TABLE OF CONTENTS

VII. CHILD CUSTODY

a. Legal vs. Physical Custody
b. Joint Legal Custody
c. Joint Physical Custody
d. Sole Custody
e. Best Interests Standard
f. Modifications
g. Third Party Custody/Visitation
h. Relocation
i. Family Relations
j. GAL vs. AMC
k. Psychological Evaluations

VIII. CHILD SUPPORT

a. General Obligation
b. Child Support Guidelines
c. Deviation Criteria
d. The *Maturo* Holding
e. Medical Coverage and Expenses
f. Educational Support Orders
g. Modification

IX. POST-JUDGMENT MOTIONS

a. Enforcement/Contempt

X. PREMARITAL AND POST-MARITAL AGREEMENTS

XI. CONCLUSION

PROLOGUE

Something brought you here. It may have been a long time coming or an isolated event, but one way or another, you have arrived at this decision, at your own pace, and on your own terms. A decision to terminate a marriage, to dissolve a personal, romantic partnership, is not one that is taken lightly. Often, the surefire ramifications of the decision, the inevitable ripple effect of the action, can and will dictate the course of action itself.

Almost half the time, the "decision" is not a decision at all, but a forced mandate. I have been served with papers. A marshal has unceremoniously knocked on my door and handed me… this. I never expected it would be this way. Or perhaps, I long expected that it would be this way.

What happens next? What are my options? Do I need the assistance of a professional? What can I expect from the process? How long will this take? What about our children? What about the house? What about our debts? How will I survive financially from here on? Lawyers who practice in family law field these sorts of questions on a daily basis. We do not consider ourselves to be smarter, in any fashion, than any of the many people who find themselves in the midst of a divorce proceeding. What we do have, however, is the benefit of experience - *your* experience, and the shared experiences of our past and current family law clients - coupled with years of training and courtroom exercises in which judges, lawyers, legal guardians, social workers, psychologists, and parents collectively shape the outcomes of the hundreds upon hundreds of divorces finalized each and every year in the State of Connecticut.

This publication is intended to be a guide, a charting course for what many clients perceive to be the treacherous, dark, riptide currents of divorce litigation here in Fairfield County. It is meant to bring reassurance, direction, assistance, and familiarity to a process which is at times logistically daunting and almost always emotionally taxing. This guidebook will assist you in identifying the legal issues of family law litigation in our

jurisdiction, and will lend a hand where practicable for you to understand and navigate those issues.

OPTIONS

Counseling

By the time many prospective clients contact a law firm regarding a divorce, a surprisingly few number will have sought the assistance of a therapist or marriage counselor. Incidentally, those who have tried marriage counseling have often *really* tried counseling – usually with several therapists over a significant chunk of the marriage. Nevertheless, we are often surprised by those individuals who never tried counseling in any form, and nonetheless seek divorce as the only available option. For many of these individuals, the act of filing a divorce action (or even simply consulting with a lawyer) is an end to itself, bringing the hope that by "showing him I am serious" or "finally standing up to her" the marriage will somehow improve when a State Marshal shows up on a doorstep with divorce papers.

Is there any going back? While we have not produced hard data on our clients' confidential cases, experience tells us that a significant percentage of divorces between parties who have never engaged in marriage counseling result in a withdrawal of the action, a reconciliation of the parties, and a costly and public start-and-stop routine which often leaves indelible scars of mistrust and memory. Of those, many clients will return, years later, for a second run at litigation – perhaps with a sprinkling of counseling in the interim.

It is for this reason that we advise our clients to at least explore the option of marital counseling and/or individual therapy, where practical and feasible, to address not just the symptoms of the discord but the source itself. An exploratory journey along this path may save a marriage, may save money, may protect a childhood, or at the very least, may help narrow the issues of conflict to more cleanly and efficiently pursue the dissolution action with a lawyer or mediator.

Mediation/Co-Mediation

If you are reading this guidebook, chances are you have either heard of mediation, have explored the process, or perhaps have been through a failed mediation effort. Mediation is generally an informal procedure, wherein an attorney, social worker, psychologist, or other trained neutral party works with both parties to identify issues, bridge gaps and forge compromise. The success rate of mediation is directly proportional to the level of commitment of the parties; conversely, a party to an impending divorce who refuses to compromise and has greater interest in making the other spouse "pay a price" for the breakdown of the marriage will likely see minimal results in mediation - of course, depending upon the skills, experience, and resources available to the neutral.

A mediator, even when he or she is an attorney, does not represent either side in a divorce action. However, he or she is not a judge either - it is not the mediator's role to "decide" the outcome of the case or determine what is "fair" for divorcing spouses. Rather, the mediator facilitates the legal process, helping the parties craft their own agreement which will take into account both financial nuances and, when children are involved, the peculiarities of a living, breathing parenting plan, so that the end result is the synergy of the parties' respective best interests.

A failed mediation, however, sometimes results in further entrenched positions and discord. An attorney mediator - despite his familiarity with the parties and the work (and cost) that went into his engagement - may not ethically represent either party after a failed mediation, and may not be called as a witness in any subsequent proceeding. Simply put, the parties must start over if a mediation falls through; there is no "picking up where you left off."

Co-mediation is a mechanism whereby divorcing spouses can benefit from not one, but two neutral professionals. While mediation can often be effective, in many instances one party or the other might feel as though he or she has “won” or “lost” the mediation, gaining some perceived empathy from the mediator because of some similarity or identification with that person. In those cases, the parties’ mutual selection

of a mediator may have served to alienate one party or another, with feelings that he or she has selected the "wrong" person to resolve the dispute. Co-mediation addresses this potential pitfall by pairing *two* professionals as independently functioning neutrals to lend greater balance, identification, and equity to the mediation process. Some co-mediation models merge the experience of a family law attorney with the expertise of a licensed, clinical psychologist. From the legal angle, co-mediation can help the parties identify and narrow the issues in dispute, with guidance through the court system and assistance with the preparation of legally enforceable agreements on property division, child support, alimony, custody, and post-secondary educational support, to name a few. From the therapeutic and clinical perspective, the model simultaneously offers the skill set of a clinical psychologist with specialization in stressors within the home, at-risk children and associated custody issues, substance abuse and anger management issues, and a keen acumen towards resolving conflict. When employed properly, given willing participants and an industrious team approach, co-mediation can often be successful at a fraction of the cost of litigation.

Litigation

Supposed counseling has been ineffective or non-participatory. Mediation has either failed or is not a viable option since one or both parties refuses to attend - or perhaps emotional impediments loom too large. Divorce as an end result is a given; the only remaining route to that goal is litigation.

Litigation refers to the filing of a lawsuit. Initial pleadings are filed (more on this, below), the filing fee is paid, and the great unknown - the legal process - begins to take shape with its own deadlines, rules, procedures, and local practices. Every litigant in state court - lawyer or not - is presumed (for better or worse) to know the rules of court, which are set forth in a daunting publication known as the Connecticut Practice Book. The friendly-sounding, simple name is misleading. At multiple volumes, hundreds of pages (or countless clicks down the screen, since the Practice Book is also published and updated online), it is a tall order for most litigants in a divorce action to familiarize

themselves with civil practice, filing of pleadings and motions, the “discovery” mechanisms available to each party, and the role of the judge in a dissolution action.

This publication is intended to demystify the process for the divorce litigant. It is not intended to replace the services of an experienced family law practitioner who can effectively advocate for a divorcing party. There are hundreds of attorneys in Fairfield County alone, a very many of whom claim to practice family law. How does a divorcing spouse decide upon a family law attorney?

CHOOSING A LAWYER

During an initial consultation, an accelerated get-to-know-you process, an often troubled, upset or confused client prospect searches for an advocate, a guide, and a legal counselor through the difficult process of divorce litigation. Despite the very different paths that bring those individuals through the front door of a lawyer's office, most prospective divorce clients have common goals in their search for a lawyer.

Usually with the benefit of some advanced research and an initial meeting, a divorcing spouse will try to select a lawyer with just the right expertise, attitude, experience, skills, and temperament to guide them through troubled times. The comparisons to the non-legal world, however, are scarce. In so very few professions is the personal connection to the client so very vital to the integrity and viability of the relationship. The critical need for a personal connection is multiplied by the emotional response brought on by the prospect of divorce. Divorce clients often - understandably - cannot view the conflict objectively. This is undoubtedly the most critical reason for the involvement of an attorney.

From the moment a client walks into a law firm for a consultation regarding divorce, a lawyer’s main priority is twofold: firstly, to offer comfort and a solid basis for trust, and secondly, to determine why this prospective client is either seeking a divorce or is defending an action filed by their spouse. An experienced family practitioner will try to ascertain, from the outset, whether the person is truly seeking a divorce or simply “considering their options,” for example, trying to envision what a divorce would mean

for them financially. A dissolution action is a means to no other end than terminating the marriage – a client who does not understand this concept is embarking on a perilous journey. The selection of an attorney for a divorce matter (much like choosing an attorney to defend against criminal charges) is not only the acquisition of an advocate, a fighter, and a trusted advisor, but in many ways, is the selection of a client's surrogate "best friend" for the next 6-8 months, year, or longer. If the necessary chemistry is present, both the attorney and the client will recognize it within the first several minutes of the consult. Those looking for legal counsel, must ask themselves if the attorney is truly listening to them. Is he or she engaged in the conversation? Does the attorney seem to want to "run the show" under any and all circumstances, or is he attuned to the desires of the client, and willing to offer advice and counsel? Will the attorney be flexible where necessary, and aggressive when needed? Does he or she have the style that the client prefers? Does he or she seem like a person with whom the client could have healthy disagreements, discussion, and accord? If, in that first consultation, the client (or the attorney, for that matter) perceives there is a misconnection or a communication problem, it cannot be, and should not be, ignored.

The attorney client relationship in a divorce action is a working, changing, dynamic relationship. Both the attorney and client should expect the relationship to be tested, challenged, invigorating, inspiring, rewarding and difficult – often at the same time. A solid foundation, often formed during that initial consultation, will and should be the basis for sustaining the attorney-client relationship throughout the often emotional fray to come. Beyond finding comfort in an attorney's legal abilities and experience (while these are very important indeed), a client should feel able and comfortable to speak about his or her mental health, his or her childhood, details of the marriage, and his or her motives – all without concern that the attorney will pass judgment on any level.

Perhaps the most useful information an attorney receives during a consult comes in response to the questions: "If your spouse were sitting here across from me instead of you, what would he or she say about you? What would he or she say about

the marriage? About the children? About the finances?" By truly and honestly considering the other spouse's position – or by merely attempting to – a client can greatly assist his or her lawyer in preparing for the major (and perhaps minor) issues in a case, well ahead of time. Notably, these types of questions often yield very different responses, depending on whether they are posed at the beginning or the end of the consultation. Indeed, the more a client is honest and candid regarding information, history, and his or her spouse during the initial stages of the representation, the more accurate an attorney's prediction will be concerning the road – and the cost – ahead.

Family lawyers often hear from a new client that "this should be straightforward." This is to assume that the marriage itself failed, perhaps counseling and/or mediation failed, the parties can no longer effectively communicate - and yet the (perhaps hopeful) statement is intended to comfort the divorce attorney. Incidentally, rarely does a client represent that a divorce is extremely complicated when the issues are, in fact, quite simple. A client's effort to simplify a divorce during the initial consultation – usually in an effort to minimize a forthcoming quote for counsel fees – does no one any good. Choose your cliché: this business is not an exact science; nothing is straightforward; there is always a wrinkle. Each statement is almost *always* true, and a family lawyer would much prefer that a client offers full disclosure of potential problems, and more importantly, fully understands what is (or could be) in store for the litigation ahead.

For this reason, family law attorneys often ask clients to prepare a privileged and confidential marital summary for use as work product throughout the litigation – containing as much detail as possible, "even if it doesn't seem important." Invariably, the summary yields something useful for negotiation purposes, even if the matter is never fully litigated.

Some divorces have been brimming for years, and brought only to the surface by the one party who – perhaps due to the proverbial straw placed on the camel's back – finally walked into a lawyer's office after years of unhappiness. Other cases begin with the virtual explosion of special issues that require immediate attention. If custody is

likely to be disputed, is there an emergent reason for that position? Has the Department of Children and Families been involved, or have any criminal arrests been made? Is this a domestic abuse situation that calls for either criminal involvement or a civil application for relief from abuse (a restraining order)? At this juncture, the client is faced with the reality of whether the litigation will start with a bang or a whisper. Indeed, an immediate civil restraining order and motion for exclusive possession of the marital home (where a spouse is ordered to leave and reside elsewhere) – and perhaps even a criminal arrest – might be warranted under the circumstances. In that case, any attorney or law firm must be accessible and prepared to act quickly and aggressively, and the client must be ready and willing to accept and trust in the advice as the situation rapidly unfolds.

