PACE LAW SCHOOL

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MOTION PRACTICE IN MATRIMONIAL ACTIONS

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I. Pendente Lite Motions: To Move or Not to Move?

A. Introduction

A pendente lite motion seeks immediate, temporary relief while the matrimonial action is pending. The relief sought can include temporary child support, temporary maintenance, direct payments of expenses (such as car payments, carrying charges for the marital residence, insurance premiums), counsel and/or expert fees, parenting issues, exclusive use and occupancy of the marital residence, or protective orders. Pendente lite motions are often filed upon the commencement of a divorce action or at or before the preliminary conference, but they can be brought at any time up to the time of trial.[1]

Filing a pendente lite motion should never be a knee-jerk reaction. Counsel should consider the following factors in deciding whether to file a motion for pendente lite relief:

- Is the client's situation an emergency?
- Is the case likely to be heavily litigated or prolonged?
- Is your adversary open to stipulating to pendente lite issues?

[1] Effective as of October 13, 2010, DRL §236 provides that upon service, each spouse is bound to follow the Notice of Automatic Stay. A copy of the Notice of Automatic Stay is attached as **Exhibit A**.

- Is the motion likely to improve the client's position, particularly since appeals of interim orders are seldom modified on appeal?
- Is it worth the financial cost to the client?
- What is the likelihood of success?
- What are the possible long-term effects on the case?

The last two factors are the most problematic, because results are often unpredictable. Even if you bring the motion and win, you may lose in the end because an overly generous interim order may harden the parties' positions and make the negotiation of the final deal difficult or impossible. An onerous order will likely remain in place for the duration of the case, which can be financially disastrous for one or both parties.

The Uniform Rules for matrimonial actions (22 NYCRR § 202.16) specifically provide that applications for pendente lite relief maybe considered at the preliminary conference ("PC"); see 22 NYCRR § 202.16(f)(2). In fact, the Rules encourage that motions for interim support or counsel fees be made at the PC; see 22 NYCRR § 202.16(k)(1): "Such motion shall be made before or at the PC, if practicable." However, do not expect to simply show up at the PC and request interim relief -- the Rules do not suspend the formalities of motion practice.

In Westchester County, motion practice is governed by the Matrimonial Part Operational Rules (a copy is attached as **Exhibit B**) (the "Matrimonial Part Rules"). The Matrimonial Part Rules require that in all pre-Note of Issue cases, unless the attorney believes that an emergency exists, permission to file a motion must be obtained via a "pre-motion conference" with a Court Attorney-Referee. The rationale is to reduce the number of motions by giving the Court an opportunity to resolve the issues at the pre-motion conference – and it often works.

The best approach is to try to negotiate a stipulation covering interim issues. At best, you will save your client a significant amount of money. At worst, your efforts will be evidence of your good faith if you must make a pendente lite motion.

B. Statement of Net Worth

We usually provide potential clients with a blank Statement of Net Worth ("SNW") form at our initial consultation. Next to the Separation Agreement or Stipulation of Settlement resolving parenting and financial issues, we consider the Statement of Net Worth the most important document in a matrimonial matter. You will need your client's SNW for any pendente lite motion involving finances and at the PC.

C. Applicable Rules

The rules applicable to *pendente lite* motions in matrimonial cases are found in three places: the CPLR, the NYCRR and, sometimes, in the individual rules of the judge hearing the case. Never forget to check the individual judge's rules before you even so much as call chambers; the judge's rules might even prohibit such calls. Some judges require conferences before motions are made. In Westchester, see Matrimonial Part Rules attached as Exhibit B.

1. <u>The CPLR</u>

Article 22 of the CPLR is entitled "Stay, Motions, Orders and Mandates" and contains the fundamental rules applicable to all motions, regardless of the subject matter of the case. The basic rules are:

- CPLR 2214 (a): what a Notice of Motion must state
- CPLR 2214 (b): timetable for serving moving, answering and reply papers
- CPLR 2214 (c): what the Court must receive from the parties

- CPLR 2214 (d): order to show cause (in Court's discretion, not subject to same time constraints as noticed motions)

- CPLR 2215: cross motions; timetable (Caution: no right of reply)

- CPLR 2217(b): affidavit on ex *parte* motion (i.e., order to show cause) must state if there has or has not been a prior request for the same relief and, if there has, explain why a new application.

2. The NYCRR

a. Certification of Papers. 22 NYCRR 130-1.1a is entitled "Signing of Papers". This section pertains to all papers served in every kind of case, matrimonial or otherwise, and requires that every pleading, written motion and other papers, served on another party or filed or submitted to the court must be signed by an attorney. By signing a paper, the attorney or pro se litigant is certifying that, to the best of his or her knowledge, information and belief, formed after a reasonable inquiry, the submission of the paper or the contentions contained in the paper are not frivolous as defined in 22 NYCRR 130-1.1(c). 22 NYCRR 130-1.1 defines "frivolous" conduct as being (a) completely without merit in law; or (b) designed to create delay or to harass; or (c) the assertion of false factual statements. See also 202.16 (e).

b. Briefs and Affidavits. 22 NYCRR 202.8(c) provides that "affidavits shall be for a statement of the relevant facts, and briefs shall be a statement of the relevant law." Thus, attorney affirmations should not contain legal citations and arguments.

c. Matrimonial Rules. 22 NYCRR 202.16 is entitled "Matrimonial Actions; Calendar Control of Financial Disclosure in Actions and Proceedings Involving Alimony, Maintenance, Child Support and Equitable Distribution; Motions for Alimony, Counsel Fees Pendente Lite, and Child Support, Special Rules." The provisions relevant to motions are:

- 202.16 (f) (2): At the preliminary conference, the court may consider applications for *pendente lite* relief. Be prepared to discuss, in detail, the merits of the issues. Some judges will try to "conference" the issue and avoid a motion. *See also* 202.16 (k) (1): "Such motion shall be made before or at the preliminary conference, if practicable." Because of the Matrimonial Part Rules in Westchester, unless brought by Order To Show Cause, applications for pendente lite relief are usually made after the PC.[2]

- 202.16 (k) (2): All motions for temporary support and counsel fees must have attached a statement of net worth. Failure to attach the statement of net worth is a fatal defect that cannot be cured in reply papers. See Section I(B) above.

- 202.16 (k) (3): All motions for counsel, accounting and expert fees must contain a submission by the professional seeking fees explaining money received, work to be done and fee agreement.[3]

- 202.16 (k) (4): For the purposes of the motion (not the balance of the case) any fact set forth in the moving party's statement of net worth that is not controverted in the responding party's statement of net worth or sworn affidavits is deemed to be true.

- 202.16 (k) (5): In the court's discretion, non-compliance with any of the provisions of Sec. 202.16 may be the basis of the Court's either making inferences favorable to the adverse party or denying the motion outright, without prejudice to renewal upon compliance with the provisions of the section.

3. The Individual Judge's Rules

Virtually every judge publishes his or her own rules. You can find them on the web at www. Courts.state.ny.us. However, in Westchester County, the Matrimonial Part Rules, attached as Exhibit B, applies to all Judges in the Matrimonial Part.

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[2] Under the Matrimonial Part Rules, Section E, paragraph 1, unless the attorney believes that an emergency exists, permission to file a motion must be obtained via a "pre-motion conference" with a Court Attorney-Referee. Therefore, prior to the PC, you should notify the court by letter that there is an issue that needs to be addressed at the PC; if not resolved at the PC, you must obtain permission at the PC to bring your motion.

[3] There is a discrepancy between 202.16(k)(3) and DRL §237. Rule 202.16(k)(3) specifies that the moving papers must include an affidavit from **the movant's attorney disclosing attorneys fees that have been paid or promised to the movant's attorney whereas DRL §237 requires BOTH parties to disclose attorneys fees paid or to be paid.**

II. Motions for Temporary Maintenance, Child Support, Exclusive Occupancy.

A. Temporary Maintenance

1. Motions for *pendente lite* maintenance are governed by the Temporary Maintenance Guidelines (DRL §236 Part B(5)). This law applies to all matrimonial actions commenced on or after October 12, 2010. The Temporary Maintenance Guidelines:

- set forth a formula for determining the presumptive amount of temporary maintenance awards based on the "payor's" CSSA income (plus rental income) up to $500,000;
- Enumerates 19 Factors to be considered if income exceeds $500,000;
- Enumerates 17 Factors to be considered if the Court deviates from the presumptive amount of temporary maintenance because it is "unjust or inappropriate."

2. **Calculation of Temporary Maintenance Under DRL § 236 Part B (5-A)**

The calculation of income in accordance with the Child Support Standards Act ("CSSA") is as follows[4]:

Payor's Income minus FICA
(i.e., $____ + $____ = $_____) $_____

Payee's Income minus FICA
(i.e., $____ + $____ = $_____) $_____

Temporary Maintenance is the lower of A or B:

A. 30% of the Payor's CSSA Income (up to $500,000)
- 20% of the Payee's CSSA Income.
= Temporary Maintenance

OR

B. Payor's CSSA Income (up to $500,000)

+ Payee's CSSA Income
= Total Spousal Income

(Total Spousal Income x 40%) – (Payee's CSSA Income) = Temporary Maintenance

[4] Under DRL §236(B)5-A(4)(B), income shall include income from income producing property.

