Family Law 101

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Foreword

The attorney practicing family law faces a barrage of challenges. This program and course manual focus on the fundamental issues necessary to practice in this unique field.

We are especially grateful to our Course Planner(s), **Catherine A. Boyle, Esq. of Saltzgiver & Boyle, Harrisburg, Gail C. Calderwood, Esq. of Raphael Ramsden & Behers PC, Pittsburgh and Gerald L. Shoemaker, Jr., Esq. of Hangley Aronchick Segal Pudlin & Schiller, Norristown,** for recruiting an outstanding faculty for the program. Each faculty member has devoted significant time and effort developing the course and preparing written materials. All of them are described in the biographical section that follows.

On behalf of all who will benefit from this program we express our sincere gratitude to all of our volunteers.

Pennsylvania Bar Institute
Megan Barrick, Program Manager

November 2023

Biographies

PLANNING TEAM

Catherine A. Boyle, Esq.

As a family law attorney for over 28 years, Cathy has devoted her legal career to the practice of family law, including divorce, child custody, child support, spousal support, property division, prenuptial agreements and many other family law related issues. She is also a certified divorce mediator.A graduate of Pennsylvania State University and Widener School of Law, Cathy started as an associate at Meyers & Desfor in 1996. In 1999, she became a partner in what is now Saltzgiver & Boyle.Cathy is a frequent course planner and lecturer for the Pennsylvania Bar Institute (PBI) and the National Business Institute (NBI), having taught numerous family law seminars to fellow attorneys. She has authored and published extensive instructional materials for both PBI and NBI. Cathy also taught Family Law at Widener University of Law, as an adjunct professor.Cathy is active in her local legal community. In 2011, Cathy was invited by the Dauphin County judges and her peers to join the Honorable William W. Lipsitt Inns of Court as a founding member, where she now serves as an officer. She is also a member of the Family Law Sections of the Pennsylvania Bar Association and Dauphin County Bar Association, where she previously served as an officer.In 2012, Cathy was recognized by the YWCA of Greater Harrisburg as a Woman of Excellence in the Capital Region. She served on the YWCA Board of Directors for eight years in many different capacities, including Vice President. She also chaired the YWCA Legal Center Advisory Committee, and raised much needed funds for the Center.In 2022 and 2020, Harrisburg Magazine recognized Cathy as "Simply The Best" Divorce Attorney in their annual readers' poll.

Gail C. Calderwood, Esq.

Ms. Calderwood is a partner in the Pittsburgh law firm of Raphael, Ramsden & Behers, P.C., where her practice is concentrated in family law, including a collaborative approach to resolution of family law issues. She is currently the chair of the Family Law Section of the Pennsylvania Bar Association, is a former member of council, and former chair of the Domestic Rules Committee. Ms. Calderwood is also a member of the Allegheny County Bar Association Family Law Section and has served on its council. She is the past co-chair for the Program Committees of the Allegheny County Bar Association and the past Chair of the Pennsylvania Bar Association Family Law Sections. Since 2012, Ms. Calderwood has been named by Philadelphia Magazine in all editions as a “Super Lawyer,” and in 2005 to 2008 and 2010 and 2011, she was named as a “Rising Star” by the Pennsylvania Super Lawyers.

She is a fellow of the Allegheny County Bar Foundation, has participated in various pro bono and community service efforts, and was awarded the 2007 Outstanding Young Lawyer Award from the Young Lawyers Division of the Allegheny County Bar Association. Additionally, she was the president of the Pittsburgh Matrimonial Inn of Court for the 2007–2009 term.She has joined her legal partner, Carol A. Behers, Esquire, as a co-author of the PBI publication Premarital Agreements in Pennsylvania. She has served as a speaker for continuing legal education presentations on behalf of the Pennsylvania Bar Association, Pennsylvania Bar Institute, and Allegheny County Bar Association. Ms. Calderwood was admitted to practice in 1998. She is a 1993 magna cum laude graduate of the University of Pittsburgh and attended the Dickinson School of Law of the Pennsylvania State University.

Gerald L. Shoemaker, Jr., Esq.

Mr. Shoemaker is a shareholder at Hangley Aronchick Segal Pudlin & Schiller in Plymouth Meeting. He concentrates his practice in domestic relations issues, including equitable distribution, alimony, custody and support matters. Mr. Shoemaker has also handled a variety of issues arising out of same-sex relationships. Sensitive to his clients' needs, he is settlement-oriented but ready to litigate when necessary. Mr. Shoemaker has been repeatedly recognized as a leader in family law and was named one of the Greater Philadelphia Region's Ten Leaders in Divorce Law, 45 & Under, by the Ten Leaders Cooperative. He has earned multiple recognitions by Pennsylvania Super Lawyers Magazine as a Rising Star in Family Law and, subsequently, as a Super Lawyer. Mr. Shoemaker is committed to the practice of family law, evidenced by his active participation in the Pennsylvania Bar Association (PBA), which selected him as one of 10 members to participate in its prestigious leadership program. He is a frequent lecturer on family law topics for both the PBA and the Pennsylvania Bar Institute. Mr. Shoemaker is a member of the PBA Family Law Section (FLS) and he serves as the second vice chair. He is a Fellow of the American Academy of Matrimonial Lawyers. He also serves as an editor for the American Bar Association's quarterly publication, Family Advocate. He offers free legal clinics at the Women's Center of Montgomery County, an organization that focuses on freedom from domestic violence and other forms of abuse. He is a member of the Doris Jonas Freed Inns of Court. Mr. Shoemaker is a board member of the Regional Center for Women in the Arts, whose mission is to advance women in all aspects of art. A graduate of University of Pittsburgh School of Law, he received his B.A. from Duquesne University.

FACULTY

Stephanie T. Anderson, Esq.

Ms. Anderson is a partner at the firm of Vollen Anderson Long, LLC. She practices all areas of matrimonial law, including divorce, child custody, equitable distribution and child support at both the trial court and appellate level. While Ms. Anderson is experienced in all matrimonial practice areas, her practice has primarily concentrated on high conflict complex custody litigation. Along with her practice in Allegheny County, she practices regularly in Washington, Butler, Lawrence and Westmoreland counties. Ms. Anderson obtained her J.D. from the University of Missouri at Kansas City. She is admitted to practice before the Supreme Court of Pennsylvania and the U.S. District Court for the Western District of Pennsylvania. Ms. Anderson is an active member of the Pennsylvania Bar Association and Allegheny County Bar Association, where she previously served as an appointed member of the council for the Family Law Section. She is a Fellow of the Allegheny County Bar Foundation, which recognizes and honors attorneys who have shown a commitment to

excellence in charitable, community, professional and/or public service areas. Ms. Anderson previously has been a member of the Matrimonial Inns of Court, an organization designed to promote professionalism, ethics, camaraderie and education among the bench and bar. She is a trained mediator and parent coordinator, and trained in Collaborative Law. Ms. Anderson is a regular volunteer for Neighborhood Legal Services in the PFA program and devotes time to a variety of charitable endeavors.

Sandra E. Gray, Esq.

Ms. Gray is a Texan and a graduate of Houston Christian University. After graduating from college, she was a secondary Mathematics teacher. While teaching, Ms. Gray earned a Master's Degree in Education from Temple University, where she graduated with honors. She later attended Villanova Law School, where she won the Annual Client Counseling Competition and represented Villanova at the Regional Competition. After graduating from law school, Ms. Gray served as a Law Clerk for The Honorable Wayne G. Hummer, Jr., and then joined the law firm of Pyfer Reese. She is now a Shareholder and Secretary of the Firm. Ms. Gray was selected by the Judges of the Lancaster County Court of Common Pleas to serve as a Custody Conference Officer, a position she served, on a part-time basis, for 10 years. She has served as a lecturer for the Pennsylvania Bar Institute and has spoken to local groups in the areas of Estate Planning, LGBTQ issues, and Matrimonial Law. Among others, Ms. Gray's achievements include, being listed in Outstanding Young Women of America and being voted one of the top attorneys in Lancaster County by Lancaster County Magazine. She is active in community affairs and is currently a member of The Board Of Trustees for The Janus School. Ms. Gray is also an active member of the American Academy Of Matrimonial Attorneys. In the past, she has served as chairman of the Lancaster Symphony Orchestra Board, treasurer of Dollars for Scholars of Lancaster County, and a board member of the Board of Directors of the YWCA, League of Women Voters, Project Runaway, and the Lancaster Guidance Center. Finally, Ms. Gray is a member of St. Leo's Catholic Church in Lancaster.

Christina M. DeMatteo, Esq.

Ms. DeMatteo is an attorney at the Law Office of Christina M. DeMatteo, LLC, in Blue Bell, PA. Her practice focuses on family law, including custody, support, equitable distribution and protection from abuse. Ms. DeMatteo is currently treasurer of the Pennsylvania Bar Association Family Law Section and is a former Chair of the Montgomery Bar Association Family Law Section and a former president of the Doris Jonas Freed Inn of Court. She has been named as a Pennsylvania Super Lawyer by Philadelphia Magazine and has been selected by her peers for inclusion in the Best Lawyers in America. Ms. DeMatteo is an active member of the family law sections of the Pennsylvania Bar Association and the Montgomery Bar Association, and a course planner for PBI's Family Law Institute. She has served on the Board of Directors of the Wissahickon Educational Opportunities Foundation (WEOF) and Family Services of Montgomery County. Ms. DeMatteo is a frequent speaker for the Montgomery Bar Association and the Pennsylvania Bar Association. She also has donated her time to teach family law topics through the North Penn Community Education Program and the Second Saturday Program. Ms. DeMatteo received her J.D. from Villanova University School of Law and her undergraduate degree from the College of William and Mary, and is admitted to practice in Pennsylvania and New Jersey.

Andrew D. Taylor, Esq.

Mr. Taylor is a partner at Shemtob Draganosky Taylor in Blue Bell, Pennsylvania. Mr. Taylor has practiced family law exclusively for 15 years. He is experienced in all aspects of family law, including equitable distribution, alimony, child support, child custody and abuse matters. He regularly argues appeals before the Pennsylvania Superior Court involving complex family law issues. Mr. Taylor has also argued before the Pennsylvania Supreme Court. Mr. Taylor was selected by his peers for inclusion in The Best Lawyers in America® (2015–2019 Editions) in the field of family law, one of the legal profession's oldest and most respected peer-review publications, published by U.S. News & World Report. Mr. Taylor has attained an "AV Preeminent®" rating by Martindale-Hubbell, which is the highest rating available from Martindale-Hubbell. Mr. Taylor received the American Institute of Family Law Attorneys (AIOFLA) Pennsylvania AIOFLA "10 Best" Client Satisfaction Award, which recognizes commitment to the field of family law and a high level of approval from peers and clients. Mr. Taylor has been named a "Rising Star" from 2008 through 2018 by the publisher of the Pennsylvania Edition of the Super Lawyers magazine, an honor given to the top 2.5 percent of attorneys in Pennsylvania who are 40 years or younger or in practice for 10 years or less. Mr. Taylor holds an Avvo® Rating of "10 – Superb." Mr. Taylor has been named a "Top Divorce Attorney" by Mainline Today Magazine, a "Top Family Law Attorney" by Philadelphia Life Magazine and an "Awesome Attorney" in the area of Family Law in Philadelphia by Suburban Life Magazine. In 2011, Mr. Taylor received the "Lawyer on the Fast Track Award," an honor given to only 27 Pennsylvania attorneys under 40 years of age by The Legal Intelligencer recognizing the future leaders of Pennsylvania's legal community. Mr. Taylor is the past Chair of the Montgomery Bar Association Family Law Section. Mr. Taylor speaks and writes frequently on a number of family law topics.

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Chapter One

Protection from Abuse in Pennsylvania

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INTRODUCTION

Protection orders provide protection to victims of abuse and to their families. In Pennsylvania, there are three types of protection orders. The first and most widely known is the Protection from Abuse Order, or PFA. The second is the Protection of Victims of Sexual Violence Order (SVPO) and the third is the Protection from Intimidation Order (PFI).

Protection orders seek to end abuse, threats, harassment and stalking by dictating parameters for contact that the abuser must abide by or face criminal charges. These parameters typically prohibit the abuser from entering the victim's home or contacting the victim in public places (such as in school or at work). The order may also forbid the abuser from calling or texting the victim, interacting with the victim on social media, or contacting the victim through a third party, such as a mutual acquaintance. In cases in which the victim and abuser are cohabitating, protection orders may be used to compel the abuser to vacate the residence.

Protection orders require the abuser to relinquish all firearms and gun permits. The provisions in a protection order may additionally require the abuser to complete a batterer's intervention program and pay for any damages, such as medical expenses, which were incurred as a result of the abuse. If minor children are involved, protection orders may dictate that the abuser has no contact with the child(ren) or set forth physical custody guidelines that both parties must follow while the protection order is in place.

A victim is still entitled to relief, even if he or she flees the residence in order to avoid further abuse. An abuser's absence from, or non-residence in, the Commonwealth has no effect on the court's ability to issue a protection order, provided that the court has personal jurisdiction over the abuser in accordance with 42 P.a.C.S. § 5322, relating to bases of personal jurisdiction over persons outside of the Commonwealth. (23 P.a.C.S.A. § 6103.)

Below please find several graphics illustrating statewide data relating to the Protection from Abuse caseload through the end of 2018. This data shows that more than 39,000 new PFA Petitions were filed statewide through the end of 2018. This information was obtained from the PA Courts InfoShare Database. The Administrative Office of Pennsylvania Courts (APOC) tracks Pennsylvania Court Statistics using the judiciary's case management systems. More data and other resources relating to protection from abuse and other case types can be at pacourts.us. *Reproduction of this data is permissible as long as the source is cited.*

A closer look at Protection From Abuse Orders in Pennsylvania

infoshare PACOURTS

What is a PFA?

A protection from abuse order (PFA) is a civil order that helps protect victims of domestic violence, providing relief from abuse by an intimate partner, family or household member.

In 2018:

39,048 New petitions requesting relief under the PFA Act were filed

91% of temporary PFAs filed (valid until a final hearing) were granted

PFAs filed between 2014 and 2018:

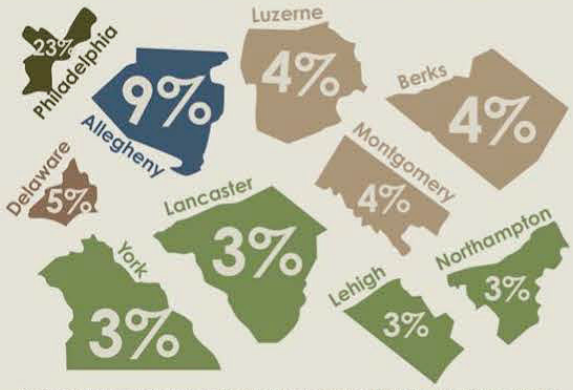


A PFA can order an abuser to:

- Have no contact with you or your children including: no texting, no calling, no communication via social media
- Leave the home where you both live
- Relinquish any weapons

http://www.pacourts.us/learn/protection-orders

Top 10 counties with highest number of new PFA cases in 2018:



Percentages given reflect the percent of total state filings.

The plaintiff did not appear in 28% of PFA court cases.

PFA case outcomes	cases	% of total
Plaintiff did not appear in court	10,499	(28%)
Withdrawn by plaintiff	7,654	(20%)
Agreement reached between parties	7,252	(19%)
Final order granted	6,459	(17%)
Temporary order dismissed/denied	4,002	(11%)
Final order denied	1,915	(5%)
Other	160	(<1%)

Additional data, including county-level data, is available at http://www.pacourts.us/news-and-statistics/research-and-statistics/.

AOPC

Protection From Abuse (PFA) Caseload

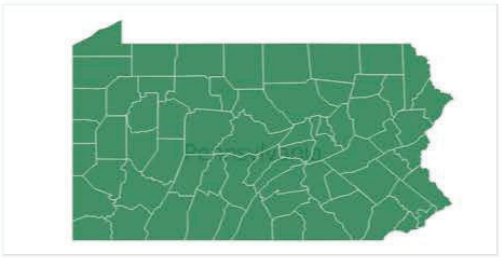
Statewide | County | Class of County | Glossary

Select County
State Total

Select Year
2018

Click here for info on County Classes

State Total
As of 12/31/2018:
Population Estimate: 12,807,060
No. Common Pleas Court Judges: 457



2018 PFA Cases Filed and Processed

State Total

Cases Pending at the Beginning of the Year	7,001
New Cases Filed	39,048
Subtotal Cases Available for Processing	46,049
Cases Processed	37,941
Cases Pending at the End of the Year	8,108

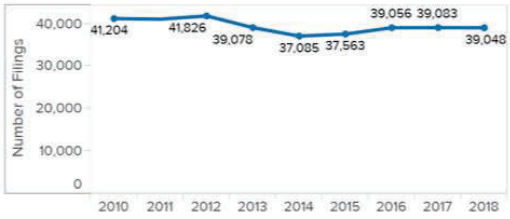
2018 PFA Temporary Orders

State Total

Requested 38,809

Granted	35,226	90.8%
Denied	3,503	9.0%

State Total PFA Filings 2010 - 2018



2018 PFA Processed

State Total

Hover over bar for definition.

After a hearing is scheduled, a case is processed by one of the following outcomes:



Note: The disposition outcomes include practices adopted by local courts.

AOPC
ADMINISTRATIVE OFFICE of PENNSYLVANIA COURTS

To print this page, click the "Download" icon on the menu located at the bottom of this page, then select "image" and download. To download data, click the table or the graph first, then click the "Download" icon and select "Crosstab." Use the other icons to refresh page content, pause automatic updates to the page, or share this page via email or to embed on another page.

PROTECTION FROM ABUSE ACT

Protection from Abuse matters are governed by the Protection from Abuse Act 23 PA. C.S. § 6101 et. seq, and the Pennsylvania Rules of Civil Procedure, 1901-1905 "Actions Pursuant to Protection from Abuse Act".

A. Abuse Defined:

§6102 of the Protection from Abuse Act defines abuse as one or more of the following acts between family or household members, sexual or intimate partners or persons who share biological Parenthood:

(1) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury, serious bodily injury, rape, involuntary deviant sexual intercourse, sexual assault, statutory sexual assault, aggravated indecent assault, indecent assault or incest with or without a deadly weapon.

(2) Placing another in reasonable fear of imminent serious bodily injury

(3) The infliction of false imprisonment pursuant to 18 Pa.C.S. § 2903 (relating to false imprisonment).

(4) Physically or sexually abusing minor children, including such terms as defined in Chapter 63 (relating to child protective services).

(5) Knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following the person, without proper authority, under circumstances which place the person in reasonable fear of bodily injury. The definition of this paragraph applies only to proceedings commenced under this title and is inapplicable to any criminal prosecutions commenced under Title 18 (relating to crimes and offenses).

B. Who May File:

An adult or emancipated minor may seek relief under the Protection from Abuse Act. Any parent, adult household member, or guardian ad litem may seek relief for minor children under the Act, and guardians may seek relief under the Act on behalf incompetent persons. 23 P.a. C.S.A § 6016.

C. Venue:

Pa.R.C.P. 1901.1 outlines where victims of abuse can file their PFA petition. Pa. R.C.P. 1901.1, entitled Venue provides, in pertinent part, that an action for protection from abuse may be brought in a county which:

(1) the plaintiff resides, either temporarily or permanently, or is employed, or

(2) the defendant may be served, or

(3) the abuse occurred.

D. Process and Procedure:

A person looking to obtain protection under the Act must file a petition. A PFA petition can be filed by a private attorney. However, PFA petitions are most commonly filed by agencies such as victim witness programs, domestic violence services, or legal aid services. A call to a particular county's bar association or legal aid office will assist people in locating the appropriate route for filing a PFA petition in their particular county. If a private attorney wishes to file a PFA petition, they will need access to PFAD, the state PFA Database. Access to the database can be obtained by calling 717-671-4767.

23 P.a. C.S.A. § 6106 outlines the process for filing a PFA petition. The first step is to complete a petition for a Protection from Abuse order, wherein the plaintiff provides information on both parties, and children if applicable and details regarding the incident or incidents of abuse as defined above. The petition is filed with the prothonotary, and then presented to a Court of Common Pleas judge who will conduct an ex parte proceeding and at the conclusion of the proceeding and may then enter a temporary protection from abuse order. The temporary order will remain in effect until modified or terminated by the court after notice and hearing. The court is within its discretion to order additional types of relief within the PFA order, including directing the defendant to relinquish to the sheriff, any firearms, or other weapons for the duration of the temporary order if the petition demonstrates any of the following: 1) abuse which involves a firearm or other weapon, or 2) an immediate or present danger of abuse. In determining whether an immediate presence of abuse exists, the court shall consider a number of factors, including, but not limited to:

(1) Whether the temporary order of protection from abuse is not likely to achieve its purpose in the absence of such a condition;

(2) Whether the defendant has previously violated a protection from abuse order;

(3) Whether past or present abuse to the plaintiff or any of the plaintiff's minor children resulted in injury;

(4) Whether the abuse occurred in public;

(5) Whether the abuse includes:

a. Threats or suicide;

b. Killing or threatening to kill pets;

c. Escalation of violence;

d. Stalking or obsessive behavior;

e. Sexual violence; or

f. Drug or excessive alcohol use.

Temporary protection orders may be denied or granted. However, in either case, *§ 6107* of the Act requires a hearing on whether or not a final order will be issued to be scheduled within ten days following the hearing on the temporary PFA. While the statute requires that the hearing be held within ten business days of the filing of a petition, some counties have elected not to follow this part of the statute, and instead merely bring the parties to the courtroom and tell them that, if a hearing is required, it will be scheduled at a later date. Therefore, as a practice tip, if you are deciding to represent a plaintiff or a defendant in a PFA action, it would be wise to call court administration in the subject county and inquire as to the exact hearing date.

The minor judiciary can enter an emergency order in instances where the court of common pleas is unavailable.

The next step in the process is to have a final hearing on the Protection from Abuse claim. As noted above, the final hearing is most commonly scheduled ten business days following the hearing on the temporary PFA.

E. Final Order vs. Civil Consent Order

(1) Final Order:

A final PFA order picks up where the temporary order leaves off and keeps the PFA in place for a period up to three years. Any final order must direct the defendant to refrain from

abusing, harassing, stalking, threatening, or attempting to threaten to use physical force against the plaintiff or minor children and may order that the defendant is subject to the firearms prohibition provisions of the Act. 23 Pa. C.S.A. § 6108.2.

A final PFA order can be entered by the judge along with terms relative to custody, support, and eviction of the defendant from the subject residence, along with any other requirements deemed necessary by the court. It is important to note that if custody issues and eviction terms are addressed in the final protection from abuse order, those terms will disappear once the final order is dismissed for any reason or expires. If custody is addressed in a final PFA order, the parties should follow up with a family law attorney to assist them with filing a custody complaint or modification in order to achieve terms that will expire with the PFA order.

(2) Civil Consent Order:

In this instance, the parties to a PFA action do not proceed with a final hearing. Instead, they will enter a civil consent order reflecting their agreement. The language of a civil consent order is oftentimes very similar to that of a PFA order, in that there may be provisions directing the defendant to refrain from abusing, harassing, stalking, threatening, or attempting to threaten to use physical force against the plaintiff or minor children. Additional provisions may deal with custody schedules, relinquishment of weapons, and exclusion the defendant from the residence or workplace of the plaintiff.

F. Enforcement:

If the defendant violates the PFA order, he or she is subject to an Indirect Criminal Contempt charge or ICC pursuant to 23. P.a. C.S.A. § 6114. 23 Pa. C.S.A. § 6113 (a) states that defendants in violation of a PFA order are also subject to arrest by the police. Upon probable cause, said arrest may be made without a warrant, whether or not the violation was committed in the presence of the police officer. §6113 (b) further provides that subsequent to an arrest, the court shall seize all firearms or other weapons used in violation of the protection order or used in prior incidents of abuse. Any other firearms in the defendant's possession may also be seized.

23 P.a. C.S.A. § 6113.1 states that a plaintiff may file a private criminal complaint alleging non-economic violation of any provision of an order or court-approved consent agreement. The private criminal complaint must be filed in the jurisdiction where the violation occurred.

G. Mutual Orders of Protection:

§ 6108 of the act states in part that mutual orders will not be issued unless both parties have filed timely written petitions and have complied with all other requirements of the act relating to service, etc.

H. Extension of Protection Orders:

§ 6108 provides that PFA orders may be extended as long as:

1. A petition for extension of the final order is filed in accordance with § 6106 and 6107 of the act.
2. It is shown that the defendant committed one or more acts of abuse subsequent to the filing of the final order.

§ 6108 goes on to say that there are no limitations on the number of extensions that may be granted.

PROTECTION OF VICTIMS OF SEXUAL VIOLENCE OR INTIMIDATION ACT

The Protection of Victims of Sexual Violence or Intimidation Act can be found at 42 Pa. C.S.§62A. The purpose of the act is to provide victims of sexual violence and intimidation who desire safety and protection from further incidents of abuse and or intimidation a civil remedy requiring the offender to stay away the victim, regardless of whether or not the victim chooses to seek criminal prosecution. Similar to the PFA, the court may also include other forms of relief in the order.

A Sexual Violence Protection Order or (SVPO) is designed to protect victims of sexual violence from further abuse, whether or not criminal charges are filed against the abuser. A SVPO is similar to a PFA; however, the difference lies in the relationship between the abuser and victim. A PFA require the parties to be household members or have a familial or intimate relationship, while an SVPO is available to all victims of sexual violence who are at risk of further abuse, regardless of the precise relationship.

A Protection from Intimidation Order (PFI) is available in cases of harassment and stalking, where the victim and abuser do not have and never have had a familial or intimate relationship and

have never lived in the same household. However, the abuser must be an adult and the victim must be under 18 years of age, as a PFI cannot be issued in cases involving two minors, two adults, or in cases where a minor is harassing and or stalking an adult. A PFI must be filed on behalf of the minor by a parent, legal guardian, or adult household member of the minor.

If a victim of sexual violence or intimidation approaches you for help, know that information is available for victims of sexual assault from a domestic violence or sexual assault center where they live. A counselor can usually meet with victims quickly, in a matter of hours. Victims can find the center closest to them by going to the Pennsylvania Coalition Against Domestic Violence (PCADV) or Pennsylvania Coalition Against Rape (PCAR) websites or by calling their local bar association or prothonotary's office.

More resources regarding PFAs, SVPOs and PFIs are available on the Pennsylvania Unified Judicial System website at pacourts.us.

A. Process and Procedure:

The process for obtaining relief under the PSVI Act is similar to the process for obtaining relief under the PFA Act. This includes the plaintiff filing and serving a petition in accordance with the act and the court holding an ex parte hearing, after which a temporary order can be entered prior to a final hearing which must be held in ten (10) days. Just as with the PFA, you may wish to contact court administration in the subject county to ensure that you have the correct date for the final hearing.

Emergency orders are available under the PSVI Act in the same manner which they are available under the PFA Act when the Court of Common Pleas in unavailable.

B. Enforcement:

Defendants who violate SVPOs and PVIs are subject to criminal consequences such as arrest and Indirect Criminal Contempt Proceedings. The language of 42 Pa. C.S.A. § 62A12 is similar to that of the PFA Act, and like the PFA Act, it also allows for private criminal complaints.

I have included sample documents relating to PFAs, SVPOs, and PFIs found on the UJS Website for your reference.

Chapter One

Appendices

PETITION FOR PROTECTION FROM ABUSE

IN THE COURT OF COMMON PLEAS OF _____ COUNTY, PENNSYLVANIA
NO.

1. **PLAINTIFF**

First | Middle | Last | Plaintiff's DOB

Plaintiff's Address:

☐ Plaintiff's address is confidential or ☐ Plaintiff's address is: _____

V.

2. **DEFENDANT**

First | Middle | Last | Suffix

Defendant's Address:

_____

_____

DEFENDANT IDENTIFIERS			
DOB		HEIGHT	
SEX		WEIGHT	
RACE		EYES	
HAIR			
SSN			
DRIVERS LICENSE #			
EXP DATE		STATE	

CAUTION:

☐ **Weapon Involved**

☐ **Weapon Present on the Property**

☐ **Weapon Requested Relinquished**

Defendant's Place of employment is: _____

☐ Check here if you have reason to believe that Defendant is a licensed firearms dealer, employed by a licensed firearms dealer or manufacturer; employed as a writer, researcher, or technician in the firearms or hunting industry, or is required to carry a firearm as a condition of employment.

3. I am filing this Petition on behalf of: ☐ Myself or ☐ Another Person

If you checked "myself", please answer all questions referring to yourself as "Plaintiff". If you ONLY checked "another person", please answer all questions referring to that person as the "Plaintiff", and provide your name and address here, as filer, unless confidential.

Filer's Name:

First | Middle | Last | Suffix

☐ Filer's Address is Confidential or ☐ Filer's address is: _____

If you checked "Another Person", indicate your relationship with Plaintiff:

☐ parent of minor Plaintiff(s)

☐ applicant for appointment as guardian ad litem of minor Plaintiff(s)

☐ adult household member with minor Plaintiff(s)

☐ court appointed guardian of incompetent Plaintiff(s)

4. Name(s) of all persons, including minor child/ren, who seek protection from abuse:

_____

_____

5. Indicate the relationship between Plaintiff and Defendant**:**

CHECK ALL THAT APPLY:

☐ spouse or former spouse of Defendant
☐ parent of a child with Defendant
☐ current or former sexual or intimate partner with Defendant
☐ child of Plaintiff
☐ child of Defendant
☐ family member related by blood (consanguinity) to Defendant
☐ family member related by marriage or affinity to Defendant
☐ sibling (person who shares parenthood) of Defendant

☐ Check here if Defendant is 17 years old or younger.

6. Have Plaintiff and Defendant been involved in any of the following court actions?

☐ Divorce ☐ Custody ☐ Support ☐ Protection from Abuse

If you checked any of the above, briefly indicate when and where the case was filed and the court number, if known: _____

_____

7. Has Defendant been involved in any criminal court action? _____

If you answered Yes, is Defendant currently on probation? _____

Has Defendant been determined to be a perpetrator in a founded or indicated report under the Child Protective Services Law, 23 Pa.C.S. §§ 6301 - 6386? _____

If you answered Yes, what county's court or child protective services agency issued the founded or indicated report? _____

8. Plaintiff and Defendant are the parents of the following minor child/ren:

Name(s)	Age(s)	who reside at (list address unless confidential)
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____

9. If Plaintiff and Defendant are parents of any minor child/ren together, is there an

existing court order regarding their custody? _____

If you answered "Yes," describe the terms of the order (e.g., primary, shared, legal or physical custody):

_____

If you answered "yes", in what county and state was the order issued?

_____

If you are now seeking an order of child custody as part of this petition, list the following information:

(a) Where has each child resided during the past five years?

Child's name	Person(s) child lived with	Address, unless confidential	When

(b) List any other persons who are known to have or claim a right to custody of each child listed above.

Name	Address	Basis of Claim

10. The following other minor child/ren presently live with Plaintiff:

Name(s)	Age(s)	Plaintiff's relationship to child/ren

11. The facts of the most recent incident of abuse are as follows:
Approximate Date: _____
Approximate Time: _____
Place: _____

Describe in detail what happened, including any physical or sexual abuse, threats, injury, incidents of stalking, medical treatment sought, or calls to law enforcement. (attach additional sheets of paper if necessary):

_____

_____

_____

12. If Defendant has committed prior acts of abuse against Plaintiff or the minor child/ren, describe these prior incidents, including any threats, injuries, or incidents of stalking, and indicate approximately when such acts of abuse occurred (attach additional sheets of paper if necessary):

_____

_____

_____

13. (a) Has Defendant used or threatened to use any firearms or other weapons against Plaintiff or the minor child/ren? If so, please describe the use or threatened use below and list on Attachment A to Petition, which is incorporated by reference into this petition, any firearms, other weapons**,** or ammunition Defendant used or threatened to use against Plaintiff or the minor child/ren: _____

_____

_____

(b) Other than the firearms, other weapons**,** or ammunition Defendant used or threatened to use against Plaintiff or the minor child/ren, does Defendant, to the best of your knowledge or belief, own or possess any additional firearm, other weapon, ammunition**,** or any firearm license?

(c) If the answer to (b) above is "yes," list any additional firearm, other weapon**,** or ammunition owned by or in the possession of Defendant on Attachment A to Petition, which is incorporated by reference into this petition.

(d) Plaintiff (*check one*) ☐DOES☐ DOES NOT request that the court order Defendant to relinquish firearms, other weapons**,** or ammunition listed on Attachment A to Petition. If Plaintiff does seek relinquishment, identify on Attachment A to Petition the firearms, other weapons or ammunition Plaintiff requests the court to order Defendant to relinquish.

14. Identify the sheriff, police department**,** or law enforcement agency in the area in which Plaintiff lives that should be provided with a copy of the protection order:_____

_____

15. There is an immediate and present danger of further abuse from Defendant.

CHECK THE FOLLOWING BOXES ONLY IF THEY APPLY TO YOUR CASE AND PROVIDE THE REQUESTED INFORMATION

☐ Plaintiff is asking the court to evict and exclude Defendant from the following residence:_____

☐ owned by (list owners, if known):_____

☐ rented by (list all names, if known): _____

☐ Defendant owes a duty of support to Plaintiff or the minor child/ren:

☐ Plaintiff has suffered out-of-pocket financial losses as a result of the abuse described above. Those losses are: _____

_____

FOR THE REASONS SET FORTH ABOVE, I REQUEST THAT THE COURT ENTER A TEMPORARY ORDER, AND AFTER HEARING, A FINAL ORDER THAT WOULD DO THE FOLLOWING (CHECK ALL FORMS OF RELIEF REQUESTED)

☐ A. Restrain Defendant from abusing,harassing, stalking, threatening, attempting or threatening to use physical force against Plaintiff or the minor child/ren in any place where Plaintiff or the child/ren may be found.

☐ B. Evict/exclude Defendant from Plaintiff's residence and prohibit Defendant from attempting to enter any temporary or permanent residence of Plaintiff.

☐ C. Require Defendant to provide Plaintiff or the minor child/ren with other suitable housing.

☐ D. Award Plaintiff temporary custody of the minor child/ren and place the following restrictions on contact between Defendant and the child/ren: _____

_____

☐ E. Prohibit Defendant from having any contact with Plaintiff or the minor child/ren, in person, by telephone, or in writing, personally or through third persons, including but not limited to any contact at Plaintiff's school, business, or place of employment, except as the court may find necessary with respect to partial custody with the minor child/ren.

☐ F. Prohibit Defendant from having any contact with Plaintiff's relatives and Plaintiff's children listed in this petition, except as the court may find necessary with respect to partial custody with the minor child/ren. The following persons are Plaintiff's relatives or family and household members that Plaintiff believes require protection from stalking and harassment by Defendant.

Name Address (optional) Relationship to Plaintiff

_____

_____

_____

☐ G. Order Defendant to temporarily relinquish the firearms, other weapons, or ammunition listed on Attachment A to Petition, under Defendant's control, or in Defendant's possession, or any firearm license to the sheriff or the appropriate law enforcement agency.

☐ H. Prohibit Defendant from acquiring or possessing firearms for the duration of the order.

☐ I. Order Defendant to pay temporary support for Plaintiff or the minor child/ren, including medical support and payment of the rent or mortgage on the residence.

☐ J. Direct Defendant to pay Plaintiff for the reasonable financial losses suffered as the result of the abuse, to be determined at the hearing.

☐ K. Order Defendant to pay the costs of this action, including filing and service fees.

☐ L. Order Defendant to pay Plaintiff's reasonable attorney's fees.

☐ M. Order the following additional relief, not listed above:

_____

_____

_____

☐ N. Grant such other relief as Plaintiff requests or the court deems appropriate

☐ O. Order the police, sheriff, or other law enforcement agency to serve Defendant with a copy of this petition, any order issued, and the order for hearing. Plaintiff will inform the designated authority of any addresses, other than Defendant's residence, where Defendant can be served.

☐ P. Direct the Pennsylvania State Police, the municipal police, or the sheriff to accompany Plaintiff to his or her residence to retrieve personal belongings or accompany Plaintiff while the petition or order is served on

Defendant, if Plaintiff has reason to believe his or her safety is at risk.

VERIFICATION

I verify that I am the petitioner as designated in the present action and that the facts and statements contained in the above Petition are true and correct to the best of my knowledge. I understand that any false statements are made subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities

_____
Signature

_____
Date

(Caption)

ATTACHMENT A TO PETITION
FIREARMS, OTHER WEAPONS, OR
AMMUNITION INVENTORY

I,_____, Plaintiff in this Protection from Abuse Action, hereby

(a) state that Defendant used or threatened to use the following firearms, other weapons, or ammunition against Plaintiff or the minor child/ren (include addresses or locations, if known, such as "front seat of blue truck", "gun cabinet," "bedroom closet," etc.)

Firearm/Other Weapon/Ammunition Location

1.
2.
3.
4.
5.

(b) state that Defendant, to the best of my knowledge or belief, owns or possesses the following firearms, other weapons**,** or ammunition not set forth in (a) above (include addresses or locations if, known):

Firearm/Other Weapon/Ammunition Location

1.
2.
3.
4.
5.

(c) request that the court order Defendant to relinquish the following firearms, other weapons, or ammunition (include addresses or locations, if known):

Firearm/Other Weapon/Ammunition Location

1.
2.
3.
4.
5.

☐ All firearms, other weapons, or ammunition owned or possessed by Defendant.
If more space is needed, more sheets may be attached to this document.

Name:_____

Date: _____

NOTICE: This attachment will be withheld from public inspection in accordance with 23 Pa. C.S. § 6108 (a)(7)(v).

FINAL PROTECTION FROM ABUSE ORDER ☐ **Extended Order** ☐ **Amended Order**	IN THE COURT OF COMMON PLEAS OF _____ COUNTY, PENNSYLVANIA NO.

PLAINTIFF

First	Middle	Last	Plaintiff's DOB

Name(s) of all protected persons, including minor child/ren and DOB:

_____

_____

_____

V.

DEFENDANT

First	Middle	Last	Suffix

Defendant's Address:

_____

_____

_____

DEFENDANT IDENTIFIERS			
DOB		HEIGHT	
SEX		WEIGHT	
RACE		EYES	
HAIR			
SSN			
DRIVERS LICENSE #			
EXP DATE		STATE	

CAUTION:

☐ **Weapon Involved**

☐ **Weapon Present on the Property**

☐ **Weapon Ordered Relinquished**

The Court Hereby Finds: That it has jurisdiction over the parties and subject matter, and Defendant has been provided with reasonable notice and opportunity to be heard.

The Court Hereby Orders:

☐ Defendant shall not abuse, harass, stalk**,** threaten**, or** attempt or threaten to use physical force against any of the above persons in any place where they might be found.

☐ Except as provided in Paragraph 5 of this order, Defendant shall not contact Plaintiff, or any other person protected under this order, by telephone or by any other means, including through third persons.

☐ Additional findings of this order are set forth below.

Order Effective Date_____**Order Expiration Date** _____

NOTICE TO DEFENDANT

Defendant is hereby notified that failure to obey this order may result in arrest as set forth in 23 Pa.C.S. § 6113 and that violation of the order may result in a charge of indirect criminal contempt as set forth in 23 Pa.C.S. § 6114**.** Violation may also subject you to prosecution and criminal penalties under the Pennsylvania Crimes Code. A violation of this order may result in the revocation of the safekeeping permit, which will require the immediate relinquishment of your firearms, other weapons**,** or ammunition to the sheriff or the appropriate law enforcement agency. Plaintiff's consent to contact by Defendant shall not invalidate this order which can only be modified by further order of court. 23 Pa.C.S. § 6108(g).

This order is enforceable in all fifty (50) States, the District of Columbia, Tribal Lands, U.S. Territories**,** and the Commonwealth of Puerto Rico under the Violence Against Women Act, 18 U.S.C. § 2265. If you travel outside of the state and intentionally violate this order, you may be subject to federal criminal proceedings under that act. 18 U.S.C. §§ 2261-2262. If you possess a firearm or any ammunition while this order is in effect, you may be charged with a federal criminal offense even if this Pennsylvania order does not expressly prohibit you from possessing firearms or ammunition under 18 U.S.C. § 922(g)(8) or state criminal offenses and state criminal penalties under 18 Pa.C.S. § 6105.

CHECK ALL THAT APPLY:

Plaintiff or Protected Person(s) is/are:

☐ spouse or former spouse of Defendant
☐ parent of a child with Defendant
☐ current or former sexual or intimate partner with Defendant
☐ child of Plaintiff
☐ child of Defendant
☐ family member related by blood (consanguinity) to Defendant
☐ family member related by marriage or affinity to Defendant
☐ sibling (person who shares parenthood) of Defendant

Defendant was served in accordance with Pa.R.C.P. No. 1930.4 and provided notice of the time, date, and location of the hearing scheduled in this matter.

AND NOW, this ___ day of _____, 20 __, the court having jurisdiction over the parties and the subject-matter, it is ORDERED, ADJUDGED, and DECREED as follows:

This order is entered by (check one) ☐ by agreement ☐ by agreement without an admission ☐ after a hearing and decision by the court ☐ after a hearing at which Defendant was not present, despite proper service being made ☐ by default. Without regard as to how the order was entered, this is a final order of court subject to full enforcement pursuant to the Protection From Abuse Act.

Note: Space is provided to allow for 1) the court's general findings of abuse; 2) inclusion of the terms under which the order was entered (e.g., that the order was entered with the consent of the parties, or that Defendant, though properly served, failed to appear for the hearing, or the reasons why the plaintiff's request for a final PFA order was denied); or 3) information that may be helpful to law enforcement (e.g., whether a firearm or other weapon was involved in the incident of abuse or whether Defendant is believed to be armed and dangerous).

☐ Plaintiff's request for a final protection order is denied.

OR

☐ Plaintiff's request for a final protection order is granted.

☐ 1. Defendant shall not abuse, stalk, harass, threaten, or attempt or threaten to use physical force against Plaintiff or any other protected person in any place where they might be found

☐ 2. Defendant is completely evicted and excluded from the residence at (NONCONFIDENTIAL ADDRESS FROM WHICH DEFENDANT IS EXCLUDED) or any other residence where Plaintiff or any other person protected under this order may live. Exclusive possession of the residence is granted to Plaintiff. Defendant shall have no right or privilege to enter or be present on the premises of Plaintiff or any other person protected under this order.

☐ On [insert date and time], Defendant may enter the residence to retrieve his/her clothing and other personal effects, provided that Defendant is in the company of a law enforcement officer or sheriff when such retrieval is made and [insert any other conditions]: _____

_____

☐ 3. Except as provided in Paragraph 5 of this order, Defendant is prohibited from having ANY CONTACT with Plaintiff, either directly or indirectly, or any other person protected under this order, at any location, including but not limited to any contact at Plaintiff's school, business, or place of employment. Defendant is specifically ordered to stay away from the following locations for the duration of this order.

_____

_____

_____

☐ 4. Except as provided in Paragraph 5 of this order, Defendant shall not contact Plaintiff, either directly or indirectly, or any other person protected under this order, by telephone or by any other means, including through third persons.

☐ 5. Temporary custody of the minor children: [NAMES OF THE CHILDREN SUBJECT TO THE PROVISION OF THIS PARAGRAPH] shall be as follows:

Check all that apply.

☐ STATE TO WHOM PRIMARY PHYSICAL CUSTODY IS AWARDED; STATE TERMS OF PARTIAL CUSTODY, IF ANY.

_____

_____

_____

☐ There is a current custody order as to the children of the parties:

_____ _____

(county court) (docket number)

☐ A custody petition is pending.

☐ A hearing is scheduled for

_____

(Date, time and location)

☐ THIS ORDER SHALL NOT SUPERSEDE THE CURRENT CUSTODY ORDER.

☐ THIS ORDER SUPERSEDES ANY PRIOR ORDER RELATING TO CHILD CUSTODY.

The custody provisions of Paragraph 5 of this order are temporary. Either party may initiate custody proceedings pursuant to the custody statute at 23 Pa.C.S. §§ 5321 — 5340. Any valid custody order entered after the final Protection From Abuse order supersedes the custody provisions of this order.

☐ 6. FIREARMS, OTHER WEAPONS, OR AMMUNITION RESTRICTIONS

Check all that apply:

☐ Defendant is prohibited from possessing or acquiring any firearms for the duration of this order.

☐ Defendant shall relinquish to the sheriff or the appropriate law enforcement agency the following firearm licenses owned or possessed by Defendant:

_____

_____

☐ Defendant is directed to relinquish to the sheriff or the appropriate law enforcement agency any firearm, other weapon, or ammunition listed in Attachment A to Final Order, which is incorporated herein by reference.

Defendant may relinquish any firearms, other weapons, or ammunition to the sheriff or the appropriate law enforcement agency. As an alternative, Defendant may either relinquish firearms, other weapons, or ammunition to a third party provided Defendant and the third party first comply with all the requirements to obtain a safekeeping permit, or relinquish firearms, other weapons, or ammunition to a licensed firearms dealer for consignment sale, lawful transfer, or safekeeping pursuant to 23 Pa.C.S. § 6108.2(e). Defendant must relinquish any firearm, other weapon, ammunition, or firearm license ordered to be relinquished no later than 24 hours after

service of this order. Failure to timely relinquish any firearm, other weapon, ammunition, or any firearm license ordered to be relinquished shall result in a violation of this order and may result in criminal conviction under the Uniform Firearms Act, 18 Pa.C.S. § 6105.

☐ 7. Any firearm delivered to the sheriff or the appropriate law enforcement agency or transferred to a licensed firearm dealer or a qualified third party, who satisfies the procedural and substantive requirements to obtain a safekeeping permit issued under 23 Pa. C.S. § 6108.3 pursuant to this order or the temporary order, shall not be returned to Defendant until further order of court or as otherwise provided by law.

☐ 8. The Pennsylvania State Police, the municipal police, or the sheriff shall accompany Plaintiff to his or her residence to retrieve personal belongings.

☐ 9. The following additional relief is granted as authorized by § 6108 of the Act:

☐ Defendant is prohibited from stalking, as defined in 18 Pa.C.S. §2709.1, or harassing, as defined in 18 Pa.C.S. § 2709, the following family and household members of Plaintiff:

Name	Address (optional)	Relationship to Plaintiff

☐ Other relief:

_____

_____

_____

☐ 10. Defendant is directed to pay temporary support for: [INSERT THE NAMES OF THE PERSONS FOR WHOM SUPPORT IS TO BE PAID] as follows: [INSERT AMOUNT, FREQUENCY AND OTHER TERMS AND CONDITIONS OF THE SUPPORT ORDER]. This order for support shall remain in effect until a final support order is entered by this court. However, this order shall lapse automatically if Plaintiff does not file a complaint for support with the Domestic Relations Section of the court within two weeks of the date of this order. The amount of this temporary order does not necessarily reflect Defendant's correct support obligation, which shall be determined in accordance with the guidelines at the support hearing. Any adjustments in the final amount of support shall be credited, retroactive to this date, to the appropriate party.

11. ☐ (a) The costs of this action are imposed on Defendant.

☐ (b) Because this order followed a contested proceeding, or a hearing at which Defendant was not present, despite being served with a copy of the petition, temporary order and notice of the date, time and place of the hearing, Defendant is ordered to pay an additional $100 surcharge to the court, which shall be distributed in the manner set forth in 23 Pa C.S. §6106(d).

☐ (c) Upon a showing of good cause or a finding that Defendant is unable to pay, the costs of this action are waived.

☐ 12. Defendant shall pay $____ to Plaintiff by (insert date) as compensation for Plaintiff's out-of-pocket losses, which are as follows: _____

An installment schedule is ordered as follows:_____

_____

OR

☐ Plaintiff is granted leave to present a petition, with appropriate notice to Defendant, to [INSERT THE NAME OF THE JUDGE OR COURT TO WHICH THE PETITION SHOULD BE PRESENTED] requesting recovery of out-of-pocket losses. The petition shall include an exhibit itemizing all claimed out-of-pocket losses, copies of all bills and estimates of repair, and an order scheduling a hearing. No fee shall be required by the prothonotary's office for the filing of this petition.

☐ 13. THIS ORDER SUPERSEDES ANY PRIOR PROTECTION FROM ABUSE ORDER OBTAINED BY THE SAME PLAINTIFF AGAINST THE SAME DEFENDANT.

14. All provisions of this order shall expire:

CHECK ONE

☐ in [INSERT DAYS, MONTHS OR YEARS] on [INSERT EXPIRATION DATE]

☐ in three years, on [INSERT EXPIRATION DATE]

NOTICE TO DEFENDANT

Defendant is hereby notified that failure to obey this order may result in arrest as set forth in 23 Pa.C.S. § 6113 and that violation of the order may result in a charge of indirect criminal contempt as set forth in 23 Pa.C.S. § 6114. Violation may also subject you to prosecution and criminal penalties under the Pennsylvania Crimes Code. A violation of this order may result in the revocation of the safekeeping permit, which will require the immediate relinquishment of your firearms, other weapons, and ammunition to the sheriff or the appropriate law enforcement agency. Plaintiff's consent to contact by Defendant shall not invalidate this order, which can only be modified by further order of court. 23 Pa.C.S. § 6108(g).

This order is enforceable in all fifty (50) States, the District of Columbia, Tribal Lands, U.S. Territories, and the Commonwealth of Puerto Rico under the Violence Against Women Act, 18 U.S.C. § 2265. If you travel outside of the state and intentionally violate this order, you may be subject to federal criminal proceedings under that act. 18 U.S.C. §§ 2261-2262. If you possess a firearm or any ammunition while this order is in effect, you may be charged with a federal criminal offense even if this Pennsylvania order does not expressly prohibit you from possessing firearms or ammunition under 18 U.S.C. § 922(g)(8) or state criminal offenses and state criminal penalties under 18 Pa.C.S. § 6105.

NOTICE TO SHERIFF, POLICE, AND LAW ENFORCEMENT OFFICIALS

The police and sheriff who have jurisdiction over Plaintiff's residence OR any location where a violation of this order occurs OR where Defendant may be located, shall enforce this order. The court shall have jurisdiction over any indirect criminal contempt proceeding, either in the county where the violation occurred or where this protective order was entered. An arrest for violation of Paragraphs 1 through 7 of this order may be without warrant, based solely on probable cause, whether or not the violation is committed in the presence of the police or any sheriff. 23 Pa.C.S. § 6113.

Subsequent to an arrest, and without the necessity of a warrant, the police officer or sheriff shall seize all firearms, other weapons, and ammunition in Defendant's possession that were used or threatened to be used during the violation of the protection order or during prior incidents of abuse and any other firearms in Defendant's possession. The [insert the appropriate name or title] shall maintain possession of the firearms, other weapons, or ammunition until further order of this court.

When Defendant is placed under arrest for violation of the order, Defendant shall be taken to the appropriate authority or authorities before whom Defendant is to be arraigned. A "Complaint for Indirect Criminal Contempt" shall then be completed and signed by the police officer, sheriff, OR Plaintiff. Plaintiff's presence and signature are

not required to file the complaint.

If sufficient grounds for violation of this order are alleged, Defendant shall be arraigned, bond set, if appropriate, and both parties given notice of the date of the hearing.

BY THE COURT:

_____

Judge

_____

Date

This order was entered pursuant to the consent of Plaintiff and Defendant:

_____ _____

Plaintiff's Signature Defendant's Signature

(Caption)

ATTACHMENT A TO FINAL ORDER
FIREARMS, OTHER WEAPONS AND
AMMUNITION INVENTORY

It is hereby ordered that Defendant relinquish the following firearms, other weapons, and ammunition to the sheriff or the appropriate law enforcement agency:

Firearm/Other Weapon/Ammunition	Location
1.	
2.	
3.	
4.	
5.	
6.	
7.	
8.	
9.	
10.	

☐ All firearms, other weapons, and ammunition owned or possessed by Defendant.

BY THE COURT

Judge_____

Date: _____

NOTICE**:** This attachment will be withheld from public inspection in accordance with 23 Pa. C.S. § 6108(a)(7)(v).

* * *

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF

PETITION FOR EMERGENCY RELIEF IN CONNECTION WITH CLAIMS OF SEXUAL VIOLENCE OR INTIMIDATION

Mag. Dist. No:
MDJ Name:
Address:

Telephone:

_____
v.
_____

Docket No:
Case Filed:

PETITION OF THE PLAINTIFF

I, _____, hereby petition for emergency relief:
(Name of Plaintiff - please print)

☐ On behalf of myself.
☐ On behalf of the following minor (child) (children) of whom I am a (parent) (adult household member) (guardian).
☐ On behalf of the following incapacitated person to whom I am guardian.

(Name)	(Address)	(Age)

The cause for seeking relief is as follows:

Emergency relief is required because there is immediate and present danger posed by the defendant to me and/or to the above listed minor (child) (children) (incapacitated person).
(Print additional names/addresses on a separate sheet of paper and attach hereto.)

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF

PETITION FOR EMERGENCY RELIEF IN CONNECTION WITH CLAIMS OF SEXUAL VIOLENCE OR INTIMIDATION

Mag. Dist. No:
MDJ Name:
Address:

Telephone:

_____
v.

_____

Docket No:
Case Filed:

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

_____
(Signature of the Plaintiff)

FREE INTERPRETER
www.pacourts.us/language-rights

_____, Plantiff

VS.

_____, Defendant

Case No. _____

NOTICE OF HEARING AND ORDER

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the following papers, you must appear at the hearing scheduled herein. If you fail to appear, the case may proceed against you and a FINAL order may be entered against you granting the relief requested in the petition.

A hearing on the matter is scheduled for the _____ day of _____, 20__ at ____ _.m. in Courtroom _____ at _____Courthouse, _____, Pennsylvania.

If a temporary protection order has been entered, you MUST obey the order until it is modified or terminated by the court after notice and a hearing. If you disobey that order, the police or sheriff may arrest you. A violation of this order may subject you to a charge of indirect criminal contempt. A violation may also subject you to prosecution and criminal penalties under the Pennsylvania Crimes Code. Under 18 U.S.C. § 2265, an order entered by the court may be enforceable in all fifty (50) States, the District of Columbia, Tribal Lands, U.S. Territories and the Commonwealth of Puerto Rico. If you travel outside of the state and intentionally violate this order, you may be subject to federal criminal proceedings under the Violence Against Women Act, 18 U.S.C. § 2262.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER IMMEDIATELY. YOU HAVE THE RIGHT TO HAVE A LAWYER REPRESENT YOU AT THE HEARING. THE COURT WILL NOT, HOWEVER, APPOINT A LAWYER FOR YOU. IF YOU DO NOT HAVE A LAWYER, GO TO OR CALL THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER. IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE. IF YOU CANNOT FIND A LAWYER, YOU MAY HAVE TO PROCEED WITHOUT ONE.

County Lawyer Referral Service
(insert Street Address)
(insert City, State, and ZIP)
(insert Phone Number)

AMERICANS WITH DISABILITIES ACT OF 1990

The Court of Common Pleas of _____County is required by law to comply with the Americans with Disabilities Act of 1990. For information about

accessible facilities and reasonable accommodations available to disabled individuals having business before the court, please contact our office. All arrangements must be made at least 72 hours prior to any hearing or business before the court. You must attend the scheduled conference or hearing.

BY THE COURT:

_____

Judge

_____

Date

_____, Plaintiff

VS.

_____, Defendant

Case No. _____

PETITION FOR PROTECTION OF VICTIMS OF
- ☐ **SEXUAL VIOLENCE**
- ☐ **SEXUAL VIOLENCE AGAINST A MINOR CHILD**
- ☐ **INTIMIDATION**

1. Plaintiff:

_____
First Middle Last Name

Plaintiff's Address: _____

☐ Plaintiff's address is confidential pursuant to 42 Pa.C.S. § 62A11.

Plaintiff's Date of Birth: _____

I am filing this petition on behalf of ☐ myself or ☐ another person.
If you checked "myself," please answer all questions referring to yourself as "Plaintiff." If you checked "another person," please answer all questions referring to that person as "Plaintiff," and provide your name and address below.

Name: _____

Address: _____

If you checked "another person," indicate your relationship to the plaintiff:

_____

2. Defendant:

_____
First Middle Last Name

Defendant's Address:

_____
_____

DEFENDANT IDENTIFIERS			
DOB		HEIGHT	
SEX		WEIGHT	
RACE		EYES	
HAIR			
SSN			
DRIVERS LICENSE #			
EXP DATE		STATE	

3. Name(s) of other designated person(s) under 42 Pa.C.S. § 62A07(b)(1):
_____

4. Is there a relationship between Plaintiff and Defendant? _____. If yes, what is the relationship?
_____

5. Have Plaintiff and Defendant been involved in any other legal proceedings? If so, state when and where the case was filed and the court docket number, if known:
_____
_____

6. Has Defendant been involved in any criminal proceedings?
_____

If you answered Yes, is Defendant currently on probation or parole?
_____

7. (a) The facts of the most recent incident of sexual violence are as follows:

Approximate Date: _____

Approximate Time: _____

Place: _____

Describe in detail what happened, including any physical or sexual abuse, threats, injury, incidents of stalking, medical treatment sought, and/or calls to law enforcement (attach additional sheets of paper if necessary):
_____
_____
_____

(b) The facts of the most recent incident of intimidation are as follows:

Approximate Date: _____

Approximate Time: _____

Place: _____

Describe in detail what happened, including medical treatment sought, and/or calls to law enforcement (attach additional sheets of paper if necessary):

_____
_____
_____

8. If Defendant has committed prior acts of sexual violence or intimidation against Plaintiff, describe these prior incidents, and indicate approximately when such acts occurred (attach additional sheets of paper if necessary):

_____
_____
_____

9. Identify the sheriff, police department, or other law enforcement agency in the area in which Plaintiff lives that should be provided with a copy of the protection order:

_____

10. Is Plaintiff in immediate and present danger from Defendant? If so please describe:

_____

FOR THE REASONS SET FORTH ABOVE, I REQUEST THAT THE COURT ENTER A TEMPORARY ORDER AND, AFTER A HEARING, A FINAL ORDER THAT WOULD INCLUDE ALL OF THE FOLLOWING RELIEF (CHECK ALL FORMS OF RELIEF REQUESTED):

☐ A. Restrain Defendant from having any contact with the victim, including, but not limited to, entering the victim's residence, place of employment, business, or school.

☐ B. Prohibit indirect contact through third parties.

☐ C. Prohibit direct or indirect contact with other designated persons.

☐ D. Order Defendant to pay the fees of this action.

☐ E. Order the following additional relief, not listed above:

_____
_____
_____
_____

☐ F. Grant such other relief as the court deems appropriate, including, but not limited to, issuing an order under 42 Pa.C.S. § 62A11(b) related to the non-disclosure of the victim's address, telephone number, whereabouts or other demographic information.

☐ G. Order the police, sheriff or other law enforcement agency to serve the Defendant with a copy of this petition, any order issued, and the order for the hearing. Plaintiff will inform the designated authority of any addresses, other than Defendant's residence, where Defendant can be served.

VERIFICATION

I verify that the statements made in this petition are true and correct to the best of my knowledge. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

_____

Signature

_____

Date

_____, Plaintiff

VS.

_____, Defendant

Case No. _____

TEMPORARY ORDER FOR PROTECTION OF VICTIMS OF

- ☐ **SEXUAL VIOLENCE**
- ☐ **SEXUAL VIOLENCE AGAINST A MINOR CHILD**
- ☐ **INTIMIDATION**

Plaintiff: _____
First Middle Last Name

Plaintiff's address: _____

☐ Plaintiff's address is confidential pursuant to 42 Pa.C.S. § 62A11.

Defendant:

_____
First Middle Last Name

Defendant's Address:

_____
_____

DEFENDANT IDENTIFIERS			
DOB		HEIGHT	
SEX		WEIGHT	
RACE		EYES	
HAIR			
SSN			
DRIVERS LICENSE #			
EXP DATE		STATE	

AND NOW, this _____ day of _____, 20__, upon consideration of the attached Petition for Protection of Victims of Sexual Violence or Intimidation, the court hereby enters the following Temporary Order:

Plaintiff's request for a Temporary Protection Order is denied.

Plaintiff's request for a Temporary Protection Order is granted.

1. The following person is protected under this order:

_____

2. Defendant is:

☐ A. Restrained from having any contact with the victim, including, but not limited to, entering the victim's residence, place of employment, business, or school.

☐ B. Prohibited from indirect contact with the victim through third parties.

☐ C. Prohibited from direct or indirect contact with the following designated persons:
_____

☐ 3. Additional relief, including, but not limited to, issuing an order under 42 Pa.C.S. § 62A11(b) related to the non-disclosure of the victim's address, telephone number, whereabouts or other demographic information:
_____
_____
_____
_____

☐ 4. A certified copy of this order shall be provided to the sheriff or police department where Plaintiff resides and any other agency specified (insert name of agency):
_____

☐ 5. THIS ORDER SUPERSEDES ANY PRIOR PROTECTION OF VICTIMS OF SEXUAL VIOLENCE OR INTIMIDATION ORDER OBTAINED BY THE SAME PLAINTIFF AGAINST THE SAME DEFENDANT.

6. THIS ORDER APPLIES IMMEDIATELY TO THE DEFENDANT AND SHALL REMAIN IN EFFECT UNTIL _____ (insert expiration date) OR UNTIL OTHERWISE MODIFIED OR TERMINATED BY THIS COURT AFTER NOTICE AND A HEARING.

NOTICE TO THE DEFENDANT

Defendant is hereby notified that violation of this order may result in arrest for indirect criminal contempt. Under 18 U.S.C. § 2265, an order entered by the court may be enforceable in all fifty (50) States, the District of Columbia, Tribal Lands, U.S. Territories and the Commonwealth of Puerto Rico. If you travel outside of the state and intentionally violate this order, you may be subject to federal criminal proceedings under the Violence Against Women Act, 18 U.S.C. § 2262. Consent of Plaintiff shall not invalidate this order, which can only be changed or modified through the filing of appropriate court papers for that purpose. 42 Pa.C.S. § 62A17. Defendant is further notified that violation of this order may subject him/her to prosecution and criminal penalties under the Pennsylvania Crimes Code.

NOTICE TO SHERIFF, POLICE AND LAW ENFORCEMENT OFFICIALS

The police department and sheriff who have jurisdiction over Plaintiff’s residence, the location where a violation of this order occurs, or where Defendant may be located, shall enforce this order. The court shall have jurisdiction over any indirect criminal

contempt proceeding, either in the county where the violation occurred or where this protective order was entered. An arrest for violation of paragraphs 2 and 3 of this order may be without warrant, based solely on probable cause, whether or not the violation is committed in the presence of the police or any sheriff. 42 Pa.C.S. § 62A12.

When Defendant is placed under arrest for violation of the order, Defendant shall be taken to the appropriate authority or authorities before whom Defendant is to be arraigned. A ‘‘Complaint for Indirect Criminal Contempt’’ shall then be completed and signed by the police officer, sheriff or Plaintiff. Plaintiff’s presence and signature are not required to file the complaint.

If sufficient grounds for violation of this order are alleged: (1) Defendant shall be arraigned; (2) bond set, if appropriate; and (3) both parties shall be given notice of the date of the hearing.

BY THE COURT:

_____
Judge

_____
Date

Chapter Two

Prenuptial Agreements

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THE INITIAL INTERVIEW

It is important that the initial interview include a review of the client's purpose behind the request for a prenuptial agreement. These reasons may include:

A. The protection of existing assets;
B. The protection against support, APL, and alimony;
C. The protection of business interests, particularly family businesses;
D. The protection of assets for children from a prior relationship; and
E. Estate planning.

Even if the client is able to clearly articulate the reasons behind the prenuptial agreement, the lawyer should be certain to review all of the options available to the client, of which he or she is not aware. Likewise, when the purpose articulated is limited, there may be other options available other than a prenuptial agreement.

Each initial interview must also include an explanation of the law in the event there is no prenuptial agreement. This includes an explanation not only of the application of the Pennsylvania Divorce Code, but also the Fiduciary Code.

PROTECTION IN THE EVENT OF DIVORCE AND/OR SEPARATION

I. Pre-Existing Property

Under the Divorce Code, assets owned prior to marriage, which are kept in separate names, are the assets of the individual owner. However, any increase in value of those assets is marital property to be distributed by the Court. Clients commonly arrive at a consultation armed with a list of the assets they currently own and a desire to protect those assets. During the consultation, you must identify clearly those existing assets and how the client wishes to protect them. You must consider potential growth, both from contributions during the marriage as well as from market growth. You must also consider the transfer of these assets into another form. Finally, you must also consider contribution of these assets into the marital estate. There are specific types of separate properties which warrant more attention such as residences, businesses and retirement assets. These will be discussed in greater detail later in the materials.

II. Assets Accrued During The Marriage

The prenuptial agreement must define clearly what is considered separate property (not to be distributed between spouses) and what will be considered martial property (and ultimately distributed between spouses). Under the Divorce Code, marital property includes the majority of assets acquired during the marriage no matter the title of the property. Your client faces alternatives in this election.

A. No protection for marital assets. A client may elect to only protect those pre-existing assets. He or she may not wish to protect anything accrued during the marriage and treat same as the Divorce Code treats such assets. If this is the case, a practitioner must very carefully explain to the client the protections the prenuptial agreement could offer and be certain that the client does not wish to avail himself of these protections.

B. Limited definition of marital assets. A client may elect to place a limited definition on marital assets. Such definition could be limited to the title of the asset. For example, unless an asset is placed into joint names, it is not a marital asset. Such definitions could be limited to a certain asset such as a bank account or marital residence. It is critical that the definition of a marital asset is clear.

C. Distribution of marital assets. A client must elect how the marital assets will ultimately be divided. This is oftentimes seen as an equal division, but the agreement may be crafted in any manner

D. Contributions to the marital assets. During marriage, the parties may contribute separate property into the marital estate. For example, they may each contribute separate funds into a down payment on a jointly owned residence. The client must determine if those contributions will be a gift to the marriage and become a marital asset or if those contributions will be refunded in the event of separation, and before the division of the marital asset. If contributions are to be refunded, the definition of the contribution must be specific and the client must be counseled to keep clear records of such.

III. Marital Residence

It is important to discuss your client's intentions regarding a marital residence. If the couple plans to reside in a home owned individually, one needs to contemplate what happens to that residence (and its residents) in the event of separation. As family law practitioners, we know how difficult it can be to exclude someone from a marital residence upon separation. You would be remiss if this issue was not addressed in your prenuptial agreement.

A. Occupancy in a residence upon separation. If the parties are going to reside in a home owned solely by your client, the agreement should contemplate provisions for excluding the non-owner spouse from the home. The provisions should include a time frame for exclusion. Oftentimes, the agreement will include provisions for a lump sum payment to allow for a new residence to be easily established.

B. Division of a jointly held residence. Oftentimes, the parties will contemplate the purchase of a jointly held residence. They may wish this asset to simply be considered marital, but do not wish to address occupancy or other issues. Be sure to discuss with your client the options of occupancy, right of first refusal and time frames to resolve the issues of residency under the contract. Such terms may be conditioned on the existence of children, or may be conditioned on the location or value of the home. Addressing this issue in one form or another can avoid a stressful living situation. At separation, if there are multiple jointly held homes, one may offer a spouse the election of a certain property as part of an exclusionary provision related to the marital residence. Just because the marital residence is held jointly, does not mean a discussion of options should not take place with your client.

C. Maintenance of a household. In some instances, prenuptial agreements will address how the parties intend to live on a day-to-day basis. Such provisions may allocate household maintenance costs, require the establishment of a joint bank account, or provide for an allowance for the dependent spouse.

IV. Pre-Marital and Marital Debt

The issue of debt must be addressed in a prenuptial agreement. Parties generally handle debt in a similar manner to their elections regarding assets. For drafting purposes, the definitions of separate and marital debt can be consolidated with the asset definitions. There may be a particular debt which will be given different treatment such as school loans. To the extent that marital debts are defined, the agreement must also divide those obligations upon separation and divorce.

V. Retirement Assets

One must be certain the language contained in the prenuptial agreement provides the protections your client wishes to have in regard to retirement assets. There are issues which must be considered:

A. Is the growth of the pre-marital retirement asset protected?

i. If your client is expecting that the pre-marital retirement asset will be protected, be certain to define growth by both contribution and by market growth.

B. Are retirement assets created during the marriage protected?

i. Be certain that the retirement assets created during the marriage are classified in the manner that your client wishes. If separate property is not defined by title, be certain that the creation and investment in retirement funds remains otherwise separate.

C. Is the beneficiary designation waived?

i. In certain ERISA qualified plans, a spouse becomes the automatic beneficiary of the retirement benefit in the event of death. The only manner in which this designation can be avoided is by a signed waiver to that effect. Your prenuptial agreement should contain that waiver language. However, language in the agreement may not be enough. You must have that waiver signed AFTER the marriage, when the person is actually the spouse and has the rights provided by status. This requires a follow-up reminder to your clients after the marriage date. You may also utilize a limited Power of Attorney for this purpose, and an example is attached hereto.

VI. Gifts And Inheritances

Under the Divorce Code, these non-marital assets can be protected if left in the individual's name, but the growth is marital to be divided. You must talk to your client as to whether they want this protection or not. This is a critical component of your prenuptial agreement if there is an expectation of substantial inheritance. It is also critical language if your client is

going to be gifted interests in family businesses or will be the beneficiary of an estate planning gifting program.

VII. Support, Alimony, Alimony Pendente Lite, Counsel Fees And Costs

In addition to the protection of premarital assets, protection from these claims ranks at the top of client requests. A prenuptial agreement should contain a waiver of alimony, support, APL, and counsel fees and costs. A blanket waiver obviously grants the greatest protection. But, there are a variety of provisions that can be utilized. One can consider a formula that is triggered by the number of years of marriage with a threshold minimum being required. One can consider the existence of children or the cessation of employment as a trigger. To the extent possible, the term, payment and limiting events should be clearly spelled out to avoid unnecessary litigation.

PROTECTION IN THE EVENT OF DEATH

When first discussing a prenuptial agreement with a client, divorce and separation are always at the forefront. But one must also discuss protections available at death. These provisions only apply when one of the parties dies prior to a separation or divorce. Just as with divorce, one must discuss the intestacy laws that apply if a prenuptial agreement is not in place. The Fiduciary Code is full of many rights and obligations, but the most significant for a client to consider are:

A. The intestacy laws;
B. The Elective Share Rights;
C. The ability to grant letters of testamentary/letters of administration; and
D. The ability to appoint an executor.

Under the Fiduciary Code, a spouse has the ability to claim a spousal election even if they have not been named in a will. Therefore, there is no absolute protection provided for a client's estate upon death. A prenuptial agreement can call for the waiver of all rights under the Fiduciary Code and permit the spouses to voluntarily provide for each other in their estate plan. The agreement can confirm the transfer of joint assets to the surviving spouse, or require the provision of life insurance or other benefits for the surviving spouse. These provisions are only triggered if death occurs prior to separation. Once separation occurs, those provisions apply, even if death occurs prior to final resolution.

Clients need to understand that without specifications contained in a prenuptial agreement, they may not have ultimate control on the disposition of their estate. If your client is seeking to protect assets for children of a prior relationship, such protection should extend into death as well.

A prenuptial agreement may waive the rights of the surviving spouse to the protections provided by the Fiduciary Code. It may then provide specific provisions to apply at death, including the provision of life insurance, the transfer of jointly held property, or a specific request.

Prenuptial agreements may also be used for estate planning to protect against federal estate tax issues.

ENFORCEABILITY OF THE AGREEMENT

Pre 2005

Prior to January 28, 2005, prenuptial agreements were governed by Simeone v. Simeone, 581 A.2d 162 (Pa. 1990), which is attached to these materials. Simeone states that a spouse is bound by the terms of an agreement unless the spouse can provide by clear and convincing evidence that consent to the agreement was procured by fraud, misrepresentation or duress.

Due to the freedom of contract, courts have a relatively narrow scope in determining the validity of a prenuptial agreement. A court may consider only whether a party was induced into the agreement through misrepresentation, fraud, or duress, and it may invalidate an agreement on such grounds only upon clear and convincing evidence of a fraud or misrepresentation.

A prenuptial agreement is presumed to be valid when it provides that the parties have made a full and fair disclosure of their financial positions to each other. Cooper v. Oakes, 629 A.2d 944, 948 (Pa. Super. 1993). In order to rebut this presumption and to prove misrepresentation or fraud, a spouse must prove (1) that the other party failed to make a full and fair disclosure of financial worth, and (2) that the lack of full and fair disclosure induced the spouse to enter into an agreement she otherwise would have rejected. Colonna v. Colonna, 791 A.2d 353, 356 (Pa Super. Ct 2002).

Full & Fair Disclosure

A. "It is well settled that this disclosure need not be exact, so long as it is "full and fair." Simeone v. Simeone, 581 A.2d 162, 167 (Pa. 1990).

B. It is not necessary to reduce to writing the parties' respective financial disclosures. Sabad v. Fessenden, 825 A.2d 682, 691 (Pa. Super. 2003) (analyzing a martial settlement agreement). Note that premarital agreements and marital settlement agreements are reviewed under the same standard. Paroly v. Paroly, 876 A.2d 1061, 1065 (Pa. Super. 2005).

C. "Whether adequate disclosure has been made will depend on the facts and circumstances of individual cases." Paroly v. Paroly, 876 A.2d 1061, 1066 (Pa. Super. 2005) (quoting Mormello v. Mormello, 682 A.2d 824, 827 (Pa. Super. 1996)).

Cases that find a failure to provide "full and fair disclosure:"

A. "Agreement only vaguely refers to the remaining property waived by wife as 'all stocks, bonds, mutual funds, retirement plan, personal banking checking accounts and all other financial assets accumulated through the marriage.'" Ebersole v. Ebersole, 713

A.2d 103, 104 (Pa. Super. 1998) *overruled on other grounds* by Colonna v. Colonna, 791 A.2d 353 (Pa. Super. Ct. 2001), *overruled on other grounds* by Stoner v. Stoner, 572 Pa. 665, 819 A.2d 529 (2003).

B. Although disclosure of the "exact amount" may not be required, "fair and full disclosure, however, requires that a reasonable estimate of the worth of the assets must be attempted so that the general financial resources of the parties are not obscured." Hess v. Hess, 580 A.2d 357, 359 (Pa. Super. 1990). Note that although Hess v. Hess was decided prior to Simeone v. Simeone, Simeone upheld the Pennsylvania standard of "full and fair disclosure," therefore, cases prior to Simeone may be used to determine the meaning of the phrase. Simeone v. Simeone, 581 A.2d 162, 167 (Pa. 1990) (citing Hillegass Estate, 244 A.2d 672 (1968)).

C. The vagueness of the agreement itself did not help to inform the wife as to the financial situation of the parties and, actually, further obscured the financial situation. Mormello v. Mormello, 452 Pa. Super. 590, 601, 682, A.2d 824, 829 (Pa. Super. 1996) *overruled on other grounds* by Stoner v. Stoner, 819 A.2d 529 (Pa. 2003).

D. "Where the [spouse] assisted [the other spouse] in the running of [a] privately owned business enterprises, the [the financially disadvantaged spouse] in this case could not and did not involve [themselves in the other spouse's business or employment]. Mormello v. Mormello, 682 A.2d 824, 829 (Pa. Super. 1996) *overruled on other grounds* by Stoner v. Stoner, 572 Pa. 665, 819 A.2d 529 (Pa. 2003).

E. A marital settlement agreement failed to provide full and complete disclosure of all assets owned because it (1) failed to state the assets owned by the parties or an estimate of their worth; (2) the only assets mentioned were vehicles; (3) the agreement failed to provide any information about husband's pension, bank accounts, or other assets. McCurdy v. McCurdy, PICS Case No. 11-4213 (C.P. Lawrence Sept. 28, 2011).

Cases that found "full and fair disclosure" was made:

A. "Case law establishes that when a spouse is fully engaged in the couple's financial affairs and is familiar with a business owned by the other spouse, the court shall uphold a marital settlement agreement even when it contains neither disclosure nor an affirmation that disclosure was made. Adams v. Adams, 607 A.2d 1116 (Pa. Super. 1992)." Firmi v. Firmi, C.P. Lawrence County, No. 11665 of 2008, C.A. (C.C.P. August 31, 2012).

B. Where the "agreement recites that full and fair disclosure was made" and wife was "intimately involved" in husband's business, full and fair disclosure was made. Paroly v. Paroly, 876 A.2d 1061, 1067 (Pa. Super. 2005). Full and fair disclosure was provided where wife was (1) a knowledgeable working business woman, (2) intimately involved in the business operations, (3) continued to execute the corporate tax returns, and (4) had knowledge of the income earned by the business. Id. at 1067.

C. Where wife was involved in her husband's business and aware of the parties' general resources, full and fair disclosure was met. Adams v. Adams, 607 A.2d 1116, 1118

(Pa. Super 1992) disapproved of on different grounds by Stoner v. Stoner, 819 A.2d 529 (Pa. 2003).

Duress

Pennsylvania law defines duress as "that degree of restraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or apprehension to overcome the mind of a person of ordinary firmness . . . In the absence of threats of actual bodily harm there can be no duress where the contracting party is free to consult with counsel." Hamilton v. Hamilton, 591 A.2d 720, 721-22 (Pa. Super. 1991). Thus, "where a party has been free to consult counsel before signing an agreement, the courts have uniformly rejected duress as a defense to the agreement." Id. at 722.

Reasonableness and Lack of Full Understanding

While there are a number of factors courts examine in determining the validity of a prenuptial agreement, those factors are exclusive. To emphasize this point, Pennsylvania courts have explicitly barred consideration of certain other factors, such as:

A. Reasonableness of the agreement; and
B. Lack of full understanding.

Thus, a general failure to become familiar with the content of an agreement, either by reading it or having it explained, will not invalidate the agreement. Simeone, 581 A.2d at 165 (citing Standard Venetian Blind Co. v. American Empire Insurance Co., 469 A.2d 563, 566 (Pa. 1983) ("failure to read a contract does not warrant avoidance or nullification of its provisions"), and Montgomery v. Levy, 177 A.2d 448, 450 ("one is legally bound to know the terms of the contract entered")). A lack of independent legal counsel is similarly insufficient. Simeone, 581 A.2d at 166.

2005 And Thereafter

23 Pa. C.S. 3106 became effective on January 28, 2005 and is applicable to prenuptial agreements executed thereafter. The statue states:

> ∓(a) General rule.--The burden of proof to set aside a premarital agreement shall be upon the party alleging the agreement to be unenforceable. A premarital agreement shall not be enforceable if the party seeking to set aside the agreement proves, by clear and convincing evidence, that:
> (1) the party did not execute the agreement voluntarily; or
> (2) the party, before execution of the agreement:
> (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
> (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

(iii) did not have an adequate knowledge of the property or financial obligations of the other party.

(b) Definition.--As used in this section, the term "premarital agreement" means an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage. 23 Pa. C.S.A. § 3106.

The significant difference between the statute and Simeone is that the statue provides for a party's full waiver of full and fair disclosure.

Disclosure should be provided in an prenuptial agreement after 2005, but a separate waiver of such disclosure should also be provided. An example of such waiver is attached to these materials.

THINGS TO CONSIDER WHEN YOU REPRESENT THE DEPENDENT SPOUSE

Your job in representing a dependent spouse is usually less geared to protection of assets than it is to assure the client that he/she will have some protection in the event of separation or divorce. Consider:

A. Provision of a vehicle at separation;
B. Provision of a lump sum payment at separation to obtain a residence;
C. Provision of health insurance for a period of time;
D. Creation of retirement accounts in his/her individual name during the marriage if accounts will be considered separate property:
E. The maintenance of a jointly held bank account with a minimum balance to go to the dependent spouse upon separation;
F. Distribution of household goods at separation;
G. Payment of educational expenses either during the marriage or upon separation;
H. Provision of some form of support or additional lump sum to get your client back on his/her feet;
I. Mandatory creation of jointly held home or placement of spouses name on home;
J. Life insurance beneficiary designation; and
K. Inheritance planning.

PRACTICE POINTERS

1. You may never represent both parties in the drafting of a prenuptial agreement because of the inherent conflict of interest (see Rule of Professional Conduct 1.7).

2. Remember that your client is going to marry the other party in this process. There should be an expectation that they will be talking to each other throughout the negotiations. The lawyers should be careful not to treat the parties as adversaries, but more as business partners seeking a dissolution plan that will work for them.

3. Make certain your disclosures are as complete as possible, attached to the agreement, and initialed at the time of execution.

4. Make certain that, while you follow pointer #3, you also obtain a separate waiver of disclosure of assets (a sample is attached hereto).

5. If other documents are considered in the prenuptial agreement, be certain they are cross-referenced and executed concurrently with the prenuptial agreement. All documents should be read together to be certain there are no conflicts.

6. Document your negotiations to demonstrate input from all parties into the drafting and terms of the prenuptial agreement.

7. Complete a thorough final review with your client and provide him/her with a memo or letter summarizing the agreement and its terms, and where these terms differed from the original draft and/or your recommendations. This will serve as a reminder to your client and yourself as to the nature of the discussions which occurred during drafting.

8. Send a follow-up letter after marriage reminding your client of actions he/she was to complete after marriage. Specifically remind him/her of the retirement spousal beneficiary waiver and the Power of Attorney, if utilized.

9. Where the parties find it difficult to have such discussion on their own, a four-party conference may be helpful to foster discussions regarding some of the specific terms of the agreement. Remember the parties are not adversaries (at least not yet).

Chapter Two

Appendices

CONSULTATION OUTLINE

I. Pre-Existing Assets/Debts

A. Identified by client
B. Should they be protected? Including growth/ ?
C. What happens if they all contributed to the marital estate? Do you get your contribution back?

II. Residence (if pre-existing)

A. Where planning to live and how is residence titled
B. Will home be kept separate?
C. In the event of separation, do you want to exclude non-owner spouse?

i. Terms:
(a) Time frame
(b) Payment

D. Division of Household Costs, If Applicable

i. Mortgage
ii. Maintenance
iii. Decorating
iv. Utilities

E. Joint Household Account

i. Terms
(a) Amount per month
(b) Use

F. Residence Upon Death

i. Terms

III. During The Marriage

A. How to treat assets obtained during marriage;
B. Anything purchased during the marriage (marital-no matter title)
C. Anything purchased during marriage only, joint is marital
D. Anything purchased during marriage in separate name, separate?
E. Does source of funds matter, or just title? If source of funds matter, contribution terms should be reviewed.

IV. Retirement

A. Are contributions to premarital plans, marital or not
B. Waiver of spousal beneficiary-post marriage
C. Creation of new plans – marital or not

V. Business Interests

A. Current status of ownership
B. Family transition
C. Involvement in operations (both spouses)
D. Protection goals

VI. Support, Alimony, APL, Counsel Fees and Costs

A. Complete Waiver
B. Term/amount/conditions

VII. Inheritances/Gifts

A. Protection to each party
B. Exclude gifts to one another?

VIII. Income During Marriage

A. How handled?

IX. Death

A. Right to live in house? Contents?
B. Right to jointly held property?
C. Waiver of all inheritance rights
D. Provisions

i. Life insurance beneficiary?
ii. Cash payment?

PRENUPTIAL AGREEMENT DISCLOSURES

1. Real property (marital and vacation homes, timeshares, land).
2. Retirement accounts (401(k), pension, IRA, TSP, 403B).
3. Investment accounts (mutual funds, money market, stocks, bonds).
4. Bank accounts (checking, savings, certificates of deposit).
5. Business interests (corporations, sole proprietorships, partnerships).
6. Vehicles (cars, trucks, boats, ATV, trailers, recreational vehicles).
7. Household belongings.
8. Income (last three years of tax returns).
9. Life insurance cash value.
10. Debts (mortgages, loans, credit card balances).
11. Miscellaneous items.

525 Pa. 392, *; 581 A.2d 162

Catherine E. Walsh SIMEONE, Appellant, v. Frederick A. SIMEONE, Appellee

No. 70 E.D. Appeal Dkt. 1989

Supreme Court of Pennsylvania

525 Pa. 392*; *581 A.2d 162

January 23, 1990, Argued
September 25, 1990, Decided

PRIOR HISTORY: Appeal from the Order of the Superior Court dated October 26, 1988, at No. 03441, Philadelphia 1987, affirming the Order of the Court of Common Pleas of Philadelphia County, Family Court Division, April Term 1984, at No. 1847.

380 Pa.Super. 37, 551 A.2d 219 (1988).

DISPOSITION: Order affirmed.

COUNSEL: Leonard Dubin, George J. Krueger, Philadelphia, for appellant.

Albert Momjian, Philadelphia, Stewart B. Barmen, Pittsburgh, Jerold S. Berschler, Norristown, for: amicus -- The American Academy of Matrimonial Lawyers, Pa. Chapter.

Robert I. Whitelaw, Philadelphia, for appellee.

JUDGES: Nix, C.J., and Larsen, Flaherty, * McDermott, Zappala, Papadakos and Cappy, JJ. Papadakos, J., files a concurring opinion. McDermott files a dissenting opinion which is joined by Larsen, J.

OPINION BY: FLAHERTY

OPINION

OPINION OF THE COURT

At issue in this appeal is the validity of a prenuptial agreement executed between the appellant, Catherine E. Walsh Simeone, and the appellee, Frederick A. Simeone. At the time of their marriage, in 1975, appellant was a twenty-three year old nurse and appellee was a thirty-nine year old neurosurgeon. Appellee had an income of approximately $ 90,000 per year, and appellant was unemployed. Appellee also had assets worth approximately $ 300,000. On the eve of the parties' wedding, appellee's attorney presented appellant with a prenuptial agreement to be signed. Appellant, without the benefit of counsel, signed the agreement. Appellee's attorney had not advised appellant regarding any legal rights that the agreement surrendered. The parties are in disagreement as to whether appellant knew in advance of that date that such an agreement would be presented for signature. Appellant denies having had such knowledge and claims to have signed under adverse circumstances, which, she contends, provide a basis for declaring it void.

The agreement limited appellant to support payments of $ 200 per week in the event of separation or divorce, subject to a maximum total payment of $ 25,000. The parties separated in 1982, and, in 1984, divorce proceedings were commenced. Between 1982 and 1984 appellee made payments which satisfied the $ 25,000 limit. In 1985, appellant filed a claim for alimony *pendente lite*. A master's report upheld the validity of the prenuptial agreement and denied this claim. Exceptions to the master's report were dismissed by the Court of Common Pleas of Philadelphia County. The Superior Court affirmed. *Simeone v. Simeone, 380 Pa.Super. 37, 551 A.2d 219 (1988)*.

We granted allowance of appeal because uncertainty was expressed by the Superior Court regard-

ing the meaning of our plurality decision in *Estate of Geyer, 516 Pa. 492, 533 A.2d 423 (1987)* (Opinion Announcing Judgment of the Court). The Superior Court viewed *Geyer* as permitting a prenuptial agreement to be upheld if it *either* made a reasonable provision for the spouse *or* was entered after a full and fair disclosure of the general financial positions of the parties and the statutory rights being relinquished. Appellant contends that this interpretation of *Geyer* is in error insofar as it requires disclosure of statutory rights *only* in cases where there has not been made a reasonable provision for the spouse. Inasmuch as the courts below held that the provision made for appellant was a reasonable one, appellant's efforts to overturn the agreement have focused upon an assertion that there was an inadequate disclosure of statutory rights. Appellant continues to assert, however, that the payments provided in the agreement were less than reasonable.

The statutory rights in question are those relating to alimony *pendente lite*. Other statutory rights, such as those pertaining to alimony and equitable distribution of marital property, did not exist in 1975. Those rights arose under the Divorce Code of 1980, and the Code expressly provides that marital agreements executed prior to its effective date are not affected thereby. 23 P.S. § 103. Certainly, at the time the present agreement was executed, no disclosure was required with respect to rights which were not then in existence. The present agreement did expressly state, however, that alimony *pendente lite* was being relinquished. It also recited that appellant "has been informed and understands" that, were it not for the agreement, appellant's obligation to pay alimony *pendente lite* "might, as a matter of law, exceed the amount provided." Hence, appellant's claim is not that the agreement failed to disclose the particular right affected, but rather that she was not adequately informed with respect to the nature of alimony *pendente lite*.

The plurality opinion in *Geyer* expressly applied and followed this Court's decision in *Hillegass Estate, 431 Pa. 144, 244 A.2d 672 (1968)*, which held that a prenuptial agreement will be upheld if it *either* made a reasonable provision for the spouse *or* was entered after a full and fair disclosure of financial status. See *Geyer, 516 Pa. at 502 n. 9, 533 A.2d at 427 n. 9*. The concluding paragraph of the *Geyer* plurality opinion, however, injected a basis for uncertainty as to whether *Hillegass* was being strictly followed. It stated as follows:

> *[A]ny* agreement which seeks to change the duly enacted public policy of this Commonwealth must be based on nothing less than full and fair disclosure. Such disclosure must include both the general financial pictures of the parties involved, and evidence that the parties are aware of the statutory rights which they are relinquishing.

516 Pa. at 506, 533 A.2d at 429-30 (emphasis added) (footnotes omitted).

The Superior Court attempted to reconcile this language with the earlier portion of *Geyer* which applied *Hillegass* and concluded that, viewed in context, this language meant that full and fair disclosure of financial positions and statutory rights was required *only* where the provisions made for a spouse were unreasonable. Because the Superior Court viewed the present agreement as having made an adequate provision for appellant, it held that the agreement was valid regardless of whether there had been a full disclosure of statutory rights being surrendered. The alternative, of course, would have been to require full and fair disclosure in *every* case, but such would plainly have been inconsistent with *Hillegass, supra.*

While the decision of the Superior Court reflects, perhaps, a reasonable interpretation of *Geyer*, we do not view this case as a vehicle to affirm that interpretation. Rather, there is need for a reexamination of the foundations upon which *Geyer* and earlier decisions rested, and a need for clarification of the standards by which the validity of prenuptial agreements will be judged.

There is no longer validity in the implicit presumption that supplied the basis for *Geyer* and similar earlier decisions. Such decisions rested upon a belief that spouses are of unequal status and that women are not knowledgeable enough to understand the nature of contracts that they enter. Society has advanced, however, to the point where women are no longer regarded as the "weaker" party in

marriage, or in society generally. Indeed, the stereotype that women serve as homemakers while men work as breadwinners is no longer viable. Quite often today both spouses are income earners. Nor is there viability in the presumption that women are uninformed, uneducated, and readily subjected to unfair advantage in marital agreements. Indeed, women nowadays quite often have substantial education, financial awareness, income, and assets.

Accordingly, the law has advanced to recognize the equal status of men and women in our society. See, e.g., *Pa. Const. art. 1, § 28* (constitutional prohibition of sex discrimination in laws of the Commonwealth). Paternalistic presumptions and protections that arose to shelter women from the inferiorities and incapacities which they were perceived as having in earlier times have, appropriately, been discarded. See *Geyer, 516 Pa. at 509-14, 533 A.2d at 431-33* (dissenting opinion of Mr. Chief Justice Nix setting forth detailed history of case law evidencing a shift away from the former paternalistic approach of protecting women towards a newer approach of equal treatment). It would be inconsistent, therefore, to perpetuate the standards governing prenuptial agreements that were described in *Geyer* and similar decisions, as these reflected a paternalistic approach that is now insupportable.

Further, *Geyer* and its predecessors embodied substantial departures from traditional rules of contract law, to the extent that they allowed consideration of the knowledge of the contracting parties and reasonableness of their bargain as factors governing whether to uphold an agreement. Traditional principles of contract law provide perfectly adequate remedies where contracts are procured through fraud, misrepresentation, or duress. Consideration of other factors, such as the knowledge of the parties and the reasonableness of their bargain, is inappropriate. See *Geyer, 516 Pa. at 516-17, 533 A.2d at 434-35* (Flaherty, J. dissenting). Prenuptial agreements are contracts, and, as such, should be evaluated under the same criteria as are applicable to other types of contracts. See *Geyer, 516 Pa. at 508, 533 A.2d at 431* ("These agreements are nothing more than contracts and should be treated as such." (Nix, C.J. dissenting)). Absent fraud, misrepresentation, or duress, spouses should be bound by the terms of their agreements.

Contracting parties are normally bound by their agreements, without regard to whether the terms thereof were read and fully understood and irrespective of whether the agreements embodied reasonable or good bargains. See *Standard Venetian Blind Co. v. American Empire Insurance Co., 503 Pa. 300, 305, 469 A.2d 563, 566 (1983)* (failure to read a contract does not warrant avoidance or nullification of its provisions); *Estate of Brant, 463 Pa. 230, 235, 344 A.2d 806, 809 (1975)*; *Bollinger v. Central Pennsylvania Quarry Stripping & Construction Co., 425 Pa. 430, 432, 229 A.2d 741, 742 (1967)* ("Once a person enters into a written agreement he builds around himself a stone wall, from which he cannot escape by merely asserting he had not understood what he was signing."); *Montgomery v. Levy, 406 Pa. 547, 550, 177 A.2d 448, 450 (1962)* (one is legally bound to know the terms of the contract entered). Based upon these principles, the terms of the present prenuptial agreement must be regarded as binding, without regard to whether the terms were fully understood by appellant. *Ignorantia non excusat*.

Accordingly, we find no merit in a contention raised by appellant that the agreement should be declared void on the ground that she did not consult with independent legal counsel. To impose a *per se* requirement that parties entering a prenuptial agreement must obtain independent legal counsel would be contrary to traditional principles of contract law, and would constitute a paternalistic and unwarranted interference with the parties' freedom to enter contracts.

Further, the reasonableness of a prenuptial bargain is not a proper subject for judicial review. *Geyer* and earlier decisions required that, at least where there had been an inadequate disclosure made by the parties, the bargain must have been reasonable at its inception. See *Geyer, 516 Pa. at 503, 533 A.2d at 428*. Some have even suggested that prenuptial agreements should be examined with regard to whether their terms remain reasonable at the time of dissolution of the parties' marriage.

By invoking inquiries into reasonableness, however, the functioning and reliability of prenuptial agreements is severely undermined. Parties would not have entered such agreements, and, indeed, might not have entered their marriages, if they did not expect their agreements to be strictly en-

forced. If parties viewed an agreement as reasonable at the time of its inception, as evidenced by their having signed the agreement, they should be foreclosed from later trying to evade its terms by asserting that it was not in fact reasonable. Pertinently, the present agreement contained a clause reciting that "each of the parties considers this agreement fair, just and reasonable . . . ."

Further, everyone who enters a long-term agreement knows that circumstances can change during its term, so that what initially appeared desirable might prove to be an unfavorable bargain. Such are the risks that contracting parties routinely assume. Certainly, the possibilities of illness, birth of children, reliance upon a spouse, career change, financial gain or loss, and numerous other events that can occur in the course of a marriage cannot be regarded as unforeseeable. If parties choose not to address such matters in their prenuptial agreements, they must be regarded as having contracted to bear the risk of events that alter the value of their bargains.

We are reluctant to interfere with the power of persons contemplating marriage to agree upon, and to act in reliance upon, what *they* regard as an acceptable distribution scheme for their property. A court should not ignore the parties' expressed intent by proceeding to determine whether a prenuptial agreement was, in the court's view, reasonable at the time of its inception or the time of divorce. These are exactly the sorts of judicial determinations that such agreements are designed to avoid. Rare indeed is the agreement that is beyond possible challenge when reasonableness is placed at issue. Parties can routinely assert some lack of fairness relating to the inception of the agreement, thereby placing the validity of the agreement at risk. And if reasonableness at the time of divorce were to be taken into account an additional problem would arise. Virtually nonexistent is the marriage in which there has been absolutely no change in the circumstances of either spouse during the course of the marriage. Every change in circumstance, foreseeable or not, and substantial or not, might be asserted as a basis for finding that an agreement is no longer reasonable.

In discarding the approach of *Geyer* that permitted examination of the reasonableness of prenuptial agreements and allowed inquiries into whether parties had attained informed understandings of the rights they were surrendering, we do not depart from the longstanding principle that a full and fair disclosure of the financial positions of the parties is required. Absent this disclosure, a material misrepresentation in the inducement for entering a prenuptial agreement may be asserted. *Hillegass, 431 Pa. at 152-53, 244 A.2d at 676-77*. Parties to these agreements do not quite deal at arm's length, but rather at the time the contract is entered into stand in a relation of mutual confidence and trust that calls for disclosure of their financial resources. *Id., 431 Pa. at 149, 244 A.2d at 675*; *Gelb Estate, 425 Pa. 117, 120, 228 A.2d 367, 369 (1967)*. It is well settled that this disclosure need not be exact, so long as it is "full and fair." *Kaufmann Estate, 404 Pa. 131, 136 n. 8, 171 A.2d 48, 51 n. 8 (1961)*. In essence therefore, the duty of disclosure under these circumstances is consistent with traditional principles of contract law.

If an agreement provides that full disclosure has been made, a presumption of full disclosure arises. If a spouse attempts to rebut this presumption through an assertion of fraud or misrepresentation then this presumption can be rebutted if it is proven by clear and convincing evidence. *Hillegass, 431 Pa. at 152-53, 244 A.2d at 676-77*.

