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An Insider's Guide To Matrimonial Law in New York

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AN INSIDER'S GUIDE TO MATRIMONIAL LAW

AM &S Aronson Mayefsky & Sloan, LLP

Practice Devoted Exclusively to Family Law

AN INSIDER'S GUIDE TO MATRIMONIAL LAW IN NEW YORK

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ABOUT US

We are an internationally-recognized law firm working exclusively in matrimonial and family law.

Senior executives in the financial services and real estate industries, leaders in the arts and media, distinguished professionals and members of many of America's most prominent families routinely call on us to work with them in understanding and analyzing their family law concerns, and formulating reasonable and responsible resolutions.

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Michael, a partner with the Firm, is a Fellow of both the American Academy and International Academy of Matrimonial Lawyers. Actively involved in city, state and national bar associations, Michael has served as the Chair of the Matrimonial Law Committee for the New York City Bar Association (2011-2014) and frequently lectures both within New York State and nationally on topics involving family law and trial practice. He currently serves as the Vice-Chair of the ABA Family Law Section.

Michael has been selected to the Best Lawyers in America, New York's Best Lawyers and to Super Lawyers. Prior to joining the Firm, Michael served as a law clerk to the Honorable Virginia M. Morgan of the United States District Court for the Eastern District of Michigan.

Michael earned his B.A. from the University of Michigan (with Distinction) and his Juris Doctor from Brooklyn Law School. He is admitted to the New York and Connecticut Bars.

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Peter is a Fellow of the American Academy of Matrimonial Lawyers and has been selected as a Super Lawyer. Prior to joining the Firm, Peter worked as a Certified Public Accountant at Pricewaterhouse Coopers.

Peter earned his B.S. in finance and accounting from Indiana University and his Juris Doctor from Brooklyn Law School. He is admitted to the New York and Connecticut State Bars.

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- Agreements
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GROUNDS FOR DIVORCE

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- Leveling the playing field

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  - Do a little bit of everything; don't be stingy
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PRENUPTIAL AGREEMENTS

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- What are its broader implications, if any?

- How we are dealing with it at AMS

SOCIAL MEDIA:
Keeping Your Client Out of Trouble

- Understand the ramifications of one's conduct
  - The internet is FOREVER
- Real life anecdotes
- Spoliation
- Recent cases
- The best advice we can give – Just Say No

Complete Details following this slide

MATRIMONIAL ACTIONS

A. GENERALLY

Matrimonial actions in New York are governed by the Domestic Relations Law (the "DRL") and are subject to unique residency and jurisdictional rules. In other words, in order to obtain a divorce in New York, you need to meet the jurisdictional requirements and have a "ground" for divorce.

1. DRL §230 – RESIDENCY REQUIREMENT

The residency requirements are set forth in DRL §230. They are:

a. The parties were married in the state and either party is a resident when the action is commenced and has been a resident for a continuous period of one year immediately preceding the action.

b. The parties have resided in the state as husband and wife and either party is a resident when the action is commenced and has been a resident for a continuous period of one year immediately preceding the action.

c. The cause [of action for divorce] occurred in New York State and either party has been a resident for a continuous period of at least one year immediately preceding the action.

d. The cause [of action for divorce] occurred in the state and both parties are residents at the time of commencement.

For the purposes of DRL §230, a person's "residence" is interpreted as either an individual's [legal] residence or his or her domicile. *Heydt-Benjamin v. Heydt-Benjamin*, 84 A.D.3d 1167 (2d Dep't 2011); *Guedes v. Guedes*, 45 A.D.3d 533, (2d Dep't 2007); *See also P.C. v. K.K.*, 20 Misc.3d 1211 (A) (Sup. Ct. Kings Cty.2011).

Domicile is defined as the place where a person intends to make his or her fixed and permanent home. Even if a person is physically living out of state, so long as his or her intention is to maintain New York as his or her domicile, New York will remain his or her domicile.

As compared to domicile, legal residence is defined as the place where a person physically lives. It is a much broader term referring to the location where a person is physically located without regard to whether his or her intent is to make New York his or her permanent residence.

Satisfaction of one of the residency requirements does not eliminate the need to satisfy the requirements for personal jurisdiction over the parties in order for the Court to be able to address economic issues, nor does it obviate the need for *in rem* jurisdiction.

