

**Supreme Court of the State of New York**  
**COUNTY OF QUEENS: IDV Court** \_\_\_\_\_x

N. B.,

Plaintiff,

-against-

R.B.,

Defendant.

Dated: May 11, 2006

Index # 19965/2004

**DECISION and ORDER**

Present:

Hon. Esther M. Morgenstern  
J.S.C.

\_\_\_\_\_x

**FINDINGS of FACTS**

Plaintiff is seeking a Divorce on the ground of Constructive Abandonment by the Defendant pursuant to DRL §170 (2). The Plaintiff alleges that commencing on January 10, 2003 and continuing for more than one year the Defendant refused to engage in sexual relations with the Plaintiff. The parties were married on June 16, 1995 in the State of New York. There is one child of the marriage, K., who is ten years of age ( b. March 19, 1996 ). At trial, the Plaintiff was 41 years of age and the Defendant was 39 years of age. The Plaintiff suffers from Multiple Sclerosis (MS) which was diagnosed in 1998. The Defendant is in good health.

Plaintiff filed a Summons with Notice on September 2, 2004. Plaintiff served a Verified Complaint dated November 9, 2005 seeking a divorce based on Constructive Abandonment pursuant to DRL §170 (2). A Note of Issue and Certificate of Readiness were served and filed by the Plaintiff on August 19, 2005. The Plaintiff and the Defendant filed Statements of Proposed Disposition with the Court.

## **Grounds**

The Plaintiff's Verified Complaint alleges that for more than a one year period before filing the Summons and Notice the Defendant refused to engage in sexual relations with the Plaintiff. (See, Verified Complaint ¶ Sixth). The Plaintiff alleges that the refusal was willful and intentional and that the Defendant continued to refuse "without good cause or provocation ... Defendant therefore disavowed his marriage to Plaintiff and constructively abandoned her." Pursuant to DRL §170(2) a constructive abandonment is established if the evidence proves Defendant continuously, wilfully and without cause withheld sex from the Plaintiff despite repeated requests, for more than one year. The parties stipulated as to the ground for divorce and the Court conducted an Inquest on November 9, 2005.

The Plaintiff in her Complaint demanded a dissolution of the marriage, custody of the infant issue of the marriage, child support, exclusive use and possession of the marital residence until K. is eighteen years old, and equitable distribution of all marital property, if a divorce is granted.

The Court finds that the Plaintiff has submitted sufficient evidence to support her cause of action for a divorce based on Constructive Abandonment. The evidence submitted supports the Plaintiff's Complaint for divorce since the Plaintiff's testimony described a willful, continuous and without cause refusal to engage in sexual relations by the Defendant for more than one year. Jurisdiction has been established and Plaintiff has proven her claim of Constructive Abandonment and a judgement of divorce based on the ground of Constructive Abandonment under DRL§170(2) is hereby granted to the Plaintiff on her Complaint.

### **Stipulations**

On December 12, 2005 the parties entered into a Stipulation of Settlement that issues of custody and visitation were resolved. This Stipulation was “so ordered” by the Court. A Final Order of Custody was granted to the Plaintiff and a Final Order of Parenting Time was granted to the Defendant. The remaining issues to be determined are child support, maintenance and equitable distribution of the assets of the marriage. The Court will address the classification, valuation and appropriate equitable distribution of the assets of the marriage. The Court shall determine the appropriate amount of child support for the non custodial parent to pay under the Child Support Standards Act (CSSA) and maintenance.

### **Marital Assets**

The marital residence located at \*\*, Glendale, N.Y. was purchased by the parties during the marriage in October of 1996 for \$225,000. The Plaintiff worked at Chase Manhattan Bank when the parties were first married and resigned from that position before the birth of K. Plaintiff has operated a day care center at the marital residence called L\*\*\*\* since 1997. The Defendant has worked as an Operating Engineer in a large commercial building in Manhattan since 1990. The parties were both previously married and divorced and have one child each from those marriages. The Plaintiff’s son, J., sixteen years of age, lived with the Plaintiff and Defendant in the marital residence. Plaintiff receives Social Security benefits for J. since his father passed away. Defendant makes child support payments of \$200 a week for his son, C., pursuant to a court order of support by income deduction order.

The Plaintiff served and filed an Affidavit of Net Worth in a timely fashion. It was supported by pay stubs, tax returns and account statements. Plaintiff submitted corporate tax

returns for the day care center. Defendant submitted several Affidavits of Net Worth and copies of tax returns as well as payroll documents. Defendant's Statement of Net Worth indicated that he earned a base annual salary of \$58,000 as an Operating Engineer in 2005. He consistently earned additional income for overtime employment. His Statements indicate that he earned \$85,000 in 2002, \$103,000 in 2003 and \$114,000 in 2004. Defendant has a defined benefit retirement plan and an annuity retirement benefit with his union: The Union of Operating Engineers. Defendant owns a 1992 Dodge automobile with a stated worth of \$500. Plaintiff's Statement of Net Worth claims that she earned only \$6,360 in 2004 as the only officer of L\*\*\*\*. Plaintiff has no retirement benefit from her employment. Plaintiff owns a 1999 Nissan Quest with an approximate value of \$9,500 averaging the trade-in and retail price of this vehicle according to the National Automobile Dealer's Association (NADA) Used Car Guide.

The marital residence was appraised by the Court's neutral expert, Peter Avenia. A copy of the report was submitted into evidence. ( Plaintiff Ex.9 ) The appraiser made "a personal inspection of the dwelling" and used recent comparable sales to establish a market value for the residence of \$570,000 dollars as of March 1, 2005. The report specifically gave no separate added value to an additional twenty five by one hundred foot lot of land adjacent to the home which the parties had acquired for an additional \$25,000 when they purchased the residence and no added value for the space in the home rented to L\*\*\*\*.

The parties did not demand a jury trial on the grounds issue and pursuant to the Uniform Rules of Court § 202.21 this constitutes a waiver by all parties of a jury trial. A trial on the issues of child support, maintenance and equitable distribution was concluded on

February 27, 2005, after both parties submitted Memoranda of Law and Statements of Proposed Disposition.

### **Defendant's Testimony**

Plaintiff called the Defendant as the first witness. Defendant was removed from the marital residence on June 24, 2004 after an alleged incident of domestic violence. The Defendant testified that he left the marital residence on June 24, 2004 without an opportunity to remove any belongings. He moved to his Grandmother's home and then into the home of his sister where he is currently living. He testified further that he pays his sister \$645 a month in rent and "helps her out" financially. His Affidavit of Net Worth indicated that he gave his sister \$750 a month. He acknowledged that the Court had ordered him to pay temporary child support in the amount of \$400 a month on November 17, 2004 and the amount was increased to \$295 a week pursuant to a Court Order dated December 21, 2004. The same order directed him to pay the mortgage on the marital residence in the amount of \$2,450 a month beginning with the December 2004 payment subject to re-allocation. He testified that he made the December 2004 mortgage payment and one additional payment by credit card. He testified further that his overtime was decreased which dramatically reduced his income and he stopped making those payments. He testified that the management at the building where he is employed hired more workers in order to reduce overtime assignments. He testified further that he paid \$7,755 in child support payments. He admitted that he stopped paying Plaintiff completely for a period of time. His testimony included a breakdown of his current budget for personal expenses. He testified that he expends over \$2700 a month for living expenses. He

has consistently paid his child support payment of \$200 a week for his other child pursuant to a court order by income deduction. He owns a 1992 Dodge automobile that costs him \$260 a month for insurance and expenses. He has maintained his health club membership and his budget includes \$300 a month for recreation. He testified that he is indebted to private individuals and is making a payment of \$510 every month to J.M. for an unidentified obligation.

