Y.S.2d 40 (1st Dep't 1991) -- Upon application for *pendente lite* child support, because of plaintiff's failure to produce the requested tax returns for 1986 and 1987, which might have explained how he supposedly declined from considerable wealth in 1985 to abject poverty in 1988, the IAS court was permitted to draw an unfavorable inference with respect to his stated financial picture, which in turn authorized the court to determine that the standard calculation for the basic child support obligation would be unjust or inappropriate.

O'Connor v. O'Connor, 241 A.D.2d 648, 660 N.Y.S.2d 173 (3d Dep't 1997)-- A modification of a *pendente lite* award of child support was warranted where child support calculations were based solely on defendant's 1995 income (artificially inflated due to a non-recurring payment). Additionally, the financial obligations imposed on defendant consumed most of his base salary and thereby prevented him from meeting his own financial obligations.

Militana v. Militana, 280 A.D.2d 529, 720 N.Y.S.2d 188 (2d Dep't 2001) -- In calculating the plaintiff's *pendente lite* child support obligation, the Supreme Court erroneously failed to deduct from the defendant's income the *pendente lite* maintenance which was awarded to the plaintiff. Additionally, in determining the plaintiff's future child support obligations, the Supreme Court erred in failing to draw a distinction between the combined parental income up to $80,000 and the combined parental income above $80,000 as required by CSSA, and did not state any reason for departing from the CSSA guidelines.

5. PROCEDURAL ASPECTS

i. Effective Date

- Domestic Relations Law §236 (b)(6)(a) requires that a *pendente lite* order be effective as of the date of service of the application.

- *Pendente lite* awards are retroactive to the date the initial application was filed with the court.

Temporary maintenance award to wife would be made retroactive to date of wife's application. *See* Policastro v. Policastro, 150 A.D.2d 437, 541 N.Y.S.2d 45 (2d Dep't 1989). *See also*, Banks v. Banks, 148 A.D.2d 407, 538 N.Y.S.2d 823 (2d Dep't 1989); Dooley v. Dooley, 128 A.D.2d 669, 513 N.Y.S.2d 16 (2d Dep't 1987); Ross v. Ross, 157 A.D.2d 652, 549 N.Y.S.2d 752 (2d Dep't 1990) (*Pendente lite* maintenance award should have been made retroactive to the date of wife's application for same, rather than to date the motion was filed.)

6. ALLOCATION

- The trial court has the discretion to award a lump sum monthly amount for *pendente lite* maintenance and child support.

Fricke v. Fricke, 119 A.D.2d 798, 501 N.Y.S.2d 425 (2d Dep't 1986); Christina v. Christina, 140 A.D.2d 482, 528 N.Y.S.2d 594 (2d Dep't 1988)(It was not error for Supreme Court to fail to separately allocate the temporary

maintenance and child support from which the payment of the carrying charges and utilities for the marital residence.)

- If the amount awarded for child support and maintenance is "unallocated" the maintenance cannot be deductible by the payor and taxable to the payee.

7. APPEALS OF *PENDENTE LITE* CHILD SUPPORT AND MAINTENANCE AWARDS

i. Standard

- On appeal, absent exigent circumstances, *pendente lite* awards of child support and maintenance will be sustained.

- An example of exigent circumstances is where a party is unable to meet his or her financial obligations.

- Modifications are rarely made as deference is given to the trial courts.

ii. Speedy Trial Rule

- It is well-settled that a speedy trial is ordinarily the proper remedy to rectify a perceived inequity in a *pendente lite* award.

See Levakis v. Levakis, 7 A.D.3d 678, 776 N.Y.S.2d 510, (2d Dep't 2004)("A speedy trial is ordinarily the property remedy to rectify a perceived inequity in a *pendente lite* award."); Maksoud v. Maksoud, 71 A.D.2d 643, 896 N.Y.S.2d 387 (2d Dep't 2010); Shukra v. Shukra, 68 A.D.3d 488, 891 N.Y.S.2d 37 (1st Dep't 2009); Dowd v. Dowd, NYLJ, 6/21/10, p. 30 col. 3 (2d Dep't 2010)

- The speedy trial rule, although often applied, is not "iron clad." *Pendente lite* awards will be modified when they are deficient.

See Gold v. Gold, 212 A.D.2d 503, 622 N.Y.S.2d 113 (2d Dep't 1995) -- *Pendente lite* award was excessive where it directed husband to pay child support in addition to the college tuition and room and board of the children, leaving him with insufficient funds to meet his own debts and reasonable expenses. Although generally the best remedy for any claimed inequity in a temporary award is a speedy trial, the rule is not ironclad when the award is deficient.

iii. Additional Case Law

Whelan v. Whelan, 59 A.D.3d 437, 873 N.Y.S.2d 648 (2d Dep't 2009) (Case No. 2008-02924) -- temporary maintenance modified upward from $100 per week to $400 per week where shown that wife could not pay her bills or provide for her children on maintenance award of the lower court. The Court also imputed income to the Husband based upon earnings from the previous year.

Buddle v. Buddle, 53 A.D.3d 745, 861 N.Y.S.2d 193 (3d Dep't 2008) -- exigent circumstances did not exit warranting a downward modification of husband's *pendente lite* maintenance obligation.

Signorelli v. Signorelli, 50 A.D.3d 772, 857 N.Y.S.2d 164 (2d Dep't 2008) -- while a speedy trial is the proper remedy to rectify inequities in a *pendente lite* award, the fact that the lower court directed husband to pay child support for his child who reached the age of majority warranted the order to be modified.

Hearst v. Hearst, 29 A.D.2d 395, 813 N.Y.S.2d 906 (1st Dep't 2006) -- wife's request for an upward modification of *pendente lite* maintenance was denied where the amount awarded to her permitted her to sustain her prior luxurious lifestyle even though the actual amount awarded did not permit her to cover her budgetary needs in their entirety. The lower court properly determined that some of wife's expenses were inflated.

Silver v. Silver, 46 A.D.3d 667, 847 N.Y.S.2d 596 (2d Dep't 2007) -- Husband's *pendente lite* maintenance obligation was reduced because the lower court failed to consider his actual reasonable living expenses or his current debts.

McGarrity v. McGarrity, 49 A.D.3d 824, 854 N.Y.S.2d 522 (2d Dep't 2008) -- wife's application for an upward modification of *pendente lite* maintenance was denied where husband was paying for 100% of the carrying charges and other miscellaneous expenses.

Beige v. Beige, 220 A.D.2d 636, 632 N.Y.S.2d 826 (2d Dep't 1995) -- Modifications of *pendente lite* awards should rarely be made by an appellate court, and then only under exigent circumstances such as where a party is unable to meet his or he financial obligations or justice otherwise requires.

Wagner v. Wagner, 175 A.D.2d 391, 572 N.Y.S.2d 462 (3d Dep't 1991) -- Court does not favor modifying *pendente lite* awards, except when the ordered payments are so prohibitive as to prevent the payor spouse from meeting his/her own financial obligations or where justice otherwise requires.

Berger v. Berger, 125 A.D.2d 285, 508 N.Y.S.2d 572 (2d Dep't 1986) -- A speedy trial is the most effective means of resolving any claimed inequities in a *pendente lite* award.

Sonitis v. Sonitis, 125 A.D.2d 661, 510 N.Y.S.2d 183 (2d Dep't 1987) -- Ordinarily, appeals from an order granting *pendente lite* relief are not favored inasmuch as it is more expedient and less consuming of both judicial time and that of the attorneys if counsel promptly proceed to trial.

Ljutic v. Ljutic, 216 A.D.2d 274, 627 N.Y.S.2d 759 (2d Dep't 1995) -- Where a *pendente lite* order did not leave husband with adequate resources from which to pay his actual, reasonable living expenses, a reduction of his obligation was warranted.

Androvett v. Androvett, 172 A.D.2d 792, 569 N.Y.S.2d 163 (2d Dep't 1991) -- Notwithstanding the speedy trial rule, the *pendente lite* relief may be modified on appeal where the interest of justice warrants and where the court-ordered temporary maintenance payments are so prohibitive as to prevent the payor spouse from meeting his or her own financial obligations.

Berkowitz v. Berkowitz, 176 A.D.2d 775, 574 N.Y.S.2d 829 (2d Dep't 1991) -- A *pendente lite* award may be increased on appeal where it is determined to be inadequate, particularly where the husband was able to, and voluntarily did, pay a greater amount before the commencement of the action.

Guiry v. Guiry, 159 A.D.2d 556, 552 N.Y.S.2d 421 (2d Dep't 1990) -- Although the proper remedy to rectify inequities in *pendente lite* order of support is a speedy trial, relief may be granted on appeal where justice so dictates. Husband should not be entirely relieved of his obligation to support his daughter because she earns $6,500 per year from part-time employment while attending college. While a child's resources are a factor to be considered in determining an application for child support, children should not be forced unwittingly to use their funds or diminish their assets to supply their basic needs, such as shelter, food and clothing. Where father was ordered to pay half his son's college expenses, he should have been granted a credit against or a reduction in the amount of his child support obligation payable directly to his wife.

Suydam v. Suydam, 167 A.D.2d 752, 563 N.Y.S.2d 315 (3d Dep't 1990) -- Modifications of *pendente lite* awards should rarely be made by an appellate court. If a modification is to be made it should be made and then only under exigent circumstances, such as where a party is unable to meet his or her financial obligations or justice otherwise requires.

Match v. Match, 134 A.D.2d 210, 521 N.Y.S.2d 10 (1st Dep't 1987) -- *pendente lite* maintenance award modified downward where trial court focused too narrowly on parties' prior standard of living and ignored the fact that such standard of living was subsidized by husband's employer providing benefits on a tax-free basis. To require the husband to maintain

that standard of living out of his income would require that his income provide what it did not even do during the marriage.

