

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 28 SUFFOLK COUNTY**

PRESENT:

Honorable Mark D. Cohen

DECISION AFTER TRIAL

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DORENE GLASSBERG

Plaintiff

- against -

MARC GLASSBERG

Defendant

**PLAINTIFF'S ATTORNEY
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This is an action for absolute divorce. It was commenced by the Plaintiff-Wife, Dorene Glassberg, against the Defendant-Husband, Marc Glassberg, on October 17, 2005, by the filing of a summons with notice. The parties entered into a written stipulation dated October 19, 2008, in which they resolved the issue of grounds. A trial on ancillary issues relative to child support, child support arrears and related matters, including unreimbursed medical and college expenses for the parties' son and equitable distribution, including certain separate property claims, was conducted on February 26, 2009 and February 27, 2009. The parties agreed to submit their separate applications for attorney's fees to the Court on paper only. The Wife was represented by Debra Rubin, Esq., of the law firm of Rubin & Rosenblum, PLLC. The Husband was represented by T. Glenn Hoffman, Esq. Post-trial submissions from counsel were received and have been considered by the Court. The Court has had a full opportunity to consider the evidence presented with respect to the issues in this proceeding, including the testimony offered and the exhibits received in evidence. The Court has further had a full opportunity to observe the demeanor of the various witnesses called to testify and has made determinations on issues of credibility with respect to these witnesses. The Court makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

A. Background

The parties were married on July 31, 1988. They had one child during their marriage, Ross Daniel Glassberg, who was born on February 20, 1989. The Wife has one daughter from a prior marriage, Alyssa Heather Propessa, who is now 27 years old. The Husband has two children from his prior marriage, Sean Jason Glassberg, who is 29 years old and Matthew Adam Glassberg, who is 27 years old. At the time of the parties' marriage, Alyssa lived with the Wife. The Husband's sons did not reside with him during the marriage, although Matthew visited the marital residence from time to time. The Wife has a close relationship with Matthew, his wife and their daughter, who is regarded the Wife's grandchild. The Husband has been estranged from Ross, Alyssa, Sean and Matthew.

The Wife has been employed as a special education teacher by the Brentwood Union Free School District (Brentwood) for more than thirty (30) years. She was also employed part-time during several summers with a foreign student exchange organization, earning approximately \$10,000.00 per year in this capacity. She obtained both her bachelors and masters degrees prior to the marriage. At the time of the marriage, the Wife earned approximately \$30,000.00 annually. Her 2007 tax return reflected gross annual income of \$118,163.00. She has a defined benefit plan pension with the New York State Teachers Retirement System (NYSTRS), with the marital portion valued in the amount of \$310,902.00 and a 403(b) deferred compensation account with AXA Equitable with a marital portion valued in the amount of \$54,326.00.

The Husband was also employed by Brentwood as an English teacher from 1969 through 1983. He attended law school at night and was admitted as an attorney in or about 1983. He engaged in the practice of law from that time until he was disbarred by the Appellate Division as a result of IOLA account defalcations by Order dated August 28, 2000. *In re Glassberg*, 275 A.D.2d 94. The Wife testified that the Husband earned upwards of \$100,000.00 per year as an attorney, while the Husband testified that he may have earned that amount in one year (1991) as an attorney, due to a large referral fee he received that one year as a "bump," but he never netted more than \$30,000.00 annually in earnings as an attorney in any one year.¹ After his disbarment, the Husband took a series of part and full-time minimum wage jobs.² He resumed teaching full-time in 1999 in a public high school in the Bronx, New York, where he earned approximately \$40,000.00 per year. He testified that during this time, he had no automobile and thus commuted by train and subway from St. James to the Bronx three hours each way. He was terminated in 2001 by the New York City School System for misconduct. He was thereafter employed by a private school, the Windsor Academy, as a full-time teacher in 2001-2002 and from 2002-2005 worked as a per diem substitute in several Long

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He testified that he had to vacate a local storefront office because he could not maintain the upkeep and operated his practice out of the basement of his home and, at times, his automobile.

