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2018 ANNUAL MATRIMONIAL LAW UPDATE

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MATRIMONIAL LAW UPDATE

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BIOGRAPHY:

Vincent F. Stempel, Esq. has his practice in Garden City, New York. His practice is solely limited to matrimonial law for 33 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.

ALIMONY DEDUCTION

Under the Tax Cuts and Jobs Act of 2017 the law will be effective as to any divorce or separation instruments executed after December 31, 2018 and will no longer permit alimony to be deductible to the payor spouse.

SOCIAL MEDIA DISCOVERY

In a personal injury action, the Court of Appeals addressed a dispute concerning disclosure materials from plaintiff's Facebook account. The Appellate Division modified the lower Court's ruling to limit disclosure to the defendant to photographs posted on Facebook that plaintiff intended to introduce at trial whether pre or post-accident and eliminated the authorization permitting defendant to obtain data relating to post-accident messages. Court of Appeals reversed.

Disclosure in civil actions is governed by CPLR 3101(a) which directs that there shall be full disclosure of all matters material and necessary to the prosecution or defense of an action regardless of the burden of proof. This Court has recognized that litigants are not without protection against unnecessarily onerous applications of the discovery statutes. (See, CPLR 3103). New York discovery rules do not condition a party's receipt of disclosure on a showing that the items the parties seek actually exist. Rather, the request need only be appropriately tailored and reasonably calculated to yield relevant information.

We agree with other Courts that have rejected the notion that commencement of a personal injury action renders a party's entire Facebook account automatically discoverable.

In the event that judicial intervention becomes necessary, Courts should:

- (i) First consider the nature of the event giving rise to litigation (and the injuries claimed) as well as any other information specific to the case to assess whether relevant materials are likely to be found on the Facebook account.
- (ii) Second, balancing the potential utility of the information sought against any specific "privacy" or other concerns raised by the account holder, the Court should issue an order tailored to the particular controversy that identifies the types of material that must be disclosed while avoiding disclosure of non-relevant materials.

(iii) Temporal limitations may also be appropriate for example, the Court should consider whether or not photographs or messages posted years before an issue are likely to be germane to the litigation.

Applying these principles here the Appellate Division erred in modifying the Supreme Court's Order to further restrict disclosure of plaintiff's Facebook account and limiting discovery to only those photographs plaintiff intended to introduce at trial. (Forman v. Henkin, NY Court of Appeals, February 13, 2018, 2018 NY Slip Op. 01015).

Application to Financial Issues: Domestic Relations Law: DRL§ 236(B)(5)(d)(2) requires the Court to consider the "health" of both parties; (9) requires the consideration of probable future financial circumstances and (12) requires the consideration of wasteful dissipation of assets." Application to Custody Trials: DRL 240.

COUNSEL FEES

Supreme Court in a matter of first impression referred to a hearing counsels' right to a retaining lien and noted that the Court may set a security interest and an "interim charging lien" which would then be subject to a further hearing at the conclusion of the trial to determine the amount of a "final charging lien". (Dayan v. Dayan, 2017 N.Y. Slip Op 27399; NYSBA Family Law Review Winter 2017, Supreme Court, Kings County, Justice Sunshine).

If a client discharges an attorney without cause the attorney possesses a common law retaining lien on the client's file in his or her possession and is entitled to recover compensation from the client measured by the fair and reasonable value of the services rendered. The common law retaining lien is founded and determined by possession of the file and operates outside of the Judiciary Law §475 which governs charging liens.

Absent exigent circumstances, an attorney may generally not be compelled to surrender the papers and files until an expedited hearing has been held to ascertain the amount of the fees or reimbursement to which he or she may be entitled.

Judiciary Law §475 provides that from the commencement of an action in any Court the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a final order in his client's favor and the proceeds thereof. It is well settled that a charging lien will be available to attach to an award of equitable distribution "to the extent that an equitable distribution award reflects the creation of a new fund by an attorney greater than the value of the interest already held by the client". However, where the attorney's services do not create any proceeds but consists

solely of defending title or interest already held by the client, there is no lien on that title or interest. (citing first Theroux v. Theroux, 145 A.D.2d 625, 536 N.Y.S.2d 151; Charnow v. Charnow, 134 A.D.3d 875, 22 N.Y.S.3d 126).

MODIFICATION OF CUSTODY

In order to modify an existing custody arrangement, there must be a showing of a subsequent change of circumstances so that modification is required to protect the best interests of the child. Here, the parties' inability to agree on the child's religious training, which was an issue that had not been addressed in the parties' Stipulation of Settlement, constituted a change of circumstances. (Matter of Baalla v. Baalla, 2018 N.Y. Slip Op 01050).

PREFERENCE OF CHILD

The child was 10 years old at the time of the hearing and accordingly, the Family Court properly considered her wishes weighed in light of her age and maturity. (Matter of Baalla v. Baalla (id)).

MODIFICATION OF SUPPORT

The Family Court properly granted that branch of the mother's motion which was to dismiss the father's petition for a downward modification of his child support obligations. The court lacked authority to vacate or modify the provisions of the Stipulation of Settlement in which the father agreed to transfer funds from his retirement accounts to the mother. In any event, that branch of the motion was properly granted in light of the "father's conclusionary and unsupported allegations of parental alienation on the part of the mother." (Matter of DeGennaro v. DeGennaro, 2018 N.Y. Slip Op 01054).

UPWARD MODIFICATION OF CHILD SUPPORT

In determining whether there has been a change in circumstances warranting a modification of a parent's child support obligation, the Court must consider several factors including the increased needs of the children, the increased costs of living insofar as it relates in greater expenses for the children, a loss of income or assets by a parent or a substantial improvement in the financial condition of a parent, and the current and prior lifestyles of the children. Under the circumstances of this case, the significant increase in the father's income between the date of the Stipulation and the time of the application for modification, as well as a showing of increased expenses related to the children, the depletion of the mother's assets and her substantial debt, warranted a new determination

and an upward modification of the father's child support. Note: The Stipulation of Settlement provided that if the father earned more than \$230,000 gross income in 2013 or any year thereafter, the mother would have the right to petition for an increase in child support. At the hearing on the petition evidence was presented that the father's wages were more than \$500,000 in 2013. (Matter of Calenda v. Calenda, 2018, N.Y. Slip Op 00830).