Kramer v. Kramer, 131 A.D.2d 317, 516 N.Y.S.2d 210 (1st Dep't 1987) -- While a speedy trial is the best remedy for any inequity in a temporary maintenance order, under facts of case, the great disparity in the parties' finances, where the husband earned about $1,000,000 and the wife earned $20,000, warranted an upward modification of interim maintenance and child support.

Puroura v. Puroura, 123 A.D.2d 678, 507 N.Y.S.2d 49 (2d Dep't 1986) -- *pendente lite* award modified upward upon unique facts and circumstances of case, including fact that prolonged discovery and probable dispute over finances.

8. CREDITS

i. Reimbursement For Excess Temporary Maintenance

- As a general rule, strong public policy provides that a party is not entitled to reimbursement for excess temporary maintenance payments. Fox v. Fox, 306 A.D.2d 583, 759 N.Y.S.2d 702 (3d Dep't 2003).

- Pursuant to DRL §236[B][6][a] adjustments addressing inequities resulting from overpayment are available within the context of the ongoing matrimonial action. Pursuant to the statute, the temporary order is retroactive to the date of the application and all retroactive amounts shall be paid in one or periodic sums, as the court shall direct, "taking into account any amount of temporary maintenance which has been paid."

- Adjustments are not given where a payee intentionally conceals material facts that would have terminated the payor's obligation or where a payor willfully ignores his or her obligation under an order, a retroactive credit should not be given.

- The Payor has the burden of proof with respect to the overpayments. Canceled checks, credit card statements and other financial documents can be used a trial to prove overpayment.

ii. Adjustment To Award of Equitable Distribution Based Upon Excess Payment of Temporary Maintenance

- Pursuant to DRL §236 [B][5][d][5] credits for overpayment of temporary maintenance can be made by adjusting an equitable distribution award.

- Because these adjustments may have tax implications, any such implication must be raised by the payee.

iii. Additional Case Law

Rosenberg v. Sack, 46 A.D.2d 1273, 848 N.Y.S.2d 760 (3d Dep't 2007) -- retroactive adjustment not given to payor who made "voluntary payments" to the payee prior to the entry of the temporary support award because he failed to make any payments required by the temporary support award.

Shankles v. Shankles, 173 A.D.2d 461, 570 N.Y.S.2d 85 (2d Dep't 1991) -- While husband may be entitled to certain credits for past payments against the *pendente lite* maintenance and child support award, under the circumstances of case, that issue is best resolved at the trial of the action rather than as part of the *pendente lite* award.

Galvano v. Galvano, 303 A.D.2d 206, 755 N.Y.S.2d 599 (1st Dep't 2003) -- While Wife's application for an upward modification of temporary maintenance was sustained, the Appellate Division stated that if the award was deemed excessive at trial, the trial court could remedy the inequity by adjusting the Wife's equitable distribution award.

Vicinanzo v. Vicinanzo, 193 A.D.2d 962, 598 N.Y.S.2d 362 (3d Dep't 1993) --credit for overpayment of temporary maintenance was denied on the basis that evidence at trial proved that Husband agreed to contribute the money towards the payment of his daughter's wedding.

Pickard v. Pickard, 33 A.D.3d 202, 820 N.Y.S.2d 547 (1st Dep't 2006) -- The First Department determined that Husband improperly received a 100% credit for maintenance and homeowner's insurance payments since each of these payments permitted the parties to maintain the marital residence which they each equally benefited from at the time the marital residence was sold. Accordingly, Husband's credit was reduced by 50%.

West v. West, 151 A.D.2d 475, 542 N.Y.S.2d 265 (2d Dep't 1989) -- In determining arrears due by plaintiff under *pendente lite* order, payments of real estate taxes on former marital residence, Master Card charges and insurance on defendant's car, as they were made to satisfy defendant's legal obligations, were properly granted as a credit to the plaintiff; payments on another credit card and their daughter's tuition, was they were not the legal obligations of the defendant, should not be credited to plaintiff.

Meyer v. Meyer, 173 A.D.2d 1021, 570 N.Y.S.2d 250 (3d Dep't 1991) -- In directing that *pendente lite* child support be awarded retroactive to the date of the application therefor, the court is required to credit against the

retroactive amount due any voluntary support payments which had been made by the obligor parent.

9. TEMPORARY CUSTODY

i. General

- An award of temporary custody to either parent is atypical.

ii. Standard

- The standard of proof with regard to an award of custody is the same for an award of *pendente lite* custody.

- The standard is the "best interests of the child."

- The leading case on the issue of custody is Eschbach v. Eschbach, 56 N.Y.2d 167, 436 N.E.2d 1260, 451 N.Y.S.2d 658 (1982). The court in Eschbach sets out factors to be considered in determining the best interests of the child. *See also,* Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 432 N.E.2d 765, 447 N.Y.S.2d 893 (1982).

iii. Best Interests of the Child

- If the court is presented with evidence indicating that an award of temporary custody to either parent will be in either parent's "best" interest, such an award will be made.

- Factors in determining "best interests of the child" include:

(a) parental guidance the custodial parent provides for the child;
(b) quality of the home environment;
(c) ability of each parent to provide for the child's emotional and intellectual development;
(d) stability of home environment;
(e) ability of each parent to provide for the child's emotional and intellectual development;
(f) stability of home environment for the child;
(g) desires of the child (Court must consider the age and maturity of child);
(h) length of time the present custody situation had continued;
(i) financial status and the ability of each parent to provide for the child; and
(j) parental guidance the custodial parent provides for the child.

- In order to set out proof of the "best interests" of the child in the motion, affidavits from school teachers, school psychiatrists, private therapists and other third parties such as family members, friends, nannies and other household staff is helpful.

Melancon v. Melancon, 204 A.D.2d 1061, 613 N.Y.S.2d 65 (4th Dep't 1994) -- Mother was awarded temporary custody of the children where the record demonstrated that she maintained close contact with the children's school personnel, involved the children in numerous extra curricular activities, was involved in family counseling with the children and was able to spend substantial time with them. To the contrary, the Father's work schedule would often require third parties to care for the children, and he had failed to demonstrate that he could provide an emotionally stable home environment for the children. "In determining the best interests of the children, the court should examine the ability of the parties to provide for the emotional and intellectual development of the children, the quality of the home environment and the parental guidance provided."

Askinas v. Askinas, 155 A.D.2d 498, 547 N.Y.S.2d 260 (2d Dep't 1989) -- The Appellate Division affirmed a court order, which granted the wife's *pendente lite* application for temporary custody of the parties' one child. The Court notes that the Supreme Court did not make any award of custody; rather it referred the issue of custody to the trial court and merely retained residential care with the plaintiff. Askinas, 547 N.Y.S.2d at 361. In this case, both parties moved for temporary custody. There was no evidence in the record that either party was unfit, and the husband did not suggest that the wife was unfit. The motion papers disputed which party had the best babysitter. Id. The court also noted that the fact that the wife must work to support herself and the child is only one factor, and based on the circumstances in the case Is not an overriding factor. Id.

Assini v. Assini, 11 A.D.3d 417, 783, N.Y.S.2d 51 (2d Dep't 2004) -- Temporary custody properly awarded to husband on basis of unrebuked and documented evidence of repeated complaints filed by wife with law enforcement authorities asserting numerous incidents of domestic violence, including physical and emotional abuse, by her live-in boyfriend, with at least one incident involving the parties' child and several arrests of the boyfriend in the presence of the child.

Mauter v. Mauter, 309 A.D.2d 737, 765 N.Y.S.2d 378 (2d Dep't 2003) -- Temporary custody award to the Father was affirmed where the Law Guardian and the court appointed forensic recommended that the Father retain custody, as the forensic expert expressed concern that the Mother was coaching the child to falsely report being abused by the Father.

iv. Hearing is Required

See Christensen v. Christensen, 55 A.D.3d 1453, 867 N.Y.S.2d 580 (4th Dep't 2008) (Case No. 07-02447) -- Error to award temporary custody without a hearing. Despite conflicting affidavits, the lower court based its determination solely on an in-camera interview with the children and communications with the parties' attorneys.

Hizme v. Hizme, 212 A.D.2d 580, 622 N.Y.S.2d 737 (2d Dep't 1995) -- Trial court erred as a matter of law by failing to hold a hearing prior to awarding *pendente lite* custody to the Mother and limiting Father's visitation to four hours per week where parties submitted conflicting affidavits accusing each other of being an unfit parent.

Peck-Barnett v. Barnett, ___A.D.3d ___ (1st Dep't 2011) -- First Department reversed the lower court's award of temporary custody to the Father without a hearing.

v. Hearing Is Not Required

- Temporary custody may be awarded without a hearing where sufficient facts are shown by uncontroverted affidavits.

See McAvoy v. Hannigan, 41 A.D.3d 791, 837 N.Y.S.2d 584 (2d Dep't 2007); Gandia v. Rivera-Gandia, 260 A.D.2d 321, 689 N.Y.S.2d 391 (1st Dep't 1999). *But see* Capolino v. Capolino, 174 A.D.2d 825, 570 N.Y.S.2d 753 (3d Dep't 1991)(where affidavits were submitted by both parties containing contradictory allegations of unfitness, an award of custody without a hearing was improper); Carlin v. Carlin, 52 A.D.3d 559, 861 N.Y.S.2d 74 (2d Dep't 2008)(because the record contained controverted allegations, a hearing must be held to determine temporary custody); Miller-Glass v. Glass, 237 A.D.2d 723, 563 N.Y.S.2d 982 (3d Dep't 1997). *See also,* Harrilal v. Harrilal, 128 A.D.2d 502, 512 N.Y.S.2d 433 (2d Dep't 1987); Kehoe v. Kehoe, 234 A.D.2d 272, 651 N.Y.S.2d 324 (2d Dep't 1996); Portnof v. Portnof, 188 A.D.2d 411, 591 NY.S.2d 782 (1st Dep't 1992).

