

FINANCE 101 FOR FAMILY LAW PRACTITIONERS

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A. Valuation and Division of Assets (Real Estate, Insurance, Stock Options, Retirement Plans)

Equitable Distribution

DRL 236 B(5)(a) provides that equitable distribution of marital property shall be made "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." This provision authorizes the court to equitably distribute marital property only when there is a change in the marital status through a divorce or an annulment. Absent such a change, the court is powerless to distribute marital property. Should there be no matrimonial action filed, or if the status of the marriage is not requested to be changed such as in an action for a separation under DRL 200, or if the divorce or annulment is denied, the non titled spouse has no right to seek equitable distribution of the marital property, since DRL 236 B(5)(a) requires that the divorce, dissolution or annulment of the marriage must first be granted. Equitable distribution of property can never be modified, since any post judgment application by a former spouse cannot change their marital status, and would run afoul of DRL 236 B(5)(a).

Under DRL 236 B (4), mandatory financial disclosure is required for all income and assets without regard to whether it is marital or separate. A comprehensive but non exhaustive list of assets include: cash, checking accounts, savings accounts, security deposits, securities, notes, mortgages held, stocks, stock options, commodity contracts, broker's margin accounts, loans to others, accounts receivables, business interests, cash surrender value of life insurance, vehicles, real estate, interests in trusts, contingent interests, household furnishings, jewelry, art, antiques, precious metals, tax shelter investments, collections, judgments, causes of action, patents, and trademarks.

Once all property has been identified, the next step is to classify each asset as either marital or separate. Separate property is defined under DRL 236 B(1)(d) as the following:

- property acquired before the marriage
- property acquired by bequest, devise, descent (i.e., an inheritance)
- gifts to one spouse from anyone other than the other spouse. However, it is often disputed whether a gift was to one or both spouses, the latter making it marital property.
- compensation for personal injury cases, but only that part which constitutes punitive damages and pain and suffering.
- separate property acquired in exchange for separate property.

- appreciation of separate property will be considered separate property if the non titled spouse did contribute towards the appreciation.
- property designated as separate by a validly executed marital agreement as defined in DRL 236 B(3).

Marital property defined as any property which is not within the definition of separate property, and is any property which is acquired by either party during the marriage, regardless of who actually owns the asset. Thus, a business interest, real estate, bank accounts, pensions, and professional licenses are marital property and are subject to equitable distribution. Likewise, portions of personal injury awards covering lost wages are also marital property, as is appreciation of separate property when the non titled spouse can show contribution towards the appreciation.

Engagement rings are separate property, as it was given prior to the marriage. See Lipton v. Lipton 134 Misc.2d 1076 (Sup. Ct., New York County 1986). Wedding gifts are gifts made to both spouses and are therefore marital. Nehorayoff v. Nehoravoff, 108 Misc. 2d 311 (Sup. Ct., Nassau County 1981).

Property acquired during the marriage is presumed to be marital property. Raviv v. Raviv, 153 AD2d 932 (2nd Dept. 1989). This presumption may be overcome by the party seeking to prove it is separate, but absent such proof the default is to assume it is marital. Likewise, when one spouse puts property in the name of both spouses, the asset becomes marital. See Lisetza v. Lisetza, 135 AD2d 20 (3rd Dept. 1988). However, the transferring party should be given a credit. Robertson v. Robertson 186 AD2d 124 (2nd Dept. 1992).

Classifying the appreciation of separate property as marital or separate was addressed in the Court of Appeals Case of Price v. Price, 69 N.Y.2d 8 (Court of Appeals 1986) which held that if the titled spouse took no active actions regarding the separate property, and the appreciation was due to market conditions, then the property would remain separate. If the titled spouse did actively manage the separate property, then that activity is marital. However, for the non titled spouse to be entitled to a share of that, he or she must still show some sort of contribution towards the appreciation. The holding of Price was expanded in Hartog v. Hartog, 85 N.Y.2d 36 (Court of Appeals, 1995) in which the Court of Appeals said the non titled spouse must show the titled spouse actively participated in the appreciation by some degree.

Step 1: *Classification of Assets*. The court takes an inventory of all of the married couple's property and classifies each item into one of two categories, either marital property or separate property. Separate property is immune from equitable distribution while marital property is subject to division. In general terms, it is the step that determines which assets are subject to distribution and which are not. Failure to classify an asset is error, even where there is no distribution of the asset in question. As the Appellate Division noted in Pacifico v. Pacifico, 101 A.D.2d 709, 475 N.Y.S.2d 952 (Fourth Dept. 1984), the omission to classify precluded intelligent review, because the appellate court was unable to determine whether the trial court erroneously found the businesses to be separate property or whether it found them to be marital property but concluded that plaintiff should have no interest in them, a distinction which can make a critical, analytical difference. There are two ways to classify assets: (1) Assets acquired during the marriage, which is between the date of marriage and date of commencement of the Action for Divorce are typically considered marital property subject to equitable distribution; and (2) Assets acquired before the marriage or after commencement of the action are, again, as a general rule, separate property immune from distribution.