Defendant testified that he provided \$18,456 from an annuity loan for the down payment on the marital residence. He testified that he worked throughout the marriage. Defendant alleged that he made significant renovations to the marital residence. He testified that his annuity loan was used for the purchase of the residence and not to renovate it. He claimed to have spent \$40,000 to furnish the marital residence and pay marital debts. He testified that such purchases were on credit cards which were satisfied with Defendant's settlement money from a personal injury action however he only produced a copy of a bill of \$9,900 for living room furniture as evidence of those purchases.

Defendant denied that he ever assaulted the Plaintiff. He claimed that the Plaintiff fabricated a domestic violence incident because she wanted him out of the residence. Defendant testified that the parties had a joint bank account until he was removed from the marital residence and they filed their income taxes jointly. Defendant alleged that Plaintiff managed all the financial affairs pertaining to the residence and the business on her own since purchasing the property. He testified that Plaintiff handled the finances because "she was good at it".

Plaintiff moved by Order to Show Cause returnable June 7, 2005 to hold Defendant in

contempt for his failure to pay child support and maintenance in the form of the mortgage payment for the residence. Defendant's attorney submitted an Affirmation in Opposition which sought a downward modification of the December 21, 2004 Order. Defendant maintained that he should pay child support to the Plaintiff in the reduced amount of \$203 a week from the \$295, as ordered by the Court. ( See, Affidavit of Defendant dated August 22, 2005 ¶ Ten ). Defendant testified that he paid the Plaintiff \$7,755 to date. Defendant was adjudged to be in contempt of the December 21, 2004 Order and jailed overnight then was released on a promise to purge that contempt and pay the arrears. The motion was held in abeyance until the conclusion of the trial.

Defendant testified that he was employed as an Operating Engineer and was a member of the union before the marriage. He possesses a pension and annuity benefit through his union. His health benefits cover the Plaintiff and child. He testified further that Plaintiff continues to receive treatment for her MS under his health insurance plan, although the expensive MS medication is paid for separately by Plaintiff.

Defendant testified that the marital residence was refinanced in order to pay for the construction of the day care center in the home. He personally expended time and effort to create the space that is used by L\*\*\*\*. Defendant maintained that the mortgage on the marital residence was increased by \$78,000 in order to pay for this improvement. He seeks a separate credit for \$39,000 (one half the increased mortgage debt) since L\*\*\*\* occupies that improved rentable space. He testified that he received a \$90,000 personal injury settlement that was used to pay marital credit card debt and furnish the marital residence. When asked to produce documents regarding the suit he claimed the Plaintiff had all the documentation in the marital

residence and he has not returned to the home since being removed therefrom pursuant to the Temporary Order of Protection. Plaintiff testified that Defendant received a settlement and \$50,000 of the settlement money was used to furnish the residence. Defendant produced a bill for living room furniture for \$9,900 from Ethan Allen Furniture purchased in October of 2003. He testified that he paid to furnish four other rooms in the residence from the personal injury settlement.

Plaintiff's Affidavit of Net Worth includes a 1999 Nissan Quest automobile which was purchased for \$28,000 in 1999. Defendant maintains the vehicle is worth \$12,000 but has submitted no evidence as to its value; the NADA guide indicates it is worth approximately \$9,500. Defendant is seeking to have the vehicle valued and to receive a credit for one half of its value. Defendant claimed he has tools, a bicycle and a motorcycle in the garage at the residence. Plaintiff testified that those items are in the garage and Defendant could remove them from the garage.

Defendant testified that L\*\*\*\* earned significant amounts of cash, some of which was deposited into their joint account and subsequently withdrawn and concealed by the Plaintiff. He testified further that L\*\*\*\* was to pay \$720 of the current \$2,450 a month mortgage payment in lieu of rent, as it had since the creation of the business. Additionally, Defendant alleged that the Plaintiff was hiding marital assets disguised as cash gifts from Plaintiff's mother in her son, J.'s, Uniform Gift to Minors Act (UGMA) custodial account.

On cross examination, Defendant testified that his disposable income was limited by other factors in 2005. Defendant paid \$17,700 in attorney fees for the disposition of his criminal case. He paid \$3500 to a financial researcher and a sum, which he could not recall, to

hire a private investigator. He also paid for his own real property appraisal for the marital residence.

Defendant testified that he enrolled in his union's pension plan in September of 1990. He is eligible for payment from the plan after 35 years of employment. He testified that he borrowed \$18,456.50 from his annuity when the marital home and adjacent lot were purchased. However he defaulted on repayment of that annuity loan on June 22, 1998 which transformed the loan into an income distribution according to his union (See, Defendant's Ex. D). The same annuity fund administrator informed him that his individual annuity fund had a balance of \$82,583.45 as of February 1, 2005. (See, Plaintiff's Ex. 8). This Individual Annuity Fund (IAF) is administered by Local 40 of the International Union of Operating Engineers and is separate from the Defendant's defined benefit pension benefit administered by the Central Pension Fund. (Plaintiff's Ex. 7). Its distribution can be accomplished with a Qualified Domestic Relations Order that addresses the IAF benefit.

Defendant testified that in 2001, 2002, and 2003 the parties filed their income tax returns jointly and the refunds were placed in their joint account for household expenses. Defendant submitted proof that the parties' 2003 federal income tax return was adjusted and \$2,670 is owed. (See Def. Ex. J ). Defendant maintained that this debt should be shared equally. In 2004 Defendant filed his income tax return as head of household and received a refund which he deposited into his own account. Any amount of the 2003 income tax liability that may have been the responsibility of the Plaintiff is offset by the 2004 income tax refund that the Defendant received.

Defendant testified that the Plaintiff operated the day care center for eight years and the

center earned a sufficient amount of money for L\*\*\*\* to pay \$1000 a month in rent and utilities toward the residential mortgage. In 2004 Defendant deducted a child care expense in the sum of \$6,000 paid to Melody P. , for day care for his nephews, according to his tax return. He claimed exemptions for his nephews on the same return. When asked why he was paying to support his sister's children when he was not supporting his own child, Defendant stated that he no longer pays for child care for his nephews. Defendant testified that he should be excused for his failure to pay child support and that the arrears should be waived. Defendant has the burden to explain his failure to pay support since he did pay other expenses. Calvello v. Calvello, 20 AD 3<sup>rd</sup> 525, (2d Dept. 2005).

Defendant testified further that when the marital residence was purchased in October 1996 there was a mortgage of \$207,000 on the property. He acknowledged that Plaintiff's mother provided \$50,000 for the purchase. Plaintiff produced a document, indicating the sum was a loan, signed by Plaintiff and her mother, who testified that this was a loan. Defendant, who did not sign this document, maintains that it was a gift. The property was refinanced, according to the Defendant, to pay for the renovation needed to start the day care business. The mortgage was increased by \$78,000 to \$285,000.

Defendant maintained that the separate twenty five by one hundred foot lot should have a value since the New York City Tax Assessor valued the lot at \$92,900 for property tax purposes. The report submitted by Peter Avenia indicated that the New York City Tax Assessor designated a current market value of \$92,900 for that separate lot. (Plaintiff's Ex.9).

