

Plaintiff, Toni Fleischmann, age 51 (“Toni” and/or “Plaintiff”), and Defendant, Stuart Fleischmann, age 52 (“Stuart” and/or “Defendant”), were married on December 27, 1980. They have three children: Matthew Fleischmann, age 20; Michael Fleischmann, age 18; and Jenna Fleischmann, age 15.

This action for divorce was commenced on January 23, 2006. By Stipulation and Order dated January 3, 2007 (the “January 2007 Stipulation”) grounds for divorce were resolved in favor of Plaintiff and against Defendant on the ground of constructive abandonment. The inquest took place on December 19, 2006 with the entry of judgment being withheld pending final determination and resolution of all equitable distribution issues.

Through the January 2007 Stipulation, the parties also agreed: to shared residential and physical custody of the children; to the sale of the marital residence located at 7 Campden Road, Scarsdale, New York (the “Campden Residence”); to purchase two new residences in or around Scarsdale to facilitate the shared custodial arrangement; and to an advance of \$100,000 each from the proceeds of the sale of the marital residence.

The parties physically separated in March 2007 to live in their respective residences. Stuart now resides at 26 Doris Drive, Scarsdale, New York (the “Doris Residence”), while Toni resides at 51 Windsor Road, Scarsdale, New York (the “Windsor Residence”). There is no dispute that these two properties are the parties’ respective separate property. Pursuant to the January 2007 Stipulation, the children have been going back and forth between these two households.

The trial of the remaining issues in this case relating to such matters as equitable distribution, spousal maintenance and child support, were tried on May 7, 8, 28, 29 and 30, August 13 and 14 and October 15, 16 and 17, 2008.

During the trial, various stipulations were reached.

The first obviated the need for calling to the stand the Court-appointed neutral forensic accountant, John Johnson, CPA, of BST Valuation & Litigation Advisors, LLC (“BST”). The stipulation reads as follows:

BST valued the Defendant, Stuart Fleischmann’s Law License (hereinafter the “License” or “EEC”) as of December 31, 2005 at \$2,800,000. The marital component of the License was valued by BST at \$1,400,000 as of December 31, 2005, based upon the fact that Defendant had completed one-half of his law school education prior to the date of the parties’ marriage. The License valuation performed by BST was based on the present value of the Defendant’s annual enhanced earnings between November 26, 2005 and November 26, 2025.

The parties also came to terms by agreeing that each would retain their individual IRA accounts at Morgan Stanley (since they are virtually of equal value), that they would file joint income tax returns for the year 2007, and that the issue of counsel fees would be determined on paper.

This Trial Decision follows the close of trial and the submission of post-trial memorandums of law as originally scheduled and as thereafter extended upon request, all of which have been duly considered by the Court. The principal issues to be decided deal with Toni’s interest in Stewart’s law license and partnership interest, the amount and duration of maintenance and child support. Defendant, through counsel, notes in his post-trial memorandum that he has always offered

... from the beginning of the case to equally divide all of the tangible marital assets and liabilities, including personal property, cash bank accounts, securities accounts and pension plans. . . . He has agreed to pay basic child support without reduction based on the fact that the children live with him 50 percent of the time, as well as customary college expenses for the unemancipated children [as further set forth in the memorandum].

Defendant makes clear that his position still stands, and the Court will proceed under that premise.

Stewart graduated, cum laude, with a Bachelor’s of Arts degree in Government and Philosophy from Georgetown University in May of 1978, two years before the parties’ December 27, 1980 marriage. After working as a paralegal in a Washington D.C. law firm for approximately one year, in September 1979 Stewart enrolled as a full-time student in Villanova Law School where he would complete one-half of his law school curriculum prior to the parties’ marriage. All of the direct costs associated with Stewart’s law school education were paid through academic scholarships including a full scholarship in his third year, gifts from his parents, savings accumulated prior to the date of the marriage, and monies earned through Stewart’s summer employment during the marriage. Stewart would eventually graduate second in his class, earning several academic distinctions such as Dean’s List, Order of the Coif, and Law Review.

Toni obtained an Associates Degree from Union County Technical Institute prior to the marriage. Thereafter, Toni became a licensed dental hygienist after which she secured employment in such capacity. In August 1980, several months before the marriage, Toni began attending Rutgers University with a view towards completing her undergraduate education.

Upon marriage, the parties moved into an apartment in Pennsylvania near Stuart’s law school, but quite a distance from Rutgers University New Jersey campus where Toni was then attending school. Consequently, during the school week, Toni either stayed with Stuart’s parents who reside in New Jersey or commuted back and forth the rather long distance between school and home. While devoting time to her studies at Rutgers, Toni also worked part-time at a dentist’s office. In short, during this period of the marriage, both parties devoted much time pursuing their respective careers.

Stuart graduated from law school in May of 1982. He took and successfully passed the July 1982 Bar Examination. During this period, Toni completed her education at Rutgers University. She then secured a position at NYU Medical Center as an administrative liaison in the anesthesia department.

Following Stuart’s unwavering efforts marked by the submission of numerous applications, hundreds of telephone calls, related follow-up letters, and travel to New York on numerous occasions for initial and follow-up interviews in pursuit of various positions, Stuart ultimately secured a position at the New York City law firm of Shearman & Sterling where he continues to be employed. Toni did not directly assist Stewart in this endeavor and her indirect efforts, if any, can only be described as marginal, at best, given the parties’ then recent marriage, childless status, and devotion and focus on her own career goals.

By the time Stuart began his career with Shearman & Sterling in October 1982, the parties had relocated to New Jersey. It was at this time that Toni also started working for NYU Medical Center. Stuart would make his commute from New Jersey to the Wall Street area by driving to the train station and then taking the train to Manhattan. His workday was long. He also worked many weekends. Toni neither referred any clients to Stuart nor assisted him in bringing in any clients to his office.

On the other hand, upon Stewart’s request, Toni would attend business events/functions and would host clients or co-workers, as the case may be.

While still childless and with similar vigor, Toni worked towards her own career. After graduating with a BA from Rutgers, Toni worked for NYU Medical Center for approximately eighteen months. Thereafter, she ceased employment and entered a graduate program at Rutgers University to secure a Master’s Degree in Allied Health. For the most part, these educational costs were paid for from Stuart’s earnings. As Stuart was moving forward with his career, so was Toni.

Upon attaining her Master’s Degree, Toni became a marketing consultant for Metropolitan Life Insurance Company where she worked from September 1986 to April 1989 earning as much as \$48,000 annually, during the last eighth months of which she was a pregnant with the parties’ first child, Matthew. As agreed to by the parties (at least up until sometime after the commencement of this action), Toni has not returned to the work force and, instead, has dedicated the next seventeen years of her life to raising the parties’ children, as she and Stewart had agreed.

Immediately after their marriage and up until the time that Toni stopped working, the parties pooled their employment earnings and otherwise shared their financial resources from whatever source.