Assets acquired during the marriage are presumed to be marital property and the burden of proof falls on the party claiming separate property status to trace such assets to separate property sources. Silver v. Akerson, 223 A.D.2d 499, 637 N.Y.S.2d 378 (First Dept. 1996). Assets may be separate property, even though acquired during the marriage, if they were derived from separate property sources, such as:

- Inheritance
- Gifts
- Personal Injury Compensation
- Exchanges of Separate Property Assets
- Increases in Value of Separate Property

Step 2: *Valuation*. Generally, the court is mandated to fix a valuation date for each asset in the marital estate. See, D'Amato v. D'Amato, 96 A.D.2d 849, 466 N.Y.S.2d 23 (Second Dept. 1983). Absent unusual circumstances making valuation unnecessary or unfeasible (see, e.g., Sementilli v. Sementilli, 102 AD2d 78), consideration of the total value of the marital property is essential to the fashioning of a plan for distribution.

The earliest permissible date allowed by statute is the date of commencement of the action. The latest valuation date allowable under the statute is the date of trial. DRL § 236(B)(4)(b). The general approach is to value "active" assets as of the date of commencement, while setting the value

for "passive" assets as close to the date of trial as feasible. A fair number of decisions clearly underscore that these are guidelines, not rules. *See, Grunfeld v. Grunfeld*, 94 N.Y.2d 696, 731 N.E.2d 142, 709 N.Y.S.2d 486, 2000 N.Y. Slip Op. 04722 (N.Y., May 11, 2000) (NO. 56); *McSparron v. McSparron*, 87 N.Y.2d 275, 662 N.E.2d 745, 639 N.Y.S.2d 265 (N.Y., Dec. 07, 1995) (NO. 260). But see, *Fuchs v. Fuchs*, 276 A.D.2d 868, 714 N.Y.S.2d 381(Third Dept. 2000), wherein the Appellate Division affirmed use of valuation date prior to commencement of action, notwithstanding DRL § 236(B)(4)(b).

Step 3: *Distribution*. The court decides which party gets which assets. In a community property state like California, the court is required to divide the assets 50/50. However, New York courts are not required to divide the assets 50/50 and rather, the determination is discretionary based on a number of factors. The court has the greatest amount of discretion in this step. Pursuant to §236(B)(5)(d) the court sets forth factors that the court shall consider in determining how to divide the assets. In a written decision the court must set forth which factors it considered and the reason for its decision.

- The income and property of each party at the time of marriage, and at the time of the commencement of the action;
- The duration of the marriage and the age and health of both parties. The longer the marriage, the more prone the court is to divide the assets 50/50;
- The need of a custodial parent to occupy or own the marital residence and to use or own its household effects. This has to do with providing stability for the children. Courts will often place a high value on not disrupting the children's lives more than necessary;
- The loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;
- The loss of health insurance benefits upon dissolution of the marriage;
- Any award of maintenance under subdivision six of this part. Here, the court is looking at the standard of living of the parties. What the spouse is already receiving in maintenance is relevant to what property he or she will be provided in the division of assets;
- 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. This factor reflects the notion that the court recognizes not only financial contributions of spouses, but also non-economic contributions, such as cooking, cleaning, taking care of the children, etc.;
- The liquid or non-liquid character of all marital property;
- The probable future financial circumstances of each party;

- 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;
- The tax consequences to each party;
- The wasteful dissipation of assets by either spouse;
- Any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
- Any other factor which the court shall expressly find to be just and proper. One factor the courts consider under this category is egregious misconduct. Courts have said that marital fault is not a factor in equitable distribution unless it rises to the level of egregious misconduct. Very little rises to this level, but where there is conduct by one party that “shocks the conscience of the court,” that factor will be considered in the division of assets.

Specific Types of Property

Real Estate: Most spouses have a marital home. A home can be a single-family house, a condo or co-op, or even a mobile or trailer home. Some couples may have vacation or second homes, or maybe a timeshare. Non-residential property includes investment property, farm land, and business property used in the owner's business. The monetary value of all of these kinds of real property must be assessed in a divorce. Three valuation methods are commonly used with real estate:

1. **Market or Sales Comparison Approach:** This method compares a property to recent sales of similar properties. These comparable sales should be as close in location and type as possible to the subject property. Adjustments are made for differences between the properties. This approach is most useful for single-family homes or properties that are sold on a unit basis, such as apartments or office space.

