

5. INTRODUCTION TO EQUITABLE DISTRIBUTION AND MAINTENANCE

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INTRODUCTION TO EQUITABLE DISTRIBUTION AND MAINTENANCE

A. EQUITABLE DISTRIBUTION:

THE STATUTORY FACTORS AND WHICH ONES ARE THE MOST IMPORTANT: DRL 236 (B) (5) (d):

5. Disposition of property in certain matrimonial actions.

a. Except where the parties have provided in an agreement for the disposition of their property pursuant to subdivision three of this part, the court, in an action wherein all or part of the relief granted is divorce, or the dissolution, annulment or declaration of the nullity of a marriage, and in proceedings to obtain a distribution of marital property following a foreign judgment of divorce, shall determine the respective rights of the parties in their separate or marital property, and shall provide for the disposition thereof in the final judgment.

b. Separate property shall remain such.

c. Marital property shall be distributed equitably between the parties, considering the circumstances of the case and of the respective parties.

d. In determining an equitable disposition of property under paragraph c, the court shall consider:

(1) the income and property of each party at

the time of marriage, and at the time of the commencement of the action;

OBSERVATIONS AND NOTES: This factor requires the Court to take a “snapshot” of the parties’ comparative incomes and holdings as of the date of the marriage and as of the date of the commencement of the matrimonial action. The Court will attempt to determine from an analysis of this information how the parties have respectively fared in the acquisition of property and what if anything has changed in earning power during the course of the marriage. Quite often as a consequence of this analysis the Court can ascertain that one spouse’s income, income earning ability and holdings have substantially decreased due to responsibilities as a spouse, parent and homemaker and can then begin to weigh this information in devising equitable distribution.

(2) the duration of the marriage and the age and health of both parties;

OBSERVATIONS AND NOTES: This information begins the Court’s analysis of the parties’ future financial circumstances. The duration of the marriage can most certainly impact the percentage the Court may consider in equitably distributing property. While generalizations should be avoided, in marriages of long duration, absent unique or compelling circumstances, the Courts may very well view the duration as warranting an equal division of the property. This is consistent with the notion that the marriage is an economic partnership with the economic and noneconomic contributions of each of the parties receiving equal weight. Good or bad health is a consideration along with duration as it may impact a party’s ability to be self-supporting or contribute to his or her own support, which may require a greater distribution to a spouse in poor health. Considered as a whole or individually, the directive of the statute is that these items be weighed and taken into account in arriving at the distribution of property.

(3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects;

OBSERVATIONS AND NOTES: The Court is charged with the responsibility of ascertaining the need of the parent having custody to continue to occupy the residence from the perspective of each parent, implicitly the best interests of the children and the financial circumstances of he parties. This is a discretionary

determination of the Court pertaining to one particular asset in the marital estate. Are the parties financially capable of maintaining the marital home? Is there replacement housing that could be found at substantial savings? Are the emotional or psychological issues with the children which would mitigate against uprooting the children? What is the equity in the residence? Is there significant marital debt and are there other means to satisfy that indebtedness other than the equity in the residence?

Another significant consideration is the ability of the custodial parent to maintain the property. Is there is a question that the custodial parent could not sufficiently care for the property, and as a consequence seriously impact the present or future equity of both parties? If the award of support and/or maintenance and/or income from the working custodial parent is insufficient to accomplish the same, the Court should be hard pressed to allow the custodial parent to remain in the residence.

(4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;

OBSERVATIONS AND NOTES: As a consequence of the dissolution of the marriage, a spouse will lose all statutory rights to take from the estate of the other spouse. This loss may be of significant consequence, especially in a situation where there is separate property. As a spouse, if the other spouse died, there is the possibility of taking against the estate of the deceased spouse his or her statutory share even though the deceased spouse cut the other spouse out of his will. In a situation where there was no marital discord, presumably upon the death of the spouse with the separate property, the surviving spouse would inherit the separate property.

As to loss of pension rights, it is usually the case that the marital portion of pension and retirement benefits and entitlements will be distributed and there will be no loss of pension or inheritance rights. However, where there is a substantial separate property component due one spouse that will be lost due to the dissolution of the marriage, the Court can take this into consideration. The foregoing assumes that if the parties had not divorced, the non-titled spouse would have shared in what would otherwise have been classified as separate property.