During Stuart's first three years at Shearman & Sterling, Stuart worked twelve hour days and some weekends. From 1986 through 1989 when the parties' first child was born, his hours remained virtually the same. Stuart would bill approximately 2,500 hours a year through 1986 and between 2,500 and 2,900 hours in 1987, with billable hours from 1989 forward of over 3,000 hours per year. Up until the time that the first child was born, however, the parties shared on a relative equal basis, the responsibilities of the household with Stewart, however, contributing the bulk of the parties' income.

Stuart became a partner in November 1990 with a partnership interest in Shearman & Sterling of 0.486 percent. While Stuart earned the vast majority of income throughout their marriage, Toni's devotion to the household and the children certainly allowed him that opportunity.

After their first child was born and with Stuart devoting such a great amount of time and energy to his career, Toni assumed the bulk of the responsibilities of the day-to-day operation of the household including attending to the daily physical, educational, extra-curricular, emotional and special needs of the children as they came along. Such endeavors included dealing with tutors to address the children's special needs and, on weekends, accompanying the children on play dates, sporting events, parties and other social activities. It's important to note, however, the parties' first child would not be born until Stewart was on the verge of becoming a partner.

EQUITABLE DISTRIBUTION

VALUATIONS

Value of the Marital Component of the Law License

By Order dated August 2, 2006, John Johnson, a principal of BST, was appointed the neutral accountant/valuator in this matter. As earlier stated, during the trial, the parties stipulated as follows, thus obviating the need for Mr. Johnson's testimony:

BST valued the Defendant, Stuart Fleischmann's Law License (hereinafter the "License" or "EEC") as of December 31, 2005 at \$2,800,000. The marital component of the License was valued by BST at \$1,400,000 as of December 31, 2005, based upon the fact that Defendant had completed one-half of his law school education prior to the date of the parties' marriage. The License valuation performed by BST was based on the present value of the Defendant's annual enhanced earnings between November 26, 2005 and November 26, 2025.

Thus, using the 50 percent coverture to the \$2,800,000 value of Defendant's law license, the value of the law license for equitable distribution purposes is \$1,400,000.

The Johnson Stipulation further provides: "Any monies included within the December 31, 2005 BST valuations which were subsequently distributed and proven to be equitably shared by the Plaintiff shall be an offset against any monies owed to the Plaintiff by the Defendant." As stipulated, the law license valuation captures the Defendant's future income for the next seventeen years; therefore, 2009 through 2025. Since, except as otherwise herein noted and accounted for, there has been no such distributions to Plaintiff, no adjustment need be made. Unless otherwise indicated, monies paid by Defendant to Plaintiff since the commencement of the action were for spousal and child support, paid either directly to or on behalf of Plaintiff, and are not deemed advanced distributions of Defendant's Law License or practice or otherwise amount to a credit to Defendant from Plaintiff. Thus, contrary to Defendant's argument, it is not appropriate to remove from the calculation of the value of the Law License or the practice defendant's income from November 25, 2005 through January 5, 2009, as argued by Defendant.

VALUE OF DEFENDANT'S PARTNERSHIP INTEREST

That aspect of the Johnson Stipulation relating to Stewart's partnership interest in 0.486 percent of Shearman & Sterling reads as follows:

BST valued the Defendant's .05 percent partnership interest in the law firm of Shearman & Sterling, as of December

31, 2005. BST valued Defendant's interest based upon the partnership agreement in effect on January 23, 2006 (the date of commencement of the instant action). BST concluded the value of the Defendant's partnership interest was \$322,000 if the Defendant retained the entirety of the HR10 and employee pension plan accounts in his name (employed as offsets under the agreement formula) or \$709,000 if the HR10 and employee plans are divided between the parties by the Court. The lower value of the partnership interest (to wit: \$322,000) is based upon the fact that the Defendant would assume all of the income tax burden on the HR10 and Employee Pension Plan since the monies distributed to him upon retirement would be taxed at that point. Both of the foregoing valuations include the value of the Defendant's capital account (to wit: \$1,119,906, as of December 31, 2005).

At the outset, the Court concludes that the HR10 and employee pension plans will be divided between the parties in kind through the vehicle of a qualified domestic relations order ("QDRO") or direct roll-over to an IRA. As such, the Court accepts \$709,000 as the value of the Stewart's partnership interest in Shearman & Sterling.

DISTRIBUTION

The statutory factors that must be considered by a trial court upon rendering a determination of the equitable distribution of marital assets are set forth in Domestic Relations Law §236(B)(5)(d) as follows:

(1) the income and property of each party at the time of marriage, and at the time of the commencement of the action; (2) the duration of the marriage and the age and health of both parties; (3) the need of a custodial parent to occupy or own the marital residence and to use or own its household effects; (4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution; (5) any award of maintenance under subdivision six of this part; (6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party; (7) the liquid or non-liquid character of all marital property; (8) the probable future financial circumstances of each party; (9) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party; (10) the tax consequences to each party; (11) the wasteful dissipation of assets by either spouse; (12) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; (13) any other factor which the court shall expressly find to be just and proper.

(1)(a) ANNUAL INCOME:

The annual income of Plaintiff at the time of marriage was \$4,369.00 and at the time of the commencement of the action was zero. Defendant's annual income at time of marriage was \$2,100.00 and increased to an annual income of \$1,039,674.00 by the date of commencement.

(1)(b)(i) PROPERTY AT TIME OF MARRIAGE

Neither Plaintiff nor Defendant had any property to speak of at the time of marriage. Both were newlyweds who were still working towards career goals and who were yet to amass any assets worthy of consideration in the context of this action.

(1)(b)(ii) PROPERTY AT COMMENCEMENT OF ACTION

As agreed to by the parties, soon after the action was commenced, Plaintiff received \$970,000.00 in cash, \$870,000 from the division of the parties' joint Citibank investment account and an additional \$100,000 from the net proceeds derived from the sale of the marital residence. This was used by Plaintiff for an all cash purchase of an \$870,000.00 residence. Plaintiff still possesses the \$100,000 cash balance.

(2) PERSONAL DATA

As is more fully set forth above, this is a marriage of approximately 25 years, where both parties are in good health. At the time of this Decision & Order, Plaintiff is 52 as is Defendant.

(3) MARITAL RESIDENCE

As earlier indicated, the former marital residence has since been sold with both parties purchasing substituted separate homes.

(4) INHERITANCE/PENSION RIGHTS

See *infra*.

(5) MAINTENANCE AWARD SOUGHT

See *infra*.

(6) Equitable claim to, interest in, or direct or indirect contribution made to acquisition of marital property by party not having title.

See *supra*.

(7) LIQUID OR NON-LIQUID CHARACTER OF MARITAL PROPERTY

Both parties have received approximately almost One Million Dollars in cash. There is still approximately One Million Dollars in liquid assets yet to be distributed.¹

(8) PROBABLE FUTURE CIRCUMSTANCES OF EACH PARTY

With due regard to the accumulation and nature of marital assets, liquid and otherwise, and taking into account the award of child support and maintenance herein, Defendant's profession and Plaintiff's educational background and past work experience, the Court concludes that each party is capable and well situated to enjoy a prosperous and rewarding future, notwithstanding the break-up of their marriage.