- The court does not need to set forth the reasons for its award of temporary custody to a particular parent.

vi. The Court Can Set An Access Schedule And Order Supervised Visitation

In Waldman v. Waldman, 95 A.D.2d 827, 463 N.Y.S.2d 868 (2d Dep't 1983), the Appellate Division modified the lower court's order and granted husband supervised visitation despite the fact that neither husband nor wife made an application for such relief.

B. TEMPORARY ATTORNEY FEES, EXPERT FEES, APPRAISAL FEES

i. Purpose of *Pendente Lite* Counsel and Expert Fees:

- To enable a financially needy spouse to obtain funds necessary to prosecute or defend the action.

- To even the playing field between the less affluent spouse so that he or she may obtain competent and experienced counsel equivalent to counsel that may be obtained by the other spouse.

ii. Requirements of 22 §NYCRR 202.16:

- 22 NYCRR §202.16(k)(7) - **Applications With Respect to Counsel Fees:** A *pendente lite* application seeking counsel fees must include, in the moving papers, an attorney's affirmation or affidavit indicating the payments received by the client through the date of the application, the balance of any retainer moneys on account and a copy of the retainer agreement.

- Applications must be supported by detailed time records.

- Attorney's Affirmation or Affidavit stating qualifications and monies received, i.e. a retainer from client.

- 22 NYCRR §202.16(k)(7): **Decisions Relating to Counsel, Appraisal/Accounting Fees:** A decision of the court addressing applications for *pendente lite* counsel, appraisal and/or accounting fees must specifically address, in writing or on the record, the facts it considered and the reasons for its decision.

iii. **THE NEW LAW**

- DRL §§237 and 238 were amended on August 15, 2010 (effective October 12, 2010 and only as to actions and proceeding commenced on or after the effective date) in several respects:

    - "Counsel fees and fees and expenses of experts" are now explicitly referenced, rather than "such sum or sums of money."

    - DRL § 237(1)(a) now applies to any action or proceeding brought to obtain maintenance or a distribution of property following a foreign judgment of divorce.

    - DRL § 237(1)(b) now applies to any application brought to enforce an order or judgment of alimony, as well as to enforce, annul or modify an order or judgment for alimony, maintenance, distributive award, or distribution of marital property.

- DRL § 238 now applies to modification as well as enforcement proceedings.

- DRL § 238 also now applies to actions or proceedings to enforce or modify a provision of judgment or order entered in an action for:

    - Declaration of validity or nullity of a judgment of divorce rendered against a spouse who was the defendant in any action outside New York and did not appear therein where such spouse asserts the nullity of such foreign judgment.

    - An injunction restraining the prosecution in any other jurisdiction if an action for divorce.

- Pursuant to § 237(1)(a) and (1)(b) and § 238:

    - There is now a rebuttable presumption that counsel fees shall be awarded to the less monied spouse.

    - In exercising its discretion, the Court must assure that each party is adequately represented and that, where fees and expenses are awarded, they are to be awarded on a timely basis, pendente lite, so that there is adequate representation from the start of a case.

    - Applications for fees and expenses can be made at any time or times prior to final judgment.

    - Both parties to the action or proceeding and their attorneys must file an affidavit with the Court detailing the financial agreement between the party and the attorney, including the amount of the retainer, the amounts paid and still owing, the hourly rate charged, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses.

    - Payment of any retainer fees to the attorney for the petitioning party does not preclude any awards of fees and expenses that would be allowed under DRL.

iv. <u>Prior Case Law (to the extent still applicable):</u>

Kooper v. Kooper, 74 A.D.3d 6, 901 N.Y.S.2d 312 (2d Dep't 2010) -- wife entitled to interim counsel fees of $100,000 in light of significant disparity in financial circumstances of the parties.

Decabrera v. Cabrera-Rosete, 70 N.Y.2d 879, 523 N.Y.S.2d 176 (1987) -- A spouse is not required to show indigency in order to obtain an award of counsel fees. Also, a court should review the financial circumstances of both parties together with all the other circumstances of the case, which may include the merit of the parties' positions.

Charpié v. Charpié, 271 A.D.2d 169, 710 N.Y.S.2d 363 (1st Dep't 2000) -- On an application for counsel fees in a matrimonial litigation, where a wife has assets that, although considerable, are finite, while her husband's wealth is far greater and his earnings continue to amass, and a wife's expected attorneys' fees will exhaust a large portion of her finite resources, while husband will be able to pay his ongoing attorneys' fees without substantial impact on his estate, the court should not limit itself to inquiry into whether the wife is able to pay her attorney with the funds then in her possession.

Rosenbaum v. Rosenbaum, 55 A.D.3d 713, 866 N.Y.S.2d 234 (2d Dep't 2008) (Case No. 2007-03316) -- Husband (a licensed physician) awarded $75,000 in interim counsel fees to maintain financial parity in the divorce litigation.

Wald v. Wald, 844 N.Y.S.2d 86 (2d Dep't 2007) -- Award of interim attorney fees in divorce action is designed to redress the economic disparity between monied spouse and non-monied spouse, so that matrimonial scales of justice are not unbalanced by weight of wealthier litigant's wallet.

Prichep v. Prichep, 858 N.Y.S.2d 667 (2d Dep't 2008) -- the Supreme Court abused its discretion in denying wife's application for interim counsel fees by deferring the request to trial court, where there was significant disparity in the parties' financial circumstances, wife submitted detailed billing documents and time records showing work her counsel had performed and had billed her for, and husband was able to pay his own counsel fees without any substantial impact upon his lifestyle.

Stubbs v. Stubbs, 41 A.D.3d 832, 839 N.Y.S.2d 511 (2d Dep't 2007) -- Trial court's award of interim counsel fees to the wife in an action for divorce and ancillary relief was a provident exercise of discretion in view of the disparity in the financial circumstances of the parties, with the wife having no independent source of income.

Karas-Abraham v. Abraham, 847 N.Y.S.2d 82 (1st Dep't 2007) -- *Pendente Lite* award of attorney's fees in favor of wife in the amount of

$50,000 was a proper exercise of discretion, in light of husband's greater financial resources, and the fact that his actions had caused protracted litigation.

CH v. RH, 846 N.Y.S.2d 560 (Sup. Ct. Nassau Co. 2007) -- *Pendente lite* counsel fees to plaintiff wife in divorce action was unwarranted, given comparable financial circumstances of parties, indicating ability of each to pay for their individual counsel fees.

Singer v. Singer, 792 N.Y.S.2d 541 (2d Dep't 2005) -- Awarding to wife an interim counsel fee of $100,000 in a divorce suit was a provident exercise of discretion based upon the financial disparity between the parties, the husband's obstreperous conduct which unnecessarily protracted the litigation, and the quality of the representation afforded the wife by her counsel.

Shanon v. Patterson, 294 A.D.2d 485, 742 N.Y.S.2d 653 (2d Dep't 2002) -- Given disparate earnings of parties, court properly ordered husband to pay interim counsel fees incurred by wife in seeking *pendente lite* child support.

Kerzner v. Kerzner, 281 A.D.2d 215, 726 N.Y.S.2d 388 (1st Dep't 2001) -- Denial of wife's motion in action against husband for award of $50,000 in interim counsel fees was proper exercise of discretion, where wife had access to $2 million from sale of former marital residence.

Marr v. Marr, 181 A.D.2d 974, 581 N.Y.S.2d 873 (3d Dep't 1992) -- Wife was entitled to *pendente lite* award of attorney fees where she had had to borrow money from her grandfather to pay retainer fee, husband had an income of more than $47,000, and wife had no income.

Maharam v. Maharam, 177 A.D.2d 262, 575 N.Y.S.2d 846 (1st Dep't 1991) -- Where husband was a millionaire, and wife had savings of $2,600, the trial court should have awarded her interim accountant's fees of $15,000 and that sum would be taken into account in the equitable distribution award and represented an advance of funds necessary to allow the wife to effectively analyze and present evidence involving complex and substantial financial transactions and holdings.

Isaacs v. Isaacs, 71 A.D.3d 951, 897 N.Y.S.2d 225 (2d Dep't 2010) -- Defendant's ability to pay counsel fees was established by in-camera review of financial documents he produced. A hearing was not necessary.

Rodriguez v. Rodriguez, 175 A.D.2d 157, 573 N.Y.S.2d 897 (2d Dep't 1991) -- *Pendente lite* award to wife of $10,300 in counsel fees and expert fees was appropriate as wife set forth in detail the nature of the marital property involved, the difficulties involved in identifying and evaluating it, the services rendered and to be rendered and an estimate of the time

involved and her financial status, and in opposition thereto, the husband did not set forth any evidence regarding his own financial circumstances or the relative merits of his position.

Goodson v. Goodson, 135 A.D.2d 604, 522 N.Y.S.2d 182 (2d Dep't 1987) -- both parties are entitled to searching exploration of each other's assets and, in order to facilitate such investigation, court may direct one spouse to pay fees necessary for expert services.

v. Genuine Need (to the extent still applicable):

Grant v. Grant, 299 A.D.2d 521, 751 N.Y.S.2d 40 (2d Dep't 2002) -- Wife was not entitled to *pendente lite* award of interim counsel fees of $25,000 in divorce proceeding, where she failed to show that she lacked sufficient funds of her own to compensate her counsel.

Block v. Block, 296 A.D.2d 343, 746 N.Y.S.2d 15 (1st Dep't 2002) -- There was no justification, either on the basis of need or fairness, for an award to a wife of $15,000 in interim attorney fees to defend against the husband's appeal of an earlier $35,000 award of fees; the wife earned a substantial income, approximately $100,000 annually, received $49,000 yearly in child support and expenses, had assets of $142,000, had previously been awarded $87,750 in legal fees and $31,081.43 in expert fees, and had already received $216,000 in equitable distribution to be supplemented by a further distribution.