Also note that some retirement packages will provide for health insurance benefits to the participant's spouse. If the parties are no longer married there will a loss of those benefits, the value of which can be ascertained and asked for in the context of the equitable distribution. ***Walek v. Walek 193 Misc.2d 241 (Sup.Ct. Erie Co., 2002)***

(5) any award of maintenance under subdivision six of this part;

OBSERVATIONS AND NOTES: The Court is required to consider any award it would make for maintenance and weigh it as part of making the determination as to equitable distribution of the property of the parties. It is assumed that in making the determination as to the amount and duration of maintenance, the Court would consider the income, if any, which would be produced by the equitable distribution award.

One should also take note that the statute does not require the Court to take into account any award for child support and in theory, such an award should not in any manner impact the equitable distribution of the parties' property. However, the reality is that it will be considered and weighed in the overall decision making process.

(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;

OBSERVATIONS AND NOTES: This factor embodies the essence of the theory underlying equitable distribution. It requires the Court to look at all of the potential contributions, joint and individual, both direct and indirect, of the non-titled spouse in the various capacities in the acquisition of marital property by the spouse having title. In addition the Court is charged with the responsibility to consider said contributions as they may have impacted the career or career potential of the other party. The Court can distribute marital property regardless of title and this factor is designed to guide the Court in what it should consider in arriving at an appropriate percentage to each spouse. Again the statute recognizes non-

monetary contributions, non-economic contributions as well as monetary and economic contributions of the spouses.

Direct contributions can be found with actual payment by the non-titled spouse towards the acquisition of marital property. The direct contributions may be in the nature of services or labor rendered to the property in question.

One of the most basic indirect contribution found in many cases is where the non-titled spouse remains in the home and contributes as a mother, homemaker and spouse while the other spouse is engaged in gainful employment which leads to the acquisition of property in his or her name alone or permits the working spouse to enhance his career or career potential while not having to be concerned about the duties being performed by the other party as mother, homemaker and/or spouse. The Court is charged with the responsibility to consider and give recognition to these contributions in fashioning an equitable distribution of property.

(7) the liquid or non-liquid character of all marital property;

OBSERVATIONS AND NOTES: Once the Court has identified all of the assets, determined whether those assets are marital or separate and valued the assets, it is charged with the responsibility of making a distribution, whether that distribution is in the form of cash, property or in the form of a distributive award. In ultimately making the determination, the Court must determine if the asset is liquid, namely in cash or cash equivalent or whether it would be difficult to turn a specific asset into cash or cash equivalent. An example of this would be the distribution to the non-titled spouse of his or her share in the other spouse's interest in a closely held corporation where the titled spouse is the sole shareholder. The Court could in theory order the transfer of a number of shares in the name of the titled spouse to the non-titled spouse in satisfaction of the non-titled spouse's interest. This is impractical in that it now puts the parties in a position of potentially more conflict. Could the Court order the sale of the stock? It could, but who would buy the shares which would probably be a minority position in a corporation in which one will have very little say as to how the business is conducted. The Court would most likely rule that the non-liquid nature of the stock would require a distributive award in cash to the non-titled spouse or distribute to said spouse other property to compensate for the value of her equitable share of the stock.

(8) the probable future financial circumstances of each party;

OBSERVATIONS AND NOTES: Under this factor, the Court must consider proof of what is likely to be the financial future of each of the parties. The Court must look to each party's training, education, present employment, past employment, the prospects for future employment, each party's ability to be self-supporting or contributing to their own support, their ages, present, past and future health concerns, as well as the duration of the marriage. For example if the Wife has not worked for the entire duration of the marriage, has little prospects for future employment, is eligible for and receiving Social Security and there is very little income available for maintenance, the Court may very well fashion a disproportionate property distribution to provide a future financial blanket for the Wife. However, if the Husband's financial circumstances and prospects are very similar to that of the Wife, the Court would be hard pressed to make a disproportionate award. All cases in this area of the law are very fact specific and it is very difficult to paint with a broad brush, Once the facts of a particular case are gathered and developed, the applicability of some or all of the factors becomes that much more clear.

