SUPREME COURT-STATE OF NEW YORK
I.A.S. PART XIV SUFFOLK COUNTY

P R E S E N T:
HON. JOHN ILIOU
Acting Justice of the Supreme Court

x----------x

B.Z.,

Plaintiff,

-against-

P.Z.,

Defendant.

x----------

DECISION AND ORDER

INDEX NO.: 18796-2013

PLAINTIFF'S ATTY:
THOMAS F. LIOTTI, LLC
600 Old Country Road, Suite 530
Garden City, NY 11530

DEFENDANT'S ATTY:
PAROLA & GROSS, LLP
775 Wantagh Avenue
Wantagh, NY 11793

ATTY FOR CHILD(REN):
MICHAEL M. MCCLELLAN, ESQ.
1770 Motor Parkway
Hauppauge, NY 11788

This action for divorce was commenced by the plaintiff on or about July 18, 2013. The defendant was personally served via Summons with Notice conferring both *in rem* and *in personam* jurisdiction over the parties' marriage and the person of the defendant. The plaintiff, B.Z., was represented by Thomas F. Liotti, Esq. of Law Offices of Thomas F. Liotti, LLC. The defendant, P.Z., was represented by Barry J. Gross, Esq. of Parola & Gross, LLP and the infant child was represented by Michael M. McClellan, Esq. A trial was conducted on July 7, 8, 10, 13, 14, 15, 17, 20, 21, 22, and 23, 2015. On July 23, 2015, the Court conducted an *in camera* examination of the infant child.

During the trial, the parties called a total of seven (7) witnesses to present evidence to the Court. The plaintiff called herself as the sole witness for the plaintiff. The defendant called Dr. Peter Favaro, the court appointed forensic psychologist, for the purpose of putting his written report into the record. The Court allowed each of the parties to "cross examine" Dr. Favaro as if he were an adverse or hostile witness. Additionally, the defendant called the plaintiff's fiancé Vincent DeMaille, the plaintiff's father Alvaro Vega, the plaintiff's step-mother Rosemary Vega, and the defendant's girlfriend Tiffany Luther. The defendant also testified on his own behalf.

In addition to the testimony of those witnesses called by the parties, this Court has had the opportunity, at the conclusion of the defendant's case, to take testimony, *in camera*, from the child. The Attorney For the Child, Mr. Michael McClellan, Esq. was present and participated during the foregoing inquiry. The parties were given an opportunity to submit proposed questions to the Court

for use during the *in-camera* inquiry.

The Court has had an opportunity to observe the demeanor of the witnesses called and to make credibility determinations with respect to each of the witnesses. In making its determination, the Court, as fact finder, must not only evaluate the quality of the proof but also must consider issues of credibility and resolve conflicting testimony between the witnesses.

In the instant matter, the Court finds the testimony of each of the plaintiff and defendant to be self serving. Not surprisingly, there is a great divergence between them. Numerous issues of credibility have arisen as a result of the parties' contradictory testimony relating to the plaintiff's claims. The Court having observed the parties during the course of the trial, including their demeanor on the witness stand, and having carefully considered the testimony given, finds that the plaintiff suffers from a deficiency of credibility. Further, the Court finds the defendant's testimony to be more credible than that of the plaintiff. Accordingly, where issues of credibility have arisen and the record is devoid of objective corroboration, the Court has resolved such issues in favor of the defendant.

Based upon the evidence adduced at trial, together with those stipulations entered by the parties, the Court now finds by a fair preponderance of the credible evidence as follows:

The parties were married in the State of New York on April 14, 2008 in a civil ceremony. There is one infant issue of the marriage, to wit: J.Z., age 6, born December 29, 2008. At the time of the commencement of this action, the plaintiff was a resident of New York and had resided in New York for a period of at least two years immediately preceding commencement. Neither the plaintiff nor the defendant are in the military service of the United States and there is no judgment or decree of divorce, separation or annulment granted with respect to the parties' marriage by this or any other Court of competent jurisdiction. No other action for similar relief is pending at this time.

The Court finds that jurisdiction as required by § 230 of the Domestic Relations Law has been obtained and that the requirements of the Domestic Relations Law have been met (*see* DRL § 230[5]).

Grounds

The plaintiff seeks a judgment of divorce pursuant to DRL §§ 170(1) (2) and (7). Pursuant to DRL § 170(1) an action for divorce may be brought to procure a judgment of divorce upon a showing of cruel and inhuman treatment of the plaintiff by the defendant such that the

conduct of the defendant so endangers the physical or mental well being of the plaintiff as to render it unsafe or improper for the plaintiff to cohabit with the defendant.

The plaintiff testified that the discord between the parties began prior to and continued throughout the marriage. The plaintiff testified about such discord in broad and general terms lacking in specificity. She testified regarding both verbal and physical abuse by the defendant. However, the plaintiff failed to testify with any specificity regarding such alleged incidents. The plaintiff testified that "[the defendant] would hit [her] the way you would hit a man." The defendant testified that he has never struck either the plaintiff or their child. Furthermore, the record is devoid of any corroboration of such abuse by the defendant. While corroboration is not a requirement for a finding of cruel and inhuman treatment constituting grounds for divorce, this Court has significant concerns regarding inconsistencies in the plaintiff's testimony and plaintiff's inability to recall such alleged incidents of abuse with any particularity.

In attempting to reconcile the parties' conflicting testimony this Court cannot find by a preponderance of the evidence presented that the plaintiff has met her burden pursuant to DRL §170(1) (*see* ***McGuire v McGuire***, 93 AD3d 701, 939 NYS2d 572 [2d Dept 2012]; *see also* ***Davis v Davis***, 83 AD2d 547, 441 NYS2d 26 [2d Dept 1981]; ***Cataudella v Cataudella***, 74 AD2d 893, 425 NYS2d 863 [2d Dept 1980]). Accordingly, that cause of action seeking a judgment of divorce pursuant to DRL §170(1), "cruel and inhuman treatment" must be ***denied.***

Pursuant to DRL §170(2) an action for divorce may be brought to procure a judgment of divorce upon a showing of abandonment or the "constructive abandonment" of a spouse. To establish a cause of action for a divorce on the ground of constructive abandonment, the spouse who claims to have been constructively abandoned must prove that the abandoning spouse unjustifiably refused to fulfill the basic obligations arising from the marriage contract and that the abandonment continued for at least one year. In order to rise to the level of constructive abandonment, the refusal must be unjustified, willful, and continued, despite repeated requests from the other spouse for resumption of cohabitation.

In the instant matter the plaintiff could not recall, with any clarity, the last time the parties engaged in sexual relations. Further, the plaintiff testified that "[she] never sought to resume sexual relations with [the defendant]." Where there is no proof that one spouse repeatedly requested a resumption of sexual relations, the evidence is insufficient to sustain a cause of action for divorce on the ground of constructive abandonment (***Silver v Silver***, 253 AD2d 756, 677 NYS2d 593 [2d Dept 1998]). As to the plaintiff's claim for divorce because of actual

abandonment, the Court notes that upon cross examination the plaintiff testified that she actually consented to the defendant's departure from the marital residence. Thus, by her own testimony, the plaintiff has disproved the foregoing cause of action. Accordingly, the cause of action seeking a judgment of divorce pursuant to DRL § 170 (2) must be ***denied***.

Pursuant to DRL § 170 (7) an action for divorce may be brought to procure a judgment of divorce upon a showing that the relationship between husband and wife has broken down "irretrievably" for a period of at least six months, provided that one party has so stated under oath. Counsel for the defendant has made an oral application to withdraw any previously filed denial and has consented to the granting of a judgment of divorce on these grounds.

Upon the consent of the defendant, as well as plaintiff's testimony, the Court finds that the parties' relationship is irretrievably broken. The Court further finds that such irretrievable breakdown has occurred for a continuous period of at least six (6) months immediately preceding the commencement of these proceedings. The plaintiff shall be entitled to a judgment of absolute divorce as against the defendant herein upon the grounds of Irretrievable Breakdown of the Marital Relationship pursuant to DRL § 170 (7). Both the plaintiff and the defendant shall take all steps solely within their power to remove all barriers to the other's remarriage following entry of the Judgment of Divorce. At her option, the defendant shall be permitted to resume the use of her pre-marriage surname.

Equitable Distribution

Domestic Relations Law § 236 (B) (5) mandates, in pertinent part, that in a matrimonial action for divorce or dissolution of a marriage, the Court shall determine the respective rights of the parties to their separate and marital property, unless the parties have provided for the disposition of said property by agreement. Marital property is broadly defined as all property acquired during the marriage by either party and prior to the commencement of a matrimonial action regardless of the form in which title is held (*see* DRL §236 [B] [1] [c]).

The parties testified vaguely regarding marital debt in the form of unsecured credit card debt. With the exception of the parties' respective statements of proposed disposition and statements of net worth, the record is devoid of sufficient evidence specifying the amount of debt or when the debt was incurred. Additionally, the parties testified regarding certain vehicles owned by the parties during the marriage. Neither of the parties, however, presented sufficient evidence of ownership or value for this Court to make a determination with regard to their

distribution.

The sole marital asset remaining is that portion of the defendant's retirement assets earned during the marriage and prior to commencement. There is a statutory presumption that all property, unless clearly separate, is deemed marital property, and the burden rests with the titled spouse to rebut the presumption (*see* ***Fields v Fields***, 15 NY3d 158, 163, 905 NYS2d 783 [2010]; ***DeJesus v DeJesus***, 90 NY2d 643, 652, 665 NYS2d 36 [1997]; ***Tsigler v Kasymova***, 73 AD3d 1159, 1159-60, 902 NYS2d 128 [2d Dept 2010]). The plaintiff seeks an equal division of this asset while the defendant seeks an order granting the plaintiff only 20% of said marital asset. The defendant's pension(s) represent a form of deferred compensation paid after retirement in lieu of the receipt of greater compensation during the period of employment (*see* ***Majauskas v Majauskas***, 61 NY2d 481, 474 NYS2d 699 [1984]; ***Pagliaro v Pagliaro***, 31 AD3d 728, 729, 821 NYS2d 602 [2d Dept 2006]). "Under controlling law, pension benefits, except to the extent that they are earned or acquired before marriage or after commencement of a matrimonial action, constitute marital property" (***Nugent-Schubert v Schubert***, 88 AD3d 967, 968, 931 NYS2d 642 [2d Dept 2011] quoting ***Dolan v Dolan***, 78 NY2d 463, 466, 577 NYS2d 195 [1991]; *see* ***Kraus v Kraus***, __AD3d__, 14 NYS3d 55 [2d Dept 2015]).