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These efforts included working at Godiva Chocolates and at a local card store as a retail sales person.

Island school districts.³ He earned approximately \$105.00 per day (\$550.00 per week or \$18,000.00 per year) in this latter employment effort. Thereafter, the Husband began work in a not-for-profit entity known as the Authors Playhouse,⁴ but has been employed since September 2008 as a teacher by the Los Angeles County School District (LACSD). The Husband's 2007 tax return reflects gross annual income of \$23,632.87. His 2009 Updated Statement of Net Worth reflects monthly gross income from the LACSD of \$4,563.74 or \$54,674.88 annually. He also receives \$801.11 per month from his New York City Teachers Retirement System (NYCTRS) or \$9,613.32 annually for a total of \$64,378.20.

The parties' marriage was apparently often tumultuous, marred by frequent disputes over finances and fidelity and the subject of several episodes in which the Husband left the marital residence for extended periods of time (1989, 1992, 1995 and 2005). In particular, the Wife claimed that her Husband was involved in several extramarital affairs and estranged himself from his family. She also maintained that he had little if anything to do with either maintaining the household or the parenting of their son Ross during the marriage. Thus, she claimed that she provided "virtually" all the support in this regard. At trial she also urged that the Husband's misconduct in losing his law license and thereafter in his termination from employment as a teacher in New York City, should result in imputed income that could have been otherwise earned by him during the marriage. The Husband maintained that he was indeed involved with his family and child but that he suffered hard luck, misfortune and indeed a "reversal of fortune," such that he exercised his best efforts to be a parent and financial provider. He also argued that other than one year in which he received a large contingency fee for a referral of a case, he never earned more as an attorney than he earned as a teacher.

The Court finds that during the marriage, that the Wife provided a substantial share of the financial and day- to-day support in maintaining the household and in particular, in raising Ross. This included working full-time, being the primary caregiver for their son⁵ and as noted elsewhere, providing for the consistent and reliable income flow the family enjoyed. In this regard, the Court

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These districts included Bay Shore, Smithtown, Hauppauge, Three Village and Long Beach.

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The Husband testified that he invested \$25,000.00 of the approximately \$30,000.00 monies he received as a lump sum longevity pension payment for his work as a volunteer fireman with this organization. See *infra*. He also testified that while this entity was hoped to have been economically viable, it went bankrupt.

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The Wife testified that she engaged in virtually all of the household duties with no assistance from the Husband during the marriage that included cooking, cleaning, yard work, doing the laundry, along with "always" doing homework with Ross, arranging for his play dates and attending to his doctors appointments, in addition to her full time work as a teacher. A babysitter was hired to assist the Wife to help her get Ross ready for school notwithstanding the fact that the Husband was frequently at home during the morning hours. The Wife also indicated that she similarly "completely parented" her daughter, Alyssa, with no help from her Husband. She did concede that the Husband coached Ross' soccer team for two (2) years and took the garbage out. The Husband, claimed that he shared parenting and household duties with the Wife by doing "housecleaning and yard work" when they were first married, installing a waterfall and trees in the back yard and by coaching both Ross' soccer and possibly (he was not sure if this involved Ross or Matthew), his playing with a baseball team.

finds that while the Husband provided some support toward these efforts, it was limited, sporadic, unreliable and inconsistent. In this regard, based on these findings and elsewhere herein, the Court finds that the "economic partnership" between the parties was limited to the degree indicated.

The Court finds no basis to impute income to the Husband beyond his reported earnings on the factual conclusion that while he surely exercised extremely poor judgment in conduct that resulted in his disbarment from the practice of law which theoretically reduced his potential earning capacity to some marginal degree, he nonetheless generally (although at times inconsistently) acted to earn income during the marriage⁶ and has resumed full time work as a teacher at a salary range commensurate with his average earnings as a lawyer.