The present agreement recited that full disclosure had been made, and included a list of appellee's assets totalling approximately $ 300,000. Appellant contends that this list understated by roughly $ 183,000 the value of a classic car collection which appellee had included at a value of $ 200,000. The master, reviewing the parties' conflicting testimony regarding the value of the car collection, found that appellant failed to prove by clear and convincing evidence that the value of the collection had been understated. The courts below affirmed that finding. We have examined the record and find ample basis for concluding that the value of the car collection was fully disclosed. Appellee offered expert witnesses who testified to a value of approximately $ 200,000. Further, appellee's disclosure included numerous cars that appellee did not even own but which he merely hoped to inherit from his mother at some time in the future. Appellant's contention is plainly without merit.

Appellant's final contention is that the agreement was executed under conditions of duress in

that it was presented to her at 5 p.m. on the eve of her wedding, a time when she could not seek counsel without the trauma, expense, and embarrassment of postponing the wedding. The master found this claim not credible. The courts below affirmed that finding, upon an ample evidentiary basis.

Although appellant testified that she did not discover until the eve of her wedding that there was going to be a prenuptial agreement, testimony from a number of other witnesses was to the contrary. Appellee testified that, although the final version of the agreement was indeed presented to appellant on the eve of the wedding, he had engaged in several discussions with appellant regarding the contents of the agreement during the six month period preceding that date. Another witness testified that appellant mentioned, approximately two or three weeks before the wedding, that she was going to enter a prenuptial agreement. Yet another witness confirmed that, during the months preceding the wedding, appellant participated in several discussions of prenuptial agreements. And the legal counsel who prepared the agreement for appellee testified that, prior to the eve of the wedding, changes were made in the agreement to increase the sums payable to appellant in the event of separation or divorce. He also stated that he was present when the agreement was signed and that appellant expressed absolutely no reluctance about signing. It should be noted, too, that during the months when the agreement was being discussed appellant had more than sufficient time to consult with independent legal counsel if she had so desired. See generally *Carrier v. William Penn Broadcasting Corp., 426 Pa. 427, 431, 233 A.2d 519, 521 (1967)* (concept of duress as applied to contracting parties). Under these circumstances, there was plainly no error in finding that appellant failed to prove duress.

Hence, the courts below properly held that the present agreement is valid and enforceable. Appellant is barred, therefore, from receiving alimony *pendente lite*.

Order affirmed.

CONCUR BY: PAPADAKOS

CONCUR

PAPADAKOS, Justice, concurring.

Although I continue to adhere to the principles enunciated in *Estate of Geyer, 516 Pa. 492, 533 A.2d 423 (1987)*, I concur in the result because the facts fully support the existence of a valid and enforceable agreement between the parties and any suggestion of duress is totally negated by the facts. The full and fair disclosure, as well as the lack of unfairness and inequity, standards reiterated in *Geyer* are supported by the facts in this case so that I can concur in the result.

However, I cannot join the opinion authored by Mr. Justice Flaherty, because, it must be clear to all readers, it contains a number of unnecessary and unwarranted declarations regarding the "equality" of women. Mr. Justice Flaherty believes that, with the hard-fought victory of the Equal Rights Amendment in Pennsylvania, all vestiges of inequality between the sexes have been erased and women are now treated equally under the law. I fear my colleague does not live in the real world. If I did not know him better I would think that his statements smack of male chauvinism, an attitude that "you women asked for it, now live with it." If you want to know about equality of women, just ask them about comparable wages for comparable work. Just ask them about sexual harassment in the workplace. Just ask them about the sexual discrimination in the Executive Suites of big business. And the list of discrimination based on sex goes on and on.

I view prenuptial agreements as being in the nature of contracts of adhesion with one party generally having greater authority than the other who deals in a subservient role. I believe the law protects the subservient party, regardless of that party's sex, to insure equal protection and treatment under the law.

The present case does not involve the broader issues to which the gratuitous declarations in question are addressed, and it is injudicious to offer declarations in a case which does not involve those issues. Especially when those declarations are inconsistent with reality.

DISSENT BY: McDERMOTT

DISSENT

McDERMOTT, Justice, dissenting.

I dissent. I would reverse and remand to the trial court for further consideration of the validity of the prenuptial agreement executed by the appellee, Dr. Frederick Simeone, and Catherine Simeone, on the eve of their wedding.

Let me begin by setting forth a common ground between my position in this matter and that of the majority. There can be no question that, in the law and in society, men and women must be accorded equal status. I am in full agreement with the majority's observation that "women nowadays quite often have substantial education, financial awareness, income, and assets." Majority Slip Op. at 6. However, the plurality decision I authored in *Estate of Geyer, 516 Pa. 492, 533 A.2d 423 (1987)*, as well as the Dissenting Opinion I offer today, have little to do with the equality of the sexes, but everything to do with the solemnity of the matrimonial union. I am not willing to believe that our society views marriage as a mere contract for hire. On the contrary, our Legislature has set forth the public policy which must guide this Court: "The family is the basic unit of society and the protection of the family is of paramount public concern." *See 23 P.S. § 102*. In this Commonwealth, we have long declared our interest in the stability of marriage and in the stability of the family unit. Our courts must seek to protect, and not to undermine, those institutions and interests which are vital to our society.

The subject of the validity of pre-nuptial agreements is not a new issue for this Court. A pre-nuptial agreement is the reservation of ownership over land, money and any other property, acquired in the past, present or future, from the most unique of human bargains. A pre-nuptial agreement may also prove an intention to get the best out of a marriage without incurring any obligation to do more than be there so long as it suits a purpose. Certainly, a pre-nuptial agreement may serve many purposes consistent with love and affection in life. It may answer obligations incurred prior to present intentions, obligations to children, parents, relatives, friends and those not yet born. It may answer obligations owed for prior help and affection. It may serve to keep matters right and fair, for innumerable reasons arising antecedent to the marriage. Indeed, it may prove a fidelity in persons to prior obligations that makes their intended promises the more secure. Moreover, society has an interest in protecting the right of its citizens to contract, and in seeing the reduction, in the event of a dissolution of the marriage, of the necessity of lengthy, complicated, and costly litigation. Thus, while I acknowledge the longstanding rule of law that pre-nuptial agreements are presumptively valid and binding upon the parties, I am unwilling to go as far as the majority to protect the right to contract at the expense of the institution of marriage. Were a contract of marriage, the most intimate relationship between two people, not the surrender of freedom, an offering of self in love, sacrifice, hope for better or for worse, the begetting of children and the offer of effort, labor, precious time and care for the safety and prosperity of their union, then the majority would find me among them.

In my view, one seeking to avoid the operation of an executed pre-nuptial agreement must first establish, by clear and convincing evidence, that a full and fair disclosure of the worth of the intended spouse was not made at the time of the execution of the agreement. This Court has recognized that full and fair disclosure is needed because, at the time of the execution of a pre-nuptial agreement, the parties do not stand in the usual arm's length posture attendant to most other types of contractual undertakings, but "stand in a relation of mutual confidence and trust that calls for the highest degree of good faith . . . ." *See Gelb Estate, 425 Pa. 117, 123, 228 A.2d 367, 369 (1967)*. *See also In Re Estate of Kester, 486 Pa. 349, 405 A.2d 1244 (1979)*. In addition to a full and fair disclosure of the general financial pictures of the parties, I would find a pre-nuptial agreement voidable where it is established that the parties were not aware, at the time of contracting, of existing statutory rights which they were relinquishing upon the signing of the agreement. *Estate of Geyer, supra.* It is here, with a finding of full and fair disclosure, that the majority would end its analysis of the validity of a pre-nuptial agreement. I would not. An analysis of the fairness and equity of a pre-nuptial agreement has long been an important part of the law of this state. *Hillegass Estate, 431 Pa. 144, 244 A.2d 672 (1968)*. I am not willing to depart from this history, which would continue to serve our public policy.

At the time of dissolution of the marriage, a spouse should be able to avoid the operation of a pre-nuptial agreement upon clear and convincing

proof that, despite the existence of full and fair disclosure at the time of the execution of the agreement, the agreement is nevertheless so inequitable and unfair that it should not be enforced in a court of this state. Although the spouse attempting to avoid the operation of the agreement will admittedly have a difficult burden given the standard of proof, and the fact of full and fair disclosure, we must not close our courts to relief where to enforce an agreement will result in unfairness and inequity. The majority holds to the view, without waiver, that parties, having contracted with full and fair disclosure, should be made to suffer the consequences of their bargains. In so holding, the majority has given no weight to the other side of the scales: the state's paramount interest in the preservation of marriage and the family relationship, and the protection of parties to a marriage who may be rendered wards of the state, unable to provide for their own reasonable needs. Our sister states have found such treatment too short a shrift for so fundamental a unit of society. [1]

> 1 *See Marschall v. Marschall, 195 N.J.Super. 16, 477 A.2d 833 (1984)*; *Newman v. Newman, 653 P.2d 728 (Col.Sup.Ct.1982)*; *Osborne v. Osborne, 384 Mass. 591, 428 N.E.2d 810 (1981)*; *Scherer v. Scherer, 249 Ga. 635, 292 S.E.2d 662 (1982)*; *Gooch v. Gooch, 10 Ark.App. 432, 664 S.W.2d 900 (1984)*.

Thus, I believe that the door should remain open for a spouse to avoid the application of a pre-nuptial agreement where clear and convincing proof establishes that the result will be inequity and unfairness under the circumstances of the particular case and the public policy of this state. Some pre-nuptial agreements will be unfair and inequitable from their beginning. In *Hillegass Estate, supra.*, we recognized that reasonableness at the inception of the agreement necessarily depends upon the totality of all the facts and circumstances existing at the time of the execution of the agreement, including: (a) the financial situation of each spouse; (b) the age of the parties; (c) the number of children each has; (d) the intelligence of the parties; (e) the standard of living each spouse had before marriage and could reasonably expect to have during marriage. *Id., 431 Pa. at 150, 244 A.2d at 676*. The plurality in *Estate of Geyer, supra.*, determined that the pre-nuptial agreement at issue there was so inequitable at its inception as to render it unenforceable against the wife upon her husband's death, given the fact that the wife, according to the agreement, was to receive, in essence, only the marital home which she could not possibly afford to keep or to maintain. "Appellant's plight was predictable, especially to decedent who, at the time of the antenuptial agreement, was aware of the costs of running his home. Nevertheless, no provision for the home's maintenance costs were included within the agreement. The net result of this was that the conveyance of the house to appellant was doomed to fail from the beginning . . . . We can hardly say such a one-sided bargain represents reasonable provision under the *Hillegass* standard." *Id. 516 Pa. at 504-505, 533 A.2d at 429*.

I would emphasize that there are circumstances at the inception of marriage that render a pre-nuptial agreement not only fair and equitable, but a knowing and acceptable reservation of ownership. Such are usually the circumstances surrounding a second marriage. One coming to a second marriage may reserve property created in a previous union, to satisfy what they think a proper and just disposition of that property should be, for children of that prior marriage, or other relations or obligations they feel it a duty to observe. Likewise, one of wealth or property entering a marriage need stake no more on its success than what is fair and reasonable independent of the value of their wealth. That is to say that one's previous wealth is not in itself a criterion of fairness. One is not required to give all they brought for an agreement to be reasonable. So too may one properly reserve things given them as heirlooms, or things of peculiar meaning expressly stated, so long as their value is not increased or preserved as a result of efforts or sacrifice by the union.

It is also apparent that, although a pre-nuptial agreement is quite valid when drafted, the passage of time accompanied by the intervening events of a marriage, may render the terms of the agreement completely unfair and inequitable. While parties to a pre-nuptial agreement may indeed foresee, generally, the events which may come to pass during their marriage, one spouse should not be made to suffer for failing to foresee all of the surrounding circumstances which may attend the dissolution of

the marriage. Although it should not be the role of the courts to void pre-nuptial agreements merely because one spouse may receive a better result in an action under the Divorce Code to recover alimony or equitable distribution, it should be the role of the courts to guard against the enforcement of pre-nuptial agreements where such enforcement will bring about only inequity and hardship. It borders on cruelty to accept that after years of living together, yielding their separate opportunities in life to each other, that two individuals emerge the same as the day they began their marriage.

At the time of the dissolution of marriage, what are the circumstances which would serve to invalidate a pre-nuptial agreement? This is a question that should only be answered on a case-by-case basis. However, it is not unrealistic to imagine that in a given situation, one spouse, although trained in the workforce at the time of marriage, may, over many years, have become economically dependent upon the other spouse. In reliance upon the permanence of marriage and in order to provide a stable home for a family, a spouse may choose, even at the suggestion of the other spouse, not to work during the marriage. As a result, at the point of dissolution of the marriage, the spouse's employability has diminished to such an extent that to enforce the support provisions of the pre-nuptial agreement will cause the spouse to become a public charge, or will provide a standard of living far below that which was enjoyed before and during marriage. In such a situation, a court may properly decide to render void all or some of the provisions of the pre-nuptial agreement.

I can likewise conceive of a situation where, after a long marriage, the value of property may have increased through the direct efforts of the spouse who agreed not to claim it upon divorce or death. In such a situation, the court should be able to decide whether it is against the public policy of the state, and thus inequitable and unfair, for a spouse to be precluded from receiving that increase in the value of property which he or she had, at least in part, directly induced. I marvel at the majority's apparent willingness to enforce a pre-nuptial agreement in the interest of freedom to contract at any cost, even where unforeseen and untoward illness has rendered one spouse unable, despite his own best efforts, to provide reasonable support for himself. I would further recognize that a spouse should be given the opportunity to prove, through clear and convincing evidence, that the amount of time and energy necessary for that spouse to shelter and care for the children of the marriage has rendered the terms of a pre-nuptial agreement inequitable, and unjust and thus, avoidable.

The majority is concerned that parties will routinely challenge the validity of their pre-nuptial agreements. Given the paramount importance of marriage and family in our society, and the serious consequences that may accompany the dissolution of a marriage, we should not choose to close the doors of our courts merely to gain a measure of judicial economy. Further, although I would continue to allow parties to challenge the validity of pre-nuptial agreements, I would not alter the burden of proof which has been required to sustain such a challenge.

Turning to the facts of the present case, the Master and the trial court agreed that full and fair disclosure had been made as to the value of Dr. Simeone's antique cars. Thus, I agree with the majority that the appellant, Catherine Simeone, cannot seek to avoid the operation of the pre-nuptial agreement on the grounds that full and fair disclosure of financial status was lacking at the time the agreement was executed. However, at issue in the present appeal is the provision of the pre-nuptial agreement which bars appellant's claim for alimony *pendente lite*. In 1975, the following statutory provision was applicable:

> In the case of divorce from the bonds of matrimony or bed and board, the court may, upon petition, in proper cases, allow a spouse reasonable alimony pendente lite and reasonable counsel fees and expenses.

The Divorce Law, Act of May 2, 1929, P.L. 1237, § 46, as amended, June 27, 1974, P.L. 403, No. 139, § 1; 23 P.S. § 46. This statute was repealed in 1980 with the enactment of the new Divorce Code:

> The court may, upon petition, in proper cases, allow a spouse reasonable alimony pendente lite, spousal

> support and reasonable counsel fees and expenses . . . .

23 P.S. § 502.

I would remand this matter to provide the appellant with an opportunity to challenge the validity of the pre-nuptial agreement on two grounds. Although alimony *pendente lite* was mentioned in the pre-nuptial agreement, [2] appellant should have an opportunity to establish that the mere recitation of this legal term did not advise her of the general nature of the statutory right she was relinquishing with the signing of the agreement. [3] Appellant must establish this lack of full and fair disclosure of her statutory rights with clear and convincing evidence. Further, I would allow appellant the opportunity, with the same standard of proof, to challenge the validity of the pre-nuptial agreement's support provisions, relating to alimony *pendente lite* and alimony, for undue unfairness and inequity. I would express no opinion, however, on the appropriate final resolution of these issues. An appellate court should defer to the trial court in these determinations, and the trial court order should not be reversed absent an error of law or an abuse of discretion.

2 The agreement stated in relevant part: "Frederick's obligation to make payments to Catherine for her support and maintenance or as alimony (including, without limitation, alimony *pendente lite*) shall be limited to and shall not exceed the $ 200 per week as above provided, and Catherine does hereby acknowledge that the foregoing provision for the payment of $ 200 per week is fair, just and reasonable."

3 This would not apply to any claim for alimony, as the statutory right to alimony did not arise until the enactment of the Divorce Code of 1980.

ACKNOWLEDGEMENT

I, _____, have read the attached Power of Attorney and am the person identified as the Agent for the principal. I hereby acknowledge that in the absence of a specific provision to the contrary in the Power of Attorney or in 20 Pa.C.S. when I act as Agent:

1. I shall exercise the powers for the benefit of the principal.
2. I shall keep the assets of the principal separate from my assets.
3. I shall exercise reasonable caution and prudence.
4. I shall keep a full and accurate record of all actions, receipts and disbursements on behalf of the principal.

Date:_____ _____

IRREVOCABLE LIMITED POWER OF ATTORNEY
OF _____

NOTICE

THE PURPOSE OF THIS POWER OF ATTORNEY IS TO GIVE THE PERSON YOU DESIGNATE (YOUR "AGENT") BROAD POWERS TO HANDLE YOUR PROPERTY, WHICH MAY INCLUDE POWERS TO SELL OR OTHERWISE DISPOSE OF ANY REAL OR PERSONAL PROPERTY WITHOUT ADVANCE NOTICE TO YOU OR APPROVAL BY YOU.

THIS POWER OF ATTORNEY DOES NOT IMPOSE A DUTY ON YOUR AGENT TO EXERCISE GRANTED POWERS, BUT WHEN POWERS ARE EXERCISED, YOUR AGENT MUST USE DUE CARE TO ACT FOR YOUR BENEFIT AND IN ACCORDANCE WITH THIS POWER OF ATTORNEY.

YOUR AGENT MAY EXERCISE THE POWERS GIVEN HERE THROUGHOUT YOUR LIFETIME, EVEN AFTER YOU BECOME INCAPACITATED, UNLESS YOU EXPRESSLY LIMIT THE DURATION OF THESE POWERS OR YOU REVOKE THESE POWERS, OR A COURT ACTING ON YOUR BEHALF TERMINATES YOUR AGENT'S AUTHORITY.

YOUR AGENT MUST KEEP YOUR FUNDS SEPARATE FROM YOUR AGENT'S FUNDS.

A COURT CAN TAKE AWAY THE POWERS OF YOUR AGENT IF IT FINDS YOUR AGENT IS NOT ACTING PROPERLY.

THE POWERS AND DUTIES OF AN AGENT UNDER A POWER OF ATTORNEY ARE EXPLAINED MORE FULLY IN 20 Pa.C.S. CH. 56.

IF THERE IS ANYTHING ABOUT THIS FORM THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER OF YOUR OWN CHOOSING TO EXPLAIN IT TO YOU.

I HAVE READ OR HAD EXPLAINED TO ME THIS NOTICE AND I UNDERSTAND ITS CONTENT.

_____ _____

Date

IRREVOCABLE LIMITED POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS that I, _____, of _____, in accordance with a certain Prenuptial Agreement between me and _____ of even date herewith, hereby irrevocably constitute and appoint said _____, of _____, as my TRUE AND LAWFUL ATTORNEY, for me and in my name and on my behalf, for the limited purpose of executing, acknowledging and delivering any and all consents, waivers, releases or any other instruments necessary to bar, relinquish or extinguish any rights, interests or claims which I might acquire by reason of _____'s participation in any retirement plan intended to satisfy the requirements of Section 401(a) of the Internal Revenue Code of 1986, as the same has been and may hereafter be amended (the "Code"), including without limitation:

(1) The right to a survivor annuity as part of a "qualified joint and survivor annuity" as such term is defined in Section 417(b) of the Code;

(2) The right to a "qualified pre-retirement survivor annuity" as such term is defined in Section 417(c) of the Code;

(3) The right to be designated the beneficiary of any other form of payment of benefits under any such plan, if my consent as spouse is necessary to waive such right in favor of an alternate beneficiary; and

(4) The right to any benefit which could otherwise be awarded pursuant to a "qualified domestic relations order" as such term is defined in Section 414(p) of the Code.

This Irrevocable Limited Power of Attorney shall not be affected by my future disability or incapacity.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this _____ day of _____, 201_.

WITNESS:

_____ _____ (SEAL)

ACKNOWLEDGMENT

COMMONWEALTH OF PENNSYLVANIA :
: SS.
COUNTY OF :

On this, the _____ of _____, 201_, before me, the undersigned officer, personally appeared _____, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument, and acknowledged that she/he executed the same for the purposes therein set forth.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

_____
Notary Public

My Commission Expires:

WAIVER OF FURTHER DISCLOSURE

I, _____, having had the opportunity to review, in advance of the execution thereof, the Prenuptial Agreement and all disclosure referenced therein to which Agreement I hereafter intend to affix my signature evidencing my agreement thereto, hereby state as follows:

I am executing this Waiver voluntarily, of my own free will, and without pressure or duress, and am doing so before executing the aforesaid Agreement.

I hereby voluntarily and expressly waive any right to disclosure of the current property or financial obligations of _____ and to any other disclosure that may now or hereafter be deemed to have been required in connection with the Prenuptial Agreement beyond the disclosure provided in the aforesaid Prenuptial Agreement.

With the intent to be legally bound hereby, I hereby set my hand and seal this ____ day of _____, 201_.

WITNESS:

_____ _____

COMMONWEALTH OF PENNSYLVANIA :
: ss.
COUNTY OF :

BEFORE ME, the undersigned authority, on this day personally appeared _____, known to me to be the person who executed the foregoing instrument, and who acknowledged to me that he/she executed same for the purposes and considerations therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this _____ day of _____, 201_.

_____
Notary Public

My Commission Expires:

Chapter Three

Divorce

Darren J. Holst, Esq.
Howett Kissinger & Holst PC
Harrisburg

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I. INTRODUCTION

A. The Law Prior to 1980

Prior to the enactment of the Divorce Code of 1980, all grounds for obtaining a divorce required one spouse to prove that the other was at fault and that he or she was the innocent and injured party. As prior law did not recognize the reality that some marriages fail through no fault of either party, in order to obtain a divorce in such situations one party had to allege fault and the other simply would not contest the divorce.

B. The Divorce Code of 1980

1. The Divorce Code of 1980 brought divorce reform to Pennsylvania by providing:

   a. No-fault grounds for divorce in addition to fault grounds;

   b. Post-divorce alimony; and

   c. Equitable distribution of all property acquired during the marriage without regard to title.

2. The Divorce Code, now at 23 Pa. C.S.A. §§3101 et. seq., became effective on July 1, 1980, and was amended on February 12, 1988. The statute was codified and incorporated into the Pennsylvania Consolidated Statutes by Act 206 of 1990, effective March 19, 1991, which repealed the Divorce Code as enacted in 1980 and re-enacted it as Part IV of the Domestic Relations Code.

3. The provisions of the Divorce Code address annulment as well as divorce.

C. The Divorce Code Amendments of 2005

The Divorce Code of 1980 was again amended on January 28, 2005. The 2005 amendments provided significant changes or additions to the Divorce Code, including, but not limited to, the addition of a section addressing premarital agreements (§3106 of the Divorce Code), which is modeled somewhat after the Uniform Premarital Agreement Act; an overhaul of §3323 dealing with bifurcation; and changing the law with respect to valuing defined benefit retirement plans reversing established case law. See Berrington v. Berrington, 534 Pa. 393, 633 A.2d 589 (1993). The new amendments codify the methodology employed in Holland v. Holland, 403 Pa. Super. 116, 581 A.2d 58 (1991) and the result reached by three of the justices in Gordon v. Gordon, 545 Pa. 391, 681 A.2d 732 (1996).

D. Rules

In addition to the statutory provisions of the Divorce Code, practitioners also must be familiar with the Pennsylvania Rules of Civil Procedure at 1920.1 et. seq. relating to actions for divorce and annulment, as well as the local rules in the county in which they practice. There tends to be slight nuances in procedure from county to county.

E. Change in Marriage Laws

The U.S. Supreme Court struck down provisions of the federal Defense of Marriage Act ("DOMA") defining a marriage as between only a man and a woman. U.S. v. Windsor, 570 U.S. 744, 133 S.Ct. 2675 (2013). Pennsylvania's Marriage Laws (23 Pa.C.S.A. Sections 1102 and 1704) that prevented same sex marriages within the Commonwealth and recognizing same sex marriages from sister states deemed unconstitutional and a violation of equal protection and due process under the Fourteenth Amendment of the US Consititution. Whitewood v. Wolf, 992 F.Supp.2d 410 (M.D. Pa. 2014). The U.S. Supreme Court invalidated same sex marriage restrictions altogether in 2015. See Obergefell v. Hodges, 576 U.S. __, 135 S.Ct. 2584 (2015). As such, Section 1704 of the Domestic Relations Code, defining marriage as between a man and a woman, is deemed invalid. Likewise, the definition of "marriage" in Section 1101 of the Domestic Relations Code is deemed invalid. County employees cannot deny marriage licenses to same sex partners. Dep't. of Health v. Hanes, 78 A.3d 676 (Pa. Cmwlth. 2013). In light of the changes to the marriage laws, same sex couples can now avail themselves of the provisions of the Divorce Code. A civil union between same sex couples contracted in another state will be deemed the "functional equivalent" of a marriage for purposes of divorce. Neyman v. Buckley, 153 A.3d 1010 (Pa. Super. 2016).

II. GROUNDS FOR DIVORCE

While the Divorce Code provides that the courts have authority to determine issues related to divorce, such as equitable distribution and alimony, the establishment of grounds for divorce is a prerequisite for jurisdiction over ancillary matters. Provisions governing the grounds for divorce and annulment are set forth in chapter 33 of the Divorce Code. As a civil action, there is no right to counsel in a divorce action. Rich v. Acrivos, 815 A.2d 1106 (Pa. Super. 2003).

A. Fault Grounds - §330l(a)

A divorce on the basis of fault may be granted upon the establishment that the conduct of one of the parties during the marriage falls into one of six categories enumerated below and the person seeking divorce is "innocent and injured":

1. Desertion — Pursuant to §3301(a)(1), a divorce may be granted where there is "willful and malicious desertion and absence from the habitation of the innocent and injured spouse, without reasonable cause, for a period of one or more years." Absence is not willful or malicious if the remaining spouse consents to separation. Bench v. Bench, 199 Pa. Super. 405, 1 85 A.2d 644 (1962). Moreover, a party can have reasonable cause to leave if the spouse remaining in the home is guilty of conduct that would in itself provide grounds for divorce. Herwig v. Herwig, 279 Pa. Super. 65, 420 A.2d 746 (1980). Legal cause for leaving will overcome a desertion claim. S.M.C. v. W.P.C., 44 A.3d 1181 (Pa. Super. 2012). Conduct that results in a separation pursuant to a protection from abuse-order may constitute desertion although the separation itself was voluntary. See: In re Estate of Cochran, 738 A.2d 1029 (Pa. Super. 1999). The party who leaves has the burden of showing reasonable cause. Mott v. Mott 308 Pa. Super. 1,453 A.2d 1038 (1982). In such cases, the departing spouse may claim a "constructive desertion" as ground for divorce, but only if there was sufficient cause to leave, based upon a justifiable fear of immediate bodily harm. Valerio v. Valeria, 298 Pa. Super. 262, 444 A.2d 1166 (1982). "Constructive Desertion" also may arise where the spouse who left attempts to reconcile, but the

attempt is unreasonably refused by the spouse who remained in the home. At that point, the refusal to reconcile constitutes desertion. Decker v. Decker, 192 Pa. Super. 234, 160 A.2d 242 (1960). See also Commonwealth ex rel Lutz v. Lutz, 298 Pa. Super. 473, 444 A.2d 1281 (1982)("good faith and sincerity of an offer of reconciliation are often best measured by the parties' conduct before and after the hearing.").

2. Adultery — While direct proof of adultery is not required to establish grounds for divorce pursuant to §3301(a) (2), there must be proof by clear and convincing evidence of "opportunity and inclination" to have extramarital sexual relations prior to final separation. Roach v. Roach, 337 Pa. Super. 440, 487 A.2d 27 (1985). However, it may be possible to establish that post-separation adultery relates back to a time before separation if there is evidence of extramarital sex after separation and it can be shown that prior to separation there was a close relationship between the allegedly adulterous spouse and the person with whom he or she had a sexual relationship after separation. Bonawitz v. Bonawitz, 246 Pa. Super. 257, 369 A.2d 1310 (1976). In Hoffman v. Hoffman, 762 A.2d 766 (Pa. Super. 2000), husband claimed wife's alleged adultery as a ground for a fault divorce. However, husband's condonation of wife's infidelity was a defense to the action. This was the case even though the husband refused to withdraw his custody action and also limited wife's access to money. Husband's condonation occurred when he accepted wife back into the marital residence.

3. Cruel and Barbarous Treatment — Establishing grounds for divorce on the basis of cruel and barbarous treatment under §3301 (a)(3) of the Divorce Code requires a showing that the spouse who is alleged to be at fault by "cruel and barbarous treatment, endangered the life or health of the innocent and injured spouse". The behavior complained of must entail a merciless and savage disposition leading to conduct amounting to actual personal violence, creating a reasonable apprehension of violence and making future cohabitation physically dangerous. Gray v. Gray, 220 Pa. Super. 143, 286 A.2d 684 (1971). A single act of sufficient severity and atrocity may constitute grounds for divorce. Id.

4. Bigamy — A divorce may be obtained pursuant to §3301(a)(4) where one spouse knowingly entered into the marriage while a former marriage was still in existence and the moving spouse was unaware of the continued subsistence of the marriage. In Pennsylvania, bigamy is a crime over which the Court of Common Pleas has subject matter jurisdiction so long as the second, bigamous marriage occurs within the state. Commonwealth v. Seiders, 11 A.3d 495 (Pa. Super. 2010).

5. Incarceration — Grounds for divorce exist pursuant to §330l(a)(5) where one party is convicted of a crime and sentenced to a term of two or more years imprisonment. Arguably, the full sentence need not be served to establish grounds for divorce, the basis being the sentencing itself.

6. Indignities — Section 3301(a)(6) retains the most frequently used basis for divorce prior to the availability of no-fault grounds and permits the entry of a divorce decree where one spouse offered such indignities to the innocent and injured spouse so as to make that person's "condition intolerable and life burdensome." Hunsinger v. Hunsinger, 381 Pa. Super. 453, 554 A.2d 89 (1989). In other words, there are two requirements for divorce based on indignities: existence of indignities and direction of them to an innocent and injured spouse. Schuback v.

Schuback, 412 Pa. Super. 233, 603 A.2d 194 (1992). The spouse alleging indignities must prove that the course of conduct was humiliating, degrading and inconsistent with the innocent spouse's position. Jayne v. Jayne, 663 A.2d 169 (Pa. Super. 1995). However, it has been held that husband's alleged misconduct after separating from wife could not be considered as evidence in determining the sufficiency of wife's complaint for divorce on the ground of indignities. Id. All sorts of conduct have been determined to constitute indignities. For example, where actual adultery cannot be proven, an allegation of infidelity based on prior conduct during the marriage may constitute an indignity. Shrock v. Shrock, 241 Pa. Super. 53, 359 A.2d 435 (1976). In addition, indignities have been described as including vulgarity, abusive language, unmerited reproach, studied neglect, intentional incivility, manifest disdain and malignant ridicule. See, e.g. Hunsinger, supra; Beaver v. Beaver, 313 Pa. Super. 512, 460 A.2d 305 (1983). No general rule can be formulated as to the exact nature of conduct that will suffice to establish "indignities to the person" in a case. The conclusion depends upon the circumstances of the particular situation. Rorabaugh v. Rorabaugh, 302 Pa. Super. 1, 448 A.2d 64 (1982). However, in order to have grounds for divorce on the basis of indignities there must be a course of treatment and an isolated incident is not sufficient. Id. The moving party also must show that he or she is innocent and injured. While that does not mean totally without fault, it does require that the moving spouse did not provoke the indignities unless the retaliation was excessive or the fault of the moving spouse occurred after grounds for divorce accrued. Schuback v. Schuback, 412 Pa. Super. 233, 603 A.2d 194 (1992); Beaver, supra. If both parties are almost equally at fault, a divorce based on indignities will not be granted.

B. No-Fault Grounds for Divorce

Section 3301(c) and 3301(d) of the Divorce Code provide the statutory authority for no-fault divorces.

1. Section 3301(c)(1) — A divorce by mutual consent of the parties may be obtained where both parties execute and file affidavits consenting to the entry of a divorce decree and the complaint alleges irretrievable breakdown of the marriage. Pursuant to Pa. R.C.P. l920.42(b)(l), effective January 1, 1996, the affidavit of consent cannot be filed until ninety (90) days have elapsed from both filing and service of the complaint. The ninety (90) day waiting period under Section 3301(c) runs from the date of filing of the complaint as that is "commencement" date; per Rule 1920.42(b)(1), affidavits of consent can be filed on the ninetieth (90th) day after service of the complaint. Reece v. Reece, 66 A.3d 709 (Pa. Super. 2013).

a. Irretrievable breakdown is defined at §3103 of the Divorce Code as "estrangement due to marital difficulties with no reasonable prospect of reconciliation."

b. The form of the affidavit is prescribed by Pa. R.C.P. 1920.72(b). The affidavit cannot be signed prior to the expiration of the ninety (90) day period after filing and service of the complaint and, if it is not filed within thirty (30) days of execution, it expires. Pa. R.C.P. 1920.42(b). Once filed, an affidavit of consent may be withdrawn only with leave of court. Pa. R.C.P. 1920.42(c). This is the result of a 1995 rule change. However, the 1995 Explanatory Comment states: "The committee notes that the law is unsettled as to whether a court has the authority to refuse leave to withdraw an affidavit of consent." See Rule 1920.42 for the requirements of the affidavit.

2. Section 3301(d) — If one party does not consent to the divorce, a unilateral no-fault divorce based on the separation of the parties can be obtained where the complaint alleges irretrievable breakdown and the parties have lived separate and apart for the statutorily required period of time. The Divorce Code originally required a separation of three (3) years, but that period was reduced to two (2) years by the 1988 amendments for final separations commencing after February 12, 1988, the effective date of the amendments. In 2016, the Divorce Code was amended once again to reduce the required separation period to one year for separations occurring after December 5, 2016, the effective date of the amendment. Thus, where one party wants a divorce and the other does not, the party seeking to dissolve the marriage can proceed on fault grounds, if such exist and have been pleaded, or wait until the statutory period of separation has expired and seek a unilateral no-fault divorce. Section 3301(d) thus gives a party whose conduct may have been responsible for the breakup of the marriage the means to dissolve the union. It has recently been held by the Superior Court that the trial court could grant a divorce upon no-fault ground of irretrievable breakdown even though husband desired to proceed on the fault theories of adultery and desertion. Rich v. Acrivos, 815 A.2d 1106 (Pa. Super. 2003).

a. In a §3301(d) divorce action, the moving party files an affidavit in conformity with Pa. R.C.P. 1920.72(d) asserting irretrievable breakdown and the requisite separation period. The allegations in the complaint are deemed denied unless admitted by an answer; however the allegations of a §3301(d) affidavit are deemed admitted unless denied by a counter affidavit. Pa. R.C.P. 1920.14(b). The form of the counter affidavit must be in conformity with Pa. R.C.P. 1920.72(e). See Rule 1920.42 for the requirements of the affidavit.

3. Section 3301(c)(2) – Subsection (c)(2) has been added to provide that, where a party has been convicted of a personal injury crime against the other party, that party's consent to divorce will be presumed. In Section 3103 "personal injury crime" is defined to include a misdemeanor or felony of the enumerated offenses. It further includes criminal attempt, solicitation, or conspiracy to commit one of the enumerated offenses. "Convicted" is defined as encompassing having been found guilty, having entered a plea of nolo contendere, and having been accepted into Accelerated Rehabilitative Disposition. See Rule 1920.42 for the procedure for obtaining a no-fault divorce under Section 3301(c)(2).

b. Separation

(1) The definition of "separate and apart" is found at Section 3103of the Divorce Code, and the 2005 amendments to the Divorce Code changed the definition to establish a rebuttable presumption that parties begin living separate and apart no later than the date a divorce complaint is served. As the presumption is rebuttal, the burden is on the moving party to show either an earlier date of separation or a later date of separation utilizing factors set forth in established case law.

(2) Parties can be separated for purposes of §3301(d) even though they reside in the same household. The 1988 amendments to the Divorce Code at §104 (now §3103) define separate and apart as "complete cessation of any and all cohabitation, whether living in the same residence or not." This codified prior case law. See Biler v. Biler, 353 Pa. Super. 49, 508 A.2d 1261 (1986); Flynn v. Flynn, 341 Pa. Super. 76, 491 A.2d 156 (1985).

(3) Indicia of separation include, but are not limited to, cessation of the sexual relationship, separation of financial matters and representation to the community that the parties have separated.

(4) Physical separation alone is not sufficient. To commence the statutory period of separation for a §3301(d) divorce, there must be an intention by one party to dissolve the marriage, and that intention must be clearly manifested and communicated to the other. Sinha v. Sinha, 515 Pa. 14, 526 A.2d 765 (1987). See, also Wellner v. Wellner, 699 A.2d 1278 (Pa. Super. 1997) (finding no error in trial court's determination that separation date occurred 13 years after the parties ceased living together.)

(5) Occasional sexual encounters between the parties generally does not toll the period of separation. Thomas v. Thomas, 335 Pa. Super. 41, 483 A.2d 945 (1984).

(6) A determination as to whether or not the parties have been separated for the requisite period must be based on the facts and circumstances of each case and the parties cannot elect to use a separation date not supported by the facts. Britton v. Britton, 400 Pa. Super. 43, 582 A.2d 1335 (1990).

(7) Determining a date of final separation is important not only to the divorce itself, but to property issues as well because it marks the period at which time property acquired by either spouse ceases to be presumptively marital.

C. Grounds for Divorce on the Basis of Insanity

There is one basis for divorce under the Divorce Code of 1980 that does not fall into the category of other fault divorce under §3301(a), and thus does not require one spouse to be innocent and injured. Furthermore, it does not fall into the category of no-fault divorce under §§3301(c) or (d). Pursuant to §3301(b), it is lawful for the court to grant a divorce where a serious mental disorder has resulted in the confinement of a spouse for at least eighteen (18) months (reduced from three (3) years by the 1988 amendments) prior to filing the complaint and there is no reasonable prospect of discharge during the eighteen (18) months subsequent to the filing of the complaint. Pre-Divorce Code, insanity was a defense to divorce if such could be shown to be the cause of the conduct which otherwise would provide grounds for divorce. The court has jurisdiction under §3308 to receive a complaint for divorce or annulment against a defendant who is insane or suffers from a serious mental disorder.

III. ANNULMENT

A. As divorce is the manner by which valid marriages are terminated, annulment is the procedure by which a purported marriage can be declared to be invalid. Either party may bring an annulment action, even the party whose conduct may provide the basis for an annulment. §3303(a). The Divorce Code distinguishes between two types of invalid marriages: those that are void from their inception and those which have curable impediment**s,** but are valid until terminated by annulment.

B. Void Marriages

Where there has been no confirmation of the marriage by cohabitation after the

removal of the impediment, purported marriages which are invalid from their inception include those:

1. In which one person was, at the time of the purported marriage, validly married to another person. §3304(a)(l). Cann v. Cann, 429 Pa. Super. 234, 632 A.2d 322 (1993).

2. Between persons within the statutorily prohibited degrees consanguinity or affinity. §3304(a)(2). See 23 Pa. C.S.A. § 1304(e) relating to restrictions on issuance of marriage license.

3. Where either party was incapable of consenting by reason of insanity or mental disorder or otherwise lacked the capacity or intention to enter the marriage. §3304(a)(3).

4. Where either party to a purported common-law marriage was under 18 years of age. §3304(a)(4).

C. Voidable Marriages

Marriages that are valid but voidable from inception and subsist until an annulment is granted include those:

1. Involving one party under the age of 16 who did not have the express approval of the court to marry. §3305(a)(1).

2. In which either party was 16 or 17 years of age and did not have parental consent nor authority from the court to marry, and the marriage was not ratified after the party reached age 18. §3305(a)(2).

3. In which a party was intoxicated by alcohol or drugs. §3305(a)(3).

4. In which "natural and incurable" impotence was not known to the other party prior to the marriage. §3305(a)(4); Manbeck v. Manbeck, 339 Pa. Super. 493,489 A.2d 748 (1985).

5. In which there was fraud, duress, coercion or force and there was no voluntary cohabitation after knowledge of the fraud or release from the effects of fraud, duress, coercion or force. §3305(a)(5).

D. Possible Actions

1. Petition for declaratory judgment as to the existence or non-existence of the marriage pursuant to §3306.

2. Complaint for annulment pursuant to §3303. However, where an annulment is sought pursuant to §§3305(a)(2) or (3), the annulment action must be commenced within sixty (60) days after the marriage ceremony.

3. Pursuant to §3304(b), the invalidity of a void marriage may be declared in any collateral proceeding.

4. The validity of a voidable marriage is not subject to attack if the parties subsequently confirm it or if either party has died. §3305(b).

E. Defenses to Annulment

1. Ratification by cohabitation after the impediment is removed. Dowd v. Dowd, 275 Pa. Super. 472, 418 A.2d 1387 (1980).

2. Estoppel. Diamond v. Diamond, 501 Pa. 418, 461 A.2d 1227 (1983) (attorney who asserted his current marriage was invalid and purported wife was not entitled to relief under the Divorce Code because his divorce from his prior wife, which he himself obtained, was invalid, was estopped from setting aside the second marriage). See also, Lowenschuss v. Lowenschuss, 396 Pa. Super. 531, 579 A.2d 377, app. denied, 527 Pa. 611, 590 A.2d 297 (1990).

F. In annulment actions, the Divorce Code authorizes the court to determine rights such as alimony, property division and interim relief. However, if a purported marriage is determined to have been void from its inception and thus never in existence, then no rights under the Code should be available. Arguably, the statute's inclusion of annulment in provisions dealing with economic issues should refer only to annulment actions involving voidable marriages. The court's broad equitable powers to effectuate economic justice, however, may be invoked to alleviate the harsh result of denying relief to someone who relied upon a void marriage. See Section 3323(f) of the Divorce Code.

IV. PROCEDURE

A. Complaint

An action for divorce or annulment is initiated by a complaint that must conform to Pa. R.C.P. 1920.12. The form of a no-fault complaint under §§3301(c) or (d) shall be in the form prescribed at Pa. R.C.P. 1920.72(a). All complaints must include a Notice to Defend and Claims Rights that conforms to Pa. R.C.P. 1920.71 See Pa. R.C.P. 1920.12(c). Also, it is important for practitioners to check local rule notice requirements. Rule 1920.17 limits the circumstances under which a divorce complaint can be withdrawn.

1. Marriage

A divorce complaint must assert that the parties are married and must state the date and place of the marriage. There can be no divorce if there is not a valid marriage.

a. Generally, a marriage that was otherwise valid when and where entered will be valid elsewhere unless it violates an important public policy of another state which had the most significant relationship to the parties and the marriage at the time of the marriage. However, 23 Pa. C.S.A. §1704 (P.L. 706, No. 124, Sec. 2, 10/16/96) declares it to be the "strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman." Thus, a homosexual marriage, even if valid in the state or foreign jurisdiction where entered into, is void in Pennsylvania. Following this conclusion regarding homosexual relationships, it has been held in an adoption proceeding that a same-sex partner cannot be the "spouse" of the legal parent and therefore cannot attain benefits of the spousal exception to

relinquishment of parental rights necessary for a valid consent to adoption. In re Adoption of R.B.F., 569 Pa. 269, 803 A.2d 1195 (2002). Section 1704 has been invalidated in light of the U.S. Supreme Court's decision in Obergefell v. Hodges.

b. Common Law Marriage

As of September 17, 2003, common law marriage appeared to be abolished in Pennsylvania for unions entered into after that date. The issue of common law marriage came before the Commonwealth Court on appeal from the Workers' Compensation Appeal Board in PNC Bank v. Worker's App. Bd., 831 A.2d 1269 (Pa. Cmwlth. 2003). In that case, the applicant sought and received surviving spouse benefits on the basis of a common law marriage to an employee who died in a work-related plane crash. The Superior Court questioned the Commonwealth Court's decision in PNC Bank due to the absence of a ruling from the Supreme Court on the abolishment of the doctrine. Stackhouse v. Stackhouse, 862 A.2d 102 (Pa. Super. 2004). The legislature subsequently addressed the subject by amending Section 1103 of the Domestic Relations Code to abolish prospectively the doctrine of common law marriage for any unions entered into on or after January 1, 2005.

Prior to September 17, 2003 (and then January 1, 2005), the law in Pennsylvania recognized common law marriages although they were disfavored. The relevant case law regarding common law marriages was as follows:

(1) To form a valid common law marriage, the parties must have the capacity to consent and must exchange words of present tense with the intent to create the relationship of husband and wife. Staudenmayer v. Staudenmayer, 714 A.2d 1016 (Pa. 1998).

(2) Where there is an absence of testimony as to the words of present intent, a rebuttable presumption that a marriage exists can arise where there is evidence of constant cohabitation and a broad and general reputation in the community as husband and wife. Id. Constant cohabitation and reputation alone do not constitute a common law marriage where there was no present intent to be married. Cann v. Cann, 429 Pa. Super. 234, 632 A.2d 322 (1993); In re Estate of Kovalchick, 345 Pa. Super. 229, 498 A.2d 374 (985). However, such evidence of cohabitation and general reputation is relevant to prove the exchange of words of present tense when the testimony is contradictory. Staudenmayer, 714 A.2d at 1021.

(3) Like a statutory marriage, a common law marriage can only be entered into by two persons of opposite sexes. DeSanto v. Barnsley, 328 Pa. Super. 1 81, 476 A.2d 952 (1984). In light of the U.S. Supreme Court's decision in Obergefell v. Hodges, this is no longer true. See In re: Estate of Stephen Carter, 159 A.3d 970 (Pa. Super. 2017).

(4) Contrary to popular belief, no time period is required for the formation of a common law marriage.

2. Collusion

Section 3309 of the Divorce Code prohibits collusive actions in which the parties conspire to fabricate grounds for divorce or annulment, to commit perjury or the parties perpetrate a fraud on the court. Neither a general appearance nor negotiation of a settlement are considered collusive.

3. Grounds

A plaintiff, or a defendant by counterclaim, may assert either fault or no-fault grounds or both in the alternative. However, a party will not be permitted to proceed on fault grounds if no-fault grounds are established. §3301(e); O'Callaghan v. O'Callaghan, 389 Pa. Super. 319, 567 A.2d 308 (1989), rev'd on other grounds, 530 Pa. 176, 607 A.2d 735 (1992). In Eastman v. Eastman, 4 Bradford 185 (September 11, 2002), a petition to amend a divorce complaint was denied. In that case, the complaint alleged grounds for a no-fault divorce under 23 Pa. C.S.A. §3301 (c). Leave was sought to amend the complaint to add a count for adultery. The petition was denied because the defendant had filed a consent to the no-fault divorce. The Bradford County Court of Common Pleas noted that marital misconduct relevant to alimony considerations does not necessarily have to be alleged in the complaint.

4. Jurisdiction

a. The Pennsylvania Courts of Common Pleas have original jurisdiction over divorce and annulment actions if either of the parties has resided in the commonwealth for at least six months immediately prior to the commencement of the action. §3104. Pa. R.C.P. 1920.12 also requires that the complaint assert facts pertinent to jurisdiction.

b. Foreign Decrees — Pennsylvania courts will give full faith and credit to foreign divorce decrees. Where a foreign court does not have in personam jurisdiction over one party who is a Pennsylvania resident and the decree of that foreign court does not address economic issues attendant to divorce, the Pennsylvania courts can determine economic claims upon petition of a party. Sohmer v. Sohmer, 318 Pa. Super. 500,465 A.2d 665 (1983). The acquisition of personal jurisdiction, necessary for the adjudication of eceonomic claims, requires the defendant to have minimium contacts with Pennsylvania consistent with the Due Process Clause of the United States Constitution. Gaboury v. Gaboury, 988 A.2d 672 (Pa. Super. 2009). The 1988 amendments, in repealing original §505 and adding new §301(c), now §3104(d), give the Pennsylvania court's jurisdiction to decide any matters which could have been raised pursuant to §301(a), now §3104(a), of the Divorce Code but were not litigated in the foreign action. Such a concept is known as a "divisible divorce." Gaboury, 988 A.2d at 676.

c. Section 3323(f) of the Divorce Code gives the court broad equitable powers.

5. Venue

a. According to the original 1980 Divorce Code, venue was governed by Pa. R.C.P. 1920.2, which specified that an action was properly filed only where either plaintiff or defendant resided.

b. The venue rules at Pa. R.C.P. 1920.2 now provide that the action may be commenced in the county where either party resides, or in any county upon which the parties have agreed either in a writing attached to the complaint or by participating in the proceedings. The rule does not specify what participation is required to show consent. However, entering an appearance in order to file a preliminary objection to venue does not constitute "participation" for the purposes of Pa. R.C.P. 1920.2(a)(2)(ii). If both parties initiate actions in

different counties within ninety (90) days of one another, and one of the counties is the location of the last marital domicile and one party continues to reside there, then the court of that county shall decide which of the two actions shall proceed. 1920.6(a). If neither is the county of last marital domicile and the residence of one party, then the court in which the first action was initiated decides which shall proceed. 1920.6(a). If the second action is initiated more than ninety (90) days after the first, the second action shall be stayed until the conclusion of the first. Pa. R.C.P. 1920.6(b).

c. Objections to venue must be raised by preliminary objections filed within twenty (20) days of service of the complaint. See Pa. R.C.P. 1920.11, 1017, 1026 and 1028.

d. Practice tip: While generally a spousal support order is interlocutory and not appealable while a divorce is pending (see Leister v. Leister, 453 Pa. Super. 576, 684 A.2d 192 (1996)), if the support and divorce actions are in two different counties, a spousal support order, in certain circumstances, may be appealable See Asin v. Asin, 456 Pa. Super. 515, 690 A.2d 1229 (1997).

6. Joinder of Claims

Any other claim that may be joined with an action for divorce may be included in the complaint or raised by subsequent pleading. Pa. R.C.P. 1920.13(b). Note: According to Pa. R.C.P. 1920.11, the pleadings in an action for divorce shall be limited to those authorized by Pa. R.C.P. 1017, a bill of particulars, a petition authorized by the Divorce Code (23 P.S. §101) and an answer thereto. Certain claims must be raised before a decree is entered or they are waived. This is important to keep in mind in a bifurcated proceeding (addressed below). Claims can also be joined to the divorce action by the defendant's counterclaim under Pa. R.C.P. 1920.15. Section 3104(a)(5) of the Divorce Code affords a court jurisdiction to additionally address "[a]ny other matters pertaining to the marriage and divorce or annulment authorized by law and which fairly and expeditiously may be determined and disposed of in such action."

7. Joinder of Parties

Pa. R.C.P. 1920.34 permits the joinder of any additional person who could have joined or been joined in the action. Joinder is governed by Pa. R.C.P. 2226 et. seq. See Van Buskirk v. Van Buskirk, 527 Pa. 218, 590 A.2d 4 (1991) (former husband's parents who were alleged grantors of property on which marital residence was located were held to be indispensable parties to the equitable distribution portion of the divorce action.) At any stage of the proceeding, the court may order joinder of any additional person who could have joined, or been joined, in the action. The court may also stay the proceedings in whole or in part until the additional person is joined. The action may proceed although such person has not been made a party if jurisdiction over that party cannot be obtained, and if the person is not an indispensable party to the proceeding.

8. Service

Pursuant to Pa. R.C.P. 1920.4, the rules for service of process are governed by Pa. R.C.P. 1930.4**.** In addition to other methods of service set forth in that rule, simultaneous service by certified and regular mail is permitted. If the certified mail is refused, but the regular mail is not returned within fifteen (15) days, service may be deemed complete. If the mail is

returned as unclaimed, then service must be accomplished by other means. Pa. R.C.P. 1930.4(c)(2). The defendant may accept service by filing of an Acceptance of Service in conformity with Pa. R.C.P. 1930.4(d). Service must be complete within thirty (30) days of the filing of the complaint or within ninety (90) days if outside the Commonwealth. R.C.P. 1930.4(e) and (f).

Rule 1920.6 provides that, if, within ninety days of service of the complaint, a second action is brought in another county and one of the two counties is the county in which the last family domicile was located, and one of the parties continues to reside therein, the court of the county of last matrimonial domicile shall determine which action should be stayed and which should proceed. If neither county is the county of last matrimonial domicile, the court of county in which the first action was brought shall make the determination. If more than ninety days elapse between service of the first action and the filing of the second, the second action shall be stayed.

Rule 1920.17 provides that a plaintiff may withdraw a divorce complaint and discontinue the action by praecipe so long as no ancillary claims or counterclaims have been raised and divorce grounds haven't been established. A party can withdraw a claim of equitable distribution only if there is written consent of both parties filed with the court or if he or she files a notice of intention to withdraw and the other side does not object within twenty days of being served the notice.

9. Counseling

The Divorce Code at §3302 and Pa. R.C.P. 1920.45 provide that the court shall require no more than three (3) counseling sessions if one party requests it and the grounds for divorce are no-fault or indignities. The complaint must state that the plaintiff has been advised of the availability of counseling (Pa. R.C.P. 1920.12(8)) and, since notice to the defendant of the right to request counseling also is required, such is included with the complaint on the cover notice required by Pa. R.C.P. 1920.71. However, a party cannot unduly delay the entry of a §3301(d) divorce by requiring the court to order counseling after the statutory period of separation has run and there is no reasonable prospect of reconciliation. Liberto v. Liberto, 360 Pa. Super. 284, 520 A.2d 458 (1987). Pa. R.C.P. 1920.45 provides that in a §3301(c) divorce, counseling must be completed within ninety (90) days of filing the complaint and in a §3301(d) divorce within one hundred twenty (120) days unless the parties agree to a longer period. In Rich v. Acrivos, 815 A.2d 1106 (Pa. Super. 2003), the Superior Court concluded that the trial court was not required by statute to order marriage counseling requested by husband as a prerequisite to granting the divorce. In that case, the parties had no children. Moreover, the trial court determined that there was no chance that the parties could reconcile in the marriage. See also Weitzel v. Heiney, 17 A.3d 405 (Pa. Super. 2011).

Recent amendments to Section 3302 now provide that court may not require counseling over the objection of a party that has a valid protection from abuse order against the other party or where that party was the victim of a personal injury crime for which the other party was convicted.

10. Mediation

In April 1996, §§3901-3904 were added to the Divorce Code permitting

courts to establish mediation programs in divorce. Section 3901 further provides that a mediation program may also be established for actions brought under Chapter 53 (custody). Check local rules to determine if such a program exists in the county in which you practice.

B. Answer

1. The validity of the marriage that is the subject of an action for divorce or annulment may be challenged in the answer to the complaint. Additionally, the validity of the subject marriage may be raised in a petition for declaratory judgment under §3306.

2. All averments in a complaint for divorce or annulment are deemed denied unless they are admitted in an answer. Pa. R.C.P. 1920.14(a). Thus, no answer need be filed and no judgment may be entered by default or on the pleadings. Pa. R.C.P. 1920.41.

3. Alternate grounds for divorce may be raised by a defendant through the filing of a counterclaim. Ancillary issues may be raised in the counterclaim or subsequent petition. Pa. R.C.P. 1920.15.

4. Defenses

Some of the pre-Divorce Code common law defenses to fault divorce are retained as to the fault grounds enumerated at §3301(a) of the Code, as well as the insanity grounds at §3301(b). As to no-fault grounds, the defenses of condonation, connivance, collusion, provocation and recrimination were abolished pursuant to §3307(a). The four (4) specific statutory defenses to the ground of adultery are set forth at §3307(b) and are as follows: (1) plaintiff has been guilty of like conduct; (2) plaintiff has admitted the defendant into conjugal society or embraces after the plaintiff knew of the fact; (3) plaintiff allowed the defendant's prostitution or received hire from it; or (4) plaintiff exposed the defendant to lewd company whereby the defendant became involved in the adultery.

C. Bill of Particulars

A party against whom fault grounds are asserted may request a bill of particulars. If the bill is not filed within twenty (20) days of service of the rule, the prothonotary may enter a judgment of non-pros. Pa. R.C.P. 1920.21.

D. Discovery in Domestic Relations Matters

According to Pa. R.C.P. 1930.5(b), discovery shall be available without leave of court in accordance with Pa. R.C.P. 4001, et seq. in complex support, alimony, equitable distribution, counsel fee and expense applications and complex support proceedings.

E. Testimony by Electronic Means

Pa. R.C.P. 1930.3 states that "With the approval of the court upon good cause shown, a party or witness may be deposed or testify by telephone, audiovisual or other electronic means at a designated location in all domestic relations matters." In 2000, this rule was amended to its present form to implement 23 Pa. C.S.A. §4342 (j) that sets forth the numerous electronic

methods that may be used to take testimony in support actions. With the 2000 amendment, these methods are extended to all domestic relations proceedings.

F. Special Relief

The parties in a divorce action may be able to obtain special relief during the course of the proceedings pursuant to Pa. R.C.P. 1920.43 that provides as follows:

1. At any time after the filing of the complaint, on petition setting forth facts entitling the party to relief, the court may, upon such terms and conditions as it deems just, including the filing of security:

a. issue preliminary or special injunctions necessary to prevent the removal, disposition, alienation or encumbering of real or personal property in accordance with Rule 1531(a), (c), (d) and (e); or

b. order the seizure or attachment of real or personal property; or

c. grant other appropriate relief.

(See Section 3505 of the Divorce Code relating to injunction against disposition of property pending suit and the 2005 amendment to Section 3502(f) providing specific support for the court to award advances on equitable distribution prior to a final hearing).

2. Where property ordered attached is in the possession of a garnishee, the practice and procedure shall conform as nearly as may be to Rules 3111 to 3113 and Rules 3142 to 3145 governing attachment and execution. Judgment shall not be entered against a garnishee except by order of the court.

G. Praecipe to Transmit Record

When there are no outstanding ancillary claims, either because none were asserted or they were settled or withdrawn, the prothonotary is authorized pursuant to Pa. R.C.P. 1920.42(a) to transmit the record to a judge for the entry of a no-fault divorce decree after both parties have filed §3301(c) affidavits or one party has filed a §3301(d) affidavit which has not been opposed. No master is appointed in these circumstances. Pursuant to Pa. R.C.P. l920.42(d)(1), amended effective July 1, 1997, "no decree shall be entered by the court under §3301(c) or §3301 (d)(l)(i) of the Divorce Code unless a notice of intention to request entry of divorce decree, substantially in the form prescribed by 1920.73(a), was mailed or delivered to the attorney of record of the party against whom the decree is to be entered or, if there is no attorney of record, to the party, at least twenty days prior to the date of the filing of the praecipe to transmit the record." It has been held recently that the failure to send notice of intention to request entry of divorce decree to wife prior to entry of the decree rendered it invalid. Lazaric v. Lazaric, 818 A.2d 523 (Pa. Super. 2003)(decided February 21, 2003, Philadelphia Co.). However, a notice of intention to request entry of a divorce decree is not required prior to entry of a §3301(c) decree if the parties have executed and filed with the prothonotary a waiver of notice substantially in the form set forth in Pa. R.C.P. 1920.72(c). Pa. R.C.P. 1920.42(e)(1). Moreover, if the defendant is not represented by counsel, then notice in both §§3301(c) and (d) cases must include a counter affidavit in the form

proscribed by Pa. R.C.P. 1920.72(e). Pa. R.C.P. 1920.42(d)(2). Thus, in any no-fault divorce action where the defendant is unrepresented, notice of intent to file a praecipe to transmit the record for entry of a divorce decree must be accompanied by a counter affidavit under either §3301(c) or §3301(d). No notice of intention is necessary under §3301(d) where the court finds there has been no appearance entered on the defendant's behalf and the defendant cannot be located after diligent search. Pa. R.C.P. 1920.42(e) (2).

H. Hearing by Master

Where there are issues in dispute, either grounds for divorce or other ancillary matters, such must be heard by a court or an appointed master. The process for appointment of a master is set forth at Pa. R.C.P. 1920.51 and §3321 of the Divorce Code. The provisions of Pa. R.C.P. 1920.53-1920.55-3 address the duties of the master. If the defendant fails to appear in the action, the plaintiff must file an affidavit of non-military service with the motion for appointment of the master, before the trial, of with the plaintiff's affidavit of consent to divorce.

1. Masters may hear all issues including partial custody or visitation. Masters may not hear issues of legal, physical or shared custody or paternity. Pa. R.C.P. 1920.5 1(a)(2)(iii).

2. Local practice differs in the role of the master. In some counties, a master takes testimony and files a report and recommendation. In others, the master takes testimony and returns same to the court. Thus, in some counties exceptions are taken to the master's report after which the court hears argument on the exceptions and renders an opinion. In other counties, the court hears the matter de novo. Therefore, it is important to be familiar with the practice in the county in which the action is brought. New alternative procedures for appeal from the recommendation of the master are set forth at Pa. R.C.P. 1920.55-1 and 1920.55-2. The 1995 Explanatory Comment to Pa. R.C.P. 1920.55-I sets forth the procedure used in various counties.

3. Rule 1930.7 of the Pennsylvania Rules of Civil Procedure authorizes a court, the court's designee, or a master to hold a status conference, scheduled sua sponte of upon motion by a party, in order to review the case status and expedite the litigation. Such a conference can be scheduled at any time during the course of the proceedings; it can be conducted in person or by telephone (or any other means permitted by the rules of civil procedure); and the conference can include just counsel or counsel and the parties.

4. Rule 1920.31 (effective July 1, 2015) now provides that parties must file their most recent tax return, six months' worth of paystubs, a completed income statement, and a completed expense statement whenever a claim for alimony or counsel fees, costs and expenses is filed. A motion to appoint the master cannot be filed until after thirty (30) days from the filing of the above documents. The other party must file their documents within twenty (20) days of the other side filing the above documents.

5. Rule 1920.33 (effective July 1, 2015) now provides each side must file an inventory listing all property owned or possessed as of the date of separation. A party cannot seek the appointment of a master until after thirty (30) days from the filing of the inventory. The other side must file an inventory within twenty (20) days after the other side files their inventory. Inventories must now also include estimated values.

I. Hearing by Court

According to Rule 1920.52 (adopted March 30, 1994, effective July 1, 1994, and amended May 31, 2000, effective July 1, 2000), the order of the trial court shall state the reasons for the determination in any claim involving marital property, enforcement of marital agreements, alimony or a contested action of divorce or annulment. With regard to all orders entered under Rule 1920.52 (a), no motion for post-trial relief may be filed. According to Rule 1920.52(b), the court may set forth only general findings regarding the following claims: child or spousal support; paternity when tried by a judge; custody, partial custody, or visitation; alimony pendente lite; counsel fees, costs and expenses, an uncontested action for divorce or annulment; or protection from abuse. As with those claims discussed in Rule 1920.52(a), no post-trial motions may be filed related to the issues set forth in Rule 1920.52(b). The procedure relating to motions for reconsideration are set forth in Rule 1930.2.

J. Motions for Reconsideration

Pursuant to Rule 1930.2, no motions for post-trial relief may be filed in any domestic relations matter. However, according to Rule 1930.2(b), a party who is aggrieved by the court's decision may file a motion for reconsideration. See Pa. R.A.P. 1701(b)(3). If the trial court does not grant the motion for reconsideration within the time permitted, then the time for filing a notice of appeal will run as if the motion for reconsideration had never been filed. It is important to remember that Pa. R.A.P. 903 requires that except as otherwise provided by that rule, a notice of appeal shall be filed within thirty (30) days after the entry of the order from which the appeal is taken. The reconsidered decision shall be rendered within 120 days of the date the motion is granted. If it is not rendered within 120 days, the motion shall be deemed denied. The time for filing a notice of appeal will begin to run anew from the date of entry of the reconsidered decision or, if the court does not enter a reconsidered decision within 120 days, from the 121st day. Moreover, if the court grants the motion for reconsideration and files the same within the thirty (30) day appeal period, then it may, at any time during the applicable 120 day period, issue an order directing that additional testimony be taken. It the court so acts, then the reconsidered decision does not have to be rendered within the 120 day period. The time for filing a notice of appeal will run from the date the reconsidered decision is rendered. Pa. R.C.P. 1930.2(e).

K. Decree

1. Findings of fact or law necessary to the entry of a final unappealed decree of divorce or annulment (for example the validity or invalidity of marriage) are res judicata in subsequent actions as to all parties to the action. 23 Pa. C.S.A. §3333.

2. The Divorce Code provides that, in the absence of fraud, the validity of an unappealed decree is not subject to collateral attack by a party over whom the court had in personam jurisdiction or who received a benefit from the decree. 23 Pa.C.S.A. §3333.

3. Collateral attacks on the validity of a decree are prohibited after the death of one party to the divorce if the other was aware of the alleged invalidity at the time the decree was entered or more than two years have passed since the entry of the decree. 23 Pa.C.S.A. §333 1.

4. If a decree is alleged to have been fraudulently obtained (intrinsic fraud) or new evidence is sufficient to invalidate the decree, the remedy is a motion to open the decree, filed within the 30-day period limited by 42 Pa.C.S.A. §5505 (relating to modification of orders). §3332; Osial v. Cook, 803 A,2d 209 (Pa. Super. 2002)(held that absent fraud or extraordinary cause, the trial court's broad discretion to modify a divorce decree is lost if the court does not act within 30 days); Justice v. Justice, 417 Pa. Super. 581, 612 A.2d 1354 (1992), app. denied, 533 Pa. 635, 621 A.2d 581 (1993). See, Hassick v. Hassick, 695 A.2d 851 (Pa. Super. 1997) (wife's petition under §3332 denied where she filed 14 years after execution of property settlement agreement). See, also Stockton v. Stockton, 698 A.2d 1334 (Pa. Super. 1997) (finding trial court had no jurisdiction to modify QDRO more than 30 days after its entry where there were no allegations of fraud or extraordinary circumstances). However, there is a five-year limitation period if the basis of attack is lack of subject matter jurisdiction, extrinsic fraud or fatal defect on the record, in which case the proper remedy is a motion to vacate the decree or strike the judgment. §3332; Pastuszek v. Pastuszek, 346 Pa. Super. 416, 499 A.2d 1069 (1985); Fenstermaker v. Fenstermaker, 348 Pa. Super. 237, 502 A.2d 185 (1985).

5. A motion to open an order or decree must be filed within thirty (30) days after the entry of the decree unless there is an allegation of intrinsic fraud or new evidence attacking the validity of the decree. Where extrinsic fraud is alleged as a basis for attacking the validity of the decree, the action must be commenced within five (5) years of the entry of the final decree. See 23 Pa. C.S.A. §3332. A proceeding to open a divorce decree is equitable in nature and an appellate court will not reverse the trial court's order unless there has been a clear abuse of discretion. In Egan v. Egan, 759 A.2d 405 (Pa. Super. 2000), wife requested that the trial court open the divorce decree because she had not received notice of entry of the decree. Thus, according to wife, the trial court should have opened the decree and reinstated her exceptions because she had not had the opportunity to allege a timely request to vacate the decree under the statute. The Superior Court concluded that wife had not alleged extrinsic fraud, but instead, had asserted that there were extraordinary causes to justify the court's intervention. The Superior Court affirmed the trial court's dismissal of wife's request, holding that wife failed to present a sufficient extraordinary cause as to why the divorce decree should be opened.

6. In Melton v. Melton, 831 A.2d 646 (Pa. Super. 2003), the Pennsylvania Superior Court determined that the spouse could not assert an alimony claim *nunc pro tunc* when the petition to open the divorce decree was filed more than thirty (30) days after the decree was entered. There were no allegations in the petition to open the decree regarding fraud, lack of subject matter jurisdiction, a fatal defect on the record or extraordinary cause. Therefore, the failure to raise the alimony claim prior to the entry of the divorce decree resulted in a complete waiver of the claim.

L. Appeal

1. Under the master procedure at Pa. R.C.P. 1920.55-2, after hearing the master files a report and recommendation, and within twenty (20) days of the mailing of the report and recommendation, either party may file exceptions that are then heard and ruled upon by the court. Matters not preserved by exceptions are deemed waived. See McArdle v. McArdle, 451 Pa. Super. 465, 679 A.2d 1316 (1996) (Husband's appeal quashed where no exceptions were filed). Appeal is from the final decree. No motions for post-trial relief are permitted but the court may

entertain a motion for reconsideration. Pa.R.C.P. 1930.2. (But note Rule 1930.2(c) provision by which failure to enter a reconsidered order within 120 days acts as an automatic denial of reconsideration. Weinzetl v. Weinzetl, 452 Pa. Super. 271, 681 A.2d 813 (1996)).

2. If a court by local rule has adopted the procedure at Pa.R.C.P. 1920.55-3, then no record is made of the master's hearing and each party has twenty (20) days from the date the report and recommendation is mailed to make written demand for a hearing de novo. Again, appeal is from the final decree and no motions for post-trial relief are permitted.

3. Practitioners should be familiar with what orders are subject to appeal, and at what stage of the proceedings. For example, a spousal support order is not subject to appeal as long as the divorce is pending. A contempt finding cannot be appealed unless and until a sanction has been imposed.

4. The following issues are important in considering an appeal: 1) preservation of the issues for appeal; 2) availability of appellate remedy specific to the issue raised; and 3) possible relief vis-à-vis the standard of review.

5. Practice pointers:

a. Issues must be preserved at the time of trial. You should state with specificity your objections and make a record of all the important facts. Also, be certain that you make all the pertinent documents and exhibits part of the record.

b. Make sure that you have a final order that can be appealed, as defined by Pa. R.A.P. 341. If so, file a Notice of Appeal to protect the record. If the order is a collateral order under Pa. R.A.P., 313, it is appealable even though it is not final. Some orders that are not final are appealable as of right under Pa. R.A.P. 311 as interlocutory orders. Even if an order is not final or an interlocutory order appeable as of right or a collateral order that can be appealed, you still have the option to file an interlocutory appeal by permission according to Chapter 13 of the Pennsylvania Rules of Appellate Procedure. Usually, in divorce proceedings, there is no final appealable order until all economic issues have been resolved and a divorce decree has been entered. Campbell v. Campbell, 516 A.2d 363 (Pa. Super. 1986). Spousal support orders are not appealable prior to the entry of the divorce decree, but child support orders may be appealed before the decree is entered. Hrinkevich v. Hrinkevich, 676 A.2d 237 (Pa. Super. 1996). However, if a spousal support order is entered where no divorce action is pending, then the order may be appealed. Hasson v. Hasson, 696 A. 2d 221 (Pa. Super. 1997).

c. It is also important to be sure that issues are preserved after trial. Subsequent to filing the notice of appeal, you must file a Concise Statement of Matters Complained of on Appeal pursuant to Pa. R.A.P. 1925(b). The trial court will issue an order requiring the statement. If you do not file it in a timely manner, all issues will be waived for purposes of the appeal. Commonwealth v. Lord, 553 Pa. 415, 719 A.2d 306 (1998)(strictly applied to family law cases – Lobaugh v. Lobaugh, 753 bA.2d 834 (Pa. Super. 2000). See also Riley v. Foley, 783 A.2d 807 (Pa. Super 2001) (held that if an issue is not raised in a party's Concise Statement of Matters Complained of on Appeal, the issue is waived). Furthermore, be certain to comply with briefing requirements. Failure to do so may result in the appellate court quashing or dismissing your appeal.

Pa. R.A.P. 2101. You should read and familiarize yourself with the appellate rules for preparing briefs and reproduced records.

d. Remember that all issues concerning the appeal, such as time requirements, appellate rules and so forth, are just as important if you represent an appellee as if you are counsel for appellant.

V. BIFURCATION

A. Bifurcation allows the parties to obtain a divorce prior to resolution of ancillary claims.

B. Bifurcation is authorized pursuant to §3323(c) of the Divorce Code and Pa.R.C.P. 1920.52(d).

C. Standards

The 2005 amendments to the Divorce Code significantly changed the criteria for bifurcation. Subsection (c) of Section 3323 was deleted in its entirety by the 2005 amendments, and in its place subsection (c.1) was added. The new subsection rejects the balancing test set forth by the Superior Court in Wolk v. Wolk, 318 Pa. Super. 311, 464 A.2d 1359 (1983), and also rejects any notion of an automatic bifurcation. The new subsection allows for bifurcation upon the consent of both parties; if the parties do not consent, the court can enter a bifurcated decree only if: (1) grounds for divorce have been established (new subsection (g) provides for when divorce grounds are established); and (2) the moving party demonstrates:

(i) Compelling circumstances exist for the entry of a bifurcated decree; and

(ii) Specific economic protections are enacted to protect the other party during the pendency of the disposition of the economic matters.

The intent of new subsection (c.1) is to limit bifurcation and make it more difficult to obtain. The 2005 amendments to §3323 also modified the long standing rule that a divorce action abates upon the death of either party and property rights are then determined under Title 20, the Decedents, Estates and Fiduciaries Code. The rule remains that, if one of the partys dies after the entry of a divorce decree but before the final determination of economic issues, the deceased spouse's estate is substituted as a party and the action proceeds. With the 2005 amendments, a divorce action will proceed upon the death of either party, even in the absence of a divorce decree, if divorce grounds have been established prior to the spouse's death. Subsection (g) of §3323 provides that divorce grounds are established in one of the following ways:

1. In a divorce premised upon common law fault grounds or insanity, if the court adopts a report from the master finding that divorce ground exist or makes its own independent finding that grounds for divorce exist;

2. In an action premised upon §3301(c), both parties have filed affidavits of consent; or

3. In an action premised upon §3301(d), an affidavit has been filed and no counter-affidavit has been filed or, if a counter affidavit has been filed denying the averments of the affidavit, the court determines the marriage is irretrievably broken and that the parties have lived separate and apart for at least two years.

To incorporate the changes as to abatement, the legislature also amended §2203 of the Decedent's, Estates and Fiduciaries Code, 23 Pa. C.S.A. §2203(2005).

A trial court is not empowered to enter a posthumous divorce decree even where divorce grounds were established prior to death and the economic claims survive. Yelenic v. Clark, 922 A.2d 935 (Pa. Super. 2007); see also Taper v. Taper, 939 A.2d 969 (Pa. Super. 2007). Divorce grounds must clearly be established prior to a party's death for an action to continue and not abate; a court is barred from holding a hearing after death to determine if grounds exist. Gerow v. Gerow, 962 A.2d 1206 (Pa. Super. 2008). The Superior Court recently held that, even when divorce grounds have been established and economic claims have been raised, the plaintiff can discontinue a divorce action under Rule 229 following the death of the defendant. Tosi v. Kizis, 85 A.3d 585 (Pa. Super. 2014). In response to this decision, the Supreme Court recently promulgated Rule 1920.17 (effective July 1, 2015) providing that a plaintiff may withdraw a divorce complaint and discontinue a divorce action only if no economic claims have been raised and divorce grounds have not been established. A party may only withdraw a claim for equitable distribution if both parties consent in a writing filed with the court or twenty (20) days after filing and serving a notice of intention to withdraw the claim.

Absent consent to a birfurcation, the moving party requesting bifurcation has the burden of proving the requirements set forth in Section 3323. The trial court must find the underlying grounds present before granting a request for bifurcation. Bonawits v. Bonawits, 907 A.2d 611 (Pa. Super. 2006). A trial court is obligated to explain its reasoning for granting bifurcation on the record; an order granting bifurcation is interlocutory in nature whereas a divorce decree entered pursuant to a bifurcation order is a final and appealable order. Brian v. Brian, 872 A.2d 843 (Pa. Super. 2005).

Wolk v. Wolk, 318 Pa. Super. 311, 464 A.2d 1359 (1983), established the standards for evaluating petitions for bifurcation prior to the enactment of new Subsection (c.1) of §3323 of the Divorce Code. In Wolk, a case in which a decision to bifurcate was reversed and remanded, the Superior Court determined that while it was the intent of the legislature to permit bifurcation, the decision to bifurcate should not be made pro forma, but must be based upon a determination of the advantages and disadvantages in each case. Only when the benefits outweigh the disadvantages should bifurcation be granted. The most recent case which reemphasized the Wolk standards for bifurcation clearly provided that the trial court should conduct a systematic and on-the-record inquiry of the advantages and disadvantages of bifurcation. Savage v. Savage, 736 A.2d 633 (Pa. Super. 1999).

1. The Wolk court also discussed several advantages and disadvantages to be considered. Advantages of bifurcation include the following: the speedy resolution of the divorce which permits the parties to quickly begin restructuring their lives, an advantage which furthers the goals of the Divorce Code; encouragement of settlements; tax advantages in being able to remarry and file jointly with a new spouse, avoid the status of married filing separately, facilitate

avoiding stock redemption attribution rules and permitting individual election of capital gains exclusions.

2. The disadvantages pointed out by the Wolk court include: the need for two hearings if there is no settlement; delay in resolution; inability to file a joint tax return; in the event of the death of one party, the preclusion of enjoyment of the benefits of the Probate, Estate and Fiduciary Code, problems connected with the dead man's rule; and the effect on the right to receive the proceeds of life insurance policies. Further the Savage court, supra, noted that bifurcation may provide little incentive for the spouse who controls most, if not all, of the marital assets to resolve the economic claims. However, no disadvantage with respect to alimony pendente lite will occur as such can be continued at its current level until a resolution of the ancillary claims. See also, McNulty v. McNulty, 347 Pa. Super. 363, 500 A.2d 876 (1985); Pastuszek v. Pastuszek, 346 Pa. Super 416, 499 A.2d 1069 (1985). See also, Pa.R.C.P. 1920.76. The entry of a divorce decree will also not alter a party's right to counsel fees. Pastuszek, supra.

a. Other disadvantages may include termination of health insurance and pension benefits upon divorce, conversion of real property originally held as tenants by entirety to tenancy in common subject to possible attachment by creditors of one spouse; and increase in attorneys' fees due to continuation of the action.

b. With respect to the death of one party, the long-standing rule that a divorce action, including equitable distribution claims, abates on the death of a party prior to the entry of a divorce decree was not affected by the passage of the Divorce Code. Haviland v. Haviland, 333 Pa. Super. 162,418 A.2d 1355 (1984); Upperman v. Upperman, 119 Pa. Super. 341, 181 A. 252 (1935). See also, Geraghty v. Geraghty, 411 Pa. Super 53, 600 A.2d 1261 (1991) (husband's death abated divorce action and thus divested court of its power to alter beneficiary designation on life insurance policy). However, ancillary matters which remain pending after the entry of a divorce decree survive the death of one party and the surviving spouse can pursue equitable distribution. Pastuszek v. Pastuszek, 346 Pa. Super. 416, 499 A.2d 1069 (1985). However, see In re Estate of Bullotta, 798 A.2d 771 (Pa. Super. 2002), appeal granted, 570 Pa. 681, 808 A.2d 568 (Pa. 2002)(held that death of spouse during pendency of divorce proceeding abates the divorce action and any and all claims for equitable distribution, but if spouse dies after the decree is entered, the right to distribution is already vested). Also see new subsection (g) of Section 3323, part of the 2005 Amendments, as when a divorce action now abates upon the death of a party. Where one party kills the other, the Slayers Act, 20 Pa.C.S. §§8801 et. seq., prohibits that party from asserting the legal theory of abatement to benefit from the crime. Drumheller v. Marcello, 516 Pa. 428, 532 A.2d 807 (1987). In addition, if a decree is appealed, then a party dies and the decree is reversed, the action abates. Hall v. Hall, 333 Pa. Super. 483, 482 A.2d 974 (1984).

c. One of the disadvantages often asserted concerning bifurcation relates to the change in character of real estate that has been held as a tenancy by the entirety. Such property becomes a tenancy in common pursuant to 68 Pa.C.S.A §501, upon the entry of a divorce decree. Once this occurs, creditors of one of the parties can pursue the real estate of that party. The apparent conflict between creditors of parties to a divorce and the rights of the parties pursuant to equitable distribution is discussed in Keystone Savings Association v. Kitsock, 429 Pa. Super. 561, 633 A.2d 165 (1993). In that case, the court points out that although the decree automatically severs the tenancy by the entirety of real estate acquired during the marriage, the marital aspect of

that property remains covered by the principles of the Divorce Code. Therefore, marital property remain in custodia legis. Thus, a divorce court retains broad equity powers to maintain the marital estate. While a divorce operates to convert a tenancy by the entirety to a tenancy in common, the change in legal title does not affect the status of the property as marital nor the court's power to determine the parties' respective rights to that property. See Jawork v. Jawork, 378 Pa. Super. 89, 548 A.2d 290 (1988). If a spouse dies before a decree is entered, the divorce action abates and the surviving spouse is limited solely to estate rights, not marital or equitable distribution rights. The probate code applies to the distribution of marital property after death if no decree is entered to assure the fair distribution of the marital estate upon the death of one spouse. Haviland v. Haviland, 333 Pa. Super. 162, 481 A.2d 1355 (1984).

d. In opposing a petition for bifurcation on the basis that there would be a disadvantage in the event of death, such alleged disadvantage must be made specific. In Taylor v. Taylor, 349 Pa. Super. 423, 503 A.2d 439 (1986), for example, the court noted that wife's mere assertions of potentialities, without providing evidence of specific disadvantages to herself, was insufficient to deny a petition for bifurcation. Similarly, in Leese v. Leese, 369 Pa. Super. 104, 534 A.2d 1101(1987), a per curium opinion, the Superior Court granted an 87-year-old husband's petition for bifurcation, holding that wife's argument that she stood to acquire a greater interest in the marital estate if husband died prior to divorce was an insufficient reason to deny bifurcation.

e. As it is the disadvantages rather than the advantages of bifurcation that are the more common subjects of litigation, most cases only discuss advantages in general terms. The strongest and most often repeated advantages are that bifurcation furthers the goals of the Divorce Code and that the parties' personal lives should not be held hostage to economic disputes. Savage v. Savage, 736 A.2d 633 (Pa. Super. 1999).

D. Appeal

1. The standard of review on appeal is abuse of discretion and "so long as the trial judge assembles adequate information, thoughtfully studies the information, and then explains his decision regarding bifurcation," the appellate court will defer to the trial court's discretion. Wolk at 318, 464 A.2d 1362. The burden of proof is on the party seeking bifurcation to show that the advantages outweigh the disadvantages. Ness v. Ness, 102 York Leg. Rec. 211 (1989).

2. To withstand appeal, the record and opinion must reflect that the Wolk analysis has been applied**,** and that the advantages and disadvantages of bifurcation in the particular circumstances have been weighed. In Mandia v. Mandia, 341 Pa. Super. 116, 491 A.2d 177 (1985) and Hall v. Hall, 333 Pa. Super. 483, 482 A.2d 974 (1984), orders granting bifurcation were reversed because the Wolk analysis was not reflected in the record and opinion which were accordingly insufficient to support bifurcation. But see Prall v. Prall, 698 A.2d 1338 (Pa. Super. 1997) (holding that no bifurcation hearing was required where the master's report had been filed and no timely exceptions had been filed.)

3. An order granting or denying bifurcation is interlocutory. An appeal can only be taken from the entry of a divorce decree. Mosier v. Mosier, 359 Pa. Super. 187, 518 A.2d 848 (1986); Mandia v. Mandia, 341 Pa. Super. 116, 491 A.2d 177 (1985). See also, Curran v. Curran, 446 Pa. Super. 633, 667 A.2d 1155 (1995). Previously, under Pa. R.C.P. 1920.52**,** it was

necessary to follow post-trial procedures in accordance with Pa. R.C.P. 227.1 to 227.4. However, Pa. R.C.P. 1930.2, (effective July 1, 1994), abolished all post-trial practice in domestic relations cases. The exception to this rule is in paternity cases tried before a jury. In such cases, motions for reconsideration are permitted. For purposes of future appeal, opposition to bifurcation must be preserved during trial or by motion for reconsideration.

4. In Savage v. Savage, 736 A.2d 633 (Pa. Super. 1999), it was held that the trial court was divested of jurisdiction to approve and enter special master's recommendation concerning economic claims after wife filed a notice of appeal from a bifurcated divorce decree.

E. The legislative findings and intent in enacting the Divorce Code are set forth in §3102. These provide a basis upon which the practitioner can make policy arguments related to requests for bifurcation as well as on other issues.

VI. PRACTICE POINTERS - FAULT IN DIVORCE

While the Divorce Code brought divorce reform in the nature of no-fault divorce to Pennsylvania, it retained fault grounds as well. The retention of fault grounds provides strategic considerations for practitioners.

A. Divorce

1. If one party does not consent to divorce, in the absence of fault grounds, no divorce can be obtained for one (1) year. Even then, if the action is not bifurcated, any unresolved economic issues must be addressed prior to the entry of a divorce decree. This results in additional delay in having a master or court hear and adjudicate those issues. Therefore, the practitioner should consider asserting and proceeding on fault grounds if the goal is to accelerate the progress of the case. The 1988 amendments at §201(e), now §3301(e), indicate a legislative preference for no-fault divorce by providing that if grounds are established under §3301(c) or §3301(d), the court shall grant a divorce without requiring a hearing on any other grounds. Thus, if a plaintiff has asserted no-fault grounds, either alone or with fault grounds, the defendant who wishes to avoid litigation on fault grounds and/or move the matter along needs only to admit the allegation in the complaint that the marriage is irretrievably broken to establish no-fault grounds. Once grounds are established, bifurcation is possible and practitioners should keep that in mind whether they are representing a party to whom bifurcation will be beneficial, or a spouse who will want to avoid bifurcation.

2. Where one party seeks a divorce on the grounds of indignities, there is case law to support equating such a claim with no-fault grounds on the basis of irretrievable breakdown. In Morrison v. Morrison, 36 D. & C. 3d 516 (1983), aff'd, 329 Pa. Super. 576, 478 A.2d 65 (1984), the court concluded that an allegation of indignities is equivalent to an allegation that the marriage is irretrievably broken. The court reasoned that if it was the plaintiffs purpose to terminate the marriage and if in fact her condition was intolerable and life burdensome, then there was no reason consistent with the purposes of the Divorce Code for the plaintiff not to consent to the termination of the marriage.

3. If one party files a complaint or counterclaim for divorce including claims for economic benefits available under the Code, it is possible to force that person to proceed or

lose the economic benefits such as support, alimony pendente lite, etc. In Reuckert v. Reuckert, 20 D. & C. 3d 191 (1981), the court held that a complainant who alleged the marriage to be irretrievably broken could suffer the dismissal of his or her action if an affidavit of consent was not filed after the requisite ninety (90) day waiting period. In that case, the plaintiff filed a divorce action under both no-fault provisions of the Code and defendant filed his affidavit of consent after ninety (90) days. Plaintiff then refused to file an affidavit of consent and contended that she could control how she wanted to proceed. The court's reasoning balanced the benefits that would accrue to the plaintiff and the detriments to the defendant and determined that the Divorce Code's purpose of economic justice would be violated under the plaintiffs theory because a spouse who may not legally be entitled to support could receive alimony pendente lite for three years (now two years) by filing a divorce complaint and not pursuing it. Noting that the Divorce Code provided necessary remedies, the court stated that such also represent a potent weapon that should not be available where the progress of the divorce action is impeded by the beneficiary of the remedy. In Hoffman v. Hoffman, 350 Pa. Super. 380, 504 A.2d 356 (1986) the Superior Court determined the reasoning of the Reuckert court to be sound and determined that a party should not be allowed to withhold consent to a divorce while simultaneously seeking alimony pendente lite. Note that the remedy under Reuckert is to dismiss the divorce action, as court cannot order a party to sign an affidavit of consent. See Norris v. Norris, 10 D. & C. 4th 207 (1991); Skelly v. Skelly, 117 Dauph. Co. Rep. 119 (1997). Similarly, in Karchner v. Karchner, 25 Adams 118 (1983), the plaintiff filed for divorce, but after receiving a favorable support award, failed to proceed. The court noted that plaintiff wanted the marriage to remain intact so her support benefits would not be terminated but if she was receiving alimony pendente lite as a benefit of the divorce action, those benefits could be terminated if the case was not pursued.

B. Spousal Support and Alimony Pendente Lite

1. While spousal support is an obligation arising from the marriage and the filing of a divorce complaint is not a prerequisite to an award, the conduct of the party seeking support may give rise to an entitlement defense for the potential obligor. The obligation of spousal support continues unless it is shown that the conduct of the dependent spouse provides grounds for divorce. Morley v. Morley, 283 Pa. Super. 397, 424 A.2d 524 (1981). Therefore, a successful entitlement defense, which proves fault on the part of the spouse seeking support, will bar a support award.

2. If a dependent spouse seeks an income stream by way of alimony pendente lite rather than spousal support, a divorce complaint must be first filed as a prerequisite. While there is no entitlement defense to alimony pendente lite under the reasoning of Reuckert and Hoffman, a party cannot simply file a complaint in order to obtain alimony pendente lite and then refuse to proceed with the action. Therefore, the raising of an entitlement defense to a spousal support action may work to force a reluctant spouse to proceed with a divorce action. A successful entitlement defense, or the threat thereof, may force a dependent spouse who might not otherwise want to proceed with the divorce to file a complaint in order to obtain an award of alimony pendente lite in which fault is not at issue. Therefore, the practitioner may want to consider trying to force a reluctant party to file a divorce complaint first, rather than initiating an action immediately.

3. Pursuant to Pa. R.C.P. 1920.76, effective March 1, 1995, divorce decrees

include a provision that any existing spousal support order shall be deemed to be an order for alimony pendente lite if any economic claims remain pending.

4. The Superior Court does not have jurisdiction to entertain an appeal from a spousal support order until the divorce is final. Portugal v. Portugal, 798 A.2d 246 (Pa. Super. 2002).

C. Alimony

Fault is a factor the court may consider in determining an award of alimony. However, fault is not the only or the most important factor for consideration. Practitioners should keep in mind that fault, or marital misconduct, during the marriage (but not after separation) is a factor considered for an award of alimony. However, an exception is that the court may consider abuse by one spouse against the other when making a determination of alimony. 23 Pa. C.S. §370l(b)(14) (amended 1997, December 16, P.L. 549, No. 58, §1, effective January 1, 1988). Generally speaking, vis-à-vis the factors to be considered, an award of alimony is based on the reasonable needs, in accordance with the lifestyle and standard of living established by the parties during the marriage, as well as the obligor's ability to pay. DeMarco v. DeMarco, 787 A.2d 1072 (Pa. Super. 2001).

D. Equitable Distribution

The practitioners should keep in mind that while fault is not one of the factors to be considered in equitable distribution, evidence of such on the issue of grounds for divorce or alimony could potentially affect the equitable distribution portion of the case. During the course of litigation, marital property subject to equitable distribution is held *in custodia legis* by the court and, thus, is not subject to attachment by third party lien, even an attorney lien for unpaid fees. Frantz v. Frantz, 972 A.2d 525 (Pa. Super. 2009).

Chapter Four

Ethics

Chapter Four
Section 1

Ethics Resources: Who Ya Gonna Call?

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Ethics Resources: Who Ya Gonna Call?

Public perception surveys consistently rank lawyers among some of the least ethical and honest people around. *See, e.g.,* Gallup Polls at http://www.gallup.com/poll/1654/ honesty-ethics-professions.aspx#3. There are many reasons for this, the biggest of which is a lawyer's divided loyalties. Specifically, a lawyer owes a duty not only to his or her client, but also to the legal system and society at large. Preamble to Pa. Rules of Professional Conduct, A Lawyer's Responsibilities [7]. It is when these duties conflict that ethical dilemmas arise. Listed below are resources you can, and should, consult when you are confronted by an ethical bind. Consult these sources often so as to identify potential ethical dilemmas before they become ethical violations! Remember, a lawyer "sells" not only his or her legal skills, but also his or her reputation with the court and the legal community. What good is knowing which hearsay objections to raise before the court if the court feels you have little or no credibility? Consistent failure to conduct your practice ethically or on the outer bounds of ethical conduct will gain you a reputation as difficult, unprofessional, sleazy, or worse and, ultimately, will affect your ability to make a living. Also, toeing that ethical line will make your day-to-day work dealings even more unpleasant, anxious, and confrontational than they already are as well as you a *persona non grata* at professional functions.

List of Pennsylvania Ethics Resources

1. Consult and review the **Pennsylvania Rules of Professional Conduct**, Preamble and Scope through Rule 8.5. Contained within West's Pennsylvania Rules of Court or online at http://www.pacode.com/secure/data/204/chapter81/chap81toc.html.

2. Consult and review the **formal ethics opinions of various ethics committees**, such as the Pennsylvania Bar Association's Committee of Legal Ethics and Professional Responsibility: http://www.pabar.org/public/committees/lglethic/, or your local bar association's ethics' committee, such as the Philadelphia Bar Association's Professional Guidance Committee: http://www.philadelphiabar.org/page/EthicsOpinions.

3. **Make an inquiry** regarding prospective conduct to the Pennsylvania Bar Association's Committee on Legal Ethics and Professional Responsibility. The Committee will review your inquiry and provide you with an informal letter opinion for your files. The Ethics Hotline phone number is 1.800.932.0311, ext. 2214, or call the Ethics Counsel, Victoria White, Esquire, at 1.717.238.6715. A written request should be submitted to Victoria.White@pabar.org. Your local bar association, such as the Allegheny County Bar Association or Philadelphia Bar Association, may offer a similar service, e.g.: http://www.philadelphiabar.org/page/SCGuidance?appNum=4.

4. Consult the **Pennsylvania Ethics Handbook**, published by PBI.

5. **Contact an attorney expert** in the field of attorney ethics and discipline for either a formal opinion, an informal opinion, or an informal tete-a-tete on your situation. Most are flattered by the inquiry and happy to provide guidance. For example, Sam Stretton, Esquire, regularly responds to ethics inquiries in his "Ethics Forum" in Philadelphia's The Legal Intelligencer.

6. Consult **the opinions of other jurisdictions** as well as the American Bar Association. Be mindful that these are not precedential or binding in any way upon a Pennsylvania matter, but may provide some insight or guidance in a jurisdiction with similar ethics rules to Pennsylvania's.

7. Look to **The Disciplinary Board's website** for hyperlinks to Pennsylvania's Rules affecting ethical matters as well as information on, *inter alia*, how to report misconduct and how to respond to a complaint. *See*, http://www.padisciplinaryboard.org/ attorneys/faqs/.

8. **Join or found an Inn of Court** in your community. The American Inns of Court is a national organization with local "inns" comprised of lawyers, judges, law professors, and law students dedicated to promoting legal skills, ethics, professionalism and civility. The Doris Jonas Freed Matrimonial Inn of Court, http://www.innsofcourt.org/ inns/freedinn/, and the Nicholas Cipriani Inn of Court, http://www.innsofcourt.org/inns/ ciprianiinn/, are the Philadelphia 5-county area's inns dedicated to the practice of family law.

Chapter Four
Section 2

Hypotheticals

Updated by
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HYPOTHETICALS

Hypo 1. Suppose that you represent Husband and you have received a proposal for equitable distribution and alimony from Wife's attorney. You and opposing counsel have agreed to bifurcate the case so that Husband can remarry soon. You have discovered that opposing counsel failed to raise a claim for alimony in the pleadings. May you tell opposing counsel about his error? Must you tell your client?

APPLICABLE RULES

Preamble: A Lawyer's Responsibilities [9]

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interest, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

Rule 1.2
Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Rule 1.3
Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment:

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

Rule 1.4
Communication

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Hypo 2. Husband and Wife are engaged in divorce, but both remain in the home with access to the home computer. Husband and his counsel regularly e-mail each other discussing strategy, including the valuation of a marital business. For example, Husband writes his counsel that a certain machine is really worth far more than book value because of its unique capabilities. Wife regularly downloads and prints these communications – both her Husband's and the counsel's, and brings them to her lawyer for review.

a. Can Wife's lawyer review the e-mails?

b. Does Wife's counsel have a duty to disclose the situation to Husband's counsel?

c. Can Wife's counsel use the information in trial?

APPLICABLE RULE

Rule 4.4
Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Comment:

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of

obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Paragraph (b) recognizes that lawyers sometimes receive documents that were mistakenly sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of this Rule, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Hypo 3. Can a law firm represent the Wife in a divorce where eighteen months prior a former associate of the firm had been consulted by the Husband regarding a civil personal injury matter and a "family law matter?" A paralegal, still associated with the firm, assisted the former associate in the Husband's consultation. However, no prior retention resulted and no fees were charged. Any file materials are now closed and in storage.

APPLICABLE RULES

Rule 1.9
Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.10
Imputation of Conflicts of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm, or unless permitted by Rules 1.10(b) or (c).

(b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter unless:

(1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the appropriate client to enable it to ascertain compliance with the provisions of this rule.