If a prospective client is attending an initial divorce consultation, it is typically the case that he or she has thought matters out, has discussed it with family members, friends, confidants, and perhaps even other lawyers. What he or she needs now is not simply information ("what are my rights?"), general strategy, or empty promises (no lawyer worth his salt will make any promises in an initial consult). What the individual truly needs is a person to trust, with the knowledge that such person has the skills, legal resources, experience, and capability to litigate the matter through to conclusion in the event that their spouse is unwilling to settle. As we often remind our clients: if you want a mediocre result, you can engage in mediocre settlement dialogue, at any time, and even without a lawyer. Only those lawyers who are prepared to go to trial are equipped to deal with the unreasonable spouse who refuses to give in – such as the husband who stops paying bills and hides his income, or the wife who denies visitation or changes the locks.

A client looking for a divorce attorney has often been spurned by a spouse, and has in some fashion or another suffered a breakdown in communication within the home. It is our my hope for each of our clients with children that the communication gap repair itself over time, in the best interests of those children. In the interim, however, the goal of a divorce attorney as a counselor and advisor is to rebuild

communication and trust for that person within the four walls of our law firm, so that together we can use the law to our advantage, in order to achieve the best possible settlement or result after trial.

DIVORCE BASICS

No Fault?

The general rule in Connecticut, and other "no-fault" jurisdictions, is that a spouse is not required to prove "grounds" (a reason) to obtain a dissolution of marriage. Where fault does not exist, a court will grant a divorce on the ground that the marriage has simply "broken down irretrievably with no reasonable prospect of reconciliation." Nevertheless, many divorcing spouses will come into litigation painfully aware of the "cause" for the breakdown of the relationship - which begs the question: if the other spouse was the reason for the divorce, will the judge listen, and will it matter?

The answer is yes, to some degree. In fact, fault is part of the statutory framework of divorce in Connecticut, and although a party is not *required* to allege or prove fault, he or she is *permitted* to do so. If a party does allege fault, a judge may take the allegations into consideration when deciding how to divide the marital property and/or whether (and how much) alimony should be awarded to one spouse or the other. When the fault alleged by one party is substantial, *and* when it substantially contributes to the breakdown of the marriage or the loss of marital assets, a court is more likely to award that party a greater share of the assets or more alimony. Nevertheless, in the vast majority of court decisions judges mention fault as alleged by one side or the other, but usually find the parties equally responsible for the breakdown of the marriage.

Residency Requirements

For a court to have "jurisdiction" - that is, in order for a judge to have the authority to dissolve a marriage - one party must have been domiciled *continuously* in the State of Connecticut for a period of twelve months prior to the date that the court

issues the judgment. The residency requirement does not require you to have lived for the full year in the judicial district in which you have filed, and in fact, you may file for divorce before meeting the one-year requirement, as long as a full year has elapsed before the final date of your divorce. There are also less frequently-used bases for jurisdiction as well: the cause for the divorce arose after you and your spouse moved to Connecticut (but before you had been in the state for a year); you were Connecticut residents before going on active military duty which took you out of state; or you were previously a resident of Connecticut and moved back to Connecticut with the intent of making Connecticut your permanent residence. All of the above would give the courts in Connecticut the authority to grant your divorce. For further information and advice on this subject (especially if your factual circumstances are complicated), it is strongly suggested you seek the advice of an attorney.

Venue

The town in which you live dictates the court in which your action will be filed and heard. Divorce actions in Fairfield County are heard in the courthouse for the Stamford/Norwalk Judicial District (on Hoyt Street in Stamford), the Danbury Judicial District (on White Street in Danbury), and the Fairfield Judicial District (on Main Street in Bridgeport). There are certain municipalities where you may choose your courthouse. Generally speaking, no one court or set of judges is better than the other, and the courts follow similar procedures and rules, with limited exceptions.

Filing and Associated Fees

A divorce litigant, even one who represents himself or herself, should be prepared to pay certain court costs for the privilege of utilizing the court system. The filing fee to start an action is $360.00. A state marshal will be needed to serve the summons and complaint on your spouse in all cases, and rates for service generally range from $50.00 to $100.00, depending on the method of service and the number of attempts. If there are minor children of the marriage, once the action is commenced,

both parties will be required to participate in a Parenting Education Class at a cost of $125.00 per person.

Summons and Complaint

To initially file an action for divorce, a "pro se" spouse (one proceeding without a lawyer) must obtain three forms from the office of the clerk, or from the judicial branch website (the link is: http://www.jud.ct.gov/webforms/#FAMILY). A summons (Form JD-FM-3) advises your spouse that he or she has been commanded, through official legal process, to appear at the courthouse to answer the complaint for dissolution. The summons will contain the case name, as well as the official "appearance" for you (if you are self-represented) or for your attorney, together with contact information for both parties. The summons also contains the case "Return Date" and "Case Management Date." The first date is the date (always a Tuesday, usually a few weeks out from the date the summons is signed) by which the defendant must "appear" in the case. To say that a party must "appear" does not mean that he or she must physically go to the courthouse on that date. Rather, the litigant must simply complete an appearance form (Form JD-CL-12), which may be e-filed, mailed, or hand delivered to the clerk of the court on or prior to the Return Date. The appearance form simply notifies the court that you have received the summons and complaint, and that you wish to be notified of future court dates and developments in the case. The Case Management Date is generally three months after the Return Date, and does require an in-person court appearance unless a case management agreement, along with each party's financial affidavit, is signed by both parties and submitted to the court in advance of that date.

The complaint form (Form FM-159) is the second form that a plaintiff must complete to start the action. This self-explanatory form contains check boxes and data entries for information about the parties, the marriage itself, and any minor children of the marriage. It includes a section concerning the relief requested in the dissolution action (with convenient check boxes). Generally speaking, divorce litigants ask the court to dissolve the marriage, to divide the property fairly, to award alimony and/or child

support as appropriate, to enter orders regarding the payment of college expenses when necessary, and to restore the wife's maiden name (if desired). A litigant may also request orders related to the legal and physical custody of minor children of the marriage. These are two separate but related concepts as discussed in more detail below.

Service of Process

The person initiating the divorce action must give the summons, the complaint, and a notice of automatic orders (Form JD-FM-158) (after being signed by an attorney or the clerk of the court) to a state marshal (these can be found on a list on the judicial website or provided by the clerk of the court), for "service" (delivery in accordance with law) upon the other spouse. Generally, a marshal will try to deliver the papers to your spouse in person (you may be asked for an ideal time of day, the make/model of his or her car, or a work address and time of arrival). There are provisions in the law which allow for service at someone's usual place of residence if they cannot be served in person, or even by publication in a newspaper if their whereabouts are unknown. As serving an out-of-state spouse may require a different procedure entirely, we recommend you engage the services of an attorney in the event you anticipate difficulties with service of process. Once service is complete (at least twelve full days prior to the return date selected on the summons), the marshal will deliver a "return of service" to the plaintiff, who must file it (at least six days before the return date) with the clerk of the court, together with the filing fee. These deadlines must be strictly followed for the court to have jurisdiction- that is, the ability to hear and decide your case.

Automatic Orders

The "Automatic Orders" referenced above are restraining orders which go into effect at the outset of every divorce action in Connecticut and are binding on the plaintiff (the person who files for the divorce) at the time the papers are issued by the

clerk and binding on the defendant spouse at the time the papers are served upon him or her. The purpose of the automatic orders is to provide a measure of security to both parties by maintaining the status quo with respect to the financial matters and custody related issues. These orders serve to prevent the parties from emptying bank accounts, running up debts, or otherwise taking advantage of the other spouse while the divorce is pending. Since the orders are entered automatically (and since the defendant is notified of them as soon as he or she is served with the initial papers), theoretically, neither party is required to file motions in court to prevent the other spouse from engaging in the prohibited conduct. Further, the orders provide that both parties must exchange "mandatory discovery," which consists of financial records used in determining asset division, alimony, and child support. The basic prohibitions set forth by the automatic orders prevent divorcing spouses from doing the following:

(1) withdrawing large sums of moneys,

(2) incurring major, atypical expenses,

(3) selling or mortgaging property,

(4) changing life insurance beneficiaries,

(5) relocating children, or

(6) locking a spouse out of the marital residence.

The parties, by their own specific, written agreement, may waive any of the orders, and a court may have reason and discretion to modify the orders based on the current circumstances of the parties.

Case Management Program

Unless circumstances exist that require the court to become immediately involved in a newly-filed dissolution action (such as emergent custody issues, violations of the automatic orders, or a necessity for temporary alimony or child support), the first time parties will be required to "report in" to the court is on the Case Management Date. This date is approximately ninety days after the Return Date.

On or before the Case Management Date, the parties must e-file a fully signed

Case Management Agreement. This form contains an agreed upon schedule, which the parties will follow throughout the remainder of the litigation, and informs the court as to whether the case is contested. If the parties are unable to agree upon a schedule, or otherwise fail to file the form before the Case Management Date, they will be required to appear in court that day.

Whether through the submission of a Case Management Agreement or in-person conference before the court, every dissolution action will be marked as "fully contested," "limited contested," or "uncontested." Uncontested dissolution actions are only those in which the parties have reached a complete agreement on every facet of the dissolution (i.e., financial support, custody and the division of assets). While the vast majority of dissolutions ultimately become "uncontested," most of those are not fully decided within this first ninety day period.

"Limited contested" cases are ones in which parties have reached an agreement as to custody and visitation, but have not reached an agreement on all financial issues. "Fully contested" markings are reserved for those instances where the parties, even after the initial 90 day period, have not reached an agreement on custody or financial matters. Even absent such an agreement, the court will require a temporary parenting plan to be filed (and to become an order of the court) so that there is some measure of certainty over the whereabouts and arrangements for any minor children of the marriage until such time as the dissolution becomes final or subsequent orders are sought by either party.

In all instances, parties can expect that judges are most concerned with the custody aspects of dissolution actions (and less concerned, by comparison, with financial matters between the parties). It is for this reason that the court will be quite firm regarding the submission of temporary parenting plans and the appointment of a Guardian ad Litem (where necessary), while at the same time allowing both parties ample time to conduct discovery and negotiate terms related to financial matters.

Unless the case is marked as "uncontested" (in which case the court will assign a date for you to return to court with your spouse to have your separation agreement

approved by the judge), the court will set deadlines for exchanging relevant documents, including financial affidavits, identifying expert witnesses, and taking depositions. Last but not least, the court will assign a date for a Special Masters or Judicial Pretrial. In many judicial districts, the Court will also assign a trial date – typically no later than one year from return date. This trial is scheduled in an abundance of caution, in the event that the parties cannot resolve their differences

Generally, a pretrial is an non-binding, informal proceeding conducted in a courthouse (but typically not in open court) during which both sides will present their case to a neutral third party (or parties) who, after listening to both sides, will recommend a global resolution. A special masters pretrial is conducted before "Special Masters," or a pair of volunteer, experienced family lawyers while a judicial pretrial is conducted before a judge. Both types of pretrials are non-binding, and if a judge participates in the informal process he or she will be precluded from hearing the case if it ultimately goes to trial. Many cases resolve at or just after a pretrial, which is the goal of the judiciary (of course, if every divorce action were to proceed to trial, our court system would be hopelessly log jammed).

The Financial Affidavit

At the cornerstone of a party's responsibilities in a dissolution action is the financial affidavit, a document that complies with a court-approved format, and indicates to a judge the affiant's weekly or monthly income (setting forth all applicable deductions), living expenses, assets of any kind, and debts. With this document (a multi-page, fillable, detailed form is available on the State of Connecticut Judicial Branch webpage), a judge can reduce each party's current financial situation to a glance, which enables the court to determine an issue immediately before it or to approve (or disapprove) a proposed agreement.

Parties must exchange and file with the court their sworn financial affidavits on or before the Case Management Date, unless judicial approval is sought and obtained in the form of an executed Case Management Agreement. Work on your financial affidavit

carefully; the state-approved form on the website is sufficient for all but the most complicated of financial circumstances, and you may certainly reference any attached schedule if you require additional space for either an asset or an enumeration of expenses.

In preparing financial affidavits, many clients will ask if the expenses should be projected or actual - knowing that the parties' circumstances will change as one spouse moves out of the marital residence, or if custody circumstances are likely to change. Remember, the financial affidavit is a snapshot of a point in time; you will have other opportunities to update your financial information with the court (at the very least, at the time of your final judgment), so the first financial affidavit should best represent your *current* living circumstances, expenses, income, debts, and assets.