The defendant posits that because this was a marriage of short duration that somehow the plaintiff did not "earn" an equal share in this marital asset. Counsel for the defendant submits ***Wood v Wood*** (139 AD2d 506, 526 NYS2d 608 [2d Dept 1988]) in support of this position. In ***Wood***, however, the marriage was only three and one-half years in length and the wife received an asset distribution in excess of $170,000. In the instant matter, the parties were married for over five years and there are no other assets to be distributed. The defendant's argument assumes that the length of the marriage is the sole consideration in determining the equitable distribution of the marital assets. However, the duration of the marriage is but one of thirteen factors considered under Domestic Relations Law § 236 (B) (5) (d). Here, the plaintiff contributed to the partnership in ways other than just direct financial contribution. The plaintiff stopped working less than one year into the marriage upon the birth of the parties' child and stayed home to care for the child while the defendant went to work. Despite the emotional breakdown of the partnership, it remained a joint economic partnership, the success of which depended upon each of them and their contributions (*see* ***Mele v Mele***, 152 AD2d 685, 544 NYS2d 25 [2d Dept 1989]). The defendant has failed to convince the Court that this marital asset should be distributed any way other than equally between the parties. Accordingly, it is

ORDERED that the parties shall equally divide the marital portion of the defendant's retirement assets and pension(s) pursuant to ***Majauskas***. Said distribution shall be made by Qualified Domestic Relations Order (QDRO) submitted together with the Judgment herein.

Maintenance

Generally, the determination of maintenance is within the sound discretion of the trial court upon consideration of the relevant factors enumerated in Domestic Relations Law § 236 (B) (6) (a) and the parties' pre-divorce standard of living (*see* ***Hartog v Hartog***, 85 NY2d 36, 50-51, 623 NYS2d 537 [1995]; ***Morrow v Morrow***, 19 AD3d 253, 800 NYS2d 378 [1st Dept 2005]).

The factors to be considered in awarding maintenance include "the standard of living of the parties during the marriage, the income and property of the parties, the distribution of marital property, the duration of the marriage, the health of the parties, the present and future earning capacity of both parties, the ability of the party seeking maintenance to become self-supporting, and the reduced or lost lifetime earning capacity of the party seeking maintenance" (***Alleva v Alleva***, 112 AD3d 567, 568, 977 NYS2d 267 [2d Dept 2013] [internal quotation marks omitted]). These factors must be evaluated along with the fact that "[t]he overriding purpose of a maintenance award is to give the spouse economic independence" (*see* ***Cohen v Cohen***, 120 AD3d 1060, 993 NYS2d 6 [1st Dept 2014]; ***Bains v Bains***, 308 AD2d 557, 764 NYS2d 721 [2d Dept 2003]).

"It is settled that a court is not bound by [a party's] own account of his [or her] finances and may, if a version of [those] finances is patently unbelievable, find the income to be higher than that claimed" (***Cusimano v Cusimano***, 149 AD2d 397, 539 NYS2d 502 [2d Dept 1989]). Indeed, the Court is afforded considerable discretion in determining whether to impute income to a party for the purposes of determining maintenance and child support (***Matter of Gebaide v McGoldrick***, 74 AD3d 966, 901 NYS2d 857 [2d Dept 2010]). That determination may properly be based upon (1) a party's prior employment experience (2) money, goods, or services provided by relatives and friends or (3) the income such party is capable of earning "by honest efforts, given his [or her] education and opportunity" (***Kay v Kay***, 37 NY2d, 632, 637, 376 NYS2d 443 [1975]; ***Gebaide v McGoldrick***, *supra*; ***Matter of Genender v Genender***, 51 AD3d 669, 858 NYS2d 673 [2d Dept 2008]; *see* ***Matter of Thompson v Perez***, 42 AD3d 503, 838 NYS2d 789 [2d Dept 2007]).

The plaintiff, born January 17, 1980, is 35 years old. In her sworn statement of net worth she avers that she is in "good health" and that she has an Associate's degree in Liberal Arts from Suffolk Community College, which she attained in 2001. The plaintiff is currently employed independently as a swim instructor. She testified that she earns $40 per hour for private instruction for a total of approximately $180 per week. The plaintiff has previously been employed as an assistant manager for a toy store. She was also previously employed at a supermarket and an electronics store. She earned $10 per hour at each of these prior jobs. In addition, soon after the parties' marriage, the plaintiff worked at a nursing home earning $15 per hour.

The Court finds that in consideration of her age, level of education, health and prior work experience the plaintiff is currently underemployed (***Matter of Cordero v Olivera***, 40 AD3d 852, 853, 837 NYS2d 172 [2d Dept 2007]). In this regard, the Court finds that the plaintiff is currently capable of re-entering the workforce on a full time basis and earning, at the very least, an income of $20,000 per annum. In addition, the plaintiff testified that she is engaged to be married and living with Mr. Vincent DeMaille. Upon further examination, the plaintiff testified that Mr. DeMaille contributes at least $1,050 to the plaintiff's living expenses on a monthly basis. The Court will impute such income and third party contribution to the plaintiff for the purposes of this determination (*see* ***Rogers v Rogers***, 52 AD3d 354, 860 NYS2d 70 [4th Dept 2013]). Accordingly, the Court imputes a total annual income of $32,300 to the plaintiff.

The defendant, born August 25, 1985, is 30 years old. He is employed by the New York Police Department, Housing Bureau, since 2007. The defendant has an Associate's degree in Criminal Justice from Suffolk Community College and is in good health. He is currently earning $93,043.00 per annum.

The parties did not enjoy a lavish lifestyle during their marriage. For extended periods the parties relied upon a single income for the support of themselves and their child while the plaintiff was home with their child. The parties rented a home for $1,000 per month and, with the exception of the defendant's retirement assets, accumulated no discernable assets during the tenure of their marriage. In fact, each of the parties lists their total cash holdings at the time of commencement as less than $1,000.

The parties were married for approximately 5 years through the commencement of the action. The plaintiff had the primary homemaking and child-rearing responsibilities during most of the parties' marriage. Since commencement, however, the plaintiff has worked at least part

time and cohabited with her "fiancé" upon whom she relies for partial financial support.

Under the totality of the circumstances of this case and taking into consideration the aforementioned statutory factors, the Court finds an award of maintenance unwarranted. Specifically, the Court has considered the parties' lifestyle during the marriage (*see* ***Summer v Summer***, 85 NY2d 1014, 630 NYS2d 970 (1995); ***Costa v Costa***, 46 AD3d 495, 497, 849 NYS2d 204 (1st Dept 2007), the plaintiff's age, the plaintiff's ability to work and the plaintiff's reliance upon Mr. DeMaille as a financial supporter (***Heydt-Benjamin v Heydt-Benjamin***, 127 AD3d 814, 815, 6 NYS3d 582 [2d Dept 2015] citing ***Clark v Clark***, 33 AD3d 836, 827 NYS2d 159 [2d Dept 2006]; ***Matter of Ciardullo v Ciardullo***, 27 AD3d 735, 815 NYS2d 599 [2d Dept 2006]; ***Matter of Emrich v Emrich***, 173 AD2d 818, 571 NYS2d 49 [2d Dept 1991]; ***Scharnweber v Scharnweber***, 105 AD2d 1080, 482 NYS2d 187 [4th Dept 1984] affd 65 NY2d 1016 [4th Dept 1984]). Accordingly, the plaintiff's cause of action seeking an award of post judgment maintenance is hereby ***denied***.

Health Insurance

The parties shall each be 100% responsible for their own healthcare costs and are hereby placed on notice that once the Judgment of Divorce is signed, each party may or may not be eligible to be covered under the other party's health insurance plan, depending upon the terms of the plan. The parties may be entitled to purchase insurance through the Consolidated Omnibus Budget Reconciliation Act (COBRA) option, if available, and may otherwise be required to secure their own insurance.

Custody

There is one infant issue born of the parties' marriage, to wit: J.Z., age 6, born December 29, 2008. Each party seeks an order of the Court granting them sole legal custody of the child with a schedule of parenting time for the other party.

Based on its *in camera* inquiry with the child, the Court finds J.Z. to be a bright and energetic child who was eager to discuss and enlighten the Court as to certain issues relevant to the Court's determination. The child clearly understood the importance of being truthful with the Court. The Court does have concerns regarding statements made by the child during the *in-camera* interview which evidence that he was coached by either the plaintiff or someone on the plaintiff's behalf to make certain statements to the Court. The Court has considered the testimony of the child in rendering the instant determination.

Based on the testimony of the parties, the Court now makes the following findings of fact and conclusions of law with respect to the issue of custody.

The parties met during college at Suffolk Community College in October of 2003 and married on April 14, 2008. Upon their marriage, the parties did not immediately reside together. Rather, the defendant insisted that the plaintiff obtain employment prior to moving in together. The plaintiff, therefore, continued to reside with her grandmother. Shortly after their marriage the parties learned that the plaintiff was pregnant. Approximately two months after their marriage they began living together in a rental house in West Babylon, New York.

The plaintiff's parents divorced in 1980 when she was an infant. Following the divorce, the plaintiff was raised by her mother, Susan Darragh and her mother's new husband. Through this relationship with her mother's new husband, the plaintiff has three half siblings, to wit: Frederick, Joseph and Dillon Najdek. Each of these siblings reside outside of New York. The plaintiff has been estranged from her father for extended periods of time and refers to him as Mr. Vega. During these proceedings the plaintiff has raised serious allegations concerning Mr. Vega, alleging that he sexually abused her as a child beginning as young as 5 through about the age of 14. These allegations are discussed further herein.

Since the time of the parties' separation in July of 2012 the plaintiff has had defacto residential custody of J.Z. and the parties have arranged for parenting time with the defendant. J.Z. is diagnosed, by his current treating therapist, as afflicted with Unspecified Adjustment Disorder and Attention Deficit/Hyperactivity Disorder. Previously, J.Z. had been diagnosed by his treating therapist as suffering from Oppositional Defiant Disorder with Dysthmia. J.Z. is not currently prescribed medication for this diagnosis but does attend counseling sessions weekly for one-half hour.

The plaintiff has shown that she is attentive to J.Z. and supports his educational needs. The plaintiff describes J.Z. as having "special needs" at school. J.Z., however, does not have an Individualized Education Program (IEP) at his current school. On a typical day J.Z. will wake up at 8:00 a.m. and feed the dog. After eating breakfast he goes to school. This past year J.Z. attended Allegheny Elementary School in Lindenhurst for Kindergarten. After school J.Z. will typically have a snack and then do his homework. Dinner is at approximately 5:00 p.m. and bath time is at 6:30 p.m. After his bath J.Z. enjoys reading time with his mother. The plaintiff is very attentive to J.Z.'s particular weakness in reading. She has several books and other learning tools such as sight words that she uses to work with him on a regular basis. The plaintiff joined the

PTA at J.Z.'s school and has volunteered as a "class mom." She attends parent teacher conferences and communicates directly with J.Z.'s teacher and the school social worker. Additionally, the plaintiff signed J.Z. up for "Banana Splits," a school based program designed to assist children of divorce. At home, the plaintiff has implemented a reward system with J.Z. to provide incentive for him to behave and to accomplish assigned tasks such as homework. The Court finds all of the foregoing to be evidence of good hands on parenting skills displayed by the plaintiff.

The defendant moved out of the marital residence sometime in July of 2012. The plaintiff testified that she did not ask the defendant to stay or return to the marital home. In September or October of 2012 the plaintiff moved in with Mr. Vega. The basement in Mr. Vega's home was unfinished therefore he added walls, a bathroom and a kitchen area for the plaintiff and J.Z. Mr. Vega testified that, with the exception of "maybe once weekly," J.Z. slept upstairs during the period that the plaintiff resided with him.