(c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(d) A disqualification prescribed by this Rule may be waived by the affected client under the conditions stated in Rule 1.7.

(e) While lawyers are associated in a firm, a prohibition in paragraphs (a) through (i) of Rule 1.8 that applies to any one of them shall apply to all of them.

(f) The disqualification of lawyers in a firm with former or current government lawyers is governed by Rule 1.11.

(g) The disqualification of lawyers in a firm with a former judge, arbitrator, mediator or other third-party neutral is governed by Rule 1.12.

(h) Where a lawyer in a firm is disqualified from a matter due to consultation with a prospective client pursuant to Rule 1.18(b) and (c), disqualification of other lawyers in the same firm is governed by Rule 1.18(d).

(i) The disqualification of a lawyer when another lawyer in the lawyer's firm is likely to be called as a witness is governed by Rule 3.7.

Chapter Four
Section 3

Pennsylvania Bar Association Legal Ethics Inquiries and Formal Opinions

Submitted by
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State College



December 3, 2014

INQUIRY NO. 2014-040

You have requested an ethics opinion from the PBA Legal Ethics and Professional Responsibility Committee based upon the following submitted facts.

You and Lawyer A are associated with Law Firm A. Lawyer B is associated with Law Firm B.

In 2012, you represented Dad A in a custody action against Mom. You also represented Dad A in a custody action against another mother. Dad A is now a former client.

Lawyer B of Law Firm B currently represents Dad B in a separate custody action against Mom which is in litigation. During the litigation, Lawyer B contacted you about Dad A testifying as a witness in the litigation and to discuss information regarding Mom that was useful in Dad A's case against Mom.

Mom has asked Lawyer A of Law Firm A for representation in the custody action involving Dad B, who is represented by Lawyer B. You ask whether representation is ethically permissible.

Your question implicates Rule 1.9 in the Pennsylvania Rules of Professional Conduct. Rule 1.9 provides in part:

> **Rule 1.9 Duties to Former Clients**
>
> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.
>
> . . .
>
> (b) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 1.9(a) prohibits a lawyer from representing a party adverse to a former client in a matter that is the same or substantially related to the prior representation without the former client's informed consent. If the matters are substantially related--the matters involve the same transaction or legal dispute or the lawyer might have acquired information in the prior representation that could be used to the detriment of the former client in the subsequent matter--representation is prohibited absent the former client's informed consent.

Lawyer A of Law Firm A does not have a conflict in representing Mom for the following reasons: First, the matter in which you represented the former client, Dad A, is not the same or substantially related to the litigation between Dad B and Mom. Second, the interests of Mom are not materially adverse to the interests of Dad A.

You are reminded that Rule 1.9(c) prohibits a lawyer from using confidential information relating to the representation of a former client to the former client's disadvantage or revealing such information except as provided by the Rules or to the extent that the information "has become generally known."

CAVEAT: The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. This opinion carries only such weight as an appropriate reviewing authority may choose to give it. Moreover, this is the opinion of only one member of the committee and is not an opinion of the full committee.



March 12, 2014

INQUIRY NO. 2014-012

You have requested an ethics opinion from the PBA Legal Ethics and Professional Responsibility Committee.

You previously represented "Bob" in a divorce and custody matter. Bob subsequently entered into a relationship with "Mary" who was unmarried at the time but was ending a difficult relationship with another man. Mary, acting pro se, filed a Petition for Protection from Abuse (PFA) and obtained a temporary PFA Order. At the request of Bob, you represented Mary at the final hearing on the PFA.

Bob has now proposed marriage to Mary and has asked you to prepare a prenuptial agreement. You will not represent Mary or provide her with any advice other than the advice to have the prenuptial agreement reviewed and explained to her by an attorney of her choosing. You ask whether your representation of Bob is ethically permissible.

Your question implicates Rule 1.9 in the Pennsylvania Rules of Professional Conduct. Rule 1.9 provides in part:

> **Rule 1.9 Duties to Former Clients**
>
> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.

The prior matter in which you represented Mary at the PFA hearing is not the same or substantially related to the present matter involving the preparation of a prenuptial agreement for Bob. Therefore, you do not have a conflict of interest that would prevent you from representing Bob. You are reminded that Rule 1.9(c) prohibits a lawyer from using confidential information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known, or reveal

information relating to the representation except as these Rules would permit or require with respect to a client.

CAVEAT: The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. This opinion carries only such weight as an appropriate reviewing authority may choose to give it. Moreover, this is the opinion of only one member of the committee and is not an opinion of the full committee.



May 9, 2013

INQUIRY NO. 2013-015

You have requested an ethics opinion from the PBA Legal Ethics and Professional Responsibility Committee. You state that in June 2007, you entered your appearance for Husband A in a divorce case. Husband then reconciled with Wife A. However, the divorce case was not withdrawn and you did not withdraw your appearance. In February 2013, Husband separated from Wife again and requested that you continue representation of him in the pending divorce.

In November 2012, you were retained by Husband B in a divorce against Wife B. In March 2013, Husband B advised you that you were representing his girlfriend's husband, who is Husband A.

You advised both clients that you were representing the other and asked them whether they had any objection. Husband A signed a waiver, but Husband B did not. You withdrew from representing Husband B. You ask whether you must withdraw from representing Husband A.

Husband B is now a "former client." Your responsibilities to him are spelled out in Rules 1.6 and 1.9 of the Pennsylvania Rules of Professional Conduct. Rule 1.6(a) states:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent (with exceptions not relevant to your inquiry).

Rule 1.9 states:

> (a) A lawyer who has formerly represented a client in a matter shall not represent another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.
>
> . . .

(c) A lawyer who has formerly represented a client in a matter...shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except of these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation . . . .

As to your representation of Husband A, Rule 1.7 provides in part:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

. . .

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

You will need to consider what information you received from Husband B and its possible relevance to issues of custody or finances in your representation of Husband A. If your representation of Husband A is materially limited by your responsibilities to your former client, Husband B, under Rule 1.9, you must withdraw from representing Husband A.

CAVEAT: The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. This opinion carries only such weight as an appropriate reviewing authority may choose to give it. Moreover, this is the opinion of only one member of the committee and is not an opinion of the full committee.



January 15, 2014

INQUIRY NO. 2014-002

You have requested an ethics opinion from the PBA Legal Ethics and Professional Responsibility Committee.

In 2011, you met with Client A and Client B, same-sex domestic partners. Client A was pregnant and the clients asked you to prepare a Last Will and Testament with a guardianship provision appointing Client B as guardian in the event that Client A passed away during child birth or any time thereafter. You discussed with the clients the benefits of adoption and why the guardianship provision in the Last Will and Testament was necessary if in fact there was no adoption. You followed up with a letter to the clients memorializing your discussion regarding your brief discussion about adoption and how the guardianship provision would provide protection if an adoption would not take place. Prior to the birth of the child, you prepared a Last Will and Testament for the clients as well as a Durable Health Care Power of Attorney.

Client B recently contacted you and advised that Client A and Client B were separating. Client B requested representation in filing a Petition for Custody/Visitation. You state that at no point in time did you perform any services for the parties with regard to adoption. You ask whether you have a conflict of interest under the Pennsylvania Rules of Professional Conduct with respect to representing Client B in a Petition for Custody/Visitation. Client A is represented by separate counsel.

PA RPC provides:

Rule 1.9 Duties to Former Clients

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.
>
> . . .

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Comment [3] to Rule 1.9 states, "Matters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." *See also*, PBA Formal Opinion 2012-100 "Substantially Related" Matters Within the Meaning of RPC 1.9(a) Pertaining to Former Client Conflicts: General Considerations. A copy of that opinion is enclosed.

As that opinion makes clear, the "substantially related" analysis is invariably highly fact specific. Inasmuch as the child who is the subject of the proposed representation was not born at the time of your former relationship it seems likely that information acquired during the prior relationship is not relevant to the proposed representation of Client B. You should, however, consider whether in the prior representation, you might have acquired information that is now relevant since, if you did, Client A's consent would be required before proceeding with the representation of Client B.

An edited version of this written response that does not identify you, your firm or the county in which you practice may be posted to the PBA website or summarized in PBA publications to provide guidance to other lawyers. If, for some reason, you have an objection to the posting of the response, please contact the PBA Ethics Counsel within five days.

CAVEAT: The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. This opinion carries only such weight as an appropriate reviewing authority may choose to give it. Moreover, this is the opinion of only one member of the committee and is not an opinion of the full committee.



May 26, 2009

INQUIRY NO. 2009-027

I am writing to you on behalf of the Pennsylvania Bar Association's Committee on Legal Ethics and Professional Responsibility.

You have asked the Committee for its opinion concerning your obligations, if any, to a gentleman (Husband) you met in your office approximately six months ago, based on the following facts assumed to be true. Husband made an appointment to see you to consult regarding a domestic issue. On his intake sheet, he wrote that the purpose of this visit was Wife's plan to move out and "other activities with other individuals." Husband wrote his name, address and place of employment, date of marriage and names and ages of children. He did not provide any other information in writing.

In your meeting, you advised Husband of the basics of divorce, support and custody law. You did not discuss the specifics of his situation. He did not disclose anything about assets or liabilities. He did not retain your services, and did not follow up with you after this initial meeting.

Three months later, Wife retained you in connection with the divorce complaint served upon her. You entered your appearance for Wife, having forgotten that Husband previously met with you. Shortly thereafter, Husband's attorney called you reminding you of your initial consultation with Husband and informing you of his belief that you had a conflict of interest by representing Wife. You then reviewed your intake sheets and determined that you had met with Husband, but you had no independent recollection of the meeting other than the basics set forth above.

Your inquiry is governed by Rule 1.18 of the Rules of Professional Conduct. Husband was a "prospective client" under Rule 1.18(a) because he discussed with you the possibility of forming a client-lawyer relationship, which never materialized. Because Husband is a "prospective client," you are subject to Rule 1.18(b), which prevents you from using or revealing information which may be significantly harmful to Husband that you learned in the consultation, unless some other Rule would permit or require the use of disclosure. *See* Rule 1.9(c). Although no such Rule would seem to apply here, nothing in the facts that you advised me constitutes information significantly harmful to Husband.

As a lawyer subject to Rule 1.18(b), Rule 1.18(c) precludes you from representing Wife in this matter, which is the same or substantially related to the purpose of Husband's initial consultation with you, only if you received information from Husband that could be significantly harmful to Husband in the matter at issue, except as provided in Rule 1.18(d). As discussed above, you did not receive any such information. Therefore, you may continue representing Wife. If, however, you had received significantly harmful information, you would need to withdraw, because Rule 1.18(d) provides you no protection, i.e., you do not have Husband's consent as required under (d)(1), and you would not be screened from representing Wife under (d)(2)(ii).

An edited version of this written response that does not identify you, your firm, or the county in which you practice may be posted to the PBA website to provide guidance to other lawyers. If, for some reason, you have an objection to the posting of the response, please contact the PBA Ethics Counsel within five days.

CAVEAT: The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. This opinion carries only such weight as an appropriate reviewing authority may choose to give it. Moreover, this is the opinion of only one member of the committee and is not an opinion of the full committee.



FORMAL OPINION 2014-300

ETHICAL OBLIGATIONS FOR ATTORNEYS USING SOCIAL MEDIA

I. Introduction and Summary

"Social media" or "social networking" websites permit users to join online communities where they can share information, ideas, messages, and other content using words, photographs, videos and other methods of communication. There are thousands of these websites, which vary in form and content. Most of these sites, such as Facebook, LinkedIn, and Twitter, are designed to permit users to share information about their personal and professional activities and interests. As of January 2014, an estimated 74 percent of adults age 18 and over use these sites.[1]

Attorneys and clients use these websites for both business and personal reasons, and their use raises ethical concerns, both in how attorneys use the sites and in the advice attorneys provide to clients who use them. The Rules of Professional Conduct apply to all of these uses.

The issues raised by the use of social networking websites are highly fact-specific, although certain general principles apply. This Opinion reiterates the guidance provided in several previous ethics opinions in this developing area and provides a broad overview of the ethical concerns raised by social media, including the following:

1. Whether attorneys may advise clients about the content of the clients' social networking websites, including removing or adding information.
2. Whether attorneys may connect with a client or former client on a social networking website.
3. Whether attorneys may contact a represented person through a social networking website.
4. Whether attorneys may contact an unrepresented person through a social networking website, or use a pretextual basis for viewing information on a social networking site that would otherwise be private/unavailable to the public.
5. Whether attorneys may use information on a social networking website in client-related matters.
6. Whether a client who asks to write a review of an attorney, or who writes a review of an attorney, has caused the attorney to violate any Rule of Professional Conduct.
7. Whether attorneys may comment on or respond to reviews or endorsements.
8. Whether attorneys may endorse other attorneys on a social networking website.
9. Whether attorneys may review a juror's Internet presence.

[1] http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/

10. Whether attorneys may connect with judges on social networking websites.

This Committee concludes that:

1. Attorneys may advise clients about the content of their social networking websites, including the removal or addition of information.
2. Attorneys may connect with clients and former clients.
3. Attorneys may not contact a represented person through social networking websites.
4. Although attorneys may contact an unrepresented person through social networking websites, they may not use a pretextual basis for viewing otherwise private information on social networking websites.
5. Attorneys may use information on social networking websites in a dispute.
6. Attorneys may accept client reviews but must monitor those reviews for accuracy.
7. Attorneys may generally comment or respond to reviews or endorsements, and may solicit such endorsements.
8. Attorneys may generally endorse other attorneys on social networking websites.
9. Attorneys may review a juror's Internet presence.
10. Attorneys may connect with judges on social networking websites provided the purpose is not to influence the judge in carrying out his or her official duties.

This Opinion addresses social media profiles and websites used by lawyers for business purposes, but does not address the issues relating to attorney advertising and marketing on social networking websites. While a social media profile that is used exclusively for personal purposes (*i.e.,* to maintain relationships with friends and family) may not be subject to the Rules of Professional Conduct relating to advertising and soliciting, the Committee emphasizes that attorneys should be conscious that clients and others may discover those websites, and that information contained on those websites is likely to be subject to the Rules of Professional Conduct. Any social media activities or websites that promote, mention or otherwise bring attention to any law firm or to an attorney in his or her role as an attorney are subject to and must comply with the Rules.

II. Background

A social networking website provides a virtual community for people to share their daily activities with family, friends and the public, to share their interest in a particular topic, or to increase their circle of acquaintances. There are dating sites, friendship sites, sites with business purposes, and hybrids that offer numerous combinations of these characteristics. Facebook is currently the leading personal site, and LinkedIn is currently the leading business site. Other social networking sites include, but are not limited to, Twitter, Myspace, Google+, Instagram, AVVO, Vine, YouTube, Pinterest, BlogSpot, and Foursquare. On these sites, members create their own online "profiles," which may include biographical data, pictures and any other information they choose to post.

Members of social networking websites often communicate with each other by making their latest thoughts public in a blog-like format or via e-mail, instant messaging, photographs, videos, voice or videoconferencing to selected members or to the public at large. These services permit members to locate and invite other members into their personal networks (to "friend" them) as well as to invite friends of friends or others.

Social networking websites have varying levels of privacy settings. Some sites allow users to restrict who may see what types of content, or to limit different information to certain defined groups, such as the "public," "friends," and "others." For example, on Facebook, a user may make all posts available only to friends who have requested access. A less restrictive privacy setting allows "friends of friends" to see content posted by a specific user. A still more publicly-accessible setting allows anyone with an account to view all of a person's posts and other items.

These are just a few of the main features of social networking websites. This Opinion does not address every feature of every social networking website, which change frequently. Instead, this Opinion gives a broad overview of the main ethical issues that lawyers may face when using social media and when advising clients who use social media.

III. Discussion

A. Pennsylvania Rules of Professional Conduct: Mandatory and Prohibited Conduct

Each of the issues raised in this Opinion implicates various Rules of Professional Conduct that affect an attorney's responsibilities towards clients, potential clients, and other parties. Although no Pennsylvania Rule of Professional Conduct specifically addresses social networking websites, this Committee's conclusions are based upon the existing rules. The Rules implicated by these issues include:

- Rule 1.1 ("Competence")
- Rule 1.6 ("Confidentiality of Information")
- Rule 3.3 ("Candor Toward the Tribunal")
- Rule 3.4 ("Fairness to Opposing Party and Counsel")
- Rule 3.5 ("Impartiality and Decorum of the Tribunal")
- Rule 3.6 ("Trial Publicity")
- Rule 4.1 ("Truthfulness in Statements to Others")
- Rule 4.2 ("Communication with Person Represented by Counsel")
- Rule 4.3 ("Dealing with Unrepresented Person")
- Rule 8.2 ("Statements Concerning Judges and Other Adjudicatory Officers")
- Rule 8.4 ("Misconduct")

The Rules define the requirements and limitations on an attorney's conduct that may subject the attorney to disciplinary sanctions. While the Comments may assist an attorney in understanding or arguing the intention of the Rules, they are not enforceable in disciplinary proceedings.

B. General Rules for Attorneys Using Social Media and Advising Clients About Social Media

Lawyers must be aware of how these websites operate and the issues they raise in order to represent clients whose matters may be impacted by content posted on social media websites. Lawyers should also understand the manner in which postings are either public or private. A few Rules of

Professional Conduct are particularly important in this context and can be generally applied throughout this Opinion.

Rule 1.1 provides:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

As a general rule, in order to provide competent representation under Rule 1.1, a lawyer should advise clients about the content of their social media accounts, including privacy issues, as well as their clients' obligation to preserve information that may be relevant to their legal disputes.

Comment [8] to Rule 1.1 further explains that, "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology…." Thus, in order to provide competent representation in accordance with Rule 1.1, a lawyer should (1) have a basic knowledge of how social media websites work, and (2) advise clients about the issues that may arise as a result of their use of these websites.

Another Rule applicable in almost every context, and particularly relevant when social media is involved, is Rule 8.4 ("Misconduct"), which states in relevant part:

> It is professional misconduct for a lawyer to:
> …
> (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

This Rule prohibits "dishonesty, fraud, deceit or misrepresentation." Social networking easily lends itself to dishonesty and misrepresentation because of how simple it is to create a false profile or to post information that is either inaccurate or exaggerated. This Opinion frequently refers to Rule 8.4, because its basic premise permeates much of the discussion surrounding a lawyer's ethical use of social media.

C. Advising Clients on the Content of their Social Media Accounts

As the use of social media expands, so does its place in legal disputes. This is based on the fact that many clients seeking legal advice have at least one account on a social networking site. While an attorney is not responsible for the information posted by a client on the client's social media profile, an attorney may and often should advise a client about the content on the client's profile.

Against this background, this Opinion now addresses the series of questions raised above.

1. Attorneys May, Subject to Certain Limitations, Advise Clients About The Content Of Their Social Networking Websites

Tracking a client's activity on social media may be appropriate for an attorney to remain informed about developments bearing on the client's legal dispute. An attorney can reasonably expect that opposing counsel will monitor a client's social media account.

For example, in a Miami, Florida case, a man received an $80,000.00 confidential settlement payment for his age discrimination claim against his former employer.[2] However, he forfeited that settlement after his daughter posted on her Facebook page "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT." The Facebook post violated the confidentiality agreement in the settlement and, therefore, cost the Plaintiff $80,000.00.

The Virginia State Bar Disciplinary Board[3] suspended an attorney for five years for (1) instructing his client to delete certain damaging photographs from his Facebook account, (2) withholding the photographs from opposing counsel, and (3) withholding from the trial court the emails discussing the plan to delete the information from the client's Facebook page. The Virginia State Bar Disciplinary Board based the suspension upon the attorney's violations of Virginia's rules on candor toward the tribunal, fairness to opposing counsel, and misconduct. In addition, the trial court imposed $722,000 in sanctions ($542,000 upon the lawyer and $180,000 upon his client) to compensate opposing counsel for their legal fees.[4]

While these may appear to be extreme cases, they are indicative of the activity that occur involving social media. As a result, lawyers should be certain that their clients are aware of the ramifications of their social media actions. Lawyers should also be aware of the consequences of their own actions and instructions when dealing with a client's social media account.

Three Rules of Professional Conduct are particularly important when addressing a lawyer's duties relating to a client's use of social media.

Rule 3.3 states:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; …
>
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence before a tribunal or in an ancillary proceeding conducted pursuant to a tribunal's adjudicative authority, such as a deposition, and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
>
> (b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal

[2] "Girl costs father $80,000 with 'SUCK IT' Facebook Post, March 4, 2014: http://www.cnn.com/2014/03/02/us/facebook-post-costs-father/

[3] *In the Matter of Matthew B. Murray*, VSB Nos. 11-070-088405 and 11-070-088422 (June 9, 2013)

[4] *Lester v. Allied Concrete Co.,* Nos. CL08-150 and CL09-223 (Charlotte, VA Circuit Court, October 21, 2011)

or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Rule 3.4 states:

> A lawyer shall not:
>
> (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value or assist another person to do any such act;

Rule 4.1 states:

> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid aiding and abetting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

The Rules do not prohibit an attorney from advising clients about their social networking websites. In fact, and to the contrary, a competent lawyer should advise clients about the content that they post publicly online and how it can affect a case or other legal dispute.

The Philadelphia Bar Association Professional Guidance Committee issued Opinion 2014-5, concluding that a lawyer may advise a client to change the privacy settings on the client's social media page but may not instruct a client to destroy any relevant content on the page. Additionally, a lawyer must respond to a discovery request with any relevant social media content posted by the client. The Committee found that changing a client's profile to "private" simply restricts access to the content of the page but does not completely prevent the opposing party from accessing the information. This Committee agrees with and adopts the guidance provided in the Philadelphia Bar Association Opinion.

The Philadelphia Committee also cited the Commercial and Federal Litigation Section of the New York State Bar Association and its "Social Media Guidelines," which concluded that a lawyer may advise a client about the content of the client's social media page, to wit:

- A lawyer may advise a client as to what content may be maintained or made private on her social media account, as well as to what content may be "taken down" or removed, whether posted by the client or someone else, as long as there is no violation of common law or any statute, rule, or regulation relating to the preservation of information.
- Unless an appropriate record of the social media information or data is preserved, a party or nonparty may not delete information from a social media profile that is subject

> to a duty to preserve. This duty arises when the potential for litigation or other conflicts arises [5]

In 2014 Formal Ethics Opinion 5, the North Carolina State Bar concluded that a lawyer may advise a client to remove information on social media if not spoliation or otherwise illegal.[6]

This Committee agrees with and adopts these recommendations, which are consistent with Rule 3.4(a)'s prohibition against "unlawfully alter[ing], destroy[ing] or conceal[ing] a document or other material having potential evidentiary value." Thus, a lawyer may not instruct a client to alter, destroy, or conceal any relevant information, regardless whether that information is in paper or digital form. A lawyer may, however, instruct a client to delete information that may be damaging from the client's page, provided the conduct does not constitute spoliation or is otherwise illegal, but must take appropriate action to preserve the information in the event it is discoverable or becomes relevant to the client's matter.

Similarly, an attorney may not advise a client to post false or misleading information on a social networking website; nor may an attorney offer evidence from a social networking website that the attorney knows is false. Rule 4.1(a) prohibits an attorney from making "a false statement of material fact or law." If an attorney knows that information on a social networking site is false, the attorney may not present that as truthful information. It has become common practice for lawyers to advise clients to refrain from posting any information relevant to a case on any website, and to refrain from using these websites until the case concludes.

2. Attorneys May Ethically Connect with Clients or Former Clients on Social Media

Social media provides many opportunities for attorneys to contact and connect with clients and other relevant persons. While the mode of communication has changed, the Rules that generally address an attorney's communications with others still apply.

There is no *per se* prohibition on an attorney connecting with a client or former client on social media. However, an attorney must continue to adhere to the Rules and maintain a professional relationship with clients. If an attorney connects with clients or former clients on social networking sites, the attorney should be aware that his posts may be viewed by clients and former clients.

Although this Committee does not recommend doing so, if an attorney uses social media to communicate with a client relating to representation of the client, the attorney should retain records of those communications containing legal advice. As outlined below, an attorney must not reveal confidential client information on social media. While the Rules do not prohibit connecting with clients on social media, social media may not be the best platform to connect with clients, particularly in light of the difficulties that often occur when individuals attempt to adjust their privacy settings.

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[5] *Social Media Ethics Guidelines*, The Commercial and Federal Litigation Section of the New York State Bar Association, March 18, 2014 at 11 (footnote omitted).
[6] http://www.ncbar.com/ethics/printopinion.asp?id=894

3. Attorneys May Not Ethically Contact a Represented Person Through a Social Networking Website

Attorneys may also use social media to contact relevant persons in a conflict, but within limitations. As a general rule, if contacting a party using other forms of communication would be prohibited,[7] it would also be prohibited while using social networking websites.

Rule 4.2 states:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Regardless of the method of communication, Rule 4.2 clearly states that an attorney may not communicate with a represented party without the permission of that party's lawyer. Social networking websites increase the number of ways to connect with another person but the essence of that connection is still a communication. Contacting a represented party on social media, even without any pretext, is limited by the Rules.

The Philadelphia Bar Association Professional Guidance Committee concluded in Opinion 2009-02,[8] that an attorney may not use an intermediary to access a witness' social media profiles. The inquirer sought access to a witness' social media account for impeachment purposes. The inquirer wanted to ask a third person, *i.e.*, "someone whose name the witness will not recognize," to go to Facebook and Myspace and attempt to "friend" the witness to gain access to the information on the pages. The Committee found that this type of pretextual "friending" violates Rule 8.4(c), which prohibits the use of deception. The action also would violate Rule 4.1 (discussed below) because such conduct amounts to a false statement of material fact to the witness.

The San Diego County Bar Legal Ethics Committee issued similar guidance in Ethics Opinion 2011-2,[9] concluding that an attorney is prohibited from making an *ex parte* "friend" request of a represented party to view the non-public portions of a social networking website. Even if the attorney clearly states his name and purpose for the request, the conduct violates the Rule against communication with a represented party. Consistent with this Opinion, this Committee also finds that "friending" a represented party violates Rule 4.2.

While it would be forbidden for a lawyer to "friend" a represented party, it would be permissible for the lawyer to access the public portions of the represented person's social networking site, just as it would be permissible to review any other public statements the person makes. The New York State

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[7] *See, e.g.,* Formal Opinion 90-142 (updated by 2005-200), in which this Committee concluded that, unless a lawyer has the consent of opposing counsel or is authorized by law to do so, in representing a client, a lawyer shall not conduct ex parte communications about the matter of the representation with present managerial employees of an opposing party, and with any other employee whose acts or omissions may be imputed to the corporation for purposes of civil or criminal liability.

[8] Philadelphia Bar Assn., Prof'l Guidance Comm., Op. 2009-02 (2009).

[9] San Diego County Bar Assn., Legal Ethics Comm., Op. 2011-2 (2011).

Bar Association Committee on Professional Ethics issued Opinion 843,[10] concluded that lawyers may access the public portions of other parties' social media accounts for use in litigation, particularly impeachment. The Committee found that there is no deception in accessing a public website; it also cautioned, however, that a lawyer should not request additional access to the social networking website nor have someone else do so.

This Committee agrees that accessing the public portion of a represented party's social media site does not involve an improper contact with the represented party because the page is publicly accessible under Rule 4.2. However, a request to access the represented party's private page is a prohibited communication under Rule 4.2

4. Attorneys May Generally Contact an Unrepresented Person Through a Social Networking Website But May Not Use a Pretextual Basis For Viewing Otherwise Private Information[11]

Communication with an unrepresented party through a social networking website is governed by the same general rule that, if the contact is prohibited using other forms of communication, then it is also prohibited using social media.

Rule 4.3 states in relevant part:

> (a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. …
> (c) When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer should make reasonable efforts to correct the misunderstanding.

Connecting with an unrepresented person through a social networking website may be ethical if the attorney clearly identifies his or her identity and purpose. Particularly when using social networking websites, an attorney may not use a pretextual basis when attempting to contact the unrepresented person. Rule 4.3(a) instructs that "a lawyer shall not state or imply that the lawyer is disinterested." Additionally, Rule 8.4(c) (discussed above) prohibits a lawyer from using deception. For example, an attorney may not use another person's name or online identity to contact an unrepresented person; rather, the attorney must use his or her own name and state the purpose for contacting the individual.

In Ohio, a former prosecutor was fired after he posed as a woman on a fake Facebook account in order to influence an accused killer's alibi witnesses to change their testimony[12]. He was fired for "unethical behavior," which is also consistent with the Pennsylvania Rules. Contacting witnesses under false pretenses constitutes deception.

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[10] New York State Bar Assn., Comm. on Prof'l Ethics, Op. 843 (2010).

[11] Attorneys may be prohibited from contacting certain persons, despite their lack of representation. This portion of this Opinion only addresses communication and contact with persons with whom such contact is not otherwise prohibited by the Rules, statute or some other basis.

[12] "Aaron Brockler, Former Prosecutor, Fired for Posing as Accused Killer's Ex-Girlfriend on Facebook," June 7, 2013. http://www.cnn.com/2014/03/02/us/facebook-post-costs-father/

Many Ethics Committees have addressed whether an attorney may contact an unrepresented person on social media. The Kentucky Bar Association Ethics Committee[13] concluded that a lawyer may access the social networking site of a third person to benefit a client within the limits of the Rules. The Committee noted that even though social networking sites are a new medium of communication, "[t]he underlying principles of fairness and honesty are the same, regardless of context."[14] The Committee found that the Rules would not permit a lawyer to communicate through social media with a represented party. But, the Rules do not prohibit social media communication with an unrepresented party provided the lawyer is not deceitful or dishonest in the communication.

As noted above, in Opinion 2009-02,[15] the Philadelphia Bar Association Professional Guidance Committee concluded that an attorney may not access a witness' social media profiles by deceptively using a third party intermediary. Use of an alias or other deceptive conduct violates the Rules as well, regardless whether it is permissible to contact a particular person.

The New Hampshire Bar Association Ethics Committee agreed with the Philadelphia Opinion in Advisory Opinion 2012-13/05,[16] concluding that a lawyer may not use deception to access the private portions of an unrepresented person's social networking account. The Committee noted, "A lawyer has a duty to investigate but also a duty to do so openly and honestly, rather than through subterfuge."

The Oregon State Bar Legal Ethics Committee concurred with these opinions as well in Opinion 2013-189,[17] concluding that a lawyer may request access to an unrepresented party's social networking website if the lawyer is truthful and does not employ deception.

These Committees consistently conclude that a lawyer may not use deception to gain access to an unrepresented party's page, but a lawyer may request access using his or her real name. There is, however, a split of authority among these Committees. The Philadelphia and New Hampshire Committees would further require the lawyer to state the purpose for the request, a conclusion with which this Committee agrees. These Committees found that omitting the purpose of the contact implies that the lawyer is disinterested, in violation of Rule 4.3(a).

This Committee agrees with the Philadelphia Opinion (2009-02) and concludes that a lawyer may not use deception to gain access to an unrepresented person's social networking site. A lawyer may ethically request access to the site, however, by using the lawyer's real name and by stating the lawyer's purpose for the request. Omitting the purpose would imply that the lawyer is disinterested, contrary to Rule 4.3(a).

5. Attorneys May Use Information Discovered on a Social Networking Website in a Dispute

If a lawyer obtains information from a social networking website, that information may be used in a legal dispute provided the information was obtained ethically and consistent with other portions of

[13] Kentucky Bar Assn., Ethics Comm., Formal Op. KBA E-434 (2012).
[14] *Id.* at 2.
[15] Philadelphia Bar Assn., Prof'l Guidance Comm., Op. 2009-02 (2009).
[16] New Hampshire Bar Assn., Ethics Comm., Op. 2012-13/05 (2012).
[17] Oregon State Bar, Legal Ethics Comm., Op. 2013-189 (2013).

this Opinion. As mentioned previously, a competent lawyer has the duty to understand how social media works and how it may be used in a dispute. Because social networking websites allow users to instantaneously post information about anything the user desires in many different formats, a client's postings on social media may potentially be used against the client's interests. Moreover, because of the ease with which individuals can post information on social media websites, there may be an abundance of information about the user that may be discoverable if the user is ever involved in a legal dispute.

For example, in 2011, a New York[18] court ruled against a wife's claim for support in a matrimonial matter based upon evidence from her blog that contradicted her testimony that she was totally disabled, unable to work in any capacity, and rarely left home because she was in too much pain. The posts confirmed that the wife had started belly dancing in 2007, and the Court learned of this activity in 2009 when the husband attached the posts to his motion papers. The Court concluded that the wife's postings were relevant and could be deemed as admissions by the wife that contradicted her claims.

Courts have, with increasing frequency, permitted information from social media sites to be used in litigation, and have granted motions to compel discovery of information on private social networking websites when the public profile shows relevant evidence may be found.

For example, in *McMillen v. Hummingbird Speedway, Inc.,*[19] the Court of Common Pleas of Jefferson County, Pennsylvania granted a motion to compel discovery of the private portions of a litigant's Facebook profile after the opposing party produced evidence that the litigant may have misrepresented the extent of his injuries. In a New York case, *Romano v. Steelcase Inc.,*[20] the Court similarly granted a defendant's request for access to a plaintiff's social media accounts because the Court believed, based on the public portions of plaintiff's account, that the information may be inconsistent with plaintiff's claims of loss of enjoyment of life and physical injuries, thus making the social media accounts relevant.

In *Largent v. Reed,*[21] a Pennsylvania Court of Common Pleas granted a discovery request for access to a personal injury plaintiff's social media accounts. The Court engaged in a lengthy discussion of Facebook's privacy policy and Facebook's ability to produce subpoenaed information. The Court also ordered that plaintiff produce her login information for opposing counsel and required that she make no changes to her Facebook for thirty-five days while the defendant had access to the account.

Conversely, in *McCann v. Harleysville Insurance Co.,*[22] a New York court denied a defendant access to a plaintiff's social media account because there was no evidence on the public portion of the profile to suggest that there was relevant evidence on the private portion. The court characterized this request as a "fishing expedition" that was too broad to be granted. Similarly, in *Trail v. Lesko,*[23] Judge R. Stanton Wettick, Jr. of the Court of Common Pleas of Allegheny County denied a party access to a

[18] *B.M. v D.M.,* 31 Misc. 3d 1211(A) (N.Y. Sup. Ct. 2011).
[19] *McMillen v. Hummingbird Speedway, Inc.,* 2010 Pa. Dist. & Cnty. Dec. LEXIS 270 (Pa. County Ct. 2010).
[20] *Romano v Steelcase Inc.,* 30 Misc. 3d 426 (N.Y. Sup. Ct. 2010).
[21] *Largent v. Reed*, No. 2009-1823 (Pa.Ct.Com.Pl. Franklin Cty. 2011).
[22] *McCann v. Harleysville Ins. Co. of N.Y.,* 78 A.D.3d 1524 (N.Y. App. Div. 4th Dep't 2010).
[23] *Trail v. Lesko,* 2012 Pa. Dist. & Cnty. Dec. LEXIS 194 (Pa. County Ct. 2012).

plaintiff's social media accounts, concluding that, under Pa. R.Civ.P. 4011(b), the defendant did not produce any relevant evidence to support its request; therefore, granting access to the plaintiff's Facebook account would have been needlessly intrusive.

6. Attorneys May Generally Comment or Respond to Reviews or Endorsements, and May Solicit Such Endorsements Provided the Reviews Are Monitored for Accuracy

Some social networking websites permit a member or other person, including clients and former clients, to recommend or endorse a fellow member's skills or accomplishments. For example, LinkedIn allows a user to "endorse" the skills another user has listed (or for skills created by the user). A user may also request that others endorse him or her for specified skills. LinkedIn also allows a user to remove or limit endorsements. Other sites allow clients to submit reviews of an attorney's performance during representation. Some legal-specific social networking sites focus exclusively on endorsements or recommendations, while other sites with broader purposes can incorporate recommendations and endorsements into their more relaxed format. Thus, the range of sites and the manner in which information is posted varies greatly.

Although an attorney is not responsible for the content that other persons, who are not agents of the attorney, post on the attorney's social networking websites, an attorney (1) should monitor his or her social networking websites, (2) has a duty to verify the accuracy of any information posted, and (3) has a duty to remove or correct any inaccurate endorsements. For example, if a lawyer limits his or her practice to criminal law, and is "endorsed" for his or her expertise on appellate litigation on the attorney's LinkedIn page, the attorney has a duty to remove or correct the inaccurate endorsement on the LinkedIn page. This obligation exists regardless of whether the information was posted by the attorney, by a client, or by a third party. In addition, an attorney may be obligated to remove endorsements or other postings posted on sites that the attorney controls that refer to skills or expertise that the attorney does not possess.

Similarly, the Rules do not prohibit an attorney from soliciting reviews from clients about the attorney's services on an attorney's social networking site, nor do they prohibit an attorney from posting comments by others.[24] Although requests such as these are permissible, the attorney should monitor the information so as to verify its accuracy.

Rule 7.2 states, in relevant part:

> (d) No advertisement or public communication shall contain an endorsement by a celebrity or public figure.
> (e) An advertisement or public communication that contains a paid endorsement shall disclose that the endorser is being paid or otherwise compensated for his or her appearance or endorsement.

Rule 7.2(d) prohibits any endorsement by a celebrity or public figure. A lawyer may not solicit an endorsement nor accept an unsolicited endorsement from a celebrity or public figure on social

[24] In *Dwyer v. Cappell*, 2014 U.S. App. LEXIS 15361 (3d Cir. N.J. Aug. 11, 2014), the Third Circuit ruled that an attorney may include accurate quotes from judicial opinions on his website, and was not required to reprint the opinion in full.

media. Additionally, Rule 7.2(e) mandates disclosure if an endorsement is made by a paid endorser. Therefore, if a lawyer provides any type of compensation for an endorsement made on social media, the endorsement must contain a disclosure of that compensation.

Even if the endorsement is not made by a celebrity or a paid endorser, the post must still be accurate. Rule 8.4(c) is again relevant in this context. This Rule prohibits lawyers from dishonest conduct and making misrepresentations. If a client or former client writes a review of a lawyer that the lawyer knows is false or misleading, then the lawyer has an obligation to correct or remove the dishonest information within a reasonable amount of time. If the lawyer is unable to correct or remove the listing, he or she should contact the person posting the information and request that the person remove or correct the item.

The North Carolina State Bar Ethics Committee issued Formal Ethics Opinion 8,[25] concluding that a lawyer may accept recommendations from current or former clients if the lawyer monitors the recommendations to ensure that there are no ethical rule violations. The Committee discussed recommendations in the context of LinkedIn where an attorney must accept the recommendation before it is posted.[26] Because the lawyer must review the recommendation before it can be posted, there is a smaller risk of false or misleading communication about the lawyer's services. The Committee also concluded that a lawyer may request a recommendation from a current or former client but limited that recommendation to the client's level of satisfaction with the lawyer-client relationship.

This Committee agrees with the North Carolina Committee's findings. Attorneys may request or permit clients to post positive reviews, subject to the limitations of Rule 7.2, but must monitor those reviews to ensure they are truthful and accurate.

7. Attorneys May Comment or Respond to Online Reviews or Endorsements But May Not Reveal Confidential Client Information

Attorneys may not disclose confidential client information without the client's consent. This obligation of confidentiality applies regardless of the context. While the issue of disclosure of confidential client information extends beyond this Opinion, the Committee emphasizes that attorneys may not reveal such information absent client approval under Rule 1.6. Thus, an attorney may not reveal confidential information while posting celebratory statements about a successful matter, nor may the attorney respond to client or other comments by revealing information subject to the attorney-client privilege. Consequently, a lawyer's comments on social media must maintain attorney/client confidentiality, regardless of the context, absent the client's informed consent.

This Committee has opined, in Formal Opinion 2014-200,[27] that lawyers may not reveal client confidential information in response to a negative online review. Confidential client information is defined as "information relating to representation," which is generally very broad. While there are

[25] North Carolina State Bar Ethics Comm., Formal Op. 8 (2012).

[26] Persons with profiles on LinkedIn no longer are required to approve recommendations, but are generally notified of them by the site. This change in procedure highlights the fact that sites and their policies and procedures change rapidly, and that attorneys must be aware of their listings on such sites.

[27] Pennsylvania Bar Assn, Ethics Comm., Formal Op. 2014-200 (2014).

certain circumstances that would allow a lawyer to reveal confidential client information, a negative online client review is not a circumstance that invokes the self-defense exception.

As Rule 1.6 states:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
> (b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.
> (c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:
> (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client
> (d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.
> (e) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

Thus, any information that an attorney posts on social media may not violate attorney/client confidentiality.

An attorney's communications to a client are also confidential. In *Gillard v. AIG Insurance Company,*[28] the Pennsylvania Supreme Court ruled that the attorney-client privilege extends to communications from attorney to client. The Court held that "the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice."[29] The court noted that communications from attorney to client come with a certain expectation of privacy. These communications only originate because of a confidential communication from the client. Therefore, even revealing information that the attorney has said to a client may be considered a confidential communication, and may not be revealed on social media or elsewhere.

Responding to a negative review can be tempting but lawyers must be careful about what they write. The Hearing Board of the Illinois Attorney Registration and Disciplinary Commission reprimanded an attorney for responding to a negative client review on the lawyer referral website AVVO[30]. In her response, the attorney mentioned confidential client information, revealing that the client had been in a physical altercation with a co-worker. While the Commission did not prohibit an attorney from

[28] *Gillard v. AIG Insurance Co.*, 15 A.3d 44 (Pa. 2011).
[29] *Id.* at 59.
[30] *In Re Tsamis*, Comm. File No. 2013PR00095 (Ill. 2013).

responding, in general, to a negative review on a site such as AVVO, it did prohibit revealing confidential client information in that type of reply.

The Illinois disciplinary action is consistent with this Committee's recent Opinion and with the Pennsylvania Rules. A lawyer is not permitted to reveal confidential information about a client even if the client posts a negative review about the lawyer. Rule 1.6(d) instructs a lawyer to make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of . . . information relating to the representation of a client." This means that a lawyer must be mindful of any information that the lawyer posts pertaining to a client. While a response may not contain confidential client information, an attorney is permitted to respond to reviews or endorsements on social media. These responses must be accurate and truthful representations of the lawyer's services.

Also relevant is Rule 3.6, which states:

> (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

This Rule prohibits lawyers from making extrajudicial statements through public communication during an ongoing adjudication. This encompasses a lawyer updating a social media page with information relevant to the proceeding. If a lawyer's social media account is generally accessible publicly then any posts about an ongoing proceeding would be a public communication. Therefore, lawyers should not be posting about ongoing matters on social media when such matters would reveal confidential client information.

For example, the Supreme Court of Illinois suspended an attorney for 60 days[31] for writing about confidential client information and client proceedings on her personal blog. The attorney revealed information that made her clients easily identifiable, sometimes even using their names. The Illinois Attorney Registration and Disciplinary Commission had argued in the matter that the attorney knew or should have known that her blog was accessible to others using the internet and that she had not made any attempts to make her blog private.

Social media creates a wider platform of communication but that wider platform does not make it appropriate for an attorney to reveal confidential client information or to make otherwise prohibited extrajudicial statements on social media.

8. Attorneys May Generally Endorse Other Attorneys on Social Networking Websites

Some social networking sites allow members to endorse other members' skills. An attorney may endorse another attorney on a social networking website provided the endorsement is accurate and not misleading. However, celebrity endorsements are not permitted nor are endorsements by judges. As previously noted, Rule 8.4(c) prohibits an attorney from being dishonest or making

[31] *In Re Peshek*, No. M.R. 23794 (Il. 2010); Compl.., *In Re Peshek*, Comm. No. 09 CH 89 (Il. 2009).

misrepresentations. Therefore, when a lawyer endorses another lawyer on social media, the endorsing lawyer must only make endorsements about skills that he knows to be true.

9. Attorneys May Review a Juror's Internet Presence

The use of social networking websites can also come into play when dealing with judges and juries. A lawyer may review a juror's social media presence but may not attempt to access the private portions of a juror's page.

Rule 3.5 states:

> A lawyer shall not:
> (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;
> (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;
> (c) communicate with a juror or prospective juror after discharge of the jury if:
> (1) the communication is prohibited by law or court order;
> (2) the juror has made known to the lawyer a desire not to communicate; or
> (3) the communication involves misrepresentation, coercion, duress of harassment; or
> (d) engage in conduct intended to disrupt a tribunal.

During jury selection and trial, an attorney may access the public portion of a juror's social networking website but may not attempt or request to access the private portions of the website. Requesting access to the private portions of a juror's social networking website would constitute an ex parte communication, which is expressly prohibited by Rule 3.5(b).

Rule 3.5(a) prohibits a lawyer from attempting to influence a juror or potential juror. Additionally, Rule 3.5(b) prohibits *ex parte* communications with those persons. Accessing the public portions of a juror's social media profile is ethical under the Rules as discussed in other portions of this Opinion. However, any attempts to gain additional access to private portions of a juror's social networking site would constitute an ex parte communication. Therefore, a lawyer, or a lawyer's agent, may not request access to the private portions of a juror's social networking site.

American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 466 concluded that a lawyer may view the public portion of the social networking profile of a juror or potential juror but may not communicate directly with the juror or jury panel member. The Committee determined that a lawyer, or his agent, is not permitted to request access to the private portion of a juror's or potential juror's social networking website because that type of *ex parte* communication would violate Model Rule 3.5(b). There is no *ex parte* communication if the social networking website independently notifies users when the page has been viewed. Additionally, a lawyer may be required to notify the court of any evidence of juror misconduct discovered on a social networking website.

This Committee agrees with the guidance provided in ABA Formal Opinion 466, which is consistent with Rule 3.5's prohibition regarding attempts to influence jurors, and *ex parte* communications with jurors.

10. Attorneys May Ethically Connect with Judges on Social Networking Websites Provided the Purpose is not to Influence the Judge

A lawyer may not ethically connect with a judge on social media if the lawyer intends to influence the judge in the performance of his or her official duties. In addition, although the Rules do not prohibit such conduct, the Committee cautions attorneys that connecting with judges may create an appearance of bias or partiality.[32]

Various Rules address this concern. For example, Rule 8.2 states:

> (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

In addition, Comment [4] to Canon 2.9 of the Code of Judicial Conduct, effective July 1, 2014, states that "A judge shall avoid comments and interactions that may be interpreted as *ex parte* communications concerning pending matters or matters that may appear before the court, including a judge who participates in electronic social media." Thus, the Supreme Court has implicitly agreed that judges may participate in social media, but must do so with care.

Based upon this statement, this Committee believes that attorneys may connect with judges on social media websites provided the purpose is not to influence the judge, and reasonable efforts are taken to assure that there is no ex parte or other prohibited communication. This conclusion is consistent with Rule 3.5(a), which forbids a lawyer to "seek to influence a judge" in an unlawful way.

IV. Conclusion

Social media is a constantly changing area of technology that lawyers keep abreast of in order to remain competent. As a general rule, any conduct that would not be permissible using other forms of communication would also not be permissible using social media. Any use of a social networking website to further a lawyer's business purpose will be subject to the Rules of Professional Conduct.

Accordingly, this Committee concludes that any information an attorney or law firm places on a social networking website must not reveal confidential client information absent the client's consent. Competent attorneys should also be aware that their clients use social media and that what clients reveal on social media can be used in the course of a dispute. Finally, attorneys are permitted to use social media to research jurors and may connect with judges so long as they do not attempt to

[32] American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 462 concluded that a judge may participate in electronic social networking, but as with all social relationships and contacts, a judge must comply with the relevant provisions of the Code of Judicial Conduct and avoid any conduct that would undermine the judge's independence, integrity, or impartiality, or create an appearance of impropriety.

influence the outcome of a case or otherwise cause the judge to violate the governing Code of Judicial Conduct.

Social media presents a myriad of ethical issues for attorneys, and attorneys should continually update their knowledge of how social media impacts their practice in order to demonstrate competence and to be able to represent their clients effectively.

CAVEAT: THE FOREGOING OPINION IS ADVISORY ONLY AND IS NOT BINDING ON THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA OR ANY COURT. THIS OPINION CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOOSE TO GIVE IT.



April 18, 2014

INQUIRY NO. 2014-016

You have requested an ethics opinion from the PBA Legal Ethics and Professional Responsibility Committee.

I. Introduction

According to your email, you are requesting a written ethics opinion concerning various issues relating to social networking websites. Although your inquiry refers to specific website, I am summarizing the inquiry as follows:

(1) Whether lawyers may ethically connect with a client or former client on a social networking website.
(2) Whether an attorney is allowed to endorse another attorney on a social networking website.
(3) Whether a client who asks to write a review of an attorney, or who writes a review of an attorney, has caused the attorney to violate any rule of professional conduct.
(4) Whether attorneys may comment on or respond to reviews or endorsements.

It is this member of the Committee's opinion that, subject to the limitations described below:

(1) Lawyers may ethically connect with clients or former clients.
(2) Attorneys may endorse other attorneys on social networking websites.
(3) Client reviews do not *per se* violate the Rules of Professional Conduct.
(4) Attorneys may comment or respond to reviews or endorsements.

II. Analysis

A. Introduction

Initially, I note that the issues raised by social networking websites, ranging from Facebook to Google+ to LinkedIn, as well as sites such as Twitter, implicate many ethical issues, and as such, are highly fact-specific. This opinion attempts to provide a broad overview of the issues, with the strong recommendation that you examine the Rules

carefully and understand that, as social media evolves, so will the ethical issues related to it.

B. Relevant Pennsylvania Rules of Professional Conduct

Your inquiry implicates numerous Rules of Professional Conduct. Among the most critical are the following Rules, or excerpts of the relevant portions of the Rules:

Rule 1.1. Competence.

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
>
> Comment:
>
> Maintaining Competence
>
> (8) To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Rule 1.6. Confidentiality of Information.

> (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
> (b) A lawyer shall reveal such information if necessary to comply with the duties stated in Rule 3.3.
> (c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;
> (2) to prevent the client from committing a criminal act that the lawyer believes is likely to result in substantial injury to the financial interests or property of another;
> (3) to prevent, mitigate or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services are being or had been used; or
> (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved, or to respond

to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to secure legal advice about the lawyer's compliance with these Rules; or

(6) to effectuate the sale of a law practice consistent with Rule 1.17; or

(7) to detect and resolve conflicts of interest from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(e) The duty not to reveal information relating to representation of a client continues after the client-lawyer relationship has terminated.

Rule 3.6. Trial Publicity.

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) and (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be

limited to such information as is necessary to mitigate the recent adverse publicity.

Rule 7.1. Communications Concerning a Lawyer's Services.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Rule 7.2. Advertising.

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through written, recorded or electronic communications, including public media, not within the purview of Rule 7.3.

(b) A copy or recording of an advertisement or written communication shall be kept for two years after its last dissemination along with a record of when and where it was used. This record shall include the name of at least one lawyer responsible for its content.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay:

(1) the reasonable cost of advertisements or written communications permitted by this Rule;

(2) the usual charges of a lawyer referral service or other legal service organization; and

(3) for a law practice in accordance with Rule 1.17.

(d) No advertisement or public communication shall contain an endorsement by a celebrity or public figure.

(e) An advertisement or public communication that contains a paid endorsement shall disclose that the endorser is being paid or otherwise compensated for his or her appearance or endorsement.

(f) A non-lawyer shall not portray a lawyer or imply that he or she is a lawyer in any advertisement or public communication; nor shall an advertisement or public communication portray a fictitious entity as a law firm, use a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated together in a law firm if that is not the case.

(g) An advertisement or public communication shall not contain a portrayal of a client by a non-client; the re-enactment of any events or scenes; or, pictures or persons, which are not actual or authentic, without a disclosure that such depiction is a dramatization.

(h) Every advertisement that contains information about the lawyer's fee shall be subject to the following requirements:

(1) Advertisements that state or indicate that no fee shall be charged in the absence of recovery shall disclose that the client will be liable for certain expenses in addition to the fee, if such is the case.

(2) A lawyer who advertises a specific fee or hourly rate or range of fees for a particular service shall honor the advertised fee for at least ninety (90) days; provided that for advertisements in media published annually, the advertised fee shall be honored for no less than one (1) year following initial publication unless otherwise stated as part of the advertisement.

(i) All advertisements and written communications shall disclose the geographic location, by city or town, of the office in which the lawyer or lawyers who will actually perform the services advertised principally practice law. If the office location is outside the city or town, the county in which the office is located must be disclosed.

(j) A lawyer shall not, directly or indirectly (whether through an advertising cooperative or otherwise), pay all or any part of the costs of an advertisement by a lawyer not in the same firm or by any for-profit entity other than the lawyer's firm, unless the advertisement discloses the name and principal office address of each lawyer or law firm involved in paying for the advertisement and, if any lawyer or law firm will receive referrals from the advertisement, the circumstances under which referrals will be made and the basis and criteria on which the referral system operates.

(k) A lawyer shall not, directly or indirectly, advertise that the lawyer or his or her law firm will only accept, or has a practice limited to, particular types of cases unless the lawyer or his or her law firm handles, as a principal part of his, her or its practice, all aspects of the cases so advertised from intake through trial. If a lawyer or law firm advertises for a particular type of case that the lawyer or law firm ordinarily does not handle from intake through trial, that fact must be disclosed. A lawyer or law firm shall not advertise as a pretext to refer cases obtained from advertising to other lawyers.

Rule 7.3. Solicitation of Clients.

(a) A lawyer shall not solicit in-person or by intermediary professional employment from a person with whom the lawyer has no family or prior professional relationship when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted is a lawyer or has a family, close personal, or prior professional relationship with the lawyer. The term "solicit" includes contact in-person by telephone or by real-time electronic communication, but, subject to the requirements of Rule 7.1 and Rule 7.3(b), does not include written communications, which may include targeted, direct mail advertisements.

(b) A lawyer may contact, or send a written communication to, the target of the solicitation for the purpose of obtaining professional employment unless:

(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer.

(2) the person has made known to the lawyer a desire not to receive communications from the lawyer; or

(3) the communication involves coercion, duress, or harassment.

Rule 7.4. Communication of Fields of Practice and Specialization.

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state that the lawyer is a specialist except as follows:

(1) a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation;

(2) a lawyer engaged in admiralty practice may use the designation "admiralty," "proctor in admiralty" or a substantially similar designation;

(3) a lawyer who has been certified by an organization approved by the Supreme Court of Pennsylvania as a certifying organization in accordance with paragraph (b) may advertise the certification during such time as the certification of the lawyer and the approval of the organization are both in effect;

(4) a lawyer may communicate that the lawyer is certified in a field of practice only when that communication is not false or misleading and that certification is granted by the Supreme Court of Pennsylvania.

(b) Upon recommendation of the Pennsylvania Bar Association, the Supreme Court of Pennsylvania may approve for purposes of paragraph (a) an organization that certifies lawyers, if the Court finds that:

(1) advertising by a lawyer of certification by the certifying organization will provide meaningful information, which is not false, misleading or deceptive, for use of the public in selecting or retaining a lawyer; and

(2) certification by the organization is available to all lawyers who meet objective and consistently applied standards relevant to practice in the area of the law to which the certification relates.

The approval of the certifying organization shall be for such period not longer than five (5) years as the Court shall order, and may be renewed upon recommendation of the Pennsylvania Bar Association.

Rule 7.5. Firm Names and Letterheads.

(a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may be used by a lawyer in private practice if it does not imply a connection with a government, government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1. If otherwise lawful a firm may use as, or continued to include in, its name, the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession.

(b) A law firm with offices in more than one jurisdiction may use the same name or other professional designation in each jurisdiction, but identification of the lawyers in an office of the firm shall indicate the jurisdictional limitations on those not licensed to practice in the jurisdiction where the office is located.
(c) The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communication on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.
(d) Lawyers shall not state or imply that they practice in a partnership or other organization unless that is the fact.

Rule 8.2. Statements Concerning Judges and Other Adjudicatory Officers.

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

C. Discussion

As a preliminary matter, this Opinion addresses social media profiles and websites used by lawyers for business purposes. While a social media profile that is used exclusively for personal purposes (*i.e.,* to maintain relationships with friends and family) may not be subject to the rules of advertising and soliciting, attorneys should be conscious that clients and others may discover those websites, and any information may be considered public and subject to the Rules of Professional Conduct by the Disciplinary Board. However, any social media activities or websites that promote, mention or otherwise bring attention to any law firm or to an attorney law firm in his or her role as an attorney is subject to and must comply with the Rules.

All of the conclusions above can be summarized under the following general guidelines:

1. If lawyers use social media, they must be aware of how these websites operate and the issues they raise, as well as the manner in which postings are either public or private.
2. Comments placed on social networking websites must maintain attorney/client confidentiality, and the disclosure of confidential client information is a violation of the Rules.
3. Attorneys are responsible for any content or information that they post on a social networking website, and should monitor those sites to ensure that they comply with the Rules of Professional Conduct.
4. All statements made on social networking websites must be truthful and verifiable.
5. All statements made on social networking websites must comply with the advertising rules and other Rules of Professional Conduct.
6. Although attorneys are not responsible for the content that other persons, who are not agents of the attorneys, post on their social networking

websites, they have an obligation to monitor their social networking websites to verify the accuracy of any information posted, regardless whether the information was posted by the attorney, by a client or by a third party.

7. Attorneys may not make statements on social networking websites that they would be prohibited from making elsewhere, *e.g.*, an attorney may not refer to himself or herself as a "specialist" unless the attorney has been certified as a specialist by the proper accrediting body in accordance with the Rules.
8. Lawyers may connect with clients or former clients on social networking websites, but are cautioned to avoid disclosing confidential information. Attorneys must also be aware that they should preserve any such communications, particularly with existing clients. In addition, attorneys must abide by traditional restrictions relating to solicitation of clients.
9. An attorney may endorse another attorney on a social networking website provided the endorsement is accurate and not misleading. However, celebrity endorsements are not permitted nor are endorsements by judges. Similarly, attorneys should take great care in their relationships with judges to avoid creating circumstance in which a judge's impartiality could be questioned.
10. If an attorney asks a client to write a review of the attorney, the attorney must review any reviews for truthfulness and accuracy, and to confirm that the review complies with the Rules of Professional Conduct.
11. Any reviews written by an attorney must comply with the Rules of Professional Conduct.
12. Attorneys may comment or respond to reviews or endorsements, but must do so in accordance with the Rules of Professional Conduct.

CAVEAT: The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. This opinion carries only such weight as an appropriate reviewing authority may choose to give it. Moreover, this is the opinion of only one member of the committee and is not an opinion of the full committee.



LAWYER'S RESPONSE TO CLIENT'S NEGATIVE ONLINE REVIEW

FORMAL OPINION 2014-200

The PBA Legal Ethics and Professional Responsibility Committee has been asked whether the Pennsylvania Rules of Professional Conduct ("PA RPC") impose restrictions upon a lawyer who wishes to publicly respond to a client's adverse comments on the internet about the lawyer's representation of the client. The Committee concludes that the lawyer's responsibilities to keep confidential all information relating to the representation of a client, even an ungrateful client, constrains the lawyer. We conclude, therefore, that a lawyer cannot reveal client confidential information in response to a negative online review without the client's informed consent.

We further believe that any decision to respond should be guided by the practical consideration of whether a response calls more attention to the review. Any response should be proportional and restrained. For example, a response could be, "A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events."

Applicable Ethics Rules

PA RPC 1.6 provides, in pertinent part:

Rule 1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).

. . .

(c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:

. . .

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the

> lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Comment [14] to Rule 1.6 states:

> [14] Fifth, where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (c)(4) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

Under PA RPC 1.6(e), the duty of confidentiality survives the termination of the client-lawyer relationship.

Scope of Restricted Information

Rule 1.6(a) prohibits lawyers who do not have the client's informed consent from revealing information relating to "representation of a client" with certain limited exceptions. "Information relating to representation" is generally recognized to be very broad and is not limited to secrets or confidences." *Pennsylvania Ethics Handbook, 2011 Ed.,* § 3.3 at 51; *Iowa Supreme Court Att'y Discipline Bd. v. Marzen*, 779 N.W.2d 757, 765–67 (Iowa 2010) (concluding that" the rule of confidentiality is breached when an lawyer discloses information learned through the lawyer-client relationship even if that information is otherwise publicly available").

Exceptions to Confidentiality

Among the exceptions to the rule of confidentiality is the "self-defense exception," PA RPC 1.6(c)(4) (which is identical to 1.6(b)(5) in the Model Rules). That section permits, but does not require, a lawyer to reveal information to the extent the lawyer reasonably believes necessary:

- to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client;

- to establish a defense to a criminal charge or civil claim or disciplinary proceeding against the lawyer based upon conduct in which the client was involved; or

- to respond to allegations in any proceeding concerning the lawyer‘s representation of the client.

Oxford Dictionaries Online defines “controversy” as a “disagreement, typically when prolonged, public, and heated.” http://www.oxforddictionaries.com. A disagreement as to the quality of a lawyer’s services might qualify as a “controversy.” However, such a broad interpretation is problematic for two reasons. First, it would mean that any time a lawyer and a client disagree about the quality of the representation, the lawyer may publicly divulge confidential information. Second, Comment [14] makes clear that a lawyer’s disclosure of confidential information to “establish a claim or defense” only arises in the context of a civil, criminal, disciplinary or other proceeding. Although a genuine disagreement might exist between the lawyer and the client, such a disagreement does not constitute a “controversy” in the sense contemplated by the rules to permit disclosures necessary to establish a “claim or defense.” The literal language of Rule 1.6(c)(4) (the self-defense exception) does not authorize responding on the internet to criticism.

The Right to Defend Before an Action is Commenced

> Comment [14] to Rule 1.6 states, in part:
>
> Paragraph (c)(4) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion.

While comment [14] provides that “[p]aragraph (c)(4) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity” (wrongdoing in which the client’s conduct is implicated), there must be an action or proceeding in contemplation.

The Restatement (Third) of the Law Governing Lawyers, Section 64 is the functional equivalent of PA RPC 1.6(c)(4). Comment c states: “A lawyer may act in self defense ... only to defend against charges that imminently threaten the lawyer or the lawyer’s associate or agent with serious consequences, including criminal charges, claims of legal malpractice, and other civil actions such as suits to recover overpayment of fees, complaints in disciplinary proceedings, and the threat of disqualification. Imminent threats arise not only upon filing of such charges but also upon the manifestation of intent to initiate such proceedings by persons in an apparent position to do so, such as a prosecutor or aggrieved potential litigant.”

The Restatement (Third) of the Law Governing Lawyers, Section 64, comment e states: “Use or disclosure of confidential client information ... is warranted only if and to the extent that

the disclosing lawyer reasonably believes necessary. The concept of necessity precludes disclosure in responding to casual charges, such as comments not likely to be taken seriously by others. The disclosure is warranted only when it constitutes a proportionate and restrained response to the charges. The lawyer must believe that options short of use or disclosure have been exhausted or will be unavailing or that invoking them would substantially prejudice the lawyer's position in the controversy."

State Bar of Arizona Opinion 93-02 concluded that an attorney could disclose otherwise confidential information to the author of a book about the murder trial of a former client in response to assertions made by the former client that the attorney had acted incompetently. The opinion concluded that limiting the exception to situations where there is a formal claim or threat of a formal claim would render the language in Rule 1.6(c)(4) "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client" largely superfluous.

In Opinion 2014-1, the San Francisco Bar Association commented:

> [The Arizona opinion] is inconsistent with the logic of subsequent ABA Formal Opinion 10-456 which prohibited voluntary disclosure of confidential information outside a legal proceeding even though the former client had asserted an ineffective assistance of counsel claim. The Arizona opinion relies, in part, on a tentative draft comment to a section of the Restatement (Third) of the Law Governing Lawyers regarding the use or disclosure of information in a lawyer's self-defense which states: "Normally, it is sound professional practice for a lawyer not to use or reveal confidential client information, except in response to a formal client charge of wrongdoing with a tribunal or similar agency. *When, however, a client has made public charges of wrongdoing, a lawyer is warranted under this Section in making a proportionate and restrained response in order to protect the reputation of the lawyer."* State Bar of Arizona Op. 93-02, pp. 4-5 (Emphasis added). This language is not part of the Restatement as adopted.

ABA Formal Opinion 10-456 states:

> In general, a lawyer must maintain the confidentiality of information protected by Rule 1.6 for former clients as well as current clients and may not disclose protected information unless the client or former client gives informed consent. The confidentiality rule "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."
>
> . . .
>
> The self-defense exception applies in various contexts, including when and to the extent reasonably necessary to defend against a criminal, civil or disciplinary claim against the lawyer. The rule allows the lawyer, to the extent reasonably necessary, to make disclosures to a third party who credibly threatens to bring such a claim against the lawyer in order to persuade the third party that there is no

> basis for doing so. For example, the lawyer may disclose information relating to the representation insofar as necessary to dissuade a prosecuting, regulatory or disciplinary authority from initiating proceedings against the lawyer or others in the lawyer's firm, and need not wait until charges or claims are filed before invoking the self-defense exception. Although the scope of the exception has expanded over time, the exception is a limited one, because it is contrary to the fundamental premise that client-lawyer confidentiality ensures client trust and encourages full and frank disclosure necessary to an effective representation. Consequently, it has been said that "[a] lawyer may act in self-defense under [the exception] only to defend against charges that *imminently* threaten the lawyer or the lawyer's associate or agent with *serious* consequences. . . ."

Ethics Opinions

The New Hampshire Bar Association Ethics Committee was asked whether a lawyer could post a detailed response to a client's online comment that the lawyer took the client's money for a hearing that he knew he could not win. The Committee advised that "while you may be permitted to make some sort of limited response to your client's postings, you are not authorized to make the disclosures that you propose." NH Bar News, Feb. 19, 2014.

The Los Angeles County Bar Association Professional Responsibility and Ethics Committee issued Opinion 525 on December 6, 2012 on Ethical Duties of Lawyers in Connection with Adverse Comments Published by a Former Client. It concluded:

> The lawyer may publicly respond to such comments as long as the rebuttal: (1) does not disclose any confidential information; (2) does not injure the former client in any matter involving the prior representation; and (3) is proportionate and restrained.

The San Francisco Bar Association opined:

> Lawyer is not barred from responding generally to an online review by a former client where the former client's matter has concluded. Although the residual duty of loyalty to the former client does not prohibit a response, Lawyer's on-going duty of confidentiality prohibits Lawyer from disclosing any confidential information about the prior representation absent the former client's informed consent or a waiver of confidentiality. California's statutory self-defense exception, as interpreted by California case law, has been limited in application to claims by a client (against or about a lawyer), or by an lawyer against a client, in the context of a formal or imminent legal proceeding. Even in those circumstances where disclosure of otherwise confidential information is permitted, the disclosure must be narrowly tailored to the issues raised by the former client. San Francisco Bar Association Op. 2014-1.

Disciplinary Actions

In December 2006, the Supreme Court of Oregon approved a stipulation for discipline suspending a lawyer for 90 days for sending an email message to members of a bar listserv in which the lawyer disclosed confidential information about a former client who had fired the lawyer in an effort to warn colleagues that the former client was "attorney shopping." *In re Quillinan*, 20 DB Rptr 288 (Or. 2006).

The Supreme Court of Wisconsin, in June 2011, suspended the license of a lawyer who wrote and published an Internet blog in which the lawyer revealed confidential information about current and former clients that was sufficiently detailed to identify those clients using public sources. *Office of Lawyer Regulation v. Peshek*, 798 N.W.2d 879 (Wis. 2011).

The Georgia Supreme Court in a March 2013 ruling rejected as inadequate a recommendation of the Georgia State Bar General Counsel seeking a review panel reprimand for lawyer for violating Rule 1.6. The lawyer admitted to posting on the internet confidential information about the lawyer's former client in response to negative reviews about the lawyer the client had posted on consumer websites. *In re Skinner*, 740 S.E.2d 171 (Ga. 2013).

A Chicago lawyer was reprimanded by the Illinois Lawyer Registration and Disciplinary Commission for revealing client communications in response to a former client who posted a negative review of the lawyer on Avvo. The parties' stipulated that the lawyer exceeded what was necessary to respond to the client's accusations by revealing in her response to a negative review that the client had beaten up a co-worker. *In re Tsamis,* Commission File No. 2013PR00095 (Ill. 2013).

Conclusion

While it is understandable that a lawyer would want to respond to a client's negative online review about the lawyer's representation, the lawyer's responsibilities to keep confidential all information relating to the representation of a client, even an ungrateful client, must constrain the lawyer. We conclude that a lawyer cannot reveal client confidential information in a response to a client's negative online review absent the client's informed consent.

CAVEAT: THE FOREGOING OPINION IS ADVISORY ONLY AND IS NOT BINDING ON THE DISCIPLINARY BOARD OF THE SUPREME COURT OF PENNSYLVANIA OR ANY COURT. THIS OPINION CARRIES ONLY SUCH WEIGHT AS AN APPROPRIATE REVIEWING AUTHORITY MAY CHOOSE TO GIVE IT.



July 21, 2013

INQUIRY NO. 2013-026

Inquirer asked whether there was an ethical obligation to notify or report to the court that the opposing party to a divorce action may not understand the divorce complain and subsequent pleadings, such as a §3301(c) affidavit of consent or a §3301(d) affidavit of separation, where the opposing party is unrepresented, is illiterate, and, while not declared incapacitated, is working with the county's Intellectual and Developmental Disabilities Department, hereinafter "IDD"?

The answer is no. Nowhere do the Rules of Professional Conduct set forth an express or implied obligation upon you to notify the Court of an opposing party's assumed incapacity or state of mind. (Notably, the applicable Rule of Court, i.e., Pa. R.C.P. 1930.4, regarding Service of Original Process in Domestic Relations Matters does not impose this obligation either). Examination of Rule 3.3 regarding "Candor Toward the Tribunal" guides us to this conclusion.

Essentially, Rule 3.3, "Candor Towards the Tribunal," provides a lawyer shall not knowingly (a) make or fail to correct a false statement of law or fact made by the lawyer to the tribunal; (b) fail to disclose adverse and controlling legal authority to the tribunal; and (c) offer evidence that the lawyer knows to be false. The Rule further imposes the duty upon a lawyer to "take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Where his or her client is engaging or has engaged in criminal or fraudulent conduct. Rule 3.3(b). Filing and serving a divorce complain upon a *pro se* divorce litigant who you believe, but do not know, may not understand the meaning of the complaint, even when explained to her, is neither criminal nor fraudulent. However, if the opposing party truly is unable to understand the meaning of the divorce complaint, there is a slim chance that proceeding with a divorce action, whether pursuant to §3301(c) or (d) of the Pennsylvania Divorce Code, without taking reasonable remedial measures could potentially result in a petition to open or vacate the final decree on the basis of extrinsic fraud, i.e., a "collateral matter which precluded a fair hearing or presentation of one side of the case." 23 Pa. C.S.A. §3332. Therefore, to protect against the possibility of such a petition and, in the even it does occur, the success of such a petition, you should take remedial steps now. Rules 4.3 and 1.14, along with common sense, provide guidance as to the remedial steps you can consider taking.

Rule 4.3, "Dealing with Unrepresented Persons," imposes a duty upon you to make clear to any unrepresented opposing party that you are not disinterested in the legal

proceeding and that you are unable to give him or her legal advice other than to seek his or her own attorney. Rule 1.14, "Client with Diminished Capacity," deals solely with your responsibilities when your client may be laboring under diminished capacity, not an opposing party. Helpfully, the Explanatory Comment [1] to the Rule indicates that a "client suffering from diminished capacity often has the ability to understand, deliberate upon, and reach conclusion about matters affecting the client's own well-being." Thus, the Rule recognizes that diminished capacity might not affect a party's ability to understand and make decisions related to the lawsuit and this logic applies to your opposing party as well. The Explanatory Comment further advises that a lawyer dealing with a client who has diminished capacity might want to involve the client's family in discussions and, if a legal representative has been appointed for the client, look to that legal representative to make decisions. Explanatory Comment [3] and [4] to Rule 1.14. Ultimately, you may consider whether appointment of a guardian ad litem is necessary. Explanatory Comment [7] to Rule 1.14. Obviously appointment of a guardian ad litem is expensive and probably the course of last resort. The duties and advice set forth in these Rules and Comments are helpful to determine the reasonable remedial measures you should take when dealing with the opposing party.

During our discussion, you indicated that the opposing party lives with her brother, who is neither incapacitated nor illiterate and who cares for her. I explained to you that illiteracy is not a basis to claim bad service or extrinsic fraud in that the illiterate recipient of legal pleadings can and should get someone to read them to him or her. You also explained that, while the opposing party does suffer from some cognitive disability, you did not know the extent of the disability. You further knew that she had not been "declared incapacitated." I explained that, with your client's approval, you should contact the client's brother (and serve the complaint upon him per Pa.R.C.P. 1930.4(a)(2)(i) regarding the divorce and see if he is his sister's legal guardian and/or power of attorney. That way, you can deal with him regarding the divorce. If the brother is aware of the pending proceedings, he can explain those proceedings to the opposing party, obtain an attorney and/or guardian ad litem for her, and, perhaps, help make the divorce process less complicated and protracted as may be necessary without his involvement. At the minimum, even if the brother is not the legal guardian or power of attorney, if you copy him on all correspondence going to the opposing party, you are creating a record of your efforts to remediate the opposing party's potential inability to understand the divorce proceedings and, thus, weakening the opposing party's ability at a later date to claim that she was somehow precluded from defending herself regarding entry of the final divorce decree.

CAVEAT: The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. This opinion carries only such weight as an appropriate reviewing authority may choose to give it. Moreover, this is the opinion of only one member of the committee and is not an opinion of the full committee.



June 14, 2011

INQUIRY NO. 2011-017

The Inquirer received several alarming telephone messages from a client whom the Inquirer had been representing in a dispute with the client's landlord. The first message came in the early morning hours. The client stated his name and yelled and swore for three minutes until the maximum message time was reached and the message was cut off. Shortly thereafter, the client called again and continued to use inappropriate language in regards to the Inquirer and the opposing party, and expressly threatened to take matters into his own hands and deal with the landlord "as he had always wanted to." The threats included the police having to "pull the client off" the landlord. The message was again cut off when the maximum time was reached. Following the second message, a third message came in containing more threats against the inquirer, the landlord and the court system. The client sounded even more agitated. The final message followed containing additional threats against the Inquirer and the landlord. Inquirer asked whether the Rules of Professional Conduct would permit Inquirer to disclose the threats to law enforcement authorities.

Rule 1.6 provides in pertinent part:

Rule 1.6 Confidentiality of Information

> (a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).
>
> . . .
>
> (c) A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm;

Comment [10] to Rule 1.6 states, "Paragraph (c)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat."

Based on the threats in the voice mail message, the Inquirer may reasonably infer that disclosure to the authorities is necessary in order to prevent death or substantial bodily harm. For this reason, disclosure is permissible under Rule 1.6(c)(1).

CAVEAT: The foregoing opinion is advisory only and is not binding on the Disciplinary Board of the Supreme Court of Pennsylvania or any other Court. This opinion carries only such weight as an appropriate reviewing authority may choose to give it. Moreover, this is the opinion of only one member of the committee and is not an opinion of the full committee.

Chapter Five

Child Support, Spousal Support, and Alimony Pendente Lite

Chapter Five
Section 1

Child Support, Spousal Support, and Alimony Pendente Lite

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I. INTRODUCTION.

A. AUTHORITY.

An action for spousal support, child support and alimony pendente lite is often the initial confrontation between the litigants. The preparation of the parties and their attorneys at this initial stage may set the tone for the rest of the domestic relations case. Statutory authority spousal support, child support and alimony pendente lite may be found as follows:

1. Relevant provisions of the Pennsylvania Divorce Code (*hereinafter "the Divorce Code")*, 23 Pa.C.S. § 3101 et seq.

a. Alimony pendente lite and preliminary counsel fees, 23 Pa.C.S. § 3704

b. Child and spousal support, 23 Pa.C.S. § 4301 et seq.

c. Counsel fees in support proceedings, 23 Pa.C.S. § 4351

Most support actions are brought pursuant to the support provisions of the Divorce Code, which includes provisions establishing liability for support; mandating support guidelines; requiring the proper county authority to aid in enforcement of the duty of support; and procedural provisions relating to expedited procedures, paternity, contempt, attachment, consolidation of proceedings, effect of an appeal and continuing jurisdiction to enforce, modify and transfer orders.

2. 23 Pa.C.S. § 4601 et seq., (*superseding* The Support Law, 62 P.S. § 1971 et seq.)

This law is broadly written and generally provides that a parent, spouse or child of an indigent person shall provide support for such person if the parent, spouse or child has the financial ability to do so. A child's duty is relieved if the parent abandoned the child for a period of 10 years or more. The indigent, or any other public body or person having an interest in the maintenance of the indigent person may petition the court for an order of support. The amount of liability shall be determined by local rule, but in the case of medical assistance (other than nursing home care), shall not exceed ½ of the liable person's excess annual income.

Under the prior law, indigence was not limited to persons completely destitute and helpless, but encompassed those persons who had some limited means, but whose means were not sufficient to provide for their maintenance and support. 62 P.S. § 1973; *Verna v. Verna*, 432 A.2d 630 (Pa. Super.1981).

The former Support Law was repealed on July 7, 2005 by P.L. 196, No. 43 § 3.

Most cases are instituted by the Department of Welfare to compel legally responsible relatives to contribute to the support of an indigent receiving welfare or to recover money expended by the Department. Therefore, a husband, wife, child, father and mother can be legally responsible to pay support to the Commonwealth or county for the costs of support or care paid on behalf of the indigent person.

3. Uniform Interstate Family Support Act *(hereinafter "UIFSA")*, 23 Pa.C.S. § 7101 et seq.

This law supersedes RURESA. It provides an update to the 47-year-old URESA and subsequent RURESA laws. Society now recognizes the problem of non-payment of family support by interstate obligors. There are considerable differences in this new law.

UIFSA provides that only one order in a case at one time can be effective. This is known as the "one order theory" or "one order-one-time concept." Only one state has "continuing exclusive jurisdiction" to modify the order. The Act provides for long-arm jurisdiction to maximize the state's power over nonresidents. Plus, it provides that an income withholding order can be mailed directly to the obligor's employer in another state, regardless if the issuing state has jurisdiction over the out-of-state employer.

UIFSA authorizes registration for enforcement purposes only in any state. Administrative enforcement is also available. If neither the child nor the parents are residents of the issuing state and the obligor is subject to the jurisdiction of the responding state, an order may be registered in the responding state for modification purposes. Also, if there is consent to the jurisdiction by all parties and one party is subject to personal jurisdiction in the new tribunal, the order can be registered there for modification purposes.

UIFSA enables the use of videotaped and telephone depositions, facsimile evidence and introduction of certified documents. The Act is more user friendly and less formality is required to achieve its goals. The Act authorizes attorney fee awards. The Act authorizes establishment of paternity without seeking child support.

4. Intrastate Family Support Act *(hereinafter "IFSA")*, 23 Pa.C.S. § 8101 et seq.

As with RURESA, and now UIFSA, the experienced practitioner must weigh the benefits of the reciprocal procedure against the deficiencies. The advantage of avoiding the inconvenience and cost of travel to the obligor's jurisdiction may be outweighed by the prejudice to the plaintiff from being deprived the opportunity to present testimony in person before the Master or Judge who will be deciding the case. Private local counsel may be retained to fully represent the plaintiff in the responding state.

5. Protection from Abuse Act *(hereinafter "the PFA Act")*, 23 Pa.C.S. § 6101 et seq.; 35 P.S. § 10181 et seq. (repealed)

The PFA Act authorizes the court to impose a temporary order for support in conjunction with an order granting possession of the residence to the plaintiff. The Act requires, however, that the beneficiary of the temporary order petition for support under 23 Pa.C.S. § 4301 et seq. within two weeks of the issuance of the temporary order or the temporary order becomes void. Also, the temporary order will become void upon a ruling on the complaint for support.

6. Uniform Act on Blood Tests to Determine Paternity, 23 Pa.C.S. § 4343 and 5101 et seq.; 42 Pa.C.S. § 6131 et seq.

This act sets forth the statutory and procedural basis for the use of paternity tests and the admissibility of their results in a paternity action.

7. Relevant provisions of the Pennsylvania Rules of Civil Procedure *(hereinafter "Pa.R.C.P." or "Rule")*, 42 Pa.C.S.

a. Support – Pa.R.C.P. 1910 et seq.

b. Support Guidelines – Pa.R.C.P. 1910.16

c. Divorce – Pa.R.C.P. 1920 et seq.

The Pennsylvania Rules of Civil Procedure for support, divorce, custody and protection from abuse cases are the result of a Herculean effort by the Pennsylvania Supreme Court's Domestic Relations Committee, with contributions by local bar associations and state and federal agencies. The 1981 Explanatory Comments to the Rules recognize that family courts have become a focus of increased attention by society in general, and the legal community in particular, due to: "increased filings for divorce, spouse and child support and custody which resulted from rapidly changing social values. Federal funding of programs such as the IV-D Program and Spouse and Child Support has caused authorities to review judicial procedures and the processing of the family court matters." There has been an explosion of cases in our Courts of Common Pleas in nearly every county, necessitating the development of uniform Rules for support. Likewise, nearly every county in the Commonwealth has promulgated local rules specifically directed to spousal and child support. On September 6, 1989, to comply with federal law mandating expedited procedures for child support, the Supreme Court of Pennsylvania promulgated uniform statewide Support Guidelines (effective September 30, 1989). The Guidelines were most recently comprehensively amended by the Supreme Court effective May 1, 2017.

B. PRACTICE CONSIDERATIONS.

At the outset, counsel for the dependent spouse must consider the legal and practical consequences to decide whether to (1) initiate a claim for alimony pendente lite by filing a claim in the divorce case or (2) initiate a spousal support claim by filing a Complaint for Support through the local Domestic Relations Office. Alimony pendente lite has been considered nearly identical to spousal support in Guidelines cases by the Pennsylvania Supreme Court. The duty of spousal support arises from the marital relationship. Alimony pendente lite is not a duty, but an equitable interim remedy to enable the economically dependent spouse to maintain or defend the divorce action. A claim for child support, spousal support or alimony pendente lite must be raised in a pleading filed with Domestic Relations. These claims cannot be raised in a divorce matter pursuant to Pa.R.C.P. Sec. 1910.4.

The dependent spouse need not institute a divorce action to secure spousal and child support. From the perspective of the dependent spouse, a support action may suffice to generate income and maintain health insurance benefits without committing to proceed with the divorce and ancillary issues of custody, equitable distribution of marital property, alimony and other potential claims.

Before deciding whether to pursue spousal support or alimony pendente lite, counsel for the economically dependent spouse should consider the client's willingness to proceed with the divorce, and the defenses potentially available in a support action.

Counsel for the economically independent spouse should recognize the likelihood that a claim for spousal support, child support and/or alimony pendente lite may be raised by the dependent spouse in a divorce action that the independent spouse initiates.

Under the Uniform Statewide Support Guidelines, actions for spousal support, child support and/or alimony pendente lite are income-driven. The primary emphasis is upon calculation of the parties' net monthly incomes. Upon determination of the parties' net monthly incomes, the Guidelines dictate the presumptive amount of support or alimony pendente lite. In a Guidelines case, it is no longer necessary to prepare and present a budget of the parties' monthly expenses except to justify a deviation from the Guidelines. In cases with income in excess of $30,000.00 or where "deviations" and "adjustments" are requested, a budget and supporting documentation are essential as the action is also needs-driven.

The court's discretion is broad and should consider the parties' earnings and earning capacities. The Court must determine the parties' needs, including the recipient spouse's basic living expenses plus those expenses incurred to pursue or defend the divorce litigation.

Remember that the Support Guidelines provide the presumptive minimum amount of support, which may be insufficient to meet your client's reasonable needs. If the Support Guidelines are inadequate for the dependent spouse and/or the children, argue and prove the needs, fixed expenses, unusual expenses and other particular requirements that your client must be able to maintain. Emphasize needs and expenses that the payor spouse created or helped to create or acquiesced. On the other hand, counsel for the payor spouse may rebut the presumption established by the Support Guidelines by demonstrating grounds for a downward "deviation" pursuant to Rule 1910.16-5. Often, it is more effective to prove that the dependent spouse has a greater earning capacity or other financial resources, or that certain expenditures are completely unreasonable. Also, Rule 1910.16-6 provides for certain "adjustments" to the basic support obligation.

Where the dependent spouse has collected spousal support or alimony pendente lite throughout the mandatory separation period, or longer, as the parties have attempted to conciliate or litigate the economic claims, such support or alimony pendente lite award may constitute rehabilitative alimony with or without the court's seal of approval. The support or alimony pendente lite order may actually satisfy the request for alimony. Often, counsel for the dependent spouse may put away the file and refuse to proceed for a year after securing spousal support or alimony pendente lite in a simple wage earner case. Alimony pendente lite is intended to assist a financially dependent spouse during the pendency of a divorce proceeding so that dependent spouse is not placed at a disadvantage. Alimony pendente lite can assist and enable the dependent spouse effectively defend the divorce claims, to advance economic claims or to be unfairly forced to settle. Spousal support is intended to enable the dependent spouse to continue to maintain a semblance of the standard of living that was established during coverture. However, an overly burdensome order may shift the bargaining leverage so dramatically that the independent spouse is compelled to settle at all costs to avoid financial ruin for payor or the parties. The blind imposition of a Guideline support order intended to satisfy the reasonable needs of the dependent spouse and children may have the ancillary effect of preventing the independent spouse from meeting other financial obligations (including joint obligations) and thus precipitating judgments, liens, foreclosures and/or bankruptcies.

To commence an action for spousal and/or child support by filing a Complaint for Support, typically the practitioner can send or accompany the petitioner to the Domestic Relations Section, where forms are provided, or the attorney or client can file online at https://www.humanservices.state.pa.us/csws. Fees vary by county but are small and can be paid at the time of the conference as opposed to the time of filing. The Domestic Relations Section then schedules the joint conference and/or hearing according to local rule without further intervention from the practitioner or client. To secure alimony pendente lite, the procedure of the local counties varies as to how a conference and hearing will be scheduled, and the "system" in which the case will proceed. Determine the filing fees and local procedures for filing and initiating your alimony pendente lite case. Under Pa.R.C.P. § 1910.11, the Domestic Relations Office has expanded the list of documents the parties are required to produce at the support conference.

The parties are ordered to bring the following documents:

1. Individual and corporate Federal tax returns, complete with all W-2s, 1099s, Schedules, and attachments
2. 6 months of paystubs
3. Child care costs
4. Existing orders and agreements for support
5. The cost of health, dental, and vision insurance
6. Health, dental and vision insurance cards

In high income cases, in addition to the above documentation, the parties must also provide an expense statement. Determine how the matter can be reviewed on an "appeal" and hearing *de novo* or exceptions and argument to the Court. Know your procedure.

C. PREPARATION.

Prepare your client. Your client's journey to the domestic relations section for a support or alimony pendente lite hearing may be your client's first foray into the courthouse. The experience will be emotion-charged, and your client will soon become aware of its significant economic impact. Explain in detail to your client what will be experienced and how to best present the evidence. Tell your client that he/she is embarking on a journey into your area of expertise. Your client certainly would not expect you to know your fingers from your thumbs inside a circuit box. Counsel your client to follow your directions and orientation.

Be prepared. Complete your appearance form, obtain paystubs, tax returns, W-2s, 1099 Forms, payroll ledgers or other documentary evidence of your client's income, and prepare income calculations and a budget, if necessary, in advance. Ask your client to describe in detail the client's occupation or business, earnings and perquisites and the spouse's occupation or business, earnings and perquisites. Do not overlook other sources of income (investments, trusts, parental gifts, gratuities, perquisites, "under the table" income). Make sure your client has reviewed the income calculation and budget, and understands and approves them, as well as the spouse's income calculation and budget. Listen to your client. Your client should know better than you what can be proven and how to find and prove same. Get as much information as possible through your client's memory of out-of-court statements, events and other relevant matters. Examine the income tax returns for a number of prior years, W-2 Forms, 1099 Forms, year-to-date pay stubs, bills, and statements of expenses. Do not accept income tax returns as gospel. Your calculations of net spendable income should be based upon the realities of the parties' business expenditures, actual income and taxation. Recalculate your client's income taxes and the spouse's income taxes as withholding may not have a semblance of reality. The payor spouse must acquaint you with the

payee spouse's realistic needs, goals, requirements, earnings and earning capacity. Be prepared to convince the trier of fact that by not granting, or minimally granting alimony pendente lite, a hardship will not be placed on the requesting spouse. On the other hand, know the payee spouse's realistic needs, goals, requirements, earning and earning capacities. Be prepared to demonstrate that a recommendation in excess of the Guidelines is the only way that the family can survive economically.

Do research. Take the time to read practice oriented treatises, such as the following texts which are the most reliable and thorough texts on support, among other subjects: Joanne Ross Wilder, *West's Pennsylvania Family Law Practice and Procedure* (7th Ed. 2008); Barbara B. Zulick and Arthur S. Zanan, *Pennsylvania Support Practice* (2012); *Pennsylvania Family Lawyer*, a quarterly publication provided without additional cost to members of the Pennsylvania Bar Association Family Law Section; the Pennsylvania Rules of Civil Procedure; local rules and local court manuals. Read the Pennsylvania Supreme Court Support Guidelines Rule 1910.16-1 et seq. thoroughly and often. PBI & PBA programs provide up-to-date publications and materials, law, information and techniques for use in your cases. They also enable family law practitioners the invaluable opportunity to share experiences and knowledge. Attend all of your local bar association Family Law Section meetings and practice seminars. Know your Judges, Masters, Hearing Officers, Domestic Relations Officers, Administrators and Staff and fellow practitioners. Know your system. And, know that as each county "fine tunes" its system, changes will occur with frequency.

Make a deal. There is no winning or losing in a support case. The pie can only be cut into so many pieces. Two people usually cannot live separate and apart as economically as they could together. As Judge R. Stanton Wettick wrote concerning a claim for permanent alimony in *Kertis v. Kertis*, 6 A.C.D.D. 168 (1984):

In most cases, the standard of living of the parties during the marriage was based almost entirely on their incomes during the marriage, and in most cases, upon separation, the standard of living of both parties has declined as a result of the additional expenses involved in maintaining two households. Thus, in this situation the issue is not what standard of living did the party seeking alimony maintain during the marriage but *rather what lesser standard of living should this party be permitted to maintain today*. (Emphasis added)

This is equally applicable to the competing claims of payor and payee spouses that arise in alimony pendente lite, spousal support and child support cases. So, be creative with incomes, expenses, fixed bills, usual bills and expenses, unnecessary assets and income taxation.

Attempt to compromise by confronting and resolving the spouses' fixed expenses and obligations. Do not lose sight of the ultimate goal: a fair and just determination or settlement that enables both spouses and their children to recover from the trauma of divorce and to rebuild their economic and personal lives. You should encourage either or both non-working spouses to seek full or part-time training and/or employment as appropriate. It behooves the parties "to do everything in their power to contribute to their own economic well-being to the extent that is possible." House Journal at 1873L (September 29, 1979).

Determine a theme, but do not be inflexible in your strategy. Your client and his/her spouse are prone to change their goals, feelings and perspectives over time. Thus, the "case" is ever-changing--a moving target. So you must adapt your strategies, consideration and advice as the ingredients of the case change. Alimony pendente lite or spousal support is not only an aid to a dependent spouse, but it is also an effective tool to hasten a divorce action. The payment of alimony

pendente lite can be used as a stepping stone to alimony or to satisfy a potential alimony obligation.

Compromise is not an ugly word. Nevertheless, child support is an absolute obligation that must be satisfied despite the sacrifices it may require of the parents. A payor spouse's refusal to pay child support is unabashed punishment of children who did not choose to participate in the parents' personal battles. The obligation to support a minor child is "well nigh absolute." To enforce the obligation, request information at the support conference and hearing to enable collection through wage attachment or lien and execution.

Your client's needs and the goals of the case should be your first priority. Be careful not to allow counsel fee requests to impact detrimentally upon the gains you have sought or achieved for your client. On the other hand, pursue counsel fee requests with vigor if they are fair, reasonable and well-substantiated. In alimony pendente lite and support contempt cases, counsel fees awards may be an effective, although perhaps unpredictable tool to motivate settlement. Unless the action is so complex that a substantial award of interim counsel fees is merited, you should defer your fee request until the support conference and hearing. Except in unusual circumstances, a request for an expedited hearing to determine interim counsel fees and expenses would be considered counsel's action for counsel's own sake.

To recapitulate. Review the law, rules and procedures; learn the idiosyncrasies of the county in which venue lies; talk to experienced practitioners; get your feet wet; and remember that matrimonial law is charged with emotion. It is not only accepted, but expected, that you will serve as a zealous advocate for your client. Do not unnecessarily provoke opposing counsels, the court and its officers. Such action is usually not forgotten. Your career should be long and meaningful. To be an effective advocate for your clients, develop a working and trusting relationship with opposing counsel, the court and the court personnel. Hopefully, they will be your only repeat customers! Treat the domestic relations officers, hearing officers, masters, judges' staffs and judges with respect. They are there to serve your clients and will be there long after your clients have walked down the courthouse steps. With all the unavoidable aggravation in domestic relations practice, take time to appreciate how important your efforts are and how important a working relationship with the court, its staff and opposing counsel can be -- not only for the present client, but also for future clients. Do not make things ugly because that is what your clients want. Be an advocate. But maintain a civil relationship with opposing counsel who will be a part of your "community" for your entire career. Remember that your reputation is important. Be reliable in time, effort and quality of work product. Your word should be your bond. Nevertheless, do not forget to confirm deals and stipulations in writing to opposing counsel with copies to your client. Conflicts develop when the parties and counsel carelessly fail to memorialize their understanding or write without clarity. If you are authorized by your client to make a deal, then stick to it. Be firm and do not let opposing counsel's attack on you personally be controlling. Take the "personal stuff" and shelve it for later reflection and rehabilitation. It is your client you represent today. And it is your conscience that you take home at night. Do not let either keep you awake - so do the right thing by both.

Work with your client and opposing counsel to reach and effectuate the deal. Do not create roadblocks to reaching, memorializing and effectuating the deal. Cut through unreasonable positions developed by counsel or the parties. And, of utmost importance, remember you are dealing with people's personal lives and the very core of their beings. Respect your client and your client's wishes without disrespect to the court or opposing counsel. Yet, do not be the mere extension or "mouthpiece" of your client. Just unthinkingly doing what your client wants as a hired gun does not necessarily benefit your client, the family, the issues, the children or the case.

And, it clearly does not necessarily benefit the justice system and the reputation of the bar -- or you. Be a mensch -- be wise. Recognize that you have entered an area of law that requires respect for clients and their matters, no matter what lack thereof may exist from the bench, the bar, the clients and the public. You have embarked upon an undertaking far greater than mere book learning.

II. JURISDICTION AND VENUE.

A. CHILD SUPPORT.

1. Relevant provisions of the Divorce Code.

a. Child and spousal support, 23 Pa.C.S. § 4305, 4342, 4352, 4510 (repealed), 7201, 8201

b. Counsel fees in support proceedings, 23 Pa.C.S. § 4351

c. The Long Arm Statute, 23 Pa.C.S. § 4342(c), provides:

> The Supreme Court shall by general rule establish procedures for the exercise of long arm jurisdiction to establish paternity and to establish and enforce support. Long arm jurisdiction shall be used in preference to proceedings under [UIFSA or IFSA] unless it would be more effective to proceed otherwise. Long arm proceedings may be commenced or continued in any county where the plaintiff resides regardless of whether the parties maintained a family domicile in that county.

d. The United States Supreme Court applied traditional due process standards to the question of support jurisdiction in *Kulko v. Superior Court*, 436 U.S. 84, 98 S.Ct. 1960 (1978). The Court held that the due process clause of the Fourteenth Amendment operates as a limitation on the state court's jurisdiction over non-resident defendants. Valid judgments may be entered only by courts having jurisdiction over the person of the defendant. Personal jurisdiction depends upon the presence of reasonable notice to the defendant that an action has been brought and a sufficient connection between the defendant and the forum state or to make it fair to require a defense of the action in the forum. The Court held that the husband's temporary visits to California, his marriage there and the mere act of sending a child to California to live with the mother did not satisfy the criteria of *International Shoe Company v. Washington*, 326 U.S. 310 (1945), that the quality and nature of their activities be such that it is "fair and reasonable" to require the defendant to conduct a defense in that state.

e. The Workers Compensation Appeal Board has jurisdiction to determine paternity in the context of a claim for benefits brought upon behalf of a dependent child born out of wedlock. *Rossa v. WCAB*, 794 A.2d 919 (Pa. Cmwlth.2002).

2. 23 Pa.C.S. § 4301

The Divorce Code, 23 Pa.C.S. § 4301, provides: "Actions or proceedings provided by this chapter are in addition to and not in substitution of actions or proceedings provided by unsuspended statutes where there is desertion or a failure to perform a duty to support."