2. **Capitalization of Income:** Value in the capitalization of income approach is based on the net income that a property will generate. A present worth is then determined. This complex method is often used for investment properties.

3. **Cost Approach:** The cost approach is based on the concept of substitution. No careful person would buy property for more than it cost to buy land and a building with equal desirability and use. Another description of this method is reproduction cost new, less depreciation and obsolescence. This method is also used as a check for the other two valuation methods. It is also used for new buildings and special use properties, and for insurance or tax purposes.

Getting appraisals or valuations of real property assets is a necessity. State laws often require judges to determine the fair market value of marital assets before deciding property division issue. While judges may refuse to make decisions without this information, they may act on information provided by just one spouse. It is best to obtain the services of a professional appraiser. Sources for finding the right appraiser include:

- Securities organizations, such as the Federal Analysts Federation
- Trade organizations
- Telephone directories
- Bar associations
- Business brokers
- State licensing boards for real estate appraisers
- Appraisal societies and associations, such as the American Society of Appraisers

Insurance: Property division is a key issue in most divorces, along with spousal support and child custody and support. Making a property inventory will likely be among your first tasks as you start your divorce. One possible type of property to be included in your property division may be a life insurance policy. There are basically two kinds of life insurance: *term life* and *whole life*. A term life policy insures against someone's death for a set period, and ends. Contrast this to a whole life policy that has investment qualities, builds cash value, and generally won't expire once the premiums are paid up. Term life insurance generally isn't treated as marital property – there's no surrender or loan value. A whole life policy with a cash surrender value can be treated as marital property. Even if a life insurance policy isn't an asset you need to include in your property division, make changes as needed. Changing your beneficiary may be important given the life change of your divorce. It's a detail that is also easy to overlook, and you don't want a current and former spouse left fighting over who is truly entitled to your policy's proceeds. Terms of your separation or divorce decree may require one spouse to keep a policy in force and name the other.

Most often it is a whole life insurance policy with a cash value that is at issue in the property division in a divorce. The "value" in a term life policy may be limited to the power to renew it for another term. Life insurance can be characterized as separate or marital property. Generally, a life insurance policy bought before marriage and paid for with separate funds remains separate property. Conversely, a policy purchased during marriage is entirely marital property if all premiums are paid with marital or community funds. Problems may come up when policy premiums were paid partly with separate and shared funds.

Stock Options: Equity compensation in the form of stock options has become increasingly more popular in the workplace. High-tech companies historically have paid employees, consultants, and directors less in salary than other industries, but offered participation in the companies' growth by issuing stock options. Many employees of these companies have come to expect stock options as part of any routine employment package. Other industries also are making increased use of stock options. Many larger, publicly-traded companies now grant stock options in one form or another and closely-held companies are seeing the benefits of this compensation strategy as well. The basic tenet of equitable distribution is that marriage is a financial partnership and, therefore, the "marriage" is entitled to the fruits of its labor. It follows that any stock option rights earned during the marriage as a result of the work or employment of either spouse are Marital Property and subject to equitable distribution.

The classification of stock options as Marital Property or Separate Property focuses on whether a stock option is "vested" prior to the date of separation. A stock option is considered to be "vested" when the employee's rights to the stock option are complete, not contingent or conditional, and may be exercised. If a stock option has been earned by a spouse during the marriage and before separation, that stock option is Marital Property regardless of whether the option has "vested," or whether it can be exercised only after the date of the spouses' divorce. If the stock option has been earned during the marriage and before separation, the stock option is Marital Property and subject to equitable distribution. In order for a stock option to be classified as Separate Property, the acquiring spouse must prove that the stock option was acquired, in whole or in part, from services performed by the acquiring spouse either prior to the marriage or after the date of separation. For example, although a stock option may be received during the marriage and presently owned as of the date of separation, the stock option still could be classified as part of the Separate Property of the acquiring spouse if the stock option was granted solely for services rendered by that spouse prior to the date of marriage.

Another classification issue arises when a stock option is granted to one spouse during the marriage and prior to separation, but is not received by that spouse until after the date of separation. Such an option is classified as Divisible Property. While this distinction is important for many other reasons, the treatment of Divisible Property in the context of equitable distribution is no different than the treatment of Marital Property – the net value of the Divisible Property is also equitably divided between the divorcing spouses.

Substantial information and documentation may be needed to classify stock options as Marital or Separate Property, and to assess the valuation and distribution issues involved in their equitable distribution. It is necessary to review and understand the terms of the stock option plan, and know the grant date, the number of options, and the expiration date of each option granted. If an option has already been exercised at the time of the relevant date, the exercise price, the date, and the number of shares purchased also must be known. There can be many variables involved in the classification, valuation, and distribution of stock options in an equitable distribution situation. The services of perhaps other professionals such as accountants, appraisers, and tax consultants, should be sought in order to ensure that rights in and to specific stock options are maintained and preserved for the benefit of the spouse entitled to an equitable distribution.

