

What Every Mental Health Professional Needs to Know About Divorce Law

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I- Introduction and Overview

A. Introductions (5 minutes)

- Chaim Steinberger
- Joy Dryer
- Summary of agenda - We will:
 1. Give you an outline and general understanding of divorce law and the issues that may be involved in a divorce action, so that:
 - a. You are aware of legal issues that have ramifications for your patients;
 - b. You are sensitive about when a legal professional needs to be consulted, and when your patient is treading on sensitive ground and might require legal advice to avoid trouble or protect his/her interests;
 - c. You are sensitive to legal issues and sufficiently aware to avoid giving legal advice yourself;
 - d. You can know, even when your patient thinks s/he has no options, that a skilled lawyer may be able to help;
 2. Discuss different conflict resolution processes. We will ask you for your participation, thoughts and experiences about what characteristics and considerations are important in the selection of a dispute resolution process. We will review the characteristics of each of:
 - a. [informal] negotiation;
 - b. mediation;
 - c. arbitration;
 - d. litigation;
 - e. collaboration; and
 - f. capitulation.

Goal: So that you can help your patients consider the characteristics of each, and help them work through which one is right for each of them.
 3. Your interaction with the legal system. What are your rights and obligations as a mental health professional, when dealing with the legal system.

B. Case Study

You are in session with this 36 year old, married, woman. She has two children, ages three and one. She's been married for 6 years, though together for 10.

She is miserable in the marriage and feels trapped. She'd like to leave but thinks she can't do so. She gave up her job and career when her first child was born.

She tells you about an affair she's having, and the joy she gets from it. Her husband, as best you know, has been faithful to her, though he works long hours (at a family business) and she feels neglected by him.

She doesn't know anything about the family's finances (Husband took care of it all) or what he owns. She feels like she has no choices.

C. Agenda

D. Disclaimer(s):

- What this seminar is not - It is not specific legal advice on an actual issue in an ongoing situation. There may be more facts that are necessary for the lawyer to know before a considered opinion is rendered. So, while we will discuss general issues of law and how they relate to your practice, you should consult privately with the speakers or another competent professional for advice about a specific situation.
 - This seminar will not, of course, turn you into lawyers, give you every nuance of every issue, or make you competent to render legal advice to your patients. We will, however, cover general concepts and you will get an idea of the complexities and issues involved.
-

II - Presentation Material

A. Legal Issues Involved in Divorce

1. Grounds for Divorce -

New York Domestic Relations Law section 170 allows for six (6) grounds for divorce:

- (i) Cruel & Inhuman treatment
- (ii) Abandonment for one or more years;
- (iii) Confinement (imprisonment) for 3 consecutive years;
- (iv) Adultery;
- (v) Lived separate & apart pursuant to a judgment of separation;
- (vi) Lived separate & apart pursuant to a separation agreement; and

effective October 12, 2010, for a seventh (“no-fault”) ground:

- (vii) the “breakdown of the marriage.”

2. Equitable Distribution of Marital property

Concepts:

Separate property;

Marital property;

What are they and how are they dealt with;

Can one be converted (or “transmuted”) to the other?

Philosophy:

Marriage is a physical, emotional, and also financial partnership.

Domestic Relations Law section 236[B][1][c] and [d] defines marital and separate property:

Marital property is generally defined as

all property acquired by either spouse from the date of the marriage until the date of the commencement of the divorce action.

Separate property is:

- (i)
 - a. property owned by either spouse *before* their marriage;
 - b. property *inherited* by either spouse;
 - c. property received by a spouse as a *gift* from someone *other than the other spouse*;

- (2) Any personal injury award;

- (3)
 - a. Property received in exchange for separate property,
 - b. The *increase in value* of separate property
unless [*and this is a big UNLESS*]
the appreciation is due to the “contributions or efforts of the other spouse.”
Price v. Price, 69 NY2d 8, 511 NYS2d 219 (1986).

- (4) Property excepted by an *agreement of the parties* (pre- or post-nuptial agreement);

Distribution of Property:

Separate property - remains with its owner;

Marital property - is divided by the Court.

The process used: *Equitable distribution*.

“Equitable” distribution does not [necessarily?] mean “equal” distribution, *Kelly v. Kelly*, 69 AD3d 577, 892 NYS2d 185 (Second Dept., 2010).

The statute provides for thirteen (13) factors the Court must consider in distributing marital property, including the catch all “any other factor” the Court “finds just and proper.”

Generally, in a long-term marriage, there is a presumption of a 50/50 division, *Kelly, supra*, but it’s not a hard-and-fast rule.

13 Equitable Distribution Factors

DRL § 236[B][5][d] provides:

d. In determining an equitable disposition of property under paragraph c, the court shall consider:

- (1) the **income and property of each party** at the time of marriage, and at the time of the commencement of the action;
- (2) the **duration of the marriage** and the **age and health of both parties**;
- (3) the need of a custodial parent to occupy or own the **marital residence** and to use or own its household effects;
- (4) the **loss of inheritance** and pension rights upon dissolution of the marriage as of the date of dissolution;
- (5) any **award of maintenance** under subdivision six of this part;
- (6) any equitable claim to, interest in, or direct or **indirect contribution** made to **the acquisition of** such marital property **by the party not having title**, including joint efforts or expenditures and contributions and services as a **spouse, parent, wage earner and homemaker**, and to the **career or career potential of the other party**;
- (7) the **liquid or non-liquid character of all marital property**;
- (8) the probable **future financial circumstances** of each party;
- (9) the impossibility or **difficulty of evaluating** any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;
- (10) the **tax consequences** to each party;
- (11) the **wasteful dissipation of assets by either spouse**;
- (12) any **transfer or encumbrance** made in **contemplation of a matrimonial action** without fair consideration;
- (13) **any other factor** which the court shall expressly find to be just and proper.

DRL § 236[B][5][d].

Marital property, therefore, generally includes the following large-ticket items, and this scheme therefore allows spouses to negotiate (*i.e.*, fight over) all of the following:

- ★ the parties' home;
- ★ any other real estate acquired by the parties during the marriage;
- ★ any businesses acquired, built, or improved during the marriage, *Hartog v. Hartog*, 85 NY2d 36, 623 NYS2d 537 (1995);
- ★ any pensions accrued during the marriage,

Different types of pensions -

“Defined Benefit” Plans

valuation and distribution issues;

“Defined Contribution” Plans

- ★ and, *for New York residents only*, the value of any degrees earned during the marriage.

Leading Court of Appeals cases:

O'Brien v. O'Brien, 66 NY2d 576, 498 NYS2d 743 (1985)

McSparron v. McSparron, 87 NY2d 275, 639 NYS2d 265 (1995)

Grunfeld v. Grunfeld, 94 NY2d 696, 709 NYS2d 486 (2000)

Three step process in determining the value of the license, usually requires professional valuation experts;

- ★ any increase in value of separate property due to the efforts (direct or indirect) of the non-titled spouse, *Hartog v. Hartog*, 85 NY2d 36, 623 NYS2d 537 (1995);

- valuation issues

- ★ Transmutation issues – occurs, generally, when separate property is commingled with marital property.

Litvak v. Litvak, 63 AD3d 691, 880 NYS2d 690 (Second Dept., 2009)– \$193,000 inherited by husband from his grandfather deemed marital property because it was commingled with marital assets.

– defenses to transmutation theory;

– credits available to transmuted property;

- ★ Should fault factor into equitable distribution?

O'Brien v. O'Brien, 66 NY2d 576, 498 NYS2d 743 (1985) - "Plaintiff also contends that the trial court erred in excluding evidence of defendant's marital fault on the question of equitable distribution. Arguably, the court may consider marital fault under factor 10, 'any other factor which the court shall expressly find to be just and proper.' Except in egregious cases which shock the conscience of the court, however, it is not a 'just and proper' factor for consideration in the equitable distribution of marital property. That is so because marital fault is inconsistent with the underlying assumption that a marriage is in part an economic partnership and upon its dissolution the parties are entitled to a fair share of the marital estate, because fault will usually be difficult to assign and because introduction of the issue may involve the courts in time-consuming procedural maneuvers relating to collateral issues." (citations omitted.)

3. Maintenance (alimony, spousal support)

- Temporary;
 - Permanent;
 - Standards:
 1. career sacrifice
 2. contributions to spouse's career
-

Use this worksheet to determine the amount of child support to be paid by application of the Child Support Standards Act ("*CSSA*"). Note: Words in bold italics are defined terms.

1. Case Name: _____
2. Court & Index/Docket Number: _____
3. Today's Date: 10/05/10
4. Last year for which tax return was filed (or should have been filed): _____
5. The children of the two parties who are currently entitled to receive support are:

Name	Date of Birth	Age	Social Security No.

6. "***Mother's Child Support Income***":

- | | | |
|----|--|---------------|
| a. | Last year <u>2009</u> earned income | _____ |
| b. | Less FICA of _____ | - _____ |
| | (Social Security) 6.2% up to \$97,500 | |
| | Medicare <u>1.45%</u> | \$ 0 |
| | 7.65%) | |
| c. | Less New York City income tax | - _____ |
| d. | Total <i>Mother's Child Support Income</i> | = \$ <u>0</u> |

7. "***Father's Child Support Income***":

- | | | |
|------|--|------------------|
| i. | Last year _____ earned income | _____ |
| ii. | Less FICA of _____ | - _____ |
| iii. | Less New York City income tax | - _____ |
| iv. | Total <i>Father's Child Support Income</i> | = _____ <u>0</u> |

8. **Lesser of**

(a)
30% of payor income
- 20% of payee income

(b)
Combined income x 40%
- Payee Income

DRL §236 [B] [5-a] [e] [1]

(1) The court shall order the presumptive award of temporary maintenance in accordance with paragraphs c and d of this subdivision, unless the court finds that the presumptive award is unjust or inappropriate and adjusts the presumptive award of temporary maintenance accordingly based upon consideration of the following factors:

- (a) the standard of living of the parties established during the marriage;
- (b) the age and health of the parties;
- (c) the earning capacity of the parties;
- (d) the need of one party to incur education or training expenses;
- (e) the wasteful dissipation of marital property;
- (f) the transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
- (g) the existence and duration of a pre-marital joint household or a pre-divorce separate household;
- (h) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;
- (i) the availability and cost of medical insurance for the parties;
- (j) the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity or ability to obtain meaningful employment;
- (k) the inability of one party to obtain meaningful employment due to age or absence from the workforce;
- (l) the need to pay for exceptional additional expenses for the child or children, including, but not limited to, schooling, day care and medical treatment;
- (m) the tax consequences to each party;
- (n) marital property subject to distribution pursuant to subdivision five of this part;
- (o) the reduced or lost earning capacity of the party seeking temporary maintenance as a result of having foregone or delayed education, training, employment or career opportunities during the marriage;
- (p) the contributions and services of the party seeking temporary maintenance as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and
- (q) any other factor which the court shall expressly find to be just and proper.

(2) Where the income of the payor exceeds the income cap:

(a) the court shall determine the guideline amount of temporary maintenance for that portion of the payor's income that is up to and including the income cap according to subparagraph one of this paragraph, and, for the payor's income in excess of the income cap, the court shall determine any additional guideline amount of temporary maintenance through consideration of the following factors:

- (i) the length of the marriage;
- (ii) the substantial differences in the incomes of the parties;
- (iii) the standard of living of the parties established during the marriage;
- (iv) the age and health of the parties;
- (v) the present and future earning capacity of the parties;
- (vi) the need of one party to incur education or training expenses;
- (vii) the wasteful dissipation of marital property;
- (viii) the transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
- (ix) the existence and duration of a pre-marital joint household or a pre-divorce separate household;
- (x) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;
- (xi) the availability and cost of medical insurance for the parties;
- (xii) the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity or ability to obtain meaningful employment;
- (xiii) the inability of one party to obtain meaningful employment due to age or absence from the workforce;
- (xiv) the need to pay for exceptional additional expenses for the child or children, including, but not limited to, schooling, day care and medical treatment;
- (xv) the tax consequences to each party;
- (xvi) marital property subject to distribution pursuant to subdivision five of this part;
- (xvii) the reduced or lost earning capacity of the party seeking temporary maintenance as a result of having foregone or delayed education, training, employment or career opportunities during the marriage;
- (xviii) the contributions and services of the party seeking temporary maintenance as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party; and
- (xix) any other factor which the court shall expressly find to be just and proper.

4. Child Custody

Concepts:

Legal Custody;

Physical (residential) custody;

What are they, and how are they determined by the Court?

Parental Access (visitation);

Move away issues;

Parental alienation

Definitions:

- a. Legal custody = decision making
- b. Physical/residential custody = primary residence & who pays child support to whom;

Choices for Legal Custody:

Father;

Mother;

Both = joint legal custody

When a child is born:

Before any legal proceedings, both natural parents have joint legal custody;

Neither parent has a prima facie right to custody. DRL §§ 70[a], 240[1][a]; *see Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89;

When a court must decide:

The Court is mandated to determine custody “as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the *best interests of the child.*” DRL § 240(1)(a), *Friederwitzer v. Friederwitzer*, 55 NY2d 89, 447 NYS2d 893 (1982) (emphasis added).

Both = joint legal custody

Unfortunately (?), though, if the parents cannot agree -

“[J]oint custody is encouraged primarily as a voluntary alternative for relatively stable, amicable parents behaving in mature civilized fashion. As a court-ordered arrangement imposed upon already embattled and embittered parents, accusing one another of serious vices and wrongs, it can only enhance familial chaos.”

Braiman v. Braiman, 44 NY2d 584, 589-90, 407 NYS2d 449 (1978)
(citations omitted).

There is no presumptive custodian. But how does it work in practice?

New Trend -

Spheres of decision-making

Custody Considerations

- Best Interest Standard
- No Prima Facie Right in Either Parent
- Totality of Circumstances
- Age of Parent
- Health of Parent
- Mental & Emotional Stability
- Alcohol & Drug Abuse
- Marital Misconduct
- Moral Character
- Homosexuality
- Financial Condition
- Child's Preference
- Religious Considerations
- Willingness to Foster Relationship with Non-Custodial Parent
- Nature & Quality of Home Environment
- Separation of Siblings
- Availability of Parent
- Abuse & Neglect
- Racial Considerations
- Stability
- Primary Caregiver
- Domestic Violence
- Ability to Provide for Intellectual and Emotional Needs
- Pattern of absence and Tardiness
- Smoking
- Excessive Discipline
- Illicit Tape Recording
- Alienation and False Accusations
- Unspecified Violent Behavior
- Home Schooling
- Disregard of Court Orders
- Voluntary Agreement
- Involving Children in Marital Conflict
- Quality of Care
- Disparate Treatment of Children
- Intention to Move
- Obsessive Medical Treatment
- Inflexible Parenting Approach

Parenting time/visitation –

“Child’s best interests.”

Best interests of child lie in being nurtured and guided by both parents.

Visitation is a joint right of child and non-custodial parent.

Non-custodial parent has right to reasonable visitation.

Pollack v. Pollack, 56 AD3d 637, 868 NYS2d 243 (Second Dept. 2008)

Factors to consider include:

- ◆ quality of home environment,
- ◆ parental guidance,
- ◆ each parent’s ability to provide for child’s emotional and intellectual development,
- ◆ parties’ relative fitness and
- ◆ effect that custody to one parent may have on child’s relationship with other parent.

i. parenting plan should be age appropriate to the age(s) of the child(ren);

(1) driven by findings in the mental health field;

Permission to move away – Is it required?

Pre-action?

Post-divorce -

Tropea v. Tropea, 87 N.Y.2d 727 [1996];

5. Parental alienation –

See, Father? What Father? Parental Alienation and its Effects on Children available for download on the publications page of www.theNewYorkDivorceLawyer.com.

Manifestations of Parental Alienation

1. Campaign of Denigration;
2. Weak, frivolous, absurd reasons for child rejecting parent;
3. Child lacks ambivalence about his/her rejection of parent;
4. The “Independent Thinker” phenomenon (a five year old saying “I know what I want and this is my decision”);
5. Absence of guilt about the treatment of the targeted parent;
6. Reflexive support for alienating parent;
7. Presence of borrowed scenarios;
8. Rejection of extended family of targeted parent;

6. Child Support

Use this worksheet to determine the amount of child support to be paid by application of the Child Support Standards Act ("**CSSA**"). Note: Words in bold italics are defined terms.

- 1. Case Name: _____
- 2. Court & Index/Docket Number: _____
- 3. Today's Date: 10/04/10
- 4. Last year for which tax return was filed (or should have been filed): _____
- 5. The children of the two parties who are currently entitled to receive support are:

Name	Date of Birth	Age	Social Security No.

- 6. "**Mother's Child Support Income**":
 - a. Last year 2009 earned income _____
 - b. Less FICA of _____
 - (Social Security) 6.2% up to \$97,500
 - Medicare 1.45% \$ 0
 - 7.65%)
 - c. Less New York City income tax - _____
 - d. Total *Mother's Child Support Income* = \$ 0

- 7. "**Father's Child Support Income**":
 - i. Last year _____ earned income _____
 - ii. Less FICA of - _____
 - iii. Less New York City income tax - _____
 - iv. Total *Father's Child Support Income* = _____ 0

8. "**Combined Parental Child Support Income**" (6)(d) + (7)(d) _____ 0

- 9. Percentage share of combined parental income for each parent:
 - a. Mother's percentage share of the *Combined Parental Child Support Income* is
(6)(d) \$0 / (8) \$0 = ERR
 - b. Father/s percentage share of the *Combined Parental Child Support Income* is
(7)(d) \$0 / (8) \$0 = ERR

10. Number of children younger than 21 years of age: _____

11. Applicable "**Child Support Percentage**" for 0 children (from table below) is: _____ %;
- (1) 1 child = 17%
 - (2) 2 children = 25%
 - (3) 3 children = 29%
 - (4) 4 children = 31%
 - (5) 5 children = 35%

12. Enter the lower of *Combined Parental Child Support Income* (8) or \$130,000 \$ _____ ;
13. Multiply this number by the *Child Support Percentage* 0% \$ 0 ;

	Percentages	Annual Child Support	Monthly (/12)	Semi-Monthly (/24)	Bi-Weekly (/26)	Weekly (/52)
Mother's <i>pro rata</i> share	ERR	ERR	ERR	ERR	ERR	ERR
Father's <i>pro rata</i> share	ERR	ERR	ERR	ERR	ERR	ERR

14. **Income "Cap"** for child support purposes: \$ _____ ;
15. *Income Cap* less \$130,000 = \$ -130,000 ;
16. Multiply this number by the *Child Support Percentage* 0% \$ 0 ;

	Percentages	Annual Child Support	Monthly (/12)	Semi-Monthly (/24)	Bi-Weekly (/26)	Weekly (/52)
Mother's <i>pro rata</i> share	ERR	ERR	ERR	ERR	ERR	ERR
Father's <i>pro rata</i> share	ERR	ERR	ERR	ERR	ERR	ERR

17. Totals:

Mother's total c/s obligation		ERR	ERR	ERR	ERR	ERR
Father's total c/s obligation		ERR	ERR	ERR	ERR	ERR

Math check: total combined annual support (for both parents) _____
 - Combined Child Support Income ERR
 x Child Support Percentage 0 % = _____

18. Who will be providing **Health Care Insurance** for the child(ren)? **Mother / Father**
- a. Is that party incurring any additional cost for such insurance? **Yes / No**
 - b. Annual cost of such insurance: _____ ;

19. Determine the amount of any *Child Support Add-on Expenses* -

- a. Child Care Expenses: _____
- b. Health Care Insurance (18(b)): _____
- c. Health Care Expenses: _____
- d. Education Expenses: _____
- e. Other extraordinary Expenses: _____
 - i. _____
 - ii. _____
 - iii. _____
- f. Total *Child Support Add-on Expenses* \$ \$ 0.00

20. Calculate each parent's *pro rata* share based on their percentages of income:

	Percentages	Annual Child Support	Monthly (/12)	Semi-Monthly (/24)	Bi-Weekly (/26)	Weekly (/52)
Mother's <i>pro rata</i> share	ERR	ERR	ERR	ERR	ERR	ERR
Father's <i>pro rata</i> share	ERR	ERR	ERR	ERR	ERR	ERR

21. Add the *Child Support Add-on Expenses* to the amount of child support (line 16) to get the total obligation of each parent:

Mother's total c/s obligation	ERR	ERR	ERR	ERR	ERR	ERR
Father's total c/s obligation	ERR	ERR	ERR	ERR	ERR	ERR

22 To determine the amount of child support to be paid on the *Combined Parental Income* above \$130,000 a Court is required to consider the following factors:

- a. The financial resources of the custodial and non-custodial parent, and those of the child;
- b. The physical and emotional health of the child and his/her special needs and aptitudes;
- c. The standard of living the child would have enjoyed had the marriage or household not been dissolved;
- d. The tax consequences to the parties;
- e. The non-monetary contributions that the parents will make toward the care and well-being of the child;
- f. The educational needs of either parent;
- g. A determination that the gross income of one parent is substantially less than the other parent's gross income;
- h. The needs of the children of the non-custodial parent for whom the non-custodial parent is providing support who are not subject to the instant action and whose support has not been deducted from income pursuant to subclause (D) of cause (vii) of subparagraph five of paragraph (b) of [the CSSA], and the financial resources of any person obligated to support such children, provided, however, that this factor may apply only if the resources available to support the children who are subject to the instant action;
- i. Provided that the child is not on public assistance (I) extraordinary expenses occurred by the non-custodial parent in exercising visitation, or (ii) expenses incurred by the non-custodial parent in extended visitation provided that the custodial parent's expenses are substantially reduced as a result thereof; and
- j. Any other factors the court determines are relevant in each case.