3. PFA Act, 23 Pa.C.S. § 6108

4. Uniform Act on Testing to Determine Paternity, 23 Pa.C.S. § 4343 and 5104; 42 Pa.C.S. § 6131 et seq.

5. Relevant provisions of the Pennsylvania Rules of Civil Procedure.

a. Support – Pa.R.C.P. 1910.1 (jurisdiction)

b. Support Guidelines – Pa.R.C.P. 1910.16-3

c. Note support venue requirements at Rule 1910.2.

Pa.R.C.P. 1910.2 provides that a support action may be commenced properly in any county in which the defendant or the child resides, in which the defendant is regularly employed, or in which plaintiff resides and that county is the county in which the last family domicile was located and in which the plaintiff continued to reside. Cases brought under the long-arm statute may be commenced in the county where the plaintiff resides.

As in any other action, the plaintiff is given the right to choose the forum so long as that choice is permitted by Rule 1910.2. According to established principles, the plaintiff's choice of forum is "entitled to great weight and should not be disturbed lightly." *Daugherty v. Inland Co.*, 359 A.2d 465 (Pa. Super.1976).

Although the venue provisions are broadly drawn, Rule 1910.2(d) grants the trial court discretion to transfer the matter to any other county where the action could have been brought originally. The rule embodies the concept of forum non conveniens. *Altschuler v. Altschuler*, 482 A.2d 1106 (Pa. Super.1984).

Rule 1910.18(a) provides that subsequent proceedings to *modify* or *terminate* a support order must be brought in the county which entered the order or in the county to which the action was transferred under Rule 1910.2.

Subsequent proceedings to *enforce* a support order may be brought in the court which entered the order or in a county to which the order has been transferred. Pa.R.C.P. 1910.18(b). Pennsylvania court lacks jurisdiction over out-of-state obligor if Pennsylvania was not the last family domicile. *Bratton v. Jury*, 644 A.2d 1259 (Pa. Super.1994).

B. SPOUSAL SUPPORT.

1. Relevant provisions of the Divorce Code.

a. Child and spousal support, 23 Pa.C.S. § 4305, 4342, 4352, 7201, 8201

b. Counsel fees in support proceedings, 23 Pa.C.S. § 4351

2. 23 Pa.C.S. § 4602

3. PFA Act, 23 Pa.C.S. § 6108

4. Relevant provisions of the Pennsylvania Rules of Civil Procedure.

a. Support – Pa.R.C.P. 1910.2

b. Support Guidelines – Pa.R.C.P. 1910.16-3

C. ALIMONY PENDENTE LITE.

1. Relevant provisions of the Divorce Code.

a. Alimony pendente lite and preliminary counsel fees, 23 Pa.C.S. § 3702

b. Divorce jurisdiction is set forth in 23 Pa.C.S. § 3104.

2. PFA Act, 23 Pa.C.S. § 6108

3. Relevant provisions of the Pennsylvania Rules of Civil Procedure.

a. Support Guidelines – Pa.R.C.P. 1910.16-3

b. Divorce – Pa.R.C.P. 1920.2

c. Note divorce venue requirements at Rule 1920.2.

D. COUNSEL FEES.

1. Relevant provisions of the Divorce Code.

a. Alimony pendente lite and preliminary counsel fees, 23 Pa.C.S. § 3702

b. Counsel fees in support proceedings, 23 Pa.C.S. § 4351

2. PFA Act, 23 Pa.C.S. § 6108

3. Judicial Code, 42 Pa.C.S. § 2503

4. Relevant provisions of the Pennsylvania Rules of Civil Procedure.

a. Support – Pa.R.C.P. 1910.2

b. Support Guidelines – Pa.R.C.P. 1910.16-3 c. Divorce – Pa.R.C.P. 1920.2

Rule 1920.2 provides that a divorce action (and thus alimony pendente lite claim) may be filed in the county in which plaintiff resides or defendant resides, or in the county in which the parties agree, such as a no-fault divorce with no claims (and obviously inapplicable to an alimony pendente lite case). In the event that a claim is made in a previously anticipated "no-frills" divorce, the local Prothonotary will transfer the action to the proper county upon request of a party.

Due to the penchant of certain attorneys to file divorce actions in counties of non-residence, Rule 1920.2 provides that the court on its own can transfer a divorce action to the county where the action originally could have been brought.

E. INTERSTATE AND INTERCOUNTY CASES.

1. UIFSA, 23 Pa.C.S. § 7201, 7205, 7701

UIFSA provides that only one order in a case at one time can be effective. This is known as the "one order theory" or "one order-one time concept." Only one state has "continuing exclusive jurisdiction" to modify the order. The Act provides for long-arm jurisdiction to maximize the state's power over nonresidents. Plus, it provides that an income withholding order can be mailed directly to the obligor's employer in another state, regardless if the issuing state has jurisdiction over the out-of-state employer. UIFSA authorizes registration for enforcement purposes only in any state.

Jurisdiction is set forth at § 7201 to § 7204; continuing exclusive jurisdiction is set forth at § 7205; and jurisdiction for enforcement and modification under UIFSA is set forth at § 7206.

Trial court erred in holding that father could not seek support modification under UIFSA where parties and child no longer lived in state which issued the controlling order, father lived in California and trial court had personal jurisdiction over mother. *Reichenbacher v. Reichenbacher*, 729 A.2d 97 (Pa. Super.1999).

Mother was unable to register a valid Indiana support order after her move to Pennsylvania since father had also moved to Pennsylvania. Registration of out-of-state order can only be had under UIFSA which can only be applied if parties live in different states. UIFSA cannot be applied when both parties live in the same state. *Clark v. Clark*, 714 A.2d 427 (Pa. Super.1998).

Where a registrant seeks to register a foreign support order in Pennsylvania pursuant to 23 Pa.C.S. § 7602, the registrant need not prove that she resided in Pennsylvania for six months or more to confer jurisdiction. Rather, it is the contesting party's burden to disprove jurisdiction. *Simpson v. Sinclair*, 788 A.2d 1016 (Pa. Super.2001).

Although UIFSA authorizes the accrual of pre-registration interest upon unpaid support arrears, RURESA did not authorize pre-registration interest. *Ingraham v. Carr*, 2001 WL 1808024 (Phila.Co. 1/5/01).

2. IFSA, 23 Pa.C.S. § 8201

F. LIMITATION OF ACTIONS.

1. Statutes of Limitations.

a. 23 Pa.C.S. § 4343(b) provides that an action or proceeding for paternity of a child born out of wedlock must be commenced within 18 years of the birth of the child. *Clark v. Jeter*, 486 U.S. 456 (1988).

b. The collection of arrearages is subject to the six-year statute of limitations set forth in 42 Pa.C.S.A. § 5527. Neither § 5527 nor laches were found applicable in *Miller v. Bistransky*, 679 A.2d 1300 (Pa. Super.1996), wherein the 1945 child support order was imposed subject to the then-applicable criminal statute.

c. Superior Court found no time bar to adult woman's claim that she was decedent's out-of-wedlock heir. Because she was not attempting to establish right to support, but rather to establish her right to inherit, the statute of limitations in the paternity provisions did not apply. The P.E.F. Code has no time limitation. *In re Estate of Greenwood*, 587 A.2d 749 (Pa. Super.1991); *Wawrykow v. Simonich*, 652 A.2d. 843 (Pa. Super.1994).

d. Cross petitions for termination and enforcement of spousal and child support provisions of pre-February 12, 1988 agreement resulted in arrearages being set for four years only, pursuant to the four-year limitations applicable to contracts in 42 Pa.C.S. § 5525(8). *Horowitz v. Horowitz*, 600 A.2d 982 (Pa. Super.1991).

e. Four-year statute of limitations defense in an action to enforce a foreign money judgment pursuant to RURESA held applicable. 42 Pa.C.S.A. § 5525(a). *Morrissey v. Morrissey*, 713 A.2d 614 (Pa. 1998).

f. Four-year statute of limitations not applicable to the registration of foreign judgments under UIFSA, UEFJA or § 3705. *Bonfiglio v. Bonfiglio*, 781 A.2d 1197 (Pa. Super.2001).

2. Laches.

a. Laches held inapplicable to paternity case. *Rogers v. Woodin*, 672 A.2d 814 (1996); *Roboski v. Fink*, 669 A.2d 1017 (1996).

b. Petition for contempt of support order could not be dismissed, even though plaintiff took no steps to enforce order for nine years, absent finding that arrears were generated from a foreign support order. *Park v. Williams*, 2 Bradford Co.L.Rep. 246 (1998).

III. ISSUES COMMON TO CHILD SUPPORT, SPOUSAL SUPPORT AND ALIMONY PENDENTE LITE PROCEEDINGS.

A. CALCULATION OF PARTIES' INCOMES.

1. Generally.

a. In Pennsylvania, support is based upon the net monthly incomes of the parties. Pa.R.C.P. 1910.16-2(c).

b. To calculate a party's net monthly income, the following items are deducted from his or her gross income.
- federal, state and local taxes
- FICA (Social Security and Medicare) or self-employment taxes
- Non-voluntary retirement contributions
- Union dues
- Alimony paid to the other party

c. The statutory definition of gross income is set forth at 23 Pa.C.S. § 4302 and Rule 1910.16-2(a).

"Income." Includes compensation for services, including, but not limited to, wages, salaries, bonuses, fees, compensation in kind, commissions and similar items; income derived from business; gains derived from dealings in property; interest; rents; royalties; dividends; annuities; income from life insurance and endowment contracts; all forms of retirement; pensions; income from discharge of indebtedness; distributive share of partnership gross income; income in respect of a decedent; income from an interest in an estate or trust; military retirement benefits; railroad employment retirement benefits; social security benefits; temporary and permanent disability benefits; workers' compensation; unemployment compensation; other entitlements to money or lump sum awards, without regard to source, including lottery winnings; income tax refunds; insurance compensation or settlements; awards or verdicts; and any form of payment due to and collectible by an individual regardless of source. The main focus of the court will be income available for support.

d. Social Security. Social Security benefits received by a party for their disability or retirement are considered income. Social security derivative benefits are treated differently. The derivative benefit is added to the income of the receiving parent. Then the benefit is deducted off of the child support obligation if the parent receiving the benefit and the parent receiving child support are the same parent. Child care and other expense are allocated without considering the derivative benefit. In shared custody cases, the derivative benefit is not considered when determining which parent will be the payor (the parent with the greater income). If one of the parents has died, the derivative benefit is added to the recipient's income.

e. If the party receives alimony the court must consider whether the income is taxable or not. If the income is non-taxable the court MAY add the gross alimony to the parties' net income. If the alimony is taxable, the court must include it in the party's income. Pa.R.C.P. 1910.16-2(a).

f. In calculating support, the trial court must consider "income from all sources." 23 Pa.C.S. § 4302; Pa.R.C.P. 1910.16-2(a); *Hyde v. Hyde*, 618 A.2d 406 (Pa. Super.1992).

g. When determining support, alimony pendente lite or alimony, "income must reflect actual available financial resources and not the oft-time fictional financial picture which develops from tax returns. Otherwise put, 'cash flow' ought to be considered and not federally taxed income." *Labar v. Labar*, 557 Pa. 54, 731 A.2d 1252 (1999), citing *Com. ex re. Hagerty v. Eyster*, 429 A.2d 665 (Pa. Super.1981). Again, the focus is "income available for support" as opposed to "taxable income."

h. Where Husband's income was subject to seasonal fluctuations, it was reasonable to consider the previous year's income to determine his earnings for calculation of an alimony pendente lite award. Pa.R.C.P. 1910.16-2(d) (3); *Wright v. Wright*, 11 A.C.D.D. (1989).

i. Where obligor refuses to produce income tax returns or other documentation of income, court may reconstruct obligor's income from prior-year joint bank account statements and make reasonable adverse inferences against obligor based upon obligee's testimony. *Sokolic v. Sokolic*, 130 Montg. Co. L.R. 401 (1994); *Smith v. Smith*, No. FD91-09099 (Ally. Co. 1994); *Yialouris v. Yialouris*, 140 P.L.J. 422 (1992).

j. An obligee cannot seek to double dip and treat monies received by the obligor as income for support purposes as well as funds to be distributed in equitable distribution. A determination of whether the funds are income for support purposes will be determined based on the time during which the funds were accrued. *Berry v. Berry*, 898 A.2d 1100 (Pa. Super. 2006).

k. Bielak v. Bielak, 2019 Pa. Super. 165 (May 22, 2019) Wife inherited an IRA and liquidated the IRA and used the money for living expenses. Husband argued the IRA proceeds were income available for support. Husband argued an asset must be included in either income or equitable distribution. The Superior court disagreed and said the IRA proceeds were not income available for support.

2. Taxes.

a. Rule 1910.16-4 – New orders of spousal support and APL are non-deductible, and no tax adjustment shall be made for spousal support/APL or unallocated orders.

b. Obligor's income tax refund and rental income should be included in income available for support. *Farabaugh v. Killen*, 648 A.2d 60 (Pa. Super.1994). *But see* Note to Pa.R.C.P. 1910.16-2(a) (8) ("Income tax refunds should not be included as income to the extent they were already factored into the party's actual tax obligation for purposes of arriving at

his or her net income.").

3. Bonuses and Overtime.

a. See Pa.R.C.P. 1910.16-2(a) (1).

b. Trial court must look to the immediate past year's experience to fix income, i.e., bonus or overtime. *Fichthorn v. Fichthorn*, 533 A.2d 1388 (Pa. Super.1987); *see* Pa.R.C.P. 1910.16-2(a) (1).

c. Where bonuses paid by obligor's family business were not based on job performance, were not guaranteed, and were actually discontinued by obligor's family, the trial court was not obligated to impute bonuses into the future. *Woskob v. Woskob*, 843 A.2d 1247 (Pa. Super.2004).

d. A bonus in the form of life insurance premiums paid by employer on behalf of employee did not constitute income. *Cellini v. McElveney*, 149 Pitt.L.J. 1 (2000).

4. Perquisites.

a. The court must look beyond taxable income especially where obligor spouse operates a closely held business and benefits from substantial business expenses, depreciation and miscellaneous deductions which enable him or her to live well prior to spending taxable income. *Murphy v. Murphy*, 599 A.2d 647 (Pa. Super. 1991); *Com. v. Miller*, 198 A.2d 373 (Pa. Super.1964).

b. Perquisites were excluded from income of both parties where both parties benefitted equally. *Mascaro v. Mascaro*, 764 A.2d 1085 (Pa. Super.2000), affirmed in part, reversed in part, 803 A.2d 1186 (Pa.2002).

c. Benefits and perquisites provided by an employer were correctly considered in determining payor's net monthly income to the extent that the perquisites reduced payor's personal expenses. *Arbet v. Arbet*, 863 A.2d 34 (Pa.Super 2004).

5. Severance pay.

a. Inclusion of severance pay as income is a factual determination. *Hinkle v. Hinkle*, 685 A.2d 175 (Pa. Super.1996).

6. Business income.

a. See Pa.R.C.P. 1910.16-2(a) (2).

b. Where the obligor spouse has substantial control over the finances of a business in which he is a controlling partner or sole shareholder and has the attendant opportunity to manipulate the timing and amount of personal income derived from said business, the courts must look beyond the corporate veil to determine actual cash flow for support determination. *Morris v. Bell*, 639 A.2d 846 (Pa. Super.1993), *affirming*, 141 P.L.J. 169 (1992); *Cunningham v. Cunningham*, 548 A.2d 611 (Pa. Super.1988)

(depreciation expense added back). *See also Blaisure v. Blaisure*. 577 A.2d 640 (Pa. Super.1990) (retained earnings); *King v. King*, 568 A.2d 627 (Pa. Super.1989) (retained earnings).

c. Support obligor may not construct business income in such a way as to create a form of self-impoverishment to evade support obligations. *McAuliffe v. McAuliffe*, 613 A.2d 20 (Pa. Super.1992).

d. Depreciation deductions, automobile expenses, and automobile and malpractice insurance premiums may be excluded from net spendable income purposes where these deductions reflect actual cash outlays. *Holland v. Holland*, 663 A.2d 768 (Pa. Super.1995); *McAuliffe v. McAuliffe*, 613 A.2d 20 (Pa. Super.1992); *Cunningham v. Cunningham*, 548 A.2d 611 (Pa. Super.1988).

e. Depreciation. Business depreciation deductions and capital outlays should be added back to obligor's income if (1) income tax savings created by deductions was realized by shareholders and not reinvested in the business or (2) capital outlays underlying the deductions (such as inventory build-ups) were unnecessary or represented an attempt to shelter income. Absent specific evidence of intent to shelter income, it must be presumed that business expenditures were legitimate and necessary. *Labar v. Labar*, 557 Pa. 54, 731 A.2d 1252 (1999).

f. Some finders of fact rule that depreciation is always to be added to taxable income to arrive at a net spendable income calculation for support purposes. This unrealistic position seems to seek justification in simplicity, consistency and the volume of support cases. Nonrecognition of the need for capital acquisitions to maintain a business or for other legitimate business expenses is indefensible. See *Labar*, 557 Pa. 54, 731 A.2d 1252 (1999).

g. See discussion in 18 *Pennsylvania Family Lawyer* 6-10 regarding *T. Calabrese v. J. Calabrese*, 670 A.2d 1161 (Pa. Super.1996); *Kessler v. Helmick*, 672 A.2d 1380 (Pa. Super.1996) and *S. Calabrese v. M. Calabrese*, 682 A.2d 393 (Pa. Super.1996) (but see *Mascaro v. Mascaro*, 803 A.2d 1186 (Pa. 2002).

h. Loans. Installment payments toward loan used to purchase obligor's business were deductible from obligor's income available for support. *Jayne v. Jayne*, 663 A.2d 169 (Pa. Super.1995); *but see Lehman v. Lehman*, 636 A.2d 1172 (Pa. Super.1994).

i. Business owner's draws against business lines of credit are not properly included in the calculation of income available for support. *Fitzgerald v. Kempf,* 805 A.2d 529 (Pa. Super.2003).

j. Obligor's salary draw funded by loans to start up business held to be income, because obligor as proprietor has set his draw based upon corporation's cash flow and economic viability. *Jones v. Jones*, No. FD92-02054 (Ally. Cy. 1994).

k. Retained earnings. A minority shareholder's proportionate share of retained earnings from a subchapter "S" corporation (which were reported on his personal tax return but not actually received) were not included in the shareholder's income, where there was no evidence to suggest that the shareholder had any control over the distribution of earnings. *Fennell v. Fennell*, 753 A.2d 866 (Pa. Super.2000). See also, *Fitzgerald v. Kempf,* 805 A.2d 529 (Pa. Super.2003) (business may retain earnings for legitimate business purposes, such as funding accounts receivable).

l. Where an obligor is the beneficiary of a trust holding less than 10% of the shares in a family-owned business, the retained earnings of the family-owned business must be presumed to be readily available to the obligor for support purposes unless obligor proves otherwise. *Hoag v. Hoag*, 646 A.2d 578 (1994), *affirmed*, 541 Pa. 621, 664 A.2d 1354 (1995) (3-3 decision); see also *King v. King*, 568 A.2d 627 (Pa. Super.1989).

m. In *Hoag*, the trial court placed the burden upon the shareholder to prove that he lacked control over the distribution of earnings. The trial court's decision was affirmed by the Superior Court, whose decision was affirmed by three Justices of the Supreme Court. Because the Supreme Court was divided 3 to 3, the Superior Court's decision was affirmed. The Fennell court's decision was based, in part, upon the Supreme Court's decision in *Labar*, supra, in which the Supreme Court enunciated a presumption that legitimate business decisions would be respected in the absence of any evidence that the shareholder was attempting to shelter income from support obligations.

n. Distributions Husband received from Subchapter S Corporation for payment of the prior year's income tax liability was correctly considered as income for support purposes. The Superior Court found that corporate disbursements to reimburse or relieve a party of their tax liability is income for support purposes. *Spahr v. Spahr*, 869 A.2d 548 (Pa. Super. 2005).

7. Investment income.

a. See Pa.R.C.P. 1910.16-2(a) (3).

b. Interest income, pension income and capital gains many be included as income for support purposes. *Riley v. Foley*, 783 A.2d 807 (Pa. Super.2001); *Kessler v. Helmick*, 672 A.2d 1380 (Pa. Super.1996).

c. Monies in retirement accounts were considered income for support purposes pending equitable distribution. The trial court of Lawrence County upheld the Master, who included in Husband's income, his social security benefits and pension. Because Husband was drawing from his pension and receiving social security, they were considered as income for support purposes. *Lavender v. Lavender*, Pa.D.&C. _____ (Lawrence Cty., 2005).

d. Capital gains which were reinvested were considered income. *Ramsey v. Ramsey*, 48 Chester Co. L.Rep. 338 (2000).

8. Gifts/Inheritance.

a. Inter vivos gifts received by a support obligor from family are not within the statutory definition of "income" and therefore cannot be counted as a source of income for support purposes. *Jacobs v. Jacobs*, 884 A.2d 301 (Pa. Super.2005).

b. The principal portion of an inheritance was not within the statutory definition of income available for support. *Humphreys v. DeRoss*, 567 Pa. 614, 790 A.2d 281 (2002).

9. Lump sums.

a. The statutory definition of income at 23 Pa.C.S. § 4302 includes "other entitlements to money or lump sum awards, including lottery winnings, income tax refunds, insurance compensation or settlements, awards and verdicts, and any form of payment due to and collectible by an individual regardless of source. *See also*, Pa.R.C.P. 1910.16-2(a) (8). The Note provides that the lump sum awards may be annualized or averaged over a longer or shorter period, or escrowed in an amount sufficient to secure the support obligation during that period of time.

b. The Supreme Court in *Humphreys v. DeRoss*, 790 A.2d 281 (Pa. 2002) did not construe the statutory definition of income as broadly as it might appear. The first phrase of the statutory language ("compensation for services") is highly significant in understanding the Supreme Court's statutory construction.

c. A lump sum received by a support recipient is treated the same as a lump sum received by a payor. In *Maher v. Maher*, 575 Pa. 181, 835 A.2d 1281 (2003), the trial court pro-rated a lump sum inheritance over a period of 69 months from the date on which the parent received the inheritance until the date of the child's majority, and the Superior Court affirmed, relying on the Superior Court's earlier decision in *Humphreys v. DeRoss*, 737 A.2d 775 (Pa. Super.1999), reversed, 790 A.2d 281 (Pa. 2002). In *Maher*, the Supreme Court reversed, holding that an inheritance received by a support recipient must not be included in income for the same reasons that an inheritance received by a payor was excluded in *Humphreys*.

d. Inheritance. The principal of an inheritance or trust is not included in the statutory definition of "income" (23 Pa.C.S. § 4302) and is therefore not properly included in the calculation of income for child support purposes. *Maher v. Maher*, 575 Pa. 181, 835 A.2d 1281 (2003); *Fitzgerald v. Kempf,* 805 A.2d 529 (Pa. Super.2003); *Humphreys v. DeRoss*, 567 Pa. 614, 790 A.2d 281 (2001).

e. Obligor's distributive share of a decedent's estate held not to be "income" as defined by 23 Pa.C.S. § 4302, but includable in obligor's cash flow for determining support. *Sample v. King*, 52 Som. Leg. J. 347 (1994).

f. Judgment or settlement proceeds derived from litigation. A trial court imputed interest income from a tort settlement in calculating income attributable to a dependent spouse. *Diament v. Diament*, 44 Pa.D.& C.4th 135 (Chester Co.2000), *appeal quashed as interlocutory*, 771 A.2d 793 (Pa. Super. 2001).

g. In *Darby v. Darby*, 686 A.2d 1346 (Pa. Super.1996), the Superior Court held that the entire proceeds of a personal injury settlement, and not just the interest income, were included in income. The statutory construction upon which the Darby court relied, however, was explicitly rejected by the Supreme Court in *Humphreys v. DeRoss*, 790 A.2d 281 (Pa. 2002).

h. Trial court erred in refusing to consider a party's lump sum workers compensation award in calculating income for child support purposes. *Witherow v. Witherow*, 432 A.2d 634 (Pa. Super.1981).

10. Income-producing assets.

a. Trust income and principal. Distribution of principal upon request from Husband's trust that had been relied upon by the parties during their marriage held to be "income" available for support. *Hillman v. Hillman*, 140 P.L.J. 475 (1992); see also *Butcher v. Butcher*, 769 A.2d 1218 (Pa. Super. 2001); Green v. Green, 783 A.2d 788 (Pa. Super.2001).

b. Assets received in equitable distribution proceedings. The principal portion of assets received by a party in equitable distribution do not constitute income available for support purposes. *Miller v. Miller*, 783 A.2d 832 (Pa. Super.2001); *Riley v. Foley*, 783 A.2d 807 (Pa. Super.2001); *Rohrer v. Rohrer*, 715 A.2d 463 (Pa. Super.1998).

c. Stock options. Vested stock options may be considered as an element of income available for support purposes even if the options have not been exercised. *Mackinley v. Messerschmidt*, 814 A.2d 680 (Pa. Super. 2002).

11. Governmental benefits.

a. Workers Compensation. Pa.R.C.P. 1910.16-2(a) (6). Worker's Compensation commutation was included in obligor's income in *Darby v. Darby*, 686 A.2d 1346 (Pa. Super.1996). The statutory construction upon which the *Darby* court relied, however, was explicitly rejected by the Supreme Court in *Humphreys v. DeRoss*, 567 Pa. 614, 790 A.2d 281 (2001).

b. Unemployment compensation. See Pa.R.C.P. 1910.16-2(a) (6).

c. Social Security. See Pa.R.C.P. 1910.16-2(a) (6).

d. SSI and cash assistance. Neither public assistance nor SSI are income for support purposes. Pa.R.C.P. 1910.16-2(b).

e. SSI was considered "other income in the household" to justify downward deviation from the Guidelines. *Landis v. Landis*, 691 A.2d 939 (Pa.

Super.1997); *Crawford v. Crawford*, 633 A.2d 155 (Pa. Super.1993). See *Rodrigues v. Rodriques*, FD86-0293 (Ally. Cy. 1997) wherein the court, per Mulligan, J., persuasively and conclusively writes that SSI is federal welfare and thus a downward deviation due to receipt of SSI will bring increase in SSI. Thus, SSI should not be taken into account either as "income" to determine support or "other household income" to determine deviation. *See* 19 *Pa. Family Lawyer* 55-57 (1997).

f. Mother's receipt of cash assistance from Welfare did not support deviation from guidelines simply because payment of guideline order might serve to reduce debt owed to Welfare by mother and fathers of her other children. *Middleton v. Robinson*, 728 A.2d 368 (Pa. Super. 1999). Receipt of public assistance is not an unusual circumstance warranting deviation from Guidelines. *Sanders v. Lott*, 630 A.2d 438 (Pa. Super.1993).

g. SSDI and other disability benefits. Social Security disability and other disability benefits are includable in "income" as defined by Rule 1910.16-2(a) (6). However, Social Security derivative benefits (due to disability or retirement of a parent) are treated differently under Rule 1910.16-2(b) (2). *Maddas v. Dehass*, 816 A.2d 234 (Pa. Super.2003).

h. Veterans' benefits. Obligor was entitled to credit against arrearage for VA death benefits paid to child. *Miller v. Bistransky*, 679 A.2d 1300 (Pa. Super.1996); see also *Whitmore v. Kenney*, 626 A.2d 1180 (Pa. Super.1993); *Wingard v. Wingard*, 11 Pa.D.& C.4th 343 (Fayette Co.1991).

B. CASH FLOW FOR SUPPORT PURPOSES.

1. Statutory definition of income. 23 Pa. C. S. § 4302.

2. Rules definition of income. Pa. R.C.P. 1910.16-2.

FORM OF CASH FLOW	WHERE ON TAX RETURNS	CASE LAW AUTHORITY
Advances – shareholder (corporate distributions)	Schedule K-1 line 19 code A (1065) line 16 code D (1120S)	*Spahr v. Spahr,* 869 A.2d 548 (Pa. Super. 2005); *Diament v. Diament,* 816 A.2d 256 (Pa. Super.2003); *Heisey v. Heisey*, 633 A.2d 211 (Pa. Super.1993)
Advances - partnership	Schedule K-1 line 19 code A (1065) line 16 code D (1120S)	*King v. King,* 568 A.2d 627 (Pa. Super.1989)
Annuity income	Form W-2 or 1099	*Arbet v. Arbet,* 863 A.2d 34 (Pa. Super. 2004), 23 Pa.C.S. § 4302

FORM OF CASH FLOW	WHERE ON TAX RETURNS	CASE LAW AUTHORITY
Automobile expenses	Schedule C, line 9 Schedule E, line 6	*S. Calabrese v. M. Calabrese*, 682 A.2d 393 (Pa. Super.1996) (but see Mascaro v. Mascaro 803 A.2d 1186 (Pa. 2002)); *Holland v. Holland*, 663 A.2d 768 (Pa. Super.1995); *Heisey v. Heisey*, 633 A.2d 211 (Pa. Super. 1993); *DeMasi v. DeMasi*, 530 A.2d 871 (Pa. Super. 1987)
Bonuses	Form W-2 or 1099	*Woskob v. Woskob,* 843 A.2d 1247 (Pa. Super.2004); *Fitchorn v. Fitchorn*, 533 A.2d 1388 (Pa. Super.1987)
Capital gains	Schedule D, lines 7-15	23 Pa.C.S. § 4302; *Riley v. Foley*, 783 A.2d 807 (Pa. Super.2001); *Coffey v. Coffey*, 575 A.2d 587 (Pa. Super.1990); *Ramsey v. Ramsey*, 48 Chester Co. L.Rep. 338 (2000).
Charitable or political contributions	Schedules C, E, K-1	*Coffey v. Coffey*, 575 A.2d 587 (Pa. Super.1990)
Commissions	Form 1099	23 Pa.C.S. § 4302
Depreciation	Schedule C, line 13 Schedule E, line 18 Form 4562	*Kraisinger v. Kraisinger*, 928 A.2d 333 (Pa. Super. 2007), *Labar v. Labar*, 557 Pa. 54, 731 A.2d 1252 (1999), *Labar v. Labar*, 644 A.2d 777 (Pa. Super.1994); *S. Calabrese v. M. Calabrese*, 682 A.2d 393 (Pa. Super.1996) (but see Mascaro v. Mascaro 803 A.2d 1186 (Pa. 2002)); *Holland v.Holland*, 663 A.2d 768 (Pa. Super. 1995); *McAuliffe v. McAuliffe*, 613 A.2d 20 (Pa. Super.1992)
Disability income		23 Pa.C.S. § 4302; *Parker v. Parker*, 335 Pa. Super. 348, 484 A.2d 168 (1984)
Dividend income	Schedule B, line 5	23 Pa.C.S. § 4302
Earning capacity		*Ney v. Ney,* 917 A.2d 863 (Pa. Super. 2007), *Dennis v. Whitney,* 844 A.2d 1267 (Pa. Super. 2004) *Baehr v. Baehr,*106 P.D.D.R.R. 28 (2005); *Portugal v. Portugal*, 798 A.2d 246 (Pa. Super.2002); *Myers v. Myers*, 592 A.2d 339 (Pa. Super. 1991); *Rock v. Rock*, 560 A.2d 199 (Pa. Super.1989)

FORM OF CASH FLOW	WHERE ON TAX RETURNS	CASE LAW AUTHORITY
Entertainment/meals	Schedule C, line 24	*DeMasi v. DeMasi*, 530 A.2d 871 (Pa. Super.1987)
Gift income		*Suzanne D. v. Stephen W.*, 2013 Pa. Super. 93 (2013); *Jacobs v. Jacobs*, 884 A.2d 301 (Pa. Super. 2005); *Singleton v. Waites*, 616 A.2d 644 (Pa. Super.1992); *Funk v. Funk*, 545 A.2d 326 (Pa. Super. 1988)
Inheritance		23 Pa.C.S. § 4302*; Drevenik v. Nardone,* 862 A.2d 635 (Pa. Super. 2004), *Maher v. Maher*, 575 Pa. 181, 835 A.2d 1281 (2003); *Fitzgerald v. Kempf,* 805 A.2d 529 (Pa. Super.2003); *Humphreys v. DeRoss*, 567 Pa. 614, 790 A.2d 281 (2001)
Insurance premiums - life		*Heisey v. Heisey*, 633 A.2d 211 (Pa. Super.1993); *DeMasi v. DeMasi*, 530 A.2d 871 (Pa. Super. 1987); *Pearson v. Pearson*, 49 Chest.Co. L.Rep. 83 (2000)
Insurance premiums - malpractice		*Chapman-Rolle v. Rolle,* 893 A.2d 770 (Pa. Super. 2006), *Holland v. Holland*, 663 A.2d 768 (Pa. Super. 1995)
Insurance proceeds		23 Pa.C.S. § 4302
Interest income	Schedule B, line 1	23 Pa.C.S. § 4302; *S. Calabrese v. M. Calabrese*, 682 A.2d 393 (Pa. Super.1996); *Kessler v. Helmick*, 672 A.2d 1380 (Pa. Super. 1996)
Loan payments	See interest deductions on Schedules A, C & E	*Jayne v. Jayne*, 663 A.2d 169 (Pa. Super.1995); *Lehman v. Lehman*, 636 A.2d 1172 (Pa. Super.1994)
Loans, proceeds of		*Suzanne D. v. Stephen W.*, 2013 Pa. Super. 93 (2013); *Fitzgerald v. Kempf,* 805 A.2d 529 (Pa. Super. 2003); *Fichthorn v. Fichthorn,* 533 A.2d 1388 (Pa. Super.1987)

FORM OF CASH FLOW	WHERE ON TAX RETURNS	CASE LAW AUTHORITY
Marital property - sale of		*Donnelly v. Donnelly*, 463 A.2d 1182 (Pa. Super.1983); *Buehler v. Buehler*, 431 A.2d 1059 (Pa. Super. 1981)
Military housing allotment		*Krankowski v. O'Neil,* 928 A.2d 284 (Pa. Super. 2009), *Alexander v. Armstrong*, 609 A.2d 183 (Pa. Super.1992); *Bennethum v. Grundza*, 93 Berks Co.Leg.J. 109 (2000)
Pension benefits	Form 1040, lines 15-16	23 Pa.C. S. § 4302
Pension contributions - employer and employee	Form 1040, line 23 Form W-2, line 17	*Kessler v. Helmick*, 672 A.2d 1380 (Pa. Super.1996); *DeMasi v. DeMasi*, 530 A.2d 871 (Pa. Super. 1987) (employer contribution), *Szafran v. Szafran*, 344 A.2d 612 (Pa. Super. 1975), *Murphy v. McDermott,* 979 A.2d 373 (Pa. Super. 2009)
Perquisites - *see also* auto, entertainment, insurance		*Arbet v. Arbet,* 105 P.D.D.R.R. 16 (2005); *Diament v. Diament,* 816 A.2d 256 (Pa. Super.2003); *Mascaro v. Mascaro*, 764 A.2d 1085 (Pa. Super.2000), reversed in part, 803 A.2d 1186 (Pa.2002).
Personal injury lawsuit proceeds		*Focht v. Focht,* 613 Pa. 48, 32 A.3d 688 (2011); *Diament v. Diament,* 816 A.2d 256 (Pa. Super.2003); *Darby v. Darby*, 686 A.2d 1346 (Pa. Super.1996); *Butler v. Butler*, 488 A.2d 1141 (Pa. Super.1985)
Rental income	Schedule E, line 24	23 Pa.C. S. § 4302; *S. Calabrese v. M. Calabrese*, 682 A.2d 393 (Pa. Super. 1996) (but see Mascaro v. Mascaro 803 A.2d 1186 (Pa. 2002)); *Farabaugh v. Killen*, 648 A.2d 60 (Pa. Super.1994); *Leonard v. Leonard*, 510 A.2d 827 (Pa. Super.1986); *Francis v. Francis*, 517 A.2d 997 (Pa. Super. 1986)
Severance pay	Form W-2 or 1099	*Hinkle v. Hinkle*, 685 A.2d 175 (Pa. Super.1996), *Berry v. Berry*, 898 A.2d 1100 (Pa. Super. 2006)

FORM OF CASH FLOW	WHERE ON TAX RETURNS	CASE LAW AUTHORITY
Retained earnings	Schedule K-1, line 1	*Fennell v. Fennell,* 753 A.2d 866 (Pa. Super.2000)*; Hoag v. Hoag*, 646 A.2d 578 (Pa. Super.1994), *affirmed*, 541 Pa. 621, 664 A.2d 1354 (1995); *Blaisure v. Blaisure*, 577 A.2d 640 (Pa. Super. 1990); *King v. King*, 568 A.2d 627 (Pa. Super.1989)
Social Security	Form 1040, line 20a	23 Pa.C. S. § 4302; *In re Estate of Johnson,* 970 A.2d 433 (Pa. Super. 2007), *Preston v. Preston*, 646 A.2d 1186 (Pa. Super. 1994); *CYS v. Chorgo*, 491 A.2d 1374 (Pa. Super. 1985)
Social Security disability		23 Pa.C. S. § 4302; Pa.R.C.P. 1910.16-2(b) (2); *Maddas v. Dehass*, 816 A.2d 234 (Pa. Super. 2003); *Bernstein v. Bernstein*, 457 A.2d 1316 (Pa. Super. 1983)
Stock options		*Mackay v. Mackay*, 984 A.2d 529 (Pa. Super.2009), *Murphy v. McDermott*, 979 A.2d 373 (Pa. Super. 2009); *Mackinley v. Messerschmidt,* 814 A.2d 680 (Pa. Super.2003).
SSI (Supplemental Security Income)		*Silver v. Pinsky,* 981 A.2d 284, *Whitmore v. Kenney*, 626 A.2d 1180 (Pa. Super.1993); *Landis v. Landis*, 691 A.2d 939 (Pa. Super. 1997) .
Tax refunds	Form 1040, lines 10 and 60a	*Young v. Muthersbaugh*, 609 A.2d 1381 (Pa. Super.1992); *Farabaugh v. Killen*, 648 A.2d 60 (Pa. Super. 1994); *O'Connell v. O'Connell*, 597 A.2d 643 (Pa. Super.1991); *Parkinson v. Parkinson*, 512 A.2d 20 (Pa. Super.1986); *Reisinger v. Reisinger*, 471 A.2d 544 (Pa. Super. 1984)

FORM OF CASH FLOW	WHERE ON TAX RETURNS	CASE LAW AUTHORITY
Trust income	Schedule E, line 32	23 Pa.C. S. § 4302; *Mencer v. Ruch*, 928 A.2d 294; *Butcher v. Butcher*, 769 A.2d 1218 (Pa. Super. 2001); *Green v. Green*, 783 A.2d 788 (Pa. Super.2001); *Hoag v. Hoag*, 646 A.2d 578 (Pa. Super. 1994), *affirmed*, 541 Pa. 621, 664 A.2d 1354 (1995); *Abarbanel v. Weber*, 490 A.2d 877 (Pa. Super. 1985); *Hillman v. Hillman,* 140 P.L.J. 475 (1992)
Unemployment compensation	Form 1040, line 19	23 Pa.C.S. § 4302
Unreimbursed Employee Expenses (deduction from income)		Berry v. Berry, 898 A.2d 1100 (Pa. Super.2005)
Workers compensation		23 Pa.C. S. § 4302; *Darby v. Darby*, 686 A.2d 1346 (Pa. Super. 1996); *Babish v. Babish*, 521 A.2d 955 (Pa. Super.1987); *Witherow v. Witherow*, 432 A.2d 634 (Pa. Super. 1981).

C. DOUBLE DIPPING.

1. Generally.

a. If an income-producing asset has been awarded to a party in equitable distribution, the same asset cannot be counted as a source of income from which alimony or support may be paid. *Berry v. Berry*, 898 A.2d 1100 (Pa. Super. 2006); *Miller v. Miller*, 783 A.2d 832 (Pa. Super. 2001) (proceeds from sale of marital property); *Rohrer v. Rohrer*, 715 A.2d 463 (Pa. Super. 1998) (retained earnings of a business); *Kokolis v. Kokolis*, 83 Pa.D. & C.4th 214 (Ally. 2006) (pension in pay status), *affirmed*, 927 A.2d 663 (Pa. Super. 2007); cf. *McFadden v. McFadden*, 563 A.2d 180 (Pa. Super.1989) (pension in pay status).

b. Retained earnings of a business that accrued during the pendency of a support order which was based on the pass-through income of the same business cannot be included in the marital estate. *Rohrer v. Rohrer*, 715 A.2d 463, 465 (Pa. Super. 1998).

c. Money earned prior to the marital separation (a refund of a partner's capital account upon termination) was marital property which cannot be counted as income for support purposes, while money acquired after separation (a severance payment) was not marital property and could be counted as income for support. *Berry v. Berry*, 898 A.2d 110 (Pa. Super.2006).

d. Proceeds from the sale of marital assets could not be counted as income for child support purposes. *Miller v. Miller*, 783 A.2d 832 (Pa. Super. 2001).

e. Pension in pay status, which had been previously divided in equitable distribution, could not be counted as income for alimony purposes in modification proceeding. *Kokolis v. Kokolis*, 83 Pa.D. & C.4th 214 (Ally. 2006), *affirmed*, 927 A.2d 663 (Pa. Super. 2007).

f. Pension in pay status, which had NOT been previously divided in equitable distribution, could be counted as income during alimony modification proceeding. *McFadden v. McFadden*, 563 A.2d 180 (Pa. Super.1989).

D. EARNING CAPACITY.

1. Generally.

a. Earning potential, in addition to actual earnings, is considered in making a determination. Pa.R.C.P. 1910.16-2(d) (4).

b. In determining a party's ability to provide support, the focus is on earning capacity rather than on the parent's actual earnings. *Calibeo v. Calibeo*, 663 A.2d 184 (Pa. Super.1995). The court may impute an earning capacity to a party who is not working up to his or her earning potential. *Portugal v. Portugal*, 798 A.2d 246 (Pa. Super.2002); *McNulty v. McNulty*, 347 Pa. Super. 363, 500 A.2d 876 (1985).

c. In determining earning capacity, the court must look not to what the spouse could theoretically earn, but what he or she could realistically earn under the circumstances considering the spouse's health, age, mental and physical condition, training and time out of the workforce among other factors. Pa.R.C.P. 1910.16-2(d) (4).

d. The Superior Court declined to hold that, as a matter of law, an obligor could not be required to work more than one full time job, where there was a history of working two full time jobs. However, the Court remanded for a more comprehensive record on the issue of obligor's earning capacity. *Haselrig v. Haselrig*, 840 A.2d 339 (Pa. Super.2003).

e. The Superior Court held that it was not an abuse of discretion to assess a party to have an earning capacity greater than his/her pension for support purposes, where that party voluntarily retired, prior to a reasonable retirement age. The court likened retirement at age 52, to a voluntary reduction of income pursuant to Pa.R.C.P. 1910-2(d) (1). *Medley v. Lowman*, 2 A.3d 1226 (Pa. Super. 2010).

f. A part-time earning capacity is appropriate where the party has historically worked part time and has not refused work or developed other marketable skills. *Marshall v. Marshall*, 142 P.L.J. 221 (1994).

g. Trial court was required, in the context of a child support case, to conduct an independent review of a party's earning capacity, where the opposing party failed to adequately explore the issue. *Haselrig v. Haselrig*, 840 A.2d 339 (Pa. Super.2003); *Gephart v. Gephart*, 764 A.2d 613 (Pa. Super.2000).

h. Where father had a bachelor's degree and nine years of work experience, but had not conducted a reasonable job search, the Superior Court found that an earning capacity which was three times what he was presently earning was appropriate. Parties must make reasonable efforts to find employment in their field, and absent a reasonable job search, the court can impute an earning capacity consistent with employment in their field. *Baehr v. Baehr*, 889 A.2d 1240 (Pa. Super. 2005).

i. The trial court cannot find that payee had an earning capacity of zero on the testimony of the payee alone. To support an assertion that a party should be assessed an earning capacity of zero, medical documentation and supporting documentation must be provided. *D.L. v. N.L.*, 106 P.D.D.R.R. 34 (Lycoming Cty., 2005).

j. The trial court may not apply an earning capacity which is not supported by the evidence where the party is employed, and has a fixed salary. Masters cannot find earning capacities where they are not supported by the evidence. *Chilcote v. Chilcote*, 106 P.D.D.R.R. 52 (Blair Cty., 2006).

k. When a party earns more working part-time than a full-time minimum wage earning capacity, the court can apply a full-time minimum wage earning capacity where given the party's work history, they would not be able to earn more than minimum wage if they were to work full time. *G.J. v. J.J.*, 105 P.D.D.R.R. 24 (Lycoming Cty., 2004).

l. A party that is unemployed must make reasonable efforts to maintain income, even if said party was laid off, or a party may be held to an earning capacity. The earning capacity cannot be prohibitive in comparison to income. *Baehr v. Baehr*, 889 A.2d 1240 (Pa. Super 2005).

2. Voluntary or Involuntary Reduction of Income. See Section III.H., "Modification", below.

3. Nurturing parent doctrine.

a. In appropriate cases, the earning capacity of a parent who elects to stay home with a young child need not be considered when calculating support. *Atkinson v. Atkinson*, 616 A.2d 22 (Pa. Super. 1992); *Singleton v. Waites*, 616 A.2d 644 (Pa. Super.1992).

b. When applying the nurturing parent doctrine, a trial court must consider the age and maturity of the child, the availability of others who might assist the child, the availability of others who might assist the parent, the

adequacy of financial resources at home, and finally, the parent's desire to stay home and nurture the child. *Hesidenz v. Carbin*, 512 A.2d 707 (Pa. Super.1986); *also see Com. ex rel. Wasiolek v. Wasiolek*, 380 A.2d 400 (Pa. Super. 1977); *White v. White*, 313 A.2d 776 (Pa. Super.1973).

c. Nurturing parent doctrine may not apply to a custodial parent with substantial recent work history. Where Mother had school-age children at home and a substantial work history, trial court did not commit abuse of discretion in assigning an earning capacity. *Doherty v. Doherty*, 859 A.2d 811 (Pa. Super.2004); *Woskob v. Woskob*, 843 A.2d 1247 (Pa. Super.2004). Parent having shared physical custody does not qualify for exemption from child support by invoking the nurturing parent doctrine. *Depp v. Holland*, 636 A.2d 204 (1994); *Frichtman-Pickford v. Pickford*, 48 Cumb.L.J. 167 (1999).

d. Child of subsequent union. In *Frankenfield v. Feeser*, 449 Pa. Super. 47, 672 A.2d 1347 (1996), the nurturing parent doctrine was applied to negate an earning capacity of Mother of subject minor child because she had a child by a second marriage. *See also*, *Atkinson v. Atkinson*, 616 A.2d 22 (Pa. Super.1992); *Rathgeber v. Krout*, 50 Cumb.L.J. 44 (2000). But see, *Elias v. Spencer*, 449 Pa. Super. 359, 673 A.2d 982 (1996); *Shoup v. Shoup*, 46 Chest. Co. Rep. 209 (1998).

E. PENNSYLVANIA SUPREME COURT GUIDELINES.

1. Calculation of Basic Support.

a. The Support Guidelines are not a mere starting point, but establish a rebuttable presumption of the correct amount of support or alimony *pendente lite*. 23 Pa.C.S. § 4322(b); Pa.R.C.P. 1910.16-1(d); *Ball v. Minnick*, 538 Pa. 441, 648 A.2d 1192 (1994); *Landis v. Landis*, 691 A.2d 939 (Pa. Super.1997); *Hasson v. Hasson*, 696 A.2d 221 (Pa. Super. 1997). The Guidelines must be applied taking into consideration the special needs and obligations of the parties, which can give rise to "deviations" (Pa.R.C.P. 1910.16-5) and "adjustments" (Pa.R.C.P. 1910.16-6). Where the children's special needs justify deviation from the Guideline amount, a support order may exceed the Guideline. *Holland v. Holland*, 663 A.2d 768 (Pa. Super.1995).

(1) Extra expenses for a special needs child must be reasonable. *Howland v. Howland*, 2006 Pa. Super. 125 (2006).

(2) Placement costs must be considered when a determination of support is made and a child is in placement and a ward of the state/county. *Bradford County Children and Youth Services v. Powell*, 889 A.2d. 1235 (Pa. Super. 2005).

b. The order must set a particular amount (as opposed to a percentage of obligor's income or other variable amount). *Com. ex rel. Maier v. Maier*, 418 A.2d 558 (Pa. Super.1980). An order requiring direct payment of mortgage loan, real estate taxes and insurance premiums was valid, however, because such payments were constant, often, and benefited both parties. *Smith v. Smith*, 426 A.2d 1184 (Pa. Super. 1981).

c. A *Melzer* analysis of the dependent parties' reasonable needs is not required in Guidelines cases, except where the dependent parties have unique needs. *Young v. Muthersbaugh*, 609 A.2d 1381 (Pa. Super.1992); *Prud'homme v. Prud'homme*, 48 Pa.D. D.4th 182 (Lehigh Co.2000). Furthermore, lower court will not hear evidence of obligor's expenses unless obligor asserts that such are extraordinary, permitting deviation from Guidelines. *Singleton v. Waites*, 616 A.2d 644 (Pa. Super.1992).

d. Where the parties' combined incomes falls between two levels of the Guidelines schedule, the trial court was not required to pro-rate the two Guideline amounts. *Mooney v. Doutt*, 766 A.2d 1271 (Pa. Super.2001).

2. Custodial Parent who owes Spousal Support.

a. Rule 1910.16-4(e) provides: "If child is residing with the spouse (custodial parent) obligated to pay spousal support or alimony *pendente lite* and the other spouse (non-custodial parent) has a legal obligation to support the child, the guideline spousal support or alimony *pendente lite* amount is determined by offsetting the non-custodial parent's child support amount and the custodial parent's spousal support or alimony *pendente lite* amount, and awarding the net difference either to the non-custodial parent as spousal support/alimony *pendente lite* or to the custodial parent as child support as the circumstances warrant."

b. Under Rule 1910.16-4(e), the court will first calculate spousal support or alimony *pendente lite* owed by the custodial parent to the non-custodial parent. Second, the court will add spousal support to the non-custodial parent's income and subtract spousal support from the custodial parent's income. Based upon these recomputed incomes, the court will determine child support. Finally, the court will determine the custodial parent's net support obligation by subtracting child support from spousal support. This method was first promulgated in *Storer v. Storer*, No. FD90-11960 (Ally. Co. 1992).

c. To calculate child support, alimony paid to the other party is always deductible from the payor's income. Pa.R.C.P. 1910.16-2(c) (1) (V). All or a portion of alimony received by a party may be included in the recipient's income if deemed appropriate by the court. Pa.R.C.P. 1910.16-2(a) (7). Generally, alimony which is intended to satisfy a portion of the recipient's living expenses should be included in his or her income.

d. Where, in a Melzer case, there are offsetting child support and APL obligations, the APL should be determined first from the guidelines as though the couple were childless. Therefore, the custodial parent's APL obligation is determined by multiplying the income differential by 40%. Next, the non-custodial parent's child support obligation is determined, based upon the parties' adjusted incomes. *Diament v. Diament*, 816 A.2d 256 (Pa. Super. 2003).

3. Shared Physical Custody.

a. Rule 1910.16-4(c) (1) provides a formula by which substantial or shared physical custody will result in a reduction in the child support pursuant to the formula. When the children spend 40% or more of their overnights during the year with non-custodial parent, a rebuttable presumption exists that the non-custodial parent is entitled to a reduction in the basic support obligation to reflect this additional time. Thus for each percentage of overnights over 30% when a non-custodial has overnights in excess of 40% of the year, the percentage share of the basic child support obligation will be reduced.

b. Where there is nearly equal custodial time which constitutes de facto shared custody, the income disparity is substantial and the non-custodian parent has significant daytime pick up and delivery obligations with respect to the children, the primary custodial parent may be ordered to pay to the noncustodial parent child support. *Little v. Little*, 657 A.2d 12 (Pa. Super.1995). Note that the support order was vacated on remand to the trial court, upon a finding that there was not substantially shared custody.

c. In calculating the amount of time that each parent spends with the children, a parent is not entitled to credit for time when he or she was entitled to custody under a court order but did not actually exercise custody, even if the other parent withheld the children. *Riley v. Foley*, 783 A.2d 807 (Pa. Super.2001).

d. Court must consider expenses incurred by a supporting parent for the children in his care when computing his support obligation. *Blaisure v. Blaisure*, 577 A.2d 640 (Pa. Super.1990).

e. Prior Rule 1910.16-5(m) provided that: "The support guidelines contemplate that the non-custodial parent has regular contact, including vacation time, with his or her children, and that he or she makes direct expenditures on behalf of the children. Thus, a non-custodial parent's support obligation should be reduced only if that parent spends an unusual amount of time with the children."

f. Where Husband and Wife had shared physical custody of one of their minor children, and Wife had primary physical custody of the other child, Superior Court held that former Rule 1910.16-5(j) (currently Rule 1910.16-4(c)) was inappropriate where the payee's net monthly income was minimal. On remand, the Superior Court directed the trial court to apply former Rule 1910.16-5(j) (calculation of child support where custodial parent owes spousal support). The Superior Court directed the trial court to first calculate Husband's "gross" spousal support obligation then deduct Wife's hypothetical child support obligation to Husband. *Holland v. Holland*, 663 A.2d 768 (Pa. Super.1995). See Pa.R.C.P. 1910.16-4(c) (3).

g. Child who lived in grandmother's home and who was solely supported by her was entitled to Workers' Compensation death benefits, even though his parents were able to care for him at time of grandmother's death. *Hertz v. WCAB*, 724 A.2d 395 (Pa. Cmwlth.1999).

4. Estoppel in Lieu of Guidelines

a. Where a spouse signed an I-864 immigration affidavit promising to provide support to his immigrant spouse in an amount equal to 125% of the federal poverty guidelines, the Superior Court reversed a guideline support order in a lesser amount. *Love v. Love*, 33 A.3d 1268 (Pa. Super. 2011).

b. See VIII. Agreements, below.

5. Low Income Cases – Calculated Minimum Allowance (CAM)

a. See Pa.R.C.P. 1910.16-2(e) (1).

b. Under the operation of Rule 1910.16-2(e) (1), the Guidelines are intended to leave the payor spouse with no less than $1,063 per month for the payor's own living expenses after payment of support or APL to the payor's dependents. However, the $1,063 CAM amount is a presumptive minimum, and the trial court may enter an order which would leave the obligor with less than $1,063 per month if there is evidence that obligor's needs are minimal. *Mooney v. Doutt*, 766 A.2d 1271 (Pa. Super.2001).

c. Trial court was not bound by the CAM amount where the obligor voluntarily took a lower paying job to avoid his or her obligation of support. *Laws v. Laws*, 758 A.2d 1226 (Pa. Super.2000).

6. Adjustments to Basic Support.

a. Health Care Insurance Premiums. Pursuant to 23 Pa.C.S. § 4326, the court will look first to the non-custodial parent to provide medical insurance if it is available at reasonable cost through employment or group basis. If insurance is available to the custodial parent at reasonable cost, the court shall require the custodial parent to carry coverage, unless adequate coverage has been provided by the non- custodial parent. If insurance is available to both parents, the court may order one or both parents to maintain coverage. If not available to either parent through employment or group basis, the court may order either parent to purchase medical insurance at reasonable cost.

b. If health insurance is available at no cost or reasonable cost to an obligor's or obligee's spouse through his or her employment, the employee shall provide such coverage. 23 Pa.C.S. § 4324. Following the entry of a decree in divorce (after which an employee's spouse usually will not qualify for coverage), the court may direct that adequate health and hospitalization insurance be maintained for either party (usually through COBRA). 23 Pa.C.S. § 3502(d) and 3702.

c. Where the parties were divorced and the custodial parent subsequently commenced a child support action, it was error for the trial court to award health insurance coverage to the uninsured parent. *Maher v. Maher*, 575 Pa. 181, 835 A.2d 1281 (2003)

d. The Superior Court has held that an order for medical insurance alone is

a "support order." *Asin v. Asin*, 690 A.2d 1229 (Pa. Super. 1997).

e. 23 Pa.C.S. § 4324 vests discretion in trial court to order one party to pay for the other party's or the children's, medical insurance or a portion thereof. Further, § 4324 provides that if the health care coverage is available at reasonable or no cost as a benefit of employment, the court must order the employed spouse to provide or extend the medical coverage to the other spouse and children. See *Hasson v. Hasson*, 696 A.2d 221 (Pa. Super. 1997).

f. Unreimbursed Medical and Dental Expenses. Rule 1910.16-6(b) provides unreimbursed medical expenses in excess of $250.00 per person of the obligee or the children shall be allocated between the parties in proportion to their respective net incomes and the obligors share shall be added to his or her basic support obligation. Medical expenses include insurance co-payments and deductibles and all expenses incurred for "reasonably necessary medical services and all expenses reasonable incurred for reasonably necessary medical services and supplies, including but not limited to surgical, dental and optical services, and orthodontia. Medical expenses do not include cosmetic, chiropractic, psychiatric or psychological services unless specifically directed in the order of court." The Rules distinguish between annual medical expenses which are unpredictable or non-recurring, which may also be allocated between the parties. Further, "an annual limitation may be imposed when the burden on the obligor would otherwise be excessive such as the instances of unreasonable or unnecessary medical expenses." Further, the Notes provide: "If the trier of fact determines that the obligee acted reasonably in obtaining services which were not specifically set forth in the order of support, payment for such services may be ordered retroactively." Pa.R.C.P. 1910.16-6(b).

g. Equitable distribution award requiring Father to pay "one half (1/2) of all medical expenses not reimbursed by said coverage" broad enough to include uncovered medical expenses and dental expenses. *Lyons v. Lyons*, 585 A.2d 42 (Pa. Super.1991).

h. Child Care. Rule 1910.16-6(a) provides that reasonable child care expenses paid by the custodial parent "if necessary to maintain employment or appropriate education in pursuit of income" are to be allocated between the parties in accordance with their net incomes.

i. The custodial parent's child care costs are an expense that must be considered by the court to calculate the child support order. *Funk v. Funk*, 545 A.2d 326 (Pa. Super.1988). The trial court did not abuse its discretion to award reimbursement of after-school expenses for child care to enable the mother to earn a living. *Rock v. Rock*, 560 A.2d 199 (Pa. Super.1989).

j. Child care expenses may include babysitting expenses, child care centers, preschool and extended day before and after school (K-12) to enable the custodial parent to maintain employment or education in pursuit of income.

k. A claim for child care expenses may not be defeated by an offer from the

other parent to care for the children in lieu of paying for the child care expenses. *Funk v. Funk*, 545 A.2d 326 (Pa. Super. 1988).

l. Private School Tuition and Summer Camp. See Rule 1910.16-6(d). Private school education may be a reasonable need for a child if it is demonstrated that the child will benefit from such and if private schooling is consistent with the family's standard of living and station in life before the separation. *Fitzgerald v. Kempf,* 805 A.2d 529 (Pa. Super.2003); *Knapp v. Knapp*, 758 A.2d 1205 (Pa. Super.2000); *Pellish v. Gerhart*, 701 A.2d 594 (Pa. Super.1997).

m. Support order directing obligor to contribute to child's private school tuition did not constitute a deviation from Guidelines, and therefore need not be justified by factors listed in Rule 1910.16-5. Instead, trial court must determine whether private education is a reasonable special need: 1) whether the child would benefit from private schooling; and 2) whether private schooling is consistent with the family's station in life and standard of living. *Francis v. Francis*, 517 A.2d 997 (Pa. Super.1986); *Marshall v. Marshall*, 142 P.L.J. 221 (1994). A county may order parents to pay for the cost of school tuition as an additional expense to the standard child support award if it determines that doing so is reasonable in light of the parties' respective incomes and expenses. *S.S. v. K.F.*, 189 A.3d 1093 (Pa. Super. 2018).

n. Excess Mortgage Payment. Rule 1910.16-6(e) provides that where the mortgage payment exceeds 25% of the net income (including support and APL) of the spouse occupying the marital residence, the excluded spouse may be required to contribute up to 50% of the excess mortgage payment. The mortgage payment to which the excluded spouse may be required to contribute includes the first mortgage, real estate taxes and homeowners insurance and may, in the court's discretion, include subsequent mortgages, home equity loans, and other obligations secured by the marital residence.

o. The excess mortgage subsidy under Rule 1910.16-6(e) is not dependent upon having custody of children. *Woskob v. Woskob*, 843 A.2d 1247 (Pa. Super.2004), or the pendency of a divorce action. *Isralsky v. Isralsky*, 824 A.2d 1178 (Pa. Super.2003).

p. The Guidelines assume that the party occupying the marital residence shall be responsible for payment of the mortgage payment, real estate taxes, and homeowners insurance. Pa.R.C.P. 1910.16-6(e).

7. Deviation from Guidelines.

a. Rule 1910.16-5 provides that the court may deviate from the Guideline amount upon consideration of the listed factors. Any deviation from the Guideline amount must be justified in writing according to the criteria set for in Rule 1910.16-5. All of the Rule 1910.16-5 factors must be considered; no single criteria will justify deviation from the Guideline amount of support. Deviation will be permitted only where special needs and/or circumstances are present such as to render an award in the amount of the guideline figure unjust or inappropriate. *Ball v. Minnick*, 538 Pa.

441, 648 A.2d 1192 (1994); *Hasson v. Hasson*, 696 A.2d 221 (Pa. Super. 1997).

b. Brevity of marriage. Rule 1910.16-5(b) (8) provides grounds for a deviation, in a spousal support or APL case, based upon the brevity of the marriage. It was not error to deny a downward deviation, where the obligor failed to raise the issue at trial. *Ramsey v. Ramsey*, 48 Chester Co. L.Rep. 338 (2000).

c. Unusually high fixed obligations. Under prior law, an unusually high mortgage obligation relative to income was often considered to be adequate justification for a deviation from the Guidelines. The current version of the Guidelines, however, provides specifically for excess mortgage payments. Pa.R.C.P. 1910.16-6(e).

d. Substantial fixed assets. In *Humphreys v. DeRoss*, 567 Pa. 614, 790 A.2d 291 (2001), the Supreme Court suggested in dicta that a party's receipt of a substantial inheritance might constitute grounds for a deviation from the Guidelines.

e. Other household income. The income of a parent's spouse may not be included in the calculation of a Guideline child support amount. Furthermore, a trial court may not grant deviation from the Support Guidelines figure absent evidence that the parent's spouse's income reduces the obligor's contribution toward household expenses and increases available income for support. Pa.R.C.P. 1910.16-5(b) (3); *Smith v. Smith*, 653 A.2d 1259 (Pa. Super. 1995).

f. To the extent that parent's expenses are reduced by a live-in companion, the parent has increased financial resources available for support. *Fee v. Fee*, 496 A.2d 793 (Pa. Super.1985); *Rodriguez v. Rodriguez*, 11 A.C.D.D. 258 (1989); *Lampa v. Lampa*, 537 A.2d 350 (Pa. Super.1988); *Allen v. Thorpe*, No. FD89-09243 (Ally. Co. 1991).

g. "The law has always been that a [new] spouse's [or live-in] income is not directly relevant in calculating support. However, it is indirectly relevant by effectuating a reduction in the payor's expenses. *Travitsky v. Travitsky*, 326 A.2d 883 (Pa. Super.1974).

h. An upward deviation of $701 per month was added to Father's $665 per month guideline support obligation due to the substantial additional income of Father's spouse, and due to spouse paying all of Father's expenses. J.P.D. v. W.E.D., 2015 Pa. Super.108 (May 5, 2015).

i. Standard of living. In formulating a support order, particularly if the parties' incomes are outside of the support grids, the court must consider the parties' station in life and standard of living. *Melzer v. Witsberger*. 505 Pa. 462, 480 A.2d 991 (1984); *Marshall v. Marshall*, 404 Pa. Super. 628, 591 A2d 1060 (1991); See Pa.R.C.P. 1910-16.1 et seq.

j. A downward deviation from the support guideline was not warranted where payor claimed that it would be much cheaper to maintain the standard of living established during the marriage in the parents' home

country (India). *Nischal v. Nischal*, 879 A.2d 813 (Pa. Super.2005).

k. Special needs trust. A parent could not reduce or avoid child support obligation where the child was a beneficiary of a special needs trust established through a med-mal insurance settlement (because trust was intended to meet child's special needs, not basic needs). *Ricco v. Novitski*, 874 A.2d 75 (Pa. Super.2005).

F. COUNSEL FEES.

1. Preliminary counsel fees in divorce proceedings.

a. Pursuant to 23 Pa.C.S. § 3702, the trial court may award preliminary counsel fees in conjunction with an award of alimony pendente lite.

b. To substantiate a request for counsel fees, the requesting party must offer evidencing indicating the nature and reasonableness of the services rendered, the time expended, and the charges therefor. *Sell v. Sell*, 714 A.2d 1057 (Pa. Super.1998). The amount of the award is within the discretion of the trial court. *Butler v. Butler*, 621 A.2d 659 (Pa. Super.1993), *reversed on other grounds*, 663 A.2d 148 (Pa. 1995).

2. Counsel fees in support proceedings.

a. Pursuant to 23 Pa.C.S. § 4351(a), the trial court is authorized to award counsel fees to the support recipient who prevails in a proceeding against an obligor who unreasonably opposed the determination of support or paternity. However, the obligee need not prove bad faith or dilatory, obdurate or vexatious conduct by the obligor. *Bowser v. Blom*, 766 A.2d 1259 (Pa. Super.2001), affirmed on other grounds, 569 Pa. 609, 807 A.2d 830; see also *Mascaro v. Mascaro*, 764 A.2d 1085 (Pa. Super. 2000), reversed on other grounds, 803 A.2d 1186 (Pa. 2002).

b. However, obstreperous or unreasonable conduct on the part of the obligor in paternity or support litigation is not the only basis upon which an award of counsel fees would be appropriate. Rather, it is the totality of relevant circumstances that informs the trial court's determination of whether to award counsel fees. *Bowser v. Blom*, 569 Pa. 609, 807 A.2d 830 (2002).

c. It is unclear whether counsel fees are available in a proceeding to modify support.

d. Under prior law, an award of counsel fees was not authorized in a support proceeding (but was authorized in an APL proceeding).

e. Counsel fees can be appropriate where Father's filing of exceptions in a support case were so frivolous and without merit. *Michalski v. Michalski*, 105 P.D.D.R.R. 20 (Berks Cty., 2004).

f. Local rule dismissing a party's exceptions to a Hearing Officer's recommendation for failure to request transcript was upheld by the Superior Court. *Delcamp v. Delcamp*, 881 A.2d 853 (Pa. Super 2005).

3. Counsel fees in PFA proceedings.

a. An award of counsel fees is authorized by 23 Pa.C.S. § 6108(a) (8). The language of the statute suggests a requirement that the fees were incurred as a result of the defendant's abusive conduct. Perhaps, then, the statute does not contemplate an award of fees to the plaintiff if the PFA is denied, or to the defendant under any circumstances.

4. Counsel fees as sanction for dilatory obdurate or vexatious conduct.

a. 42 Pa.C.S. § 2503 authorizes an award of counsel fees as a sanction for the dilatory, obdurate or vexatious conduct of a party to the litigation.

b. The requesting party bears a substantial burden to prove sanctionable conduct. See *O'Connell v. O'Connell*, 597 A.2d 643 (Pa. Super.1991).

5. Counsel fees as sanction for contempt.

a. An award of counsel fees is an appropriate sanction in an action for civil contempt, even where the criteria have not been established for an award pursuant to 42 Pa.C.S. § 2503 (pertaining to dilatory, obdurate and vexatious conduct). *Diamond v. Diamond*, 792 A.2d 597 (Pa. Super.2002); see also *Sinaiko v. Sinaiko*, 664 A.2d 1005 (Pa. Super.1995).

b. There must be a finding of contempt before counsel fees may be awarded. *Nika v. Nika*, 555 A.2d 1337 (Pa. Super.1989).

G. RETROACTIVITY.

1. Alimony pendente lite.

a. Rule 1920.31(a) (2) – Prohibits the filing of claims for spousal support, child support and APL in a divorce complaint; those claims must be filed in the Domestic Relations Section by filing a support complaint. See Rule 1910.4.

b. An award for support is retroactive to the date of filing even if a significant amount of time has passed before a *de novo* hearing is held. *Clark v. Lawrence*, FD00-4450-003 Allegheny County, October 7, 2010.

2. Child support.

a. In a support action, the support order shall be effective from the date of filing the complaint unless the order specifies otherwise. Pa.R.C.P. 1910.17(a); *Christianson v. Ely*, 575 Pa. 647, 838 A.2d 630 (2003); *Shovlin v. Shovlin*, 465 A.2d 673 (Pa. Super.1983); *Banks v. Banks*, 418 A.2d 1370 (Pa. Super. 1980), *appeal on remand*, *Com. ex rel. Banks v. Banks*, 478 A.2d 1387 (Pa. Super. 1984).

b. The obligor, not obligee, bears the burden to rebut the presumption of retroactivity. *Christianson v. Ely*, 575 Pa. 647, 838 A.2d 630 (2003); *Karp v. Karp*, 686 A.2d 1325 (Pa. Super.1996).

c. Retroactivity of child support action was not barred by laches or estoppel where obligor failed to demonstrate that he relied to his detriment and

was prejudiced by the delay. *Christianson v. Ely*, 575 Pa. 647, 838 A.2d 630 (2003); *Rodgers v. Woodin*, 672 A.2d 814 (Pa. Super.1996).

d. Estate of obligor not responsible for payment of child support arrears which accrued prior to the obligor's death. *Benson v. Patterson*, 782 A.2d. 553 (Pa. Super.2001).

e. Support recipient not entitled to prejudgment interest on retroactive arrears where obligor was not delinquent. *Ramsey v. Ramsey*, 48 Chester Co. L.Rep. 338 (2000).

f. Unless a party presents evidence that overcomes retroactivity, support orders are retroactive to the date of filing for support. To overcome retroactivity, a party must show good cause why the order should not be retroactive. *Moore v. Coleman*, 105 P.D.D.R.R. 109 (Allegheny Cty., 2005).

3. Credit for payments made.

a. A party is entitled to credit against arrearages in the amount of the payments made directly to the support recipient from the date of the filing of the complaint until the date of hearing. See, e.g., *Riley v. Foley*, 783 A.2d 807 (Pa. Super.2001). However, obligor may not be entitled to credit for payments which were voluntary and not necessary for children's support. *Hertz v. Hertz*, 48 Pa. D.&C. 4th 424 (Chester Co.2000).

b. Unless circumstances warrant otherwise, child support obligor should be given credit for Social Security death, retirement or disability benefits paid directly to children. *Allegheny Co. CYS v. Chorgo*, 491 A.2d 1374 (Pa. Super.1985).

c. Superior Court rejected argument that *Chorgo* is limited to cases in which one party is a governmental entity or applies only to disability benefits. *Preston v. Preston*, 646 A.2d 1186 (Pa. Super.1994).

d. Father was not entitled to credit for payment of retroactive Social Security dependents' benefits for children, since he received payments, not mother, who was custodian at the time. *Chester v. Ireland*, 147 P.L.J. 181 (1998).

e. Child support obligor given credit for veterans benefits derived from obligor's benefits paid to child. *Miller v. Bistramsky*, 451 Pa. Super. 433, 679 A.2d 1300 (1996).

4. Repayment of arrears.

a. Lump sum arrearages payment, deferral of payment to equitable distribution or payment over time is within the discretion of the trial court. See *Kessler v. Helmick*, 672 A.2d 1380 (Pa. Super.1996).

b. Often, retroactivity of an order creates a substantial arrearage. Counsel should be prepared to present evidence and argument regarding how the arrearage will be liquidated. For example, a defendant who has paid no support for several months and has available liquid assets may be required to pay the arrearages in a lump sum rather than by a small weekly payment to be added to the order.

c. Permitting Husband to delay payment of alimony pendente lite arrears until the completion of the case may defeat the very purpose of alimony pendente lite. *Ghaznavi v. Ghaznavi*, 11 A.C.D.D. 73 (1989).

d. Trial court declined to enforce arrears where parties had agreed privately that father was excused from supporting child if he did not pursue custody, mother had not enforced order over a 13-year period, father had no contact with child and child had already reached majority. *Daniels v. Daniels*, ____ Phila. Cy. ____ (1999).

H. ENFORCEMENT AND CONTEMPT.

1. Statutory Authority.

a. 23 Pa.C.S. 3703 provides as follows:

> If at any time a party is in arrears in the payment of alimony or alimony pendente lite … the court may, after hearing, in order to effect payment of the arrearages:
>
> (1) Enter judgment;
>
> (2) Authorize the taking and seizure of the goods and chattels and the collection of the rents and profits of the real estate of the party;
>
> (3) Attach no more than 50% of the wages of the party;
>
> * * *
>
> (6) Issue attachment proceedings … directing that the person named as having failed to comply with the court order be brought before the court. … If the court finds, after hearing, that the named person willfully failed to comply … it may declare the person in civil contempt of court … [punishable by] commitment of the person to prison for a period not to exceed six months;
>
> (7) Award counsel fees and costs.

b. Mechanisms for enforcement and contempt of support orders are provided by 23 Pa.C.S. § 4345(contempt); 4348(income attachment); 4352(d) (judgments); 4352(d.1) (real property lien); 4352(g.2) (work programs); 4355 (suspension of licenses); and Rules 1910.20, 1910.21, 1910.22,

1910.23, 1910.24, 1910.25 and 1910.26.

c. Rule 1910.20 provides that a support order may be enforced by automatic increase in support amount; income attachment (Rule 1910.21), liens against real property (Rule 1910.22), attachment of financial account (Rule 1910.23), or judgment for arrears (Rule 1910.24), and may also be enforced by civil contempt through an expedited procedure (Rules 1910.25-1 through 1910.25-6).

d. Generally, all payments must be made through the Domestic Relations Section. 23 Pa.C.S. § 3704. The process for collection and disbursement is described in 23 Pa.C.S. § 4374.

2. Income attachment.

a. Wage attachment is mandatory unless payor is not delinquent and payee waives attachment, or by court upon good cause shown. 23 Pa.C.S. § 4348 (implementing the federal mandate of the Family Support Act of 1988, Pub. Law No. 100485, 102 Stat. 2343 (1988)).

b. 23 Pa.C.S. § 3703 provides that the court may attach up to 50% of the wages of the owing party. This section has been interpreted as permitting the garnishment of no more than 50% of the net wages of the party. *Goodstein v. Goodstein*, 619 A.2d 703 (Pa. Super.1992).

c. The maximum amount of attachment shall not exceed the limits set forth in the Consumer Credit Protection Act, 15 U.S.C. § 1673(b) (1). Specifically, the court may attach no more than 50% of an obligor's disposable income if the obligor is not delinquent, 60% if the obligor is delinquent, or 65% of the obligor's income to collect arrears more than 12 weeks old.

d. The Pennsylvania statute (23 Pa.C.S. § 3703) is not pre-empted by the federal statute. *Goodstein v. Goodstein*, 619 A.2d 703 (Pa. Super. 1992).

e. The garnishment of wages earned by employees of the Commonwealth is governed by 23 Pa.C.S. § 4381.

f. The court may attach 50% of the obligor's net earning capacity, even if the obligor's income is less than his or her earning capacity. *Laws v. Laws,* 758 A.2d 1226 (Pa. Super.2000).

g. The employer may deduct an additional two (2%) percent of the amount of the attachment from the employee as a "service charge" for executing the wage attachment. 23 Pa.C.S. § 4348(j).

h. Income from a spendthrift trust was subject to attachment where the income beneficiary had a duty of support. *Butcher v. Butcher*, 769 A.2d 1218 (Pa. Super. 2001); see 20 Pa.C.S. § 6112 and 23 Pa.C.S. § 4348.

3. Attachment of financial accounts.

a. 23 Pa.C.S. § 4305 and Rule 1910.23 establish the procedures for attachment of financial accounts to enforce a support order.

b. An obligor's pension and profit-sharing plan is subject to garnishment for purposes of fulfilling the support obligation. *Hopkinson v. Hopkinson*, 470 A.2d 981 (Pa. Super.1984). See also *Young v. Young*, 507 Pa. 40, 488 A.2d 264 (1985) which permitted attachment of a municipal pension.

c. PSERS pension is subject to attachment to satisfy support order. *Millick v. Millick*, 592 A.2d 788 (Pa. Cmwlth.1991).

d. If objections are filed by a garnishee within 30 days, as provided by Rule 1910.23(c), then the trial court may not garnish the account without first considering and disposing of the objections. *Cutlip v. Shugars*, 815 A.2d 1060 (Pa. Super.2003).

4. Income tax refund intercept.

a. Pursuant to 42 U.S.C. § 664, upon receiving notice from the state agency naming an individual owing past due designated child support or child support and spousal support/alimony pendente lite, the Secretary of the Treasury may take all necessary steps to retain the refunds of federal income tax paid of an individual who owes past due child support or child support and spousal support/alimony pendente lite and forward the same to the state agency or designated party.

b. The federal government has enacted legislation authorizing Domestic Relations Sections to intercept federal income tax refunds of obligors to be applied toward delinquent support payments. The Domestic Relations office maintains the forms required to be signed by a plaintiff who wishes to pursue this form of enforcement.

c. Arrearages created by retroactivity of support order does not constitute "past due support" justifying the interception of a federal income tax refund for such arrearages that exist by virtue of the retroactivity. *Laub v. Zaslavsky*, 534 A.2d 1090 (Pa. Super.1987).

d. Pursuant to 23 Pa. C.S. § 4307, the Department of Public Welfare has been given the authority to implement a state income tax refund intercept program pursuant to § 466(a) (3)) of the Social Security Act (42 U.S.C. § 666(a) (3) if in the judgment of the Department it is cost effective to do so.

5. Foreign attachment.

a. Income attachment is available to non-resident payees to enforce a UIFSA obligation against a Pennsylvania resident. 23 Pa.C.S. § 4348(p).

6. Judgments.

a. Rule 1910.24 permits judgments to be entered only when a defendant fails to comply with the support order and does not apply if the defendant is in compliance. *O'Neill v. Gioffre*, 559 A.2d 588 (Pa. Super.1989).

Plaintiff in support action is not entitled to a judgment against a defendant for arrears where defendant is making regular partial payments on the arrears pursuant to an order of court. *Welz v. Stump*, 588 A.2d 47 (Pa. Super.1991).

b. Under Rule 1910.24, the Prothonotary shall enter judgment upon praecipe accompanied by a certification of arrearages from the domestic relations office demonstrating that a defendant is thirty (30) days or more in arrears. Some counties also require a certificate that there are no outstanding motions to modify, vacate or remit arrears.

c. Rule 1910.24(b) limits the grounds for correcting an erroneous judgment on arrears.

d. The judgment which is entered may be enforced in the same manner as other judgments for the payment of money. The judgment may be enforced by execution upon real or personal property, transferred to other counties and jurisdictions, or enforced by other means. Pa.R.C.P. 1910.24(c).

e. Judgment on arrearage may be opened where there is a partial/full defense to claim, petition to open is filed promptly and reasonable excuse for failure to respond. *Hutchinson v. Hutchinson*, 422 A.2d 501 (Pa. Super.1980).

f. Judgments against real property issued as result of litigation under Divorce Code are not exempt from statute and rules regarding judgments and their expiration. *Mid-State Bank v. Globalnet*, 710 A.2d 1187, 1193 (Pa. Super.1998), aff'd, 557 Pa. 555, 735 A.2d 79 (1999). Wife's judgment entered as result of equitable distribution lost its priority over mortgage lien when wife failed to revive judgment after five years. *Mid- State Bank v. Globalnet*, 735 A.2d 79 (Pa. 1999).

7. Liens against Property.

a. 23 Pa.C.S. § 4352(d.1) and Rule 1910.22 governs liens on real property.

b. Under the Support Law, 62 P.S. § 1974, a public agency incurring expenses for the support maintenance, assistance or burial of a spouse or unemancipated minor children has a cause of action against any real or personal property of the person who had a duty to support; however, the home and furnishings of the obligor may not be subject to execution during the lifetime of the person's surviving spouse or dependent children.

c. Property liable under this provision includes death benefits, *In Re Egolf's Estate*, 83 D.& C. 123, 44 Berks 148 (1952); entireties property, *Dept. of Public Assistance v. DeCarli*, 44 D.& C. 291, 43 Lack.J. 181 (1942); trusts funds, *Jones Estate*, 23 D.&C.2d 247 (1960); legacies and distributive shares, *In Re Kerchner Estate*, ___ D.&C.2d 674, 56 Berks 189 (1965); private pension plan, *Com. ex rel. Magrini v. Magrini*, 398 A.2d 179 (Pa. Super.1979); and rents and profits, *In re Charles Whiteseu*, 18 Dist. 520, 11 Northumb. 369 (1909); however, Social Security benefits may not be levied. *In Re Algier Estate*, 43 D.&C.2d 351, 15 Chest. 143(1966).

8. Credit Bureau Reporting.

a. Pursuant to 23 Pa.C.S. § 4303, information regarding the amount of arrearage owed by an obligor shall be made available to any consumer credit bureau upon the request of the organization, provided that the obligor has been notified by the domestic relations office of the proposed action and given not more than twenty (20) days to contest the accuracy of the information.

9. Suspension of Licenses.

a. Professional licenses. If obligor is three months or more delinquent and not subject to income attachment, the court may issue an order prohibiting issuance or renewal of a professional license or directing suspension of a professional license (such as a license to practice law or medicine). 23 Pa.C.S. § 4355(a).

b. The court must first give notice to the obligor of the impending suspension. If the obligor wishes to contest the suspension, the obligor must appear before the domestic relations section within ten days of issuance of the notice. The only grounds for contesting an order for suspension is mistake of fact. 23 Pa.C.S. § 4355(c).

c. Pennsylvania Securities Commission properly suspended father's broker's license without hearing pursuant to trial court order directing same since Commission had no obligation to hold hearing where facts were not at issue and it had no discretion in complying with trial court order. *Crooks v. PSC*, 706 A.2d 360 (Pa. Cmwlth. 1998).

d. Drivers licenses. See 23 Pa. C.S. § 4355(d) (1) regarding special procedures for operating privileges.

e. Recreational licenses. See 23 Pa.C.S. § 4355(d) (2) for special procedures for recreational licenses issued by the Pennsylvania Game Commission which relate to license suspension due to nonpayment of child support.

10. Interest and Fines.

a. 23 Pa.C.S. § 4344 and 4345 provide for the imposition of fines upon obligors who fail to appear at hearings or fail to comply with support orders.

b. Trial court properly denied husband pre-judgment interest on wife's repayment of APL, since amount owed by wife was not owed until Supreme Court reversed APL award; award of post-judgment interest was required by statute. *Musko v. Musko*, 714 A.2d 1076 (Pa. Super. 1998).

11. Incarceration.

a. 23 Pa.C.S. § 4344 and 4345 and Rule 1910.25-5 provide for the incarceration of obligors who fail to appear at hearings or fail to comply with support orders.

b. Incarceration, probation and/or the imposition of fines may be reasonable means to enforce the support or counsel fee provisions of a post-1988 marital settlement agreement, where there was a finding that the obligor had present ability to pay or waived his argument regarding ability to pay. *Glynn v. Glynn*, 789 A.2d 242 (Pa. Super.2001) (*en banc*); *Sinaiko v. Sinaiko*, 664 A.2d 1005 (Pa. Super.1995). *Compare Sonder v. Sonder*, 549 A.2d 155 (Pa. Super.1988) (*en banc*) (court may not order incarceration to enforce pre-1988 property settlement agreement) *with* 23 Pa.C.S. § 3105(a) (effective February 12, 1988) *and* 23 Pa.C.S. § 3502(e)(6) (incarceration for less than six months).

c. Order requiring father to pay lump sum on child support arrears within 30 days or face six month incarceration was interlocutory, unappealable order, since sanction had not been imposed on father at time appeal was filed. *Sargent v. Sargent*, 733 A.2d 640 (Pa. Super. 1998) (*but see Glynn v. Glynn*, 789 A.2d 242 (Pa. Super. 2001).

d. Six month prison sentence was reversible error in a case where the trial court failed to determine that obligor had present ability to pay purge condition. *Orfield v. Weindel*, 52 A.3d 275 (2012).

e. Pursuant to *Nash v. Herbster*, 932 A.2d 183 (Pa. Super. 2007) and Rule 1910.16(f) incarceration may be considered as a factor for modification of support if the incarceration makes the obligor unable to pay support and makes the order uncollectable and unenforceable.

f. A termination of support due to obligor's incarceration was appropriate; however, arrears that arose prior to a change in the law, and prior to obligor's request for modification were not remitted. *Plunkard v. McConnell* 962 A.2d 1227 (Pa. Super. 2008).

12. Contempt.

a. Grounds for finding of contempt. In a civil contempt proceeding, the complaining party must prove by a preponderance of evidence that the other party has violated the court order. *Childress v. Bogosian,* 12 A.3d 448 (Pa. Super. 2011); *Hyle v. Hyle*, 868 A.2d 601 (Pa. Super. 2005); *Chrysczanavicz v. Chrysczanavicz*, 796 A.2d 366 (Pa. Super.2002); *Garr v. Peters*, 773 A.2d 183, 189 (Pa. Super. 2001); *Sinaiko v. Sinaiko*, 664 A.2d 1005 (Pa. Super.1995); *Barrett v. Barrett*, 470 Pa. 253, 264, 368 A.2d 616, 621 (1977).

b. Civil contempt is distinguishable from criminal contempt. In civil contempt, the primary purpose is to coerce the contemnor's compliance with a court order, not to punish the contemnor. *Orfield v. Weindel*, 52 A.3d 275 (2012) (see concurring opinion by Judge Strassburger); *Hyle v. Hyle*, 868 A.2d 601 (Pa. Super. 2005); *Wetzel v. Suchanek*, 373 Pa. Super. 458, 541 A.2d 761, 763 (Pa. Super. 1988).

c. The five elements which are essential to a finding of civil contempt are (1) a rule to show cause why attachment should not issue; (2) an answer and hearing; (3) a rule absolute; (4) a hearing on the contempt citation; and

(5) an adjudication. *Chrysczanavicz v. Chrysczanavicz*, 796 A.2d 366 (Pa. Super.2002); *Cahlin v. Goodman*, 421 A.2d 696 (Pa. Super.1980).

d. A party will be held in civil contempt if it is shown that the contemnor's failure to comply with the support order is willful and there is present ability to comply. Contempt may not be found where contemnor has demonstrated a good faith attempt to comply with the order. Rule 1910.25-1(b).

e. The trial court abused its discretion in finding payor in civil contempt for failure to appear for court and pay support, where payor's testimony supported his assertion that he did not have the ability to meet the purge requirement. In setting purge conditions, the court must set the purge requirements that the payor is able to meet. *Godfrey v. Godfrey*, 894 A.2d 776 (Pa. Super. 2005).

f. A civil contempt sentence and purge payment must be based on the contemnor's present ability to pay and not a possible ability to pay in the future. When setting a purge amount by which a contemnor may purge contempt, the court must set a condition which the contemnor will be or should be able to pay. *Hyle v. Hyle*, 868 A.2d 601 (Pa. Super. 2005). See *Orfield v. Weindel*, 52 A.3d 275 (2012).

g. A contemnor must have the ability to pay at the time of finding of contempt, in order to be held in civil contempt. *Godfrey v. Godfrey* 894 A.2d. 776 (Pa. Super. 2006)

h. A warrant of attorney to confess judgment in a settlement agreement must be clear, definite and explicit. *Vincler v. Vincler*, 583 A.2d 4 (Pa. Super.1990).

I. MODIFICATION.

1. Substantial and continuing change in circumstances.

a. Rule 1910.19 provides for modification or termination of child support, spousal support and/or alimony pendente lite, as follows:

- A petition for modification or termination of an existing support order shall specifically aver the material and substantial change in circumstances upon which the petition is based. A new guideline amount resulting from new or revised support guidelines may constitute a material and substantial change in circumstances.

- The procedure upon the petition shall be in accordance with Rule 1910.10 et seq.

- Pursuant to a petition for modification, the trier of fact may modify or

terminate the existing support order in any appropriate manner based upon the evidence presented.

b. Petitioner who requests an increase or decrease in support must demonstrate changed circumstances of a permanent and substantial nature. *Sladek v. Sladek*, 563 A.2d 172 (Pa. Super.1989) (mere passage of two years was insufficient to constitute a change in circumstance); *Com. ex rel. Kreiner v. Scheidt*, 131 A.2d 147 (Pa. Super.1957); *Com. ex rel. Berry v. Berry*, 419 A.2d 1340 (Pa. Super.1980).

c. The burden of proof is on the petitioner who seeks to modify the order. *Jeske v. Jeske*, 423 A.2d 1063 (Pa. Super.1981); *Banks v. Banks*, 418 A.2d 1370 (Pa. Super.1980); *Com. ex rel. Berry v. Berry*, 419 A.2d 1340 (Pa. Super.1980).

d. A new Guideline amount resulting from new or revised support guidelines may constitute a material and substantial change in circumstances. Pa.R.C.P. 1910.19(a).

e. A support obligor is not entitled to modification if the asserted change in circumstances occurred prior to the entry of the existing support order. *Barthel v. Jarrett*, 131 Montg. Co. L.Rep. 123 (1994).

f. When a party files for modification of an existing support order, the Court has the authority to modify the Order to the detriment of the petitioning party, even if the opposing party did not file a separate petition seeking modification of the support order. *Brickus v. Dent*, 5 A.3d 1281 (Pa. Super. 2010).

g. Where a party flagrantly disobeys a support order, his petition to reduce may be denied, *Goodwin v. Goodwin*, 413 Pa. 551, 198 A.2d 503 (1964); especially where father withholds support to enforce a visitation order. *Com. ex rel. Zercher v. Bankert*, 405 A.2d 1266 (Pa. Super.1979). Where lower court did not find father in contempt, Superior Court would not find that there was flagrant disobedience. *Banks v. Banks*, 418 A.2d 1370 (Pa. Super.1980), *appeal from remand*, *Com. ex rel. Banks v. Banks*, 478 A.2d 1387 (Pa. Super. 1984).

h. If there is a good faith effort to pay timely, the mere existence of arrearages does not preclude a hearing for modification. *Com. ex rel. Belin v. Belin*, 408 A.2d 863 (Pa. Super.1978).

i. Father may not claim "change in circumstance" warranting reduction in child support where he agreed to provision governing tax deduction in settlement contract and only later realized that its terms might be unfavorable or might render his financial situation more difficult than originally anticipated. *Van Dyke v. Van Dyke*, 573 A.2d 608 (Pa. Super.1990).

j. Where a party fails to comply with the terms of an agreement, a change

of circumstances exists. *Belcher v. Belcher*, 887 A.2d 253 (Pa. Super. 2005).

2. Pleading requirements.

a. Rule 1910.19(c) provides: "Pursuant to a petition for modification, the trier of fact may modify or terminate the existing support order in any appropriate manner based upon the evidence presented."

b. Rule 1910.3 (amended 2011) provides: "The trier of fact shall enter an appropriate child support order based upon the evidence presented, without regard to which party . . . filed a modification petition."

c. In a case where a petitioner completed a modification form and checked a box but did not fill in the grounds for modification, the Superior Court refused to overturn the trial court's decision to modify child support. *Summers v. Summers*, 35 A.3d 786 (Pa. Super. 2012).

d. Rules do not require a party to file a cross-petition for modification. *Brickus v. Dent*, 5 A.3d 1281 (Pa. Super. 2010). Trial court may increase child support in response to evidence presented by a respondent, even though petitioner sought decrease (or vice versa).

3. A request for modification is retroactive to date of the filing of the petition for modification. *Calibeo v. Calibeo*, 663 A.2d 184 (Pa. Super.1995).

4. Grounds for modification.

a. Decrease in obligor's income. *Shuster v. Shuster*, 226 Pa. Super. 542 (1974). *See Soncini v. Soncini*, 612 A.2d 998 (Pa. Super. 1992) (increase in obligee's income did not warrant modification where obligor's income also increased).

b. Obligor's retirement. *Com. ex rel. Burns v. Burns*, 232 Pa. Super. 295 (1974).

c. Increase in obligor's expenses. *Braderman v. Braderman*, 488 A.2d 613 (Pa. Super.1985).

d. Increase in obligee's expenses. *Farabaugh v. Killen*, 648 A.2d 60 (Pa. Super.1994); *Bukics v. Bukics*, 570 A.2d 1364 (Pa. Cmwlth. 1990); *Palmatier v. MacCartney*, 529 A.2d 518 (Pa. Super.1987).

e. Job loss. *Malenfant v. Malenfant*, 639 A.2d 1249 (Pa. Super.1994); *Bradley v. Bradley*, 564 A.2d 504 (Pa. Super.1989). Husband's petition to decrease support was denied, where his unemployment was not a change of circumstances from time of entry of original agreed-upon order, and where husband had a history of taking low-paying jobs for which he was over-qualified. *Nally v. Nally*, 90 Berks Co.L.J. 11 (1997).

f. Incarceration. Father's incarceration for two years held to be a

permanent change in circumstances justifying modification of a support order. *Leasure v. Leasure*, 549 A.2d 225 (1988). *But see Kelly vs. Kelley*, 663 A.2d 785 (Pa. Super.1995) (no modification upon obligor's incarceration after threatening to kill judge and attorney). Trial court refused to terminate or suspend child support obligation where obligor was incarcerated. *Campbell v. Hudson*, 57 Som.L.J. 122 (2000).

g. Time. The mere passage of time not considered a change in circumstance to warrant modification. *Com. ex rel. Fusco v. Fusco*, 372 A.2d 893 (Pa. Super.1977).

h. Revised guidelines. "A new guideline amount resulting from new or revised support guidelines may constitute a material and substantial change in circumstances." Pa.R.C.P. 1910.19(a). *See Newman vs. Newman*, 597 A.2d 684 (1991).

i. Medical condition. Determination of obligee's medical condition rendering her unable to work is a change of circumstances sufficient to justify modification. *Malenfant vs. Malenfant*, 639 A.2d 1249 (Pa. Super.1994). Father's support obligation was suspended when he was rendered physically and psychologically unable to work after accidental exposure to toxic substances. *Mc Grath v. Forbes*, ____ Chester Cy. ____ (1998).

j. Husband failed to prove reduction in earnings from his solely owned company when financial records were unsubstantiated and husband's

k. While father left employment to start his own business and not to avoid support obligation, Court found 65% reduction in pay unreasonable and assigned higher earning capacity while reducing support order 25%. *Brown v. Brown*, Chester Co. (1999).

l. Husband's voluntary retirement and receipt of social security were grounds for modification of alimony. Where Husband voluntarily retired resulting in a $1,000 per month reduction of income, alimony could be modified given a substantial and continuing change of circumstances. *Burd v. Miller*, 105 P.D.D.R.R. 32 (Centre Cty., 2005.

5. Involuntary Reduction of Income.

a. Job loss. See Pa.R.C.P. 1910.16-2(d) (2). Trial court did not err in failing to assign earning capacity to unemployed obligor, whose job loss was involuntary. Obligor engaged in a diligent job search, which yielded only out-of-state offers that would have impaired obligor's ability to exercise partial custody. *Riley v. Foley*, 783 A.2d 807 (Pa. Super.2001).

b. Trial court was not bound by the finding of the Unemployment Compensation Bureau that obligor was not fired for cause. Collateral estoppel did not apply because obligee was not a party to the UC proceeding and had no opportunity to litigate the issue in the UC proceeding. *Ewing v. Ewing*, 843 A.2d 1282 (Pa. Super. 2004).

c. Trial court did not assign earning capacity in excess of obligor's part time earnings where he was involuntarily terminated. *Prol v. Prol*, 49 Chester Co. L.Rep. 5 (2000).

d. Disability. Medical testimony is not required to document party's claim that he or she is disabled and lacks an earning capacity for support purposes. *Malenfant v. Malenfant*, 639 A.2d 1249 (Pa. Super.1994).

e. Court did not include income from second job father quit in determining child support, since father credibly testified that job had caused physical pain and interfered with performance of full-time employment. *Lentz v. Lentz*, 135 Montg.Co.L.Rep. 161 (1997).