MAINTENANCE

In a 26 year marriage, Supreme Court providently exercised its discretion in awarding the plaintiff/wife maintenance for a period of eight years in the sum of \$2,200 per month for the first five years and the sum of \$1,000 per month for the last three years. (Culen v. Culen, 2018 N.Y. Slip Op 00541).

PROSPECTIVE INHERITANCE

The Court properly considered as one factor in awarding maintenance to the plaintiff the inheritance that the defendant was entitled to receive from his aunt's estate, even though the inheritance was the defendant's separate property and not subject to equitable distribution. (Culen id).

PERCENTAGE OF DISTRIBUTION

Equitable distribution does not mandate an equal division of marital property. A trial court is vested with broad discretion in making an equitable distribution of marital property. The plaintiff was properly awarded a 25% share of the value of defendant's business, Hudson, valued as of the date of commencement. (Culen, id).

SEPARATE PROPERTY

Defendant's claim that he was entitled to a separate property credit for his contributions to the down payment of the marital residence is without merit. The defendant's self-serving trial testimony that his aunt gave him a check in the sum of \$50,000 and that his uncle gave him the sum of \$10,000 and that he used these funds towards the down payment was unsupported by documentary evidence and insufficient to establish his entitlement to a separate property credit. (Culen id.; see also, Marshall v. Marshall, 91 A.D.3d 610, 937 N.Y.S.2d 253).

COUNSEL FEES

In exercising a trial courts discretion toward counsel fees a court must consider the financial circumstances of the parties, the circumstances of the case as a whole, the relative merits of the parties position and whether either party has delayed the proceedings or engaged in unnecessary litigation. Plaintiff was entitled to an award of attorney's fees in the amount of \$90,000 based upon, inter alia, the relative merit of the parties' positions and the defendant's obstructionist tactics which unnecessarily prolonged the litigation. (Culen v. Culen, 2018 N.Y. Slip Op 00542).

CUSTODY

In making an initial child custody determination the Court must consider which alternative will best promote stability; the available home environment; the past performance of each parent; each parent's relative fitness including his or her ability to guide the child, provide for the child's overall well-being and foster the child's relationship with the non-custodial parent as well as the child's desires. Here, the Supreme Court's determination awarding residential custody of the parties' children to the mother lacked a sound and substantial basis in the record and as such, was reversed. The father was awarded residential custody of the children. Relevant facts showed that the mother struck the father on more than one occasion in the presence of the children and the mother described the father as being a pedophile toward their daughter, a word she used at separate times and in reports to the police and in an interview with the court appointed forensic evaluator. There was no evidence in the record that the father engaged in any pedophilic or similar conduct toward the daughter. A parent's false accusation of sexual abuse by the other parent constitute conduct so inconsistent with the best interests of the child as to per se raise a strong probability that the parent is unfit to act as a custodial parent. (Altieri v. Altieri, 156 A.D.3d 667).

RECISSION

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. An agreement is not unconscionable merely because in retrospect some of its provisions were improvident or one-sided. (Humes v. Humes, 156 A.D.3d 604).

DOWNWARD MODIFICATION OF CHILD SUPPORT

A parent seeking a downward modification of a child support obligation must submit competent proof that a termination of employment occurred through no fault of the parent and the parent has diligently sought re-employment commensurate with his or her earning capacity. A parent's loss of employment may constitute a substantial change in circumstances warranting a modification of support. In this case, the Support Magistrate denied the father's application for a downward modification of child support since the evidence submitted relating to his unemployment showed that he voluntarily left his job to follow his girlfriend to Florida. Thus, the father failed to establish that the termination of his employment did not occur through his own fault. (Matter of Lindsay v. Lindsay-Lewis, 156 A.D.3d 642).

DOWNWARD MODIFICATION OF CHILD SUPPORT

Although a petition for a downward modification of child support may be granted based on a parents loss of employment due to an injury or illness, it may be denied if the parent still has the ability to provide support through some other type of employment. A party seeking modification on the basis of loss of employment due to illness must show that he or she has made a good faith effort to obtain other employment commensurate with his or her abilities or qualifications. Application for a downward modification denied. Father failed to present any competent medical evidence in support of his testimony that he is permanently and completely disabled and unable to obtain gainful employment to meet his child support obligations. (Matter of Muller v. Muller, 156 A.D.3d 644; see also, Moran v. Moran, 56 A.D.3d 675, 869 N.Y.S.2d 107).

GRANDPARENT CUSTODY

Pursuant to DRL §72(2)(a), a grandparent may commence a proceeding for custody of his or her grandchild based upon the existence of extraordinary circumstances. However, in a child custody dispute between a parent and a non-parent, the parent has a superior right to custody that cannot be denied unless the non-parent first establishes that the parent has relinquished that right due to surrender, abandonment, persistent neglect, unfitness or other extraordinary circumstances. (Matter of Sellers v. Brown, 155 A.D.3d 1047; citing Matter of Bennett v. Jeffreys, 40 N.Y.2d 543). A parent cannot be displaced merely because a child has bonded psychologically with a non-parent.

CONTEMPT

The defendant established by clear and convincing evidence that there was an unequivocal mandate of the Court that the plaintiff pay the sum of \$1,400 per month in *pendente lite* child support, that the plaintiff had knowledge of that mandate, that the plaintiff disobeyed the mandate and this disobedience prejudiced the defendant. Sufficient to hold the plaintiff in civil contempt. The defendant was not required to show that she had exhausted other enforcement remedies before moving to hold the plaintiff in contempt. (Avraham v. Avraham, 155 A.D.3d 931).