The plaintiff met Mr. DeMaille through an on-line dating site in August 2012. On their first date together Mr. DeMaille divulged to the plaintiff that he has a criminal history. The plaintiff's testimony was evasive on this subject. She testified that she doesn't know the details of Mr. DeMaille's criminal history. On October 29, 2012 the local area was struck by Superstorm Sandy. The storm displaced Mr. DeMaille from his home and the plaintiff invited him to move in with her and J.Z. in Mr. Vega's home. The plaintiff testified that this decision was easy for her to make as the two "had been talking for a while about [moving in together]." It is noteworthy that this is only approximately two and one-half months from the time the plaintiff had met Mr. Demaille. The plaintiff testified that she and Mr. Demaille shared a studio apartment with J.Z. in the basement of Mr. Vega's house. She further testified that she and Mr. DeMaille shared a bed in the same room as J.Z. This testimony is contradicted by evidence that J.Z. used a bedroom upstairs in Mr. Vega's home during this period. A reconciliation of this conflict in the evidence can only lead this Court to question either the plaintiff's judgment in introducing Mr. DeMaille to the bedroom she shared with J.Z. or her veracity if J.Z. was in fact sleeping upstairs in Mr. Vega's quarters.

Mr. DeMaille testified that he provides the plaintiff assistance with child care for J.Z. He avers that he cares for J.Z. for a few hours per day while the plaintiff is working. Mr. DeMaille expressed a sincere affection for J.Z. and testified that he "would give the world for him." The Court is concerned, however, that during these periods that J.Z. is left under Mr. DeMaille's care

he has on occasion left J.Z. (age 6) alone in the home telling him to lock the door and not open it for anyone while he walks the dog and conducts other errands.

Mr. DeMaille was also evasive when asked about his criminal history and length of incarceration. He testified to a total of "approximately ten years" of total time incarcerated. He testified that he was charged with conspiracy to commit murder and two weapons charges, which charges resulted in a conviction for Attempted Criminal Possession of a Weapon in the Third Degree after which he was sentenced to 3 years incarceration plus 2 years of post release supervision. In 2005 he violated his post release supervision and was returned to prison for "1 to 2 years". Mr. DeMaille further testified that he was sentenced to 4 months in local jail when he was young for a conviction of Criminal Facilitation as a misdemeanor. He further testified that he has two convictions for Driving While Intoxicated. Mr. DeMaille was not able to reconcile the significant difference between his testimony of having served 10 years incarceration and the approximately 5 years served for the convictions he testified to. Such a discrepancy, and the evasive nature of the witnesses testimony, creates an issue of credibility of great concern to this Court. Mr. DeMaille is the author of a book and publisher of a website each entitled "Incarceration 101." Mr. DeMaille testified that this is more of a hobby than a business but that he is available to advise criminal defendants and their families on life in prison and prepare for incarceration.

This Court is not interested in attacking the character of Mr. DeMaille directly or judging his mistakes of the past. Clearly, Mr. Demaille has paid his debt to society through our system of criminal justice. The parties, however, must be judged in the context of a custody determination for the decisions they make and how they may effect the child. In the instant matter, the plaintiff introduced J.Z. to her new boyfriend less that two months after the child's father had moved from the marital residence. Although the new boyfriend told her that he had a criminal history, the plaintiff testified that she did not investigate the nature of the criminal history before introducing him to J.Z. In fact, the plaintiff testified that his criminal history didn't concern her. Further, very shortly thereafter the plaintiff allowed Mr. DeMaille to move in with her and J.Z. With regard to her relationship with Mr. DeMaille, the plaintiff appears to have placed her own self interests ahead of her responsibility as a parent. Such decisions by the plaintiff cause this Court to have great concerns regarding her judgment as a parent.

An additional example of the plaintiff's poor judgment is defendant's exhibit NN. Exhibit NN is a photograph of J.Z. together with Mr. DeMaille. The photograph was posted on

Mr. DeMaille's Facebook account. In the photograph J.Z. is wearing a shirt that reads "BEST KID EVER" and Mr. DeMaille is wearing a matching shirt that reads "BEST DAD EVER." Mr. DeMaille testified that the shirt was a Father's Day gift from J.Z. and that the photograph must have been posted by the plaintiff as she is the only other person with access to his Facebook page. Initiating or permitting the designation of Mr. DeMaille as J.Z.'s father or the equivalent shows a lack of judgment on the part of the plaintiff. This conduct causes concern as to the plaintiff's ability to foster the necessary relationship between the child and his father.

Alvaro Vega is the plaintiff's father. Mr. Vega and the plaintiff's mother separated in 1982 when the plaintiff was only 2 years old. Mr. Vega became remarried to Rosemary Vega in 1986. He is employed as a Drafting Analyst at PSEG for thirty-one years having worked his way up from the mail room. After J.Z.'s birth, the parties and J.Z. would dine regularly at Mr. Vega's home. These visits would occur each Wednesday because the defendant was not working. Additionally, the plaintiff would visit the Vegas one to two more times weekly with J.Z. The parties and J.Z. would celebrate major religious holidays and birthdays with the Vegas. Mr. Vega and J.Z. enjoy a close relationship. When together, Mr. Vega and J.Z. play with action figures, go to the park, he takes J.Z. to the water park, J.Z. rides his bicycle and Mr. Vega and J.Z. talk. The Wednesday dinner visits stopped immediately upon the parties' separation in July 2012.

As discussed, *infra*, Mr. DeMaille moved into the Vega home with the plaintiff immediately after Superstorm Sandy, in late October 2012. Mr. DeMaille later moved from Mr. Vega's home in March of 2013. Mr. Vega testified that he asked Mr. DeMaille to leave when he learned of an incident between the plaintiff and Mr. DeMaille in which he had struck the plaintiff. On March 10, 2013, the plaintiff moved from Mr. Vega's home to move in with Mr. DeMaille once again.

On or about August 1, 2013 the plaintiff filed a complaint against Mr. Vega and Mr. Vega was charged with making a threat over the phone that he was going to kill the plaintiff and Mr. DeMaille. This allegation was denied by Mr. Vega and the resulting charge of Aggravated Harassment was dismissed by the Court. The defendant testified that it was not until after this complaint was filed in August 2013, that he first became aware of allegations by the plaintiff that Mr. Vega had abused her as a child. This allegation came to light in the context of the matrimonial proceeding and the plaintiff's insistence that J.Z. not be left alone with Mr. Vega.

There is no evidence in the record that the plaintiff's allegations were ever made known prior to August 2013.

It is not for this Court to determine whether Mr. Vega in fact committed the alleged acts of abuse against the plaintiff when the plaintiff was a child. The Court takes note of the lack of any corroboration of this allegation not in the context of determining whether in fact it did occur but in the context of judging the credibility of the plaintiff. The Court is called upon in this proceeding to make a judgment and determination regarding the plaintiff and the defendant as parents, not Mr. Vega.

The record at trial, however, belies the plaintiff's concerns about Mr. Vega. Not as to whether the plaintiff was ever abused by Mr. Vega but as to whether the plaintiff has actual concerns for J.Z.'s safety while in Mr. Vega's care. Despite whatever may or may not have happened during her adolescence, the plaintiff clearly established a more normalized relationship with Mr. Vega after her marriage and the birth of J.Z. Most notably, the plaintiff moved into Mr. Vega's home when she and the defendant separated. During this time, the plaintiff acquiesced in regular contact between J.Z. and Mr. Vega, even allowing J.Z. to sleep upstairs while she was downstairs. It is noted that the plaintiff did not express concern for the safety of J.Z. until after Mr. DeMaille was asked by Mr. Vega to leave his home. Shortly thereafter, the plaintiff cut off all contact between J.Z. and Mr. Vega. This appears to the objective observer to be more of a punishment directed toward Mr. Vega than conduct meant to protect J.Z. This again goes toward this Court's concerns regarding the plaintiff's judgment and credibility. To the extent, however, that Mr. Vega has had or will continue to have contact with J.Z., the Court finds that J.Z. enjoys a healthy relationship with Mr. Vega. The importance of this relationship is amplified by the strained relationship between the parties and the lack of other family contact.

The defendant has attempted through various witnesses, and other submitted proofs, to show this Court that the plaintiff has suffered through her life from some level of mental disease or defect. The defendant has attempted to demonstrate such mental disease or defect through evidence of an alleged suicide attempt by the plaintiff as a teenager as well as through her current treatment and medication. No causal connection has been proven to the satisfaction of this Court with respect to the plaintiff's prior or current medical condition affecting her relative fitness as a parent. Accordingly, such claim has been disregarded by this Court.

The defendant is currently in a relationship with Tiffany Luther. Ms. Luther, born June 2, 1980, is 35 years old. Ms. Luther has an 8 year old son K.L. who lives with her. Ms. Luther has a Bachelors degree in Accounting from St. Joseph's College and a Masters degree in Finance from Dowling College. She is currently employed as an accountant. Ms. Luther met the parties in September of 2009 when she moved in next door to them. She first met the plaintiff and they became friendly in the spring of 2010. In September of 2011 Ms. Luther began babysitting for J.Z. "once or twice every couple of weeks." She would watch J.Z. while the defendant was at work so that the plaintiff could go out in the evening. This included occasions where she would watch J.Z. overnight. The plaintiff would drop him off around 10:00 p.m. and pick him up in the morning.

The defendant began dating Ms. Luther in of November 2012. The defendant moved in with Ms. Luther on or about May 1, 2015. Ms. Luther's son K.L. and J.Z. play together. They are close enough in age to have a healthy peer relationship. The boys relationship seems, at times, to resemble a sibling type of relationship. Overall, this age appropriate relationship in the household is a positive for J.Z.. Ms. Luther expressed that she loves J.Z. while admitting that their relationship is "a little trying at times." She has observed the defendant helping J.Z. with his homework and doing various other activities with J.Z., such as, doing puzzles, coloring, watching movies together, and going to the beach and the water park. She has observed the defendant discipline J.Z. "[using] a hand on the butt maybe a handful of times." Additionally, she avers that the defendant utilizes "time outs" as a method of disciplining J.Z. The Court finds Ms. Luther's testimony to be credible in all respects.

The defendant assisted the plaintiff in J.Z.'s care as an infant, including assisting her in the changing of diapers and feeding. The defendant works nights as a Police Officer in New York City. However, within the constraints of his work schedule, the defendant did participate in many of the same activities as the plaintiff. The defendant joined the plaintiff in taking J.Z. for walks in his stroller, they played in his backyard playhouse, and they went to Phelps Lane Park ("Mommy's Park"). They also took several trips to Syracuse to visit the defendant's family.

The defendant encourages J.Z.'s relationships with other family members, including his only local family Mr. Vega and his wife Rosemary. He has taken J.Z. to see his paternal grandmother and aunt in Syracuse as recently as Memorial Day 2015. The defendant is also actively involved in J.Z.'s education. The defendant is very familiar with all of J.Z.'s classes including pre-school, pre-k and kindergarten. He is familiar with each of J.Z.'s teachers as well.