Income that fluctuates should be annualized and averaged into weekly amounts (provide an explanation for your calculations on an attached schedule, or at the very least, be prepared to answer questions regarding your calculations when asked by the other side or by the court). Expenses which spike in certain months or seasons should also be annualized, and averaged on a weekly basis so as to accurately predict budgeting and available resources. The best advice for the preparation of a financial affidavit at any stage is *to be consistent.* There is no incorrect way to complete a financial affidavit, so long as the information provided on the document is truthful, complete, consistent, and self-explanatory.

Mandatory Discovery

At the outset of divorce litigation, either party may request "mandatory disclosure," specific documents that enable both sides and/or their lawyers to fully understand the parties' finances before discussing a potential resolution of the case. Section 25-32 of the Connecticut Practice Book defines the parties' obligations regarding mandatory disclosure as follows:

"Unless otherwise ordered by the judicial authority for good cause shown, upon request by a party involved in an action for dissolution of marriage or civil union, legal separation, annulment or support, or a post judgment motion for modification of alimony or support, opposing parties shall exchange the following documents within thirty days of such request:

(1) all federal and state income tax returns filed within the last three years, including personal returns and returns filed on behalf of any partnership or closely-held corporation of which a party is a partner or shareholder;

(2) IRS forms W-2, 1099 and K-1 within the last three years including those for the past year if the income tax returns for that year have not been prepared;

(3) copies of all pay stubs or other evidence of income for the current year and the last pay stub from the past year;

(4) statements for all accounts maintained with any financial institution, including banks, brokers and financial managers, for the past 24 months;

(5) the most recent statement showing any interest in any Keogh, IRA, profit sharing plan, deferred compensation plan, pension plan, or retirement account;

(6) the most recent statement regarding any insurance on the life of any party;

(7) a summary furnished by the employer of the party's medical insurance policy, coverage, cost of coverage, spousal benefits, and COBRA costs following dissolution;

(8) any written appraisal concerning any asset owned by either party.

Upon close inspection, this list of documentation appears daunting, especially for a party who might not have had any involvement in the family finances. However, attorneys should remind clients that these obligations extend to both parties and truly do enable the attorneys to gather a better understanding of the financial mechanics of the marriage and the assets subject to division, especially by focusing on the past two years of statements.

While some litigants or law firms begin the divorce action by requesting immediate mandatory disclosure (thereby dictating compliance within thirty days of the return date), others may attempt to conduct informal discovery in an attempt to resolve matters during the ninety day waiting period without unnecessary expense. Our recommendation for all litigants in dissolution actions is to make diligent efforts to gather and exchange this material at the earliest possible time - and to share it with your counsel - as there is no better way to quickly ascertain the family's full financial picture.

Parenting Education Program

Whenever a minor child is involved in a dissolution of marriage proceeding, both parents must attend parenting education classes. These classes are designed specifically to educate parents about how their separation may affect their children. By statute the courses must include information regarding the developmental stages of children, adjustment of children to parental separation, dispute resolution and conflict management, guidelines for visitation, stress reduction in children and cooperative parenting.[1] There is a mandatory $125.00 participation fee; however, where a party is indigent, it may be waived by the court. Parenting education classes are generally six hours in total duration, and are typically offered as two, three hour classes or three, two hour classes. A parent should sign-up with the provider directly, and bring to the first class the Parenting Education Program Order, Certificate and Results form (JD-FM-149) which can be found under "Forms" on the State of Connecticut Judicial Website. Classes are available at several locations in Fairfield County, including Bridgeport, Norwalk, Stamford and Greenwich, and a parent may find contact information for the various providers on the Connecticut Judicial Website. It is important to note that in the event a parent does not complete the program in a timely manner, the court may decline to enter orders in the case, and may even decline to accept a separation agreement until both parents have done so.

[1] C.G.S. § 46b-69b.

MOTIONS, GENERALLY

Once your case has begun, there may come a time -- either before or after the Case Management Conference -- when a dispute rises to the level that it requires the intervention of a judge. A large percentage of divorce litigants in Connecticut stay out of court entirely, at least until the final, uncontested hearing when the judge approves a final separation agreement and enters a judgment. Others, however, are faced with more immediate, short term problems which may be difficult to resolve either with or without attorneys. Determining who will have temporary possession of the marital home, how the children will be cared for while the case is pending, or how household bills will be paid until judgment are some examples of what are referred to as "*pendente lite*" issues which may be resolved by motion practice.

A motion is any written request by a party, in a form described in more detail in the Connecticut Practice Book, properly filed with the court in a manner upon which a judge can grant relief to the party requesting the action. Family division motions in the Connecticut Superior Courts are accepted either in person (at the appropriate clerk's office), or by e-filing (pro se litigants may register for e-filing with the Connecticut Judicial Branch, and will thereafter be electronically notified of all activity on their case). Motions should be concise, in plain language, and with no more facts than are necessary to spell out the nature of the request from the Court. Certain post-judgment motions (such as a motion to modify a judgment) require filing fees; however, *pendente lite* motions may be filed at no additional cost, can be easily filed electronically, and automatically appear on the "short calendar" for that courthouse within a couple weeks of filing the motion.

The family "short calendar" call is done on one day of each week (Mondays in Stamford and Danbury Judicial Districts, and Thursdays in Bridgeport, for example). At this time, all of the family case motions that were filed within the previous weeks will be listed, giving the parties to the motion an opportunity to be heard on that date.[2] A

[2] An exception to this timing is in the Stamford/Norwalk Judicial District, which currently utilizes a program wherein the motions are written on the calendar a full two (2) weeks before the short calendar

motion filed in the Fairfield Judicial District at Bridgeport, for example, will appear on a short calendar list on a future Thursday, and the parties to the dissolution action may consult the judicial website short calendar lists to confirm the precise date the motion is "written on." Armed with that information, if the party who filed the motion is ready to proceed, he or she must do two things. First, the motion must be "marked ready" by following the procedure and timeframe designated by the Court in that district (in Bridgeport, this must be done by 4 pm on the Tuesday before the Thursday short calendar; in Stamford, however, this must be done by the Thursday a full eleven days before the hearing). Second, the party marking the motion ready must notify the other side by "serving" written notification of the ready marking by fax, email, or regular mail. The moving party should bring proof of this notification to court on the short calendar date.

If a party is not "ready," is unavailable on the short calendar date, or otherwise decides to delay the motion being heard by the Court, one can file a "reclaim" form with the clerk (also by e-filing, and also available on the judicial forms website). The filing of that reclaim will cause the motion to reappear on the next available short calendar date, triggering new deadlines for marking the motion ready. In all cases, if a motion addresses financial issues, the court rules require that the parties file and exchange updated financial affidavits at least five (5) days before the hearing.

At the actual short calendar call, the parties should be present before 9:30 am. In some judicial districts (Stamford and Danbury) but not all (Bridgeport), the judge will actually "call" the calendar in order. Parties or attorneys are expected to announce their presence, their intention to proceed, and give the Court an estimate of how much time the motion will take if an amicable resolution cannot be reached. With all motions, other than very limited cases in which legal argument is all that is required, the parties will be directed to visit the Family Relations Office, where a trained court official will attempt to mediate and resolve the subject matter of the motion(s) to be heard that

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date. Other judicial districts provide litigants with approximately one (1) week's notice. We suggest that you consult with your attorney or with the clerk's office regarding motion practice in your judicial district.

day. Unrepresented parties meet personally with the family relations counselors; otherwise, only attorneys attend and discuss the matter behind closed doors in the Family Relations Office. If an agreement can be forged, sometimes the family relations counselor himself or herself will draft the document and the parties will sign it on the spot, subject to approval by the Court. Family relations counselors are trained to opine on matters regarding parenting disputes, and often will assist in running child support calculations where applicable. If the matter is excessively complex, would require substantially more time than the constraints of short calendar would allow, or if an agreement cannot be reached, the family relations counselor will provide the parties with a form confirming their attendance for the Court. This form will be taken back to the assigned judge, who will then determine when a hearing will be conducted.

This is where parties should be forewarned: many, many motions in family cases are filed each and every week. Hundreds of litigants across the state appear eagerly before family division judges at short calendar, ready to proceed with their motions. There are simply not enough judges, and not enough courtrooms, to handle every motion that cannot be resolved by the Family Relations Office, most certainly not in the few hours that are available on any given short calendar date. Parties may be frustrated by a process which involves considerable waiting, and sometimes exasperating rescheduling. While courts will make best efforts to hear emergent matters first (restraining orders regarding abuse, for example), the parties are often best served by attempting in good faith to resolve their temporary dispute (the subject of the motion) by way of a written agreement. Having an attorney can indeed help speed up the process for any litigant unfamiliar with the family court docket, but in Fairfield County, there is often no replacement for creative, effective negotiation and compromise in resolving temporary issues to the mutual benefit of the parties.

MARITAL PROPERTY & EQUITABLE DISTRIBUTION

Marital Property Explained

Even before divorce litigation is commenced, most laypeople have a generalized understanding of the concept of "marital property." Marital property is any asset - whether real estate, a bank account, a business or legal interest, a security or stock holding, or even a piece of home furnishing - which was purchased or obtained during or prior to the marriage, and remains the property of either party of the marriage, regardless of whose name is listed on the title for such property.

Equitable Distribution

Connecticut General Statutes Section 46(b)-81(a) broadly defines the court's powers with respect to equitably dividing marital property between divorcing spouses:

> "At the time of entering a decree annulling or dissolving a marriage or for legal separation pursuant to a complaint under section 46b-45, the Superior Court may assign to either the husband or wife all or any part of the estate of the other. The court may pass title to real property to either party or to a third person or may order the sale of such real property, without any act by either the husband or the wife, when in the judgment of the court it is the proper mode to carry the decree into effect."

In essence, this subsection sets forth the very generous authority of the Superior Court in family matters to fairly divide assets, and even order the sale of property, in order to accomplish what the court finds to be fair and equitable in a divorce action.

Connecticut is sometimes defined as an "all property distribution state," or a "kitchen sink jurisdiction." Divorcing spouses can and should expect that the court will consider allocating any and all property - including premarital or inherited property -- by and between the parties, regardless of how that property was acquired. This does not, however, mean that inherited property, for example, will necessarily be equally divided in all cases. As with all property, the court will consider a number of statutory factors in

determining what a fair division of the assets would be. These factors, set forth in Connecticut General Statutes Section 46b-81, are:

(1) The age of the parties;

(2) the health of the parties;

(3) the station of the parties;

(4) each party's occupation

(5) the amount and sources of the parties' respective income;

(5) each party's vocational skills and employability;

(6) the party's liabilities;

(7) relevant special needs;

(8) each party's future earning capacity and prospects for acquisition of capital assets and income; and

(9) the contribution of each of the parties in the acquisition, preservation, or appreciation of the assets.

In determining whether a party has a likelihood of retaining a certain asset after trial (or in order to advance such a position during negotiation), capable counsel will be familiar with recent court decisions, and engage in discovery so they may advance the best possible presentation and position at trial. Nevertheless, due to the broad discretion afforded to the Superior Court to divide marital property by statute, no spouse - and no attorney - should expect or guarantee that a certain item of property will be insulated from equitable distribution to the other spouse in any and all circumstances.

It should be further noted that C.G.S. § 46b-81 only permits the courts to enter orders regarding the distribution of property *during* the dissolution proceedings. The court is not permitted to modify its original orders or enter additional orders providing for the distribution of property after the divorce is finalized. That said, there are three limited exceptions where a court may revisit its original property orders. Firstly, a party

may seek to open a judgment if, for example, one of the parties engaged in fraud, or the judgment was based upon a mutual mistake of the parties. Secondly, a court may enter orders to *effectuate* a previously ordered property distribution. Thirdly, parties may agree to have the court retain jurisdiction to resolve disputes that arise while parties are attempting to carry out orders related to the division of property. The last two scenarios may occur, for example, where the parties reach an impasse with respect to terms regarding the sale of a home (e.g., selecting a broker, reducing the price, etc.), or the division of specific retirement accounts.

The Marital Residence

In the majority of divorces, parties are jointly living in a home that they jointly own at the time of service. This property, referred to as the "marital residence," often becomes an asset subject to equitable division by the court at some later date. Again, although there are often variations with respect to which spouse is listed on the title and/or any note or mortgage associated with the property, the trial court is empowered to either force a sale of the property, or assign that property to one party or the other as part of the dissolution action, where appropriate.