(9) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party;

OBSERVATIONS AND NOTES: In the case of professional licenses, professional practices, closely held corporations and other business entities the Court must consider the desirability from a practical and policy standpoint of allowing the titled spouse to retain the asset or interest in tact. Many of these items cannot be sold or divided to provide the non-titled spouse with a real economic benefit. The application of the intent and spirit of the statute would require the Court to provide for a distributive award or the transfer of other property to the non-titled spouse to satisfy his or her interest in the same. Additionally, the Court could fashion an award of maintenance to compensate the non-titled spouse for his or her interest in said property.

(10) the tax consequences to each party;

OBSERVATIONS AND NOTES: This factor may be one of the most important for the Court to consider in fashioning its equitable distribution of the marital estate. It is of great importance that the attorneys for the respective parties have a basic working knowledge of tax law and how it potentially impacts the overall distribution of the marital estate. A full exploration of all of the tax law as it impacts on property distribution is well beyond the parameters of these materials. An excellent overview of the tax implications can be found in Alan D. Scheinkman's Practice Commentaries to Section 236 B of the Domestic Relations Law. (See **McKinney's Domestic Relations Law Section 236, Part B, Book 14, Main Volume, Scheinkman's Practice Commentaries pp. 417 to 423**)

Let it suffice to basically say that if there is going to be an exchange of appreciated assets between the parties incident to divorce, as a general rule there will be no recognition of gain which would result in income taxation. However, if there is going to be a sale of an asset to a third party, depending upon the basis of the asset, there may be recognition of gain and resulting taxation. The Court must be made aware of the income tax consequences of any transaction involving assets to be distributed and there may very well be the necessity of obtaining the assistance of a tax expert to assist counsel and the Court in the consideration of the tax consequences.

If there is sufficient liquidity in the marital estate, the Court may consider a distributive award which is non-taxable. However, in reaching the value of the assets in the marital estate, even though the Court may be contemplating a distributive award, the value of any asset in the estate may require tax impacting before a true net distributive value can be established.

Finally, and most importantly, the Court may be relieved of its obligation under this factor if there is a failure by the parties to provide the Court with competent and clear evidence of the tax consequences. **Kudela v. Kudela, 277 AD2d 1015 (4th Dept., 2000); Atwal v Atwal, 270 AD2d 799 (4th Dept., 2000); Maloney v. Maloney, 137 AD2d 666 (2nd Dept., 1988)**

***(11) the wasteful dissipation of assets by
either spouse;***

OBSERVATIONS AND NOTES: What is wasteful dissipation? A husband spending thousands of dollars on trips with and gifts to his paramour may certainly

qualify if one can sufficiently prove that such conduct occurred. That is an extreme case. If a husband engaged in aggressive short term trading in commodities and securities during the marriage and losses and debt were incurred as a consequence, would this necessarily constitute wasteful dissipation of assets? In **Grunfeld v. Grunfeld, 255 AD2d 12 (1st Dept., 1999)**, affirmed and modified on other grounds, **94 NY2d 696 (2000)**, the Court found that he had a good faith belief in the profitability of such a course of action and found that there was no dissipation.

Where the Husband continuously appropriated marital assets, including money set aside for children's education for his own purposes and ignored the Wife's pleas for financial and emotional assistance and withdrew money from an escrow account in violation of a court order and sold other items of marital property, the Court found this to constitute willful wasteful dissipation of marital assets. **K v. B, 13 AD3d 12 (1st Dept., 2004)**.

A former husband's use of his income, including severance pay to pay legitimate household expenses did not constitute dissipation of marital assets. **Corless v. Coreless 18 AD3d 493 (2nd Dept., 2005)**

The determination that a party to a divorce action has willfully dissipated marital assets is a very specific fact determination by the trier of fact and each case must be viewed separately and on its own merits.

(12) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration;

OBSERVATIONS AND NOTES: This factor is similar to factor 11. This factor contemplates situations where there are and have been transfers to third parties or other legal entities in an attempt to defraud the other party of his or interest in the asset transferred. This is a very fact sensitive determination for the trial court in assessing how such wrongful and fraudulent conveyances are to be considered in the equitable distribution of property.

The transfer of the husband's interest in a corporation to a trust established for the benefit of the parties' child some two months prior to the commencement of the divorce action between the parties was deemed to be in contemplation of the divorce proceeding and an attempt to remove said interest from the marital estate. **Ferraro v. Ferraro, 257 AD2d 596 (2nd Dept., 1999)**

While Supreme Court may not have the jurisdiction over the third party to whom any transfer was made, it can take the value of the transferred asset and include it in the estate for distribution. In a situation where there may be insufficient assets to offset the value of the fraudulent conveyance, a party may seek to commence a action under the Debtor and Creditor Law, Sections 272, 273 and/or 275 and seek consolidation of such an action with the divorce action.