2. *IN REM* JURISDICTION

Matrimonial actions, as defined in CPLR §105(p), are *in rem* actions. *Lieb v. Lieb*, 86 Misc. 2d 75 (Sup. Ct. Queens Cty. 1976) *aff'd* 53 A.D.2d 67 (2d Dept. 1976). For purposes of adjudicating the marital status (i.e., the dissolution of the marriage itself), the presence of the defendant in New York is not necessary, provided one of the spouses resides in New York. The defendant may be personally served out of state with notice of the divorce action in the same manner as he or she may be personally served within New York. However, the *in rem* jurisdiction of the court is limited to the issue of the marital status and may not extend to economic issues between the parties which can only be adjudicated in New York if the court has also obtained personal jurisdiction over the defendant.

3. ***IN PERSONAM* JURISDICTION**

Economic issues of spousal maintenance and equitable distribution are considered ancillary matters to the marital status, and thus, a court must acquire personal jurisdiction over a litigant in order to determine such matters.

a. New York Domiciliary

Personal jurisdiction may be obtained over a New York domiciliary by personal service upon him in New York or in certain circumstances, outside New York.

b. Non-Domiciliary

Personal jurisdiction over a non-domiciliary defendant may be obtained by: (a) personal service upon the defendant in the State of New York; or (b) personal service outside the state pursuant to long arm jurisdiction. If the non-domicilliary defendant is served outside the state, personally jurisdiction over him or her is only acquired if two additional requirements are met. First, the non-domiciliary defendant must have been a domiciliary or resident of New York at one time in his or her life. Second, there must be a separate basis for long arm jurisdiction, which requires one of the following conditions to be met:

i. New York was the matrimonial domicile of the parties before they separated.

ii. The defendant abandoned the plaintiff in New York.

iii. The claim for support, alimony, maintenance, distributive awards or special relief accrued under the laws of New York.

iv. The claim for support, alimony, maintenance, distributive awards or special relief accrued pursuant to an agreement executed in New York.

B. GROUNDS

In addition to the jurisdictional requirements for divorce discussed above, in order to maintain a cause of action for divorce in New York, one must have an independent "ground" for divorce.

Until October 12, 2010 the only grounds available for divorce in New York that did not involve proving "fault" were found in DRL §170(5) (living separate and apart for more than one year following a judicial decree or judgment of separation) and DRL §170(6) (living separate and apart for more than one year following execution of a written separation agreement which was subscribed by the parties and acknowledged or proved in the form required to entitle a deed to be recorded).

Effective October 13, 2010, and specifically for actions commenced after that date, a true "no fault" ground for divorce became available. A new section of the DRL, §170(7) was added to create the "irretrievable breakdown" ground for divorce in New York. For that ground to apply, one party merely needs to state under oath that the marital relationship "has broken down irretrievably for a period of at least six months." The final judgment of divorce however will not be made and entered until all ancillary issues are determined by the Court or by agreement of the parties. *See* DRL §170(7).

While "no fault" legislation has made it much easier for a party to obtain a divorce in New York, the grounds for divorce that pre-dated the new statute (adultery, cruelty and abandonment being the most common) remain in effect and are addressed briefly below.

1. **ADULTERY – DRL §170(4)**

> "The commission of an act of adultery, provided that adultery for the purposes of article ten, eleven, and eleven-A of this chapter, is hereby defined as the commission of 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."

2. CRUELTY – DRL §170(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."

3. ABANDONMENT: ACTUAL AND CONSTRUCTIVE – DRL 170(2)

"The abandonment of the plaintiff by the defendant for a period of one or more years."

C. AUTOMATIC ORDERS

In 2009, the New York State legislature adopted automatic orders in matrimonial actions. *See* DRL §236(B)(2)(b). The purpose of the automatic orders is to ensure that the status quo is maintained with respect to the marital estate during the pendency of the action. The Orders provide that neither party shall transfer, encumber or dispose of "any property" without the other party's written consent, whether title to the property is held jointly or individually, "except in the usual course of business, for customary and usual household expenses or for reasonable attorney's fees in connection with this [matrimonial] action." The orders also provide that medical coverage must be maintained, life insurance beneficiaries must remain unchanged, and all other policies of insurance are to be maintained in full force and effect. The automatic orders are binding upon the plaintiff immediately upon commencement of a matrimonial action (by filing a summons with notice or summons and complaint) and upon the defendant immediately upon service of the automatic orders with the summons.