(9) IMPOSSIBILITY OR DIFFICULTY OF EVALUATING ANY COMPONENT ASSET OR INTEREST AND ECONOMIC DESIRABILITY OF RETAINING SUCH ASSET OR INTEREST INTACT AND FREE FROM ANY CLAIM OR INTERFERENCE BY OTHER PARTY

Pursuant to the provisions of the Defendant's partnership agreement, Defendant must be awarded his HR10 and Employee Pension Plan, with due credit to Plaintiff.

(10) TAX CONSEQUENCES TO EACH PARTY

See *infra*.

(11) WASTEFUL DISSIPATION OF ASSETS BY EITHER SPOUSE

Not applicable.

(12) TRANSFER OR ENCUMBRANCE WITHOUT FAIR CONSIDERATION

Not applicable.

PLAINTIFF'S EQUITABLE SHARE
OF THE LAW LICENSE

It is well settled that the provision in Domestic Relations Law §236B(5)(c) that marital property be distributed "equitably" between the parties "does not require an "equal distribution" (see, *Arvantides v. Arvantides*, 64 N.Y.S.2d 1033, 1034; *Brough v. Brough*, 285 A.D.2d 913, 914 [3d Dept., 2001]).

Nevertheless, "it is ... incumbent upon the nontitled party seeking a distributive share of such assets to demonstrate that they made a substantial contribution to the titled party's acquisition of that marital asset' and '[w]here only modest contributions are made by the nontitled spouse toward the other spouse's attainment of a degree or professional license, and the attainment is more directly the result of the titled spouse's own ability, tenacity, perseverance and hard work, it is appropriate for courts to limit the distributed amount of that enhanced earning capacity'" (*Higgins v. Higgins*, 50 A.D.3d 852, 853, 857 N.Y.S.2d 171, quoting *Brough v. Brough*, 285 A.D.2d 913, 914-915, 727 N.Y.S.2d 555 and *Farrell v. Cleary-Farrell*, 306 A.D.2d 597, 599-600, 761 N.Y.S.2d 357; see *Vora v. Vora*, 268 A.D.2d 470, 471, 702 N.Y.S.2d 343).

(*Krfitcher v. Krfitcher*, 59 A.D.3d 392, 393 [2d Dept., 2009]).

Upon the findings of Facts herein, the Court finds that Toni contributed minimally to Stuart's obtaining of his degree and license. Thus, she is entitled to a share of ten (10 percent)

percent of the resulting enhanced earnings (see, *Krfitcher v. Krfitcher*, *supra*).

More particularly, the Court concludes that Stewart's attainment of his law license was the direct result of Stuart's "ability, tenacity, perseverance and hard work". In sum, Stuart completed one-half of his curriculum prior to the marriage. Thereafter, he continued to work hard, achieving academic honors such as Dean's list, Order of the Coif and Law Review and ultimately graduating second in his class. The entirety of Stuart's education was paid for by non-marital resources, including a full scholarship during his last year at law school and except for a modest amount of income earned during summer employment. Toni paid no part of Stuart's education from her earnings or separate property. In addition, Toni did not assist Stuart in connection with his law school or bar examination studies. During this time, Toni devoted much of her efforts to her own studies, contributing modest and unspecified earnings to the marital pot.

Toni's contributions to the marriage, laudable in themselves, are viewed by this Court as "overall contributions to the marriage rather than an additional effort to support Defendant in obtaining his license" (*Carman v. Carman*, 22 A.D.3d 1004, 1007 [3d Dept., 2005]). Thus, her share of this marital asset must be viewed differently from the distribution of other marital assets. Where only modest contributions are made by the non-titled spouse toward the other spouse's attainment of a degree or professional license, and the attainment is more directly the result of the titled spouse's own ability, tenacity, perseverance and hard work, it is appropriate for the courts to limit the distributed amount of that enhanced earning capacity (see, *Arvantides v. Arvantides*, *supra* at 1034; *Brough v. Brough*, *supra* at 916; *Gandhi v. Gandhi*, 283 A.D.2d 782, 785 [3d Dept., 2001]; *Mallet v. Mallet*, 246 A.D.2d 904, 905 [1998], *lv. dismissed* 91 N.Y.2d 1002 [1998])."

Upon consideration of the quantity, quality and directness of each parties' contributions to Stuart's attainment of his degree and license, with due consideration given to Stuart's proven aptitude, ability, tenacity, hard work, and perseverance, the Court concludes that Toni is entitled to ten (10 percent) percent of the marital component of Stuart's law license.

This is especially appropriate upon consideration of the fact that Toni, the non-titled spouse, was during this time pursuing her own educational or employment opportunities (see, *Mallet v. Mallet*, *supra* [non-titled spouse awarded no share (0 percent) of accounting degree where spouse did not interrupt his career, did not assist in studies, nor assume disproportionate share of household responsibilities]; *Flanigan-Rout v. Rout*, 17 A.D.3d 1093 [4th Dept., 2005]) [even where spouse interrupted his career, and stayed at home to care for child in order to facilitate wife's studies which culminated in a medical license, non-titled spouse only awarded 20 percent of the value of said license]; *Ochs v. Ochs*, 40 A.D.3d 1061 [2d Dept., 2007, *lv. denied* 9 N.Y.3d 810] [wife who supported husband during his last year and one-half of law school but who did not sacrifice any educational employment opportunities limited to 25 percent share of his law license]; *Vora v. Vora*, 268 A.D.2d 470 [2d Dept., 2000] [wife awarded 10 percent of husband's medical license where she sacrificed her education while husband completed his training and provided some economic support]).

PLAINTIFF'S EQUITABLE SHARE
OF PARTNERSHIP INTEREST

Now, upon consideration of Toni's equitable share of Stewart's partnership interest and associated retirement funds, the Court, upon application of the case law cited with respect to Stewart's law license, rules as follows.

The Court finds that Toni's efforts and contributions to the marriage are, for the most part, relegated to the "overall contributions to the marriage" rather than to specific contributions to the Defendant's attainment of his partnership interest. Stuart's attainment of his partnership interest was the direct result of his "own ability, tenacity, perseverance and hard work" (see, *Evans*, *supra* at p. 790), having worked long hours with thousands of billable hours leading to a steady rise to partner. The responsibilities of the household leading up to partnership were not disproportionately borne by Toni, especially when accounting for the fact that the parties' first child would not be born until Stewart was on the verge of becoming a partner. Thus, although Toni was a "stay at home" parent for all three children, it must be noted that two of the

children were born after Stewart became partner and the first child had just been born.

It cannot be ignored, however, that Stuart's attainment of partnership status, Toni became a stay at home parent who attended on a full-time basis to the needs of the children who, during this period, also attended firm events and functions and hosted clients and/or co-workers at the marital residence.