### **Plaintiff's Testimony**

The Plaintiff testified on her own behalf and the Court found her to be evasive and a less than credible witness as to her financial dealings. Plaintiff met the Defendant in 1994 and when first married she worked as an administrative secretary for Chase Manhattan Bank earning \$800 every two weeks in take home pay. The parties lived in an apartment. Plaintiff testified that she receives Social Security benefits for her son, J., from the prior marriage whose father died. K. attends a parochial school and is involved in many extra curricular activities . The tuition is \$3150 a year. According to the Plaintiff, Defendant does not currently contribute to these expenses at all. Plaintiff has removed money from the UGMA accounts to pay these expenses. According to the Plaintiff, after K. was born the parties decided to purchase a house. Plaintiff claimed that the Defendant's annuity loan was used to renovate the house and that the Defendant had no intention of repaying the loan. She acknowledged that the Defendant received a monetary settlement in 1999 for a personal injury lawsuit. Plaintiff acknowledged that Defendant contributed \$50,000 from that settlement over time to pay marital expenses. The Plaintiff recounted that she stopped working in 1998 and wanted to start her own business. She testified that the parties originally renovated the basement so that Plaintiff's mother could move in with them. Plaintiff's mother changed her plans and the parties decided that Plaintiff should operate a day care facility in that space in the house. Plaintiff testified that both parties agreed to refinance the house to pay for the further renovation that would be needed. Plaintiff testified that the Defendant worked many hours of overtime and was not home much during this time.

The Plaintiff testified further that she was diagnosed with MS in 1998 and is now

hampered by significant body tremors. During the litigation there was a problem with the insurance coverage and Plaintiff had to borrow money to continue treatment. Plaintiff and their child are currently covered by the Defendant's health insurance. Plaintiff now has a separate insurance policy for her MS medication which costs \$895 a month. According to Plaintiff, MS has detrimentally effected her handwriting and speech. Plaintiff stated that she has difficulty standing and also suffers from rheumatoid arthritis. Plaintiff testified that her health problems contributed to the joint decision to open the L\*\*\*\* day care business.

Plaintiff testified about the day care business and claims she earns approximately \$6,000 a year working full time as the director of L\*\*\*\*. Plaintiff was not forthright about the income and distribution of the proceeds from the business. She submitted business tax returns which showed that the business grossed \$63,342 in 2003. ( See, Plaintiff's Ex. 21 ). The gross receipts from the day care business show a steady increase from \$34,013 in 2001, to \$41,630 in 2002 and finally to \$63,342 in 2003. However the tax returns show an operating loss for every year of operation. Plaintiff receives compensation as an officer of the Corporation and she earned \$6,360 in 2003. L\*\*\*\* has a staff of two employees who were paid salaries totaling \$19,034 in 2003. The facility can provide care for up to 14 children according to Plaintiff. L\*\*\*\* did pay rent and utilities to the parties that defrayed the monthly mortgage cost for the residence before the divorce action commenced. Plaintiff testified that since April of 2005 the police were called repeatedly to the residence. She testified that there were reports of abandoned children at the day care facility and parents began to remove their children from the center. Plaintiff testified further that despite this problem the business grossed approximately \$4,500 to \$5,000 a month and is providing day care for up to 14 children. Plaintiff gave no

indication that she would retire from working due to her health problems.

Plaintiff maintained that she took care of most aspects of the day care business but the Defendant was involved to some degree. According to Plaintiff, Defendant made out checks for the business, which she signed. The Defendant prepared deposit slips and paid some expenses of the business. Plaintiff testified that Defendant kept his name off the title of the house and L\*\*\*\* so he could keep the child support payments to his first child low. The Plaintiff was complicit with this arrangement in an attempt to deny Defendant's son his appropriate child support and she knowingly benefitted from this deception as well.

Defense counsel queried Plaintiff about her finances and asked, why there were discrepancies in her Statement of Net Worth. Plaintiff testified that she gave financial information about the business, to the Court's neutral expert, Heidi Muckler, CPA. However, she failed to turn over attendance sheets from L\*\*\*\* for 2003 or 2004 claiming that they were not available. She testified that she was paid by parents in cash or bank checks since 1998. The business did not provide receipts to parents according to the Plaintiff. She had no explanation as to the whereabouts of that cash. The Court's expert, with the information provided by the Plaintiff, determined, in a "draft" evaluation, that the business had no financial value. The Court completely discounts this appraisal. The "draft" report submitted delineated the methodology selected to value the day care business. It explained that in reaching that "zero" valuation "we determined that based on the facts and circumstances of this matter and the lack of guideline public companies or comparable transaction data the Excess Earnings Approach was the most appropriate under the circumstances." (Muckler Report page 7). Such an approach combines net tangible assets and intangible assets in order to generate a

conclusion of value for a business. A final report was never prepared by the expert and no expert was called as a witness in order to testify as to the value of the L\*\*\*\* business. The Court finds that this method of evaluation is totally inappropriate to value this day care business and no expert was called to explain the conclusions reached.

This business is a cash business and there was little information from the Plaintiff about the cash from that business, how it was spent and where it was deposited. According to the Plaintiff, the business earned little or no money. The “draft” report succinctly poses the question, “The question does arise why someone would continue to work in a business which does not generate any income to them.” (Muckler Report page 2). The “draft” report does indicate that reasonable compensation should be an adjustment to the analysis. A reasonable compensation for someone replacing the Plaintiff would be \$ 21, 232 a year according to the evaluator. (See Report page 8). The draft report is silent as to the payments that L\*\*\*\* was making to pay for the residential mortgage and utility bills on the residence in lieu of rent.

Plaintiff first moved for child support and maintenance in the Summons with Notice dated September 2, 2004. The temporary support that should have been paid pursuant to this Court’s Order and the CSSA is \$23,600 at \$295 a week for child support calculated from September 2, 2004 to April 2006. [20 months]

Plaintiff testified that Defendant paid the December 2004 mortgage payment for the residence as ordered by the Court on December 21, 2004. She claims, he made no further payment for the mortgage. In fact, the Defendant stopped making any payments for child support for a time and provided evidence that he made two mortgage payments by credit card during the pendency of the action. Defendant admits that as of February 21, 2005 he paid

\$7,755 towards his child support obligation. (See Defendant's Memorandum pg. 19). The Plaintiff testified she could not pay the mortgage on the home and the loan went into default. The lender initiated court proceedings to foreclose on the mortgage. Plaintiff turned to her sister, G. Z., and her brother, J. Z., for assistance. Plaintiff did not explain what happened since the action commenced to the \$1,000 that L\*\*\*\* was supposed to pay toward the monthly mortgage and utility bills as reported on her corporate tax return. Plaintiff testified that she borrowed \$33,507 to pay the mortgage arrears and the expenses to reinstate the loan and borrowed the money to pay the \$650 fee for the Court ordered appraisal of the marital residence from her sister, which was subject to re-allocation. Plaintiff submitted a copy of a check from G. Z. to N. B. for \$2,100 dated July 30, 2004 which purported to be for property taxes on the marital residence as well as copies of checks from G. Z. to General Motors Acceptance Corporation, the mortgagee for the residence. (See Pltf. Ex. 18).