(13) any other factor which the court shall expressly find to be just and proper.

OBSERVATIONS AND NOTES: This is the catch all factor which permits the Court to consider any other evidence in may deem relevant in arriving at an equitable distribution of the marital estate. In theory, the court can consider a party's conduct during the litigation, that is, stonewalling discovery, delay tactics, the use of other inappropriate tactics by the client or his attorney, a party's trial conduct and tactics, his or her lack of credibility as well as a myriad of other factors. See **Wilbur v. Wilbur, 116 AD2d 953 (3rd Dept., 1986)**

Conduct constituting economic fault may be considered under this factor. **Griffin v. Griffin, 115 AD2d 587 (2nd Dept., 1985).** This must not be construed to mean marital fault which, as a general rule, may not be considered unless it is deemed to be "egregious so as to shock the conscience of the Court." **O'Brien v. O'Brien, 66 NY2d 576 (1985); Blickstein v. Blickstein, 99 AD2d 287 (2nd Dept., 1984).** For a comprehensive decision outlining what at least one Justice of the Supreme Court deemed to be "egregious" and what will be universally be recognized as egregious see Justice Silberman's decision in **Havell v. Islam, 186 Misc. 2d 726 (2000).**

e. In any action in which the court shall determine that an equitable distribution is appropriate but would be impractical or burdensome or where the distribution of an interest in a business, corporation or profession would be contrary to law, the court in lieu of such equitable distribution shall make a distributive award in order to achieve equity between the parties. The court in its discretion, also may make a distributive award to supplement, facilitate or effectuate a distribution of marital property.

f. In addition to the disposition of property as set forth above, the court may make such order regarding the use and occupancy of the marital home and its household effects as provided in [section two hundred thirty-four](#) of this chapter, without regard to the form of ownership of such property.

g. In any decision made pursuant to this subdivision, the court shall set forth the factors it considered and the reasons for its decision and such may not be waived by either party or counsel.

h. In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as defined in [subdivision six of section two hundred fifty-three](#) of this article, on the factors enumerated in paragraph d of this subdivision.

B. EQUITABLE DISTRIBUTION: NOT NECESSARILY EQUAL

The distribution of property under the statute is given to the sound discretion of the trial Court. It is quite clear that equitable does not mean equal. **Arvantes v. Arvantes, 64 NY2d 1033(1985). Schiffmacher v. Schiffmacher 21 AD3d 1386.** However, the case law that has subsequently developed clearly expresses in marriages of long duration that there should be equal distribution of assets. In **Florio v. Florio 25 AD2d 947 (3rd Dept., 2006)**, the Court stated:

Although "[e]quitable distribution issues are resolved by the exercise of the court's sound discretion, guided by consideration of the statutory factors set forth in [Domestic Relations Law § 236 \(B\) \(5\) \(d\)](#), and need not result in an equal division of the marital property regardless ****3** of the length of the marriage" ([Lincourt v Lincourt, 4 AD3d 666, 666-667 \[2004\]](#) [citations omitted]), some semblance of parity must be achieved (see [Brough v Brough, 285 AD2d 913, 914 \[2001\]](#)) In this 25-year marriage, not only did defendant contribute financially, but Supreme Court found that she contributed as a spouse, parent and homemaker. Under these circumstances, we find that Supreme Court

abused its discretion in not dividing all assets 50% to each party. **Florio, supra at 949-950.**

See also, **Smith v. Smith 8 A.D.3d 728 (3 Dept., 2004); Haymes v. Haymes 298 AD2d 117 (1st Dept., 2002)**

C. MAINTENANCE:

**STATUTORY FACTORS AND WHICH ONES ARE MOST IMPORTANT:
DRL 236 (B) (6) (a):**

6. Maintenance.

a. Except where the parties have entered into an agreement pursuant to subdivision three of this part providing for maintenance, in any matrimonial action the court may order temporary maintenance or maintenance in such amount as justice requires, having regard for the standard of living of the parties established during the marriage, whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for his or her reasonable needs and whether the other party has sufficient property or income to provide for the reasonable needs of the other and the circumstances of the case and of the respective parties. Such order shall be effective as of the date of the application therefor, and any retroactive amount of maintenance due shall be paid in one sum or periodic sums, as the court shall direct, taking into account any amount of temporary maintenance which has been paid. In determining the amount and duration of maintenance the court shall consider:

(1) the income and property of the respective parties including marital property distributed pursuant to subdivision five of this part;

OBSERVATIONS AND NOTES: The Court is charged with looking at all sources of income and property that the parties are to receive in equitable distribution. While the statute specifically mentions marital property, can or should the Court also look to the separate property of each party in making its decision regarding maintenance? It is clear that income from the marital property distributed is to be

considered. It would certainly be reasonable to look at any income derived from separate property of both parties in the Court's determination as to the respective parties' income. See **Cerabona v. Cerabona, 302 AD2d 346 (2nd Dept, 2003)**

It is important to note that maintenance (and child support) are determined on the basis of earning capacity not necessarily earnings. **Chamberlain v. Chamberlain 24 AD3d 589 (2nd Dept., 2005)**, It is therefore well within the purview of the Court to impute income to one or both parties in determining the basis for the award of maintenance.

(2) the duration of the marriage and the age and health of both parties;

OBSERVATIONS AND NOTES: This factor is identical to the equitable distribution factor with the same considerations.

(3) the present and future earning capacity of both parties;

OBSERVATIONS AND NOTES: It is important to note that the Court is required to look at the present and future earning capacities of **both** parties. The analysis involves a review of their current situation, their respective abilities to be self-supporting presently and in the future, the ability to continue to earn in the future and for what period of time, their skills and training and their future prospects.

(4) the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor;

OBSERVATIONS AND NOTES: The Court must look to what has transpired during the marriage and what is currently the situation. On one end of the spectrum, can the spouse in a long term marriage who has not worked in many years, has no current marketable skills, is in his or her mid-to-late fifties capable of becoming self-supporting. Is it foreseeable based on the circumstances that he or she can, at some time in the future after a period of rehabilitative maintenance and some education or training, become self-supporting. The likelihood is somewhat remote under this set of facts. **Keane v. Keane 25 AD3 729 (2nd Dept. 2006)** See **Shai v. Shai 301 AD2d 461(1st Dept., 2003)**

On the other end, can a spouse and parent with three young children be expected to leave the marital home immediately and re-enter the workplace (assuming the parent has currently marketable skills), The likelihood in this scenario would be that a period of maintenance and some training may be necessary for this person to become self-supporting. Again, this factor is very fact sensitive and requires a very close analysis of those facts and how this factor will apply. **Smith v. Smith 1 AD3d 870 (3d Dept., 2003)**

(5) reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage;

OBSERVATIONS AND NOTES: This factor goes to the essence of the equitable distribution statute and to the essence of recognizing reduced or lost earning capacity. This factor, usually applied in marriages of long duration, requires the Court to analyze what in fact happened in the marriage. The Court must determine what were the agreed upon roles of the respective parties and what consequences occurred as a result of maintaining those roles. The Court must determine whether or not in equity to impose a change in those roles and the consequences of those roles to the detriment of one spouse and to the benefit of the other. **Silverman v. Silverman, 304 AD2d 41 (1st Dept., 2003)**

(6) the presence of children of the marriage in the respective homes of the parties;

OBSERVATIONS AND NOTES: Under this factor, the Court must look to the need for the custodial parent to remain in the home because of the children. An excellent example of this is **Klein v. Klein 296 AD2d 533 (2nd Dept., 2002)** The Court stated:

The award of \$1,000 per week to the plaintiff as maintenance was an appropriate exercise of the Supreme Court's discretion. However, in light of the documented learning disabilities and emotional disturbances of the parties' three minor children, as

well as the evidence that the plaintiff takes an active role in their schooling, homework, and after-school activities, the award of maintenance should be for 15 years to allow the children to reach 18 years of age and provide the plaintiff time to acquire appropriate job skills (see *Sheridan v Sperber*, 269 AD2d 439, 440; *Ingram v Ingram*, 208 AD2d 593; cf. *Costello v Costello*, 268 AD2d 403).