Consequently, the Court finds that Toni is entitled to an equitable share in Stewart's partnership interest of twenty five (25 percent) percent, somewhat more than the awarded equitable share of Stewart's law license when taking into account the fact that Toni's contributions to Stewart's attainment of his partnership interest and the marriage in general spanned a greater period of time than that involved in Stewart's attainment of his law license.

As such, the Court hereby awards Toni a 25 percent interest in the the \$709,000 partnership value for an equitable share of \$177,250.00.

CREDITS TO DEFENDANT FOR THE VALUE
OF THE PARTNERSHIP
INTEREST ALREADY DISTRIBUTED

The Johnson Stipulation further provides:

BST concluded the value of the Defendant's partnership interest was \$322,000 if the Defendant retained the entirety of the HR10 and employee pension plan accounts in his name (employed as offsets under the agreement formula) or \$709,000 if the HR10 and employee plans are divided between the parties by the Court ... [with] both of the foregoing valuations includ[ing] the value of Defendant's capital account [of \$1,119,906], as of December 31, 2005.

... On January 17, 2006 and April 7, 2006 (after the December 31, 2005 valuation date employed by BST), a portion of the monies reflected on the December 31, 2005 K1 employed in the valuation of Defendant's interest in his law firm were distributed by the firm to the Defendant. Defendant received \$555,601 on January 17, 2006 and \$89,200 on April 7, 2006.

... Any monies included within the BST valuations which were subsequently distributed and proven to be equitably shared by the Plaintiff shall be an offset against any monies owed to the Plaintiff by the Defendant.

Both of the alternate partnership valuations were based upon the Defendant's capital account as it existed on December 31, 2005, part of which was distributed to the Defendant in the total amount of \$1,200,402.00. The Johnson Stipulation further provides that the Defendant is entitled to a credit for any monies included within the BST valuations which were "proven to be equitably shared by the Plaintiff."

In this regard, the Court finds that Defendant received \$555,201 of the money included within the practice valuation on January 17, 2006. The next day, he deposited \$555,201 into a joint Citibank Savings Account. A portion of the funds, \$440,000, was then transferred to a joint linked checking account. Then, on January 20, 2006, Defendant transferred the \$440,000 into the joint Citicorp Investment Account. As agreed between the parties, this account was thereafter divided in half to finance the purchase of the parties' current respective homes with Plaintiff receiving \$90,000 on September 22, 2006 as and for the downpayment for the purchase of her new home and then \$773,881.74 from the account on November 6, 2006 to complete the purchase. (This is inconsistent with the distribution as reflected in Par. [1][b][iii] on Page 7). In accord with those transactions, Defendant also took a like amount from the joint Citicorp Investment Account to pay the majority of the purchase price for his home. Therefore, the Court finds that \$440,000 of partnership monies were equally divided between the parties from the December 31, 2005 capital account employed in the valuation to the equal division of the joint Citicorp Investment Account.

The equal division of the funds on deposit in the joint Citicorp Investment Account, including the \$440,000 deposited in January of 2006, results in the partial and equal distribution of the 2005 K-1 amounts. As such, Plaintiff is charged with having received \$220,000 of the monies included within the partnership valuation of December 31, 2005.

Therefore, the total amount owed to Plaintiff for her equitable share of the marital and undistributed share of the Defendant's

law license, the marital and undistributed share of the Defendant's partnership interest and the retirement funds associated with said partnership interest is as follows:

As to Defendant's law license, the value of the marital portion is \$1,400,000. Upon attributing a 10 percent equitable share to Plaintiff, the Court finds that Plaintiff is entitled to \$140,000.

With regards to Defendant's partnership interest valued at \$709,000, the higher value predicated on the in-kind division of the HR10 and employee pension plans, Plaintiff's equitable share is 25 percent or \$177,250.00.

Therefore, Plaintiff is entitled to a combined credit of \$317,250 for the law license and the partnership interest (\$140,000 plus \$177,250). Deducting the \$220,000 already paid Plaintiff by virtue of the equal division of the joint Citicorp Investment Account, Plaintiff is entitled to a net credit in this regard of \$97,250.

Having used the higher practice valuation of \$709,000, the Court directs that there be an in-kind and equal distribution of the HR10 and employee pension plan accounts by way of a direct roll-over of one-half of the monies in the Defendant's retirement account to an IRA set up for the benefit of the Plaintiff or a QDRO in a sum equal to the values as of the date of commencement, plus or minus any gain thereon, and less any post-commencement contributions.

As such, Plaintiff should receive by direct roll over to an IRA or QDRO the sum of \$483,523, one-half of the marital portion of the HR10 and employee pension plan, which is a one-half in-kind interest in the Defendant's HR10 account payable by QDRO of the HR10 plan, plus or minus any appreciation or depreciation since the date of the commencement of the action and less any post-commencement contributions by the Defendant or his firm. In addition, \$97,250 representing Plaintiff's net entitlement to a 10 percent interest in Defendant's law license and a 25 percent interest in his partnership interest, net of \$220,000, that has already been distributed to the Plaintiff in cash.

In addition, Plaintiff is released from any liability with respect to the approximately \$256,000 of indebtedness outstanding at commencement of the action with respect to the debt incurred by the parties to acquire Defendant's existing partnership interest.

EQUITABLE DISTRIBUTION CREDITS DUE THE
Defendant FOR OTHER PAYMENTS MADE BY
Defendant POST-COMMENCEMENT

Defendant has also established entitlement to the following equitable distribution credits which flow from payments that he made post-commencement:

The Court hereby awards Defendant a fifty-percent (50 percent) credit for the reduction in the principal balance of the first mortgage and second mortgages of the Campden Residence from the date of commencement of this action through March 2007 when the parties moved to separate residences (see *Charles v. Charles*, 53 A.D.3d 468 [2nd Dept., 2008][wife's share of proceeds of sale from marital residence reduced by one-half of the total of the husband's payments of principal on the mortgage]; *Palumbo v. Palumbo*, 10 A.D.3d 680, [2nd Dept., 2004][proper to reduce wife's share of proceeds of sale of marital home to credit husband with 50 percent share of money paid in reducing principal balance of mortgage]) and the aggregate amount of all principal, interest, real estate taxes, insurance and other carrying charges associated with preservation of the Campden Residence as a marital assets following the parties' vacating the same in March 2007 up until the time of sale on September 25, 2007.