Pursuant to the Automatic Orders (as discussed above) neither party may deny the other use of the parties' primary residence without a court order, so long as the parties are living together at the commencement of the lawsuit. Nevertheless, due to the likelihood of conflict between the parties (and perhaps in the presence of minor children), the spouses have the option of filing and proceeding with a motion for exclusive possession of the marital home. This procedural mechanism allows one party - on a temporary basis only - to be heard as to why it would be "just and equitable" to grant only one party interim use of the marital home (to the exclusion of the other spouse) without making a determination as to which party will ultimately receive title to that property upon final judgment.

A myriad of factors may be considered by the court in awarding temporary (also referred to as "Pendente Lite," Latin for "while the action is pending") exclusive

possession of the marital home, but perhaps the most significant factor is recent or present violence (or the threat thereof) in the marital home, especially if the same has resulted in police intervention or involvement by the Department of Children and Families. In circumstances of physical abuse of a spouse or a child, there are three options to be considered and employed (in tandem or individually) as circumstances allow: A) criminal proceedings and a criminal protective order; B) a civil application for relief from abuse; and C) the temporary, exclusive possession of the marital home as discussed here. Each of these options comes with its own benefits and procedural mechanisms; obviously, in the case of an emergency or serious, imminent danger to a person or child, law enforcement is the best option.

Inheritance, Gifts & Trusts

In a divorce action, the Superior Court has the authority to allocate inheritances and gifts that have been received to either party regardless of the source. In determining whether a party should retain his or her inheritance or gift, judges utilize a fairness test, and look to numerous factors, including when the gift or inheritance was received, its past and current value, how it was used (if at all) during the marriage, whether it was held by one or both of the parties, and the reason the inheritance or gift was received.

In a dissolution of marriage action, "property" refers to a *presently* existing, enforceable right to receive income from the other party. Thus, a mere expectation of a future inheritance does not qualify as "property" and is generally not considered part of the marital estate. In the case of *Rubin v. Rubin*[3], where the husband's status as a possible residuary beneficiary under his mother's revocable trust and will was deemed a "mere expectancy," the court determined that his possible future inheritance should not have been the subject of a court order as the husband's "hope" to receive money in the future was not divisible or assignable by a court. Of course, divorcing parties may always enter into voluntary agreements about future inheritances as a way to achieve

[3] 204 Conn. 224, 230-31 (1987).

equity in the division of property, and this type of provision often bridges the gap of an otherwise difficult settlement.

Pension Benefits

It is well settled that both vested and unvested pension benefits are marital property subject to equitable distribution under Connecticut General Statutes § 46b-81.[4] Once it is established- either through an agreement or court order- that a pension will be divided, the valuation and distribution method must be addressed. There are generally two approaches used in Connecticut to divide a pension, the present value method and the present division method of deferred distribution.[5]

Under the present value approach, the parties, or the court, must first determine the present value of the pension benefits at issue. The parties, or, again, the court, will then decide the portion to which the nonemployee spouse is entitled, and award other property to that spouse to offset the value of the pension benefits the employee spouse will retain. It should be noted that although this approach may result in immediately severing the parties' financial connection, it also puts a considerable amount of risk on the employee spouse. Indeed, if, for example, the employee spouse never receives unvested benefits, the nonemployee spouse will have received at the time of dissolution a greater share of the marital assets.

Under the present division method of deferred distribution, on the other hand, the court or the parties determine at the time of dissolution the percentage share of the benefits each will receive upon maturity, regardless of the overall value of the plan. Typically, the parties will then receive their respective shares as a monthly payment when the pension goes into pay status, e.g., when the employee spouse retires. Unlike the present value approach, the deferred distribution method imposes the risk of forfeiture on both parties in that if the employee spouse never receives the benefits, the nonemployee spouse will forfeit them as well. However, this approach also forces the

[4] *Bender v. Bender*, 258 Conn. 733 (2001).
[5] Id.

parties to remain financially tied to one another for what could potentially be a very significant amount of time.

ALIMONY

Factors Taken into Consideration

One of the great uncertainties that divorce clients deal with at the outset of divorce is the likely outcome of either side's application for an order of alimony, or spousal support. In many marriages, one party largely supports the other, or there is an inequity in earnings throughout the marriage which, in the context of the marriage arrangement, results in the parties sharing their financial responsibilities in such a way that makes sense for the family unit during the marriage itself. Upon divorce, however, there is often one party who has been supported by the other during the marriage, who is now facing the prospect of either seeking additional gainful employment or receiving spousal support – whether rehabilitative or lifetime – to enable that spouse to meet his or her continuing financial obligations.

To answer the most frequently posed question first: there is no "formula" for alimony in Connecticut. Many judges, family law practitioners, and even family relations counselors employ different guidelines in certain cases, but the length, amount, and terms of alimony are designed to be case-specific, and may be as flexible (and as unexpected) as the broad variety of factual scenarios that come before the Superior courts week in and week out.

An alimony award is based primarily upon a spouse's "continuing duty to support" the other, even after the breakdown of the marriage, and is governed by Connecticut General Statutes § 46b-82.

In Connecticut, courts may only enter alimony awards *during* dissolution proceedings, or upon judgment. If a party is not awarded alimony during the initial proceedings he or she will be precluded from returning to any court to seek alimony at any time in the future. Because in some cases an immediate alimony order is not appropriate, courts may enter a nominal award, often set as one dollar per year. This

effectively suspends the payor's obligation, while preserving the recipient's right to receive alimony at some point in the future. Orders may set a condition or a time frame for alimony to terminate, may leave the duration of the nominal award indefinite, or may specify that an automatic modification will occur after a designated period of time.

Earning Capacity

In today's economy, where the only constant is unpredictability, a theme of increasing frequency in divorce litigation is the difficulty in calculating appropriate alimony or child support figures. When a breadwinner has fallen on hard times – late in a marriage, during a divorce, or immediately thereafter – and is constrained to take a cut in income, should support figures be based on what he or she *now* earns, or should they instead be based upon what *could* be earned given that person's experience, education, credentials, and marketability?

Trial courts in Connecticut often utilize the concept of "earning capacity," which is "meant to be a flexible concept, particularly suited to cases where the designation of a precise monetary value of earned income is inappropriate."[6] The Connecticut Supreme Court has defined earning capacity as "not an amount which a person can theoretically earn, nor is it confined to actual income, but rather it is an amount which a person can realistically be expected to earn considering such things as his vocational skills, employability, age and health."[7] The Appellate Court has noted that "it is particularly appropriate to base a financial award on earning capacity where there is evidence that the payor has voluntarily quit or avoided obtaining employment in his field."[8]

Recent case law has directed trial courts to assign a specific number to a party's earning capacity in order to assist judges and parties in subsequent motions to modify an alimony award. Connecticut's Supreme Court has required the assignment of a specific earning capacity to a payor of alimony (who sought to reduce his obligation

[6] *Weinstein v. Weinstein,* 87 Conn. App. 699 (2005).
[7] *Weinstein v. Weinstein,* 280 Conn. 764 (2007).
[8] *Hart v. Hart,* 19 Conn. App. 91, 95 (1989).

after claiming to receive decreased taxable earnings at his new job), underscoring the weight an earning capacity determination can have on the primary wage earner of a marriage. In *Tanzman v. Meurer*[9] the Appellate Court pointed out that the husband had "failed to provide us with any statute, case law, or rule of practice that requires the trial court to specify an exact earning capacity when calculating an alimony and child support award." The Supreme Court, in remanding the matter to the trial court for further proceedings, concluded that "the specific amount of the plaintiff's earning capacity" should have been determined for the trial court to provide a "baseline," such that a party attempting to prove a substantial change of circumstances would not be "playing a game of blindman's bluff."

As a potential payor of alimony in a divorce proceeding, one should be aware that a judge might not simply glance at a tax return or even at a paystub, but may instead base his or her decision on a comprehensive history of the parties' earnings, education, employability, and economic resilience. Moreover, even after that award is determined, any litigant would be best served to seek the counsel of an experienced family law attorney before attempting to modify the award based on decreased income or a change in employment.

Type of Alimony Award- Periodic vs. Lump Sum

In awarding alimony[10] a court may assign to either party a part of the estate of the other party, award periodic payments, or do both.[11] It is important to note that alimony is generally tax deductible by the payor and taxable to the payee, regardless of whether it is paid periodically or in a lump sum. Thus, when considering a potential alimony award, it is very important to thoroughly understand the tax ramifications (we suggest you consult with a tax professional), in terms of both the potential financial benefit for the payor and the potential financial liability for the payee.

[9] 128 Conn. App. 405 (2011).
[10] 309 Conn 105, at 120 (2013).
[11] *Hotkowski v. Hotkowski*, 165 Conn. 167 (1973).

Alimony is most often awarded as a periodic payment, typically paid weekly, monthly, or even quarterly. Although in many cases, alimony is designated as a straightforward, fixed sum, in some cases, it may be appropriate or even necessary to devise a more intricate payment scheme. For example, self-employed individuals, sales persons who earn a commission and/or those who receive a discretionary bonus in addition to their base salary, may experience significant fluctuations in their income from one quarter, or even one month to the next. In such cases, it would be difficult to set a fixed sum as the parties would be forced to continually modify the dissolution judgment. As an alternative, the parties may find it more practicable to designate the alimony award as a fixed percentage of the payor's income. This allows for automatic modifications without the necessity of revisiting and modifying the terms of the court's prior orders, and therefore eliminates the need for further court involvement.

Periodic Alimony- Amount

When considering an alimony award, it is important to address whether the amount will be modifiable. As set forth in more detail below, alimony is generally modifiable upon a showing of a substantial change in circumstances. However, in certain situations, parties may find it desirable to lock in either a fixed amount or a fixed percentage.

For example, if a payor anticipates an increase in income at some point in the future, he or she may want the amount of alimony fixed or "capped" to prevent the former spouse from sharing in the post-marital increase. On the other hand, if the payor is uncertain as to his or her future earnings, he or she may prefer to have the ability to seek a downward modification in the event of an income reduction or unemployment. An alimony recipient may prefer to "lock in" a designated sum or percentage, (and may even accept a lower amount), in exchange for the certainty and consistency associated with a fixed sum each period. Here, the recipient will forfeit the opportunity to seek an increase in alimony if the payor's income increases, but will secure the certainty and predictability associated with receiving the fixed amount, and

will be able to budget and plan accordingly. A recipient may also prefer to "lock in" a designated sum or percentage if he or she anticipates that his or her own income will increase, potentially warranting a downward modification by the payor. Conversely, a more risk-tolerant alimony recipient may forfeit the certainty and predictability of fixed payments and pursue a modifiable order if he or she suspects the payor's income will substantially increase in the future, and the recipient wants to share in the additional earnings.

As there are a multitude of potential scenarios from one case to the next, it is critically important to have a thorough understanding of the various alimony schemes available, and how those schemes will advance and/or protect the payor's and recipient's respective interests.

Periodic Alimony- Term

When considering a periodic alimony award, it is also important to address details related to the term, or duration of the award, as periodic alimony is usually paid over an extended period of time. When dealing with periodic alimony, parties, or the court, will generally designate the duration of the obligation as a set number of months or years. Usually, it is also specified that the obligation will automatically terminate sooner upon the occurrence of certain events, for example, if one of the parties dies, the recipient remarries, or the recipient begins cohabitating with another individual. It is crucial to specify both the duration and the conditions that will trigger earlier termination. Indeed, in the absence of specified events triggering automatic termination, the alimony obligation may continue indefinitely, requiring further judicial intervention to resolve the issue.

When negotiating an alimony provision, parties generally have considerable latitude in formulating terms. With respect to the term, or duration, of the alimony award, for example, it may be beneficial for the parties to agree to a shorter, non-modifiable term with a higher amount of alimony. This might be preferred where a payor would like to be able to plan ahead and/or sever financial ties with his or her

former spouse sooner rather than later. The recipient might prefer this arrangement as well if he or she is in need of cash "up front," or if he or she is planning to remarry before the alimony obligation would otherwise have terminated. On the other hand, one spouse may prefer to receive payments over a longer period of time, in which case it may be desirable to set lower payments, or either front load or back load them (i.e., the payments will start off high and decrease or start off low and increase).

In some cases, it may also be appropriate to designate additional events triggering automatic termination above and beyond those mentioned above. When negotiating details related to the duration of alimony, it is important to fully understand both the financial and tax implications of such payments, as well as the different options available. From a negotiating standpoint, it is also important to consider the circumstances of each case, and how a court might view those circumstances in formulating orders of its own if the case were to go to trial.

Remarriage and Cohabitation

As mentioned above, in the event parties intend for an alimony obligation to terminate upon certain events, it is necessary that they specify the triggering events in their separation agreement. This hold equally true for the remarriage of the recipient as it does for any other event. In fact, a payor's alimony obligation does not automatically terminate upon the recipient's remarriage. To the contrary, except in the most exceptional circumstances, such remarriage simply produces an inference that the recipient intended to abandon the previous alimony award.[12] Although an alimony payor has the benefit of this presumption, he or she may still be required to litigate the matter in court, as opposed to enjoying an automatic termination. Furthermore, the payor is be required to continue paying alimony until the order is formally modified by the court.