ORDER OF PROTECTION

In a family offense proceeding, the 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 Family Court and its determinations regarding the credibility of witnesses are entitled to great weight on appeal such that they will not be disturbed unless clearly unsupported by record. Petitioner failed to establish by a fair preponderance of the evidence that the appellant committed the family offense of aggravated harassment and assault in the third degree. Both of those family offenses require proof of physical injury which is defined as impairment of physical condition or substantial pain. Contrary to the Family Court's determination, the evidence presented at the fact finding hearing failed to adequately demonstrate that the petitioner suffered a physical injury as a result of the conduct alleged in the petition. (Penal Law §10.00(9); Penal Law §120.00(1); Penal Law §240.30(3) (Matter of Stanislaus v. Stanislaus, 155 A.D.3d 963).

GRANDPARENT VISITATION

When a grandparent seeks visitation pursuant to DRL §72(1), the Court must make a two part inquiry. First, it must determine whether the grandparent has standing based upon equitable considerations. If it concludes that the grandparent has established standing to petition for visitation, then the Court must determine if visitation is in the best interest of the child. In considering whether a grandparent has standing an essential part of the inquiry is the nature and extent of the grandparent-grandchild relationship. The Court must also consider the nature and basis of the parents' objection to visitation. In cases where a grandparent relationship has been frustrated by a parent, the grandparent must show that he or she has made a sufficient effort to establish a relationship with the child so that the Court perceives the matter as one deserving the Court's intervention. The

evidence necessarily will vary in each case but what is required of grandparents must always be measured against what they could reasonably have done under the circumstances. Grandparent lacked standing and petition dismissed. (Matter of McAvoy v. McAvoy, 155 A.D.3d 867).

ORDER OF PROTECTION

The determination of whether a family offense was committed is a factual issue to be resolved by the hearing court and its determination regarding the credibility of witnesses are entitled to great weight on appeal unless clearly unsupported by the record. A fair preponderance of the evidence supported a finding that the appellant committed the family offense of harassment in the second degree. The appellant engaged in a course of conduct consisting of screaming at and striking the other party on his face, neck and back with both of her hands which alarmed or seriously annoyed him and served no legitimate purpose. (Matter of Shank v. Shank, 155 A.D.3d 875).

FAMILY COURT COUNSEL FEES

The Family Court has the authority to award an attorney's fee in custody proceedings when warranted under the circumstances of the case. An award of an attorney's fee is to be based upon the financial circumstances of the parties and the circumstances of the case as a whole which may include the relative merit of the parties positions but should not be predicated solely on "who won and who lost". Family Court improperly exercised its discretion in denying the mother's motion for an award of attorney's fees, denial reversed and matter remitted to the Family Court for a determination of the amount of attorney's fees to be awarded to the mother. (Matter of Tundis v. Tundis, 155 A.D.3d 882).

ATTORNEY'S FEES

Order of the Supreme Court awarding counsel fees only in the sum of \$5,000 on account of an application for \$74,682 modified on the law and in the exercise of discretion by increasing the award from the sum of \$5,000 to the sum of \$60,000. Here, considering the disparity of the parties' income, and the plaintiff's undisputed contentions that the defendant willfully delayed the litigation by failing to comply with court-ordered obligations and payments, the plaintiff should have been awarded more than \$5,000 in attorney's fees. (Straub v. Straub, 155 A.D.3d 919).

EQUITABLE DISTRIBUTION

Property acquired during the marriage is presumed to be marital property. The plaintiff failed to meet her burden of establishing that the defendant dissipated marital assets. A home equity line of credit was opened by both parties in the amount of \$200,000 in 2005, three years prior to the commencement of the action. The available balance at the time of trial was \$500. The defendant testified at trial that the funds were used to pay bills. At the time of trial, the defendant was receiving disability benefits which amounted to \$2,164, a month. The Court properly directed that the parties were equally responsible for the repayment of the HELOC loan with the exception of \$33,500 that the defendant used to pay his own counsel fees. (Leva v. Leva, 155 A.D.3d 707).

ARTICLE 78

Proceeding pursuant to CPLR Article 78 in the nature of a prohibition to prohibit the respondents from committing any acts that are in violation of the US Constitution and the New York State Constitution and in the nature of Mandamus to compel the respondent Justice Lorintz to vacate a prior restraint on free speech and a restraint on liquid accounts. Motion denied. (Matter of Pappas v. Nassau County Supreme Court, 155 A.D.3d 628).

DISQUALIFICATION OF COUNSEL

To succeed on a motion to disqualify counsel on the ground that he or she may be called as a witness, the movant has the burden of demonstrating that the testimony of the opposing parties counsel is necessary to his or her case and that such testimony would be prejudicial to the opposing party. The disqualification of an attorney is a matter that rests within the sound discretion of the Court. The Supreme Court properly exercised its discretion in granting that branch of the plaintiff's motion to disqualify counsel from representing the defendant since counsel was the only person with knowledge of certain facts which are material to a pending hearing in this action involving his conduct as an escrow agent and his alleged disregard of a Sheriff's execution and restraining notice served upon him. (Baram v. Baram, 154 A.D.3d 912).

INCOME EXECUTION ORDERS

CPLR 5241 which governs income executions for support enforcement created a broad expansion of benefits available to a creditor. While an ordinary income execution is limited to a maximum of 10% of income, the maximum percentage available for garnishment pursuant to CPLR 5241 is between 50% and 65%, depending upon the

debtors other support obligations and the extent and duration of the support arrears. (CPLR 5241(g)). In this case, the percentage available for garnishment was 65% of the plaintiff's disposable earnings given that the parties had stipulated that the plaintiff/husband owed support arrears of approximately \$1.6 million and had stipulated to the entry of judgment against him in that amount.

