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MATRIMONIAL LAW: CLIENT COUNSELING IN NEW YORK STATE

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GROUNDS FOR DIVORCE

Domestic Relations Law ("DRL") § 170:

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

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

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

(3) The **confinement** of the defendant in prison for a period of three or more consecutive years after the marriage of plaintiff and defendant.

(4) The commission of an act of **adultery**, provided that adultery for the purposes of articles ten, eleven, and eleven-A of this chapter, is hereby defined as the commission of an act of sexual intercourse, oral sexual conduct or anal sexual conduct, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant. Oral sexual conduct and anal sexual conduct include, but are not limited to, sexual conduct as defined in subdivision two of section 130.00 and subdivision three of section 130.20 of the penal law. *But, see, DRL §171.*

(5) The husband and wife have **lived apart pursuant to a decree or judgment of separation for a period of one or more years** after the granting of such decree or judgment, and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such decree or judgment.

(6) The husband and wife have **lived separate and apart pursuant to a written agreement of separation,** subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded, **for a period of one or more years** after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such agreement. Such agreement shall be filed in the office of the clerk of the county wherein either party resides. In lieu of filing such agreement, either party to such agreement may file a memorandum of such agreement, which memorandum shall be similarly subscribed and acknowledged or proved as was the agreement of separation and shall contain the following information: (a) the names and addresses of each of the parties, (b) the date of marriage of the parties, (c) the date of the agreement of separation and (d) the date of this subscription and acknowledgment or proof of such agreement of separation.

(7) **The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath.** No judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce.

A few other points:

- Only the Supreme Court has jurisdiction over a divorce action.
- There is a 5-year statute of limitations on actions for divorce based on cruel and inhuman treatment. DRL § 210.

Are you entitled to a trial by jury?

- DRL § 173: In an action for divorce there is a right to trial by jury of the issues of the grounds for granting the divorce.
- There is no right to a jury trial on any other issue in a matrimonial action.
- There is conflicting case law as to whether a defendant may contest that the marriage has been "irretrievably broken" at a trial on grounds for divorce.
- A.C. v. D.R., 32 Misc.3d 293, 927 N.Y.S.2d 496 (Sup. Ct. Nassau Co. 2011). Court found that a plaintiff's self-serving declaration about his or her state of mind is all that is required for a marriage to be dissolved pursuant to DRL §170(7).
- Strack v. Strack, 31 Misc.3d 258, 916 N.Y.S.2d 759 (Sup. Ct. Essex Co. 2011). "[I]t appears that Domestic Relations Law § 170(7) is not a panacea for those hoping to avoid a trial. Rather, it is simply a new cause of action subject to the same rules of practice governing the subdivisions which have preceded it."
- Schiffer v. Schiffer, 33 Misc.3d 795, 930 N.Y.S.2d 827 (Sup. Ct. Dutchess Co. 2011). The trial court should determine whether a marriage is "irretrievably broken" pursuant to DRL § 170(7). "Since the sole means of procuring a divorce in New York is by judicial process (N.Y. Const., art. I, § 9), precluding a party from contesting a ground for divorce 'must be regarded as the equivalent of denying [him or her] an opportunity to be heard ... and in the absence of a sufficient countervailing justification for the State's action, a denial of due process' (*Boddie v. Connecticut,* 401 U.S. 371, 380–381, 91 S.Ct. 780, 28 L.Ed.2d 113 [1971])."
- Palermo v. Palermo, 35 Misc.3d 1211(A), 950 N.Y.S.2d 724 (Sup. Ct. Monroe Co. 2011). Noting the "apparent collision" of the entitlement to a "no-fault" divorce and the entitlement of a right to a trial on the issue of entitlement to a divorce, the Court declined to follow Strack and Schiffer, supra. The Court read the plain language of DRL § 170(7), noting that the Legislature wrote that the basis for a no-fault divorce existed, "provided

that one party has so stated under oath," and emphasized the use of the word "provided" rather than "and" as indicating that the basis for a divorce was satisfied upon the sworn statement of one party, regardless of the other party's acceptance of its truth.

- Vahey v. Vahey, 35 Misc.3d 691, 940 N.Y.S.2d 824 (Sup. Ct. Nassau Co. 2012). "Under this new ground the plaintiff's sworn belief about the state of the relationship must be deemed sufficient,….Although this may seem harsh to a defendant spouse who does not view the state of the marriage the same way as the plaintiff, actions for divorce are entirely statutory; courts are bound to follow the scheme enacted by the Legislature, without adding or deleting requirements to conform to judicial notions of fairness."
- G.T. v. A.T., 43 Misc.3d 500, 980 N.Y.S.2d 255 (Sup. Ct. Suffolk Co. 2014). Suffolk County followed the reasoning in Palermo, supra, in that Defendant's testimony at trial could not rebut Plaintiff's entitlement to divorce based on DRL § 170(7).