3. Pursuant to DRL §236 Part B(5), in determining the amount and duration of maintenance the court shall consider:

i. the income and property of the respective parties including marital property distributed pursuant to subdivision five of this part;
ii. the duration of the marriage;
iii. the age and health of both parties;
iv. the present and future earning capacity of both parties;
v. the need of one party to incur education or training expenses;
vi. the existence and duration of a pre-marital joint household or a pre-divorce separate household;
vii. acts by one party against another that have inhibited or contribute to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the Social Services Law;
viii. the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor;
ix. reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage;
x. the presence of children of the marriage in the respective homes of the parties;
xi. the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continue to inhibit a party's earning capacity;
xii. the inability of one party to obtain meaningful employment due to age or absence from the workforce;
xiii. the need to pay for exceptional additional expenses for the child/children, including but not limited to, schooling, day care and medical treatment;
xiv. the tax consequences to each party;
xv. the equitable distribution of marital property;
xvi. contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
xvii. the wasteful dissipation of marital property by either spouse;
xviii. the transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;
xix. the loss of health insurance benefits upon dissolution of the marriage, and the availability of medical insurance for the parties; and

xx. any other factor which the court shall expressly find to be just and proper.

4. The following chart compares recent decisions in which court's have applied the temporary maintenance statutory formula and deviated from the presumptive award.

Deviated From Presumptive Award	**Applied the Statutory Formula**
N.F. v. A.E.F., NYLJ 1202587386964, (Westchester Sup. Ct.) (J. Christopher)	G.R.P. v. L.B.P., 36 Misc. 3d 1217(A) (Monroe Sup. Ct. 2012) (J. Dollinger)
The Wife requested that the Husband pay $12,448.16 per month in non-taxable temporary maintenance and $5,208.33 per month in temporary child support. The Husband requested that the court base its award on his **projected 2012 income ($122,353)** instead of the income on his 2011 joint income tax return ($406,894). The court **based its award on the Husband's AGI on his last filed 2011 joint income tax return, in the amount of $406,894**. The court held that the presumptive temporary maintenance award under the guidelines in the amount of **$10,172 per month would be "unjust and inappropriate" and awarded the Wife $4,000/mo. temporary maintenance taxable to the Wife and $3,000/mo. temporary child support**. The court directed that the Husband (who resided in the marital residence with the Wife and two children) pay carrying charges on the marital residence, plus health and auto insurance, totaling approximately $10,000/mo. The court denied Wife's request for Husband to pay children's add-on expenses, including tutoring, extracurricular and summer activities. The Wife requested a *pendente* lite counsel fee	The court awarded temporary maintenance to the wife in the amount of $25,906 per year where the husband had resources available in the amount of $110,000, $75,000 from annual subsidies from his parents and $35,000 as imputed income. The husband does not have the income to support these payments but he does have assets to pay these expenses during the pendency of the divorce. In the absence of a job that will generate enough income, the husband may have to turn to his parents for the resources to pay his obligations where his parents have always provided that financial support to the couple.

award of $30,000, citing the Husband's dilatory conduct and the complexity of the case. The Husband (an attorney) was appearing *pro se*, claiming he could not afford to hire counsel for himself, let alone pay the Wife's counsel fees. The court awarded the Wife $15,000 attorneys fees.	
Salman v. Salman, 53611/2011, 2012 WL 5048190 (Kings Sup. Ct. 2012) (J. Sunshine) Based on the "husband's complete lack of candor with the court and his incredible and inconsistent sworn financial affidavits, tax returns and deposition testimony" the court cannot calculate the presumptively correct sum of temporary maintenance utilizing the temporary maintenance guidelines. Instead, the court deviated from awarding a **presumptively correct sum and awarded an amount based on the needs of the payee and the standard of living of the parties prior to commencement of the divorce action.**	Charasz v. Rozenblum, 95 A.D.3d 1057, 945 N.Y.S.2d 117 (2d Dept. 2012) The lower court properly applied the new statutory formula set forth in DRL § 236 (B) (5-a) to determine an appropriate award of temporary maintenance pursuant to the wife's application for pendente lite relief, which was made in her separate divorce action, commenced after the effective date of the new statutory formula. **Interestingly, the court did not discuss why the statutory formula was properly applied**. Instead, it relied on the well established case law that "inequities in pendent lite awards are best remedied by a speedy trial … ."
Gaetano D. v. Antoinette D., 16888/11, 2012 WL 4748311 (Westchester Sup. Ct. 2012) (J. Connolly) The court based its temporary maintenance award of $2,000 per month on wife's reasonable needs, and not the statutory presumptive obligation of pendente lite maintenance, in light of insufficient evidence to determine husband's gross income; parties' lifestyle and expenses set forth in net worth statements exceeded the	C.H. v. S.H., 34 Misc. 3d 1218(A), 950 N.Y.S.2d 490 (Schenectady Sup. Ct. 2012) (J. Versaci) The guideline amount totaled $0 where the court projected the net annual incomes of the parties to be $54,000 for the Plaintiff and $68,000 for the Defendant.

income stated in their tax returns. The temporary maintenance award was based on the standard of living established during the marriage, age and health of parties, earning capacity of parties, and reasonable expenses to maintain pre-divorce marital residence.	
E.J.L. v. K.L.L., 950 N.Y.S.2d 626 (Monroe Sup. Ct. 2012) (J. Dollinger) The court reduced the presumptive temporary maintenance award of $19,349 to $10,000 per year because the sheer size of the presumptive award would result in a financial resource shift justifying the court's determination that the presumptive calculation would be unjust and inappropriate. Unlike the court in Scott M, the court concluded that an analysis of the 17 factors listed in DRL §236B(5-a)(e)(1) was not required because the "resource shift" was sufficient to conclude that the presumptive award would be unjust and inappropriate.	S.B. v. G.B., 33 Misc. 3d 1212(A), 939 N.Y.S.2d 743 (N.Y. Sup. Ct. 2011) (J. Gesmer) Where the husband's gross income was $862,451, the court applied the formula to $500,000 and concluded that the presumptive award of $12,500 was not unjust or inappropriate.
Liebman v. Liebman, 37 Misc. 3d 1224(A) (Queens Sup. Ct. 2012) (J. Packman Brown) The held that the presumptive award in the sum of $6,337.70 monthly is unjust or inappropriate. Specifically, the Court adjusted the presumptive temporary maintenance award considering factor (q). The statute is silent regarding whether the Court shall order the presumptive maintenance award in proceedings in which the payor spouse has agreed or is directed to maintain the mortgage and/or carrying charges on the marital residence. In	H.K. v. J.K., 32 Misc. 3d 1226(A), 936 N.Y.S.2d 58 (N.Y. Sup. Ct. 2011) (J. Drager) **Where the Husband's income exceeded $1,000,000 and the Wife's income was $0,** the court applied the guideline amount and held that some **additional amount of maintenance was appropriate based on the Husband's income over $500,000 and that the** additional amount was $5,050 each month, necessary for the Wife's rental payment. Accordingly, **the court increased the presumptive temporary maintenance**

the instant proceeding, it is undisputed that Plaintiff has maintained the carrying charges on the marital residence, including the mortgage, maintenance and insurance, in the sum of $1,739.91 monthly. Thus, the Court shall deduct the sum of $1,739.91 from Plaintiff's temporary maintenance obligation in the sum of $6,337.70. Therefore, Plaintiff's temporary maintenance obligation is the sum of $55,173.51 annually, or $4,597.79 monthly, or $2,122.05 bi-weekly, or $1,061.02 weekly.	**award from $150,000 to $210,600 per year.**
Maddiwar v. Maddiwar, 37 Misc. 3d 1224(A) (Queens Sup. Ct. 2012) (J. Packman Brown) Defendant's application seeking **temporary maintenance** is denied where the court finds that the presumptive award in the sum of $3,558.22 monthly is unjust or inappropriate. Specifically, the Court adjusts the presumptive temporary maintenance award considering factor (q). The statute is silent regarding whether the court shall order the presumptive maintenance award in proceedings in which the payor spouse has agreed or is directed to maintain the mortgage and/or carrying charges on the marital residence. In the instant proceeding, Plaintiff has agreed to maintain the carrying charges on the marital residence, including the mortgage, real estate taxes and homeowner's insurance. The carrying charges on the marital residence total approximately $7,466.95 monthly. This amount exceeds the presumptive maintenance award. Moreover, the statute is silent regarding whether the Court shall order the presumptive maintenance award where the Court directs the payor spouse to	S.C. v. J.R.C., Jr., 31 Misc. 3d 1239(A), 930 N.Y.S.2d 177 (Nassau Sup. Ct. 2011) (J. Maron) Husband's gross income totaled $105,397 and Wife's gross income totaled $34,000; the court **imputed additional income of $10,000 to the Wife**. The court's award of temporary maintenance in the sum of $14,529.49 per year, was the presumptive guideline amount. Additionally, husband was required to contribute $300 per month to the carrying charges for the marital residence.

