



**SUFFOLK ACADEMY OF LAW**  
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2015  
**MATRIMONIAL -  
FAMILY LAW UPDATE**

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SCBA CENTER - HAUPPAUGE, NY

**SUFFOLK COUNTY ACADEMY OF LAW**

**MATRIMONIAL LAW UPDATE**

**March 30, 2015**

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### **ENHANCED EARNING CAPACITY**

Supreme Court did not err in determining that Plaintiff's nursing license was not marital property subject to equitable distribution. Although enhanced earnings from academic degrees and licenses attained during the marriage are subject to equitable distribution, it is incumbent upon the non-titled party seeking a distributive share of such assets to demonstrate a substantial contribution to the titled party's acquisition of that asset. Where only modest contributions are made by the non-titled spouse towards the other spouse's attainment of a degree or license and the attainment is more directly the result of the titled spouse's own ability, tenacity, perseverance and hard work, it is appropriate for Courts to limit the distributed amount of that enhanced earning capacity. No evidence that Defendant made a substantial contribution to the Plaintiff's acquisition of her nursing degree. No evidence that the Defendant made career sacrifices or assumed a disproportionate share of household work as a consequence of Plaintiff's education. His contributions were minor. (Badwal v. Badwal, 2015 NY Slip Op 01910)

**NOTE:** Whether an asset is marital or separate property is a question of law. (Fields v. Fields, 15 N.Y.3d 158).

### **MATERIAL MISREPRESENTATION**

Plaintiff commenced action against his wife's law firm alleging a violation of Judiciary Law §487 Fraud and Abuse of Process. The Supreme Court properly granted the branch of the Defendant's motion which was for summary judgment dismissing the cause of action to recover damages for fraud. The Defendant established, *prima facie*, that it did not make a material misrepresentation of an existing fact. (Tenore v. Kantrowitz, Goldhamer and Graifman P.C., 121 A.D.3d 775; see also, Capetola v. Capetola, 96 A.D.3d 612, 947 N.Y.S.2d 94), where the Court imposed sanctions, upon Husband and his attorney of \$10,000 each for material misrepresentations on a motion. Affirmed. (22NYCRR 130-1.1(c)(3)).

### **SANCTIONS**

Supreme Court erred in failing to provide the Plaintiff with "a reasonable opportunity to be heard" before it, *sua sponte*, imposed sanctions against him. (22NYCRR 130-1.1). Therefore, the Order of Sanctions must be vacated. (Hester v. Hester, 121 A.D.3d 645).

## QDRO

Supreme Court should have granted that branch of the wife's motion which was for a QDRO directing payments from the Plaintiff's retirement plan to the Defendant to satisfy the judgments for the arrears of child support and maintenance. Defaults in child support and maintenance obligations may be enforced by QDROs against pension and retirement assets. However, the Supreme Court properly denied that branch of the motion which was for a QDRO directing payments from the Plaintiff's retirement account to the Defendant's attorney to satisfy unpaid counsel fees, since the attorney does not qualify as a "alternate payee" (Lundon v. Lundon, 120 A.D.3d 1395).

## FRAUD

In a cause of action regarding fraud in the factum, the claim was that the Plaintiff was induced to sign something entirely different than what she thought she was signing. However, a party is under an obligation to read a document before signing it and generally such a cause of action only arises if the signor is illiterate, blind, or not a speaker of the language in which the document is written. (Ackerman v. Ackerman, 120 A.D.3d 1279).

## QDRO

Contrary to the Plaintiff's contention, the reference to "any survivor benefits" in the provision of the amended QDRO applicable to the payment of arrears did not provide a right to survivor benefits that was not provided for in the Stipulation of Settlement. (Murphy v. Murphy, 120 A.D.3d 1319; Pre-Retirement and Retirement Benefits, see also, McCoy v. Feinman, 99 N.Y.2d 295).

1. Loans.
2. With gains and losses to date of distribution.
3. Pre-Retirement Benefits.
4. Survivor Benefits.

## **QDRO**

Where a QDRO is inconsistent with the provisions of a Stipulation or Judgment of Divorce, Court's possess the authority to amend the QDRO to accurately reflect the provisions of the stipulation pertaining to the pension benefits. A proper QDRO obtained pursuant to a Stipulation of Settlement can convey only those rights to which the parties' stipulated as a basis for the judgment. (Mondshein v. Mondshein, 117 A.D.3d 1002).

## **MODIFICATION OF CUSTODY/ORDER OF PROTECTION**

A party seeking the modification of an existing court-sanctioned child custody arrangement has the burden of proving that circumstances have changed since the initial custody order to the extent that modification is necessary to ensure the child's best interests. Here, immediately following the conclusion of a family offense proceeding in which the mother's inappropriate conduct towards the subject child and others, and the father's positive parental relationship with the child were amply demonstrated at a hearing, the Family Court properly granted the father's petition to modify custody without conducting an additional hearing. A separate hearing and the submission of additional forensic evidence was unnecessary since the Family Court had adequate relevant information including the testimony adduced at the hearing in the family offense proceeding and the report of a forensic evaluator to enable it to render an informed determination on the petition to modify custody in the child's best interests. (Navarrete v. Navarrete, 2015 NY Slip Op 01950).

## **MODIFICATION OF CUSTODY**

In determining whether a custody agreement should be modified, the Court must weigh several factors of varying degrees of importance including the original placement of the child; the length of that placement; the child's desires; the relative fitness of the parents; the quality of the home environment; the parental guidance given to the child; the parent's financial status; and his or her ability to provide for the child's emotional and intellectual development. A further relevant consideration includes whether the change in circumstances implicates the fitness of the custodial parent or affects the nature and quality of the relationship between the child and the non-custodial parent. (Matter of Miedema v. Miedema, 2015 NY Slip Op 01640, 125 A.D.3d 971).

### **MODIFICATION OF CUSTODY**

A motion to modify the parties existing custody and visitation arrangements must include a showing that there has been a change in circumstances such that modification is required to protect the best interests of the child. A party seeking such a modification is not automatically entitled to a hearing but first must make an evidentiary showing sufficient to warrant a hearing. Moreover, a hearing will not be necessary where the Court possesses adequate relevant information to enable it to make an informed and provident determination as to the child's best interest. (Whitehead v. Whitehead, 122 A.D.3d 921).

### **MODIFICATION OF CUSTODY**

A parent who seeks a change of custody is not automatically entitled to a hearing, but must make an evidentiary showing sufficient to warrant a hearing. Here, the Father failed to show that there had been a change of circumstances which could support a finding that it was in the children's best interest to change residential custody to himself and therefore, failed to meet his threshold burden. His modification motion was made only two weeks after the issuance of the Judgment of Divorce. (Macchio v. Macchio, 120 A.D.3d 560).