At the commencement of trial, the parties stipulated that the Wife's Merrill Lynch account [#P 840-26R36] is her separate property and was derived from her inheritance monies. See *infra*. The parties also stipulated that the marital residence located at 22 Harding Street, Smithtown would be sold by a broker appointed and at a price set the Court.

B. The Marital Residence

In late 1987, prior to the marriage but after the parties began dating, the Wife purchased a home located at 5 Brasswood Street, St. James, New York. This home was deeded to and carried a mortgage solely in the Wife's name because the Husband had credit difficulties.⁷ The Wife claimed that she used \$75,000.00 of proceeds from the sale of a cooperative residence previously owned by her in East Meadow, New York but did not produce any records, such as a closing statement to substantiate this assertion. The Husband maintained that he also paid \$75,000.00 for both the down payment and closing costs of this dwelling out of his separate funds, from the sale of his prior residence from his first marriage but was similarly unable to produce any documentary records.⁸ The Court has carefully considered the respective credibility of the parties on this issue in the context of the totality of circumstances presented in the record and in so doing accepts the Wife's claims that she paid \$75,000.00 of her separate funds for the purchase of the residence but rejects the Husband's assertions as unworthy of belief.

The Husband acted as the parties' attorney at the closing of this property. The Wife testified that from at or about the time the parties first began to reside in the Brasswood home in late 1987, the Husband initially contributed to the upkeep of the marital residence. She further testified that the Husband contributed to the household following the marriage and thereafter on an inconsistent and sporadic basis; sometimes he would provide her as much as \$3,000.00 per month, after 1989 this amount was reduced to \$2,000.00 per month, that after 1991, this amount was not greater than

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As previously outlined, he commuted for six hours each day by mass transportation for a two year period to sustain these efforts.

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The Husband claimed that they purchased the home "together" but conceded that title was in the Wife's name alone to do "credit problems."

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The Defendant also claimed that he paid \$8,000.00 for an in-ground pool prior to the marriage but was also unable to produce any documentary proof in support of this testimony.

\$1,000.00 per month and that sometimes the amount would be nothing or a little as \$200.00 per month.

The Court finds that the Husband contributed sporadically and thus, infrequently to the expenses required for the upkeep of the marital residence, certainly after the first several years of the marriage, (and thus throughout the majority of the marriage). The Court further finds that any difference in what he did provide to the Wife to meet household expenses (that ran as high as \$5,000.00 per month) was contributed by the Wife, who used both marital income and funds she obtained from a \$100,000.00 inheritance from her brother, from her mother and thereafter from a \$675,000.00 inheritance from her mother's estate. The Wife testified that she paid the electricity, oil, and telephone payments for the home and the at times these were shut off because she did not have the money to meet these obligations.⁹

The parties lived in the Brasswood residence until 2002 when they sold the St. James home and purchased a new residence located at 230 Harding Street, Smithtown. The sale of the St. James home netted approximately \$230,000.00 after application of the gross proceeds to the mortgage payoff and closing costs, which funds were applied to the down payment of the new home.¹⁰ The Wife testified that she used her inheritance monies to make certain improvements and repairs to this dwelling. Documentary evidence was introduced that reflected a payment by her of \$2,982.00 for a granite kitchen counter, \$2,124.08 for carpeting, \$5,141.00 for hardwood floors, \$2,300.00 for painting \$1,048.00 for appliances, \$675.00 for roof damper repairs and \$3,860.00 for flooring. These claimed expenses total \$16,331.00. Documentary proof was introduced into evidence of the payoff of the mortgage on the marital residence by the Wife in the amount of \$10,000.00. The Harding property was appraised at \$550,000.00 as of January 19, 2007 and \$435,000.00 as of January 12, 2009. The Husband vacated the marital residence in 2005 and never returned.

As outlined, supra, at the commencement of trial, the parties stipulated that the marital residence would be sold, that the listing price (based on appraisals admitted in evidence) and broker would be determined by the Court.