Plaintiff testified that although there were considerable amounts of money deposited into the UGMA accounts for her son J. she had no authorization to remove those funds to keep the mortgage current, although she used money from the Account to pay taxes for L\*\*\*\* and to lend money to a friend. Plaintiff testified that the large deposits into these accounts came from the Plaintiff's mother. The Plaintiff claimed that the source of the funds was from J.'s maternal great grandparents and his maternal grandmother whose parents had successful businesses in Puerto Rico. The maternal grandmother inherited the estate. The maternal grandmother testified that she sold real property in Puerto Rico for \$81,000 in 1974 and according to Plaintiff her mother brought all this money back to the United States to distribute between her children and grandchildren.

The Plaintiff submitted evidence that the main custodial account for J., at a Fleet Bank, in an account ending in 026, had a balance of \$ 245,812 as of December 2004. The Account was opened on July 30, 2001 with a deposit by Plaintiff from a Bank Check drawn from New York Community Savings Bank payable to Plaintiff in the amount of \$ 44,642. The other accounts had \$10,140 and \$12,658 balances as of December 2004. Plaintiff testified that all three were UGMA accounts at Fleet Bank funded by gifts from her family. The UGMA account ending in 026 was the one that Defendant claimed was a depository for marital funds from L\*\*\*\* and defense counsel submitted account and deposit information which showed that since the account was opened the Plaintiff made 28 cash deposits every month ranging from \$500 to \$ 4000 beginning on August 7, 2001 and ending June 7, 2004. The total cash deposits into the Account is \$45,000. It is more credible that these monthly cash deposits to the Account came from L\*\*\*\* and should be credited to the marital assets.

A deposit of \$102,781, into the 026 UGMA Account, was made by a check drawn from the parties joint account on September 12, 2003. The ultimate source of this deposit was not established. In addition, the Plaintiff and her mother made a single deposit of \$54,846 on November 6, 2002 from a joint account, in their names, into the UGMA account.

The Plaintiff testified, without objection, that she took care of the household and took care of the child. Plaintiff alleged that Defendant tried to run her over with an automobile in the summer of 2004. She filed a report with the New York City Police Department and the Defendant was removed from the marital residence. The Plaintiff commenced this proceeding in September 2004. Plaintiff expressed her desire to remain in the marital residence but did not explain how she will pay the mortgage and expenses after distributing to the Defendant his

equitable share of the marital assets on a weekly salary of \$109 with household expenses exceeding \$80,000 a year.

### **Testimony of Maternal Grandmother G. Z. F.**

Defendant called G.Z.F., the Plaintiff's mother, as a witness. Ms. F. is seventy six years of age and her sole income is a Social Security disability pension that she has received for twenty nine years. The maternal grandmother claimed to live in a New York City Housing Authority apartment with a monthly rent of \$145. She testified that the money in J.'s UGMA account was placed there at her direction but that she can direct withdrawals for her needs and that N. B. may remove money if she needs it. Ms. F. testified that she gave money to her adult children and deposited money into UGMA accounts for her grandchildren including K.. The witness testified that she did not trust Defendant so she put money in J.'s name. She testified about the source of funds deposited into J.'s UGMA accounts specifically the largest one with a balance over \$245,000 as of December 2004. The witness testified that she also gave cash to Plaintiff in order for the Plaintiff to give the gift to J. . Ms. F. testified that she gave J. \$44,000 and placed additional money in J. 's account out of fear that Plaintiff's MS would interfere with her ability to care for the child. She testified further that \$44,000 of the funds in this account represent half the net proceeds from a sale of her real property in Puerto Rico in 2002 and the rest of the account represented gifts from Ms. F. to J. from her inheritance from her parents and her wedding gifts. She maintained that she also made a \$50,000 loan to the parties to help purchase the marital residence. Her testimony did not match the Plaintiff's testimony. Ms. F. testified that she could direct the Plaintiff to withdraw any amount from J. 's UGMA

account if Ms. F. needed money.

Ms. F. was married in 1957 and her mother died in 1989. The witness stated that most of her assets which funded J.'s account were brought by her to the United States in cash. She has resided in the United States for 25 years yet the UGMA Accounts were first opened in July of 2001. She testified that she kept more than \$60,000 in cash in her apartment and that cash funded, at least, 28 cash deposits that Plaintiff made to J.'s UGMA account on a monthly basis between August 2001 and June 2004. These deposits which were made by the Plaintiff, N. B. totaled \$45,000. The witness could not explain why this gift of \$45,000 was made in increments and on a monthly basis commencing in 2001. Ms. F. was also able to provide \$50,000 to the parties when they purchased the marital residence in 1996. The maternal grandmother testified that she could use the money in J.'s Account whenever she needed it. The testimony of Ms. F. that she can direct the Plaintiff to remove funds for her needs from J.'s Account vitiates any donative intent and is evidence that this was not an irrevocable gift. The testimony of the Plaintiff revealed that she withdrew money from J.'s Account to pay taxes and to make a personal loan to a friend. The Court finds the witness's testimony as to the creation of the Account and the source of the cash deposits to it to be incredible.

#### **Testimony of A. Z.**

A. Z., the Plaintiff's brother, testified and he supported his mother's testimony that the source of funds in J.'s UGMA account was his mother. He acknowledged that a sale of real property in Puerto Rico netted his mother \$78,000 of which his mother gave half to Justin and

half to him. The testimony from Plaintiff and Ms. F. does not adequately explain the source of all the cash that was deposited into the UGMA accounts from August 2001 to June 2004.

The testimony of Ms. F. and A. Z. is particularly incredible. While the Defendant has made no representation as to his direct contribution to the accounts he argued that the L\*\*\*\* business generated cash income and he maintained that the cash was deposited into J.'s Account. It strains credulity that no cash deposits were made into the Account before L\*\*\*\* was in business and the deposits increased in size and regularity until 2004, the year the action was commenced. There have apparently been no additional cash deposits made to the Account since the action commenced. The Court finds that the cash deposits that Plaintiff made monthly into this account are marital property and the Defendant shall receive a credit for the one half of the \$45,000 deposited.

A party that claims that property acquired during the marriage is separate property has the burden of proving that the property is not a marital asset. Defendant maintains that he is entitled to an equal share of the equity in the residence and Defendant has submitted evidence that he made significant contributions to this asset during the marriage. The Plaintiff acknowledged that it was purchased during the marriage.

DRL§236 B(1)[c] states in pertinent part:

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

The residence at \*\*, Glendale, N.Y. is marital property and shall be subject to equitable distribution analysis in order to determine a proper division of the equity in the residence. The parties agree that the equity in the home was approximately \$300,000 at the time of commencement. The residence was appraised by Peter Avenia, the neutral expert, at \$570,000, with no additional value given to the twenty-five by one hundred foot lot that the parties purchased with the residence for an additional \$25,000. The parties acknowledged that \$270,000 is outstanding on the mortgage. The property had an initial mortgage of \$207,000 in 1996 and in 1999, the property was refinanced. The Defendant maintains that he should be entitled to a separate credit for \$39,000 or half of the increased mortgage principal over \$207,000 since that represents a contribution to the renovation for the opening of the day care business. In addition he is seeking a separate credit for his \$90,000 personal injury settlement that he received in 1999. The marital residence was purchased with a \$32,000 down payment in 1996. Defendant maintains, in his Proposed Statement of Disposition, that the UGMA account in Fleet Bank for J., which has a balance of approximately \$245,000, should be deemed marital property and shared equally between the parties.

Defendant seeks a downward modification of his child support and a reduction in the arrears owed to Plaintiff to \$8,700. Defendant is seeking to have the Court waive all child support arrears. (See page 19 Defendant's Memorandum of Law). The Court has the discretion to cancel child support arrears when the amount is unconscionable. A court excused arrears when the amount agreed to by the parties was three times greater than the applicable CSSA

guideline amount. See, Wisniewski v. Cairo, 305 AD 2d 788, (3d Dept. 2003). The Defendant herein has failed to establish any reasonable excuse for his failure to pay child support as ordered.