Demas v. Demas, 125 A.D.2d 441, 509 N.Y.S.2d 479 (2d Dep't 1986) -- Where a genuine need does not appear from the record it was, not error for Special Term to deny request for temporary counsel fees.

Rados v. Rados, 133 A.D.2d 536, 519 N.Y.S.2d 906 (4th Dep't 1987) -- A spouse need not be indigent to receive an award of counsel fees.

Hyman v. Hyman, 56 A.D.2d 337, 392 N.Y.S.2d 455 (1st Dep't 1977) -- A party is not required to exhaust his or her own capital resources in order to qualify for an interim counsel fee.

Zerilli v. Zerilli, 110 A.D.2d 634, 487 N.Y.S.2d 373 (2d Dep't 1985) -- In light of wife's lack of income or significant assets, Special Term should have awarded her counsel fees.

Bergstein v. Bergstein, 207 A.D.2d 285, 615 N.Y.S.2d 382 (1st Dep't 1994) -- Plaintiff's alleged possession of sufficient funds to pay a portion of her outstanding attorneys' fees did not preclude the award of interim counsel fees, the court's exercise of discretion in this respect not being dependent upon a showing of indigency.

Fisher v. Fisher, 159 Misc. 2d 1115, 608 N.Y.S.2d 383 (Sup. Ct. N.Y. Co. 1994) -- Court awards interim counsel fee of $75,000, citing recommendation from Milonas Committee report that: "The duration of a case would be drastically reduced if the monied spouse were compelled to pay opposing counsel's fees at the outset of the action and at regular intervals. Forced to confront the unpleasant reality of such an obligation, a party would be much less inclined to prolong the litigation."

vi. Complexity (to the extent still applicable):

Piali v. Piali, 247 A.D.2d 455, 668 N.Y.S.2d 711 (2d Dep't 1998) -- Award of interim attorney fees to wife in divorce litigation was justified, given issues which included ownership rights in various corporations allegedly jointly possessed by parties, appreciation in value of marital residence and vacation home, accusations surrounding custody of parties' child, and parties' unequal financial situation after wife was barred from co-managing family trucking business with husband.

Ahern v. Ahern, 94 A.D.2d 53, 463 N.Y.S.2d 238 (2d Dep't 1983) -- The complexity of the issues, the time and expertise required to properly prepare for trial are factors to consider in awarding counsel fees.

Hinden v. Hinden, 122 Misc. 2d 552, 472 N.Y.S.2d 248 (Sup. Ct. Nassau Co. 1983) -- The Court awarded the wife $15,000 interim counsel fees in view of the large sums at issue, the complexity of the issues, the standing of counsel and the failure of the husband to disclose his financial arrangements with his own attorney.

Bricker v. Powers, 208 A.D.2d 463, 617 N.Y.S.2d 309 (1st Dep't 1994) -- Award of $75,000 interim counsel fee affirmed where action already relentlessly litigated and is certain to be protracted, and husband is in far better position to bear the bulk of the litigation expense.

vii. Prima Facie Case (to the extent still applicable):

Waterman v. Waterman, 128 Misc. 2d 665, 490 N.Y.S.2d 436 (Sup. Ct. Suffolk Co. 1985) -- Court *sua sponte* examined the complaint, found it unlikely that plaintiff would prevail on the merits, and thus denied an award of interim counsel and expert fees.

viii. Procedure (to the extent still applicable):

Bush v. Bush, 46 A.D.3d 1140, 848 N.Y.S.2d 721 (3d Dep't 2007) -- To justify an award of counsel fees, a sufficient evidentiary basis must exist for the court to evaluate the respective financial circumstances of the parties and value of the services rendered, and without adequate proof of the financial circumstances of the parties, the matter was remitted to Supreme Court for an evidentiary hearing.

Fraguela v. Fraguela, 177 A.D.2d 910, 576 N.Y.S.2d 669 (3d Dep't 1991) -- Wife's failure to supply attorney's affidavit did not render award for interim counsel fees improper where wife discharged her initial attorney, was not seeking funds to continue counsel's services and, based on substantial efforts to obtain new counsel, indicated that she did not have resources or funds to hire new counsel without payment of substantial sums in advance and statute permitted award of counsel fees to a spouse as, in court's discretion, justice required.

Hughes v. Hughes, 208 A.D.2d 502, 617 N.Y.S.2d 56 (2d Dep't 1994) -- Award of interim counsel fees improper where wife's counsel did not submit time records or otherwise provide breakdown of services rendered, did not confirm wife's statements that she had paid him on account, and neither wife nor her counsel established nature of their relationship or whether they had executed a retainer agreement.

Cronin v. Cronin, 158 A.D.2d 447, 551 N.Y.S.2d 44 (2d Dep't 1990) -- While wife established her inability to pay counsel fees p*endente lite*, an award of $20,000 was unwarranted where wife's counsel failed to provide adequate documentation regarding the services rendered, and supplied time records which, for the most part, were illegible.

ix. 22 NYCRR §130-1 – Awards of Costs and Imposition of Financial Sanctions for Frivolous Conduct in Civil Litigation

2. EXPERTS--USE THEREOF AND FEES

i. Use of Neutral Experts and 22 NYCRR §202.18:

- The Court has the power to appoint neutral experts to determine the value of assets including, without limitation, real property; personal property such as jewelry, art, antiques, wine and other collections; business and partnership interests; and intangible assets such as licenses, celebrity status and intellectual property. See NYCRR §202.18.

- Pursuant to NYCRR §202.18 a court may also appoint a psychiatrist, psychologist, social worker or other appropriate expert to give testimony with respect to custody or visitation.

- The courts maintain a list of neutral experts. Most judges will appoint an expert that is mutually agreeable by the parties. If the parties are unable to mutually agree on an expert, each judge has his or her own method for appointing a neutral expert. Some judges have counsel submit on an un-marked piece of paper the names of multiple experts. It is a blind submission. The submission cannot be linked to a specific party or law firm. The

judge will then randomly select a name from one of the lists. Other judges simply appoint an expert in the form of a written order. Others literally will pick out of a hat.

- A neutral expert will determine the value of the asset on behalf of both husband and wife.

- Requests for the appointment of experts to determine the value of assets can be made by way of a *pendente lite* application. The request can be for the appointment of a neutral expert or for an expert to represent the interests of a party.

- A request can also be made for an award of fees to cover the expert's fees.

ii. Requirement for Fees: Applications must contain affidavit or affirmation describing the nature of expert work involved and difficulties in evaluating property.

iii. If an expert is not a neutral expert, and you will require that expert to give testimony at trial certain requirements must be met:

(a) Pursuant to CPLR §3101(d) a response to a demand for expert information must be served 20 days following the date on which the demand is made.

(b) Pursuant to NYCRR §202.16(g) an expert who is expected to be called at trial is required to file with the court and exchange with opposing counsel, no later than 60 days before the date set for trial an expert report. The reports are the only reports that will be admissible at trial. Pursuant to CPLR §3101(d)(1)(i) late reports may be filed upon a showing of good cause.

iv. Necessary Showing (to the extent still applicable; see counsel fee section regarding new law):

Avello v. Avello, 72 A.D.2d 850, 899 N.Y.S.2d 337 (2d Dep't 2010). Appellant conceded that she failed to submit an expert affidavit and, as such, lower court properly dismissed her application for expert fees.

Darvas v. Darvas, 242 A.D.2d 554, 662 N.Y.S.2d 87 (2d Dep't 1997) -- Plaintiff did not set forth a sufficient basis upon which to determine an award of expert fees because her application contained no information concerning the anticipated expert work involved, nor an estimate of the number of hours necessary to complete the work, nor any details with respect to the difficulties involved in evaluating the marital property.

Coppola v. Coppola, 129 A.D.2d 760, 514 N.Y.S.2d 754 (2d Dep't 1987) *Pendente lite* expert appraisal fees were denied where the moving papers contained only a conclusory letter from an accountant which failed to provide information concerning the anticipated work involved, an estate of the number of hours necessary to complete the work, or any details of the difficulties involved in evaluating the marital property.

Roach v. Roach, 193 A.D.2d 660, 597 N.Y.S.2d 468 (2d Dep't 1993) -- Interim award to wife of $7,500 experts' fees would be vacated, where wife failed to provide any information which could serve as basis for determining amount to be awarded; however, wife could renew her application upon submission of proper documentation.

Scagnelli v. Scagnelli, 127 A.D.2d 754, 512 N.Y.S.2d 146 (2d Dep't 1987) -- Application for award of accountant's fees properly set forth the nature of the property involved, the difficulties in evaluating it, plaintiff's financial status, and an affidavit from a refutable accountant setting forth the services to be rendered and an estimate of the time involved.

O'Sullivan v. O'Sullivan, 154 A.D.2d 850, 546 N.Y.S.2d 709 (3d Dep't 1989) -- Defendant was ordered to pay the reasonable costs of an accountant and an appraiser in view of the disparate financial conditions of the parties. The defendant listed assets totaling over $230,000, an annual salary of $54,000, and the plaintiff had no assets except $240 per week maintenance. The Court determined that the assets were many, complex and elusive, and the appointment of an accountant was necessary to trace and evaluate assets for proper equitable distribution.

Raboy v. Raboy, 138 A.D.2d 585, 526 N.Y.S.2d 1678 (2d Dep't 1988) -- Award of accountant's fees, *pendente lite*, was proper where defendant's application set forth in detail the nature of the marital property involved, the difficulty involved in identifying and evaluating that property, the services to be rendered and the movant's financial statement.