CUSTODY AND VISITATION

1. Custody and child support are governed by DRL § 240. The court "shall enter orders for custody and support as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child." N.Y. Dom. Rel. Law § 240.
2. As defined by DRL §2, minors or infants are persons under the age of 18 years. Children over the age of 18 years are no longer subject to a custody order. See Belsky v. Belsky, 172 A.D.2d 576, 568 N.Y.S.2d 627 (2d Dept. 1991).
3. Although a child cannot be subject to a custody order past 18 years of age, the parents of a child remain chargeable for the support of the child until the child attains age 21.
4. There is no *prima facie* right to the custody of the child in either parent. DRL § 240; Fountain v. Fountain, 83 A.D.2d 694, 442 N.Y.S.2d 604 (3d Dept. 1981) aff'd 55 N.Y.2d 838, 432 N.E.2d 596, 447 N.Y.S.2d 703 (1982) (a presumption of "maternal superiority" is now considered to be outdated).
5. The overarching standard for custody determinations is the child's best interest. Eschbach v. Eschbach, 56 N.Y.2d 167, 436 N.E.2d 1260, 451 N.Y.S.2d 658 (1982).
    a. "Any court in considering questions of child custody must make every effort to determine 'what is for the best interest of the child, and what will promote [the child's] welfare and happiness.'"
    b. "As we have recently stated, there are no absolutes in making these determinations; rather, there are policies designed not to bind the courts, but to guide them in determining what is in 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).
    c. Agreement entered into between the parties is not an absolute, but a weighty factor to be considered in the absence of extraordinary circumstances. Weight to be given will depend on whether it resulted from a full hearing or by agreement.
    d. Consider child's desires, but they are not determinative.
    e. Court has long recognized that it is often in the child's best interests to continue to live with his siblings.
6. In New York, there is no presumption or preference of joint custody.
    a. It has long been believed that if the parties were unable to agree as to custody and access schedules between themselves, they would not be able to effectively co-parent. See Braiman v. Braiman, 44 N.Y.2d 584, 378 N.E.2d 1019, 407 N.Y.S.2d 449 (1978).
    b. There has been a recent shift towards courts ordering joint custody after a trial where the parties have nevertheless demonstrated their ability to work together in the best interests of the child. See Johanys M. v. Eddy A., 115 A.D.3d 460, 982 N.Y.S.2d 30 (1st Dept. 2014); Scott M. v. Ilona M., 38 Misc.3d 1216(A), 967 N.Y.S.2d 870 (Sup. Ct. Kings Co. 2013).

7. In determining the "best interests of the child," a court will consider the following factors (among others):
    a. The stability that each parent would be able to provide for the child;
    b. Which parent has been the primary caretaker for the child;
    c. Each parent's ability to care for the child;
    d. The ability of each parent to provide for the child's emotional and intellectual development;
    e. The ability and willingness of each parent to foster a relationship with the other parent;
    f. The quality of the home environment;
    g. The mental health of each parent;
    h. The parental guidance to be provided and the parental judgment demonstrated by each parent, including past parental performance; and
    i. The effect of domestic violence, if any, upon the child.

How are these factors implemented by the Courts?

- Where both parents are equally fit, preference may be given to a parent who has served as the caretaker for children. See Lenczycki v. Lenczycki, 152 A.D.2d 621, 543 N.Y.S.2d 724 (2d Dept. 1989).

- Ebel v. Urlich, 273 A.D.2d 530, 709 N.Y.S.2d 237 (3d Dept. 2000). The Court found that the evidence supported a determination that the best interests of the child was promoted by awarding custody to the mother noting that she had always been the primary caretaker of the child, provided the greatest stability in the child's upbringing, offered a more stable home environment than the father, adjusted her work schedule to be available for the child after daycare whereas the father often left the child with daycare or babysitters in the evenings to pursue his own interests. He regularly permitted the child to stay up late on nights that the mother was working late and made no attempts to adjust his schedule in order to increase time with the child.

- In Melvina H. v. James Lee W., 269 A.D.2d 186, 702 N.Y.S.2d 79 (1st Dept. 2000), both parents had addiction problems. The mother had a drug addiction and the father was an alcoholic. The Court found that it was in the best interests of the child for the mother to be awarded custody because she made substantial progress in overcoming her drug addiction and was able to provide a stable, safe, comfortable home for the child, whereas the father had failed to address his abuse of alcohol and failed to maintain employment. The child in that case also had expressed a preference for residing with her mother.

- Young v. Young, 212 A.D.2d 114, 628 N.Y.S.2d 957 (2d Dept. 1995). "Psychological poisoning" of a child's mind so as to turn him or her away from the non-custodial parent is a type of interference with visitation, and is a factor when determining whether to

modify custody. Here, the mother, the custodial parent, made numerous false accusations of sexual abuse of the child against the father - all were uncorroborated and unfounded. The court found that this cast serious doubt on her fitness to be the custodial parent. Also, the child stated that her mother reminded her every other night that her father hurt her and that her mother would not let her father have visitation so that he would "learn his lesson."

- A child's preference ought to be considered by the Court but is not determinative. However, in weighing the child's preference, the Court must consider the age and maturity of the child and the potential for influence having been exerted in the child.

    - Eschbach v. Eschbach, 56 N.Y.2d 167, 436 N.E.2d 1260, 451 N.Y.S.2d 658 (1982).
    - Clara L. v. Paul M., 251 A.D.2d 22, 673 N.Y.S.2d 657 (1st Dept. 1998)
    - Dintruff v. McGreevy, 34 N.Y.2d 887, 316 N.E.2d 716, 359 N.Y.S.2d 281 (1974). While a child's preference should be considered, it is not determinative. Custody should not be changed simply because the child at some time stated that he desires it. Stability is preferred.
    - Suzanne T. v. Arthur L.T., 12 Misc.3d 691, 817 N.Y.S.2d 855 (Sup. Ct. Monroe Co. 2005). A child's preference is one factor to consider in determining which parent should have custody of the child. The older and more mature the child, the greater weight should be accorded to the child's preference. The court found that the child here was a very mature fourteen year old who is strong-willed and articulate, had researched alternative schools and had no problem changing school districts and was very able to express why living with the Petitioner is in her best interests.

- Kemp v. Kemp, 19 A.D.3d 748, 797 N.Y.S.2d 146 (3d Dept. 2005). Court found that father provided an adequate and stable home environment while the mother failed to exercise good parental judgment. She also engaged in self-destructive conduct and failed to seek therapy to address her behavior.

- Irwin v. Schmidt, 236 A.D.2d 401, 653 N.Y.S.2d 627 (2d Dept. 1997). Custody modified where there was evidence of the father's acts of domestic violence against his current wife. Such behavior demonstrated that he possessed a character which is ill-suited to the difficult task of providing his young children with moral and intellectual guidance.