pay temporary child support pursuant to CSSA. In the instant proceeding, this Court directed Plaintiff to pay the sum of $3,516.19 as temporary child support, in addition to the monthly carrying charges on the marital residence, in the sum of $7,466.95.	
Khaira v. Khaira, 938 N.Y.S.2d 513 (1st Dep't 2012) Payor spouse's gross income must include his bonus and could not be based on net income, which was subject to being manipulated through deductions and deferred compensation. The lower court incorrectly applied the presumptive guideline amount and then added the direct mortgage payment on top of that without providing the explanation required for deviating from guideline amount.	A.C. v. D.R., 32 Misc. 3d 293, 927 N.Y.S.2d 496 (Nassau Sup. Ct. 2011) (J. Falanga) In keeping with the mandate of the statute but **limiting its reach to only disposable income, the court deducted the carrying charges of $7,274 per month from defendant's income** to yield the presumptive amount of temporary maintenance in the amount of $10,897 per month.
Osha v. Osha, 101 A.D.3d 481 (1st Dept. 2012) There was no basis for disturbing the lower court's award of temporary maintenance when the lower court correctly applied the formula set forth in Domestic Relations Law § 236(B)(5–a)(c)(1). The court considered numerous statutory factors and found that the statutory presumptive or guideline amount of temporary maintenance of $1,959.86 per month was "unjust or inappropriate". The court set forth the amount of the unadjusted presumptive award, the factors it considered, and the reasons that it deviated from the presumptive award.	Jill G. v. Jeffrey G., 31 Misc. 3d 1209(A), 929 N.Y.S.2d 200 (Nassau Sup. Ct. 2011) (J. Janowitz) The court awarded the presumptive maintenance award based on defendant's $500,000 annual income in the amount of $10,783.33 per month. The court did not find the presumptive amount to be unjust or inappropriate given the expenses set forth in the parties' Net Worth Statements and the settlement funds awarded to the parties' child.

Woodford v. Woodford, 2012 NY Slip Op 07993 (2d Dept. 2012) It is "reasonable and logical" to view the [temporary maintenance] formulas set forth in DRL §236(B)(5-a) "as covering all the spouse's basic living expenses, including housing costs." (quoting Khaira v. Khaira, 93 A.D.3d at 200 (1st Dep't 2012). The court deleted the provision in the Suffolk County's Supreme Court order that directed the husband to pay the wife "both temporary maintenance and 100% of certain carrying charges on the marital residence" and remitted the case to the Supreme Court for a new determination pursuant to DRL §236(B)(5-a) of those branches of the Wife's motion for *pendent lite* relief as to maintenance and payment of the carrying charges on the marital residence.	J.H. v. W.H., 31 Misc. 3d 1203(A), 930 N.Y.S.2d 175 (Kings Sup. Ct. 2011) (J. Thomas) The presumptive amount of temporary maintenance in the amount of $26,708.26 per year would not be unjust or inappropriate after considering the parties' expenses.
Martin v. Buckley, 33 Misc. 3d 1234(A), 946 N.Y.S.2d 67 (Monroe Sup. Ct. 2011) (J. Fisher) The court reduced the presumptive award from $20,156 to $8,000 per year. The deviated from the guideline amount because "the income redistribution contemplated by the presumptive award at these disparate income levels simply strips the wage earning spouse of most of what he earns and simply gives it to the non-wage earning spouse without any reference to established need or merit." Using plaintiff's yearly projected gross income of $77,878 and the wife's **imputed gross income figure of $10,000**, the court awarded maintenance of **$8,000 per year. In reaching this amount, the**	Margaret A. v. Shawn B., 31 Misc. 3d 769, 921 N.Y.S.2d 476 (Westchester Sup. Ct. 2011) (J. Connolly) The court awarded the presumptive temporary maintenance in the amount of $6,217.42 per month where **the court imputed $248,698 income to the husband** and $0 to the wife because the wife was a full-time mother and housewife during a less than four-year marriage and the parties' had three children which included a five-year-old and three-year-old twins.

court considered that "defendant's expenses include $200/month or $2,400/yearly for cigarettes, a habit plaintiff should not be required to support, the additional fact that any final maintenance award is likely to be durational in this 9+ year marriage, and because of the tax burden on plaintiff, and other carrying charges he must meet for the marital residence which he commendably maintains."	
R.L. v. C.L., 33 Misc. 3d 1226(A), 941 N.Y.S.2d 540 (Rensselaer Sup. Ct. 2011) (J. Lynch) The court denied the Husband's request for presumptive temporary maintenance of $58,292 per year and awarded him $26,000 per year. The court imputed $52,000 income to the Husband and further deviated from the presumptive award because the Wife maintained health insurance, paid the carrying charges and cared for the parties' 21-year old daughter who has Aspersers Syndrome.	Fraterrigo v. Fraterrigo, 2011 WL 5325731 (Albany Sup. Ct. 2011) (J. Teresi) * The court awarded the Wife presumptive temporary maintenance in the amount of $156 per week.
Salai v. Salai, 34 Misc. 3d 232, 934 N.Y.S.2d 659 (Monroe Sup. Ct. 2011) (J. Fisher) The court reduced the Wife's presumptive temporary maintenance award of $9,571 to $3,000 per month based on the parties' standard of living.	
J.V. v. G.V., 33 Misc. 3d 1212(A), 939 N.Y.S.2d 740 (Nassau Sup. Ct. 2011) (J. Janowitz) The court reduced the Wife's presumptive temporary maintenance of $10,249 to $5,332 per month.	

S.G. v. P.G., 32 Misc. 3d 1233(A), 936 N.Y.S.2d 61 (Nassau Sup. Ct. 2011) (J. Maron) The court reduced the Wife's presumptive temporary maintenance award of $2,167 to $2,000 per month because the court directed the Husband to also pay the carrying charges.	
Valentin v. Valentin, 32 Misc. 3d 1223(A), 936 N.Y.S.2d 62 (Queens Sup. Ct. 2011) (J. Jackman-Brown) The court reduced the Wife's presumptive temporary maintenance award of $1,806 to $1,083 per month so that the Husband would have sufficient income to maintain his pre-divorce separate household. The court also directed the Husband to pay $1,000 per month toward carrying charges for the marital residence.	
C.K. v. M.K., 31 Misc. 3d 937, 923 N.Y.S.2d 817 (Rockland Sup. Ct. 2011) (J. Weiner) The presumptive amount of temporary maintenance of $0 in favor of wife was unjust and inappropriate under temporary maintenance statute, so as to warrant an upward deviation to an award of $2,000 per month where the wife had been a stay at home mother throughout the marriage, her statement of net worth showed no income, and income "attributed" to wife from husband's business was a bookkeeping	

matter and was not income in the traditional sense.	
Scott M. v. Ilona M., 31 Misc. 3d 353, 915 N.Y.S.2d 834 (Kings Sup. Ct. 2011) (J. Sunshine) The presumptive amount of temporary maintenance was unjust and inappropriate warranting a deviation because under the formula, the shift in resources from the payor spouse to the payee spouse resulted in plaintiff having a substantial reduction in resources and left him unable to maintain his pre-separation household. However, the court concluded that the resource shift was not a basis upon which to deviate from the presumptive award. Instead, the court was required to consider the 17 factors listed in DRL §236B (5-a)(e)(1) to determine if the presumptive award was unjust and inappropriate. After considering these factors, the court reduced the presumptive award of temporary maintenance from $3,097 per month to $2,055 per month.	

B. Temporary Child Support

1. The Child Support Standards Act does not strictly apply to temporary orders of child support as it does in final orders. The structure of temporary child support is entirely within the discretion of the Court. Rizzo v. Rizzo, 163 A. D.2d 15, 558 N.Y. S.2d 12 (1st Dept 1990).

C. Temporary Custody

1. Ex parte orders of temporary custody are rarely granted. Good practice dictates that opposing counsel be given notice, however brief, that you intend to present an Order to Show Cause requesting *ex parte* relief.

2. If the situation is serious and requires intervention before the return date of the Order to Show Cause, consider requesting the ex parte appointment of a law guardian.

3. The general rule is that temporary orders of custody and visitation should not be granted without a hearing. Hizme v. Hizme, 212 A.D.2d 580, 622 N.Y.S.2d 737 (24 Dept. 1995); Alberts v. Alberts, 168 A.D.2d 1004, 565 N.Y.S.2d 945 (4th Dept. 1990).

D. Restraints

1. The purpose of restraining orders on assets in a matrimonial action is to preserve the status quo of marital property pending equitable distribution, with the necessity for such order demonstrated by proof that the spouse to be restrained is attempting or threatening to dispose of marital assets so as to adversely affect the movant's ultimate rights in equitable distribution. Kroteya v. Kroteya, 170 A.D.2d 371, 566 N.Y.S.2d 265 (1st Dept. 1991).

2. Effective as of October 13, 2010, DRL §236 provides that upon service, each spouse is bound to follow the Notice of Automatic Stay. A copy of the Notice of Automatic Stay is attached as Exhibit A. Violation of the Notice of Automatic Stay is subject to contempt of court.

3. DRL Sec. 234 authorizes a Court to issue *pendente lite* injunctive relief in a marital action without requiring the movant to make the requisite showing normally required by CPLR Article 63: irreparable harm and a likelihood of success on the merits However, a

voluntarily established an alternative residence. Annexstein v. Annexstein, 202 A.D2d 1062,609 N.Y.S.2d 132 (4th Dept. 1994).