### **MODIFICATION OF CUSTODY**

Father's application to modify custody and award him sole legal and residential custody of the parties' children was appropriate, where, as here, the record demonstrates that the parties' relationship had deteriorated to the point that they could not communicate and rendered them unable to engage in joint decision making with regard to their children. Supreme Court's order awarding sole legal and residential custody to the father was in the children's best interests. Mother's contention that the Court attorney referee (Buetow, Court-Referee) was biased against her is without merit. (Filippi v. Filippi, 118 A.D.3d 939).

### **MODIFICATION OF CHILD SUPPORT**

Stipulation dated April 29, 2009 prior to the 2010 Amendments to the Domestic Relations Law. Father had the burden of showing a substantial and unanticipated change in circumstances measured from the time he agreed to pay child support provided for in the Stipulation. Considerably greater amount of parenting time is not an unanticipated change in circumstances given the terms in the stipulation that the Father would have liberal and flexible parenting time with the schedule representing only a minimum parenting schedule. (DelGaudio v. DelGaudio, 2015 NY Slip Op 02091).

### **MODIFICATION OF CHILD SUPPORT**

The party seeking modification of an order of child support has the burden of establishing the existence of a substantial change in circumstances warranting the modification. In determining whether that burden of proof has been met, the Court must consider several factors including the increased needs of the children; the increased cost of living insofar as it results in greater expenses for the children; a loss of income or assets by a parent; or a substantial improvement in the financial conditions of a parent; the current and prior lifestyles of the children. (Citing Matter of Brescia v. Fitts, 56 N.Y.2d 132). A parent's obligation is not necessarily determined by his or her current financial condition but rather, is determined by his or her ability to provide support. Where a party's account of his or her finances is not credible, the Court may impute to that party a true or potential income higher than claimed. Father's application for downward modification based on a decrease in his income was properly denied, however, support magistrate failed to acknowledge evidence demonstrating a significant increase in the mother's income since the entry of the original order of support which warranted a new determination of the parties' respective child support obligations. (Matter of Baumgardner v. Baumgardner, 2015 NY Slip Op 02119).

### **MODIFICATION OF PENDENTE LITE AWARD**

An appellate court should rarely modify *pendente lite* awards and then only under exigent circumstances such as where a party is unable to meet his or her financial obligations or justice otherwise requires. Here, the Supreme Court did not adequately consider the husband's needs. Using the figures utilized by the Supreme Court, the Defendant would not be able to meet his own financial needs and obligations after making the payments imposed. Modification granted by the Appellate Division. (Weinberg v. Weinberg, 123 A.D.3d 697).

### **ORDER OF PROTECTION**

Supreme Court erred in concluding that husband had committed the Family Offense of disorderly conduct as the testimony credited by the Court was insufficient to establish, by a preponderance of the evidence, that his conduct was either intended to cause or recklessly created a risk of causing public inconvenience, annoyance or harm. (See, Penal Law Section 240.20)(Dayan v. Dayan, 2015 NY Slip Op 01918, 2 N.Y.S.3d 811).

### **ORDER OF PROTECTION**

Petitioner has the burden of establishing by a fair preponderance of the evidence that the charged conduct was committed as alleged in the petition. The determination of whether a family offense was committed is a factual issue to be resolved by the hearing Court. These determinations regarding the credibility of witnesses is entitled to great weight on appeal unless clearly unsupported by the record (Matter of Musheyev v. Musheyev, 2015 NY Slip Op 01949, 2 N.Y.S.3d 807).

### **ORDER OF PROTECTION**

Family Court properly concluded that petitioner proved by a preponderance of the evidence that the husband had committed the family offense of menacing in the second degree. Contrary to his contention, under the particular circumstances in which the appellant threatened to use a fork against the petitioner, the fork constituted a dangerous instrument. (See, Penal Law 10.00). In that respect, evidence of a genuine threat of physical harm backed by the ability to carry it out is sufficient to prove harassment in the second degree. (Monos v. Monos, 123 A.D.3d 931).

### **EXPUNGEMENT HEARING**

At an administrative expungement hearing to determine whether a report of child abuse or maltreatment is substantiated, the allegations in the report must be established by a preponderance of the evidence. It is the function of the administrative agency not the reviewing Court to weigh the evidence or assess the credibility of the witnesses. Judicial review pursuant to CPLR Article 78 of a determination that a report of maltreatment has been substantiated is limited to whether the determination is supported by substantial evidence in the record. Substantial evidence “means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact”. (Iacono v. New York State Central Register of New York State Office of Children and Family Services, 2015 NY Slip Op 01802).

### **CUSTODY DETERMINATIONS**

Any custody determination depends to a very great extent upon the hearing court’s assessment of the credibility of the witnesses and of the character, temperament and sincerity of the parties and therefore, the Court’s findings are generally accorded great respect and will not be disturbed on appeal unless they lack a sound and substantial basis in the record. (Matter of Vujanic v. Petrovic, 2015 NY Slip Op 01651, 125 A.D.3d 984).



## **REMOVAL OF FORENSIC EVALUATOR**

A motion for leave to renew a prior request to remove the Court-appointed forensic evaluator had been properly granted where the moving party subsequently obtained a copy of a letter to the Court-appointed forensic evaluator that he had been removed from the Mental Health Professionals Panel. The Mental Health Professionals Panel was established by the Appellate Divisions in the First and Second Departments to ensure that Courts have access to qualified Mental Health Professionals who are available to evaluate the parties and to assist courts in reaching appropriate decisions with respect to custody and visitation. (See, 22NYCRR 623.1; Carlin v. Carlin, 124 A.D.3d 817).

## **ARBITRATION**

Disputes concerning child custody and visitation are not subject to arbitration as the Court's role as *parens patriae* must not be usurped. Accordingly, that branch of the petition which was to confirm the custody and visitation provisions of the arbitration award pursuant to CPLR §7510 should have been denied and the matter must be remitted to the Supreme Court for a hearing and determination as to the issues of custody and visitation. An arbitration award concerning child support may also be vacated on public policy grounds if it fails to comply with the CSSA. Under the circumstances of this case, we decline to disturb the Supreme Court's determination to confirm so much of the Beth Dins award of child support. (Matter of Goldberg v. Goldberg, 124 A.D.3d 779).

## **CUSTODY JURISDICTION**

Since the subject child is now over 18 years of age, she is no longer subject to the Court's jurisdiction to modify custody and visitation. (Matter of Kripfgans v. Kripfgans, 123 A.D.3d 930).