- Anthony M.M. v. Jacquelyn N.N., 91 A.D.3d 1036, 937 N.Y.S.2d 360 (3d Dept. 2012). After the mother made continuous baseless accusations that the father was sexually abusing the child, a psychologist evaluated the mother and testified that she had personality disorders that caused her to, among other things, display little regard for the negative consequences that her actions had on the father's relationship with the child.

The psychologist further testified that, if left untreated, the mother's disorders could result in the child being alienated from the father. Although the Court found both parties were loving parents and capable of providing for the child's physical needs, the father was more likely to encourage a relationship between the child and the other parent and, therefore, sole custody to the father was proper.

- Russo v. Russo, 257 A.D.2d 926, 684 N.Y.S.2d 350 (3d Dept. 1999). Parties were married while the petitioner-father was incarcerated for manslaughter. Their child was born two years later while the parties were living together. Shortly after, the father had a drug relapse and entered into treatment. The parties' 1990 stipulation whereby they agreed that the mother would have custody of their daughter was incorporated into their judgment of divorce. In 1993, father's Family Court application to modify the judgment, transferring custody of the child to him, was granted. The Third Department affirmed. Despite the fact that the father was formerly incarcerated for manslaughter, the Court found that he was rehabilitated, and in light of the mother's unfitness, including but not limited to the fact that the child resided in six different places and attended three different schools due to the mother's relationships with different men and the mother drank to excess and left the home in the middle of the night, the child's best interests would be substantially enhanced by the transfer of custody to him.

- Verret v. Verret, 37 A.D.3d 479, 829 N.Y.S.2d 216 (2d Dept. 2007). The record established that the mother had a seizure condition that was not being treated and for which she had been hospitalized on several occasions. The father also testified that the mother refused to allow the child to undergo a recommended sleep study, refused to administer medication to the child, and believed that the father and his family were responsible for the child's medical conditions through the use of voodoo. The father, on the other hand, was concerned and informed about his daughters' progress in school and social development and he followed the instructions of the doctor. The family court's best interest determination had a sound and substantial basis in the record.

- Tin Tin v. Thar Kyi, 92 A.D.3d 1293, 938 N.Y.S.2d 407 (4th Dept. 2012). At a custody hearing in the Family Court, the mother testified without contradiction that the father had physically abused her and that he had physically abused one of their two children. The mother further testified that the father threatened her life shortly before the hearing. The father did not testify at the hearing and called no witnesses of his own. The Family Court found that the mother's testimony was credible and the Appellate Division determined that there was a sufficient evidentiary basis in the record for the Family Court to award custody to the mother, holding that the evidence of the father's domestic violence demonstrated that he possessed a character that was ill-suited to the difficult task of providing his young children with moral and intellectual guidance (citing Moreno v. Cruz, supra).

- In Mars v. Mars, 286 A.D.2d 201, 729 N.Y.S.2d 20 (1st Dept. 2001), the Court had vested all decision making authority with the mother based on its view that the father was abusive, controlling and had no decent respect of for the mother's opinions or judgment. The Appellate Division found that the record supported that the same could be said of the mother's attitude towards the father. The Court found that each parent took an active interest in the children's lives and that it was in the children's best interests that both parents remain involved with them notwithstanding the parents' present intolerance for each other. The Appellate Division found that the Trial Court should not have vested all decision making authority in one parent in a situation where it appears that neither parent can be trusted not to obstruct the other's relationship with the children. The Court specifically noted that while there is significant precedent for dividing decision making between parents, there was no precedent for completely depriving a non-custodial parent of decision making authority who is otherwise to remain fully involved in the children's lives. As a result, the Appellate Division found that the children's interests would best be served by giving the father decision making authority over the children's religious upbringing which was an area that he took a greater interest in than the mother and over their dental treatment in recognition of his professional expertise. The parents were required to consult with each other concerning significant decisions in their areas of authority.

- Wideman v. Wideman, 38 A.D.3d 1318, 834 N.Y.S.3d 405 (4th Dept. 2007). Since joint custody was not a realistic possibility in this case, the Court did not err in determining it was appropriate to divide the decision-making authority. Here, the mother was granted decision-making authority with respect to religion, finances, counseling/therapy and summer activities, and the defendant was granted decision-making authority with respect to education, medical/dental care and extracurricular activities.

Modification of a prior custody order

1. Standard for modification is whether there has been a change in circumstances, such that modification is required to protect the best interests of the child. Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 432 N.E.2d 765, 447 N.Y.S.2d 893 (1982).

2. Carpenter v. LaMay, 241 A.D.2d 625, 659 N.Y.S.2d 943 (3d Dept. 1997). Mother failed to prove sufficient change in circumstances warranting a change in the physical custody of the parties' child. Mother testified that she stopped associating with bad crowd, and that she no longer used drugs or alcohol. However, she did not present any objective evidence of these claims.

Relocation

1. Where a custodial parent seeks to relocate with the child, it is that parent's burden to show that the move would so further the best interests of the child that it outweighs any potential interference in the other parent's access to the child.

2. Leading relocation case: Tropea v. Tropea, 87 N.Y.2d 727, 665 N.E.2d 145, 642 N.Y.S.2d 575 (1996) ("each relocation request must be considered on its own merits with due consideration of all the relevant facts and circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child. While the respective rights of the custodial and noncustodial parents are unquestionably significant factors that must be considered, it is the rights and needs of the children that must be accorded the greatest weight, since they are innocent victims of their parents' decision to divorce and are the least equipped to handle the stresses of the changing family situation" (internal citations omitted)).

3. The Tropea factors include, but are not limited to:
    a. Each parent's reasons for seeking or opposing the move;
    b. The impact of the move on the quantity and quality of the child's future contact with the noncustodial parent;
    c. The degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move; and
    d. The feasibility of preserving the relationship between the noncustodial parent and child through the suitable visitation arrangements.