Retirement Plans: To the extent that the pension is accrued during the marriage, the portion accrued is considered marital property. For many individuals, their pensions are one of their most valuable assets. Pensions are to be valued at the date of commencement of the action. Whatever contributions are made to the pension after the date of commencement are considered separate property. In order to obtain access to an ex-spouse's retirement plan, a Qualified Domestic Relations Order ("QDRO") must be issued by the court. The specifics of QDRO's are discussed below.

B. Tax Ramifications of Divorce

The financial aspects of a divorce settlement or judgment after trial are to achieve the most favorable after-tax result.

Spousal maintenance: As defined in Sections 71 and 215 of the Internal Revenue Code, spousal maintenance payments are deductible by the payor and includable in the income of the recipient. Because of our graduated income tax structure, each dollar paid by a moneyed spouse who is in a higher income tax bracket than a non-moneyed spouse can reduce the payor's taxes by more than they increase the recipient's taxes, provided that you comply with the IRC rules and regulations. If you do not, the payor could lose the deduction and the recipient could receive a windfall.

The dependency exemption: You are entitled to take a \$3,400 deduction from income for yourself and each of your dependents. The value of that deduction phases out when your income is more than \$150,000. The code has rules that regulate how the deduction may be claimed for children, and it may be the subject of negotiation in a carefully crafted agreement.

Property transfers: There is a \$250,000 lifetime exclusion on the transfer of marital residence. Further, the transfer of capital assets - i.e. the marital residence incident to the divorce - should be clearly identified as a tax-free transaction with a stepped up basis.

Filing status: A spouse cannot take the alimony deduction if they continue to reside together. Spouses should file a joint income tax return if they are not divorced yet, even if they do not reside together anymore. New York courts may characterize the refusal to join in a tax return as marital waste.

Reporting requirements: There is no statute of limitations for unreported income. The Schedule C's or business income tax return, which spouses filed during the marriage, may be a time bomb or the key to an expedient out-of-court settlement. In the divorce case, spouses may often, and spouses often do, argue that the "so-called" executive perks, like the care, credit cards, and cell phone, are really household lifestyle items or "add-backs." This argument creates potential tax problems.

The innocent spouse exception: By requesting innocent spouse relief, a spouse can be relieved of responsibility for paying tax, interest, and penalties if their spouse (or former spouse) improperly reported items or omitted items on their tax return. Generally, the tax, interest, and penalties that qualify for relief can only be collected from the spouse (or former spouse). However, spouses are jointly and individually responsible for any tax, interest, and penalties that do not qualify for relief. The IRS can collect these amounts from either spouse. A spouse must meet all of the following conditions to qualify for innocent spouse relief.

1. A joint return was filed.
2. There is an understated tax on the return that is due to erroneous items of one spouse (or former spouse).
3. Spouse must show that when the joint return was signed the spouse did not know, and had no reason to know, that the understated tax existed (or the extent to which the understated tax existed).
4. Taking into account all the facts and circumstances, it would be unfair to hold the spouse liable for the understated tax.

Innocent spouse relief will not be granted if the IRS proves that the spouses (or former spouse) transferred property to one another as part of a fraudulent scheme. A fraudulent scheme includes a scheme to defraud the IRS or another third party, such as a creditor, former spouse, or business partner.

C. Petition for Child Support

The parents of a child under the age of 21 years old have a duty to support such child (Family Court Act §413). Child Support can be ordered as part of a divorce proceeding, either in the form of a temporary Pendente Lite Order or in a final Judgment of Divorce. However, in the event that there is no divorce proceeding, and the parents are not cohabitating, then either parent may ask the court to order the other parent to pay child support by filing a petition for child support in Family Court. The Child Support Standards Act (CSSA), which was passed in 1989, determines child support based on parental income. The act imposes a state-wide standard.

As a general rule, a parent's obligation of support for one child cannot be diminished or affected by the addition of a new obligation to another child. This is sometimes referred to as the "first in time, first in line" rule.

Timing of Award of Child Support

Support begins to toll when the petition is filed in Family Court. A judge will not order support to be paid for the time before an application was made to the court. Either parent can be ordered to pay child support to the other until a child turns twenty-one, or earlier if that child becomes emancipated. Other than emancipation, the only other ways to terminate an order of support are death of the payor-parent or adoption of the child by a third person.