Alimony is often terminated or modified in the event the recipient begins cohabitating with another individual. Indeed, pursuant to General Statutes § 46b-86(b),

[12] *Cary v. Cary*, 112 Conn. 256 (1930).

a court may modify, suspend, reduce or terminate the payment of periodic alimony upon a showing that the party receiving the periodic alimony is living with another person under circumstances which the court finds should result in the modification, suspension, reduction or termination of alimony because the living arrangements cause such a change of circumstances as to alter the financial needs of that party.[13] Importantly, *cohabitation alone is not enough*. As set forth in C.G.S. 46b-86(b), for cohabitation to constitute a change of circumstances, the living arrangement must be such that the financial needs of the recipient are altered. Unlike remarriage, which is relatively easy to prove, it is often more difficult to prove that a party's financial needs have been changed as a result of cohabitation. This is particularly true where the cohabitating party and his or her new partner engage in efforts to conceal the details of their finances, or intentionally keep their finances separate. As the burden of proof rests on the party seeking the termination or modification of alimony, it is often advisable to seek the assistance of counsel familiar with available discovery mechanisms, such as depositions, interrogatories and requests for production of documents. These steps are often required in order to obtain the information and documentation necessary to prove a case.

Lump Sum Awards

For a variety of reasons, parties may find it desirable to handle alimony in the form of a lump sum payment instead of a periodic obligation. For example, a recipient may be in need of cash for moving costs, or simply to reestablish himself or herself, and therefore might prefer one large payment up front in lieu of smaller periodic payments over an extended period of time. From a strategic standpoint, a recipient who anticipates getting remarried may also prefer an up front, lump sum payment as alimony would typically terminate upon the party's remarriage. Under certain circumstances the alimony payor may also find such an arrangement beneficial. Firstly, a lump sum payment is usually significantly discounted to account for future

[13] C.G.S. § 46b-86.

contingencies, and where a payor has the resources available, it might make sense to take advantage of the savings. Secondly, a lump sum payment may be beneficial where the payor anticipates increased earnings in the future. If the lump sum is calculated based on current earnings, the payor would receive both the aforementioned discount, and may effectively preclude the former spouse from receiving a portion of the additional future earnings. In many cases, both parties find a lump sum arrangement beneficial as it immediately severs their financial ties.

Although a lump sum alimony award is not treated the same as a property distribution for tax purposes, the two are nevertheless similar in that, unlike periodic alimony, lump sum alimony cannot be modified after the divorce is finalized- even if it is paid in installments. Therefore, unless the payor has ample resources with which to fulfill the obligation, both parties should consider this option very carefully.

Modifiability

Generally speaking, and unless the parties contract otherwise, periodic alimony awards may be modified after a divorce is finalized. C.G.S. 46b-86(a) provides that, "Unless and to the extent that the decree precludes modification, any final order for the periodic payment of permanent alimony or support, an order for alimony or support pendente lite or an order requiring either party to maintain life insurance for the other party or a minor child of the parties may, at any time thereafter, be continued, set aside, altered or modified by the court upon a showing of a substantial change in the circumstances of either party." Even a cursory reading of the statute reveals a few very important components. Primarily, C.G.S. § 46b-86(a) only applies to orders for periodic alimony. As set forth above, lump sum alimony payments are generally non-modifiable as, in this regard, they are essentially treated as property distributions. In addition, as set forth in § 46b-86(a), periodic alimony is modifiable unless and to the extent the pertinent orders preclude modification. Indeed, as discussed above, an alimony award may be designated as non-modifiable as to term, as to amount, or as to both. Alternatively, an alimony award may be designated as non-modifiable, except under

certain circumstances. For example, the amount of alimony may be non-modifiable by the recipient unless or until the payor's earnings exceed a set dollar amount, effectively giving that party what lawyers and courts call an earnings "safe harbor" (essentially an incentive to earn income). On the other hand, the amount of alimony may be designated as non-modifiable by the payor unless his or her earnings fall *below* a certain dollar amount, thereby giving the recipient added security of consistent payments, and disincentivizing the payor from voluntarily earning less money. Additionally, as discussed above, the term, or duration, of alimony may be designated as non-modifiable except in certain circumstances, such as the payor's unemployment or disability, the death of either party, the remarriage of the recipient or the cohabitation of the recipient.

As set forth in C.G.S. § 46b-86(a), and as further established by applicable case law, the party seeking a modification of alimony must prove as a threshold matter that there has been a substantial change in the circumstances of one or both of the parties warranting the modification. Although there is no limit to the types of circumstances that might warrant modification, suspension or termination, cases typically involve situations where the payor has lost his or her job or has otherwise experienced a significant *reduction* income. Cases also frequently involve situations in which the recipient learns that his or her former spouse has experienced a significant *increase* in income.

Separate and apart from the reasons advanced in furtherance of the proposed modification, it is important to note that the change must have occurred after the original orders were entered. A party will not be afforded a second bite at the apple by pointing to circumstances that could and should have been taken into account when the original orders were entered. Although courts once required that the change not be contemplated at the time the original orders were entered, this requirement has since been eliminated. Thus, in seeking a modification of alimony, a party may be permitted to rely upon events that took place after the orders were entered even though they were known or expected at the time of the divorce.

Policing Changes in Income

During negotiations centered around alimony, clients often ask: "how will I know if his/her income goes up?" This is often a major concern where the payor has historically received large, discretionary bonuses, or where the payor is self-employed. Courts in Fairfield County and beyond have dealt with this issue in a variety of ways, depending on the complexity of the parties' finances and the amount of money involved. In a relatively straightforward case, a court may simply order the parties to exchange tax returns (or tax forms demonstrating income) annually, allowing each to see the other's income. In more complex cases, however, the court may permit the recipient spouse to retain a tax professional to audit the payor's books and financial records each year. In cases where the audit reveals under-reporting, the payor may be required to reimburse the recipient for any underpayment of support, and he or she may even be held responsible for the cost of the audit. These types of provisions are designed not only to facilitate the exchange of information, but also deter the obligor from hiding or otherwise misrepresenting his or her income.

CHILD CUSTODY

Custody - Legal Custody vs. Physical Custody

In cases involving children, determinations regarding custody and visitation must be made by the parties, or if they cannot agree, by the court. When faced with issues related to custody, it is helpful to first understand the difference between legal custody and physical custody. Generally speaking, legal custody refers to the respective rights of parents to make major decisions regarding a child, whereas physical custody refers to the rights of parents to have in-person access to the child.

Joint Legal Custody

Determinations regarding legal custody often include an award of joint custody or sole custody. Where parents have joint legal custody, both will typically have the

right to participate in making major decisions regarding their child. Notably, where the term "joint custody" is used absent a distinction between legal custody and physical custody, it is presumed that the phrase is referring to both. Indeed, as set forth in C.G.S. 46b-56a(a), joint custody is defined as "an order awarding legal custody of the minor child to both parents, providing for joint decision making by the parents and providing that physical custody shall be shared by the parents in such a way as to assure the child of continuing contact with both parents."

Generally speaking, under a joint legal custody arrangement, parents are obligated to consult with one another regarding major decisions affecting the child. Major decisions often involve those related to the child's health, growth and development, choice of schools, religion, course of study, travel, employment, sports and activities and significant changes in the child's social environment. On the other hand, the parent with physical custody of the child usually has the right to make less significant, day-to-day decisions while the child is in his or her care. This allows a parent to determine, for example, what the child will wear to school, or what the child will have for dinner, without the necessity of repeatedly consulting the other parent throughout the day.

Even in the context of a joint legal custody arrangement, the degree to which each parent has a right to participate in the decision-making process may be considerably different from one case to the next. In one case the parents may be on completely equal footing, whereas in another case certain decisions may be allocated to one parent or the other. For example, one parent may have the right to make decisions regarding the child's education, while the other parent may have the right to make decisions regarding the child's medical treatment. In other cases, the parents may be required to consult with one another on major issues concerning the children, but one parent may have final say with respect to certain issues. In joint custody arrangements, both parents typically have the right to make emergency decisions on the child's behalf without consulting with the other parent. For example, if the child is injured while in

one parent's care, that parent generally has the right to make decisions related to the child's emergency medical treatment.

Joint Physical Custody

Most often, parents that share joint legal custody also share joint physical custody, with one parent designated as the primary custodial figure. Typically, "joint physically custody" does not mean "shared custody" or "50/50" parenting time. Rather, joint custody refers to arrangements whereby the child lives with one parent on a primary basis, subject to flexible and liberal visitation with the other parent. A classic example of a joint custody arrangement involves the child living with one parent during the week, subject to visitation with the other parent every other weekend (often overnight, beginning after school on Friday afternoon through Sunday evening), as well as one or two evening visits during the school week for dinner. In these arrangements, the non-custodial parent typically has expanded parental time during the summer months. This baseline model is becoming antiquated as parties are increasingly turning to more innovative and creative models. In fact, today it is not at all uncommon to see parents using a truly shared parenting model where each parent has equal time with the child each week, or each month. By way of example, parties may agree to a week on/week off arrangement, or even a three or four day split, balanced to minimize disruptive transitions. The appropriateness of a particular schedule varies as parenting plans are often influenced by the child's age, the child's school and/or activity schedule, the parents' respective work schedules and/or the distance between the parent's homes. As discussed in more detail below, these, and many other, factors will ultimately be considered in formulating a parenting plan that promotes the best interests of the child.

Sole Custody

During an initial consultation, clients very often ask whether it is likely that one parent or the other will be awarded sole custody. Such a result is statistically rare. Sole

custody is typically reserved for extraordinary cases in which a parent has demonstrated a clear inability to make sound decisions on the child's behalf. For example, the non-custodial parent may have a disability impacting their judgment or decision-making ability, a drug or alcohol addiction, or may have engaged in conduct (often criminal in nature) detrimental to the child's welfare.

As with joint custody, there are varying degreesof sole custody. Although the custodial parent in such situations typically has the ability and obligation to make all major decisions regarding the child, in most cases, the non-custodial parent is not completely excluded from the child's life. To the contrary, except in extreme circumstances, the non-custodial parent will usually have some visitation. Because there usually exist reasons to limit the non-custodial parent's contact with the child, however, visitation may be limited to one or two short visits per week, and depending on the circumstances, there may be a requirement that the visits be supervised, either by a trusted family member or neutral third party.

Best Interests Standard

From a procedural standpoint, a court has jurisdiction to enter orders regarding custody of a minor child during the pendency of a divorce, as a final order at the conclusion of the proceedings, or when a modification is required after the dissolution has been finalized. Pursuant to C.G.S. § 46b-56(c), when making or modifying custody orders, the court must consider the best interests of the child. In fact, a court typically will not enter custody orders – even when an agreement is reached by the parties -- unless it first finds that such orders are in the child's best interest. In determining whether a particular custody arrangement is in the child's best interest a court may consider, among other things, the following statutory factors:

(1) the temperament and developmental needs of the child;

(2) the capacity and the disposition of the parents to understand and meet the needs of the child;

(3) any relevant and material information obtained from the child, including the informed preferences of the child;

(4) the wishes of the child's parents as to custody;

(5) the past and current interaction and relationship of the child with each parent, the child's siblings and any other person who may significantly affect the best interests of the child;

(6) the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court orders;

(7) any manipulation by or coercive behavior of the parents in an effort to involve the child in the parents' dispute;

(8) the ability of each parent to be actively involved in the life of the child;

(9) the child's adjustment to his or her home, school and community environments;

(10) the length of time that the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity in such environment;

(11) the stability of the child's existing or proposed residences, or both;

(12) the mental and physical health of all individuals involved;

(13) the child's cultural background;

(14) the effect on the child of the actions of an abuser, if any domestic violence has occurred between the parents or between a parent and another individual or the child;

(15) whether the child or a sibling of the child has been abused or neglected.

Which factors the court takes into consideration will vary significantly depending on the circumstances of the case, the presentation by counsel, the veracity of the witnesses, and the individual leanings of the particular judge. Significantly, a court is not required to assign any weight to the factors it considers.