Non-Parent Custody

- In Bennett v. Jeffreys, 40 N.Y.2d 543, 356 N.E.2d 277, 387 N.Y.S.2d 821 (1976), the biological mother sought custody of her child, whom she entrusted to the care of a family friend. The Family Court ruled that the child should remain with her present custodian, even though the biological mother had not surrendered or abandoned the child and was not unfit. The Appellate Division reversed, with one justice dissenting, and awarded custody to the mother. The child's custodian appealed.
- The Court of Appeals held that "a State may not deprive a parent of the custody of a child absent surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances. If any such extraordinary circumstances are present, the disposition of custody is influenced or controlled by what is in the best interests of the child."
- "Neither law, nor policy, nor the tenets of our society would allow a child to be separated by officials of the State from its parents unless the circumstances are compelling. Neither the lawyers nor Judges in the judicial system nor the experts in psychology or social welfare may displace the primary responsibility of child-raising that naturally and legally falls to those who conceive and bear children."

- The Court of Appeals reversed and remitted to the Family Court for a new hearing as the Family Court did not inquire into the qualifications and background of the mother and the custodian.

CHILD SUPPORT

1. Child Support Standards Act ("CSSA"), provided in DRL § 240.

2. In New York, child support is payable until the child reaches age 21 or is otherwise emancipated by the happening of one of the following events:
    a. The child marries;
    b. The child enlists in the military service; or
    c. The child is gainfully employed, fully self-supporting and economically independent from the parents.
    d. Roe v. Doe, 29 N.Y.2d 188, 272 N.E.2d 567, 324 N.Y.S.2d 71 (1971) – Court of Appeals held that father is not obligated to support his daughter based on her conduct. Child's right to support and parent's right to custody and services are reciprocal.
    e. Conley v. Conley, 234 A.D.2d 910, 651 N.Y.S.2d 802 (4th Dept. 1996) - Husband's obligation to pay child support was not terminated when child was adjudicated juvenile delinquent and placed in nonsecure residential facility for 18 months.

3. Courts will apply the CSSA to calculate the "basic support obligation," which is the amount of direct support paid by the noncustodial parent to the custodial parent.

4. CSSA calculations: based on the "combined parental income" ("income" means gross income, less FICA taxes). The statute provides for a "cap" of $141,000 (increases every 2 years based on the CPI) but the court can set its own cap above that amount if it deems it appropriate. See Cassano v. Cassano, 85 N.Y.2d 649, 651 N.E.2d 878, 628 N.Y.S.2d 10 (1995) - The court may apply the parties' combined income over the statutory cap (which was then $80,000) when calculating child support, but must state the basis for doing so in its order.

5. From the "combined parental income, the "basic child support obligation" is the following percentage of that amount, based o
    a. One child: 17%
    b. Two children: 25%
    c. Three children: 29%
    d. Four children: 31%
    e. Five or more children: "no less than 35%"

6. Each party is responsible for his or her *pro rata* share (usually based on the portion of the combined parental income attributable to that party) of the "basic support obligation." The noncustodial parent pays his or her *pro rata* share of the basic support obligation to the custodial parent.

7. Child support is non-taxable (not income to the recipient, not deductible to the payor).

8. In addition to direct child support, the Court may order that each parent be responsible for his or her *pro rata* share of the "add-on" expenses for the child. The mandatory "add-ons" are:
    a. Medical insurance for the child;
    b. Unreimbursed medical expenses (those not covered by insurance); and
    c. Childcare which enables the custodial parent to work or complete education/training in order to obtain work.

9. Discretionary "add-ons" may include:
    a. Educational expenses for the child (including college); and
    b. Extracurricular activities, including summer camp.

10. The parties may enter into an agreement as to child support in which they *deviate* from the statutory guidelines. However, that agreement must contain the requisite language explaining the calculation under the formula based on the parties' respective incomes and the reasons for the deviation from that amount.

This requirement is very strictly enforced. A court may decline to order the child support agreed to if the requisite language is not included.

See: http://courts.state.ny.us/divorce/divorce_withchildrenunder21.shtml#ucdforms

11. The parties may also agree to alter the "emancipation events" (e.g. the child will not be emancipated until age 22 if he or she is enrolled in college full-time).

Note: Even though the parties are free to contract independently, the Court must approve the child support terms and it is within the Court's discretion to reject an inappropriate agreement. See Thomas B. v. Lydia D., 69 A.D.3d 24, 886 N.Y.S.2d 22 (1st Dept. 2009) (parties could not contractually emancipate their child and cease the payor's child support obligation upon showing that the child was working full-time, absent a simultaneous showing of economic independence of the child).

Interplay of Custody with Child Support

- Child support is paid to the custodial parent.
- Baraby v. Baraby, 250 A.D.2d 201, 681 N.Y.S.2d 826 (3d Dept. 1998). Where the parties share physical custody of the child 50/50, the parent with the higher income is deemed the non-custodial parent for child support purposes.

- Bast v. Rossoff, 91 N.Y.2d 723, 697 N.E.2d 1009, 675 N.Y.S.2d 19 (1998). The Court of Appeals declined to endorse the "proportional offset method" of calculating child support based upon the amount of time each parent spends with the child (this is done in other states).
- However, in Gainey v. Gainey, 303 A.D.2d 628, 756 N.Y.S.2d 647 (2d Dept. 2003), the Court found that the basic support obligation pursuant to the CSSA formula was "unjust and inappropriate under the circumstances" based in part upon the shared physical custody of the child.
- Rohrs v Rohrs, 297 A.D.2d 317. 746 N.Y.S.2d 305 (2d Dept. 2002). A noncustodial parent's child support obligation shall be reduced by the amount that that parent contributes toward the child's room and board while that child is away at college.