The Defendant maintains that his share of the \$2450 mortgage payments should have been set at \$725 a month, which represents one half of the \$1,450 monthly mortgage obligation after Little Forest pays its rent and utilities payment of \$1,000 a month, and that the premises be sold in order to effect a distribution of the assets. (See page 17 Defendant's Memorandum of Law).

The Plaintiff has paid the mortgage payments during the pendency of this action to reduce the principal and reinstate the present mortgage. Plaintiff claims that she has been responsible for the mortgage payments since September 2004 when the action commenced except for two payments made by Defendant. (Plaintiff Ex. 17). Plaintiff was forced to pay additional money to keep the mortgage current since the Defendant's failure to pay caused the foreclosure proceeding. Those payments entitle Plaintiff to a credit of one half of \$2450 X 20 months less the two payments made by Defendant in December 2004 or \$ 22,050, the amount Plaintiff expended on the mortgage on Defendant's behalf since the action commenced. Plaintiff testified that she borrowed money from her sister and brother to reinstate the delinquent mortgage. Plaintiff shall receive a credit for the full amount of **all** costs she expended to reinstate the delinquent mortgage: \$2,790 in legal fees as evidenced by a copy of a bank check for the amount to Steven J. Baum, Esq and an additional \$1,135 in foreclosure charges for the mortgagee for a total of \$3,925. (See Plaintiff's Ex.12). The Plaintiff is entitled to a credit for half the property tax which she paid, as well.

The Defendant is entitled to a credit representing one half of the rent portion of the \$1,000 a month that L\*\*\*\* should have been paying towards the mortgage and utilities on the residence during that time. Plaintiff gave no adequate explanation as to what happened to those payments since the commencement of this action. L\*\*\*\* was to pay \$720 a month as rent to the parties which was used to pay the mortgage on the marital residence. This \$720 a month component of L\*\*\*\*'s \$1,000 a month is evidenced by copies of monthly checks in 2003 submitted. (See Plaintiff's Ex. 16). The credit to Defendant would be \$7,200 ( $\frac{1}{2}$  20 X \$720). The credit for the rent shall reduce the mortgage arrear amount which the Defendant must pay. The net credit to the Plaintiff for mortgage costs would be \$14,850 plus \$3925, the legal costs incurred by the foreclosure proceeding, plus one half of the property taxes paid as of April 2006.

The Court finds the Defendant's testimony to be credible but self serving when describing his significant reduction in income that is coincidental with the commencement of this action. Defendant failed to comply with the Child Support and Maintenance Order of this Court which caused increased expense and complication in the divorce action which thereby increased the cost of litigation for both parties. Defendant has failed to fully pay the \$295 a week in child support or the mortgage payments on the marital residence as ordered. The Court ordered the mortgage payments to be made by the Defendant subject to future re-allocation. In fact, the direction for the Defendant to pay temporary child support **and** the entire monthly mortgage payment was an improper award of a double shelter allowance to the Plaintiff. See, Sicarelli v. Sicarelli, 285 AD 2d 541, (2d Dept. 2001). "Shelter costs attributable to the children are inherent in the basic child support obligation." Id., 542, *citing*,

Chasin v. Chasin, 182 AD2d 862; Ryan v. Ryan, 186 AD2d 245; James v. James, 169 AD 2d 441; Lenigan v. Lenigan, 159 AD 2d 108. However, Defendant has failed to show any proof of a compelling reason for his payment of other expenses before his child support obligation. The Court finds no reason to excuse or waive the child support arrears that the Defendant owes to the Plaintiff as adjusted. In addition, Defendant failed to pay his share of the cost of the neutral appraiser for the marital residence.

This Court is not bound by a party's testimony about their own finances. Rohrs v. Rohrs, 297 AD 2d 317( 2d Dept. 2002). A court may correctly impute income to a party when it determines that testimony given is not credible. Scammacca v. Scammacca, 15 AD 3d 382, (2d Dept. 2005). In this case both parties gave less than credible testimony about their income and their ability to earn.

Defendant has steady employment which provides him with a significant salary and health insurance. Defendant testified that he has worked in the same union since 1990. The Plaintiff seeks maintenance from the Defendant. The Defendant seeks no maintenance from the Plaintiff. Plaintiff seeks child support from the Defendant in accordance with this Court's prior order while the Defendant seeks a decrease in the amount that he was ordered to pay. The Court shall apply the Child Support Standards Act (CSSA) to the parties combined income. Plaintiff maintains that the prior Support Order, properly computed a weekly child support payment of \$295 and should remain in effect.

## **EQUITABLE DISTRIBUTION**

### **Marital Assets**

The Court must classify, value and make an equitable distribution of the marital assets pursuant to the factors enumerated pursuant to DRL§ 236 B (5) [d]. The marital residence, the L\*\*\*\* day care business, the 1992 Dodge automobile, the 1999 Nissan Quest automobile, the cash deposits imputed to the day care business made by Plaintiff into J.'s UGMA account totaling \$45,000 and the Defendant's retirement benefits are marital property. The Court finds that the residence was purchased after the parties married and before the action for divorce was commenced therefore it should be classified as marital property. The L\*\*\*\* day care business, likewise, is a marital asset created and funded by the parties during the marriage. That portion of the Defendant's retirement benefits, as well as the vehicles acquired during the marriage are marital assets.

All property or things of value acquired by either party during the marriage and prior to the commencement of the action shall be deemed marital property for the purposes of equitable distribution pursuant to DRL §236 (B) 1[c]. The parties were married on June 16, 1995. The residence was purchased in October of 1996. This action was commenced on September 2, 2004. The testimony and documentary evidence indicate that Plaintiff and Defendant bought the home together with funds from the Plaintiff's mother and from Defendant's annuity. The parties took out a mortgage under both parties names and the Defendant testified how he contributed to the cost, upkeep and repair of the residence before the action commenced.

The parties have credit cards in their own names. They had a joint bank account which was closed after the Defendant was removed from the residence. They filed their tax returns jointly during the marriage. The Defendant has a pension and an annuity account with the Union of Operating Engineers. The Annuity was worth \$82,583 in Feb 2005. The parties

were financial and life partners throughout the marriage. The residence in Queens is a marital asset that Defendant has contributed to in a significant manner. He asks for a credit for the personal injury settlement that he testified was initially kept separate and then used to pay marital debts. Plaintiff conceded that the Defendant did receive a personal injury settlement in 1999 and Plaintiff convinced the Defendant to place the proceeds into a joint account that was used for marital expenses. Plaintiff testified that \$50,000 of that money was used to furnish and maintain the marital residence. Defendant produced a credit card receipt that indicated that he paid \$9,951 for living room furniture that was delivered to the marital residence on October 17, 2003. (Defendant's Ex.K).

A court is required, pursuant to Domestic Relations Law § 236 (B) 5(a) to “ determine the respective rights of the parties in their separate or marital property, and ... provide for the disposition thereof in the final judgment.” The deed to the marital residence is in the Plaintiff's name alone but the parties acted together to purchase, renovate and maintain the home. They acted together to create and start up the L\*\*\*\* business. It is equitable, under the circumstances, as presented, to determine that the Defendant is entitled to an equal share of both assets.