## **CUSTODY**

The factors to be considered in determining the custody of a child is the child's best interests including the quality of the home environment and the parental guidance the custodial parent provides for the child, the ability of each parent to provide for the child's emotional and intellectual development, the financial status and ability of each parent to provide for the child, the relative fitness of the parents, and the effect an award of custody to one parent might have on the child's relationship with the other parent. Custody determinations turn on assessments of credibility and will not be disturbed unless it lacks a sound and substantial basis in the record. Contrary to the mother's contention the existence of

an interim order awarding her physical custody which was made without a hearing did not require the Court to engage in a change of circumstances analysis to determine the final award of custody after a hearing. Father granted custody. (McDonald v. McDonald, 122 A.D.3d 911). No forensic evaluation, since no credible evidence that warranted a forensic evaluation.

### **CUSTODY**

While not determinative a Court should consider the child's express preference as an indication of what is in the child's best interest. The Court may also consider the recommendation of a Court appointed expert and the position of the Attorney for the Child. If domestic violence is alleged and such allegations are proven by a preponderance of the evidence, the Court must consider the effects of such violence upon the child. The trial court after having had the opportunity to evaluate the testimony, consider the opinion of a forensic expert, interview the child *in camera* and consider the position of the Attorney for the Child determine that the child's best interests will be served by an Order awarding sole legal and physical custody of the child to the Father. (Bressler v. Bressler, 122 A.D.3d 659).

### **SUPERVISED VISITATION**

The Court determined that the Father's visitation should be supervised by the paternal grandmother was based upon the best interests of the child given the Father's erratic conduct and the forensic evaluation. (Matter of Bonet v. Bonet, 121 A.D.3d 978).

### **CUSTODY DETERMINATION**

Courts may consider religion as one of the factors in determining the best interest of a child but religion alone may not be the determinative factor. New York Courts will consider religion in a custody dispute when a child has developed actual religious ties to a specific religion and those needs can be served better by one parent rather than the other. Although the children expressed preference to reside with the mother and the attorney for the children advocated awarding custody to the mother, the children's preference and the recommendation of the Attorney for the Children are not determinative and do not usurp the judgment of the Court. There was a sound and substantial basis in the record for the Court to award custody to the Father. (Matter of Gribeluk v. Gribeluk, 120 A.D.3d 579).

## **RELOCATION**

The Family Court properly determined that the mother's proposed relocation to Florida with the child was in the child's best interests. The proposed relocation will provide financial security to the mother and the child, and the presence of the maternal grandparents in Florida will provide extended family support. In addition, since at the time of the Order, the child was not in school, there was no reason for concern that the proposed relocation will cause any significant disruption to his life. (Matter of Pepe v. Pepe, 124 A.D.3d 898).

## **RELOCATION**

Family Court erred in denying the mother's modification petition so as to allow her to relocate to Georgia with the subject child. A parent's relocation request must be considered on its own merits with due consideration of all the relevant circumstances and with predominant emphasis being placed on what outcome is most likely to serve the best interests of the child. (Citing Matter of Tropea v. Tropea, 87 N.Y.2d 727). The Court must determine based upon all of the proof whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interest. (Matter of Hall v. Hall, 118 A.D.3d 879).

## **RELOCATION**

The mother was seeking to relocate with the subject child from New York to Michigan. The mother explained that she and the child were living in temporary housing provided by their church and that they were at risk of ending up in a shelter. The mother alleged that she could no longer afford to live in an apartment since they were not receiving any consistent or meaningful support from the father. In Michigan, the mother could afford a clean modern apartment near public transportation on her disability benefits alone. The mother had researched the school district the child would attend and the medical providers he would see. The mother testified to the assistance of a network of friends who had already demonstrated their willingness to provide her and the child with needed support and stability. Although the father was no longer incarcerated, he had not been exercising his visitation rights and was not intimately involved in the child's daily life. The father only began offering meaningful financial support after the mother proposed the move. Relocation granted. (Ortiz v. Ortiz, 118 A.D.3d 800).

**EQUITABLE DISTRIBUTION**  
**EXCLUSIVE OCCUPANCY OF THE MARITAL HOME**

Trial Court is vested with broad discretion in making an equitable distribution of marital property and unless it can be shown that the trial court improvidently exercised that discretion its determination should not be disturbed. Where a determination as to equitable distribution has been made after a non-jury trial, the evaluation of the credibility of the witnesses and evidence is committed to the sound discretion of the court and its assessment is given great weight on appeal. Whether a custodial parent should be granted exclusive occupancy of the marital home, a Court should consider the needs of the children, whether the non-custodial parent is in need of the proceeds from the sale of that home, whether comparable housing is available to the custodial parent in the same area at a lower cost and whether the parties are financially capable of maintaining the residence. (Bernard v. Bernard, 2015 NY Slip Op 01770).

**PRECLUSION OF EXPERT**

The Supreme Court providently exercised its discretion in precluding the husband's expert from testifying at trial. The Defendant's expert was not disclosed to the Plaintiff until the morning of the first day of trial in violation of the Court's directive as to disclosure of expert witnesses. (See, also 22NYCRR 202.16(g); (Sutaria v. Sutaria, 123 A.D.3d 909)).

**VALUATION**

The determination of the value of a business is a function properly within the fact finding power of the Court. Where the determination is within the range of the testimony presented, it will be accorded deference on appeal if it rests primarily on the credibility of expert witnesses and their valuation techniques. (Sutaria, Id.).

**PERCENTAGE OF DISTRIBUTION**

The Supreme Court providently exercised its discretion in awarding the Plaintiff/Wife 25% of the value of each of the Defendant's businesses. The award of 25% of the value of the businesses properly accounts for the Plaintiff's direct and indirect contributions to the businesses including her contributions as the primary caretaker for the parties' children which allowed Defendant to focus on the business. Because the husband's businesses constituted tangible income producing assets, the Supreme Court did not err in awarding the Plaintiff a distributive share of those businesses in addition to maintenance. (Pharmacy businesses) (Citing Keane, 8 N.Y.3d 115)(Sutaria, Id.).

### **EQUITABLE DISTRIBUTION – LONG MARRIAGE**

Notwithstanding the long duration of the parties' marriage, there is no requirement that the distribution of each item of marital property be made on an equal basis. There is no merit to the Defendant's contention that the Supreme Court should have equally distributed the parties' bank accounts as of the commencement of the action since the parties had not functioned as an economic partnership for many years. (Taylor v. Taylor, 123 A.D.3d 693).

### **EQUITABLE DISTRIBUTION – LONG TERM MARRIAGE**

In this long term marriage, both parties made significant contributions to the marriage. Plaintiff established an insurance agency and developed it as a source of the family's income. Plaintiff's insurance license was revoked in 1991 after he was convicted of felony drug charges. Defendant continued to derive income from the agency and obtained her own insurance license in 1997. Equal division of the income from the insurance agency and the pension. (Cabral v. Cabral, 122 A.D.3d 893).

### **EXCLUSIVE OCCUPANCY**

Supreme Court properly exercised its discretion in awarding the wife exclusive possession of the marital home until the date of her remarriage or the date the parties' youngest child graduates from high school whichever occurs first. (Smithie v. Smithie, 122 A.D.3d 719).