7. *Pendente Lite* (interim) issues

- i. Exclusive use and occupancy of the marital home;
 - ii. Attorneys fees;
 - (1) Fee shifting to non-monied spouse;
 - iii. Orders of protection;
 - iv. Interim maintenance (support);
 - v. Discovery and litigation;
-

8. Taxes & back taxes

- vi. Innocent spouse relief;
-

9. Pre- and Post-nuptial Agreements

B. Dispute-Resolution Processes

Dispute-resolution processes available to clients and the benefits and disadvantages of each;

What do you think are the important criteria to consider when selecting a dispute resolution process?

1.	_____	2.	_____	3.	_____
4.	_____	5.	_____	6.	_____
7.	_____	8.	_____	9.	_____
10.	_____	11.	_____	12.	_____
13.	_____	14.	_____	15.	_____
16.	_____	17.	_____	18.	_____
19.	_____	20.	_____	21.	_____
22.	_____	23.	_____	24.	_____
25.	_____	26.	_____	27.	_____
28.	_____	29.	_____	30.	_____

Roger Fisher and William Ury from the Harvard Negotiation Project, in their seminal book *Getting to Yes, Negotiating Agreement Without Giving In*, describe certain types of agreements as “wise.”

Agreements can be accomplished using any one or more of the following methods:

- a. Negotiation;
- b. Mediation;
- c. Arbitration;
- d. Litigation;
- e. Collaboration – “Collaborative Law” as emerging trend;
- f. Capitulation;

How We View Disputes

Are disputes good or bad?

Why do disputes occur?

Chinese Symbol for Risk

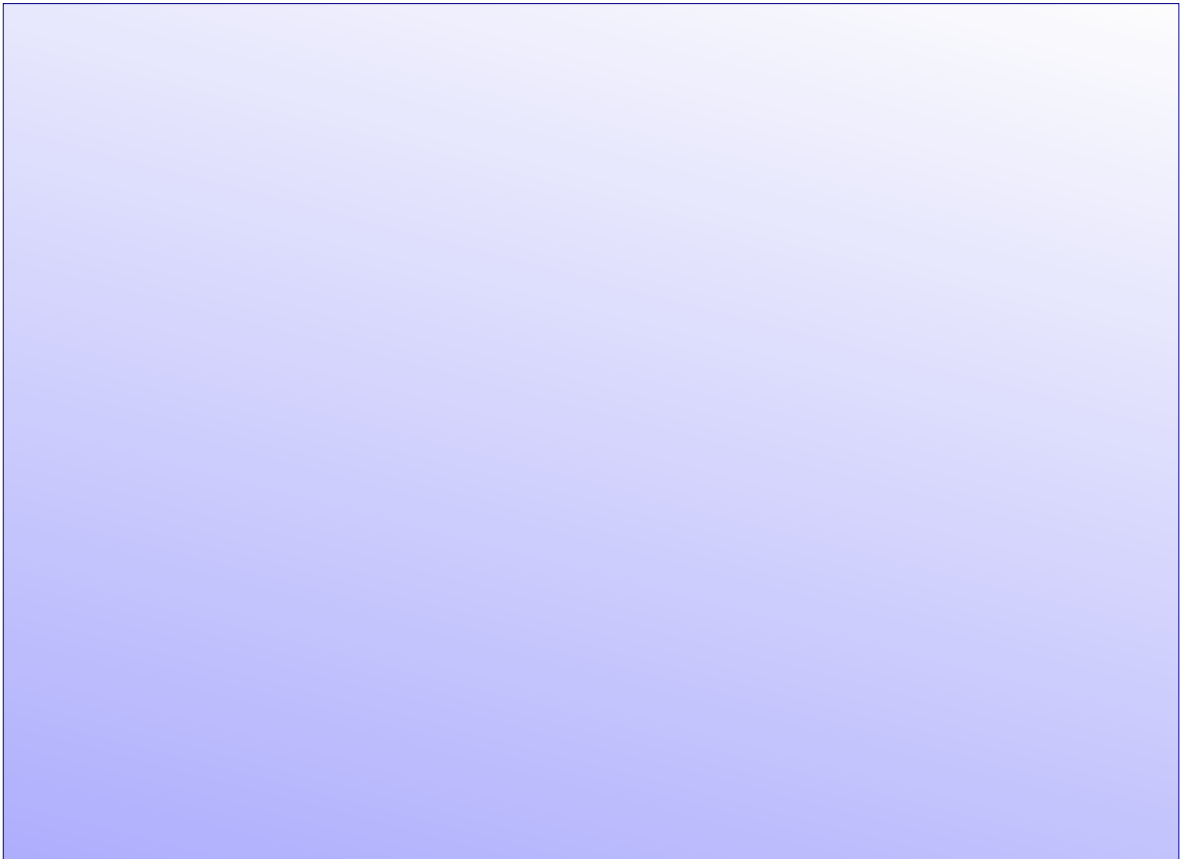
The image displays two large, stylized Chinese characters in a dark blue color. The character on the left is '危' (wēi), which means 'danger' or 'hazard'. The character on the right is '險' (xiǎn), which means 'risk' or 'opportunity'. Together, they form the phrase '危險' (wēixiǎn), which translates to 'risk' or 'danger and opportunity'.

The first symbol is the symbol for “danger”, while the second is the symbol for “opportunity”, making risk a mix of danger and opportunity.

Negotiation



—



Mediation



The Magic of Mediation:

In mediation, disputing parties are encouraged to express themselves and state their needs and desires, their claims and feelings, in non-provocative ways. They also get to listen and hear as the other party states their own feelings, needs and desires, too. This open and, hopefully, empathetic communication creates, or strengthens the, bonds between the parties, and helps dissipate their pain or anger, allowing them to begin to heal. The mediation gives each party a safe space to hear and be heard, often for the first time. This, in itself, creates a powerful dynamic.

Techniques and skills implemented by expert mediators:

- Probe to understand goals and interests, rather than stated position;
- Search for “win-win” solutions by “expanding the pie” before dividing it;
- Allowing the parties to jointly, “attack” the problem and search for mutual solutions (be “hard on the problem, but soft on the people”)
- Implement “principled” negotiation rather than “positional bargaining”;

Empowering the parties by allowing them to be part of the process that determines the outcomes (and, therefore, their destinies);

- Keep the tone of the discussions civil;
- Feel heard and understood;
- Acknowledge and respect the feelings and interests of the other side;
- Look forward, rather than backward;
- Find objective principles that both parties can agree on, to be used to evaluate any proposed solutions;
- Discover areas of agreement;
- Brainstorm new and perhaps unconventional ways of resolving the dispute;
- Become invested in finding solutions, instead of creating obstacles and further conflict;
- Develop the facts needed to assure the other of the party’s good faith;
- Reframe issues into a way that can be “heard” by the other, without provoking a counter-reaction;
- Find ways in which concessions by one party have little cost to that party, but high value to the other;
- In the event the dispute cannot be resolved, to consider different procedures to resolve the dispute, that might be agreed upon;
- Structure the discussions so that smaller, easier agreements can be used to build larger, more complicated ones;
- Recognize when a position is not realistic;
- Start to build trust with one another;
- Understand the costs of not settling the dispute.

Using these and other relationship-building techniques, mediators are often able to create goodwill and understanding between parties that were warring and malicious towards one another.

Arbitration

Litigation



Game Theory: The Prisoners' Dilemma

You and a friend have committed a crime together (burglary) and have been caught with only minimal evidence of a lesser crime (possession of burglar tools). You are being held in separate cells. You are both offered a deal but have to decide what to do. You are unable to communicate with your partner and you will not be told what s/he has decided until you have made your decision.

Essentially the deal is this.

- * If you confess and your partner denies taking part in the crime, you go free and your partner goes to prison for ten years.
- * If your partner confesses and you deny participating in the crime, you go to prison for ten years while your partner goes free.
- * If you both confess you will serve four years each.
- * If you both deny taking part in the crime, you both go to prison for two years on the possession charge.

Stages of Litigation

Commencement
of the Action

Summons
w or w/o
Complaint

Answer

Discovery

Documents
Exchanged

Statement of
Net Worth

Interrogatories (?)

Depositions

Expert Valuations

Pre Trial Motions

Parties
voluntarily reach
an agreement to
settle the action

Trial

Trial
(Evidence
Presented)

Judge Renders
Decision

Post-Trial

Lawyers Prepare
Papers for Judge's
Signature

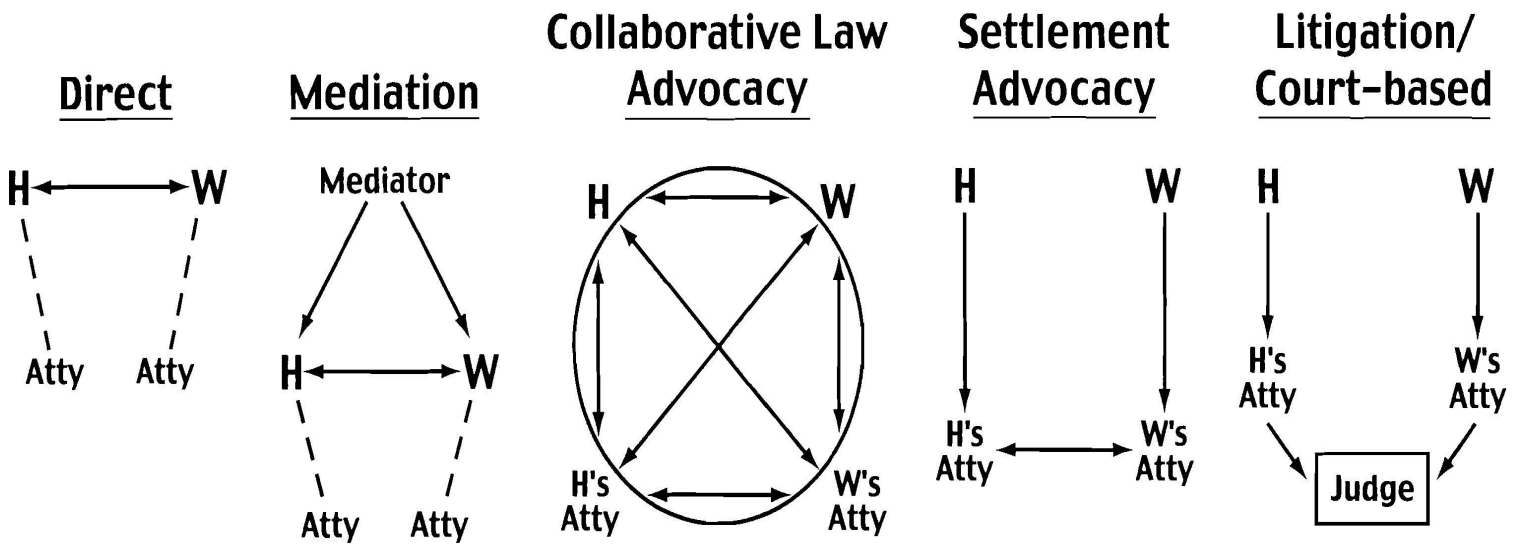
Judge Signs Papers

Lawyer Serves
Papers

Collaboration



DISPUTE RESOLUTION MECHANISMS



Client's role in decision-making becomes less direct...



...Matter becomes more expensive.



Pauline Tesler
Mary Pence

Client Name: _____

So that we can properly serve you and align our efforts with your priorities, please answer the following questions for us:

Describe what you would like this firm to accomplish for you:

What would constitute a "success" in your matter?

How much is such a "success" worth to you?

1. What I want from my lawyer in this action is:

- (a) The best result at the cheapest price;
- (b) Victory at any cost;
- (c) Vindication at a negotiated price;
- (d) Some of the above (circle the ones that apply);
- (e) All of the above;
- (f) It depends on _____;

2. I want my lawyer to:

- (a) Fight tooth and nail for everything I am entitled to;
- (b) Be very cost conscious and manage costs above all else;
- (c) Prepare the most impeccable, professional documents possible;
- (d) Some of the above (circle the ones that apply);
- (e) All of the above;
- (f) It depends on _____;

3. I will come back and give you more business if you are:

- (a) The most aggressive, argumentative lawyer;
- (b) The least expensive lawyer;
- (c) The most creative and inventive lawyer;
- (d) Some of the above (circle the ones that apply);
- (e) All of the above;
- (f) It depends on _____;

4. The single most important thing to me is:

- (a) The speed with which the divorce is finalized;
- (b) My cost;
- (c) The quality of the outcome;
- (d) Getting what I am entitled to from my spouse;
- (e) Protecting my children;
- (f) Other _____;

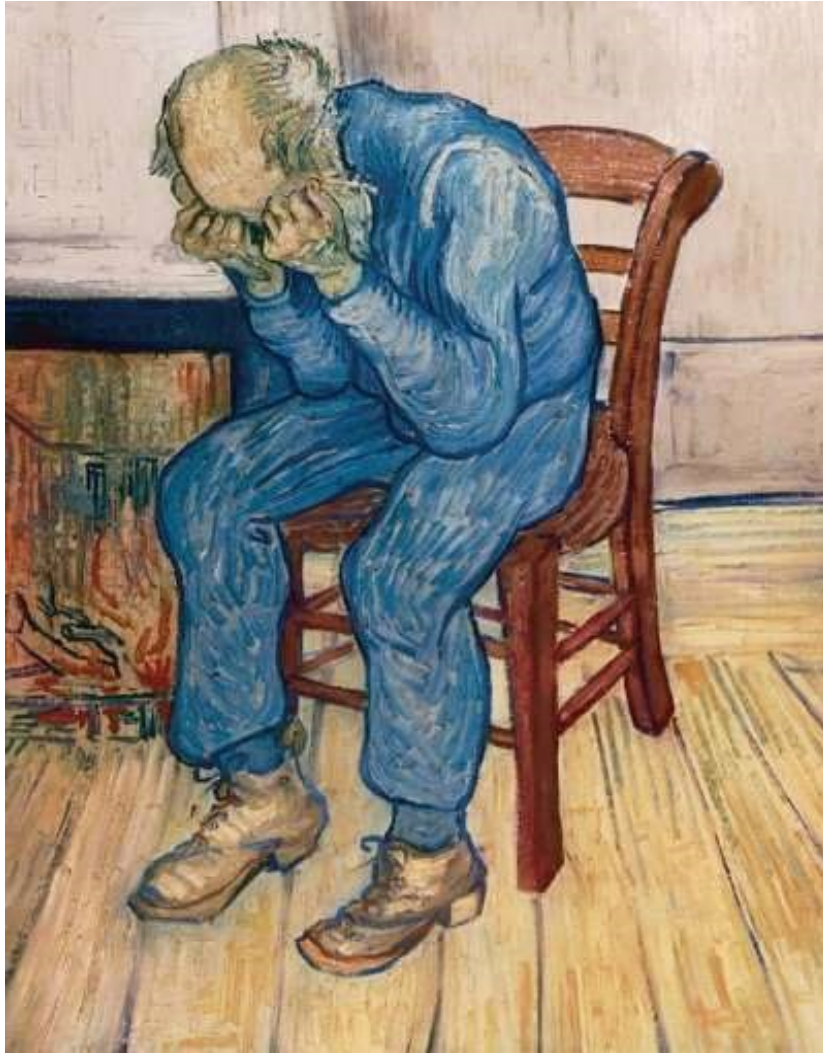
5. Please rank in order of importance to you ("1" being the most important):

- _____ speed;
- _____ quality;
- _____ cost;

On a scale of 1-5 (5 being the strongest) describe how important each of these objectives are for you:

	1 Very Unimportant to me	2 Unimportant	3 Neutral	4 Somewhat Important	5 Very Important
Take revenge on my spouse;					
Destroy my spouse at any cost;					
Hurt my spouse in a legal way;					
1. Get divorced quickly;					
2. Control over the process;					
3. Control over the result;					
4. Minimize the financial cost;					
5. Minimize the stress, anger and hostility in the process;					
6. Show my spouse civility and hope s/he reciprocates;					
7. Obtain what a judge thinks is a fair result;					
8. Ensure that I am not taken advantage of;					
9. Obtain what I and my spouse think is a fair result;					
10. Get as much as I can out from the marriage;					
11. Protect my child(ren) from additional pain;					
12. Ensure that my child(ren) have two loving parents;					
13. Preserve my relationship with my child(ren)'s other parent so that we can continue to co-parent them;					
14. Learn a better method of dealing with and resolving disputes;					
15. Obtain a result that is based, primarily, on the needs of our child(ren);					
16. Role model to my child(ren) how to properly resolve disputes;					

Capitulation



C. The MHP's Interaction With the Legal System

General Rule: The Law is entitled to the testimony of every person. All persons must give testimony of the facts within their personal knowledge, inquired of in a court of law.

Exception: Certain relationships that are protected to serve an interest greater than the truth-finding process.

Problem: As such an exception, and notwithstanding its desirable purpose, the . . . privilege constitutes an obstacle to the truth-finding process, the invocation of which should be cautiously observed to ensure that its application is consistent with its purpose

Privileges:

Physician-patient privilege:

CPLR § 4504 grants a privilege to every “person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic” for the information obtained “in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity.” CPLR § 4504.

Psychologist-patient privilege:

CPLR § 4507 puts it on a par with the lawyer-client relationship. Specifically, it provides, in relevant part, that “The confidential relations and communications between a psychologist registered under the . . . education law and his client are placed on the same basis as those provided by law between attorney and client.” CPLR § 4507.

Social Worker-patient privilege:

CPLR § 4508 grants every “licensed master social worker [and] licensed clinical social worker” a privilege for “communication made by a client, or his or her advice given thereon, in the course of his or her professional employment.” CPLR § 4508.

Exceptions:

When placed in issue

“It is well settled that in a matrimonial action, a party waives the

physician-patient privilege concerning his or her mental or physical condition (see, CPLR 4504) by actively contesting custody (see, *Baecher v. Baecher*, 58 A.D.2d 821, 396 N.Y.S.2d 447; *People ex rel. Chitty v. Fitzgerald*, 40 Misc.2d 966, 244 N.Y.S.2d 441).” *McDonald v. McDonald*, 196 AD2d 7, 608 NYS2d 477 (2nd Dept., 1994), accord, *Frierson v. Goldstrom*, 9 AD3d 612 (3rd Dept.)¹

Article 10 proceedings:

Family Court Act § 1046 excepts article 10 child-protective (abuse & neglect) proceedings from the privileges of CPLR §§ 4507 & 4508. *Rockland County Dept. of Social Services vs. Brian MCM*, 193 A.D.2d 121, 602 N.Y.S.2d 416.

Guardianship & Custody for children whose parents suffer from mental illness.