A marriage of long duration where the parties have contributed equally should lead to as equal a division of marital property as possible. Meza v. Meza 294 AD 2d 414 (2d Dept 2002). In a marriage of long duration where both parties have made significant contributions to the marriage a division of the marital assets in a divorce action should be as equal as possible. Granade-Bastuck v. Bastuck, 249 AD 2d 444 ( 2d Dept. 1998).

In the case at bar, the parties both made significant economic contributions to the

marriage. The marriage was nearly ten years in duration. This couple behaved during the course of the marriage as husband and wife. An equitable distribution shall be made between these parties according to the 13 factors enumerated in DRL § 236 B(5) [d].

DRL §236 B(5) [c] requires that marital property shall be distributed equitably between the parties “ considering the circumstances of the case and of the respective parties.” Equitable means what is fair, just and right under the circumstances and facts of an individual case. Our courts have stressed that equitable does not necessarily mean equal. See, Arvantides v. Arvantides, 64 NY 2d 1033(1985). In the context of a long term marriage the distribution of marital property should be equal or as close to equal as possible under the circumstances. Adjmi v. Adjmi, 8 AD 3d 411 (2d Dept 2004). However, a Court shall give proper weight to the evidence submitted and apply the governing statute when making an equitable distribution of marital property. Havell v. Islam, 301 AD 2d 339 (1st Dept 2002). “The Equitable Distribution Law requires that the court distribute property “equitably”, upon consideration of specific statutory factors, other just factors, and upon the circumstances of the case and of the parties” (DRL Practice Commentaries Alan D. Scheinkman 1999 C236B:34).

The Court finds that after hearing the testimony of both parties and giving the testimony its proper weight an equal division of property under these circumstances would be equitable. The evidence submitted and the relevant statutory factors favor as equal a division of the assets of this marriage as possible. The evidence demonstrated that the Defendant made significant economic and non economic contributions to the marital residence and to the day care business. An unequal equitable distribution of a marital asset is appropriate when a party has not contributed to the marital asset. Sade v. Sade, 251 AD 2d 646 (2d Dept. 1988). In the

case at bar, the parties both contributed significantly to the assets of the marriage.

The Defendant raised an issue as to the money deposited in J.'s UGMA account. Plaintiff testified that she deposited and withdrew funds from this Account more like an owner of the account rather than a custodian. The creation of a true UGMA account is an irrevocable gift and withdrawals should be made only for the benefit of the minor donee. There was testimony that the Plaintiff withdrew funds from the account for purposes other than J.'s benefit. The Plaintiff's evasive testimony concerning the source of the funds and the fact that Plaintiff made withdrawals to pay taxes for L\*\*\*\*\* and to make personal loans to friends, indicates that the Plaintiff breached her fiduciary duty to J. . Defendant made a claim that the cash from L\*\*\*\*\* day care which would be marital funds to be equitably distributed were being deposited into the Account. The Plaintiff confirmed that in fact significant cash deposits were made by her into this account totaling at least \$45,000 between 2001 and 2004. The Plaintiff never satisfactorily explained the source of the cash deposits to J.'s UGMA account. The Defendant only asserted a claim to the UGMA Account ending in 026. The Defendant correctly maintains that Plaintiff has breached her fiduciary duty as to the Account. The Court finds that the cash deposits identified by the Defendant are income from the day care business. The Court finds that this UGMA Account was used by the Plaintiff as her own account and that marital assets in the form of cash deposits were co-mingled into the Account.

A properly established UGMA account under EPTL §7-4 constitutes *prima facie* evidence that a gift was intended. The party challenging such a gift needs to produce extrinsic evidence that the donor did not have the requisite intent to make a gift at the time the account was established. Gordon v. Gordon, 70 AD2d 86( 2d Dept. 1979), *affd.* 52 NY 2d 773 (1980).

The Court finds the testimony of the maternal grandmother that she could access the money in the UGMA account for her own benefit indicates that no irrevocable trust was ever created.

The Defendant submitted credible evidence that the cash deposits made into the Account were marital assets and should be deemed marital property. The UGMA Account was not a proper custodial account and there was credible evidence that the cash deposited into it represents marital assets.

The Court shall direct a just and proper division of the marital property of the parties under the facts and circumstances of this action. In the instant case the residence and the business are marital property. They should be divided as equally as possible. The Defendant's refusal to comply with the Court's Order of Child Support and Maintenance caused economic hardship for the Plaintiff. Defendant shall pay all the fees necessitated by the foreclosure proceeding. The Plaintiff's secretive operation of the day care business produced a valuation of zero for a successful enterprise. These facts should be considered under DRL §236 B (5)[d] 13 statutory factors when determining an equitable distribution of the marital estate. In reviewing the statutory factors, the Court makes the following findings:

- 1. The income and property of each party at the time of the marriage and at the time of the commencement of the action;** The Plaintiff earns much less income than the Defendant. The Defendant has a higher earning capacity.
- 2. The duration of the marriage and the age and health of both parties;** This is a marriage of nine and one half years. The parties are 41 and 39 years of age respectively and Plaintiff is suffering from MS. Defendant is in good health. Both parties indicated that they would continue their employment however the Plaintiff will

have more difficulty working if her disease progresses.

**3. The need of a custodial parent to occupy or own the marital residence and to**

**use or own its household effects;** The Plaintiff is the custodial parent and the child

is ten years of age. The Plaintiff has a need to occupy the residence in order to provide

the child with a stable household. In addition, Plaintiff testified that the day care

certificate is only valid at the location of the marital residence. If Plaintiff leaves the

residence the business will need to be reestablished elsewhere. The Court granted the

Plaintiff the exclusive use and occupancy of the residence during the litigation.

Defendant requested that the residence be sold or that he receive his equitable portion

of it from the Plaintiff. The Court has discretion to order a sale of a marital residence

when it is clear that both parties are incapable of maintaining it. Behrens v. Behrens,

143 AD 2d 617, (2d Dept. 1988). In this case, Plaintiff claims her yearly expenses

exceed \$80,000 and she clearly is incapable of maintaining the marital residence on the

\$109 a week income that she claims to receive from L\*\*\*\*. She clearly earns more

than that on a regular basis. Additionally, the Plaintiff's family has the financial

wherewithall to assist her and has given her financial assistance in the past. If Plaintiff

remains in the residence after paying the Defendant his equitable share of the marital

assets she can continue to operate the L\*\*\*\* business without interruption.

**4. The loss of inheritance and pension rights upon dissolution of a marriage as of**

**the date of the dissolution;** Neither party testified about inherited property. It was

undisputed that the Plaintiff has no retirement benefits while the Defendant possesses a

pension and an annuity. The Court finds that the Plaintiff shall be entitled to one half

of the marital fraction of the pension and of the annuity. According to the Central Pension Fund that administers these benefits, there is no provision for a lump sum distribution to an alternate payee. (See Pltf. Ex. 7).