(7) the tax consequences to each party;

OBSERVATIONS AND NOTES: As with equitable distribution, the Court being made aware of the tax consequences to a payor spouse and a payee spouse is the responsibility of the attorneys for the respective. It is clear that under the Internal Revenue Code, 26 U.S.C.A. Sections 71(a) and 215, alimony payments meeting the statutory requirements are an adjustment to the income of the payor and is includable in the income of the payee. Expert testimony will be needed to provide the Court with the tax impact upon each party of various maintenance scenarios containing varying amounts of maintenance, to allow the Court to determine which amount most meets the demonstrated needs of the payee and the ability of the payor to make the payments. The Court must take into account the tax benefit to the payor (that is, the actual out of pocket cost being less because of the tax savings) and the lessening of the amount payable to the payee because of the taxation. The Court must also be made aware of the requirements of the Internal Revenue Code with respect to maintenance payments in order to achieve deductibility and insuring that the payments are includable in the income of the recipient spouse.

The matrimonial practitioner should also be aware of the fact that the parties can agree or the Court can order that the alimony payments are not taxable to the recipient and not an adjustment to the income of the payor. 26 U.S.C.A. Section 71 (b)(1)(B). This can be applicable to the entire award or a portion of the award. This tool could be most helpful on a temporary order of alimony. This is true in light of the fact that the payee is in need of funds from the payor because he or she is unable to be self-supporting. In many instances where there are not high income earners the impact of the deductibility to one spouse would be minimal and the taxation to the needy spouse may very well reduce what is needed for his or her support. It is a scenario that must be closely

scrutinized by the parties, the attorneys and the Court. However, the Court must have a clear rationale for ordering the payments non-taxable and absent that rationale the rule of taxability to the recipient spouse and the ability of the payor spouse to take an adjustment to income should be followed. **Grumet v. Grumet, 37 AD3d 534 (2nd Dept., 2007)**

(8) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;

OBSERVATIONS AND NOTES: As with equitable distribution, the statute mandates that all economic and non-economic contributions to the other spouse of the party seeking maintenance in the enumerated capacities must be considered and weighed by the Court in arriving at the maintenance award.

(9) the wasteful dissipation of marital property by either spouse;

OBSERVATIONS AND NOTES: The Court must consider if one of the parties is guilty of the wasteful dissipation of marital property in arriving at the maintenance award. This factor is different than the equitable distribution factor in that there is a consideration herein of only marital property as being wastefully dissipated as opposed to “assets” in the equitable distribution factor. A few examples of conduct which may invoke the use of this factor can be found where a spouse squanders marital property on a paramour, or where a spouse makes ongoing investment decisions contrary to sound economic advice, knowing that it is contrary to such advice. Another situation which may warrant application of this factor is one where a spouse’s spending has been so extravagant during the course of the marriage that such spending has seriously impacted the debt situation and/or the parties’ ability to amass a marital estate while having the income to do so. All of this being done notwithstanding the pleas of the non-spending spouse to have this stop.

(10) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; and

OBSERVATIONS AND NOTES: The considerations under this factor are the same as those set forth under the same equitable distribution factor. The Court would be authorized hereunder to award maintenance to compensate the other party for the loss of the asset or the removal of the asset from the marital estate.

(11) any other factor which the court shall expressly find to be just and proper

OBSERVATIONS AND NOTES: This factor allows the Court to consider any other circumstance that it deems appropriate under the circumstances of the case. Most often considered hereunder is the issue of fault. While fault may not be considered in the equitable distribution of the marital estate unless it is egregious (see OBSERVATIONS AND NOTES under equitable distribution factor 13, supra), there is no such standard applicable to fault as it relates an award of maintenance. While marital fault does not preclude an award of maintenance it is a relevant factor which can be considered **Holmes v. Holmes 25 AD3d 931 (3rd Dept., 2006)**. It is not considered error for the trial court to refuse to deny a party maintenance because of marital fault. **Maloney v. Maloney 114 AD2d 440 (2nd Dept., 1985)**

b. In any decision made pursuant to this subdivision, the court shall set forth the factors it considered and the reasons for its decision and such may not be waived by either party or counsel.

c. The court may award permanent maintenance, but an award of maintenance shall terminate upon the death of either party or upon the recipient's valid or invalid marriage, or upon modification pursuant to [paragraph \(b\) of subdivision nine of section two hundred thirty-six](#) of this part or [section two hundred forty-eight](#) of this chapter.

d. In any decision made pursuant to this subdivision the court shall, where appropriate, consider the effect of a barrier to remarriage, as

defined in [subdivision six of section two hundred fifty-three](#) of this article, on the factors enumerated in paragraph a of this subdivision.