3. The general rule is that exclusive possession, *pendente lite* should riot be granted without a hearing. Formato v. Formato, 173 A.D.2d 274, 569 N.Y.S.2d 665 (1st Dept. 1991).

F. Procedural Aspects

1. DRL §236 requires that a *pendente lite* order for maintenance and child support be effective as of the date of application therefor.

2. The date of the application is the date of service of the application. Dooley v. Dooley, 128 A. D.2d 669, 513 N.Y. S.2d 167 (2d Dept. 1987).

3. A temporary award is extinguished when the permanent award is made. No order fixing arrears can be made after the permanent award. McLaughlin v. McLaughlin, 143 A.D.2d 941, 533 N.Y.S.2d 581 (2d Dept. 1987).

4. Where the underlying action is dismissed, a hearing has to be held if the financial award is to be continued. Sass v. Sass, 129 A. D.2d 622, 514N.Y.S.2d 257 (2d Dept 1987).

G. Credits and Adjustments

1. A *pendente lite* award is retroactive to the date of application, with the payor being entitled to a credit against the retroactive sums for amounts voluntarily paid by him/her for maintenance and support during that period for which she/he has canceled checks or other similar proof of payment, including payments of real estate taxes on marital residence,

charge accounts and car insurance paid for the payee. Mamet v. Mamet, NYLJ, 11/5/87, p.13, col.2 (Sup.Ct., N.Y.Co.); West v. West, 151 A. D.2d 475, 542 N.Y. S.2d 265 (2d Dept. 1989).

H. Effect of Denial of Relief

1. The fact that temporary maintenance was denied during the pendency of the action does not preclude an award of retroactive maintenance in the final order. DeBergalis v. DeBergalis, 156 A.D.2d 335, 496 N.Y.S.2d 311 (4th Dept. 1989).

I. Discovery

1. DRL § 236(B)(4) provides for compulsory financial disclosure. While most disclosure may be had by the service of a notice, parties are sometimes forced to bring motions requesting a court to intervene in the pretrial process of discovery. Article 31 of the CPLR provides the power to the courts to control disclosure.

2. Noncompliance with DRL §236 is punishable by sanction or any or all of the penalties prescribed in CPLR §3126. A motion may seek any of the following relief under CPLR §3126: (i) an order deeming the issue to which the requested information is relevant resolved in favor of the opposing party; (ii) an order precluding the noncomplying party from supporting or opposing designated claims or defenses, or from introducing evidence relevant thereto; and (iii) an order striking out pleadings, staying further proceedings, dismissing the action, or rendering a default judgment.

J. Bars to Relief

1. Prior Agreement. Effect of an outstanding agreement on awards of temporary maintenance and counsel fees:

2. General Rule. If there is an agreement between spouses, not void on its face, in existence, no maintenance or counsel fees are permitted until the agreement has been set aside. Demis v. Demis, 115 A.D. 2d 790, 548 N.Y.S.2d 67 (3d Dept. 1989).

a. Two Exceptions to the General Rule:

i. Where the agreement does not provide for temporary maintenance but, instead, support does not begin until after the entry of the divorce decree. Tregellas v. Tregellas, 169 A.D.2d 553, 564 N.Y.S.2d 406 (1st Dept. 1991); Pronp v. Ergo, 112 AD.2d 868, 493 N.Y.S.2d 142 (1st Dept. 1985).

ii. Where the party raising the agreement as a bar to a support award is not complying with the financial requirements of the agreement Andreini v. Andreini, 79 AD.2d 928, 434 N.Y.S.2d 407 , (1st Dept 1981); Peerce v. Peerce, 88 A D.2d 832, 451 N.Y.S.2d 139 (1st Dept. 1982); Ravel v. Ravel, 161 A D.2d 547, 556 N.Y. S.2d 51 (1st Dept. 1991).

III. Motions For Accountants', Attorneys', Appraisers' and Other Experts' Fees

A. Experts' Fees

1. DRL 237 provides the statutory authority for the Court to award counsel fees and expenses upon proper application.

2. DRL 237(d) defines "expenses" to include accountant fees, actuarial fees, etc. It also codifies the requirements of Ahern v. Ahern by stating the four factors to be considered by the, Court in determining the propriety of an application for "expenses":

a. The nature of the marital property involved;

b. The difficulties involved, if any, in identifying and evaluating the marital property;

c. The services rendered and an estimate of the time involved; and

d. The applicants financial status.

3. Thus, a proper application for expert fees must include an affidavit of the expert satisfying the four elements of DRL Sec. 237(4 Failure to set forth the required elements will result in the denial of the motion. Coppola v. Coppola, 129 AD.2d 760, 514 N.Y.S.2d 754 (2d Dept).

4. The Matrimonial Rules provide the authority for the Court to appoint an expert to give testimony with respect to equitable distribution or custodial issues. The cost of such expert witness shall be paid by a party or parties as the court shall direct. 22 NYCRR Sec. 202.18.

5. The Court may direct at the preliminary conference that a list of expert witnesses be filed with the Court within thirty days of the conference from which the Court may select a neutral expert to assist the Court. 22 NYCCR Sec. 202.16(f)(3).

6. Upon any application for an award of counsel fees or appraisal/accounting fees made prior to the conclusion of the trial, the Court shall set forth in specific detail, in writing or on the record, the factors it considered and the reasons for its decision. 22 NYCRR Sec. 202.16(k)(7).

B. Attorneys' Fees

1. The requirements and authority for the application for counsel fees in found in DRL Sec. 237(a) and 22 NYCRR Sec. 202.16(k)(3). DRL § 237 creates a rebuttable presumption that counsel fees be awarded to the non-monied spouse. The statute also provides that each party be adequately represented and that, where an award is made, that the award be made timely on a *pendente lite* basis so as to assure that there is adequate representation from the beginning of the case. *See* footnote 3 on page 5.

2. The Appellate Division, Second Department has acknowledged that delaying an award of counsel fees until after trial can compromise the ability of the non-monied spouse to retain quality legal representation to present his or her case, and unanimously held in Prichep v. Prichep, 858 N.Y.S.2d 667, 2008 N.Y. Slip Op. 04335 (2d Dep't 2008):

3. Sec. 202.16(k)(3) provides that

> *No motion for counsel fees shall be heard unless the moving papers also include the affidavit of the movant's attorney stating the moneys, if any, received on account of such attorney's fee from the movant or any other person on behalf of the movant, and the moneys such attorney has been promised by, or the agreement made with, the movant or other persons on behalf of the movant, concerning or in payment of the fee.*

4. As a practical matter to avoid the uncertainty of an onerous counsel fee award if you represent the propertied spouse, consider making a voluntary contribution. Also, if the marital estate has liquid assets, consider making an advance partial distribution to the non-propertied spouse from which s/he can pay counsel fees.

5. Interim fee applications are usually determined on the basis of the papers submitted and without an evidentiary hearing. The Second Department has ruled that an evidentiary hearing is not required prior to an award of interim counsel fees. Isaacs v. Isaacs, 71 A.D.3d, 897 N.Y.S.2d 225 (2d Dept. 2010).

6. When making a fee application, submit an affidavit revealing billing rate, justification for the rate, professional standing and experience in the field. Describe in brief detail the work already done and that which you expect to do. Note if opposing counsel or the other spouse is difficult to deal with (be careful about how this is worded). Argue the rough rule of equality: you should be paid at least as much as the propertied spouse paid his/her counsel.

Remember: Under DRL §237(a) BOTH parties must disclose the attorneys' fees they have paid and/or incurred.

7. In defending a fee application, attack opposing counsel's qualifications or the work done or estimated to be done. Argue that the request only serves to inflame the litigation, for money given is money spent. If the application is made near trial, argue that the fees should not be granted when the moving party may very well receive sufficient assets to pay his/her own fees at the conclusion of the case. Suggest that opposing counsel's fees, if granted, be paid at various points in the case to keep the case moving and assure that the work gets done.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

----------X

,

Plaintiff,

-against-

,

Defendant.

----------X

Index No.

NOTICE OF AUTOMATIC RESTRAINING ORDERS

PLEASE TAKE NOTICE that pursuant to Domestic Relations Law § 236 (B) (2) (b), you are hereby served with the following automatic restraining orders, simultaneous with the service of the summons. These automatic orders are binding upon the plaintiff upon the commencement of the action by the filing of the summons or summons and complaint. They are binding upon the defendant upon service of the Summons. These automatic orders shall remain in full force and effect during the pendency of the action, unless terminated, modified or amended by further order of the court, upon motion of either of the parties, or upon written agreement between the parties duly executed and acknowledged.

The automatic orders are as follows:

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

(2) Neither party shall transfer, encumber, assign, remove, withdraw or in any way dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401K accounts, profit sharing plans, Keough accounts, or any other pension or retirement account, and the parties shall further refrain from applying for or requesting the payment of retirement benefits or annuity payments of any kind, without the consent of the other party in writing, or upon further order of the court.