Calculation

The calculation of how much child support an individual must pay is a 3-step process:

Step 1: Determine the Combined Parental Income (CPI)

- Combined Parental Income means the sum of the income of both parents (DRL 240(1-b)(4))
- Under the CSSA, the CPI is calculated by taking: Actual Income + Discretionary Income – Statutory Deductions
(1) **Actual Income** (DRL 240(1-b)(5)(i through iii))

Gross Income (as reported on income tax return – although the court is not bound by what was reported if there is a question of truth)

Net Investment Income (if not already included on income tax return)

The amount of income or voluntarily deferred income from any of the following sources (if not already included on income tax return):

Workers' compensation benefits
Disability benefits
Unemployment benefits
Social Security benefits
Veterans benefits
Pension and Retirement benefits
Fellowships and stipends
Annuity payments

(2) **Discretionary Imputed Income** (DRL 240(1-b)(5)(iv)). It is within the court's discretion to include in Combined Parental Income certain other income and resources available to the parent, including but not limited to:

Non-income producing assets

Benefits provided for personal use as part of employment, such as meals, lodging, memberships, automobiles, etc., which directly or indirectly confer personal economic benefit

Fringe benefits provided as part of compensation

Money, goods, or services provided by relatives or friends

(3) **Imputed Income** (DRL240(1-b)(5)(v)). This refers to an individual's past earning capacity – where a court determines that an individual has voluntarily reduced his/her actual earnings for the purpose of reducing or avoiding their child support obligations - the court will impute income based upon the individual's former resources or income.

(4) **Deductions** (DRL240(1-b)(5)(vi through vii))

Unreimbursed employee business expenses, except to the extent that those expenses reduce personal expenses

Alimony or maintenance actually paid pursuant to a court order to a spouse who is NOT a party to the instant action

Alimony or maintenance actually paid to a spouse paid to a spouse that IS a party to this action, if the order or agreement specifically provides for an adjustment in the amount of child support based on alimony or maintenance

Child support actually paid pursuant to a court order on behalf of a child who is NOT a subject of this proceeding

Public Assistance

Supplemental Social Security Income

New York City or Yonkers Income Tax

FICA (Note: Federal income tax and NY state tax are not deductible)

Step 2: Determine the Child Support Percentage – DRL §240(1-b)(3)

- 1 Child: 17% of CPI
- 2 Children: 25% of CPI
- 3 Children: 29% of CPI
- 4 Children: 31% of CPI
- 5 or More Children: no less than 35% of CPI

Step 3: Determine the Basic Child Support Obligation (“BCSO”) and Pro-Rate Among the Parents in Proportion to their Respective Incomes

- The Basic Child Support Obligation. This is calculated by multiplying the Combined Parental Income (CPI) by the Child Support Percentage
- Add-Ons (Once the BCSO is calculated, the court will add on additional money for certain expenses) like child care. The court **MUST** award child care where the custodial parent is working or engaged in education or training that the court concludes will reasonably lead to a livelihood. The court **MAY** award child care where the custodial parent is not working or getting education or training but is seeking employment.
- Health Care – the amount of health care expenses that are not reimbursed by insurance are a mandatory add-on
- Educational Expenses (for college or private school) – this is a discretionary add-on
- Pro-Rating Among the Parents
- Once you have determined the total amount to be paid in child support, you then need to figure out what percentage of that total each parent owes
- To do this, you would take one parent’s income and divide it by the combined parental income, this will give you the percentage that parent is required to pay
- You will then multiply that percentage by the total child support obligation to determine the parent’s pro-rated share

Deviations from Child Support

Factors for Deviation (DRL §240(1-b)(f)): A court may find that the BCSO as calculated by the CSSA is unjust or unfair. In this case, the court will order the non-custodial parent to pay an amount that the court finds is just and appropriate, setting forth in a written decision the factors considered. The DRL outlines the following factors:

- The financial resources of the custodial and non-custodial parent, and those of the child
- The physical and emotional health of the child and his or her special needs and aptitudes
- The standard of living the child would have enjoyed had the marriage or household not been dissolved
- The tax consequences to the parties
- The non-monetary contributions that the parents will make toward the care and well-being of the child
- The educational needs of either parent
- A determination that the gross income of one parent is substantially less than the other parent's gross income
- 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 - this is a rare exception to the general rule that the obligations to one child cannot be reduced because of the addition of obligations to other children. In order for this exception to apply, the total resources of the non-custodial parent and the parent of the non-subject child must be less than what is available in the home of the subject child
- Extraordinary expenses incurred by the non-custodial parent in exercising visitation or expenses incurred by the non-custodial parent in extended visitation provided that the custodial parent's expenses are substantially reduced as a result thereof
- Any other factors that the court determines are relevant

Statutory Cap on Combined Parental Income: When determining the CPI, there is a statutory maximum, above which child support is discretionary. For the year 2012, the statutory cap is \$136,000, to be increased every two years based on the consumer price index. Pursuant to Family Court Act §413(c)(3), where the combined parental income exceeds the dollar amount proscribed by §111-i(2)(b) of the Social Services Law, the court will determine the amount of child support to be paid in excess of that amount based on a consideration of the factors laid out above.