**5. Any award of maintenance under subdivision six of this part;** Both parties expressed their intention to continue working. The Plaintiff is requesting maintenance from the Defendant. Defendant is not seeking maintenance from the Plaintiff. The Plaintiff is diagnosed as suffering from MS. It is a progressive and debilitating affliction. However she testified that she could continue to operate the day care business which grossed more than \$60,000 in 2003. Plaintiff may have to hire additional employees to run the business but she has a means of support from this marital asset. It is unclear how, with her stated income, the Plaintiff would support the expense of the marital residence if she were allowed to remain there. In fixing the amount of spousal maintenance a court must consider the finances of both parties, present and future income, earning capacity and their standard of living. Cerabona v. Cerabona, 302 AD2d 346 (2d Dept. 2003). A Court may order maintenance in an amount that justice requires considering, *inter alia*, the parties' lifestyle before the action commenced, the income of both parties, the distribution of the marital assets, the health of the parties and the future earning potential of the parties. Mica v. Mica, 275 AD 2d 765 (2d Dept. 2000). Plaintiff operates a successful business and has money set aside over which she maintains control and uses for her benefit. Plaintiff shall receive at least one half the significant equity in the marital residence, child support and she receives Social Security payments for J. . The Defendant has a larger income and a

greater income potential which is offset by his obligations to K. and C. . Additionally, the Plaintiff has the support of her extended family who have been a financial support throughout the marriage.

Therefore under these circumstances no award for spousal maintenance is granted.

**6. Any equitable claim to, interest in or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;**

In the case at bar, the Defendant offered credible evidence of contributions to the acquisition and maintenance of the parties' day care business. It is ludicrous to believe that the value of a corporation with steadily increasing receipts that currently exceed \$60,000 a year has no value. No evidence was submitted that either party possessed a professional license.

**7. The liquid or non-liquid character of all marital property.** The main asset subject to equitable distribution is the real property, the day care business and Defendant's retirement benefits.

**8. The probable future financial circumstances of each party;** The Court recognizes that Plaintiff cannot count on the Defendant cooperating fully with his obligations, given the history of this case. It is of vital importance for the subject child to have a stable environment especially at this time.

**9. The impossibility or difficulty of evaluating component, asset or any interest in a business ... and the economic desirability of retaining such asset or interest intact**

**or free from any claim or interference by the other party;** A viable claim has been made by Defendant for a share in the day care business.

**10. The tax consequences to each party;** This was not a factor raised by the parties; but the Plaintiff as the custodial parent may claim the child as a deduction for income tax purposes.

**11. The wasteful dissipation of assets by either spouse;** Plaintiff and Defendant testified that they have maintained separate bank accounts after the Defendant left the marital residence. The Defendant claims an equitable share in the automobile purchased during the marriage. The Defendant claimed that the Plaintiff secreted income from her business in the form of cash deposits to the UGMA account of her son by a previous marriage. There was a pattern of regular cash deposits by the Plaintiff to the Account totaling \$45,000 before commencement of the action. There was testimony by the Plaintiff and her mother that this account was used and would be used in the future for purposes other than the needs of the child. One half of those deposits should be a credit to the Defendant's equitable share of the marital assets.

**12. Any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;** This was not a factor in the instant case. Defendant testified that Plaintiff withdrew money from accounts belonging to J. who is not his biological child and who is not a party to the action.

**13. Any other factor which the Court shall expressly find to be just and proper.** Under the circumstances of this case the Court must consider the Defendant's failure to pay support during the course of the proceeding. It triggered a Mortgage Foreclosure

action and motion practice. The Defendant now proposes to pay \$202 a week in support and \$725 a month towards the mortgage arrears. If the Defendant concedes that he had the ability to pay \$1,533 every month since the action commenced, this makes his claim that his failure to pay was beyond his control, incredible. The Defendant was held in contempt and was incarcerated overnight then was released after promising to purge his contempt. The Court finds that Defendant willfully failed to comply with this Court's Order for Support since he concedes, at the close of trial, that he is able to provide \$1,533 a month to Plaintiff while he maintains a separate household. He continued to support his first child and provided support for his nephews. The Court hereby grants an award to the Plaintiff and Defendant of 50 % of the value of the marital assets and deems that to be fair and equitable.

## **COMPUTATION**

### **Marital Assets**

The marital residence, the day care business and the Plaintiff's retirement account are marital assets. The Plaintiff shall be entitled to remain in the residence if she can make the ordered distributive award to the Defendant. The Court finds that the separate lot of unimproved land adjacent to the residence which was given a market value according to the New York City Tax Assessor of \$92,900 should have a value of at least \$25,000. This value amount shall be added to the appraisal of the residence.

The equity in the house located at \*\*, Glendale, N.Y. shall be equally divided between the Plaintiff and Defendant after giving the Plaintiff a credit for one half of the mortgage

payments and property tax and all the foreclosure fees paid. The other marital asset is the Defendant's retirement benefits. The Plaintiff shall receive 50 percent of the appropriate marital fraction of the pension and annuity according to a Qualified Domestic Relations Order. The Court has the discretion under DRL §236 B to order a distribution to one spouse of an equitable portion of that part of the present value of the other spouses pension earned during the marriage or provide that recipient pay a portion of each future payment to the former spouse or order a distributive award if valuation or other problems make equitable distribution of the pension impractical. Majauskas v. Majauskas, 61 NY 2d 481 (1984).

Plaintiff shall pay Defendant:

\$162,500 50% equity in marital residence and additional lot (\$595,000-\$270,000=\$325,000)

\$ 22,500 50% of \$45,000 cash deposits by Plaintiff to the UGMA Account attributed to the marital business

\$ 9,900 Represents less than 50% present value of \$50,000 for household furnishings that Plaintiff testified that Defendant paid

\$ 4,750 50% value of 1999 Nissan Quest

\$199,650 to the Defendant

Defendant shall have deducted from this amount:

\$ 14,850 The credit Plaintiff should receive for mortgage payments on the residence during the action after adjusting for the rent payments L\*\*\*\*\* should have made (  $\frac{1}{2}$  \$2,450 X 20 months less two months payment = \$22,050 less \$7,200(  $\frac{1}{2}$  of \$720 rent X 20 months) = \$14,850.

\$ 250 50% of the value of 1992 Dodge automobile

\$ 15,845 Child Support arrears that Defendant owes on the *pendent lite* order of support

\$ 4,975 50% of property tax paid on residence and all the foreclosure fees

(\$1,050 and \$3,925)

\$ 325 Defendant's share of the fee for the property appraisal

\$ 36,245

Defendant's net award is  $\$199,650 - \$36,245 = \$163,405$ . This amount shall be further reduced by the award of a \$250 fine and \$5,000 attorneys fees for the contempt motion. The Defendant shall receive \$158,155.

The Plaintiff shall receive a 50% share of the marital fraction of the Defendant's retirement benefits.

Both parties are seeking an award for their attorney fees. This was a highly contested divorce proceeding and despite contentions to the contrary both parties have been able to maintain the action until the end with their own respective financial resources. Plaintiff and Defendant have continued to work and maintain separate households during the action. There is significant equity in the marital assets which shall be divided. After reviewing the respective financial circumstances of both parties the Court finds that the parties should be responsible for their own attorney fees and they may utilize their equitable share of the assets to pay their own counsel fees. *See, DeCabrera v. DeCabrera-Rosete*, 70 NY 2d 879 (1987). In the case at bar, the Court finds that it would be equitable under the circumstances of this case to award the Plaintiff her attorney fees for the contempt proceeding since the Defendant did not purge his contempt and his willful failure to comply prejudiced the Plaintiff and impeded the resolution of the action. *Hackett v. Hackett*, 147 AD 2d 611, (2d Dept. 1989). The Court

hereby grants the Plaintiff \$5,000 for her attorney fees for the contempt motion.