Social Services Law § 384-b(3)(h)

Mandatory reporting of suspected abuse

Social Services Law §§ 413 & 415

When client presents a “serious and imminent danger” to another person

Mental Hygiene Law § 33.13(c)(6)

When evaluating an alleged incapacitated person

Mental Hygiene Law § 81.09(d)

When patient is the key witness against a criminal defendant

People v. Manzanillo, 145 Misc.2d 504, 546 NYS2d 954 (NY Crim. Ct., 1989) (child sex abuse prosecution); *Pennsylvania v. Ritchie*, 480 US 39, 107 S.Ct. 989 (1987)

People v. Bridgeland, 19 AD3d 1122, 796 NYS2d 768 (4th Dept., 2005) (seeking disclosure of sex abuse victims recanting a prior sex abuse claim)

¹ *But see, People v. Wilkins*, 65 NY2d 172, 490 NYS2d 759 (1985); *People ex rel Hickox*, 64 AD2d 412 (1st Dept.) (no automatic waiver).
Chaim Steinberger, Esq., 10/6/2010 MHP Seminar, (212) 964-6100

Analyzing a Request for Information

Analysis:

1. Is there a privilege?
 - a. Is there a psychologist/therapist-patient relationship?
 - b. Was the information obtained in a therapeutic and confidential setting?
2. Who “holds” the privilege?
 - a. Who is the patient?
 - b. Multiple patients?
3. Who is asking for the information?
 - a. Patient’s attorney?
4. Is there a legal duty to respond?
 - a. In what form is the request?
 - i. Letter?
 - ii. Phone call?
 - iii. Legal Process
 - (1) Subpoena?
 - (a) Does the subpoena comply with HIPAA & other legal requirements? (*See*, CPLR 2301, 2303(a), 3122(a), 8001(a) & (b))
 - (i) Must include patient’s written authorization, defective without, CPLR 3122(a);
 - (ii) Witness fee, \$15/\$18 (travel expense outside city), CPLR 2303(a), 8001;

- (iii) Served on all other parties (presumably patient) who can move for protective order, CPLR 2303(a), 2304, 3122;
 - (b) Does loss of income have to be recompensed? *See* Practice Commentary 2303:9 (“If the witness loses income for the time the testimonial above takes off the job, the lawyer should see to it that this is recompensed.”)
 - (c) In-state action;
 - (d) Out-of-state action;
 - (i) Authority? *See, e.g.*, CPLR 2303, 3108 & 3122(a), and Practice Commentary 2303:5–7; Judiciary Law §2-6
 - (ii) Enforcement powers;
 - iv. Request for a meeting
5. Subpoenas, CPLR §2301;
 - a. Information subpoenas, CPLR 5224(a)(3);
 - i. Child support subpoena, see CPLR 2301, 2302(a), 2303(b)
 - b. Deposition subpoenas;
 - i. Subpoena ad testificandum, 2301;
 - ii. Subpoena duces tecum, CPLR 2301;
 - c. Trial subpoenas – Requires statement that the materials produced include a copy of the subpoena (so that the clerks know how to route the material), CPLR §2301. [*but see*, CPLR 3117(a)(4) that may allow for deposition testimony to be introduced instead of appearance at trial, CPLR 2303(a)], CPLR 2303-a, 2305.
 - d. Giving testimony –
 - i. How to testify at a deposition?
 - ii. How to testify at trial?
6. Session notes, work papers & other supporting documents

- a. Do you have to turn over your work papers and other supporting documents?
- 7. Spoliation of evidence –
 - a. Spoliation of evidence – what is it and how can it hurt you and your client?
- 8. HIPAA online: http://www.nycourts.gov/forms/hipaa_fillable.pdf
- 9. Guide to remember: Who's your best friend? Your patient's lawyer!

Instructions for the Use
of the HIPAA-compliant Authorization Form to
Release Health Information Needed for Litigation

This form is the product of a collaborative process between the New York State Office of Court Administration, representatives of the medical provider community in New York, and the bench and bar, designed to produce a standard official form that complies with the privacy requirements of the federal Health Insurance Portability and Accountability Act (“HIPAA”) and its implementing regulations, to be used to authorize the release of health information needed for litigation in New York State courts. It can, however, be used more broadly than this and be used before litigation has been commenced, or whenever counsel would find it useful.

The goal was to produce a standard HIPAA-compliant official form to obviate the current disputes which often take place as to whether health information requests made in the course of litigation meet the requirements of the HIPAA Privacy Rule. It should be noted, though, that the form is optional. This form may be filled out on line and downloaded to be signed by hand, or downloaded and filled out entirely on paper.

When filing out Item 11, which requests the date or event when the authorization will expire, the person filling out the form may designate an event such as “at the conclusion of my court case” or provide a specific date amount of time, such as “3 years from this date”.

If a patient seeks to authorize the release of his or her entire medical record, but only from a certain date, the first two boxes in section 9(a) should both be checked, and the relevant date inserted on the first line containing the first box.

III- Supplemental Materials

A- Statutes

Domestic Relations Law § 70. Habeas corpus for child detained by parent

(a) Where a minor child is residing within this state, either parent may apply to the supreme court for a writ of habeas corpus to have such minor child brought before such court; and on the return thereof, the court, on due consideration, may award the natural guardianship, charge and custody of such child to either parent for such time, under such regulations and restrictions, and with such provisions and directions, as the case may require, and may at any time thereafter vacate or modify such order. In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly.

(b) Any order under this section which applies to rights of visitation with a child remanded or placed in the care of a person, official, agency or institution pursuant to article ten of the family court act or pursuant to an instrument approved under section three hundred fifty-eight-a of the social services law, shall be enforceable pursuant to the provisions of part eight of article ten of such act, sections three hundred fifty-eight-a and three hundred eighty-four-a of the social services law and other applicable provisions of law against any person or official having care and custody, or temporary care and custody, of such child.

Domestic Relations Law § 170. Action for divorce

Effective October 12, 2010

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

- (1) The cruel and inhuman treatment of the plaintiff by the defendant such that the conduct of the defendant so endangers the physical or mental well being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant.
- (2) The abandonment of the plaintiff by the defendant for a period of one or more years.
- (3) The confinement of the defendant in prison for a period of three or more consecutive years after the marriage of plaintiff and defendant.
- (4) The commission of an act of adultery, provided that adultery for the purposes of articles ten, eleven, and eleven-A of this chapter, is hereby defined as the commission of an act of sexual intercourse, oral sexual conduct or anal sexual conduct, voluntarily performed by the defendant, with a person other than the plaintiff after the marriage of plaintiff and defendant. Oral sexual conduct and anal sexual conduct include, but are not limited to, sexual conduct as defined in subdivision two of section 130.00 and subdivision three of section 130.20 of the penal law.
- (5) The husband and wife have lived apart pursuant to a decree or judgment of separation for a period of one or more years after the granting of such decree or judgment, and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such decree or judgment.
- (6) The husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded, for a period of one or more years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such agreement. Such agreement shall be filed in the office of the clerk of the county wherein either party resides. In lieu of filing such agreement, either party to such agreement may file a memorandum of such agreement, which memorandum shall be similarly subscribed and acknowledged or proved as was the agreement of separation and shall contain the following information: (a) the names and addresses of each of the parties, (b) the date of marriage of the parties, (c) the date of the agreement of separation and (d) the date of this subscription and acknowledgment or proof of such agreement of separation.
- (7) The relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath. No judgment of divorce shall be granted under this subdivision unless and until the economic issues of equitable distribution of marital property, the payment or waiver of spousal support, the payment of child support, the payment of counsel and experts' fees and expenses as well as the custody and visitation with the infant children of the marriage have been resolved by the parties, or determined by the court and incorporated into the judgment of divorce.

Domestic Relations Law § 236. Special controlling provisions; prior actions or proceedings; new actions or proceedings

Except as otherwise expressly provided in this section, the provisions of part A shall be controlling with respect to any action or proceeding commenced prior to the date on which the provisions of this section as amended become effective [FN1] and the provisions of part B shall be controlling with respect to any action or proceeding commenced on or after such effective date.

Any reference to this section or the provisions hereof in any action, proceeding, judgment, order, rule or agreement shall be deemed and construed to refer to either the provisions of part A or part B respectively and exclusively, determined as provided in this paragraph any inconsistent provision of law notwithstanding.

PART A

PRIOR ACTIONS OR PROCEEDINGS

Alimony, temporary and permanent.

1. Alimony.

In any action or proceeding brought

- (1) during the lifetime of both parties to the marriage to annul a marriage or declare the nullity of a void marriage, or
- (2) for a separation, or
- (3) for a divorce,

the court may direct either spouse to provide suitably for the support of the other as, in the court's discretion, justice requires, having regard to the length of time of the marriage, the ability of each spouse to be self supporting, the circumstances of the case and of the respective parties.

Such direction may require the payment of a sum or sums of money either directly to either spouse or to third persons for real and personal property and services furnished to either spouse, or for the rental of or mortgage amortization or interest payments, insurance, taxes, repairs or other carrying charges on premises occupied by either spouse, or for both payments to either spouse and to such third persons.

Such direction shall be effective as of the date of the application therefor, and any retroactive amount of alimony due shall be paid in one sum or periodic sums, as the court shall direct, taking into account any amount of temporary alimony which has been paid.

Such direction may be made in the final judgment in such action or proceeding, or by one or more orders from time to time before or subsequent to final judgment, or by both such order or orders and the final judgment.

Such direction may be made notwithstanding that the parties continue to reside in the same abode and notwithstanding that the court refuses to grant the relief requested by either spouse

- (1) by reason of a finding by the court that a divorce, annulment or judgment declaring the marriage a nullity had previously been granted to either spouse in an action in which jurisdiction over the person of the other spouse was not obtained, or
- (2) by reason of the misconduct of the other spouse, unless such misconduct would itself constitute grounds

for separation or divorce, or

(3) by reason of a failure of proof of the grounds of either spouse's action or counterclaim.

Any order or judgment made as in this section provided may combine in one lump sum any amount payable to either spouse under this section with any amount payable to either spouse under section two hundred forty of this chapter.

Upon the application of either spouse, upon such notice to the other party and given in such manner as the court shall direct, the court may annul or modify any such direction, whether made by order or by final judgment, or in case no such direction shall have been made in the final judgment may, with respect to any judgment of annulment or declaring the nullity of a void marriage rendered on or after September first, nineteen hundred forty or any judgment of separation or divorce whenever rendered, amend the judgment by inserting such direction.

Subject to the provisions of section two hundred forty-four of this chapter, no such modification or annulment shall reduce or annul arrears accrued prior to the making of such application unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears.

Such modification may increase such support nunc pro tunc based on newly discovered evidence.

2. Compulsory financial disclosure.

In all matrimonial actions and proceedings commenced on or after September first, nineteen hundred seventy-five in supreme court in which alimony, maintenance or support is in issue and all support proceedings in family court, there shall be compulsory disclosure by both parties of their respective financial states.

No showing of special circumstances shall be required before such disclosure is ordered.

A sworn statement of net worth shall be provided upon receipt of a notice in writing demanding the same, within twenty days after the receipt thereof.

In the event said statement is not demanded, it shall be filed by each party, within ten days after joinder of issue, in the court in which the procedure is pending.

As used in this section, the term net worth shall mean the amount by which total assets including income exceed total liabilities including fixed financial obligations.

It shall include all income and assets of whatsoever kind and nature and wherever situated and shall include a list of all assets transferred in any manner during the preceding three years, or the length of the marriage, whichever is shorter; provided, however that transfers in the routine course of business which resulted in an exchange of assets of substantially equivalent value need not be specifically disclosed where such assets are otherwise identified in the statement of net worth.

Noncompliance shall be punishable by any or all of the penalties prescribed in section thirty-one hundred twenty-six of the civil practice law and rules, in examination before or during trial.

PART B

NEW ACTIONS OR PROCEEDINGS

Maintenance and distributive award.

1. Definitions. Whenever used in this part, the following terms shall have the respective meanings hereinafter set forth or indicated:

a. The term “maintenance” shall mean payments provided for in a valid agreement between the parties or awarded by the court in accordance with the provisions of subdivisions five-a and six of this part, to be paid at fixed intervals for a definite or indefinite period of time, but an award of maintenance shall terminate upon the death of either party or upon the recipient's valid or invalid marriage, or upon modification pursuant to paragraph (b) of subdivision nine of section two hundred thirty-six of this part or section two hundred forty-eight of this chapter.

b. The term “distributive award” shall mean payments provided for in a valid agreement between the parties or awarded by the court, in lieu of or to supplement, facilitate or effectuate the division or distribution of property where authorized in a matrimonial action, and payable either in a lump sum or over a period of time in fixed amounts.

Distributive awards shall not include payments which are treated as ordinary income to the recipient under the provisions of the United States Internal Revenue Code.

c. The term “marital property” shall mean all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, except as otherwise provided in agreement pursuant to subdivision three of this part.

Marital property shall not include separate property as hereinafter defined.

d. The term separate property shall mean:

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

(2) compensation for personal injuries;

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

(4) property described as separate property by written agreement of the parties pursuant to subdivision three of this part.

e. The term “custodial parent” shall mean a parent to whom custody of a child or children is granted by a valid agreement between the parties or by an order or decree of a court.

f. The term “child support” shall mean a sum paid pursuant to court order or decree by either or both parents or pursuant to a valid agreement between the parties for care, maintenance and education of any unemancipated child under the age of twenty-one years.

2. Matrimonial actions.

a. Except as provided in subdivision five of this part, the provisions of this part shall be applicable to actions for an annulment or dissolution of a marriage, for a divorce, for a separation, for a declaration of the nullity of a void marriage, for a declaration of the validity or nullity of a foreign judgment of divorce, for a declaration of the validity or nullity of a marriage, and to proceedings to obtain maintenance or a distribution of marital property following a foreign judgment of divorce, commenced on and after the effective date of this part.

Any application which seeks a modification of a judgment, order or decree made in an action commenced prior to the effective date of this part shall be heard and determined in accordance with the provisions of part A of this section.

b. With respect to matrimonial actions which commence on or after the effective date of this paragraph, the plaintiff shall cause to be served upon the defendant, simultaneous with the service of the summons, a copy of the automatic orders set forth in this paragraph.

The automatic orders shall be binding upon the plaintiff in a matrimonial action immediately upon the filing of the summons, or summons and complaint, and upon the defendant immediately upon the service of the automatic orders with the summons.

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

The automatic orders are as follows:

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

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

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

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

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

3. Agreement of the parties.

An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded.

Notwithstanding any other provision of law, an acknowledgment of an agreement made before marriage may be executed before any person authorized to solemnize a marriage pursuant to subdivisions one, two and three of section eleven of this chapter.

Such an agreement may include

- (1) a contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will;
- (2) provision for the ownership, division or distribution of separate and marital property;
- (3) provision for the amount and duration of maintenance or other terms and conditions of the marriage relationship, subject to the provisions of section 5-311 of the general obligations law, and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment; and
- (4) provision for the custody, care, education and maintenance of any child of the parties, subject to the provisions of section two hundred forty of this article.

Nothing in this subdivision shall be deemed to affect the validity of any agreement made prior to the effective date of this subdivision.

4. Compulsory financial disclosure.

a. In all matrimonial actions and proceedings in which alimony, maintenance or support is in issue, there shall be compulsory disclosure by both parties of their respective financial states.

No showing of special circumstances shall be required before such disclosure is ordered.

A sworn statement of net worth shall be provided upon receipt of a notice in writing demanding the same, within twenty days after the receipt thereof.

In the event said statement is not demanded, it shall be filed with the clerk of the court by each party, within ten days after joinder of issue, in the court in which the proceeding is pending.

As used in this part, the term "net worth" shall mean the amount by which total assets including income exceed total liabilities including fixed financial obligations.

It shall include all income and assets of whatsoever kind and nature and wherever situated and shall include a list of all assets transferred in any manner during the preceding three years, or the length of the marriage, whichever is shorter; provided, however that transfers in the routine course of business which resulted in an exchange of assets of substantially equivalent value need not be specifically disclosed where such assets are otherwise identified in the statement of net worth.

All such sworn statements of net worth shall be accompanied by a current and representative paycheck stub and the most recently filed state and federal income tax returns including a copy of the W-2(s) wage and tax statement(s) submitted with the returns.

In addition, both parties shall provide information relating to any and all group health plans available to them for the provision of care or other medical benefits by insurance or otherwise for the benefit of the child or children for whom support is sought, including all such information as may be required to be included in a qualified medical child support order as defined in section six hundred nine of the employee retirement income security act of 1974 (29 USC 1169) including, but not limited to:

- (i) the name and last known mailing address of each party and of each dependent to be covered by the order;
- (ii) the identification and a description of each group health plan available for the benefit or coverage of the disclosing party and the child or children for whom support is sought;
- (iii) a detailed description of the type of coverage available from each group health plan for the potential benefit of each such dependent;
- (iv) the identification of the plan administrator for each such group health plan and the address of such administrator;
- (v) the identification numbers for each such group health plan; and
- (vi) such other information as may be required by the court. Noncompliance shall be punishable by any or all of the penalties prescribed in section thirty-one hundred twenty-six of the civil practice law and rules, in examination before or during trial.

b. As soon as practicable after a matrimonial action has been commenced, the court shall set the date or dates the parties shall use for the valuation of each asset. The valuation date or dates may be anytime from the date of commencement of the action to the date of trial.

5. Disposition of property in certain matrimonial actions.

a. Except where the parties have provided in an agreement for the disposition of their property pursuant to subdivision three of this part, the court, in an action wherein all or part of the relief granted is divorce, or the dissolution, annulment or declaration of the nullity of a marriage, and in proceedings to obtain a distribution of marital property following a foreign judgment of divorce, shall determine the respective rights of the parties in their separate or marital property, and shall provide for the disposition thereof in the final judgment.

b. Separate property shall remain such.

c. Marital property shall be distributed equitably between the parties, considering the circumstances of the case and of the respective parties.

d. In determining an equitable disposition of property under paragraph c, the court shall consider:

- (1) the income and property of each party at the time of marriage, and at the time of the commencement of the action;
- (2) the duration of the marriage and the age and health of both parties;
- (3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;

- (4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;
- (5) the loss of health insurance benefits upon dissolution of the marriage;
- (6) any award of maintenance under subdivision six of this part;
- (7) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
- (8) the liquid or non-liquid character of all marital property;
- (9) the probable future financial circumstances of each party;
- (10) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;
- (11) the tax consequences to each party;
- (12) the wasteful dissipation of assets by either spouse;
- (13) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
- (14) any other factor which the court shall expressly find to be just and proper.

e. In any action in which the court shall determine that an equitable distribution is appropriate but would be impractical or burdensome or where the distribution of an interest in a business, corporation or profession would be contrary to law, the court in lieu of such equitable distribution shall make a distributive award in order to achieve equity between the parties.

The court in its discretion, also may make a distributive award to supplement, facilitate or effectuate a distribution of marital property.

f. In addition to the disposition of property as set forth above, the court may make such order regarding the use and occupancy of the marital home and its household effects as provided in section two hundred thirty-four of this chapter, without regard to the form of ownership of such property.

g. In any decision made pursuant to this subdivision, the court shall set forth the factors it considered and the reasons for its decision and such may not be waived by either party or counsel.

h. In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph d of this subdivision.

5-a. Temporary maintenance awards.

a. Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial action the court shall make its award for temporary maintenance pursuant to the provisions of this subdivision.

b. For purposes of this subdivision, the following definitions shall be used:

- (1) "Payor" shall mean the spouse with the higher income.
- (2) "Payee" shall mean the spouse with the lower income.
- (3) "Length of marriage" shall mean the period from the date of marriage until the date of commencement of action.
- (4) "Income" shall mean:
 - (a) income as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act; and
 - (b) income from income producing property to be distributed pursuant to subdivision five of this part.
- (5) "Income cap" shall mean up to and including five hundred thousand dollars of the payor's annual income; provided, however, beginning January thirty-first, two thousand twelve and every two years thereafter, the payor's annual income amount shall increase by the product of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of labor bureau of labor statistics for the two year period rounded to the nearest one thousand dollars.

The office of court administration shall determine and publish the income cap.
- (6) "Guideline amount of temporary maintenance" shall mean the sum derived by the application of paragraph c of this subdivision.
- (7) "Guideline duration" shall mean the durational period determined by the application of paragraph d of this subdivision.
- (8) "Presumptive award" shall mean the guideline amount of the temporary maintenance award for the guideline duration prior to the court's application of any adjustment factors as provided in subparagraph one of paragraph e of this subdivision.
- (9) "Self-support reserve" shall mean the self-support reserve as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act.

c. The court shall determine the guideline amount of temporary maintenance in accordance with the provisions of this paragraph after determining the income of the parties:

- (1) Where the payor's income is up to and including the income cap:
 - (a) the court shall subtract twenty percent of the income of the payee from thirty percent of the income up to the income cap of the payor.
 - (b) the court shall then multiply the sum of the payor's income up to and including the income cap and all of the payee's income by forty percent.
 - (c) the court shall subtract the income of the payee from the amount derived from clause (b) of this subparagraph.

(d) the guideline amount of temporary maintenance shall be the lower of the amounts determined by clauses (a) and ©) of this subparagraph; if the amount determined by clause ©) of this subparagraph is less than or equal to zero, the guideline amount shall be zero dollars.

(2) Where the income of the payor exceeds the income cap:

(a) the court shall determine the guideline amount of temporary maintenance for that portion of the payor's income that is up to and including the income cap according to subparagraph one of this paragraph, and, for the payor's income in excess of the income cap, the court shall determine any additional guideline amount of temporary maintenance through consideration of the following factors:

- (i) the length of the marriage;
- (ii) the substantial differences in the incomes of the parties;
- (iii) the standard of living of the parties established during the marriage;
- (iv) the age and health of the parties;
- (v) the present and future earning capacity of the parties;
- (vi) the need of one party to incur education or training expenses;
- (vii) the wasteful dissipation of marital property;
- (viii) the transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
- (ix) the existence and duration of a pre-marital joint household or a pre-divorce separate household;
- (x) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;
- (xi) the availability and cost of medical insurance for the parties;
- (xii) the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity or ability to obtain meaningful employment;
- (xiii) the inability of one party to obtain meaningful employment due to age or absence from the workforce;
- (xiv) the need to pay for exceptional additional expenses for the child or children, including, but not limited to, schooling, day care and medical treatment;
- (xv) the tax consequences to each party;

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

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

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

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

(b) In any decision made pursuant to this subparagraph, the court shall set forth the factors it considered and the reasons for its decision. Such written order may not be waived by either party or counsel.