Agreements by the Parties (DRL §240(1-b)(h)). The parties may agree to a deviation from the CSSA basic child support obligation by voluntarily entering into an agreement or stipulation. In

the document, the parties must specify the amount that the BCSO would have been based on the CSSA calculations, and the reason or reasons for deviating therefrom.

Payments from Extraordinary Services: Where a parent receives a one-time payment, for example from a life insurance policy, gift, inheritance, lottery, etc., then the court may allocate a portion of that income to child support.

Cannot Impoverish Someone: Pursuant to DRL §240(1-b)(d), where the BCSO calculated according to the CSSA would reduce the non-custodial parent's income below the poverty line (as reported by the federal department of health and human services), then the BCSO in that case will be set at \$25/month or some other amount as the court deems proper based on the above factors. Where the BCSO calculated would not reduce the non-custodial parent's income below the poverty line but would reduce it below the self-support reserve (as determined by DRL §240(1-b)(c)), then the BCSO will be set at \$50/month or the difference between the non-custodial parent's income and the self-support reserve, whichever is greater.

Modifications to Child Support Order

Basis For Modification (DRL 236(B)(9)(b)(2)): A court may modify an order of child support, including an order which incorporates an agreement or stipulation of the parties, based on one of the following situations:

- Substantial Change in Circumstances
 - Incarceration can be considered a substantial change in circumstances sufficient to warrant a modification of an order of support, so long as the incarceration is not a result of nonpayment of child support, or an offense against the custodial parent or child who is the subject of the order or judgment
- Three years have passed since the order was entered, last modified or adjusted
 - This can be opted out of by the parties in the separation agreement
- There has been a change in either party's gross income by 15% or more since the entry/modification/adjustment of the last order
 - This can also be opted out of by the parties in the separation agreement
 - In this case, a reduction of income will not be considered as a grounds for a downward modification unless the reduction in income was completely involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability, and experience. In other words – a person

may not voluntarily quit or take a lower paying job, nor may they intentionally get fired, in order to avoid support obligations.

D. Child Support Enforcement Options

If a parent fails to pay court-ordered child support, the court has a number of different options to compel enforcement. These options, discussed in detail below, include sequestration, contempt, or income deduction.

Sequestration Proceedings

Pursuant to §243 of the Domestic Relations Law, when a parent fails to pay court-ordered child support, the court may sequester his or her personal property and the rents and profits of his or her real property and apply the money to the payment of the support; and if the amount sequestered is insufficient, the court, on application of the receiver, may direct the mortgage or sale of such real property by the receiver. A motion for sequestration takes place after the entry of a final judgment of divorce, and is looked at like a motion for contempt, in that it is a part of the matrimonial action itself. See, *Robinson v. Robinson*, 24 A.D.2d 138.

Money Judgment

In order to enforce payment, one option is to reduce the unpaid arrears to a money judgment so that enforcement can be made under the applicable provisions of the CPLR or any other money judgment recovery option available to creditors. To do this, the receiver of the support must apply to the court, and the court, pursuant to DRL §244, will make an order directing the entry of judgment for the amount of arrears of child support together with costs and disbursements.

The court must make this order unless the defaulting party shows good cause for failure to make application for relief from the judgment or order prior to the accrual of such arrears. A money judgment does not prevent the receiver parent from still employing the other enforcement devices mentioned in this section.

Income Deduction

CPLR 5241 was enacted to aid in the enforcement of support obligations by permitting a creditor parent to garnish a debtor parent's wages through an income execution (see Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 5241). Pursuant to the statute, the income execution must first be served upon the debtor parent, and must warn that the execution will

be served upon his or her employer unless the debtor parent shows a "mistake of fact" within 15 days (CPLR 5241[c][iv]). The 15-day period in which to challenge an income execution based upon mistake of fact runs from service of the income execution, which may be made either by ordinary mail, or "in the same manner as a summons" (CPLR 5241[d], [e]).

An income deduction order essentially allows the receiver to have direct access to the payor's income. Where the court determines that the paying parent earns wages that could be subject to an income deduction order, the court shall issue an income deduction order to obtain payment. The court must enter the order unless the court finds that there is good cause not to require immediate income withholding; or an agreement providing for an alternative arrangement has been reached between the parties.