D. EQUITABLE DISTRIBUTION

1. Generally

Since July 19, 1980, New York has joined the majority of states in providing for the distribution of marital property upon the termination of a marriage. The provisions for the distribution of property are contained in DRL §236 part B, and are known as the Equitable Distribution Law ("EDL").

2. Definitions

The EDL defines "marital property" as all property acquired by either or both spouses commencing from the date of the marriage and continuing until the execution of a separation agreement or the commencement of a matrimonial action, regardless of the name or title in which the property is held. Exceptions to the definition of marital property are: (a) property that is defined by the EDL to be "separate property"; and (b) property that the parties have determined by a formal agreement will be treated as separate property.

The categories of separate property not subject to equitable distribution are: (a) property acquired before the marriage or after the commencement of an action for a divorce or annulment; (b) property acquired by bequest, devise or descent, or a gift from a party other than his or her spouse; (c) compensation for personal injuries; and (d) property determined to be treated as separate property by a written agreement of the parties in a form prescribed by statute.

Similarly, separate property may be treated by agreement of the parties as though it were marital property.

3. <u>Distribution</u>

Having classified property as marital or separate, the next step is to determine value. Once value is determined, the court analyzes a series of factors set forth in the EDL to arrive at an equitable percentage division of the marital property. New York case law has interpreted equitable division to not necessarily mean equal division.

a. EQUITABLE DISTRIBUTION: THE STATUTORY FACTORS - DRL 236 (B) (5) (d)

i. <u>Disposition of property in certain matrimonial actions</u>.

a. Except where the parties have provided in an agreement for the disposition of their property, 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 as 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, the court shall consider:

1. the income and property of each party at the time of the 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 contribution 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 compensation;

13. any other factor which the court shall expressly find to be just and proper. Note: this is the catch-all factor which permits the court to consider any other evidence it may deem relevant in arriving at an equitable distribution of the marital estate. *See, e.g.*, *Wilbur v. Wilbur*, 116 AD2d 953 (3d Dept. 1986)

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, the court may make such order regarding the use and occupancy of the marital home and its household effects as without regard to the form of ownership of such property.

g. In any decision made, the court shall set forth 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 the court shall, where appropriate, consider the effect of a barrier to remarriage, on the factors above.

b. EQUITABLE DISTRIBUTION: NOT NECESSARILY EQUAL

Again, the ultimate distribution of property under the statute is given to the sound discretion of the trial court. It is quite clear that equitable does not mean equal. *Arvantides v. Arvantides*, 64 N.Y.2d 1033 (1985). *See also Schiffmacher v. Schiffmacher*, 21 A.D.3d 1386 (4th Dept. 2005). However, the case law that has developed clearly expresses in marriages of long duration that there should be an equal distribution of assets, although the court will consider the type of asset subject to division, whether it be a bank account, a home, a pension or a business in determining the appropriate percentage division. Percentage divisions may differ as amongst different types of assets (*e.g.* liquid bank accounts as opposed to business interests).

E. CUSTODY

Custody in New York is broken up into two categories: (a) legal custody and (b) physical custody. Legal custody refers to how decisions are made for the child. Physical custody refers to the time each parent spends with the child.

1. Presumptions

By statute, there is no presumptive right on the part of either parent for the custody of a child of the marriage if both parents are living. Specifically, and unlike the law of certain other jurisdictions, New York has no presumptive right that the parties shall share joint custody of a child upon the conclusion of their divorce. By decisional law, it has been determined that the court may not properly grant joint custody to "warring" parents.

2. Factors

The underlying and controlling factor in making any award of child custody is ultimately the best interests of the child after a consideration of all the relevant facts and circumstances. Each case is decided strictly upon its own facts, and generalizations often do not apply to a particular case. Among the factors a court may consider are:

a. age of the child;

b. health and special needs of the child;

c. capability of each parent to provide for the care of the child;

d. history of the care provided by each parent for the child;

e. health and physical condition of each parent, including mental health and disabilities resulting from alcohol, drug abuse and other substances;

f. previous and contemplated home environments for the child;

g. educational needs of the child and the ability of each parent to fulfill them;

h. presence or absence of members of the "extended family" of the child;

i. interference with visitation or the relationship of the other parent with the child;

j. religious considerations;

k. preference of the child; depending upon the child's age.