MAINTENANCE

Two types of maintenance:

1. "Temporary maintenance" – support paid after the filing for divorce, up until the judgment of divorce is signed (or an agreement is reached). Also called "*pendente lite*" ("during the litigation") maintenance.

2. "Post-divorce maintenance" (also called "durational maintenance" or "non-durational maintenance") - support paid after the judgment of divorce is signed (or an agreement is reached) and the parties are officially no longer married.

Temporary Maintenance (DRL § 236(B)(5-a))

1. In 2010, the Legislature adopted a formula to determine the "guideline amount" of temporary maintenance based on the parties' respective incomes (same definition of income as in CSSA).
    a. The statute provides that there will be a cap on the income attributed to the payor (currently $543,000) but the court may, in its discretion and based on certain statutory factors, choose to apply more of the Payor's income than the first $543,000.
    b. The formula yields the "presumptive" or "guideline" amount of temporary maintenance by the following:
        i. Calculation A: 30% of Payor's income minus 20% of the Payee's income
        ii. Calculation B: 40% of the combined incomes minus the Payee's income
        iii. Presumptive amount: the lesser of Calculation A or Calculation B
        iv. If either calculation results in $0 or less than $0, the presumptive amount of support is $0
        v. If the presumptive amount of support would reduce the Payor's income below the self-support reserve (currently $15,755), the presumptive amount is the Payor's income minus the self-support reserve.

c. Sample Calculations:

SCENARIO #1

H - $700,000 **W - $100,000**

STEP ONE

DRL §236B(5-A)(C)(1)(A) – Subtract 20% of the payee's income from 30% of the payor's income up to the cap.

Payor - $543,000 (cap) x 30% = $162,900
Payee - $100,000 x 20% = $20,000
Resulting Amount - $162,900 - $20,000 = **$142,900**

STEP TWO

DRL §236B(5-A)(C)(1)(B) – Multiply the sum of the payor's income (up to the cap) and payee's income by 40%.

$543,000 (cap) + $100,000 x 40% = $257,200

DRL §236B(5-A)(C)(1)(C) – Subtract the income of the payee from the amount derived from clause (B).

Resulting Amount - $257,200 – $100,000 = **$157,200**

STEP THREE

Presumptive amount of maintenance is the lesser of the above two calculations, or $**142,900.**

RESULTS

H - $700,000 - $142,900 = $557,100

W - $100,000 + $142,900 = $242,900

SCENARIO #2

H - $20,000 **W - $0**

STEP ONE

DRL §236B(5-A)(C)(1)(A) – Subtract 20% of the payee's income from 30% of the payor's income up to the cap

Payor - $20,000 x 30% = $6,000
Payee - $0 x 20% = $0
Resulting Amount - $6,000 - $0 = **$6,000**

STEP TWO

DRL §236B(5-A)(C)(1)(B) – Multiply the sum of the payor's income (up to the cap) and payee's income by 40%

$20,000 + $0 x 40% = $8,000

DRL §236B(5-A)(C)(1)(C) – Subtract the income of the payee from the amount derived from clause (B).

Resulting Amount - $8,000 - $0 = **$8,000**

STEP THREE

Presumptive amount of maintenance is the lesser of the above two calculations, or **$6,000.**

RESULTS

H - $20,000 - $6,000 = $14,000

W - $0 + $6,000 = $6,000

BUT, this leaves the Husband with income below the self-support reserve ($15,755).

DRL §236B(5-A)(C)(2)(B)(3) – Where the guideline amount of temporary maintenance reduces the payor's income below the self-support reserve, the presumptive amount shall be the difference between the payor's income and the self- support reserve.

H - $20,000 - $15,755= **$4,245**

d. The statute provides that the court may adjust the award if it finds the award to be "unjust or inappropriate."

e. The factors for the court to consider in order to "adjust" an "unjust or inappropriate" support award are (DRL § 236(B)(5-a)(e):

(a) the standard of living of the parties established during the marriage;

(b) the age and health of the parties;

(c) the earning capacity of the parties;

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

(e) the wasteful dissipation of marital property;

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

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

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

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

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

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

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

(m) the tax consequences to each party;

(n) marital property subject to distribution pursuant to subdivision five of this part;

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

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

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

f. A court issuing a temporary support award must set forth the basis for its determination, including any decision to adjust the guideline award.

Khaira v. Khaira, 93 A.D.3d 194, 938 N.Y.S.2d 513 (1st Dept. 2012) - First Appellate Division case to interpret the temporary maintenance formula. "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."

Woodford v. Woodford, 100 A.D.3d 875, 955 N.Y.S.2d 355 (2d Dept. 2012) (reversed an Order of the lower Court that directed payment of the presumptive amount of maintenance as well as 100% of the carrying charges)

Post-Divorce Maintenance (DRL §236B(6))

1. There is no formula for maintenance after the parties are divorced (though there are bills being proposed to adopt a similar formula).

2. In determining the amount and duration of maintenance, the court shall consider the following factors:

> (1) the income and property of the respective parties including marital property distributed pursuant to subdivision five of this part;
>
> (2) the length of the marriage;
>
> (3) the age and health of both parties;
>
> (4) the present and future earning capacity of both parties;
>
> (5) the need of one party to incur education or training expenses;
>
> (6) the existence and duration of a pre-marital joint household or a pre-divorce separate household;
>
> (7) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;
>
> (8) the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor;
>
> (9) reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage;
>
> (10) the presence of children of the marriage in the respective homes of the parties;
>
> (11) the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity;

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

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

(14) the tax consequences to each party;

(15) the equitable distribution of marital property;

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

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

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

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

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

3. In any decision determining maintenance, the court must set forth the factors it considered and the reasons for its decision.