Modification

Because circumstances relating to children often change over time, courts are empowered to modify prior orders - and even make entirely new orders - after a divorce is finalized. Such orders might affect child support, custody, visitation, or as is often the case, a combination of the three. In any post-judgment proceeding to modify orders related to custody and visitation of minor children, the Superior Court is guided by General Statutes § 46b-56 (a), which provides the court with broad authority to make or modify any proper order regarding the custody, care, education, visitation and support of minor children in dissolution actions.[14]

Unlike motions to modify alimony or child support awards, where a party is required to demonstrate a "substantial change in circumstances," a parent seeking a custody modification must prove that there has been a "material change" of circumstances since the court's previous finding as to the best interests of the child, or that the existing custody order was not based upon the best interests of the child in the first place.[15] The end result is a quick shift back to examine the effectiveness of the previous order, together with a snapshot of the present circumstances, to examine whether the "best interests" analysis, as presently applied, would make new custody orders more appropriate for the child.

Motions to modify visitation, on the other hand, require a somewhat lighter judicial touch. In ruling on a motion to modify visitation, the court is not at all required to find as a threshold matter that a change in circumstances has occurred.[16] Instead, the trial court is guided solely by the best interests of the child.[17] Accordingly, no showing of a "substantial change" or "material change" in circumstances is required to change a visitation plan, if indeed it can effectively be shown that the best interests of the minor child would be better served by the proposed plan.

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[14] *Tomlinson v. Tomlinson*, 119 Conn. App. 194 (2010).
[15] *Malave v. Ortiz*, 114 Conn. App. 414 (2009).
[16] *Szczerkowski v. Karmelowicz*, 60 Conn. App. 429 (2000); *McGinty v. McGinty*, 66 Conn. App. 35 (2001).
[17] C.G.S. § 46b-56(b); *Kelly v. Kelly*, 54 Conn. App. 50 (1999).

Before any judicial effort is undertaken to modify a parenting plan, parties are well served to meet with counsel experienced in such matters and to assemble evidence demonstrating the change the party intends to demonstrate to a court.

Third Party Rights to Custody and Visitation

Prospective clients often call with inquiries regarding the custody and visitation rights of third parties, or non-parents (such as grandparents, aunts, uncles, or close family friends). Although there are many similarities between the burden placed on third parties seeking custody and third parties seeking visitation, there are also some slight differences worth noting.

In *Roth v. Weston*,[18] the Supreme Court held that a third party seeking *visitation* with a minor child must plead a relationship with that child akin to that of a parent, and that denial of visitation with the third party would result in emotional harm to the child analogous to the type of harm required to prove that a child is neglected, uncared-for or dependent under the temporary custody and neglect statutes. Once alleged, the third party must then prove the allegations by clear and convincing evidence, a significantly more burdensome standard than "by a preponderance of the evidence." As its rationale for imposing such a strict standard, the Court pointed to, at least in part, the landmark United States Supreme Court decision in *Troxel v. Granville*,[19] in which the Court observed that "the liberty interest… of parents in the care, custody and control of their children… is perhaps the oldest of the fundamental liberty interests recognized by this court." In other words, the law imposes a heavy presumption that, except in very limited circumstances, a parent should be permitted to raise his or her child free from the interference of third parties.

The Connecticut Supreme Court in *Fish v. Fish*,[20] distinguished the interests at stake in third party visitation proceedings from those at stake in third party custody

[18] 259 Conn. 202 (2002).
[19] 530 U.S. 57 (2000).
[20] 285 Conn. 24 (2008).

proceedings. As the Court explained, in a visitation petition, the third party is essentially challenging the decision of a fit parent, who is presumed to be acting in the child's best interest, to deny or limit the petitioner's request for visitation. The harm alleged in a visitation petition results from the child's lack of access to the third party, rather than from the parent-child relationship, which is presumed to be beneficial. The harm alleged in a third party custody petition, however, arises from the fundamental nature of the parent-child relationship, which may be emotionally, psychologically or physically damaging to the child. Because a third party custody petition specifically challenges the overall competence of the parent to care for the child, the standard employed to protect the liberty interest of the parent must be more flexible and responsive to the child's welfare than the standard applied in visitation cases, in which the underlying parent-child relationship is not contested. In other words, in a visitation petition, the focus is centered around the justification for intruding upon a fit parent's parental rights; in a custody petition, the focus is the parent-child relationship and the welfare of the child. Thus, in addition to adopting the requirement that a child prove a parent-like relationship with the child, the Court in *Fish* held that "… the statutory presumption in favor of parental custody may be rebutted only in exceptional circumstances and only upon a showing that it would be clearly damaging, injurious or harmful for the child to remain in the parent's custody." The Court added, "…this does not mean temporary harm of the kind resulting from the stress of the dissolution proceeding itself, but significant harm arising from a pattern of dysfunctional behavior that has developed between the parent and the child over a period of time."[21] In Connecticut, a third party seeking custody or visitation of a child will often face an uphill battle, so to speak, as the standard of harm that must be demonstrated in both contexts is quite burdensome.

Relocation

In the years following a divorce, many custodial parents are faced with the challenge– and the associated legal hurdles– of determining whether they are permitted

[21] Id.

to relocate out of state or across the country with the minor children of the marriage. The non-custodial parent may object to the move, and if the parties cannot agree, ultimately a judge will be empowered to determine whether the relocation will be allowed. The law governing this decision is set forth in both our state statutes and governing case law.

Prior to a change in the law in 2006, a parent seeking to relocate with minor children against the objection of the other parent had to prove by a preponderance of the evidence that the proposed relocation was for a legitimate purpose, and, further, that the proposed relocation was reasonable in light of that purpose. If the moving party was successful, the burden then shifted to the non-custodial parent (the parent opposed to the relocation) to demonstrate to a court that the move would not be in the best interests of the minor child or children.[22]

This "burden-shifting" analysis adopted by the Supreme Court in 1998 was replaced by the Connecticut legislature in 2006 with Public Acts 2006, No. 06-168, now codified in General Statutes § 46b-56d. Section 46b-56d(a) now reads: "In any proceeding before the Superior Court arising after the entry of a judgment awarding custody of a minor child and involving the relocation of either parent with the child, where such relocating parent would have a significant impact on an existing parenting plan, the relocating parent shall bear the burden of proving, by a preponderance of the evidence, that (1) the relocation is for a legitimate purpose, (2) the proposed location is reasonable in light of such purpose, and (3) the relocation is in the best interests of the child."

The effect of General Statutes § 46b-56d(a) is essentially to codify the three-part provisions of the 1998 "Ireland Rule," while at the same time placing squarely on the shoulders of the party advocating relocation the entire burden of demonstrating, by a preponderance of the evidence, not only that the relocation is for a legitimate purpose and that the location is reasonable in light of that purpose, but also that the relocation is in the best interests of the child.

[22] *Ireland v. Ireland*, 246 Conn. 413 (1998).

C.G.S. § 46b-56d(b) further enumerates five specific factors that our courts are now statutorily obligated to consider in determining whether to approve a parent's request to relocate with a child. Section 46b-56d(b) reads:

> "In determining whether to approve the relocation of the child under subsection (a) of this section, the court shall consider, but such consideration shall not be limited to: (1) Each parent's reasons for seeking or opposing the relocation; (2) the quality of the relationships between the child and each parent; (3) the impact of the relocation on the quantity and the quality of the child's future contact with the nonrelocating parent; (4) the degree to which the relocating parent's and the child's life may be enhanced economically, emotionally and educationally by the relocation; and (5) the feasibility of preserving the relationship between the non-relocating parent and the child through suitable visitation arrangements."

Although each of the foregoing factors must be considered, they are not exclusive. In other words, a court is permitted to consider other relevant circumstances it feels may aid it in making its decision. The ultimate goal in considering these and other factors deemed appropriate by the court is to facilitate an accurate case-by-case determination of whether the relocation proposed by the moving party indeed lies in the best interests of the child.

Importantly the analysis set forth in General Statutes § 46b-56d applies only in the context of a proposed post judgment relocation. When a proposed relocation is contested *during* a dissolution proceeding, the court's decision is considered an initial determination of custody, and it is therefore governed by General Statutes § 46b-56.[23] Under that statute, the court must simply determine whether the move is in the "best interests" of the child or children in accordance with the rubric set forth above.

[23] *Noonan v. Noonan*, 122 Conn. App. 184 (2010).

Family Relations

Ordinarily, when matters related to custody and/or visitation are in dispute, the court will require parents to confer with the Family Relations Office. As an arm of the judiciary, the primary function of this office is to assist the court in resolving custody related matters, and in certain cases, aid the court in determining what type of arrangement serves the best interests of the children at issue. The Family Relations office itself is located within the courthouse, and is staffed by a team of professionals trained specifically to deal with family related issues. The degree to which Family Relations becomes involved in a matter varies from one case to the next. For example, a judge may refer a limited issue to the Family Relations Office for a mediation session (which may only last an hour, or less), or might refer the matter for a more complex or comprehensive study (typically involving both custody and visitation), which could take several weeks or months to complete.

When a matter is referred for a full evaluation, Family Relations is essentially tasked to make a determination as to how to resolve the issue at hand in a manner that will serve the best interests of the child. This may involve an initial dispute as to legal and/or physical custody (e.g., which parent will have primary residence of the child), a post judgment dispute as to a parenting plan modification (e.g., one parent may be seeking a shared parenting plan), or a proposed relocation. During the evaluation process, the court proceedings will effectively be placed on hold in that the parties typically will not proceed with a trial until Family Relations has concluded its investigation, and has issued its final report. As part of its investigation, which can take anywhere from several weeks to several months, the Family Relations Officer assigned to the case will interview the key participants in the matter, including the parents, the child or children involved, physicians, mental health professionals and teachers. The officer's goal is to obtain as much information as possible about the circumstances so he or she can formulate a sound recommendation for the court. This recommendation will be given to the parties, but only delivered to the court if the parties cannot reach an agreement and therefore need a trial.

GAL vs. AMC

In addition to a Family Relations referral, highly contested custody disputes also warrant the involvement of a Guardian Ad Litem or Attorney for the Minor Child. Like the Family Relations Office, Guardians Ad Litem and Attorneys for the Minor Child are often involved in initial custody/visitation determinations, post judgment custody modifications, and relocation petitions. Generally speaking, a Gurdian Ad Litem is a an individual with specialized training in family related matters (and often an attorney-although this is not a requirement), who is either appointed by the court, or hired privately by the parties, to evaluate the case as a neutral third party and ultimately determine what type of parenting plan would be in the child's best interests. Importantly, a Guardian Ad Litem does not represent the child. Rather his or her role is to advocate to the court what he or she believes is in the children's best interest, regardless of the child's stated feelings, wishes, or beliefs.

In contrast, an Attorney for the Minor Child, although theoretically neutral as between the parents, is hired specifically to represent the child. Unlike a Guardian Ad Litem who serves as a witness in the proceedings (e.g., at trial a Guardian Ad Litem may be called to testify), the Attorney for the Minor Child participates in the capacity of a lawyer. Generally, an Attorney for the Minor Child will advocate the child's wishes on his or her behalf. Only in certain situations will the Attorney for the Minor Child be required to advocate what he or she believes is in the children's best interest despite the children's stated wishes. Although there is no bright line rule, Attorneys for the Minor Child are typically more appropriate where children are of an age where they have developed the ability to formulate and express legitimate wishes of their own, whereas a Guardian Ad Litem is more appropriate for a younger child who is incapable of determining what is in his or her best interest.

Psychological Evaluations

At the outset of any family law representation, experienced attorneys inquire as to any documented psychiatric history of the participants. Even in the absence of

historical psychiatric treatment of any kind, undiagnosed conditions – when properly explored through discovery and presented at trial – may indeed play a role in a court's determination of an appropriate parenting plan for a minor child of divorce.

Pursuant to General Statutes §§ 46b-3 and 46b-6, the Superior Court may require the parties and the child to undergo a psychiatric or psychological evaluation for the purpose of properly disposing of a family matter, in a modification of custody case, and to assist in determining the best interest of the child.[24] C.G.S. § 46b-6 provides in relevant part that the court, "may cause an investigation to be made with respect to *any circumstance of the matter which may be helpful or material or relevant to a proper disposition of the case.*" The statute further provides, that "Such investigation may include an examination of the parentage and surroundings of any child, his age, habits and history, inquiry into the home conditions, habits and character of his parents or guardians and evaluation of his mental or physical condition." Furthermore, in any action for dissolution of marriage, legal separation or annulment of marriage, such investigation may include an examination into the age, habits and history of the parties, the causes of marital discord and the financial ability of the parties to furnish support to either spouse or any dependent child."[25] General Statutes § 46b-3 provides that the judge in any family relations matter may employ the use of a psychologist, psychiatrist or family counselor in carrying out such an evaluation**.**

However, a parent should not assume that a mere dispute over custody is in and of itself equivalent to putting one's mental health at issue in the case, in a manner which would necessarily result in the ordering of psychological evaluations. While there is no specific Supreme Court ruling on this issue[26] courts have nevertheless held that so many issues must be assessed in a custody determination, that one discrete issue – such as a parent's mental health – must not overtake the determination.[27] Instead, courts have determined that the conduct of the parties – rather than their mental status –

[24] *Pascal* v. *Pascal*, 2 Conn. App. 472 (1984).
[25] C.G.S. § 46b-6.
[26] *Bieluch* v. *Bieluch,* 190 Conn. 813 (1983).
[27] *Granbery v. Carleton*, 1993 Conn. Super. LEXIS 3444.

must be the primary focus of the court in assessing the extent and quality of involvement of each parent in the life of the child.