6. Voluntary Reduction of Income.

a. Generally. See Rule 1910.16-2(d) (1) and 1910.16-2(d) (2). To modify a support obligation based upon reduced income, the petitioner must establish that (1) the voluntary change in employment was not made for the purpose of avoiding a support obligation and (2) the reduction in support is warranted based upon the petitioner's efforts to mitigate any loss. *Grigoruk v. Grigoruk*, 912 A.2d 311 (Pa. Super. 2006); *Ewing v. Ewing*, 843 A.2d 1282 (Pa. Super. 2004); *Grimes v. Grimes*, 596 A.2d 240 (Pa. Super.1991).

b. The court must look to a party's prior earning capacity when circumstances indicate that he or she has voluntarily reduced his or her actual income by terminating employment, *Com. ex rel. Snively v. Snively*, 212 A.2d 905 (Pa. Super.1965); *Com. ex rel. Jamison v. Jamison*, 27 A.2d 535 (Pa. Super.1942), *Irwin v. Weisberg*, 64 Bucks Co. L.Rep. 230 (1994) (disbarment for cause), or is underemployed, *Com. ex rel. Raitt v. Raitt*, 199 A.2d 512 (Pa. Super.1964); *Com. ex rel. Wieczorkowski v. Wieczorkowski*, 38 A.2d 347 (Pa. Super.1944). The exception to this exception is when the spouse has acquiesced in his or her spouse's reduction in earnings. *Perlberger v. Perlberger*, 626 A.2d 1186 (Pa. Super. 1993); *Weiser v. Weiser*, 362 A.2d 287 (Pa. Super.1976).

c. Trial court was free to base initial support order on husband's previous earnings, since his reduction in income was voluntary and in an attempt to avoid his duty of support; court was not barred by fact that no other support order had been previously entered. *Ewing v. Ewing*, 843 A.2d 1282 (Pa. Super. 2004); *Neil v. Neil*, 731 A.2d 156 (1999).

d. In pursuit of education or career advancement. Where obligor was terminated from his employment and chose to take interim part-time employment while pursuing further education, the obligor was not held to his former earnings, but was assigned an earning capacity suitable to the circumstances. *Beegle v. Raisler*, 576 A.2d 1100 (Pa. Super.1990). Where obligor voluntarily reduced his income by withdrawing from partnership to commence sole proprietorship, the court assigned an earning capacity equal to his prior earning. *Caldwell v. Caldwell*, 131 Montg. Co. L.R. 49 (1994).

e. A parent is not prohibited from making a career change that may cause an immediate decrease in earnings with a long-term prospect of an overall increase in income. *Perlberger v. Perlberger*, 626 A.2d 1186 (Pa. Super.1993); *Weiser v. Weiser*, 362 A.2d 287 (Pa. Super.1976); *Rodriguez v. Rodriguez*, 11 A.C.D.D. 259 (1989). A dependent spouse may voluntarily reduce earnings for legitimate reason, such as the wife in *McNulty*, who returned to school to obtain her degree in nursing and received alimony pendente lite. *McNulty v. McNulty*, 500 A.2d 876 (Pa. Super.1985). If support recipient is pursuing further education in order to obtain greater employment opportunities, he or she may not be required to work to provide child support until her education is completed. *Com. ex rel. Giamber v. Giamber*, 386 A.2d 160 (Pa. Super.1978).

f. However, an obligor was found to have voluntarily reduced his income where he voluntarily left his full time employment as a teacher to work part time while attending medical school (where he had been previously enrolled when the child was conceived, but withdrew to earn income for a few years before returning). *Kersey v. Jefferson*, 791 A.2d 419 (Pa. Super.2001). See also *Cragle v. Cragle*, 419 A.2d 1179 (Pa. Super.1980), where it was held that a parent's educational ambition cannot be realized at the expense of parental obligation to support a child.

g. In pursuit of custody. Hearing Officer erred in failing to allow father part-time income, where mother was allowed part-time earnings, the parties shared custody equally and no viable options for enhancing father's income could be shown. *Ferris v. Ferris*, 146 P.L.J. 113 (1997).

h. Termination for cause. Obligor's termination from his employment due to altercation with fellow employee is not conclusive evidence that he voluntarily reduced his income to avoid support. *Klahold v. Kroh*, 649 A.2d 701 (Pa. Super.1994); *see also Diehl v. Beaver*, 663 A.2d 232 (Pa. Super.1995).

i. Trial court held that obligor was terminated from his employment due to excessive absenteeism, even though the Unemployment Compensation Bureau had previously ruled that obligor was not fired for cause. *Ewing v. Ewing*, 2004 PA Super. 46.

j. Retirement. Although physician/husband retired at a normal retirement age, he was given an earning capacity where it was clear that the retirement was for a retaliatory purpose. *Hirsch v. Hirsch*, 11 A.C.D.D. 219 (1989). For a discussion of "normal" retirement age, see *DeMarco v. DeMarco*, 787 A.2d 1072 (Pa. Super.2001).

k. A party may not retire while he has minor children to support. *Zecha v. Evans*, No. DR90-267 (Perry Co. 8/24/00).

l. Incarceration. Father's incarceration for two years held to be a permanent

change in circumstances justifying modification of a support order. *Leasure v. Leasure*, 549 A.2d 225 (Pa. Super. 1988). *But see Kelly vs. Kelley*, 663 A.2d 785 (Pa. Super.1995) (no modification upon obligor's incarceration after threatening to kill judge and attorney).

m. APL does not terminate prior to the entry of a divorce decree where the payee spouse is cohabiting and shares expenses with the cohabitant. *Childress v. Bogosian,* 12 A.3d 448 (Pa. Super. 2011). Distinguished from *Schenk v. Schenk* 880 A.2d 633 (Pa. Super.2005).

7. Retroactive modification.

a. Generally, the court may not modify or remit a support obligation retroactively for any period of time unless a petition for modification was pending. 23 Pa.C.S. § 4352(e); *Ewing v. Ewing*, 2004 PA Super. 46; *Kelleher v. Bush*, 832 A.2d 483 (Pa. Super.2003); *but see Barnes v. Barnes*, 528 Pa. 258, 597 A.2d 89 (1991) (retroactive modification not barred where grounds for modification predate 1988 amendments).

b. 23 Pa.C.S. § 4352 and the General Assembly state an intention to make arrears more difficult to vacate or modify. *Mosier v. McCaughtry*, 564 A.2d 241 (Pa. Super.1989).

c. Emancipation of child. Retroactive modification also permitted upon emancipation of a child. 23 Pa.C.S. § 4352(e); *Benjamin v. Benjamin*, 596 A.2d 877 (Pa. Super.1991).

d. Misrepresentation or other compelling reason. 23 Pa.C.S. § 4352(d) permits retroactive modification prior to the filing of a petition for modification upon proof of a "misrepresentation of another party."

e. Retroactive modification permitted where (a) the petitioner was precluded from filing a petition for modification by reason of the misrepresentation of another party or other compelling reason, and (b) after learning of the misrepresentation, the petitioner promptly filed a petition. 23 Pa.C.S. § 4352(e); *Barinka v. Barinka*, 617 A.2d 733 (Pa. Super.1992).

f. Husband's failure to report increased income prompted trial court to retroactively increase alimony and child support prior to date of filing of petition, back to date of husband's income increase. *Maue v. Gilbert*, 839 A.2d 430 (Pa. Super.2003); *Simmons v. Simmons*, 723 A.2d. 221 (Pa. Super. 1998). See also, *Ritter v. Ritter*, 92 Berks Co.L.J. 423 (2000).

g. Father's failure to report $40,000.00 in annual income was sufficient basis to allow retroactive increase of his support obligation for years income was misrepresented. *Albert v. Albert*, 707 A.2d 234 (Pa. Super. 1998).

h. Trial court allowed retroactive increase of support order where father had failed to report increase in income as required by initial court order and 23 Pa.C.S. § 4353. *Brown v. Radabaugh*, 47 Cumb.L.J. 135 (1998).

i. Retroactive modification to pre-modification date of change in employment status permitted where payee failed to inform court, Domestic Relations Section or payor of changed income. *DelSignore v. DelSignore*, 143 P.L.J. 501 (Ally. Cy. 1995); see *Purdue v. Purdue*, 580 A.2d 1146 (Pa. Super.1990).

j. Retroactive modification of arrears. Section 4352(e) permits the trial court to modify unpaid arrears accrued after child is emancipated only. If obligor pays child support, no recoupment of payments made after child is emancipated is provided by the controlling statute which provides: "In the case of an emancipated child, arrears shall not accrue from and after the date of emancipation of the child for whose support the payment is made." (emphasis added). *Holcomb v. Holcomb*, 670 A.2d 1155 (Pa. Super.1996).

J. TERMINATION.

1. Death of Party.

a. 23 Pa.C.S. § 3707 provides that an APL order terminates upon the death of the payee.

b. 23 Pa.C.S. § 3707 provides that an APL order terminates upon the death of the payor unless otherwise provided by written agreement or order of court.

c. Estate of deceased parent has no obligation to provide child support to surviving children. *Benson v. Patterson*, 574 Pa. 346, 830 A.2d. 966 (2003); *Garney v. Hain*, 653 A.2d 21 (Pa. Super.1995).

2. Emancipation of Child.

a. Obligation to provide child support terminates when the child attains 18 years of age or graduates from high school, whichever occurs later. *Blue v. Blue*, 532 Pa. 521, 616 A.2d 628 (1992).

3. Entry of Divorce Decree.

a. Spousal support is automatically converted into an order of alimony pendente lite upon the entry of a divorce decree if economic claims remain pending.

b. If no economic claims remain, spousal support terminates upon the entry of a divorce decree.

4. Remarriage or Cohabitation.

a. APL does not terminate prior to the entry of a divorce decree where the payee spouse is cohabiting and shares expenses with the cohabitant. *Childress v. Bogosian,* 12 A.3d 448 (Pa. Super. 2011). Distinguished from *Schenk v. Schenk* 880 A.2d 633 (Pa. Super.2005).

5. Resolution of Economic Claims in Divorce.

a. Spousal support and APL terminate upon the resolution of the economic claims in divorce.

6. Pendency of Appeals.

a. Although alimony pendente lite may continue during appeal, obligor was not required to maintain health insurance for dependent spouse where appealed order explicitly terminated spousal support and dismissed all other economic claims. *Hoffman v. Hoffman*, 504 A.2d 356 (Pa. Super.1986).

b. An appeal from an order of support does not operate as a supersedeas unless so ordered by the court. 23 Pa.C.S. § 4350.

c. Mother had an appeal pending on her request to suspend child support. During the pendency of the appeal on the suspension of child support, Mother filed a modification of child support and filed de novo to the denial of a decrease. Trial court refused to allow Mother to present evidence on modification during the de novo hearing stating it lacked jurisdiction due to the pending appeal. Mother appealed the de novo order to the Superior Court and in a non-precedential opinion the Superior Court stated that a suspension is different from a modification and remanded Mother's modification request back to the trial court for hearing on the de novo demand. *Askins v. Davidson*, No. 1487 WDA 2017, (Pa. Super. December 31, 2018).

7. Bankruptcy.

a. Obligation of support, alimony pendente lite and alimony may not terminate upon bankruptcy. The nature of ongoing obligations is determined by federal bankruptcy law, not state law. *Zimmerman v. Zimmerman*, 469 A.2d 212 (Pa. Super.1983).

K. <u>INCOME TAX CONSEQUENCES</u>.

1. Spousal Support and Alimony Pendente Lite.

a. Direct payments on behalf of payee will qualify as "alimony or separate maintenance payments" if made pursuant to the terms of a support order or agreement. Temp.Reg. § 1.71-1T Q&A 7.

b. Spousal support and alimony pendente lite are neither includable in the payee's taxable income nor deductible from payor's taxable income for Pennsylvania state income tax purposes.

2. Child Support.

a. Child support is not income tax deductible from the taxable income of the payor or includable in the taxable income of the recipient. IRC § 262.

3. Unallocated Orders.

a. Unallocated orders for child and spousal support or APL entered prior to January 1, 2019, are deductible from payor's taxable income and includable in payee's taxable income. IRC § 71.

b. If any amount specified in the instrument is to be reduced based on a contingency in the instrument relating to a child - such as attainment a specified age, death, graduation from school, marriage or emancipation - the amount of the specified reduction is treated as child support.

c. The same rule applies if the reduction under the instrument occurs at a time that can be "clearly associated" with such contingency. Thus, payments that vary with the status of a child are not deductible.

d. The "clearly associated" test for unallocated alimony and child support payments does not apply to unallocated orders for child and spousal support, or child support and APL.

e. An unallocated child support and spousal support order met IRS criteria for alimony and was includable in Wife's income and was taxable for Wife. *Kean v. C.I.R.,* 407 F.3d 186 (2005). Note this would only apply to an order entered prior to January 1, 2019.

4. Allocation.

a. If the court order or agreement does not expressly designate a portion of the payment as child support, then generally no portion of payment will be considered to be child support.

b. The court's refusal to allocate a support award into child support and alimony pendente lite portions is not error where the result is tax savings and increased support. Pa.R.C.P. 1910.16-4(f); *Reisinger v. Reisinger*, 471 A.2d 544 (Pa. Super.1984).

c. Failure to adjust an allocated award to compensate for tax consequences is not error if it results in greatest benefit to obligee. *Holland v. Holland*, 663 A.2d 768 (Pa. Super.1995).

d. Rules 1910.16, 1910.16-4(f) and 1920.56 provide an extensive discussion of allocation and appealability of unallocated orders.

5. Dependency Exemptions.

a. Under IRC § 152(e), the parent having custody of a child for a greater portion of the year is generally treated as having provided more than one-half of the child's support and, therefore, is entitled to the dependency exemption. The new tax law reduced the exemption to $0 through 2025 but the exemption can still have value in determining the filing status of a party which in turn determines the standard deduction for the party. The standard deductions were raised in the new tax law. The deductions are $12,550 for single or married filing separately, $18,800 for head of household and $25,100 for married filing jointly for tax year 2021.

b. This general rule applies only if both parents in the aggregate have custody of the child for more than one-half of the year and they furnish more than one-half of the child's support.

c. This general rule applies only if both parents in the aggregate have custody of the child for more than one-half of the year and they furnish more than one-half of the child's support.

d. In addition to applying to divorced or separated parents, the amended rule applies to parents who "live apart at all times during the last six months of the calendar year." IRC § 152(e) (1) (A) (iii).

e. IRC § 152(e), as amended, is subject to three exceptions:

- The custodial parent may release his or her claim to the exemption to the noncustodial parent.

- The general rule is subject to the provisions and terms of the separation or divorce agreement.

- Section 152(e) (4) provides that prior law will continue to apply to separation or divorce agreements that were executed prior to January 1, 1985, and which allocate the dependency exemption to the noncustodial parent.

f. To accomplish a release of the exemption, the custodial parent is required to sign a written declaration that he or she will not claim the child as a dependent for the year. Further, the noncustodial parent must attach the custodial parent's declaration to the return filed by the noncustodial parent for the year. See IRC § 152(e) (2) and Temp. Reg. § 1.152-4T(a), Q-3.

g. The form and content of the written declaration is set out in the attached IRS Form 8332 "Release of Claim to Exemption for Child of Divorced or Separated Parents."

h. The trial court is authorized to order a parent to execute an IRS Form8332 and thereby allocate dependency exemptions to the non-custodial parent. *Piso v. Piso*, 761 A.2d 1215 (Pa. Super. 2000) (en banc); *Miller v. Miller*, 744 A.2d 781 (Pa. Super.1999); *Bland v. Bland*, 8 D.&C.4th 55 (Erie Co. 1990).

i. Where the trial court chooses to exercise its power to allocate the

dependency exemptions, it must order the custodial parent to execute an IRS Form 8332 in favor of the other parent. *Portugal v. Portugal*, 798 A.2d 246 (Pa. Super.2002).

j. Maximization of available family income is not the only goal when allocating dependency exemptions between the parents. Thus, the dependency exemptions need not always be allocated to the parent whose income is greater. Where the support recipient's income is greater than the payor's income, the trial court may allocate one or more dependency exemptions to the payor to maximize the income available to the payor. *May v. May*, 837 A.2d 566 (Pa. Super.2003).

6. Child Care Tax Credit.

a. Generally, eligibility for dependency exemption determines which parent can claim the child care credit.

b. Only the custodial parent can claim the child care credit, under IRC § 21, even if the eligibility to claim the dependency exemption was transferred to the non-custodial parent.

c. The noncustodial parent cannot claim the credit because even in the case of divorced or separated parents the household must be the principal residence of the taxpayer and the child.

d. Where the payee was assessed an earning capacity, the master appropriately calculated the child tax credit in determining support, even though mother did not actually claim the child tax credit. When calculating an earning capacity, the court should also consider and apply applicable tax credits that would accompany the assessed earning capacity. *C.S. v. C.W.,* 106 P.D.D.D.R. 38 (Lycoming Ct., 2005).

7. Medical Expense Deductions.

a. Parent who pays medical expenses of his or her dependent child may deduct them along with his or her own under IRC § 213(a)

b. Both parents may deduct their portions of the child's medical expenses regardless of who is entitled to the dependency exemption. IRC § 213(d)(5)

8. For further details, see Pollock, "Tax Aspects of Child Support," Chapter Two, *Tax Traps in Divorce*, PBI 1995-96.

L. APPEALS.

1. No Motion for Post-Trial Relief may be filed to an order for support or alimony pendente lite, Pa.R.C.P. 1910.16(b), 1930.2(a).

2. Motions for Reconsideration, if explicitly granted within 30 days, will toll the time for filing an appeal up to 120 days. Pa.R.A.P. 1701(b) (3); Pa.R.C.P. 1930.2(b)-(e).

3. A final order cannot be modified more than 30 days after its entry. The trial court could not vacate dismissal of a support order more than 30 days after the dismissal absent fraud or mistake. *Fulton v. Kilgore,* (Armstrong Cty., 2004).

4. A Motion for Reconsideration may not be filed more than 30 days after the entry of the underlying order. 42 Pa.C.S. § 5505; 23 Pa.C.S. § 3332; *Orfield v. Weindel*, 52 A.3d 275 (2012).

5. A notice of appeal becomes inoperative when, during the 30 day appeal period, a party files a Motion for reconsideration and the trial court files an order granting the reconsideration. If both of these conditions occur, the trial court must enter a reconsidered decision or an order for additional testimony within 120 days or the Motion for Reconsideration will be considered denied. *Dumas v. Brooks*, 201 A.3d 1273, (Pa. Super. 2018), Pa. R.C.P. 1930.2 and Pa R.A.P. 1701(b) (3).

6. Child Support.

a. Rule 1910.16(b) provides that an unallocated spousal and child support order is a final order and therefore appealable.

b. Rule 1920.56(b) provides that an unallocated alimony pendente lite and child support order is a final order and therefore appealable.

c. The foregoing rules dispel the confusion created by *Dubin v. Dubin*, 538 A.2d 1362 (Pa. Super.1988) with respect to the appealability of unallocated alimony pendente lite and child support orders, Pa.R.C.P 1910.16(b) and 1910.56(b).

d. An appeal of an interim order of child support entered pursuant to Rule 1910.11(f) pending a de novo hearing is a temporary order from which no appeal can be taken. *Freedman v. McCandless*, 654 A.2d 529 (Pa. Super.1997).

e. A request for child support sought by Father, who was already paying spousal support to Mother, was viewed as merely a request for reduction of spousal support pursuant to Rule 1910.16-4(e); therefore, the trial court's denial of child support was interlocutory and unappealable. *Diament v. Diament*, 771 A.2d 793 (Pa. Super.2001); see also *Colonna v. Colonna*, 855 A.2d 648 (Pa. 2004).

f. Trial court's remand of support matter to hearing officer, after granting husband's exceptions, was not a final, appealable order. *Deasy v. Deasy*, 730 A.2d 500 (1999)

g. In reviewing a child support order, the standard of review is narrow, and the trial court's order will not be reversed or vacated absent an abuse of discretion. For the purposes of review, an abuse of discretion requires proof of more than a mere error of judgment, but rather evidence that the law was misapplied or overridden, or that the judgment was manifestly

unreasonable or based on bias, ill will, prejudice or partiality. *Portugal v. Portugal*, 798 A.2d 246 (Pa. Super.2002); citing *Kersey v. Jefferson*, 791 A.2d 419 (Pa. Super.2002).

7. Paternity.

a. The finding of paternity prior to the imposition of a support order is interlocutory, not subject to appeal. Pa.R.C.P. 1910.15(f); *S.A.C. v. S.B.*, 605 A2d 832 (Pa. Super.1992).

b. Interlocutory orders concerning paternity tests are appealable. *Sanders v. Sanders*, 558 A.2d 556 (Pa. Super.1989).

c. A final order dismissing the action will be entered when the verdict or decision is in favor of the defendant. The order dismissing the action is appealable to the Superior Court. Pa.R.C.P. 1910.15(d) (5).

d. Rule 1910.15(d) (5) provides for the entry of an "interlocutory order" of paternity if the defendant is determined to be the father. The interlocutory order is not appealable at that time. The issue of paternity becomes appealable only after the final order of support is entered. After an interlocutory adjudication of paternity, the court is provided with the alternative of referring the case to a Domestic Relations Office conference as in other support matters or holding a hearing to determine the final order of support, thus bypassing the conference. Pa.R.C.P. 1910.15(d) (5). In certain cases, where the parties are in court when paternity is adjudicated and the evidence is ready, a hearing may be immediately held and a final support order entered. In other cases, the court may find it advantageous to refer the matter to the conference to follow the usual procedure of a support action.

8. Alimony Pendente Lite.

a. An award of interim economic relief (alimony pendente lite, counsel fees and expenses) in a divorce action is interlocutory and not appealable until final disposition of the divorce case. *Fried v. Fried*, 509 Pa. 89, 501 A.2d 211 (1985); *see Shazes v. Baltuskonis*, 519 A.2d 514 (Pa. Super.1987); *Calibeo v. Calibeo*, 663 A.2d 184 (Pa. Super.1995); *O'Brien v. O'Brien*, 519 A.2d 511 (Pa. Super.1987).

b. The standard of review of an order of alimony pendente lite is the abuse of discretion standard. *Cross v. Cross*, 456 A.2d 214 (Pa.Suiper.1983).

9. Spousal Support.

a. Where no divorce action is pending, an order for spousal support is a final appealable order. *Fortune-Forsvthe v. Fortune*, 508 A.2d 1205 (Pa. Super.1986).

b. Appeal of spousal support during pendency of divorce case is an

interlocutory appeal. *Calibeo v. Calibeo*, 663 A.2d 184 (Pa. Super.1995); *Nemoto v. Nemoto*, 620 A.2d 1216 (Pa. Super.1993); *DeMasi v. DeMasi*, 530 A.2d 871 (Pa. Super.1990); *Krakovsky v. Krakovsky*, 583 A.2d 485 (Pa. Super.1990); *Desch v. Desch*, 477 A.2d 883 (Pa. Super.1984); *Purdue v. Purdue*, 137 P.L.J. 201 (1989),

c. Where a divorce action is pending, a spousal support order is interlocutory and unappealable, even if commenced by a separate Complaint for Support. *Shellhammer v. Shellhammer*, 688 A.2d 1219 (Pa. Super.1997); *Hasson v. Hasson*, 696 A.2d 221 (Pa. Super. 1997); *Leister v. Leister*, 684 A.2d 192 (Pa. Super.1996); *Orzeck v. Orzeck*, 684 A.2d 203 (Pa. Super.1996).

d. In *Calibeo*, the Superior Court relied upon 1994 Amendments to Rules 1920.31(d) and 1920.76, effective March 1, 1995, which provide that spousal support shall be automatically converted to alimony pendente lite upon the entry of a divorce decree. Therefore, the court held that spousal support and alimony pendente lite are indistinguishable in the context of a divorce action.

10. Preservation of Issues on Appeal.

a. A party's failure to preserve issues by raising objections at trial or even attending the support hearing was grounds for dismissal of his appeal. *Mazlo v. Kaufman*, 793 A.2d 968 (Pa. Super.2001).

b. Issues not identified in the Statement of Matters Complained of on Appeal are deemed waived. *Riley v. Foley*, 783 A.2d 807 (Pa. Super.2001).

M. BANKRUPTCY.

1. Dischargeability of Obligations.

a. Generally, orders or agreements for child support, spousal support or alimony pendente lite cannot be discharged by the obligor in bankruptcy. 11 U.S.C. § 523(a) (5).

b. Similarly, an award of counsel fees to the non-debtor spouse is non-dischargeable if incurred to recover support. *In re Shenewolf*, 27 B.R. 187 (M.D.Pa. 1982); *In re Schmiel*, 94 B.R. 373 (E.D.Pa. 1988).

c. Whether an obligation imposed by a court order or separation agreement constitutes non-dischargeable alimony or support is a matter of federal bankruptcy law, not state law. However, in making such determinations, the bankruptcy court must not disregard relevant state law. *In re Gianakas*, 917 F.2d 759 (3rd Cir. 1990); *In re Jenkins*, 94 B.R. 355 (E.D.Pa.1988); *Bucchino v. Bucchino*, 580 A.2d 13 (Pa. Super.1990) (property distribution held to constitute non- dischargeable support obligation); see also, *Bold v. Bold*, 574 A.2d 552 (Pa. Super.1990) (property distribution in lieu of equitable reimbursement alimony); *Hodge v. Hodge*, 513 Pa. 264, 520 A.2d 15 (1986); *Lehmicke v. Lehmicke*, 489 A.2d 782 (Pa. Super.1982).

d. Bankruptcy judge found that the provisions of the parties Separation

Agreement regarding child support were nondischargeable. This Court lifted the stay of the bankruptcy proceeding to allow wife to pursue her rights to child support in state court. *In Re Sokoloff*, 200 B.R. 300 (1996).

e. Trial court could not award counsel fees to husband for having to defend against wife's attack on equitable distribution decree in federal bankruptcy court. *Ingerbrethsen v. Ingerbrethsen*, 72 Bucks Co.L.Rep. 85 (1999). Husband was awarded nearly $27,000.00 in counsel fees for attempting to enforce equitable distribution order where court found wife sought to delay distribution through pro se litigation so as to totally devalue husband's share. *Ingerbrethsen v. Ingerbrethsen*, 72 Bucks Co.L.Rep. 85 (1999).

2. Priority over Other Claims.

a. The 1994 Amendments to the Bankruptcy Code extended a seventh (7th) priority to "allowed claims for debts to a spouse, former spouse, or child of the debtor for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree or other order of court of record, determination made by a governmental unit, or property settlement agreement…" This provision permits support obligations to be paid ahead of other unsecured claims against the debtor spouse. 11 U.S.C. § 507(a) (7).

b. See generally Divorce & Bankruptcy, PBI 1995-997.

N. SELF-EMPLOYED OBLIGORS

1. The question before the court is what income is *available for support*, not what is the individual's income.

2. Look beyond the tax return to find the income available for support.

3. For a sole proprietorship, look at Schedule C.

4. For a partnership or corporation, look at Schedule E. This document by itself will not have much information. The obligor needs to provide his K-1. The K-1 will show how much income from the business is attributable to the partner.

5. For a farmer, look at Schedule F.

6. *Labar v. Labar*, 731 A.2d 1252 (Pa. 1999), obligor owned bowling alley. An obligor is entitled to expend money to grow the business but cannot grow the business on the backs of his children. Examine whether the expense was "necessary". Ask whether the individual is trying to shield or hide income.

7. Add back depreciation of real estate into income available for support of obligor. *McAuliffe v. McAuliffe*, 613 A.2d 20 (Pa. Super. 1992); *Cunningham v. Cunningham*, 548 A.2d 611 (Pa. Super. 1988). *Labar* is an exception to *McAuliffe* and *Cunningham*.

8. Look for company over-supplying their inventory as a way of hiding income.

9. Ask how much control the obligor has over the books of the company and if they have control, they have an opportunity to hide income. Look for placing accounts receivable in later months to decrease income.

10. Examine multiple years of tax returns and see if the depreciation is the same year after year.

11. Other party is entitled to the records of the business. A confidentiality agreement can be used to calm concerns of other partners about releasing records. If they refuse to release, have court authorize discovery and subpoena records.

12. If obligor has expenses like a car and cell phone paid for, argue it is income available for support. Subpoena biggest customers of the business to reconstruct cash flow.

13. Look at cash reserves of the business, did they suddenly increase? Be careful not to consider company retained earnings if you want this to be dealt with in equitable distribution. The court cannot double dip. *Berry v. Berry*, 898 A.2d 1100 (Pa. Super. 2006). Expect obligor to argue retained earnings (cash reserve) are to pay upcoming bills.

14. If it makes financial sense, retain an expert as early as possible.

15. If you cannot win arguing it is income, argue for a deviation.

IV. CHILD SUPPORT.

A. DUTY TO PROVIDE SUPPORT.

1. Parents.

a. A child support action may be initiated by a parent who is entitled to receive child support or a parent who owes child support. Rule 1910.3 (amended 2011). The determination of which party owes child support may be determined at the hearing based upon the evidence of the parties' incomes and the custodial arrangement at the time of the hearing.

b. When parents share custody of their children equally, the parent with higher income shall owe child support to the parent with lower income. Rule 1910.3.

c. The support obligation is based upon the reasonable needs of the child and the parents' available income, after consideration of the amount required to meet the parents' reasonable needs. *Melzer v. Witsberger*, 505 Pa. Super. 462, 480 A.2d 991 (1984) (*but see* P.R.C.P. 1910.16-1 et seq.)

d. The obligation to support minor children is "well nigh absolute". *Com.*

ex rel. Mexal v. Mexal, 193 A.2d 680 (Pa. Super.1963). Both parents are equally liable to the best of their ability. *Conway v. Dana*, 456 Pa. 536, 318 A.2d 324 (1974); *DeMasi v. DeMasi*, 530 A.2d 871 (Pa. Super.1987).

e. Both parties have an obligation to support their children based upon their respective incomes, earning capacities, assets and abilities. *Akers v. Akers*, 540 A.2d 269 (Pa. Super.1988); *Com. ex rel. Vona v. Stickley*, 430 A.2d 293 (Pa. Super.1980).

f. The support order may not be confiscatory. *Fee v. Fee*, 496 A.2d 793 (Pa. Super.1985); *Shank v. Shank*, 444 A.2d 1274 (Pa. Super.1982); *Com. ex. rel. Levy v. Levy*, 361 A.2d 781 (Pa. Super.1976); *Com. ex rel. Shumelman v. Shumelman*, 223 A.2d 897 (Pa. Super.1966).

g. Although support orders may not be punitive or confiscatory, parents may be required to make sacrifices in order to achieve the support goal. *Opie v. Richart*, 598 A.2d 1321 (Pa. Super.1991).

h. Even if the award of child support inures to the benefit of the custodial parent, the primary purpose is to give the child some semblance of the standard of living that the child would experience if the family remained intact. *Schenkel v. Schenkel*, 47 Lehigh L.J. 469 (1997).

i. Parent was obligated to provide support, even where the child's boarding school was tuition free and provided food, clothing and books for child. *Breiner v. DeJohn*, 91 Luzerne Leg.Reg. 175 (2001)

j. Child that was the subject of the support order had turned 18 and graduated high school but remained in placement through CYS. Child was not physically or mentally disabled. Father had no duty to pay support. Agency could seek reimbursement under alternative remedy but support was not the correct avenue. *Somerset County Children and Youth Services, Appellant v. H.B.R., Appellee,* No. 823 WDA 2016 (2017).

k. Father had child support arrearages and received a Worker's Compensation settlement of $3,400. 23 Pa.C.S. 4308.1 states that the net proceeds of a worker's compensation award must exceed $5,000 to be subject to a child support lien. Case is silent on using sum as income for support. Coffman v. Kline, No. 1216 EDA 2016 (Pa. Super. 2017).

2. Custody.

a. 23 Pa.C.S. § 4341(b) confers standing upon any person caring for a child, regardless of whether a court order has been issued granting custody.

b. The Superior Court refused to terminate a child support order against a parent who argued that his custody rights were effectively terminated by a custody order that prevented him from seeing the child. *Kimock v. Jones*, 47 A.3d 850 (Pa. Super. 2012).

3. Adoptive parents.

a. Upon adoption, the duty of support becomes that of the adopting parent. *Com. ex rel. Borrow v. Borrow*, 185 A.2d 605 (Pa. Super.1962).

b. Father could not repudiate adoption of child in support action, where father had actively participated in adoption and held child out to be his own. *Sell v. Sell*, 714 A.2d 1057 (Pa. Super. 1998).

4. Step-parents.

a. A step-parent may be liable for support of his/her spouse's children by a former marriage if step-parent assumed an in loco parentis relationship and voluntarily assumed parental duties and status. *Klein v. Sarubin*, 471 A.2d 881 (Pa. Super.1984); *Com. ex rel Hagerty v. Eyster*, 429 A.2d 665 (Pa. Super.1981); *Bulson v. Bulson*, 419 A.2d 1327 (Pa. Super.1980); *Spells v. Spells*, 378 A.2d 879 (Pa. Super.1971).

b. Absent a written agreement releasing the natural father from his duty of support, a stepfather who stands *in loco parentis* has no legal obligation to provide support for his stepchildren following divorce. *Drawbaugh v. Drawbaugh*, 647 A.2d 240 (Pa. Super.1994). *Compare DeNomme v. DeNomme*, 544 A.2d 63 (Pa. Super.1988) *with Roberts v. Furst*, 561 A.2d 802 (Pa. Super.1989) (written agreement releasing natural father). *See also Com. ex rel. McNutt v. McNutt*, 496 A.2d 816 (Pa. Super.1985).

c. Where mother released stepfather from his obligation to support stepson, mother was later barred from reinstating support. *Garman v. Garman*, 646 A.2d 1251 (Pa. Super.1994).

5. Estate of deceased parents.

a. In the absence of a contractual agreement or pre-existing court order, there was no statutory authority to impose a child support obligation against a deceased parent's estate. *Benson v. Patterson*, 574 Pa. 346, 830 A.2d. 966 (2003); *Garney v. Hain*, 653 A.2d 21 (Pa. Super.1995); see *In re Fessman Estate*, 386 Pa. 447, 126 A.2d 676 (1956).

b. Obligor not required to purchase life insurance as security for child support obligation. *Ramsey v. Ramsey*, 48 Chester Co. L.Rep. 338 (2000).

6. Third parties.

a. After the Supreme Court's decision in *Larson v. DiVeglia*, 700 A.2d 931 (Pa. 1997), disallowing an uncle, with whom the subject child resided, to sue the father for child support, the legislature revised the Domestic Relations Code to provide at 23 Pa.C.S. § 4341(b):

(b) Standing. Any person caring for a child shall have standing to commence or continue an action for support of that child regardless of whether a court order has been issued granting that person custody of the child.

b. Prior to the Supreme Court decision in *Larson v. DiVeglia*, supra, it was believed that child support was payable to the individual or entity which had physical custody of the child. *Larson v. DiVeglia*, 682 A.2d 310 (Pa. Super.1996), reversed 700 A.2d 931 (Pa. 1997); *Trosky v. Mann*, 581 A.2d 177 (Pa. Super.1990). Therefore, Section 4341(b) reinstates the law regarding standing as it was known to exist.

c. Non-biological same-sex parent who exercised partial custody pursuant to court order was liable for child support pursuant to equitable estoppel. *Kove v. Naumoff*, 50 Cumb.L.J. 72 (2000).

B. PATERNITY.

1. Relevant statutory authority.

a. Upon the request of either party, the court shall require the child and the parties to submit to genetic tests. 23 Pa.C.S. § 4343(c) (1), 5104(c). "While the Act [23 Pa.C.S. § 5104(c)] creates a statutory right to obtain blood testing to determine paternity, the right is not absolute and must be balanced against competing societal/family interests." *Donnelly v. Lindemuth*, 597 A.2d 1234 (Pa. Super.1991).

b. The paternity statute provides for interstate cases. 23 Pa.C.S. § 4343(c) (5).

c. Rule 1910.15(b) (2) provides for a voluntary stipulation as to paternity prior to the testing dependent upon the test results.

d. The costs of the paternity tests can be imposed by order of court upon the father if paternity is established. 23 Pa.C.S. § 4343(c) (4); 5104(e).

e. If a party refuses to submit to the court ordered paternity tests, the court may resolve the question of paternity against such party. Pa.R.C.P. 1910.15(b) (1); 23 Pa.C.S. § 5104(c). Summary judgment was properly entered against an alleged Father who refused to submit to paternity tests. *Eadie v. Bohatch*. 601 A.2d 361 (Pa. Super.1992).

2. Justiciable controversy.

a. Paternity tests are typically not permitted unless they are a part of a controversy. Accordingly, Father's petition for rule to show cause why paternity tests should not be taken was denied because the paternity issue did not arise in a claim for support or custody. There were no existing support and custody cases. *Monzi v. Monzi*, No. FD82-00048 (Ally. Co. 1986). *But see* 23 Pa.C.S. § 4343(a) which provides in part: "A putative father may not be prohibited from initiating a civil action to establish paternity."

3. Right to Counsel.

a. In paternity actions, indigent defendants are entitled to representation by

court appointed counsel to ensure due process of law. This right to counsel is meaningless unless it included the right to challenge the counsel's effectiveness on appeal. *Kitrell v. Dakota,* 540 A.2d 301 (Pa. Super.1988); *Gardner v. Gardner*, 538 A.2d 4 (Pa. Super.1988); *Banks v. Randle*, 486 A.2d 974 (Pa. Super.1984); *Cotta v. Coll*, 451 A2d 480 (Pa. Super.1982).

4. HLA Blood Type Testing.

a. The paternity test results are admissible to prove or disprove parentage. *Turek v. Hardy*, 458 A.2d 562 (Pa. Super.1983); 23 Pa.C.S. § 4343(b) (3). In *Smith v. Schaeffer*, 511 Pa. 421, 515 A.2d 527 (1986), the Supreme Court upheld a jury verdict in favor of the defendant where the HLA test established a 99.99% probability that the defendant was the father but circumstantial evidence was offered that the mother had engaged in sexual intercourse with many other men during the possible conception period.

b. In *Stahli v. Wittman*, 603 A.2d 583 (Pa. Super.1992), Superior Court upheld jury's finding that Defendant was not father despite HLA blood test results of 99.99%. Court distinguished HLA tests from those provided in 23 Pa.C.S. § 4343(c) (2), which provides that "genetic test results shall be considered prima facie evidence of paternity."

c. Lower court held that an HLA blood test was inadmissible in a paternity action where the results show a probability of paternity of less than 95%. *Smith v. Richardson*, 30 Adams Leg. J. 201 (1988).

d. Testimony of medical expert who supervised technicians is admissible, although witness did not actually perform the HLA blood tests. *Mitchell v. Randall*, 534 A.2d 508 (Pa. Super.1987).

5. DNA Genetic Testing.

a. Genetic tests which create a degree of probability of 99% or greater creates a presumption of paternity which can only be rebutted by clear and convincing evidence of the unreliability of the results. 23 Pa.C.S. § 4343(c) (2); but see *Zearfoss v. Frattaroli,* 646 A.2d 1238 (Pa. Super.1994) (stipulated 99.9% genetic test not sufficiently conclusive to warrant summary judgment).

b. Jury instruction that 99.90% probability of paternity determined by genetic blood testing shall be considered prima facie evidence of paternity was proper. *Reed v. Boozer*, 693 A.2d 233 (Pa. Super. 1997).

c. Geneticist was qualified to give expert testimony where he was not familiar with paternity testing procedure and had not actually performed the testing. *Estate of Pew*, 598 A.2d 65 (Pa. Super.1991). See also *Reed v. Boozer*, 693 A.2d 233 (Pa. Super. 1997) (Associate Director of paternity testing laboratory, supervised department, established results and signed reports).

d. Trial court erred in failing to find a presumption of paternity based on DNA testing result of 99.97%; mother did not have to raise presumption of paternity in order for it to apply. *Spaw v. Springer*, 715 A.2d 1188 (Pa.

Super. 1998).

6. Inconclusive or Flawed Testing.

a. *DeAngelo v. Murray*, 638 A.2d 966 (Pa. Super.1994) created a bar to retesting of a putative father despite minimal intrusiveness of test, unless proponent of retesting could demonstrate that the prior test was defectively performed. See *Cable v. Anthou*, 546 Pa. 140, 699 A.2d 722 (1997) wherein the Supreme Court affirmed the Superior Court's reversal of the lower court's allowance of a second buccal swab DNA test, since there was no defect in the prior test or its performance.

b. But where the combination of inclusionary and exclusionary tests were so inconsistent as to be legally insufficient, the testing itself was considered flawed and retesting was proper. *Rodgers v. Woodin*, 672 A.2d 814 (Pa. Super.1996).

c. Putative father not required to take additional paternity tests where results of the paternity tests performed were inconclusive. *Com. ex rel. Broscious v. Fern*, 613 A.2d 17 (Pa. Super.1992). Absent a showing by the preponderance of the evidence that paternity testing was defective, the court may not order additional paternity tests. *Koleski v. Park*, 525 A.2d 405 (Pa. Super.1987).

d. Putative father required to submit to DNA testing despite that HLA tests were not shown to be defective. The Superior Court en banc held that there was no constitutional violation where evidence presented by the DNA tests was not cumulative or duplicative of prior HLA testing, but was a more accurate measure of paternity. *Mastromatteo v. Harkins*, 615 A.2d 390 (Pa. Super.1992).

e. Second test ordered where first HLA test defective (insufficient blood sample) due to putative father's extreme fear of needle. Paternity testing found defective, under *Koleski v. Park*, supra, as a result of defendant's own behavior. *Paroby v. Godek*, 588 A.2d 967 (Pa. Super.1991).

f. Second test ordered where mother contended that a picture of the individual tested was not defendant, and no thumbprint was given. Paternity testing found defective under *Koleski v. Park*, supra. *Stundon v. Peluso*, 140 P.L.J. 290 (1992).

7. Acknowledgment of Paternity.

a. 23 Pa.C.S. § 5103 and Rule 1910.15(a) provide that an acknowledgment of paternity constitutes conclusive evidence of paternity without further judicial ratification.

b. Under Rule 2034(d), an adverse judgment against an unrepresented minor may be set aside if justice requires. In this case, an acknowledgment of paternity signed by unrepresented 17-year-old was vacated because defendant was not advised by DRO of his right to paternity tests. *Sweger*

v. Hoey, 112 Dauph. 253 (1992).

c. Defendant's written acknowledgment of paternity set aside as fraudulently induced, where genetic tests proved he was excluded as father. Defendant had limited experience in the world, limited intelligence, and an eighth-grade education. *B.O. v. C.O.*, 590 A.2d 313 (Pa. Super. 1991).

8. Presumption of Legitimacy.

a. A presumption exists that a child conceived or born during the marriage is the child of the mother's husband. The presumption is irrebuttable unless the husband lacked access to the mother at the time of conception, the husband was impotent, the mother was sterile, or there was no intact family at the time of the conception and birth of the child. *Brinkley v. King*, 549 Pa. 241, 701 A.2d 176 (1997); *TLF v. DWT*, 2002 WL 499527 (April 3, 2002); *Barnard v. Anderson*, 767 A.2d 592 (Pa. Super.2001).

b. If either party raises the issue of the presumption of legitimacy, the court shall promptly resolve the issue and may stay the order for genetic testing. Pa.R.C.P. 1910.15(c).

c. Presumption of legitimacy prevented natural father, who had been included by DNA testing, from pursuing custody complaint, since child was conceived and born of marriage and mother and husband remained together. *Strauser v. Stahr*, 726 A.2d 1052 (Pa. 1999).

d. The presumption that a child born to a married woman is a child of the marriage can be overcome only by clear and convincing evidence of non-access, impotency, or sterility. *John M v. Paula T*, 524 Pa. 306, 571 A.2d 1380 (1990); *Michael H. and Victoria G. v. Gerald D.,* 491 U.S. 110, 109 S.Ct. 233 (1989). Putative father may not compel mother's husband to submit to a paternity test, despite Mother's acknowledgment of sexual intercourse with putative father, where husband resided with mother during the period of conception, and the parties remained married and parented two more children. The putative father's due process rights' to establish paternity are outweighed by the husband's right to privacy and the state's interest in preservation of the family unit. *Id*.

e. "The presumption that a child born to a married woman is the child of the marriage and therefore, of the woman's husband, is one of the strongest presumptions known to common law." Superior Court affirmed trial court's award of partial custody to woman's former husband and denial of mother's request for HLA blood tests because she presented no clear and convincing evidence. Husband and wife resided together and engaged in marital relations during relevant period, so mother was estopped from asserting that the child's father was other than her husband. *McCue v. McCue*, 604 A.2d 738 (Pa. Super.1992).

f. Support action against third party dismissed where mother was married and living with her husband at the time of conception and birth. Although court could have relied upon equitable estoppel to reach result, it held that it was preferable to rely upon the intact marriage as the basis for its

holding. *Scott v. Mershon*, 576 A.2d 67 (Pa. Super.1990).

g. Presumption of legitimacy does not apply where parties were separated and divorced shortly after child's birth. Furthermore, Mother's claim against third party not estopped because neither Father nor Mother acted in such a manner as to estop her from claiming child support against putative Father. *Jones v. Trojak*, 586 A.2d 397 (Pa. Super.1990). Presumption of legitimacy did not apply where parties, although married at time of birth, were not married at time of conception, father did not fulfill his obligations for short time he resided with child and no public policy purpose would be served by applying presumption. *Martin v. Martin*, 710 A.2d 61 (Pa. Super. 1998). Presumption of legitimacy did not apply where husband and wife were separated at time of the child's birth and divorced prior to commencement of the support proceeding, and where husband was stationed at sea during the relevant period of conception. *Green v. Good*, 704 A.2d 682 (Pa. Super. 1998). Where Husband and Wife were separated before the conception and birth of Wife's child, Wife's petition for HLA blood tests of a putative father, not her husband, was granted. "[U]nlike *Scott v. Mershon*, supra, there clearly is no extant family relationship between the child and the husband such as would preclude a challenge to the presumption [of legitimacy]." *Selm v. Elliott*, 602 A.2d 358 (Pa. Super.1992).

h. Where Husband and Wife were separated prior to conception and birth (and remained separated except for one meeting which Wife alleged resulted in conception), Husband was entitled to obtain paternity tests for paternity. *Faust v. Faggart*, 594 A2d 660 (Pa. Super.1991). Distinguished *John M. v. Paula T.,* 524 Pa. 306, 571 A.2d 1380 (1990), in which the Pennsylvania Supreme Court declared that putative Father had no right to compel paternity testing of mother's husband), and *Scott v. Mershon*, 576 A.2d 67 (Pa. Super.1990), in which Superior Court denied Mother's request to compel paternity tests of putative Father of child born during wedlock to her Husband).

i. Even though child was admittedly conceived outside mother's common law marriage, and paternity testing showed probability of paternity of man not mother's husband, presumption of legitimacy was applied since child was born into and continued to live in intact family. *Metzger v. Walters*, 20 Lycoming Rep. 355 (1999).

j. Superior Court dismissed third party's paternity complaint, asserting mother's husband's non-access. The presumption that a child conceived and born during the marriage is the child of the Mother's husband is irrebuttable, and thus a hearing on the issue of non-access or impotency was superfluous. *Coco v. Vandegrift*, 611 A.2d 299 (Pa. Super.1992).

k. Father resided with mother for over two years as husband and wife, prior to father becoming suspicious of the child's paternity. Superior Court affirmed trial court's refusal to order paternity test and refusal to admit father's own DNA tests excluding paternity. Presumption of legitimacy not overcome; mother equitably estopped where husband knowing child

was not his supported him anyway in an intact family. *Fish v. Behers*, 741 A.2d 721 (Pa. 1999).

l. Previous application of presumption of legitimacy barred further adjudication of paternity, even though DNA testing showed man other than husband to be father. *Kightlinger v. Buzza*, 25 Craw. Co. Leg.J. 155 (1998).

9. Paternity by Estoppel.

a. Where the child's putative father has provided support or held out the child as his own, he may be estopped from denying paternity *if estoppel is in the best interests of the child*. *K.E.M. v. P.C.S.*, 38 A.3d 798 (Pa. 2012); *Fish v. Behers*, 559 Pa. 523, 741 A.2d 721 (1999); *Brinkley v. King*, 549 Pa. 241, 701 A.2d 176, 180 (Pa. 1997); *Jones v. Trojak*, 535 Pa. 95, 634 A.2d 201 (1993); *R.W.E. v. A.B.K.*, 961 A.2d 161, 169 (Pa. Super. 2008) (en banc); *Wieland v. Wieland*, 948 A.2d 863, 869 (Pa. Super. 2008)*; McConnell v. Berkheimer*, 781 A.2d 206 (Pa. Super.2001).

b. Under the "best interests" standard, the trial court may consider the relationship of each putative father to the child, the results of genetic testing, and/or the financial ability of each putative father to support the child. *K.E.M. v. P.C.S.*, 38 A.3d 798 (Pa. 2012).

c. Estoppel is based on the public policy that children should be secure in knowing who their parents are. If a certain person has acted as the parent and bonded with the child, the child should not be required to suffer the potentially damaging trauma that may come from being told that the father he has known all his life is in fact not his father. *Fish v. Behers*, 559 Pa. 523, 741 A.2d 721 (1999). Estoppel doctrine might not be applied where the child is too young to be damaged by new information. *V.E. v. W.M.,* 54 A.3d 368 (Pa. Super. 2012)

d. If either party raises the issue of the paternity by estoppel, the court shall promptly resolve the issue and may stay the order for genetic testing. Pa.R.C.P. 1910.15(c).

e. Trial court was not precluded from ordering genetic testing prior to conducting a hearing on estoppel in a case where a putative father signed the child's birth certificate. *V.E. v. W.M.*, 54 A.3d 368 (Pa. Super. 2012).

f. Wife equitably estopped from disputing child's paternity where she had named her husband as Father on birth certificate, he acted in role of father, and he supported Mother and baby after birth. *Gulla v. Fitzpatrick*, 408 Pa. Super. 269, 596 A.2d 851 (1991). Mother's husband had held himself out to be father of her deceased child on child's birth certificate, by name, in support proceedings and to community, even though parties separated before child's birth, sufficient to prohibit any other challenge to child's paternity after his death. *Broadwater v. Sentner*, 725 A.2d 779 (Pa. Super. 1999). Mother and husband's actions in continuing to live together for 14 months after child's birth estopped them from

challenging legitimacy at later date. *Amrhein v. Cozad*, 714 A.2d 409 (Pa. Super. 1998).

g. Prior consent support order of court is final and binding on issue of paternity. A second support order for same child payable by different alleged father vacated as prior consent support order constitutes collateral estoppel. The court will not permit the possibility of two paying fathers for one child. *Sanders v. Sanders*, 384 Pa. Super. 311, 558 A.2d 556 (1989).

h. An order of support of illegitimate child necessarily determines the issue of paternity and later request to take HLA blood tests should be denied. *Wachter v. Ascero*, 550 A.2d 1019 (Pa. Super.1988).

i. Blood tests verifying that boyfriend was father are inadmissible to challenge paternity of presumptive father upon mother's petition, to terminate partial custody rights. Mother was collaterally estopped by virtue of the entry to the consent child custody order. *Barclay v. Barclay*, 367 Pa. Super. 529, 533 A.2d 143 (1987).

j. Where Husband and Wife resided together for a period of two years prior to the child's birth, there was no intercourse and husband did not acknowledge child as his own, the presumption of legitimacy of the offspring of the husband of his mother was overcome. In addition, putative father had provided support for the child for four years. *Jones v. Trojak*, 402 Pa. Super. 61, 586 A.2d 397 (1990), *affirmed*, 535 Pa. 95, 634 A.2d 201 (1993).

k. Denial of father's petition for visitation does not necessarily exclude him as a father. At most it is a finding that the individual is not entitled to visitation for one of many reasons. There was not a final judgment on the merits of paternity for which father's petition to confirm paternity would be barred. *Mitchell v. Randall*, 368 Pa. Super. 421, 534 A.2d 508 (1987).

l. Implicit in the entry of a support order is the determination that payor is the father. The appropriate challenge to the finding of paternity is an appeal of the original order. *Gardner v. Gardner*, 371 Pa. Super. 256, 538 A.2d 4 (1988); *Manze v. Manze*, 362 Pa. Super. 153, 523 A2d 821 (1987). Support order entered upon father's failure to appear for joint conference and hearing, failure to file exceptions and failure to file an appeal is res judicata as to paternity. Defendant has waived his defense as to paternity as the entry of a support order establishes paternity as a matter of law. *Gathers v. Wheeler*, No. FD83-9999 (Ally Co. 1987); *Manze v. Manze*, 362 Pa. Super. 153, 523 A.2d 821, 824 (1987). Entry into nonappealed consent order for support constituted res judicata as to paternity, absent any showing of fraud. *Farrar v. Henlev*, No. FD88-02585 (Ally. Co. 1991).

m. Entry into unappealed consent support and custody orders necessarily determine the issue of paternity. Mother is collaterally estopped from

asserting a third party as father. Ordering the third party to undergo paternity tests was inappropriate. *Com. ex. rel. Coburn v. Coburn*, 384 Pa. Super. 295, 558 A.2d 548 (1989).

n. Putative father not estopped where involuntary BAQ allotment and medical insurance were provided by the Navy. Defendant had consistently denied paternity and was not listed on birth certificate. *Ostrowski v. Pethick*, 404 Pa. Super. 392, 590 A.2d 1290 (1991).

o. Husband was estopped even though children were conceived through artificial insemination against husband's wishes, using sperm donated by a third party. Husband permitted himself to be named on birth certificates, paid medical bills on behalf of children, declared children as dependents on his tax return, and expressed his pride in a newspaper interview. *Turczyn v. Turczyn*, memo op., No. 905 EDA 2000 (November 14, 2000).

p. Paternity by Estoppel can be rebutted by a showing of fraud. A misrepresentation need not be an actual statement; it can be manifest in the form of silence or failure to disclose relevant information when good faith requires disclosure. *Glover v. Severino*, 946 A.2d 710 (Pa. Super. 2008). Fraud is practiced when deception of another to his damage is brought about by a misrepresentation of fact or by silence when good faith required expression. Fraud compromises anything calculated to deceive, whether by single act or combination, or by suppression of the truth, or suggestion of what is false, whether by direct falsehood or innuendo, by speech or silence, word of mouth, or look or gesture." *R.W.E. v. A.B.K. and M.K.*, 2008 WL 4684341 (Pa. Super. 2008) citing *Glover*, 946 A.2d 710.

q. In *Vargo v. Schwartz*, 940 A.2d 459 (Pa.Super, 2007), the Superior Court held that Paternity by Estoppel does not apply where there is no intact family to preserve. *Id.* at 470.

10. Non-access, impotency and sterility.

a. Non-access and paternity tests may be shown to overcome the presumption of legitimacy where there was not otherwise an entry of a support order. *Nixon v. Nixon*, 354 Pa. Super. 232, 511 A.2d 847 (1986).

b. Where a married woman seeks to establish paternity of a man other than her husband, the wife may testily as to non-access by her husband and the presumption of legitimacy will not pertain to this situation. *Commonwealth ex rel. Savruk v. Derby*, 235 Pa. Super. 560, 344 A.2d 624 (1975).

c. Sterile, cohabitating putative father who entered into a support order cannot later move to vacate the order based upon his infertility. The entry of a support order necessarily determines the issue of paternity. Even after the entry of a support order, putative father is subsequently excluded by paternity tests as the biological father, the putative father is precluded from challenging paternity which is not a change in

circumstance to modify an existing order. *Schultz v. Connelly*, 378 Pa. Super. 98, 548 A.2d 294 (1988); *Manze v. Manze*, 362 Pa. Super. 153, 523 A.2d 821 (1987).

C. AMOUNT OF SUPPORT.

1. Income and Earning Capacity – see Section III.A. and III.B. *supra*.

a. A parent may not use a self-imposed incapacity to earn income as a reason to avoid child support. *Kelley v. Kelley*, 663 A.2d 785 (Pa. Super.1995).

b. Child's Own Financial Resources. A parent who was custodian of a Uniform Transfers to Minors Act account for the benefit of a child was not entitled to withdraw funds after the majority of the child to pay expenses incurred during the child's minority that are ordinarily paid by a parent. *In re Amanda Gumpher*, 840 A.2d 318 (Pa. Super.2003); *Sternlicht v. Sternlicht*, 822 A.2d 732 (Pa. Super.2003) (allocatur granted).

2. Calculation of Child Support.

a. Due to the tax change, there are now two different formulas to use depending on whether you are modifying a pre-2019 order or creating a new support order. Again, allocation is no longer relevant unless modifying a pre-2019 order and pre-2019 spousal/APL support orders that are modified now are still tax deductible. One critical issue is moving from a pre-2019 order for spousal or APL to post divorce alimony in 2019. There is no law determining whether the alimony post-divorce can be tax deductible or not.

When modifying a pre-2019 order calculate child support first. Then use the same formula for APL/spousal. 40% without children or 30% with children. This formula is encapsulated in "Subdivision 2" of the software. Rule 1910.19(h) (5) restores court's authority to deviate based on tax consequences.

If you are establishing a new order in 2019, spousal/APL is calculated first and then child support is calculated. If there are no children, take 33% of payor and subtract 40% of recipient net income. Then you are done. If there are children, take 25% of payor income and subtract 30% of recipient net income. Then recalculate the parties' income and run the guidelines to determine the child support obligation. This formula is incorporated into "Subdivision 1" of the software. Remember the spousal/APL/alimony will be non-taxable and non-deductible.

SUPPORT CALCULATION CHANGES

Type of Calculation	Tax Deductible	Taxable	Portion of Software
Modification of pre-2019 spousal/APL to 2019 spousal/APL	Yes	Yes	Subdivision 2

Modification of pre-2019 spousal/APL to 2019 alimony	Unknown	Unknown	Subdivision 2
2019 spousal/APL new order	No	No	Subdivision 1
2019 spousal/APL to alimony	No	No	Subdivision 1
All Child Support orders	No	No	Guidelines

CALCULATION OF SPOUSAL/APL

Pre-2019	Spousal/APL w Child	Calculate child support first then APL/Spousal is 30% of difference in parties' income
Pre-2019	Spousal APL no child	APL/Spousal is 40% of difference in parties' income
2019	Spousal/APL w Child	Calculate spousal support first using 25% of payor net income minus 30% of recipient net income then calculate parties' adjusted income, then run child support guidelines.
2019	Spousal/APL no Child	Difference of 33% of payor net income minus 40% of recipient net income.

b. Support Guidelines - see Section III.C. supra.

c. Adjustments to Basic Support – see Section III.D. supra.

d. High Income (Melzer) Cases – see Section III.E. supra.

e. Obligor not required to purchase life insurance as security for child support obligation. *Ramsey v. Ramsey*, 48 Chester Co. L.Rep. 338 (2000).

f. Pa.R.C.P. 1910.16-6 was amended effective October 1, 2017 to require that the documentation of the child care expenses shall be provided to the other party with a reasonable period of time after receipt unless the service provider invoices the parties separately for their proportionate share of the expenses. Allocation of expenses for which documentation is <u>not</u> timely provided to the other party shall be within the discretion of the court. The rule also added that the obligor can be obligated to pay child care expenses to the other parent, the provider, or it can be added into the basic child support obligation.

g. Father's contribution of $2.5 million to a trust for the child was not a basis for a deviation from the support guidelines. The child's assets should not be considered in determine support obligations. The trial court should focus on the immediate needs of the child. Ordering a downward deviation

because of money set aside for future use is improper. Courts may examine the reasonable needs of the child in high income cases. The guidelines apply to all income levels. *Hanrahan v. Bakker,* 186 A.3d 958 (Pa. 2018).

D. DURATION.

1. Custody.

a. The obligation to provide support is not dependent upon a parent's having custody of a child. *Luzerne Co. CYS v. Cottam*, 603 A.2d 212 (Pa. Super.1992).

2. Emancipation of Child.

a. Notwithstanding child reaching majority at age 18, parental duty of support is owed until child has graduated from high school, whichever comes first. *Blue v. Blue*, 432 Pa. 521, 616 A.2d 628 (1992).

b. Merely quitting high school did not give rise to presumption of emancipation; prior to majority, there existed presumption against emancipation which must be overcome by non-custodial parent. Emancipation of minor could only be established when child had no more need for parent's care, custody or maintenance. *Nicholason v. Follweiler*, 735 A.2d 1275 (Pa. Super.1999).

c. A child cannot enforce support provisions of parent's settlement agreement because the parent is the beneficiary of the support. However, a child can intervene and has standing to request enforcement of a provision of the agreement where they are the direct beneficiary, such as with payment for a college education. Case was remanded to proceed with only the child as petitioner. The Superior Court held that Mother did not need to be a party for the child to request or seek relief. Weber v. Weber No. 1312 WDA 2016 (Pa. Super. 2017) proof is upon the child to rebut the presumption of emancipation. *Com. ex rel. Welsh v. Welsh*, 296 A.2d 891 (Pa. Super.1972).

d. Ask whether the child is dependent on his parents for support or is independent of such needs. *Griffin v. Griffin*, 558 A.2d 75 (Pa. Super.1989).

e. Where over-18 child returned to high school full-time intending to obtain diploma following his expulsion, his parents remained liable for support. *Malenfant v. Malenfant*, 639 A.2d 1249 (Pa. Super.1994).

f. Support was terminated for child who had reached 18, worked part-time and was dismissed from high school classes by 11:30 each day because he was deemed able to support himself. *Pick v. Pick*, 20 Lycoming Rep. 384 (1999).

g. Child's failure of several high school courses, causing him to repeat senior year of high school after age 18 was not sufficient to terminate support. *Pick v. Pick*, 20 Lycoming Rep. 384 (1999).

h. It is possible to move in and out of emancipation. *Maurer v. Maurer,* 555 A.2d 1294 (Pa. Super.1989).

i. Trial court did not err in directing mother to pay support for adult child who was committed to juvenile facility after his 18th birthday, since child was defined as such under Juvenile Act, which allowed for recovery of costs, and since child was unable to be employed during period of detention. *Erie County v. Schroeck*, 721 A.2d 799 (Pa. Super. 1998).

j. Obligor was required to pay support for a child over the age of eighteen, that suffered seizure requiring brain surgery and testimony of lay witnesses was that the child suffered from migraines that interfered with her work schedule. *Kotzbauer v. Kotzbauer*, 937 A.2d 487 (Pa. Super. 2007).

3. Estrangement.

a. Where minor declined to live with her father and chose instead to rent an apartment against her father's wishes, father was relieved of the support obligation. *Oeler by Gross v. Oeler*, 527 Pa. 532, 594 A.2d 649 (1991).

4. Termination of Parental Rights

a. Voluntary relinquishment. See *Kaufmann v. Truett*, 771 A.2d 36 (Pa. Super.2001).

b. Involuntary termination. Involuntary termination of parental rights terminates the parent's obligation to provide child support. *Kaufmann v. Truett*, 771 A.2d 36 (Pa. Super.2001); *Monroe Co. CYS v. Werksheimer*, 598 A.2d 313 (Pa. Super.1991).

c. Superior Court refused to terminate support obligation of a parent whose estrangement from the child was so severe that it led to a custody order that effectively terminated any contact between the parent and child. *Kimock v. Jones*, 47 A.3d 850 (Pa. Super. 2012).

E. TRUST PAYMENTS FOR FUTURE NEEDS.

1. In light of the decision in *Curtis vs. Kline*, 542 Pa. 249, 666 A.2d 265 (1995), the establishment of a trust for post-secondary educational needs is not justifiable. See *Leonard v. Jones*, (memorandum opinion), Nos. 1280 and 1372 Pittsburgh 1994, December 13, 1995, *vacating and remanding*, 143 P.L.J. 357. However, a child with special needs or a special income circumstances created by a fleeting occupation, award or lottery prize may justify the imposition of a trust for future needs.

2. In Leonard v. Jones, Father was pro football player earning $47,000 net per month. Mother was a flight attendant earning $718 per month. Father was ordered to pay child support in the amount of $1,458 per month plus $2,000 per month for educational trust. On appeal, Father argued that the support order exceeded the child's reasonable needs as reflected by the mother's budget. Citing *Branch v. Jackson*, 629 A.2d 170 (Pa. Super.1993), the Superior Court held: "We reject appellant's argument that the reasonable needs of an infant is limited solely to expenses determined from the mother's life-style and budget. It is accepted that a father with high income is obligated to endow his children with some of the inherent advantages thereof. . . even if the other parent of that child collaterally benefits." The Court noted that the *Melzer* formula establishes the *presumptive minimum* amount of support but may be supplemented in light of the parents' assets and standard of living. Nevertheless, the Superior Court agreed that Father could not be required to provide for the child's future educational needs.

3. In *Branch v. Jackson*, 629 A.2d 170 (Pa. Super.1993), the Superior Court vacated and remanded the trial court's order for $2,000 per month current support plus $3,000.00 per month to be paid to a trust for the benefit of child of Michael Jackson (baseball player) due to the tenuousness of Father's career. As trial judge noted: "A baseball middle reliever is merely a few home runs or injury from oblivion."

4. Court established trust for benefit of minor child of Tony Dorsett (football player) due to limited economic future in football. *Casterlow v. Dorsett*, No. D810 of 1977 (Ally. Co. 1978).

5. In *Com. ex rel. Giamber v. Giamber*, 386 A.2d 160 (Pa. Super.1978), the Superior Court held that placing a portion of the child support order in escrow for the child's future needs was improper, citing *Com. ex rel. Gutzeit v. Gutzeit*, 189 A.2d 324 (Pa. Super.1963) and *Com. ex rel. Page v. Page*, 100 A.2d 117 (Pa. Super.1953).

6. Orphan's court did not err by placing into escrow a portion of wrongful death settlement received by child for the child's future support. *Velazquez v. Gupta*, 660 A.2d 645 (Pa. Super.1995).

7. In the absence of an agreement, a parent was not required to establish a college fund for children as an element of his child support obligation. *Ramsey v. Ramsey*, 48 Chester Co. L.Rep. 338 (2000).

8. Obligation to pay support is absolute and payment can be compelled from a spendthrift trust. *Drevenik v. Nardone*, 862 A.2d 635 (Pa. Super 2004).

9. Where child was beneficiary of a special needs trust established from med-mal insurance proceeds, such trust was intended to meet child's special needs, not basic needs. Therefore, parents could not reduce or avoid their obligation to provide basic child support. *Ricco v. Novitski*, 874 A.2d 75, (Pa. Super. 2005).

F. FAILURE TO SUPPORT AND WRONGFUL DEATH AWARDS

Shireetta Turn et al. v. Cambridge Beauty Supply et al., No. 02193 Philadelphia Court of Common Pleas (2017) - a parent who has not supported a child for a year prior to the death

of the child has no right to recovery of funds received as a result of the death of the child. Petitioner must show the decedent was a minor, the parent owed a duty of support, the parent failed to perform any duty of support for at least a year prior to death. The court states the seminal case, *In re Estate of Teaschenko,* 574 A.2d 649 (Pa. Super. 1990), was decided prior to the amendment of the statute and requires that the parents' failure be willful. However, in 2000 20 Pa. C.S.A. 2106(b) (1) was amended to remove the requirement that the parent's conduct be proven willful. Mother's failure to seek a child support order does not remove Father's obligation to support the child. In other words, there is no legal obligation for a parent to seek a support order in order for the other parent to be obligated to support the child. The obligation to support your child exists on its own.

V. SPOUSAL SUPPORT.

A. STATUTORY AND CASE LAW AUTHORITY.

1. Statutory Authority.

a. 23 Pa.C.S. § 3104(a) (1) acknowledges that spousal support, as well as alimony pendente lite, can be determined as a part of a divorce action.

2. Purpose of Award.

a. The purpose of spousal support is to assure the dependent spouse a reasonable living allowance. *Fexa v. Fexa*, 578 A.2d 1314 (Pa. Super.1990); *McNulty v. McNulty*, 500 A.2d 876 (Pa. Super.1985); *Com. v. Turner*, 392 A.2d 848 (Pa. Super.1978).

b. The duty to provide spousal support arises out of the marital relationship and terminates when the marriage ends. *McNulty v. McNulty*, 500 A.2d 876 (Pa. Super.1985); *Sorber v. Sorber*, 31 D. & C. 217, 220 (1984); *Remick v. Remick*, 456 A.2d 163 (Pa. Super.1983).

c. There must be a valid common law or statutory marriage relationship between complainant and respondent which has not been dissolved by a decree of divorce. There is an absolute right of support unless complainant has given grounds for divorce. *White v. White*, 313 A.2d 776 (Pa. Super.1973); *Com. ex rel. Keeth v. Keeth*, 289 A.2d 723 (Pa. Super.1972).

3. Cases of General Applicability.

a. Actual earnings. *Reisinger v. Reisinger*, 471 A.2d 544 (Pa. Super.1984).

b. Capital assets. *Bernstein v. Bernstein*, 457 A.2d 1316 (Pa. Super.1983); *Geyer v. Geyer*, 456 A.2d 1025 (Pa. Super.1983).

c. Obligee's earning capacity. Spouse cannot avoid support obligation by staying with a losing business. *Newcomer v. Newcomer*, 473 A.2d 197 (Pa. Super.1984).

d. Standard of living. Dependent spouse entitled to support at level equivalent to standard of living to which he or she had previously become accustomed, provided that finances are still sufficient for such support.

Com. ex rel. Goodyear v. Goodyear, 411 A.2d 550 (Pa. Super.1980).

e. Future issues. Husband was veteran. Husband and wife were both receiving their portion of Husband's Air Force retirement benefit. Thereafter, Husband was deemed disabled from service-related injury and agreed to waive or reduce his retirement benefit by the amount he would receive in disability. This reduced Wife's benefit but she sustained a loss in monthly benefit because she did not get a portion of the disability benefit Husband received. Federal statute states a State may treat as community property and divide at divorce, a military veteran's retirement pay. 10 U.S.C. 1408(c) (1). There is an exemption to this for any amount that the veteran has to waive in order to receive disability benefits. 10 U.S.C. 1408(a) (4) (B). United States Supreme Court held that federal law preempted state law and states could not order the waived portion of the retirement benefit as a divisible asset in divorce. Husband did not have to compensate, or indemnify, Wife for her lost portion. The Court said whether the waiver occurs before or after divorce is irrelevant. The court said this could be addressed in the calculation or re-calculation of spousal support. Howell v. Howell – 137 S.Ct. 1400 (2017).

f. Perquisites of part ownership in closely held family corporation. *Mascaro v. Mascaro*, 803 A.2d 1186 (Pa.2002) *Com. ex rel. Maier v. Maier*, 418 A.2d 558 (Pa. Super.1980).

g. One spouse's use of appropriated marital funds. *Machen v. Machen*, 420 A.2d 466 (Pa. Super.1981).

B. DEFENSES.

1. Lack of Entitlement due to Defective Marriage.

a. "Married persons are liable for the support of each other according to their respective abilities to provide support as provided by law." 23 Pa.C.S.A. § 4321(1).

b. A plaintiff who is unable to establish a common law marriage, or whose ceremonial marriage is defective (e.g., bigamous) is not entitled to spousal support. *Perrotti v. Meredith*, 868 A.2d 1240 (2005) (common law); *Canute v. Canute*, 557 A.2d 772 (Pa. Super. 1989) (defective ceremonial marriage).

c. Failure to establish common law marriage during spousal support proceeding was grounds for estoppel in subsequent divorce proceeding. *Vignola v. Vignola*, 1282 EDA 2011.

2. Lack of Entitlement due to Marital Misconduct.

a. A spouse may forfeit the right to support by engaging in misconduct rising to the level of valid grounds for a fault divorce, *e.g.*, indignities, *King v. King, 568 A.2d 627 (Pa. Super 1989*); *Morley v. Morley*, 424 A.2d 524 (Pa. Super.1981), or adultery, *Hoffman v. Hoffman*, 762 A.2d 766 (Pa. Super.2000).

b. Spouse's relationship with a member of the opposite sex will not, of itself, deny entitlement to support unless it is flagrant and is conducted as to bring "continued shame, humiliation and disgrace" to the other spouse. *Narbesky v. Narbesky*, 386 A.2d 129 (Pa. Super.1978).

c. The misconduct claimed to nullify the support obligation must be proven with clear and convincing evidence. *Roach v. Roach*, 487 A.2d 27 (Pa. Super.1985); *Aiello v. Aiello*, 620 A.2d 1230 (Pa. Super. 1992).

d. A spouse's post-separation misconduct is irrelevant for the purpose of establishing an entitlement defense, except to the extent that it sheds light upon that spouse's pre-separation misconduct. *S.M.C. v. W.P.C.*, 44 A.3d 1181 (2012); *Jayne v. Jayne,* 443 Pa. Super. 664, 663 A.2d 169 (Pa. Super. 1995); *Schuback v. Schuback*, 603 A.2d 194, 196 (Pa. Super. 1992).

e. The conduct of obligee may be negated by conduct of obligor. *Hellman v. Hellman*, 371 A.2d 964 (Pa. Super.1977); *Domencic v. Domencic*, 738 A.2d 1060 (Pa. Super. 1999).

f. When both parties are guilty of marital misconduct, however, the court may have to balance the equities involved and decide which party was more culpable. *Schrieber v. Schrieber*, 454 A.2d 112 (Pa. Super.1982).

3. **Condonation**.

a. Condonation of spouse's misconduct may restore the duty of support. *Hoffman v. Hoffman*, 762 A.2d 766 (Pa. Super.2000); *Com. ex rel. D'Andrea v. D'Andrea*, 396 A.2d 765 (Pa. Super.1978).

b. Husband's pre-separation adultery and post-separation cohabitation with paramour would not automatically condone wife's post-separation adultery. *Miller v. Miller*, 22 D. & C.4th 159 (Adams Co.1994).

4. Indignities.

a. Indignities may consist of vulgarity, unmerited reproach, habitual contumely, studied neglect, intentional incivility, manifest disdain, abusive language, malignant ridicule, and every other plain manifestation of settled hate and estrangement. *S.M.C. v. W.P.C.*, 44 A.3d 1181 (2012); *Hunsinger v. Hunsinger*, 381 Pa. Super. 453, 554 A.2d 89, 91 (Pa. Super. 1989) (quoting *McKrell v. McKrell*, 352 Pa. 173, 180, 42 A.2d 609, 612 (1945)).

b. A single act by a spouse, however, will not give rise to a finding of indignities. Rather, "indignities 'must consist of a course of conduct or continued treatment which renders the condition of the innocent party intolerable and his or her life burdensome … a course of conduct as is humiliating, degrading and inconsistent with the position and relation as a spouse.'" Id.

5. Voluntary withdrawal from marital residence without adequate cause.

a. Voluntary withdrawal from the marital residence without adequate legal cause is a bar to spousal support. *Myers v. Myers*, 592 A.2d 339 (Pa. Super.1992) (criticized on other grounds); *Morley v. Morley*, 424 A.2d 524 (Pa. Super.1981); *Tract v. Dixon*, 47 Chest. Co. L. Rep. 48 (1998).

b. Wife seeking support after voluntarily vacating the marital residence without husband's consent has burden to establish that her Husband's conduct justified her leaving. *Rock v. Rock*, 560 A.2d 199 (Pa. Super.1989).

c. Burden of proof is on dependent spouse to establish adequate legal cause for leaving the marital residence. *Clendenning v. Clendenning*, 572 A.2d 18 (Pa. Super.1990); *Rock v. Rock*, 560 A.2d 199 (Pa. Super.1989).

d. Evidence to prove obligee's adequate legal cause to vacate marital residence can be somewhat general in nature. *Myers v. Myers*, 592 A.2d 339 (Pa. Super.1992). Obligee spouse need not establish facts which would entitle her to a divorce. *Rock v. Rock*, 560 A.2d 199 (Pa. Super.1989).

e. Wife's departure from marital residence just four weeks after the parties' marriage was justified where the parties had a fight two weeks after they were married, in which Husband threw a shoe at Wife and told her to "get the hell out of his house." *Brotzman-Smith v. Smith*, 650 A.2d 471 (Pa. Super. 1994).

f. Petitioner has the burden of establishing that the spouse's conduct provided the petitioner with justification to leave the marital home in order to obtain spousal support. *Brotzman-Smith v. Smith*, 650 A.2d 471 (Pa. Super. 1994). Petitioner will be denied spousal support if left marital home without adequate legal cause. *Id.*

g. Where there is no evidence a Petitioner's mental illness prevented them from returning to the marital home and where Petitioner fails to show they did not return due to spouse's conduct, Petitioner is not entitled to support. Noll v. Noll, 1994 WL 906704 (Berks Co. Pa. Com. Pl. 1994).

h. Husband's cross-dressing held to be legal justification for Wife's departure from marital residence, entitling her to receive spousal support. *McKolanis v. McKolanis*, 644 A.2d 1256 (Pa. Super.1994).

i. Wife's testimony that Husband was emotionally abusive, did not attend marital counseling and bullied her was sufficient grounds to leave marital residence. *S.M.C. v. W.P.C.*, 44 A.3d 1181 (2012).

6. Entitlement defense to unappealed support order raised at initial hearing may not be subsequently not raised at modification hearing. *Com. ex rel. Grow v. Grow*, 407 A.2d 1361 (Pa. Super.1979).

7. Lack of need - *George* Rule.

a. A court does not have the power to issue a support order where the parties are living together in the same household unless the basic necessities of life are not being supplied. *Shilling v. Shilling*, 575 A.2d 145 (Pa. Super.1990); *Com. v. George*, 358 Pa. 118, 56 A.2d 228 (1948).

b. Although the husband and wife lived in the same house, they were separated so as to satisfy the requirements for an award of support to the wife. The parties shared only limited common areas of the house and had not spoken to each other in over a year. It was held that the lower court did not abuse its discretion in awarding the wife support even though the husband paid the joint household expenses since the wife had necessary expenses not being covered by the husband. *Biler v. Biler*, 508 A.2d 1261 (Pa. Super.1986). *See Papale v. Papale*, 139 P.L.J. 263 (1991). *Powelson v. Powelson*, 419 A.2d 741 (Pa. Super. 1980).

c. On the other hand, alimony pendente lite may be awarded even where the parties are living in the same house and absent a showing of a willful denial of necessities. *Wechsler v. Wechsler*, 363 A.2d 1307 (Pa. Super.1976).

d. 23 Pa.C.S. § 3103 and 3301(d) define "separate and apart" as "complete cessation of any and all cohabitation, whether living in the same residence or not."

C. AMOUNT OF SUPPORT.

1. Income and Earning Capacity – see Section III.A. and III.B. *supra*.

2. Calculation of Spousal Support.

a. Due to the tax change, there are now two different formulas to use depending on whether you are modifying a pre-2019 order or creating a new support order. Again, allocation is no longer relevant unless modifying a pre-2019 order and pre-2019 spousal/APL support orders that are modified now are still tax deductible. One critical issue is moving from a pre-2019 order for spousal or APL to post divorce alimony in 2019. There is no law determining whether the alimony post-divorce can be tax deductible or not.

When modifying a pre-2019 order calculate child support first. Then use the same formula for APL/spousal. 40% without children or 30% with children. This formula is encapsulated in "Subdivision 2" of the software. Rule 1910.19(h) (5) restores court's authority to deviate based on tax consequences.

If you are establishing a new order in 2019, spousal/APL is calculated first and then child support is calculated. If there are no children, take 33% of payor and subtract 40% of recipient net income. Then you are done. If there is children, take 25% of payor income and subtract 30% of recipient net income. Then recalculate the parties income and run the guidelines to determine the child support obligation. This formula is incorporated into

"Subdivision 1" of the software. Remember the spousal/APL/alimony will be non-taxable and non-deductible.

SUPPORT CALCULATION CHANGES

Type of Calculation	Tax Deductible	Taxable	Portion of Software
Modification of pre-2019 spousal/APL to 2019 spousal/APL	Yes	Yes	Subdivision 2
Modification of pre-2019 spousal/APL to 2019 alimony	Unknown	Unknown	Subdivision 2
2019 spousal/APL new order	No	No	Subdivision 1
2019 spousal/APL to alimony	No	No	Subdivision 1
All Child Support orders	No	No	Guidelines

CALCULATION OF SPOUSAL/APL

Pre-2019	Spousal/APL w Child	Calculate child support first then APL/Spousal is 30% of difference in parties' income
Pre-2019	Spousal APL no child	APL/Spousal is 40% of difference in parties' income
2019	Spousal/APL w Child	Calculate spousal support first using 25% of payor net income minus 30% of recipient net income then calculate parties' adjusted income, then run child support guidelines.
2019	Spousal/APL no Child	Difference of 33% of payor net income minus 40% of recipient net income.

b. Rule 1910.16-5(b) (8) permits the trier of fact to consider, in deciding whether to deviate from the Support Guidelines, "in a spousal support or alimony pendente lite case, the period of time during which the parties lived together from the date of marriage to the date of final separation."

c. Adjustments to Basic Support – see Section III.D. supra.

d. High Income (Melzer) Cases – see Section III.E. supra.

e. Presumptive Minimum Amount. It has been asserted that the presumptive minimum amount of spousal support is equal to forty (40%) percent of the parties' differential net incomes. *Terpak v. Terpak*, 697 A.2d 1006, n.3 (Pa. Super. 1997).

f. In *Mascaro v. Mascaro*, 764 A.2d 1085 (Pa. Super.2000) (allocatur granted)803 A.2d 1186 (Pa. 2002), the Superior Court held that a *Melzer* needs analysis must be applied to determine spousal support or APL. The *Mascaro* panel held that *Terpak* was dicta with regard to the presumptive minimum amount. On appeal, the Supreme Court reversed, holding that the 30% (or if there is no child support, 40%) guideline is the appropriate method of determining spousal support or APL in high income cases. See P.R.C.P. 1910.16-4.

g. In cases where the Custodial Parent owes spousal support & the spousal support or APL is taxable, Rule 1910.16-4(e) authorizes the court to deviate from the calculation based on tax consequences.

h. Expenses are allocated after the spousal support/APL is added to the recipient's net income and subtracted from the payor's net income. Rule 1910.16-6.

D. DURATION.

1. Termination.

a. Death of payor or recipient.

b. Entry of divorce decree.

2. Conversion into Alimony Pendente Lite.

a. An award of spousal support shall be automatically converted into an order of alimony pendente lite upon entry of a bifurcated divorce decree if economic claims remain pending. Pa.R.C.P. 1920.31(d). Otherwise, "the economically dependent spouse could be placed at a great disadvantage during the interim period if his or her right of support were eliminated by the prior entry of the divorce decree." *Desch v. Desch*, 477 A.2d 883 (Pa. Super.1984).

b. Under prior law, an order of spousal support was not automatically converted into an order of alimony pendente lite upon the entry of a bifurcated divorce decree. Where wife failed to request conversion, husband has no duty to provide spousal support after entry of divorce decree. *Krakovsky v. Krakovsky*, 583 A.2d 485 (Pa. Super.1990); *Purdue v. Purdue*, 580 A.2d 1146 (Pa. Super.1990); *Levine v. Levine*, 520 A.2d 466 (Pa. Super.1987). Some local court rules, however, previously provided for automatic conversion into an alimony pendente lite order.

VI. ALIMONY PENDENTE LITE.

A. STATUTORY AND CASE LAW AUTHORITY.

1. Statutory Authority.

a. 23 Pa.C.S. § 3702(a) provides that the court may upon petition, and in proper cases, allow a spouse reasonable alimony pendente lite, spousal support and reasonable counsel fees and expenses. Reasonable counsel fees and expenses may be allowed pendente lite, and the court shall also have authority to direct that adequate health and hospitalization insurance coverage be maintained for the dependent spouse pendente lite.

b. 23 Pa.C.S. § 3103 defines alimony pendente lite as "an order of temporary support granted to a spouse during the pendency of a divorce or annulment proceeding." Support is "care, maintenance and financial assistance." 23 Pa.C.S. § 3103, 4302.

c. 23 Pa.C.S. § 3323(c) provides that a court may order interim alimony, reasonable counsel fees and expenses, pending final disposition of the litigation.

d. 23 Pa.C.S. § 3502(d) empowers the court to direct the continued maintenance and beneficiary designation or purchase of health and life insurance policies.

e. 23 Pa.C.S. § 3505(a) authorizes the court to enter an injunction when a party is about to dispose of or encumber property to defeat alimony pendente lite.

f. 23 Pa.C.S. § 3323(b) (1) authorizes the court "to make a temporary order necessary to protect the interests of the parties pending final disposition" of the divorce case.

g. 23 Pa.C.S. § 3703 provides for enforcement, should a party be in arrears in the payment of alimony pendente lite.

h. 23 Pa.C.S. § 3704 provides that a court may order that all payments of alimony pendente lite be made to the domestic relations section of either the court issuing the order or the court at the residence of the party to receive the award.

i. 23 Pa.C.S. § 3705 provides for enforcement of foreign decrees of alimony or alimony pendente lite.

j. Alimony pendente lite will not be awarded where the Court lacked personal jurisdiction over defendant/payor. *Bergere v. Bergere*, 527 A.2d 171 (Pa. Super.1987).

2. Purpose of Award.

a. Alimony pendente lite is based upon the need of the dependent spouse to have equal financial resources to maintain or defend the divorce action where the other party has major assets which are the financial sinews of domestic warfare. *Spink v. Spink*, 619 A.2d 277 (Pa. Super.1992); *DeMasi v. DeMasi*, 597 A.2d 101 (Pa. Super.1991); *Krakovsky v. Krakovsky*, 583 A.2d 485 (Pa. Super.1990); *Prozzoly v. Prozzoly*, 475 A.2d 820 (Pa. Super.1984); *Bees v. Bees*, 386 A.2d 114 (Pa. Super.1978).

b. Alimony pendente lite may be awarded when the court deems that it is necessary to enable a spouse to maintain or defend a divorce action. *Horn v. Horn*, 564 A.2d 995 (Pa. Super.1989); *Keller v. Keller*, 419 A.2d 49 (Pa. Super.1980); *Wechsler v. Wechsler*, 363 A.2d 1307 (Pa. Super.1976).

c. Wife was not awarded APL, alimony or counsel fees where her income, child support and equitable distribution award put her on an equivalent economic footing with husband. *Dietrich v. Dietrich*, 119 Dauph. Co. Rep. 111 (1999).

3. Cases of General Applicability.

a. The court's primary consideration is the respective incomes and earning capacities of the parties. *Young v. Young*, 418 A.2d 415 (Pa. Super.1986). Merely because the payee spouse is employed does not preclude an award of alimony pendente lite. *Cross v. Cross*, 456 A.2d 214 (Pa. Super.1983). The recipient spouse need not be "dependent" so long as a disparity in incomes exists. *Powers v. Powers*, 615 A.2d 459 (1993).

b. The test to determine whether alimony pendente lite should be awarded and the amount of same involves a court's examination of each spouse's ability to pay, their separate estates, their earning capacities and surrounding circumstances. *Orr v. Orr*, 461 A.2d 850 (Pa. Super.1983); *Young v. Young*, 418 A2d 415 (Pa. Super.1980); *Venanzi v. Venanzi*, 29 D. & C.3d 141 (1983).

c. The court will also consider age, training, mental and physical condition of the dependent spouse, *Com. ex rel Simpson v. Simpson*, 430 A.2d 323 (Pa. Super.1981), as well as a mothers' belief in her obligation to remain home with young children, *Com. ex rel. Wasiolek v. Wasiolek*, 380 A.2d 400 (Pa. Super.1977), when determining the right to and amount of alimony pendente lite.

d. Actual need. The recipient spouse must, however, demonstrate need for such relief to adequately maintain or defend the divorce litigation. The simple fact that one spouse earns more than the other does not entitle the other spouse to alimony pendente lite, *Schenk v. Schenk*, 880 A.2d 633 (Pa. Super.2005); Counsel fees. *Kohl v. Kohl*, 564 A.2d 222 (Pa. Super.1989).

e. Although wife owed over $4,000.00 in attorney's fees, trial court denied her request for APL, finding that she was able to maintain herself and that her debt was due to her spending choices. *Fetzer v. Fetzer*, 70 Northumb.Leg.J. 111 (1998).

f. Assets. Where a dependent spouse has sufficient means of his or her own, no award of alimony pendente lite will be made. *Ruth v. Ruth*, 462 A.2d 1351 (Pa. Super.1983). Where a party has secured adequate funds from joint savings prior to equitable distribution to cover his or her needs during the pendency of the litigation, award of alimony pendente lite will not be made. *Pangallo v. Pangallo*, 477 A.2d 885 (Pa. Super.1984).

g. A dependent spouse will not be compelled to dispose of or encumber

marital assets rather than receive alimony pendente lite prior to equitable distribution in order to fund a "separate estate." *Orr v. Orr*, 461 A.2d 850 (Pa. Super.1983); *Gerloff v. Gerloff*, 23 D. & C.3d 515 (1982).

h. Alimony pendente lite was not appropriate where the duration of the marriage was four months and neither party had changed their economic circumstances during the marriage. The purpose of APL is to support a party during divorce litigation and an award of APL for a four-month marriage would equal the cost of litigating the APL petition and would not serve any purpose. The court overturned the master's finding. *S.E.M. v. F.R.M.,* 106 PDDR 12 (Pa. C.P. 2005).

i. Master did not err in limiting alimony pendente lite to one year where the marriage was of short duration (two years and eight months). There is no clear guidelines with respect to the duration of apl. *J.W. v. C.W.*, 105 P.D.D.R.R. 34. (Lycoming Cty., 2005).

j. APL does not terminate prior to the entry of a divorce decree where the payee spouse is cohabiting and shares expenses with the cohabitant. *Childress v. Bogosian,* 12 A.3d 448 (Pa. Super. 2011). Distinguished from *Schenk v. Schenk* 880 A.2d 633 (Pa. Super.2005).

B. DEFENSES.

1. Lack of Entitlement due to Marital Misconduct.

a. At the common law, marital fault was irrelevant to the establishment of an alimony pendente lite claim. *Brown v. Brown*, 386 A.2d 15 (Pa. Super.1978), and was not a factor for the court to consider in determining the amount of alimony pendente lite. *Belsky v. Belsky*, 175 A.2d 348 (Pa. Super.1961); *Hanson v. Hanson*, 110 A.2d 750 (Pa. Super.1955). Entitlement was not a defense to alimony pendente lite. *Stelter v. Stelter*, 54 Beaver L.J. 165 (2000); *Siciliano v. Siciliano*, 3 A.C.D.D. 72 (1982).

b. Briefly, as a result of the legislative amendments to § 3702(b) of the Divorce Code, all of the statutory factors for the determination of alimony set forth at § 3701(b), including marital misconduct, were relevant to the determination of alimony pendente lite. These amendments were subsequently repealed.

c. Superior Court affirmed trial court's denial of APL during the period when support recipient was cohabiting with a significant other. Although cohabitation in itself was not a defense to APL, the Superior Court held that the support recipient failed to demonstrate actual need for APL while cohabiting with a significant other who paid the support recipient's expenses. *Schenk v. Schenk*, 880 A.2d 633 (Pa. Super.2005).

d. The Superior Court distinguished *Schenk* in a case where the trial court reversed the hearing officer's decision to terminate APL on the date

when wife moved in with her boyfriend who employed her. The Court held that the short duration of the marriage and Wife's cohabitation were adequate grounds for a downward deviation from the guidelines, however. *Childress v. Bogosian*, 12 A.3d 448 (Pa. Super. 2011).

2. George Rule.

a. Alimony pendente lite may be awarded even where the parties are living in the same house, absent a showing of a willful denial of necessities. *Biler v. Biler*, 508 A.2d 1261 (Pa. Super.1986); *Wechsler v. Wechsler*, 363 A.2d 1307 (Pa. Super.1976).

b. Where Husband had voluntarily given to Wife $200.00 per week for approximately seven years after separation, and paid the mortgage, principal, interest, taxes and insurance and oil bills for the marital residence in which she resided, the trial court did not abuse its discretion to find that when combined with Wife's earnings, she had adequate resources to "maintain the divorce action and support herself." *Kohl v. Kohl*, 564 A.2d 222 (1989). *But see Papale v. Papale*, 139 P.L.J. 263 (1991).

3. Lack of need due to receipt of marital assets.

a. Wife was not awarded APL, alimony or counsel fees where her income, child support and equitable distribution award put her on an equivalent economic footing with husband. *Dietrich v. Dietrich*, 119 Dauph. Co.Rep. 111 (1999).

4. *Rueckert.*

a. A plaintiff in a no-fault divorce action cannot refuse to execute an affidavit of consent merely to extend the period during which he/she receives alimony pendente lite. Upon petition of the defendant, the court may dismiss plaintiff's claim for alimony pendente lite or the divorce action (unless defendant files a counterclaim for divorce). *Rueckert v. Rueckert*, 20 D.& C.3d 191 (Ally.Co. 1981), *cited with approval*, *Hoffman v. Hoffman*, 504 A.2d 356 (Pa. Super.1986).

b. Wife was entitled to retroactive suspension of her APL obligation, when husband, who had filed divorce complaint, did not file 3301(c) affidavit until morning of hearing on wife's motion to compel filing. *Montgomery v. Montgomery*, 20 Lycoming Rep. 409 (1999).

c. Similarly, in a fault divorce action, the trial court may dismiss the plaintiff's claim for alimony pendente lite or the divorce action if the plaintiff refuses to proceed to a § 3301(a) fault hearing. *Sozan v. Sozan*, 9 A.C.D.D. 100 (1987).

d. Rueckert does not justify dismissal of the alimony pendente lite claim of a defendant who refuses to execute an affidavit of consent. *Hulek v. Hulek*, 7 A.C.D.D. 96 (1984).

e. Even though she declined to sign consent affidavit, wife was still entitled to APL, since she had participated in all other aspects of litigation in timely manner. *Maguire v. Maguire*, 112 York Leg. Rec. 178 (1999).

C. AMOUNT OF SUPPORT.

1. Income and Earning Capacity – see Section III.A. and III.B. *supra*.

2. Calculation of Spousal Support.

a. Due to the tax change, there are now two different formulas to use depending on whether you are modifying a pre-2019 order or creating a new support order. Again, allocation is no longer relevant unless modifying a pre-2019 order and pre-2019 spousal/APL support orders that are modified now are still tax deductible. One critical issue is moving from a pre-2019 order for spousal or APL to post divorce alimony in 2019. There is no law determining whether the alimony post-divorce can be tax deductible or not.

When modifying a pre-2019 order calculate child support first. Then use the same formula for APL/spousal. 40% without children or 30% with children. This formula is encapsulated in "Subdivision 2" of the software. Rule 1910.19(h) (5) restores court's authority to deviate based on tax consequences.

If you are establishing a new order in 2019, spousal/APL is calculated first and then child support is calculated. If there are no children, take 33% of payor and subtract 40% of recipient net income. Then you are done. If there are children, take 25% of payor income and subtract 30% of recipient net income. Then recalculate the parties' income and run the guidelines to determine the child support obligation. This formula is incorporated into "Subdivision 1" of the software. Remember the spousal/APL/alimony will be non-taxable and non-deductible.

SUPPORT CALCULATION CHANGES

Type of Calculation	Tax Deductible	Taxable	Portion of Software
Modification of pre-2019 spousal/APL to 2019 spousal/APL	Yes	Yes	Subdivision 2
Modification of pre-2019 spousal/APL to 2019 alimony	Unknown	Unknown	Subdivision 2
2019 spousal/APL new order	No	No	Subdivision 1
2019 spousal/APL to alimony	No	No	Subdivision 1
All Child Support orders	No	No	Guidelines

CALCULATION OF SPOUSAL/APL

Pre-2019	Spousal/APL w Child	Calculate child support first then APL/Spousal is 30% of difference in parties' income
Pre-2019	Spousal APL no child	APL/Spousal is 40% of difference in parties' income
2019	Spousal/APL w Child	Calculate spousal support first using 25% of payor net income minus 30% of recipient net income then calculate parties' adjusted income, then run child support guidelines.
2019	Spousal/APL no Child	Difference of 33% of payor net income minus 40% of recipient net income.

b. Adjustments to Basic Support – see Section III.D. supra.

c. Rule 1910.16-5(b) (8) permits the trier of fact to consider, in deciding whether to deviate from the Support Guidelines, "in a spousal support or alimony pendente lite case, the period of time during which the parties lived together from the date of marriage to the date of final separation."

d. High Income (*Melzer*) Cases – see Section III.E. supra.

D. MODIFICATION.

1. The award of alimony pendente lite can be modified or vacated by a change in circumstances. *Jeffrey v. Jeffrey*, 296 A.2d 873 (Pa. Super.1972). However, it is the practice of the court to make the modifications at the time of the hearing on equitable distribution and alimony. *Hovis v. Hovis*, 6 A.C.C.D. 197 (1984), reversed on other grounds, 518 Pa. 137, 541 A.2d 1378 (1988).

2. Absent unusual circumstances, once a divorce decree is imminent or is entered, the Court will defer ruling on a modification until the time of the equitable distribution. *Davis v. Davis*, 134 P.L.J. 194 (Ally. Cy. 1986). See *Litmans v. Litmans*, 673 A.2d 382 (Pa. Super.1996).

3. An alimony pendente lite award based upon payee spouse's payment of mortgage for marital residence was held modifiable upon showing that mortgage not being paid. *Hendricks v. Hendricks*, A.C.D.D., No. FD87-12194 (Ally. Co. 1990).

E. DURATION

1. Alimony pendente lite is interim relief intended to cover only that period during which the litigation may with due diligence be prosecuted to conclusion. *Hoffman v. Hoffman*, 504 A.2d 356 (Pa. Super.1986); *Remick v. Remick*, 456

A.2d 163 (Pa. Super.1983). This effectuates the policy of the Divorce Code to encourage the speedy resolution of divorce matters.

2. The entry of a divorce decree in bifurcated divorce proceeding does not alter the right of a former spouse to receive alimony pendente lite while economic claims are *pending. Pastuszek v. Pastuszek*, 499 A.2d 1069 (Pa. Super.1985); *Klein v. Klein*, 16 D.& C.3rd 651 (Ally. Co. 1980), Pa.C.S. 23 § 3323(c.1).