In addition, Defendant is to receive a fifty-percent (50 percent) credit for all mortgage (principal and interest) payments and real estate tax payments and other carrying charges paid by him from March 2007, when both parties vacated the Campden Residence, through the date of sale. Defendant's payment of the mortgage and real estate taxes on the Campden Residence were made solely for the purpose of preserving this valuable marital asset and not for purposes of providing shelter for the Plaintiff or the parties' children (see *Weiner v. Weiner*, 57 A.D.3d 241 [1st Dept., 2008][credit allowed for 50 percent of payments made towards mortgage on the marital residence after wife moved out])

The total payments on the first mortgage and taxes for the Campden Residence from April 2007 to the date of sale is

\$36,233.61, for which the Defendant should receive a 50 percent credit in the amount of \$18,116.81. The total year 2007 payments made by Defendant on the Campden Residence second mortgage home equity loan is \$9,260.75 which when pro-rated for the applicable six out of nine months amounts to \$6,204.70, for which the Defendant receives a 50 percent credit in the amount of \$3,102.85. Thus, Defendant is entitled to a total credit for mortgage and tax payments from date of commencement through March 2007 and all mortgage and tax payments from April 2007 through the date of sale in September 2007 of \$29,684.94.²

The Court further finds that Defendant is entitled to a fifty percent credit for sums expended in connection with the expenses he contributed towards the following maintenance and repairs of the Campden Residence in preparation for its sale, both before and after both parties had moved out, such as the costs and expenses associated with painting in the amount \$1,030.00, legalization of the basement in the amount \$1,666.73, toilet and sink repair of \$1,114.18, architect fee of \$2,000.00, permit fee \$400.00, and classified advertisement of \$1,215.60 for attempted sale of Campden Residence, for a total of \$7,426.51. This is especially appropriate since Plaintiff is awarded a one-half share of the net proceeds realized from the sale of this asset (see, *Goddard v. Goddard*, 256 A.D.2d 545 [2d Dept., 1998]; *Judge v. Judge*, 48 A.D.3d 424 [2d Dept., 2008]), which, as defined, excludes the "Expenses of Sale" such as attorneys fees, transfer taxes, and brokerage commissions all of which were addressed and paid for at closing. The parties shall also share equally any capital gains thereon and any other taxes flowing from the disposition of this asset. Deducting the credits enumerated above from Plaintiff's share of the net proceeds available from the sale of the Campden Residence, Defendant should receive the sum of \$3,713.25 from the Plaintiff's share of the net proceeds available from the sale of the Campden Residence.

To effectuate the parties January 2007 Stipulation to purchase two separate residences, the marital residence was sold with the parties dividing almost the entirety of the joint Citigroup Investment Account so as to allow each enough money to purchase their own residence (the Plaintiff's Windsor Road Residence and the Defendant's Doris Drive Residence). Towards that end, each ended up with approximately \$870,000. In addition to the parties agreeing that each separately purchased home would be deemed separate property, they further agreed that each would be responsible for the acquisition and closing expenses relating to their separate residences. Toward that end, the Stipulation provided that upon the sale of the marital residence each party would receive \$100,000 from the net proceeds.

The Court further finds that the following sums expended by Defendant in connection with Plaintiff's new home should properly be credited to him: HD Television & DVD for the Windsor Residence, \$2,760.00; Title Insurance for the Windsor Residence, \$3,669.00; house painting, \$18,849.00; carpeting \$5,827.83; dryer, \$254.75; and, moving expenses, \$1,496.00. This amounts to \$32,856.58.

Defendant is also entitled to a credit of \$5,000 as and for an advance on the proceeds of the sale of the Campden Residence as advanced to Plaintiff by Defendant from his post-commencement funds. Plaintiff has requested these funds in connection with her desire to take certain continuing education cooking or chef-training classes.

The parties are entitled to an equal share of the balance in the former joint Citibank account XXXX0804 as of date of commencement. Upon accounting for the transfer of monies from the savings portion of the account to cover a \$154,550.87 overdraft in the checking portion, the actual combined balance of the savings and checking accounts on January 23, 2006 is \$46,574.59. Therefore, as of date of commencement, each party is entitled to \$23,287.29.

Since the parties' 2005 income tax liability of \$63,200.20 was paid post-commencement by the Defendant from post-commencement income, Defendant is entitled to a fifty percent contribution from Plaintiff, or \$31,600.10 (see, *Chabbott v. Chabbott*, 306 A.D.2d 368 [2nd Dept., 2003])[husband entitled to credit for taxes owed to the Internal Revenue Service since this was a joint obligation to be shared equally by the parties]; *Conway v. Conay*, 29 A.D.3d 725 [2nd Dept., 2006])[wife was responsible for one-half of parties' income tax liabilities incurred during marriage]; *Johnson v. Johnson*, 297 A.D.2d 279 [2nd

Dept., 2008][matter remitted for determination of credit to husband for income taxes paid on pension benefits]). Likewise, Defendant is entitled to receive a further credit for the \$8,800.27 in real estate taxes paid from his post-commencement earnings for real estate taxes due on the Plaintiff's separate property Windsor Residence.

EQUITABLE DISTRIBUTION OF REMAINING MARITAL ASSETS AND DEBTS

The remaining marital assets and debts to be equitably distributed between the parties, other than the Defendant's law license and partnership interest previously discussed, consist of the following: Morgan Stanley brokerage account XX2062; Joint SmithBarney brokerage account (reflecting the balance of the former Citigroup Global Markets XX066-15-580 account); Defendant's T. Rowe Price 401K account; Morgan Stanley IRA accounts XX137-132 and XX138-132 opened on behalf of the Plaintiff and the Defendant; three Morgan Stanley custodial accounts for the children's college expenses (Matthew account # XXX 012065 104; Michael account #XXX 012064 104; Jenna account #XXX 012063 104); wife's fur, jewelry and separate Citibank account balance; two automobiles; the parties joint credit card debt; the parties joint Citibank overdraft line of credit debt balance; and, the balance of the proceeds of sale of the Campden Residence.

The parties personal property such as furniture, clothes, wedding china, wedding silver, memorabilia, holiday crystal, Christmas ornaments, memorabilia, and other items which have already been divided by agreement of the parties upon March 2007 separation are hereby awarded to the party now in possession, there being no viable argument before the Court to rule differently.

The Joint Morgan Stanley Brokerage Account

The Morgan Stanley brokerage account xx2062 in the joint names of the parties with and account balance of \$184,434.57 as of September 30, 2008 shall be shared equally by the parties, with each party bearing any attendant gain/loss on his or her share.

The Joint Citigroup XX15-580 Brokerage Account

The parties' joint Citigroup Global Markets Inc. account no. xx03066-15-580, now account no. xx03066-15-71B (the "Citigroup brokerage account"), had a balance of \$44,864.92 on September 30, 2008. At the Court's directive, the cost for the trial transcripts in this action were paid from this account in the amount of \$12,548.70. The balance remaining therein shall be divided equally between the parties.

Defendant's T. Rowe Price 401K Retirement Account

The Defendant's T. Rowe Price 401K account had a balance of \$213,538.49 as of April 1, 2006. The parties shall equally divide the April 1, 2006 balance in this account, by way of a QDRO, with each party equally bearing the investment gains/losses since that date.

Morgan Stanley IRA Accounts XX137-132 and XX138-132

In accord with the parties stipulation, the Defendant will retain account xx137-132 in his name with an approximate value of \$29,000.00, with Plaintiff retaining account xx138-132 in her name, with an approximate equal value.