### **MARITAL GIFTS**

Gifts given by one spouse to another during the marriage are marital property and thus are subject to equitable distribution. Here, the Defendant testified that during the marriage, the husband gave her a diamond ring valued at \$16,900. The Supreme Court erred in failing to equitably distribute the value of that item, and Plaintiff is entitled to a credit of \$8,450. (Smithie v. Smithie, 122 A.D.3d 719).

### **SEPARATE PROPERTY**

Supreme Court properly determined that the marital residence was the husband's separate property. The evidence demonstrated that the house in which the Defendant had grown up was formerly owned by the Defendant's Father and that the Defendant's father transferred it solely to the Defendant for no consideration. This was a gift from a party other than a spouse and was therefore separate property. (Filippazzo v. Filippazzo, 121 A.D.3d 835).

### **EQUITABLE DISTRIBUTION**

There is no requirement that the distribution of each item of marital property be on an equal basis. Here, equity dictates that the Plaintiff/Husband should receive most of the annuity, as he is permanently disabled and unable to earn an income now or in the future. In contrast, the Plaintiff/Wife is employed and has future income earning capacity. Taking into account the circumstances of this case and of each of the parties, the allocation of 90% of the monthly annuity payment to the Plaintiff and 10% to the Defendant is equitable. (Rizzo v. Rizzo, 120 A.D.3d 1400).

### **EQUITABLE DISTRIBUTION**

An award to the wife of a 25% share of the appreciation in value of the Plaintiff's interest in a family owned hardware store take into account the Defendant's limited involvement in the Plaintiff's business, while not ignoring the direct and indirect contributions she made as the primary caretaker of the children, as a homemaker, and as a social companion to the Plaintiff while foregoing her career. (Hymowitz v. Hymowitz, 119 A.D.3d 736).

### **PRINCIPAL REDUCTION OF MORTGAGE**

Supreme Court improvidently exercised its discretion in awarding the husband a credit against the proceeds of the sale of the marital residence for 100% of the payments he made to reduce the principal balance of the mortgage during the divorce proceedings. The husband was entitled to a credit of only 50% of the reduction in mortgage principal because generally it is the responsibility of both parties to maintain the marital residence during the pendency of the matrimonial action. (Hymowitz (Id.) see also, Turco v. Turco, 117 A.D.3d 719).

Supreme Court should have awarded the Plaintiff a credit against the proceeds of the sale of the marital residence for 100% of the amount she paid to reduce the mortgage principal from the date of the divorce judgment until the sale of the marital residence. (Turco, Id.).

### **EQUITABLE DISTRIBUTION OF LIABILITIES**

The Supreme Court properly exercised its discretion in denying Defendant's request for a \$20,000 credit for utilizing marital funds used to pay a premarital debt of the Plaintiff. The parties choice of how to spend funds during the course of the marriage should ordinarily be respected and the Court should not second-guess the economic decisions made during the course of a marriage but rather should equitably distribute the assets and obligations remaining once the relationship is at an end. (Kessler v. Kessler, 118 A.D.3d 946)(Citing Mahoney-Buntzman, 12 N.Y.3d 415).

### **EQUITABLE DISTRIBUTION OF LIABILITIES**

The distribution of marital property and allocation of marital debt is generally left to the sound discretion of the Court. The Supreme Court properly determined the amount of the parties' marital debt however the Court failed to set forth the factors it considered in determining how to allocate the parties' debt. (Lewis v. Lewis, 118 A.D.3d 958).

### **SEPARATE PROPERTY**

There is a statutory presumption that all property unless clearly separate is deemed marital property. The burden rests with the titled spouse to rebut the presumption. The titled spouse may seek to rebut the presumption that any comingled funds became marital property by tracing the source of the funds with sufficient particularity. (Overton v. Overton, 118 A.D.3d 858).

### **EXCLUSIVE OCCUPANCY**

The Court should have awarded the Plaintiff exclusive possession of the former marital residence until the parties' younger child attains the age of 18 or is otherwise emancipated. During the period of exclusive occupancy of the residence, the Plaintiff/Wife must pay the carrying charges for the home including the first mortgage payments, property taxes, utilities and upkeep costs. (McCoy v. McCoy, 117 A.D.3d 806).

### **SALE OF MARITAL RESIDENCE**

The Supreme Court improperly exercised its discretion in directing the sale of the marital residence without first offering the Defendant the option of retaining exclusive occupancy of the marital residence by purchasing the Plaintiff's interest in the home. In order to exercise the option to purchase the Plaintiff's interest, the Defendant shall within three months after service upon him of a copy of this Decision and Order with Notice of Entry, pay off the remaining balances of all existing marital debts on the property including the mortgage and the home equity loan. (Lamparillo v. Lamparillo, 116 A.D.3d 924).

### **IMPUTATION OF INCOME**

A Court's determination concerning the imputation of income is based on the resolution of credibility which is given great deference on appeal. (Badwal v. Badwal, 2015 NY Slip Op 01910). The Defendant's child support obligation was based on his employment history, future earning capacity and money received from family and friends.

### **PENDENTE LITE SUPPORT**

*Pendente lite* Order of \$75.00 per week increased to \$784.62. Interim award of counsel fees increased from \$2,500 to \$7,500. Temporary Maintenance Guidelines resulted in a presumptive award of \$784.62. The record does not support any reduction of the presumptively correct award or otherwise lead to the conclusion that the presumptive award is unjust or inappropriate. (Dunleavy v. Dunleavy, 2015 NY Slip Op 01433, 125 A.D.3d 832).

### **DETERMINATION OF CHILD SUPPORT**

Family Court did not err in denying the Father's objections to the Order directing him to pay child support in the sum of \$2,438 per month. Great deference should be given to the credibility determination of the Support Magistrate who is in the best position to assess the credibility of the witnesses. The Father's Financial Disclosure Affidavit, tax returns and testimony at the hearing did not contain adequate information for the Support Magistrate to determine his income and assets. Therefore, the Support Magistrate did not err in basing the Father's support obligation on the needs of the children pursuant to FCA §413(1)(K). (Matter of Toumazatos v. Toumazatos, 2015 NY Slip Op 01461, 125 A.D.3d 870).



### **DURATION OF MAINTENANCE**

In light of the parties' long term marriage, their respective ages and their financial circumstances and because the wife has only part-time work experience and suffers from various medical conditions, it is unrealistic to believe that she will be able to achieve a level of financial independence which would eliminate her need to rely on the Plaintiff's support. Supreme Court should have awarded the Defendant/wife maintenance until the earliest of her eligibility for full social security retirement benefits at the age of 66, her remarriage or the death of either party. Under the circumstances of this case the Supreme Court properly exercised its discretion in directing the wife to obtain her own health insurance coverage. (DRL §236(B)(8))(Carroll v. Carroll, 2015 NY Slip Op 01235, 125 A.D.3d 710).