4. Maintenance terminates:

    a. After the durational period;
    b. Upon the death of either party; or
    c. Upon the remarriage of the Payee.

Unless otherwise stated, *maintenance* (both temporary and post-divorce) is taxable as income to the Payee and tax-deductible to the Payor.

Implementation of Post-Divorce Maintenance Statute:

- Rabinovich v. Shevchenko, 93 A.D.3d 774, 941 N.Y.S.2d 173 (2d Dept. 2012). Trial court properly awarded wife lifetime maintenance where she suffered from a medical condition and was unable for the foreseeable future to be self-supporting.

- Bayer v. Bayer, 80 A.D.3d 492, 914 N.Y.S.2d 169 (1st Dept. 2011). First Department upheld lifetime maintenance to wife of $10,000 per month based on the length of the marriage, equitable distribution, the parties' lavish standard of living during the marriage, the parties' income potentials, future earning capacities and the wife's reasonable needs and ability to become self-supporting.
- Carr-Harris v. Carr-Harris, 98 A.D.3d 548, 949 N.Y.S.2d 707 (2d Dept. 2012). Where wife was highly educated and was similarly situated to the husband in terms of age, educational background, and future potential to work, and was capable of earning $40,000 per year ($14,000 less than the husband's income), the trial court properly declined to make any maintenance award.
- Alecca v. Alecca, 111 A.D.3d 1127, 975 N.Y.S.2d 801 (3d Dept. 2013). Trial Court properly considered the fact that the wife had always been and would continue to be the primary caretaker of the parties' child, who had special needs. The wife, who earned $7,000 to $16,000 annually was awarded $1,265.33 per month in maintenance from the husband, who earned $75,000.
- Settle v. McCoy, 108 A.D.3d 810, 968 N.Y.S.2d 697 (3d Dept. 2013). Trial court properly took into account the wife's absence from the workforce to care for the parties' children, both of whom have special needs, and the wife's resulting reduction in lifetime earning capacity. However, the court also recognized the wife's present and future earning potential, that husband has been awarded sole custody of the parties' children and that the wife received approximately $800,000 in assets from equitable distribution, including the unencumbered marital home. Therefore, the trial court did not abuse its discretion in granting the wife $1,600 per month until she reached age 62 or began to collect her portion of the husband's pension.

EQUITABLE DISTRIBUTION

1. "Equitable distribution" *does not* mean "equal distribution."

2. DRL §236 - "Marital property" means all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held.

3. "Separate property" means

   (1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse;

   (2) compensation for personal injuries;

   (3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse;

   (4) property described as separate property by written agreement of the parties.

4. Equitable distribution factors for the court to consider include:

   (1) the income and property of each party at the time of marriage, and at the time of the commencement of the action;

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

   (3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;

   (4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;

   (5) the loss of health insurance benefits upon dissolution of the marriage;

   (6) any award of maintenance under subdivision six of this part;

   (7) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;

   (8) the liquid or non-liquid character of all marital property;

(9) the probable future financial circumstances of each party;

(10) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;

(11) the tax consequences to each party;

(12) the wasteful dissipation of assets by either spouse;

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

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

5. Marital fault is not a factor in equitable distribution, except in egregious cases which shock the conscious of the Court.
    a. Howard S. v. Lillian S., 14 N.Y.3d 431, 928 N.E.2d 399, 902 N.Y.S.2d 17 (2010). Where husband did not know that a child of the marriage was the product of the wife's extramarital affair until shortly before the time of commencement, those actions did not constitute "egregious fault" to be considered in equitable distribution.
    b. Levi v. Levi, 46 A.D.3d 520, 848 N.Y.S.2d 225 (2d Dept. 2010). Husband's attempt to bribe the presiding judge for a favorable outcome was properly deemed "egregious fault" and factored into the equitable distribution award.

Implementation of Equitable Distribution Statute:

- O'Brien v. O'Brien, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985). Wife sacrificed her own educational and career opportunities to support the husband's endeavors in medical school and residency. Two months after the husband was licensed to practice medicine, he commenced an action for divorce. The Court of Appeals held that the wife's contributions toward the husband's medical license entitled her to share in the husband's "enhanced earning capacity" as a result of that license. The Court held that "it would be unfair not to consider the license a marital asset."
- Moll v. Moll, 187 Misc.2d 770. 722 N.Y.S.2d 732 (Sup. Ct. Monroe Co. 2001). The Court held that the husband's "book of business" or personal goodwill inherent in his career as a stockbroker or financial advisor is a marital asset subject to equitable distribution, and denied his motion for partial summary judgment on this issue.