An employer served with an income deduction order deducts the court ordered amount directly from the payor's paycheck. This is a relatively quick remedy, as once the employer receives the order, they must begin deducting the income no later than the first pay period that occurs fourteen days after service of the income deduction order. The child support would be payable through the Child Support Collections Unit.

Contempt

For civil contempt, moving party must demonstrate by clear and convincing evidence that party charged with contempt violated clear and unequivocal court order which defeated, impaired, impeded, or prejudiced moving party. See, Judiciary Law § 753[A][3]; Manning v. Manning, 82 AD3d 1057, 1058; McCain v. Dinkins, 84 N.Y.2d 216, 226; Matter of McCormick v. Axelrod, 59 N.Y.2d 574, 583. Failure to pay court ordered child support, constitutes prima facie evidence of a willful violation justifying imprisonment (see, Matter of Dart v. Howell, 237 A.D.2d 825, 825; see, Family Ct Act § 454[3][a]).

Supreme Court had discretion to direct undertaking to insure payment of child support obligations. See, Krinsky v. Krinsky, 208 A.D.2d 601, 618 N.Y.S.2d 220; Labow v. Labow, 154 A.D.2d 90, 550 N.Y.S.2d 889; Rainone v. Rainone, 118 A.D.2d 766, 767, 500 N.Y.S.2d 156.

Family Court also has the power to suspend driving privileges pursuant to FCA § 454(2)(e).

E. Drafting Clear QDROs – Do's and Don'ts

Pensions and other deferred compensation interests are commonly found in the marital estates subject to equitable distribution upon divorce. In small and mid-size estates, the pension interests of the spouses often represent the most valuable marital asset the parties own. See, for example, *McDermott v. McDermott*, 119 A.D.2d 370, 507 N.Y.S.2d 390 (Second Dept. 1986). One of the earliest substantive law decisions rendered by the Court of Appeals after passage of the Equitable Distribution Law declared that pension interests, to the extent acquired during the marriage, are marital property, subject to distribution upon dissolution of the marriage. *Majauskas v. Majauskas*, 61 N.Y.2d 481, 463 N.E.2d 15, 474 N.Y.S.2d 699 (1984). *Majauskas* instructed quite clearly: "To the extent that they result from employment time after marriage and before commencement of a matrimonial action, they are contract rights of value, received in lieu of higher compensation which would otherwise have enhanced either marital assets or the marital standard of living and, therefore, are marital property."

Every pension plan has its own form and requirements for the preparation of a Domestic Relations Order.

Do's

Prior to preparing a DRO, you should contact the pension administrator of the particular plan to be distributed for their procedure and forms. Some of the typically provisions contained in any DRO are as follows:

- Must be an Order, Judgment, or Decree for Property Division/maintenance/child support on behalf of spouse, former spouse, child or other dependant pursuant to a state domestic relations law. (must be a DRO—Domestic Relations Order)
- The order, judgment, or decree can incorporate an agreement *but* an agreement ALONE cannot become a QDRO b/c it is not a DRO.
- Must set forth what plan is to pay to non-title spouse by stating amt or setting
- Name/Address of Parties
- forth a formula/method which amount can be determined (formulas discussed earlier)
- Must be for the benefit of a spouse, former spouse, child, or other dependent.

Don'ts

- Require plan to pay any benefit which the plan is not required to pay
- Require plan to pay a form of benefit not required by the plan itself. Can't propose pay-out option that plan does not provide
- Require plan to make any payment to an alternative payee which the plan is already required to pay to another alternate payee under a previously qualified order

Example: H has the pension. In divorce #1 he says in the settlement: W gets 100% of whatever monthly benefit it is. That goes into DRO. W #1's L enters the divorce judgment in county clerk's office and forgets to send it to the plan administrator. Now, years later, H gets divorced from W #2. He says W #2 gets 100% of pension benefits when he retires. L sends to plan administrator. W #2 is qualified b/c has a QDRO. H retires, W #2 gets the benefits b/c #2 qualified 1st and speaks for 100% of the benefits.

Lesson: develop an effective close-out system in your office. Otherwise, if you are W #1's L then you're in trouble... malpractice. Saving grace will be 3 year SOL on malpractice in such case.

- If H had promised 50% to each W, then everything would have worked out okay.

F. Bankruptcy

You should be aware of the following issues:

1. *Maintenance and Support Are Not Dischargeable.* The Bankruptcy Code excepts from discharge, maintenance or support payments owed to a spouse, former spouse or child of the debtor, in connection with a separation agreement, divorce decree, court order, administrative determination, or property settlement. Section 523(a)(5).