F. SPOUSAL MAINTENANCE

In a New York divorce case, the court will decide whether either spouse is entitled to spousal maintenance (formerly referred to as alimony). Maintenance is paid to ensure that supported spouses continue to live the same or a similar lifestyle as they did while they were married. It is also a way to give supported spouses time to gain skills or training necessary to become "self-sufficient" (meaning that they can support themselves financially). Spousal support and maintenance are gender neutral. Courts can, and do, award spousal maintenance to men and woman.

"*Pendente lite*" maintenance (also known as temporary maintenance) may be awarded to a spouse while a divorce action is pending. The purpose is to give the supported spouse money to cover living expenses and maintain the "status quo" while the court is making a decision on a final award of maintenance.

The maintenance guidelines bill passed the Assembly on June 15, 2015 with just one dissenting vote (A 7645). It passed the Senate unanimously on June 24, 2015 (S 5678). The following is a summary of key provisions of the new legislation:

- **Effective Date and Applicability:**

  Temporary Maintenance Guidelines-30 days after the act becomes law and applies to actions commenced on or after the effective date.

  All other provisions (Post-Divorce maintenance, Family Court spousal support, elimination of enhanced earning capacity)-120 days after the act becomes law and applies to matrimonial actions and Family Court spousal support proceedings commenced on or after the effective date.

  Note-Nothing in the act affects the validity of agreements made prior to the effective date of the legislation.

  Nothing in the act prohibits parties from entering into validly executed agreements which deviate from the maintenance guidelines.

The existence of the new statute, itself, will not constitute a change of circumstances warranting modification of maintenance awards made prior to the effective date of the new legislation, whether by court order or the parties' agreement. Further, the existence of the statute, itself, does not change the standard for modification of maintenance awards made in unmerged agreements (extreme hardship).

- **Elimination of Enhanced Earning Capacity:**

DRL 236 B (5) (d) (7) is amended to provide the following:

> "The court shall not consider as marital property subject to distribution the value of a spouse's enhanced earning capacity arising from a license, degree, celebrity goodwill, or career enhancement."

Caveat: The new legislation states that, in determining equitable distribution, the court shall consider a spouse's direct or indirect contributions during the marriage towards the other spouse's development of enhanced earning capacity.

- **Definition of Income:**

For purposes of maintenance guidelines, "income" shall mean income as defined in the CSSA without subtracting maintenance paid to a party spouse in the instant action or proceeding.

In addition, for post-divorce maintenance, the term "income" also includes "income from income-producing property distributed or to be distributed" in the action.

- **Determine Maintenance Before Child Support:**

The statute expressly states that maintenance (temporary or post-divorce) shall be calculated *prior to* child support because the amount of maintenance shall be subtracted from the payer's income and added to the payee's income as part of the child support calculation.

- **Guidelines Also Applicable To Spousal Support:**

The new legislation establishes guidelines for both temporary maintenance and post-divorce maintenance. Based on the recommendation of the Law Revision Commission, the guidelines also apply to Family Court spousal support proceedings. The same formulas apply for temporary maintenance, post-divorce maintenance and family court spousal support.

The new legislation continues existing case law providing that Family Court spousal support awards are non-durational in nature and continue until the parties enter into an agreement for spousal support, the issuance of a judgment of divorce or other order in a matrimonial action, or the death of either party, whichever first occurs.

Notwithstanding the above, Family Court may modify a prior spousal support order upon a showing of a "substantial change in circumstances." FCA 412 {10).

- **Cap:**

The income cap for temporary maintenance is lowered from the current $543,000 to $175,000 of the payer's income. The cap also applies to post-divorce maintenance and spousal support.

There is a COLA provision which adjusts the cap every 2 years beginning January 1, 2016.

- **<u>Two Sets of Formulas:</u>**

A. <u>For Income Below the Cap:</u>

Where the payer's income is lower than or equal to the income cap ($175,000}, there are two different maintenance formulas. One formula is used where no child support is being paid by the maintenance payer to the recipient spouse. For this formula, there either are no unemancipated children or the maintenance payer is also the custodial parent for child support purposes.