CHILD SUPPORT

The Obligation to Maintain

The primary statute dealing with child support in the context of dissolution proceedings requires that both parents financially maintain the child or children of the marriage according to their respective abilities.[28] In determining the "respective ability" of parents under Connecticut General Statutes § 46b-84, the court must consider a variety of factors, including the age, health, station, occupation, earning capacity, amount and sources of income, estate, vocational skills and employability of each of the parents, as well as the age, health station, occupation, educational status and expectation, amount and sources of income, vocational skills, employability, estate and needs of the child.[29] To determine the amount of child support a parent must pay, one must also take into consideration the provisions set forth in the Connecticut Child Support Guidelines.[30] Although in theory one must consider the Connecticut Child Support Guidelines *in addition* to the factors enumerated in C.G.S. § 46b-84, from a practical standpoint, a court will typically rely solely on the Guidelines. In fact, there is a rebuttable presumption that the amount of child support calculated under the Guidelines is correct, and a specific factual finding is required to rebut the presumptive amount.[31]

It is important to note that, generally, parents must support a child of the marriage until he or she reaches the age of majority. If a child has attained the age of eighteen, but is still a full-time high school student and is in need of continuing maintenance, the parents must provide support until the child completes the twelfth grade or attains the age of nineteen, whichever occurs first.[32]

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[28] C.G.S. §46b-84.
[29] C.G.S. § 46b-84(d).
[30] See C.G.S. §46b-215a.
[31] C.G.S. § 46b-215b(a).
[32] §46b-84(b).

Calculating Child Support- The Connecticut Child Support Guidelines

In Connecticut, child support is generally calculated using the parties' respective net income. To arrive at net income under the Connecticut Child Support Guidelines, however, one must first determine the parties' respective gross income, defined as one's "average weekly earned and unearned income from all sources before deductions." This approach ensures that each and every applicable resource is taken into consideration. In determining gross income under the Connecticut Child Support Guidelines, one must include salary, hourly wages, commissions, bonuses and tips; deferred compensation and severance pay; employment perquisites; workers' compensation benefits; social security benefits, including dependency benefits; pension and retirement income; rental income; estate of trust income; royalties; interest, dividends and annuities; lottery and gambling winnings; and education grants, among other resources. To calculate net income, one must then subtract the allowable deductions, including federal, state and local income taxes, social security taxes, medical, dental or health insurance premiums, mandatory union dues or fees; court-ordered alimony and child support awards for individuals not involved in the support determination.

Once the parties' respective net incomes are calculated, one may consult the Schedule of Basic Child Support Obligations to determine the parties' "basic child support obligation."[33] Based on the parties' combined net weekly income and the number of children for whom support is being calculated, the "basic child support obligation" represents the total, combined child support obligation for both parents. Each parent's *share* of the basic child support obligation is then determined by calculating each parent's percentage share of the combined net weekly income, and multiplying the result for each parent by the "basic child support obligation."

Based on the Income Shares Model, the Connecticut Child Support Guidelines "allow for the calculation of current support based on each parent's share of the amount estimated to be spent on a child if the parents and child lived in an intact

[33] §46b-215a-2b.

household."[34] The amount calculated for the noncustodial parent represents the level of support to be ordered by the court, while the amount calculated for the custodial parent is retained by the custodial parent and is presumed to be spent on the child.[35] Both the custodial parent's share and the noncustodial parent's share together constitute the total support obligation of both parents.[36]

Deviation Criteria

Although an amount calculated under the Connecticut Child Support Guidelines is presumed to be correct, the presumption may be rebutted by specific facts demonstrating that such amount would be inappropriate in a particular case. In varying from the calculated child support amount, however, that only certain "deviation criteria" may be used. As set forth in Connecticut Regulations §46b-215a-3(b), those criteria include, but are not limited to, a) other financial resources available to a parent, including substantial assets (e.g., both income producing and non-income producing property), a parent's earning capacity, hourly wages for overtime in excess of forty-five hours per week (but not to exceed 52 total paid hours per week), and/or regular recurring contributions or gifts of a spouse or domestic partner; b) extraordinary expenses for the care and maintenance of the child; c) extraordinary parental expenses; and d) coordination of total family support (i.e., child support is considered in conjunction with a determination of total family support, property settlement, and tax implications provided such considerations do not result in a lesser economic benefit to the child).[37] Importantly, the Guidelines also provide a limited catchall provision allowing for a deviation in "special circumstances" not otherwise specifically enumerated, but in which deviation from presumptive support amounts is warranted for reasons of equity.[38] For example, a deviation may be warranted where a shared physical custody arrangement exists and that arrangement substantially reduces the

[34] Child Support and Arrearage Guidelines (2005), preamble, § (d), p. ii.
[35] Id.
[36] Id.
[37] §46b-215a-3.
[38] 46b-215a-3b(6).

custodial parent's expenses for the child, or substantially increases the noncustodial parent's expenses for the child.[39]

The *Maturo* Holding

The Connecticut Child Support Guidelines do not provide presumptive amounts for situations in which parents' combined net weekly income exceeds Four Thousand Dollars. Rather, they provide simply that in such cases support must be determined on a case-by-case basis. Though the Guidelines provide that the support prescribed at the $4,000 net weekly income level shall be the minimum presumptive amount, the Guidelines do not expressly provide a cap.[40] Nevertheless, courts and/or litigants may not exercise unfettered discretion in fashioning child support awards under such circumstances.[41]

Indeed, in *Maturo v. Maturo*,[42] the Connecticut Supreme Court held that the principles underlying the Guidelines must be applied in cases where the parties' combined net weekly income exceeds the upper limit of the Schedule. One such principle is the notion that, although parents may spend more on their children as their income grows, spending on children as a percentage of household income actually declines as family income rises. It is thought that this spending pattern exists because families at higher income levels do not have to devote most or all of their incomes to perceived necessities. Rather they can allocate some proportion of income to savings and other non-consumption expenditures, as well as discretionary adult goods. This is reflected in the Child Support Guidelines in that, as parents' combined net weekly income increases, the *percentage* that must be paid in child support actually decreases. For example, the required support payment for two children declines from 35.00% when the parties' combined net weekly income is $300, to 15.89% when the parties' combined net weekly income is $4,000.00. Thus, when a family's combined net weekly

[39] Id.
[40] § 46b-215a-2b(a)(2).
[41] *Maturo v. Maturo*, 296 Conn. 80 (2010).
[42] 296 Conn. 80 (2010)

income exceeds $4,000.00, the court should treat the percentage set forth in the schedule at the highest income level as the presumptive ceiling on the child support obligation. For one child, the presumptive ceiling would thus be 11.83% of the parties' combined net weekly income, and for two children the ceiling would be 15.89%. Although this framework is subject to rebuttal by application of the deviation criteria enumerated in the Child Support Guidelines, according to *Maturo*, any such deviation by a court must be accompanied by an explanation as to why the presumptive amount is inequitable or inappropriate, as well as an explanation as to why the deviation is necessary to meet the needs of the child.[43]

Medical Coverage / Medical Expenses

In addition to child support itself, under Connecticut law, courts may also require parents to provide support for medical and dental expenses incurred on behalf of their minor children. Indeed, as set forth in C.G.S. § 46b-84(f)(2)(A), a court may order that either parent "name any child as a beneficiary of any medical or dental insurance or benefit plan carried by such parent or available to such parent at a reasonable cost." In the event such coverage is not available at a reasonable cost, the court may require a parent to apply for and maintain coverage on behalf of the child under the HUSKY Plan, Part B.[44] Where an order providing for medical coverage has been entered, the court is required to enter an additional order that the parents pay in accordance with the Connecticut Child Support Guidelines all unreimbursed and/or uninsured medical expenses incurred on behalf of the child(ren).[45] Under the Guidelines, this additional support is set forth as each parent's percentage share of the total expense.

When considering the terms of a potential separation agreement, there are many additional details related to medical expenses that parents should address. For example, parties are well advised to include language requiring them to exchange

[43] *Maturo v. Maturo*, supra.
[44] C.G.S. § 46b-84(f)(2)(B).
[45] C.G.S. § 46b-84(f)(2)(C)

documentation evidencing expenses incurred within a certain period of time. Parties might also include language requiring them to reimburse one another with a certain period of time (e.g., two weeks, or thirty days). Additionally, parents should address how controversial or elective treatment (e.g., plastic surgery, orthodontia, psychological counseling) will be handled. Perhaps the parties would benefit from a provision requiring advanced notice before the treatment is undertaken, or a provision providing that elective treatment must be mutually agreed upon. If either party has particular concerns, they may even define specific types of treatment that will be considered "elective" to avoid ambiguity and confusion in the future.

College Expenses

When considering the terms of a potential divorce settlement involving minor children, it is very important to consider whether your child(ren) will be attending college at some point in the future. If this detail is not properly addressed during the dissolution proceedings, it may be very difficult- even impossible- to obtain contribution from a former spouse for books, tuition and/or living expenses if and when your child enrolls in college.

In Connecticut, educational support orders are governed by Connecticut General Statutes §46b-56c, which authorizes the courts to enter orders defining how parents will handle "necessary educational expenses." By statute, "necessary educational expenses" include application costs, registration costs, room, board, dues, tuition, and fees up to the amount charged by the University of Connecticut for a full-time, in-state student at the time the child registers. The order may account for the cost of books and medical insurance for the child as well, and parents are permitted upon agreement to increase the limit beyond the amount charged by the University of Connecticut.

Importantly, C.G.S. §46b-56c does contain some restrictions. For example, educational support orders may only be entered for children under the age of twenty-three, and must terminate upon the child reaching the age of twenty-three. Additionally, a parent may only be required to provide support for a child or children to

attend up to four full academic years at an institution of higher education or a private occupational school for the purpose of obtaining a bachelors or other type of undergraduate degree, or vocational instruction. Notably, parents are not required to provide support for graduate or postgraduate education beyond a bachelor's degree. Additionally, a child is not permitted to bring a separate cause of action against his or her parents for parental support for higher education.

Where parties are able to resolve their case amicably (i.e., without the necessity of a trial), college expenses may be addressed in one of two ways. First, the parties may simply include in their separation agreement a provision outlining in detail how they will divide such expenses. If the children are very young during the proceedings, and the parties' circumstances at the time the child will be ready to attend college are unforeseeable, this issue may not be ripe for consideration. In such cases, the parties may wish to defer the issue until the child is older. It is very important to note that if the parties choose this course of action, they must include in their separation agreement a provision expressly requesting that the court retain jurisdiction over issues related to post secondary educational expenses. Indeed, if they fail to do so, the court will not retain jurisdiction, and the parties will be precluded from seeking court intervention in the future. However, if the parties do request that the court retain jurisdiction, either may request a post judgment educational support order at a later, appropriate time. Once the post judgment action is commenced- as with the divorce itself- the parties may either resolve the issue by agreement or request a hearing for this limited purpose.

Whether a post-secondary educational support order is entered at the time of the divorce or post judgment, the court must find that it is more likely than not that the parents would have provided support to the child for higher education if the family remained intact. The parties may stipulate to this fact in an agreement, or leave it up to the court to decide. In either event, assuming that threshold requirement is satisfied, the court will then determine whether an educational support order is appropriate. In doing so, the court will consider all relevant circumstances, including the parents'

income, assets and other obligations; the child's need for support based on his or her assets and ability to earn income; the availability of financial aid, including grants and loans; the reasonableness of the higher education considering the child's academic record and financial resources available; and the child's preparation for, aptitude for and commitment to higher education.