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

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

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

PLEASE TAKE FURTHER NOTICE THAT A VIOLATION OF ANY OF THESE AUTOMATIC ORDERS MAY BE PUNISHED AS A CONTEMPT OF COURT AND THAT SUCH PUNISHMENT MAY CONSIST OF A FINE OR IMPRISONMENT, OR BOTH, ACCORDING TO LAW.

Dated: December, ____2013
White Plains, New York

McCarthy Fingar LLP

By: _____

Attorneys for Plaintiff
11 Martine Avenue
White Plains, New York 10606
(914) 946-3700

To:

WESTCHESTER SUPREME COURT
MATRIMONIAL PART OPERATIONAL RULES
Effective February 1, 2010 and Revised October 11, 2011

By Order of the Hon. Alan D. Scheinkman, Administrative Judge of the Ninth Judicial District, the operations of the Matrimonial Part of the Supreme Court, Westchester County, are revised as set forth herein, effective February 1, 2010 and revised October 11, 2011:

These operational rules will promote active and effective matrimonial case management consistent with the requirements and guidelines set forth in the Uniform Civil Rules for the Supreme Court. The revisions focus the use of judicial resources by concentrating the use of judges to trials and resolution of substantive motions, while, at the same time, assuring intensive case supervision throughout the civil litigation process. These operational rules also establish procedures for expeditious resolution of pre-trial matrimonial disputes, which will reduce the number of motions and court appearances, conserve judicial resources, and reduce expense, delay, and emotional trauma for the parties and their children. These operational rules have been developed in consultation with the Justices presiding in the Matrimonial Part and after receiving input from the Matrimonial Bar.

A. *Application*

These rules shall apply to all matrimonial actions and proceedings in the Supreme Court, Westchester County, including any applications to enforce or modify matrimonial judgments.

B. *Post-Judgment Part*

The Post-Judgment Part shall hear and determine all post-judgment matters.

1. Motions: The provisions of paragraphs 1, 2, 3, 4, 5, 6, 11, and 12 of Section E, *infra*, governing motions shall not apply to the initiation of a post-judgment application in the Matrimonial Part. The provisions of paragraphs 7, 8, 9, 10, and 13 of Section E, *infra*, shall apply to motions made in post-judgment actions. All motions in post-judgment actions should be brought by order to show cause whenever practicable.

2. Parenting Issues: The Post-Judgment Matrimonial Part Justice may order the parties to conference with the Family Counseling and Case Analyst issues relating to decision-making and/or parenting time with a child. The provisions of paragraph 4 of Section D, *infra*, shall apply to the conduct of any such conference.

3. Alternative Dispute Resolution: The Post-Judgment Matrimonial Part Justice

may order the parties to participate in mediation in accordance with the protocol set forth in the Westchester Supreme Court Matrimonial Mediation Program, or other form of alternative dispute resolution. The post-judgment application may be adjourned for not more than two (2) times, for a total not to exceed sixty (60) days, pending the outcome of the mediation or alternative dispute resolution process. A protocol for mediation is separately established.

C. *Assignment of Court Attorney-Referees in Pre-Judgment Actions*

A court attorney-referee shall be assigned to pre-judgment cases on a random basis and shall be designated at the same time that a Matrimonial Justice is assigned to the case, which is also done on a random basis. Once a court attorney referee is assigned to a case, she or he shall continue with that assignment.

D. *Pre-Note of Issue Court Conferences*

1. The assigned court attorney-referee shall conduct a Preliminary Conference, which shall be scheduled and conducted in accordance with 22 NYCRR §202.16(f). A preliminary conference may be adjourned not more than two (2) times, subject to the approval of the court attorney-referee and in no event may the preliminary conference be adjourned more than thirty (30) days beyond the date originally established.

2. In each case, the attorneys for the parties (including a party not represented by counsel) shall meet in person whenever practicable, or conduct a meaningful phone conference at least two (2) days prior to the Preliminary Conference and review and complete a proposed preliminary conference order and submit same to the Matrimonial Part by e-mail transmitted in WordPerfect or PDF. format to: MatrimonialWestchester@nycourts.gov. or alternatively, if a party does not have access to e-mail, then by facsimile transmitted to: (212) 457-2879. The subject line of the e-mail or fax to the Matrimonial Part shall include the name of the assigned court attorney-referee, the case name, and the index number. The form of preliminary conference order that shall be utilized is annexed hereto.

3. The assigned court attorney-referee shall meet personally with counsel for the parties (including a party not represented by counsel) and with the parties at the Preliminary Conference and at any other conferences held by the assigned court attorney-referee. Unless agreed to by the parties personally in the presence of the assigned court attorney-referee, the parties shall be personally present throughout all conferences.

4. If all issues relating to decision-making and/or parenting time with a child have not been completely resolved by the conclusion of the Preliminary

Conference, the court attorney-referee shall forthwith refer the parties to the Family Counseling and Case Analyst who shall conduct a prompt conference. The Family Counseling and Case Analyst shall confer with the parties for the purposes of developing a parenting plan. In the event that a parenting plan is agreed upon, the Family Counseling and Case Analyst shall forward the plan to the assigned court attorney-referee for inclusion as an order of the Court. In the event that no parenting plan is agreed upon, or only a partial agreement is reached, the Family Counseling and Case Analyst shall so advise the court attorney-referee. The parties may request a conference with the Family Counseling and Case Analyst at any time prior to trial to resolve issues relating to decision-making and/or parenting time with a child. The assigned Matrimonial Part Justice may order the parties to conference with the Family Counseling and Case Analyst issues relating to decision-making and/or parenting time with a child. Such meetings, in the Family Counseling and Case Analyst's discretion, may be together or separate, with or without counsel. The refusal of a party to participate in a conference ordered by the court may be reported to the court, but all statements made by the parties in the context of the meetings shall be deemed to be made solely for the purpose of settlement and shall not be admissible at any hearing or trial in any court or other tribunal. The Family Counseling and Case Analyst shall not be subpoenaed by either party with regard to her opinion or statements made by the parties.

5. Upon consent of the parties, the court attorney-referee may refer the parties to the Westchester Supreme Court Matrimonial Mediation Program or other form of alternative dispute resolution. The order of reference to the Matrimonial Mediation Program may be signed by the court attorney-referee or the assigned Matrimonial Justice. The preliminary conference may be adjourned for not more than two (2) times, for a total not to exceed sixty (60) days, pending the outcome of the mediation or alternative dispute resolution process. After a Preliminary Conference has been held, examinations before trial may be adjourned, upon consent, by the court-attorney referee once for a period not to exceed thirty (30) days. A protocol for mediation is separately established. The assigned Matrimonial Part Justice may order the parties to participate in mediation in accordance with the mediation protocol.

6. During the Preliminary Conference, the court attorney-referee shall ascertain whether the granting of a divorce is contested. In the event the parties agree that the granting of a divorce will not be contested, a stipulation to that effect shall be entered into by not later than thirty (30) days following the conclusion of the Preliminary Conference. In the event that a complaint or answer has not been served, the stipulation shall provide that the parties waive and relinquish any right either may otherwise have to discontinue the action as of right. In the event that a party opposes the granting of a divorce, then the court attorney-referee shall adjourn the Preliminary Conference and:

(1) if a complaint or answer has not yet been served, the court attorney-referee shall provide a schedule for the service of all required pleadings; and (2) provide for the filing of a note of issue limited to the issue of divorce grounds, which filing date shall be no later than twenty (20) days after the service of the answer or, in the event an answer has been served, within twenty (20) days of the Preliminary Conference; and (3) notify the Clerk of the Supervising Judge of the Matrimonial Part of the necessity for a trial on the issue of grounds for divorce so that such trial may be promptly scheduled. In the event that a finding is made upon trial that divorce grounds exist, then the court attorney-referee shall fix a date for the resumption of the Preliminary Conference.

7. During the Preliminary Conference, the court attorney-referee shall determine whether the case is complex, moderately complex or non-complex and fix a schedule for the completion of disclosure accordingly. The schedule shall require that all disclosure be completed and a note of issue filed within four (4) months of the Preliminary Conference in non-complex cases; that all disclosure be completed and a note of issue filed within seven (7) months of the Preliminary Conference in moderately complex cases; and that all disclosure shall be completed and a note of issue filed within eleven (11) months of the Preliminary Conference in complex cases.

(a). For purposes of this provision, a case shall be considered non-complex where the following factors predominate:

- Custody and/or parenting time is not in dispute.
- There are no allegations of domestic violence or egregious conduct.
- The parties are W-2 wage earners and have filed tax returns for the preceding three (3) years.
- Neither party owns any commercial real property or business interest, degree or license that requires valuation.

(b). For purposes of this provision, a case shall be considered moderately complex where the following factors predominate:

- Custody and/or parenting time is in dispute but forensic evaluation is not sought by either party.
- There are allegations of domestic violence or egregious conduct.
- The parties are W-2 wage earners but do not have recently filed tax returns.
- One or both parties is self-employed with less than two (2) employees.
- One or both parties owns commercial real property or a business interest, degree or license that requires valuation.