D. MAINTENANCE: AMOUNTS AND DURATION WILL VARY

1. OPEN ENDED AWARDS: The Court cannot make an open ended award in terms of the amount that is to be paid. The Court cannot direct the payor spouse to pay the mortgage payments, taxes, insurance, utilities, rent, moving expenses and this should be avoided. **Delgado v. Delgado, 160 AD2d 383 (1st Dept., 1990); O'Sullivan v. O'Sullivan 282 AD2d 586 (4th Dept., 2001); Weinstein v. Weinstein 125 AD2d 301 (2nd Dept., 1986)**

2. AMOUNT OF AWARD: STANDARD OF LIVING, NEEDS OF THE RECIPIENT SPOUSE AND THE ABILITY OF THE PAYOR SPOUSE TO MAKE SUPPORT PAYMENTS: Unlike child support there is no statutory formula that can be followed or applied by the Court. The Court in determining the amount of maintenance, in addition to the statutory factors, must look to the pre-separation standard of living of the parties, the needs of both parties and the ability of the other spouse to meet the reasonable needs of the person in need of maintenance. **Hartog v. Hartog, 85 NY2d 36 (1993); Broughton v. Broughton 239 AD2d 935 (4th Dept., 1997).** Although a party had the capacity to earn additional income, self-sufficiency depends upon the ability to achieve a lifestyle equal to that enjoyed during the marriage. **Kirschenbaum v. Kirschenbaum 264 AD2d 344 (1st Dept., 1999).**

3. DURATION OF AWARDS: DURATIONAL VERSUS NON-DURATIONAL: The reason for imposing a time limitation upon a maintenance award is usually to give the supported spouse a reasonable period of time in order to learn or update work skills and to enter the work force with a view to being self-supporting. **Guttman v. Guttman 159 AD2d 431 (1st Dept., 1990).** Nondurational maintenance should not be awarded to a party who, given time and opportunity, will be capable of self-support consistent with the parties standard of living. **Palestra v. Palestra 300 AD2d 288 (2nd Dept., 2002); Sperling v. Sperling 165 AD2d 338 (2nd Dept., 1991)**

Non-durational maintenance may be appropriate where a spouse's energies during the marriage were primarily devoted to homemaking and childrearing to the detriment of her ability to become self-sufficient and maintain the pre-divorce standard of living. **Gubiotti v. Gubiotti 19 AD3d 893 (3rd Dept., 2005); Sass v. Sass, 276 AD2d 42 (2nd Dept., 2000).** The rule in determining whether to award durational or non-durational maintenance is that there is no rule. Every case is left to the very specific facts before the Court in any particular matter and in the exercise of the sound discretion by the Court.

UPDATE

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Syracuse, NY

E.D.: Not Necessarily Equal:

In *Elias vs. Elias*, 101 A.D.3d 938 (2d Dep't. 12/19/12), the Court affirmed a Supreme Court award to the Wife of 25% of the value of the husband's interest in the business, "taking into account the plaintiff's minimal direct and indirect involvement in the defendant's company, while not ignoring her contributions as the primary caretaker for the parties' children, which allowed the defendant to focus on his business".

Separate Property Appreciation: Transmutation:

In *Johnson vs. Johnson*, 99 A.D.3d 765 (2d Dep't. 10/10/12), although the marital residence was the wife's separate property, the record established "that the appreciation in the value was attributable to the joint effort of the parties".

Formica vs. Formica, 101 A.D.3d 805 (2d Dep't. 12/12/12), the wife failed to sustain the burden of demonstrating how her contributions resulted in the increase in value of the marital residence.

Maintenance:

Interesting 4th Department case: *Perry vs. Perry*, 101 A.D.3d 1762 (12/28/12): A.D. increased duration of maintenance on appeal, saying it was to provide an economically deprived spouse with an opportunity to achieve independence. The Court even stated that at the conclusion of the term (10 years), the wife could apply to modify the Judgment to continue maintenance if she does not become self-supporting.