(3) Notwithstanding the provisions of this paragraph, where the guideline amount of temporary maintenance would reduce the payor's income below the self-support reserve for a single person, the presumptive amount of the guideline amount of temporary maintenance shall be the difference between the payor's income and the self-support reserve.

If the payor's income is below the self-support reserve, there is a rebuttable presumption that no temporary maintenance is awarded.

d. The court shall determine the guideline duration of temporary maintenance by considering the length of the marriage.

Temporary maintenance shall terminate upon the issuance of the final award of maintenance or the death of either party, whichever occurs first.

e. (1) The court shall order the presumptive award of temporary maintenance in accordance with paragraphs c and d of this subdivision, unless the court finds that the presumptive award is unjust or inappropriate and adjusts the presumptive award of temporary maintenance accordingly based upon consideration of the following factors:

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

(b) the age and health of the parties;

(c) the earning capacity of the parties;

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

(e) the wasteful dissipation of marital property;

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

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

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

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

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

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

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

(m) the tax consequences to each party;

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

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

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

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

(2) Where the court finds that the presumptive award of temporary maintenance is unjust or inappropriate and the court adjusts the presumptive award of temporary maintenance pursuant to this paragraph, the court shall set forth, in a written order, the amount of the unadjusted presumptive award of temporary maintenance, the factors it considered, and the reasons that the court adjusted the presumptive award of temporary maintenance. Such written order shall not be waived by either party or counsel.

(3) Where either or both parties are unrepresented, the court shall not enter a temporary maintenance order unless the unrepresented party or parties have been informed of the presumptive award of temporary maintenance.

f. A validly executed agreement or stipulation voluntarily entered into between the parties in an action commenced after the effective date of this subdivision presented to the court for incorporation in an order shall include a provision stating that the parties have been advised of the provisions of this subdivision, and that the presumptive award provided for therein results in the correct amount of temporary maintenance.

In the event that such agreement or stipulation deviates from the presumptive award of temporary maintenance, the agreement or stipulation must specify the amount that such presumptive award of temporary maintenance would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount.

Such provision may not be waived by either party or counsel.

Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the presumptive award of temporary maintenance provided such agreements or stipulations comply with the provisions of this subdivision.

The court shall, however, retain discretion with respect to temporary, and post-divorce maintenance awards pursuant to this section.

Any court order incorporating a validly executed agreement or stipulation which deviates from the presumptive award of temporary maintenance shall set forth the court's reasons for such deviation.

g. When a party has defaulted and/or the court is otherwise presented with insufficient evidence to determine gross income, the court shall order the temporary maintenance award based upon the needs of the payee or the standard of living of the parties prior to commencement of the divorce action, whichever is greater.

Such order may be retroactively modified upward without a showing of change in circumstances upon a showing of newly discovered or obtained evidence.

h. In any action or proceeding for modification of an order of maintenance or alimony existing prior to the effective date of this subdivision, brought pursuant to this article, the temporary maintenance guidelines set forth in this subdivision shall not constitute a change of circumstances warranting modification of such support order.

i. In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in this subdivision.

6. Postdivorce maintenance awards.

a. Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial action the court may order maintenance in such amount as justice requires, having regard for the standard of living of the parties established during the marriage, whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs and whether the other party has sufficient property or income to provide for the reasonable needs of the other and the circumstances of the case and of the respective parties.

Such order shall be effective as of the date of the application therefor, and any retroactive amount of maintenance due shall be paid in one sum or periodic sums, as the court shall direct, taking into account any amount of temporary maintenance which has been paid.

In determining the amount and duration of maintenance the court shall consider:

- (1) the income and property of the respective parties including marital property distributed pursuant to subdivision five of this part;
- (2) the length of the marriage;
- (3) the age and health of both parties;
- (4) the present and future earning capacity of both parties;

- (5) the need of one party to incur education or training expenses;
- (6) the existence and duration of a pre-marital joint household or a pre-divorce separate household;
- (7) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;
- (8) the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor;
- (9) reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage;
- (10) the presence of children of the marriage in the respective homes of the parties;
- (11) the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity;
- (12) the inability of one party to obtain meaningful employment due to age or absence from the workforce;
- (13) the need to pay for exceptional additional expenses for the child/children, including but not limited to, schooling, day care and medical treatment;
- (14) the tax consequences to each party;
- (15) the equitable distribution of marital property;
- (16) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
- (17) the wasteful dissipation of marital property by either spouse;
- (18) the transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
- (19) the loss of health insurance benefits upon dissolution of the marriage, and the availability and cost of medical insurance for the parties; and
- (20) any other factor which the court shall expressly find to be just and proper.

b. In any decision made pursuant to this subdivision, the court shall set forth the factors it considered and the reasons for its decision and such may not be waived by either party or counsel.

c. The court may award permanent maintenance, but an award of maintenance shall terminate upon the death of either party or upon the recipient's valid or invalid marriage, or upon modification pursuant to paragraph b of subdivision nine of this part or section two hundred forty-eight of this chapter.

d. In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in subdivision six of section two hundred fifty-three of this article, on the factors enumerated in paragraph a of this subdivision.

6-a. Law revision commission study.

a. The legislature hereby finds and declares it to be the policy of the state that it is necessary to achieve equitable outcomes when families divorce and it is important to ensure that the economic consequences of a divorce are fairly shared by divorcing couples.

Serious concerns have been raised that the implementation of New York state's maintenance laws have not resulted in equitable results.

Maintenance is often not granted and where it is granted, the results are inconsistent and unpredictable.

This raises serious concerns about the ability of our current maintenance laws to achieve equitable and fair outcomes.

The legislature further finds a comprehensive review of the provisions of our state's maintenance laws should be undertaken.

It has been thirty years since the legislature significantly reformed our state's divorce laws by enacting equitable distribution of marital property and introduced the concept of maintenance to replace alimony. Concerns that the implementation of our maintenance laws have not resulted in equitable results compel the need for a review of these laws.

b. The law revision commission is hereby directed to:

(1) review and assess the economic consequences of divorce on the parties;

(2) review the maintenance laws of the state, including the way in which they are administered to determine the impact of these laws on post marital economic disparities, and the effectiveness of such laws and their administration in achieving the state's policy goals and objectives of ensuring that the economic consequences of a divorce are fairly and equitably shared by the divorcing couple; and

(3) make recommendations to the legislature, including such proposed revisions of such laws as it determines necessary to achieve these goals and objectives.

c. The law revision commission shall make a preliminary report to the legislature and the governor of its findings, conclusions, and any recommendations not later than nine months from the effective date of this subdivision, and a final report of its findings, conclusions and recommendations not later than December thirty-first, two thousand eleven.

7. Child Support.

a. In any matrimonial action, or in an independent action for child support, the court as provided in section two hundred forty of this chapter shall order either or both parents to pay temporary child support or child support without requiring a showing of immediate or emergency need.

The court shall make an order for temporary child support notwithstanding that information with respect to income and assets of either or both parents may be unavailable.

Where such information is available, the court may make an order for temporary child support pursuant to section two hundred forty of this article.

Such order shall, except as provided for herein, be effective as of the date of the application therefor, and any retroactive amount of child support due shall be support arrears/past due support and shall be paid in one sum or periodic sums, as the court shall direct, taking into account any amount of temporary child support which has been paid.

In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules.

When a child receiving support is a public assistance recipient, or the order of support is being enforced or is to be enforced pursuant to section one hundred eleven-g of the social services law, the court shall establish the amount of retroactive child support and notify the parties that such amount shall be enforced by the support collection unit pursuant to an execution for support enforcement as provided for in subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules, or in such periodic payments as would have been authorized had such an execution been issued.

In such case, the court shall not direct the schedule of repayment of retroactive support.

The court shall not consider the misconduct of either party but shall make its award for child support pursuant to section two hundred forty of this article.

b. Notwithstanding any other provision of law, any written application or motion to the court for the establishment of a child support obligation for persons not in receipt of family assistance must contain either a request for child support enforcement services which would authorize the collection of the support obligation by the immediate issuance of an income execution for support enforcement as provided for by this chapter, completed in the manner specified in section one hundred eleven-g of the social services law; or a statement that the applicant has applied for or is in receipt of such services; or a statement that the applicant knows of the availability of such services, has declined them at this time and where support enforcement services pursuant to section one hundred eleven-g of the social services law have been declined that the applicant understands that an income deduction order may be issued pursuant to subdivision ©) of section five thousand two hundred forty-two of the civil practice law and rules without other child support enforcement services and that payment of an administrative fee may be required.

The court shall provide a copy of any such request for child support enforcement services to the support collection unit of the appropriate social services district any time it directs payments to be made to such support collection unit.

Additionally, the copy of any such request shall be accompanied by the name, address and social security number of the parties; the date and place of the parties' marriage; the name and date of birth of the child or children; and the name and address of the employers and income payors of the party from whom child support is sought.

Unless the party receiving child support has applied for or is receiving such services, the court shall not direct such payments to be made to the support collection unit, as established in section one hundred eleven-h of the social services law.

c. The court shall direct that a copy of any child support or combined child and spousal support order issued by the court on or after the first day of October, nineteen hundred ninety-eight, in any proceeding under this section be provided promptly to the state case registry established pursuant to subdivision four-a of section one hundred eleven-b of the social services law.

d. Any child support order made by the court in any proceeding under the provisions of this section shall include, on its face, a notice printed or typewritten in a size equal to at least eight point bold type informing

the parties of their right to seek a modification of the child support order upon a showing of:

(i) a substantial change in circumstances; or

(ii) that three years have passed since the order was entered, last modified or adjusted; or

(iii) there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted; however, if the parties have specifically opted out of subparagraph (ii) or (iii) of this paragraph in a validly executed agreement or stipulation, then that basis to seek modification does not apply.

8. Special relief in matrimonial actions.

a. In any matrimonial action the court may order a party to purchase, maintain or assign a policy of insurance providing benefits for health and hospital care and related services for either spouse or children of the marriage not to exceed such period of time as such party shall be obligated to provide maintenance, child support or make payments of a distributive award.

The court may also order a party to purchase, maintain or assign a policy of accident insurance or insurance on the life of either spouse, and to designate in the case of life insurance, either spouse or children of the marriage, or in the case of accident insurance, the insured spouse as irrevocable beneficiaries during a period of time fixed by the court.

The obligation to provide such insurance shall cease upon the termination of the spouse's duty to provide maintenance, child support or a distributive award.

A copy of such order shall be served, by registered mail, on the home office of the insurer specifying the name and mailing address of the spouse or children, provided that failure to so serve the insurer shall not effect the validity of the order.

b. In any action where the court has ordered temporary maintenance, maintenance, distributive award or child support, the court may direct that a payment be made directly to the other spouse or a third person for real and personal property and services furnished to the other spouse, or for the rental or mortgage amortization or interest payments, insurances, taxes, repairs or other carrying charges on premises occupied by the other spouse, or for both payments to the other spouse and to such third persons.

Such direction may be made notwithstanding that the parties continue to reside in the same abode and notwithstanding that the court refuses to grant the relief requested by the other spouse.

c. Any order or judgment made as in this section provided may combine any amount payable to either spouse under this section with any amount payable to such spouse as child support or under section two hundred forty of this chapter.

9. Enforcement and modification of orders and judgments in matrimonial actions.

a. All orders or judgments entered in matrimonial actions shall be enforceable pursuant to section fifty-two hundred forty-one or fifty-two hundred forty-two of the civil practice law and rules, or in any other manner provided by law.

Orders or judgments for child support, alimony and maintenance shall also be enforceable pursuant to article fifty-two of the civil practice law and rules upon a debtor's default as such term is defined in paragraph seven of subdivision (a) of section fifty-two hundred forty-one of the civil practice law and rules.

The establishment of a default shall be subject to the procedures established for the determination of a mistake of fact for income executions pursuant to subdivision (e) of section fifty-two hundred forty-one of the civil practice law and rules.

For the purposes of enforcement of child support orders or combined spousal and child support orders pursuant to section five thousand two hundred forty-one of the civil practice law and rules, a "default" shall be deemed to include amounts arising from retroactive support.

The court may, and if a party shall fail or refuse to pay maintenance, distributive award or child support the court shall, upon notice and an opportunity to the defaulting party to be heard, require the party to furnish a surety, or the sequestering and sale of assets for the purpose of enforcing any award for maintenance, distributive award or child support and for the payment of reasonable and necessary attorney's fees and disbursements.

- b. (1) Upon application by either party, the court may annul or modify any prior order or judgment as to maintenance, upon a showing of the recipient's inability to be self-supporting or a substantial change in circumstance or termination of child support awarded pursuant to section two hundred forty of this article, including financial hardship.

Where, after the effective date of this part, a separation agreement remains in force no modification of a prior order or judgment incorporating the terms of said agreement shall be made as to maintenance without a showing of extreme hardship on either party, in which event the judgment or order as modified shall supersede the terms of the prior agreement and judgment for such period of time and under such circumstances as the court determines.

The court shall not reduce or annul any arrears of maintenance which have been reduced to final judgment pursuant to section two hundred forty-four of this article.

No other arrears of maintenance which have accrued prior to the making of such application shall be subject to modification or annulment unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears and the facts and circumstances constituting good cause are set forth in a written memorandum of decision.

Such modification may increase maintenance nunc pro tunc as of the date of application based on newly discovered evidence.

Any retroactive amount of maintenance due shall, except as provided for herein, be paid in one sum or periodic sums, as the court directs, taking into account any temporary or partial payments which have been made.

The provisions of this subdivision shall not apply to a separation agreement made prior to the effective date of this part.

- (2) (i) The court may modify an order of child support, including an order incorporating without merging an agreement or stipulation of the parties, upon a showing of a substantial change in circumstances.

Incarceration shall not be a bar to finding a substantial change in circumstances provided such incarceration is not the result of nonpayment of a child support order, or an offense against the custodial parent or child who is the subject of the order or judgment.

- (ii) In addition, unless the parties have specifically opted out of the following provisions

in a validly executed agreement or stipulation entered into between the parties, the court may modify an order of child support where:

(A) three years have passed since the order was entered, last modified or adjusted; or

(B) there has been a change in either party's gross income by fifteen percent or more since the order was entered, last modified, or adjusted.

A reduction in income shall not be considered as a ground for modification unless it was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability, and experience.

(iii) No modification or annulment shall reduce or annul any arrears of child support which have accrued prior to the date of application to annul or modify any prior order or judgment as to child support.

Such modification may increase child support nunc pro tunc as of the date of application based on newly discovered evidence.

Any retroactive amount of child support due shall, except as provided for in this subparagraph, be paid in one sum or periodic sums, as the court directs, taking into account any temporary or partial payments which have been made.

Any retroactive amount of child support due shall be support arrears/past due support.

In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules.

When a child receiving support is a public assistance recipient, or the order of support is being enforced or is to be enforced pursuant to section one hundred eleven-g of the social services law, the court shall establish the amount of retroactive child support and notify the parties that such amount shall be enforced by the support collection unit pursuant to an immediate execution for support enforcement as provided for by this chapter, or in such periodic payments as would have been authorized had such an execution been issued.

In such case, the court shall not direct the schedule of repayment of retroactive support.

c. Notwithstanding any other provision of law, any written application or motion to the court for the modification or enforcement of a child support or combined maintenance and child support order for persons not in receipt of family assistance must contain either a request for child support enforcement services which would authorize the collection of the support obligation by the immediate issuance of an income execution for support enforcement as provided for by this chapter, completed in the manner specified in section one hundred eleven-g of the social services law; or a statement that the applicant has applied for or is in receipt of such services; or a statement that the applicant knows of the availability of such services, has declined them at this time and where support enforcement services pursuant to section one hundred eleven-g of the social services law have been declined that the applicant understands that an

income deduction order may be issued pursuant to subdivision ©) of section five thousand two hundred forty-two of the civil practice law and rules without other child support enforcement services and that payment of an administrative fee may be required.

The court shall provide a copy of any such request for child support enforcement services to the support collection unit of the appropriate social services district any time it directs payments to be made to such support collection unit.

Additionally, the copy of such request shall be accompanied by the name, address and social security number of the parties; the date and place of the parties' marriage; the name and date of birth of the child or children; and the name and address of the employers and income payors of the party ordered to pay child support to the other party.

Unless the party receiving child support or combined maintenance and child support has applied for or is receiving such services, the court shall not direct such payments to be made to the support collection unit, as established in section one hundred eleven-h of the social services law.

d. The court shall direct that a copy of any child support or combined child and spousal support order issued by the court on or after the first day of October, nineteen hundred ninety-eight, in any proceeding under this section be provided promptly to the state case registry established pursuant to subdivision four-a of section one hundred eleven-b of the social services law.

Domestic Relations Law § 240. Custody and child support; orders of protection

1. (a) In any action or proceeding brought

(1) to annul a marriage or to declare the nullity of a void marriage, or

(2) for a separation, or

(3) for a divorce, or

(4) to obtain, by a writ of habeas corpus or by petition and order to show cause, the custody of or right to visitation with any child of a marriage,

the court shall require verification of the status of any child of the marriage with respect to such child's custody and support, including any prior orders, and shall enter orders for custody and support as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child and subject to the provisions of subdivision one-c of this section.

Where either party to an action concerning custody of or a right to visitation with a child alleges in a sworn petition or complaint or sworn answer, cross-petition, counterclaim or other sworn responsive pleading that the other party has committed an act of domestic violence against the party making the allegation or a family or household member of either party, as such family or household member is defined in article eight of the family court act, and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section and state on the record how such findings, facts and circumstances factored into the direction.

If a parent makes a good faith allegation based on a reasonable belief supported by facts that the child is the victim of child abuse, child neglect, or the effects of domestic violence, and if that parent acts lawfully and in good faith in response to that reasonable belief to protect the child or seek treatment for the child, then that parent shall not be deprived of custody, visitation or contact with the child, or restricted in custody, visitation or contact, based solely on that belief or the reasonable actions taken based on that belief.

If an allegation that a child is abused is supported by a preponderance of the evidence, then the court shall consider such evidence of abuse in determining the visitation arrangement that is in the best interest of the child, and the court shall not place a child in the custody of a parent who presents a substantial risk of harm to that child, and shall state on the record how such findings were factored into the determination.

An order directing the payment of child support shall contain the social security numbers of the named parties.

In all cases there shall be no prima facie right to the custody of the child in either parent.

Such direction shall make provision for child support out of the property of either or both parents.

The court shall make its award for child support pursuant to subdivision one-b of this section.

Such direction may provide for reasonable visitation rights to the maternal and/or paternal grandparents of any child of the parties.

Such direction as it applies to rights of visitation with a child remanded or placed in the care of a person, official, agency or institution pursuant to article ten of the family court act, or pursuant to an instrument

approved under section three hundred fifty-eight-a of the social services law, shall be enforceable pursuant to part eight of article ten of the family court act and sections three hundred fifty-eight-a and three hundred eighty-four-a of the social services law and other applicable provisions of law against any person having care and custody, or temporary care and custody, of the child.

Notwithstanding any other provision of law, any written application or motion to the court for the establishment, modification or enforcement of a child support obligation for persons not in receipt of public assistance and care must contain either a request for child support enforcement services which would authorize the collection of the support obligation by the immediate issuance of an income execution for support enforcement as provided for by this chapter, completed in the manner specified in section one hundred eleven-g of the social services law; or a statement that the applicant has applied for or is in receipt of such services; or a statement that the applicant knows of the availability of such services, has declined them at this time and where support enforcement services pursuant to section one hundred eleven-g of the social services law have been declined that the applicant understands that an income deduction order may be issued pursuant to subdivision ©) of section fifty-two hundred forty-two of the civil practice law and rules without other child support enforcement services and that payment of an administrative fee may be required.

The court shall provide a copy of any such request for child support enforcement services to the support collection unit of the appropriate social services district any time it directs payments to be made to such support collection unit.

Additionally, the copy of any such request shall be accompanied by the name, address and social security number of the parties; the date and place of the parties' marriage; the name and date of birth of the child or children; and the name and address of the employers and income payors of the party from whom child support is sought or from the party ordered to pay child support to the other party

Such direction may require the payment of a sum or sums of money either directly to the custodial parent or to third persons for goods or services furnished for such child, or for both payments to the custodial parent and to such third persons; provided, however, that unless the party seeking or receiving child support has applied for or is receiving such services, the court shall not direct such payments to be made to the support collection unit, as established in section one hundred eleven-h of the social services law.