Appellate Division modified pursuant to CPLR 5240. This provision provides the Court with the authority to make an order denying, limiting or modifying the use of any enforcement procedure. CPLR 5240 grants Courts broad discretionary power to issue protective orders to control and regulate the enforcement of money judgments under CPLR Article 52 to prevent unreasonable annoyance, expense, disadvantage or other prejudice to any person or the Court. Notwithstanding his history of arrears, plaintiff demonstrated that at the time of his motion a 65% income execution was unduly prejudicial. Defendant had received the sum of \$511,000 towards the arrears. The plaintiff/husband demonstrated that the 65% income execution provided the defendant/wife with a monthly payment of approximately \$7,500 per month and that the plaintiff received only about \$3,000 per month after garnishment and other deductions. His monthly expenses were approximately \$5,000 which included the sum of \$575 per month for a student loan payment on behalf of one of the parties' children. On this record, the percentage for the income execution was modified from 65% to 40% of plaintiff's disposable earnings. (Fishler v. Fishler, 154 A.D.3d 917).

CONTRACT INTERPRETATION

A Separation Agreement or Stipulation of Settlement is a contract, the terms of which are binding on the parties. In interpreting a 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 particular interpretation of the expressions of the parties' intent 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 from the four corners of the agreement and not from extrinsic evidence. In this case, the plain meaning of the Stipulation of Settlement required that the plaintiff receive an award of \$165,000 representing her share of funds from a 401(K) account. (Iannuzzo v. Iannuzzo, 154 A.D.3d 923).

DEFAULT ORDERS

Although the Courts have adopted a liberal policy which respect to vacating defaults in matrimonial actions, it is still incumbent upon a defendant seeking to vacate a default judgment pursuant to CPLR 5015(a)(1) to demonstrate a reasonable excuse for his or her default and the existence of a potentially meritorious defense. CPLR 5015(a)(1)

provides that the motion must be made within one year after service of a copy of the Judgment or Order with written Notice of Entry upon the moving party. Here, the defendant's motion was untimely since it was not made within one year after service. While the Supreme Court has the inherent authority to vacate the default judgment in the interest of justice, even where the statutory one year period has expired, the defendant herein failed to submit any evidence to support her claim that she was unable to participate in the action due to mental and physical illness and therefore, failed to demonstrate a reasonable excuse for the delay. Supreme Court Order granting motion to vacate default reversed and in the exercise of discretion, motion denied. (Dankenbrink v. Dankenbrink, 154 A.D.3d 809).

REPLY PAPERS ON A MOTION

A movant may not meet his or her burden on a motion by submitting evidence in a Reply. (Dankenbrink, Id; see also, Samuelson v. Samuelson, 108 A.D.3d 612, 969 N.Y.S.2d 143). The plaintiff's statements with respect to the needs of the child were raised in his Reply papers and therefore, were not properly before the Court.

DOWNWARD MODIFICATION OF CHILD SUPPORT

A party seeking modification of a child support order has a burden of establishing the existence of a substantial change of circumstances warranting the modification. A party seeking a downward modification of child support based upon a loss of employment has the burden of proof to demonstrate that his or her employment was terminated through no fault of his or her own and that he or she made diligent efforts to secure employment commensurate with his or her education, ability, and experience. Motion denied and Affirmed. Contrary to the father's contention, he failed to present competent medical evidence in support of his testimony that a diagnosis of bi-polar disorder interfered with his ability to obtain gainful employment to meet his child support obligation. (Matter of Hackett v. Hackett, 154 A.D.3d 751).

UPWARD MODIFICATION OF CHILD SUPPORT

The parties divorced in 2014 and the Stipulation of Settlement was incorporated but not merged in the Judgment of Divorce. The agreement provided that the father would pay the mother \$500 per month in child support. After the divorce, the father began collecting social security benefits in addition to his salary which caused his income to increase by more than 15%. Mother petitioned for an upward modification of child support which the Support Magistrate granted on the basis of the father's increased income.

Section 451 of the Family Court Act allows a Court to modify to an order of child support without requiring a party to allege or demonstrate a substantial change in circumstances, inter alia, where either party's gross income has changed by 15% or more since the order was entered or modified. (Family Court Act, Section 451(3)(b)(ii)). Although this statutory ground for modification is not available in the event that the parties specifically opt out in a validly executed Stipulation, the parties in this case did not opt out of that provision. (Matter of Walsh v. Walsh, 154 A.D.3d 767).

COLLEGE ROOM AND BOARD CREDIT

Father applied for a credit against his child support obligation for the money that he contributed toward his daughter's college room and board. Family Court denied the application. Affirmed. The Stipulation did not provide for such a credit, had separate and distinct section for child support and college expenses and categorized college room and board as a college expense rather than as a component of child support. (Matter of Walsh v. Walsh, 154 A.D.3d 767).

STIPULATION OF SETTLEMENT

A Stipulation of Settlement entered into by the parties to a divorce proceeding constitutes a contract between them subject to the principles of contract interpretation. Where the intention of the parties is clearly and unambiguously set forth, effect must be given to the intent as indicated by the language used. A Court may not write into a contract conditions that the parties did not insert by adding or exercising terms under the guise of construction and it may not construe the language in such a way as would distort the contracts apparent meaning. (Toscano v. Toscano, 153 A.D.3d 1440; citing Slatt v. Slatt, 64 N.Y.2d 966).

LEGAL MALPRACTICE

In a legal malpractice action against an attorney which alleged malpractice while representing her in a divorce action, the Court properly determined that the continuous representation doctrine was not applicable to toll the statute of limitations. There was no evidence that the parties contemplated further representation of the defendant by the plaintiff after the entry of the Judgment of Divorce in the divorce action. The fact that the defendant again retained the plaintiff attorney in May 2007 (Judgement of Divorce entered on February 27, 2004) to represent her in a subsequent litigation with her former husband's estate which involved the interpretation of the divorce settlement agreement drafted by the

plaintiff did not render the representation continuous for purposes of tolling the statute of limitations. (Verkowitz v. Ursprung, 153 A.D.3d 1443).