C. The Vermont Condominium

During the marriage, the Wife purchased a one quarter share studio condominium in her name only in Mt. Snow, Vermont.¹¹ In 2004, this property was sold and the Wife purchased a quarter share of a one bedroom condominium on Mt. Snow in Vermont. She testified that she paid

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The Wife maintained that she was "living off her inheritance" but nonetheless purchased a horse in 1999 for \$10,000.00 and a second horse in 2003 for \$20,000.00 out of these monies as well. The Husband claimed that the Wife had sufficient monies for household expenses as reflected by her purchases of the horses and along with the fact that she had cosmetic surgery "numerous times" and went on separate vacations during the marriage.

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According to the Wife, the St. James property was sold for approximately \$530,000.00 and the Smithtown residence was purchased for approximately \$435,000.00.

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The Husband testified that this was undertaken for the same reasons outlined above as for the purchase of the marital residence.

for this with \$54,598.00 of funds from a Merrill Lynch investment account that she funded from monies she received from her mother's estate. The Wife also testified that she used her inheritance monies to make improvements on this residence. The Husband testified that he and his wife discussed "upgrading" and that the funds used to purchase the one bedroom unit were derived from the sale of the studio unit. The Court finds that the Vermont Condominium is the separate property of the Wife.

D. The \$7,000.00 Note Dated January 12, 1988

The Husband provided services as an attorney on the 1987 closing concerning the Wife's East Meadow cooperative outlined above. The Wife testified that following the closing but still prior to the marriage, she realized that \$8,000.00 in funds payable to her and held by the Husband in his escrow account had not be paid to her. According to the Wife, the Husband admitted that he owed her the money. Thereafter the parties agreed that the Husband would pay her \$1,000.00 immediately and owe the Wife \$7,000.00. The \$1,000.00 was evidently paid and the Husband executed a demand promissory note dated, January 12, 1988, in the amount of \$7,000.00 due with 10% interest due on demand to the Wife (who then was known as Doreen Ridolf) after January 13, 1989. According to the Wife, no monies were ever repaid of this amount by the Husband. The Husband claimed that his mother repaid this amount to the Wife but no documentation to support this assertion was provided. There was no claim that the Wife made a demand for payment or that an action was commenced to recover these funds from the Husband.

E. A \$7,000.00 Loan

The Wife testified that the Husband borrowed \$7,000.00, from her for his "practice" in or about 1995 and that she provided these funds out of inheritance proceeds she received from her brother's estate. The Husband testified he borrowed this money in or about 1997, believed he told her it was for his "business," and that his mother re-paid this amount to the Wife at some point in time thereafter. No documentation was provided whatsoever to support either claim. The Court finds no basis in the record to grant the Wife a credit for this money.

F. Pensions and Retirement Accounts

The Wife has a defined benefit plan and a defined contribution plan with the New York State Teachers Retirement System valued respectively at \$310,902.71 and \$54,326.65 for a total of \$365,229.36.

As briefly outlined above, the Husband received a lump sum payment of approximately \$30,000.00 in 2003 as a length of service award for his work as a volunteer fireman.¹² He receives \$801.11 per month from his NYCTRS pension, or \$9,613.32 annually, which has been in payout status since October 8, 2003.

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At trial, the Husband's attorney maintained that these funds were not a marital asset subject to equitable distribution as a matter of law. This claim has not been substantiated notwithstanding the Court's invitation to provide legal support for this claim. Indeed, the Husband's post-trial submission reflects a request that the Wife be awarded fifty percent (50%) of the marital portion of these monies.