### **DURATION OF MAINTENANCE**

Wife was 40 years old at the time of trial, her son was in High School and she ran a small business. An award of \$2,000 per month maintenance until the wife is eligible to collect social security retirement was an improvident exercise of discretion. Maintenance is designed to encourage the recipient spouse to gain economic independence. Appellate division concludes the duration of the wife's maintenance should be the earlier of the wife's remarriage, 17 years from August 1, 2012 or the Plaintiff's death. This is adequate to give the wife a reasonable period of time, as well as an incentive, to obtain employment and/or training and become self-supporting. (Naik v. Naik, 2015 NY Slip Op 01251, 125 A.D.3d 734).

### **CHILD SUPPORT ARREARS**

A court has no discretion to reduce or cancel arrears of child support which accrued before an application for downward modification of the child support obligation. The Father petitioned for a downward modification of his child support obligation after the arrears accrued. Thus, any modification was prohibited. (Matter of Cadwell v. Cadwell, 124 A.D.3d 649).

## **MAINTENANCE**

When determining a maintenance obligation where a party's account of his or her finances is not believable, a court may impute a true or potentially higher income than that alleged. The Supreme Court properly exercised its discretion in imputing income to the Defendant based on his failure to account for income that he received from rental property. The amount and duration of maintenance is a matter committed to the sound discretion of the trial court and every case must be determined on its own unique facts. The Supreme Court properly determined that the Defendant owed maintenance arrears in the sum of \$9,750. The Defendant's contention that he should be relieved of this obligation is without merit as he failed to seek appropriate relief and instead resorted to self-help. (Lubrano v. Lubrano, 122 A.D.3d 807).

## **DENIAL OF MAINTENANCE**

The amount and duration of maintenance is committed to the sound discretion of the Court and each case is decided on its own unique facts. Supreme Court did not improperly exercise its discretion in declining to award the wife maintenance in light of her ability to become self-supporting, the parties' modest lifestyle and funds distributed from the Defendant to the Plaintiff upon the parties' separation. (Filippazzo v. Filippazzo, 121 A.D.3d 835).

## **IMPUTATION OF INCOME**

A court is justified in imputing income to a spouse when it is shown that the marital lifestyle was such that, under the circumstances, there was a basis for the Court to conclude that the spouse's actual income and financial resources were greater than what he or she reported on his or her tax returns. (Weitzner v. Weitzner, 120 A.D.3d 1406).

## **MAINTENANCE**

Supreme Court should have awarded the Wife until the earliest of her eligibility for full Social Security benefits at age 66, her remarriage or death of either party. (Hymowitz, Id.)

### **CHILD SUPPORT**

By statute, child support awards should be retroactive to the date an application for such support was made, which in this case was the date upon which the Defendant served her motion for *pendente lite* child support. Payments by the husband on behalf of the Defendant and children under the *pendente lite* order, which required him to pay the carrying charges for the marital residence, to the extent that these payments can appropriately be allocated to temporary child support rather than temporary maintenance should be permitted to offset accrued child support arrears. In view of the standard of living enjoyed by the parties' children during the marriage and the earnings and assets of the parties, the child support award should be based upon \$175,000 of combined parental income. (Hymowitz v. Hymowitz, 119 A.D.3d 736).

### **CHILD SUPPORT**

The level of child support is determined by the parents' ability to provide for their children rather than their current economic situation. A court is not required to rely on a party's account of his or her finances and may instead impute income based upon the parties past income or demonstrated earning potential. A support magistrate is afforded considerable discretion in determining whether to impute income to a parent and that determination may properly be based upon a parent's prior employment experience. Under the circumstances of this case, it was appropriate to impute income where, as here, the father voluntarily left his employment. While a parent is entitled to attempt to improve his vocation, his children should not be expected to subsidize his decision. (Matter of Bustamante v. Donawa, 119 A.D.3d 559).

### **COLLEGE EXPENSES**

Plaintiff correctly contends that the Supreme Court erred in directing him to pay college expenses for the parties' daughter who is only 15 years old at the time of trial. While a Court may direct a parent to contribute to a child's college expenses pursuant to DRL §240 under the circumstances of this case, based upon the child's age, lack of evidence presented as to her interest in and possible choice of college, an Order compelling the Plaintiff to pay for those college expenses is premature and not supported by the evidence. (Lewis v. Lewis, 118 A.D.3d 958).

### **COUNSEL FEES**

An award of counsel fees is within the sound discretion of the trial court and the issue is controlled by the equities and circumstances of each particular case. The Court should review the financial circumstances of both parties which may include the relative merit of the parties' position. Court may also consider whether either party has engaged in conduct or taken positions resulting in delays of the proceedings or unnecessary litigation. An award of \$73,602.46 was affirmed. (Sutaria v. Sutaria, 123 A.D.3d 908).

### **ACCOUNT STATED**

Plaintiff law firm established its *prima facie* entitlement to judgment as a matter of law on the cause of action to recover on an account stated for legal fees. The law firm submitted copies of its invoices for professional services setting forth the billable hours expended and identifying the services rendered and demonstrated that the Defendants received and retained the invoices without objecting to them within a reasonable time. The Defendants also made partial payments on the invoices. In opposition, the Defendants unsupported and conclusionary allegations were insufficient to raise a triable issue of fact. Order denying account stated reversed. (Mauro Lilling Naparty LLP v. Huang, 120 A.D.3d 1314).

### **COUNSEL FEES**

Counsel fee awards of \$22,480 and \$22,520, respectively, were proper where the Plaintiff is not receiving any significant equitable distribution award, and that Defendant's conduct throughout these proceedings including his failure to abide by a *pendente lite* order unnecessarily protracted the litigation. (McMahon v. McMahon, 120 A.D.3d 1316).

### **COUNSEL FEES**

Order which referred to trial a motion for an award of interim counsel fees reversed on appeal. Appellate Division granted Defendant's motion to the extent of awarding Defendant interim counsel fees in the sum of \$307,350. Domestic Relations Law §237 provides a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. Such an award is intended to ensure that the non-monied spouse will be able to litigate the action and do so on equal footing with the monied spouse. (Citing Prichep v. Prichep, 52 A.D.3d 61). Accordingly, Court should not defer requests for counsel fees to the trial court. An award of \$307,350 is proper based upon the amount of legal fees that the Defendant has incurred or will imminently incur. (Carlin v. Carlin, 120 A.D.3d 734).

## **DISQUALIFICATION OF LAW FIRM**

The disqualification of an attorney is generally a matter resting within the sound discretion of the Court. Doubt as to the existence of a conflict of interest must be resolved in favor of disqualification to avoid even the appearance of impropriety. The very appearance of a conflict of interest was alone sufficient to warrant disqualification of the law firm as a matter of law without an evidentiary hearing notwithstanding the existence of a factual dispute as to whether attorney even met with the Plaintiff/husband. (Cohen v. Cohen, 2015 NY Slip Op 00839, 125 A.D.3d 589). One Judge dissent.