3. The right to receive alimony pendente lite ceases with the termination of the divorce litigation, *DeMasi v. DeMasi*, 597 A.2d 101 (Pa. Super.1991); *Horn v. Horn*, 564 A.2d 995 (Pa. Super.1989); or when the recipient spouse obtains a isufficient estate (as through equitable distribution or alimony) to vitiate the need for APL. *Nemoto v. Nemoto*, 620 A.2d 1216 (Pa. Super.1993).

4. Alimony pendente lite may continue after the entry of the equitable distribution decree while such decree is on appeal. *Nemoto v. Nemoto*, 620 A.2d 1216 (Pa. Super.1993); *DeMasi v. DeMasi*, 597 A.2d 101 (Pa. Super.1991); *Shuda v. Shuda*, 423 A.2d 1242 (Pa. Super.1980). However, upon the exhaustion of a party's appeals as of right (as opposed to appeals by permission), the right to APL ceases. *Prol v. Prol*, 840 A.2d 333 (Pa. Super.2003). *Schenk v. Schenk*, 880 A.2d 633 (Pa. Super. 2005).

5. The court will not set time limits on the duration of an order for alimony pendente lite. *Lowenschuss v. Lowenschuss*, 470 A.2d 970 (Pa. Super.1983).

    a. Death of payor or recipient. The right to alimony pendente lite ceases upon the death of payee spouse or payor spouse, unless there is an agreement to the contrary. 23 Pa.C.S. § 3707; *Taylor v. Taylor*, 503 A.2d 439 (Pa. Super.1986); *Pastuszek v. Pastuszek*, 499 A.2d 1069 (Pa. Super.1985).

    b. Remarriage or cohabitation of recipient. Wife's remarriage after the entry of a bifurcated divorce decree, but prior to resolution of financial issues does not bar or terminate an award of alimony pendente lite or counsel fees. *DeMasi v. DeMasi*, 530 A.2d 871 (Pa. Super.1987); *Steiner v. Steiner*, 143 P.L.J. 453 (Ally. Cy. 1995).

    c. Recipient spouse's cohabitation is not a bar to alimony pendente lite. *Miller v. Miller*, 508 A.2d 550 (Pa. Super.1986). Marital fault was irrelevant to the establishment of an alimony pendente lite claim. *Brown v. Brown*, 386 A.2d 15 (Pa. Super.1978); *Siciliano v. Siciliano*, 3 A.C.D.D. 72 (1982); *Belsky v. Belsky*, 175 A2d 348 (Pa. Super.1961); *Hanson v. Hanson*, 110 A.2d 750 (Pa. Super.1955).

    d. Wife's remarriage does not preclude the entry of a retroactive award for alimony pendente lite for the period prior to remarriage. *Bergere v. Bergere*, 527 A.2d 171 (Pa. Super.1987); *Purdue v. Purdue*, 137 P.L.J. 201 (1989).

    e. Entry of final decree.

VII. CONTRAST BETWEEN SPOUSAL SUPPORT AND ALIMONY PENDENTE LITE.

A. PURPOSE OF AWARD.

1. The purpose of spousal support is to assure a reasonable living allowance to the party requiring support. *Com. v. Turner*, 392 A.2d 848 (Pa. Super.1978). The duty to provide spousal support arises from the marital relationship itself and terminates when the marriage ends. *Remick v. Remick,* 456 A.2d 163 (Pa. Super.1983).

2. Alimony pendente lite is "[a]n order for temporary support granted to a spouse during the pendency of a divorce or annulment proceeding." 23 Pa.C.S. § 3103. Alimony pendente lite is awarded to equalize the parties' ability to maintain or defend the divorce action. *Butler v. Butler*, 621 A.2d 659 (Pa. Super.1993), *reversed on other grounds*, 541 Pa. 364, 663 A.2d 148 (1995); *Nemoto v. Nemoto*, 620 A.2d 1216 (Pa. Super.1993); *Krakovsky v. Krakovsky*, 583 A.2d 485 (Pa. Super.1990); *Prozzoly v. Prozzoly*, 475 A.2d 820 (Pa. Super.1984); *Remick v. Remick*, 456 A.2d 163, 169 (Pa. Super.1983). In addition to considering the petitioner's ability to maintain or defend the divorce action on an equal footing, the respondent's ability to pay and the parties' general situation must be considered. *Powers v. Powers*, 615 A.2d 459 (Pa. Super.1993).

B. SIMULTANEOUS ORDERS AND CONVERSION.

1. There cannot be simultaneous orders for APL and spousal support. Note to Rule 1910.16-1 states: "Orders for spousal support and alimony pendente lite shall not be in effect simultaneously." The maintenance of a support action, however, does not preclude a separate action for alimony pendente lite. *Remick v. Remick*, 456 A.2d 163 (Pa. Super.1983).

    a. Prior law provided that orders for support and alimony pendente lite, while not exclusive of each other, must be considered in conjunction with each other as they relate to the obligor's ability to pay, when both procedures are used. *See McNulty v. McNulty*, 500 A.2d 876 (Pa. Super.1985).

    b. Previously, dependent spouse may be entitled to both APL and counsel fees where both are necessary to maintain the divorce proceeding. *DeMasi v. DeMasi*, 530 A.2d 871 (Pa. Super.1990).

2. Pursuant to Rule 1920.31(d) "Upon entry of a decree in divorce, any existing order for spousal support shall be deemed an order for alimony pendente lite if any economic claims remain pending."

3. There is an interesting tension between Rule 1910.16-1(b) ("the amount of support (child support, spousal support, or alimony pendente lite) to be awarded pursuant to the procedures under Rules 1910.11 and 1910.12 shall be determined in accordance with the support guidelines"); the Note to Rule 1910.16-1 ("orders for spousal support and alimony pendente lite shall not be in effect simultaneously"); and the 1994 Explanatory Comment to Rule 1910.1 ("Nothing in this Rule should

be interpreted to eliminate the distinctions between spousal support and alimony pendente lite which were established by case law"). Early case law found distinctions between spousal support and alimony pendente lite in terms of calculation, available defenses and appealability. By mandating application of the Guidelines to both spousal support and alimony pendente lite, however, the Supreme Court may have narrowed the distinction to insignificance.

C. JURISDICTION AND PROCEDURE.

1. Jurisdiction.

a. Spousal support is founded in 23 Pa.C.S. § 4321 (the Support Act); 23 Pa.C.S. § 4501 et seq. (the Revised Uniform Reciprocal Enforcement of Support Act); 62 P.S. § 1971 et seq. (the Support Law of 1937); 23 Pa.C.S. § 4501 et seq. (the Divorce Code of 1980); and 23 Pa.C.S. 6101 et seq. (Protection From Abuse Act).

b. Alimony pendente lite is founded in the Divorce Code of 1980, as amended February 12, 1988, 23 Pa.C.S. § 3701, 3702.

2. Venue.

a. Venue for hearing a spousal support case is generally in the county of the payor spouse, or the county of the payee spouse if residing continuously in the marital residence.

b. Venue in an alimony pendente lite case follows the venue of the divorce action.

3. The Support Guidelines apply to alimony pendente lite as well as child and spousal support. Pa.R.C.P. 1910.16-1(b).

4. Both spousal support and alimony pendente lite orders may be retroactive to the date of filing the claim. Pa.R.C.P. 1910.17(a) and 1920.31(a) (3).

5. Enforcement of spousal support and alimony pendente lite is identical. Pa.R.C.P. 1910.21-1 et seq. and 1920.31(b) (1).

D. PRACTICAL DISTINCTION.

1. If no divorce action is pending, only spousal support can be requested.

2. If a divorce action has been initiated, spousal support or alimony pendente lite may be requested as an economic claim in divorce. Or, a support action may be commenced separately from the divorce action.

3. If a divorce has been entered on a bifurcated basis, only alimony pendente lite is

available after entry of the decree in divorce. The support action, however, will be considered and treated in the context of the divorce action. *Hasson v. Hasson*, 696 A.2d 221 (Pa. Super. 1997); *Shellhamer v. Shellhamer*, 688 A.2d 1219 (Pa. Super.1997); *Leister v. Leister*, 684 A.2d 192 (Pa. Super.1996); *Orzeck v. Orzeck*, 684 A.2d 203 (Pa. Super.1996); *Calibeo v. Calibeo*, 663 A.2d 184 (Pa. Super.1995).

4. Recipient spouse's cohabitation is not a bar to alimony pendente lite, *Miller v. Miller*, 508 A.2d 550 (Pa. Super.1986), but it may raise an entitlement issue of adultery in a support action. *See, e.g., White v. White*, 313 A.2d 776 (Pa. Super.1973).

E. <u>TERMINATION</u>.

1. Wife's remarriage after the entry of a bifurcated divorce decree, but prior to resolution of the financial issues, does not bar or terminate alimony pendente lite, *DeMasi v. DeMasi*, 530 A.2d 871 (Pa. Super.1987); *Steiner v. Steiner*, 143 P.L.J. 453 (Ally. Cy. 1995). However, the substantive right to support terminates upon divorce. *Com. ex rel. Smith v. Smith*, 393 A.2d 1224 (Pa. Super. 1978).

2. However, if there are pending claims in the divorce action, the support order can be automatically converted to an alimony pendente lite order. Pa.R.C.P. 1920.31(d).

3. In the context of a prenuptial agreement, the Supreme Court found support and alimony indistinguishable from alimony pendente lite, "which is merely a type of support awarded in divorce cases." *Musko v. Musko*, 548 Pa. 378, 697 A.2d 255 (1997).

F. <u>CASE LAW</u>.

1. *Horn v. Horn*, 564 A.2d 995, 996 (Pa. Super.1989), summarized the interrelationships and distinctions between alimony pendente lite and spousal support as follows:

> This Court has repeatedly held that spousal support and alimony pendente lite are distinct concepts. See generally, *Prozzoly v. Prozzoly*, 475 A.2d 820 (Pa. Super.1984); *Wargo v. Wargo*, 136 A.2d 163 (Pa. Super.1957). The duty to provide spousal support is derived from marital obligations, *White v. White*, 313 A.2d 776 (Pa. Super.1973), and that duty terminates when the marriage does, *Remick v. Remick*, 456 A.2d 163 (Pa. Super.1983). Spousal support is designed to ensure the dependent spouse a reasonable living allowance. *Levine v. Levine,* 520 A.2d 466, 468 (Pa. Super.1987). The duty to provide alimony pendente lite arise upon the commencement of litigation and continues until all of the economic issues are settled, *Wolk v. Wolk*. 464 A.2d 359 Pa. Super.1983). Alimony pendente lite is designed to allow a dependent spouse to pursue the divorce litigation, *Keller v. Keller*, 419 A.2d 49 (Pa. Super.1980). Spousal support and alimony pendente lite are not mutually exclusive, *Remick v. Remick*, 456 A.2d 163 (Pa. Super.1983), nor interdependent, *Keller v. Keller*, 419 A.2d 49 (Pa. Super.1980) (support

obligation ended, but alimony pendente lite obligation continued).

2. The relationship between alimony and alimony pendente lite has been summarized in *Spink v. Spink*, 619 A.2d 277 (Pa. Super.1992), as follows:

> At this point, it is important to make the distinction between alimony and alimony pendente lite. Alimony pendente lite is based on the need of one party to have equal financial resources to pursue a divorce proceeding when, in theory, the other party has major assets "which are the sinews of domestic warfare." *DeMasi v. DeMasi*, 597 A.2d 101, 104 (Pa. Super.1991). Under the Divorce Code, however, the trial court may allow alimony to either party only if it finds alimony is necessary. 23 Pa.C.S. § 3701(a). Accordingly, alimony is not available until after the divorce decree has been entered. Id. "[Alimony] is based on need and may be reduced or terminated upon remarriage or change of economic circumstances of the party receiving it." *Id.* (*citing* 23 Pa.C.S. § 3701(3), 3706, and 3707).
>
> Alimony pendente lite is not dependent upon the status of the parties, but upon the status of the litigation. *Id.* Theoretically, alimony pendente lite terminates at the time of the divorce. *Id.* However, "a divorce is not final for the purposes of [APL] until appeals have been exhausted and a final decree been entered." Id. at 420-21, 597 A.2d at 104. If an appeal is pending on the equitable distribution of the marital assets, alimony pendente lite will continue throughout the appeals process and any remand until a final order is entered. Id. at 421. "[APL] focuses on the ability of the individual who receives the [APL] during the course of the litigation to defend her/himself, and the only issue is whether the amount is reasonable for that purpose, which turns on the economic resources available to the spouse." Id.

VIII. AGREEMENTS.

A. <u>CHILD SUPPORT.</u>

1. Enforcement.

a. Agreements entered on or after February 12, 1988, are subject to the Amendments to the Divorce Code, which provide: "A provision of an agreement regarding child support, visitation or custody shall be subject to modification by the court upon a showing of changed circumstances." 23 Pa. C.S. 3105(b).

b. "A party to an agreement…whether or not the agreement has been merged or incorporated into the decree, may utilize a remedy or sanction set forth in this party to enforce the agreement to the same extent as though the agreement had been an order of court except as provided to the contrary in the agreement." 23 Pa.C.S. § 3105(a).

c. Under prior law, Code remedies to enforce child support provisions of property settlement agreements were available only if the agreement was incorporated in the divorce decree. *Brown v. Hall*, 495 Pa. 635, 435 A.2d 859 (1981); *Tokach v. Tokach*, 474 A.2d 41 (Pa. Super.1984); *Millstein v. Millstein*, 457 A.2d 1291 (Pa. Super.1983). While remedies

under the Code were available to enforce agreements that had been incorporated in the divorce decree, Code remedies were not available to enforce unincorporated agreements.

d. If obligee seeks to enforce child support provision of property settlement agreement, obligor is bound by agreement under ordinary contract law. *Flick v. Flick*, 596 A.2d 216 (Pa. Super. 1991); *D'Huy v. D'Huy*, 568 A.2d 1289 (Pa. Super. 1990).

e. The terms of a valid postnuptial agreement are enforceable in assumpsit under the usual rules applicable to other contractual rights. *Hollman v. Hollman*, 500 A.2d 837 (Pa. Super.1985), *reversed on other grounds*, 515 Pa. 288, 528 A.2d 146 (1987). The assumpsit action may be brought by the spouse who is a party to the agreement, or, if the action is brought to enforce a child support obligation, it may be brought in the name of the child or children who are third party beneficiaries of the agreement.

f. Child was not an intended third party beneficiary of her parents' Property Settlement Agreement and thus could not sue to enforce payment of support. Unless the Property Settlement Agreement clearly includes that the child support provision can be enforced by the child, or unless the agreement makes clear the intent to benefit the child, a child benefiting from the support provision cannot seek enforcement. *Chen v. Chen,* 893 A.2d 87 (Pa. 2006).

2. Modifiability.

a. 23 Pa.C.S. § 3105(b) provides that contractual provisions regarding child support, custody or visitation shall be subject to modification by the court upon a showing of change in circumstances.

b. Where payee forsakes agreement by filing petition for modification, child support provisions of post-February 12, 1988, property settlement agreement incorporated but not merged into a divorce decree are modifiable upward. *Hanson v. Hanson*, 625 A.2d 1212 (Pa. Super.1993); *Knorr v. Knorr*, 527 Pa. 82, 588 A.2d 503 (1991), or downward, *McGinnis v. McGinnis*, 654 A.2d 563 (Pa. Super.1995) (trial court erred by refusing to reduce above-Guideline child support provision of post- 1988 agreement). See *McMichael v. McMichael*, 700 A.2d 1337 (Pa. Super. 1997) which holds to the contrary but is suspect as it relies on the Superior Court decision in *Nicholson v. Combs*, which was reversed by the Supreme Court. *Nicholson v. Combs*, 550 Pa. 23, 703 A.2d 407 (1997).

c. Petition for modification not barred by an agreement providing that obligee would not seek an increase in child support so long as obligor made timely payments under the existing consent order. *Farabaugh v. Killen*, 648 A.2d 60 (Pa. Super.1994).

d. In ruling on a petition for modification of support, the court could consider the entire Property Settlement Agreement and is not limited to consider only the provisions of the Property Settlement Agreement regarding support. *McClain v. McClain*, 872 A.2d 856 (Pa. Super. 2005).

e. *Azaltovic v. Hedges*, No. 2090 MDA 2016 (Pa. Super. 2017) - Mother and Father signed MSA agreeing that if mom filed for child support dad would be entitled to a $910 credit against the child support amount, for alimony. Mom filed for child support. Court struck down this clause in the MSA as bargaining away the child support and against public policy.

3. Waiver of Child Support.

a. A parent cannot contract away a minor child's right to support. Pennsylvania courts have consistently disregarded support agreements that fail to provide adequate support for minor children. *Conway v. Dana*, 456 Pa. 536, 318 A.2d 324 (1974); *Kesler v. Weniger*, 744 A.2d 794 (Pa. Super.2000); *Hollman v. Hollman*, 500 A.2d 837 (Pa. Super.1985); reversed on other grounds *Hollman v. Hollman,* 528 A.2d 146 (Pa. 1987); *Com. ex rel. Snively v. Snively*, 212 A.2d 905 (Pa. Super.1965); *Com. v. Bishop*, 137 A.2d 822 (Pa. Super.1958); *Com. ex rel. Rossi v. Rossi*, 53 A.2d 887 (Pa. Super.1947). A minor child's right to support cannot be waived or bargained away. *Meisen v. Frank*, 361 Pa. Super. 204, 522 A.2d 85 (1987).

b. In *Roberts v. Furst*, 561 A.2d 802 (Pa. Super.1989), the court dismissed mother's complaint for child support and upheld the enforcement of previous agreement between mother and second husband and father to release father from child support obligation upon payment of $9,000.00 to mother and second husband who agreed to provide support for child. Mother and second husband were to execute a judgment note for $9,000.00 as security for mother's promise to pay child support.

c. *Misen v. Frank*, 522 A.2d 85 (Pa. Super.1987) where the court refused to enforce separation agreement by which wife agreed to indemnify husband's obligation to support the parties' children as a provision against public policy.

d. Agreement with Mother settling paternity action in 1980 with payment of $20,000.00 into trust for child and dismissal of action did not bar subsequent action by child for child support 15 years later. *Shirley v. Javan*, 684 A.2d 1088 (Pa. Super.1996).

e. Mother's assignment of right to receive support to DPW was not an impermissible bargaining away of the child's right to receive support since that restriction applied only when a father benefitted. *Middleton v. Robinson*, 728 A.2d 368 (Pa. Super. 1999).

B. <u>SPOUSAL SUPPORT AND ALIMONY PENDENTE LITE</u>.

1. Enforcement.

a. For so long as the *Simeone* criteria (Section IX.B.) are met where there has been a full and fair disclosure of the parties' financial net worth and assets, an agreement as to spousal support is enforceable. *Mormello v. Mormello*, 682 A.2d 824 (Pa. Super.1996).

b. The Courts strictly construe asserted waiver provisions in support agreements. See *Musko v. Musko*, 676 A.2d 1200 (Pa. Super.1995), Bucks Co.L.Rep. 35 (1995) (waiver of "alimony" not include waiver of spousal support); Volume 18 PA Family Lawyer, No. 1 at page 20; and 19 PA Family Lawyer, page 75-76.

c. The *Musko* prenuptial agreement provision waived alimony or support, and failed to include an express waiver for alimony pendente. Court held that the waiver was intended to include alimony pendente lite, which is definitionally a form of support. 23 Pa. C.S. § 3103; *Musko v. Musko*, 548 Pa. 378, 697 A.2d 255 (1997).

d. Where a spouse signed an I-864 immigration affidavit promising to provide support to his immigrant spouse in an amount equal to 125% of the federal poverty guidelines, the spouse was estopped from paying a lesser amount under the guidelines. *Love v. Love,* 33 A.3d 1268 (Pa. Super. 2011).

e. Selection of the enforcement remedy is important as the provisions of a property settlement agreement may be enforceable but not modifiable with respect to spousal support. Thus, contempt proceedings with respect to a postnuptial agreement may be ineffective but an order entered enforcing a property settlement agreement provision will be enforceable. Compare *Thomson v. Rose*, 698 A.2d 1321 (Pa. Super. 1997) and *Gaster v. Gaster*, 703 A.2d 513 (Pa. Super. 1997) .

f. Instituting a support complaint does not vitiate the support provision of a property settlement agreement. *Swartz v. Swartz*, 689 A.2d 302 (Pa. Super.1997).

g. The remedy for breach of contract is a damage award, which will typically be a judgment in an amount representing the value of whatever bargain has been lost. In cases where a support/alimony agreement is breached, the measure of damages is typically the unpaid support plus interest at the statutory rate or at any rate which the agreement may specify. A contract action will not result in an order to make future payments in compliance with the agreement; successive contract actions for each breach or an equity action for specific performance are required to obtain this result. A damage judgment is not generally enforceable either by imprisonment for failure to comply with the order of judgment or by attachment of the person, because such a judgment is considered a decree for the payment of money which early cases hold may not be enforced by such methods.

h. Alimony agreed to in a Property Settlement Agreement cannot be modified if the payor unilaterally and voluntarily reduces his income. A reduction of an alimony agreement, although permitted pursuant to the modification provision of the Property Settlement Agreement, was not appropriate where the payor voluntarily left a lucrative job. *Stamerro v. Stamerro*, 889 A.2d 1251 (Pa. Super 2005).

2. Modifiability.

a. 23 Pa.C.S. 3105(c) provides: "In the absence of a specific provision to the contrary appearing in the agreement, a provision regarding … alimony, alimony pendente lite, counsel fees or expenses shall not be subject to modification by the court." See also *Brower v. Brower*, 604 A.2d 726 (Pa. Super.1992). The foregoing statutory provision codified the existing case law as set forth in *Stanley v. Stanley*, 488 A.2d 338 (Pa. Super.1985), and *Fleming v. Fleming*, 130 P.L.J. 68 (1982).

b. If a party wishes to reduce a support agreement, an action must be taken pursuant to contract law as an action of assumpsit or equity unless divorce decree clearly states agreement is merged with decree. The enforcement and modification remedies available pursuant to the support laws, i.e., attachment of the property of the person or wage attachment, are not available to enforce support agreements unless the decree clearly states that the agreement is merged with decree. *Dechter v. Kesky*, 549 A.2d 588 (Pa. Super.1988); *Sonder v. Sonder*, 549 A.2d 155 (Pa. Super.1988).

c. The enforcement of a valid agreement in a court of equity may produce an order for specific performance requiring the transfer of assets provided for in the agreement or any other affirmative obligation contained therein, including an order to perform payments in the future and to pay arrearages resulting from failure to perform in the past. As is true of a damage award in a contract action, such a decree for the payment of money is not enforceable by attachment of the person or imprisonment for failure to pay money pursuant to the decree. It is therefore frequently desirable to obtain some form of security for performance of the agreement or to consider the benefits of incorporation of the agreement into the divorce decree to avoid future enforcement difficulties, particularly where the ex-spouse may render himself or herself or herself judgment-proof by placing all property in entireties title with a new spouse. Normal equitable defenses are available in an action for specific performance of a postnuptial agreement, although it has been settled that equity does not lack jurisdiction in these cases due to the existence of an adequate remedy at law. *Balter v. Balter*, 425 A.2d 1138 (Pa. Super.1981).

d. To be enforceable, an agreement need not make reasonable provision for dependent spouse so long as there is full and fair disclosure of the parties' financial resources. *Simeone v. Simeone*, 525 Pa. 392, 581 A.2d (1990); *Hillegass Estate*, 431 Pa. 144, 244 A.2d 672 (1968). A recital of disclosure is sufficient to raise a rebuttable presumption that the disclosure requirements are met.

e. Husband argued that he shouldn't have to pay permanent alimony because if Wife did not receive alimony, she could get more in government benefits. Court held Husband's obligation to pay alimony was not and should not diminished by Wife's ability to receive government benefits. Government supporting someone should be a last resort, not the first. Leicht v. Leicht 164 A.3d 1246 (Pa. Super. 2017).

3. Waiver.

a. Agreement for waiver of spousal support upheld despite Wife's claim of duress and lack of reasonable provision. Court held that lack of legal representation did not constitute "duress" where Wife was neither forced nor threatened with force to induce signing of agreement. *Hamilton v. Hamilton*, 591 A.2d 720 (Pa. Super.1991).

IX. POST MAJORITY SUPPORT.

A. <u>POST SECONDARY EDUCATIONAL SUPPORT.</u>

1. Statutory and Case Law History.

a. 23 Pa.C.S. § 4327 was declared unconstitutional in *Curtis v. Kline*, 542 Pa. 249, 666 A.2d 265 (1995).

b. In *Curtis vs. Kline*, 542 Pa. 249, 666 A.2d 265 (1995), the Supreme Court of Pennsylvania held that the post-secondary educational support statute, 23 Pa.C.S. § 4327 et seq., was unconstitutional and violated the equal protection clause of the U.S. Constitution. The statute had been enacted to ameliorate the elimination of the common law right to post-secondary educational support, which had been recognized by Pennsylvania courts for thirty years prior to the Supreme Court's decision in *Blue v. Blue*, 432 Pa. 521, 616 A.2d 628 (1992). *See Com. ex rel. Ulmer v. Sommerville*, 190 A.2d 182 (Pa. Super.1963).

c. "Under the common law, a parent had a duty to support a minor child. In its wisdom, our General Assembly has bestowed adulthood on minor children at age 18. Consequently, the common law duty to support a minor child must by necessity cease at age 18. … A basic education as guaranteed by our Commonwealth constitution must be available to all Commonwealth citizens. In many instances, high school students reach their 18th birthday prior to graduation from high school. It would make no sense to terminate a support order while a child is attending high school. The rigors of high school are difficult enough without worrying about how a child is going to support himself for the remaining day of his high school education. Therefore, notwithstanding a child reaching majority at age 18, a parental duty of support is owed until a child reaches

18 or graduates from high school, whichever event occurs later." *Blue v. Blue*, 432 Pa. 521, 616 A.2d 628 (1992).

d. *Curtis v. Kline* has not been given retroactive effect so as to allow reimbursement of monies paid pursuant to court-imposed educational support order. *Simmers v. Packer*, 680 A.2d 904 (Pa. Super.1996).

2. Agreements for Post-Secondary Educational Support.

a. The Supreme Court in *Blue* affirmed that agreements for college educational support are enforceable even if there is no common law right to educational support. *Blue v. Blue*, 432 Pa. 521, 616 A.2d 628, (1992); *Emrick v. Emrick*, 445 Pa. 428, 284 A.2d 682 (1971).

b. It is assumed that consent orders for post-secondary educational support constitute enforceable agreements entered on the courthouse steps, rather than unenforceable orders entered in light of the inevitability of a court-imposed obligation under prior law.

c. Where support agreement required both parents to contribute to post-secondary educational support "to the best of their then financial ability," the court did not include room and board in child's educational expenses, as he was living with mother, but held that the trial court should include all expenses incurred by the parent with whom the child lives that would not be incurred if child were working. *Goss v. Timblin*, 424 Pa. Super. 216, 622 A.2d 347 (1993).

d. Subsequent trust created for child did not relieve father of college support obligation created by PSA; PSA was clear on its fact that trust was in addition to, not in place of tuition. Reasonableness of college expenses was upheld, where father objected to questions about his finances at trial, daughter had properly mitigated her costs and PSA showed father to be of means. *Bender v. Bender*, 715 A.2d 1199 (Pa. Super. 1998).

e. Father was not obligated to pay college costs or uncovered medical expenses, where PSA required his consultation beforehand and father was not consulted. Father was obligated to share expense for college loans, even though PSA called for payment of college tuition and expenses, since tuition loans were reasonably understood in that term. *Fina v. Fina*, 737 A.2d. 760 (Pa. Super. 1998).

f. Estrangement is not a defense to contractual obligation for post-secondary educational support. *Trunkwalter v. Trunkwalter*, 617 A.2d 1308 (Pa. Super.1992); *Cook vs. Covey*, 609 A.2d 560 (Pa. Super.1992).

g. Where support agreement required father to pay for 75% of child's expenses for post-secondary education, the court refused to construe agreement as requiring father to pay for graduate school unless specifically stated. *del Castillo v. del Castillo*, 617 A.2d 26 (Pa. Super.1992).

h. Father neither relieved of contractual obligation for post-secondary educational support nor entitled to reimbursement for payments made when maternal grandmother established college education trust for benefit of her grandchildren. *Frank v. Frank*, 587 A.2d 340 (Pa. Super.1991).

i. Superior Court affirmed trial court's refusal to impose a college support obligation upon a parent based upon an alleged verbal agreement that was not adequately proven at trial. *Mackay v. Mackay*, 984 A.2d 529 (Pa. Super.2009).

B. NON-EDUCATIONAL SUPPORT OF ADULT CHILDREN.

1. Generally.

a. A parent is not generally required to support an adult child. *Marino v. Marino*, 601 A.2d 1240 (Pa. Super.1992); *but see DeWalt v. DeWalt*, 529 A.2d 508 (Pa. Super.1987).

b. There may be an obligation under the Support Law, 62 P.S. § 1971, to reimburse state agencies for necessities provided to an indigent adult child, however. The obligation to contribute to the support of an adult child will not be imposed where it will result in undue hardship to the supporting parent or parents. *Chesonis v. Chesonis*, 538 A.2d 1376 (Pa. Super.1988); *Com. ex. rel. Grallnick v. Grallnick*, 421 A.2d 232 (Pa. Super.1980).

2. Disabled Child.

a. A parent's duty to support a child may continue even after the child attains majority, where the child is physically or mentally disable, unemployable or otherwise unable to support himself. *Com. ex. rel. Magaziner v. Magaziner*, 419 A.2d 149 (Pa. Super.1980); *Com. v. Wingert*, 98 A.2d 203 (Pa. Super.1953); *Com. ex. rel. Nicholson v. Groff*, 82 A.2d 536 (Pa. Super.1951); *Com. v. Cisney*, 6 Cumb. 95. (1956).

b. The burden is on the petitioner to prove that the adult child is physically or mentally disabled or unemployable and thus incapable of self-support. *Brown v. Brown*, 474 A.2d 1168 (Pa. Super.1984); *Verna v. Verna*, 432 A.2d 630 (Pa. Super.1981).

c. Where child's disabilities prevented her from being emancipated, the Support Guidelines were utilized to determine the proper amount of support. *Crawford v. Crawford*, 633 A.2d 155 (Pa. Super.1993).

d. Trial court held parents of adult child responsible for medical bills when she did not work and was physically disabled; and when parents had paid her bills previously. *Geiger v. Rouse*, 715 A.2d 454 (Pa. Super. 1998)

3. Indigent Child.

a. A person may be "indigent" within the meaning of the Support Law, 62

P.S. § 1973, regardless of the person's age if the person is "completely destitute and helpless." The term encompasses those persons who have some limited means, but whose means are not sufficient to adequately provide for their maintenance and support. *Verna v. Verna*, 432 A.2d 630 (Pa. Super.1981).

b. Note: Often the bases for support of an adult child overlap, i.e., a disabled/unemployable child may also have a claim under the indigency statute.

c. Public Agencies Third Parties. The Support Law gives a cause of action to any public agency to recover expenditures made to the indigent child. Under 23 Pa.C.S. § 4605, a public body or agency supplying care or assistance may have a cause of action in assumpsit against the parents. *Albert Einstein Medical Center v. Forman*, 243 A.2d 181 (Pa. Super.1968) (decided under the prior Support Law, which was repealed and replaced in 2005).

Chapter Five
Section 2

Determination of Basic Child Support and Spousal Support Obligations/Deviations

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I. THE RULES AND THE GUIDELINES.

A. The Rules. While the support guidelines are located in the rules of civil procedure governing support actions, they do not constitute all of the rules governing support actions. The guidelines must be viewed and interpreted in light of all of the rules. Practitioners should review the rules, beginning at Rule 1910.1, before bringing a support action. In addition, knowledge of the local rules in the county in which the action will be filed is vital. Some of the more important introductory rules include the following:

1. Definitions. Rule 1910.1. Of particular importance in this rule is the distinction between overdue and past due support. That distinction is critical in the area of enforcement.

2. Venue. Rule 1910.2. A support action may be brought in the county in which the defendant resides or is regularly employed, or the county in which the plaintiff resides if it is the county of the parties' last marital domicile and the plaintiff has continued to live there or the county in which the child resides if the action includes a claim for child support. If jurisdiction over the defendant is pursuant to the long arm statute, 23 Pa. C.S. §4342(c), the action can be brought in the county in which the plaintiff resides. If, at the time of the filing of the action, there is a divorce or custody action pending between the parties in an appropriate court in another county, the court upon good cause shown may transfer the support action to that county. For the convenience of the parties and witnesses the court may transfer an action to the appropriate court of any other county where the action could have been brought at the time of transfer.

3. Parties. Rule 1910.3. This rule allows the party who does *not* have primary physical custody of the children or who may owe a duty of support to initiate the support action. In addition, the court may enter a support order against either party, regardless of who initiated the support filing. The entire rule reads as follows:

> (a) An action may be brought:
>
> (1) by a person, including a minor parent or a minor spouse, to whom a duty of support is owing, or
>
> (2) on behalf of a minor child by a person having custody of the child, without appointment as guardian ad litem, or
>
> (3) on behalf of a minor child by a person caring for the child regardless of whether a court order has been issued granting that person custody of the child, or
>
> (4) by a public body or private agency having an interest in the case, maintenance or assistance of a person to whom a duty of support is owing, or
>
> (5) by a parent, guardian or public or private agency on behalf of an unemancipated child over eighteen years of age to whom a duty of support is owing, or

(6) by any person who may owe a duty of support to a child or spouse. If the person to whom a duty of support may be owed does not appear, the action may be dismissed without prejudice for the petitioner to seek further relief from the court.

(b) The trier of fact shall enter an appropriate child support order based upon the evidence presented, without regard to which party initiated the support action, filed a modification petition, or filed a petition for recovery of support overpayment. The determination of which party will be the obligee and which will be the obligor will be made by the trier of fact based upon the respective incomes of the parties, consistent with the support guidelines and existing law, and the custodial arrangements at the time of the initial or subsequent conference, hearing or trial. If supported by the evidence, the party named as the defendant in the initial pleading may be deemed to be the obligee, even if that party did not file a complaint for support. The provisions of this subdivision do not apply to parties seeking spousal support or alimony *pendente lite*. Parties seeking spousal support or alimony *pendente lite* must assert a claim in an appropriate pleading with proper notice served upon the other party.

(1) In general, the party who has primary custody of the children shall be the obligee of a child support order.

(2) When the parties share custody of the children equally, the party with the higher income shall be the obligor as provided in Rule 1910.16-4(c)(2).

4. Filings for Alimony *Pendente lite*. Rule 1910.4. This rule was amended to confirm that the domestic relations section shall be the filing office for pleadings and documents for not only child support and spousal support, but also alimony *pendente lite*. Although an alimony pendente lite complaint is filed in the domestic relations section, the court will require confirmation that a divorce complaint has likewise been filed and a divorce matter is pending.

5. Discovery. Rule 1910.9. This rule confirms that there shall be no discovery in an action for support unless authorized by special order of court. However, the domestic relations section is permitted to initiate discovery by sending a wage subpoena to each party's employer.

6. Alternate Procedures. Rule 1910.10. This rule lists each county and indicates whether its support proceedings are conducted pursuant to Rule 1910.11 (office conference/de *novo* court review) or 1910.12 (office conference/record hearing/exceptions to the court). This list changes regularly.

7. Paternity in the Context of a Support Action. Rule 1910.15. Note that Rule 1930.6 provides a procedure for a putative father to initiate a civil action to establish paternity. *See,* 23 Pa. C.S. §4343.

8. Allocation. Rule 1910.16. The rule regarding allocation, which was previously located at 1910.16, has since been rescinded after the 2017 Federal Tax Cuts and Jobs Act ("TCJA"). The prior rule provided the Court guidance regarding setting forth the amount of the order for child support and for the support of the spouse, or directing that the Order identify as "unallocated."

Since the TCJA removed the ability of an obligor to reduce the obligor's taxable income for spousal support, alimony pendente lite, and alimony payments—for all support orders or agreements entered after December 31, 2018—the allocation rule became obsolete.

B. The Guidelines. The guidelines have had two significant revisions since 2019. The first major revision occurred on December 28, 2018, and were effective January 1, 2019. The first major revision revised the way support is calculated in Pennsylvania due to the TCJA. The second major revision occurred on August 17, 2021, and became effective January 1, 2022 to reflect newer economic data. Effective January 1, 2022, child support obligations generally increased.

The guidelines begin at Rule 1910.16-1 and continue through Rule 1910.16-7. There is a rebuttable presumption that the amount of child support, spousal support and alimony *pendente lite* calculated in accordance with the guidelines is the correct amount of support to be awarded. Pursuant to state and federal law, the guidelines must be reviewed at least once every four years to ensure that their application results in the determination of the appropriate amount of support.

II. NET INCOME--RULE 1910.16-2. Calculation of each party's net monthly income is key to the application of the guidelines. Those calculations are explored in a separate chapter.

III. THE FORMULA--RULE 1910.16-4

The rules and process identified below uses the rules in place for an order entered on or after January 1, 2019, or for a modification of an order entered before January 1, 2019 that includes spousal support alimony pendente lite in which the amendments to the TCJA expressly apply. There are increasingly less cases where modification of an order entered before January 1, 2019 is applicable, however, it is an important distinction to address with the court.

A. PART "A" – Calculation of Monthly Net Income. First, determine the monthly net income of a party.

The trier-of-fact shall deduct the following items from monthly gross income to arrive at monthly net income:

(i) federal, state, and local income taxes;
(ii) unemployment compensation taxes and Local Services Taxes (LST);
(iii) F.I.C.A. payments (Social Security, Medicare and Self-Employment taxes) and non-voluntary retirement payments;
(iv) mandatory union dues; and
(v) alimony paid to the other party.

B. Part "B" – If Applicable, Calculate Spousal Support or Alimony Pendente Lite. Spousal support and alimony *pendente lite* are calculated in Part "B," before the amount of child support is determined.

In computing a spousal support or alimony pendente lite obligation, the trier-of-fact shall (Pa.R.C.P. 1910.16-2(c)(2)):

(i) deduct from the obligor's monthly net income child support, spousal support, alimony pendente lite, or alimony amounts paid to children and

former spouses, who are not part of this action; and

(ii) include in a party's monthly net income alimony pendente lite or alimony received from a former spouse that was not included in the party's gross income, as provided in subdivision (a).

Note: Since the reasons for ordering payment of alimony vary, the appropriateness of including it in the recipient's monthly net income must also vary. For example, if the obligor is paying $ 1,000 per month in alimony for the express purpose of financing the obligee's college education, it would be inappropriate to consider that alimony as income from which the obligee could provide child support. However, if alimony is intended to finance the obligee's general living expenses, inclusion of the alimony as income is appropriate

1. Without Dependent Children. In cases without dependent children, determine the difference between 33% of the obligor's net monthly income and 40% of the obligee's monthly net income to determine the preliminary monthly spousal support or alimony pendente lite obligation (line 8 through 13 of Part B of the formula).

2. With Dependent Children. In cases with dependent children, determine the difference between 25% of the obligor's net monthly income and 30% of the obligee's monthly net income to determine the preliminary monthly spousal support or alimony pendente lite obligation (line 8 through 13 of Part B of the formula).

C. Part "C" – Calculating Child Support and The Child Support Schedule

1. Adjusting Incomes. The initial step is to adjust the obligor's and obligee's monthly net income by the preliminary monthly spousal support or alimony pendente lite. The preliminary monthly spousal support or alimony pendente lite is deducted from the obligor's monthly net income and added to the obligee's monthly net income. (line 16 through 18 of Part C of the formula).

2. Combined Incomes. Next use the combined adjusted monthly net incomes of both parties. All examples have been rounded to the nearest whole number and utilize the pre-2022 schedule (line 19 of the Part C of the formula).

3. The Schedule. Next, apply the combined adjusted monthly net incomes to the Basic Child Support Schedule at Rule 1910.16-3. The parties' combined net income in the left column. If the obligor's net monthly income is $5,000 and the obligee's net monthly income is $2,300, go to $7,300 in the left column of the schedule. It should be noted that the guideline includes combined net monthly incomes up to $30,000 per month. Thereafter, calculations for high income cases (cases with a combined net monthly incomes exceeding $30,000) are addressed in Rule 1910.16-3.1.

4. Number of Children. In the column corresponding with the number of children for whom support is being sought, find the basic child support obligation for both parties. If the parties' combined net monthly income is $7,300 and they have two children, the basic child support obligation is $1,701. Note that the schedule applies only if the support action involves

six or fewer children. Rule 1910.16-4(b) applies when the parties have more than six children. In order to determine the amount of basic child support for eight children, for example, first find the appropriate amount for six children. Using the same income figures above, the amount from the schedule for six children whose parents have a combined net monthly income of $7,300 is $2,620. Then, using the same income figures, find the amount for five children ($2,401) and subtract that amount from the amount for six children. ($2,620-$2,401=$219). Multiply the difference by the number of children in excess of six and add it to the amount on the schedule for six children. [$219 x 2 (children in excess of 6) =$438 + $2,620 = $3,058].

5. Percentage Share of Income. Calculate each party's percentage share of the combined monthly net incomes by dividing each party's net monthly income by the parties' combined net monthly income and multiplying by 100. For example, if the obligor's net monthly income is $5,000 and the obligee's is $2,300, the obligor's income is 68% of the parties' combined month net incomes, while the obligee's is 32% of the parties' combined month net incomes.

6. Basic Child Support Amount. Multiply each party's percentage of their combined incomes by the basic child support obligation from the schedule to determine each party's basic child support obligation. Using the same figures as above, the obligor's share of the basic child support amount would be $1,157 ($1,701 x 68%). As the primary custodial parent, the obligee's contribution to the basic child support amount will be in the form of direct expenditures.

D. Part "D" – Substantial or Shared Physical Custody. The percentage of overnight custodial time is the only factor required to determine the application of Part D. Thus, a practitioner must be aware of the schedule of physical custody for the parties' children. If the children spend 40% or more of their time with the obligor, use Part D of the formula to determine the amount of the reduction in the obligor's basic child support obligation. Custodial time is measured in overnights. Divide the number of overnights the children spend with the obligor by 365 and multiply by 100 to calculate the percentage of time the children spend with the obligor. For example, if the children spend three nights each week with the obligor, the calculation would be: 3 nights x 52 weeks per year = 156 nights per year divided by 356 nights per year = .427 x 100=43%.

E. Assumptions Underlying the Pre-2022 Guidelines. As stated in Rule 1910.16-4(c) of the Pre-2022 Guidelines, the support amounts in the guidelines are premised upon an assumption that obligors have regular contact, including vacation time, with their children and that during those times, the obligors make direct contributions to the children's support. The amount of time built into the guidelines is 30%. That is, the guidelines presume that, on average, children will be with the non-custodial parent 30% of the time. The 40% figure discussed above is a threshold to determine if Part D of the formula applies. Rule 1910.16-4(c) provides that if the children are with the obligor 40% of the time or more, a rebuttable presumption arises that the obligor is entitled to a reduction in the basic amount of child support he or she would otherwise have to pay. The reduction reflects the higher-than-average amount of time the obligor spends with the children and the resulting increase in direct expenditures he or she will have to make on the children's behalf.

The revisions effective 2022 provide the following comment:

> Previously, the Basic Child Support Schedule incorporated a 30% child custody presumption, which created approximately a 5% decrease in the basic child support obligation across all combined monthly net incomes regardless of the actual custody schedule. The new Basic Child Support Schedule reflects the actual expenses of an intact family living in a single household at the various combined monthly net incomes and the number of children with no shared custody adjustment.
>
> To the extent the parties share physical custody with the obligor having 40% or more of the annual overnights as set forth in Pa.R.C.P. No. 1910.16-4(c), the formula in Pa.R.C.P. No. 1910.16-4(a)(1)(Part D) or (a)(2)(Part II) should be used to calculate the appropriate shared custody adjustment.

F. 40% Time Frames. If the obligor has custody of the children 40% of the time or more, the next step in Part D. Using the same figures as above, if the children are with the obligor 43% of the time, the obligor would be presumptively entitled to a 13% reduction in the amount of basic child support. (43%-30%=13%). Thus, if the obligor's percentage share of the basic child support obligation was 68% using the Part C formula, it now would be reduced to 55% (68%-13%=55%). The obligor's share of the basic child support obligation would be reduced to $936 in the example ($1,701 total basic amount from Rule 1910.16-3 schedule x 55%). This is the presumptively correct amount of basic child support the obligor must pay.

G. Equally Shared Custody and Equal Allocation of Income. In general, the obligor is the parent who spends less time with the children. However, when the parties share custody of the children on an equal basis and, therefore, there is no primary custodial parent, the determination as to which parent is the obligor is a function of income rather than time. The parent with the higher income becomes the obligor, no matter which parent initiated the support action. *See* Rule 191 0.16-4(c)(2). Part D of the formula then serves to reduce the obligation. However, in all cases in which the parties share custody equally and the support calculation results in a child support order that gives the obligee more than 50% of the parties' combined monthly net incomes, then the trier of fact must reduce the obligor's basic child support obligation so that the combined incomes of the parties are allocated equally between the obligee's and obligor's respective households. For example, if the parties' combined monthly net income is $7,300, but of that total, the obligor's income is $4,000 and the obligee's is $3,300, then the calculation under Part C of the formula would result in an order of $914, because the obligor's income is 55% of the parties' combined incomes. (55% x $1,701 = $936). As the parties share custody of their children equally, application of Part D of the formula would reduce the obligation. The obligor's percentage share of the basic child support obligation would be 35%, or $595. (50% time with the children minus 30% average time for a non-custodial parent=20%; 55%-20%=35%; 35% x $1,701=$595). After payment of child support, the obligor would be left with $3,405 per month ($4,000 income less $595 child support). The obligee would have $3,895 available ($3,300 income plus $595 child support). In those circumstances, the court would be required to reduce the obligor's support obligation by $245 to $350 so that each household would have available funds of $3,650. (Obligor: $4,000-$350=$3,650; Obligee: $3,300 + $350=$3,650). Note that the closer the parties' incomes, the more likely this adjustment will have to be made.

H. Divided or Split Custody. If each party is the primary custodial parent for one or more of the parties' children, each party's obligation to the other (as the non-custodian to the primary custodian) is calculated pursuant to the Part C formula. The resulting basic support amounts are then offset so that only one parent pays support to the other. For example, if Father is the primary custodian of two of the parties' children and Mother's support obligation for those two children is $500 per month, while Mother is the primary custodian of one of the parties' children for whom Father would have to pay Mother $300, the amounts would be offset such that Mother would pay Father $200 per month and Father would pay nothing.

I. When the Custodial Parent Owes Spousal Support. A five-step offset method is applied when a custodial parent owes spousal support or alimony *pendente lite* to the non-custodial parent. In such cases, (1) the spousal support or alimony *pendente lite* calculation is performed first as if there were *no dependent children*. The resulting amount is then (2) deducted from the payor's income and added to the payee's income. Using these new incomes, (3) calculate the amount of child support owed to the custodial parent. Then (4) subtract the child support amount from the amount of spousal support or alimony *pendente lite* as calculated in the first step. The remaining amount is paid to the non-custodial parent as spousal support or alimony *pendente lite*. Finally, if the proceeding is a modification of an order entered before January 1, 2019, that has federal tax consequences associated with spousal support or alimony pendente lite payments, the trier-of-fact may deviate the final order due to the tax effect, as appropriate.

IV. ADDITIONAL EXPENSES--RULE 1910.16-6. The additional expenses listed below may be allocated between the parties even if the parties' respective incomes (or custodial time) do not warrant an award of basic support.

NOTE: Most adjustments to the basic support amount are the result of additional expenses which are fixed in nature. As such, those expenses are not affected by the amount of time the children spend with either parent. Thus, even in cases in which the parties share custody of the children equally or the children are with the obligor 40% of the time or more, the obligor's share of any additional expenses should be based upon his or her percentage of the parties' total combined incomes before any reduction in the percentage as a result of the application of Part D of the formula in Rule 1910.16-4(a).

A. Child Care--Rule 1910.16-6(a).

(1) General Rule. Reasonable childcare expenses paid by the custodial parent, if necessary for that parent to maintain employment or pursue appropriate education, will be allocated between the parties in proportion to their net incomes with the obligor's share added to the basic support obligation.

(2) Subsidized Child Care. If the custodial parent receives a childcare subsidy through the Department of Human Services, the amount of childcare expenses allocated between the parties is the amount the custodial parent actually pays.

(3) Reduction to Reflect Federal Child Care Tax Credit. The total childcare expenses shall be reduced to reflect the amount of the federal childcare tax credit available to the eligible parent, whether or not the credit is actually claimed by that parent, up to the maximum annual cost allowable under the Internal Revenue Code. However, the federal childcare tax credit shall not be used to reduce

the childcare expenses subject to allocation between the parties if the eligible parent is not qualified to receive the credit.

B. Health Insurance Premiums--Rule 1910.16-6(b).

1. General Rule. The cost of the premiums for health insurance for the children and the parties is allocated between the parties in proportion to their respective net incomes. The rule clarifies that the portion of the premium covering the obligor is subject to allocation.

2. Pursuant to statute, 23 Pa. C.S. §4326, the non-custodial parent bears the initial responsibility of providing health insurance coverage if it is available at a reasonable cost through an employer-sponsored or other group plan. If the obligor pays the premiums, the obligee's share is deducted from the obligor's basic support obligation [at line 26(c) of Part E of the Rule 1910.16-4(a) formula]. However, if it is the obligee who pays the premiums, the obligor's share is added to the obligor's basic support obligation [at line 26(b) of Part E of the Rule 1910.16-4(a) formula].

3. Costs that are not apportioned between the parties are employer-paid premiums and those portions of the premiums that provide coverage for children or other persons (children from a different marriage, step- children or a current spouse, for example) who are not the subjects of the current support action.

4. When the obligee has little or no income such that the responsibility of paying for 90% or more of the health insurance premiums will fall to the obligor, the trier of fact has the option of an alternative calculation under Rule 1910.16-6(4) to reduce the burden on the obligor and encourage the maintenance of health insurance. Rather than allocating the costs as set forth above, the trier of fact may instead simply reduce the obligor's gross income for support purposes by the amount of the premiums actually paid to provide the health insurance coverage.

C. Unreimbursed Medical Expenses--Rule 1910.16-6(c).

1. General Rule. "Reasonably Necessary" medical expenses incurred by the obligee or the children (over and above the first $250 per person per calendar year) that are not covered or reimbursed by insurance are allocated between the parties in proportion to their respective net incomes. The burden is on the obligee to prove expenses over the $250 threshold. If the expenses are recurring and reasonably predictable, the cost can be apportioned as a fixed expense and added to the obligor's basic support obligation (at line 26(d) of Part E of the Rule 1910.16-4(a) formula). If the expenses are non-recurring or unpredictable, the court may direct the obligor to pay his or her share to the obligor or directly to the health care provider.

2. Expenses to be allocated include insurance co-payments, deductibles, reasonably necessary medical services and supplies, including but not limited to surgical, dental and optical services and orthodontia. While not mandatory, the court may also specifically direct in an order the allocation of reasonable costs for cosmetic, chiropractic, psychiatric or psychological services.

3. The obligor can be required to retroactively reimburse the obligee for services not specifically set forth in the support order if the obligee acted reasonably in obtaining the services.

4. The trier of fact may impose an annual limit on the amount of the obligor's contribution to unreimbursed expenses to prevent an excessive burden on the obligor.

5. Documentation of the unreimbursed medical expenses that either party seeks to have allocated between the parties shall be provided to the other party not later than March 31 of the year following the calendar year in which the final bill was received by the party seeking allocation.

D. Private School, Summer Camp and Other Additional Expenses--Rule 1910.16-6(d). If the court determines that the child has other reasonable needs not specifically addressed in the rules, it may order the costs to be allocated between the parties and added to the obligor's basic support obligation. The rules have been updated effective 2022 to clarify the expenses that the court "shall" apportion the expenses if certain criteria are met. This allocated amount of additional support is in excess of the basic monthly child support obligation, and this Rule creates a procedure for a party to seek reimbursement of such expenses.

E. Mortgage Contribution--Rule 1910.16-6(e). The guidelines assume that the spouse occupying the marital residence is paying the mortgage, real estate taxes and insurance. If the obligee is the spouse in the marital residence and the cost of the mortgage, taxes and insurance exceeds 25% of the obligee's income (including support awards), the trier of fact may require the obligor to contribute up to 50% of the amount above 25% of the obligee's income. If the obligor is occupying the marital residence and the mortgage payment exceeds 25% of the obligor monthly net income (less any amount of spousal support, alimony pendent lite or child support the obligor is paying), the court may make an appropriate downward adjustment to the obligor's support obligation. It should be noted that this Rule does not apply after the resolution of outstanding economic matters.

V. MULTIPLE FAMILIES--RULE 1910.16-7.

A. General Rule. If an obligor is obligated under more than one support order, there generally should be no downward deviation from any order unless the total of all of the obligor's basic child support obligations (not including additional expenses such as the obligor's contribution to childcare or medical expenses, for example) equals 50% or more of his or her net monthly income. If the amount does exceed 50% of the obligor's income, the court may consider a proportional reduction of the obligations, without giving preference to any one obligation. However, the court may not simply divide the guideline amount of support for all children equally between the children's households.

B. Self-Support Reserve. Effective January 1, 2022, the court should assure that the obligor's available income in light of all basic child support obligations does not fall below $1,063 per month to reflect the Self-Support Reserve built into the guidelines to assure that obligors retain sufficient income to meet their own basic needs and maintain incentive to continue working so that support can be paid.

VI. DEVIATION-RULE 1910.16-5. While the amount of support calculated under the guidelines is the presumptively correct amount, this rule gives the trier of fact broad authority to deviate from that amount when warranted by the circumstances. In deciding whether or not deviation is warranted, the court must consider unusual needs and fixed obligations, other support obligations,

other income in the household, the ages of the children, the assets of the parties, medical expenses, the parties' and child's standard of living and any other relevant factor. In spousal support or alimony pendente *lite* case, the court also should consider the length of the marriage. If deviation is determined to be warranted under the circumstances, the trier of fact must set forth in writing or on the record the guideline amount of support, the reasons and findings of fact justifying deviation.

Chapter Six

Custody

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THE CUSTODY STATUTE

I strongly recommend to anyone taking this CLE that you join the Family Law Section or Committee of your local bar association. In addition, I strongly recommend that you join the PBA Family Law Section. If you join the PBA Family Law Section there is a link for members to the "Quick Reference Guide for Child Custody Matters in Pennsylvania", which is updated every two years and is an excellent summary of the case law on custody for the past many years.

Definitions

The definitions section of the Act is found at §5322. The following definitions are noteworthy:

Physical custody - The actual physical possession and control of a child.[1]

> **Sole physical custody -** The right of one individual to exclusive physical custody of the child.
>
> **Shared physical custody -** The right of more than one individual to assume physical custody of the child, each having significant periods of physical custodial time with the child.
>
> **Primary physical custody -** The right to assume physical custody of the child for the majority of time.
>
> **Partial physical custody -** The right to assume physical custody of the child for less than a majority of the time.
>
> **Supervised physical custody -** Custodial time during which an agency or an adult designated by the court or agreed upon by the parties monitors the interaction between the child and the individual with those rights.

Legal custody - The right to make major decisions on behalf of the child, including, but not limited to, medical, religious and educational decisions.

> **Sole legal custody -** The right of one individual to exclusive legal custody of the child.

[1] Note that the term "visitation" has been completely removed from the definition of physical custody. As such, the term has been removed from the entire statute and the Rules.

Shared legal custody - The right of more than one individual to legal custody of the child.

Relocation - A change in a residence of the child which significantly impairs the ability of a non-relocating party to exercise custodial rights.

In C.M.K. v. K.E.M., 45 A.3d 417 (Pa. Super. 2012), the Superior Court found that Mother's proposed move from Grove City (Mercer County) to Albion (Erie County), a distance of 68 miles, would "significantly impair" Father's ability to exercise his custodial rights, in that Father was actively involved in the child's school and sports activities and he would be unable to continue his involvement if the child was relocated. The Court also found that Mother's offer for Father to have additional custodial times would not ameliorate the adverse effect of Father's inability to have frequent involvement with the child's life.

The Rules of Court, at Pa.R.C.P. 1915.1, also include several definitions.

Types of Custody and Contempt

According to §5323, the court may award any of the five (5) categories of physical custody (i.e., shared, primary, partial, sole or supervised) and either of the two (2) categories of legal custody (i.e., shared or sole), as long as it is in the best interest of the child. Custody may be awarded via special relief on an interim basis and the court may enter an order if the parties are living separate and apart in the same residence, with the caveat that the order only becomes effective once the parties are no longer living under the same roof.

Section 5323 also includes the penalties for contempt of a custody order, which were previously included in the child support portion of the statute. As before, the failure to comply with a custody order must be willful and it is punishable by up to six (6) months in jail (with purge conditions), a fine of not more than $500, probation of not more than six (6) months, suspension of the party's driver's license, and/or counsel fees.

Standing

The requirements for "standing", which is the right to file a custody action, are found in §§5324 and 5325. Under §5324, which provides for a person to file for "any form of physical or legal custody", the person must satisfy one of the following requirements:

(1) A parent of the child.

(2) A person who stands *in loco parentis* to the child.

(3) A grandparent of the child who is not in loco parentis to the child:
   (i) whose relationship with the child began either with the consent of a parent of the child or under a court order;

   (ii) who assumes or is willing to assume responsibility for the child; and

   (iii) when one of the following conditions is met:

      (A) the child has been determined to be a dependent child under 42 Pa.C.S. Ch. 63 (relating to juvenile matters);

      (B) the child is substantially at risk due to parental abuse, neglect, drug or alcohol abuse or incapacity; or

      (C) the child has, for a period of at least 12 consecutive months, resided with the grandparent, excluding brief temporary absences of the child from the home, and is removed from the home by the parents, in which case the action must be filed within six months after the removal of the child from the home.

Per Justice Zappala in T.B. v. L.R.M., 786 A.2d 913 (Pa. 2001), the phrase "*in loco parentis"* refers to a person who puts him/herself in the situation of a lawful parent by assuming the obligations incident to the parental relationship without going through the formality of a legal adoption. Thus, there are two requirements – the assumption of a parental status, then the discharge of parental duties. See also, D.G. v. D.B., 91 A.3d 706 (Pa. Super. 2014) for a thorough

discussion of "*in loco parentis"* and K.W. v. S.L. & M.L. v. G.G., 157 A.3d 498 (Pa. Super. 2017) (Superior Court found that prospective adoptive parents were not *in loco parentis* to the child).

Section 5325 provides that in addition to the provisions set forth in §5324, a grandparent or great-grandparent may file an action for partial physical custody or supervised physical custody in the following situations:

(1) where the parent of the child is deceased, a parent or grandparent of the deceased parent may file an action under this section;

(2) where the relationship with the child began either with the consent of a parent of the child or under court order and where the parents of the child:

i. have commenced a proceeding for custody; and,
ii. do not agree as to whether the Grandparents or Great-Grandparents should have custody under this section; or [2]

(3) when the child has, for a period of at least 12 consecutive months, resided with the grandparent or great-grandparent, excluding brief temporary absences of the child from the home, and is removed from the home by the parents, an action must be filed within six months after the removal of the child from the home.

Note that under both sections (§5324 & §5325), if the child has resided with the grandparent or great-grandparent for at least twelve (12) consecutive months, the grandparent or great-grandparent must file an action within six (6) months after removal of the child from the home. This requirement was not in the previous act.

Presumptions

The Act, at §5327, provides that in any action between the parents of the child or between two third parties (i.e., non-parent vs. non-parent), there shall be no presumption that primary physical custody be awarded to a particular parent/party; however, in an action between a parent

[2] This section was amended in 2018, addressing the concerns raised in D.P. & B.P. v. G.J.P. & A.P., 146 A.3d 204 (2016)

and a third party, there is a presumption that custody shall be awarded to the parent, which can only be overcome by clear and convincing evidence.

Custody Factors

The sixteen (16) factors that must be considered by the court in making a custody award are enumerated in §5328. This section is a codification of the factors as set forth in the case law over several years. The factors are as follows:

(1) Which party is more likely to encourage and permit frequent and continuing contact between the child and another party.

(2) The present and past abuse committed by a party or member of the party's household, whether there is a continued risk of harm to the child or an abused party and which party can better provide adequate physical safeguards and supervision of the child.

(2.1) The information set forth in section 5329.1(a) (relating to consideration of child abuse and involvement with protective services).[3]

(3) The parental duties performed by each party on behalf of the child.

(4) The need for stability and continuity in the child's education, family life and community life.

(5) The availability of extended family.

(6) The child's sibling relationships.

(7) The well-reasoned preference of the child, based on the child's maturity and judgment.

(8) The attempts of a parent to turn the child against the other parent, except in cases of domestic violence where reasonable safety measures are necessary to protect the child from harm.

(9) Which party is more likely to maintain a loving, stable, consistent and nurturing relationship with the child adequate for the child's emotional needs.

[3] This provision was added on December 18, 2013 with an effective date of January 1, 2014.

(10) Which party is more likely to attend to the daily physical, emotional, developmental, educational and special needs of the child.

(11) The proximity of the residences of the parties.

(12) Each party's availability to care for the child or ability to make appropriate child-care arrangements.

(13) The level of conflict between the parties and the willingness and ability of the parties to cooperate with one another. A party's effort to protect a child from abuse by another party is not evidence of unwillingness or inability to cooperate with that party.

(14) The history of drug or alcohol abuse of a party or member of a party's household.

(15) The mental and physical condition of a party or member of a party's household.

(16) Any other relevant factor.

The trial court must apply the foregoing factors and issue a written explanation of its decision when the trial court orders any of the seven (7) forms of custody set forth in §5323. S.W.D. v. S.A.R., 96 A.3d 396 (Pa. Super. 2014). The Superior Court, in J.R.M. v. J.E.A., 33 A.3d 647 (Pa. Super. 2011), which was decided less than a year after the new statute was enacted, held that the trial court must specifically address **each** of the sixteen (16) factors in making its custody decision. However, the trial court is not necessarily required to make a detailed discussion of the trial testimony with references to the record. M.J.M. v. M.L.G., 63 A.3d 331 (Pa. Super. 2013) Moreover, in a case in which the trial court is deciding a "single discrete and narrow issue", the trial court is not required to address all sixteen factors set forth in the statute. M.O. v. J.T.R., 85 A.3d 1058 (Pa. Super. 2014).

In order to enable a litigant who files an appeal to prepare a complete 1925(b) Concise Statement, the trial court must specify the reasons for its decision in a custody case, specifically addressing each of the factors, "prior to the deadline by which a litigant must file a notice of appeal,

and preferably at the time the custody order is issued or shortly thereafter". C.B. v. J.B., M.B., and T.B., 65 A.3d 946 (Pa. Super. 2013). This requirement was extended to relocation cases by the Superior Court in A.M.S. v. M.R.C., 70 A.3d 830 (Pa. Super. 2013).

Effect of a Criminal Conviction or Criminal Charge

If a party **or a person in a party's household** has been convicted of or pled guilty or *nolo contendere* to one (or more) of the thirty-one (31) enumerated criminal offenses (increased from fifteen (15) in the prior statute) set forth in §5329, the court must "consider such conduct and determine that the party does not pose a threat of harm to the child before making any order of custody". In "considering" this conduct, subsection (c) requires that the court provide for an "evaluation" to determine whether the person poses a threat to the child and if counseling is necessary for the person. This has raised the oft repeated question of who is going to conduct this "evaluation", along with who is going to pay for the "evaluation", especially if a party is indigent. If the court determines that the party or a member of the party's household poses a threat of harm to the child, the court may order a further evaluation and/or counseling by a mental health professional.

In D.R.C. v. J.A.Z., 31 A.2d 677 (Pa. 2011), the Supreme Court found that the previous portion of the statute regarding consideration of criminal convictions and counseling does not apply to incarcerated persons. Rather, in a situation in which an incarcerated parent seeks visitation or partial custody of his/her child, the trial court should consider the factors set forth in Etter v. Rose, 684 A.2d 1092 (Pa. Super. 1996).

According to §5330, if a party becomes aware that the other party has been charged with one of the crimes enumerated in §5329, he/she may move for a temporary custody order or for

modification of an existing custody order. The trial court, who must consider whether the party charged with the crime poses a risk of "physical, emotional or psychological harm" to the child, must hold a hearing in an expeditious manner.

Consideration of Child Abuse and Involvement with Protective Services

Effective January 1, 2014, the legislature added §5329.1. This section requires that in all custody cases, the trial court is required to determine if there has been a previous "indicated" or "founded" report of child abuse, whether the party seeking custody or a member of the party's household has been identified as the perpetrator, the date and circumstances of the child abuse, and where the investigation took place. It further requires the trial court to determine if "protective services" have been provided to a party or a member of a party's household, the type of services provided, the circumstances surrounding the provision of services, the status of the services, and the date and location of the services.

Parenting Plans, Parenting Programs, and Counseling

In a contested custody action, the court *may* require the parties to submit a Parenting Plan, which, under §5331, shall provide the party's proposed physical custody schedule, along with the party's position as to education, religious training, health care, child care, transportation, and a suggestion as to the manner in which disputes are to be resolved (i.e., arbitration, mediation, court intervention, etc.).

Sections 5332 and 5333 provide that the Court may require the parties to attend an informational parenting/parental duties program or counseling as part of a custody order.

Guardian *ad litem* and/or Counsel for the Child[4]

A guardian *ad litem* (GAL) may be appointed for the child, pursuant to §5334, on motion of a party or *sua sponte* by the court. The GAL, who must be a licensed attorney, must represent both the legal interests and the best interests of the child during the custody action. The GAL is required to do the following:

(1) Meet with the child, depending on the child's age and maturity, on a regular basis;

(2) Have access to court records, reports regarding the parents or custodian of the child, and the child's medical, psychological, and educational records;

(3) Participate in the proceedings;

(4) Conduct investigation as necessary;

(5) Interview witnesses, call witnesses to testify, and cross-examine witnesses;

(6) Present other evidence to the court;

(7) Make specific recommendations in a written report, which shall become part of the record and to which the parties may file written comments;

(8) Explain the proceedings to the child; and

(9) Advise the court of the child's wishes, which may include evidence to support the child's wishes.

Per the statute, the GAL may not testify, except as authorized by Rule 3.7 of the Rules of Professional Conduct (pertaining to a Lawyer as a Witness).

In addition to the option of appointing a GAL for the child, the court may, under §5335, appoint counsel to represent the child. It is very important to note that according to the statute, if

[4] This section of the statute must be read in conjunction with Rule 1915.11-2 and Rule 1915.25, the provisions of which are set forth below because these Rules actually suspend the portions of the statute requiring the GAL to be an attorney, permitting the GAL to represent both the best interests and legal interests of the child, providing the GAL the right to cross-examine, present witnesses, and present evidence on behalf of the child, and prohibiting the GAL from testifying.

a child has counsel and a GAL, counsel shall represent the legal interests of the child and the GAL shall represent the best interests of the child.

Relocation

The relocation section of the Act, which is found at §5337, is proving to be the most frequently appealed provision in the Act. This section contains procedural requirements for seeking or objecting to relocation, along with the factors to be considered by the court in ruling on a request for relocation.

Initially, counsel for a party must determine if his/her client's desire to move the child's residence will "significantly impair the ability of a non-relocating party to exercise custodial rights", which is the definition set forth above in §5322. Obviously, this is a judgment call, which must be made very carefully due to the serious adverse consequences in advising a client that his/her proposed move does not meet the definition.

A relocation may not occur unless all parties who have custody rights to the child consent or the court approves the relocation via an order of court.

The party seeking to relocate is required to send notice to every other party who has custody rights to the child, via certified mail (return receipt). The notice must be given at least sixty (60) days in advance or no later than the tenth (10^{th}) day after the date the individual knows of the relocation, if the individual could not know (or reasonably know) of the relocation in sufficient time to give the sixty (60) days notice and it is not reasonably possible to delay the date of relocation to comply with the notice requirement. The notice must include all of the following information, if available:

(1) Address and telephone number of the new residence;

(2) Names and ages of all persons who will reside at the new address;

(3) Name of the new school district;

(4) Date of the proposed relocation;

(5) Reasons for the proposed relocation; and

(6) Proposal for a revised custody schedule.

The notice also must include a Counter-Affidavit, which can be used by the other party to object to the proposed relocation and the modification of the custody order, along with a warning that if the non-relocating party does not file an objection with the court within thirty (30) days after receipt of the notice, the non-relocating party will be foreclosed from objecting to the relocation. See also, Rule 1917.17, which sets forth at subsection (i) the notice form to be used and at subsection (j) the Counter-Affidavit form to be used.

If the non-relocating party chooses to file the Counter-Affidavit, it must be sent to the party seeking relocation via certified mail (return receipt) and **must** be filed with the court within thirty (30) days of receipt of the notice. If proper notice has been given and an objection is not filed within thirty (30) days, the court is prohibited from hearing testimony challenging the relocation.

In the event that a relocating party fails to provide reasonable notice, as defined above, the court may consider that a factor in making a determination regarding relocation or modification of custody. The court may also direct that the child be returned to the non-relocating party or direct that the relocating party pay reasonable counsel fees and expenses to the non-relocating party. Note that failure to provide reasonable notice due to abuse may be considered as a mitigating factor by the court.

If proper notice is given and no objection is filed, it will be presumed that the non-relocating party has consented to the relocation. The party seeking relocation must then file a "confirmation of relocation" with the court, including an affidavit stating that proper notice was

given to all required parties and no objection has been filed, proof of proper notice, a petition to confirm relocation and modify an existing order, and a proposed order containing detailed information regarding the relocation.

If a Counter-Affidavit is filed stating no objection to the relocation and no objection to the proposed modification of the custody order, the court may issue an order modifying the existing custody order to comport with the provisions of the proposed order.

If a Counter-Affidavit is filed stating no objection to the relocation, but posing an objection to the proposed modification of the custody order, the court shall schedule an expedited hearing on modification of custody.

If a Counter-Affidavit is filed opposing the relocation and the proposed modification of the custody order, the court shall hold an expedited full hearing on relocation and modification of the custody order. The court may, if exigent circumstances exist, permit the relocation to occur prior to an expedited full hearing; however, the court may not infer any presumption in favor of relocation at the time of the full hearing. The Superior Court addressed the presumption issue in the case of B.K.M. v. J.A.M., 50 A.3d 168 (Pa. Super. 2012). The trial court determined that based upon the "no presumption" provision, it could not hear any evidence regarding the children's emotional, educational, and social lives in Sweden, where they had been residing with mother for approximately eighteen (18) months prior to the relocation hearing. The Superior Court found that in refusing to hear this evidence, the trial court did not properly consider all of the relocation factors and the Court remanded the case to the trial court to weigh evidence of the children's lives in Sweden.

At the full hearing, the party seeking relocation has the burden of proving that the relocation will serve the best interests of the child based upon, at least, the following factors:

(1) The nature, quality, extent of involvement and duration of the child's relationship with the party proposing to relocate and with the non-relocating party, siblings and other significant persons in the child's life.

(2) The age, developmental stage, needs of the child and the likely impact the relocation will have on the child's physical, educational and emotional development, taking into consideration any special needs of the child.

(3) The feasibility of preserving the relationship between the non-relocating party and the child through suitable custody arrangements, considering the logistics and financial circumstances of the parties.

(4) The child's preference, taking into consideration the age and maturity of the child.

(5) Whether there is an established pattern of conduct of either party to promote or thwart the relationship of the child and the other party.

(6) Whether the relocation will enhance the general quality of life for the party seeking the relocation, including, but not limited to, financial or emotional benefit or educational opportunity.

(7) Whether the relocation will enhance the general quality of life for the child, including, but not limited to, financial or emotional benefit or educational opportunity.

(8) The present and past abuse committed by a party or member of the party's household and whether there is a continued risk of harm to the child or an abused party.

At the hearing, each party has the burden of establishing his/her motives in seeking the relocation or seeking to prevent the relocation.

Similar to the J.R.M. case cited above, the Superior Court, in E.D. v. M.P., 33 A.3d 73 (Pa. Super. 2011), which was also decided less than a year after the statute was enacted, held that the trial court must specifically address each of the ten (10) factors in deciding whether to grant or deny a request for relocation.

In C.M.K. v. K.E.M., 45 A.3d 417 (Pa. Super. 2012), the Superior Court agreed with the trial court that under the circumstances presented, Mother's request to move from Mercer County

to Erie County, a distance of sixty-eight (68) miles, met the definition of "relocation" as set forth in the statute.

In D.K. v. S.P.K., 102 A.3d 467 (Pa. Super. 2014), the Superior Court rejected Father's argument that Mother should have provided him with notice of her proposed relocation under a factual situation in which Mother was not moving from her residence in North Carolina; rather, she sought to have primary custody of the children, who resided in Pittsburgh with Father. The Court found that the notice requirements and procedures are inapplicable when the case only involves the children moving and not a parent and the children.

Counsel Fees and Expenses

Pursuant to §5339, a court may award reasonable interim or final counsel fees, costs, and expenses to a party, if the court finds that the conduct of another party was obdurate, vexatious, repetitive or in bad faith.

In a case decided in September 2014, the Superior Court held that a suit is "vexatious", such that an award of counsel fees would be warranted if the action is brought without legal or factual grounds and if the sole purpose of the action was to cause annoyance. Dong Yuan Chen v. Saidi, 100 A.3d 587 (Pa. Super. 2014) However, under the facts of the Chen case, the Court found that Husband's filing of seven (7) petitions to modify custody over the course of seven (7) years did not rise to the level of "repetitive" because each petition sought distinct relief pertaining to a variety of legitimate issues.

THE RULES OF COURT PERTAINING TO CUSTODY

Rule 1915.2 sets forth the proper venue for a custody action.

Rule 1915.3 provides for the commencement of an action via a Complaint, substantially in the form set forth in Rule 1915.15(a). Note that subsection (e) of the Rule pertains to grandparents. Also, Paragraph 9 of the Complaint form (found at 1915.15) includes a provision that must be included in a Complaint filed on behalf of a grandparent or another third party claiming *in loco parentis* status.

Rule 1915.3-1, which was effective July 25, 2013, addresses the withdrawal or discontinuance of a custody action. The Rule provides that a custody pleading cannot be withdrawn after the issuance of a scheduling order or notice of conference without leave of court (after notice to the other party) or by written agreement of the parties. It further provides that a custody action may be discontinued by Praecipe only upon a verified statement by the filing party that the Complaint has not been served. If the Complaint has been served, the action can only be discontinued with leave of court (after notice to the other party) or by written agreement of the parties.

Rule 1915.3-2(a) requires the parties to file a Criminal Record or Abuse History Verification. The form Verification is set forth in subsection (c) of the Rule. The moving party is required to file the Verification at the time of filing and serving the initial Complaint or Petition and to attach a blank Verification, which is to be completed by the responding party. The responding party must file his/her Verification on or before the initial in-person contact with the court, but not later than thirty (30) days after service of the Complaint or Petition. Both parties are required to file and serve updated Verifications five days prior to trial. Note that the Verification applies to the party and any member of the party's household.

Rule 1915.3-2(b) provides that the court person conducting the initial in-person contact with the parties perform "an initial evaluation" to determine whether the existence of a criminal or abuse history of either a party or a member of the party's household poses a threat to the child and whether counseling is necessary. After this "initial evaluation", the court may order further evaluation or counseling by a mental health professional.

Rule 1915.4 requires that custody cases be disposed of promptly by the court. The initial contact with the court shall be within 45 days of the filing of the Complaint or Petition. A trial must be scheduled within 180 days of the filing of the Complaint, either automatically by the court or via a Praecipe or motion of a party. If the trial is not scheduled within 180 days, the trial court, either *sua sponte* or upon motion of a party, **shall** dismiss the matter, unless a party has been granted an extension for good cause shown, or the court finds that dismissal is not in the best interest of the child. However, the extension shall not be for more than 60 days.[5] Subsection (c) of the Rule requires that the trial actually commence within 90 days of the date of the scheduling order. Subsection (d) requires that the court file and serve its decision within 15 days of the conclusion of the trial, unless the court extends the deadline for good cause, but in no event shall the decision be rendered more than 45 days after the conclusion of the trial.

With regard to partial custody actions, each county has a choice of two options. The President Judge or the Administrative Judge of the Family Division in each county is required to file a certification as to whether custody proceedings are generally conducted in accordance with Rule 1915.4-2 or Rule 1915.4-3. In counties choosing the option set forth in 1915.4-2, the parties appear before a conference officer. If the respondent fails to appear, the conference may proceed

[5] The Superior Court, in Dietrich v. Dietrich, 923 A.2d 461 (Pa. Super. 2007), affirmed the dismissal of a custody petition in a case in which the trial was not automatically scheduled within 180 days and neither party requested a trial or an extension of the 180-day period. See also, Harrell v. Pecynski, 11 A.3d 1000 (Pa. Super. 2011).

without him/her. If the parties reach an agreement, the conference officer prepares an order of court to be signed by the parties and the court. If the parties are unable to reach an agreement, the matter is referred to a hearing officer, who shall hear the matter on the same day or within 45 days. The hearing officer must be an attorney and the hearing must be recorded. The hearing officer takes testimony, receives evidence, and hears argument. Within 10 days of the conclusion of the hearing, the hearing officer files a report and a recommended order of partial custody or supervised physical custody. Either party may file exceptions to the report within 20 days after the date of mailing. If no exceptions are filed, the court shall review the report and enter a final order. The other option is set forth in 1915.4-3, which provides for an initial non-record proceeding, such as a conciliation or a conference. If the parties are unable to reach an agreement, the conference officer notifies the court that the matter should be listed for trial. The court then schedules a *de novo* hearing in accordance with the time period requirements set forth in Rule 1915.4.

Rule 1915.4-4 establishes uniform pre-trial procedures in custody cases. A pre-trial conference shall be scheduled at the request of a party or *sua sponte.* The conference may be scheduled at any time, but at least 30 days prior to trial. The parties are required to file a pre-trial statement at least 5 days prior to the conference. The pre-trial statement shall include the name and address of each expert witness, the name and address of each witness (and a statement indicating that either the party or counsel has communicated with the witness), and a proposed order setting forth a custody schedule. Expert reports and other proposed exhibits shall be provided to the opposing side, but not to the court.

Rule 1915.5(a) was amended in 2014 to add a provision regarding standing. This subsection requires a party to raise a question of jurisdiction of the person or venue by preliminary

objection filed within 20 days of service of the pleading. It also provides that the question of standing *may* be raised by preliminary objection.

Rule 1915.5(c) prohibits discovery in custody actions, absent leave of court.

Rule 1915.8 permits the court to order the children and/or any party to submit to and fully participate in a physical or mental evaluation by an appropriate expert. A form order directing expert evaluation is set forth in Rule 1915.18.

Rule 1915.10 was revised significantly in August 2013 to comply with the provisions of the statute. Subsection (a) provides that the court may make a decision before the testimony is transcribed. The court must state the reasons for its decision either on the record in open court, in a written opinion, or in the order. Subsection (b) states that the terms of the order shall be sufficiently specific such that the order can be enforced. If the court finds that a child or a party is at risk of harm, the order shall include safety provisions to protect that person. In an effort to clarify this subsection, the Superior Court, in R.L.P. v. R.F.M., 110 A.3d 201, 206 (Pa Super. 2015), held as follows:

> …in order to be sufficiently specific to be enforced, an order of custody must be entered as a separate written order, or as a separate section of a written opinion. If entered as a separate section of an opinion, it must be designated as such by the use of the heading entitled "Order." A custody order may not be entered as a transcript from any trial or hearing.

Subsection (c) requires that all custody orders include a notice of a party's obligations regarding the intent to relocate. Subsection (d) prohibits the filing of a motion for post-trial relief.

Rule 1915.11 was also significantly revised in 2013, including the addition of a form order. The Rule is entitled: Appointment of Attorney for Child. Interrogation of Child. Attendance of Child at Hearing or Conference. Subsection (a) permits the court *sua sponte* or on motion of a party to appoint an attorney to represent a child in a custody action. This counsel represents the

child's legal interests and is not a guardian *ad litem* or a best interest attorney. The order appointing an attorney to represent a child is set forth in Rule 1915.19. With regard to interviewing the child, subsection (b) provides that it can be done either in open court or in chambers. It further requires that the interview be on the record and in the presence of counsel, who shall have the right to ask questions, and indicates that the parties may be present, at the court's discretion. The child is not required to attend a hearing or a conference, unless directed to do so via court order (Subsection (c)).

Effective March 1, 2019, former Rule 1915.11-1, regarding Parenting Coordination, was amended. Subsection (a)(1) states that, after a final custody order has been entered, the judge or a party, upon motion, can appointment a parenting coordinator in cases involving repeated or intractable conflict. Subsection (a)(2) states circumstances in which a parenting coordinator shall not be appointed without appropriate safety measures.

Subsection (d) sets forth the qualifications needed for a parenting coordinator. As per Rule 1915.11-1(d)(1), a parenting coordinator may recommend resolutions for the following issues:

1. Custody exchanges;
2. Temporary custody changes;
3. Schedule and activities;
4. Childcare;
5. Personal possessions of child;
6. Information exchanges and coordination of services for the child;
7. Behavioral management; and,
8. Any other issue agreed upon by the parties.

A parenting coordinator may not make permanent changes to the custody order or address any other issues set forth in 1515.11-1(d)(2).

Subsection (e) addresses communication with the parenting coordinator. Most notably, parties and counsel may not initiate, but may receive oral ex parte communication with the parenting coordinator. The parenting coordinator must advise the other party or counsel of the communication. A party cannot compel the testimony of a parenting coordinator without a court order.

Subsection (f) sets forth the procedure by which recommendations and objections may be made. An objecting party shall file a petition for a hearing with in five days of service of the recommended action by the parenting coordinator.

As the Rules never addressed the appointment of a Guardian *Ad Litem* (GAL) in custody cases, Rule 1915.11-2 was adopted effective September 3, 2013. Subsection (a) of the Rule provides, in pertinent part, as follows:

> The court may, on its own motion or the motion of a party, appoint a guardian *ad litem* to represent the best interests of the child in a custody action. The guardian *ad litem* shall be a licensed attorney or licensed mental health professional. The guardian *ad litem* shall not act as the child's counsel or represent the child's legal interests.

The GAL is required to file and provide copies of any report at least 20 days prior to trial. The GAL is required to attend all proceedings and may be called to testify. The form order appointing a GAL is set forth in Rule 1915.21. Interestingly, a note to this Rule, along with Rule 1915.25, specifically suspends provisions of the statute set forth at §5334 that require that the GAL be an attorney, that permits the GAL to represent both the best interests and the legal interests of the child, that permits the GAL the right to present witnesses, cross-examine witnesses, and present evidence on behalf of the child, and that prohibits the GAL from testifying.

Rule 1915.12 sets forth the form of a Petition for Civil Contempt of a custody Order.

Rule 1915.13 permits the Court to "grant appropriate interim or special relief".

As indicated above, Rules 1915.15-1915.21, some of which were amended in 2016, are sample pleadings and orders to be used in conjunction with the Rules and the statute. In particular, note Rule 1915.17 which provides for the relocation notice and the wording of the Counter-Affidavit.

Chapter Six

Appendix: *Fausey v. Hiller*

851 A.2d 193 (2004)

Shane FAUSEY, Appellant
v.
Cheryl HILLER, Appellee

Superior Court of Pennsylvania.

Submitted February 12, 2004.
Filed May 25, 2004.

Randi W. Dincher, Williamsport, for appellant.

194 *194 Janice R. Yaw, Williamsport, for appellee.

Before: LALLY-GREEN, GANTMAN and CAVANAUGH, JJ.

OPINION BY CAVANAUGH, J.

¶ 1 Appellant (father) appeals the August 1, 2003 order granting appellee, maternal grandmother (grandmother), partial physical custody of minor, Kaelen Fausey (born October 5, 1994), under the Grandparents' Visitation Act, 23 Pa.C.S.A. §§ 5311-5314. We affirm.

¶ 2 Kaelen's mother died of cancer on May 25, 2002, when Kaelen was seven years old. Father and mother were married until mother's death. Grandmother and Kaelen had a great deal of contact before the death of Kaelen's mother, and during the final two years before her death, their contact was almost daily. They shared a very close relationship through which grandmother helped to emotionally prepare Kaelen for his mother's death. The regular contact between Kaelen and appellee ended when Kaelen's mother died. The trial court found that appellee had made numerous attempts to obtain visits with Kaelen, but that appellant was not cooperative.

¶ 3 Grandmother sought partial custody and visitation rights under 23 Pa.C.S.A. § 5311. The trial court concluded that without a court order, Kaelen would have little or no contact with grandmother because of the following findings: 1) Father didn't foster visits before grandmother filed the custody petition; 2) Father's position on how much, if any contact is appropriate has been inconsistent; 3) Father's negative feelings toward grandmother interfere with his ability to make good decisions regarding Kaelen's contact with her; 4) Father alleges that grandmother is a threat to Kaelen's safety due to a history of alcohol abuse, domestic violence and the fact that her husband has Hepatitis C; and 5) Father alleges that spending time with grandmother would interfere in his father-son relationship with Kaelen because of the animosity between father and grandmother. Despite the court's recognition that father genuinely cares for his son, it found that the safety concerns he raised did not pose a meaningful threat to Kaelen, and that father was unlikely to allow Kaelen to spend time with grandmother absent a court order.

¶ 4 By order of court dated August 1, 2003, grandmother was granted one weekend of partial physical custody each month from 9:00 a.m. on Saturday until 7:00 p.m. on Sunday, as well as one week each summer.

¶ 5 Appellant raises the following two issues on appeal:

1. DID THE TRIAL COURT'S ORDER OF AUGUST 1, 2003 RESULT IN AN

UNCONSTITUTIONAL INFRINGEMENT ON MR. FAUSEY'S FUNDAMENTAL LIBERTY RIGHT TO MAKE CHILD REARING DECISIONS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

2. DOES THE PENNSYLVANIA GRANDPARENT ACT, 23 Pa.C.S.A. 5311 AND 5312 VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, FOR IT TREATS CHILDREN OF SINGLE PARENTS AND THOSE OF MARRIED PARENTS UNEQUALLY WITHOUT THERE BEING A SUFFICIENT GOVERNMENT INTEREST TO INTERFERE IN THE RIGHTS OF A SINGLE PARENT?

195 *195 ¶ 6 We first address the constitutionality of 23 Pa.C.S.A. § 5311 with regard to the due process clause and then with regard to the equal protection clause. Because § 5312 is not implicated by this case, we will not consider it. The portion of the statute in question provides:

§ 5311. When parent deceased

> If a parent of an unmarried child is deceased, the parents or grandparents of the deceased parent may be granted reasonable partial custody or visitation rights, or both, to the unmarried child by the court upon a finding that partial custody or visitation rights, or both, would be in the best interest of the child and would not interfere with the parent-child relationship. The court shall consider the amount of personal contact between the parents or grandparents of the deceased parent and the child prior to the application.

23 Pa.C.S.A. § 5311. This court has stated our standard for reviewing the constitutionality of a statute as follows:

> [W]e note that properly enacted statutes enjoy a strong presumption of constitutionality. *Commonwealth v. Miller,* 455 Pa.Super. 534, 689 A.2d 238 (Pa.Super.1997). Our standard of review is limited to a consideration of whether the legislation at issue is clearly, palpably, and plainly in violation of the constitution. *Commonwealth v. Swinehart*, 541 Pa. 500, 664 A.2d 957 (Pa. [] 1995).

In re C.C.J., 799 A.2d 116, 122 (Pa.Super.2002).

¶ 7 Our Supreme Court recently set forth the following:

> When confronted with a constitutional challenge premised upon substantive due process grounds, the threshold inquiry is whether the challenged statute purports to restrict or regulate a constitutionally protected right. *Commonwealth v. Burnsworth,* 543 Pa. 18, 669 A.2d 883, 889 (Pa.1995). If the statute restricts a fundamental right, it must be examined under strict scrutiny. *Smith v. Coyne,* 555 Pa. 21, 722 A.2d 1022, 1025 (Pa.1999). Pursuant to that analysis, legislation that significantly interferes with the exercise of a fundamental right will be upheld only if it is necessary to promote a compelling state interest and is narrowly tailored to effectuate that state purpose. *Nixon [v. Commonwealth*], 576 Pa. 385, 839 A.2d 277, 286 (2003); *Commonwealth v. Robinson,* 497 Pa. 49, 438 A.2d 964 (Pa.1981), appeal dismissed, 457 U.S. 1101, 102 S.Ct. 2898, 73 L.Ed.2d 1310 (1982).

Khan v. State Bd. of Auctioneer Examiners, 842 A.2d 936, 947 (Pa.2004).

¶ 8 The United States Supreme Court has stated that the right of parents to make decisions about the upbringing of their children is a fundamental right. "[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville,* 530 U.S. 57, 67, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). Accordingly, we employ a strict scrutiny analysis to determine if § 5311 is necessary to promote a compelling state interest and is narrowly tailored to effectuate that purpose. *See Khan,* 842 A.2d at 947.

¶ 9 Appellant's argument relies heavily on the United States Supreme Court decision in *Troxel v. Granville, supra,* for the proposition that the application of § 5311 to this case violates the due process clause. The *Troxel* court found that a particular application of a very broad Washington state third-party visitation
196 statute violated a mother's due process rights to make *196 decisions regarding her children.[1] This court recently addressed the applicability of *Troxel* to § 5311 of Pennsylvania's Grandparent Visitation Act, as follows:

> In *Troxel* the Supreme Court found the application of a Washington state statute permitting "any person" to petition for visitation impermissibly broad and found that, under the facts of that case, it unconstitutionally infringed on the fundamental right of the parent to make decisions concerning her child. However, the *Troxel* Court cited with approval statutes comparable to 23 Pa.C.S. § 5311 ["When parent deceased"], which do not contain the broad, sweeping language like that in the Washington statute. Moreover, the *Troxel* Court determined the trial court erred by placing the burden on the parent to disprove that the best interests of the child would be served by granting visitation with grandparents. Here, we emphasize it is the grandparents' burden to demonstrate partial custody or visitation is in the best interest of the children and will not interfere with the parent-child relationship.

Douglas v. Wright, 801 A.2d 586, 590-91, n. 1 (Pa.Super.2002).

¶ 10 As noted by this court in *Douglas,* the Washington statute at issue in *Troxel* is readily distinguishable from the Pennsylvania statute under consideration. In *Troxel,* the U.S. Supreme Court explained:

197 > Section 26.10.160(3), as applied to Granville and her family in this case, unconstitutionally infringes on that fundamental parental right. The Washington nonparental visitation statute is breathtakingly broad. According to the statute's text, "*any person* may petition the court for visitation rights *at any time,*" and the court may grant such visitation rights whenever "visitation may serve *the best interest of the child.*" § 26.10.160(3) (emphases added). That language effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parent's children to state-court review. Once the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference. Section 26.10.160(3) contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever. Instead, the Washington statute places the best-interest determination solely in the hands of the judge. Should the judge disagree with the parent's estimation of the child's best interests, the judge's view necessarily prevails. Thus, in practical effect, in the State of Washington a court can disregard and overturn any decision by a fit custodial parent concerning visitation whenever a third party affected by the decision files a visitation petition, based solely on the judge's determination of the child's best interests. The Washington Supreme Court had the opportunity to give § 26.10.160(3) a narrower reading, but it declined to do so. See, e.g., 137 Wash.2d at 5, 969

> P.2d at 23 ("[The statute] allows any person, at any time, to petition for visitation without regard to relationship to the child, without regard to changed circumstances, and without regard to harm"); id. at 20, 969 P.2d at 30 ("[The statute] allows `any person' to petition for forced visitation of a child at `any time' with the only requirement *197 being that the visitation serve the best interest of the child").

Troxel v. Granville, 530 U.S. 57, 67, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000).

¶ 11 By contrast, and as aptly explained in the trial court opinion, § 5311 is far more narrowly tailored than the Washington statute invalidated by *Troxel:*

> In summary, the *Troxel* court found three defects in the Washington statute and its application by the courts: The statute was "breathtakingly broad," a presumption was given in favor of the grandparents, and the trial court made slender findings in support of its decision.
>
> By contrast, the Pennsylvania statute at issue and its application do not suffer from defects contained in the Washington case.
>
> Section [5311] places limits on the persons who may petition: grandparents and great-grandparents. It also specifies under what circumstances the petition may be filed: a parent of the grandchild must be deceased. It also states when the petition may be granted: the partial custody or visitation must be in the best interest of the child, and the partial custody or visitation must not interfere with the parent-child relationship. Moreover, by placing the burden upon the petitioning grandparents to show that partial custody or visitation is in the best interest of the children and will not interfere with the parent-child relationship, Pennsylvania courts give deference to the parent's decision.
>
> And finally, § [5311] requires the court to consider the amount of personal contact between the parents or grandparents of the deceased parent and the child prior to the filing of the petition.

Trial Court Opinion at 10-11.

¶ 12 Importantly, the *Troxel* court deliberately explained the limited scope of its decision by stating:

> [W]e rest our decision on the sweeping breadth of § 26.10.160(3) and the application of that broad, unlimited power in this case[.] ... We do not, and need not, define today the precise scope of the parental due process right in the visitation context. In this respect, we agree with JUSTICE KENNEDY that the constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best "elaborated with care." *Post,* at 198 (dissenting opinion). Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a per se matter. n1 ...
>
> n1 All 50 States have statutes that provide for grandparent visitation in some form...

Troxel v. Granville, 530 U.S. 57, 73-74, 120 S.Ct. 2054, 147 L.Ed.2d 49 (U.S.2000). We agree with the trial court that the overly broad terms of the Washington statute addressed by the *Troxel* court do not similarly encumber § 5311, which is markedly more narrow than the Washington statute and does not violate

father's due process rights as applied in this case, and further discussed *infra.*

¶ 13 We also find no violation of the equal protection clause in § 5311. Our Supreme Court has set forth the following:

> The essence of the constitutional principle of equal protection under the law is that like persons in like circumstances will be treated similarly. However, it does not require that all persons under all circumstances enjoy identical protection under the law. The right to equal
> 198 protection under the law does not absolutely *198 prohibit the Commonwealth from classifying individuals for the purpose of receiving different treatment, and does not require equal treatment of people having different needs. The prohibition against treating people differently under the law does not preclude the Commonwealth from resorting to legislative classifications, provided that those classifications are reasonable rather than arbitrary and bear a reasonable relationship to the object of the legislation. In other words, a classification must rest upon some ground of difference which justifies the classification and have a fair and substantial relationship to the object of the legislation.

Curtis v. Kline, 542 Pa. 249, 666 A.2d 265, 267-68 (1995) (citations omitted).

¶ 14 To the extent that § 5311 treats children who have lost a parent to death differently than children who have not, it is for the justified and reasonable purpose of protecting a child's emotional well-being and accounting for the potentially different needs of a child whose parent has died. Our supreme court has put forth the following regarding the policy purposes behind this statute:

> In the statute's declaration of policy, 23 P.S. [C.A.] § 5301, the "General Assembly declares that it is the public policy of this Commonwealth, when in the best interest of the child, to assure a reasonable and continuing contact of the child with both parents after a separation or dissolution of the marriage and the sharing of the rights and responsibilities of child rearing by both parents and continuing contact of the child or children with grandparents when a parent is deceased, divorced or separated." ... Section 5311 would come into play when one of the partners to the marriage dies while the marriage is intact and ensure that the parents of the deceased partner would not be unreasonably cut off from contact with their grandchildren by their son-in-law or daughter-in-law.

Bishop v. Piller, 536 Pa. 41, 637 A.2d 976, 978 (1994). We agree with the trial court that:

> [E]ven under a strict scrutiny analysis, interpreting the statute to implicate the parents' fundamental right to make decisions regarding their children, § [5311] would still pass muster. The compelling purpose behind § [5311], as stated earlier, is to foster the emotional welfare of children. It is a remedy to protect children from an unwise decision by a parent to cut off meaningful and beneficial contact with a grandparent or great grandparent. The statute treats children from intact families different[ly] from children who have experienced the death of a parent. That classification makes perfect sense because it is precisely in those cases where the danger of alienation from a grandparent is greatest. Children from intact families have two parents, either of which may promote grandparent contact. When one parent is deceased, the chance of the living parent cutting off contact with a grandparent—especially with a parent of the deceased parent—is heightened. Therefore, those children need greater protection.

Trial Court Opinion at 17. To this we would add that a child has a natural right to share in the heritage of

each of his parents, and § 5311 fosters preservation of this familial right.

¶ 15 As previously noted, properly enacted statutes enjoy a presumption of constitutionality and may be invalidated only if clearly, palpably and plainly in violation of the constitution. *In re C.C.J.,* 799 A.2d at 122.
199 Section 5311 does not approach these criteria. Having found § 5311 constitutional, we briefly turn to *199 appellant's complaint that this specific application of the statute violated his rights and that the trial court abused its discretion in rendering the custody award.