Modification of Child Support

Unless an order specifically (and atypically) precludes modification, child support may be modified by a court upon a showing of a "substantial change" in the financial circumstances of either party.[46] Additionally, unless there was a specific finding that application of the Connecticut Child Support Guidelines would have been inequitable or inappropriate, child support may be modified upon a showing that the existing order substantially deviates from the Guidelines.[47] For this reason, it is particularly important to ensure that the court record is complete with facts supporting the deviation criteria utilized. Indeed, if the criteria are unsupported, or a finding has not been entered on the record, the deviation may later be challenged. It is also important to note that there is a rebuttable presumption that any deviation of less than fifteen percent from the Guidelines is not "substantial," and any deviation of fifteen percent or more is "substantial."[48]

Although there are a variety of circumstances which may constitute a "substantial change of circumstances," there is no bright line rule, and thus, it is important that the merits of each case are evaluated independently. That said, there are some circumstances that often justify a child support modification. For example, a modification may be warranted where one party has experienced either a significant increase or reduction in income. As discussed above, however, a court is permitted to consider a party's earning capacity, and may in fact deny a motion to modify child

[46] C.G.S. §46b-86(a).
[47] Id.
[48] Id.

support where a party's earning capacity has remained unchanged despite a substantial decrease in that party's actual earnings.

Assuming a party is able to demonstrate a substantial change in circumstances or a substantial deviation from the child support guidelines, the parties or the court must determine the amount of the new award. In doing so, the court must take into consideration the statutory criteria outlined in C.G.S. §46b-84, as well as the Connecticut Child Support Guidelines.[49]

POST JUDGMENT MOTIONS

Motions for Contempt

Orders entered at the conclusion of divorce proceedings typically impose upon the parties ongoing obligations to one another. For example, one might party might be required to pay alimony or child support, divide a pension or retirement account, or even sell a home. In all cases where parents share joint legal custody of their children, they each have an obligation to consult with each other regarding major decisions affecting the children's welfare, and parenting plans often give parents the right to have physical custody, or visitation, of the children at designated times. Unfortunately, it is often the case that at one point or another, the parties will fall short of fulfilling their obligations. Often a party's noncompliance is completely inadvertent; all too frequently, though, it is intentional.

A motion for contempt is the primary mechanism for enforcing court orders. Generally speaking, a motion is simply a formal, written request submitted to the court requesting its involvement in a particular matter, and ultimately some sort of specified relief. Contempt is defined as the willful violation of a clear, unambiguous court order. Thus, in order to prevail on a motion for contempt, the moving party must prove not only that nonmoving party violated a court order, but that he or she did so wilfully, or purposely.[50] Given the requirement that a violation was willful, the nonmoving party

[49] *Hardisty v. Hardisty*, 183 Conn. 253 (1981).

[50]

may present evidence in an effort to show, for example, that he or she was unable to comply with the order, or that there was a genuine dispute over the meaning of the order. In the context of alimony or child support, the payor may try to show that he or she simply could not afford to make the payments. Whether this is true or not will be a question of fact for the court to ultimately decide based on the circumstances surrounding the violation and the evidence presented at trial.

Assuming a moving party prevails on a motion for contempt, the court will likely enter orders requiring the nonmoving party to comply in some fashion. The court may also enter orders penalizing the nonmoving party for his or her noncompliance. Such penalties might include payment of the counsel fees and/or court costs the moving party incurred in prosecuting the motion, sanctions, or both. In extreme cases, usually involving unpaid child support, the court may even order that the noncomplying party be incarcerated for a designated period of time, or until he pays a designated sum (often referred to as a "purge amount.") toward the past due balance.

PRENUPTIAL AND POSTNUPTIAL AGREEMENTS

While prenuptial and postnuptial agreements often do not relate directly to dissolution proceedings, they are an area of interest for our clients and are referenced here for the sake of completeness.

When prospective clients first contact our office about obtaining a prenuptial agreement, they are invariably concerned with approaching the process in a diplomatic manner. After all, acknowledging that a marriage may eventually break down is the last thing a couple wants to think about during the engagement period. However, by the time a prospective client contacts our office, the couple has usually discussed the topic already and come to some understanding as to what the terms of the agreement might be. At that point, the client is simply looking for guidance through the process.

There are certain requirements and formalities that must be met to render a prenuptial agreement valid and enforceable. Firstly, the agreement must be validly entered into by the parties. This means that both parties must enter into the

agreement voluntarily and knowingly. In other words, a party must not have been forced or coerced into entering into the agreement, and must have a full understanding of the provisions contained therein. If a party is "tricked" in some fashion into entering into a prenuptial agreement, it will likely be deemed unenforceable. The requirement that an agreement be entered into knowingly and voluntarily also requires that each party disclose and receive a fair and reasonable disclosure of the amount, character and value of property, financial obligations and income of the other party.

Secondly, the party against whom enforcement is sought should have been given an opportunity to consult with independent counsel. In this regard, a client would be well advised to begin the process of obtaining a prenuptial agreement well in advance of the wedding. In the event the party does not wish to obtain counsel, this fact should be acknowledged and memorialized in the agreement to avoid confusion in the future.

Thirdly, case law suggests that a prenuptial agreement will not be enforceable where it violates state statutes or public policy. For example, although a party may voluntarily waive his or her statutory *right* to spousal support, a party may not enter into a contractual agreement to avoid his or her statutory *obligation* to support his or her children.

Finally, a prenuptial agreement will be rendered unenforceable where it was unconscionable at the time of execution, or when enforcement is sought. On this point, case law suggests that a prenuptial agreement will not be enforced where the circumstances of the parties at the time of dissolution are so far beyond the contemplation of the parties at the time the agreement was made as to make enforcement of the agreement work an injustice, or where the economic status of the parties has changed dramatically between the date of the agreement and the dissolution that literal enforcement would work an injustice. Additionally, where a marriage has broken down through the fault of one party, a prenuptial waiver may not be enforceable depending on the circumstances of the case and the terms of the agreement. Ultimately, whether a premarital agreement is unconscionable will be determined by a court during a dissolution proceeding.

Although parties are free to address a variety of matters in a premarital agreement, the main issues typically relate to their respective rights in each other's property, as well as property acquired during the marriage; their respective rights to buy, sell, use or transfer property, the allocation of property upon dissolution, or the designation or elimination of spousal support. Parties may not enter into an agreement that adversely affects a child's right to financial support, and issues relating to the care and custody of children will be subject to judicial review and appropriate modification. A premarital agreement generally becomes effective upon marriage, and may only be amended or revoked by a written agreement signed by the parties.

POST NUPTIAL AGREEMENTS

Upon beginning an action for a divorce, many people will disclose to their lawyers that the parties had already contemplated the end of their marriage, sometimes many years before. More often than one would guess, the parties had even mapped out this projected end to their relationship with an agreement written during the marriage itself – maybe hammered out on the family computer, or perhaps scribbled on a restaurant napkin – which was intended by the parties to govern the terms of any divorce that would loom in the future.

With perhaps a waiver of alimony, a promise to exclude inheritance proceeds, or a pledge to leave the marital home intact, an intended postnuptial agreement could be as flexible and varied as the complex circumstances of the marriage itself. However, unlike their premarital cousins (agreements executed *before* marriage are governed both C.G.S. § 46b-36b *et seq.* and controlling precedent), until recently postnuptial agreements had not been officially recognized by the Connecticut Supreme Court and the prospects of their enforceability at trial was nebulous at best.

In 2011, the Connecticut Supreme Court for the first time set forth parameters to test the enforceability of postnuptial agreements.[51] Addressing first the question of whether postnuptial agreements are contrary to public policy, the Supreme Court

[51] *Bedrick v. Bedrick,* 200 Conn. 691 (2011).

concluded in the negative. While historically the Court had determined that prenuptial agreements (as an example) were generally held to violate public policy if they promoted, facilitated, or provided an incentive for separation or divorce,[52] it has been more recently decided that "private settlement of the financial affairs of estranged marital partners is a goal that courts should support rather than undermine."[53] Case law now dictates that postnuptial agreements may also encourage the private resolution of family issues as they allow couples to eliminate a source of emotional turmoil – usually, financial uncertainty – and focus instead on resolving other aspects of the marriage that may be problematic.[54]

However, the Supreme Court has also held that heightened scrutiny must be applied to a trial judge's review of a contract between already married persons, noting that "spouses do not contract under the same conditions as either prospective spouses or spouses who have determined to dissolve their marriage." The Court points out that already married spouses are "less cautious" in a contractual relationship with one another than they would be as prospective spouses, and similarly, are "certainly less cautious" with one another than they would be with third parties. "With lessened caution comes greater potential for one spouse to take advantage of the other."[55]

As such, the law now requires trial courts to enforce a postnuptial agreement only if it complies with applicable contract principles (including the element of consideration, or in layman's terms, the "give and take" in any contractual arrangement), if the terms of the agreement are both fair and equitable at the time of execution *and* if those terms are not unconscionable at the time of dissolution of the marriage. To determine whether terms are "fair and equitable" at the time of execution, a court will look to whether the agreement was made voluntarily, in other words without any undue influence, fraud, coercion, or duress. In addition, as with prenuptial agreements, there must be a factual finding that each spouse was given full,

[52] *McHugh v. McHugh,* 181 Conn. 482 (1980).
[53] *Billington v. Billington,* 220 Conn. 212 (1991).
[54] *Bedrick* at 698.
[55] *Bedrick* at 703.

fair, and reasonable disclosure of all property, assets, financial obligations, and income of the other spouse when entering into the contract.

Importantly also, the law provides that that "unfairness or inequity alone does not render a postnuptial agreement unconscionable; spouses may agree on an unequal distribution of assets at dissolution."[56] As such, trial courts are charged with applying a "totality of the circumstances" approach to determining the fairness and equity of enforcing a postnuptial agreement.

CONCLUSION

By no means is this guidebook intended to replace real world experience, the sound advice of an experienced family law practitioner, or even an entire semester of family law at an accredited law school. Nevertheless, with a basic understanding of the divorce process and a primer on the major principles of matrimonial law, it is our hope that fewer litigants will feel overwhelmed, outgunned, or even mystified by the system.

This has been intended to be a starting point for divorcing spouses – and whether it helps the reader cope with a court appearance or even better communicate with their chosen attorney, it has served its purpose. We recommend that you entrust your unique set of circumstances to a legal professional who can objectively and comprehensively advance and protect your interests. We wish you peace, we wish you clarity, and we wish you the very best as you begin the next chapter of your life.

[56] *Bedrick* at 706.

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Attorney Murphy is a partner at MAYA MURPHY, P.C., with offices located in Westport, Connecticut and New York City. A graduate of Fordham University (Fordham College at Rose Hill, Bronx, NY) and Fordham University School of Law (at Lincoln Center), he was a member of the Fordham Urban Law Journal and recipient of the Archibald R. Murray Public Service Award. After working with the legal division of the New York City Council Finance Division and the Queens County District Attorney's Office, Attorney Murphy joined a highly respected boutique litigation firm in downtown Manhattan. For the better part of a decade, Attorney Murphy's trial and advocacy skills were honed and tested, while handling cases ranging from felony criminal defense to matrimonial law, personal injury, and immigration law, in courtrooms in all five boroughs of New York City and beyond.

Since joining Maya & Associates P.C. in 2005 (the firm was renamed in 2007), Attorney Murphy has led the Firm's dynamic matrimonial practice group, and routinely handles all types of family law disputes (dissolution of marriage, child custody, support proceedings, and post-judgment actions) with an aggressive, systematic, and creative approach. His clients consist of husbands and wives with high net worth and complex asset/income structures, individuals with matters involving sensitive child custody issues, as well as those seeking post-judgment modifications of alimony, custody, and other claims for relief. His experience encompasses all aspects of family law representation in every judicial district of Fairfield County and beyond, including New York and Westchester Counties. He regularly represents clients with urgent issues concerning domestic violence, child safety, and intervention by the Department of Children and Families.

In addition to trial work, Attorney Murphy often utilizes his considerable experience as an advocate in the family law arena to alternatively serve as a neutral mediator for couples seeking a non-adversarial approach to divorce. Working in this capacity, he assists divorcing individuals to reach accord on their disputes, to mutually serve their interests as well as the benefit of any minor children involved in the process.

Attorney Murphy has been recognized by Super Lawyers magazine and has been peer reviewed and recognized for excellence by judges in and around Fairfield County.

Attorney Murphy lives with his wife and children in Fairfield, Connecticut. He may be reached at 203-221-3100 or by email at hdmurphy@mayalaw.com.

ABOUT THE FIRM:

MAYA MURPHY, P.C. is a full-service law firm with offices located at 266 Post Road East, in Westport, CT. The firm has midtown New York City offices located at 261 Madison Avenue, and a downtown office at 74 Trinity Place. While the firm's matrimonial law group is well recognized in Fairfield County, the firm handles matters ranging from employment law, estate planning and asset protection, commercial civil litigation, education law, and criminal defense. To arrange for a confidential, complimentary legal consultation with one of our attorneys, please contact Attorney H. Daniel Murphy or Attorney Joseph C. Maya at 203-221-3100.