A different maintenance formula is used where the maintenance payer is also the non-custodial parent paying child support to the recipient spouse.

- **<u>Where the Maintenance Payor Is Also the Non-Custodial Parent Paying Child Support To the Recipient Spouse:</u>**

<u>Step 1</u>- 20% of Payer's income up to $175,000 **<u>MINUS 25%</u>** of Payee's income.

<u>Step 2</u>- Payer's income up to $175,000 <u>PLUS</u> Payee's income X 40% <u>MINUS</u> Payee's income.

<u>Step 3</u> -The lower of the two amounts above is the guidelines figure.

<u>Hypothetical:</u>

Payor, the non-custodial parent, has $100,000 in income as defined in the statute {after subtracting social security and Medicare taxes). Payee, the custodial parent, has $50,000 in income (after subtracting social security and Medicare taxes).

Step 1--$100,000 x 20% = $20,000
$ 50,000 x 25% = $12,500

$20,000 - $12,500 = **<u>$7,500</u>**

Step 2--$100,000 + $50,000 = $150,000 x 40% =$60,000
$60,000 - $50,000 = **<u>$10,000</u>**

Step 3-Compare the two figures above. The lower figure ($7,500) is the guidelines amount.

- **<u>Where No Child Support Is Being Paid By the Maintenance Payor to the Recipient Spouse:</u>**

But for the amount of the income cap, this is the same formula used in the current temporary maintenance guidelines.

Step 1 - 30% of Payer's income up to $175,000 <u>MINUS</u> **20%** of Payee's income.

<u>Step 2</u>- Payer's income up to $175,000 PLUS Payee's income X 40% <u>MINUS</u> Payee's income.

<u>Step 3</u>-The lower of the two amounts above is the guidelines figure.

Hypothetical:

Payor has $100,000 in income, as defined in the statute (after subtracting social security and Medicare taxes). Payee has $50,000 in income (after subtracting social security and Medicare taxes). There either are no unemancipated children or the payer is the custodial parent-- so no child support is being paid by the payer to the payee.

Step 1--$100,000 x 30% = $30,000
$ 50,000 x 20% = $10,000

$30,000 - $10,000 = **$20,000**

Step 2--$100,000 + $50,000 = $150,000 x 40% =$60,000
$60,000 - $50,000 = **$10,000**

Step 3-Compare the two figures above. The lower figure ($10,000) is the guidelines amount.

B. **For Income Above the Cap:**

Where the payer's income exceeds the $175,000 cap:

Step 1–First, determine the guidelines amount up to and including the $175,000 cap using the appropriate formula (see above}.

Step 2-For income above the cap, the amount of additional maintenance, if any, shall be within the discretion of the court taking into consideration one or more of the numerous factors set forth in the statute. These are also the "deviation factors" (see below}.

The court shall set forth the factors it considered and the reasons for its decision in writing or on the record. This requirement may not be waived by either party or counsel. There are "18" factors for temporary maintenance and "20" for post-divorce maintenance.

- **Deviation from Guidelines:**

The court shall award the guideline amount of temporary or post-divorce maintenance up to the $175,000 cap in accordance with the appropriate formula unless it finds that the guideline amount is "unjust or inappropriate," which finding shall be based upon consideration of any one or more of numerous factors.

Where the court finds that the guideline amount is unjust or inappropriate and where it adjusts the amount, the court shall set forth, in a written decision or on the record, the guideline amount, the factors it considered, and the reasons the court adjusted the guideline amount. The requirement that this be done on the record or in writing shall not be waived by either party or counsel.

- **Unrepresented Party:**

Where either or both parties are unrepresented, the court shall not make a maintenance order unless it informs the unrepresented party or parties of the temporary or post-divorce guideline obligation.

- **Default or Insufficient Evidence of Income:**

Where a payor has defaulted, or where the court is presented with insufficient evidence to determine income, the maintenance award shall be based upon the **needs** of the payee or the parties' **standard of living** prior to the commencement of the divorce action, **whichever is greater.** The award may be retroactively modified upward, without a showing of a change in circumstances, upon a showing of newly discovered evidence.