¶ 16 The trial court properly accorded father, as a fit parent, the presumption that his decisions regarding Kaelen's visits with grandmother were in Kaelen's best interest. Nevertheless, the trial court found that grandmother overcame that presumption and met her burden of showing: 1) that partial custody would be in Kaelen's best interest; and 2) that partial custody would not interfere with the parent-child relationship. The court concluded that Kaelen's best interests would be served by granting partial custody to grandmother because of the following findings:

> Kaelen has a long-standing, very close relationship with Mrs. Hiller. He enjoys being at her home, and often does not want to leave when the visits are over. Mrs. Hiller is a warm, loving grandmother who spends her time with Kaelen doing things such as having picnics, gardening, swimming, playing games, and Kaelen's all-time favorite activity: going to the car races to see his uncle race. She also has family get-togethers on one or both days of her visit each month, which gives Kaelen the opportunity to play with his numerous cousins, second cousins, and other members of the maternal side of his family. Kaelen also is able to spend a significant amount of time with his great-grandfather, Jack Braim, who has always been an important person in Kaelen's life. And finally, when Kaelen is with Mrs. Hiller, he seeks and receives emotional support regarding the death of his mother, as described by Mrs. Hiller ... Mr. Fausey himself expressed concerns regarding Kaelen's inability to express his emotions regarding his mother's death. It appears that contact with his mother's side of the family is highly beneficial emotionally for Kaelen in helping him deal with the loss of his mother.

Trial Court Opinion at 6.

¶ 17 The court also found no evidence that grandmother's partial custody would interfere with the parent-child relationship or be detrimental to Kaelen in any way. *Id.* at 8.

¶ 18 "On issues of credibility and weight of the evidence, an appellate court defers to the findings of the trial judge, who has had the opportunity to observe the proceedings and the demeanor of the witnesses." *L.F.F. v. P.R.F.,* 828 A.2d 1148, 1152 (Pa.Super.2003). The trial court's findings are supported by the record and we accordingly defer to those findings and find that the court properly applied the law to the facts of this case.

¶ 19 In accordance with our standard of review, we find 23 Pa.C.S.A. § 5311 to be constitutional and we do not find that the August 1, 2003 order granting partial custody to maternal grandmother is violative of father's constitutional rights or manifestly unreasonable. Accordingly, we affirm the order granting partial custody to grandmother.

¶ 20 Order affirmed.

¶ 21 Judge LALLY-GREEN concurs in the result.

[1] It is worth noting that the Washington statute was invalidated only as applied, and not on its face.

Chapter Seven

Equitable Distribution of Marital Property

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Equitable Distribution of Marital Property

I. INTRODUCTION.

A. AUTHORITY.

Typically, spousal disputes over marital property involve hundreds of thousands of dollars, if not millions. This explains why the division of property may be the most hotly contested issue in divorce litigation. Modest net worth cases may be litigated as vigorously as high net worth cases. Litigants who are embroiled in the emotional turmoil of divorce sometimes find it difficult to make rational decisions or recognize the consequences of their actions. In these situations, the family law attorney may act as a legal consultant, adviser, counselor, and guide.

Equitable distribution proceedings require the family law attorney to draw upon a wide range of knowledge and expertise. The division of property touches on many areas of the law, including real estate, taxation, corporate governance, employee benefits, estates and trusts, and bankruptcy (to name a few). Additionally, equitable distribution requires a basic familiarity with the principles of accounting, appraisal, investing, and business finance.

Even when the spouses are not congenial with each other, an equitable distribution proceeding need not be bellicose. It is not constructive to cast the spouses as a righteous victim or devilish villain. Since memory, perception and honesty affect credibility, it seems unlikely that everything one's client says is completely true and accurate. Emotion affects perception and memory. Some litigants may have consulted with friends, family members or acquaintances who have shared bitter war stories, legal misconceptions, "urban legends," or irrelevant information. Some are influenced by members of the extended family or "significant others" who have animosity toward the former spouse. For these reasons, the demeanor of the family law attorney is nearly as important as his/her expertise.

In Pennsylvania, the primary sources of the law pertaining to equitable distribution of marital property are:

1. Pennsylvania Domestic Relations Code *("the Divorce Code")*, 23 Pa.C.S. § 3101 et seq.

a. Legislative findings and intent, 23 Pa.C.S. § 3102

b. Bases of Jurisdiction, 23 Pa.C.S. § 3104

c. Equitable division of marital property, 23 Pa.C.S. § 3501 et seq.

d. Effect of agreements, 23 Pa.C.S. § 3105

e. Premarital agreements, 23 Pa.C.S. § 3106

f. Bifurcation, 23 Pa.C.S. §3323(c.1)

g. Death of a party, 23 Pa.C.S. § 3323 (d.1)

h. Equity power of Divorce Court, 23 Pa.C.S. § 3323(f)

i. Grounds established, 23 Pa.C.S. § 3323(g)

j. Counsel fees, 23 Pa.C.S. § 3702

2. Pennsylvania Rules of Civil Procedure, 42 Pa.C.S.

a. Equitable distribution of marital property, Pa.R.C.P. 1920.1 et seq.

b. Domestic Relations Actions, generally, Pa.R.C.P. 1930.1 et seq.

3. Internal Revenue Code ("IRC"), 26 U.S.C. § 1

a. Transfers of property between spouses, IRC § 1041; Reg. § 1.1041-1T(d).

b. Sale of principal residence, IRC § 121

c. Transfer of interest in qualified retirement assets, IRC § 408(d)(6)

4. Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 et seq.

a. Domestic relations exception to the nonalienation rule, ERISA § 401(a)(13)(B)

b. Qualified Domestic Relations Orders, ERISA § 414(p)

5. Bankruptcy Code, 11 U.S.C. § 101 et seq.

a. Automatic stay, 11 U.S.C. § 362

b. Exemptions from discharge, 11 U.S.C. § 522(d). 523(a)(5), 523(a)(15)

c. Property of the estate, 11 U.S.C. § 541(a)(5)(B)

d. Preferences, 11 U.S.C. § 547(c)(7)

e. Priority of support obligations, 11 U.S.C. § 507(a)(1)

B. JURISDICTION.

1. Generally.

a. At least one of the parties must have been a residence for six months or more prior to the commencement of the divorce action. 23 Pa.C.S. § 3104(b).

b. Consent. A nonresident spouse may submit to the jurisdiction of the Pennsylvania court by appearing generally or filing pleadings in the

divorce action. *Paalvast v. Disarro*, 758 A.2d 192 (Pa.Super. 2000), *Bem v. Bem*, 463 A.2d 16 (Pa.Super. 1983).

c. Long arm. Where there are sufficient contacts as to extend long arm jurisdiction to the person of the defendant, the court may adjudicate the economic claims as well as the divorce. *Wagner v. Wagner*, 768 A.2d 1112 (Pa.Super.2001).

d. Bifurcation. A party cannot request equitable distribution of marital property if such claim was not raised prior to the entry of a bifurcated divorce decree. 23 Pa.C.S. § 3503; *Melton v. Melton*, 831 A.2d 646 (Pa.Super. 2003); *Justice v. Justice*, 612 A.2d 1354 (Pa.Super.1992), *appeal denied*, 533 Pa. 635, 621 A.2d 581 (1993); *Bastion v. Bastion*, 472 A.2d 226 (Pa.Super.1984); *Jackson v. Jackson,* 2017 Pa. Super. 190 (June 16, 2017). The 2004 amendments to the Divorce Code have imposed statutory criteria for bifurcation, requiring the moving party to show "compelling circumstances" and that "sufficient economic protections have been provided…" 23 Pa.C.S. § 3323(c.1). Additionally, the trial court must explain its reasoning for granting bifurcation on the record, either prior to the entry of the bifurcation order or in the bifurcation order itself. *Brian v. Brian*, 872 A.2d 843 (Pa.Super. 2005).

e. Military personnel. Domicile of military personnel is presumed not to change from time of enlistment, unless there is clear and convincing evidence of an intent to establish a new domicile elsewhere. *Milam v. Milam*, 677 A.2d 1207 (Pa.Super. 1996); *Bernhard v. Bernhard*, 668 A.2d 546 (Pa.Super. 1995).

f. Under the Uniformed Services Former Spouses' Protection Act, the courts may not exercise jurisdiction to distribute a non-resident military member's retirement pay in a divorce action unless the member consents to the personal jurisdiction of the court. *Wagner v. Wagner*, 768 A.2d 1112 (Pa.Super. 2001).

g. Minimum contacts. In *Gaboury v. Gaboury*, 988 A.2d 672 (Pa. Super. 2009), *petition for allowance of appeal denied*, 606 Pa. 672, 996 A.2d 492 (2010), the appellate court affirmed the trial court's determination that Pennsylvania had personal jurisdiction over the divorce, but not over equitable distribution. The parties had met online, married in Pennsylvania, and moved to Wisconsin. Wife moved to Pennsylvania after the separation. Husband continued to live in the marital residence in Wisconsin, and made no trips to Pennsylvania. The trial court could not exercise jurisdiction over Husband for the purposes of equitable distribution.

2. Appeals.

a. An order of court sustaining personal jurisdiction is an interlocutory order appealable as of right under Pa.R.A.P. 311(b) if the plaintiff, petitioner or party benefiting from the order files within ten days an election deeming the order as final or the trial court states in the order that a substantial issue of venue is presented.

3. Divisible Divorce.

a. Generally, a court which does not have personal jurisdiction over the defendant may enter a decree of marital dissolution but may not adjudicate economic claims in divorce. *Stambaugh v. Stambaugh*, 458 Pa. 147, 329 A.2d 483 (1974), *Gaboury v. Gaboury,* 988 A.2d 672 (Pa. Super. 2009).

b. However, where divorce was entered in a foreign jurisdiction after execution of a marital settlement agreement in Pennsylvania, the Pennsylvania court had jurisdiction over economic claims. *Polito v. Polito*, 655 A.2d 587 (Pa.Super. 1995).

4. Abatement/Death of a Party.

a. If one of the parties dies after the decree of divorce has been entered, but prior to the final determination of the property rights, the personal representative of the deceased party shall be substituted as a party, as provided by law, and the action shall continue. 23 Pa. C.S. §3323(d)

b. Pursuant to §3323(d.1), in the event that one party dies during the course of the divorce proceedings, and no decree of divorce has been entered and grounds have been established as provided in §3323(g), the parties' economic rights and obligations shall be determined under this section rather than under the statutory provisions relating to decedents, estates, and fiduciaries

c. Grounds are established as follows: (1) Under §3301(a) or (b) when the court adopts the master's report, or makes its owns findings that grounds for divorce exist; (2) Under §3301(c), when both parties have filed affidavits of consent, or, if the presumption in 3301(c)(2) is established and one party had filed an Affidavit of Consent; or (3) Under §3301(d) when an affidavit has been filed or, if a counter-affidavit has been filed denying the affidavit's averments, the court determines that the marriage is irretrievably broken, and the parties have lived separate and apart for at least one (1) year at the time of the filing of the affidavit.

d. Upon abatement, the parties property rights are governed by the Probate Estates and Fiduciaries Code; and the divorce court has no jurisdiction.

e. Wife was not required to file an election within 6 months of the date of probate to assert her claim to spousal share in husband's intestate estate; Wife's entitlement to spousal share is unrelated to elective statutory provisions which apply only to surviving spouse of a decedent who died intestate. 20 Pa. Con. Stat Ann § 2102, 2210(b); *In Re Estate of Scarpaci*, 176 A.3rd 885 (Pa. Super 2017).

f. In a case where a spouse died after grounds for divorce were established, the trial court lacked jurisdiction to enter a divorce decree *nunc pro tunc* but the divorce action did not abate. *Taper v. Taper*, 939 A.2d 969 (Pa.Super. 2007) (holding that a Pennsylvania domestic relations statute providing for posthumous property division did not provide the court with jurisdiction to enter a posthumous divorce); *Yelenic v. Clark*, 922 A.2d 935 (Pa.Super. 2007).

g. Life insurance. Pursuant to §3502(a), the court may direct the continued maintenance and beneficiary designations of the existing policies insuring the life or health of either party if the policies are originally purchased during the marriage, and were owned by (or in the control of) either party. Where it is necessary to protect the interests of a party, the court may also direct the purchase of, and beneficiary designations on, a policy insuring the life or health of either party.

Questions: Are life insurance proceeds a marital asset? Does the divorce court have jurisdiction over such property in equitable distribution? The answer is: probably not. A life insurance policy is not like a pension plan or an annuity. Life insurance benefits can only be received after a person's death.

g. Alimony. Under §3707, if the party receiving alimony dies, the right to receive alimony ceases. If the party paying alimony dies, the obligation to pay alimony ceases unless otherwise indicated in the parties' agreement, or in a court order.

C. VENUE.

1. Generally.

a. A divorce action may be brought in the county

(1) where the defendant resides

(2) if the defendant resides outside of the Commonwealth, where the plaintiff resides

(3) of matrimonial domicile, if the plaintiff has continually resided in the county;

(4) prior to six months after the date of final separation and with agreement of the defendant, where the plaintiff resides or, if neither party continues to reside in the county of matrimonial domicile, where either party resides; or

(5) after six months after the date of final separation, where either party resides.

23 Pa.C.S. § 3104(e)

2. Economic Claims.

a. Claims in divorce may be brought in the county

(1) in which the plaintiff or defendant resides; or

(2) upon which the parties have agreed

(i) in a writing attached to the complaint; or

(ii) by participating in the proceeding

Pa.R.C.P. 1920.2

(Note: Subpart (b) of Pa.R.C.P. 1920.2 requires the record to establish compliance with requirements of subdivision (a) **before** entry of the Divorce Decree.)

(But Note also: Subpart (c) of Pa.R.C.P. 1920.2 states that, notwithstanding any agreement of the parties, if neither party has resided in the county at any time during the pendency of the action, the court, on its own motion and for its own convenience, may transfer the action to the appropriate court of any other county where the action originally could have been brought.)

3. Appeals.

a. An order transferring venue to another court is an interlocutory order appealable as of right. Pa.R.A.P. 311(c). If an appeal is not filed within thirty (30) days of the order transferring venue, the issue is waived. Pa.R.A.P. 311(g)(ii).

b. An order of court sustaining venue is an interlocutory order appealable as of right under Pa.R.A.P. 311(b) if the plaintiff, petitioner or party benefiting from the order files of record within ten days after the entry of the order an election deeming the order as final or the trial court states in the order that a substantial issue of venue is presented.

4. **Raising the Issue of Venue.**

a. A claim of improper venue must be raised in preliminary objections to the divorce complaint or it will be deemed waived. *Kropf v. Kropf*,

2100 Pa. Super. 123, 24 A.3d 405 (2011); Petition for allowance of appeal, denied, *Kropf v. Kropf,* 34 A.3d 831 (Pa. 2011).

D. PROCEDURE.

The Pennsylvania Rules of Civil Procedure, Pa.R.C.P. 1920.1 et seq., set forth the procedure for prosecuting and defending a claim for equitable distribution of marital property. However, the procedures are very different in each county, so it is absolutely necessary to review the local rules.

1. Generally.

Generally, the first step in an equitable distribution proceeding is raising the claim. Next, the parties must file Inventories describing the marital property and liabilities, nonmarital property, and property transferred within three (3) years prior to the commencement of the action. Discovery may be taken by the parties at any time after the claim for equitable distribution has been raised. When discovery is complete and the grounds for divorce are ripe, the court may appoint a master or schedule a bench trial to hear evidence. The parties are required to file pretrial statements describing their witnesses and evidence, and in most counties there is a settlement conference and/or pretrial conference prior to the hearing. If the claims are heard by a master, there is an opportunity to file exceptions, which may trigger an argument or de novo hearing before a judge. Finally, the equitable distribution decree will be issued simultaneously with the decree in divorce.

a. Raising a claim. A claim for equitable distribution may be raised by the plaintiff in the Complaint in Divorce Pa.R.C.P. 1920.12 or by the defendant as a counterclaim, Pa.R.C.P. 1920.15(a). Alternatively, the defendant may file a separate petition raising claims after the divorce action has been commenced but before the decree in divorce has been entered. Pa.R.C.P. 1920.15(b).

b. A claim for equitable distribution may not be raised for the first time after the decree in divorce has been entered. 23 Pa.C.S. § 3503; *Melton v. Melton*, 831 A.2d 646 (Pa.Super. 2003); *Justice v. Justice*, 612 A.2d 1354 (Pa.Super. 1992), *appeal denied*, 533 Pa. 635, 621 A.2d 581 (1993); *Bastion v. Bastion*, 472 A.2d 226 (Pa.Super. 1984).

c. However, where both parties have filed inventories and conducted discovery in contemplation of equitable distribution, the failure to raise claims will not preclude the trial court from conducting equitable distribution upon the petition of a party to appoint a master less than 30 days after entry of a divorce decree. *Lowers v. Lowers*, 911 A.2d 553 (Pa.Super.2006) .

d. Inventories. Both parties shall submit to the court an inventory and appraisement, which shall contain a list of the property owned or possessed by either or both of them as of the date of separation and

30 days prior to the date of hearing on equitable distribution. The Inventory shall include a list of the value of the property owned or possessed by either or both of them as of the date of acquisition; the date of separation; and thirty days prior to the date of hearing on equitable distribution. The Inventory is also to include a list of the liabilities of either or both of them as of 30 days prior to the date of hearing on equitable distribution, whether or not the liabilities are related to the property set forth in the Inventory and appraisement. 23 Pa.C.S. §3505(b). Pa.R.C.P. 1920.75 (Form of Inventory).

Within 20 days of service of the moving party's Inventory, the non-moving party shall file an Inventory. A party may not file a Motion for Appointment of a Master or a request for Court Action regarding equitable division until at least 30 days following the filing of that party's inventory. Pa.R.C.P. 1920.33(a).

e. Discovery. Discovery is available without leave of court in equitable distribution matters. 23 Pa.C.S. § 3505(c); Pa.R.C.P. 1930.5.

f. Pretrial Statements. Not less than sixty (60) days prior to the bench trial or master's hearing, or other such time as directed by the judge or master, the parties are required to file and serve upon the other party pretrial statements. The pretrial statements must be in chart form and describe the assets and their values, all potential witnesses (including expert witnesses), all exhibits (including expert reports), the parties' income and expenses, the value of retirement benefits, an itemization of counsel fees, a description of tangible personal property, a list of marital debts and their values, and a proposed economic resolution. Pa.R.C.P. 1920.33. **But be aware of the new Public Access Policy Rules and how that will affect these filings after January 6, 2018.**

g. A party who fails to file a pretrial statement as required by Pa.R.C.P. 1920.33(b) shall be barred from offering any testimony or evidence in support of or in opposition to claims for the matters not covered therein. Pa.R.C.P. 1920.33(d).

h. Hearing. The parties' claims for equitable distribution may be heard by the trial judge, Pa.R.C.P. 1920.52, or by a master, Pa.R.C.P. 1920.51, 1920.54, 1920.55-1, 1920.55-2, 1920.55-3. In those jurisdictions where testimony is taken by a master, it is critically important for lawyers to familiarize themselves with local rules governing hearing procedures, or else run the risk of prejudicing their clients' interests. See *DelCamp v. DelCamp*, 881 A.2d 853 (Pa.Super. 2005)(exceptions from master's recommendation dismissed for failure to file transcript within ten days under local rules).

i. Finality. Generally, a decree of equitable distribution is a final order, which is not modifiable after thirty (30) days has elapsed, unless there is evidence of intrinsic fraud or new evidence which will sustain an attack on the validity of the decree. 23 Pa.C.S. § 3332; 42 Pa.C.S. § 5505. However, modification of equitable distribution decrees is not unheard of. See, e.g., *Marra v. Marra*, 831 A.2d 1183 (Pa.Super. 2003)(equitable distribution decree modified to include marital property recovered from fraudulent transfers); *Lowenschuss v. Lowenschuss*, 683 A.2d 1214 (Pa.Super. 1996)(restating equitable distribution decree as a QDRO to preserve nonemployee spouse's interests in bankruptcy of employee spouse); *Romeo v. Romeo*, 611 A.2d 1325 (Pa.Super. 1992)(post-decree change in circumstances warranted modification of divorce decree adopting master's recommendation, from which no exceptions were taken); *Wiggins v. Wiggins*, 2008 WL 2973964, 4 Pa. D. & C. 5th 118 (Bucks C.C.P., 2008)(Husband not permitted to revisit equitable distribution after he learned of the existence of a prenuptial agreement even though he had requested the agreement from Wife as part of the initial divorce proceedings). On the other hand, a Motion to Vacate a Decree or Strike a Judgment alleged to be void because of extrinsic fraud, lack of subject matter jurisdiction or a fatal defect upon the face of the record must be made within five (5) years. 23 Pa.C.S. §3332.

E. INJUNCTIVE AND EXTRAORDINARY RELIEF.

1. Ne exeat/Injunctive Order

a. The court is authorized to enter an injunction to prevent the removal, disposal, alienation, dissipation, or encumbrance of marital assets. 23 Pa.C.S. § 3505(a); Pa.R.C.P. 1920.43; *Lazovitz v. Lazovitz*, 453 A.2d 615 (Pa.Super. 1982).

b. Where a spouse caused a marital business to repay a shareholder loan to herself, her action was not a clear violation of an injunctive order which prohibited paying personal expenses from the business. (The injunctive order was written by the parties.) *Bold v. Bold*, 939 A.2d 892 (Pa.Super.2007).

2. Petitions to freeze

a. Where there is concern that the spouse who has possession or control over a marital asset may dissipate that asset, a petition to freeze assets can be filed. The primary goal of freezing an asset is to insure that the asset will be intact and available for equitable distribution.

b. 23 Pa. C.S.A. § 3323(f) provides as follows: "In all matrimonial cases, the Court shall have full equity power and jurisdiction and may issue injunctions or other orders which are necessary to protect the

interests of the parties or effectuate the purposes of this Act, and may grant such other relief or remedy as equity and justice require against either party . . . "

c. 23 Pa. C.S.A. § 3505(a) states as follows: "Where it appears to the Court that a party is about to leave the jurisdiction on the Court or is about to remove property of that party from the jurisdiction of the Court or is about to dispose of, alienate, encumber property in order to defeat equitable distribution, alimony *pendente lite*, alimony, child and spousal support or a similar award, an injunction may be issued to prevent the removal or disposition and the property may be attached as prescribed by general rules."

d. Pa. R.C.P. 1920.43(a) provides as follows: "At any time after the filing of the Complaint, on Petition setting forth facts entitling the party to relief, the Court may, upon such terms and conditions as it deems just, including the filing of security,

(1) issue preliminary or special injunctions necessary to prevent the removal, disposition, alienation or encumbering of real or personal property in accordance with Rule 1531 (a), (b), (c), (d), or (e); or

(2) order the seizure or attachment of real or personal property;

(3) grant other appropriate relief."

3. Exclusive possession

a. The court may award the right to reside in the marital home to one or both parties during the pendency of the divorce action. 23 Pa.C.S. § 3502(c); *Laczkowski v. Laczkowski*, 496 A.2d 56 (Pa.Super. 1985); *Uhler v. Uhler*, 41 Pa.D.& C.3d 3 (1985), affirmed, 626 A.2d 656 (Pa.Super. 1991).

b. An order awarding exclusive possession of the marital residence is interlocutory and not immediately appealable. *Shazes v. Baltuskonis*, 519 A.2d 514 (Pa.Super.1987).

4. Maintenance of Insurance or Retirement Benefits.

a. The court may direct a spouse to purchase or maintain life insurance policies or health insurance coverage for the benefit of the other spouse. 23 Pa.C.S. § 3502(d); Pa.R.C.P. 1920.43. Similarly, the court may direct a party to maintain the beneficiary designations of retirement benefits. *Titler v. SERS*, 768 A.2d 899 (Pa.Cmwlth. 2001).

5. Constructive Trust

a. The court is authorized to impose a constructive trust over marital assets having a fair market value of $1,000.00 or more that are

omitted from the final distribution of property if such assets were not disclosed in the parties' inventories. 23 Pa.C.S. § 3505(d); *Major v. Major*, 518 A.2d 1267 (Pa.Super. 1986); *Creeks v. Creeks*, 619 A.2d 754 (Pa.Super. 1993); but see *Smith v. Smith*, 749 A.2d 921 (Pa.Super. 2000).

b. Ex-wife failed to meet her burden to prove fraudulent misrepresentation and impose a constructive trust over ex-husband's pension benefit when marital settlement agreement stated she was familiar with the marital estate. *Bennett v. Bennett*, 168 A.3d 238 (Pa. Super 2017).

6. Petition to Intervene in Foreclosure

a. When wife was not named on the deed of a property in foreclosure, she was not considered a "real owner" for purposes of intervening in a mortgage foreclosure action. See Pa. R.C.P. 1144(a). Wife was not able to intervene in the foreclosure action because she did not do so in a timely manner; rather she wanted waited until the mortgage foreclosure action was no longer pending. *U.S. Bank National Association as Trustee for the Pennsylvania Housing Finance Agency vs. Bryan J. Watters and Proposed intervenor, Diane Watters*, 163 A.3d 1019 (Pa. Super 2017).

7. Fraudulent Conveyance

a. The court is authorized to avoid transfers or encumbrances of marital property to third persons who paid wholly inadequate consideration. 23 Pa.C.S. § 3505(e); Pa.R.C.P. 1920.43(b); *Lindsey v. Lindsey*, 492 A.2d 396 (Pa.Super.1985).

8. Execution of Real Estate Listing Agreement.

a. The court is authorized to direct a spouse to execute a real estate listing agreement for the sale of marital property. *McMahon v. McMahon,* 706 A.2d 350 (Pa.Super.1998).

9. Stay of Sheriff's Sale

a. Trial court was authorized to stay sheriff's sale of marital real estate, which had been executed upon by municipal authority for unpaid real estate taxes. *City of Easton v. Marra*, 862 A.2d 170 (Pa.Cmwlth. 2005).

II. IDENTIFICATION OF MARITAL PROPERTY.

A. GENERALLY.

1. Time of Acquisition

a. "Marital property" means all property acquired by either party during the marriage prior to the date of final separation. 23 Pa.C.S. §3501(a).

b. Marital property includes property acquired prior to the effective date of the Domestic Relations Code (eff. 4/2/1980). *Bachetta v. Bacchetta*, 498 Pa. 227, 445 A.2d 1194 (1982).

c. It is the time of acquisition, and not title, which determines the nature of property in equitable distribution. 23 Pa.C.S. § 3501(b); *Drake v. Drake*, 555 Pa. 481, 725 A.2d 717 (1999); *Fidelity Bank v. Carroll*, 610 A.2d 481 (Pa.Super. 1992).

d. Property which has not been "acquired" by a spouse prior to separation (such as expectancies under a will, or trust corpus or income over which a spouse has no power of withdrawal) is not marital property. *Oaks v. Cooper*, 536 Pa. 134, 638 A.2d 208 (1994)(expectancies); *Solomon v. Solomon*, 531 Pa. 113, 611 A.2d 686 (1992)(trust).

e. There is a presumption that real and personal property acquired by either party during the marriage is marital property, unless it is proven by a preponderance of evidence that the property is excluded under §3501(a). 23 Pa.C.S. § 3501(b); *Drake v. Drake*, 555 Pa. 481, 725 A.2d 717 (1999); *Sutliff v. Sutliff*, 518 Pa. 378, 543 A.2d 534 (1988); *Wilhelm v. Wilhelm*, 657 A.2d 34 (Pa.Super. 1995); *Mackalica v. Mackalica*, 716 A.2d 653 (Pa.Super. 1998).

f. There is a rebuttable presumption that the date when a complaint in divorce is filed and served is the latest possible date of separation. 23 Pa.C.S. § 3103 (amended 2004).

g. The date of separation is generally the date when parties began to live separate and apart, which is defined as a "cessation of cohabitation, whether living in the same residence or not." 23 Pa.C.S. § 3103. See also *Powers v. Lancaster*, C.C.P. Centre County, No. 1994-1612 (C.C.P. March 15, 2010)(Wife's Petition for Bifurcation granted and Petition for Divorce granted where couple lived in separate parts of the house and had not had sex for over two years); *Dinsmore v. Dinsmore*, 110 PDDRR 60 (Pa. C.P. April 12, 2010)("The essential element of the phrase `separate and apart' is the existence of separate lives, not merely separate beds.") But note: The Divorce Code no longer requires a 2 year separation period if the parties separated after

December 5, 2016. Now the waiting period has reduced to one (1) year from the date of separation. 23 Pa.C.S. §3301(d).

h. Severance payment made to Husband by his former employer was not "Marital Property" for purposes of equitable distribution where husband received severance payment 2 days after the parties separated and payment was also in exchange for husband's agreement not to compete with his former employer for 12 months following termination of his employment which occurred after the parties separated. 23 Pa. Cons. Stat. Ann § 3501(a)(8). *Schultz v. Schultz*, 184 A.3d 168 (Pa. Super 2018)

2. Increase or Decrease in Value of Nonmarital Property.

a. See III.C. below.

3. Third Party Interests

a. The divorce court does not have jurisdiction to exercise control over property which is owned by a third party. *Johnson v. Johnson*, 908 A.2d 290 (Pa.Super.2006); *Oaks v. Cooper*, 536 Pa. 134. 638 A.2d 208 (1994); cf. *Aletto v. Aletto*, 537 A.2d 1383 (Pa.Super. 1988).

b. However, the divorce court may avoid a fraudulent conveyance of property to a third party who paid wholly inadequate consideration. 23 Pa.C.S. § 3505(e).

c. Moreover, the court may find that a spouse has beneficial ownership of a property which is titled in the name of a "straw man" but was acquired from marital sources. *Liciardello v. Liciardello*, 570 A.2d 1062 (Pa.Super. 1990); *Fitzpatrick v. Fitzpatrick*, 547 A.2d 362 (Pa.Super. 1988); *Wolf v. Wolf*, 514 A.2d 901 (Pa.Super. 1986), overruled by, *Van Buskirk v. Van Buskirk,* 527 Pa. 218, 590 A.2d 4 (Pa. 1991).

d. Additionally, the court may stay a sheriff's sale of property previously owned by a divorcing party, in which either party may have an interest as marital property, pending resolution of the economic claims in divorce. *City of Easton v. Marra*, 862 A.2d 170 (Pa.Super. 2004).

e. A spouse's contribution to the improvement of property owned by a third party will not cause a third party's property to transmute into marital property. *Bolze v. Bolze*, 629 A.2d 1031 (Pa.Super. 1992).

f. Property owned by a spouse and his new wife as tenants by the entireties cannot be garnished to satisfy obligations to a former wife. *Johnson v. Johnson*, 908 A.2d 290 (Pa.Super.2006).

g. Trial court lacked power to join a third party defendant sua sponte without service of original process and personal jurisdiction over the third party defendant. *Mayer v. Garman*, 912 A.2d 762 (Pa.2006).

h. A person having a power of attorney cannot prosecute nor defend, a divorce action on behalf of an incompetent principal; that role is reserved exclusively for a court-appointed guardian or guardian ad litem. Pa. R. Civ. P. 2053; *Berry v. Berry*, 197 A.3d (Pa. Super 2018).

i. Child was a 3rd party beneficiary and had standing to intervene and enforce a provision in marital settlement agreement between former wife & former husband obligating former husband to share costs of son's post-secondary education. 23 Pa. Con. Stat. Ann. § 101 et seq.; Pa. R. Cw. P. 2330(a); *Weber v. Weber* 168 A.3d 266, (Pa. Super 2017).

B. EXCLUSIONS FROM MARITAL PROPERTY.

1. Pre-marital Property

a. Property acquired prior to the date of marriage is excluded from marital property. 23 Pa.C.S. § 3501(a)(1); *Smith v. Smith*, 749 A.2d 921 (Pa.Super. 2000). Premarital property which is exchanged for new property during marriage retains its nonmarital nature unless it is re-titled in joint names. 23 Pa.C.S. § 3501(a)(1); *Downey v. Downey*, 582 A.2d 674 (Pa.Super. 1990).

b. Property acquired prior to marriage and titled in the name of an individual spouse is excluded from marital property even though both spouses contributed to its acquisition. *Bower v. Bower*, 531 Pa. 54, 611 A.2d 181 (1992).

c. The increase in value of premarital property from the date of marriage to the date of separation is subject to equitable distribution. 23 Pa.C.S. § 3501; see A.2., "Increase in Value of Nonmarital Property," above.

2. Gifts and Inheritance Received During Coverture

a. Generally. Property which is acquired by gift, bequest, devise, or descent by an individual spouse is excluded from marital property. 23 Pa.C.S. § 3501(a)(3). Property acquired in exchange for gifted or inherited property is excluded from equitable distribution. *Winters v. Winters*, 512 A.2d 1211 (Pa.Super. 1986).

b. A refinancing of the marital residence during the marriage and execution of a new deed changing the parties' ownership from joint tenants with right of survivorship to tenants by the entireties constituted a gift to the marital estate. Donative intent was evidenced

by the creation of the entireties and is a mutual issue. *Harvey v. Harvey*, 167 A.3d 6 (Pa. Super 2017).

c. Gifts and inheritance which are acquired by the spouses jointly are marital property. *Gee v. Gee*, 460 A.2d 358 (Pa.Super. 1983).

d. There is a presumption that gifts or inheritance which are re-titled in joint names are intended to be gifts to the marriage, which are marital property. See Section II. E., "Transmutation," below.

e. Gifts between Spouses. Gifts between spouses are marital property subject to equitable distribution. Note: The Domestic Relations Code was amended in 1988 to provide that interspousal gifts are marital property. Previously, interspousal gifts were excluded from the marital estate. The 1988 amendment was intended to legislatively overrule *Semasek v. Semasek*, 509 Pa. 282, 502 A.2d 109 (1985).

f. Conditional Gifts. Generally, the engagement ring is given as a gift conditional upon the promise to marry. When the parties are married, the condition is met, and the gift becomes absolute. The law of this Commonwealth does not provide whether the gift is "acquired" when the ring was given prior to marriage (which would make the ring non-marital) or upon the occurrence of the condition (which would make the ring marital).

3. Post-separation Property

a. Property acquired by a spouse after the date of separation is excluded from marital property. 23 Pa.C.S. § 3501(a)(4); *Kohl v. Kohl*, 564 A.2d 222 (Pa.Super. 1989). For instance, a spouse's wages and salaries which are earned after separation are non-marital property.

b. However, property acquired after separation in exchange for marital property (or through the joint contributions of the parties) may be marital property. *Perlberger v. Perlberger*, 626 A.2d 1186 (Pa.Super. 1993); *Schmidt v. Krug*, 624 A.2d 183 (Pa.Super.1993).

c. Parties may be separated even though they continued to reside in the same household, so long as there has been a "physical and financial separation," and an intent to dissolve the marriage has been manifested by behavior or communication. *Sinha v. Sinha*, 526 A.2d 765 (Pa.1987); *Frey v. Frey*, 821 A.2d 623 (Pa.Super.2003); *Mackay v. Mackey,* 545 A.2d 362 (Pa.Super.1988); cf. *McCoy v. McCoy*, 888 A.2d 906 (Pa.Super.2005). Note that parties may not, by agreement, preserve a separation date while they are attempting to reconcile. *Britton v. Britton*, 582 A.2d 1335 (Pa.Super.1990).

d. Lottery proceeds received after separation were marital property because tickets were acquired prior to separation. *Nuhfer v. Nuhfer*, 599 A.2d 1348 (Pa.Super. 1991).

e. Post-separation capital appreciation of investment accounts, and similar post-separation increases in value of joint property, may be considered as marital property subject to equitable distribution or income subject to an alimony obligation, but not both (which would constitute impermissible "double dipping"). *Berry v. Berry*, 898 A.2d 1100 (Pa.Super. 2006)(partnership capital account); *Butler v. Butler*, 541 Pa. 364, 663 A.2d 148, 156 (1995)(professional goodwill); *Diament v. Diament*, 816 A.2d 256, 277 (Pa.Super. 2003)(advance of marital assets); *Miller v. Miller*, 783 A.2d 832 (Pa.Super. 2001)(proceeds from sale of marital property); *Rohrer v. Rohrer*, 715 A.2d 463 (Pa.Super. 1998)(retained earnings of a business); cf. *McFadden v. McFadden*, 563 A.2d 180 (Pa.Super.1 989)(pension in pay status). Note that "double dipping" does not occur where the income stream is counted as income for support purposes prior to its valuation for equitable distribution purposes (i.e. pension annuity counted as income for APL, and then present-valued for equitable distribution) or, perhaps, where income streams are counted as income for *child* support purposes. See *Berry v. Berry*, 898 A.2d 1100 (Pa.Super. 2006)(severance pay).

f. Post-separation COLA's that were accrued without any effort or contribution by Husband were considered marital property subject to distribution. *MacDougall v. MacDougall*, 2012 Pa. Super. 83, 49 A.3d 890 (2012).

4. Property Excluded by Agreement

a. Property acquired prior to or during marriage may be excluded from marital property by prenuptial or postnuptial agreement. 23 Pa.C.S. § 3106 (enacted 2004), § 3501(a)(2); *Simeone v. Simeone*, 525 Pa. 392, 581 A.2d 162, 165 (1990); *Williamson v. Williamson*, 586 A.2d 967 (Pa.Super. 1991)(prenuptial agreement); *Laudig v. Laudig*, 624 A.2d 651 (Pa.Super. 1993)(post-nuptial agreement); *Ratarsky v. Ratarsky*, 557 A.2d 23 (Pa.Super. 1989)(marital settlement agreement); *Laub v. Laub*, 505 A.2d 290 (Pa.Super. 1986), superseded by *Sneeringer v. Sneeringer,* 876 A.2d 1036 (Pa.Super. 2005) and *Doyle v. Doyle,* 120 A.3d 388 (Pa.Super. 2015).

b. The burden of proof to set aside a premarital agreement shall be upon the party who challenges the agreement. 23 Pa.C.S. § 3106(a). To prevail, the challenging party must prove by clear and convincing evidence that:

(1) the party did not execute the agreement voluntarily; or

(2) the party, before execution of the agreement:

(i) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; and

(ii) did not voluntarily and expressly waive, in writing, any right to disclosure; and

(iii) did not have any adequate personal knowledge of the property or financial obligations of the other party.

23 Pa.C.S. § 3106 (enacted 2004)

c. Note that § 3106 applies only to agreements executed prior to the date of marriage (not post-nuptial agreements). 23 Pa.C.S. §3106(b).

d. The appellate courts have upheld premarital agreements under all but the most extreme circumstances. *Stoner v. Stoner*, 819 A.2d 529 (Pa.2003); *Simeone v. Simeone*, 581 A.2d 162 (Pa.1990); *Stackhouse v. Zaretsky*, 900 A.2d 383 (Pa.Super.2006); *Paroly v. Paroly*. 876 A.2d 1061 (Pa.Super.2005); *Sabad v. Fessenden*, 825 A.2d 682 (Pa.Super.2003); *Busch v. Busch*, 732 A.2d 1274 (Pa.Super.1999); *Cooper v. Oakes*, 629 A.2d 944 (Pa.Super.1993); *Hamilton v. Hamilton*, 591 A.2d 720 (Pa.Super.1991).

e. The increase in value of marital property also may be excluded from the distributable marital estate by agreement. *Bianchi v. Bianchi*, 859 A.2d 511 (Pa.Super. 2004)(increase in value of pension).

5. Awards and Settlements.

a. Premarital or post-separation. A judgment or settlement of a claim that arose prior to marriage or after separation is excluded from marital property, regardless of when payment was made. 23 Pa.C.S. § 3501(a)(8).

b. During coverture. Post-separation payments of a judgment or settlement of a claim that arose during coverture are generally marital property subject to equitable distribution. *Kozich v. Kozich*, 580 A.2d 390 (Pa.Super.1990).

c. Presumptions. Settlement proceeds received during coverture are presumed marital unless the recipient can prove that the claim arose prior to marriage. *Drake v. Drake*, 555 Pa. 481, 725 A.2d 717 (1999).

d. Note: Subsection (8) of § 3501(a) was added in 1988 to reverse the Superior Court's decision in *Hurley v. Hurley*, 492 A.2d 439 (Pa.Super. 1985), which held that settlements or awards are acquired when the proceeds are received.

6. Property Disposed During Coverture

a. Property which is sold, granted, conveyed or otherwise disposed of in good faith and for value prior to separation is excluded from marital property. 23 Pa.C.S. § 3501(a)(5).

b. In other words, the divorce court generally will not conduct a forensic examination of the financial dealings of an intact family unless there is conspicuous dissipation or wasting.

c. However, where a party liquidates or disposes of marital property after separation, such property shall be included in the marital estate as an advance to the party who liquidated or disposed of such property. *Lowry v. Lowry*, 544 A.2d 972 (Pa.Super. 1988).

7. Disability and Certain Veterans Benefits.

a. Not all disability payments are excluded from marital property. *Drake v. Drake*, 725 A.2d 717 (Pa.1999); *Kozich v. Kozich*, 580 A.2d 390 (Pa.Super.1990).

b. A disability benefit will generally be excluded from the definition of marital property and will qualify as a marital asset only when it cannot be separated from other proceeds that form part of the marital estate. *Cioffi v. Cioffi*, 885 A.2d 45 (Pa.Super. 2005). VA disability benefits are generally excluded from marital property. 23 Pa.C.S. § 3501(a)(6); *Carney v. Carney*, 673 A.2d 367 (Pa.Super. 1996), *Howell v. Howell,* _____ U.S. _____, 137 S.Ct. 1400 (2017). But see *Hayward v. Hayward*, 868 A.2d 554 (Pa.Super. 2005)(Husband was bound by his agreement to pay 50% of the marital portion of his military and civil retirement benefits, even though it may have to be paid from other available funds).

8. Children's Custodial Funds.

a. Children's UTMA/UGMA custodial funds are within the jurisdiction of the Orphans Court Division, not Family Division. *Sebastianelli v. Sebastianelli*, 876 A.2d 431 (Pa.Super. 2005).

9. Other

a. A decedent's remains were not property to be divided in equitable distribution. The authority to dispose of a decedent's remains are governed by the PEF Code, but the court may have the power to assign such authority as an ancillary claim in divorce. *Kulp v. Kulp*, 920 A.2d 867 (Pa.Super.2007).

C. INCREASE OR DECREASE IN VALUE OF SEPARATE PROPERTY.

1. 2005 Divorce Code Amendments.

a. In addition to property acquired during coverture, the marital estate also includes the increase in value of:

(1) Premarital property and proceeds from the sale or exchange thereof, 23 Pa.C.S. §3501(a)(1); and

(2) Property acquired by gift (except between spouses), bequest, devise or descent and proceeds from the sale or exchange thereof, 23 Pa.C.S. § 3501(a)(3).

b. The increase in value is measured from the date of marriage or acquisition, whichever is later, until the date of separation or equitable distribution, whichever results in a lesser increase. 23 Pa.C.S. § 3501(a.1). Note: the offset is mandatory not discretionary. In a case of first impression regarding the interpretation of § 3501(a.1), the Superior Court held that the amount of payment from Husband to Wife should have been based on the value of Husband's pre-marital home at the time of separation, and not at the time of the hearing. *Biese v. Biese*, 979 A.2d 892 (Pa. Super. 2009).

c. Any decrease in the value of separate property shall be offset against an increase in the value of separate property of that same party. Decreases in the value of one party's separate property shall neither reduce the value of that party's marital property nor affect any increase in value of the other party's property. 23 Pa.C.S. § 3501(a.1)

d. Unlike some jurisdictions that distinguish between active and passive depreciation of separate assets, Pennsylvania considers all appreciation in the value of separate assets to be marital property, regardless of whether such appreciation results from inflation, market forces, or the contributions and efforts of one spouse. *Aletto v. Aletto*, 537 A.2d 1383 (Pa.Super.1988); *Anthony v. Anthony*, 514 A.2d 91 (1986).

e. 23 Pa.C.S. § 3501(a.1), enacted in 2005, codified and clarified the state of the law prior to the enactment of the amendment. See *Litmans v. Litmans*, 673 A.2d 382 (Pa.Super. 1996); comment to 23 Pa.C.S. § 3501(a.1).

f. See III.C. below.

2. Prior to 2005 Amendments.

a. The increase in value of nonmarital property from the date of marriage or date of acquisition, whichever is later, to the date of separation is subject to equitable distribution. 23 Pa.C.S. § 3501;

Smith v. Smith, 749 A.2d 921 (Pa.Super. 2000)(increase in value of stocks); *Hutnik v. Hutnik*, 535 A.2d 151 (Pa.Super. 1987) (increase in value of retirement account); *Johnson v. Johnson*, 529 A.2d 1123 (Pa.Super. 1987) (increase in value of business); *McCloskey v. McCloskey*, 514 A.2d 1389 (Pa.Super. 1986)(increase in value of real estate); *Anthony v. Anthony*, 514 A.2d 91 (Pa.Super. 1986).

D. LIABILITIES.

1. Secured Debts and Mortgages

a. Property to the extent to which it has been mortgaged or otherwise encumbered in good faith for value prior to the date of final separation is subject to equitable distribution. 23 Pa.C.S. § 3501(a)(7).

The divorce court has authority to allocate marital debts in equitable distribution. *Litmans v. Litmans*, 673 A.2d 382 (Pa.Super.1996).

2. Unsecured Debts

a. Unsecured debts incurred prior to separation are included in the marital estate, whether they are titled jointly or in the name of an individual spouse. *Duff v. Duff*, 510 Pa. 251, 507 A.2d 371 (1986) (tax liability); *Schenk v. Schenk*, 880 A.2d 633 (Pa.Super. 2005); *Hicks v. Kubit*, 758 A.2d 202 (Pa.Super. 2000) (educational loan).

E. TRANSMUTATION.

1. Generally.

a. Where a spouse has contributed nonmarital property into a joint account or conveyed an asset into joint title, there is a presumption of a gift to the marriage, which converts the nonmarital property into marital property. *Carney v. Carney*, 673 A.2d 367 (Pa.Super. 1996); *Lowry v. Lowry*, 544 A.2d 382 (Pa.Super. 1988); *Gruver v. Gruver*, 539 A.2d 395 (Pa.Super. 1988); *Brown v. Brown*, 507 A.2d 1223 (Pa.Super. 1986); *Bold v. Bold*, 516 A.2d 741 (Pa.Super. 1986); *Madden v. Madden*, 486 A.2d 401 (Pa.Super. 1984).

2. Commingling

a. During coverture. Where nonmarital property is sold and the proceeds are commingled with marital funds to acquire new property, the newly acquired property is marital property. *Gee v. Gee*, 460 A.2d 358 (Pa.Super. 1983).

b. After separation. Generally, where a spouse contributes to a marital account from his or her post-separation income, such contributions

are not transmuted into marital property. *Oaks v. Cooper*, 536 Pa. 134, 638 A.2d 208 (1994). For instance, a spouse's post-separation contributions to a defined contribution retirement plan are excluded from marital property, even though the retirement plan itself is marital property.

F. TRACING.

1. Generally.

a. See *Smith v. Smith*, 653 A.2d 1259 (Pa.Super. 1995).

b. Premarital funds of a party which were comingled with marital funds could be identified as separate property and excluded from the marital estate only if they could be traced to the satisfaction of the factfinder. *Busse v. Busse*, 921 A.2d 1248 (Pa.Super.2007) *Winters v. Winters,* 355 Pa.Super. 64, 512 A.2d 1211, 1215-1216 (1986).

c. Stock issued after separation for business operated as a proprietorship prior to separation is marital property. *Nagel v. Nagle*, 799 A.2d 812 (Pa.Super.2002).

d. Tax refund retained the same nonmarital character as the income from which it was derived. *Cerny v. Cerny*, 656 A.2d 507 (Pa.Super.1995).

G. DOUBLE DIPPING.

1. Generally.

a. If an income-producing asset has been awarded to a party in equitable distribution, the same asset cannot be counted as a source of income from which alimony or support may be paid. Johnson v. *Berry v. Berry*, 898 A.2d 1100 (Pa.Super. 2006); *Miller v. Miller*, 783 A.2d 832 (Pa.Super. 2001)(proceeds from sale of marital property); *Rohrer v. Rohrer*, 715 A.2d 463 (Pa.Super. 1998)(retained earnings of a business); *Kokolis v. Kokolis*, 83 Pa.D. & C.4th 214 (Ally. 2006)(pension in pay status), *affirmed*, 927 A.2d 663 (Pa.Super. 2007); cf. *McFadden v. McFadden*, 563 A.2d 180 (Pa.Super.1989)(pension in pay status).

b. Retained earnings of a business that accrued during the pendency of a support order which was based on the pass-through income of the same business cannot be included in the marital estate. *Rohrer v. Rohrer*, 715 A.2d 463, 465 (Pa. Super. 1998).

c. Money earned prior to the marital separation (a refund of a partner's capital account upon termination) was marital property which cannot be counted as income for support purposes, while money acquired

after separation (a severance payment) was not marital property and could be counted as income for support. *Berry v. Berry*, 898 A.2d 1100 (Pa.Super.2006).

d. Proceeds from the sale of marital assets could not be counted as income for child support purposes. *Miller v. Miller*, 783 A.2d 832 (Pa. Super. 2001).

e. Pension in pay status, which had been previously divided in equitable distribution, could not be counted as income for alimony purposes in modification proceeding. *Kokolis v. Kokolis*, 83 Pa.D. & C.4th 214 (Ally. 2006), *affirmed*, 927 A.2d 663 (Pa. Super. 2007).

f. Pension in pay status, which had NOT been previously divided in equitable distribution, could be counted as income during alimony modification proceeding. *McFadden v. McFadden*, 563 A.2d 180 (Pa.Super.1989).

III. VALUATION OF MARITAL PROPERTY.

A. DATE OF VALUATION.

1. Generally.

a. The date for valuation of marital property is generally the date of trial or distribution, not date of separation. *Sutliff v. Sutliff*, 518 Pa. 378, 543 A.2d 534 (1988); *Holland v. Holland*, 588 A.2d 58 (Pa.Super. 1991); *Miller v. Miller*, 577 A.2d 205 (Pa.Super. 1990). However, the proper date for identifying marital property is date of separation. *Butler v. Butler*, 621 A.2d 659 (Pa.Super. 1993). The date of separation is presumptively not later than the date when the complaint in divorce was served. 23 Pa.C.S. §3103; McCoy v. McCoy, 888 A.2d 906 (Pa.Super. 2005).

2. Retirement Plans.

The date for valuation of a spouse's defined contribution retirement plan and IRA was date of distribution, not date of separation, where post-separation increases in value were due to capital appreciation and investment gains rather than the employee spouse's contributions. *Smith v. Smith*, 653 A.2d 1259 (Pa.Super. 1995); *Gordon v. Gordon*, 647 A.2d 530 (Pa.Super. 1994), reversed by, *Gordon v. Gordon,* 681 A.2d 732 (Pa. 1996).

3. Date of separation.

a. It may be more equitable to value marital assets at date of separation in situations where one spouse consumes or dissipates marital assets

following separation without other spouse's consent. *Nagle v. Nagle*, 799 A.2d 812 (Pa.Super. 2002); *Smith v. Smith*, 653 A.2d 1259 (Pa.Super. 1995); *Naddeo v. Naddeo*, 626 A.2d 608 (Pa.Super. 1993); *Benson v. Benson*, 624 A.2d 644 (Pa.Super. 1993). The trial court is free to select a valuation date that works economic justice between the parties. *Fishman v. Fishman*, 805 A.2d 576 (Pa.Super. 2002); *McNaughton v. McNaughton*, 603 A.2d 646 (Pa.Super. 1992).

4. **Post-Separation Enhancement**.

a. Marital property may be valued as of the date of separation (or, at least, a date earlier than date of trial) if the value of such property was substantially enhanced by the unilateral efforts or contributions of one of the spouses. *Diamond v. Diamond*, 519 A.2d 1012 (Pa.Super.1986); *Adelstein v. Adelstein*, 553 A.2d 436 (1989).

B. METHOD OF VALUATION.

1. Generally.

a. The Divorce Code does not contain a specific method for valuing marital assets (except, perhaps, defined benefit retirement annuities; see 23 Pa.C.S. § 3501(c)). The trial court may consider estimates, inventories, records of purchase price, and appraisals submitted by the parties, and the court is free to accept all, none or portions of the testimony regarding value. *Verholek v. Verholek*, 741 A.2d 792 (Pa.Super. 1999); *Litmans v. Litmans*, 673 A.2d 382 (Pa.Super. 1996).

b. Trial court acted within its discretion by averaging the values given by the parties' appraisers. *Aletto v. Aletto*, 537 A.2d 1383 (Pa.Super. 1988).

2. **Encumbrances**.

a. Generally, marital assets are valued net of any loans or other secured liabilities which attach to such properties. See, e.g., *Schenk v. Schenk*, 880 A.2d 633 (Pa.Super. 2005).

3. **Fair Market Value.**

a. The measure of value in most divorce cases is "fair market value" rather than acquisition value, book value, or replacement value.

b. Fair market value is the price paid by a willing buyer to a willing seller, in an arms' length transaction, where neither is under

compulsion to buy nor to sell and both have reasonable knowledge of the relevant facts. Rev.Rul. 59-60.

c. Acquisition value is the purchase price.

d. Book value is generally equal to the acquisition value minus depreciation.

e. Replacement value is the cost of replacing an asset.

C. INCREASE OR DECREASE IN VALUE OF SEPARATE PROPERTY.

1. See II.C. above.

2. Date for measuring increase in value.

a. The starting point for measuring increase in value of non-marital property is the date of marriage or acquisition, whichever is later. The ending point is the date of separation or distribution, whichever results in a lesser increase in value. 23 Pa.C.S. § 3501(a.1)(codifying and clarifying existing law as of January 2005); *Litmans v. Litmans*, 673 A.2d 382 (Pa.Super. 1996).

b. Any decrease in the value of separate property shall be offset against an increase in the value of separate property of that same party. Decreases in the value of one party's separate property shall neither reduce the value of that party's marital property nor affect any increase in value of the other party's property. 23 Pa.C.S. § 3501(a.1); see III. C.2. below.

c. The increase in value of nonmarital property from the date of marriage or date of acquisition, whichever is later, to the date of separation is subject to equitable distribution. *Smith v. Smith*, 749 A.2d 921 (Pa.Super. 2000)(increase in value of stocks); *Hutnik v. Hutnik*, 535 A.2d 151 (Pa.Super. 1987) (increase in value of retirement account); *Johnson v. Johnson*, 529 A.2d 1123 (Pa.Super. 1987) (increase in value of business); *McCloskey v. McCloskey*, 514 A.2d 1389 (Pa.Super. 1986)(increase in value of real estate); *Anthony v. Anthony*, 514 A.2d 91 (Pa.Super. 1986).

d. Post-separation growth of the increase in value is not marital property. *Ling v. Ling*, 658 A.2d 805 (Pa.Super. 1995).

e. There is a rebuttable presumption that the date when a complaint in divorce is filed and served is the latest possible date of separation. 23 Pa.C.S. § 3103 (amended 2004).

3. Decrease in Value.

a. A decline in the value of nonmarital property may not be offset against any increase in the value of the other party or against the value of the marital estate. 23 Pa.C.S. §3501(a.1); *Winters v. Winters*, 512 A.2d 1211 (Pa.Super. 1986).

b. Note that one spouse may attempt to disqualify the other spouse from offsetting his/her unreasonable consumption or waste of his/her nonmarital assets (or as the comment to 3501(a.1.) describes it, "'malicious' consumption") against the increase in value of his/her nonmarital property. Comment to 23 Pa.C.S. § 3501(a.1)

4. Reconciliation/Remarriage.

a. Where parties were divorced and remarried, pension benefits earned from date of divorce until date of marriage were not included in marital property. *Smith v. Smith*, 749 A.2d 921 (Pa.Super.2000).

D. SPECIAL VALUATION ISSUES.

1. Retirement benefits.

a. Generally, the portions of a retirement plan which are earned prior to marriage and after separation are nonmarital property. Benefits earned during the marriage prior to separation, regardless of whether they were vested on the date of separation, are marital property. *Verdile v. Verdile*, 536 A.2d 1364 (Pa.Super.1988); *Major v. Major*, 518 A.2d 1267 (Pa.Super. 1986).

Note that the Supreme Court's decision in *Berrington v. Berrington*, 534 Pa. 393, 633 A.2d 589 (1993), which was previously the guiding polestar of pension cases, has been overruled by the 2005 Divorce Code Amendments. See, Comment to 23 Pa.C.S. § 3501(c).

b. Defined Contribution Plans. A defined contribution retirement plan (such as a 401(k) plan, Keogh, or profit sharing plan) is generally valued as of the date of distribution, except to the extent that an employee spouse and/or his/her employer made contributions to the retirement plan after separation. *Smith v. Smith*, 653 A.2d 1259 (Pa.Super. 1995); *Schneeman v. Schneeman*, 615 A.2d 1369 (Pa.Super. 1992). Post-separation increases that are attributable to the employee spouse's contributions are nonmarital, but investment gains and appreciation are marital property.

c. Defined Benefit Plans. The accrued benefit of a defined benefit retirement plan is marital property subject to equitable distribution. The identification of the marital component of a defined benefit pension depends, to some extent, on the method of distribution

chosen: immediate offset ("buyout") or deferred distribution (QDRO). 23 Pa.C.S. § 3501(c). The wording of the statute may require judicial interpretation, as it is not entirely clear if there is a difference between the participant's "total" accrued benefit (to be divided by deferred distribution, § 3501(c)(1)) and his/her accrued benefit "as of a date as close to the time of trial as reasonably possible" (immediate offset, § 3501(c)(2)). The subtle difference in wording suggests that the accrued benefit in deferred distribution cases will be greater, as will the denominator of the coverture fraction.

d. Immediate offset ("buyout"). Where immediate offset is chosen as the method of distribution a defined benefit pension, the marital component is equal to the accrued benefit as of a date as close to trial as reasonably possible, multiplied by a coverture fraction. The numerator is the number of months of plan participation from the later of the date of marriage or date of participation to the earlier of the date of separation or date of employment termination. The denominator is the number of months during which the participant worked to earn the accrued benefit, up to the date as close to trial as reasonably possible. 23 Pa.C.S. § 3501(c)(2).

e. Deferred distribution (QDRO). Where deferred distribution is selected, the marital component is equal to the accrued benefit as of the participant's actual retirement date. The numerator is the number of months of plan participation from the later of the date of marriage or date of participation to the earlier of the date of separation or date of employment termination. The denominator is the number of months during which the participant worked to earn the accrued benefit, up to the participant's retirement date. 23 Pa.C.S. § 3501(c)(1).

f. Post-separation Enhancements. Post-separation enhancement of the retirement plan, cost of living allowances, and other increases that are not attributable to the employee's efforts or contributions should be included in the marital component. Meyer v. Meyer, 749 A.2d 917 (Pa.2000); *Brown v. Brown*, 690 A.2d 700 (Pa.1997). Where a participant in a SERS municipal pension plan elected to increase his contributions prospectively and thereby enhance his benefits both prospectively and retrospectively, the Supreme Court held that the retrospective enhanced benefits were marital property. *Smith v. Smith*, 938 A.2d 246 (Pa.2007), *reversing,* 881 A.2d 855 (Pa.Super.2005).

g. Survivor Benefit. Where the participant has elected a joint and survivor form of payment and cannot change his/her election (e.g., the pension has commenced in pay status), the survivor benefit under a defined benefit plan which is in pay status is a separate and distinct

benefit which must be valued for equitable distribution. *Palladino v. Palladino*, 713 A.2d 676 (Pa.Super. 1998). But note that ERISA-governed pensions may be divided by a "separate-interest" QDRO, which eliminates the need to determine the value of the survivor benefit if the pension is not in pay status. See *Keller v. Keller,* 760 A.2d 22 (Pa.Super. 2000).

h. Social Security Offset. Where a spouse (such as a government employee or railroad employee) does not participate in Social Security, the value of his or her municipal or federal retirement plan should be reduced by an amount equal to the Social Security OASDI benefit that he or she would receive if he or she did participate. *Rimel v. Rimel*, 913 A.2d 289 (Pa.Super.2006); *Cohenour v. Cohenour*, 696 A.2d 201 (Pa.Super. 1997); *Cornbleth v. Cornbleth*, 580 A.2d 369 (Pa.Super. 1990). However, no offset is required where neither spouse participates in Social Security. *McClain v. McClain*, 693 A.2d 1355 (Pa.Super. 1997).

i. State employee retirement benefits. State Employees' Retirement System (SERS) covers members of the General Assembly, the Department of Education, Penn State or state-owned educational institutions, community colleges, and several independent commissions and boards. 71 Pa. C.S., Section 5102. Public School Retirement System (PSERS) covers employees of public schools, including charter schools. 24 Pa. C.S., Section 8101*, et seq.* The statutory provisions controlling each system are similar, but are not identical. They are both defined benefit plans.

j. A QDRO recognizing Wife's right to receive a portion of Husband's pension as provided in a marital settlement agreement which was entered into during the divorce proceedings was operative as of the date the parties entered into the settlement agreement and thus the city ordinance in effect as of the date of the agreement allowing for former spouses to be treated as spouses under the plan applied in the case where the city amended its ordinances after the date of the settlement agreement to preclude former spouses to be treated as spouses. 23 Pa. Con. Stat. Ann § 3102(a)(6); *Conway v. Conway*, 209 A.3d 364 (Pa. Super 2019).

k. Where there is a fatal defect on the record, extraordinary circumstances exist, allowing modification of a qualified domestic relations order (QDRO) even when the petition to modify was filed more than thirty days from the date the QDRO was entered. 42 Pa. Cons. Stat. Ann. § 5505; *Zehner v. Zehner*, 195 A.3d 574 (Pa. Super 2018).

l. Husband's State Employee Retirement System (SERS) pension was marital property subject to equitable distribution and as such

was not to be included in H's income calculation *Hess v. Hess*, 212 A.3d 520 (Pa. Super 2019).

2. Business Interests.

a. Book Value. Book value is defined as the value of the assets (usually at acquisition price plus improvements minus accumulated depreciation) minus liabilities. "Adjusted book value" often means that capital assets are listed at appraised value instead of depreciated acquisition value.

b. Goodwill. Theoretically, goodwill is defined as the positive reputation of a business. Practically speaking, the purchase price of a business often exceeds its book value (assets minus liabilities); the difference is placed in the generic category of "goodwill". An advantageous location, capital structure, or relationship with customers and/or suppliers may contribute to goodwill. When determining the value of a business for equitable distribution purposes, the court must consider whether the intangible goodwill value is transferable to a third party purchaser. In the case of a professional practice (such as a medical or dental practice), goodwill might be attributable to the skill and reputation of the professional. Such "personal goodwill" is generally non-transferable. Goodwill which is transferable to a third party purchaser is often referred to as "enterprise goodwill." See *Butler v. Butler*, 541 Pa. 364, 663 A.2d 148 (1995); *Solomon v. Solomon*, 531 Pa. 113, 611 A.2d 686 (1992).

c. Personal Goodwill. If the goodwill attached to a spouse's business is wholly personal and inalienable, then it cannot be actually realized and may not be included in the value for equitable distribution purposes. *Fexa v. Fexa*, 578 A.2d 1314 (Pa.Super. 1990). Goodwill attributable to business location and customer lists (even in a professional practice operated by a sole practitioner) is not personal goodwill and may be assigned a value for equitable distribution purposes. *Smith v. Smith*, 881 A.2d 855 (Pa.Super. 2005).

d. Cases.

CASE	TYPE OF BUSINESS	FACTORS CONSIDERED
Beasley 518 A.2d 545 (1986)	Law Firm	Sole proprietor
DeMasi 530 A.2d 871 (1987)	Medical practice	50% shareholder Specialization in rheumatology Very little competition
Buckl 542 A.2d 65 (1988)	Architectural firm	50% partner Partnership agreement

CASE	TYPE OF BUSINESS	FACTORS CONSIDERED
Fexa 578 A.2d 1314 (1990)	Dental practice	Enduring business with numerous transfers of partnership interests
McCabe 575 A.2d 87 (1990)	Law firm	Enduring business with numerous transfers of partnership interests
Butler 621 A.2d 659 (1993) 663 A.2d 148 (1995)	Accounting practice	Partnership agreement contained a fixed dollar amount for exiting partners
Gaydos 693 A.2d 1368 (1997)	Dental practice	Sole proprietorship
Baker 861 A.2d 298 (Pa.Super. 2004)	Veterinary Practice	Sole proprietorship – purchased for $200K
Brody 758 A.2d 1274 (2000)	Medical Practice	
Berry 898 A.2d 1100 (2006)	Partnership	
Fishman 805 A.2d 576 (2002)	Accounting Firm	
Naddeo 626 A.2d 608 (1993)	Law Practice	
Perlberger 626 A.2d 1186 (1992)	Law Practice	

e. Shareholder Agreements. Where the shareholder agreement specifies a formula for determining the fair market value of a shareholder's interest, such agreement might be controlling. *Butler v. Butler*, 541 Pa. 364, 663 A.2d 148 (1995); *Naddeo v. Naddeo*, 626 A.2d 608 (Pa.Super. 1993); *Buckl v. Buckl*, 542 A.2d 65 (Pa.Super. 1988).

3. Professional Degrees and Licenses.

a. Professional degrees and licenses are considered in the context of earning capacity but are not marital property subject to equitable distribution. *Hodge v. Hodge*, 513 Pa. 264, 520 A.2d 15 (1986); *Lehmicke v. Lehmicke*, 489 A.2d 782 (Pa.Super. 1985).

4. Stock Options.

a. Stock options which were earned during the marriage prior to separation are marital property and must be valued, even if the options are unvested. *Fisher v. Fisher*, 564 Pa. 586, 769 A.2d 1165 (2001); *MacAleer v. MacAleer*, 725 A.2d 829 (Pa.Super. 1999).

b. Where the market price of the stock does not exceed the exercise price (strike price), the options may have no immediate value. An

actuarial analysis, known as the "Black-Scholes" method, has been developed to determine the value of unexercised stock options, which method has been judicially adopted by at least one county. See *Dearlove v. Genzyme Transgenics Corp*., 70 Pa.D. & C.4th 314 (Phila.Co. 2004).

c. A coverture fraction may be applied to determine the marital component of stock options.

5. Trusts.

a. The increase in value of a beneficiary's interest in an irrevocable trust (of which she was not grantor) was not marital property except to the extent that the beneficiary actually received income or acquired the right to exercise control over trust corpus. *Solomon v. Solomon*, 531 Pa. 113, 611 A.2d 686 (1992).

b. A trust beneficiary's future interest in a testamentary trust established by his grandfather was vested even if a condition precedent (the death of the beneficiary's father) must occur before the actual passing of the property to the beneficiary. The increase in value of a beneficiary's future interest (which would be a non-marital gift or bequest) is not within the statutory definition of marital property. *Anzalone v. Anzalone*, 835 A.2d 773 (Pa.Super. 2003); *McGinley v. McGinley*, 565 A.2d 1220 (Pa.Super. 1989).

c. A grantor/spouse's reversionary interest in a grantor retained annuity trust (GRAT) was marital property subject to equitable distribution, notwithstanding a post-nuptial agreement which excluded from marital property any assets contained in the GRAT. *Kennedy v. Kennedy*, 865 A.2d 878 (Pa.Super. 2005). The GRAT was funded by the grantor spouse with stock of a business corporation created during the marriage of Husband and Wife; some of the stock was retained in the trust for the benefit of the parties' children, while the rest reverted to Husband over a three-year period.

E. ASSOCIATED TAX LIABILITIES AND TRANSACTIONAL COSTS.

1. **Tax Liabilities**.

a. Pursuant to the 2005 Divorce Code Amendments, any potential tax liabilities (such as income taxes or capital gains taxes that might be incurred upon the sale of the asset) and/or transfer expenses which might be associated with a marital asset must be considered, regardless of whether those costs may be "immediate and certain." 23 Pa.C.S. § 3502(a.)(10.1) and (10.2). Generally, transfers of property between spouses in connection with a divorce do not trigger

taxable events, except where the equitable distribution decree requires the sale or liquidation of marital assets. IRC §1041.

b. Previously, the case law provided that tax consequences and transfer costs were not to be considered unless the taxable event were certain to occur as a result of the divorce and the amount of tax could be reasonably predicted. *Hovis v. Hovis*, 518 Pa. 137, 541 A.2d 1378 (1988): *Fonzi v. Fonzi*, 633 A.2d 634 (Pa.Super. 1993)(environmental liability associated with removal of fuel storage tanks).

c. Certain marital assets contain built-in tax liabilities (e.g., pensions and stock portfolios) and transfer costs (e.g., real estate) which must be considered vis-à-vis other marital assets (like cash) which are after-tax assets. For a more in-depth discussion, see PBI's *Tax Consequences in Divorce*, PBI 2005-4128.

d. Court was not required to account for tax consequences had Husband sold his interest in a real estate development company where Husband failed to introduce evidence regarding tax consequences and where Husband stated company had no positive value. *Brubaker v. Brubaker*, 201 A.3d. 180, (Pa. Super 2018).

2. Tax Ramifications and Costs in Equitable Distribution

a. In *Balicki v. Balicki*, 4 A.3d 654 (Pa. Super. 2010), the Superior Court concluded that indefinite tax ramifications and costs of sale are to be considered in equitable distribution. The decision noted the factors that should be assessed in deciding whether an adjustment should be made for indefinite tax impact and costs of sale. 23 Pa. C.S.A., Sections 3502 (a)(10.1) and (10.2).

b. As to the facts of the case, it was held as follows: where the trial court properly considered the tax ramifications and sale costs that would be incurred if Husband sold his interest in a family-owned business, the trial court also properly considered the tax consequences of an alimony award to Wife even though this was not raised by either party on exceptions.

c. The Superior Court affirmed the trial court's determination to make a downward adjustment of Wife's share of the marital estate from 65% to 60%. This was based on Husband's voluntary payment of all of the college expenses for the parties' two children. The decision was also based on the fact that during the parties' separation, Husband paid other debts while Wife accumulated savings during the same period.

IV. EQUITABLE DISTRIBUTION OF MARITAL PROPERTY.

A. STATUTORY CRITERIA.

1. Generally.

a. The distribution method codified in the Domestic Relations Code is known as a "dual classification" equitable distribution scheme. Marital property is divided between the parties in such proportions as the trial court deems fit, while nonmarital property is retained by the spouse who owns it. This scheme differs from the "all property" equitable distribution scheme, in which both all property is divided, or the "community property" scheme, in which community property is divided equally. The statutory criteria for equitable distribution of marital property are set forth at 23 Pa.C.S. § 3502(a)(1) – (11).

b. The Domestic Relations Code does not dictate the weight to be placed on each of the criteria, which is within the sole discretion of the trial court. *Sergi v. Sergi*, 506 A.2d 928 (Pa.Super. 1986).

c. The trial court may divide the marital property in any such proportions as it deems appropriate to effectuate economic justice between the spouses and may consider each marital asset independently, applying a different percentage to each asset. 23 Pa.C.S. § 3502 (a).

d. There is no presumption of an equal 50/50 distribution of marital property. In fact, the trial court may not use 50/50 as a starting point for its analysis, which amounts to the same thing as a presumption. *Fratangelo v. Fratangelo*, 520 A.2d 1195 (Pa.Super. 1987).

e. In determining the propriety of an equitable distribution award courts must consider the distribution scheme as a whole. The court must measure the circumstances of the case against the objective of effectuating economic justice between the parties and achieving a just determination of their property rights. *Cook v. Cook*, 186 A.3d 1015 Pa. Super 2018).

2. The "Statistical Data" factors – § 3502(a)(1), (2) and (3).

a. Length of marriage. There is a dearth of case law to interpret this factor, but some judges and practitioners subscribe to the following theory: In the course of a lengthy marriage, it is perhaps more likely that the spouses have sacrificed other financial opportunities, contributed most or all of their separate estates and efforts, and intertwined their financial affairs with each other. *Wang v. Feng*, 888 A.2d 882 (Pa.Super. 2005). On the other hand, after a brief marriage, the spouses' financial affairs may not have been closely intertwined, they may not have sacrificed other financial opportunities, or they

may not have made substantial contributions to the marital enterprise. In cases of short marital duration, the court should endeavor to restore the parties to their original financial positions. In cases of lengthy marital duration, a more equal division of assets is warranted.

b. Prior marriages. Again, the case law is moribund, but theories abound: Perhaps assets which were subject to equitable distribution in a prior divorce should not be subject to "double jeopardy" in a subsequent divorce. Or, perhaps, a party who has been previously divorced should be aware of the need to protect his or her assets through the use of a prenuptial agreement, asset titling, or other means. A better theory: a spouse who has contributed to the care of children born to a spouse's prior union should be entitled to some consideration.

c. Age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties. Most of these criteria speak to economic factors, which are discussed below. The judges and practitioners might also consider the parties' proximity to retirement age. Upon retirement, many parties cease to earn income and begin to consume their savings and assets. If both parties are approaching retirement age, particularly after a lengthy marriage, perhaps the equitable distribution of assets should be crafted to equalize income and assets. *Teodorski v. Teodorski*, 857 A.2d 194 (Pa.Super. 2004)(trial court did not err in ordering a 50/50 split, finding that the economic situation between the two parties at the time of husband's retirement would likely be very similar in terms of monthly incomes).

3. The "Prospects for Recovery" Factors – § 3502(a)(3), (5) and (8).

a. Opportunity for future acquisition of capital income and assets. One of the stated goals of the Domestic Relations Code is "to mitigate the harm to spouses and their children caused by the legal dissolution of the marriage." When divorce occurs, the marital enterprise is severed into two economic units, each of which must be capable of supporting one of the spouses, preferably without financial ties to each other or public assistance. Thus, in dividing marital property, the trial court must consider the relative economic circumstances of the parties and consider each spouse's ability to recover from the adverse economic consequences of divorce. See, e.g., *Ressler v. Ressler*, 644 A.2d 753 (Pa.Super. 1994); *Hayward v. Hayward*, 630 A.2d 1275 (Pa.Super. 1993).

b. Age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties. Where there is a significant disparity between the parties' incomes, earning capacities and employability, the lesser-earning spouse may

require a greater share of the marital property. See, e.g., *Drake v. Drake*, 555 Pa. 481, 725 A.2d 717 (1999); *Lowry v. Lowry*, 544 A.2d 927 (Pa.Super. 1988).

c. Separate Estate/Gifts/Inheritance/Family Resources. While the trial court may not divide the spouse's separate property, it may award a smaller share of marital property to a spouse who has the benefit of a substantial separate estate. *McGinley v. McGinley*, 565 A.2d 1220 (Pa.Super. 1989).

4. The "Contribution" Factors - §3502(a)(4) and (7).

a. Contribution of Premarital Assets. A spouse who contributes his or her premarital assets to the marital estate may be entitled to credit for his or her contributions in the division of marital property. *Sergi v. Sergi*, 506 A.2d 928 (Pa.Super. 1986).

b. Wage-earner Contributions. In dividing marital property, the trial court must consider each of the spouse's contributions to the acquisition, preservation, appreciation and depreciation of the marital estate. *Mercatell v. Mercatell*, 854 A.2d 609 (Pa.Super. 2004). However, a spouse's status as breadwinner did not entitle him to more favorable treatment in equitable distribution. *Hutnik v. Hutnik*, 535 A.2d 151 (Pa.Super. 1987).

c. Homemaker Contributions. The contribution of a homemaker is equally as important as that of the breadwinner. *Fonzi v. Fonzi*, 633 A.2d 634 (Pa.Super. 1993); *Hutnik v. Hutnik*, 535 A.2d 151 (Pa.Super. 1987); *Johnson v. Johnson*, 529 A.2d 1123 (Pa.Super. 1987); *Pascoe v. Pascoe*, 133 Pitt. L.J. 142 (1985). However, where the wife did not contribute substantially to the husband's business, the trial court did not err by awarding the entire value of the business to the husband. *Williamson v. Williamson*, 586 A.2d 967 (Pa.Super.1991).

d. Contributions to Career of Other Spouse (§ 3502(a)(4)). A spouse's contribution to the education, training or career advancement of the other spouse may be considered in dividing the marital estate. *Bold v. Bold*, 524 Pa. 487, 574 A.2d 552 (1990); *Lehmicke v. Lehmicke*, 489 A.2d 782 (Pa.Super. 1985); cf. *Schenk v. Schenk*, 880 A.2d 633 (Pa.Super. 2005).

e. Dissipation. The trial court may also consider a spouse's conduct which results in a dissipation of the marital estate. *Twilla v. Twilla*, 664 A.2d 1020 (Pa.Super. 1995); *Beener v. Beener*, 619 A.2d 713 (Pa.Super. 1992).

5. The "Standard of Living" Factors - § 3502(a)(6), (9) and (10).

a. Although the statutory criteria require the trial court to consider the standard of living established during the marriage, the courts have recognized that it may be impossible or inappropriate to maintain that standard of living after divorce. *Viles v. Viles*, 610 A.2d 988 (Pa.Super. 1992).

b. The parties' incomes, earning capacity, employability and benefits may be a significant factor in determining the appropriate distribution of marital property. *Hutnik v. Hutnik*, 535 A.2d 151 (Pa.Super. 1987); However, an "income equalizing" approach may not be appropriate. *Powell v. Powell*, 577 A.2d 576 (Pa.Super. 1990).

6. The "Costs of Transfer" Factor - § 3502(a)(10.1), (10.2)

a. Pursuant to the 2005 Divorce Code Amendments, any potential tax liabilities (such as income taxes or capital gains taxes that might be incurred upon the sale of the asset) and/or transfer expenses which might be associated with a marital asset must be considered, regardless of whether those costs may be "immediate and certain."

b. Previously, the case law provided that tax consequences and transfer costs were not to be considered unless the taxable event were certain to occur as a result of the divorce and the amount of tax could be reasonably predicted. *Hovis v. Hovis*, 518 Pa. 137, 541 A.2d 1378 (1988).

c. Certain marital assets contain built-in tax liabilities (e.g., pensions and stock portfolios) and transfer costs (e.g., real estate) which must be considered vis-à-vis other marital assets (like cash) which are after-tax assets. For a more in-depth discussion, see PBI's *Tax Consequences in Divorce*, PBI 2005-4128.

7. Marital Misconduct.

a. Marital misconduct, such as infidelity, abandonment, or abusive conduct, is not relevant to the division of marital property. 23 Pa.C.S. § 3502(a); *Smith v. Smith*, 749 A.2d 921 (Pa.Super. 2000); *Perlberger v. Perlberger*, 626 A.2d 1186 (Pa.Super. 1993).

b. Certain types of misconduct, such as excessive drinking or gambling, may have economic consequences which are relevant to the issue of dissipation of marital assets.

B. EFFECT OF AGREEMENTS.

1. **Pre- and Post-nuptial Agreements**.

a. The parties may by written agreement predetermine the proportion of each party's distribution, method of distribution, or other relevant details. For instance, the parties may agree that marital property will be divided equally upon divorce. 23 Pa.C.S. § 3105, 3106.

b. A post-February 1, 1988 marital settlement agreement is enforceable as a court order even if the agreement was not explicitly incorporated or merged into a decree in divorce, and even if the complaint in divorce did not include a claim for equitable distribution. *Annechino v. Joire*, 946 A.2d 121 (Pa.Super.2008).

C. METHOD OF DISTRIBUTION.

1. Generally.

a. The trial court generally determines the percentage of the marital estate to be awarded to each of the parties, based upon the statutory criteria, and then proceeds to assign individual assets to each of the parties to effectuate the overall percentage. The court usually does not divide each individual asset between the parties. See, e.g., *Osial v. Cook*, 803 A.2d 209 (Pa.Super. 2002).

b. The court may distribute marital assets in kind or compel a sale or liquidation of some or all of the marital assets. *Nagle v. Nagle*, 799 A.2d 812 (Pa.Super. 2002); *Gill v. Gill*, 677 A.2d 1214 (Pa.Super.1996); *Zollars v. Zollars*, 579 A.2d 1328 (Pa.Super. 1990).

2. Defined Benefit Retirement Plans.

a. A defined benefit retirement plan is essentially a promise by the employer to pay an annuity to its employees, as determined under a unit benefit formula based on the employee's salary and years of service, commencing on the date of his or her retirement. Unlike a defined contribution plan, there is no account which can be divided in equitable distribution. There are two alternative methods of dividing a defined benefit retirement plan: (a) immediate offset; or (b) deferred distribution.

b. Immediate Offset. If there are sufficient assets in the marital estate, the employee spouse may retain his or her entire pension, and the non-employee may be compensated with other marital assets. To accomplish this type of distribution, it is necessary to determine the actuarial present value of the pension. The immediate offset method is the preferred method of distributing pension benefits. Comment to 23 Pa.C.S. § 3501; *DeMarco v. DeMarco*, 787 A.2d 1072 (Pa.Super. 2001); *Miller v. Miller*, 617 A.2d 375 (Pa.Super.1993); *Elhajj v. Elhajj*, 605 A.2d 1268 (Pa.Super. 1993); *Lyons v. Lyons*, 585 A.2d 42

(Pa.Super. 1991); *Lowry v. Lowry*, 544 A.2d 972 (Pa.Super. 1988); *Hutnik v. Hutnik*, 535 A.2d 151 (Pa.Super. 1987).

c. Deferred Distribution. Often, there are insufficient marital assets to effectuate an immediate offset distribution of pension benefits. Instead, the trial court may enter a Qualified Domestic Relations Order ("QDRO") to divide the pension benefits when they are received after the employee's spouse's retirement. Under the deferred distribution method, it is not necessary or appropriate to determine the actuarial present value of the pension. *Brown v. Brown*, 547 Pa. 360, 690 A.2d 700 (1997); *Berrington v. Berrington*, 534 Pa. 393, 633 A.2d 589 (1993); *Elhajj v. Elhajj*, 605 A.2d 1268 (Pa.Super. 1993); *Endy v. Endy*, 603 A.2d 641 (Pa.Super. 1992); *Lyons v. Lyons*, 585 A.2d 42 (Pa.Super.1991); *Zollars v. Zollars*, 579 A.2d 1328 (Pa.Super. 1990); *Flynn v. Flynn*, 491 A.2d 156 (Pa.Super. 1985); *King v. King*, 481 A.2d 913 (Pa.Super. 1984).

D. CREDITS.

1. Fair Rental Value of Marital Residence

a. Generally. A party who is excluded from possession of the marital residence during separation may be entitled to a credit equal to one-half of the fair rental value of the marital residence, reduced by the spouse-in-possession's payments toward the mortgage loan, real estate taxes, insurance, and maintenance. *Ressler v. Ressler,* 644 A.2d 753 (Pa.Super. 1994); *Schmidt v. Krug*, 624 A.2d 183 (Pa.Super. 1993); *Beener v. Beener*, 619 A.2d 713 (Pa.Super. 1992); *Trembach v. Trembach*, 615 A.2d 33 (Pa.Super. 1992); *Gee v. Gee*, 460 A.2d 358 (Pa.Super. 1983).

b. However, the fair rental value credit is within the trial court's discretion and is not mandatory. *Middleton v. Middleton*, 812 A.2d 1241 (Pa.Super. 2002); *Cerny v. Cerny*, 656 A.2d 507 (Pa.Super. 1995); *Gordon v. Gordon*, 647 A.2d 530 (Pa.Super. 1994), reversed on other grounds, 545 Pa. 391, 681 A.2d 732; *Butler v. Butler*, 621 A.2d 659 (Pa.Super. 1993).

c. In *Lee v. Lee*, 978 A.2d 380 (Pa. Super. 2009), the Superior Court held that the calculation of fair rental credit is discretionary. In that case, Husband was denied credit during the period of a Protection from Abuse (PFA) order.

2. Diminishing Credit for Contributions by a Spouse

a. A spouse who contributes his or her nonmarital assets to the marital estate may be entitled to a "diminishing credit" for his or her

contributions in the division of marital property. *Sergi v. Sergi*, 506 A.2d 928 (Pa.Super. 1986).

b. In *Sergi*, the Honorable Lawrence W. Kaplan of Allegheny County held that the credit for a party's contribution of nonmarital assets would diminish over a period of twenty years, such that the most recent contributions would be mostly reimbursed while older contributions would not be reimbursed.

3. Credit for Post-separation Payment of Liabilities.

a. A spouse is entitled to full credit for his or her post-separation payment of joint debts if the payment is made from marital funds. *Duff v. Duff*, 510 Pa. 251, 507 A.2d 371 (1986); *Grandovic v. Grandovic*, 564 A.2d 960 (Pa.Super. 1989).

b. The trial court may grant full credit, partial credit, or no credit at all for his or her post-separation payments of joint debts if the payment is made voluntarily from his or her income or separate assets. *Diament v. Diament*, 816 A.2d 256 (Pa.Super. 2003); *Middleton v. Middleton*, 812 A.2d 1241 (Pa.Super. 2002); *Jayne v. Jayne*, 663 A.2d 169 (Pa.Super. 1995); *Smith v. Smith*, 653 A.2d 1259 (Pa.Super. 1995); *Schneeman v. Schneeman*, 615 A.2d 1369 (Pa.Super. 1992).

4. Credit for Payment of Business Debt

a. In *M.P. v. J.P.*, 110 PDDRR 74 (Lycoming C.C.P. May 24, 2010), the court held that Husband was not entitled to a credit of the business's unpaid rent as the parties' Property Settlement Agreement did not specifically state that he was entitled to such credit.

E. EQUITABLE REIMBURSEMENT.

1. **Generally.**

a. Where the marital estate is insufficient or illiquid, the trial court may order one spouse to pay installment payments to compensate the other spouse for his or her share of marital property. This type of installment payment is not alimony, but is known as "equitable reimbursement." *Wang v. Feng*, 888 A.2d 882 (Pa.Super. 2005); *Schenk v. Schenk*, 880 A.2d 633 (Pa.Super. 2005); *Twilla v. Twilla*, 664 A.2d 1020 (Pa.Super. 1995); *Fonzi v. Fonzi*, 633 A.2d 634 (Pa.Super. 1993); *Zollars v. Zollars*, 579 A.2d 1328 (Pa.Super. 1990); *Zullo v. Zullo*, 576 A.2d 1070 (Pa.Super. 1990); *Wayda v. Wayda*, 576 A.2d 1060 (Pa.Super. 1990).

b. Trial court may not garnish proceeds from the sale of property owned jointly by husband and his new wife to collect equitable

reimbursement payments owed to former wife. *Johnson v. Johnson*, 908 A.2d 290 (Pa.Super.2006).

c. Trial court acted within its discretion by awarding 60% of the value of a business to the non-owner spouse via equitable reimbursement payments. *Dalrymple v. Kilishek*, 920 A.2d 1275 (Pa.Super.2007).

F. OTHER RECENT DEVELOPMENTS.

1. Appropriate Allocation of Marital Estate When One Party is Disabled.

a. *McCambridge v. McCambridge*, 110 PDDRR 105 (Centre Co. C.C.P. August 19, 2010): Wife was entitled to 65% of the marital estate because of her disability, and due to the fact that she was responsible for the primary care of the two minor children from her first marriage.

2. Allocation of Marital Debt.

a. *Schleiden v. Schleiden*, 110 PDDRR 106 (Centre Co, C.C.P. August 23, 2010): The trial court can allocate a negative balance of the marital estate solely to one party if that party was respeonsible for creating such a negative balance.

3. Refinance of Marital Residence.

a. *Carter v. Williams*, 110 PDDRR 90 (Allegheny Co. C.C.P., July 8, 2010): Master erred in failing to give Wife a deadline to complete the refinancing/ sale of the marital residence.

4. Allocation of Marital Estate Due to Age and Health of Parties.

a. *Coopersmith-Fredman v. Fredman*, 110 PDDRR 77 (Centre Co. C.C.P., May 17, 2010: Husband was entitled to 29% of the marital assets held in Wife's name and 29% of the increase in value of Wife's separate property because he was unable to continue to generate significant income because of his age and health.

V. MISCELLANEOUS.

A. INCOME TAX CONSEQUENCES.

1. Distribution of Marital Property.

a. Generally, transfers of property between spouses in connection with a divorce do not trigger taxable events, except where the equitable distribution decree requires the sale or liquidation of marital assets. IRC §1041.

b. The transferee of marital property receives the transferor's adjusted basis, not stepped-up basis. IRC § 1041(b)(2).

c. Pursuant to the 2005 Divorce Code Amendments, the courts must consider the tax consequences of marital assets, whether or not such tax consequences are immediate or certain. 23 Pa.C.S. § 3502.

d. Previously, the tax liabilities associated with a particular asset, such as capital gains, were deducted from the value of an asset only if a taxable event were certain to occur as a result of equitable distribution. *Hovis v. Hovis*, 518 Pa. 137, 541 A.2d 1378 (1988).

e. Gross income does not include gain from the sale or exchange of property if during the 5-year period ending on the date of the sale or exchange if such property has been owned and used by the tax payer as the tax payer's principal residence for periods aggregating 2 years or more. 26 U.S.C.A. § 121, IRC § 121; effective Dec. 22, 2017.

f. Enforcement

2. Agreements

a. Despite state constitution prohibiting imprisonment of insolvent debtors, Husband was held in contempt and sentenced to 60 days of incarceration for failure to pay ex-wife pursuant to a family trust agreement which was incorporated into the parties' marital settlement agreement. *Cunningham v. Cunningham*, 182 A.3d 464 (Pa. Super 2018).

3. Retirement Accounts and Pensions.

a. Pursuant to the Employee Retirement Income Security Act of 1975 ("ERISA"), most private employer-sponsored retirement accounts and pensions are tax-deferred. Employees and their employers contribute pre-tax dollars, and the capital gains and dividends are not recognized as income until the employee withdraws funds from the account or receives annuity payments.

b. A transfer between spouses of an interest in an ERISA-governed retirement plan does not trigger a taxable event if the transfer is made pursuant to a Qualified Domestic Relations Order. IRC § 408(d), 414(p).

c. Most federal and municipal retirement plans, which are not governed by ERISA, have similar procedures for transferring interests without triggering a taxable event.

d. Transfers between spouses of an interest in an Individual Retirement Account ("IRA") may be made without triggering a taxable event.

B. APPEALS.

1. Exceptions.

a. Although it is not technically an "appeal," exceptions is the procedure by which the trial court may review and modify the recommendation of a master in equitable distribution. In some counties, the trial court renders its decision after reading briefs and hearing oral argument. In other counties, the trial court conducts a de novo hearing. Pa.R.C.P. 1920.55.

b. The master's report, while entitled to great weight, is not binding upon the trial court. *Naddeo v. Naddeo*, 626 A.2d 608 (Pa.Super. 1993); *Butler v. Butler*, 621 A.2d 659 (Pa.Super. 1993), reversed in part and affirmed in part, 541 Pa. 364, 663 A.2d 364; *Trembach v. Trembach*, 615 A.2d 33 (Pa.Super. 1992).

c. The abuse of discretion standard which is applicable to appeals does not apply to the trial court's review of a master's report.

d. Failure to comply with local rules which do not conflict with the statewide rules of procedure may result in dismissal of a party's exceptions. *Delcamp v. Delcamp*, 881 A.2d 853 (Pa.Super. 2005). Issues not raised on exceptions are deemed waived in subsequent proceedings. *Sebastianelli v. Sebastianelli*, 876 A.2d 431 (Pa.Super. 2005).

2. Appellate Courts.

a. The standard of review under which the appellate courts review a decree of equitable distribution is the "abuse of discretion" standard. *Middleton v. Middleton*, 812 A.2d 1241 (Pa.Super. 2002); *Fielding v. Fielding*, 685 A.2d 178 (Pa.Super. 1996). Such decrees will not be disturbed on appeal unless the trial court failed to follow the proper legal procedures or misapplied the law. *Litmans v. Litmans*, 673 A.2d 382 (Pa.Super. 1996).

b. Matters of credibility are within the sound discretion of the trial court. *Smith v. Smith*, 653 A.2d 1259 (Pa.Super. 1995).

C. ENFORCEMENT.

1. Orders.

a. Forfeiture of a spouse's interest in a pension was not an appropriate remedy to sanction her failure to file a timely Qualified Domestic Relations Order as required by the equitable distribution decree. *Prol v. Prol*, 935 A.2d 547 (Pa.Super.2007).

2. Agreements.

a. A marital settlement agreement is enforceable to the same degree and utilizing the same remedies and sanctions, as a court order. 23 Pa.C.S. § 3105(a).

b. A post-February 1, 1988 marital settlement agreement is enforceable as a court order even if the agreement was not explicitly incorporated or merged into a decree in divorce, and even if the complaint in divorce did not include a claim for equitable distribution. *Annechino v. Joire*, 936 A.2d 121(Pa.Super.2008) 23 Pa.C.S. §3105(a).

c. Enforcement of a party's contractual obligations to maintain life insurance policy, satisfy credit card debt, and pay lump sum in exchange for property retained by other party were not barred by four year statute of limitations, as the property settlement agreement created continuing obligations. *Crispo v. Schweitzer Crispo*, 909 A.2d 308 (Pa.Super.2006.)

3. Equitable Reimbursement.

a. Trial court may not garnish proceeds from the sale of property owned jointly by husband and his new wife to collect equitable reimbursement payments owed to former wife. *Johnson v. Johnson*, 908 A.2d 290 (Pa.Super.2006).

D. BANKRUPTCY.

1. Dischargeability of Equitable Distribution Claims.

a. BAPCA – 2005 Bankruptcy Code Amendments. As a result of the 2005 Amendments to the Bankruptcy Code, property settlement obligations arising in divorce are not dischargeable in Chapter 7 and Chapter 11 bankruptcies. Equitable distribution obligations and support obligations have been lumped together as high-priority, non-dischargeable "domestic support obligations." Bankruptcy Code § 1328(a); § 507(a)(i).

b. Pre-Amendment Law. Pursuant to § 523(a)(15) of the Bankruptcy Code, claims against a debtor in bankruptcy arising from a divorce decree or settlement agreement were non-dischargeable in bankruptcy unless the obligation would create a financial hardship for the debtor or the benefit that the debtor would receive from discharge outweighs the detriment that the non-debtor spouse would suffer. *In re Shreffler*, 319 B.R. 113 (Bankr.W.D.Pa.2004).

Chapter Eight

Alimony in Pennsylvania

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ALIMONY IN PENNSYLVANIA

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Prior to 1980, Pennsylvania offered two forms of divorce, *a vincula matrimoni, (* literally from the vines or bonds of marriage) and *a mensa a thoro* (not literally "from bed and board"). The latter form of divorce was actually a decree of permanent separation for which *alimoni* (nourishment) would be due for life. The 1980 divorce code amended earlier statutes enacted in 1815-1817 and 1929. The early 19th century iteration allowed permanent divorce (*a vincula matrimony)* All of these statutes allowed an award of some form of post separation support.

I. **Alimony** is: "An Order for support granted by this or any other state to a spouse or former spouse in conjunction with a Decree granting divorce or annulment. " 23 Pa.C.S. §3103. An award of alimony must be consistent with the purpose of the divorce legislation, to "effectuate economic justice between the parties." 23 Pa. C.S. §3102(a)(6).

> "Following divorce, alimony provides a secondary remedy and is available only where economic justice and the reasonable needs of the parties cannot be achieved by way of an equitable distribution. Teodorski v. Teodorski, 2004 PA Super 313, 857 A.2d 194, 200 (Pa. Super. 2004) (citation omitted). An award of alimony should be made to either party only if the trial court finds that it is necessary to provide the receiving spouse with sufficient income to obtain the necessities of life. Stamerro v. Stamerro, 2005 Pa Super 424, 889 A.2d 1251, 1259, Pa. Super. 2005). "The purpose of alimony is not to reward one party and punish the other, but rather to ensure that the reasonable needs of the person who is unable to support herself through appropriate employment are met." Miller v. Miller, 1999 PA Super 347, 744 A.2d 778, 788 (Pa. Super. 1999) (citation omitted).
>
> "Alimony is based upon reasonable needs in accordance with the lifestyle and standard of living established by the parties during the marriage, as well as the payor's ability to pay." Teodorski 857 A.2d at 200 (citation omitted). An award of alimony may be reversed where there is an apparent abuse of discretion or there is insufficient evidence to support the award. Jayne v. Jayne, 443 Pa. Super. 664, 663 A.2d 169 (1995). Balicki v. Balicki, 2010 PA Super 134, 4 A.3d 654, 659 (Pa. 2010)" Kent v. Kent 2011 Pa. Super. 55 (2011). Cook v. Cook, 2018 Pa. Super, 117

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Alimony is to be distinguished from:

Spousal Support: "Care, maintenance, and financial assistance." 23 Pa. C.S. §3103, 23 Pa. C.S. §4302.