(c). For purposes of this provision, a case shall be considered complex where the following factors predominate:

- -- Custody and/or parenting time is in dispute and both parties seek forensic involvement.
- -- There are allegations of domestic violence or egregious conduct.
- -- One or both parties hold a license or degree or business that must be valued.
- -- One or both parties are self-employed in a business that has more than two (2) employees.
- -- Both parties seek to conduct non-party depositions.
- -- There are allegations that one or both parties receives substantial cash or unreported income.
- -- There are allegations as to the secreting of assets.
- -- One or both parties claims that substantial property is separate property.
- -- There is a dispute as to the validity and/or interpretation of a prenuptial or other marital agreement.

8. During the Preliminary Conference, the court attorney-referee shall provide appropriate direction to resolve any existing or anticipated disclosure disputes.

9. If a party or their counsel request the appointment of an attorney for the child[ren], or request the appointment of a forensic evaluator for issues relating to a child, the party or parties making such request shall submit to the court attorney-referee, at the time the proposed preliminary conference order is submitted, a statement, no more than four (4) pages in length, setting forth the reasons why the appointment is requested and identifying the particular issues for which the appointee shall provide assistance and, in the case of a forensic evaluator for child issues, identifying the specific matters as to which evaluation is sought. In addition, the requesting party shall include: an estimate of the expense that the appointment will entail through the completion of the case, the amount to be authorized as an initial payment, and the proposed apportionment of responsibility between the parties, including the reasons therefor. The court attorney-referee shall discuss the requests at the Preliminary Conference and shall provide copies of the requests to the Family Counseling and Case Analyst. Such statement shall be served upon all adverse parties at least two (2) days prior to the Preliminary Conference and any party opposing the application, in whole or in part, shall submit a statement, no more than four (4) pages in length, setting forth which part(s) of the application is opposed and the basis for such opposition. The Matrimonial Part Justice shall determine the application within ten (10) days of the Preliminary Conference by written order. In lieu of this

procedure, a party or counsel may move, by order to show cause, for such an appointment, at any time following the Preliminary Conference, provided that a pre-motion conference is held pursuant to the provisions of these Rules. The parties and counsel shall comply with Part E of these rules in connection with all motions. Nothing contained herein shall be deemed to limit or restrict the authority of the Matrimonial Part Justice, in accordance with the law, to make any appointment, it being the purpose of this rule to simplify the process and reduce cost, expense, and burden to the court and to the parties.

10. No attorney shall be appointed for a child nor a child forensic evaluation ordered, except upon order of the assigned Matrimonial Part Justice which shall be made either: (a) upon a motion made by order to show cause pursuant to these Rules; or (b) upon evaluation of the requests made therefor by a party or parties, the parties' net worth statements and most recent tax returns, any recommendation by the assigned court attorney-referee, and any recommendation by the Family Counseling and Case Analyst. Nothing contained herein shall be deemed to limit or restrict the authority of the Matrimonial Part Justice, in accordance with the law, to make any appointment, it being the purpose of this rule to simplify the process and reduce cost, expense, and burden to the court and to the parties.

11. Counsel (including a party not represented by counsel) may stipulate at a Preliminary or other Conference to designate a particular person or firm to conduct a property evaluation and to the allocation of the expense thereof between the parties. In the event that counsel (including any party not represented by counsel) agree upon the evaluation as necessary and as to the allocation of expenses, but cannot agree upon a person or firm to conduct the evaluation, they may submit proposed names to the court attorney-referee who shall forward them to the assigned Matrimonial Part Justice to order the designation. In the event that the parties cannot agree upon the necessity for the evaluation or upon the allocation of responsibility therefor, an application shall be made, on notice to all parties, to the assigned Matrimonial Part Justice who shall determine the application. Such application shall be made, not later than ten (10) days after the Preliminary Conference, by a statement, no more than four (4) pages in length, setting forth the reasons why the appointment is requested and identifying the specific matters as to which evaluation is sought. In addition, the requesting party shall include: an estimate of the expense that the appointment will entail through the completion of the case, the amount to be authorized as an initial payment, and the proposed apportionment of responsibility between the parties, including the reasons therefor. Such statement shall be served upon all adverse parties, and any party opposing the application, in whole or in part, shall submit a statement, no more than four (4) pages in length, setting forth which part(s) of the application is opposed and the basis for such opposition, which statement shall be submitted not later than ten (10) days after service

of the application. In lieu of this procedure, a party or counsel may move, by order to show cause, for such an appointment, at any time following the Preliminary Conference, provided that a pre-motion conference is held pursuant to the provisions of these Rules. The parties and counsel shall comply with Part E of these rules in connection with all motions. Nothing contained herein shall be deemed to limit or restrict the authority of the Matrimonial Part Justice, in accordance with the law, to make any appointment, it being the purpose of this rule to simplify the process and reduce cost, expense, and burden to the court and to the parties.

12. At the conclusion of the Preliminary Conference, the court attorney- referee shall designate a date for a Compliance Conference, which shall be held at least ten (10) days prior to the date by which disclosure is to be completed, for the purpose of confirming that all disclosure is complete or will be completed timely. The date for the Compliance Conference shall be set in the Preliminary Conference Order and, if the date is thereafter adjourned, the adjourned date shall be set forth in an Order. The Compliance Conference may be adjourned, with the approval of the assigned court attorney-referee, no more than two (2) times and for no more than a total of thirty (30) days. Any disclosure which was not completed in conformity with the Preliminary Conference Order, such discovery may be deemed waived or appropriate sanctions imposed against a party who failed to timely provide discovery.

13. The court attorney-referee shall conduct a Certification Conference within five (5) business days of the date set for completion of discovery. In lieu of a physical appearance, counsel (including a party not represented by counsel) may transmit by e-mail (in WordPerfect or PDF. format) to: MatrimonialWestchester@nycourts.gov, or alternatively, if a party does not have access to e-mail, then by facsimile transmitted to: (212) 457-2879, a stipulation certifying that all disclosure has been completed and that the action is ready for trial. The subject line of the e-mail or fax to the Matrimonial Part shall include the name of the assigned court attorney-referee, the case name, and the index number. At the Certification Conference, the court attorney-referee shall confirm that all disclosure has been completed or, if not, that such disclosure has been waived and shall recommend to the assigned Matrimonial Part Justice that the action is ready for trial. No further disclosure may be ordered, except upon order of the assigned Matrimonial Part Justice, which order shall only be obtained by motion made pursuant to order to show cause, in accordance with provisions of Part E below. The date for the Certification Conference shall be set in the Preliminary Conference Order and any adjournment shall be to a date set in the order adjourning the Compliance Conference.

14. Following the Certification Conference, if the court attorney-referee determines that the case is ready for trial, a proposed Trial Ready Order shall

be presented to the assigned Matrimonial Part Justice. Upon consideration of the recommendation made by the court attorney-referee, if the assigned Matrimonial Part Justice determines that the case is ready for trial, a Trial Ready Order shall be entered, setting forth dates for the Pre-Trial Conference and Trial to be held before the assigned Matrimonial Part Justice, and required pre-trial submissions, as set forth in Part F below.

15. Either party or any attorney for the child[ren] may, before the date set for the Compliance Conference, request a conference with the assigned court attorney referee, including a conference for the purpose of addressing any issues relating to disclosure. In the event that disclosure cannot be completed within the time allowed by the Preliminary Conference Order in a non-complex or moderately complex case due to unanticipated complexity, the court attorney-referee may, for good cause shown, change the track to which the case is assigned and reschedule the date for completion of disclosure, which date shall not be later than eleven (11) months from the date of the Preliminary Conference. In a complex case, if disclosure cannot be completed despite due diligence within the time allowed by the Preliminary Conference Order, the court attorney referee may, extend the date for completion of disclosure, provided that the date for completion of disclosure shall not be extended beyond fourteen (14) months from the date of the Preliminary Conference.

16. At the conclusion of every conference, including a Preliminary Conference, the court attorney-referee shall have counsel for the parties (including any party not represented by counsel) and the attorney for the child[ren], if any, execute a stipulation as to any issues resolved at the conference, which may be referred to the assigned Matrimonial Part Justice to be signed and entered as an order of the court. The court attorney-referee may issue a report to the assigned Matrimonial Part Justice as to each unresolved issue, summarizing the positions and arguments advanced by the parties and counsel, and may also submit a recommended order as to each unresolved issue. The court attorney-referee may make recommendations to the assigned Matrimonial Part Justice as to any matters, procedural or substantive, relating to the case. Copies of the report shall be provided to counsel for the parties (including any party not represented by counsel), and the attorney for the child[ren], if any. The assigned Matrimonial Part Justice may consider the report(s) and recommendation(s) of the court attorney-referee in making any determinations in the case, including any determination as to the awarding of counsel fees or the allocation of responsibility for any expenses, including the expenses of an attorney for the child[ren] and forensic evaluation.

