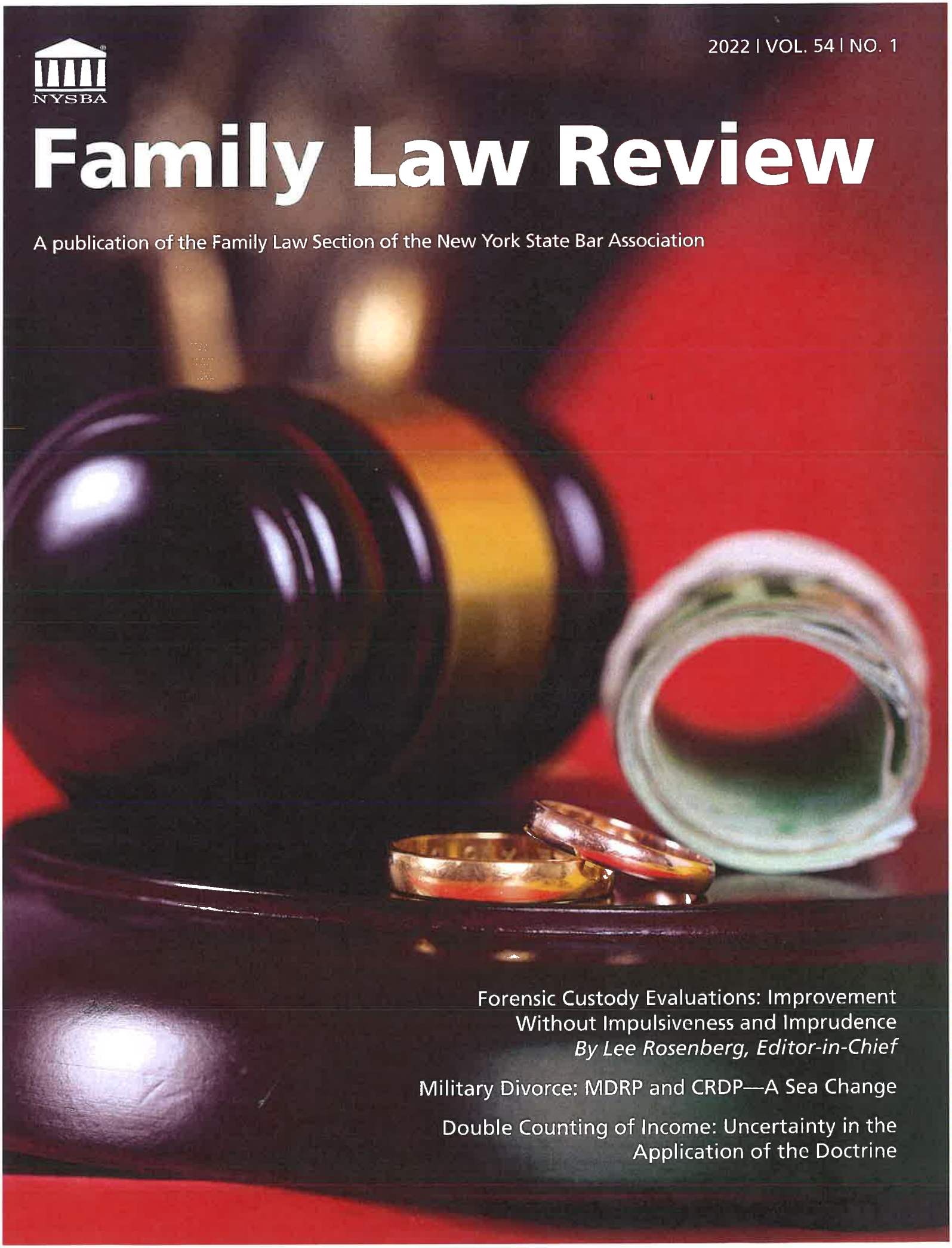
2022 | VOL. 54 | NO. 1

NYSBA

Family Law Review

A publication of the Family Law Section of the New York State Bar Association



Forensic Custody Evaluations: Improvement Without Impulsiveness and Imprudence
By Lee Rosenberg, Editor-in-Chief