- **Temporary Maintenance-Allocation of Expenses:**

In determining temporary maintenance, the court shall consider and allocate, where appropriate, the parties' respective responsibilities for the family's expenses during the pendency of the action.

- **Temporary Maintenance-Duration:**

Temporary maintenance shall terminate no later than the issuance of a judgment of divorce or the death of either party. Supreme Court has the power to limit the duration of temporary maintenance.

Further, the temporary maintenance award shall not prejudice the rights of either party regarding a post-divorce maintenance award.

- **Post-Divorce Maintenance- Duration:**

The statute sets forth an **advisory** durational formula for post-divorce maintenance tied to the length of the marriage.

The "length of the marriage" is defined as running from the date of the marriage until the date of commencement of the divorce action.

In determining the duration of post-divorce maintenance, the court must set forth in writing or on the record, the factors it considered. This is true, regardless of whether or not it follows the advisory schedule.

The following is the advisory schedule for post-divorce maintenance:

Length of the Marriage	**Percent of the Length of the Marriage For Which Post-Divorce Maintenance Will Be Payable**
Zero to 15 Years	**15% to 30%**
More than 15 to 20 years	**30% to 40%**
More than 20 years	**35% to 50%**

Nothing in the statute prevents the court from awarding non-durational maintenance in an appropriate case.

Hypothetical Durations Per the Advisory Schedule:

Length of Marriage	**Range of Duration**

3 years	.45 years to .9 years
5 years	.75 years to 1.5 years
10 years	1.5 years to 3 years
13 years	1.9 years to 3.9 years
16 years	4.8 years to 6.4 years
20 years	6.0 years to 8.0 years
23 years	6.9 years to 9.2 years
25 years	7.5 years to 10 years
28 years	9.8 years to 14 years
30 years	10.5 years to 1 years
35 years	12.25% years to 17.5 years

- **Termination of Post-Divorce Maintenance:**

  Maintenance terminates upon the death of either party or upon the payee's valid or invalid marriage, or upon modification pursuant to DRL 236 B 9 b or DRL 248 (cohabitation).

- **Retirement and Maintenance:**

  In determining the duration of post-divorce maintenance, the court shall take into consideration:

  -- anticipated retirement assets;

  --benefits; and

-- the retirement eligibility ages of both parties if ascertainable at the time of the decision.

If not ascertainable at the time of the decision, the actual **full *or* partial retirement** of the payer with a **substantial diminution** of **income** shall be a basis for modification of maintenance.

As previously noted, the new statute does not open the door to modification of prior maintenance awards, whether arising by court order or the parties' agreement. In addition, the statute does not change the standard for modification of maintenance awards made in unmerged agreements {extreme hardship).

- **DRL 248 Made Gender Neutral**

DRL 248 was modified to provide that a court may modify maintenance upon proof that the "payee" is holding "himself or herself' out as the spouse of another person, although not married to such other person.

G. CHILD SUPPORT

Parents are legally obligated to financially support their child(ren) until each child attains the age of 21 years. Child support is governed by a computational formula set forth in the Child Support Standards Act (the "CSSA") and driven primarily by the incomes of the parents and not the needs of the child. Child support required to be paid to a custodial parent is a percentage of the parties' overall combined income, pro-rated in the proportion that the noncustodial parent's income bears to the total combined income.

one child	17%

two children	25%
three children	29%
four children	31%
five or more children	35% or more

A court has the discretion to follow the percentage guidelines or to vary the child support award but must give the reason why the formula approach was not used. For combined incomes over $141,000 per year, the excess of $141,000 may be subject to the formula or not, as the court in its discretion deems appropriate. Many courts apply the formula beyond the $141,000 figure.

What constitutes income for the purpose of the computation is set forth in the CSSA. It is essentially gross income reduced by FICA taxes and by New York City and Yonkers income taxes, but not reduced by federal or state income taxes. No other deductions apply except as specifically set forth in the statute. Among the few allowable deductions are, where applicable, maintenance payments required to be paid to the spouse and to a prior spouse and support for children of a prior marriage.

H. <u>MARITAL AGREEMENTS</u>

1. <u>Statutory Authority</u>

The statutory authority for parties to enter into binding agreements in the State of New York is found in DRL §236B(3), which provides:

> 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. … 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 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 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.