The defendant also attended several parent teacher conferences and school meetings. The defendant avers that J.Z. is "a little weak in reading" but "strong in math" and that he has had "trouble adjusting socially." The defendant assists J.Z. with completing his homework as well. In this regard, he testified that J.Z. will often have one ditto of common core math to complete, sight words, reading assignments and flash cards. During the summer the defendant ensures that J.Z. reads for a minimum of twenty minutes daily.

The plaintiff placed into evidence several photographs (Exhibits 43a-j) of the defendant in costume. In most of these pictures the defendant is dressed as Batman. The plaintiff testified that the defendant has an unhealthy infatuation with the Batman character and would wear the costume up to twelve times per year. The Court is at a loss to understand the harm presented by the defendant's passion for Batman or any other fictional comic book character. In fact, it is noteworthy that the photographs entered by the plaintiff seem to depict a healthy relationship between the defendant and J.Z. Indeed, in several of the pictures J.Z. is depicted smiling and laughing with his father.

The Court conducted an *in-camera* interview with J.Z. Present for this interview were the child and his Court appointed attorney, Michael McClellan, Esq. The interview was recorded, however, the contents of such recording shall remain confidential and will not receive further comment (*see* ***Matter of Lincoln v Lincoln***, 24 NY2d 270, 299 NYS2d 842 [1969]; ***In re Eberhardt***, 83 AD3d 116, 920 NYS2d 216 [2 Dept 2011]). The Court will, however, express significant concern regarding the *in-camera* interview process. It became apparent during the interview of the child that he had been coached either by the plaintiff or an agent on behalf of the plaintiff. Additionally disturbing is that he had been coached to support the plaintiff's prior testimony before this Court.

By order of this Court dated, October 20, 2014, Peter Joseph Favaro, PhD. was appointed for the purpose of conducting a forensic evaluation of the parties and J.Z. and further to report to the Court as the Court's witness in the instant proceeding. At trial, the parties stipulated to the qualifications of the aforesaid witness and his report to the Court (hereinafter "the report") was admitted into evidence as Court Exhibit number 1. The report consists of five (5) separate parts including the CV of the drafter, Dr. Favaro. Those portions of the report are referred to by date, to wit: November 20, 2014 (4 pages); January 6, 2015 (1 page); March 9, 2015 (24 pages) and May 11, 2015 (6 pages). Dr. Favaro testified as a witness for the Court at the trial. Each party,

beginning with the defendant, was permitted to cross examine Dr. Favaro as if he were an adverse or hostile witness.

Through the evaluation process the parties completed a Custody Conflict Assessment Tool (CCAT). The CCAT allows the evaluator to gather information about the parties in a reliable way. It is important to note that reliable gathering of information does not equate to truthfulness or credibility. Dr. Favaro correctly points out that it remains the purview of the Court to make determinations regarding credibility.

The parties completed the Minnesota Multiphasic Personality Inventory (MMPI-2). The MMPI-2 is an objective personality test used to identify moderate to severe psychopathology. Scoring of the MMPI-2 is done through a computerized test scoring service which is more accurate than hand scoring. Dr. Favaro testified that he does not utilize the summary provided by the scoring service but uses his own professional knowledge and training to develop his interpretations of the MMPI-2 data. This interpretation is tempered by Dr. Favaro's knowledge concerning response tendencies of high conflict matrimonial litigants. Additionally, the parties completed the Parenting Resources Questionnaire Task Inventory. Each of the parties was interviewed individually on three separate dates. Each of the parties was observed with J.Z. in-office on one date. In addition, J.Z. was interviewed by Dr. Favaro.

Collateral information was collected from various sources. Mr. DeMaille and Ms. Luther were each interviewed by telephone. Written reports were received from Dr. Ira Woletski (J.Z.'s pediatrician), Dr. Michael Beck of the Babylon Consultation Center (J.Z.'s previous therapist), Lauren Fanwick, LMHC (J.Z.'s current therapist), Dr. M. Sabanayagam (plaintiff's psychiatrist), and Dr. Daniel Sajewski (plaintiff's pain management doctor). Additionally, teacher reports and various progress or school report cards were reviewed. Dr. Favaro acknowledges concerns with reliability of collateral sources in custody evaluations and takes appropriate precaution throughout the report to limit his reliance on the information provided by such collateral sources.

Dr. Favaro concludes from the foregoing that each of the parties is immature for their age and their station in life. He finds each of the parties to be "severely pathological." Additionally, Dr. Favaro expresses concern regarding the vindictiveness of each of the parties. In this regard, he refers to unsubstantiated complaints made by the plaintiff to the defendant's employer and by the defendant to Child Protective Services (CPS).

Dr. Favaro testified that each of the parents has shown questionable judgment in their current relationships. The defendant has shown questionable judgment in introducing Ms. Luther, whom is someone that was previously integrated with the family, as a new partner. The plaintiff has shown questionable judgment for her decision, not necessarily in her choice of partner, but in introducing such partner, Mr. Demaille, into J.Z.'s life at a very early point in their relationship and so soon after the parties' seperation. Dr. Favaro notes this is especially harmful in the context of this high conflict custody proceeding.

Dr. Favaro further testified that each of the parties appears incapable of understanding that their may be "unintended consequences" to their actions. The parties each have placed pressure upon J.Z. to be loyal to them. The plaintiff particularly has made several statements to J.Z. clearly meant to sway the forensic evaluator and/or the Court. This conduct on the part of the plaintiff presented itself both in the forensic evaluation as well as the *in-camera* interview of J.Z. As previously stated, J.Z. has been diagnosed with Unspecified Adjustment Disorder, Attention Deficit/Hyperactivity Disorder and Oppositional Defiant Disorder with Dysthmia. Dr. Favaro testified that because of J.Z.'s diagnosis and the psychopathology of the parties he is certain that J.Z. will be institutionalized in a mental treatment facility prior to emancipation. Dr. Favaro's testimony places the responsibility for J.Z. to overcome this destiny squarely upon the parties and the parties' ability to reduce the conflict between them. This Court shares Dr. Favaro's concern as to the parties ability to do this moving forward.

The report and testimony of the forensic evaluator was both insightful and helpful to the Court. The evaluator, however, did not make a specific recommendation to the Court as to which parent should be the custodial parent.

Both the plaintiff and the defendant seek sole custody of J.Z. Although neither party has specifically sought joint custody, joint custody is inappropriate in the matter at bar. Joint custody involves the sharing by the parents of responsibility for control over the upbringing of the child, and imposes upon the parents an obligation to behave in a mature, civilized and cooperative manner in carrying out the joint custody arrangement (*see e.g.* ***Braiman v Braiman***, 44 NY2d 584, 407 NYS2d 449 [1978]; ***Matter of Fowler v Rivera***, 296 AD2d 409, 745 NYS2d 457 [2d Dept 2002]; ***Matter of Fedun v Fedun***, 227 AD2d 688, 641 NYS2d 759 [3d Dept 1996]). Joint custody should not be imposed on parents who do not communicate (*see* ***Matter of Diana W. v Jose X***, 296 AD2d 614, 745 NYS2d 580 [3d Dept 2002]; ***Matter of Heintz v Heintz***, 275 AD2d 971, 713 NYS2d 709 [4th Dept 2000]); who are unwilling or unable to cooperate (*see* ***Bliss v***

Ach, 56 NY2d 995, 453 NYS2d 633 [1982]; ***Amari v Molloy***, 293 AD2d 431, 739 NYS2d 626 [2d Dept 2002]); who are unwilling or unable to set aside their personal differences (*see* ***Webster v Webster***, 283 AD2d 732, 725 NYS2d 109 [3d Dept 2001]; ***Matter of Meres v Botsch***, 260 AD2d 757, 687 NYS2d 799 [3d Dept1999]) and who are unwilling or unable to work together for the good of the child. An award of joint custody is inappropriate where the parties are so embattled and embittered as to effectively preclude joint decision making (*see* ***Matter of Fedun v Fedun***, 227 AD2d 688, *supra*; ***Juneau v Juneau***, 206 AD2d 647, 614 NYS2d 615 [3d Dept 1994]).

There is nothing in this record to suggest that these parties have the type of stable, amicable and mature relationship which would make joint custody a viable alternative (*see* ***Braiman v Braiman***, 44 NY2d 584, *supra*; ***Matter of Fowler v Rivera***, 296 AD2d 409, *supra*). Rather, as herein, there is substantial evidence in the record that the relationship between the parties is so acrimonious that an award of joint custody is not feasible. In light of the foregoing, such an award of joint custody would be inappropriate and the Court is called upon to make an award of sole legal custody to one of the parties (***Bergson v Bergson***, 68 AD2d 931, 932, 414 NYS2d 593 [2d Dept 1979]; *see also* ***Matter of Garcia v Scruggs***, 44 AD3d 660, 662, 843 NYS2d 166 [2d Dept 2007]).

For any court considering questions of child custody, the standard by which we are guided is to make every effort to determine what is for the best interest of the child, and what will best promote the child's welfare and happiness (*see* ***Eschbach v Eschbach***, 56 NY2d 167, 451 NYS2d 658 [1982] quoting DRL § 70). In determining the best interests of the child, the Court must review the totality of the circumstances presented (*see* ***Friederwitzer v Friederwitzer***, 55 NY2d 89, 447 NYS2d 893 [1982]; ***Hom v Hom***, 249 AD2d 447, 671 NYS2d 682 [2d Dept 1998]). In making a best interests determination, the factors to be considered include (1) the quality of the home environment and the parental guidance provided for the child; (2) the ability of each parent to provide for the child's emotional and intellectual development; (3) the financial status and ability of each parent to provide for the child; (4) the relative fitness of the respective parents, and (5) the effect an award of custody to one parent might have on the child's relationship with the other parent (*see* ***Eschbach v Eschbach***, 56 NY2d 167, *supra*; ***Matter of Ring v Ring***, 15 AD3d 406, 790 NYS2d 51 [2d Dept 2005]; ***Miller v Pipia***, 297 AD2d 362, 746 NYS2d 729 [2d Dept 2002]). In addition, the Court may consider the length of time of the present custody arrangement (*see* ***Fanelli v Fanelli***, 215 AD2d 718, 627 NYS2d 425 [2d Dept

1995]; ***Matter of Garvin v Garvin***, 176 AD2d 318; 574 NYS2d 760 [2d Dept 1991] lv den 79 NY2d 752, 580 NYS2d 199 [1992]); which parent is the more likely to assure meaningful contact between the child and the non-custodial parent (*see* ***Matter of Green v Gordon***, 7 AD3d 528, 776 NYS2d 73 [2d Dept 2004]; ***Matter of Dobbins v Vartabedian***, 304 AD2d 665, 758 NYS2d 153 [2d Dept 2003] lv den 100 NY2d 506, 763 NYS2d 812 [2003]), and/or whether there has been an abduction or defiance of legal process (*see* ***Matter of Green v Gordan***, 7 AD3d 528, *supra*; ***Matter of Fallon v Fallon***, 4 AD3d 426, 771 NYS2d 381 [2d Dept 2004]). In making its determination on the issue of custody, the Court is to evaluate the testimony, credibility, character, temperament, demeanor and sincerity of the parties and other witnesses (*see* ***Matter of Rory H. v Mary M.***, 13 AD3d 373, 786 NYS2d 153 [2d Dept 2004]; ***Matter of Dobbins v Vartabedian***, 304 AD2d 665, *supra*; ***Matter of McLaren v Heuthe***, 296 AD2d 500, 745 NYS2d 482 [2d Dept 2002]).