Annexstein v. Annexstein, 1060, 609 N.Y.S.2d 131 (4th Dep't 1994) -- Award of $15,000 in *pendente lite* expert's fees was not an abuse of discretion where the application was supported by affidavits of valuation experts setting forth in detail the nature of the marital property to be appraised, the difficulty in evaluating that property, and the anticipated high cost of the appraisal services to be rendered.

v. Granted (to the extent still applicable):

Dzembo v. Dzembo, 160 A.D.2d 1144, 554 N.Y.S.2d 350 (3d Dep't 1990) -- Awards directing one party to pay for expert services of the other party in a matrimonial action should not be granted routinely and should be based upon sound judicial discretion after weighing such factors as (1) the

nature of the marital property involved; (2) the difficulties involved, if any, in identifying and evaluating same; (3) the services to be rendered and an estimate of the time involved; and (4) the movant's financial status. Wife made a sufficient showing that any appreciation of the subject separate property was due in part to her contributions or efforts so as to require an appraisal of the property.

Aronauer v. Aronauer, 112 A.D.2d 261, 491 N.Y.S.2d 708 (2d Dep't 1985) -- In view of averments regarding plaintiff's inability to afford any additional discovery and defendant's uncontested ability to pay for same, it was error for Special Term to deny plaintiff an interim award for the services of an accounting exert to help evaluate defendant's dental practice.

Karnilaw v. Karnilaw, 110 A.D.2d 685, 487 N.Y.S.2d 601 (2d Dep't 1985) -- In light of defendant's net worth statement being incomplete and defendant's contention that his business is close to bankruptcy, award of $1,000 so as to permit plaintiff's accountant to examine defendant's financial status affirmed.

Gianni v. Gianni, 172 A.D.2d 487, 568 N.Y.S.2d 113 (2d Dep't 1991) -- The accountant's affidavit submitted in support of wife's application for accounting and appraisal fees was sufficiently detailed with respect to the assets to be evaluated, the services entailed and the estimated time involved, to warrant an interim award.

Brocato v. Brocato, 126 A.D.2d 695, 511 N.Y.S.2d 30 (2d Dep't 1987) -- Error to deny award of appraisal fees to plaintiff where defendant had the more significant financial resources and defendant had business interests and real estate investments which had to be evaluated.

Ganin v. Ganin, 114 A.D.2d 883, 495 N.Y.S.2d 59 (2d Dep't 1985) -- Wife's petition was insufficient to justify award of expert fees *pendente lite* in divorce action for purposes of investigating husband's assets, where affidavits submitted by wife's attorney stated merely that various experts were required and that their fees would be expensive, but did not provide sufficient information concerning experts to be utilized, anticipated work involved, and estimate of approximate costs of services to be rendered.

vi. Denied (to the extent still applicable):

Tassone v. Tassone, 209 A.D.2d 859, 619 N.Y.S.2d 357 (3d Dep't 1994) -- It was not an abuse of discretion to deny wife expert's fees of $28,000 (which she requested to pay her attorneys and to hire accountant and real estate appraiser to assess value of husband's assets and to determine what, if any, appreciation was attributable to her efforts during marriage), because she had a full-time job and certain tangible assets, her basic needs

were being met by husband's court-ordered payments and husband provided comprehensive and detailed financial statement.

Goodson v. Goodson, 135 A.D.2d 604, 522 N.Y.S.2d 182 (2d Dep't 1987) -- Although parties are entitled to searching exploration of each other's assets, the deferred ruling on wife's motion for award of accounts' and counsel fees *pendente lite*, until after trial on cause of action for divorce, was not abuse of discretion.

Rubenstein v. Rubenstein, 117 A.D.2d 593, 497 N.Y.S.2d 950 (2d Dep't 1986) -- Where defendant, subsequent to institution of divorce action, sold her private plane to her mother for $1 and was earning approximately $500 per week, not error to deny her *Pendente lite* motion for expert fees, counsel fees and maintenance.

Dunn v. Dunn, 143 A.D.2d 801, 533 N.Y.S.2d 487 (2d Dep't 1988) -- The purpose of a *pendente lite* award of appraisal and valuation fees is to enable the moving party to carry on or defend the action; where plaintiff, a psychologist, had an annual income of over 485,000 and did not challenge the assertion that her 1986 income was as high as $198,000, it was an improvident exercise of discretion to award her such fees.

Katsaros v. Katsaros, 133 A.D.2d 611, 519 N.Y.S.2d 718 (2d Dep't 1987) -- Application for accountant's and appraiser's fees properly denied where wife failed to show with the requisite specificity her financial inability to retain such experts.

vii. Court-Appointed

Zirinsky v. Zirinsky, 138 Misc. 2d 775, 525 N.Y.S.2d 464 (Sup. Ct. N.Y. Co. 1987) -- In view of the extremely complex valuation issues, court was authorized to appoint an appraiser to value marital property, with the retainer fee to be paid equally by the parties and the remainder of the fee to be apportioned by the court at the time of trial.

Haymes v. Haymes, 157 A.D.2d 506, 549 N.Y.S.2d 698 (1st Dep't 1990) -- While the Supreme Court has the power to appoint an independent appraiser, denial of such relief was not an abuse of discretion while the action was at an early stage, with discovery still in progress, plaintiff had obtained an expert and had not yet established that her husband's affairs are so complex as to require the court to appoint an appraiser.

C. EXCLUSIVE USE & OCCUPANCY, ORDERS OF PROTECTION AND TEMPORARY RESTRAINING ORDERS

1. TEMPORARY RESTRAINING ORDER

i. Automatic Orders: Preserves the financial status quo during the pendency of a matrimonial action and represents a burden shift from the party requesting the injunction to a party moving to vacate an injunction.

(a) The following automatic orders are binding on Plaintiff immediately upon the filing of the Summon or Summons and Complaint, and upon Defendant immediately upon the service of the automatic orders with the Summons.

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

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

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

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

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

(b) The automatic orders shall remain in full force and effect during the pendency of the action, unless terminated, modified, or amended by further order of the Court upon motion of either of the parties or upon written agreement between the parties duly executed and acknowledged.

ii. *See* **Exhibit B** which must be served with the summons.

iii. "Old" Law prior to September 1, 2009 (but still good law)

- Temporary restraining orders may be issued pursuant to DRL §234.

- The purpose of a temporary restraining order is to preserve marital assets pending equitable distribution.

- Temporary restraining orders are appropriate where there is evidence of conversion and/or dissipation of marital assets or where money was spent in a manner that, to a neutral party, may be regarded as improper or questionable.

See Maillard v. Maillard, 211 A.D.2d 963, 621 N.Y.S.2d 715 (3d Dep't 1995); Monroe v. Monroe, 108 A.D.2d 793, 485 N.Y.S.2d 310 (2d Dep't 1985).

- *Pendente lite* restraints on property transfers must be "supported by proof that the spouse to be restrained is attempting or threatening to dispose of marital assets so as to adversely affect the movant's ultimate rights in equitable distribution".

See Loderhouse v. Loderhouse, 216 A.D.2d 275, 627 N.Y.S.2d 453 (2d Dep't 1995); Sacks v. Sacks, 181 A.D.2d 727, 581 N.Y.S.2d 86 (2d Dep't 1992); Guttman v. Guttman, 129 A.D. 2d 537, 514 N.Y.S. 2d 382 (1st Dep't 1987).

iv. Factors To Be Considered:

(a) a showing that money was spent in a manner that, to a neutral party, may be regarded as improper or questionable;
(b) which party has control of the assets;
(c) whether the assets in contention are liquid or illiquid;
(d) location of the assets--domestically or internationally;
(e) actual attempt or threat to dispose of or deplete assets so as to adversely effect the ultimate equitable distribution;
(f) potential detrimental effect on assets;
(g) alternative method of preventing dissipation of assets; and
(h) proper remedy for an inequity of restraining order is a speedy trial.

v. NYCRR §202.7(e) and (f)

- Pursuant to NYCRR §202.7(e) *ex parte* motions submitted to a judge outside of the county where the underlying action is venued or will be venued shall be referred to the appropriate court in the county of venue unless the judge determines that the urgency of the motion requires immediate determination.

- Pursuant to NYCRR §202.7(f) a motion for a temporary restraining order shall contain an affirmation demonstrating there will be significant prejudice to the party seeking the restraining order by giving of notice. In the absence of a showing of significant prejudice, the affirmation must demonstrate that a good faith effort has been made to notify the party against whom the temporary restraining order is sought of the time, date and place that the application will be made in a manner sufficient to permit the party an opportunity to appear in response to the application.

vi. Additional Case Law

P.S. v. R.O, NYLJ, 2/8/11, (Sup. Ct. New York County) -- The court may use its contempt powers to enforce automatic orders.

Buoniello v. Buoniello, NYLJ, 5/7/10, (Sup. Ct. Suffolk County) -- The court may not use its contempt powers to enforce automatic orders.

Many v. Many, 84 A.D.3d 1036, 925 N.Y.S.2d 87 (2nd Dep't 2011) -- The Second Department held that the lower court did not improperly exercise its discretion in failing to restrain the husband from refinancing the mortgage to pay support to the wife. No evidence of wife's rights prejudiced.

Pagello v. Pagello, 17 A.D.3d 428, 793 N.Y.S.2d 447 (2d Dep't 2005) -- Where proof demonstrated that plaintiff was attempting to dispose of marital assets that

could adversely affect defendant's rights to equitable distribution the imposition of temporary restraints was appropriate.

Reich v. Reich, 278 A.D.2d 214, 717 N.Y.S.2d 277 (2d Dep't 2000) -- The Second Department reversed a temporary restraining order issued by the trial court because there was no proof that defendant attempted or threatened to dispose of marital assets.