2. <u>Presumption of Validity</u>

a. Marital Agreements Generally

Pursuant to DRL §236B(5)(a), a properly executed agreement respecting the division of property must be enforced unless it can be characterized as "unconscionable" or is the result of fraud or overreaching. The seminal case in the State of New York addressing marital agreements is *Christian v. Christian*, 42 N.Y.2d 63, 71-72 (1977). As enunciated by the Court of Appeals (New York's highest court) in *Christian*:

> Generally, separation agreements which are regular on their face are binding on the parties, unless and until they are put aside. Judicial review is to be exercised circumspectly, sparingly and with a persisting view to the encouragement of parties settling their own differences in connection with the negotiation of property settlement provisions. . . . [C]ourts should not intrude so as to redesign the bargain arrived at by the parties on the ground that judicial wisdom in retrospect would view one or more of the specific provisions as improvident or one-sided. (Internal citations omitted.)

The Court went on to find that "if the execution of the agreement … [is] fair, no further inquiry will be made." *Id.* at 72. Notably, the foregoing principle was reaffirmed as a "general rule" by the Court of Appeals in *Levine v. Levine*, 56 N.Y.2d 42 (1982).

An illustration of this mandated judicial restraint can be found in *Sardi v. Barbier*, 3/29/91 N.Y.L.J. 26, col. 1 (Sup. Ct. N.Y. Cty. 1991), where the Court in determining whether an agreement (in this case a separation agreement) was "manifestly unfair" opined "it is clear that a court may not substitute its own judgment as to what constitutes a good or better bargain for the parties." The Court then went further, and in dismissing the plaintiff wife's action to rescind the parties' agreement held that:

> … the agreement was not one which a reasonable and informed [party] would not sign or that an honest and fair [party] would not accept. Although this might not be an agreement that I would have recommended, under the circumstances of the case, the Separation Agreement does not shock the conscience of the court, nor would it

> shock the conscience or confound the judgment of any person of common sense.

As the Fourth Department stated in *Skotnicki v. Skotnicki*, 237 A.D.2d 974, 975 (4th Dep't 1997):

> Although the agreement here is favorable to plaintiff, it is not unconscionably so. It is not the kind of bargain that only a deluded person would make.

See, e.g., McCaughey v. McCaughey, 205 A.D.2d 330 (1st Dep't 1994) ("courts will not set aside an agreement on the ground of unconscionability simply because it may have been improvident"); *Amestoy v. Amestoy*, 151 A.D.2d 709 (2d Dep't 1989) (courts may not intervene and redesign or vacate an agreement simply because in retrospect judicial wisdom would view one or more of the specific provisions as improvident or one-sided).

b. Burden

It is well settled that with respect to a deliberately prepared and executed written agreement, there is a heavy presumption the agreement manifests the true intentions of the parties. *Baker Management Corp. v. Acme Quilting Co.,* 46 N.Y.2d 211, 219 (1978); *Bloomfield v. Bloomfield*, 97 N.Y.2d 188 (2001). Evidence of a high order is required to overcome this presumption. *Id.* Absent extraordinary circumstances, parties will be held to the bargain set forth in their negotiated agreement. *Van Kipnis v. Van Kipnis,* 11 N.Y.3d 573 (2008); *Bloomfield, supra; Matter of Greiff,* 92 N.Y.2d 341 (1988); *Stawski v. Stawski,* 43

A.D.3d 776 (1st Dep't 2007), and courts are not shy to summarily reject efforts brought belatedly by dissatisfied matrimonial litigants seeking to rewrite the terms of agreements voluntarily entered into years earlier. *See, e.g., Morad v. Morad,* 27 A.D.3d 626 (2d Dep't 2006); *Colyer v. Colyer,* 26 A.D.3d 303 (1st Dep't 2006); *Bronfman v. Bronfman*, 229 A.D.2d 314 (1st Dep't 1996); *DiSalvo v. Graff,* 227 A.D.2d 298 (1st Dep't 1996).