G. Child Support

The award of child support is made in accordance with Domestic Relations Law §240(1-b) and is based upon the following findings:

- (a) The child of the marriage entitled to receive parental support is Ross Daniel Glassberg, born, February 20, 1989.
- (b) The gross annual income of the Wife, who is the custodial parent, is determined to be \$118,163.00 per year. Social Security and Medicare taxes are 7.65% (the first \$102,000.00 capped for Social Security) or \$8,037.36 for a total income of \$110,125.64.
- (c) The overall annual gross income of the Husband, is \$64,378.20 per year. Social Security and Medicare taxes are 7.65% of gross income, or \$4,924.93, for a total income of \$59,483.26.
- (d) The combined parental income is \$169,578.90.
- (e) The applicable child support percentage is 17%.
- (f) The basic child support obligation is \$261.54 per week for the income up to \$80,000.00, basic child support for the income over \$80,000.00 is \$292.85 per week.
- (g) The non-custodial parent's pro rata share of the basic child support obligation, calculated at thirty-five percent (35 %) is as follows:
 - (i) \$190.04 per week;
 - (ii) thirty-five percent (35%) of future reasonable health care expenses not covered by insurance.
- (h) The non-custodial parent's pro rata share of the basic child support obligation is neither unjust nor inappropriate. Based upon the standard of living Ross would have enjoyed and the financial resources of the parties, the statutory formula will be used for the total income above \$80,000.00 per year.

For purposes of determining retroactive child support as requested by the parties in their Protracted Matrimonial Trial From, the Court determines the parties gross annual income for the years indicated based on the evidence presented at trial and filed Statements of Net Worth as follows:

2005: Wife: \$108,377.00; Husband: \$32,000.00
2006: Wife: \$118,218.00; Husband: \$36,000.00.
2007 to present: Wife: \$118,163.00; Husband \$64,378.20.

H. College Expenses

The parties' son, Ross, attends the State University of New York at Oswego, at an annual cost for room, board and tuition of approximately \$17,000.00 per year. The Wife testified that she

has paid for some of these expenses out of her income and inheritances along with loans she has obtained in her own name in the amount of \$3,400.00. Ross has evidently contributed to these costs with a student loan in his name in the amount of \$5,100.00. The Wife has requested that the Husband be responsible for one half of Ross' college expenses. The Husband has not contributed anything to these costs but stated his willingness to pay for his pro-rata share of these expenses.

I. *Pendente Lite* Arrears

By Order dated September 18, 2006, this Court (Pasteressa, J.) granted the Wife's application by motion for *pendente lite* relief to the extent that the Husband was directed to pay child support in the amount of \$500.00 in temporary child support and \$175.00 towards the carrying charges on the marital residence retroactive to the date of the service of the Wife's motion, along with fifty percent (50%) of all reasonable and necessary unreimbursed hospital, medical, dental and pharmaceutical expenses incurred by Ross. Thereafter, following the Husband's non-payment of child support, on application of the Wife, the Court directed that a money judgment in her favor be entered against the Husband in the amount of \$7,998.00 plus \$220.64 in interest for a total of \$10,018.64, by Order dated February 25, 2008, which was duly filed with the Suffolk County Clerk on May 1, 2008. An income execution was additionally undertaken by the Wife against the Husband on January 28, 2008 against the Husband's New York City pension for both the non-payment of child support and carrying charge amounts as directed. As of February 10, 2009, the Husband owed the Wife an additional \$8,775.00 in *pendente lite* arrears calculated at \$675.00 per month for the thirteen (13) months from the Court's Order dated February 25, 2008.

J. Tax Issues

The Husband testified that during his first two (2) years in the practice of law, and thus prior to the marriage, he incurred a \$15,000.00 tax liability to the I.R.S., which has increased with interest and penalties to \$50,000.00 and is still outstanding. The Wife testified that this amount was paid to the I.R.S. out of marital funds, but did not know when this occurred. She requested a credit of \$25,000.00, representing one half of this amount. The Husband testified in a similar fashion. No documentation was produced on this issue at all at trial. The Court finds that there is an insufficient basis in the record to award the Wife the requested credit.