## **DEFAULTS**

Although a party seeking to vacate a default must establish both a reasonable excuse for the default and a potentially meritorious cause of action or defense, this Court has adopted a liberal policy with respect to vacating defaults in matrimonial matters because the state's interest in the marital res and related issues such as child support and custody favors dispositions on the merits. Defendant failed to appear in Court because his counsel was unaware that a trial was scheduled and never informed the Defendant of the required Court appearance. The Court proceeded to inquest in the Defendant's absence and the Defendant promptly moved to vacate his default. Defendant's default was not willful. Defendant has a potential meritorious position with respect to certain ancillary economic issues. Defendant's motion to vacate his default should have been granted. Judgment reversed. (Alam v. Alam, 123 A.D.3d 1066).

## **DISQUALIFICATION OF COUNSEL**

Plaintiff met her burden of showing that counsel for the Defendant and his law firm should be disqualified on the ground of a conflict of interest. The Defendant's counsel is needed to testify as a witness in this action. Motion to disqualify granted. (Foley v. Foley, 123 A.D.3d 973).

## **DEFAULT**

Although a motion to vacate a judgment on the grounds of excusable default must be made within one year after service of a copy of the Judgment, the Supreme Court has the inherent authority to vacate the Judgment in the interest of justice even where the statutory one year period under CPLR §5015(a)(1) has expired. Further, while a party seeking to vacate a default must establish a reasonable excuse for the default and a meritorious claim or defense, the Courts of this State have adopted a liberal policy towards vacating defaults in

matrimonial actions. The record demonstrates that the Defendant's former counsel failed to apprise her of the fact that he did not answer the complaint and filed a motion to serve a late answer that had been denied on the ground that the papers were defective. An inquest had been scheduled which he did not attend. Further, subsequent to the entry of the Judgment of Divorce, the Defendant's former counsel falsely represented to the Defendant that he was in the process of moving to resolve issues concerning equitable distribution and visitation. The Defendant did not discover that a divorce judgment had been entered upon her failure to appear at inquest until more than one year after the judgment had been entered. Motion to vacate default should have been granted. (Goldenberg v. Goldenberg, 123 A.D.3d 761).

### **LEGAL MALPRACTICE**

Plaintiff commenced this action asserting ten causes of action including negligence, legal malpractice, fraud, breach of contract and conversion. Plaintiff alleged that the Defendant law firm had over-billed him in breach of an oral retainer agreement and they paid themselves with \$20,000 of Plaintiff's money taken from escrow without his permission. As a general rule, where a cause of action alleges breach of contract or fraud arises from the same facts as a legal malpractice cause of action and does not allege distinct damages, the breach of contract or fraud cause of action must be dismissed as duplicative of the legal malpractice action. Here, however, the Plaintiff's breach of contract cause of action makes no claim that the Defendants provided inadequate legal representation. Rather, the Plaintiff claims that the Defendants over-billed him and took money from his escrow account without his permission. Under these circumstances, the breach of contract cause of action is not duplicative of the legal malpractice cause of action and should not have been dismissed. (Postiglione v. Castro, 119 A.D.3d 920).

### **ADJOURNMENT**

As a general rule, a motion for an adjournment is addressed to the trial court's sound discretion. However, under the circumstances of this case, the Supreme Court improvidently exercised its discretion in denying the wife's request for an adjournment to enable her to obtain counsel and to complete discovery. (Buongiovanni v. Buongiovanni, 122 A.D.3d 786).

## **DISQUALIFICATION OF COUNSEL**

The disqualification of an attorney is a matter that rests within the sound discretion of the Court. A party's right to be represented by counsel of his or her own choosing is a valued right which will not be superseded absent a clear showing that disqualification is warranted. The moving party bears the burden of showing that disqualification is warranted. Any doubts as to the existence of a conflict of interest must be resolved in favor of disqualification. Disqualification may be warranted based on a mere appearance of impropriety. (Halberstam v. Halberstam, 122 A.D.3d 679).

## **DEFAULT**

Although the Courts of this State have adopted a liberal policy with respect to vacating defaults in matrimonial actions, it is nonetheless incumbent upon the defaulting party to establish a reasonable excuse for the default and a potentially meritorious position. A motion to vacate is addressed to the courts discretion. Plaintiff's attorney claimed that he suffered a unspecified dental emergency that caused his failure to appear on the morning of the scheduled trial. He produced no documentation regarding the alleged emergency and subsequently conceded that he had in fact appeared in court in another county to conference a different case on that very same morning. Also, Plaintiff did not submit an Affidavit of Merit and her attempt to cure this deficiency in her reply papers was improper. Order affirmed. (Simak v. Simak, 121 A.D.3d 1090).

## **ADJOURNMENT**

Under the facts of this case, Family Court did not improvidently exercise its discretion in denying the application made by the appellant's attorney for an adjournment at the trial. Upon the Father's failure to appear at a hearing and upon the denial of his attorney's application for an adjournment, following an inquest, the Court granted the maternal grandfather's petition for custody of the subject child. (Matter of Martin v. Martin, 121 A.D.3d 693).

### **LEGAL MALPRACTICE**

Supreme Court properly denied the branch of the Defendant law firm's motion which was to dismiss the amended complaint. In determining the motion pursuant to CPLR §3211(a)(7) to dismiss a complaint the facts alleged in the complaint must be deemed to be true and the Plaintiff must be accorded the benefit of every favorable inference. Further, a Court may consider Affidavits submitted by the Plaintiff to remedy any defects in the complaint. The second cause of action which was to recover damages for breach of fiduciary duty, and was based upon the Defendant's alleged conduct of charging unnecessary and excessive fees, were not duplicative of the cause of action to recover damages for legal malpractice. (Lauder v. Goldhamer, 122 A.D.3d 908).

### **FAMILY COURT CONTEMPT**

A determination by a Support Magistrate that a person is in willful violation of a support order and recommending commitment has no force and effect until confirmed by a Judge of the Family Court. (Matter of Baumgardner v. Baumgardner, 2015 NY Slip Op 02119).

### **VIOLATION OF CHILD SUPPORT ORDER**

The Family Court properly found that the father willfully violated the child support and spousal support orders of the court. Evidence of the father's failure to pay support as ordered constituted *prima facie* evidence of a willful violation. The burden then shifted to the father to offer competent credible evidence of his inability to make the required payments. The father failed to sustain his burden. Appeal through the order that committed the father to the Suffolk County Correctional Facility for a term of six months unless he paid the purge amount of \$15,000 is dismissed as academic as the period of incarceration has expired. The father's contention that he was deprived of the effective assistance of counsel dehors the record. However, the record reveals that the father received meaningful representation. (Matter of Saraguard v. Saraguard, 2015 NY Slip Op 01647).