17. Conferences with the court attorney-referee may be requested by written request, not to exceed two (2) pages in length, outlining the issues to be considered and the amount of time needed for the conference and setting

forth the availability of counsel and the parties. Counsel for the parties (including any party not represented by counsel) and the attorney for the child[ren], if any, shall consult with each other in person whenever practicable, or conduct a meaningful phone conference prior to requesting any conference and make a good faith effort to resolve the outstanding issues on their own without court intervention. A request for a conference shall include a certification pursuant to 22 NYCRR §130-1.1a by the person requesting a conference that he or she personally had a conference with opposing counsel (or party where appropriate) and the attorney for the child[ren], if any, and made a good faith effort to resolve the issues, which certification shall include the type of conference (in person or phone), the date of such conference, the time the conference began and ended, and the specific issues discussed. The written request shall be transmitted to the Matrimonial Part by e-mail (with the request contained in a letter appended in WordPerfect or PDF. format) to: MatrimonialWestchester@nycourts.gov or alternatively, if a party does not have access to e-mail, then by facsimile transmitted to: (212) 457-2879. The subject line of the e-mail or fax to the Matrimonial Part shall include the name of the assigned court attorney-referee, the case name, and the index number. Copies shall be served upon all adverse parties and the attorney for the child[ren], if any, contemporaneously by e-mail and either (1) facsimile or (2) hand delivery. Any response to a conference request shall likewise not exceed two (2) pages in length and shall be transmitted to the Matrimonial Part by e-mail, or alternatively, if a party does not have access to e-mail, then by facsimile (with the response contained in a letter appended in Wordperfect or PDF. format) by 5:00 p.m. of the next business day following the transmission of the request, with copies sent contemporaneously to all adverse parties by e-mail and either (1) facsimile or (2) hand delivery. There shall be no reply by counsel to any such response nor any sur-reply to any unauthorized reply. All unauthorized submissions shall be rejected, not considered, and shall not be included in the court files. The court attorney-referee shall notify counsel of the action taken in response to the conference request within two (2) business days following the transmission of the request.

18. In the event that any party or the attorney for the child[ren], if any, objects to or disagrees with the recommended order of the court attorney-referee, such party or the attorney for the child[ren], if any, must indicate the basis for the objection or disagreement at the Preliminary Conference or other conference. In the event there are issues that cannot be resolved, any party or the attorney for the child[ren], if any, may request that the court attorney-referee issue a briefing schedule for any motions that any party may wish to bring with respect to any unresolved issue, pursuant to the provisions of paragraph E below.

19. The Court may impose sanctions on a party who fails to appear for a court conference, which may include dismissal of the action or entry of a default

judgment.

20. Nothing contained herein shall preclude the assigned Matrimonial Part Justice from conducting conferences in any case pre-note of issue.

E. Motions

1. For pre-note of issue cases, except in the event of an emergency that requires immediate relief from a Matrimonial Part Justice, no motions are to be made without the movant first requesting a pre-motion conference and without the holding of a pre-motion conference, unless the motion seeks to vacate or modify a recommended order.

2. For pre-note of issue cases, a pre-motion conference is to be requested by letter application to the assigned court attorney-referee. The request shall not exceed two (2) pages in length and shall briefly enumerate the subjects to be discussed at the pre-motion conference. The request shall also contain a signed certification pursuant to 22 NYCRR §130-1.1a by the person requesting a conference that he or she personally had a conference with opposing counsel (or party, where appropriate) and the attorney for the child[ren], if any, and made a good faith effort to resolve the issues, which certification shall include the date of such conference, the time the conference began and ended, and the specific issues discussed. A person receiving a request for a pre-motion conference may respond by submitting a written request that additional subjects be discussed, provided that such request also contain a certification pursuant to 22 NYCRR §130-1.1a by the requesting person that he or she personally had a conference with opposing counsel (or party, where appropriate) and the attorney for the child[ren], if any, and made a good faith effort to resolve the issues, which certification shall include the date of such conference, the time the conference began and ended, and the specific issues discussed. Failure by counsel (or party, where appropriate) to make himself or herself available for a direct conversation with the person seeking a conference, or failure to make a good faith effort to resolve the issues before, during or after the pre-motion conference may be considered in connection with any application for counsel fees and expenses related to the conference.

3. For pre-note of issue cases, a request for a pre-motion conference shall be transmitted to the Matrimonial Part by e-mail (with the request contained in a letter appended in WordPerfect or PDF. format) to: MatrimonialWestchester@nycourts.gov or alternatively, if a party does not have access to e-mail, then by facsimile transmitted to: (212) 457-2879, with copy sent contemporaneously to all adverse parties by e-mail and

either (1) facsimile or (2) hand delivery to all counsel. The subject line of the e-mail or fax to the Matrimonial Part shall include the name of the assigned court attorney-referee, the case name, and the index number. Any response to a conference request shall likewise not exceed two (2) pages in length and shall be transmitted, by e-mail (with the response contained in a letter appended in WordPerfect or PDF. format) or alternatively, if a party does not have e-mail, then by facsimile, by 5:00 p.m. of the next business day following the transmission of the request, with copies sent contemporaneously to all adverse parties by e-mail and either (1) facsimile or (2) hand delivery. There shall be no reply by counsel to any such response nor any sur-reply to any unauthorized reply. All unauthorized submissions shall be rejected, not considered, and shall not be included in the court files. The court attorney-referee shall notify counsel of the action taken in response to the conference request within two (2) business days following the transmission of the request.

4. For pre-note of issue cases, the assigned court attorney-referee shall conduct the pre-motion conference, either in person, in the courthouse or by telephone conference. The procedures set forth in Section D, Paragraphs 15 and 16, shall apply to the completion of pre-motion conferences.

5. In the event that a party or the attorney for the child[ren], if any, perceives that an emergency exists that requires immediate judicial intervention, such person may submit an order to show cause directly to the assigned Matrimonial Part Justice. Except with respect to applications for orders of protection, in the event that a temporary restraining order or similar relief is requested, unless the person making the motion sets forth in an affidavit that significant prejudice would be suffered by him or her by giving notice to the other parties, notice shall be given to all adverse parties and the attorney for the child[ren], if any, of the time and place when the application will be submitted. Notice shall be given sufficiently in advance to permit the adverse parties and the attorney for the child[ren], if any, an opportunity to appear and respond to the application. A full copy of the application shall be provided to all adverse parties and the attorney for the child[ren], if any, contemporaneously with its presentation to the assigned Justice. In the event that the assigned Justice determines that the matter is not emergent, the Justice may decline to sign the order to show cause and refer the parties for a pre-motion conference. In the event that the assigned Justice issues the order to show cause (either with or without any interim relief), a conference shall be held by the assigned court attorney referee at least two (2) business days prior to the return date of the Order to Show Cause.

6. For pre-note of issue cases, except in the event of an emergency that

requires immediate relief from a Matrimonial Part Justice, motions may only be made in pre-judgment of divorce matters following a pre-motion conference with a court attorney-referee where the issues could not be resolved and a motion briefing schedule has been established. All motions shall be made by order to show cause and shall include a Rule E Motion Compliance Sheet that sets forth the basis for which the motion is authorized under these rules. In the event of an emergency, the Rule E Motion Compliance Sheet shall be signed by counsel for the movant, or the party if not represented by counsel, pursuant to 22 NYCRR §130-1.1a, and shall include a statement as to the nature of the emergency requiring immediate relief. If the motion is made following a pre-motion conference, the Rule E Motion Compliance Sheet shall be signed by the court attorney-referee and shall set forth the relief that may be requested in the motion(s) and the motion briefing schedule. The movant may not seek any other relief other than that authorized by the court attorney-referee at the pre-motion conference and specified in the Rule E Motion Compliance Sheet. In the event the parties fail to follow the briefing schedule, the assigned Matrimonial Part Justice may deem the issues raised at the pre-motion conference to be waived or may decline to consider untimely papers.

7. No motion in any matrimonial action, whether pre-judgment or post-judgment, may be adjourned more than two (2) times, but in no event may the motion be adjourned more than thirty (30) days beyond the original return date established, without approval from the assigned Matrimonial Part Justice.

8. For motions in all matrimonial actions, unless expressly authorized by the assigned Matrimonial Part Justice: (a) no affidavit or affirmation shall exceed 15 pages in length; (b) affirmations or affidavits of counsel shall address only those facts which are within their personal knowledge and shall not contain any citations to statutes or legal authorities; (c) any matters of law shall be addressed only in a separate memorandum of law, which may not exceed 15 pages in length; (d) the only exhibits that shall be attached to motion papers shall be those which are specifically referred to in an accompanying affidavit or affirmation and only that portion of the document which is specifically referenced shall be attached as an exhibit; and (e) there shall be no oral argument on motions unless expressly authorized by the assigned Matrimonial Part Justice. Any unauthorized papers or submissions shall not be considered and other appropriate sanctions may be granted, including but not limited to an award of counsel fees and expenses to the party required to respond to papers submitted in violation of this provision.

9. All orders to show cause are to be presented to the assigned Matrimonial

Part Justice within one hour of their presentation in the Calendar Office. In the event that the assigned justice is unavailable, then the order to show cause is to be reviewed by the assigned justice's staff and, following such review, presented to the Duty Judge. If the assigned justice's staff is not available to review the order to show cause, the Supervising Judge of the Matrimonial Part is to be notified and will arrange to have the order to show cause reviewed by the assigned court attorney-referee or, if the assigned court attorney- referee is unavailable by another court attorney-referee in the Matrimonial Part.

10. In the event that the assigned Matrimonial Justice is not available to review an order to show cause containing a request for interim relief within two (2) hours of its presentation, the order to show cause is to be brought to the Duty Judge. In the event that the Duty Judge is not available, the District Administrative Judge is to be notified forthwith by the Clerk of the Supervising Judge of the Matrimonial Part.