Nordgten v. Nordgten, 237 A.D.2d 498,655 N.Y.S.2d 585 (2d Dep't 1997) -- The court may restrain a party from transferring or disposing marital assets *pendente lite* where one party has retained exclusive control over many of the marital assets, and the unilateral decision to transfer, sell or otherwise encumber the property may have served to deprive the other party an equitable share of them. *See also*, Frankel v. Frankel, 150 A.D.2d 520, 541 N.Y.S.2d 114 (2d Dep't 1989); Chosed v. Chosed, 116 A.D.2d 690, 497 N.Y.S.2d 755 (2d Dep't 1988).

Richter v. Richter, 131 A.D.2d 453, 515 N.Y.S.2d 876 (2d Dep't 1987) -- Brokerage accounts, which are speculative and volatile assets, may be ultimately harmed by a restraining order rather than preserved. Therefore, the injunction granted should be modified so as to permit business within the accounts, provided that all cash or proceeds of the transactions remain within the account in order to be preserved for equitable distribution.

Strong v. Strong, 142 A.D.2d 810, 530 N.Y.S.2d 693 (3d Dep't 1988) -- The Supreme Court properly denied the plaintiff's motion for a preliminary injunction where plaintiff failed to establish that defendant was attempting or threatening to dispose of marital assets so as to adversely affect plaintiff's rights in equitable distribution. Defendant was a real estate developer and many of-the marital assets controlled by him were non-liquid and subject to the control of defendant's business partners. Moreover, an injunction would have been detrimental to the marital assets in that other business people may have become wary in dealing with the defendant.

Maillard v. Maillard, 211 A.D.2d 963, 821 N.Y.S.2d 715 (3d Dep't 1995) -- Issuance of a restraining order was proper where it was uncontested that the plaintiff independently engaged in a course of liquidation of approximately $278,000 of marital assets and transferred joint property to her Mother, regardless of plaintiff's claims that the money was used primarily to pay marital debt.

Joseph v. Joseph, 230 A.D.2d 716, 646 N.Y.S.2d 167 (2d Dep't 1996) -- The Supreme Court properly granted a preliminary injunction where the defendant admitted to having diverted funds from his business, did not make an accounting regarding the sale of certain properties, had made multiple trips to his native Haiti, and threatened to close his New York businesses and transfer them to Haiti. As such, the injunction was a proper exercise of the Court's discretion in order to preserve the financial *status quo* of the parties until a final determination. *See also*, Levakis v. Levakis, 7 A.D.3d 678, 776 N.Y.S.2d 510 (2d Dep't 2004).

Capolino v. Capolino, 174 A.D.2d 825, 570 N.Y.S.2d 753 (3d Dep't 1991) -- The temporary restraining order issued was not an abuse of discretion where the Order permitted the defendant to withdraw funds for living expenses and allowed him to engage in business transactions involving some property interests provided plaintiff was given thirty days notice of transactions and was provided with a full accounting. Here, defendant was clearly in exclusive control over almost all of the family finances and transferred three parcels of real property totaling more than $130,000 after commencement.

Rosenshein v. Rosenshein, 211 A.D.2d 456, 620 N.Y.S.2d 383 (1st Dep't 1995) -- Court did not err in requiring husband to deposit funds into escrow and in appointing receiver for properties which were marital assets and which husband had agreed to sell, where there was documentation of mismanagement, as court is empowered to protect marital assets for equitable distribution.

Chalos v. Chalos, 128 A.D.2d 499, 512 N.Y.S.2d 428 (2d Dep't 1987) -- The extreme remedy of the appointment of a temporary receiver justified where defendant sold the subject property to a third party for significantly less than fair market value and failed to account for or distribute profits to the plaintiff for three years prior to the commencement of the action.

2. EXCLUSIVE USE AND OCCUPANCY

i. DRL §234

- Courts are authorized to award interim exclusive possession and occupancy of the marital residence to a party where it is demonstrated that relief is necessary to (i) protect the safety of persons or property, or (ii) one spouse has voluntarily established an alternative residence and a return would cause domestic strife.

- Order of exclusive use and occupancy do not determine the respective rights of parties to possession of the property under equitable distribution law.

- Either husband or wife can seek an order of exclusive use and occupancy.

- Orders for exclusive use and occupancy must be issued upon notice. They cannot be issued *ex-parte*.

ii. Generally A Hearing Is Required

- Where there are conflicting allegations by the parties a hearing is required before an award of exclusive use and occupancy can be granted.

Formato v. Formato, 173 A.D.2d 274, 569 N.Y.S.2d 665 (1st Dep't 1991).

- The movant bears the burden of producing "persuasive evidence" that exclusive use and occupancy is warranted. Specific information must be given on which a judgment can be formed.

iii. Factors To Be Considered:

(a) Does the vacating party have an alternate residence?;
(b) Is there a necessity to protect a person's safety or property or has one party threatened the other party's person or property?;
(c) Have acts of violence been committed?; and
(d) Are orders of protection in existence?

iv. No Hearing Where Allegations of Violence and/or Threats Supported By:

(a) Evidence of prior police intervention;
(b) Existence of an order of protection;
(c) Uncontroverted medical evidence;
(d) Corroborative third party affidavits;
(e) Domestic turmoil, and
(f) The effect one party and/or their presence has on the children.

v. Divide Marital Residence Into Sections

In cases where no alternative residence exists, courts may order that husband and wife each have exclusive use and occupancy of a certain portion of the marital residence.

vi. Additional Case Law

J.L. v. A.L., ___ Misc. 3d ____ (Sup. Ct. Nassau County) -- Exclusive occupancy granted to husband after a hearing where the wife was an alcoholic (with multiple relapses) and she voluntarily lived elsewhere for various lengthy (and unexplained) periods of time.

(a) Safety of Person or Property

T.D.F. v. T.F., NYLJ, 7/11/11, (Sup. Ct. Nassau County) -- The husband's application for exclusive occupancy of the marital residence was denied where granting exclusive occupancy would be tantamount to granting temporary custody and will, in effect, predetermine that issue which is not in the best interests of the children. Moreover, although the husband demonstrated one confrontation between the parties' daughter and the wife and alleged wife's affair created a disruptive and tense environment in the residence, he did not demonstrate the wife's presence caused domestic strife, police involvement or the type of conduct that would warrant exclusive occupancy.

Taub v. Taub, 33 A.D.3d 612, 822 N.Y.S.2d 154 (2d Dep't 2006) -- where the wife's only allegation of actual violence was alleged threats made by husband which were uncorroborated and where husband failed to voluntarily vacate the marital residence, wife failed to meet the burden necessary for an order of exclusive use and occupancy.

Hashimoto v. De La Rosa, 4 Misc. 3d 1027(A), 798 N.Y.S.2d 344 (N.Y. Sup. 2004) --wife's application for exclusive use and occupancy of the marital residence was granted where a temporary order of protection was in effect and where she demonstrated that husband's presence in the home would cause "turmoil."

Annexstein v. Annexstein, 202 A.D.2d 1062, 609 N.Y.S.2d 132 (4th Dep't 1994) -- Under the appropriate circumstances, a court may award exclusive possession of the marital residence *pendente lite* where one spouse has caused domestic strife and has voluntarily established an alternative residence.

Ljutic v. Ljutic, 216 A.D.2d 274, 627 N.Y.S.2d 759 (2d Dep't 1995) -- A court properly awarded wife temporary, exclusive use and possession of the marital residence where husband failed to deny wife's allegations of violence and cruelty or otherwise create a triable question regarding possession of the apartment.

Jordan v. Richardson, 174 A.D.2d 310, 570 N.Y.S.2d 54 (1st Dep't 1991) -- The Appellate Division determined that there was evidence to support defendant's claim that her safety was threatened by plaintiff's continued presence in the marital residence and would not disturb the Court's award of *pendente lite* exclusive possession of the marital residence to defendant.

Fakiris v. Fakiris, 177 A.D.2d 540, 575 N.Y.S.2d 924 (2d Dep't 1991) -- the Second Department reversed the lower court's award of exclusive use and occupancy of the marital residence to wife where the only basis for the award was an incident involving the parties' son and some friends who allegedly harassed and annoyed wife while husband was out of town.

(b) Hearing

A.U.G. v. J.G., 300 A.D.2d 205, 750 N.Y.S.2d 857 (1st Dep't 2002) -- Through witnesses, hospital reports and expert testimony as to plaintiff's state of mind, plaintiff proved, by a preponderance of the evidence, that defendant raped her making an award of exclusive use and occupancy in her favor appropriate.

Formato v. Formato, 173 A.D.2d 274, 569 N.Y.S.2d 665 (1st Dep't 1991) -- Where plaintiff's uncorroborated affidavit was challenged by defendant's submissions, a hearing was deemed necessary to determine

credibility and to adequately evaluate the presence or absence of additional factors which would support such an award.

Kurppe v. Kurppe, 147 A.D.2d 533, 537 N.Y.S.2d 612 (2d Dep't 1989) -- In light of allegations in wife's affidavit, and the corroboration provided by the parties' daughters, it was not error to grant the wife a temporary order of protection without a hearing.

(c) Voluntary Departure/Alternative Residence

Iannone v. Iannone, 31 A.D.3d 713, 715, 820 N.Y.S.2d 86, 88 (2d Dep't 2006) -- The Second Department, Appellate Division stated that exclusive occupancy of the marital residence may be awarded upon a showing that a spouse's presence has caused domestic strife, and that the spouse has voluntarily established an alternative residence.

Kenner v. Kenner, 13 A.D.3d 52, 786 N.Y.S.2d 157 (1st Dep't 2004) -- The First Department reversed our order granting husband exclusive use and occupancy of one of the parties' multiple residence because he failed to demonstrate that there was either 1) the need for protection of persons or property, or 2) wife had voluntarily established an alternative residence and that wife's return to the marital residence would cause domestic strife.

Block v. Block, 245 A.D.2d 153, 665 N.Y.S.2d 882 (1st Dep't 1997) -- The lower court erred in not granting wife exclusive use and occupancy of the marital residence where the evidence proved that husband vacated the marital residence due to domestic strife and his return to the residence threatened her and the children's physical safety.