In the instant matter, the Court is convinced that each of the parties have a genuine and deep love for J.Z. The Court's concern, however, is what can best be described as an apparent inability to co-parent simply because of the parties' immaturity and dislike for one another.

Comparing the expected quality of the home environment the Court notes that each of the parties live in a rental unit. The plaintiff and Mr. DeMaille maintain an apartment in Lindenhurst, New York while the defendant and Ms. Luther live in a rental in West Islip, New York. Ms. Luther testified that it is her intention to purchase a home in West Islip when her current lease expires in April of 2016. It is noteworthy that in the West Islip home, J.Z. can enjoy the company of Ms. Luther's son Keith. Keith is close in age to J.Z. and they enjoy a good relationship.

The plaintiff has made significant lapses in judgment. These lapses include, the introduction of Mr. Demaille into J.Z.'s life with little or no regard for his background. Additionally, the plaintiff has, on several occasions during the conflict between the parties, coached J.Z. putting him in a position to take sides between Mom and Dad. Such questionable judgment will have a negative impact on the child's emotional and intellectual development, especially the day to day challenges J.Z. will face through his adolescence based upon his diagnosis.

When considering which parent is the more likely to assure meaningful contact between the child and the non-custodial parent this Court, unfortunately, does not have high expectations for either party. As Dr. Favaro testified, these parties have displayed such conflict that it is likely

to negatively affect J.Z. In making a finding, however, it is the plaintiff, as discussed herein, who has displayed the more concerning issues of judgment and credibility. When the plaintiff is coaching the child to make negative statements about the defendant to the forensic evaluator and the Court, it cannot be expected that she will attempt to foster J.Z.'s relationship with the defendant in the future.

The plaintiff is not without her positive attributes. Most notable is her willingness and ability to work with J.Z. to accomplish educational and behavioral goals. The plaintiff has worked hard to ensure that J.Z. exceeds all expectations in consideration of his diagnosis. The Court, however, finds that the plaintiff's significant lapses in both judgment and credibility will have an overriding negative effect above and beyond any benefit attained by her positive attributes.

Upon all of the foregoing, and based upon the credible evidence adduced, the Court finds that the "best interests" of the child would be served by an award of sole legal and residential custody to the defendant with a liberal schedule of parenting time awarded to the plaintiff. Accordingly, it is

ORDERED, that the defendant, P.Z., be and is hereby awarded sole legal and residential custody of the infant issue, to wit: J.Z., age 6 (born December 29, 2008).

Here, the antagonistic relationship between the parties is an important factor in the Court's decision to award sole custody to one parent rather than joint custody to the parties. In considering the actions of the parties and the negative effect which it may have upon J.Z., as explained by Dr. Favaro, the Court finds it inappropriate to divide custodial decision-making authority between these parties (*see* ***Chamberlain v Chamberlain***, 24 AD3d 589, 591, 808 NYS2d 352 [2d Dept 2005]; ***Matter of Ring v Ring***, 15 AD3d 406, 790 NYS2d 51 [2d Dept 2005]). The defendant shall, however, endeavor to ensure the plaintiff's involvement and access to the child at all levels of his education, medical treatment, religious upbringing and socialization.

Parenting Schedule

Whenever possible, the best interests of a child lies in being nurtured by both natural parents (*see* ***Matter of Jules v Corriette***, 76 AD3d 1016, 908 NYS2d 89 [2d Dept 2010]; ***Hemphill v Hemphill***, 169 AD2d 29, 32, 572 NYS2d 689 [2d Dept 1991]; ***Daghir v Daghir***, 82 AD2d 191, 193, 441 NYS2d 494 [2d Dept 1981] affd 56 NY2d 938). "Absent exceptional

circumstances, some form of visitation with the noncustodial parent is always appropriate" (***Burgess v Burgess***, 99 AD3d 797, 798, 951 NYS2d 893 [2d Dept 2012]; *see* ***Matter of Granger v Misercola***, 21 NY3d 86, 90, 967 NYS2d 872 [2013]; *see generally* ***Weiss v Weiss,*** 52 NY2d 170, 436 NYS2d 862 [1981]). Such visitation should be reasonable under the circumstances (*see* ***Quinn v Quinn,*** 87 AD2d 643, 448 NYS2d 248 [2d Dept 1982]). In providing for visitation that will be meaningful, the frequency, regularity and quality of the visits must be considered (*see* ***Matter of Fish v Fish***, 112 AD3d 1161, 976 NYS2d 727 [3d Dept 2013]; ***Szemansco v Szemansco***, 296 AD2d 686, 687 744 NYS2d 773 [3d Dept 2002]; ***Matter of Wright v Wright***, 211 AD2d 341, 346, 627 NYS2d 819 [3d Dept 1995]; ***Valenza v Valenza***, 143 AD2d 860, 533 NYS2d 348 [2d Dept 1988]). "Expanded visitation is generally favorable absent proof that such visitation is inimical to a child's welfare" (***Matter of Fish v Fish***, *supra*; ***Szemansco v Szemansco***, *supra* quoting ***Colley v Colley***, 200 AD2d 839, 841, 606 NYS2d 796 [3d Dept 1994]; ***Valenza v Valenza***, *supra*). There are cases where extended but less frequent visits will be more conducive to meaningful visitation by providing the opportunity for the child and the noncustodial parent to interact in a normalized domestic setting (*see* ***Matter of Tropea v Tropea***, *supra* at 738; ***Matter of Shaw v Miller***, 91 AD3d 879, 938 NYS2d 107 [2d Dept 2012]; ***Szemansco v Szemansco***, *supra*).

In the end, the primary consideration in all custody and visitation cases is what disposition will best serve the welfare and best interests of the child (*see* Domestic Relations Law § 70; ***Eschbach v Eschbach***, 56 NY2d 167, 171, 451 NYS2d 658 [1982]). There are no absolutes in making these determinations; rather, there are policies designed not to bind the courts, but to guide them in determining what is in the best interests of the child (***Eschbach v Eschbach***, *supra*; ***Friederwitzer v Friederwitzer***, 55 NY2d 89, 447 NYS 2d 893 [1982]).

Upon the foregoing, it is,

ORDERED, that, **except as otherwise agreed upon**, the following schedule of access by the plaintiff with the parties' infant issue shall take effect. Such schedule shall take effect upon service of the instant Decision and Order with Notice of Entry:

i. The plaintiff shall be entitled to parenting time on alternate weekends from completion of school (3:00 p.m. on non-school days) Friday through start of school on Monday (9:00 a.m. on non-school days). The plaintiff shall be responsible for the transportation of the child on these days.

ii. The plaintiff shall be entitled to parenting time on each Tuesday from completion of school (3:00 p.m. on non-school days) through start of school Wednesday (9:00 a.m. on non-school days). The defendant shall be responsible for the transportation of the child to the plaintiff on Tuesday and the plaintiff shall be responsible for the transportation of the child on Wednesday mornings.

iii. During alternating weeks immediately preceeding weekends where plaintiff is not scheduled to enjoy parenting time plaintiff shall be entitled to parenting time on Thursday from completion of school (3:00 p.m. on non-school days) through 8:00 p.m.

iv. The plaintiff shall be entitled to one-half of the child's vacation period from school for Christmas. The plaintiff shall enjoy the right of election as to which half of the vacation the child spends with her so long as such election is made in writing to the defendant on or before September 1st of said calendar year. Such period shall begin with the child's dismissal from school on the last day prior to such vacation period and shall end at 8:00 p.m. on the day prior to his return to school. This visitation period shall not interfere with the child's opportunity to spend Christmas Eve, Christmas Day or his birthday with the parties as otherwise provided herein.

v. In even numbered years the plaintiff shall be entitled to parenting time with the child during the child's vacation period from school for **winter recess**. Such period shall begin with the child's dismissal from school on the last day prior to such vacation period and shall end at 8:00 p.m. on the day prior to his return to school.

vi. In odd numbered years the plaintiff shall be entitled to parenting time with the child during the child's vacation period from school for **spring recess**. Such period shall begin with the child's dismissal from school on the last day prior to such vacation period and shall end at 8:00 p.m. on the day prior to his return to school. This visitation period shall not interfere with the child's opportunity to spend Easter with the defendant as otherwise scheduled.

vii. In even numbered years the plaintiff shall be entitled to parenting time with the child on Washington's Birthday, Easter Sunday, Memorial Day, Labor Day and Veterans Day, from 10:00 a.m. to 8:00 p.m. on each day.

viii. In odd numbered years the plaintiff shall be entitled to parenting time with the child on Martin Luther King's Birthday, July 4th, Columbus Day, from 10:00 a.m. to 8:00 p.m. on each day.

ix. In odd numbered years the plaintiff shall be entitled to parenting time with the child commencing December 24th at 3:00 p.m. through December 25th at 11:00a.m.

x. The plaintiff shall be entitled to parenting time with the child on Mother's Day, from 9:00 a.m. to 8:00 p.m. and the defendant shall be entitled to parenting time with the child on Father's Day, from 9:00 a.m. to 8:00 p.m. These days shall take priority over regularly scheduled parenting schedules.

xi. Each of the parties shall be entitled to parenting time with the child on his birthday (December 29th). That parent not scheduled to exercise parenting time on said date shall be permitted a three (3) hour period of time with the child as selected by the other party.

xii. The parties shall divide parenting time with the child in the summer equally alternating weekly periods beginning the first Friday after the end of the school calendar. The plaintiff shall be entitled to parenting time during the first of such alternating periods.

xiii. Weekday visits shall not be in effect during the summer unless otherwise agreed to by the parties.

xiv. The parties shall have such other, or additional, parenting time as the parties may mutually agree upon.

It is further;

ORDERED, that any holiday or school vacation period parenting time shall take priority over regularly scheduled weekend and weekday parenting time without adjustment for same, unless consented to by the parties.

The above visitation schedule is a minimum schedule and the parties shall be free to arrange additional or alternative visitation as shall be mutually agreeable between the parties.

The plaintiff's parenting time shall be such that it shall not interfere with, nor adversely affect, the school, religious, sports activities or non-routine social activities of the child. Nor shall it adversely affect the child's health or general welfare.

Each of the parties shall keep the other reasonably informed during vacation periods as to the whereabouts of the child with the father or mother respectively and to provide the other with the appropriate vacation itinerary, i.e. flight information, hotel information, telephone numbers.

The parties shall exert every reasonable effort to foster a feeling of affection between the child and the other party. Neither party shall do anything which may estrange the child from the other party or injure the child's opinion as to their mother or father which may hamper the free and natural development of the child's love and respect for the other party.

Neither party shall, at any time and for any reason, initiate or permit the designations of "Father" and/or "Mother" or their equivalent, to be used by the child with reference to any person

other than the parties hereto; nor shall the child be adopted without the express written consent of both the father and the mother.