The Wife testified that she filed her tax return as head of household in 2005. She further testified that although she was supposed to receive a refund of \$6,226.00, \$3,713.43 of this amount was withheld from her due to the Husband's pre-marriage law school loans that had not been repaid. She also testified that \$2,279.00 was withheld from a refund she was expecting from the parties' 2004 joint return due to the Husband's failure to report \$5,000.00 in income for that year. She has requested a credit for these amounts against any equitable distribution awarded the Husband.

K. Automobiles

Prior to trial, the parties advised the Court in their submitted Protracted Matrimonial Trial From that a 2004 Audi, titled in the Wife's name was a matter for equitable distribution. The Wife related in her Statement of Proposed Distribution that she bought his vehicle from her mother's inheritance and in the same filing, additionally identified a "2000 Nissan Sentra," purportedly "Traded in by Defendant during the course of the matrimonial action in violation of TRO," as a marital asset. At trial, other than a passing reference by the Husband to several cars bought by the Wife during the marriage, no evidence was presented on either vehicle.

L. Two Horses

As briefly discussed supra, the Wife purchased two horses, "Dandy" and "Murphy," during the course of the marriage out of funds derived from her inheritances. Dandy was purchased in 1999 for \$10,000.00 from her Merrill Lynch account which was funded from her brother's inheritance and Murphy was purchased in 2003 for \$20,000.00, also from this account out of funds derived from her mother's estate. The Court rejects the Husband's claims that the horses are marital assets as without sufficient record basis and thus, based on the facts presented, finds them to be the separate property of the Wife.

M. Two Oil Paintings

Prior to trial, the parties identified "two oil paintings" as a matter for equitable distribution by the Court. The Husband has conceded in his post-trial submission that during trial, he acknowledged that his paintings were given to the Wife by her mother and that as such, they are deemed her separate property.

N. Miscellaneous Personalty

The parties identified "various furnishings" in their filed Protracted Matrimonial Trial Form as an item for equitable distribution resolution by the Court. The Wife's Statement of Proposed distribution related that "Various furnishings (Dining Room/Living Room/Bedroom Set)" were "Premarital and/or inherited by Wife from Mother." No evidence was presented relative to these matters at trial.

O. Attorneys Fees and Reallocation of Expert Witness Fees

The parties agreed to submit their applications and response for attorneys fees to the Court on paper. It will be subject of a separate decision issued by the Court.

II. CONCLUSIONS OF LAW

- A. Jurisdiction as required by §230 of the Domestic Relations Law has been obtained and the requirements of Domestic Relations Law have been met.
- B. The Wife is entitled to a judgment of absolute divorce against the Husband herein upon the grounds of constructive abandonment based on the stipulation noted above.
- C. The Wife has taken, or will take, all steps solely within her power to remove all barriers to each other's remarriage following the divorce.
- D. The Wife may, but is not required, to resume the use of her maiden name.
- E. The Court is mandated pursuant to Domestic Relations Law §236B(5)(d), to consider thirteen (13) factors in making its decision as to the equitable distribution of the marital property.
 - 1) Income and Property - As outlined elsewhere herein;

- 2) The duration of the marriage and age and health of the parties - The marriage was for approximately seventeen (17) years; the Wife reports that she suffers from back ailments and the Husband indicates his health to be good;
- 3) The need of custodial parent to occupy or own the marital residence - The marital residence will be sold and the proceeds divided on the proportionate basis between the parties as directed herein;
- 4) The loss of inheritance and pension rights - The economic impact of the former is difficult to determine; the latter is the subject to the Court's determination herein;
- 5) An award of maintenance - Not applicable;
- 6) Direct and indirect contributions - The Husband contributed only sporadically and unreliably to the maintenance and upkeep of the marital residences as outlined elsewhere herein, plus the Wife provided substantially more financial support to their economic partnership throughout the marriage;
- 7) The liquid or non-liquid character of the property - The major marital asset in contention is a the marital residence and pensions;
- 8) The future financial circumstances of the parties - As outlined elsewhere herein;
- 9) The difficulty of valuing marital assets - Not applicable;
- 10) The tax consequences to each party - There are some tax consequences;
- 11) The wasteful dissipation of assets -Not applicable;
- 12) Transfers in contemplation of action - As outlined elsewhere herein.
- 13) Other factors - The Husband was out of the household for substantial periods of time during the marriage, suffered the loss of his license to practice law, and was terminated with cause from teaching employment.