Alimony Pendente Lite: "An Order for temporary support granted to a spouse during the pendency of a divorce or annulment proceeding." 23 Pa. C.S. §3103.
But be careful here; The early cases decided between 1980 and 1985 conflate alimony pendete lite, spousal support and alimony. Some say that a spouse can secure an award of alimony pendent lite and spousal support concurrently. And even as late as 1985 the Supreme Court wrote in *McNulty v. McNulty* that it was not error to "consider the Section 3502 alimony factors when rendering and award of alimony pendent lite under Section 3501. 500 A2d 876. The promulgation of statewide guidelines for alimony pendent lite and spousal support in the mid-1980s seems to have deprived these early cases of their precedential value. But in some counties an award of spousal support or alimony pendent lite is taken as the starting point for the appropriate amount of Section 3502 alimony post divorce. This is true despite an opinion that spousal support guidelines do not set basis for alimony: Fexa v. Fexa, 396 Pa. Super. 481, 578 A.2d 1314 (1990).

Alimony rights are created in the Pennsylvania Divorce Code: "Where a Divorce Decree has been entered, the Court may allow alimony, as it deems reasonable, to either party, only if it finds alimony is necessary." 23 Pa. C.S. §3701(a). "Pennsylvania Alimony Statute, 23 Pa. C.S. Section 3701 is intended to provide for economic justice according to actual needs and the ability of the parties to pay" Baker v. Baker, 861A.2d 298, (Pa. Super. 2004).

Note that the 1988 amendments to the Divorce Code specifically eliminate any threshold requirement implied by the original legislation and several cases. A spouse does not have to first show need and an inability to support himself or herself to be considered for alimony. Efforts to create legislative presumptions as to duration and amount of alimony have never gained serious traction in the legislature.

The claim for alimony must be raised prior to entry of the divorce decree! In Melton v. Melton, 831 A.2d 646 (Pa. Super. 2003), the Superior Court vacated an alimony award to the wife, because she had not petitioned for, or claimed, alimony during the pendancy of the divorce proceedings. The Superior Court also held that the trial court lacked the power to grant a claim for alimony *nunc pro tunc.* However, because the trial court had fashioned an economic distribution award relying on alimony, the entire case was remanded for further consideration, but without any provision for alimony. Obviously, the right to alimony may be waived in a premarital agreement. Stackhouse v. Zaretsky 900 A.2d 383, (Pa. Super. 2006).

However, in Bingaman v. Bingaman, 980 A.2d 155, (Pa. Super. 2009), the Superior Court vacated a divorce decree because the trial court did not properly address alimony stating that it had been resolved by the parties when the record showed that it had not. The final trial court order accepting the Master's Recommendation clearly stated: "The claim for alimony is preserved."

However, husband's praecipe to transmit did not list any related claims pending, and the final decree was silent as to the alimony claim. 71 days after the divorce was entered, wife filed to vacate the decree.

Relying on 23 Pa. C.S. Section 3332, which provides that a motion to open or vacate a divorce decree may be filed within five years if extrinsic fraud exists on the face of the record, the Superior Court held that the record clearly showed the preservation of the alimony claim for future review.

II. Purpose of Alimony: "The Court in ordering alimony shall determine the duration of the Order, which may be for a definite or indefinite period of time which is reasonable under the circumstances." 23 Pa. C.S. §3701(c).

> "The purpose of alimony is not to award one party and punish the other, but rather to insure that the reasonable needs of the person who is unable to support himself or herself through appropriate employment, are met. In determining the nature, amount, duration and manner of all payment of alimony, the court must consider all relevant factors, including those statutorily prescribed for at 23 Pa. C.S. Section 3701. Alimony is based upon reasonable needs in accordance with the lifestyle and standard of living established by the parties during the marriage, as well as the payor's ability to pay." Isralsky v. Isralsky, 824 A.2d 1178, 1188, (Pa. Super. 2003).
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> Rehabilitative - provide regular income to a dependant former spouse while he or she obtains skills necessary to obtain employment to support himself or herself. McNulty v. McNulty, 347 Pa. Super. 363, 500 A.2d 876 (1985); Barrett v. Barrett, 418 Pa. Super. 334, 614 A.2d 299 (1992); Jayne v. Jayne, 443 Pa. Super. 664, 663 A.2d 169 (1995); Miller v. Miller, 744 A.2d 778 (Pa. Super. 1999). Cook v. Cook 2018 Pa. Super. 117.
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> Permanent -to provide lifelong income to a former spouse who will always be unable support himself or herself following divorce. Terriberry v. Terriberry, 357 Pa. Super. 384, 516 A.2d 33 (1986); Gill v. Gill, 450 Pa. Super. 611, 677 A.2d 1214 (1996) -$2,700.00 per month until age 65. Morschhauser v. Morschhauser, 357 Pa. Super. 339, 516 A.2d 10 (1986). Schneeman v. Schneeman, 420 Pa. Super. 65, 615 A.2d 1369 (1992); Lawson v. Lawson, 940 A.2d 444, (Pa. Super. 2007).
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> In Smith v. Smith, 904 A.2d 15, (Pa. Super. 2006), wife, age 62, awarded permanent alimony until she reached eligibility to draw upon husband's Social Security.
>
> Compensatory - also known as "equitable reimbursement" to compensate former spouse for his or her contribution to the education or training of the other spouse if there are insufficient assets in equitable distribution to provide economic justice. Bold v. Bold, 524 Pa. 487, 574 A.2d 552 (1990); Hodge v. Hodge, 513 Pa. 264, 520 A.2d 15 (1986) Twilla v. Twilla, 445 Pa. Super. 86, 664 A.2d 1020 (1995). Equitable reimbursement can also be applied to equitable distribution in cases where insufficient income exists to fully compensate a spouse for his or her contributions. In Wang v. Feng, 888 A.2d 882, (Pa.

Super. 2005) the court awarded wife 100% of the marital estate to reimburses her for the substantial sacrifices she made while husband obtained advanced degrees. The Superior Court in Dalrymple v. Kilishek, 920 A.2d 1275 (Pa. Super. 2007) awarded wife equitable reimbursement payments based on 60% of the value of a marital business dissipated by husband following separation. The Superior Court Opinion does not specify the amount or length of the payments.

The Superior Court has disapproved the use of alimony as a device for funding an insurance policy to protect a spouse's share of a pension divided in equitable distribution. DeMarco v. DeMarco, 787 A.2d 354 (Pa. Super. 2001). The trial court had ordered Husband to Pay Wife $100 per month alimony for 20 years so that Wife could purchase a life insurance policy on Husband's life, because Husband's pension did not allow a survivor's annuity. The Superior Court considered this a double award, noting that if Husband died toward the end of the 20-year period, Wife would receive a windfall in addition to her share of the monthly pension.

In Pennsylvania, alimony is a secondary economic remedy to be considered after equitable distribution. See Cook v. Cook 2018 Pa. Super. 117 Nemoto v. Nemoto, 423 Pa. Super. 269,620 A.2d 1216 (1993); Grandovic v. Grandovic, 387 Pa. Super. 619, 564 A.2d 960 (1989). Twilla v. Twilla, 445 Pa. Super. 86, 664 A.2d 1020 (1995); Moran v. Moran, 839 A.2d 1091 (Pa. Super. 2003). But see Gill v. Gill, 450 Pa. Super. 611, 677 A.2d 1214 (1996) in which the court approved equitable distribution of 38% to wife, who receives $2,700.00 per month alimony until age 65.

III. Factors Considered in Awarding Alimony: 23 Pa. C.S. §3701(b). The court must explain its award of alimony in light of these factors. See DeMarco, supra., Anderson v. Anderson, 882 A.2d 824 (Pa. Super. 2003).

"(1) The relative earnings and earning capacity of the parties." In Edelstein v. Edelstein, 399 Pa. Super. 536, 582 A.2d 1074 (1990), the Court approved alimony of $4,000.00 per month for ten years, based in part on husband's income of $90,000.00 per month as an ophthalmologist, and wife's complete inability to work. See also Harasym v. Harasym, 418 Pa. Super. 486, 614 A.2d 742 (1992). Wife assigned an earning capacity of $20,000.00 -$25,000.00 per year based on projected earnings as a teacher or secretary. Witcher v. Witcher, 433 Pa. Super. 14, 639 A.2d 1187 (1994). In Cohenour v. Cohenour, 696 A.2d 201 (Pa. Super. 1997); husband earned $40,000.00 per year, wife age 50, $9,000.00; the court approved alimony of $400.00 per month until deferred pension distribution begins. Alimony denied in Hicks v. Kubit, 758 A.2d 202 (Pa. Super. 2000): Parties had comparable earning capacities.

"(2) The ages and the physical, mental, and emotional conditions of the parties." Miller v. Miller, 352 Pa. Super. 432, 508 A.2d 550 (1986), Hicks, supra. "Alimony denied as wife is young and healthy and holds an associate's degree" Schenk vs. Schenk, 880 A.2d 633 (Pa. Super. 2005); See also Lawson v. Lawson, supra., wife, age 33, awarded

permanent alimony following stroke. Wife awarded alimony until she qualified for social security (11 years) Balicki v. Balicki, 4 A.3rd 654, (Pa. Super. 2010)

"(3) The sources of income of both parties, including but not limited to medical, retirement insurance, or other benefits." Diamond v. Diamond, 360 Pa. Super. 101, 519 A.2d 1012 (1987), appeal denied 516 Pa. 633, 533 A.2d 92 (1988): Wife denied alimony where she would have $30,000.00 annual income from equitable distribution award. In Brody v. Brody, 758 A. 2d 1274 (Pa. Super. 2000), the court affirmed the denial of alimony to wife even though husband was an anesthesiologist who grossed over $400,000.00 per year. In a strange explanation, the court noted that wife was capable of working in her father's business.

"(4) The expectancies and inheritances of the parties." See Anderson v. Anderson, 822 A.2d 824 (Pa. Super. 2003) in which the Superior Court approved an alimony award to wife of $109.62 per week for a period of five years. The court noted that husband stood to inherit a vacation home from his parents. In Gates v. Gates, 933 A.2d 102, (Pa. Super. 2007), the court held that the income to be generated from husband's substantial trust fund could be considered in determining the amount of alimony which husband could afford.

"(5) The duration of the marriage." Many cases speak to long-term spouses needing assistance following divorce. See Smith v. Smith, 904 A.2d 15 (Pa. Super 2006), permanent alimony awarded after five year marriage. 11 years of alimony for 26 years marriage: Balicki v. Balicki 4 A.3d 654 (Pa. Super. 2010). But see Dyer v. Dyer, 370 Pa. Super. 377, 536 A.2d 453 (1988) for alimony in short term marriage. There, husband had lottery winnings income of over $100,000.00 per year while wife had only Social Security Disability of $368.00 per month But marriage was one year in length and the lottery win came nine years after separation. Alimony denied in Hicks, supra, - four year marriage; no children of the marriage. Alimony also denied in Schenk v. Schenk, 880 A.2d 633 (Pa. Super. 2005) – three year marriage, wife received APL for two years. In Gates, $4,000.00 per month awarded after 10 year marriage. See Teodorski v. Teodorski, 857 A.2d 194 (Pa. Super. 2004), for a good review of length of marriage cases. In Lawson, supra, permanent alimony awarded to disabled wife even though marriage lasted only four years. 2 year marriage yielded no alimony in Biese v. Biese, 979 A.2d 892 (Pa. Super. 2009). Length of marriage is one of the driving elements of an alimony award particularly when a dependent spouse has forsaken her own career for responsibilities to rear children.

"(6) The contribution by one party to the education, training, or increased earning power of the other party ." See Bold, Hodge, supra. In Baker v. Baker, 861 A.2d 298 (Pa. Super. 2004) the court approved alimony of $400.00 per month for three years to wife who made significant contributions while husband attended veterinary school.

"(7) The extent to which the earning power, expenses, or financial obligations of a party will be affectedly reason of serving as the custodian of a minor child." Perlberger v. Perlberger, 426 Pa. Super. 245, 626 A.2d 1186 (1993): Alimony of $30,420.00 per year for ten years awarded to wife who was custodian of child in second grade; child will be a senior in high school at termination of alimony. By contrast, husband did not have to pay

alimony to wife in Teodorski v. Teodorski, 857 A.2d 194 (Pa. Super. 2004) because he had custody of the parties' two minor children. Even though father had primary residential custody of the parties' child, the fact that mother would be watching the child during the day was considered as a significant factor. See Gates, supra.

"(8) The standard of living of the parties established during the marriage." Edelstein, supra, also states that the recipient spouse should enjoy the lifestyle that a substantial income can provide - the court will not allow the independent spouse to merely accumulate assets at the expense of the dependent spouse: "The standard of living to which she is entitled is one reasonably supportable by the income and station in life of the parties, irrespective of the frugal inclination of the husband." See also Perlberger and Dyer, supra, and Sutliffe v. Sutliffe, 339 Pa. Super. 523,489 A.2d 764 (1985) aff'd and remanded, 515 Pa. Super. 39, 528 A.2d 1318 (1986). But contrast with Fexa v. Fexa, 396 Pa. Super. 481, 578 A.2d 1314 (1990) - alimony of $100.00 per week replaced spousal support of $501.00 per week: no obligation on part of supporting spouse to see that the dependant spouse's lifestyle remains unchanged after divorce. Also, it was held that husband's post divorce alimony payments of $400 per month would not adversely affect his ability to maintain a standard of living maintained during marriage when he grossed $40,000 per annum and wife earned $9,000: Cohenour v. Cohenour, 696 A.2d 201 (Pa. Super. 1997). Standard of living is a constant source of conflict between attorneys and clients. The general impression of many dependent spouse's is that they are "entitled to live the lifestyle enjoyed during marriage." While many cases pay lip service to "station in life" (See Betz v. Betz 70 Pa. Super. 402-403(1918), rarely are the awards consistent with the rhetorical flourish found in the opinions.

"(9) The relative education of the parties and the time necessary to acquire sufficient education or training to enable the party seeking alimony to find appropriate employment. " This factor is among the most important! The modern trend is for alimony to provide a transition cushion for the dependent spouse during retraining. In Barrett v. Barrett, supra; the Superior Court disapproved alimony of $400.00 per month for ten years, stating that a college education can be completed in four years. See also Ruth v. Ruth, 316 Pa. Super. 282, 462 A.2d 1351 (1983) -$400.00 per month for two years; Bickley v. Bickley, 301 Pa. Super. 396, 447 A.2d 1025 (1982) -two years alimony so that wife could finish graduate school. Jayne v. Jayne, 443 Pa. Super. 664, 663 A.2d 169 (1995) - two years alimony to pursue retraining -Practice Pointer – make sure at trial you establish your client's future plans and all costs of returning to school.

In Smith v. Smith, 904 A.2d 15, (Pa. Super. 2006), wife, who had tenth grade education, and worked part time as a K-Mart cashier earning $6.50 per hour, was awarded permanent alimony. 35 year marriage. Husband owned his own trucking business although his earnings from it are not reported.

"(10) The relative assets and liabilities of the parties." This section coordinates with factor 16, infra. In Perlberger, supra, the court noted that husband's other post divorce expenses such as child support of $33,000.00 per year, college costs of $24,000.00 per year and life insurance premiums are important considerations. In the typical case, because

alimony is a secondary remedy, courts are going to evaluate what income, if any, can be harvested from the assets awarded.

"(11) The property brought into the marriage by either party."

"(12) The contribution of a spouse as a homemaker." Another important factor - courts are quick to recognize that the spouse who stays at home should be afforded reasonable opportunity to start a new career. In Baker v. Baker, 425 Pa. Super. 237, 624 A.2d 655 (1993), the Superior Court reversed the denial of alimony to wife who spent 30 years as homemaker. See also Schneeman, supra; Mazzei v. Mazzei, 331 Pa. Super. 432,480 A.2d 1111 (1984) Geyer v. Geyer, 310 Pa. Super. 456, 456 A.2d 1025 (1983), Cohenour v. Cohenour, 696 A.2d 201 (Pa. Super. 1997).

"(13) The relative needs of the parties." In McCabe v. McCabe, 374 Pa. Super. 451, 543 A.2d 558 (1988), appeal denied 520 Pa. 606, 553 A.2d 968 (1988). Wife awarded $65,000.00 per year based on the needs created by the parties' lifestyle during the marriage. (Equitable distribution award reversed by the Pennsylvania Supreme Court, 525 Pa. 25, 575 A.2d 87 (1990)). In Middelton v. Middelton, 812 A.2d 1241 (Pa. Super. 2002), an award of alimony for six months was approved to supplement wife's income while the marital residence was listed for sale. The Superior Court in Dalrymple v. Kilishek, 920 A.2d 1275 (Pa. Super. 2007), specifically approved the reduction of alimony from $666.00 per month as recommended by the Master, to $152.00 per month as issued by the trial court following review. The Superior Court rejected the concept that alimony is to be used to equalize the parties' monthly incomes, but must be considered only to supplement a recipients income to meet reasonable needs.

Alimony reduced by trial court because wife overstated needs for clothing and IRA contribution. Wife had received APL for three years during the pendency of the divorce, which presumably provided funds for her work wardrobe, and the award to her of almost $170,000.00 in retirement assets negated her need for additional retirement funds. Balicki v. Balicki, supra.

"(14) The marital misconduct of either of the parties during the marriage." The marital misconduct of either of the parties from the date of final separation shall not be considered by the Court in its determinations relative to alimony; except that the Court shall consider the abuse of one party by the other party. As used in this paragraph, "abuse" shall have the meaning given to it under Section 6102 (relating to definitions). This is a last remnant of the fault divorce days. Most triers of fact will tell counsel that in a statute otherwise cast as "no fault." They do not know how to evaluate this "factor". Typically, one allegation of misconduct begets another by the other spouse and absent measurable damage, most courts tend to disregard this as a factor at all.

In Miller v. Miller, 744 A.2d 778 (Pa. Super. 1999) the court found that wife's attraction to a friend could be construed as minimal marital misconduct, but not significant enough to warrant consideration by the court.

"(15) The Federal, State and local tax ramifications of the alimony award." Balicki v. Balicki, 4 A.3d 654 (Pa. Super. 2010), Cunningham v. Cunningham, 378 Pa. Super. 280, 548 A.2d 611 (1988). Although decided before the 1988 amendments, Cunningham states that depreciation and depletion will be added back in considering income for alimony. But see Labar v. Labar, 731 A.2d 1252 (Pa. 1999).

Also, the tax consequences of the alimony award must be taken into consideration. ". . .we hold that an amount of an alimony award should be established taking into consideration the actual post-tax net income of the payor under the award. This actual post-tax net income would be determined by taking into consideration the decreased tax liability due to the tax deductible alimony. In coming to this conclusion, we are simply applying well established law: '. . . it is clear that a spouse's present expendable income, potential earning power, and property and financial resources rather than his net income, determine the reasonableness of a support order.' Commonwealth ex rel. Re David v. David, 380 A.2d 398 at 400, 251 Pa. Super. 103 (Pa. Super. 1977). '" as cited in Diament v. Diament, 816 A.2d 256 (Pa. Super. 2003) at 280, 281. See also Smith v. Smith, 904 A.2d 15 (Pa. Super. 2006).

Danger: The Superior Court has also held that an alimony award must be fashioned according to the Internal Revenue Code and IRS regulations if it is intended by the court to be tax deductible to the payor and taxable income to the payee. The law related to alimony as taxable income and corresponding deductibility was changed in 2017 and unless you are working with an instrument predating 1/1/2019 (order or agreement) including modifications of an instrument from that era **the alimony deduction is effectively gone.**

"(16) Whether the party seeking alimony lacks sufficient property, including but not limited to property distributed under Chapter 35, to provide for the parties' reasonable needs." Alimony awarded where assets insufficient: Endy v. Endy, 412 Pa. Super. 398, 603 A.2d 641 (1992). Baker v. Baker, 425 Pa. Super. 237, 624 A.2d 655 (1993). Distribution of substantial marital assets justifies lower or shorter alimony award: Perlberger, supra, (Mrs. Perlberger received 2/3 of marital estate); Harasym, supra. Diamond, supra.; O'Callaghan v. O'Callaghan, 530 Pa. 176, 607 A.2d 735 (1992). In Tagnani v. Tagnani, 439 Pa. Super. 596, 654 A.2d 1136 (1995) the Superior Court approved the trial court's reduction of alimony from $2,000.00 per month recommended by the Master to $750.00 per month based on wife's equitable distribution award. In Cohenour v. Cohenour, the wife received permanent alimony of $400.00 per month in addition to 50% of a deferred pension and 70% of remaining marital assets. Assets awarded in equitable distribution should not be considered "income" for purposes of measuring alimony needs. Conner. v. Conner, 2019 Pa. Super. 251; Miller v. Miller, 783 A.2d 832, 835-6 (Pa. Super, 2001). In Schultz v. Schultz, court found that where $7 million in assets were being divided 55/45% and husband earned $15,000 a month net to wife's $10,000 a month alimony not needed. 2018 Pa. Super. 83

Alimony denied in Brody v. Brody, 758 A. 2d 1274 (Pa. Super. 2000), because wife received 55% of marital estate.

"(17) Whether the party seeking alimony is incapable of self support through appropriate employment." In Lawson, supra, husband ordered to pay permanent alimony of $500.00 per month, even though wife, because of disability, was entitled to complete care through public assistance.

The enumerated factors are not exclusive. Courts may consider other relevant factors. Ressler v. Ressler, 644 A. 2d 753 (Pa. Super. 1994); Conner v. Conner, 2019 Pa. Super. 251. Schultz v. Schultz, 2018 Pa. Super. 83

IV . Cohabitation as Bar to Alimony: "No Petitioner shall be entitled to receive any award of alimony where such Petitioner has entered into cohabitation with a period of the opposite sex who is not a member of the Petitioner's immediate family within the degrees of consanguinity subsequent to the divorce pursuant to which alimony being sought." Pa. C.S. §3706.

Moran v. Moran, 839 A.2d 1091 (2003), provides the classic example of cohabitation as a bar to alimony. At trial, husband presented the testimony of two private investigators to prove that wife had cohabitated subsequent to the parties' separation. Wife admitted the post separation affair, but argued that the relationship had terminated prior to the Master's recommendation. The court refused to accept wife's theory that she became re-eligible for alimony by terminating the cohabitation prior to the economic trial.

The court held in Lobaugh v. Lobaugh, 753 A.2d 839 (Pa. Super. 2000), that wife's relationship in her home with a companion did constitute cohabitation even though she asserted she was merely providing a home for a sick friend and his son. The evidence showed that the wife and her friend shared the same bedroom and that the friend had made financial contribution to the home. This case also seems to hold that once cohabitation occurs, all future alimony is waived, even if the cohabitation ceases.

This prohibition is not as absolute as it seems. First, it's always possible for the parties to agree that cohabitation will not bar continuation of alimony – for example there may be important tax reasons and other tradeoffs. Also, unless cohabitation termination is specifically written into a Marital Settlement Agreement alimony Section 3105 makes clear that cohabitation is not a basis for modification. See Van Kirk v. Van Kirk, 336 Pa. Super. 502, 485 A.2d 1194 (1984), Woodings v. Woodings, 411 Pa. Super. 406, 601 A.2d 854 (1992); Brower v. Brower, 413 Pa. Super. 48, 604 A.2d 726 (1992). McMahan v. McMahan 417 Pa. Super. 592, 612 A.2d 1360 (1992). Jackson v. Culp, 400 Pa. Super. 519, 583 A.2d 1236 (1990).

In Miller v. Miller, 352 Pa. Super. 432, 508 A.2d 550 (1986), the Court found that former wife was not cohabitating so as to terminate alimony although she admitted regular weekend sexual liaisons with her boyfriend. They maintained separated bank accounts, both had separate residences, and they did not commingle income or assets.

Also, see Twilla v. Twilla, 445 Pa. Super. 86, 664 A.2d 1020 (1995) in which the Superior court approves a monthly award under the theory "equitable reimbursement" where the recipient admits cohabitation.

And in a modern twist to the cohabitation theme, the Superior Court has held that cohabitation with a member of the same sex can cause alimony to terminate if the agreement is ambiguous. Parol evidence is admissible to determine the intentions of the parties. Kripp v. Kripp, 578 Pa. 82, 849 A.2d 1159 (2004). Practice Pointer: Be sure to add same sex termination language to your agreement!

V. Is It Really Alimony?

Generally, alimony takes the form of a periodic payment from one former spouse to another, such as a fixed amount per month. However, parties can label almost any type of financial assistance, such as a mortgage payment, as alimony. Consider in negotiations the tax, bankruptcy, and enforcement advantages and disadvantages of using the term alimony to describe the assignment of a continuing obligation.

But beware!

In D'Huy v. D'Huy, 390 Pa. Super. 509, 568 A.2d 1289 (1990), the Superior Court held that a periodic payment over 10 years, specifically designated as alimony by the parties in a Marital Settlement Agreement, was really a long-term buyout of property interests. The Court held that the payment would therefore not terminate upon remarriage of the recipient. See also Kohn v. Kohn, 242 Pa. Super. 435, 364 A.2d 350 (1976). (issue of whether payment was alimony or child support is for trier of fact)

In Twilla, supra, the Superior Court found that the trial court intended the $200.00 per monthly payments to be equitable reimbursement, and therefore, although labeled alimony, the payments would not be terminated under 23 Pa. C.S. §3706. Similarly, a periodic payment made to former spouse may not be considered as alimony if funds are intended to be applied to marital bills assumed by the recipient. In Zullo v. Zullo, 395 Pa. Super. 113, 576 A.2d 1070 (1990), the Court said that it would ignore artificial labels such as alimony, and look at the true reason for the payments in deciding termination and enforceability. In Johnson v. Johnson, 864 A.2d 1224 (Pa. Super. 2004), the trial court was chastised for labeling payments as alimony when the stream was clearly intended as equitable reimbursement. Husband was denied special relief to modify payments.

But Wagoner v. Wagoner, 538 Pa. 265, 648 A.2d 299 (1994) points out that "alimony" can also be reduced when it is a substitute for equitable distribution, if the distribution scheme becomes inoperative by change in circumstances.

At the time of divorce, Mr. Wagoner was making $5,000.00 per month as a Ground Flight Engineer for Pan Am. He was ordered to pay $1,000.00 per month alimony for 6 years. Nine months later Pan Am was out of business and Mr. Wagoner's income dropped to $300.00 per week unemployrnent and $750.00 per month retirement. He was 57 years old with arthritis in both knees and no chance of better employment. The Superior Court affirmed the trial court's refusal to a decrease under Section 3701, remarking that the alimony was part of overall scheme of distribution.

The Supreme Court reversed, holding that the refusal to allow modification was unreasonable and an abuse of discretion. The court characterized the payments as an offset to husband's pension, as alimony in the nature of additional financial assistance to wife. Since distribution and alimony had been decided only nine months before, and the pension still remained intact, the court remanded the whole case back for re-examination. The Supreme Court also noted that husband should have proceeded with a Petition for Specific Relief under Pa. R.C.P. 1920.43 rather than a Petition to Modify Alimony.

The equitable distribution to alimony theory was specifically rejected by the Superior Court in In Re Trust Agreement of John H. Ware, 814 A.2d 725, (Pa. Super. 2002). In this case, Mr. Ware argued that his commitment under a property settlement agreement should be considered alimony because it would be reduced by 25% should his ex-wife die. Mr. Ware was attempting to force a trust fund to make the payments for him as support, because the principal of the trust could not be invaded for ordinary debts. The court specifically refused to re-label the obligation as alimony, in part because the property settlement agreement specifically stated that the obligation was equitable distribution.

VI. **Enforcement and Collectability of Alimony**:

Alimony which is part of a Marital Settlement Agreement may be enforced by a suit on the underlying contract, or by applying 23 Pa. C.S. §3105:

> "(a) Enforcement -A party to an agreement regarding matters within the jurisdiction of the Court under this act, whether or not the agreement has been merged or incorporated into the decree, may utilize a remedy or sanction set forth in this act to enforce the agreement has been an order of the court except as provided to the contrary in the agreement. "
>
> It then follows that the remedies afforded in 23 Pa. C.S. §3502(e) are available:
>
> "(e) Powers of the Court - if, at any time, a party has failed to comply with an order of equitable distribution, as provided for in this section, or with the terms of an agreement as entered into between the parties, after hearing, the court may, in addition to any other remedy available under this act, in order to effect compliance with its order:
>
> (1) enter judgment;
>
> (2) authorize the taking and seizure of the goods and chattels and collection of rents and profits of the real and personal, tangible and intangible property of the party;
>
> (3) award interest on unpaid installments;
> (4) order and direct the transfer or sale of any property required in order to compel with the court's order;
>
> (5) require security to insure future payments in compliance with the court's order; See Nucci v. Nucci 355 Pa. Super. 549, 513 A.2d 1059 (1986).

(6) issue attachment proceedings, directed to the Sheriff or other proper officer or the county , directing that the person named as having failed to comply with the court order be brought before the court, at such time as the court may direct. If the court finds, after hearing, that the person willfully failed to comply with the court order, it may deem the person in civil contempt of court and, in its discretion, make an appropriate order, including, but not limited to, commitment of the person to the county jail for a period not to exceed six months;

(7) award counsel fees and costs;

(8) attach wages; or

(9) find the party in contempt, however, wage attachment and contempt are not permitted to enforce an alimony provision of a pre-1988 Marital Settlement Agreement unless specifically authorized in the Agreement. Other enforcement remedies of Section 3105(a) are available. Sorace v. Sorace, 440 Pa. Super. 75, 655 A.2d 125 (1995). In Espenshade v. Espenshade, 729 A.2d 1239 (Pa. Super. 1999) husband held in contempt even though he and wife had a sham addendum to their agreement to decrease the alimony payment so that husband could finance a house. The Court will look beyond the actions of the parties to determine their true intent.

In Glynn v. Glynn, 789 A2.d 359 (Pa. Super. 2001) the court approved wage attachment, assessment of attorney fees and costs, with interest, and incarceration with work release as contempt sanctions. See also Foulk v. Foulk 789 A.2d 254 (Pa. Super. 2001). The court can even go as far as to attach non-marital assets and income as a contempt sanction for failure to pay alimony: Richardson v. Richardson 774 A.2d 1267 (Pa. Super. 2001). This power includes federal disability benefits under Uveges v, Uveges, 103 A.3d 825 (Pa. Super, 2015)

Compare with Polito v. Polito, 440 Pa. Super. 328, 655 A.2d 587 (1995). The Politos entered into a Marital Settlement Agreement in Pennsylvania in January 1981 providing that $225.00 per week spousal support would be automatically converted to alimony upon entry of a Divorce Decree. Wife obtained a Dominican Republic divorce on February 16, 1981, which included language that the Marital Agreement survived the divorce, and the parties were ordered to comply with it. Mr. Polito paid alimony for over ten years, then stopped claiming that since the Dominican Republic doesn't recognize alimony, he was under no obligation. The Superior Court disagreed, holding that since the Agreement was made in Pennsylvania, and is unambiguous, the alimony is binding and enforceable under Section 3105 through application of Section 3104.

Tuthill v. Tuthill, 763 A.2d 417 (Pa. Super. 2001) held that alimony would continue under the terms of the parties' Marital Settlement Agreement at a monthly payment rather than as a lump sum payment. There, husband had elected to withdraw his pension rather than receive it in periodic payments. Wife was entitled only to the 20% of the projected monthly payment, rather than a 20% share of the lump sum.

But see Dudas v. Pietzykowski, 578 Pa. 20, 849 A.2d 852 (2004) in which the Supreme Court disapproved the escrow of husband's entire worker's compensation compromise for future

due alimony, even though husband and had a previous history of arrears. The Supreme Court first noted that since worker's compensation is a substitute for wages, only 50% could be attached under 23 Pa. C.S. Section 3703(c). Also, since husband's Social Security Disability could be attached for alimony, there was no need for additional security.

§3703 Enforcement of arrearages

"If, at any time, a party is in arrears in the payment of alimony or alimony pendente lite as provided for in sections 3701 and 3702 after hearing, the court may, in order to effect payment of the arrearages:

(1) enter judgment; see Stewart v. Stewart, 743 A.2d 955 (Pa. Super. 1999) - alimony judgment not restricted to statute of limitation for recording under 42 Pa. C.S. §5525 (4 years under action upon foreign judgment) or 42 Pa. C.S. §4306 (Uniform Enforcement of Judgment Act).

In Bonfiglio v. Bonfiglio, 781 A.2d 1197 (Pa. Super. 2001) the court confirmed that in addition to UEFJA, alimony arrears may be entered as a judgment under 23 Pa.C.S. §3705. There is no statute of limitations applicable under either act to register an alimony arrears judgment! Note: The court in Bonfiglio also implied that a judgment remedy may be available under the Uniform Interstate Family Support Act (UIFSA) 23 Pa.C.S. §7601, et seq.;

(2) authorize the taking and seizure of the goods and chattels and collection of the rents and profits of the real estate of the party;

(3) attach no more than 50% of the wages of the party; see Dudas v. Pietzykowski, supra.

(4) award interest on unpaid installments; the Court in Purdy v. Purdy, 715 A.2d 473 (Pa. Super. 1998) ruled that pre-judgment interest on unpaid alimony is discretionary with the Court under this section, but a matter of right if sought by separate suit on the contract.

(5) Require security to insure future payments;

(6) Issue attachment proceedings, directed to the sheriff or other property officer of the county, directing that the person named as having failed to comply with the court order be brought before the court at such time as the court may direct. If the court finds, after hearing that said person willfully failed to comply with the court order, it may deem said person in civil contempt of court and in its discretion make an appropriate order including, but not limited to, commitment of said person in civil contempt of court and in its discretion make an appropriate order including, but not limited to, commitment of said person to the county jail for a period not to exceed six months.

(7) award counsel fees and costs;

In Nika v. Nika, 382 Pa. Super. 551, 555 A.2d 1337 (1989), the Superior Court approved offset from future equitable distribution due husband to create an alimony credit for wife. Husband had previously ignored financial obligations, and wife could not afford continuing litigation.

See also 23 Pa. C.S. §3701(f): "Whenever the Court shall approve an agreement for the payment of alimony voluntarily entered into between the parties, such agreements shall be deemed the Order of the Court and may be enforced as provided in §3703.

The Legislature also built in a method for payment of alimony through the Domestic Relations Office:

§3704 Payment of support, alimony, and alimony pendente lite

"When so ordered by the court, all payments of child and spousal support, alimony or alimony pendente lite, shall be made to the domestic relations section of the court which issued the order or such section of the court at the residence of the party entitled to receive such an award. The domestic relations section shall keep an accurate record of all such payments and shall notify the court immediately whenever any person subject to payment order is 30 days in arrears in such payment so that appropriate action may be taken to enforce the order of the court. It shall be the duty of the domestic relations section to distribute such payments to the person entitled thereto as soon as possible after receipt. "

Whenever necessary or appropriate, the court can upon motion, treat the alimony order like a child support order. Contempt of court can follow any non-compliance. Alimony which has been ordered following a full trial is similarly enforceable under Sections 3502(e); 3703 and 3704. Look for county rules related to enrollment of an alimony order as part of the Domestic Relations/PACSES collection process.

VII. Modification of Alimony 23 Pa. C.S. §3701(e) provides:

"Any order (in contrast to an agreed order) entered pursuant to this section is subject to further order of the court upon changed circumstances of either party or substantial and continuing nature whereupon such order may be modified, suspended, terminated, re-instituted, or a new order made. Any such further order shall apply only to payment accruing subsequent to the petition for the requested relief. "

Once alimony is ordered by court, it is always subject to review Soncini v. Soncini, 417 Pa. Super. 393, 612 A.2d 998 (1992) is illustrative. The trial court originally awarded wife one year alimony of $475.00 to assist her in taking care of the parties' incurably ill daughter. However, alimony was later continued indefinitely because of wife's substantial involvement in daughter's unique medical care and daughter's deterioration. (Author's note: Shouldn't this have been handled in child support?)

Nemoto, supra, shows that courts can be very creative in alimony modification. There, wife is permitted to seek an increase if her earnings decrease or if her needs increase, but not if husband's income increases. See also Wagoner, supra.

The court in McFadden v. McFadden 389 Pa. Super. 506,563 A.2d 180, (1989) affirms the concept that alimony is modifiable, but creates a heavy burden to prove substantial and continuing change in circumstance. Husband's retirement did not constitute such a change when he knew of retirement 5 years earlier when negotiating divorce settlement. When negotiating long term alimony, be aware that many clients simply assume that lifetime alimony ends when the payor retires. There is no authority for that proposition. Furthermore, if disability or unemployment are to result in the ability to request modification, that needs to be set forth in the agreement itself.

In Speaker v. Speaker, 2018 Pa. Super 58, 183 A.3d 411 The Court reversed a modification premised upon husband's testimony about his retirement plan rather than his actual retirement.

In Gates v. Gates, 933 A.2d 102, (Pa. Super. 2007) the Superior Court approved the trial court's reservation of jurisdiction to modify an alimony award to reflect the actual income produced by the husband's trust fund. It is uncertain that this dictum would allow for annual review, or an increase or decrease, based on the performance of the investments.

However, note Lee v. Lee, 352 Pa. Super. 241, 507 A.2d 862 (1986). The court reversed the trial court's refusal to permit a payor husband to seek an alimony decrease. The parties had entered into an Agreement in 1980 for the husband to pay $450.00 per month alimony. But in 1984 husband's income was reduced from $2,000.00 per month to $1,100.00 because of forced retirement. Cited in Speaker v. Speake 2018 Pa. Super. 58

{2015 Author's Comment: I believe my predecessor author errs here. Lee was decided in 1986 . The Code was amended in 1990 to include Section 3105 stating that agreements are nonmodifiable unless modification is preserved. Thus *Lee* was legislatively overruled by a subsequent statute}

Section 3701(e) applies only to court ordered alimony. 23 Pa. C.S. §3105(c): "In the absence of a specific provision to the contrary appearing in the Agreement, a provision regarding the disposition of existing property rights and interest between the parties, alimony, alimony pendente lite, counsel fees or expenses shall not be subject to modification by the court. " But, language in a Marital Settlement Agreement allowing modification will be honored Chamberlin v. Chamberlin, 693 A.2d 1368 (Pa. Super. 1997).

In Stamerro v. Stamerro, 889 A.2d 1251, (Pa. Super. 2005), the court denied husband's attempt to decrease alimony although he alleged his annual income fell below a threshold of $200,000.00 permitting review. The court held that because husband had voluntarily left a job paying over $300,000.00, he could not take advantage of the opener in the agreement. Parties are bound by a duty of good faith in negotiations, and the court imposed the doctrine of necessary implication as a means of avoiding an unjust result. Here, husband claimed his annual income was $84,000.00, but he listed yearly living expenses of over $210,000.00. The Superior Court also approved the trial court's language that tax definitions of income are not controlling to determine income under the Divorce Code. See Darby v. Darby, 686 A.2d 1346 (Pa. Super. 1996).

Incarceration, for any reason, is not a basis for modification of alimony Willoughby v. Willoughby, 862 A.2d 654 (Pa. Super. 2004). The court should schedule a hearing when obligor is released to determine repayments due.

Only an alimony order that has been docketed in the Prothonotary's office can be subject to a review for modification. Halpern v. Halpern, 926 A.2d 444, (Pa. Super. 2007)

VIII. Termination of Alimony

The line of cases from Van Kirk v. Van Kirk, supra (see section IV - Cohabitation) establishes two distinct methods for termination of alimony: For alimony provided in a Marital Settlement Agreement, only the language in the Agreement will determine grounds for termination. However, the termination sections of the Divorce Code do apply to those alimony orders entered by court following full litigation, whether or not the language is specifically included in the Order. Gaydos v. Gaydos, Pa. Super., 693 A.2d 1368 (1997).

Cohabitation: See 23 Pa. C.S. §3706, supra.

Remarriage: ". . . remarriage of the party receiving alimony shall terminate the award of alimony." 23 Pa. C.S. §3701(e).

Death: "Upon the death of the payee party, the right to receive alimony pursuant to this chapter shall cease. Upon the death of the payor party, the obligation to pay alimony shall cease unless otherwise indicated in an agreement between the parties or an Order of Court." 23 Pa. C.S. §3707.

In Little v. Little, 441 Pa. Super. 185, 657 A.2d 12 (1995) the parties' Marital Settlement Agreement clearly stated that alimony would continue only while wife was a full time student. Husband was permitted to terminate alimony when wife entered inpatient alcohol rehabilitation program. The court went on to hold that the parties' prior modification of the agreement did not prospectively cause waiver of the termination provision where the contract was unambiguous.

Consider when negotiating alimony: Is your recipient client going to marry soon? Is the payor elderly or sick? If alimony is being used as a distribution tool, make sure that it remains payable following recipient's death, and have payments secured by judgments and insurance. The court can, but is not required to, order life insurance to secure alimony. Balicki v. Balicki, 4 A.3d 654, (Pa. Super. 2010).

IX. General Tax Aspects of Divorce

Note: In late 2017 the Congress enacted a tax reform bill which provided for a stepped elimination of the alimony deduction. Under that law, effective 1/1/19 alimony would not be taxable to the recipient or deductible by the payor **unless** the obligation arises from an order or agreement executed prior to 12/31/2018. If you are addressing order and/or agreements executed prior to 12/31/2018 the tax law recited below applies. Also, if you are amending instruments

(orders/agreements) executed prior to 12/31/2018 the presumption is that the taxability under the former law is retained. But effective 1/1/2019 no new agreement or order can be taxed to the recipient or deducted by the payor.

See also: Tax Consequences in Divorce - Avoiding the Pitfalls PBI No. 2005-4128.

Internal Revenue Code Section 71 provides that alimony payments are income to the recipient and are deductible to the payor if certain requirements are met:

(a) The payment is in cash;

(b) The payment is made under a divorce or separation instrument by or on behalf of a spouse or former spouse;

(c) The Agreement itself does not provide contrary tax treatment;

(d) The parties must be in separate households;

(e) Payments terminate at the death of the payee;

(f) The parties do not file joint tax returns with each other;

Types of Payments:

Cash or checks directly to payee;

Cash payments to a third party made for the benefit of the payee, if pursuant to the divorce or separation instrument, i.e. rent, health insurance premiums, income.

Payment will not be considered alimony for tax purposes if tied to contingencies such as the age of the child. For example, the service will consider that part of an alimony payment as child support if payment is reduced when the child reaches age 18.

X. Recapture of Front Loaded Alimony

A property distribution buyout may be couched as alimony for tax or other advantages. For example, the parties agree that the payee will receive three annual payments, with substantially larger payments due the first two years.

Section 71 (c) of the Internal Revenue Code requires the payor to include in his or her gross income in the third post-separation year the excess payments made the first and second year.

Generally, the first post-separation year payments can exceed the second year by not more than $7,500.00, and the second year can exceed the third year payment by no more than $15,000.00.

Recapture is not required if alimony terminates because of the death of either party, or remarriage of payee before the end of the third post-separation year.

How to Compute Recapture

Step 1: Did the alimony paid in the second year exceed the sum of the alimony paid in the third year post-separation year plus $15,000.00?

Step 2: Did the alimony paid in the first post-separation year exceed the sum of the average of the second year payments, reduced by any second year excess payment, and alimony paid in the third year plus $15,000.00?

Step 3: Add the sums of Step 1 and Step 2. This is the excess alimony payment which will be included as income to payor in third post-separation year, and will be deducted from income of payee in third post-separation year.

Termination of alimony near dates related to emancipation of a child.

In Isralsky v. Isralsky, 824 A.2d 1178 (Pa. Super. 2003), trial court had ordered husband to pay alimony until the youngest child graduated from high school or turned 18. This provision clearly violates Internal Revenue Code Section 71 which states that to be deductible, the payment must not be contingent upon an event associated with a child (such as attaining a specific age, marrying, dieing, or leaving school). The court remanded the alimony award back for consideration for amendment to comply with the deductibility requirements. See also Gates, supra.

XI. Alimony Trust

Section 682 of the Internal Revenue Code provides that the payee beneficiary of the income of a trust created by a divorce or separation instrument will be taxed under the same terms as the beneficiary of a regular trust. Generally, the recipient must include the payments as income, and the spouse who created the trust will not be entitled to a deduction.

XII. Appeal of Alimony Award

Standard to review is abuse of discretion/error of law. Cook v. Cook 2018 Pa. Super. 117.

Chapter Nine

Interim Relief and Counsel Fees

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I. COUNSEL FEES

A. ATTORNEY'S LIABILITY FOR COUNSEL FEES

Rule 1023.1 requires attorneys and litigants to sign pleadings with the warranty that they are not being presented to harass or without a basis in existing law or fact. *See* Pa.R.C.P. 1023.1(c). If it turns out that a pleading was filed and presented to harass or without sufficient basis in law or fact, then the trial court has discretion to sanction the attorney or parties who have violated this warranty. *See* Pa.R.C.P. 1023.1(d). The Explanatory Comments cautions that "a court should avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted." Explanatory Comment—2003.

B. COUNSEL FEES IN DISCOVERY

Discovery sanctions, including counsel fees, are permitted pursuant to Rule 4019(g)(1) which provides that

> If following refusal, objection or failure of a party or person to comply with any provision of this chapter, the court…enters an order for compliance and the order is not obeyed, the court on subsequent motion for sanctions may…require the party…to pay the moving party reasonable expenses, including attorney's fees.

Notably, if this motion for sanctions is unsuccessful, the court has discretion to award counsel fees to the party opposing the motion. Pa.R.C.P. 4019(g)(2). Significantly, this Rule applies only to depositions, the filing of a motion in bad faith and requests for admission. *See* Explanatory Comment—1978.1

C. COUNSEL FEES PURSUANT TO THE JUDICIAL CODE

An award of counsel fees is permitted pursuant to 42 Pa.C.S.A. § 2503 which provides

> The following petitions shall be entitled to a reasonable counsel fee … (7) any participant who is awarded counsel fees as a sanction against another participant for dilatory, obdurate or vexatious conduct during the pendency of the matter … (9) any participant who is awarded counsel fees because the conduct of another party in commencing the matter or otherwise was arbitrary, vexatious or in bad faith.

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[1] "Subdivision (g) contains novel provisions with respect to imposition of expenses, including counsel fees in situations…cover[ing] requests for admissions, failure of a party witness to attend depositions and the filing of a motion or application in bad faith or for purposes of delay. They constitute a small area of discovery practice…[and]…do not include…interrogatories and answers, oral deposition on notice, production of documents and things and physical and mental examinations."

The burden of proof relative to a request for counsel fees pursuant to 42 Pa.C.S.A. § 2503 is on the person requesting an award of counsel fees pursuant thereto. O'Connell v. O'Connell, 597 A.2d 642 (Pa.Super. 1991). The counsel fee awarded must be reasonable and is not to be awarded as punishment. 42 Pa.C.S.A. Section 2503; Dooley v. Rubin, 618 A.2d 1014 (Pa.Super. 1993). The statute does not authorize an award of counsel fees to a *pro se* litigant. *Lowe v. Lowe*, 110 A.3d 211 (Pa. Super. 2015).

A petitioner seeking fees for obdurate, vexatious or bad faith conduct has the burden of meeting the "stringent requirement" that there was no arguable basis for the respondent's position. O'Connell v. O'Connell, 597 A.2d 642 (Pa.Super. 1991). Lack of merit to an argument does not, in and of itself, render a position frivolous or establish bad faith. Hinkle v. Hinkle, 685 A.2d 175 (Pa.Super. 1996). Moreover, the court must consider factors such as the petitioner's ability to meet the counsel fee expenses without contribution from the respondent and is not required to award the total fee attributable to the dilatory conduct. Osial v. Cook, 803 A.2d 209 (Pa.Super. 2002). "The aim of the rule is to sanction those who knowingly raise, in bad faith, frivolous claims which have no reasonable possibility of success, for the purposes of harassing, obstructing or delaying the opposing party." Dooley v. Rubin, 618 A.2d 1014 (Pa.Super. 1993), *citing* Brenckle v. Arblaster, 466 A.2d 1075 (Pa.Super. 1983). *See also* Morgan v. Morgan, 193 A.3d 999 (Pa.Super. 2018) (Wife was entitled to an award of all attorney fees incurred from the filing of Husband's petition to modify alimony, as his petition was based upon fraudulent recitations and documents of Husband's income.) The trial court must make specific findings that the conduct reaches the level of that sufficient to award counsel fees pursuant to Section 2503. Holler, *infra*.

"Vexatious" is defined as a suit that was filed without sufficient grounds in fact or law but filed for the sole purpose of annoyance. Thunberg v. Strause, 782 A.2d 295 (Pa. 1996). "Dilatory" relates to a lack of diligence that ultimately delays the matter unnecessarily thereby causing addition legal work. In re Estate of Burger, 852 A.2d 385 (Pa.Super. 2004). A finding of "bad faith" requires that the action was filed for the purposes of fraud, dishonesty, or corruption. Id; *see also* Holler v. Smith, 928 A.2d 330 (Pa.Super. 2007). The statute requires an inquiry into the conduct of the person from whom the fees are sought and the merits of the claim asserted by that person. Id. A demonstration that a party's conduct was "antagonistic" or "recriminatory" alone is insufficient to award counsel fees because the result of such an award is a chilling effect on advocacy and legitimate actions. Hinkle, *supra.* Two cases outline the high threshold that must be established in order to receive and award of counsel fees pursuant to 42 Pa.C.S.A. Section 2503.

In Hinkle, the father and the mother were the parents of two minor children. 685 A.2d 175, 176. The father was employed as a professional football player in the National Football League as a Pittsburgh Steeler. Id. As part of the divorce and by agreement, the father had agreed to pay the sum of $4,000 per month for support of the two children. Id. For a period of approximately four (4) years, the father made timely payments. Id. In January 1994, the father retired from the NFL. Id. Legal proceedings were then instituted by both parties to determine the father's support obligation. Id. Following hearing, the trial court entered an order requiring the father to pay support of $2,000 per month for 1994 and $835 per month from 1995 forward. Id. Both parties appealed. Id.

At the trial court level and on appeal, the father raised the issue of the inclusion of his 1993 deferred compensation, which totaled $200,000, as income to him in 2004 and in the support matter, asserting that effectively it had already been considered in the prior year. Id. The mother argued that the trial court was correct in including the deferred compensation payment as income but that it had erred in awarding her $500 in counsel fees when her claim was for $8,000, asserting that Father's bad faith conduct (i.e. his position in relation to the deferred compensation) justified such an award. Id. at 178. The Superior Court affirmed the denial of the mother's claim for counsel fees finding "no evidence to support [her] assertion," and stating that "[w]hile [the f]ather's argument with respect to the $200,000 of deferred income ultimately failed, it was not a frivolous argument and it does not establish bad faith." Id.

In O'Connell, the parties were the parents of two children, one who was heading to college and one who was a minor. 597 A.2d 643, 644. Pursuant to an existing support order, the father was required to pay $85 per week in support of the then-two minor children. Id. The mother filed to increase citing (1) that their oldest child was set to attend college and (2) the general increase in expenditures related to rearing children. Id. The father filed a petition to decrease given the oldest child's imminent emancipation. Id. After hearing, the trial court found that (1) estrangement was not a defense to the father's obligation to contribute to the college expenses of the oldest child, (2) the oldest child was entitled to contribution to college expenses, (3) the father's child support obligation for the minor child should increase to $160 per week and (4) the father should pay counsel fees of $7,500 relative to his "spurious suits opposing support and…fraudulent concealment of earnings/assets." Id. at 644-645. The father appealed. Id. at 644.

On appeal, the Superior Court affirmed that trial court's decision as to the support award and the obligation for college expenses noting that the father's actions were "immature" as it related to the treatment of his children as he refers to the oldest child as a "disinherited mistake" and both children as "the defendant's children." Id. at 645. Moreover, the Superior Court noted its disdain for the father by finding the father's "adolescent behavior reprehensible". Id. In relation to the father's claims as to his income, the Superior Court referenced his "creative tax return" and the fact that he attempted to give to his current wife the sum of approximately $17,478 in an attempt to shield it from his income. Id. at 646. In addition, the trial court found and the Superior Court noted that the father throughout the proceedings "assumed a posture with '…very little legal substance and no legitimate proof in pursuing actions that the court views as vexatious and recriminatory'" and further found that the father as a pro se attorney litigant "exhibited his 'litigiousness, vexatiousness and willingness to cause expenses to his former wife when she is seeking for her children only what is their logical entitlement.'" Id. at 647.

Despite the above findings as to the father, the Superior Court reversed the trial court's award of $7,500 in counsel fees. Id. The Superior Court found that "the record does not support the stringent requirement that [the father's] behavior was dilatory, obdurate, vexatious during the pendency of this matter or that the action was arbitrary or in bad faith." In reversing the trial court, the Superior Court noted that clearly the father was "antagonistic" but this was not sufficient to award counsel fees in a "bitterly contested support matter." Id. The Superior Court determined that there was an arguable basis for the positions taken by the father and determined that an "award of counsel fees under these circumstances would have a chilling effect on legitimate pursual of court action when the law requires free and open access to court." Id. at 648.

In relation to the amount of counsel fees to be awarded pursuant to the Judicial Code, the appellate court has held as follows:

> An award of counsel fees is intended to reimburse an innocent litigant for expenses made necessary by the conduct of an opponent. Such an award is not usually intended to include reimbursement for fees and expenses incurred in proceedings to recover such attorney's fees under 42 Pa.C.S.A. §2503.

American Mutual Liability Insur. Co. v. Zion & Klein, P.A., 489 A.2d 259 (Pa.Super. 1985), *citing* Weidner v. Workmen's Compensation Appeal Board, 442 A.2d 242 (Pa. 1982). The reasonableness of a counsel fee claim can be determined by the Rules of Professional Conduct which set forth the propriety of a fee, as the criteria set forth in existing case law generally tracts the Rule.2 *See generally* Pennsylvania Family Law Practice and Procedure, Fifth Edition, Section 13-3 (Counsel Fees, Amount). The relevant factors outlined are as follows:

> 2. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.
> …
>
> 4. The fee customarily charged in the locality for similar legal services.
>
> 5. The amount involved and the results obtained.
> …
>
> 8. The experience, reputation and ability of the lawyer or lawyers performing the services.

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[2] While no case was found that specifically cited 42 Pa.C.S.A. §2503, a case was located that addressed the standards for the determination of reasonableness in terms of a request for counsel fees. *See In re Estate of LaRocca*, 246 A.2d 337 (Pa. 1968) (on appeal on the issue of reasonableness of counsel fee award, the factors to consider include: "the amount of work performed; the character of the services rendered; the difficulty of the problems involved; the importance of the litigation; the amount of money or value of the property in question; the degree of responsibility incurred; whether the fund involved was 'created' by the attorney; the professional skill and standing of the attorney in his profession; the results he was able to obtain; the ability of the client to pay a reasonable fee for the services rendered; and, very importantly, the amount of money or the value of the property in question.") *See also* Thomas v. Thomas, 194 A.3d 220 (Pa.Super. 2018) (trial court awarded $10,000 in counsel fees, finding that the fees charged by Wife's counsel were a reasonable reflection of her counsel's tasks and billing rate, and that Husband incurred comparable fees from his own counsel.); Morgans v. Morgans, 160 P.L.J. 339 (Allegheny County, May 7, 2012) (trial court awarded $57,500 in counsel fees on a request for $97,000 in fees, finding that a reasonable hourly rate for counsel was $250 per hour, not the $400+ per hour requested).

Rules of Professional Conduct, Rule 1.5. Moreover, counsel fees should be on a moderate scale and only fair and just fees should be permitted; and under appropriate circumstances, the court will reduce excessive counsel fees. McRoberts v. Burns, 34 A.2d 519 (Pa. 1943).

D. COUNSEL FEES IN CHILD SUPPORT

"If the obligee prevails in a proceeding to establish paternity or to obtain a support order, the court may assess against the obligor filing fees, reasonable attorney fees and necessary travel and other reasonable costs and expenses incurred by the obligee and the obligee's witnesses." 23 Pa.C.S.A. §4351(a). An award of counsel fees is not compulsory in a child support matter even if the obligee "prevails". Bowser v. Blom, 807 A.2d 830 (Pa. 2002). "Mounting a fair and reasonable defense in a child support action does not rise to the level of obstreperous or obstinate behavior and cannot be interpreted as unreasonably impeding the determination of…an appropriate support order." Id. In determining the propriety of an award of counsel fees made pursuant to 23 Pa.C.S.A. §4351(a), the trial court must consider the totality of the circumstances including the conduct of the parties in the litigation, the financial positions of the parties and the prior conduct of the parties in any previous litigation. Id. Notably, "the statute does not command an award of counsel fees in any instance, nor does it identify relative need as the exclusive, much less controlling factor, in determining when an award is appropriate." Id. As noted in *Bowser*, "it is unclear whether an obligee could be said to have prevailed in situations where the parties compromise or settle the matter, or in situations where the parties agree that support is due, but that there is some dispute as to the amount." Id. at 833. Counsel fees may be appropriate in a case "where the father was shirking his moral and financial obligations, requiring legal action to force him to accept his responsibility." Id. at 620.

In a child support case, it is inappropriate to include counsel fees related to the child support litigation in the children's budget. Sirio v. Sirio 951 A.2d 1188 (Pa.Super. 2007). The claim for counsel fees, rather, should be considered pursuant to §4351.

E. INTERIM COUNSEL FEES AND COSTS

Interim counsel fees and costs may be granted pursuant to several provisions of the Pennsylvania Divorce Code as follows:

> §3323(c) ... Upon the request of either party and after a hearing, the court may order alimony pendente lite, reasonable counsel fees, costs and expenses and may make a temporary order necessary to protect the interest of the parties pending final disposition of matters in subsection (b).
>
> ....
>
> §3323(e) The court may award costs to the party in whose favor the order or decree shall be entered or may order that each party shall pay their own costs or may order that costs be divided equitably as it shall appear just and reasonable.
>
> §3702 In proper cases, upon petition, the court may allow a spouse reasonable alimony pendente lite, spousal support and reasonable counsel fees and expenses. Reasonable counsel fees and expenses may be allowed pendente lite, and the

> court shall also have authority to direct that adequate health and hospitalization insurance coverage be maintained for the dependent spouse pendente lite.

Additional provisions permit the awarding of attorneys fees upon the entry of a final decree in divorce, 23 Pa.C.S.A. §3323(b) (failure of a party to comply with a court order for equitable distribution or other non-compliance), 23 Pa.C.S.A. §3502(e)(7) and also in cases where a party is in contempt of court for failure to pay alimony, alimony pendente lite, 23 Pa.C.S.A. §3703(7). See, Sinaiko v. Sinaiko, 445 Pa. Super. 56 664 A.2d 1005 (1995). Finally, attorneys fees may also be awarded in a support proceeding pursuant to Chapter 23 Pa.C.S. §4351(a).

Generally, to succeed in a proceeding for Counsel fees, a party must demonstrate lack of financial ability. Counsel fees are not awarded automatically but only upon a showing that the award is necessary to put the parties on equal footing in defending their rights or to allow the dependent spouse to maintain or defend a divorce action. See Williamson v. Williamson, 402 Pa. Super. 276, 586 A.2d 967 (1991); Kohl v. Kohl, 387 Pa. Super. 367, 564 A.2d 222 (1989); and Johnson v. Johnson, 365 Pa. Super. 409, 529 A.2d 1123 (1987).

Another basis for the awarding of interim attorneys fees was presented in Lowenschuss v. Lowenschuss, 327 Pa. Super. 120, 475 A.2d 127 (1984) and Benson v. Benson, 357 Pa. Super. 166, 515 A.2d 917 (1986), where fees were "awarded by the court" after it considered all equitable issues. Finally, note that a court may award counsel fees even after the divorce action has abated because one of the parties has died. See Drumheller v. Marcello, 351 Pa. Super. 139, 143, 505 A.2d 305, 307 (1986), *reversed on other grounds,* 516 Pa. 428, 532 A.2d 807 (1987).

It is important to note that if an order for interim counsel fees, costs and expenses is granted, it is interlocutory and non-appealable. O'Brien v. O'Brien, 359 Pa. Super 594, 519 A.2d 511 (1987).

It is also important to note that the proceedings governing alimony pendente lite, counsel fees and costs have been interpreted broadly enough to encompass a request for the awarding of funds to pay for experts such as business valuators, real estate appraisers, etc. This may be important when representing a spouse without any direct financial resources in a matter where the other spouse has funds available to pay for these experts.

F. COUNSEL FEES IN CHILD CUSTODY

The new (as of January 2011) custody statute created express authorization for an award of counsel fees, costs and expenses in a custody action, under certain circumstances. Specifically:

> § 5339. Award of counsel fees, costs and expenses.
>
> Under this chapter, a court may award reasonable interim or final counsel fees, costs and expenses to a party if the court finds that the conduct of another party was obdurate, vexatious, repetitive or in bad faith.

There are very few reported cases about this new provision at this juncture. Presumably, courts are still looking to 42 Pa.C.S.A. § 2503 and cases interpreting it (see section I.C., above) with respect to "obdurate," "vexations," and "bad faith" conduct. However, defining "repetitive" conduct warranting an award of fees, costs and expenses has proven to be new territory for the courts and practitioners. For instance, in *Dong Yuan Chen v. Saidi*, 100 A.3d 587 (Pa. Super. 2014), the Court held that seven (7) filings in seven (7) years was not sufficient grounds to impose counsel fees. The Court emphasized the need to focus on the best interests of the children and all factors that legitimately affect the child's well-being. In *Chen*, the father filed seven (7) petitions, each approximately one (1) year apart, and each involving different, specific issues. The Court found that this did not rise to the level of "repetitive" within the meaning of § 5339. *See also*, *A.L.-S. v. B.S.*, 117 A.3d 352 (Pa. Super. 2015) (mother's filing of three petitions after erroneous denial of jurisdiction was not "repetitive" or "vexatious").

With respect to monetary sanctions included in custody agreements, the Superior Court recently found that a clause in a custody agreement requiring the father to pay $10,000 to the mother for each pleading filed seeking a modification or amendment of the custody order was not unenforceable as against public policy. In *Huss v. Weaver*, 134 A.3d 449 (Pa. Super. 2016), the court found that the record did not support a finding that the "$10,000 clause" was intended to discourage the father from seeking court intervention, or that the payment of such a fee would serve as an impediment to his ability to seek such court intervention. As such, the clause could not be found to be unenforceable as against public policy.

In several other jurisdictions, counsel fees are available to custody litigants based not only on the offensive conduct of the opponent, but on disparity in the parties' income and the importance to a child's well-being for both parents to be able to participate effectively in custody litigation. See, "Right to attorneys' fees in proceeding, after absolute divorce, for modification of child custody or support order," 57 A.L.R. 4th. Clearly, the Pennsylvania legislature was not willing to take this progressive stand in the new custody legislation.

II. INTERIM RELIEF, RELATED MATTERS

A. SUPPORT

One of the first areas to address when representing a party in a divorce proceeding is support. This would include support not only for the dependent spouse which would include alimony pendente lite and spousal support, but also child support. Specific review of these areas is found elsewhere in these materials. However, it is very important for the practitioner to assess potential support claims in conjunction with other interim relief including an application for counsel fees and costs.

The practitioner should also be aware that interim relief can provide necessary help in presenting a support case on behalf of your client. This would include petitioning for special relief, physical or psychological examination, declaratory relief, protection from abuse, and discovery. Finally, and in some ways, most importantly, enforcement of existing temporary support orders may be necessary. These procedures are reviewed elsewhere in these materials. See generally, 23 Pa.C.S. §4301 et. seq.

B. CUSTODY

Temporary or interim custody orders are sometimes necessary in the event the parties cannot work out or agree to a resolution of their custody disputes prior to a final court order. The practitioner should use interim relief, where necessary, to obtain relevant materials necessary to litigate the custody issues and also to enable the parties to possibly resolve those issues prior to litigation. Requests for physical or psychological examination of the parties and/or the minor children are, in most instances, obligatory. Additional issues, such as holiday and vacation schedules, partial custody, grandparent visitation and abuse may be raised prior to the entry of a final custody order. Discovery, including depositions, is a valuable tool to the practitioner during settlement negotiations and litigation of custody matters. A review of Chapter 23 Pa. C.S. §5301 et. seq. and related issues is contained elsewhere in these materials.

C. ABUSE

A discussion of the Protection from Abuse Act, Chapter 23 Pa.C.S. §6101, et seq. appears elsewhere in these materials. It is important for the practitioner to understand and be aware of the statutes and rules relating to Protection from Abuse during all aspects of representing a party during a domestic dispute. This would include, prior to the institution of divorce proceedings, as well as after the parties are divorced by decree of court. In many instances, abuse is an issue relating to support, exclusive possession of residences, as well as child custody disputes. It should be noted, though, that a party's failure to prove allegations of abuse is not, by itself, enough to support a finding of bad faith to warrant an award of counsel fees. Courtney v. Courtney, 205 A.3d 318 (Pa.Super. 2019).

D. SPECIAL RELIEF

Special relief under the Pennsylvania Divorce Code is governed by 23 Pa.C.S. §3323(f) as follows:

> (c) In all matrimonial causes, the court shall have full equity, power and jurisdiction and may issue injunctions or other orders which are necessary to protect the interest of the parties or to effectuate the purposes of this act and may grant such other relief or remedy as equity and justice require against either party or against any third person over whom the court has jurisdiction and who is involved in or concerned with the disposition of the cause.

Moreover, §3505 provides remedies for interim relief:

> (a) Where it appears to the court that a party is about to leave the jurisdiction of the court or is about to remove property of that party from the jurisdiction of the court or is about to dispose of, alienate, or encumber property in order to defeat equitable distribution, alimony pendente lite, alimony, child and spousal support or similar award, an injunction may issue to prevent such removal or disposition and the property may be attached as provided by general rules. The court may also issue a writ of ne exeat to preclude the removal.

> (c) Discovery under this part shall be as provided for all other civil actions under the Pennsylvania Rules of Civil Procedure.
> (d) Constructive trust for undisclosed assets. -- If a party fails to disclose information provided by subsection (b) above and in consequence thereof, an asset or assets with a fair market value of $500 or more is omitted from the final distribution, the party aggrieved by the nondisclosure may at any time petition the court granting the award to declare the creation of a constructive trust as to all undisclosed assets, for the benefit of the parties and their minor or dependent children, if any. The party in whose name the assets are held shall be declared the constructive trustee and the trusts may include any terms and conditions the court may determine. The court shall grant the petition upon a finding of a failure to disclose the assets as required under subsection (b).
> (e) Encumbrance or disposition to third parties. -- An encumbrance or disposition of marital property to third persons who paid wholly inadequate consideration for such property may be deemed fraudulent and declared void.

Additional relief can be found under the Pennsylvania Rule of Procedure 1920.43 entitled "Special Relief":

> (a) At any time after the filing of the complaint, on petition setting forth facts entitling the party to relief, the court may, upon such terms and conditions as it deems just, including the filing of security, (1) issue preliminary or special injunctions necessary to prevent the removal, disposition, alienation or encumbering of real or personal property in accordance with Rule 1531 (a),(c),(d) and (e) or (2) order the seizure or attachment of real or personal property; or (3) grant other appropriate relief.
> (b) Where property ordered attached is in the possession of a garnishee, the practice and procedure shall conform as nearly as may be to Rules 3111 to Rule 3113 and Rules 3142 to 3145 governing attachment execution. Judgment shall not be entered against a garnishee except by order of the court.

The above sections of the Pennsylvania Divorce Court and the Pennsylvania Rules of Civil Procedure give the court very broad and far-reaching equitable powers in order to protect the interest of the parties to effectuate the purposes of the Divorce Code. It is very important for the practitioner to review local rules of procedure governing special relief prior to the institution of any proceedings.

In general, a petition for special relief under the Divorce Code cannot be entertained prior to the filing of the divorce complaint. However, a request for special relief may be included in the divorce complaint and, thereafter, a request for a hearing date may be entertained. Also, note that special relief is available even after divorce is granted, such as for the opening or vacating of a decree pursuant to 23 Pa.C.S.A. §3332. See Fenstermaker v. Fenstermaker, 348 Pa. Super. 237, 502 A.2d 185 (1985). See also, Jawork v. Jawork, 378 Pa. Super. 89, 548 A.2d 290 (1988).

E. INJUNCTIVE RELIEF

1. Freezing of Assets

Section 3505(a) of the Divorce Code permits the Court to enter equitable orders regarding the dissipation of marital assets (i.e., freezing of bank accounts, brokerage accounts or other assets). This has been repeatedly upheld by the appellate court. See Lazovitz v. Lazovitz, 307 Pa. Super. 341, 453 A.2d 615 (1982); Goldstein v. Goldstein, 354 Pa. Super. 490, 512 A.2d 644 (1986). The court must find, by the evidence, that the petitioner's right to relief is clear and a need for relief must be immediate and the injury must be irreparable if the injunction is not granted. In most instances, the injunctions are meant to maintain the economic status quo of the parties. There are limitations and some courts are reluctant to freeze assets. However, other relief is sometimes granted which will protect the petitioner. Most of the cases involve the operation of a business wherein the freezing of assets would impair the ongoing business operations. These types of injunctions, in general require the respondent to refrain from "doing anything which is not in the ordinary course of business" subject to either notice or written approval from either his/her spouse or some trustee.

Some injunctions require notice of one spouse to the other before disposing of, alienating or encumbering marital property that was not in joint names. Other types of relief would require the spouse to provide an accounting of bank accounts on a periodic basis so that the assets or non-dissipation of those assets may be monitored.

2. Non-Dissipation of Marital Property.

The courts have permitted injunctions preventing the dissipation of marital assets including the removal of assets from the marital home. The trial court's issuance of an injunction directing Husband to maintain life insurance beneficiary designations was sustained in Hoag v. Hoag, 435 Pa.Super. 428, 646 A.2 578 (1994). In general, injunctions will only be issued if substantial, material or valuable property is involved. The court will look at what, if any, other assets remain intact in order to provide possible set-offs to the dissipation or removal of personal property.

3. Injunctions Against Dissipation of Real Estate.

One important area is injunctive or special relief regarding the dissipation of real estate, whether marital or non-marital. In many instances, this is the most valuable asset of the parties and the failure to pay a mortgage or other expenses relating to the real estate causes potential foreclosure and reduction in the value of the asset. There are other issues that are proper for injunctive or special relief, such as the failure of one of the parties to cooperate with the purchase or sale of real estate, failure to properly maintain the premises such as capital improvements, repairs, or landscaping. Courts have required one of the spouses to contribute to the payment of a mortgage over and above any support obligations. Additionally, spouses in possession of real estate have been ordered to pay certain expenses and maintain the property during the pendency of the litigation. This could very well include other assets than real estate, such as automobiles, boats or other personal property.

4. *Appointment of a Trustee*

The special relief provisions have been interpreted broadly enough to provide for the appointment of a trustee to maintain a spouse's business during the pendency of the divorce proceedings where the court finds that the spouse in control has intentionally and willfully dissipated the asset to the detriment of the other party. See Mayhue v. Mayhue, 336 Pa. Super. 188, 485 A.2d 494 (1984). This is obviously an extraordinary relief and it would only be granted in a very limited situation, where the dissipation is clearly irreparable and no other adequate relief is available.

5. Constructive Trust

23 Pa.C.S.A. §3505 (d) of the Divorce Code provides for the imposition of a constructive trust upon a finding of non-disclosure of funds which could have been the subject of equitable distribution regardless of the intent of the party failing to disclose those assets. Creeks v. Creeks, 422 Pa. Super. 432, 619 A.2d 754 (1993). However, the Superior Court has held that an ex-wife is not entitled to a constructive trust over an undisclosed pension in Husband's name where the parties' Property Settlement Agreement specifically noted that each party made full and fair disclosures or assets, and that each party is informed of and familiar with the assets of the other. Bennett v. Bennett, 168 A.3d 238 (Pa.Super. 2017).

F. EXCLUSIVE POSSESSION OF THE MARITAL RESIDENCE OR OTHER REAL ESTATE

The courts have broadly interpreted §3323(f) together with §3502(c)3 of the Divorce Code and the Pennsylvania Rules of Civil Procedure in order to grant exclusive possession of the family home, business or other real estate, such as vacation houses to one or other of the spouses. Laczkowski v. Laczkowski, 344 Pa.Super. 154, 496 A.2d 56 (1985). The implementation of these sections may differ from locality to locality. In general, the court is reluctant to remove a spouse from the marital residence or domicile unless the facts and nature of the matter warrant the relief. Note also that the same relief can be granted pursuant to the Protection from Abuse Act which is discussed elsewhere in these materials.

G. MAINTENANCE OF HEALTH AND HOSPITALIZATION INSURANCE COVERAGE

Upon petition, a court has the authority to direct that the adequate health and hospitalization insurance coverage be maintained for the dependent spouse pendente lite. *See* 23 Pa.C.S.A. §4324. "Pendente Lite" refers to maintenance of the coverage pending the divorce litigation so as to enable the dependent spouse to be adequately protected until divorce finalization.

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[3] Section 3502(c) of the Divorce Code provides that "the court may award, during thependency of the action or otherwise, to one or both of the parties the right to reside in the marital residence."

H. DISCOVERY

Prior to July 1, 1997 discovery was limited pursuant to the Pennsylvania Rule of Civil Procedure 1920.22:

> (a) Except as provided by (b), there shall be no discovery in an action of divorce or for annulment or a claim which has been joined as permitted under the Divorce Code unless authorized by special order of the court.
> (b) When a claim is made for alimony or determination and distribution of property rights, any party may serve upon any other party as of course within such time as not to delay the trial interrogatories, limited to those claims. The practice and procedure shall be governed by the Rules of Civil Procedure governing dissipation and discovery...

As a result of this rule, petitions for discovery are frequently initiated at the outset of most matrimonial matters.

However, effective July 1, 1997, Rule 1930.5 of the Pennsylvania Rules of Civil Procedure was effectuated and stated as follows:

> (a) There shall be no discovery in a simple support, custody or Protection from Abuse proceeding unless authorized by order of court.
> (b) Discovery shall be available without leave of court in accordance with R.C.P. 4001 et. seq. in alimony, equitable distribution, counsel fee and complex support proceedings.

Because discovery is usually only needed in more complex support matters and matters relating to equitable distribution, alimony and counsel fee and expense applications, the frequency with which petitions for discovery are needed has lessened dramatically. Nonetheless, petitions for interim relief can be filed in the event that a practitioner deems discovery essential in a more simple support, custody or Protection from Abuse action.

I. APPEALS FROM SPECIAL RELIEF ORDERS

Special relief orders pursuant to the Divorce Code and the Rules of Civil Procedure are interlocutory and not appealable. Fox v. Gabler, 377 Pa. Super. 341, 547 A.2d 399 (1988), Fried v. Fried, 509 Pa. 89, 501 A.2d 211 (1985).

Chapter Ten

Alternative Dispute Resolution Process Choices

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ALTERNATIVE DISPUTE RESOLUTION PROCESS CHOICES

The threshold choice for clients is that of which process they will choose to complete their divorce. Many people assume that the only means to resolve issues surrounding the dissolution of their marriage and issues of child custody are through litigation. However, there are many process choices for parties facing issues of divorce, child custody or support. Some of the most common process choices are: the "kitchen table" method, mediation, collaboration, arbitration or litigation.

Kitchen Table Method

Using the "kitchen table" method, parties discuss their issues, reach their own agreements and bring those agreements to an attorney, who will then draft a settlement agreement and prepare the documents necessary to obtain the divorce.

Both parties should have their own attorney review the agreement to confirm that it matches the agreement as understood by each party. Parties rarely address all issues and may add complicated or unenforceable terms to their agreement. This method works for only a handful of people with relatively simple issues.

A common inquiry from parties is whether one attorney can represent both parties in these "simple" divorce or custody cases. The answer is NO! Even when the parties can proceed amicably, the reality is that matters of divorce, property division, child custody and support are adversarial matters. Even though parties may be agreeable at the inception of a case, there are almost certainly issues that they have not considered and choices that they will have to make that can change an initially agreeable and amicable situation into a contested matter.

If the parties want someone to work with them to help them reach an agreement, mediation or arbitration (discussed later in this section) may be appropriate for them.

Mediation

In mediation, an impartial third party (the mediator) assists the negotiations of both parties and tries to help settle the case. While the mediator may be an attorney, he or she does not represent either party and is not an advocate in the process. Rather the mediator facilitates the discussion between the parties and attempts to guide them to their own resolution. When the parties reach an agreement, the mediator prepares a written Memorandum of Understanding that can be used by a lawyer for one of the parties to draft a comprehensive agreement. Each party should have an attorney to answer questions and provide advice throughout the mediation process and to ensure that the terms of the agreements reached in the mediation sessions are accurately reflected in their final written agreements. Some parties choose to have their lawyers present during the mediation sessions while others prefer to attend mediation sessions alone and discuss choices and decisions with their attorney outside of the sessions. Mediation is not appropriate in all cases. It can be effective where there are two parties of relatively equal bargaining power and with relatively equal knowledge of the financial facts and circumstances of the case. Mediation is not considered appropriate in cases where domestic violence has been an issue and careful screening must be undertaken in this regard.

Collaborative Law

Collaboration provides the parties with the opportunity to settle their case through a series of group meetings between the parties and an assembled team of professionals that may include their attorneys, financial professionals and/or mental health professionals. A hallmark of

the process is the pledge of the parties to settle their case without going to court and without the threat of going to court.

The late comedian Robin Williams described traditional divorce as "circumcision with a weed wacker." The concept of Collaborative divorce was developed in 1990 by a Minnesota lawyer who wanted to find an alternative to the destructive nature of traditional divorce litigation. In a Collaborative Divorce, both spouses hire specially trained Collaborative divorce lawyers and pledge to adhere to the principles listed below throughout the case. The goal of all involved is to resolve the couple's disputes openly, respectfully and in a manner that meets the needs and interests of both parties. To do so, couples engaged in the collaborative divorce process pledge to follow an established set of guidelines:

- **They will not resort to the courts to resolve their case.** They will work diligently and in good faith to reach an agreement that best suits their needs. They will not allow decisions about their children, their home, their savings accounts, their retirement accounts and their futures to be made for them by judges or hearing officers. Rather, they will work together to reach agreements that meet the needs of both spouses as they go forward.
- **Both Husband and Wife will be open and honest and will produce information on their assets and debts freely and voluntarily.** They understand that by merely producing information about a particular asset, they aren't somehow tacitly agreeing to give that asset over to the other spouse. In Collaborative cases, nothing happens until both parties say "yes."
- **Both parties agree to think about and analyze *their* needs and interests for the future.** Rather than the guerrilla warfare approach to traditional divorce where the

focus is on how much damage can be inflicted on the other side without regard to whether that damage helps or hurts the inflicting party, participants in a Collaborative case pledge to consider what they need and want in the future and then undertake creative problem solving to see if both parties' goals can be achieved.

- **The parties pledge to explore options and solutions until they reach an agreement that works for both spouses.** At times, additional help may be needed in the form of financial planners, real estate appraisers, pension valuators or parenting experts, to name a few. When helpful to the process, the parties agree to work with these experts to fashion a result that addresses their individual needs and interests while respectfully addressing the needs and interests of their spouse.

Skeptics doubt that such "win-win" solutions really exist. Is it possible to enlarge the pie rather than just divide it? Consider two children who argued over a Snickers bar. Their mother lost patience with the argument and took the candy bar and sliced it in half – right through the wrapper. Both kids took their half and dejectedly sulked away. Their mom was surprised at their disappointment because she thought she had very equitably resolved the dispute. When one child was asked why she didn't like the result, she said she needed the entire wrapper to send away for a Selena Gomez promotion. When the other child was asked why he was unhappy, he said he loved the chocolate and wanted the whole candy bar. Many couples experience the same dissatisfaction with traditional divorces: there is a resolution but rarely do both parties consider it to be the best solution. In a Collaborative case, however, it is possible to get "just the candy bar" or "the whole wrapper" that they want and need.

Collaborative cases certainly aren't easier than traditional cases. In Collaborative cases the parties sit in the same room and deal with very difficult, emotional issues face to face. They

can't hide behind the buffer of their lawyers as often happens in traditional divorces. In Collaborative cases, the parties own the process and its result. They can't punt to a judge or master to decide matters for them. Although not easier, Collaborative cases certainly produce outcomes and agreements that are more lasting and built on far sturdier foundations than traditional divorce cases. They provide a framework for the parties to use in the future as issues arise regarding their children or their finances.

Some may question the ability of spouses to participate in the process in good faith. Issues of broken trust are often the very cause of the divorce in the first place. Nonetheless, it seems a far better result can be attained by divorcing spouses who pledge at the outset of a case to participate openly, honestly and in good faith. The parties to every Collaborative case begin by entering into a contract called a Participation Agreement. Not only do the spouses pledge to proceed honestly and in good faith but also agree that if their lawyer discovers this promise has been broken or violated, he or she will withdraw from the process and the Collaborative process will terminate causing the dishonest spouse to begin at square one in the very litigation process that he or she sought to avoid by choosing Collaborative. Also, pursuant to the parties' Participation Agreement, if either party chooses to terminate the process both lawyers are disqualified from continued representation.

Divorcing couples benefit from the experience and expertise of skilled lawyers and, in some areas, Collaborative teams, who guide them on the path to a resolution of their choosing. This growing method of resolving divorces has exploded worldwide and is now practiced by more than 3,000 professionals in more than 15 countries. Collaborative practice is evolving into areas of conflict resolution far beyond divorce and parenting issues into areas like family disputes involving probate and estates, healthcare, employment, construction and small business.

If you have questions regarding the collaborative process, there are many local groups of collaborative professionals who can provide helpful information. These groups can not only provide valuable information to attorneys seeking alternative dispute resolution methods, but they can also be an asset to potential clients who are seeking out information regarding the collaborative process ***(See Appendix: BACKGROUND INFORMATION FOR THE CLIENT SEEKING THE COLLABORATIVE PROCESS).***

Arbitration

Unlike mediation where the mediator guides and assists the parties in reaching agreements, in arbitration, the parties hire the arbitrator to make decisions for them. The parties can agree to binding or non-binding arbitration. The parties can decide the degree of formality that they want to follow with regard to presentation of witnesses and exhibits. Arbitration is similar to litigation in that a third party is making decisions for the parties, it may be attractive to parties in that they can control the pace and scheduling of proceedings and can also maintain privacy.

Litigated Settlement

The litigated case or the "litigated settlement" is the most traditional method for parties to end their marriage and deal with issues of property division, alimony, child support and custody. This can be an inefficient manner for achieving resolution in that the efforts of the parties and lawyers are geared toward litigation that, in many instances, never occurs. Energy and resources are consumed and directed at litigation that never occurs, rather than at the intentional pursuit of an agreement.

Conclusion

It is important to understand the different process choices available to parties and to discuss them with clients to allow them to make an informed decision about their case and how their case will proceed. Not every process is right for every case or every person but it is important to know about these different tools and discuss them with clients at the inception of their case.

Chapter Ten

Appendix: Background Information for the Client Seeking the Collaborative Process

BACKGROUND INFORMATION FOR THE CLIENT SEEKING THE COLLABORATIVE PROCESS

Collaborative Law is a voluntary dispute resolution process in which the parties reach agreement without going to court. For those couples who are willing to seek creative and amicable problem-solving, Collaborative Law provides a constructive alternative to conventional divorce.

HOW IT WORKS

In an adversarial, court-based process, one party sues the other, setting in motion procedures which pit the parties against each other. This often has a significant emotional impact on the parties, their children and their families.

At its core, Collaborative Law is a non-adversarial process in which the parties and their lawyers, after agreeing not to go to court, negotiate a settlement agreement which meets the needs of both parties. Collaborative Law allows parties to maintain control over their separation, divorce, custody, and other family matters rather than relinquishing decisions to the court, which often is ill-equipped to address these issues.

Collaborative Law also affords the parties an opportunity to look beyond the pain and anxiety of the present so they can plan for the future. This is especially important for couples with children, since the parents prioritize their children's needs and ease the transition to two households.

THE PROCESS

Collaborative Law is a unique and voluntary conflict resolution process. It is based on a shared belief that the parties and their families should make decisions and arrive at solutions that will work best for their individual circumstances, instead of having a court do that for them.

- Each spouse, partner or parent retains a Collaborative attorney to represent their interests and to help them advocate effectively for themselves.
- All parties sign a Participation Agreement that commits them to settlement without going to court.
- The needs of the children are a priority.
- The parties agree to negotiate in good faith and to openly and honestly disclose all information that is important to making decisions.
- Both parties and their attorneys meet in face-to-face discussions – outside of a courtroom – to exchange information about assets, debts, sources and amounts of income and any other matters important to the family.

- Other professionals such as accountants, appraisers, communication coaches and child specialists may be retained to assist the parties in obtaining information or developing options for resolution.
- The parties reach a mutually-acceptable resolution that they believe to be fair and which meets their respective short- and long-term needs.
- The Collaborative attorneys prepare a settlement agreement and any other legal documents required to effectuate the parties' resolution.

What is Collaborative Law?

Collaborative Law is an alternative dispute resolution process in which both parties retain separate, specially-trained attorneys whose only job is to help their clients settle their dispute without going to court. Parties agree to work together respectfully, honestly, and in good faith to try to find "win-win" solutions to their legitimate needs. The focus is on problem-solving, not adversarial proceedings. Rather than allowing a third-party (the courts) to make decisions about issues affecting their lives, the parties control the outcome. While engaged in the Collaborative Process, the parties and their attorneys do not go to court, or even threaten to do so. To ensure that the attorneys and parties are committed to the goal of settlement, all participants in a Collaborative case sign an agreement that requires the attorneys to withdraw from the case if one or both parties later decide to terminate the process and go to court. Collaborative attorneys cannot represent a Collaborative client in any litigation involving the other Collaborative party.

How does Collaborative Law differ from settlement in conventional litigation?

Many conventional family law matters settle "on the courthouse steps." By that time, a great deal of money has been spent, and a great deal of emotional damage may have been done. Settlements reached under the threat of trial generally are molded by what the attorneys believe the court outcome will be. Under these conditions, which create considerable tension and anxiety, parties often are not able to consider innovative options that could be tailored to their specific needs.

Because the Collaborative Law process is focused on respectful, cooperative problem-solving, the settlement process is very different. It is more creative and individualized, less stressful and more satisfying than what occurs in most conventional settlement negotiations. The Collaborative Process also can take less time and may be less costly than a traditional court-based process.

How does Collaborative Law differ from mediation?

In mediation, there is one "neutral" person who helps the disputing parties try to settle their case. The mediator cannot give either party legal advice, and cannot help either side advocate its position. If one side becomes unreasonable or stubborn, lacks factual knowledge or negotiating

skill, or is emotionally distraught, the mediation can become unbalanced. Unless the mediator finds a way to deal with the problem, the process can break down, or the resulting agreement may be unfair to one party. Even if the parties have attorneys, they might not be present at the negotiation and their advice may come too late to be helpful.

Collaborative Law was designed to address these problems, while maintaining an absolute commitment to settlement. Each party has access to legal advice and skilled advocacy at all times during the process to assist them in achieving a settlement that meets their immediate and long-term needs. The attorneys work to keep the process positive and productive.

Will I have access to the information I need to make decisions?

Both parties sign a binding agreement—early, fully and voluntarily—to disclose all relevant and pertinent documents and information. The attorneys make sure that the parties have all of the information they need to make good decisions for themselves.

Why is Collaborative Law such an effective process?

Respect is the underpinning of the Collaborative Law Process and sets the stage for the parties to work together. Collaborative Law attorneys are trained to maintain productive and non-confrontational discussions in order to help the parties reach an agreement. Collaborative professionals use their collective problem-solving skills to help the parties achieve their own personal goals for settlement.

Can a Collaborative Law attorney go to court if the Process terminates for any reason?

No. The Process is specifically designed in this way to ensure that the attorneys are invested with the parties in their commitment to creative decision-making without an underlying threat of litigation which diminishes the quality of the interest-based outcome.

Is Collaborative Law the best choice for me?

While it may not be right for every client (or every attorney), Collaborative Law is worth considering if some or all of these are true for you:

- You want a civilized, respectful resolution of the issues.
- You would like to keep open the possibility of friendship with your partner in the future.
- You and your partner will be co-parenting children, and you want a positive co-parenting relationship.

- You want to protect your children from the harm associated with litigation.
- You and your partner have friends and extended family with whom you both want to remain connected.
- You have ethical or spiritual beliefs that place high value on taking personal responsibility for handling conflicts with integrity.
- You value privacy in your personal affairs and do not want details of your family restructuring to be available in the public court record.
- You value control and autonomous decision-making and do not want to allow a stranger (i.e., a master or judge) to make decisions about restructuring your financial and/or parenting arrangements.
- You recognize the restricted range of outcomes generally available in the court system and want more creative, individualized choices for resolving your issues.
- You place as much value on the relationships that will exist in your restructured family situation as you place on obtaining the maximum amount of money for yourself.
- You understand that conflict resolution with integrity involves finding a way to achieve the reasonable goals of the other person as well as achieving your own goals.

Information provided by: Collaborative Professionals of Central Pennsylvania

(www.collaborativelawpa.com)

Chapter Eleven

Children's Fast Track Appeals

Updated by
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CHILDREN'S FAST TRACK APPEALS

Effective March 14, 2009, the Rules of Appellate Procedure were amended to include "Children's Fast Track Appeals". The purpose for the amendment to the Rules is to expedite certain appeals which effect parent-child relationships. Notably, the timing of the filing of the Concise Statement of Errors Complained of on Appeal, along with the time periods for transmitting the record and filing the required Briefs have been shortened.

According to the definition set forth in Rule 102[1], a "Children's Fast Track Appeal" is "[a]ny appeal from an order involving dependency, termination of parental rights, adoptions, custody or paternity".

The Notice of Appeal must include a statement advising the appellate court that the appeal is a Children's Fast Track Appeal. The clerk of the appellate court will stamp the Notice of Appeal with a "Children's Fast Track" designation in red ink. (Rules 904(f) and 905) The Concise Statement of Errors Complained of on Appeal must be filed with the Notice of Appeal. (Rules 905(a)(2) and 1925(a)(2)(i)) The trial court that entered the Order giving rise to the appeal must file, at least, a brief opinion setting forth its reasoning within thirty (30) days of receipt of the Notice of Appeal and Concise Statement. (Rule 1925(a)(2)(ii))

The trial court must transmit the record, including the necessary transcripts and exhibits, to the appellate court within thirty (30) days after the filing of the Notice of Appeal. (Rule 1931)

As in all appeals, the Appellant is required to file a Designation of the Record, which sets forth a list of the documents, pleadings, transcripts, etc. which will be included in the Reproduced Record. In Children's Fast Track Appeals, the Designation must be filed no later than twenty-three (23) days before the due date of the Brief for Appellant (e.g., if the Brief for Appellant is due on May 30th, the Designation must be filed on or before May 7th). If the Appellee deems it necessary to include parts of the record that have not been designated by the Appellant, he/she must file an Appellee's Designation within seven (7) days after receipt of the Appellant's Designation and the Appellant is required to include the portions of the record set forth in Appellee's Designation in the Reproduced Record, which must be filed

[1] References to Rules refer to the Pennsylvania Rules of Appellate Procedure, unless otherwise indicated.

contemporaneous with the filing of the Brief for Appellant. The Appellant is not permitted to defer preparation of the Reproduced Record until after the Briefs have been filed and served. (Rule 2154(c))

The Brief for Appellant and Reproduced Record must be filed and served within thirty (30) days after the record is transmitted to the Superior Court. The Brief for Appellee must be filed and served within twenty-one (21) days after the Appellant's Brief and Reproduced Record have been served. A Reply Brief may be filed within seven (7) days after service of the preceding brief. (Rule 2185(a)(2)) The cover sheet on all Briefs shall include a statement indicating that the matter is a Children's Fast Track Appeal. (Rule 2172(b))

According to the Superior Court's Internal Operating Procedures, extensions of the above time frames will be difficult to obtain. Extensions, which will "rarely" be granted and for not longer than seven (7) days, will be permitted only upon a showing of good cause and extraordinary circumstances.

In the event that an Application for Reargument is filed, it must be filed within seven (7) days of the entry of the judgment or order of the appellate court. An Answer to an Application for Reargument must be filed by an adverse party within seven (7) days after service of the Application. (Rule 2542(a)(2))

If a Petition for Allowance of Appeal is filed with the Supreme Court, the Supreme Court Prothonotary will stamp the Petition with a "Children's Fast Track" designation. As before, the Petition must be filed within thirty (30) days after the entry of the final Order of the Superior Court; however, if an Application for Reargument has been filed with the Superior Court and the Superior Court has not acted on the Application within forty-five (45) days of the date of filing, the Superior Court shall no longer consider the Application, it will be deemed denied, and the Prothonotary will issue an Order denying the Application. The Petition for Allowance of Appeal must be filed within thirty (30) days of the date of that Order. (Rule 1113(a)(3)) An Answer or Brief in Opposition to a Petition for Allowance of Appeal in a Children's Fast Track Appeal must be filed within ten (10) days after service of the Petition, instead of within fourteen (14) days as with other Answers to these types of Petitions. (Rule 1116(b)) An Application for Reconsideration of the denial of a Petition for Allowance of Appeal in a Children's Fast Track Appeal must be filed within seven (7) days after the entry of the denial order. (Rule 1124(b))

Since the adoption of the amendments to the Rules, the Superior Court has issued a number of opinions interpreting the rules. In In re: K.T.E.L., 983 A.2d 745 (Pa. Super. 2009), the Superior Court addressed the following issue of first impression: should the Court find waiver in a situation in which the appellant, who is appealing an order involuntarily terminating her parental rights, fails to comply with the provisions of Rules 905(a)(2) and 1925(a)(2), requiring the Concise Statement of Errors Complained of on Appeal to be filed in conjunction with the Notice of Appeal? The Court held that, henceforth, the failure to file the Concise Statement with the Notice of Appeal will be considered a defective Notice of Appeal to be handled on a case-by-case basis.

Five months later, in a case from Lawrence County, J.P. v. S.P., 991 A.2d 904 (Pa. Super. 2010), the Superior Court applied its holding in In re: K.T.E.L., *supra,* to a case in which the appellant failed to file the Concise Statement with the Notice of Appeal. The Court found the Notice of Appeal to be defective. The Court went on to find that all issues were waived because the appellant filed the Concise Statement one day after the due date as ordered by the trial court. However, the Superior Court addressed all issues and found that the appellant was not entitled to any relief.

In a case with a similar procedural history, the Superior Court found waiver due to appellant's failure to timely file the Concise Statement. In J.M.R. v. J.M., 1 A.3d 902 (Pa. Super. 2010), the appellant failed to file his Concise Statement with the Notice of Appeal. Viewing that procedural misstep under the In re: K.T.E.L. standard, the Court found the error harmless since there was no prejudice to any party and the trial court had the ability to issue a full opinion. The Superior Court then addressed the issue of appellant's failure to comply with its Order to file a Concise Statement by October 23, 2009. The Court found that, henceforth, all issues would be deemed waived when the appellant fails to comply with a directive of the Superior Court to file a Concise Statement. As this precise procedural issue had not been previously addressed by the Superior Court, it proceeded to address appellant's issues on their merit.

Similarly, in a case decided on October 8, 2010, the Superior Court held that the appellant's failure to follow its direct order instructing him to file the original Concise Statement in the trial court, serve a copy on the trial judge and all parties, and file a copy with the Superior

Court resulted in a waiver of all claims on appeal. Specifically, the appellant failed to file the original with the trial court; and thus, it was not included with the certified record. Mudge v. Mudge, 6 A.3d 1031 (Pa. Super. 2010).

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6/12

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The practice of law is a profession, a genuine calling inspirited with service to the system of justice, not a common business enterprise. The quality of the profession is only as worthy as the character of the people who practice it.

Self-esteem, shared respect for each other, the clients we serve, the judges and the officers with whom we work, are essential to it.

Civility is a virtue, not a shortcoming. Willingness to temper zeal with respect for society's interest in preserving responsible judicial process will help to preserve it.

Unwritten rules of professional courtesy have long sustained us. Since they are sometimes forgotten, we should set them down again and conscientiously observe them.

1 Treat with civility the lawyers, clients, opposing parties, the Court, and all the officials with whom we work. Professional courtesy is compatible with vigorous advocacy and zealous representation.

2 Communications are lifelines. Keep the lines open. Telephone calls and correspondence are a two-way channel; respond to them promptly.

3 Respect other lawyers' schedules as your own. Seek agreement on meetings, depositions, hearings and trial dates. A reasonable request for a scheduling accommodation should never be unreasonably refused.

4 Be punctual in appointments, communications and in honoring scheduled appearances. Neglect and tardiness are demeaning to others and the judicial system.

5 Procedural rules are necessary to judicial order and decorum. Be mindful that pleadings, discovery processes and motions cost time and money. They should not be heedlessly used. If an adversary is entitled to something, provide it without unnecessary formalities.

6 Grant extensions of time when they are reasonable and when they will not have a material, adverse effect on your client's interest.

7 Resolve differences through negotiation, expeditiously and without needless expense.

8 Enjoy what you are doing and the company you keep. You and the world will be better for it.

Beyond all this, the respect of our peers and the society which we serve is the ultimate measure of responsible professional conduct.