### **PREJUDGMENT INTEREST**

Supreme Court properly denied those branches of Defendant's motion which were for awards of prejudgment interest since the Plaintiff established that his default was not willful. (Lundon v. Lundon, 120 A.D.3d 1395).



## **CONSTRUCTIVE TRUST**

A constructive trust may be appropriate in situations when property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest (Sharp v. Kosmalski, 40 N.Y.2d 119). The necessary elements for the imposition of a constructive trust are a confidential or fiduciary relationship; a promise; a transfer in reliance on that promise; and unjust enrichment. (Igneri v. Igneri, 2015 NY Slip Op 01419, 125 A.D.3d 813).

## **CONTRACT CONSTRUCTION**

Where there is an ambiguity in a contract, the Court is entitled to rely upon the language of the entire agreement and the circumstances surrounding its execution in construing the provision. The Court should arrive at a construction that will give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized. This case involved a pro-rata contribution to the “so-called SUNY Cap”. The Father proposed an interpretation that would render the parental contribution largely illusory by first deducting the sons’ financial aid award, scholarships, grants and student loans from the SUNY cap rather than from the total amount of the son’s college expenses. Supreme Court correctly adopted the wife’s proffered interpretation to require that all financial aid awarded to the son be applied first to reduce the son’s total college cost before reducing the parental contribution to SUNY Cap obligation. (Springer v. Springer, 2015 NY Slip Op 01440, 125 A.D.3D 842).

## **CONTRACT CONSTRUCTION**

Whether an agreement is ambiguous is a question of law for the Courts. The proper inquiry is whether the agreement on its face is reasonably susceptible of more than one reasonable interpretation. The resolution of an ambiguous provision may allow for extrinsic evidence to be used. A Court may not write into a contract conditions the parties did not insert or under the guise of construction, add or excise terms and it may not construe the language in such a way as would distort the apparent meaning. (Salinger v. Salinger, 2015 NY Slip Op 01259, 125 A.D.3d 747).

## **PRENUPTIAL**

Husband's motion for summary judgment dismissing wife's demands for equitable distribution and maintenance properly granted. An agreement between spouses which is fair on its face will be enforced according to its terms unless there is proof of unconscionability, fraud, duress, overreaching or other inequitable conduct. Husband establishes *prima facie* entitlement to judgment as a matter of law by demonstrating that the terms of the agreement were not unconscionable and that the agreement was not the product of fraud, duress, overreaching or other inequitable conduct. The husband demonstrated that when the agreement was signed the wife was represented by independent counsel and that he had made full disclosure of his assets. (Citing Petrakis, 72 A.D.3d 868). Wife failed to raise a triable issue of fact in opposition. Summary Judgment granted. (Postiglione v. Postiglione, 2015 NY Slip Op 00861, 125 A.D.3d 625).

## **JURISDICTION OF THE COURT**

A final Judgment of Divorce settles the parties' rights pertaining not only to those issues that were actually litigated at trial in the matrimonial action, but also those that could have been litigated. (Nicodemus v. Nicodemus, 124 A.D.3d 849).

## **SERVICE**

In an action for divorce, DRL §232 permits substituted service pursuant to CPLR §308 by Court Order upon a showing that personal delivery of the Summons and Complaint upon the Defendant could not be effected despite efforts made with due diligence. The Affidavit of the process server wherein he attested to numerous attempts to deliver the Summons and Complaint to the Defendant at her residence at different times on different days including two Saturdays, a weekday evening and a weekday morning were sufficient to establish the due diligence requirement. The Defendant's bare claim that the process server did not use due diligence was insufficient to rebut the Plaintiff's showing. The Supreme Court properly granted the motion for leave to effect substituted service of the Summons and Complaint. Supreme Court also properly granted that branch of the motion to extend the time to serve the Summons and Complaint. (See, CPLR §306-b; Florestal v. Coleman-Florestal, 124 A.D.3d 578).

## **RECUSAL**

A party claiming Court bias must preserve an objection and move for the Court to recuse itself. When a claim of bias is raised, the inquiry on appeal is limited to whether the judge's bias, if any, unjustly effected the result to the detriment of the claiming party. The record shows that the Family Court treated the parties fairly and did not have a predetermined outcome of the case in mind during the hearing. (Matter of Bowe v. Bowe, 124 A.D.3d 645).

## **RESCISSION**

Marital settlement agreements are judicially favored and are not to be easily set aside. However, there is a fiduciary relationship between spouses. A Stipulation of Settlement should be closely scrutinized and maybe set aside upon a showing that it is unconscionable or the result of fraud or where it is shown to be manifestly unjust because of the other spouse's overreaching.

To rescind a separation agreement on the ground of overreaching, a Plaintiff must demonstrate both overreaching and unfairness. No actual fraud need be shown. Courts may examine the terms of the agreement as well as the surrounding circumstances to ascertain whether there has been overreaching. As a general rule, if the execution of the agreement is fair, no further inquiry will be made. Evidence that one spouse was not represented by counsel is insufficient, standing alone, to find overreaching. Courts have thrown their cloak of protection over separation agreements and made it their business when confronted to see to it that they are arrived at fairly and equitably in a manner so as to be free from the taint of fraud and duress and to set aside or refuse to enforce those born of and subsisting in inequity. (Jon v. Jon, 123 A.D.3d 979).

## **REPLY PAPERS**

The Supreme Court properly considered the Plaintiff's arguments and evidence raised for the first time in her reply papers. Contrary to the Defendant's contentions, review of those contentions on the merits was proper because Defendant availed himself of a fair opportunity to oppose them at oral argument of the motion. (Jon v. Jon, 123 A.D.3d 978; but see, Samuelson v. Samuelson, 108 A.D.3d 612, 969 N.Y.S.2d 143).

## **VACATING STIPULATION OF SETTLEMENT**

A Stipulation of Settlement which is fair on its face will be enforced according to its terms unless there is proof of fraud, duress, overreaching or unconscionability. Defendant established her *prima facie* entitlement to judgment as a matter of law by submitting the stipulation which contained an express representation that it was not a product of fraud or duress and which awarded the Plaintiff meaningful benefits as well as her affidavit which set forth that the parties attorneys were engaged in negotiations for months regarding the distribution of marital assets. Defendant also established that the Plaintiff ratified the Stipulation and waived any claim to set aside the Stipulation by accepting the benefits for a significant period of time. A mere unequal division of assets is insufficient to establish unconscionability. (Sabowitz v. Sabowitz, 123 A.D.3d 794).