The following items are deemed marital assets and shall be distributed in proportionate amounts, consistent with the Court's findings of facts, made elsewhere herein: the marital residence, as outlined infra; the marital portion of the Wife's NYSTRS Pension; the marital portion of the Wife's 403(b) (AXA Equitable) account; the marital portion of the Husband's NYCTRS pension (currently in pay out status) and the funds associated with the Husband's receipt of a lump sum for a length of service award as a volunteer fireman, also as outlined infra. The following items are deemed the separate property of the party specified: the Merrill Lynch account, #P 840-26R36 - Wife; the 2004 Audi - Wife; the 2 oil paintings - Wife; the 2 horses; Wife; the Vermont condo - Wife.

F. The Marital Residence

As agreed by the parties, the former marital residence shall be immediately listed at \$435,000.00, with Caldwell Banker Residential, Smithtown, New York, 11787, Telephone, (631)863-9800. It shall be reduced three percent (3%) every sixty (60) days or at such amounts as

the parties may otherwise agree until it is sold to a ready willing and able purchaser. The parties will be obligated to accept any offer from a such a buyer within five percent (5%) of the then-asking price. The proceeds of this sale are to be distributed between the parties with the Wife to receive sixty-five percent (65%) of the net proceeds and the Husband to receive thirty-five percent (35%) of the net proceeds. *Guha v. Guha*, _AD3d_, 2009 NY Slip Op 02748 (2nd Dept 4/7/09); *Arigo v. Arigo*, 38 A.D.3d 807; *Booth v. Booth*, 24 A.D.3d 1238; *Schiffmacher v. Schiffmacher*, 21 A.D.3d 1386; *Hathaway, v. Hathaway*, 16 A.D.3d 458. The Wife is granted the following credits against the Husband's share of this marital asset: \$75,000.00 for the separate funds she expended for the down payment on the Brasswood home as reflected in the Court's findings of fact, supra; monies reflecting that portion of the *pendente lite* Order attributable to carrying charges that remain unpaid by the Husband as outlined above; calculated to the submission of the Judgment of Divorce, exclusive of the stipulated judgment against the husband for *pendente lite* arrears also noted supra, *Skladanek v. Skladanek*, _AD3d_, 2009 NY Slip Op 02585 (2nd Dept 3/31/09); \$16,331.00 in expenses undertaken by the Wife for the maintenance and upkeep of these premises and \$10,000.00 for the mortgage pay down she undertook as elsewhere outlined.

G. The Retirement/Pension/403(b) Accounts

Based on the foregoing findings and conclusions, the Court similarly directs that the marital portions of the Wife's NYSTRS defined benefit plan her deferred contribution account (403(b) account), are to be split with sixty-five percent (65%) to be received by the Wife and thirty-five percent (35%) to be received by the Husband. The marital portion of the Husband's NYCTRS pension currently in payout and the Husband's volunteer fireman longevity award, shall be split evenly between the parties, fifty percent (50%) to the Wife and fifty percent (50%) to the Husband. *Majauskas v. Majauskas*, 61 N.Y.2d 481.

H. Personalty

The parties are directed to exercise diligent efforts to attempt to agree with respect to any items of personalty remaining in the marital residence or existing elsewhere still in dispute. If the parties fail to agree within thirty (30) days of the entry of the Judgment of Divorce, either party may submit an Order appointing a referee to sell said property, with proceeds to be split equally, less any appropriate fees and costs.