Each parent shall be entitled to complete detailed information from any pediatrician, general physician, dentist, mental health professional, consultant or specialist attending the child for any reason whatsoever and to be furnished with copies of any reports given by any of them, to the other parent. Each party shall execute any and all consents necessary to effectuate the provisions of this Paragraph.

Each parent shall be entitled to complete detailed information from any teacher or school giving instruction to the child or at which the child may attend, and to be furnished with copies of all reports given by them, or any of the them to the other parent. Each party shall execute any and all consents necessary to effectuate the provisions of this Paragraph.

Both parties shall encourage telephone contact. The child shall have the right to telephone access with each parent. The parties shall encourage contact on a daily basis at 7:00 p.m., or at a time mutually agreed upon, when the child is in their care and custody.

Child Support

Under the plain language of the Child Support Standards Act (hereinafter CSSA), only the noncustodial parent can be directed to pay child support. In this regard, Domestic Relations Law § 240 (1-b) (f) (10) and FCA § 413 (1) (f) (10) state that, after performing the requisite calculations, "the court shall order the non-custodial parent to pay his or her pro rata share of the basic child support obligation" ***(Rubin v Della Salla,*** 107 AD3d 60, 68, 964 NYS2d 41 [1st Dept 2013]; *see also* DRL § 240[1-b][c][7]; FCA § [1][c][7]; DRL § 240[I -b][g]; FCA § [1] [g]). The mandatory nature of the statutory language undeniably shows that the Legislature intended for the noncustodial parent to be the payer of child support and the custodial parent to be the recipient ***(Rubin v Della Salla,*** 107 AD3d 60, 68, 964 NYS2d 41 [1st Dept 2013]). The CSSA provides for no other option and vests the court with no discretion to order payment in the other direction.

Indeed, in ***Bast v Rossoff*** (91 NY2d 723, 675 NYS2d 19 [1998]) the Court of Appeals made clear that even in shared custody cases the courts are required to identify the "primary custodial parent" and in most instances, the court can determine the custodial parent for the purposes of child support by identifying which parent has physical custody of the child for a

majority of time" (***Bast*** at 728; *see* ***Rubin v Della Salla,*** 107 AD3d 60, 964 NYS2d 41 [1st Dept 2013]).

In the light of the foregoing, and to the extent that the defendant has now been granted sole legal and residential custody of the subject child, the plaintiff is no longer a custodial parent entitled to child support. Accordingly, it is

ORDERED, any prior order of the Family Court awarding child support to the plaintiff shall be deemed superseded and vacated.

Going forward, it is now the plaintiff who, as non-custodial parent, has a parental obligation to pay child support to the defendant custodial parent. In order to determine an appropriate award of child support pursuant to the CSSA, this Court must first determine the "income" of each party to be utilized in such determination. The Court has previously found herein an imputation of income to the plaintiff for a total annual income of $32,300. Pursuant to DRL 240 (1-b) (b) (5) (vii) (H), FICA taxes, actually paid, must be deducted from gross income prior to the determination of combined parental income and the percentage of each parent's obligation to pay child support (*see* ***Harrison v Harrison***, 255 AD2d 490, 680 NYS2d 624 [2d Dept 1998]; *see also* ***Frankel v Frankel***, 287 AD2d 686, 732 NYS2d 103 [2d Dept 2001]; ***Haas v Haas***, 265 AD2d 887, 695 NYS2d 644 [4th Dept 1999]). Whereas, the income attributed to the plaintiff is imputed based upon her ability to earn and gifts received from her live in fiancé no deduction can be had for taxes "actually paid." The defendant's income after deducting FICA taxes actually paid is $87,239.00.

Based on the foregoing determination of income, the Court finds that the total combined parental income of these parties (after FICA) is the sum of $119,539.00. The New York Domestic Relations Law fixes the amount of support to be paid for one child at 17% of the combined parental income (DRL §240[1-b][b][3][i]). The parties' respective *pro rata* share of the combined income is 27% for the plaintiff and 73% for the defendant.

The parties' obligation for support is calculated as follows:

$$\$119,539 \times .17 = \$20,321.63$$

This basic child support obligation of $20,321.63 is then allocated between the parties pursuant to their *pro rata* share of the combined parental income.

Plaintiff's share	$20,321.63 x .27	=	$5,486.84 per annum
			$457.23 per month

Defendant's share	$20,321.63 x .73	=	$14,834.79 per annum
			$1,236.23 per month

Accordingly, it is

ORDERED, that the defendant is awarded and the plaintiff is directed to pay the sum of $457.23 per month as and for child support to the defendant. The child support calculations herein are in accord with the Child Support Standards Act (CSSA). The plaintiff's obligation imposed herein is neither unjust nor inappropriate. The award of child support shall commence upon service of the instant decision and order of the Court with Notice of Entry.

The child is currently covered by the defendant's health insurance policy provided through his employer. The defendant shall continue such coverage of the child through the child's emancipation so long as such insurance remains available through his employer. Any premium payments shall be borne by the parties *pro rata* 27% by the plaintiff and 73% by the defendant. Where premiums are deducted from the defendant's salary the plaintiff shall reimburse the defendant on a monthly basis. Said policy shall be secured with a Qualified Medical Child Support Order, to be submitted together with the Judgment of Divorce.

In addition to the foregoing, the plaintiff is directed to pay all un-reimbursed medical, mental health, dental, optimological and pharmacological needs of the children which are deemed reasonable and necessary in the ratio of 27%. Defendant shall be responsible for 73% of all such expenses. In-network providers shall be utilized for the child's medical, mental health, dental, optimological and pharmacological needs unless use of an in-network provider is impracticable or in the event of emergency care or upon consent of the parties.

The plaintiff is directed to maintain life insurance and/or death benefits in the minimum amount of $75,000 on her life naming the child as irrevocable beneficiary and the defendant as trustee of said funds. The defendant shall maintain life insurance and/or death benefits in the minimum amount of $175,000 on his life naming the child as irrevocable beneficiary and the plaintiff as trustee of said funds. Each of the aforesaid policies shall be secured by a Qualified Life Insurance Order pursuant to NY Domestic Relations Law § 236 B (8), to be submitted together with the Judgment of Divorce. On an annual basis, and upon written request, each party shall provide proof of the required policies within 30 days of any such request.

Until J.Z. is emancipated, the parties shall alternate the available federal income tax deduction, whereas J.Z. is claimed as a dependant child. The plaintiff shall be permitted the deduction for the taxable year 2016 and all even numbered years thereafter. The defendnat shall

be permitted the deduction for the taxable year 2015 and all odd numbered years thereafter. Upon any year in which either party does not meet the IRS minimum reportable income that party will forfeit this right to deduction and it will fall to the other party. Each party shall execute those documents necessary to permit the other to exercise the income tax deduction in each year (*see* ***Farber v Farber***, 206 AD2d 644, 614 NYS2d 771 [3d Dept 1994]; ***Bennett v Bennett***, 140 AD2d 400, 528 NYS2d 103 [2d Dept 1988]).

Those payments directed herein as payable monthly shall be paid directly on the 1st day of each month commencing in the month immediately subsequent to the entry of the judgment in this matter or as otherwise provided herein. Said payment shall be made to the address provided in writing by the party entitled to such payment.

Pendente Lite Motion

By Order to Show Cause, dated July 15, 2014, the plaintiff made application for *pendente lite* relief. Specifically the plaintiff sought, *inter alia*, an order (1) directing the defendant to reimburse her for the cost of medical services, prescriptions, and expenses incurred between October 9, 2013 and November 25, 2013, as a result of the defendant's alleged unlawful termination of plaintiff's medical insurance benefits and coverage; (2) directing the defendant to obtain and/or continue in full force and effect a life insurance policy in the principal sum of $500,000 and naming the plaintiff as irrevocable beneficiary; (3) directing the defendant to pay non-taxable temporary maintenance to the wife in the sum of no less than $1,727.70 per month, effective as of the date of application; (4) directing the defendant to share *pro rata* in all past due and future extra curricular activity expenses of the child; (5) awarding the defendant interim counsel fees in the sum of $30,000, without prejudice to future awards, for services rendered, and to be rendered, in connection with the prosecution and defense of this divorce action; and (6) directing that the defendant be responsible for the expense of all forensic or evaluation service fees related to the instant matrimonial action.

The original return date of the *pendente lite* application was set by the Court as September 4, 2014. Thereafter, upon consent of the parties, the application was adjourned. The defendant's opposition papers were received by the Court on November 24, 2014 and the plaintiff's reply papers were received on January 6, 2015. The parties further consented to adjourn the application to March 9, 2015. On such dated the parties stipulated that the matters argued within the *pendente lite* application would be referred, in their entirety, to the Trial Court for determination. Having conducted the Trial of this matter, the Court is now called upon to determine the plaintiff's outstanding *pendente lite* application.

(1) The branch of the plaintiff's *pendente lite* application seeking an order directing the defendant to reimburse her for the cost of medical services, prescriptions, and expenses incurred between October 9, 2013 and November 25, 2013, as a result of the defendant's alleged unlawful termination of plaintiff's medical insurance benefits and coverage, is ***DENIED.***

Based upon the paucity of evidence presented on this issue, including that evidence presented at trial, the Court finds that there is an insufficient basis to make a finding with regard to the reimbursement of medical and/or other expenses incurred by the plaintiff between October 9, 2013 and November 25, 2013. Accordingly, the plaintiff's application for such relief must be ***denied.***

(2) The branch of the plaintiff's *pendente lite* application seeking an order directing the defendant to obtain and/or continue in full force and effect a life insurance policy in the principal sum of $500,000 naming the plaintiff as irrevocable beneficiary is, also, ***DENIED.***

In accordance with the Court's decision herein, the branch of the plaintiff's application seeking the aforesaid relief must be ***denied*** as moot. In any event, based upon the record before it the Court would find the granting of such relief to be both unwarranted and inappropriate.

3) The branch of the plaintiff's *pendente lite* application seeking an order directing the defendant to pay non-taxable temporary maintenance to the wife in the sum of no less than $1,727.70 per month, effective as of the date of application is hereby considered and determined as follows:

At the outset, the Court notes that the plaintiff's application for permanent maintenance as sought in her complaint was determined herein and denied by this Court. Such determination by the trial court, however, does not restrict the plaintiff's right to have the issue of temporary maintenance determined by this Court. In this regard, the Court notes that the considerations in determining temporary versus permanent maintenance are distinct from one another. Temporary maintenance is awarded to provide a party with support pending the trial and prior to the determination of the issues of marital rights and appropriate support. This determination is made by statutory formula, as a matter of right, with limited discretion by the Court. In contrast, the final determination on permanent maintenance is made on a long-range basis considering several other factors including, but not limited to, the standard of living of the parties during the marriage, the income and property of the parties, the distribution of marital property, the duration of the marriage, the health of the parties, the present and future earning capacity of both parties, and the ability of the party seeking maintenance to become self-supporting (*see* ***Alleva v Alleva***, 112 AD3d 567, 568, 977 NYS2d 267 [2d Dept 2013] [internal quotation marks omitted]; *see*

also Domestic Relations Law §§ 236 [B] [5-a]; 236 [B] [6-a]). A determination upon the issue of temporary maintenance shall not control the determination of permanent maintenance, and similarly, the Court's determination on permanent maintenance shall not apply backward and constitute a redetermination of the proper amount of temporary maintenance (*see* ***Barnes v Barne***, 3 AD2d 242, 159 NYS2d 987 [1st Dept 1957]). The Court further notes that the parties stipulated that the issues within the plaintiff's *pendente lite* application, including the issue of temporary maintenance, would be referred to the trial Court for determination. Under such circumstances, it would be, in this Court's view, unjust and inappropriate not to consider this application at this time.