## **WAIVER**

Waiver is the voluntary and intentional relinquishment of a contract (known) right. It should not be lightly presumed and must be based on a clear manifestation of intent to relinquish a contractual protection. It may be accomplished by affirmative conduct or failure to act so as to evince an intent not to claim the purported advantage. The mere existence of a non-waiver clause does not preclude waiver of a contract clause. However, a waiver is not created by negligence, oversight or thoughtlessness and cannot be inferred from mere silence. (Stassa v. Stassa, 123 A.D.3d 804).

## **REFEREE REPORT**

The Supreme Court is entitled to reject the report of a referee and make new findings. (CPLR §4403). However, the report and recommendations of a referee should be confirmed if his or her findings are supported by the record. (Tihomirovs v. Tihomirovs, 123 A.D.3d 808).

## **APPEAL**

The appeal must be dismissed since no appeal lies from an order entered on the consent of the appealing party (Stein v. Stein, 123 A.D.3d 730).

## **OPEN COURT STIPULATIONS**

The record demonstrates that the parties validly entered into a comprehensive open court stipulation by which the Plaintiff/Wife knowingly, voluntarily and intelligently agreed to be bound. The agreement will not be set aside since Stipulations of settlement are favored by the courts and are not lightly cast aside particularly when the parties are represented by counsel. The Plaintiff argued before the Supreme Court that her emotional state prevented her from entering into the Stipulation. The allegation was rejected. The Court conducted a thorough allocution of the Plaintiff. Motion to vacate denied. (Ebel v. Ebel, 121 A.D.3d 934).

## **CONTRACT CONSTRUCTION**

The terms of a Stipulation of Settlement that is incorporated but not merged into a Judgment of Divorce operate as contractual obligations binding on the parties. In interpreting a marital contract a court should construe it in such a way as to give fair meaning to all of the language employed by the parties to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized. Where such an agreement is clear and unambiguous on its face the parties' intent must be construed within the four corners of the agreement and not from extrinsic evidence. (Khyorshad v. Khyorshad, 121 A.D.3d 857).

## **SUMMARY JUDGMENT/PRENUPTIAL**

In determining a motion for summary judgment the court must view the evidence in a light most favorable to the nonmoving party. The court must afford such party the benefit of every favorable inference. A motion for summary judgment should not be granted where the facts are in dispute or where conflicting inferences may be drawn from the evidence or where there are issues of credibility. An agreement between spouses which is fair on its face will be enforced according to its terms unless there is proof of unconscionability, fraud, duress, overreaching or other inequitable conduct. (Citing Petracca, 101 A.D.3d 695). An unconscionable bargain is one in which no person in his or her senses and not under delusion would make on the one hand and no honest and fair person would accept on the other, the inequity being so strong and manifest as to shock the conscience and confound the judgment of any person of common sense. (Citing Cioffi-Petrakis, 72 A.D.3d 868). The husband demonstrated his *prima facie* entitlement to judgment as a matter of law by submitting the agreement which appeared fair on its face and set forth express representations stating that among other things, it was not the product of fraud or duress, each party had made full disclosure to the other and was represented by independent counsel and that they had fully discussed and understood the terms. (McKenna v. McKenna, 121 A.D.3d 864).

Wife raised triable issues of fact regarding the fairness of the Agreement, the circumstances surrounding the negotiation and execution of the agreement and the absence of any meaningful financial disclosure by the Plaintiff. Further, the Defendant's attorney was selected by the husband and paid by him. The wife claimed that said attorney was only with her for a short time before the execution of the agreement and failed to advise her of the legal consequences of the terms of the agreements. Given the parties conflicting claims as to the negotiation and execution of the prenuptial agreement, summary judgment on the validity of the prenuptial agreement is unwarranted. (Id.)

Notwithstanding that the prenuptial agreement contains a waiver of maintenance, there is no provision for the waiver of *pendente lite* maintenance during the pendency of this litigation. Where the parties' prenuptial agreement limits the Defendant's rights to obtain spousal support and waives the rights to counsel fees it does not bar temporary relief including *pendente lite* maintenance and counsel fees. (McKenna v. McKenna, 121 A.D.3d 864).

### **RECUSAL**

Absent a legal disqualification under Judiciary Law §14, a Court is the sole arbiter of the need for recusal and its decision is a matter of discretion and personal conscience. The Defendant failed to demonstrate any determinations in the case that were the result of bias and accordingly, the Court providently exercised its discretion in denying the recusal motion. (Hayes v. Barroga-Hayes, 117 A.D.3d 794).

### **LAW OF THE CASE**

The doctrine of the law of the case is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined that should be the end of the matter as far as judges and courts of co-ordinate jurisdiction are concerned. (Clark v. Clark, 117 A.D.3d 668).

### **VOLUNTARILY DISCONTINUANCE**

The determination of a motion for leave to voluntarily discontinue an action pursuant to CPLR §3217(b) rests within the sound discretion of the Court. In the absence of special circumstances, such as prejudice to a substantial right of the Defendant or other improper consequences, a motion for voluntary discontinuance should be granted. The Court properly exercised its discretion in denying the Plaintiff's application to voluntarily discontinue the action, made on the first day of trial, since the record supports finding that she was merely attempting to avoid an adverse order of the Court (Turco v. Turco, 117 A.D.3d 719).

### **COURT PERMISSION FOR MOTIONS**

In the order appeal from the Family Court directed the mother to seek permission of the Court before filing any future petitions or Motions regarding custody or visitation with the parties' child. The order appealed from is not appealable as a right. Under the circumstances presented, we decline to grant leave to appeal. (Matter of Tedeschi v. Tedeschi, 119 A.D.3d 868).

### **MOTIONS WITHOUT LEAVE OF COURT**

A court may impose financial sanctions upon a party or attorney (or both) who engages in frivolous conduct. Conduct is frivolous if it is completely without merit in law or fact and cannot be supported by any reasonable argument for an extension, modification or reversal of existing law. The Supreme Court properly directed the Plaintiff to pay sanctions based on her frivolous conduct in bringing the plenary action and making two motions without obtaining leave of Court. (Weissman v. Weissman, 116 A.D.3d 848).

## BIOGRAPHY:

Vincent F. Stempel, Esq. has his practice in Garden City, New York. His practice is solely limited to matrimonial law for 30 years. He is a past Chair of the New York State Bar Association, Family Law Section. He is a member of the Executive Committee of the New York State Bar Association, Family Law Section, and a member of the Nassau County Bar Association. He is a Fellow of the American Academy of Matrimonial Lawyers and a member of the Law Guardian Advisory Committee for the Tenth Judicial District. He frequently lectures for professional organizations including the New York State Bar Association, Suffolk and Nassau Academy of Law and the Judicial Institute, as well as other organizations. Mr. Stempel is listed as one of New York's Best Attorney's by the New York Magazine. He has also appeared on numerous television and radio programs related to matrimonial law and is an adjunct professor of law at St. John's Law School.