The Children's Custodial Accounts at Morgan Stanley

The parties established one custodial account for each of their three children to fund their respective college tuitions. Currently, Matthew is the only child in college. The custodial accounts were established, as an administrative matter, in the name of the Plaintiff as custodian for each of the party's children and not with a view towards affording the Plaintiff any specific interest therein. As of March 31, 2008 and as of September 30, 2008, each account had a balance of \$36,502.81 and \$33,387.89, respectively.

Given the financial wherewithal of the parties and the responsibilities and obligations imposed upon Defendant herein with respect to the children (see *infra*), the Court directs that these accounts be placed in the Defendant's name as custodian for each child to be applied towards the children's college tuition payments.

Jewelry, Furs and Wife's Citibank Account (XXXX8521)

As agreed to by Defendant, the Court hereby awards to Plaintiff all items of jewelry currently possessed by her, including a wedding ring with an appraisal of "about \$20,000.00". She is also awarded her full length mink coat which was acquired during the marriage as well as the Citibank account in her name (XXXX8521) which, as of date of commencement, had a balance of approximately \$6,000.00.

Whether or not the jewelry and the fur coat were acquired out of marital assets, Defendant has expressly rejected any claims to any interest therein, by way of credit or otherwise.

The Parties' Automobiles

Defendant shall retain his 2006 Mercedes ML500, and he shall transfer title to the 2005 Mercedes E320 to Plaintiff.

The Parties Credit Card Debt

The evidence of marital credit card debt at trial is as follows: Diners Club balance as of January 27, 2006, \$861.80; Discover Card balance as of January 4, 2006, \$2,139.16; Citi AAdvantage Visa Card balance as of January 18, 2006, \$3,789.80. Thus there is an outstanding balance of \$6,790.76 in marital credit card debt (see, *Grasso v. Grasso*, 47 A.D.3d 762 [2nd Dept., 2008]), which shall be borne equally by the parties.

The Amount Outstanding on the Citibank Joint Overdraft Line of Credit Associated with Account (XXXX0804)

The commencement date joint Citibank Checking Plus credit line balance of \$20,306.91 shall be divided equally by the parties (see, *Bogdan v. Bogdan*, 260 A.D.2d 521 [2nd Dept. 1999], or \$10,153.45 each.

The Division of the Proceeds of Sale of the Campden Residence Based on the Net Credit Due Defendant

According to the January 2007 Stipulation, the net proceeds of sale from the Campden Residence was to be placed into the parties' account until further order of the Court or agreement of the parties, except that each party was allowed to withdraw \$100,000 therefrom with the other party waiving any and all claim to such funds received by the other.

The Court finds that the net proceeds of sale from the Campden Residence totaled \$956,522.15 from which each party has already received \$100,000. Except as below noted, the balance in the amount of \$761,221.40 as of August 29, 2008 shall be shared equally with each party being equally responsible for any taxes due thereon, capital gains or otherwise. Defendant, however, shall receive from Plaintiff's one-half portion all sums due and owing to Defendant from Plaintiff as herein determined.

MAINTENANCE

Consideration of the amount of an award of maintenance, if any, requires judicial consideration of the reasonable needs of Plaintiff within the context of the standard of living enjoyed by the parties during the marriage as well as the eleven statutory factors outlined in Domestic Relations Law §236B.

THE PARTIES' STANDARD OF LIVING DURING THE MARRIAGE

Defendant's significant income enabled the parties to enjoy an affluent lifestyle. As a couple, they resided in the affluent town of Scarsdale. They maintained a membership at a country club, and drove luxury automobiles. They frequently dined out at restaurants ranging from family eateries to five star establishments. They attended plays and shows, threw elaborate dinner parties, and supported various charities. Their vacations included trips to such places as Czechoslovakia, Japan, Italy, Vienna, Hawaii and Prague. They enjoyed the amenities of luxury hotels. Plaintiff belonged to a gym and took various types of lessons, including voice, tennis and piano.

Section 236B of the Domestic Relations Law provides:

In determining the amount and duration of maintenance the court shall consider: (1) the income and property of the respective parties including marital property distributed pursuant to subdivision five of this part; (2) the duration of the marriage and the age and health of both parties; (3) the present and future earning capacity of both parties; (4) the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor; (5) reduced or lost lifetime earning capacity of the party seeking maintenance as a

result of having foregone or delayed education, training, employment, or career opportunities during the marriage; (6) the presence of children of the marriage in the respective homes of the parties; (7) the tax consequences to each party; (8) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party; (9) the wasteful dissipation of marital property by either spouse; (10) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; and (11) any other factor which the court shall expressly find to be just and proper.

(1) INCOME AND PROPERTY OF THE RESPECTIVE PARTIES

Although Defendant's 2007 income was \$1,275,000, for purposes of maintenance the Court must account for that portion Defendant's income which has been factored into the valuation of his law license and law practice partnership (*Grunfeld v. Grunfeld*, 94 N.Y.2d 696, [2000]; *Jarrell v. Jarrell*, 276 A.D.2d 353, 353 [1st Dept., 2000], lv. denied 96 N.Y.2d 710 [2001][correct to excluded from calculation of maintenance, party's earning capacity attributable to law degree and license and the value of law practice; such were capitalized and included in award of equitable distribution]), which is more fully set forth herein (see, supra). Upon doing so, the Court assesses Defendant's income at \$286,000 for purposes of maintenance as provided for and calculated at page 15 of the 16 page Johnson forensic report. The Court expressly rejects Plaintiff's contention that this figure must be increased to any degree based upon the distribution of the Defendant's law license or partnership interest as herein determined.

Although Plaintiff may well be expected to earn as much as \$65,000 per year upon re-entry into the work force, this may take a period of years and there is insufficient evidence before the Court to conclude otherwise.

In addition, as is more fully set forth above, both parties have already received almost One Million Dollars (\$1,000,000) in cash from the division of certain marital assets and are expected to receive substantial additional cash and assets as is more fully set forth within.

Given the above, the Court finds that the reasonable needs of Plaintiff can readily be met, especially when accounting for the child support award herein granted.

(2) DURATION OF MARRIAGE/HEALTH OF PARTIES

See supra.

(3) PRESENT AND FUTURE EARNING CAPACITY OF BOTH PARTIES

Both parties have promising career futures.

Defendant, age 51, is a one-half of one percent (.5percent) partner in Shearman & Sterling, earning approximately \$1,275,000 per year. Although he has been reduced in "step", there is nothing before this Court to conclude that Defendant is and will otherwise be anything other than a financially successful attorney.

Plaintiff, although not employed since the birth of the parties first child, holds a Master's degree in Allied Health and was successfully employed in various capacities prior thereto including employment as a licenses Dental Hygienist. The Court finds from the credible evidence that Plaintiff can put her past educational and work experience to use in today's market and earn approximately \$65,000 in the not too far further.