2. *Equitable Distribution Dischargeable.* Prior to October 1994, when the Bankruptcy Code received a major overhaul, it was easy for attorneys to advise clients: Maintenance and support were dischargeable; equitable distribution was not. However, the 1994 Bankruptcy Amendment Act changed that with the introduction of a new provision, section 523(a)(15), which makes equitable distribution "potentially" non-dischargeable. This new section enables an aggrieved spouse to make equitable distribution non-dischargeable if the aggrieved spouse can prove a two-prong test: a) the

debtor has the ability to pay the debt; and b) the detrimental consequences to the aggrieved spouse outweigh the benefits to the debtor spouse in discharging the debt.

3. *Objecting to the Dischargeability of Equitable Distribution.* The bankruptcy court has exclusive jurisdiction of dischargeability determinations under the section 523(a)(15) two-prong test. The aggrieved spouse must file an adversary proceeding complaint with the bankruptcy court within 60 days of the date of the meeting of creditors, objecting to the dischargeability of the equitable distribution. This date is known as the “bar date.”

4. *The Bankruptcy Court Shares Concurrent Jurisdiction.* Although the bankruptcy court has exclusive jurisdiction of the two-prong test of section 523(a)(15), it shares concurrent jurisdiction with the state court on section 523(a)(5) issues concerning whether a debt is non-dischargeable because it is support or maintenance.

5. *Bankruptcy Judges Hate Matrimonial Law Issues, and Supreme Court Judges Hate Bankruptcy Law Issues.* Two courts are often needed. State court judges tend to have limited familiarity with bankruptcy law issues and do not seem to be eager to get involved with interpreting bankruptcy law. On the other hand, whether a bankruptcy judge has exclusive or concurrent jurisdiction over matrimonial debt issues, the bankruptcy judge will often kick the sticky divorce issues back to the matrimonial court for a determination there, which the bankruptcy court will then adopt.

6. *Bankruptcy Judges and State Court Judges Have Different Objectives.* You should also be aware that bankruptcy judges theoretically may favor the debtor since the policy of bankruptcy is to offer a debtor the opportunity for a fresh new financial start. Meanwhile, matrimonial judges may be more likely to favor the aggrieved spouse as the state has a public policy of protecting innocent spouses.

7. *The Burden of Proof is on the Aggrieved Spouse.* A general rule of law about objecting to discharge is that the aggrieved spouse creditor carries the burden of proof that the debt is non-dischargeable.

8. *Settlement Agreements and Divorce Decrees Are Not Always Binding.* Settlement agreements and divorce decrees usually designate debts as either support and maintenance, or

equitable distribution. However, such designations are not binding and the bankruptcy court can look beyond such language to determine the true nature of the debt. The main factors that the court will look at to determine whether the debt is in the nature of a support payment or equitable distribution are: a) whether the payments terminate upon death or remarriage of the spouse receiving them; b) whether payments are contingent on future earning abilities; c) whether payments are to be periodic over a long period of time; and d) whether the payments are designated as being for the purposes of medical care, mortgage, or other needs of the spouse receiving them.

9. *Attorneys' Fees Are Usually Non-dischargeable.* Income-providing spouses are often ordered to pay the attorneys' fees of the non-income producing spouses. However, when a spouse files for bankruptcy, such attorney's fees are usually found to be in the nature of support, and thus, non-dischargeable (unless a successful adversary proceeding is brought regarding the two-prong test under section 523(a)(15)).

10. *Know When To Consult With Bankruptcy Counsel.* There are many bankruptcy traps for the unwary matrimonial attorney. Consider conferring with a bankruptcy attorney experienced in bankruptcy-matrimonial issues.

The Second Circuit Court of Appeals in the case Musso v. Ostashko, 468 F. 3d 99 (2006) ruled that even though the divorce trial court awarded the wife all of the marital assets, because the judgment of divorce was not entered until after the husband filed for bankruptcy, the assets were the property of the husband's bankrupt estate. The wife would become an unsecured creditor of the husband's bankrupt estate. In this case, on October 23, 2003, the trial court in the parties' divorce granted the wife equitable distribution and awarded her all of the parties' property. In December, the husband filed for bankruptcy. Sometime later, the judgment of divorce was docketed. The Court found that it was the judgment of divorce which gave the wife the right to take possession of the marital property, not the decision after trial. Since the judgment was not entered until after husband's bankruptcy filing, the wife did not have an immediate right to the husband's property. Therefore, the Wife's claims would have to be resolved in the bankruptcy proceeding.

G. Checklist of Necessary Documents and Sample Forms

A complete list of the Family Court forms and petitions that can be filed can be found at: <http://www.nycourts.gov/forms/familycourt/index.shtml>. Resources for divorce forms can be found

at <http://www.nycourts.gov/divorce/forms.shtml>. For DRO's the plan administrator of any pension plan should be contacted for forms and procedures for filing.