Note: Our retainers clearly provide that we render services only until the Judgment of Divorce. Once the Judgment of Divorce is entered, we send a letter to the client, in writing, advising that our representation is concluded. The retainers further expressly provide that this retainer does not include any services with respect to QDROs. There must be a clear line for the conclusion of representation for purposes of the statute of limitations. It cannot be open-ended.

EQUITABLE DISTRIBUTION

The parties were married in November 1989 and there were three children. The husband is a 50% partner in a commodities brokerage firm earning approximately \$1.5 million per year. The wife stopped working in 1996 to be a homemaker and primary caretaker of the parties' children. The parties separated in May 2010. An action was commenced in 2011, which was just shy of a 22 year marriage. Trial Court awarded the defendant 15% of the plaintiff's business interest, otherwise equally divided the marital estate and granted defendant 6 years of maintenance.

There is no uniform rule for fixing the value of a going business and evaluation of a business for equitable distribution purposes, which is an exercise properly within the fact finding power of the trial court guided by expert testimony. The price fixed by a shareholders agreement may be considered as one factor but is not conclusive of the value of the partner's interest. Whatever valuation method is used must take into consideration inhabitations on the transfer of the corporate interest resulting from market or contractual provisions. Supreme Court properly relied on the report prepared by the neutral expert which applied at 25% discount for the lack of marketability.

In view of the defendant's indirect contributions to the business as a homemaker and primary caretaker for the three children in this long term marriage, while foregoing her own career, an award to the defendant of 25% of the value of plaintiff's interest is appropriate.

Although the plaintiff's separate premarital funds were used to purchase an interest in an apartment in Manhattan and were comingled with marital funds in a joint account, the plaintiff traced the source of the funds with "sufficient particularity" to rebut the presumption that they were marital property as a result of the comingling. Passive appreciation due to market forces remains separate property.

The amount and duration of maintenance is matter committed to the sound discretion of the trial court and every case must be determined on its own unique facts. Factors to be considered include the standard of living of the parties during the marriage, the income and property of the parties, the distribution of marital property, the duration of the marriage, health, the present and future earning capacity of both parties, and the ability of the party seeking maintenance to become self-supporting together with other factors. Supreme Court awarded maintenance for six years. Appellate Division modified to extend the award until the defendant reaches retirement age which required 12 years of maintenance in decreasing amounts per allotment. (\$12,000 for two years; \$11,000 per month for two years; \$10,000 per month for two years; \$9,000 per month for two years; \$8,000 per month for two years; \$7,000 per month for following two years). (Nadasi v. Nadel-Nadasi, 153 A.D.3d 1346).

OPEN COURT STIPULATION

Stipulations of Settlement are favored by the Courts and not lightly cast aside. This is all the more so in the case of “open court” stipulations pursuant to CPLR 2104 where strict enforcement not only serves the interest of efficient dispute resolution but also is essential to the management of court calendars and the integrity of the litigation process. Only where there is a cause sufficient to invalidate a contract such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a Stipulation made during litigation. Here the defendant/husband failed to come forward with record evidence to support his assertions that the clear and unambiguous Stipulation was the produce of mutual mistake or of a unilateral mistake induced by a fraudulent misrepresentation by the plaintiff. Supreme Court properly denied the defendant’s motion to vacate the Stipulation. (McCloy v. McCloy, 153 A.D.3d 1252; but see, Little v. County of Nassau, 148 A.D.3d 797, 48 N.Y.S.3d 723. A mere agreement to agree is unenforceable.

CIVIL CONTEMPT

A motion to punish a party for civil contempt is addressed to the sound discretion of the Court. To prevail on a motion to hold a party in civil contempt, the movant must establish by clear and convincing evidence (1) that a lawful order of the Court was in effect, clearly expressing an unequivocal mandate; (2) the appearance with reasonable certainty that the order was disobeyed; (3) that the party to be held in contempt had knowledge of the Court Order; and (4) prejudice to the right of a party to the litigation. (citing El-Dehdan v. El-Dehdan, 978 N.Y.S.2d 239).

Once the moving party makes this showing, the burden shifts to the alleged contemnor to refute the movant’s showing or to offer evidence of a defense such as an

inability to comply with the order. A hearing is required only if the papers in opposition raise a factual dispute as to the elements of civil contempt or the evidence of a defense. Motion granted without a hearing. Defendant's papers failed to raise a factual dispute warranting a hearing. (Shemtov v. Shemtov, 153 A.D.3d 1295).

MODIFICATION OF MAINTENANCE

Upon application by either party, a Court may annul or modify any prior Order or Judgment made after trial as to maintenance upon a showing of a substantial change in circumstances. The party seeking the modification of maintenance has the burden of establishing the existence of the change to warrant modification. An inheritance of significant funds can constitute a substantial change of circumstances supporting a request to modify a party's maintenance obligation. Court denied motion without a hearing. Modified. The Court should have directed suitable discovery and a hearing on that branch of the defendant's motion which was to terminate his maintenance and life insurance obligations based on a substantial change in the party's circumstances. (DRL 236(B)(9)(b)(1). No Stipulation. (Schwartz v. Schwartz, 153 A.D.3d 953).

PENDENTE LITE COUNSEL FEES

A party in a matrimonial action seeking an award of interim counsel fees must include in his or her moving papers a sworn Statement of Net Worth. Where a party fails to include a Statement of Net Worth the Court should decline to hear the motion or to deny it without prejudice to renewal upon proper papers. Contrary to the plaintiff's contention, her claim that the Supreme Court was already in possession of a copy of her Statement of Net Worth is insufficient to meet the requirements of 22 NYCRR 202.16(k). (Daich v. Daich, 153 A.D.3d 900).

EQUITABLE DISTRIBUTION

Supreme Court providently exercised its discretion in awarding the defendant/wife a 30% share of the net asset value of the husband's interest in a CPA firm. A 30% share took into account the defendant's direct and indirect involvement in the firm including her contributions as the primary caretaker for the parties' children. (Katz v. Katz, 153 A.D.3d 912).