(4) ABILITY TO BECOME SELF-SUPPORTING

Given the substantial equitable distribution award, the retirement assets distributed, the child support award allowed and, among other things, Plaintiff's educational and work related experience, the Court is satisfied that Plaintiff has the ability to become self-supporting within the lifestyle enjoyed by the parties during the marriage.

Aside from a recent several month stint at running a catering business, Plaintiff has not worked since the birth of the parties first child in 1989. Before that, however, she had worked from 1986-1989 for Metropolitan Life Insurance Company in their marketing department where she earned between \$40,000-\$45,000 annually. Prior thereto and beginning in 1978, Plaintiff had worked for several years as a licensed dental hygienist. Although her license has since expired, admittedly, Plaintiff can have it re-activated upon taking refresher courses. Pursuant

to the Johnson Stipulation, a full-time dental hygienist can earn between \$43,000–\$65,000 per year.

In addition to her reasonable potential to earn income, Plaintiff possesses an Associates degree from Union County Technical Institute, a Bachelors of Science degree in Urban Studies from Rutgers University, and a Masters degree in Education from Rutgers University, thus opening up yet other possibilities. Furthermore, Plaintiff, at the time of trial, had completed six weeks of a twenty-four week culinary arts training course the completion of which would open the door for work in the field of culinary arts.

Balancing all of this with such factors as Plaintiff's voluntary and agreed upon long-term absence from the work force, the Court finds that Plaintiff is capable of earning an annual income of at least \$45,000 and upwards of \$65,000 were she to re-enter the workplace.

(5) REDUCED OR LOST EARNING CAPACITY OF PARTY SEEKING MAINTENANCE

There is no dispute that, upon agreement of the parties, Plaintiff stopped working upon the birth of their first child. Except for a brief attempt at establishing a catering business, Plaintiff has not yet returned to work despite the passage of time since the birth of her last child, now fourteen years old. In any event, Plaintiff is now again pursuing a career in catering.

(6) PRESENCE OF CHILDREN IN RESPECTIVE HOMES OF PARTIES

Under the terms of the January 3, 2007 Custody Agreement, the parties equally share physical custody of the two younger children, Michael, age 16, and Jenna, age 14, as well as their eldest, Matthew, age 19, when he is home from college. Both parties have separate adequate accommodations for the children.

(7) TAX CONSEQUENCES TO EACH PARTY

While the award of child support herein granted in non-taxable the award of maintenance is not. Nonetheless, given the child support and maintenance herein awarded, Plaintiff's potential to earn a living, and the great degree of equity in Plaintiff's newly purchased home, with proper tax planning, Plaintiff is in a position to offset the tax impact of maintenance as well as other taxable income. This can simple be accomplished, for example, by taking out a mortgage on her residence and using said tax deduction as an offset against maintenance or other taxable income.

(8) CONTRIBUTIONS AND SERVICES OF Plaintiff TO CAREER OR CAREER POTENTIAL OF Defendant AS A SPOUSE, PARENT, WAGE EARNER AND HOMEMAKER, AND TO THE CAREER OR CAREER POTENTIAL OF THE OTHER PARTY

As already alluded to herein, there is no doubt that the parties' decision to have Plaintiff leave the workforce to raise their children allowed Defendant the time and opportunity to work virtually unimpeded towards the advancement of his career. Free of the day-to-day responsibilities of child rearing, although nonetheless an involved and loving father, Defendant was afforded the opportunity to invest whatever attention was necessary to advance his career which resulted in, what is now, a remarkable career as an attorney.

(9) and (10) WASTEFUL DISSIPATION OF MARITAL PROPERTY; TRANSFER OR ENCUMBRANCE IN CONTEMPLATION OF THIS ACTION WITHOUT FAIR CONSIDERATION.

These factors are not relevant to the instant case.

(11) OTHER FACTORS TAKEN INTO ACCOUNT ARE THOSE SET FORTH IN THE FACTUAL FINDINGS HEREIN MADE INCLUDING THE FOLLOWING.

See the findings of fact herein.

Excising that aspect of Defendant's future annual income already captured in the valuation of his law license and partnership interest, the Court is left with the sum of \$286,000 for maintenance consideration (see, Grunfeld, at 705; page "3" of the Johnson Stipulation).

In maintenance determinations "the amount of earnings necessary to enable the recipient to become self-supporting must be determined with some reference to the standard of living of the parties, as well as the

earning capacity of each party; and these factors carry more weight in a marriage of long duration" (Garvey v. Garvey, 223 A.D.2d 968, 970, 636 N.Y.S.2d 893 [1996]). (Lorenz v. Lorenz, ____ A.D.3d ____, 2009 WL 1621300 [3d Dept., 2009]).

Upon consideration of the factors herein set forth and upon the Facts as herein determined, the Court finds that Defendant shall pay to Plaintiff, in equal monthly installments commencing the first day of the month following the date of entry of final judgment, the sum of \$6,500.00 for the first twenty-four months and, thereafter, the sum of \$6,000 per month. This spousal maintenance shall be included as income to Plaintiff and shall be deductible as an expense to Defendant and shall terminate on the sooner to occur of the Plaintiff obtaining the age of sixty-five, the death of either party, the remarriage of Plaintiff or any other event listed in the Domestic Relations Law that would trigger the termination of maintenance.

Defendant shall maintain a policy of insurance suitable to annuitize the after-tax net payments to Plaintiff for the balance of the maintenance period as may be determined on an annual basis. Plaintiff shall be entitled, upon written request, to annual proof of the existence of the policy, the designation of Plaintiff as beneficiary, and the amount of the death benefit.

Defendant shall continue to maintain Defendant on his health insurance plan through the date of entry of judgment and thirty days thereafter. Defendant shall provide to Plaintiff, upon request, any and all documents necessary for Plaintiff to avail herself of health insurance coverage through COBRA, should such coverage be available to her. Plaintiff shall be responsible for any costs associated with her health insurance after the expiration of thirty days from the date of entry of judgment. Plaintiff shall also be responsible for any of her own unreimbursed or uninsured medical expenses after the date of entry of judgment.

THE PLAINTIFF'S REASONABLE NEEDS BASED ON THE EVIDENCE

Aside from her potential earning power, Plaintiff already possesses a mortgage free residence purchased with her nearly One Million Dollar advance against equitable distribution. In addition, Plaintiff will be receiving a 10 percent equitable share of Defendant's law license, a 25 percent share of his partnership interest, an equal equitable distribution of other marital assets as set forth herein, including case and substantial retirements funds, a lien free 2005 Mercedes E320 automobile, half of the marital furniture and other property, and over \$75,000 in jewelry and furs, among other things.

Supplementing this is the award of maintenance of \$78,000 per year for the first two years followed by an annual amount of \$72,000 until terminated, as provided, coupled with the security of a corresponding life insurance policy. Adding to this non-taxable child support as granted herein plus a potential annual income of up to \$65,000 plus interest or investment income on her other cash distributions, the Court concludes that Plaintiff will have sufficient resources to meet her reasonable monthly needs especially when accounting for, among other things, the lack of any mortgage and automobile payments and the equal sharing of the children.