I.Q. v. A.Q., 228 A.D.2d 301, 643 N.Y.S.2d 587 (1st Dep't 1996) -- Where defendant left the marital residence because of domestic strife and where there was evidence that significant domestic strife would occur if he returned and no issue was raised that defendant's continued exclusion from the marital residence would cause more than minimal disruption there was sufficient evidence to grant plaintiff exclusive use and occupancy without a hearing.

3. ORDER OF PROTECTION

i. Generally

- Pursuant to DRL §252 the Supreme Court or the Family Court, incident to a matrimonial action, may order a Temporary Order of Protection.

- Relief pursuant to DRL §252 is available *ex parte*. If such an application is made, the court is required to hold a hearing on the day the application is filed, or the next day the court is in session.

- The court can, on its own motion, grant relief pursuant to DRL §252.

- An order granted pursuant to DRL §252 may protect a child of the parties, a parent or the spouse or former spouse of a party and any person to whom custody of the child of the parties is awarded. A parent, who is a party to a matrimonial action, may seek an order on behalf of the parties' child.

- A temporary order of protection may include relief including (i) directing a person subject to the order to stay away from the protected party, his or her residence or place of employment; (ii) directing specific locations for access to children; (iii) enjoining acts which would endanger the welfare of a child.

- Stay-away provisions will not affect equitable distribution of marital property.

- Violators of temporary orders of protection are subject to mandatory arrest.

- A party must prove by a preponderance of the evidence the occurrence of a "family offense," as that term is defined in §812 of the Family Court Act.

- If the application is brought in Family Court, the moving party has the option of alternatively pursuing the matter in criminal court (or both).

- In Family Court, as part of an Order of Protection, the moving party may also seek a temporary order of custody, child support, medical support as well as exclusive use and occupancy.

- Temporary orders of protection are enforceable by civil or criminal contempt proceedings.

ii. <u>"Family Offense"</u>

- "Family Offense" includes:

(a) assault;
(b) harassment;
(c) menacing;
(d) reckless endangerment; or
(e) disorderly conduct.

Jones v. Roper, 187 A.D.2d 593, 591 N.Y.S.2d 336 (2d Dep't 1992); Di Donna v. Di Donna, 72 Misc.2d 231, 339 N.Y.S.2d 592 (N.Y. Fam. Ct. 1972) – Although Article 8 of the Family Court Act is entitled 'Family Offenses Proceedings', the euphemism "family offense" is nowhere specifically defined in the Court Act, except by listing the types of acts over which the Family Court is given by statute exclusive original jurisdiction. Section 812 of the Family Court Act vests the Court with exclusive original jurisdiction over any proceeding concerning acts which would constitute disorderly conduct, harassment, menacing, reckless endangerment, an assault or an attempted assault between spouses." Although Petitioner may have found respondent's conduct disturbing and offensive, absent a finding that respondent engaged in any acts which would constitute harassment as defined in Section 240.25 of the Penal Law, there is no basis for a Court to attempt to set standards for or in any way circumscribe the respondent's future conduct.

iii. Who is "Family"?

Besides persons related by consanguinity or affinity, persons legally married or formerly married, and persons who have a child in common, FCA §812(e) also includes persons who are not related by consanguinity or affinity and who are or have been in an intimate relationship regardless of whether such persons have lived together at any time. Factors the court may consider in determining whether a relationship is an "intimate relationship" include but are not limited to: the nature or type of relationship, regardless of whether the relationship is sexual in nature; the frequency of interaction between the persons; and the duration of the relationship. Neither a casual acquaintance nor ordinary fraternization between two individuals in business or social contexts shall be deemed to constitute an "intimate relationship".

Matter of Maria B. v. Ndoc S., NYLJ, 4/1/09 (Docket No. O-14789/08). Motion to dismiss order of protection by former father-in-law denied.

Matter of Jessica D. v. Jeremy H., 2010 NY Slip Op 05616 (3d Dep't 2010) -- The lower court should not have dismissed an order of protection petition on public policy grounds (the state's interest in preserving the marital relationship) where a married woman sought an order of protection against her boyfriend with whom she has an intermittent sexual relationship. Such a relationship should be deemed "intimate" within the meaning of the Family Court Act.

Tyrone T. v. Katherine M., ___ A.D.3d ____ (1st Dep't 2010) -- First Department affirmed Family Court order determining that petitioner's claim that he was the boyfriend of respondent's sister and a friend of respondent was not enough to establish an "intimate relationship" for purposes of an order of protection.

Jane P. v. Mary R., NYLJ, 4/1/09, (Fam. Ct., Queens County) – Two women who had children by the same man are not in an "intimate relationship" for purposes of an order of protection.

iv. Failure to Provide Evidence Pursuant to FCA §812

Jones v. Rover, 187 A.D.2d 593, 591 N.Y.S.2d 336 (2d Dep't 1992) -- Although Petitioner may have found respondent's conduct disturbing and offensive, absent a finding that respondent engaged in any acts which would constitute harassment as defined in Section 240.25 of the Penal Law, there is no basis for a Court to attempt to set standards for or in any way circumscribe the respondent's future conduct.

Fakiris v. Fakiris, 177 A.D.2d 540, 575 N.Y.S.2d 924 (2d Dep't 1991) -- Where plaintiff's application for an order of protection failed to include evidence that defendant harassed, molested, menaced, or assaulted her, the plaintiff, the court's award of an order of protection was improper. *See also*, O'Herron v. O'Herron, 300 A.D.2d 491, 751 N.Y.S.2d 594 (2d Dep't 2002).

v. Hearing

Bodouva v. Bodouva, 263 A.D.2d 506, 692 N.Y.S.2d 608 (2d Dep't 1999) -- Evidence after a hearing demonstrated an order of protection in favor of respondent was appropriate. Petitioner deliberately struck respondent's car while respondent and her children were inside, three times. Moreover, respondent offered evidence that petitioner stalked her, was physically violent and was "readily capable of escalating his negative behavior to physical violence at any time."

Amy Cohen L. v. Howard N.L., 222 A.D.2d 677, 636 N.Y.S.2d 654 (2d Dep't 1995) -- Order of protection requiring husband to stay-away from the marital residence was properly granted where evidence demonstrated that husband's conduct was offensive and frightening.

Karakas v. Karakas, 154 A.D.2d 439, 546 N.Y.S.2d 11 (2d Dep't 1989) -- The lower court erred in granting wife exclusive use and occupancy of the marital residence and an order of protection requiring the parties to stay-away from one another where the affidavits submitted on the motion and cross-motion for orders of protection were in sharp conflict. The matter was remanded for an immediate hearing.

vi. Sufficient Evidence

Roofeh v. Roofeh, 138 Misc. 2d 889, 525 N.Y.S.2d 765 (Sup. Ct. N.Y. Co. 1988) -- Husband brought an Order to Show Cause for an order of protection against Wife prohibiting her from smoking cigarettes in the presence of himself and their children. Husband, a physician, claimed that Wife's chain smoking caused harmful effects upon the children, thereby constituting harmful or abusive

conduct. Husband failed to establish, by a fair preponderance of the evidence, a need for an order of protection under FCA §812.

Matter of Belinda YY, 74 A.D.3d 1394, 903 N.Y.S.2d 568 (3d Dep't 2010) – Where the petitioner testified that she and the child were scared of the respondent, but this fear appeared to be based upon rumors or events that were not recent and where most of the petitioner's testimony was hearsay, the lower court properly determined that a family offence had not been established by a fair preponderance of the evidence.

Ahmed v. Ahmed, 689 N.Y.S.2d 357, 180 Misc. 2d 394 (Sup. Ct. N.Y. Co. 1999) -- Where the allegations in the petition were disputed as being contrived and suggested that petitioner manufactured instances of spousal misconduct, a hearing was required to ensure that the court process was not abused.

Sherman v. Sherman, 135 A.D.2d 806, 522 N.Y.S.2d 910 (2d Dep't 1988) -- Plaintiff was properly granted order of protection in connection with a *pendente lite* application where there was unrefuted evidence that defendant had access to weapons and defendant admitted that she shot her first husband, though she claimed that she acted self-defense.

Karakas v. Karakas, 154 A.D.2d 439, 546 N.Y.S.2d 11 (2d Dep't 1989) -- Where affidavits submitted on motion and cross-motion for orders of protection were in sharp conflict, evidentiary inquiry should have been made prior to any determination that it was necessary for a spouse to vacate the marital residence or that "all contact" between the parties must be avoided.

Weiner v. Weiner, 27 Misc. 3d 1111, 899 N.Y.S.2d 555 (Sup. Ct. N.Y. Co. 2010) -- Where ex-husband rented a house directly behind his ex-wife's vacation home the moment a prior order of protection expired and where the ex-wife testified that she was afraid of her ex-husband due to threats to her, her boyfriend, her son, and her property, the Court held that the ex-wife proved by a fair preponderance of the evidence that a family offence – stalking – had been committed and an order of protection was warranted. This decision was made despite the fact that: (a) there are no reported cases where a violation of PL § 120.45 has been predicated on the offender moving into a specific area of community, (b) the parties already live in close proximity in Manhattan, and (c) the acts that have taken place in past years ordinarily should serve as the basis for the issuance of an order of protection. The Court directed that order would remain in effect until April 5, 2030.

4. Interim Property Dispositions

- Courts have no legal authority to order the sale of property held by tenants by the entirety without consent.

- Once the marital relationship is severed a court can order the sale of real property.

- If a husband and wife consent to the sale of real property title to which is held by tenants by the entirety, the court can order the sale.