### **CHILD SUPPORT**

The Defendant's child support payment was set by Court Order dated December 21, 2004 at \$295 a week. The proper child support shall be set at the CSSA amount based on the combined incomes of the parties up to \$80,000 a year. The amount shall be collected by the Support Collection Unit (SCU) through an Income Deduction Order. The Order shall direct SCU to deduct the amount from the Defendant's wages for child support. The combined income is \$125,660 with Plaintiff's salary imputed at \$25,000 per year, an amount approximating the replacement value of her services to her day care business. The Defendant's salary shall be imputed at \$100,660 per year an amount which represents the average gross income for defendant for 2002, 2003, and 2004. This amount is significantly lower than his 2004 wages but higher than his 2005 salary. It is an amount a person with his skill and training should reasonably be able to earn. The Court finds that Plaintiff's and Defendant's income must be imputed since they are both capable of earning more than their stated respective incomes. See, Tzanopoulos v. Tzanopoulos, 18 AD 3d 464, (2d Dept. 2005). This is based on the parties actual past earnings history and future earning capacity. Pursuant to DRL §236(B)(7)(a) and DRL §240(1)(b) a party's obligation to pay child support shall commence retroactively to the date of the first identifiable request. See, Burns v. Burns, 84 NY 2d 369 (1994). In the case at bar Plaintiff's first identifiable request for support was when the Summons was filed on September 2, 2004.

The Court shall impute an annual income to the Defendant because of the unconvincing

testimony submitted that since the commencement of the action the Defendant, the monied spouse in this relationship, had his ability to earn diminish from \$114,000 per annum in 2003 to \$81,000 a year in 2005. One pay stub submitted by the Defendant showed that he only worked 32 hours during the regular work week in October of 2005. (Plaintiff's Ex. 6). In fact, the Defendant can earn substantially more than \$81,000 a year he claimed to earn in 2005 as evidenced by his 2002, 2003 and 2004 tax returns. Defendant admitted that during the course of litigation his base salary increased to \$58,000 a year in 2005. The CSSA requires the Court to combine the parties' incomes: \$ 25,000 a year income imputed for the Plaintiff and \$100,660 a year income imputed for the Defendant. This is combined for a total income of \$125,660. This total is then reduced by FICA, Medicare, and Defendant's obligation of child support for his son, C. (\$10,400 a year) and local tax which produces a combined income for CSSA purposes of \$102,700 for the parties. The respective ratios are 20% for Plaintiff and 80% for Defendant. The correct ratio for child support for one child is 17% of the combined adjusted income. Defendant as the non-custodial parent is therefore liable for 80% of 17% of \$102,700 or \$13,968 (\$268.62 per week.). The Plaintiff is awarded and the Defendant is directed to pay the sum of \$268.62 per week for child support by income deduction order through the SCU.

Defendant is to pay 80% of all future unreimbursed medical and dental costs for the child. The Child Support calculations are made in accordance with the CSSA. The combined marital income falls above the \$80,000 threshold but the Court shall apply the statute to the combined income over \$80,000 since the Defendant, the non custodial parent, responsible for

paying support shall benefit from the equitable distribution of the marital assets and has excellent prospects of earning more income than he currently is earning. The Defendant's base pay and consequently his premium and overtime compensation rates have increased. He is in good health and if his employment never gives him the overtime that he enjoyed for the last several years he would have time to seek secondary employment to supplement his primary income. The Court finds that it is equitable to apply the same formula to the combined income that is above \$80,000 a year.

The Defendant shall be responsible for continuing to include the child of the marriage, K. , on his health insurance policy. The Plaintiff shall be responsible for acquiring health insurance for herself and for payment of any unreimbursed medical charges for her own care.

It is hereby

ORDERED, that Plaintiff's counsel shall submit a proposed Judgment of Divorce in accordance with this decision within thirty days on notice; and it is further

ORDERED, that the Plaintiff shall have exclusive use and occupancy of the residence at \*\*, Glendale, New York until the house is sold or the Plaintiff buys out the Defendant's equitable share in the home; and it is further

ORDERED, that Plaintiff and Defendant are awarded 50% each of the equity in the marital residence; and it is further

ORDERED, Defendant is awarded 50 percent of the value of the marital day care business: L\*\*\*\* ; and it is further

ORDERED, Plaintiff shall retain use and occupancy of the marital residence upon payment to the defendant of a net distributive award of \$158,155 for one half of the equity in

the marital residence \$162,500 [ $\$595,000 - \$270,000 = \$325,000$ ], which includes a \$25,000 value for the separate unimproved lot which was purchased with the marital home, a one half interest in the value of the day care business, a \$22,500 credit to Defendant for income from L\*\*\*\* (½ \$45,000 unexplained cash deposits to the UGMA Account), a \$9,900 credit for a less than 50% share of the Defendant's contribution for household furnishings and one half the value of the marital automobile in Plaintiff's possession: \$4,750 for the 1999 Nissan Quest ( ½ \$9,500 NADA value ); and it is further

ORDERED that the distributive award shall be adjusted by a credit to the Plaintiff of \$14,850 for the difference in what Plaintiff did pay and Defendant should have paid to the mortgage and tax during the action, adjusted for the rent payments the business should have made and for child support arrears of \$23,600 less the \$7,755 paid or \$15,845 (or the amount that the Defendant can prove that he paid for child support under the Court's Order dated December 21, 2004); a credit of \$250 for one half the value of the 1992 Dodge automobile in Defendant's possession and \$1050 for one half of the property tax paid (\$2100) and \$3,925 for foreclosure costs; the Defendant's distributive award shall be \$163,405 reduced further by the fine and attorney fees awarded (\$250 plus \$5,000) for the contempt finding of the Defendant for a net award of \$158,155; and it is further

ORDERED, the Plaintiff shall retain custody of the child, K. , pursuant to the prior agreement of the parties and the Order of this Court; and it is further

ORDERED, each party shall be responsible for their own credit card debt and other debt; and it is further

ORDERED, that the Defendant pay \$ 268.62 in child support weekly to the Plaintiff

through the SCU by income deduction order; and it is further

ORDERED, that Defendant owes that properly computed amount for child support since September 2004 or \$23,600- \$ 7,755 up to April 1, 2006 less any amount that should be properly credited to the Defendant; and it is further

ORDERED, that Defendant shall maintain health insurance for the child; Defendant to pay a pro rata share of 80% of the unreimbursed medical and dental costs for the child; and it is further

ORDERED, that the Defendant shall obtain a life insurance policy naming the child of the marriage, K., as beneficiary in the amount of \$200,000 in order to insure that future child support payments are provided; policy to be maintained by Defendant until the child reaches the age of majority; and it is further

ORDERED, that the Plaintiff shall receive a 50% share of the marital fraction of the Defendant's pension and annuity with the Central Pension Fund and Local 94 of the International Union of Operating Engineers; and it is further

ORDERED, that Defendant shall pay Plaintiff \$250 as a fine for his wilful contempt of this Court's Order by refusal to pay child support which did impair, impede and prejudice the Plaintiff during the course of this action as well as \$5,000 in attorney fees expended for the motion; said amount to be deducted from the distributive award; and it is further

ORDERED that Plaintiff receive a credit for the \$325 which represented the Defendant's share of the cost of the appraisal of the residence in Queens; and it is further

ORDERED that Defendant shall receive the walnut mirror he was given by a former employer and his tools, bicycle, and motorcycle in the garage at the residence; and it is further

ORDERED, that henceforth each party shall be responsible for their own outstanding attorney fees.

This constitutes the Decision and Order of the Court.

Enter,

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Esther M. Morgenstern J.S.C.