Every order directing the payment of support shall require that if either parent currently, or at any time in the future, has health insurance benefits available that may be extended or obtained to cover the child, such parent is required to exercise the option of additional coverage in favor of such child and execute and deliver to such person any forms, notices, documents or instruments necessary to assure timely payment of any health insurance claims for such child.

(a-1) (1) Permanent and initial temporary orders of custody or visitation.

Prior to the issuance of any permanent or initial temporary order of custody or visitation, the court shall conduct a review of the decisions and reports listed in subparagraph three of this paragraph.

(2) Successive temporary orders of custody or visitation.

Prior to the issuance of any successive temporary order of custody or visitation, the court shall conduct a review of the decisions and reports listed in subparagraph three of this paragraph, unless such a review has been conducted within ninety days prior to the issuance of such order.

(3) Decisions and reports for review.

The court shall conduct a review of the following:

(i) related decisions in court proceedings initiated pursuant to article ten of the family court act, and all warrants issued under the family court act; and

(ii) reports of the statewide computerized registry of orders of protection established and maintained pursuant to section two hundred twenty-one-a of the executive law, and reports of the sex offender registry established and maintained pursuant to section one hundred sixty-eight-b of the correction law.

(4) Notifying counsel and issuing orders.

Upon consideration of decisions pursuant to article ten of the family court act, and registry reports and notifying counsel involved in the proceeding, or in the event of a self-represented party, notifying such party of the results thereof, including any court appointed attorney for children, the court may issue a temporary, successive temporary or final order of custody or visitation.

(5) Temporary emergency order.

Notwithstanding any other provision of the law, upon emergency situations, including computer malfunctions, to serve the best interest of the child, the court may issue a temporary emergency order for custody or visitation in the event that it is not possible to timely review decisions and reports on registries as required pursuant to subparagraph three of this paragraph.

(6) After issuing a temporary emergency order.

After issuing a temporary emergency order of custody or visitation, the court shall conduct reviews of the decisions and reports on registries as required pursuant to subparagraph three of this paragraph within twenty-four hours of the issuance of such temporary emergency order.

Should such twenty-four hour period fall on a day when court is not in session, then the required reviews shall take place the next day the court is in session. Upon reviewing decisions and reports the court shall notify associated counsel, self-represented parties and attorneys for children pursuant to subparagraph four of this paragraph and may issue temporary or permanent custody or visitation orders.

(7) Feasibility study.

The commissioner of the office of children and family services, in conjunction with the office of court administration, is hereby authorized and directed to examine, study, evaluate and make recommendations concerning the feasibility of the utilization of computers in courts which are connected to the statewide central register of child abuse and maltreatment established and maintained pursuant to section four hundred twenty-two of the social services law, as a means of providing courts with information regarding parties requesting orders of custody or visitation.

Such commissioner shall make a preliminary report to the governor and the legislature of findings, conclusions and recommendations not later than January first, two thousand nine, and a final report of findings, conclusions and recommendations not later than June first, two thousand nine, and shall submit with the reports such legislative proposals as are deemed necessary to implement the commissioner's recommendations.

(a-2) Military service by parent; effect on child custody orders.

(1) During the period of time that a parent is activated, deployed or temporarily assigned to military service, such that the parent's ability to continue as a joint caretaker or the primary

caretaker of a minor child is materially affected by such military service, any orders issued pursuant to this section, based on the fact that the parent is activated, deployed or temporarily assigned to military service, which would materially affect or change a previous judgment or order regarding custody of that parent's child or children as such judgment or order existed on the date the parent was activated, deployed, or temporarily assigned to military service, shall be subject to review pursuant to subparagraph three of this paragraph.

Any relevant provisions of the Service Member's Civil Relief Act [FN1] shall apply to all proceedings governed by this section.

(2) During such period, the court may enter an order to modify custody if there is clear and convincing evidence that the modification is in the best interests of the child.

An attorney for the child shall be appointed in all cases where a modification is sought during such military service.

Such order shall be subject to review pursuant to subparagraph three of this paragraph. When entering an order pursuant to this section, the court shall consider and provide for, if feasible and if in the best interests of the child, contact between the military service member and his or her child, including, but not limited to, electronic communication by e-mail, webcam, telephone, or other available means.

During the period of the parent's leave from military service, the court shall consider the best interests of the child when establishing a parenting schedule, including visiting and other contact.

For such purposes, a "leave from military service" shall be a period of not more than three months.

(3) Unless the parties have otherwise stipulated or agreed, if an order is issued pursuant to this paragraph, the return of the parent from active military service, deployment or temporary assignment shall be considered a substantial change in circumstances.

Upon the request of either parent, the court shall determine on the basis of the child's best interests whether the custody judgment or order previously in effect should be modified.

(4) This paragraph shall not apply to assignments to permanent duty stations or permanent changes of station.

(b) As used in this section, the following terms shall have the following meanings:

(1) "Health insurance benefits" means any medical, dental, optical and prescription drugs and health care services or other health care benefits that may be provided for a dependent through an employer or organization, including such employers or organizations which are self insured, or through other available health insurance or health care coverage plans.

(2) "Available health insurance benefits" means any health insurance benefits that are reasonable in cost and that are reasonably accessible to the person on whose behalf the petition is brought.

Health insurance benefits that are not reasonable in cost or whose services are not reasonably accessible to such person, shall be considered unavailable.

(3) When the person on whose behalf the petition is brought is a child in accordance with paragraph (c) of this subdivision, health insurance benefits shall be considered "reasonable in cost" if the cost of health insurance benefits does not exceed five percent of the combined parental gross

income.

The cost of health insurance benefits shall refer to the cost of the premium and deductible attributable to adding the child or children to existing coverage or the difference between such costs for self-only and family coverage.

Provided, however, the presumption that the health insurance benefits are reasonable in cost may be rebutted upon a finding that the cost is unjust or inappropriate which finding shall be based on the circumstances of the case, the cost and comprehensiveness of the health insurance benefits for which the child or children may otherwise be eligible, and the best interests of the child or children.

In no instance shall health insurance benefits be considered "reasonable in cost" if a parent's share of the cost of extending such coverage would reduce the income of that parent below the self-support reserve.

Health insurance benefits are "reasonably accessible" if the child lives within the geographic area covered by the plan or lives within thirty minutes or thirty miles of travel time from the child's residence to the services covered by the health insurance benefits or through benefits provided under a reciprocal agreement; provided, however, this presumption may be rebutted for good cause shown including, but not limited to, the special health needs of the child.

The court shall set forth such finding and the reasons therefor in the order of support.

(c) When the person on whose behalf the petition is brought is a child, the court shall consider the availability of health insurance benefits to all parties and shall take the following action to ensure that health insurance benefits are provided for the benefit of the child:

(1) Where the child is presently covered by health insurance benefits, the court shall direct in the order of support that such coverage be maintained, unless either parent requests the court to make a direction for health insurance benefits coverage pursuant to paragraph two of this subdivision.

(2) Where the child is not presently covered by health insurance benefits, the court shall make a determination as follows:

(i) If only one parent has available health insurance benefits, the court shall direct in the order of support that such parent provide health insurance benefits.

(ii) If both parents have available health insurance benefits the court shall direct in the order of support that either parent or both parents provide such health insurance.

The court shall make such determination based on the circumstances of the case, including, but not limited to, the cost and comprehensiveness of the respective health insurance benefits and the best interests of the child.

(iii) If neither parent has available health insurance benefits, the court shall direct in the order of support that the custodial parent apply for the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law and the medical assistance program established pursuant to title eleven of article five of the social services law.

A direction issued under this subdivision shall not limit or alter either parent's obligation to obtain health insurance benefits at such time as they become available, as required

pursuant to paragraph (a) of this subdivision.

Nothing in this subdivision shall alter or limit the authority of the medical assistance program to determine when it is considered cost effective to require a custodial parent to enroll a child in an available group health insurance plan pursuant to paragraphs (b) and (c) of subdivision one of section three hundred sixty-seven-a of the social services law.

(d) The cost of providing health insurance benefits or benefits under the state's child health insurance plan or the medical assistance program, pursuant to paragraph (c) of this subdivision, shall be deemed cash medical support, and the court shall determine the obligation of either or both parents to contribute to the cost thereof pursuant to subparagraph five of paragraph (c) of subdivision one-b of this section.

(e) The court shall provide in the order of support that the legally responsible relative immediately notify the other party, or the other party and the support collection unit when the order is issued on behalf of a child in receipt of public assistance and care or in receipt of services pursuant to section one hundred eleven-g of the social services law, of any change in health insurance benefits, including any termination of benefits, change in the health insurance benefit carrier, premium, or extent and availability of existing or new benefits.

(f) Where the court determines that health insurance benefits are available, the court shall provide in the order of support that the legally responsible relative immediately enroll the eligible dependents named in the order who are otherwise eligible for such benefits without regard to any seasonal enrollment restrictions.

Such order shall further direct the legally responsible relative to maintain such benefits as long as they remain available to such relative. Such order shall further direct the legally responsible relative to assign all insurance reimbursement payments for health care expenses incurred for his or her eligible dependents to the provider of such services or the party actually having incurred and satisfied such expenses, as appropriate.

(g) When the court issues an order of child support or combined child and spousal support on behalf of persons in receipt of public assistance and care or in receipt of services pursuant to section one hundred eleven-g of the social services law, such order shall further direct that the provision of health care benefits shall be immediately enforced pursuant to section fifty-two hundred forty-one of the civil practice law and rules.

(h) When the court issues an order of child support or combined child and spousal support on behalf of persons other than those in receipt of public assistance and care or in receipt of services pursuant to section one hundred eleven-g of the social services law, the court shall also issue a separate order which shall include the necessary direction to ensure the order's characterization as a qualified medical child support order as defined by section six hundred nine of the employee retirement income security act of 1974 (29 USC 1169).

Such order shall:

(i) clearly state that it creates or recognizes the existence of the right of the named dependent to be enrolled and to receive benefits for which the legally responsible relative is eligible under the available group health plans, and shall clearly specify the name, social security number and mailing address of the legally responsible relative, and of each dependent to be covered by the order;

(ii) provide a clear description of the type of coverage to be provided by the group health plan to each such dependent or the manner in which the type of coverage is to be

determined; and

(iii) specify the period of time to which the order applies.

The court shall not require the group health plan to provide any type or form of benefit or option not otherwise provided under the group health plan except to the extent necessary to meet the requirements of a law relating to medical child support described in section one thousand three hundred and ninety-six g of title forty-two of the United States code.

(i) Upon a finding that a legally responsible relative wilfully failed to obtain health insurance benefits in violation of a court order, such relative will be presumptively liable for all health care expenses incurred on behalf of such dependents from the first date such dependents were eligible to be enrolled to receive health insurance benefits after the issuance of the order of support directing the acquisition of such coverage.

(j) The order shall be effective as of the date of the application therefor, and any retroactive amount of child support due shall be support arrears/past due support and shall, except as provided for herein, be paid in one lump sum or periodic sums, as the court shall direct, taking into account any amount of temporary support which has been paid.

In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules.

When a child receiving support is a public assistance recipient, or the order of support is being enforced or is to be enforced pursuant to section one hundred eleven-g of the social services law, the court shall establish the amount of retroactive child support and notify the parties that such amount shall be enforced by the support collection unit pursuant to an execution for support enforcement as provided for in subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules, or in such periodic payments as would have been authorized had such an execution been issued.

In such case, the courts shall not direct the schedule of repayment of retroactive support.

Where such direction is for child support and paternity has been established by a voluntary acknowledgement of paternity as defined in section forty-one hundred thirty-five-b of the public health law, the court shall inquire of the parties whether the acknowledgement has been duly filed, and unless satisfied that it has been so filed shall require the clerk of the court to file such acknowledgement with the appropriate registrar within five business days.

Such direction may be made in the final judgment in such action or proceeding, or by one or more orders from time to time before or subsequent to final judgment, or by both such order or orders and the final judgment.

Such direction may be made notwithstanding that the court for any reason whatsoever, other than lack of jurisdiction, refuses to grant the relief requested in the action or proceeding.

Any order or judgment made as in this section provided may combine in one lump sum any amount payable to the custodial parent under this section with any amount payable to such parent under section two hundred thirty-six of this article.

Upon the application of either parent, or of any other person or party having the care, custody and control of such child pursuant to such judgment or order, after such notice to the other party, parties or persons having such care, custody and control and given in such manner as the court shall direct, the court may annul or modify any such direction, whether made by order or final judgment, or in case no such direction shall have

been made in the final judgment may, with respect to any judgment of annulment or declaring the nullity of a void marriage rendered on or after September first, nineteen hundred forty, or any judgment of separation or divorce whenever rendered, amend the judgment by inserting such direction.

Subject to the provisions of section two hundred forty-four of this article, no such modification or annulment shall reduce or annul arrears accrued prior to the making of such application unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears.

Such modification may increase such child support nunc pro tunc as of the date of application based on newly discovered evidence.

Any retroactive amount of child support due shall be support arrears/past due support and shall be paid in one lump sum or periodic sums, as the court shall direct, taking into account any amount of temporary child support which has been paid.

In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules.

- 1-a. In any proceeding brought pursuant to this section to determine the custody or visitation of minors, a report made to the statewide central register of child abuse and maltreatment, pursuant to title six of article six of the social services law, or a portion thereof, which is otherwise admissible as a business record pursuant to rule forty-five hundred eighteen of the civil practice law and rules shall not be admissible in evidence, notwithstanding such rule, unless an investigation of such report conducted pursuant to title six of article six of the social services law has determined that there is some credible evidence of the alleged abuse or maltreatment and that the subject of the report has been notified that the report is indicated.

In addition, if such report has been reviewed by the state commissioner of social services or his designee and has been determined to be unfounded, it shall not be admissible in evidence.

If such report has been so reviewed and has been amended to delete any finding, each such deleted finding shall not be admissible.

If the state commissioner of social services or his designee has amended the report to add any new finding, each such new finding, together with any portion of the original report not deleted by the commissioner or his designee, shall be admissible if it meets the other requirements of this subdivision and is otherwise admissible as a business record.

If such a report, or portion thereof, is admissible in evidence but is uncorroborated, it shall not be sufficient to make a fact finding of abuse or maltreatment in such proceeding.

Any other evidence tending to support the reliability of such report shall be sufficient corroboration.

- 1-b. (a) The court shall make its award for child support pursuant to the provisions of this subdivision.

The court may vary from the amount of the basic child support obligation determined pursuant to paragraph (c) of this subdivision only in accordance with paragraph (f) of this subdivision.

(b) For purposes of this subdivision, the following definitions shall be used:

(1) "Basic child support obligation" shall mean the sum derived by adding the amounts determined by the application of subparagraphs two and three of paragraph (c) of this subdivision except as

increased pursuant to subparagraphs four, five, six and seven of such paragraph.

(2) "Child support" shall mean a sum to be paid pursuant to court order or decree by either or both parents or pursuant to a valid agreement between the parties for care, maintenance and education of any unemancipated child under the age of twenty-one years.

(3) "Child support percentage" shall mean:

- (i) seventeen percent of the combined parental income for one child;
- (ii) twenty-five percent of the combined parental income for two children;
- (iii) twenty-nine percent of the combined parental income for three children;
- (iv) thirty-one percent of the combined parental income for four children; and
- (v) no less than thirty-five percent of the combined parental income for five or more children.

(4) "Combined parental income" shall mean the sum of the income of both parents.

(5) "Income" shall mean, but shall not be limited to, the sum of the amounts determined by the application of clauses (i), (ii), (iii), (iv), (v) and (vi) of this subparagraph reduced by the amount determined by the application of clause (vii) of this subparagraph:

(i) gross (total) income as should have been or should be reported in the most recent federal income tax return. If an individual files his/her federal income tax return as a married person filing jointly, such person shall be required to prepare a form, sworn to under penalty of law, disclosing his/her gross income individually;

(ii) to the extent not already included in gross income in clause (i) of this subparagraph, investment income reduced by sums expended in connection with such investment;

(iii) to the extent not already included in gross income in clauses (i) and (ii) of this subparagraph, the amount of income or compensation voluntarily deferred and income received, if any, from the following sources:

- (A) workers' compensation,
- (B) disability benefits,
- (C) unemployment insurance benefits,
- (D) social security benefits,
- (E) veterans benefits,
- (F) pensions and retirement benefits,
- (G) fellowships and stipends, and
- (H) annuity payments;

(iv) at the discretion of the court, the court may attribute or impute income from, such other resources as may be available to the parent, including, but not limited to:

(A) non-income producing assets,

(B) meals, lodging, memberships, automobiles or other perquisites that are provided as part of compensation for employment to the extent that such perquisites constitute expenditures for personal use, or which expenditures directly or indirectly [FN2] confer personal economic benefits,

(C) fringe benefits provided as part of compensation for employment, and

(D) money, goods, or services provided by relatives and friends;

(v) an amount imputed as income based upon the parent's former resources or income, if the court determines that a parent has reduced resources or income in order to reduce or avoid the parent's obligation for child support;

(vi) to the extent not already included in gross income in clauses (i) and (ii) of this subparagraph, the following self-employment deductions attributable to self-employment carried on by the taxpayer:

(A) any depreciation deduction greater than depreciation calculated on a straight-line basis for the purpose of determining business income or investment credits, and

(B) entertainment and travel allowances deducted from business income to the extent said allowances reduce personal expenditures;

(vii) the following shall be deducted from income prior to applying the provisions of paragraph (c) of this subdivision:

(A) unreimbursed employee business expenses except to the extent said expenses reduce personal expenditures,

(B) alimony or maintenance actually paid to a spouse not a party to the instant action pursuant to court order or validly executed written agreement,

(C) alimony or maintenance actually paid or to be paid to a spouse that is a party to the instant action pursuant to an existing court order or contained in the order to be entered by the court, or pursuant to a validly executed written agreement, provided the order or agreement provides for a specific adjustment, in accordance with this subdivision, in the amount of child support payable upon the termination of alimony or maintenance to such spouse,

(D) child support actually paid pursuant to court order or written agreement on behalf of any child for whom the parent has a legal duty of support and who is not subject to the instant action,

(E) public assistance,

(F) supplemental security income,

(G) New York city or Yonkers income or earnings taxes actually paid, and

(H) federal insurance contributions act (FICA) taxes actually paid.

(6) "Self-support reserve" shall mean one hundred thirty-five percent of the poverty income guidelines amount for a single person as reported by the federal department of health and human services. For the calendar year nineteen hundred eighty-nine, the self-support reserve shall be eight thousand sixty-five dollars. On March first of each year, the self-support reserve shall be revised to reflect the annual updating of the poverty income guidelines as reported by the federal department of health and human services for a single person household.

(c) The amount of the basic child support obligation shall be determined in accordance with the provision of this paragraph:

(1) The court shall determine the combined parental income.

(2) [Eff. until Jan. 31, 2010. See, also, subpar. (2) below.] The court shall multiply the combined parental income up to eighty thousand dollars by the appropriate child support percentage and such amount shall be prorated in the same proportion as each parent's income is to the combined parental income.

(2) [Eff. Jan. 31, 2010. See, also, above.] The court shall multiply the combined parental income up to the amount set forth in paragraph (b) of subdivision two of section one hundred eleven-i of the social services law by the appropriate child support percentage and such amount shall be prorated in the same proportion as each parent's income is to the combined parental income.

(3) Where the combined parental income exceeds the dollar amount set forth in subparagraph two of this paragraph, the court shall determine the amount of child support for the amount of the combined parental income in excess of such dollar amount through consideration of the factors set forth in paragraph (f) of this subdivision and/or the child support percentage.

(4) Where the custodial parent is working, or receiving elementary or secondary education, or higher education or vocational training which the court determines will lead to employment, and incurs child care expenses as a result thereof, the court shall determine reasonable child care expenses and such child care expenses, where incurred, shall be prorated in the same proportion as each parent's income is to the combined parental income.

Each parent's pro rata share of the child care expenses shall be separately stated and added to the sum of subparagraphs two and three of this paragraph.

(5) the court shall determine the parties' obligation to provide health insurance benefits pursuant to this section and to pay cash medical support as provided under this subparagraph.

(i) "Cash medical support" means an amount ordered to be paid toward the cost of health insurance provided by a public entity or by a parent through an employer or organization, including such employers or organizations which are self insured, or through other available health insurance or health care coverage plans, and/or for other health care expenses not covered by insurance.

(ii) Where health insurance benefits pursuant to subparagraph one and clauses (i) and (ii) of subparagraph two of paragraph (c) of subdivision one of this section are determined by

the court to be available, the cost of providing health insurance benefits shall be prorated between the parties in the same proportion as each parent's income is to the combined parental income.

If the custodial parent is ordered to provide such benefits, the non-custodial parent's pro rata share of such costs shall be added to the basic support obligation.

If the non-custodial parent is ordered to provide such benefits, the custodial parent's pro rata share of such costs shall be deducted from the basic support obligation.