c. Challenges

There are several bases upon which a party may seek to set an agreement aside, the most common of which are: (1) unconscionability; (2) fraud; (3) duress; and (4) overreaching/misrepresentation. Each has a specific threshold standard which—despite ever increasing challenges—in the face of the *Christian* presumption remains difficult for a litigant to meet. However, in 2012 and 2013 the Second Department decided *Petracca v. Petracca*, 101 A.D.3d 695 (2d Dept. 2012) and *Petrakis v. Petrakis*, 103 A.D.3d 766 (2d Dept. 2013). Both decisions diverged from settled doctrine and set aside the agreements in each case (a postnuptial agreement in the former and a prenuptial agreement in the latter). The decisions were driven by the specific facts in each case and whether or not either will have broader implications or application is yet to be seen.

i. Other Challenges

1. Proper Acknowledgement

The DRL provides, *inter alia*, that a marital agreement 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." DRL §236(B)(3). If a marital agreement of any type, be it a prenuptial agreement, separation agreement or postnuptial agreement, fails to contain the proper acknowledgement, it will be set aside. *Matisoff v. Dobi*, 90 N.Y.2d 127 (1997); *Arabian v. Arabian,* 79 A.D.3d 517 (1st Dep't 2010); *Filkins v. Filkins*, 303 A.D.2d 934 (4th Dep't 2003); *Gubbins v. Fee*, 148 Misc.2d 47 (Sup. Ct. Nassau Cty. 1990). Accordingly, it is critical for the practitioner to ensure that the agreement has the proper acknowledgment, subscribed to before a notary public.

RPL §309-a (as amended and effective September 1, 1999), titled "Uniform forms of certificates of acknowledgement or proof within this state," provides a guide as to what is an appropriate acknowledgement with respect to real property transfers and recordings (and in turn, what is an appropriate acknowledgement under DRL §236(B)(3)).

I. COUNSEL FEES

DRL §237 expressly provides that courts have the authority to order one spouse to pay the attorney and professional fees of the other spouse in matrimonial actions. The purpose behind the statute is to ensure that both parties have the ability to litigate on a level playing field.

J. SOCIAL MEDIA IN THE FAMILY LAW CONTEXT

The proliferation of social media has come to wreak havoc on many matrimonial cases. Whether it is an email, a tweet, a post to Facebook or a picture to Instagram, parties often create otherwise completely avoidable problems that impact the divorce action. The key to keeping your client out of trouble (to the extent you can) with respect to social media is making him or her understand at the very outset: (1) his/her legal obligation; and (2) the ramifications for bad or questionable conduct.

First, the legal obligation. You cannot destroy evidence or delete or alter your social media sites or accounts once you reasonably anticipate litigation. Thus, once a spouse comes to your office for a consultation the legal obligation to maintain evidence begins. Spoliation is "[t]he destruction or significant alternation of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *See Zubulake v. UBS Warburg, 217 FRD 309 (2003).* The duty to preserve is quite broad and extends to what one knows, or reasonably should know, is or may be relevant in the action/potential action, is reasonably calculated to lead to the discovery of admissible evidence, or reasonably likely to be requested during discovery.

Beyond *Zubulake,* the seminal case on spoliation, further real life implications abound. In *Lester v. Allied Concrete* (Virginia), a personal injury action, the plaintiff was the husband of a woman who was killed in an auto accident. He sued the truck driver and the driver's employer. During the pendency of the action, plaintiff Lester sent a message through Facebook to an attorney for Allied Concrete. As a result, the Allied Concrete attorney was able to access Lester's Facebook page. Based on that review, a discovery request was issued to Lester's counsel. Attached to the request was a photo of Lester holding a beer can while wearing a t-shirt that had printed on it: "I ♥ HOT MOMS".

The very next morning Lester's counsel advised Lester to "clean up" his Facebook page because he didn't want "any blow-ups of this stuff at trial." He also advised Lester that there were some other photos "that should be deleted." In response, Lester deleted his Facebook page. The very next day, the attorney signed and served an answer to the discovery request which stated "I do not have a Facebook page on the date this is signed." Lester and his attorney then attempted – unsuccessfully – in the face of a motion to compel to cover up these communications and acts. The sanctions for spoliation included $542,000 against the attorney (who was also referred to the State Bar for misconduct and lost his job at his law firm) and $180,000 against Lester (who was also referred to the local prosecutor with respect to allegations of perjury).

This should leave no room for doubt that the preservation of social media is as important as any other evidence, electronic or otherwise and content, once posted, may create significant difficulties to the party engaging in the questionable conduct in the context of a litigated matrimonial case.