See, Delvito v. Delvito, 6 A.D. 3d 487, 775 N.Y.S. 2d 71 (2d Dept. 2004)

But see, Gordon v. Gordon, 144 Misc. 2d 27, 543 N.Y.S.2d 638 (Sup. Ct. N.Y. Co. 1989) -- Plaintiff was granted the right to sell the marital residence, a cooperative apartment, *pendente lite*, where neither plaintiff nor defendant resided in the apartment. As a cooperative apartment cannot be owned by the entirety, changing the form it takes, i.e., from shares of stock to cash, does not prejudice the parties as no right to survivorship is affected. Where the parties have more than one marital residence, a court ordered sale of a residence, prior to trial, is authorized.

Place v. Place, NYLJ, 7/15/91, p. 28 col. 5 (Sup. Ct. Suffolk Co.) -- Plaintiff-wife appointed receiver of marital residence and authorized to sell residence prior to trial, with proceeds being held in escrow pending final determination, by reason of extenuating circumstances, i.e., defendant failed to pay court-ordered carrying charges and the residence is in imminent danger of foreclosure; plaintiff and the children are not residing in the marital residence; and a buyer is willing to purchase the residence in accordance with the valuation of the property as set by a real estate agency. The *pendente lite* sale is designed to preserve a marital asset in danger of being dissipated and is a transmutation of the asset, rather than a premature distribution of the asset.

Frisina v. Frisina, 178 A.D.2d 460, 577 N.Y.S.2d 131 (2d Dep't 1991) -- *Pendente lite* sale of marital residence and a condominium, both owned by parties as tenants by entirety, was proper where wife, at hearing, acquiesced in the sales when questioned by the court directly about this matter.

Elkus v. Elkus, NYLJ, 3/7/90, p. 22, col. 6 (Sup. Ct. N.Y. Co.) -- Where defendant agreed with plaintiff to a sale of the parties' residence *pendente lite*, but objected to the price, defendant could be directed to execute a contract of sale, as his objection to price can be dealt with at trial by offering of evidence that residence was sold below fair market value, with defendant receiving an adjustment accordingly.

Lidsky v. Lidsky, 134 Misc. 2d 511, 511 N.Y.S.2d 765 (Sup. Ct. Westchester Co. 1987) -- Court granted plaintiff's motion to direct defendant, *pendente lite* to execute documents to secure refinancing on marital residence, held as tenants by the entirety, at more favorable

interest rates. As the application is designed to conserve a marital asset, the court has the power to direct an affirmative act as well as to restrain.

Rosen v. Rosen, 126 A.D.2d 628, 511 N.Y.S.2d 64 (2d Dep't 1987) -- Special Term should have authorized release of sufficient funds from escrow proceeds of sale of parties' apartment, which would result in substantial interest savings to parties, with a sufficient sum remaining in escrow to satisfy any distributive award.

i. Denied

Lee v. Lee, 131 A.D.2d 820, 517 N.Y.S.2d 183 (2d Dep't 1987) -- The Court properly denied a *pendente lite* application to refinance the marital residence holding that such an application will affect disposition of marital property should generally await the trial of the action. The most expedient and best remedy for any perceived inequities in *pendente lite* awards is a speedy trial.

Jancu v. Jancu, 174 A.D.2d 428, 571 N.Y.S.2d 456 (1st Dep't 1991) -- Provision in *pendente lite* order directing the sale of the parties' two New Jersey homes must be deleted as it contravenes the rule that courts do not have the authority to direct the *pendente lite* sale of property owned by parties as tenants by the entirety absent a judgment of divorce, separation or annulment.

ii. Duration

Catalano v. Catalano, 158 A.D.2d 570, 551 N.Y.S.2d 539 (2d Dep't 1990) -- A *pendente lite* restraining order prohibiting conversion or transfer of assets pending ultimate disposition of the action does not terminate with entry of judgment of divorce, where the issues relating to equitable distribution have been severed for later trial. Accordingly, husband's transfer of former marital residence was null and void, and purchaser, who had reason to know of the restraining order and did not provide consideration for the transfer, was not a bona fide purchaser.

iii. Restraints Against Non-Parties

Kletter v. Kletter, NYLJ, 6/21/89, p. 21 col. 1 (Sup. Ct. Nassau Co.) -- Motion to vacate *lis pendens* filed by wife against commercial property, allegedly owned by defendant granted, where neither the corporation nor the third parties claiming title to the stock of the corporation which owned the property are parties to the matrimonial action and the corporation is not the alter ego of the defendant.

Stewart v. Stewart, 118 A.D.2d 455, 499 N.Y.S.2d 945 (1st Dep't 1986) -- Error to enjoin mortgagee from foreclosing on marital residence, a jointly owned cooperative apartment, during pendency of divorce action, as a

court is not empowered, *pendente lite*, to compel the disposition of marital property, and to enjoin a third party from exercising its rights, in the absence of a proper motion for a preliminary injunction pursuant to CPLR Article 63; DRL Sec. § 234 does not confer upon the court authority to issue an injunction aimed at the prevention of a judicial sale by a third party with a secured interest in the marital residence.

iv. Notice - Due Process

Holmes v. Holmes, 151 A.D.2d 911, 542 N.Y.S.2d 884 (3d Dep't 1989) -- Error for court to issue *sua sponte* a preliminary injunction restraining plaintiff from transferring or encumbering property other than in the course of ordinary business, as due process requires that the party so enjoined receive notice that the court will consider such a remedy.

Monroe v. Monroe, 108 A.D.2d 793, 485 N.Y.S.2d 310 (2d Dep't 1985) -- In issuing a preliminary injunction in an equitable distribution case, due process requires that the party enjoined receive notice that the court will consider such a remedy and thus the court's blanket injunction, *sua sponte*, against plaintiff's transfers of marital assets was improper; where an issue arises as to whether the property sought to be enjoined is marital or separate, the wiser course is to enjoin the transfer of the disputed property; however, where the disputed property is a volatile brokerage account, defendant allowed to transact business within the account.

D. POSSIBLE BARS TO RELIEF

1. EXISTING AGREEMENT

Lasky v. Lasky, 163 A.D.2d 859, 622 N.Y.S.2d 649 (2d Dep't 1994) -- Wife entitled to *Pendente lite* maintenance award despite fact that parties were divorced and had executed a separation agreement, where she made a prima facie showing, pursuant to G.O.L. Sec. 5-311, that the agreement was void as it made the wife incapable of self-support and likely to become a public charge, and that she suffered from extreme hardship pursuant to D.R.L. Sec. 236(B)(9)(b).

Ravel v. Ravel, 161 A.D.2d 547, 556 N.Y.S.2d 51 (1st Dep't 1991) -- Where the validity of a separation agreement, and modification agreement to the separation agreement, is in issue in a matrimonial action, where defendant ceases to pay the support as set forth in the agreements, the court may provide temporary support.

Tregellas v. Tregellas, 169 A.D.2d 553, 564 N.Y.S.2d 406 (1st Dep't 1990) -- The prenuptial agreement waiving any right to maintenance does not bar temporary relief prior to dissolution of the marriage, as defendant is entitled to be maintained at the standard to which she has become

accustomed during the course of the marriage. But *see* Klein v. Klein, 246 A.D.2d 195, 676 N.Y.S.2d 69 (1st Dep't 1998).

Demis v. Demis, 155 A.D.2d 790, 548 N.Y.S.2d 67 (3d Dep't 1989) -- A post-nuptial agreement which controls the respective support obligations of the parties in a subsequent matrimonial action bars an award of temporary maintenance unless and until the support terms of the agreement are set aside. The agreement, however, does not blind the court with respect to the child support provisions.

Siegel v. Siegel, 150 A.D.2d 552, 541 N.Y.S.2d 130 (2d Dep't 1989) -- Although under Domestic Relations Law §236(A), where a valid separation agreement is extant governing the issue, *Pendente lite* relief cannot be granted, defendant is conversion divorce action could seek *Pendente lite* maintenance and serve interrogatories where the parties' separation agreement failed to provide for maintenance once the parties ceased living in the marital residence on alternating months.

Fischman v. Fischman, 209 A.D.2d 916, 619 N.Y.S.2d 198 (3d Dep't 1994) -- Parties' so-called separation agreement did not bar award of interim counsel fees and accountant's fees where the agreement, prepared by defendant, an attorney, was executed by plaintiff without the benefit of disinterested legal counsel only one month prior to the instant application, was silent on the issues of maintenance and support and purported to distribute substantially all of the parties' assets to defendant. Under such circumstances, plaintiff is entitled to broad discovery of defendant's current financial condition and an award of counsel and accounting fees in furtherance thereof.

2. Voluntary Payments

Davis v. Davis, NYLJ, 6/10/87, p.12, col. 4, Sup. Ct. N.Y. Co. -- When a husband furnishes support for his wife and children on a voluntary basis sufficient to meet the criteria set forth for an award of temporary support, such an award is improper. The recent amendment to DRL 236(B)(6)(a), substituting as criteria the standard of living the parties established during the marriage rather than the reasonable needs of the parties, does not require a payor spouse who is meeting the financial needs of his family to satisfy a grossly inflated and unsubstantiated budget of the recipient spouse.

Halpern v. Halpern, NYLJ, 11/5/87, p.13, col. 1, Sup. Ct. N.Y. Co., McCooe, J. -- Award of temporary maintenance denied in view of voluntary payments being made by husband, wife's failure to show necessity for such relief, and her almost two year delay in making the application.

Ruane v. Ruane, 55 A.D. 3d 586, 865 N.Y.S.2d 632 (2nd Dep't 2008) (Case No. 2007-03938) -- The husband's voluntary payment of tuition may not be recouped or credited against amounts owing under a *pendente lite* order where the order did not address the issue of tuition payments.

3. Death of Spouse

King v. Kline, 65 A.D.3d 431, 884 N.Y.S.2d 229 (1st Dep't 2009). The right to seek interim counsel fees does not survive the death of a party.