SEXUAL ORIENTATION AND CUSTODY

Modification of an existing Court ordered custody and visitation arrangement is permissible only upon a showing that there has been a change in circumstances such that a modification is necessary to ensure the continued best interest of the children. The best interest of the children must be determined by review of the totality of circumstances. To the extent the mother's sexual orientation was raised at the hearing, we note that Courts must remain neutral toward such matters and that the focus remain on the continued best interest and welfare of the children. The mother identified as gay. (Weisberger v. Weisberger, 154 A.D.3d 41). Supreme Court's determination to modify the Stipulation so as to award the father sole legal and residential custody of the children as well as final decision making authority over medical and dental issues lacked a sound and substantial basis in the record.

CONTRACT CONSTRUCTION

Pension benefits acquired by either spouse during the marriage constitute marital property subject to equitable distribution upon divorce. However, unless otherwise provided, the marital property includes only that portion of the pension benefits which accrued during the marriage and prior to the commencement of the divorce action. Here, the parties Separation Agreement provided that the parties desired to settle their financial property and other rights arising out of the marriage "and otherwise". The Separation Agreement provided that the plaintiff/husband was to pay the defendant/wife "a share of all payments" received by him. Thus, pursuant to the unambiguous terms of the Separation Agreement, the defendant is entitled to share a portion of the 401(K) pension distributions without regard to when the contributions to the 401(K) pension were earned or acquired. (Santiago v. Santiago, 153 A.D.3d 752).

MAINTENANCE

The amount in 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 overriding purpose of a maintenance award is to give the spouse economic independence and it should be award for a duration that would provide the recipient with enough time to become self-supporting. Trial Court awarded nine years of maintenance from 2014 through 2023 in a 22 year marriage. Amounts decreased from an initial payment of \$5,000 per month to \$3,000 per month near the conclusion of the award. (Galanopoulos v. Galanopoulos, 152 A.D.3d 745).

EQUITABLE DISRIBUTION CREDIT

The Supreme Court providently exercised its discretion in awarding the plaintiff wife the sum of \$83,500 representing one-half of the value of funds defendant had withdrawn from a bank account. (Galanopoulos, Id.Citing Hymowitz, 119 A.D.3d 736).

TAX LIABILITY

Contrary to the husband's contention the Supreme Court did not heir in declining to consider his potential tax liabilities resulting from a future sale of real property in New Jersey. There was no evidence of an impending sale of that property and it would be inequitable to saddle the plaintiff wife with any capital gains tax liability that defendant might incur upon a sale of the property at some point in the future. Moreover, where, as here, a party fails to offer any competent evidence concerning tax liabilities the court is not required to consider the tax consequences of its award. (Galanopoulos, Id)

MAINTENANCE

The parties were married in 1975. In 2011, plaintiff husband commenced an action for a divorce. Action proceeded to a trial in March 2014 Supreme Court directed that the plaintiff husband pay maintenance to the wife in the sum of \$2,500 until she reaches 66 years of age. (Brinkmann v. Brinkmann, 152 A.D.3d 637).

MARITAL DEBT AND PET VISITATION

In general, expenses incurred prior to the commencement of a divorce action constitute marital debt and should be equally share by the parties. However, the Court has broad discretion in allocating the assets and debts of the parties in a matrimonial action and liability for the payment of marital debts need not be equally apportioned but may be distributed in accordance with the equitable distribution factors. The Court properly exercised its discretion in allocating the parties credit card debt in proportion to their respective incomes. (Minervini v. Minervini, 152 A.D.3d 666). Note: The Trial Court also awarded the husband "visitation with the parties' dog." Appellate Division deleted the provision awarding visitation with the dog.

QDRO

Although the Stipulation of Settlement between the parties failed to identify the party who would be responsible for submitting the QDRO. It is generally the responsibility of the party seeking approval of the QDRO to submit it to the Court with

Notice of Settlement. (Scheriff v. Scheriff, 152. A.D.3d 724; Citing Kraus v. Kraus, 131 A.D.3d 94).

DOCTOR PATIENT PRIVILEGE

The Supreme Court relying on the physician/patient privilege improperly precluded testimony of two witnesses, Drs. Wilkie and Riesel regarding the wife's mental health in determining custody. In a matrimonial action a party waives the physician/patient privilege concerning his or her mental or physical condition by actively contesting custody. However, there first must be a showing beyond mere conclusory statements that resolution of the custody issue requires revelation of the protected material. In this case since the defendant actively contested custody and the plaintiff made the requisite showing that resolution of the custody issue required revelation of the protected material the Court should not have precluded the testimony of the physicians regarding the defendant's mental health. (Bruzzese v. Bruzzese, 152.A.D.3d 563).

CONSTRUCTIVE ABANDONMENT

It is fundamental public policy in New York that parents are responsible for their children's support until age 21. Nevertheless, under the doctrine of constructive emancipation where "a minor of employable age and in full possession of his or her faculties voluntarily and without cause abandons a parent's home, against the will of the parent and for the purpose of avoiding parental control, that child forfeits his or her right to demand support. The burden of proof as to the emancipation is on the party asserting it. The father testified that the child voluntarily left his home against the father's will after they had an altercation. The father testified that he thereafter repeatedly told the petitioner that she was welcome to come home if she agreed to certain conditions which we find (the Appellate Division) were reasonable. The child refused. Accordingly, the father met his burden of establishing that the child voluntarily abandoned his home to avoid his parental discipline and control thereby forfeiting her right to support. (Matter of DeJesus v. DeJesus, 152 A.D.3d 585).