11. Where an action or proceeding is pending in the Matrimonial Part, all applications for relief shall be brought there in accordance with the procedures set forth above. In the event that an application for relief is brought in the Family Court, in a circumstance in which a prior action has been pending (and process served) in the Matrimonial Part, the parties shall promptly notify the assigned court attorney-referee, who shall hold a conference within two (2) business days of notification to review whether the Family Court proceeding should be removed to the Matrimonial Part. Nothing contained herein shall be construed as limiting or restricting the right of any party to seek relief in Family Court. The purpose of this provision is to coordinate whether, if a proceeding is brought in Family Court, the proceeding should continue there or be removed to Supreme Court, in the interests of judicial economy and in the interests of the parties and any children of the parties.

12. All motions will be decided by the assigned Matrimonial Part Justice, who may consider any reports and recommendations of the court attorney-referee in deciding the motions. For any motion made following a pre-motion conference with a court attorney-referee in a pre-note of issue case where a briefing schedule has been set forth in the Rule E Motion Compliance Sheet, the assigned Matrimonial Part Justice may refer the motion to the court attorney-referee to hear and report or may obtain the assistance of the court attorney-referee in preparing a motion decision and order to be entered by the assigned Matrimonial Part Justice.

13. All motions shall be decided within sixty (60) days of the submission of the papers in opposition or reply, whichever is later, or, if no such papers are submitted, within sixty (60) days of the return date, except if the motion is

for *pendente lite* relief, the motion shall be decided within thirty (30) days of the submission of the papers in opposition or reply, whichever is later, or, if no such papers are submitted, within thirty (30) days of the return date.

F. *Pre-Trial Conference and Submissions*

1. Plaintiff shall serve and file a Note of issue and Certificate of Readiness within twenty (20) days of the date of entry of the Trial Ready Order. A file-stamped copy shall be submitted to the Part Clerk for the assigned Matrimonial Part Justice within two (2) business days of filing. Sanctions, including the striking of pleadings or dismissal of the action, may be imposed for failure to timely serve and file the Note of Issue and Certificate of Readiness and/or failure to timely submit a file-stamped copy to the Part Clerk. Once the note of issue is filed, the assigned Matrimonial Part Justice shall preside over all matters involving the case.

2. Expert reports must be furnished in accordance with 22 NYCRR §202.16(g). Failure to exchange and file the reports not later than sixty (60) days prior to the trial date (and replies not later than thirty (30) days before the trial date) may, in the Court's discretion, preclude the use of the expert.

3. Counsel must meet in person at least two (2) business days prior to the scheduled Pre-Trial Conference, whenever practicable, or conduct a meaningful phone conference. Pre-Trial conferences shall be held before the assigned Matrimonial Part Justice or, if so designated by the assigned Justice, before his or her Principal Law Secretary. Counsel must be fully prepared to discuss settlement and any anticipated procedural and substantive issues at the conference. Sanctions may be imposed upon counsel who are not prepared for the conference, such as the preclusion of witnesses or exhibits, and/or the making of an award of counsel fees and expenses or the denial of an award of counsel fees and expenses. In the event counsel believes that there are no prospects to settle the case, they should be prepared to explain their reasoning.

4. Unless the parties obtain an extension of time from the assigned Matrimonial Part Justice, at the Pre-Trial Conference, counsel must submit to the Court the following documents:

   (a). marked pleadings;

   (b). a fully executed stipulation of relevant facts that are not in dispute. The Court expects that no matter how contentious the case, there will be at least some facts that are not in dispute (*e.g.*, the date of

marriage, the names and birth dates of children, the location of any residential real estate and the approximate date of acquisition, approximate cost, and the approximate balance on any mortgage);

(c). an exhibit list and pre-marked exhibits. Only those items that are received in evidence will be marked by the reporter. Copies of all exhibits intended to be offered must be presented to the Court in a ringed notebook with a table of contents, with the plaintiff's exhibits numbered and the defendant's exhibits lettered in the order in which they are generally intended to be used. Counsel are to exchange their proposed exhibits at least seven (7) business days prior to the Pre-Trial Conference. Failure to timely submit an exhibit list and proposed exhibits may result in preclusion. Counsel must either stipulate to the admission of the exhibits to be offered by the adverse parties or state the ground of any objection to admission of any such exhibit. Counsel must be prepared to argue to the Court at the time of the Pre-Trial Conference the admissibility of any exhibits to which objection is taken. Counsel are advised that the failure to include an exhibit in the exhibit list and exhibit exchange provided for herein may result in preclusion of that exhibit;

(d). a list of witnesses, including the address of each witness, the time anticipated for the witness' direct examination, and the general subject matter of his or her testimony. The failure to identify a witness may result in the preclusion of the witness' testimony.

(e). a joint statement of proposed disposition. To the extent that the parties disagree on any item, the plaintiff's position should be set out first, followed by the defendant's position. The Court will NOT accept separate statements of proposed disposition without prior written approval from the assigned Matrimonial Part Justice;

(f). a child support worksheet if applicable; and

(g). updated statements of net worth.

G. *Trials*

1. The Trial Ready Order shall set forth the date for trial, which shall be at least 60 days from the date of the order. The provisions of 22 NYCRR §125.1(g) shall apply with respect to the scheduling and priority of trials. No trial may proceed unless a Note of Issue has been filed with the Westchester County Clerk. A copy of the Note of Issue shall be provided to the Part Clerk for the assigned Matrimonial Part Justice.

2. All matrimonial trials and hearings shall proceed day-to-day until conclusion.

3. The assigned Matrimonial Part Justice may, in her or his discretion, determine that issues relating to child decision-making and/or parenting time are to be bifurcated from the economic issues, with the issues relating to child decision-making and/or parenting time tried first.

4. All trials and hearings shall be conducted by the assigned Matrimonial Part Justice, except that the District Administrative Judge may, in the interests of the administration of justice, transfer or re-assign any action or proceeding scheduled for trial to another Justice for purposes of trial or hearing.

H. Rules of Conduct

1. All attorneys and parties must be present at the time scheduled for a conference or trial. In the event that an attorney or party fails to timely appear, such lateness or failure to appear may be considered in the award of counsel fees and expenses.

2. Unless expressly authorized by the court attorney-referee or Matrimonial Part Justice to whom it is directed, or unless specifically authorized by these rules, no letter or other written communication is to be transmitted to the Matrimonial Part by any means of transmission. Attorneys shall not copy the Part on any correspondence between them. There shall be no replies to any unauthorized submissions and all unauthorized papers shall not be considered, shall be rejected, and shall not be filed in the court records.

3. Failure by counsel (or party, where appropriate) to make himself or herself available for a direct conversation with counsel (including a party not represented by counsel) or failure to make a good faith effort to resolve the issues before, during or after any conference may be considered in connection with any application for counsel fees and expenses.

4. Violations of the provisions of these Rules may result in the imposition of appropriate sanctions, including the award of counsel fees and expenses to the non-violating parties or by the denial of counsel fees and expenses to the violating party.

5. In any order appointing any expert, the assigned Matrimonial Part Justice shall designate the name of the expert and identify the subjects to be addressed in the report and/or evaluation to be rendered by the expert.

The Matrimonial Part Justice shall also set a date for the completion of the report. In the event that the expert does not complete the assignment within the time set by the assigned Matrimonial Part Justice, the assigned Matrimonial Part Justice may disqualify the expert, may order a refund or return of any monies paid to the expert, may take the expert's failure to complete the assignment timely in deciding whether to appoint such expert to another matter. In no event may an expert who has not completed his or her assignment within the time set by the assigned Matrimonial Justice be granted another assignment until the expert has completed all past-due assignments. The Clerk of the Supervising Judge of the Matrimonial Part shall be provided with copies of all assignment orders and shall apprise the Matrimonial Part Justices of the names of experts who have not timely completed their assignments.

I. Compensation for Attorneys for the Child[ren] and Court-Appointed Experts

1. In the order appointing an attorney for the child[ren] or appointing an expert, the Matrimonial Part Justice shall designate the name of the person or firm appointed, shall provide for an initial payment to the appointee, and shall provide for the allocation of financial responsibility as between the parties.

2. Attorneys for the child[ren] and all court-appointed experts shall submit itemized statements of their services to each parent or party and their counsel at least every sixty (60) days. However, no demand shall be made upon any parent or party for any payment not authorized in an order of the assigned Matrimonial Part Justice. In the event that an attorney for a child or a court-appointed expert seeks additional interim payment(s) above the amount of the initial payment, such attorney or expert shall make application to the assigned Matrimonial Part Justice, on notice to each parent and all parties. Such application shall include an affirmation or affidavit of services, identifying what additional services are required and anticipated difficulties, if any, in providing them, and provide an estimate of the amount of time and funds necessary to complete the appointment through the date of completion of disclosure or the conclusion of trial. The assigned Matrimonial Part Justice shall make a determination as to the amount of any further payments and shall allocate responsibility therefore between the parents or parties. The failure to comply with this provision may result in the denial of fees and/or an order directing disgorgement of fees and such other sanction as may be appropriate. The foregoing provisions relating to billing and payment shall not apply where the attorney for the child[ren] or experts are compensated by public funds.