(iii) Where health insurance benefits pursuant to subparagraph one and clauses (i) and (ii) of subparagraph two of paragraph (c) of subdivision one of this section are determined by the court to be unavailable, if the child or children are determined eligible for coverage under the medical assistance program established pursuant to title eleven of article five of the social services law, the court shall order the non-custodial parent to pay cash medical support as follows:

(A) In the case of a child or children authorized for managed care coverage under the medical assistance program, the lesser of the amount that would be required as a family contribution under the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law for the child or children if they were in a two-parent household with income equal to the combined income of the non-custodial and custodial parents or the premium paid by the medical assistance program on behalf of the child or children to the managed care plan.

The court shall separately state the non-custodial parent's monthly obligation.

The non-custodial parent's cash medical support obligation under this clause shall not exceed five percent of his or her gross income, or the difference between the non-custodial parent's income and the self-support reserve, whichever is less.

(B) In the case of a child or children authorized for fee-for-service coverage under the medical assistance program other than a child or children described in item (A) of this clause, the court shall determine the non-custodial parent's maximum annual cash medical support obligation, which shall be equal to the lesser of the monthly amount that would be required as a family contribution under the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law for the child or children if they were in a two-parent household with income equal to the combined income of the non-custodial and custodial parents times twelve months or the number of months that the child or children are authorized for fee-for-service coverage during any year.

The court shall separately state in the order the non-custodial parent's maximum annual cash medical support obligation and, upon proof to the court that the non-custodial parent, after notice of the amount due, has failed to pay the public entity for incurred health care expenses, the court shall order the non-custodial parent to pay such incurred health care expenses up to the maximum annual cash medical support obligation.

Such amounts shall be support arrears/past due support and shall be subject to

any remedies as provided by law for the enforcement of support arrears/past due support.

The total annual amount that the non-custodial parent is ordered to pay under this clause shall not exceed five percent of his or her gross income or the difference between the non-custodial parent's income and the self-support reserve, whichever is less.

(C) The court shall order cash medical support to be paid by the non-custodial parent for health care expenses of the child or children paid by the medical assistance program prior to the issuance of the court's order.

The amount of such support shall be calculated as provided under item (A) or (B) of this clause, provided that the amount that the non-custodial parent is ordered to pay under this item shall not exceed five percent of his or her gross income or the difference between the non-custodial parent's income and the self-support reserve, whichever is less, for the year when the expense was incurred.

Such amounts shall be support arrears/past due support and shall be subject to any remedies as provided by law for the enforcement of support arrears/past due support.

(iv) Where health insurance benefits pursuant to subparagraph one and clauses (i) and (ii) of subparagraph two of paragraph (c) of subdivision one of this section are determined by the court to be unavailable, and the child or children are determined eligible for coverage under the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law, the court shall prorate each parent's share of the cost of the family contribution required under such child health insurance plan in the same proportion as each parent's income is to the combined parental income, and state the amount of the non-custodial parent's share in the order.

The total amount of cash medical support that the non-custodial parent is ordered to pay under this clause shall not exceed five percent of his or her gross income, or the difference between the non-custodial parent's income and the self-support reserve, whichever is less.

(v) In addition to the amounts ordered under clause (ii), (iii), or (iv), the court shall prorate each parent's share of reasonable health care expenses not reimbursed or paid by insurance, the medical assistance program established pursuant to title eleven of article five of the social services law, or the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law, in the same proportion as each parent's income is to the combined parental income, and state the non-custodial parent's share as a percentage in the order.

The non-custodial parent's pro rata share of such health care expenses determined by the court to be due and owing shall be support arrears/past due support and shall be subject to any remedies provided by law for the enforcement of support arrears/past due support.

In addition, the court may direct that the non-custodial parent's pro rata share of such health care expenses be paid in one sum or in periodic sums, including direct payment to the health care provider.

(vi) Upon proof by either party that cash medical support pursuant to clause (ii), (iii), (iv), or (v) of this subparagraph would be unjust or inappropriate pursuant to paragraph (f) of this subdivision, the court shall:

(A) order the parties to pay cash medical support as the court finds just and appropriate, considering the best interests of the child; and

(B) set forth in the order the factors it considered, the amount calculated under this subparagraph, the reason or reasons the court did not order such amount, and the basis for the amount awarded.

(6) Where the court determines that the custodial parent is seeking work and incurs child care expenses as a result thereof, the court may determine reasonable child care expenses and may apportion the same between the custodial and non-custodial parent.

The non-custodial parent's share of such expenses shall be separately stated and paid in a manner determined by the court.

(7) Where the court determines, having regard for the circumstances of the case and of the respective parties and in the best interests of the child, and as justice requires, that the present or future provision of post-secondary, private, special, or enriched education for the child is appropriate, the court may award educational expenses.

The non-custodial parent shall pay educational expenses, as awarded, in a manner determined by the court, including direct payment to the educational provider.

(d) Notwithstanding the provisions of paragraph (c) of this subdivision, where the annual amount of the basic child support obligation would reduce the non-custodial parent's income below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be twenty-five dollars per month or the difference between the non-custodial parent's income and the self-support reserve, whichever is greater.

Notwithstanding the provisions of paragraph (c) of this subdivision, where the annual amount of the basic child support obligation would reduce the non-custodial parent's income below the self-support reserve but not below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be fifty dollars per month or the difference between the non-custodial parent's income and the self-support reserve, whichever is greater.

(e) Where a parent is or may be entitled to receive non-recurring payments from extraordinary sources not otherwise considered as income pursuant to this section, including but not limited to:

- (1) Life insurance policies;
- (2) Discharges of indebtedness;
- (3) Recovery of bad debts and delinquency amounts;
- (4) Gifts and inheritances; and
- (5) Lottery winnings,

the court, in accordance with paragraphs (c), (d) and (f) of this subdivision may allocate a proportion of the same to child support, and such amount shall be paid in a manner determined by the court.

(f) The court shall calculate the basic child support obligation, and the non-custodial parent's pro rata share of the basic child support obligation.

Unless the court finds that the non-custodial parents's [FN2] pro-rata share of the basic child support obligation is unjust or inappropriate, which finding shall be based upon consideration of the following factors:

- (1) The financial resources of the custodial and non-custodial parent, and those of the child;
- (2) The physical and emotional health of the child and his/her special needs and aptitudes;
- (3) The standard of living the child would have enjoyed had the marriage or household not been dissolved;
- (4) The tax consequences to the parties;
- (5) The non-monetary contributions that the parents will make toward the care and well-being of the child;
- (6) The educational needs of either parent;
- (7) A determination that the gross income of one parent is substantially less than the other parent's gross income;
- (8) The needs of the children of the non-custodial parent for whom the non-custodial parent is providing support who are not subject to the instant action and whose support has not been deducted from income pursuant to subclause (D) of clause (vii) of subparagraph five of paragraph (b) of this subdivision, and the financial resources of any person obligated to support such children, provided, however, that this factor may apply only if the resources available to support such children are less than the resources available to support the children who are subject to the instant action;
- (9) Provided that the child is not on public assistance (i) extraordinary expenses incurred by the non-custodial parent in exercising visitation, or (ii) expenses incurred by the non-custodial parent in extended visitation provided that the custodial parent's expenses are substantially reduced as a result thereof; and
- (10) Any other factors the court determines are relevant in each case, the court shall order the non-custodial parent to pay his or her pro rata share of the basic child support obligation, and may order the non-custodial parent to pay an amount pursuant to paragraph (e) of this subdivision.

(g) Where the court finds that the non-custodial parent's pro rata share of the basic child support obligation is unjust or inappropriate, the court shall order the non-custodial parent to pay such amount of child support as the court finds just and appropriate, and the court shall set forth, in a written order, the factors it considered; the amount of each party's pro rata share of the basic child support obligation; and the reasons that the court did not order the basic child support obligation.

Such written order may not be waived by either party or counsel; provided, however, and notwithstanding any other provision of law, the court shall not find that the non-custodial parent's pro rata share of such obligation is unjust or inappropriate on the basis that such share exceeds the portion of a public assistance

grant which is attributable to a child or children.

In no instance shall the court order child support below twenty-five dollars per month.

Where the non-custodial parent's income is less than or equal to the poverty income guidelines amount for a single person as reported by the federal department of health and human services, unpaid child support arrears in excess of five hundred dollars shall not accrue.

(h) A validly executed agreement or stipulation voluntarily entered into between the parties after the effective date of this subdivision presented to the court for incorporation in an order or judgment shall include a provision stating that the parties have been advised of the provisions of this subdivision, and that the basic child support obligation provided for therein would presumptively result in the correct amount of child support to be awarded.

In the event that such agreement or stipulation deviates from the basic child support obligation, the agreement or stipulation must specify the amount that such basic child support obligation would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount.

Such provision may not be waived by either party or counsel.

Nothing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the basic child support obligation provided such agreements or stipulations comply with the provisions of this paragraph.

The court shall, however, retain discretion with respect to child support pursuant to this section.

Any court order or judgment incorporating a validly executed agreement or stipulation which deviates from the basic child support obligation shall set forth the court's reasons for such deviation.

(i) Where either or both parties are unrepresented, the court shall not enter an order or judgment other than a temporary order pursuant to section two hundred thirty-seven of this article, that includes a provision for child support unless the unrepresented party or parties have received a copy of the child support standards chart promulgated by the commissioner of social services pursuant to subdivision two of section one hundred eleven-i of the social services law.

Where either party is in receipt of child support enforcement services through the local social services district, the local social services district child support enforcement unit shall advise such party of the amount derived from application of the child support percentage and that such amount serves as a starting point for the determination of the child support award, and shall provide such party with a copy of the child support standards chart.

In no instance shall the court approve any voluntary support agreement or compromise that includes an amount for child support less than twenty-five dollars per month.

(j) In addition to financial disclosure required in section two hundred thirty-six of this article, the court may require that the income and/or expenses of either party be verified with documentation including, but not limited to, past and present income tax returns, employer statements, pay stubs, corporate, business, or partnership books and records, corporate and business tax returns, and receipts for expenses or such other means of verification as the court determines appropriate.

Nothing herein shall affect any party's right to pursue discovery pursuant to this chapter, the civil practice law and rules, or the family court act.

(k) When a party has defaulted and/or the court is otherwise presented with insufficient evidence to determine gross income, the court shall order child support based upon the needs or standard of living of the child, whichever is greater.

Such order may be retroactively modified upward, without a showing of change in circumstances.

(l) In any action or proceeding for modification of an order of child support existing prior to the effective date of this paragraph, brought pursuant to this article, the child support standards set forth in this subdivision shall not constitute a change of circumstances warranting modification of such support order; provided, however, that (1) where the circumstances warrant modification of such order, or (2) where any party objects to an adjusted child support order made or proposed at the direction of the support collection unit pursuant to section one hundred eleven-h or one hundred eleven-n of the social services law, and the court is reviewing the current order of child support, such standards shall be applied by the court in its determination with regard to the request for modification, or disposition of an objection to an adjusted child support order made or proposed by a support collection unit.

In applying such standards, when the order to be modified incorporates by reference or merges with a validly executed separation agreement or stipulation of settlement, the court may consider, in addition to the factors set forth in paragraph (f) of this subdivision, the provisions of such agreement or stipulation concerning property distribution, distributive award and/or maintenance in determining whether the amount calculated by using the standards would be unjust or inappropriate.

- 1-c. (a) Notwithstanding any other provision of this chapter to the contrary, no court shall make an order providing for visitation or custody to a person who has been convicted of murder in the first or second degree in this state, or convicted of an offense in another jurisdiction which, if committed in this state, would constitute either murder in the first or second degree, of a parent, legal custodian, legal guardian, sibling, half-sibling or step-sibling of any child who is the subject of the proceeding.

Pending determination of a petition for visitation or custody, such child shall not visit and no person shall visit with such child present, such person who has been convicted of murder in the first or second degree in this state, or convicted of and [FN3] offense in another jurisdiction which, if committed in this state, would constitute either murder in the first or second degree, of a parent, legal custodian, legal guardian, sibling, half-sibling or step-sibling of a child who is the subject of the proceeding without the consent of such child's custodian or legal guardian.

(b) Notwithstanding paragraph (a) of this subdivision a court may order visitation or custody where:

- (i) (A) such child is of suitable age to signify assent and such child assents to such visitation or custody; or

(B) if such child is not of suitable age to signify assent, the child's custodian or legal guardian assents to such order; or

(C) the person who has been convicted of murder in the first or second degree, or an offense in another jurisdiction which if committed in this state, would constitute either murder in the first or second degree, can prove by a preponderance of the evidence that:

(1) he or she, or a family or household member of either party, was a victim of domestic violence by the victim of such murder; and

(2) the domestic violence was causally related to the commission of such murder; and

(ii) the court finds that such visitation or custody is in the best interests of the child.

(c) For the purpose of making a determination pursuant to clause (C) of subparagraph (i) of paragraph (b) of this subdivision, the court shall not be bound by the findings of fact, conclusions of law or ultimate conclusion as determined by the proceedings leading to the conviction of murder in the first or second degree in this state or of an offense in another jurisdiction which, if committed in this state, would constitute murder in either the first or second degree, of a parent, legal guardian, legal custodian, sibling, half-sibling or step-sibling of a child who is the subject of the proceeding.

In all proceedings under this section, a law guardian shall be appointed for the child.

2. (a) [FN4] An order directing payment of money for child support shall be enforceable pursuant to section fifty-two hundred forty-one or fifty-two hundred forty-two of the civil practice law and rules or in any other manner provided by law.

Such orders or judgments for child support and maintenance shall also be enforceable pursuant to article fifty-two of the civil practice law and rules upon a debtor's default as such term is defined in paragraph seven of subdivision (a) of section fifty-two hundred forty-one of the civil practice law and rules.

The establishment of a default shall be subject to the procedures established for the determination of a mistake of fact for income executions pursuant to subdivision (e) of section fifty-two hundred forty-one of the civil practice law and rules.

For the purposes of enforcement of child support orders or combined spousal and child support orders pursuant to section five thousand two hundred forty-one of the civil practice law and rules, a "default" shall be deemed to include amounts arising from retroactive support.

- b. (1) When a child receiving support is a public assistance recipient, or the order of support is being enforced or is to be enforced pursuant to section one hundred eleven-g of the social services law, the court shall direct that the child support payments be made to the support collection unit.

Unless (i) the court finds and sets forth in writing the reasons that there is good cause not to require immediate income withholding; or (ii) when the child is not in receipt of public assistance, a written agreement providing for an alternative arrangement has been reached between the parties, the support collection unit shall issue an income execution immediately for child support or combined maintenance and child support, and may issue an execution for medical support enforcement in accordance with the provisions of the order of support.

Such written agreement may include an oral stipulation made on the record resulting in a written order.

For purposes of this paragraph, good cause shall mean substantial harm to the debtor.

The absence of an arrearage or the mere issuance of an income execution shall not constitute good cause.

When an immediate income execution or an execution for medical support enforcement is issued by the support collection unit, such income execution shall be issued pursuant to section five thousand two hundred forty-one of the civil practice law and rules, except that the provisions thereof relating to mistake of fact, default and any other provisions which are not relevant to the issuance of an income execution pursuant to this paragraph shall not apply; provided, however, that if the support collection unit makes an error in the issuance of an income execution pursuant to this paragraph, and such error is to the detriment of the debtor, the support collection unit shall

have thirty days after notification by the debtor to correct the error.

Where permitted under federal law and where the record of the proceedings contains such information, such order shall include on its face the social security number and the name and address of the employer, if any, of the person chargeable with support; provided, however, that failure to comply with this requirement shall not invalidate such order.

When the court determines that there is good cause not to immediately issue an income execution or when the parties agree to an alternative arrangement as provided in this paragraph, the court shall provide expressly in the order of support that the support collection unit shall not issue an immediate income execution.

Notwithstanding any such order, the support collection unit shall issue an income execution for support enforcement when the debtor defaults on the support obligation, as defined in section five thousand two hundred forty-one of the civil practice law and rules.

(2) When the court issues an order of child support or combined child and spousal support on behalf of persons other than those in receipt of public assistance or in receipt of services pursuant to section one hundred eleven-g of the social services law, the court shall issue an income deduction order pursuant to subdivision (c) of section five thousand two hundred forty-two of the civil practice law and rules at the same time it issues the order of support.

The court shall enter the income deduction order unless the court finds and sets forth in writing (i) the reasons that there is good cause not to require immediate income withholding; or (ii) that an agreement providing for an alternative arrangement has been reached between the parties.

Such agreement may include a written agreement or an oral stipulation, made on the record, that results in a written order.

For purposes of this paragraph, good cause shall mean substantial harm to the debtor.

The absence of an arrearage or the mere issuance of an income deduction order shall not constitute good cause.

Where permitted under federal law and where the record of the proceedings contains such information, such order shall include on its face the social security number and the name and address of the employer, if any, of the person chargeable with support; provided, however, that failure to comply with this requirement shall not invalidate the order.

When the court determines that there is good cause not to issue an income deduction order immediately or when the parties agree to an alternative arrangement as provided in this paragraph, the court shall provide expressly in the order of support the basis for its decision and shall not issue an income deduction order.

c. Any order of support issued on behalf of a child in receipt of family assistance or child support enforcement services pursuant to section one hundred eleven-g of the social services law shall be subject to review and adjustment by the support collection unit pursuant to section one hundred eleven-n of the social services law.

Such review and adjustment shall be in addition to any other activities undertaken by the support collection unit relating to the establishment, modification, and enforcement of support orders payable to such unit.

3. Order of protection.

a. The court may make an order of protection in assistance or as a condition of any other order made under this section.

The order of protection may set forth reasonable conditions of behavior to be observed for a specified time by any party.

Such an order may require any party:

(1) to stay away from the home, school, business or place of employment of the child, other parent or any other party, and to stay away from any other specific location designated by the court;

(2) to permit a parent, or a person entitled to visitation by a court order or a separation agreement, to visit the child at stated periods;

(3) to refrain from committing a family offense, as defined in subdivision one of section 530.11 of the criminal procedure law, or any criminal offense against the child or against the other parent or against any person to whom custody of the child is awarded or from harassing, intimidating or threatening such persons;

(4) to permit a designated party to enter the residence during a specified period of time in order to remove personal belongings not in issue in a proceeding or action under this chapter or the family court act; or

(5) to refrain from acts of commission or omission that create an unreasonable risk to the health, safety or welfare of a child.

(6) to pay the reasonable counsel fees and disbursements involved in obtaining or enforcing the order of the person who is protected by such order if such order is issued or enforced.

(7) to refrain from intentionally injuring or killing, without justification, any companion animal the respondent knows to be owned, possessed, leased, kept or held by the person protected by the order or a minor child residing in such person's household.

“Companion animal,” as used in this section, shall have the same meaning as in subdivision five of section three hundred fifty of the agriculture and markets law.

(8) to observe such other conditions as are necessary to further the purposes of protection.

b. An order of protection entered pursuant to this subdivision shall bear in a conspicuous manner, on the front page of said order, the language “Order of protection issued pursuant to section two hundred forty of the domestic relations law”.

The absence of such language shall not affect the validity of such order.

The presentation of a copy of such an order to any peace officer acting pursuant to his or her special duties, or police officer, shall constitute authority, for that officer to arrest a person when that person has violated the terms of such an order, and bring such person before the court and, otherwise, so far as lies within the officer's power, to aid in securing the protection such order was intended to afford.

c. An order of protection entered pursuant to this subdivision may be made in the final judgment in any

matrimonial action or in a proceeding to obtain custody of or visitation with any child under this section, or by one or more orders from time to time before or subsequent to final judgment, or by both such order or orders and the final judgment.

The order of protection may remain in effect after entry of a final matrimonial judgment and during the minority of any child whose custody or visitation is the subject of a provision of a final judgment or any order.

An order of protection may be entered notwithstanding that the court for any reason whatsoever, other than lack of jurisdiction, refuses to grant the relief requested in the action or proceeding.

d. The chief administrator of the courts shall promulgate appropriate uniform temporary orders of protection and orders of protection forms, applicable to proceedings under this article, to be used throughout the state.

Such forms shall be promulgated and developed in a manner to ensure the compatibility of such forms with the statewide computerized registry established pursuant to section two hundred twenty-one-a of the executive law.

e. No order of protection may direct any party to observe conditions of behavior unless: (i) the party requesting the order of protection has served and filed an action, proceeding, counter-claim or written motion and, (ii) the court has made a finding on the record that such party is entitled to issuance of the order of protection which may result from a judicial finding of fact, judicial acceptance of an admission by the party against whom the order was issued or judicial finding that the party against whom the order is issued has given knowing, intelligent and voluntary consent to its issuance.