DISABILITY PAYMENTS/QDRO

Upon their divorce, the parties stipulated that the defendant wife would share in the plaintiff's New York City Fire Department Pension. A QDRO was signed to that effect. The plaintiff husband sustained a line of duty injury and retired on an accidental disability pension. Thereafter, the plaintiff husband moved to amend the QDRO to prevent the defendant from receiving any portion of his pension until the 20th anniversary of service on the ground that defendant was not entitled to disability payments. Supreme Court denied

the motion. The Supreme Court noted that both the Stipulation and the QDRO prohibit the ex-wife from receipt of any portion of the pension as it relates to the disability. She is not seeking anything other than what was agreed to in the Stipulation ie: a share of the husband's pension once he began receiving benefits. To the extent that a disability pension represents deferred compensation it is subject to equitable distribution. The burden of distinguishing the marital property portion of a disability pension from the separate property portion is on the recipient of the pension. Pursuant to the terms of the Stipulation the wife was entitled a share of the marital portion of the husband's pension as it represented deferred compensation. The plaintiff did not meet his burden of demonstrating that all of the pension payments he received constituted separate property. (Babinski v. Babinski, 152 A.D.3d 477).

DEFAULT PROVISIONS IN STIPULATION

We reject the husband's contention that the default payment required under a stipulation represents an unenforceable penalty rather than liquidated damages. We reach this as a question of law. Liquidated damages constitutes the compensation the parties agree should be paid in the event of a parties' default. A liquidated damage clause is enforceable if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. The Stipulation provided that in the event any of the husband's checks were dishonored by defendant's bank defendant then agreed to the immediate entry of a money judgment against him. The default amount under the Stipulation was calculated according to a formula. (Colacino v. Colacino, 152 A.D.3d 486).

RIGHT TO COUNSEL

Pursuant to a Judgment of Divorce the parties were awarded joint legal custody of two children. Mother had residential custody. Mother filed a Petition seeking permission to relocate to Arizona with the children. Father appeared in Court with assigned counsel for a scheduled Hearing. Assigned counsel requested leave to be relieved. Assigned counsel was relieved and the Hearing was adjourned so that the father could retain counsel. On the date of the Hearing the father told the Court he had retained counsel but that the attorney could not be in Court that day. Court denied his request for an adjournment and proceeded with the Hearing after stating it had no choice but to proceed. Appellate Division agrees with the father's contention that he was deprived of his statutory right to counsel. (FCA Section 262(a)(V)). Family Court should have granted an adjournment. Order reversed and matter remitted to the Family Court for a new Hearing. (Charbonneau v. Charbonneau, 151 A.D.3d 1060).

CUSTODY JURISDICTION

Father's appeal from an Order denying his Petition for visitation with the parties' daughters must be dismissed as academic since the daughters are now more than 18 years of age. (Matter of DeOliveira v. DeOliveira, 151 A.D.3d 1062).

ENFORCEABLE AGREEMENT

Parties were married in 1992, action was commenced in 2012. Prior to the commencement of the action the husband transferred title to the marital residence to his wife's sole name and received \$60,000 from her. He vacated the residence. After Trial, the Supreme Court declined to award the husband any further relief with respect to the marital residence. The marital residence was clearly marital property. The wife claimed that the transfer of the marital residence to her sole name in 2010 in exchange for \$60,000 constituted an agreement of the parties that was enforceable pursuant to the Domestic Relations Law. This was not an enforceable agreement, since a valid agreement must be in writing, signed and acknowledged. (DRL 236(B)(3)). Nevertheless, equitable distribution does not mean equal distribution and it is undisputed that the defendant receives \$60,000 for his share of the equity in the former marital residence as well as other substantial marital assets. Under the circumstances, Supreme Court promptly found that defendant received an equitable apportionment of the marital estate. (Lowe v. Lowe, 151 A.D.3d 956).

ORDER OF PROTECTION

A party in a proceeding pursuant to Family Court Act, Article VIII has a right to be represented by counsel. A party, however, may waive that right provided that he or she does so knowingly, voluntarily and intelligently. To ensure that a parties waiver of the right to counsel is valid, Family Court must conduct a "searching inquiry." There is not rigid formula but the record must demonstrate that the party has chosen to proceed without counsel despite being aware of and understanding the dangers and disadvantages of doing so. Family Court did not adequately obtain the appellant's waiver. The record shows appellant was confused and did not comprehend the Court's explanation. The Court nonetheless permitted him to proceed without counsel. The deprivation of a party's right to counsel guaranteed by Family Court Act §262 requires reversal. (Matter of Gugliara v. Gugliara, 151 A.D.3d 852).

POSTNUPTIAL AGREEMENTS

Postnuptial Agreements are contracts which require consideration. Postnuptial Agreements are generally subject to ordinary principles of contract law. The parties, as husband and wife, have a fiduciary relationship to each other. To warrant equities intervention, no actual fraud need be shown for relief will be granted if the settlement is manifestly unfair to a spouse because of the other spouses overreaching. A motion to set aside an agreement between spouses may be denied without a Hearing if the agreement is fair on its face. It cannot be said that this agreement is fair on its face. It appears that the defendant wife received no benefit from the agreement. It also appears that she relinquished all assets of the marriage, along with her inheritance rights and the right to spousal support. Where an agreement appears to be so one-sided and unfair that no rational person exercising common sense would make it and no fair and honest person would accept it there should be a Hearing to determine whether the agreement is unconscionable in substance. Matter remitted to the Supreme Court for a Hearing and a new determination on defendant's motion to set aside the parties Postnuptial Agreement. (Barclay v. Barclay, 151 A.D.3d 676).

IMPUTATION OF INCOME

In determining a support obligation the Court need not rely upon a parties own account of his or her finances but may impute income based upon other things, the parties past income, demonstrated future potential earnings, educational background or money received from friends and relatives. Where a party's testimony regarding his or her finances is not credible, the Court is justified in finding a true or potential income higher than that claimed. A Court has considerable discretion in determining whether income should be imputed to a party and the Court's credibility determinations are afforded deference on appeal. Court properly exercised its discretion in imputing income to the husband in the sum of \$65,000 per year. (Rudish v. Rudish, 150 A.D.3d 1291).

ORDER OF COMMITMENT

After an inquest, the Court found that the father willfully violated a prior order of child support and committed him to the custody of the Nassau County Correctional Facility for a period of 120 days unless he paid a purge amount of \$12,500. Order affirmed. (Matter of Leonard v. Leonard, 150 A.D.3d 1242).