While maintenance and child support awards may be retroactive to the date of application after crediting the payor spouse with payments made pendente lite (see, Ferraro v. Ferraro, 257 A.D.2d 598 [2nd. Dept., 1999]; DRL §236B(6); 240(1)(j)), where, as here, the monied spouse has provided for all of the reasonable needs of non-monied spouse and family during the litigation, the Court may award maintenance and child support on a prospective basis only (see, Grumet v. Grumet, 37 A.D.3d 534 [2nd Dept., 2007]); Lobotosky v. Lobotosky, 122 A.D.2d 253 [2nd Dept., 1986]), and the Court so rules.

PLAINTIFF'S CHILD SUPPORT AWARD

The award of child support herein is for the parties' three unemancipated children: Matthew, age 20; Michael Fleischmann, age 18; and Jenna Fleischmann, age 15.

At the outset, the Court notes that for child support purposes, Defendant's income stream is not reduced even though it has been distributed in part as an asset, although such distribution can be taken into account upon determining whether a calculated CSSA obligation can be deemed "unjust or inappropriate" (see, Holterman v. Holterman, 3 N.Y.3d 1 [2004]). While Defendant's income for child support purposes is in excess of

\$1,200,000, Plaintiff's is zero (as acknowledged by Defendant, at least for child support calculation purposes).

The Court determines upon the Facts and circumstances of this case, that Defendant's concession to application of the Child Support Standard Act statutory formula to \$300,000 and for combined net parental income (see, Kaplan v. Kaplan, 21 A.D.3d 993 [2nd Dept., 2005]; Lee v. Lee, 18 A.D.3d 508 [2nd Dept., 2005]; Devries v. Devries, 35 A.D.3d 794 [2nd Dept., 2006]), all attributed to Defendant for child support calculation purposes without any deductions for spousal maintenance or FICA and medicare payments, is fair and appropriate under the circumstances of this case given the standard of living enjoyed by the children to date, the cost of living in Westchester County, the intent of both parties to see to it that their children partake in those activities most reasonably calculated to enhance their growth as individuals and as members of society, the disparity of incomes, and the shared residential custody of the children on what is essentially on 50-50 arrangement with respect to all three children.

This concession by Defendant is further acceptable to the Court because where, as here, there is essentially a 50-50 physical custodial arrangement with respect to the children, the Court has the discretion to award a lower amount of child support than would otherwise be mandated under the CSSA to the parent who is deemed the custodial parent (see, Bast v. Rosoff, 91 N.Y.2d 723 [1998]; Baraby v. Baraby, 250 A.D.2d 201 [paragraph "ff" factors may be considered in shared custody arrangements]; see, Ochs v. Ochs, supra. [court not required to apply statutory CSSA percentages to entire amount of combined parental income; court properly considered shared custody arrangement in calculating amount of child support]). Defendant's concession to the above award (as set forth in Defendant's proposed findings of fact, and otherwise) obviates the need to make such a determination and the potential consequences that might befall Plaintiff.

Without the need for further analysis, the Court notes that Defendant has agreed to a monthly child support payment of \$7,250 to be used by the Plaintiff to defray operating and living expenses for the children when living at the Windsor Residence as well as food, clothing, medical supplies, cell phone, and internet charges, tutors, transportation, vacation school supplies and other customary child related expenses. As calculated and in accord with the above, this constitutes 29 percent of parental income up to the reasonable cap of \$300,000, all attributed to Defendant, net of any statutory setoffs such as FICA, Medicare and maintenance. In addition and as further conceded by Defendant, Defendant shall also pay the add-ons specified herein, less a credit for the room and board expenses paid by Defendant on behalf of each child residing away from home while at college (see, infra). Defendant's basic child support obligation will be reduced to 25 percent of \$300,000 (i.e., \$6,250 per month) upon the emancipation of one child at age 21 (or earlier, if relevant), and 17 percent of \$300,000 (i.e., \$4,250 per month) upon the emancipation of a second child.

Defendant shall also pay as statutory "add-ons" the full amount of the costs associated with the three children's health and dental insurance plans and shall pay 100 percent of their reasonable and necessary "in plan" unreimbursed medical and dental expenses until their respective emancipations. Furthermore, until emancipation (age 21 or sooner), Defendant will also pay 100 percent of the reasonable college expenses of the three unemancipated children while they attend an accredited two-year or four-year program at a jointly agreed upon college (see, Par. "Sixth" of the Stipulation and Order January 3, 2007) after use of the funds available in the Morgan Stanley custodial accounts established by the parties to fund the children's college educations.

Defendant shall be entitled to a "Rohrs" credit for the room and board expenses paid by him for each child residing away from home while attending college (see, Rohrs v. Rohrs, 297 A.D.2d 317 [2nd Dept., 2002] [error not to reduce basic child support obligation by amount contributed by payor for room and board expenses while child is away at college]; Levy v. Levy, 52 A.D.3d 717 [2nd Dept., 2008]). This is especially appropriate in this case given the mortgage free status of Plaintiff's home and the agreed upon and otherwise ordered child support of Defendant.

The basic child support ordered herein shall be paid by Defendant on the first of each month, commencing the first day of the month following the date of entry of final judgment.

During the minority of the children, Defendant shall maintain a life insurance policy with a sufficient death benefit to provide not only basic support but also to defray reasonably anticipated college expenses and other add-on expenses. The subject child or children shall be named as beneficiaries of the policies and the surviving spouse shall be named as trustee. The surviving spouse shall have the fiduciary obligation to administer the life insurance proceeds exclusively for the benefit of the subject child or children. The Defendant shall, upon written demand, provide annual proof of the existence of the policy, the designation of beneficiary and trustee, and the amount of the death benefit. Any shortfall shall be a first lien against the estate of the Defendant.

As earlier indicated, Defendant shall be the legally responsible relative who shall maintain health insurance benefits for the three children during their minority.

Finally, as with Defendant's maintenance obligation, the Court's final award of child support is not retroactive to the date of commencement of this action, since the Defendant has paid all of the children's reasonably required support from the date of commencement to date. This is especially relevant given that the Defendant is waiving any claim for reduction based on the fact that the children live with him 50 percent of the time.

Plaintiff's application for counsel fees will be decided by way of separate determination which is soon to follow.

Plaintiff's counsel shall submit findings and judgment consistent with this Decision on notice.

1. Proceeds of Sale of Marital Residence and Balance of Investment/ Bank Accounts.

2. One-half of the paydown of the mortgage principal equals \$8,465.29, one-half of mortgage plus real estate taxes from date the parties vacated the Campden Residence until date of sale equals \$18,116.81, plus one-half of home equity loan payments after the parties vacated the Campden Residence until the date of sale equals \$3,102.85, for a total of \$29,684.94.