The provisions of this subdivision shall not preclude the court from issuing a temporary order of protection upon the court's own motion or where a motion for such relief is made to the court, for good cause shown.

f. In addition to the foregoing provisions, the court may issue an order, pursuant to section two hundred twenty-seven-c of the real property law, authorizing the party for whose benefit any order of protection has been issued to terminate a lease or rental agreement pursuant to section two hundred twenty-seven-c of the real property law.

Any party moving for a temporary order of protection pursuant to this subdivision during hours when the court is open shall be entitled to file such motion or pleading containing such prayer for emergency relief on the same day that such person first appears at such court, and a hearing on the motion or portion of the pleading requesting such emergency relief shall be held on the same day or the next day that the court is in session following the filing of such motion or pleading.

Upon issuance of an order of protection or temporary order of protection or upon a violation of such order, the court may make an order in accordance with section eight hundred forty-two-a of the family court act directing the surrender of firearms, revoking or suspending a party's firearms license, and/or directing that such party be ineligible to receive a firearms license.

Upon issuance of an order of protection pursuant to this section or upon a finding of a violation thereof, the court also may direct payment of restitution in an amount not to exceed ten thousand dollars in accordance with subdivision (e) of section eight hundred forty-one of such act; provided, however, that in no case shall an order of restitution be issued where the court determines that the party against whom the order would be

issued has already compensated the injured party or where such compensation is incorporated in a final judgment or settlement of the action.

3-a. Service of order of protection.

If a temporary order of protection has been issued upon a default, unless the party requesting the order states on the record that she or he will arrange for other means for service or deliver the order to a peace or police officer directly for service, the court shall immediately deliver a copy of the temporary order of protection or order of protection to a peace officer, acting pursuant to his or her special duties and designated by the court, or to a police officer as defined in paragraph (b) or (d) of subdivision thirty-four of section 1.20 of the criminal procedure law, or, in the city of New York, to a designated representative of the police department of the city of New York.

Any peace or police officer or designated person receiving a temporary order of protection or an order of protection as provided hereunder shall serve or provide for the service thereof together with any associated papers that may be served simultaneously, at any address designated therewith, including the summons and petition or complaint if not previously served.

Service of such temporary order of protection or order of protection and associated papers shall, insofar as practicable, be achieved promptly.

An officer or designated person obliged to perform service pursuant to this subdivision, and his or her employer, shall not be liable for damages resulting from failure to achieve service where, having made a reasonable effort, such officer or designated person is unable to locate and serve the temporary order of protection or order of protection at any address provided by the party requesting the order.

A statement subscribed by the officer or designated person, and affirmed by him or her to be true under the penalties of perjury, stating the papers served, the date, time, address or in the event there is no address, place, and manner of service, the name and a brief physical description of the party served, shall be proof of service of the summons, petition and temporary order of protection or order of protection.

When the temporary order of protection or order of protection and other papers, if any, have been served, such officer or designated person shall provide the court with an affirmation, certificate or affidavit of service and shall provide notification of the date and time of such service to the statewide computer registry established pursuant to section two hundred twenty-one-a of the executive law.

3-b. Emergency powers; local criminal court.

If the court that issued an order of protection or temporary order of protection under this section or warrant in connection thereto is not in session when an arrest is made for an alleged violation of the order or upon a warrant issued in connection with such violation, the arrested person shall be brought before a local criminal court in the county of arrest or in the county in which such warrant is returnable pursuant to article one hundred twenty of the criminal procedure law and arraigned by such court.

Such local criminal court shall order the commitment of the arrested person to the custody of the sheriff, admit to, fix or accept bail, or release the arrested person on his or her recognizance pending appearance in the court that issued the order of protection, temporary order of protection or warrant.

In making such order, such local criminal court shall consider the bail recommendation, if any, made by the supreme or family court as indicated on the warrant or certificate of warrant.

Unless the petitioner or complainant requests otherwise, the court, in addition to scheduling further criminal proceedings, if any, regarding such alleged family offense or violation allegation, shall make such matter returnable in the supreme or family court, as applicable, on the next day such court is in session.

3-c. Orders of protection; filing and enforcement of out-of-state orders.

A valid order of protection or temporary order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction shall be accorded full faith and credit and enforced as if it were issued by a court within the state for as long as the order remains in effect in the issuing jurisdiction in accordance with sections two thousand two hundred sixty-five and two thousand two hundred sixty-six of title eighteen of the United States Code.

a. An order issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction shall be deemed valid if:

(1) the issuing court had personal jurisdiction over the parties and over the subject matter under the law of the issuing jurisdiction;

(2) the person against whom the order was issued had reasonable notice and an opportunity to be heard prior to issuance of the order; provided, however, that if the order was a temporary order of protection issued in the absence of such person, that notice had been given and that an opportunity to be heard had been provided within a reasonable period of time after the issuance of the order; and

(3) in the case of orders of protection or temporary orders of protection issued against both a petitioner and respondent, the order or portion thereof sought to be enforced was supported by: (i) a pleading requesting such order, including, but not limited to, a petition, cross-petition or counterclaim; and (ii) a judicial finding that the requesting party is entitled to the issuance of the order, which may result from a judicial finding of fact, judicial acceptance of an admission by the party against whom the order was issued or judicial finding that the party against whom the order was issued had give [FN5] knowing, intelligent and voluntary consent to its issuance.

b. Notwithstanding the provisions of article fifty-four of the civil practice law and rules, an order of protection or temporary order of protection issued by a court of competent jurisdiction in another state, territorial or tribal jurisdiction, accompanied by a sworn affidavit that upon information and belief such order is in effect as written and has not been vacated or modified, may be filed without fee with the clerk of the court, who shall transmit information regarding such order to the statewide registry of orders of protection and warrants established pursuant to section two hundred twenty-one-a of the executive law; provided, however, that such filing and registry entry shall not be required for enforcement of the order.

4. One-time adjustment of child support orders issued prior to September fifteenth, nineteen hundred eighty-nine.

Any party to a child support order issued prior to September fifteenth, nineteen hundred eighty-nine on the behalf of a child in receipt of public assistance or child support services pursuant to section one hundred eleven-g of the social services law may request that the support collection unit undertake one review of the order for adjustment purposes pursuant to section one hundred eleven-h of the social services law.

A hearing on the adjustment of such order shall be granted upon the objection of either party pursuant to the provisions of this section.

An order shall be adjusted if as of the date of the support collection unit's review of the correct amount of child support as calculated pursuant to the provisions of this section would deviate by at least ten percent from the child support ordered in the current order of support.

Additionally, a new order shall be issued upon a showing that the current order of support does not provide for the health care needs of the child through insurance or otherwise.

Eligibility of the child for medical assistance shall not relieve any obligation the parties otherwise have to provide for the health care needs of the child.

The support collection unit's review of a child support order shall be made on notice to all parties to the current support order.

Nothing herein shall be deemed in any way to limit, restrict, expand or impair the rights of any party to file for a modification of a child support order as is otherwise provided by law.

(1) Upon mailing of an adjustment finding and where appropriate a proposed order in conformity with such finding filed by either party or by the support collection unit, a party shall have thirty-five days from the date of mailing to submit to the court identified thereon specific written objections to such finding and proposed order.

(a) If specific written objections are submitted by either party or by the support collection unit, a hearing shall be scheduled by the court on notice to the parties and the support collection unit, who then shall have the right to be heard by the court and to offer evidence in support of or in opposition to adjustment of the support order.

(b) The party filing the specific written objections shall bear the burden of going forward and the burden of proof; provided, however, that if the support collection unit has failed to provide the documentation and information required by subdivision fourteen of section one hundred eleven-h of the social services law, the court shall first require the support collection unit to furnish such documents and information to the parties and the court.

(c) If the court finds by a preponderance of the evidence that the specific written objections have been proven, the court shall recalculate or readjust the proposed adjusted order accordingly or, for good cause, shall remand the order to the support collection unit for submission of a new proposed adjusted order.

Any readjusted order so issued by the court or resubmitted by the support collection unit after a remand by the court shall be effective as of the date the proposed adjusted order would have been effective had no specific written objections been filed.

(d) If the court finds that the specific written objections have not been proven by a preponderance of the evidence, the court shall immediately issue the adjusted order as submitted by the support collection unit, which shall be effective as of the date the order would have been effective had no specific written exceptions been filed.

(e) If the court receives no specific written objections to the support order within thirty-five days of the mailing of the proposed order the clerk of the court shall immediately enter the order without further review, modification, or other prior action by the court or any judge or support magistrate thereof, and the clerk shall immediately transmit copies of the order of support to the parties and to the support collection unit.

(2) A motion to vacate an order of support adjusted pursuant to this section may be made no later than forty-five days after an adjusted support order is executed by the court where no specific written objections to the proposed order have been timely received by the court.

Such motion shall be granted only upon a determination by the court issuing such order that personal jurisdiction was not timely obtained over the moving party.

5. [As added by L.1997, c. 398, § 6. See, also, subd. 5 below.] Provision of child support orders to the state case registry.

The court shall direct that a copy of any child support or combined child and spousal support order issued by the court on or after the first day of October, nineteen hundred ninety-eight, in any proceeding under this section be provided promptly to the state case registry established pursuant to subdivision four-a of section one hundred eleven-b of the social services law.

5. [As added by L.1997, c. 398, § 103. See, also, subd.5 above.] On-going cost of living adjustment of child support orders issued prior to September fifteenth, nineteen hundred eighty-nine.

Any party to a child support order issued prior to September fifteenth, nineteen hundred eighty-nine on the behalf of a child in receipt of public assistance or child support services pursuant to section one hundred eleven-g of the social services law may request that the support collection unit review the order for a cost of living adjustment in accordance with the provisions of section two hundred forty-c of this article.

CPLR § 2301. Scope of subpoena

A subpoena requires the attendance of a person to give testimony. A subpoena duces tecum requires production of books, papers and other things. A child support subpoena is a subpoena issued pursuant to section one hundred eleven-p of the social services law by the office of temporary and disability assistance or a local social services district, or its authorized representative, or another state's child support enforcement agency governed by title IV-D of the social security act. A trial subpoena duces tecum shall state on its face that all papers or other items delivered to the court pursuant to such subpoena shall be accompanied by a copy of such subpoena.

CPLR § 2302. Authority to issue

(a) Without court order.

Subpoenas may be issued without a court order by the clerk of the court, a judge where there is no clerk, the attorney general, an attorney of record for a party to an action, an administrative proceeding or an arbitration, an arbitrator, a referee, or any member of a board, commission or committee authorized by law to hear, try or determine a matter or to do any other act, in an official capacity, in relation to which proof may be taken or the attendance of a person as a witness may be required; provided, however, that a subpoena to compel production of a patient's clinical record maintained pursuant to the provisions of section 33.13 of the mental hygiene law shall be accompanied by a court order. A child support subpoena may be issued by the department, or the child support enforcement unit coordinator or support collection unit supervisor of a social services district, or his or her designee, or another state's child support enforcement agency governed by title IV-D of the social security act.

(b) Issuance by court.

A subpoena to compel production of an original record or document where a certified transcript or copy is admissible in evidence, or to compel attendance of any person confined in a penitentiary or jail, shall be issued by the court. Unless the court orders otherwise, a motion for such subpoena shall be made on at least one day's notice to the person having custody of the record, document or person confined. A subpoena to produce a prisoner so confined shall be issued by a judge to whom a petition for habeas corpus could be made under subdivision (b) of section seven thousand two of this chapter or a judge of the court of claims, if the matter is pending before the court of claims, or a judge of the surrogate's court, if the matter is pending before the surrogate's court, or a judge or support magistrate of the family court, if the matter is pending before the family court, or a judge of the New York city civil court, if the matter is pending before the New York city civil court and it has been removed thereto from the supreme court pursuant to subdivision (d) of section three hundred twenty-five of this chapter.

CPLR § 2303. Service of subpoena; payment of fees in advance

(a) A subpoena requiring attendance or a subpoena duces tecum shall be served in the same manner as a summons, except that where service of such a subpoena is made pursuant to subdivision two or four of section three hundred eight of this chapter, the filing of proof of service shall not be required and service shall be deemed complete upon the later of the delivering or mailing of the subpoena, if made pursuant to subdivision two of section three hundred eight of this chapter, or upon the later of the affixing or mailing of the subpoena, if made pursuant to subdivision four of section three hundred eight of this chapter. Any person subpoenaed shall be paid or tendered in advance authorized traveling expenses and one day's witness fee. A copy of any subpoena duces tecum served in a pending civil judicial proceeding shall also be served, in the manner set forth in rule twenty-one hundred three of this chapter, on each party who has appeared in the civil judicial proceeding so that it is received by such parties promptly after service on the witness and before the production of books, papers or other things.

(b) A child support subpoena issued pursuant to section one hundred eleven-p of the social services law to public utility companies and corporations, including but not limited to cable television, gas, electric, steam, and telephone companies and corporations, as defined in section two of the public service law, may be served by regular mail, or through an automated process where information sought is maintained in an automated data base. All other child support subpoenas issued pursuant to section one hundred eleven-p of the social services law shall be served in accordance with the provisions of subdivision (a) of this section.

CPLR § 2303-a. Service of a trial subpoena

Where the attendance at trial of a party or person within the party's control can be compelled by a trial subpoena, that subpoena may be served by delivery in accordance with subdivision (b) of rule 2103 to the party's attorney of record.

CPLR § 2304. Motion to quash, fix conditions or modify

A motion to quash, fix conditions or modify a subpoena shall be made promptly in the court in which the subpoena is returnable. If the subpoena is not returnable in a court, a request to withdraw or modify the subpoena shall first be made to the person who issued it and a motion to quash, fix conditions or modify may thereafter be made in the supreme court; except that such motion with respect to a child support subpoena issued pursuant to section one hundred eleven-p of the social services law shall be made to a judge of the family court or the supreme court. Reasonable conditions may be imposed upon the granting or denial of a motion to quash or modify.

CPLR Rule 3108. Written questions; when permitted

A deposition may be taken on written questions when the examining party and the deponent so stipulate or when the testimony is to be taken without the state. A commission or letters rogatory may be issued where necessary or convenient for the taking of a deposition outside of the state.

CPLR Rule 3117. Use of depositions

(a) Impeachment of witnesses; parties; unavailable witness.

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence, may be used in accordance with any of the following provisions:

1. any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness;

2. the deposition testimony of a party or of any person who was a party when the testimony was given or of any person who at the time the testimony was given was an officer, director, member, employee or managing or authorized agent of a party, may be used for any purpose by any party who was adversely interested when the deposition testimony was given or who is adversely interested when the deposition testimony is offered in evidence;

3. the deposition of any person may be used by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had the notice required under these rules, provided the court finds:

(i) that the witness is dead; or

(ii) that the witness is at a greater distance than one hundred miles from the place of trial or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or

(iv) that the party offering the deposition has been unable to procure the attendance of the witness by diligent efforts; or

(v) upon motion or notice, that such exceptional circumstances exist as to make its use desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court;

4. the deposition of a person authorized to practice medicine may be used by any party without the necessity of showing unavailability or special circumstances, subject to the right of any party to move pursuant to section 3103 to prevent abuse.

(b) Use of part of deposition.

If only part of a deposition is read at the trial by a party, any other party may read any other part of the deposition which ought in fairness to be considered in connection with the part read.

(c) Substitution of parties; prior actions.

Substitution of parties does not affect the right to use depositions previously taken. When an action has been brought in any court of any state or of the United States and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest all depositions taken in the former action may be used in the latter as if taken therein.

(d) Effect of using deposition.

A party shall not be deemed to make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use of a deposition as described in paragraph two of subdivision (a). At the trial, any party may rebut any relevant evidence contained in a deposition, whether introduced by him or by any other party.

CPLR Rule 3122. Objection to disclosure, inspection or examination; compliance

(a) Within twenty days of service of a notice or subpoena duces tecum under rule 3120 or section 3121, the party or person to whom the notice or subpoena duces tecum is directed, if that party or person objects to the disclosure, inspection or examination, shall serve a response which shall state with reasonable particularity the reasons for each objection. If objection is made to part of an item or category, the part shall be specified. A medical provider served with a subpoena duces tecum requesting the production of a patient's medical records pursuant to this rule need not respond or object to the subpoena if the subpoena is not accompanied by a written authorization by the patient. Any subpoena served upon a medical provider requesting the medical records of a patient shall state in conspicuous bold-faced type that the records shall not be provided unless the subpoena is accompanied by a written authorization by the patient. The party seeking disclosure under rule 3120 or section 3121 may move for an order under rule 3124 or section 2308 with respect to any objection to, or other failure to respond to or permit inspection as requested by, the notice or subpoena duces tecum, respectively, or any part thereof.

(b) Whenever a person is required pursuant to such a notice, subpoena duces tecum or order to produce documents for inspection, and where such person withholds one or more documents that appear to be within the category of the documents required by the notice, subpoena duces tecum or order to be produced, such person shall give notice to the party seeking the production and inspection of the documents that one or more such documents are being withheld. This notice shall indicate the legal ground for withholding each such document, and shall provide the following information as to each such document, unless the party withholding the document states that divulgence of such information would cause disclosure of the allegedly privileged information: (1) the type of document; (2) the general subject matter of the document; (3) the date of the document; and (4) such other information as is sufficient to identify the document for a subpoena duces tecum.

(c) Whenever a person is required pursuant to such notice or order to produce documents for inspection, that person shall produce them as they are kept in the regular course of business or shall organize and label them to correspond to the categories in the request.

(d) Unless the subpoena duces tecum directs the production of original documents for inspection and copying at the place where such items are usually maintained, it shall be sufficient for the custodian or other qualified person to deliver complete and accurate copies of the items to be produced. The reasonable production expenses of a non-party witness shall be defrayed by the party seeking discovery.

CPLR § 4504. Physician, dentist, podiatrist, chiropractor and nurse

(a) Confidential information privileged. Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity.

The relationship of a physician and patient shall exist between a medical corporation, as defined in article forty-four of the public health law, a professional service corporation organized under article fifteen of the business corporation law to practice medicine, a university faculty practice corporation organized under section fourteen hundred twelve of the not-for-profit corporation law to practice medicine or dentistry, and the patients to whom they respectively render professional medical services.

A patient who, for the purpose of obtaining insurance benefits, authorizes the disclosure of any such privileged communication to any person shall not be deemed to have waived the privilege created by this subdivision.

For purposes of this subdivision:

1. "person" shall mean any individual, insurer or agent thereof, peer review committee, public or private corporation, political subdivision, government agency, department or bureau of the state, municipality, industry, co-partnership, association, firm, trust, estate or any other legal entity whatsoever; and
2. "insurance benefits" shall include payments under a self-insured plan.

(b) Identification by dentist; crime committed against patient under sixteen. A dentist shall be required to disclose information necessary for identification of a patient. A physician, dentist, podiatrist, chiropractor or nurse shall be required to disclose information indicating that a patient who is under the age of sixteen years has been the victim of a crime.

(c) Mental or physical condition of deceased patient. A physician or nurse shall be required to disclose any information as to the mental or physical condition of a deceased patient privileged under subdivision (a), except information which would tend to disgrace the memory of the decedent, either in the absence of an objection by a party to the litigation or when the privilege has been waived:

1. by the personal representative, or the surviving spouse, or the next of kin of the decedent; or
2. in any litigation where the interests of the personal representative are deemed by the trial judge to be adverse to those of the estate of the decedent, by any party in interest; or
3. if the validity of the will of the decedent is in question, by the executor named in the will, or the surviving spouse or any heir-at-law or any of the next kin or any other party in interest.

(d) Proof of negligence; unauthorized practice of medicine. In any action for damages for personal injuries or death against a person not authorized to practice medicine under article 131 of the education law for any act or acts constituting the practice of medicine, when such act or acts were a competent producing proximate or contributing cause of such injuries or death, the fact that such person practiced medicine without being so authorized shall be deemed prima facie evidence of negligence.

CPLR § 4507. Psychologist

The confidential relations and communications between a psychologist registered under the provisions of article one hundred fifty-three of the education law and his client are placed on the same basis as those provided by law between attorney and client, and nothing in such article shall be construed to require any such privileged communications to be disclosed.

A client who, for the purpose of obtaining insurance benefits, authorizes the disclosure of any such privileged communication to any person shall not be deemed to have waived the privilege created by this section. For purposes of this section:

1. "person" shall mean any individual, insurer or agent thereof, peer review committee, public or private corporation, political subdivision, government agency, department or bureau of the state, municipality, industry, co-partnership, association, firm, trust, estate or any other legal entity whatsoever; and
2. "insurance benefits" shall include payments under a self-insured plan.