- Elkus v. Elkus, 169 A.D.2d 134, 572 N.Y.S.2d 901 (1st Dept. 1991). Wife's career as opera singer and/or celebrity status constituted marital property subject to equitable distribution to extent husband's contributions and efforts led to increase in value of wife's career.
- Price v. Price, 69 N.Y.2d 8, 503 N.E.2d 684, 511 N.Y.S.2d 219 (1986). The Court of Appeals held that where the separate property of one spouse has appreciated during the marriage due to the active efforts of that spouse, directly or indirectly, and where such appreciation was due in part to the contributions or efforts of the non-titled spouse as parent and homemaker, the amount of that appreciation is marital property and subject to equitable distribution. The Court established a three prong test to apply to a separate property asset to make any appreciation marital and therefore subject to equitable distribution (i) has the asset appreciated; (ii) has it appreciated due to active effort, directly or indirectly of the titled spouse; and (iii) the appreciation was in some part facilitated by the direct or indirect contributions of the non-titled spouse.
- Hartog v. Hartog, 85 N.Y.2d 36, 647 N.E.2d 749, 623 N.Y.S.2d 537 (1995). Established the rule that, some nexus between the titled spouse's active efforts and the appreciation in the separate asset is required and that a Court could find that less then all of the appreciation was marital; the smaller the nexus, the smaller the amount of appreciation that will be deemed marital.
- Grunfeld v. Grunfeld, 94 N.Y.2d 696, 731 N.E.2d 142, 709 N.Y.S.2d 486 (2000). The Court of Appeals reversed the Appellate Division as it engaged in double dipping in modifying trial court's distributive and maintenance award. Once a court converts a specific stream of income into an asset, that income may no longer be considered in determining maintenance.
- Holterman v. Holterman, 3 N.Y.3d 1, 814 N.E.2d 765, 781 N.Y.S.2d 458 (2004). Child Support Standards Act (CSSA) does not provide for the deduction of distributive awards from income, whether based on enhanced earning capacity due to a professional license or otherwise, nor does the CSSA authorize the inclusion of a distributive award as income to the parent receiving the award.
- Mahoney-Buntzman v. Buntzman, 12 N.Y.3d 415, 909 N.E.2d 62, 881 N.Y.S.2d 369 (2009). As a general rule, in an action for divorce and ancillary relief, where payments are made before either party is anticipating the end of the marriage, and there is no fraud or concealment, in determining an equitable distribution award, courts should not look back and try to compensate for the fact that the net effect of the payments may have resulted in the reduction of marital assets. Court also held that: "We cannot, as a matter of policy, permit parties to assert positions in legal proceedings that are contrary to declarations made under the penalty of perjury on income tax returns."
- Chalif v. Chalif, 298 A.D.2d 348, 751 N.Y.S.2d 197 (2d Dept. 2002). The Second Department affirmed an award of only 25% of the marital portions of the defendant's medical practice and enhanced earning capacity. The Court stated

that there is no requirement of an equal distribution of marital property even in a marriage of long duration where both parties have made significant contributions to the marriage. In this case, the defendant completed all but two years of his neurosurgical residency when the parties became married, and the plaintiff made no direct contribution to his medical practice. Further, the Court found that the wife made only a modest indirect contribution to the practice. Also significant is the Court's refusal to award the plaintiff lifetime maintenance. Despite the fact that the parties lived the "high life" during their marriage, this does not guarantee per se entitlement to an award of lifetime maintenance. The Court upheld the award of maintenance in the amount of $100,000 per year for six years.

- Coffey v. Coffey, 119 A.D.2d 620, 501 N.Y.S.2d 74 (2d Dept. 1986). Equitable distribution does not mean equal distribution. Wife was entitled to 50% of the interest on certificates of deposit ("CDs") obtained by the husband but the husband should have been credited with 100% of the principal for his having been the one to create the asset, even though the CDs were purchased with marital funds.
- Glazer v. Glazer, 190 A.D.2d 951, 593 N.Y.S.2d 905 (3d Dept. 1993). Husband commingled his separate property inherited funds with marital funds when he placed them into a joint savings account and, therefore, he was not entitled to a separate property credit for those funds, which became marital property.
- Wade v. Steinfeld, 15 A.D.3d 390, 790 N.Y.S.2d 64 (2d Dept. 2005). Wife successfully rebutted presumption of commingling by showing that the deposit of funds from the sale of her separate property residence into the parties' joint account for 3 days was not the result of her intention to commingle the funds.
- Heine v. Heine, 176 A.D.2d 77, 580 N.Y.S.2d 231 (1st Dept. 1992). The husband had shares of stock in a formerly public company that became privately held a year after the commencement of the action. To avoid rewarding the wife for appreciation of the stock that resulted from the husband's active participation in his company's strategic decisions after commencement of the action, the appellate court in Heine determined that the husband's stock should be valued for equitable distribution purposes at the date of commencement, when the company was still publicly traded. The appellate court further affirmed the lower court's granting of a distributive award to the wife to equalize the value of marital assets titled in or in the possession of each party.
- Galvin v. Francis, 20 A.D.3d 550, 799 N.Y.S.2d 547 (2d Dept. 2005). The Second Department held that the trial court erred in awarding the husband a distributive share of certain assets titled solely in the wife's name. The Court based its holding on the fact that, except for the marital home, the parties kept their finances separate during the course of the marriage and conducted themselves in a manner inconsistent with the typical "economic partnership."

COUNSEL FEES - DRL § 237

1. Subdivision (a)
   - Authorizes a Court in a matrimonial action to order one spouse to pay the other spouse's attorney's fees (and fees and expenses of experts) "to enable the other party to carry on or defend the action or proceeding as, in the Court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties".
   - Effective October 12, 2010, amended to include: "There shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse."
   - Counsel fees shall be awarded on a timely basis, pendente lite, and may be made at any time or times prior to final judgment.
   - Requirements: both parties and counsel must file an affidavit detailing the financial agreement between the party and the attorney, which shall include:
     - the amount of any retainer
     - the amounts paid and still owing thereunder
     - the hourly rate charged by the attorney
     - the amounts paid or to be paid any experts; and
     - any additional costs, disbursements or expenses.
   - Any applications for fees and expenses may be maintained by the attorney for either spouse in his own name in the same proceeding.

2. Subdivision (b)
   - Authorizes a Court upon an application to enforce, annul or modify an order or judgment for alimony, maintenance, distributive award, distribution of marital property or for custody, visitation or maintenance of a child, to order a spouse or parent to pay the other spouse or parent's counsel and experts fees.
   - The remaining statutory text mirrors that of subdivision (a).

3. Subdivision (c)
   - Authorizes a Court in any action or proceeding for failure to obey any lawful order compelling payment of support or maintenance, or distributive award, upon a finding of contempt, to order respondent to pay petitioner's counsel fees.

4. Subdivision (d)
   - Defines "expenses"

- In determining an award of fees, the court shall consider:
  - the nature of the marital property involved
  - the difficulties involved, if any, in identifying and evaluating the marital property
  - the services rendered and an estimate of the time involved; and
  - the applicant's financial status.