Domestic Relations Law § 236 (B) (5-a) sets forth the substantive and procedural requirements for an award of temporary maintenance, addressing both the amount and the duration of the temporary award (***Chusid v Silvera***, 110 AD3d 660, 973 NYS2d 233 [2d Dept 2013]; ***Davydova v Sasonov***, 109 AD3d 955, 972 NYS2d 293 [2d Dept 2013]; ***Goncalves v Goncalves***, 105 AD3d 901, 963 NYS2d 686 [2d Dept 2013]). First, the subdivision contains a formula the court must use to determine a "[g]uideline amount of temporary maintenance" (Domestic Relations Law § 236 [B] [5-a] [b] [6]; *see* ***Goncalves v Goncalves***, *supra*). When the income of the payor spouse does not exceed the "[i]ncome cap" (Domestic Relations Law § 236 [B] [5-a] [b] [5]), the initial calculation of the amount is straightforward (*see* Domestic Relations Law § 236 [B] [5-a] [c] [1]; *see* ***Goncalves v Goncalves***, *supra*). When the income of the "payor spouse" exceeds the income cap, an additional step is necessary in this calculation of the guideline amount of temporary maintenance (*see* ***Goncalves v Goncalves***, 105 AD3d 901, 963 NYS2d 686 [2d Dept 2013]). Specifically, in determining whether and to what extent to apply the statutory formula to the payor spouse's income in excess of the income cap, the court must consider 18 specific enumerated factors, as well as "any other factor which the court shall expressly find to be just and proper" (Domestic Relations Law § 236 [B] [5-a] [c] [2] [a] [xix]; ***Goncalves v Goncalves***, *supra*).

Once it has determined the guideline amount of temporary maintenance, the court must consider the length of the marriage to determine the "guideline duration of temporary maintenance" (*see* Domestic Relations Law § 236 [B] [5-a] [b] [7]; [d]; ***Goncalves v Goncalves***, *supra*). The guideline amount of temporary maintenance and guideline duration of temporary maintenance together establish a "presumptive award" (Domestic Relations Law § 236 [B] [5-a] [b] [6]; *see* ***Goncalves v Goncalves***, *supra*).

The court may deviate from the presumptive award if that presumptive award is "unjust or inappropriate" (Domestic Relations Law § 236 [B] [5-a] [e] [2]; ***Chusid v Silvera***, *supra*; ***Goncalves v Goncalves***, *supra*; ***Osha v Osha***, 101 AD3d 481, 956 NYS2d 15 [1st Dept 2012]). In determining whether to deviate, the court must consider a broad range of factors almost identical to those it must consider in determining whether and to what extent it will apply the statutory formula to the payor spouse's income exceeding the income cap (Domestic Relations Law § 236 [B] [5-a] [e] [1] [a]-[q]; ***Chusid v Silvera***, *supra*; ***Goncalves v Goncalves***, *supra*). Said factors include:

(a) the standard of living of the parties established during the marriage;

(b) the age and health of the parties;

(c) the earning capacity of the parties;

(d) the need of one party to incur education or training expenses;

(e) the wasteful dissipation of marital property;

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

(g) the existence and duration of a pre-marital joint household or a pre-divorce separate household;

(h) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;

(i) the availability and cost of medical insurance for the parties;

(j) the care of the children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws that has inhibited or continues to inhibit a party's earning capacity or ability to obtain meaningful employment;

(k) the inability of one party to obtain meaningful employment due to age or absence from the workforce;

(l) the need to pay for exceptional additional expenses for the child or children, including, but not limited to, schooling, day care and medical treatment;

(m) the tax consequences to each party;

(n) marital property subject to distribution pursuant to subdivision five of this part;

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

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

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

Additionally, when a court is unable to perform the calculation established by Domestic Relations Law § 236 (B) (5-a) (c) as a result of being "presented with insufficient evidence to determine gross income, the court shall order the temporary maintenance award based upon the needs of the payee or the standard of living of the parties prior to commencement of the divorce action, whichever is greater" (Domestic Relations Law § 236[B][5-a][g]; ***Davydova v Sasonov***, *supra*). "In any decision made pursuant to [Domestic Relations Law § 236(B)(5-a)], the court shall set forth the factors it considered and the reasons for its decision" (Domestic Relations Law § 236[B][5-a][c][2][b]; [e][2]; *see* ***Davydova v Sasonov***, *supra;* ***Goncalves v Goncalves***, *supra*; ***Osha v Osha***, *supra*).

Here, the trial Court has had the benefit of a fact finding for the determination of the parties' incomes. Based upon said fact finding the Court made a decision, herein, to impute income to the plaintiff in the sum of $32,300 per annum. Thus, as set forth, *supra*, for the purposes of the instant calculation, the Court shall utilize the sum of **$32,300** as the plaintiff's income and the sum of **$93,043** per year as the defendant's income.

The mandatory statutory calculations are as follows:

Calculation A: 30% of the payor's income ($87,239 x.30 = $26,171) minus 20% of the payee's income ($32,300 x .20 = $6,460) is $19,711.70 per year or $1,642.64 per month.

Calculation B: 40% of the combined income of the two spouses ($119,539 x .40 = $47,815.60) subtracting the payee's income from that figure is $15,515.60 per year or $1,292.97 per month.

Based on the foregoing, as well as upon the duration of the parties' marriage, the presumptive award of temporary maintenance to be paid by the defendant to the plaintiff should have been $15,515.60 per year or $1,292.97 per month during the pendency of this action.

Notwithstanding the foregoing, the Court finds the presumptive award to be "unjust or inappropriate" (Domestic Relations Law § 236 [B] [5-a] [e] [2]; ***Chusid v Silvera***, *supra*; ***Goncalves v Goncalves***, *supra*; ***Osha v Osha***, 101 AD3d 481, 956 NYS2d 15 [1st Dept 2012]). Under normal circumstances, the Court in deciding a motion for temporary relief, has limited information available to make its determination. Here, however, in addition to the submissions of the parties, the Court is the beneficiary of the evidence adduced at trial, over eleven (11) days of testimony.

The instant application for *pendente lite* relief was filed with the Court on July 14, 2014. The trial commenced twelve months from that time. As the Court found, *supra*, the plaintiff has continued to cohabit with Mr. DeMaille, her fiancé, throughout the entire pendency of the proceeding. In fact, the Court has ruled, *supra*, that Mr. DeMaille's contribution to the household should be imputed to the plaintiff (*see* ***Heydt-Benjamin v Heydt-Benjamin***, *supra* citing ***Clark v Clark***, 33 AD3d 836, 827 NYS2d 159 [2d Dept 2006]; ***Matter of Ciardullo v Ciardullo***, *supra*; ***Matter of Emrich v Emrich***, *supra*; ***Scharnweber v Scharnweber***, *supra*). Additionally, the defendant has been obligated to pay $1,070.33 per month to the plaintiff as and for child support pursuant to order of the Family Court. In considering the evidence before the Court it is clear that the plaintiff's standard of living since the filing of the pendente lite application (July 2014 through today) has not diminished in comparison to the period prior to commencement. In fact, with Mr. DeMaille's assistance and the child support paid by the defendant, the plaintiff has maintained a lifestyle not unlike that which she enjoyed with the defendant pre-separation.

Based upon all of the foregoing, and under the facts and circumstances of this case, and of the respective parties, the Court finds that a temporary maintenance award of $650 per month is both just and appropriate. This award represents a reduction of the presumptively correct amount of maintenance based upon the above-noted facts, circumstances and criteria. This includes, but is not limited to, the imputed income of the plaintiff together with that assistance the plaintiff

received from her live in fiancé and this Court's finding that the needs of the party have been substantially met during the pendency of the proceeding. Accordingly, it is

ORDERED, that the branch of the plaintiff's motion seeking an award of temporary maintenance is ***GRANTED*** solely to the extent that the defendant is hereby directed to pay the sum of $650.00 per month to the plaintiff as and for temporary maintenance. Such payments shall be retroactive to the date of filing of the instant application for relief and terminate upon service of the instant Decision and Order of the Court with Notice of Entry. The sum of such monthly payments owed by the defendant shall be paid to the plaintiff in monthly installments of $650 per month until paid in full.

The defendant's payments toward that sum due for temporary maintenance shall be due and payable on the 15th of each month. In the event that the plaintiff has not yet provided the defendant with any payment of child support as directed herein, the defendant shall deduct such payment as a credit against the maintenance payment owed to the plaintiff. Additionally, such payment shall be made payable directly to the plaintiff at her current residence or such other place she may designate in writing.

(4) The branch of the plaintiff's *pendente lite* application seeking an order directing the defendant to share *pro rata* in all past due and future extra curricular activity expenses of the child is ***DENIED.***

Based upon the paucity of evidence presented on this issue, including that evidence presented at trial, the Court finds that there is an insufficient basis to make a finding with regard to the past due and future extra curricular activity expenses of the child. In fact, the record is devoid of any testimony with regard to either current or future activities. Additionally, the Court, herein, has directed the presumptive child support be paid in accordance with the Child Support Standards Act (CSSA). Accordingly, the plaintiff's application for such relief must be ***denied.***

(5) The branch of the plaintiff's *pendente lite* application seeking an award of interim counsel fees in the sum of $30,000, without prejudice to future awards, for services rendered, and to be rendered, in connection with the prosecution and defense of this divorce action is ***DENIED.***

Pursuant to Domestic Relations Law § 237 (a), a court in a divorce action may award counsel fees to a spouse "to enable that spouse to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties" (*see* ***Johnson v Chapin***, 12 NY3d 461, 467, 881 NYS2d 373 [2009]; ***Prichep v Prichep***, 52 AD3d 61, 858 NYS2d 667 [2d Dept 2008]). The court may direct such

payments in the final judgment and/or "by one or more orders from time to time before final judgment" (***Prichep v Prichep***, *supra*). Unlike a final award of counsel fees, a detailed inquiry or evidentiary hearing is not required prior to the award of interim counsel fees (***Gaffney-Romanello v Romanello***, *supra*; ***Lang v Lang,*** 72 AD3d 1255 [3d Dept 2010]; ***Singer v Singer***, 16 AD3d 666, 792 NYS2d 541 [2d Dept 2005]; *see also* ***Prichep v Prichep***, *supra*). In this regard, in ***Prichep***, *supra*, the Appellate Division Second Department held that "courts should not defer requests for interim counsel fees to the trial court, and should normally exercise their discretion to grant such a request made by the nonmonied spouse, in the absence of good cause--for example, where the requested fees are unsubstantiated or clearly disproportionate to the amount of legal work required in the case--articulated by the court in a written decision."