CPLR § 4508. Social worker

(a) Confidential information privileged. A person licensed as a licensed master social worker or a licensed clinical social worker under the provisions of article one hundred fifty-four of the education law shall not be required to disclose a communication made by a client, or his or her advice given thereon, in the course of his or her professional employment, nor shall any clerk, stenographer or other person working for the same employer as such social worker or for such social worker be allowed to disclose any such communication or advice given thereon; except

1. that such social worker may disclose such information as the client may authorize;
2. that such social worker shall not be required to treat as confidential a communication by a client which reveals the contemplation of a crime or harmful act;
3. where the client is a child under the age of sixteen and the information acquired by such social worker indicates that the client has been the victim or subject of a crime, the social worker may be required to testify fully in relation thereto upon any examination, trial or other proceeding in which the commission of such crime is a subject of inquiry;
4. where the client waives the privilege by bringing charges against such social worker and such charges involve confidential communications between the client and the social worker.

(b) Limitations on waiver. A client who, for the purpose of obtaining insurance benefits, authorizes the disclosure of any such privileged communication to any person shall not be deemed to have waived the privilege created by this section. For purposes of this subdivision:

1. "person" shall mean any individual, insurer or agent thereof, peer review committee, public or private corporation, political subdivision, government agency, department or bureau of the state, municipality, industry, co-partnership, association, firm, trust, estate or any other legal entity whatsoever; and
2. "insurance benefits" shall include payments under a self-insured plan.

CPLR Rule 5224. Subpoena; procedure

(a) Kinds and service of subpoena.

Any or all of the following kinds of subpoenas may be served:

1. a subpoena requiring attendance for the taking of a deposition upon oral or written questions at a time and place named therein; or

2. a subpoena duces tecum requiring the production of books and papers for examination at a time and place named therein; or

3. an information subpoena, accompanied by a copy and original of written questions and a prepaid, addressed return envelope. Service of an information subpoena may be made by registered or certified mail, return receipt requested. Answers shall be made in writing under oath by the person upon whom served, if an individual, or by an officer, director, agent or employee having the information, if a corporation, partnership or sole proprietorship. Each question shall be answered separately and fully and each answer shall refer to the question to which it responds. Answers shall be returned together with the original of the questions within seven days after receipt. Where the person serving the subpoena is a judgment creditor, other than where the state, a municipality or an agency or officer of the state or a municipality is the judgment creditor, the following additional rules shall apply:

(i) information subpoenas, served on an individual or entity other than the judgment debtor, may be served on an individual, corporation, partnership or sole proprietorship only if the judgment creditor or the judgment creditor's attorney has a reasonable belief that the party receiving the subpoena has in their possession information about the debtor that will assist the creditor in collecting his or her judgment. Any information subpoena served pursuant to this subparagraph shall contain a certification signed by the judgment creditor or his or her attorney stating the following: I HEREBY CERTIFY THAT THIS INFORMATION SUBPOENA COMPLIES WITH RULE 5224 OF THE CIVIL PRACTICE LAW AND RULES AND THAT I HAVE A REASONABLE BELIEF THAT THE PARTY RECEIVING THIS SUBPOENA HAS IN THEIR POSSESSION INFORMATION ABOUT THE DEBTOR THAT WILL ASSIST THE CREDITOR IN COLLECTING THE JUDGMENT. By signing the certification, the judgment creditor or attorney certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, that the individual or entity receiving the subpoena has relevant information about the debtor.

(ii) if an information subpoena, served on an individual or entity other than the judgment debtor, does not contain the certification provided for in subparagraph (i) of this paragraph, such subpoena shall be deemed null and void.

(iii) if an information subpoena, served on an individual or entity other than the judgment debtor, does contain the certification provided for in subparagraph (i) of this paragraph, the individual, corporation, partnership or sole proprietorship receiving the subpoena, may move to quash the subpoena pursuant to section twenty-three hundred four of this chapter, except that such motion shall be made in the court that issued the underlying judgment.

(iv) failure to comply with an information subpoena shall be governed by subdivision (b) of section twenty-three hundred eight of this chapter, except that such motion shall be made in the court that issued the underlying judgment.

4. an information subpoena in the form of magnetic tape or other electronic means. Where the person to be served consents thereto in writing, an information subpoena in the form of magnetic tape or electronic means, as defined in subdivision (f) of rule twenty-one hundred three of this chapter, may be served upon the

individual, or if a corporation, partnership, limited liability company, or sole proprietorship, upon the officer, director, agent or employee having the information. Answers shall be provided within seven days.

(a-1) Scope of subpoena duces tecum.

A subpoena duces tecum authorized by this rule and served on a judgment debtor, or on any individual while in the state, or on a corporation, partnership, limited liability company or sole proprietorship doing business, licensed, qualified, or otherwise entitled to do business in the state, shall subject the person or other entity or business served to the full disclosure prescribed by section fifty-two hundred twenty-three of this article whether the materials sought are in the possession, custody or control of the subpoenaed person, business or other entity within or without the state. Section fifty-two hundred twenty-nine of this article shall also apply to disclosure under this rule.

(b) Fees.

A judgment debtor served with a subpoena under this section and any other person served with an information subpoena shall not be entitled to any fee. Any other person served with a subpoena requiring attendance or the production of books and papers shall be paid or tendered in advance authorized traveling expenses and one day's witness fee.

(c) Time and place of examination.

A deposition on oral or written questions or an examination of books and papers may proceed upon not less than ten days' notice to the person subpoenaed, unless the court orders shorter notice, before any person authorized by subdivision (a) of rule 3113. An examination shall be held during business hours and, if taken within the state, at a place specified in rule 3110. Upon consent of the witness, an examination may be held at any other place within the state and before any officer authorized to administer an oath.

(d) Conduct of examination.

The officer before whom the deposition is to be taken shall put the witness on oath. If requested by the person conducting the examination, the officer shall personally, or by some one acting under his direction, record and transcribe the testimony and shall list all appearances by the parties and attorneys. Examination and cross-examination of the witness shall proceed as permitted in the trial of actions in open court. Cross-examination need not be limited to the subject matter of the examination in chief. All objections made at the time of the examination to the qualifications of the officer taking the deposition, or of a person recording it, or to the manner of taking it, or to the testimony presented, or to the conduct of any person, and any other objection to the proceedings, shall be noted by the officer upon the deposition and the deposition shall proceed subject to the right of a person to apply for a protective order. The deposition shall be taken continuously and without unreasonable adjournment, unless the court orders or the witness agrees otherwise. If the witness does not understand the English language, the judgment creditor shall, at his own expense, provide a translation of all questions and answers. Unless the court orders otherwise, a person other than the judgment debtor served with a subpoena duces tecum requiring the production of books of account may produce in place of the original books of account a sworn transcript of such accounts as are relevant.

(e) Signing deposition; physical preparation.

At the request of the person conducting the examination, a deposition on written questions or a deposition on oral questions which has been transcribed shall be submitted to the witness and shall be read to or by him, and any changes in form or substance which the witness desires to make shall be entered upon the deposition with a statement of the reasons given by the witness for making them; and the deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign the deposition, the officer before whom the deposition was taken shall sign it and state on the record the fact of the witness's failure or refusal to sign together with any reason given. The deposition may then be used as fully as though signed. Where testimony is transcribed, the officer before whom the deposition was taken shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness.

(f) Subsequent examination.

Leave of court is required to compel a judgment debtor to appear for the taking of his deposition or to compel the production by him of books and papers within one year after the conclusion of a previous examination of him with respect to the same judgment.

CPLR § 8001. Persons subpoenaed; examination before trial; transcripts of records

(a) Persons subpoenaed. Any person whose attendance is compelled by a subpoena, whether or not actual testimony is taken, shall receive for each day's attendance fifteen dollars for attendance fees and twenty-three cents as travel expenses for each mile to the place of attendance from the place where he or she was served, and return. There shall be no mileage fee for travel wholly within a city.

(b) Persons subpoenaed upon an examination before trial. If a witness who is not a party, or agent or employee of a party, is subpoenaed to give testimony, or produce books, papers and other things at an examination before trial, he shall receive an additional three dollars for each day's attendance.

(c) Transcripts of records. Wherever the preparation of a transcript of records is required in order to comply with a subpoena, the person subpoenaed shall receive an additional fee of ten cents per folio upon demand.

Judiciary Law § 2-b. General powers of courts of record

A court of record has power

1. to issue a subpoena requiring the attendance of a person found in the state to testify in a cause pending in that court, subject, however, to the limitations prescribed by law with respect to the portion of the state in which the process of the local court of record may be served;
2. to administer an oath to a witness in the exercise of the powers and duties of the court and;
3. to devise and make new process and forms of proceedings, necessary to carry into effect the powers and jurisdiction possessed by it.

B- Presenter's Biographies

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After going through his own rather nasty divorce, Mr. Steinberger said, "There's got to be a better way." He, therefore, left his large New York City law-firm practice, and now practices matrimonial and family law. A student of personalities and relationships, Chaim tries to use his insight and skills to help people, protect and defend them, while they work through some of the toughest times of their lives.

In addition to representing people in simple and complex family law litigation trial to appeal Mr. Steinberger places great emphasis on mediation and other non-combative, dispute resolution processes. This includes the latest one, "Collaborative Law," in which both lawyers agree to withdraw if the case is not negotiated successfully. "Imagine," Mr. Steinberger is fond of saying, "if divorce, instead of being the destructive process that prevents people from co-parenting their children for the next many years, is the beginning of a healing process, that helps the parties heal and move on to the next chapter of their lives." Mr. Steinberger mediates disputes privately and also serves on certain panels of the New York State Supreme Court in each of New York, Kings, Queens and Westchester Counties. He chairs the Alternative Dispute Resolution Committee of the American Bar Association's Family Law Section and co-chairs the Collaborative Law Committee of the New York State Bar Association's ("NYSBA") Dispute Resolution Section. He was recently appointed to the NYSBA Family Court Task Force. He utilizes his mediation and dispute resolution skills to inform his litigation, bringing an aura of calmness, understanding and safety even when parties have been fighting viciously with one another in the past. It was these skills that caused clients to dub him "The Divorce Whisperer."

Prior to starting his own firm, Mr. Steinberger apprenticed as a law clerk to the Honorable District Court Judge Edward R. Korman of the Eastern District of New York and other distinguished lawyers. He lectures for the American Bar Association, the American Inns of Court, and other organizations, and is the author of *Father? What Father? Parental Alienation and Its Effects on Children*, *Understanding the Role of the MHP in Collaborative Practice*, *Make More Money... By Being More Ethical*, and co-author of the divorce chapter in the American Bar Association's Breast Cancer Legal Advocacy Guide. He frequently lectures to lawyers as well as lay people and other professionals. Mr. Steinberger can be reached at (212) 964-6100 or via email at csteinberger@mindspring.com.

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Class Standing: Top 2%

Adelphi University, Garden City, New York
B.A., *magna cum laude*, 1983

LEGAL EXPERIENCE

■ **Negotiation;** ■ **Collaboration;** ■ **Mediation;** ■ **Arbitration;**
■ **Litigation;** ■ **Discovery;** ■ **Depositions;**
■ **Motions;** ■ **Trials;** ■ **Appeals;**

Principal, Chaim Steinberger, P.C., New York, NY 2000-present

Of Counsel, Rosenthal & Herman, P.C., New York, NY 1999-2000

Associate, Morgan, Lewis & Bockius LLP, New York, NY 1996-1998

Law Clerk, Honorable Edward R. Korman, U.S.D.J., E.D.N.Y. 1995-1996

Associate, Schulte, Roth & Zabel, New York, NY 1994-1995

Mediator, New York State Supreme Court
Commercial Division (New York & Kings Counties)
Matrimonial Mediation Project (Queens & Westchester Counties)
Community Mediation Center (Brooklyn & Queens Counties) 1992-1994

Arbitrator,
New York City Civil Court (New York & Kings Counties)
Part 137 Fee Dispute Resolution Program (Kings County)

Legal Intern, Big Apple Clinic, Brooklyn Law School Summer 1992
City of New York, Office of the Corporation Counsel

**BAR
LEADERSHIP
POSITIONS**

- ◆ Chair, American Bar Association Family Law Section Alternative Dispute Resolution Committee (2009-2011), vice-chair (2008-2009);
- ◆ Vice-chair, American Bar Association Family Law Section Ethics, Professionalism & Grievance Committee, (2010-2011), Executive Member (2008-2010);
- ◆ Co-chair, New York State Bar Association Dispute Resolution Section Collaborative Law Committee (2008-2010);
- ◆ Member, New York State Bar Association Family Court Task Force

**LECTURES &
PUBLICATIONS**

- Understanding the Role of the MHP in Collaborative Practice*, NYACP Feb. 2010
- Billing Pitfalls & Pratfalls: Avoiding the Ethical Issues that Snag Attorneys* Dec. 2008
- Co-Author, Breast Cancer Legal Advocacy Guide, Chap. 13, Divorce*
- Hot Tips in Trial Practice*, American Bar Association Annual Meeting Aug. 2008
- Father? What Father? Parental Alienation and Its Effects on Children*, Spring 2006
NYSBA Family Law Review, NYS Appellate Division, Law Guardian Reporter
- What Every Lawyer Should Know About Matrimonial Law*, NYCLA Inn of Court Feb. '05
- A Roadmap Through New York Divorce Proceedings*, National Business Inst. Nov. 2004

**ADDITIONAL
AFFILIATION
MEMBERSHIPS**

- ◆ Vice-chair (2007-2009), American Bar Association Family Law Section Pro Bono Awards Committee;
- ◆ Team Co-leader (2007-2008), NYCLA Dennis McInerney American Inn of Court;
- ◆ American Bar Association Family Law Section Families Matter Committee;
- ◆ Brooklyn Bar Association (Family Law Section, Family Court Committee, & Part 137 Fee Dispute Program);
- ◆ New York County Lawyers' Association (Matrimonial Law, Family Court, and Law Practice Management Committees);
- ◆ New York State Bar Association;
- ◆ Brooklyn Women's Bar Association;
- ◆ New York City Bar Association;
- ◆ Association of Arbitrators;

Joy A. Dryer, Ph.D.
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Divorce Consultant
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Dr. Dryer is in private practice wearing three hats: as a Clinical Psychologist/ Psychoanalyst, Collaborative Divorce Coach/ Consultant; and Organizational Psychologist. For over thirty years she has divided her time seeing patients, teaching and supervising, and giving presentations to academic conferences/ institutions and talks to general public groups/ organizations.

CLINICAL WORK EXPERIENCE. Currently, Dr. Dryer's private practice in Brooklyn Heights, NY and Poughkeepsie NY (Hudson Valley) includes individual, couple and group work in adolescent and adult psychoanalysis & psychotherapy. She specializes in working with people suffering from depression, anxieties and panic disorders, relationship and work issues, and creativity concerns.

DIVORCE CONSULTATION. As a result of her extensive therapy work with couples, she began several years ago to work as a Collaborative Divorce Coach and Consultant. She was trained in mediation and collaborative divorce law, and is a member of two practice groups: the NYC based NY Assoc. of Collaborative Professionals, and the Hudson Valley Collaborative Divorce Assoc. Working often with a team of attorney and financial colleagues, she helps families restructure their lives post separation or divorce, without resorting to litigation.

SUPERVISION. Dr. Dryer has always been involved part-time in teaching and supervising Psychologists in training. She has individual supervisees at two psychoanalytic institutes; Institute for Psychoanalytic Training & Research (IPTAR) and the National Institute of Psychotherapies, and also from Long Island University's Graduate School of Psychology.

TEACHING. She was an Adjunct Associate Professor of Psychology in New York University's Psychology Dept. Masters Program (teaching the core Personality course), and at Brooklyn College (teaching the Group Relations course). As faculty at The New School for Social Research, New York Counseling & Guidance Center, Psychoanalytic Psychotherapy Study Center, The New Hope Guild Adult Psychotherapy Program, and Yeshiva University's Ferkauf Graduate School of Psychology, she has taught courses in Basic Technique (Transference/ CT, Resistance, Unconscious Processes), and Contemporary Freudian Theory & Clinical Implications.

ORGANIZATIONAL CONSULTATION. As President of The Brookwoods Consulting Group, LLC, Dr. Dryer has consulted with schools, community colleges, and businesses in educational and health and human services settings, as well as coached business executives. She focuses on organizational change processes such as boundaries, communication norms, crisis intervention, role definitions, and structure/function differentiations.

EDUCATION. Dr. Dryer received Certificates in Adult Psychoanalysis from both the Institute for Psychoanalytic Training and Research (IPTAR) (6/00) and from New York University's Postdoctoral Program in Psycho-therapy and Psychoanalysis (6/95).

She received her Doctorate (Ph.D.) in Clinical Psychology from the City University of New York (2/83) after transferring from Columbia's Developmental Psychology Department. Her dissertation focus remains an aspect of her research interests: the study, An affective-cognitive dimension in play and its relationship to imagination, was chaired by well-known Piaget scholar, Gilbert Voyat, Ph.D.

Her first career in her 20's was as a journalist. During college she interned (summer 1968) as a News Reporter at NBC-TV in Cleveland Ohio, anchored at the time by Tom Brochaw. She graduated (6/70) with a M.S. from Columbia University's School of Journalism where she was the first woman to be honored by receiving The National RCA-NBC Fellowship .

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PROFESSIONAL ACTIVITIES. Dr. Dryer regularly gives of her time pro bono. to professional organizations of which she is a member. For all 3 editions (2000, 2005, 2010), she has been Editor of IPTAR TODAY, a glossy brochure describing every program of IPTAR. She is President of the Hudson Valley Psychological Assoc. (an APA local chapter) 9/09-9/10. Other organizational work includes Chair (4/96 - 4/99) of the Steering Committee of the American Psychological Association's Division 39 (Psychoanalysis) 5-day 19th Annual Conference in New York City, 4/14-18/99 with 1,000 attendees. In response to the World Trade Center tragedy, she helped found with a colleague the Brooklyn Counseling & Resource Center (BCRC) as a B'lyn Heights & Park Slope free referral network of psychologists, social workers, and psychiatrists which served the local public.

WRITINGS. Early integration of her writing, psychology, and creativity interests began at Case Western Reserve University (6/69), where relevant honors included The "67-68 "University Poetry Award," English Honors; & Psychology Honorary Society. Dr. Dryer also speaks periodically to professional and lay organization

RECENT PAPERS/ PRESENTATIONS

- 2/07 Dryer, J. & Lijtmaer, R. "Cyber-Sex as Twilight Zone between Virtual Reality and Virtual Fantasy: Creative Play Space or Destructive Addiction?" In Psychoanalytic Review, 94 (1) , Feb. 2007.
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- 10/6/10 Dialogue Seminar for Psychologists with Chaim Steinberger, Esq. "Everything You Always Wanted to Know about the Legalities of DIVORCE . . . but didn't know whom to ask."
- 9/14/10 Grand Rounds Presentation, Psychiatry Department, Interfaith Hospital, Brooklyn NY. "DYING TO LIVE:: Exploring Death Anxiety in Ourselves and Our Patients.
- 8/7/10 "Failure: Conceptual Reassessment : Discrepancy between Perceived and Actual Reality, or Mind the Gap". Paper presented at the Fifth Joint International Conference "Failure: Psychoanalytic Explorations". Edinburgh, Scotland
- 7/26/08 "When a Patient Abruptly Ends Treatment: A Medusa Type of Negative Therapeutic Reaction. Attachment and Separation, Unconscious Guilt and Punishment." Paper presented at the Fourth Joint International Conference "Loss & Yearnings", Vancouver, B.C. Canada.
- 8/6/05 "The Power of Unconscious Interaction Between the Leader and the Organization". Paper presented at the Third Joint International Conference, Cape Town, South Africa.
- 4/14/05 "25 Year Review of Working With Borderline Patients" (Panel): "A Proposed Stage Model Integrating Borderline Countertransference and Infant Research Paradigms". Paper presented at Division 39 (Psychoanalysis) of the Am. Psychological Assoc. 25th Spring Conference, NYC.
- 8/31/04 "Realistic Dreamin' : A Workshop for Change"
Talk & Workshop for Stroke victims and their families. Second Chance Stroke Group, Kingston,NY
- 5/1/04 "Using The Cat in the Hat as a Playful Transitional Teaching Experience: A bridge from Resistance to to Learning Psychoanalytic Concept"
Paper presented at the American Academy of Psychoanalysis, Spring conference, NYC.
- 11/2/02 "A Workshop for Change: Realistic Self vs. Idealistic Self"
Talk & Workshop for CHADD of NYC (Children & Adults with Attention-Deficit/hyperactivity Disorder), NYC.
- 9/25/02 "How to Execute a Project Plan in Times of Duress and Stress"
Talk presented to the Project Management Institute, NYC.
- 7/27/02 "Love Labors Lost: for a 9/11 Widow: "Normal' or "Pathological' Mourning?" Paper presented at the Second Joint International Psychoanalytic Conference, Dublin, Ireland.
- 4/12/02 "The Internet as Sexualized Twilight Zone between Virtual Reality and Virtual Fantasy: Creative Play Space or Destructive Addiction?" Paper presented at Division 39 (Psychoanalysis) of the American Psychological Association's 22nd Spring Conference, NYC.