I. The \$7,000 Promissory Note Dated January 12, 1988

A cause of action to recovery on a promissory note payable on demand accrues at the time of its execution. *Sce v. Ach*, 56 A.D.3d 457, citing *Lynford v. Williams*, 34 A.D.3d 761, 762. The statute of limitations applicable in an action to recover on a promissory note is six (6) years. CPLR 213(2); see *Sce v. Ach*, supra. This note was executed approximately twenty (20) years ago and as such it is not enforceable.¹³

J. Child Support and College Expenses

The Husband shall pay to the Wife child support in the amount of \$194.04 per week. Child

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The Court is aware that the assertion of the statute of limitations is a defense [CPLR 3018(b)], but such defense in a matrimonial action is not normally pleaded.

support shall commence on May 1, 2009 and shall continue until Ross reaches the age or 21 years, becomes emancipated, enters the military, marries or dies. This obligation will be retroactive to commencement and calculated and credited against retroactive child support owed by the Husband as elsewhere directed herein. The Husband shall pay thirty-five percent (35%) of all reasonable and necessary uninsured medical, psychological, pharmaceutical and dental expenses of Ross, with the Wife responsible for the remainder, or sixty-five percent (65%). The Wife shall continue to maintain all existing medical, hospitalization and dental insurance for the benefit of Ross. The Judgment of Divorce shall contain the Court's determination of prospective child support obligations, along with the computation of retroactive child support based on the findings of fact made elsewhere herein on that issue and the monies actually paid by the Husband. *Grosbeck v. Grosbeck*, 51 A.D.3d 722¹⁴. The parties shall be responsible for the reasonable tuition, room, board, books and school fees expenses incurred by Ross for college, with the Wife paying sixty-five percent (65%) of these amounts and the Husband paying thirty-five percent (35%) of these amounts until Ross reaches the age of 22 years, becomes emancipated, enters the military, marries or dies. The Husband shall tender such proportionate payments directly to the academic institution in question in the case of tuition, room, board and fees, not later than thirty (30) days after the written submission of such bills to him with appropriate credit for college expenses. *Levy v. Levy*, 52 A.D.3d 717. Pursuant to DRL §240(2)(b)(2), the Husband shall pay child support to the Wife by Income Deduction Order through the Suffolk County Support Collection Unit, through the New York State Child Support Processing Center, P O Box 15363, Albany, NY 12212-5363. Each party shall furnish to counsel his or her Social Security numbers which shall be included in the Divorce Judgment.

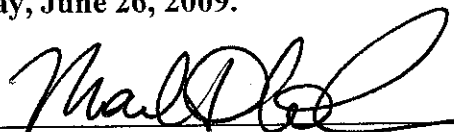
K. Tax Issues

The parties shall be allowed to claim Ross as a dependency exemption for federal and state income tax purposes as follows: To the extent applicable, the Wife will have such exemptions for the tax years 2009 and 2010, while the Husband will have such exemption for the tax year 2011. Thereafter, the parties will have the exemptions as applicable, with the Wife having it in even years and the Husband having it in odd years. Both parties shall fully cooperate with the other by executing all necessary papers and forms to permit the filing of these claimed exemptions, including without limitation IRS Form 8332. The Wife shall be granted a credit of one-half of \$3,713.43, plus \$2,279.00, or one half of \$5,992.43 or \$2,996.21 in monies she should have received in tax refunds but were not refunded to either tax defalcations or loan re-payment failures by the Husband.

- L. The Husband shall maintain a minimum of \$20,000.00 in decessing term life insurance on the Wife's life, naming Ross as an irrevocable beneficiary until he reaches the age of 22 to secure his responsibilities under this decision and prospective Judgment of Divorce.

This constitutes the decision of the Court. The Plaintiff wife shall submit a final judgment on notice pursuant to the Uniform Rules on or before **Friday, June 26, 2009**.

Dated: April 15, 2009
Riverhead, NY


HON. MARK D. COHEN, J.S.C.