Here, however, the parties stipulated that plaintiff's request for counsel fees brought within her *pendente lite* application would be referred to the trial Court on consent of each of the parties. Later, at the close of the trial, by agreement of the parties, the issue of counsel fees would be resolved by the Court upon written submission to the Court, and without the need for testimony or oral argument (see ***Reehill v Reehill***, 181 AD2d 725, 580 NYS2d 795 [2d Dept 1992]). As a result of the foregoing, the plaintiff's original *pendente lite* application seeking interim counsel fees has, in effect been rendered moot. The determination of the plaintiff's entitlement to counsel fees for the entirety of this action will be determined in toto herein upon the papers received post-trial.

(6) Lastly, the branch of the plaintiff's *pendente lite* application seeking an order directing that the defendant be responsible for the expense of all forensic or evaluation service fees related to the instant matrimonial action is ***DENIED***.

In matrimonial actions, courts have the authority to order one spouse to pay the expert fees as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties (*see* ***Chesner v Chesner,*** 95 AD3d 1252, 1253, 945 NYS2d 409 [2d Dept 2012]). An award of expert fees will generally be warranted where there is a significant disparity in the financial circumstances of the parties (*see generally* Domestic Relations Law § 237 [a]).

In accordance with the decision herein, the plaintiff's application for an order directing that the defendant be responsible for the expense of all forensic or evaluation service fees related to the instant matrimonial action must be ***denied*** as moot. Moreover, to the extent that each of the parties seeks an order re-distributing either Dr. Favor's or the attorney for the child's fees such applications must be ***denied.***

The parties failed to present any evidence to establish the amount of the expert fees and, consequently, an award is not supported (*see* ***Gilliam v Gilliam***, 109 AD3d 871, 971 NYS2d 541 [2d Dept 2013]).

Counsel Fees

By agreement of the parties the issue of counsel fees has been left to be resolved by the Court with the application as well as arguments permitted to be made "on papers" and without the need for testimony (*see* ***Reehill v Reehill***, 181 AD2d 725, 580 NYS2d 795 [2d Dept 1992]). The Court has considered plaintiff's counsel's affirmation, defense counsel's affirmation in opposition, and a reply filed by plaintiff' counsel.

Domestic Relations Law § 237 authorizes the court to direct either spouse or parent to pay counsel fees in order to enable the other to carry on or defend the action as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties (*see* ***DeCabrera v DeCabrera-Rosete***, 70 NY2d 879, 524 NYS2d 176 [1987]). While an award of counsel fees lies within the discretion of the court, that discretion is nonetheless to be controlled by the equities of the case and the financial circumstances of the parties (***Pauk v Pauk***, 232 AD2d 386, 648 NYS2d 621 [2d Dept 1996]). Case law has superimposed upon that statutory basis a number of criteria which are typically ripe for consideration and then application to the particular facts at bar. These factors include (1) the time, effort and skill required, (2) the nature and extent of the services, (3) the difficulty and complexity of the questions presented, (4) the nature of the issues involved, (5) the amount of the fee involved, (6) the amount of time actually spent on the matter and the necessity therefore, (7) counsel's experience, ability and reputation, (8) the fee customarily charged in the locality, (9) the results achieved and/or the contingency or certainty of the compensation, and (10) the financial needs and circumstances of the parties (*see generally* ***Green v Silver***, 79 AD3d 1097, 913 NYS2d 574 [2d Dept 2010]; ***Pauk v Pauk***, 232 AD2d 386, 648 NYS2d 621 [2d Dept 1996]; ***Matter of Piterniak v Piterniak***, 38 AD3d 780, 833 NYS2d 530 [2d Dept 2007]; ***Rubenstein v Rubenstein***, 137 AD2d 514, 523 NYS2d 986 [2d Dept 1988]; ***Ahern v Ahern***, 94 AD2d 53, 463 NYS2d 238 [2d Dept 1983]). The burden rests upon the petitioning attorney to establish the necessity and the reasonable value of the services rendered (***Sand v Lammers***, 150 AD2d 355, 540 NYS2d 876 [2d Dept 1989]; citing ***Matter of Potts***, 213 AD 59, 61, *affd* 241 NY 593).

Applying these criteria to the matter at bar, the Court finds the following:

Briefly stated, but more amplified and detailed within the plaintiff's counsel's moving papers, the services rendered by plaintiff's counsel involved, court appearances, preparation of paperwork, telephone calls, trial preparation, eleven (11) days on trial, and a number of other chores. Plaintiff's attorney has practiced law for a number of years and a large portion of his practice is devoted to matrimonial-type matters. He has a wealth of experience in matrimonial law. Based upon the undersigned's experience with other practitioners, the performance of counsel was appropriate and professional.

The issues involved were not extraordinarily complicated. The plaintiff and defendant devoted the bulk of their resources and energies arguing over the issue of custody of their infant child. It is fair to assume, however, that such an action, considering the number of witnesses and the expert testimony, may take a fair amount of preparation.

The hourly rate sought by plaintiff's counsel is $300.00 per hour for Mr. Liotti and $200.00 per hour for staff attorneys. Counsel's rate is fair and commensurate with charges by other attorney's in the geographic area (*see* ***Green v Silver***, *supra*). Plaintiff's counsel claims the total cost for his services in the instant matter to be $54,420.00 under Supreme Court Index No. 18796-2013.

Counsel's application further seeks an award for fees related to his representation of the plaintiff in the Suffolk County Family Court (Docket Nos. V-5955-13, V-8427-13, V-3974-13 & F-18880-13) and a matter referred to as the "GE Capital Bank Matter." In determining counsel fees in the instant matrimonial action, the Court may not consider services rendered by the plaintiff's attorney in the Family Court or any other prior proceeding. Therefore, the plaintiff's request for fees must be limited to account for only those fees accrued for services rendered in the instant matrimonial action (*see* ***Lutz v Lutz***, 38 AD3d 720, 834 NYS2d 531 [2d Dept 2007]; ***Maloney v Maloney***, 114 AD2d 440, 494 NYS2d 356 [2d Dept 1985]; ***Mattana v Mattana***, 79 AD2d 702, 434 NYS2d 267 [2d Dept 1980]).

Counsel has attached as exhibit C to his application what purports to be invoices reflecting fees paid, fees owed and the activity related thereto. The Court has an obligation to review these invoices in furtherance of it's review of the necessity and the reasonable value of the services rendered (*see* ***Sand v Lammers***, *supra*).

The invoices attached as exhibit C sufficiently itemize the services rendered. The Court, in its review of the invoices, has found several billings related to a matter referred to as the "GE Capital Bank Matter." Counsel's request for fees must be reduced by these billings totaling

$720.00 (*see* ***Mattana***, *supra*). The Court finds the remainder of the fees charged to be reasonable and necessary in counsel's representation of the plaintiff. This reduces the counsel fee in consideration to $53,720.00.

Success is the attorney's goal in all cases, but in matrimonial matters success is often difficult to gauge, when, as here, one spouse is required to litigate against the other. Here, counsel's representation of the plaintiff failed to result in an award of custody and child support as sought by the plaintiff. The result achieved, however, is not dispositive of the efforts of counsel or the value of his services in the instant matter. It cannot be argued that Mr. Liotti was anything other than well prepared and appropriately tenacious in the representation of his client.

Turning to consideration of the tactics of the parties throughout these proceedings. The defendant has argued that an award of counsel fees to the plaintiff would be inappropriate in light of the plaintiff's responsibility for the litigious nature of this case (*see* ***Carr-Harris v Carr-Harris***, 98 AD3d 548, 949 NYS2d 707 [2d Dept 2012]; *compare* ***McMahon v McMahon***, 120 AD3d 1316, 992 NYS2d 550 [2d Dept 2014]). While this Court concurs with counsel for the defendant that a settlement of the matter would have been the most cost effective way to resolve their differences, the defendant cannot be heard to place the blame entirely upon the plaintiff for the lack of a settlement in this matter. Each of the parties must share the blame for this unfortunate result. Nor can the burden be placed upon the plaintiff to accept a settlement or in the alternative lose her right to seek counsel fees after trial.

With respect to the relative financial needs and circumstances of the parties, neither of the parties appear to be in a relatively good position to pay counsel fees. At the time of trial, each of the parties listed their assets as $0. Combined, the parties have cash holdings of less that $1,000. Further, there are no assets distributed by the Court other than the defendant's pension through a QDRO. Although her application for counsel fees has indicated she is currently not working the Court in its findings, *supra*, has imputed an annual income of $32,300 to the plaintiff.

Herein lies the greatest concern of the Court in determining the instant application. Counsel for the plaintiff states that "the plaintiff has been forcibly thrust into a world of virtual poverty, as a result of the defendant's behavior." The plaintiff has not submitted an affidavit with the instant application leaving the Court to consider counsel's affirmation against only the evidence at trial. At trial, the plaintiff testified that she was employed only part time earning approximately $180 per week. She further testified that Mr. Demaille collects disability and contributes only one half of the rent and one half of the utilities. The plaintiff testified, however, that she is current in her monthly expenses. These expenses, as per her sworn Statement of Net

Worth, submitted as plaintiff's exhibit number 4, total $6,268.00 per month or $75,216.00 per annum. Additionally, upon review of counsel's billing statements, the plaintiff continued to pay her attorney's fees in a timely fashion right up to the time of trial. These payments to Mr. Liotti totaled approximately $30,800 over a two year period.

The plaintiff did testify during trial that she has had to borrow in excess of $30,000 throughout the proceedings. She did not, however, testify with any degree of specificity regarding any loan of debt incurred. Nor has the plaintiff provided any evidence of debt as a result therefrom. Additionally, counsel has affirmed that he has not received a promise to be paid by any other person on behalf of the plaintiff. The Court has already opined that it has concerns regarding the credibility of the plaintiff. Considering the foregoing, the Court cannot reconcile her apparent ability to stay current with her counsel fees and pay her expenses without any substantial income or assistance from others.

Additionally, the Court takes notice of the defendant's trial expenses as well. Although, the defendant has not submitted a detailed accounting of his legal expenses incurred, defendant's counsel submits that he has billed the defendant for the sum of $29,628 solely for trial work after July 8, 2015. In addition to his counsel fees, the defendant is responsible, pursuant to Court order, to pay 100% of the fees and costs associated with the Attorney for the Child and the forensic evaluator. The defendant submits that such fees and costs total an additional $29,662.50.

Based upon all of the foregoing, including this Court's concerns regarding the veracity of the plaintiff's application, plaintiff's application for counsel fees is ***denied***.

Any post trial correspondence submitted by the parties or there counsel, other than that related to counsel's application for counsel fees, is *dehors the record* and was not considered by the Court in its determinations herein.

To the extent that either party has either in their complaint or upon the record made application for relief which has not been addressed herein, such relief is hereby denied.

The foregoing constitutes the Decision and Order of the Court.

Settle judgment on notice on or before December 18, 2015.

DATED: October 9, 2015
CENTRAL ISLIP, NY

HON. JOHN ILIOU, A.J.S.C.