COLLEGE COSTS

A parent has an obligation to provide support for his or her child's basic needs. However, support for a child's college education is not mandatory. Absent a voluntary agreement to do so, a parent may be required to provide support for his or her child's attendance at college but the determination of that obligation is dependent upon the exercise of the Court's discretion. Such college costs may be awarded based upon the circumstances of the case and of the respective parties and of the best interest of the child as justice requires. Supreme Court improperly exercised its discretion in directing that the father pay only \$5,000 per semester towards the child's college tuition. Under the circumstances, the father should have been directed to pay 50% of the child's total college tuition and expenses with a credit against his basic child support obligation for payments made towards room and board. (Fiore v. Fiore, 150 A.D.3d 1205).

SUMMER CAMP EXPENSES

The child's summer camp expenses constituted the functional equivalent of daycare expenses covered by the parties Stipulation of Settlement. The father's claim that his obligation to pay his share of the child's summer camp expenses was not triggered because he did not expressly consent to the summer camp chosen by the plaintiff for 11 consecutive summers is without merit. (Fiore, Id.)

PRENUPTIAL AGREEMENT

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. A prenuptial agreement which contains a waiver of maintenance will not preclude a party from obtaining *pendente lite* maintenance unless such an award is expressly precluded by the terms of the agreement. The parties' prenuptial agreement did not expressly preclude an award of temporary maintenance and as such, that branch of the wife's motion which was for *pendente lite* maintenance was properly granted. (Kravetz v. Kravetz, 150 A.D.3d 1214).

EQUITABLE DISTRIBUTION

While distribution of marital property must be equitable there is no requirement that the distribution of each item of marital property be on an equal basis. The equitable distribution of marital assets must be based on the circumstances of the particular case and the consideration of the statutory factors. (Almeida v. Almeida, 150 A.D.3d 1058).

DISCONTINUANCE

Under CPLR 3217(a) a party may voluntarily discontinue an action without a Court Order by serving upon all parties to the action a Notice of Discontinuance at any time before a responsive pleading is served or, if no responsive pleading is required, within 20 days after the service of the pleading asserting the claim. Where no pleadings have been served the plaintiff has the “absolute and unconditional right” to discontinue the action by serving a notice of discontinuance upon the defendant without seeking judicial permission. (A.K. v. T.K., 150 A.D.3d 1091).

EXTENSION OF TIME

Pursuant to CPLR 306-b a Court may in the exercise of its sound discretion grant a motion for an extension of time with which to effect service for good cause shown or in the interest of justice. Good cause will not exist where a plaintiff fails to make any effort at service. In determining whether an extension of time is warranted in the interest of justice, a Court may consider inter alia diligence or lack thereof...the statute of limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff’s request for the extension of time and prejudice to defendant. Here the plaintiff made no effort at timely service and the defendant’s litigation tactics and alleged misrepresentations did not warrant an extension of time in the interest of justice. (A.K. v. T.K., Id.).

UCCJEA

Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act a Court in the State that has made an initial custody determination has exclusive continuing jurisdiction over that determination until it finds, as relevant here, that the child does not have a significant connection with New York and substantial evidence is no longer available in this State concerning the child’s care, protection, training and personal relationships. Family Court properly determined that it should relinquish jurisdiction where the subject children have lived with the mother in Colorado since October 2014, do not have a significant connection with New York and substantial evidence is no longer available in the State concerning the children. (Matter of Daniels v. Daniels, 150 A.D.3d 850).

UPDATED FORENSIC REPORT

Supreme Court denied the plaintiff's motion to strike an updated forensic mental health report or in the alternative for leave to cross-examine the court-appointed forensic expert on the updated forensic report. The same Order granted that branch of the defendant's cross-motion, which was to modify prior Orders of custody and to award him sole legal and physical custody of the party's child. In a prior Order dated July 2, 2014, the Supreme Court granted that branch of the defendant's cross-motion to award him sole legal and physical custody of the child. The Court had conducted a 44 day Hearing on the issue of change of custody. Prior Order was reversed by the Appellate Division, since the Supreme Court had failed to conduct an in-camera examination of the child and had relied upon a forensic report that by the date the Court issued its determination that was more than two and a half years old. Upon remitter the forensic evaluator performed a new evaluation and submitted an updated forensic report. However, in receiving the updated report pursuant to this Court's Order, the Supreme Court should have permitted the plaintiff to cross-examine the forensic evaluator with respect to the updated report. Accordingly, the matter was again remitted to the Supreme Court for the sole purpose of permitting cross-examination of the forensic evaluator with respect to the updated report. Thereafter, the Supreme Court shall issue "a report" setting forth its findings derived from the cross-examination and setting forth whether the testimony received would have changed its determination as set forth in its Order dated February 29, 2016. Pending receipt of the Supreme Court's "report" we hold in abeyance the appeals. The Supreme Court shall file said report no later than 45 days from the date of this Appellate Division Decision. (E.V. v. R.V., 153 A.D.3d 580).

ORDER OF PROTECTION

Parties were the parents of a child. Mother filed a Family Offense Petition against the father and obtained a Temporary Order of Protection. Thereafter, she filed a Violation Petition alleging that the father violated the temporary Order of Protection. When the parties appeared in Family Court on the Petitions, mother withdrew her Family Offense Petition and the matter proceeded to a Fact-Finding Hearing on the Violation Petition. The Family Court was not required to dismiss the Violation Petition based on the mother's withdrawal of the Family Offense Petition. However, the Court erred in granting a two year Order of Protection as the competent evidence at the Fact Finding Hearing failed to establish that the father willfully violated the Temporary Order of Protection. (Matter of Santiago v. Santiago, 2018 NY Slip. Op. 01193, February 21, 2018).

MAINTENANCE CURRENT INCOME CAP

The new “cap” for maintenance guidelines is \$184,000.