Pre-Amendment Cases

- O'Shea v. O'Shea, 93 N.Y.2d 187, 711 N.E.2d 193, 689 N.Y.S.2d 8 (1999): Husband appealed from order of the Supreme Court requiring him to pay Wife's attorney fees, including fees for legal work performed prior to commencement of action and in connection with fee hearing. Appellate Division deleted awards for pre-commencement fees and fees incurred during fee hearing. Court of Appeals reversed, holding that the fee awards were within the Supreme Court's discretion.
  - DRL § 237(a) "is designed to redress the economic disparity between the monied spouse and the non-monied spouse…The courts are to see to it that the matrimonial scales of justice are not unbalanced by the weight of the wealthier litigant's wallet."
  - "It is a matter of discretion, to be exercised in appropriate cases, to further the objectives of litigational parity, and to prevent the more affluent spouse from wearing down or financially punishing the opposition by recalcitrance, or by prolonging the litigation."
- Frankel v. Frankel, 2 N.Y.3d 601, 814 N.E.2d 37, 781 N.Y.S.2d 59 (2004): After trial, Wife discharged her attorneys to whom she owed considerable fees. Supreme Court ruled that Wife's counsel could proceed against Husband for those fees despite the discharge and ordered a fee hearing. Husband appealed and Appellate Division reversed, concluding that former counsel had no standing. Court of Appeals reversed, holding that DRL § 237(a) "allows an attorney who was discharged without cause to proceed against the monied spouse". The Court noted that "if lawyers terminated without cause lose their right to petition the court for a fee award from an adversary spouse, the less affluent spouse would suffer the consequences. The spouse with ready and ample funds would have a wide choice of counsel, and the financial wherewithal to maintain the litigation, while the nonmonied spouse would struggle to find a lawyer who might have to go unpaid."
- Prichep v. Prichep, 52 A.D.3d 61, 858 N.Y.S.2d 667 (2d Dept. 2008): Supreme Court denied Wife's request for award of interim counsel fees in the amount of $35,000, and subsequent request to renew and for additional award of interim

counsel fees in the amount of $40,000. Appellate Division reversed, holding that the Husband's financial resources far exceeded those of the Wife and that "she cannot be expected to exhaust all, or a large portion, of the finite resources available to her in order to pay her attorneys, particularly when the husband is able to pay his own legal fees without any substantial impact upon his lifestyle".

- "An award of interim counsel fees ensures that the nonmonied spouse will be able to litigate the action, and do so on equal footing with the monied spouse."

Post-Amendment Cases

- Khaira v. Khaira, 93 A.D.3d 194, 938 N.Y.S.2d 513 (1st Dept. 2012): Supreme Court awarded interim counsel fees to Wife in the amount of $42,000. Husband appealed, contending that Wife's mother guaranteed her counsel fee obligation. Appellate Division affirmed counsel fee award, holding that under DRL § 237(a), award of fees to Wife was not precluded by payment of fees on her behalf and Husband failed to rebut the presumption in favor of the award. Husband's income was over $500,000 cap; Wife's income was $60,000.
- Lennox v. Weberman, 109 A.D.3d 703, 974 N.Y.S.2d 3 (1st Dept. 2013): Supreme Court awarded interim counsel fees to the Wife in the amount of $50,000 and expert fees of $35,000. Appellate Division affirmed, holding that the award "was warranted under the circumstances where the parties' assets appear to be anywhere from $77 million to $90 million" and that the amounts awarded were significantly less than the $200,000 in counsel fees and $75,000 in expert fees that the Wife requested. The Court also noted that while the Wife had some funds in her possession, the Husband is in a "far better financial position". Husband's imputed income was $2.29 million.
- Sykes v. Sykes, 41 Misc.3d 1061, 973 N.Y.S.2d 908 (N.Y. Sup. Ct., New York Co. 2013): From December 2010 to February 2013, Husband, who owned a successful hedge fund, paid all of the counsel and expert fees that he and the Wife, who was unemployed (and receiving $75,000 a month in temporary support), incurred – a sum of approximately $1 million. In March 2013, Husband paid additional counsel fees for Wife in the sum of $238,196. When Wife's attorneys sent April 2013 bill of $355,329 for counsel fees and another bill of close to $75,000 for Wife's expert's fees, Husband decided he could no longer afford to foot the litigation costs for both sides and moved for an Order authorizing him to release $2 million from marital funds so that each party would have $1 million with which to pay his/her own litigation expenses. Supreme Court granted Husband's motion, finding that the fact that the Husband's income exceeds the Wife's does not necessarily make him the "monied spouse" for purposes of determining interim counsel fees, but that the resources available to the parties – including the assets that each party stands to obtain through equitable distribution – must be considered. Since it was anticipated that Wife would

receive approximately $10 million as her share of equitable distribution, the Court found that there was not such a significant disparity in the parties' financial circumstances that one party should bear the full responsibility for the legal fees of the other. The Court also discussed the notion of the Wife not having any "skin in the game" by having her litigation costs paid for completely by the Husband and therefore not having the same incentive to litigate reasonably and responsibly.

Expert Fees

- Ahern v. Ahern, 94 A.D.2d 53, 463 N.Y.S.2d 238 (2d Dept., 1983): Appellate Division increased Special Term's *pendente lite* awards to wife for accountant's services, real estate appraiser's fees and counsel fees in light of the complicated nature of the husband's financial holdings, his substantial assets and the wife's inability to pay. The Court held that *pendente lite* awards for the services of experts should not be granted routinely, but rather, must be based on sound judicial discretion after weighing applications which set forth the following criteria in detail:
    - i) the nature of the marital property involved;
    - ii) the difficulties involved, if any, in identifying and evaluating same;
    - iii) the services to be rendered and an estimate of the time involved; and
    - iv) the movant's financial status.