Military Divorce: MDRP and CRDP—A Sea Change

Double Counting of Income: Uncertainty in the Application of the Doctrine

Double Counting of Income: Uncertainty in the Application of the Doctrine

By Mark I. Plaine and David L. Gresen

The New York matrimonial practitioner often grapples with issues concerning double counting of income as they arise in the interplay between equitable distribution and maintenance. Double counting may arise in any one of various contexts. Often the most vexatious situation is one which involves the assessment of an owner's responsibility to pay spousal support when a portion of his or her income was capitalized to value the business or professional practice in question. Assuming that some portion of earnings has been capitalized, and distributed as an asset, does the owner have any more income which can be used for payment of spousal support beyond that which was exempted in performance of the asset valuation? An analysis of 25 years of caselaw evinces a confusing pattern of methodologies which have been employed to address the double counting conundrum. At times, the question concerns whether double counting issues even exist. When such issues do exist, the focus shifts toward how to avoid the inequitable result of twice distributing the same income of the titled spouse. In the event that double counting avoidance is not applied, where does that leave the parties in terms of redistribution of income? To illustrate the conundrum an analysis of decisional law along with hypothetical forensic accounting calculations are set forth below.

The most recent foray by the New York Court of Appeals into this arena remains the court's 2006 decision in *Keane v. Keane*.[1] As discussed more fully below, the *Keane* doctrine has proven difficult to apply and regularly produces questionable, if not inequitable, results. Moreover, there currently appears to be a divergence between appellate court's as to the application of the *Keane* decision.

The Existence of Double Counting

Double counting of income exists when a court makes use of a party's income both for valuation of an asset and for setting a spousal support award. *See* Pratt, "Valuing a Business—The Analysis and Appraisal of Closely Held Companies—5th Edition" (2008) at p. 983. The need to avoid double counting of income has been discussed by the courts of many jurisdictions (*see, e.g.*, the Ohio appeals court decision in *Heller v. Heller*,[2] the Illinois appeals court decision in *Marriage of Schneider*,[3] the Massachusetts appellate decision in *Sampson v. Sampson*,[4] and the Wisconsin court's decision in *Holbrook v. Holbrook*).[5] The rationale derives from the notion that a support recipient should not be allowed to dip twice into the same asset. While New York courts have also ascribed to the notion that double counting should be avoided, their efforts to identify and avoid same are often difficult to reconcile.

Cases decided before the *Keane* decision seemed to provide some level of consistency as to the identification and treatment of the issue. Post-*Keane* decisions have become complicated to understand and apply. Identifying what is and what is not double counting can be challenging.

A review of cases decided by the appellate divisions in recent years often leaves the reader with an understanding that can best be described as muddled. This may be due to the lack of clarity employed by the Court Appeals in writing its opinion. A sampling of relevant cases decided before and after *Keane* appear below. Before trying to analyze the decisions, it is important to understand common methodologies employed to value businesses and professional practices, including what has come to be known as the formula or "excess earnings" approach. This approach, which derives from a Revenue Ruling issued more than 50 years ago, finds its way into many of the more significant cases involving double counting. An example of the application of same appears hereafter.

Approaches Used To Value a Business or Practice

It has time and again been stated by New York courts that there is no uniform method to be used to determine the value of an ongoing business for purposes of equitable distribution.[6] Instead, New York courts have accepted valuations of businesses and professional practices based upon various methodologies, including the following.

1. Valuation Based Upon Capitalization of Income

Approaches involving principles of capitalization of income have been utilized in a host of valuation scenarios. *See, e.g., Pace v. Pace*[7] (involving the valuation of the appreciation of rental properties) *Gifford v. Gifford*[8] (concerning the valuation of an engineering firm); *Rubino v. Rubino*[9] (concerning the valuation of an interest in a law firm); *Sodaro v. Sodaro*[10] (involving the value of a psychiatric practice); *Vail-Beserini v. Beserini*[11] (valuing a cardiology practice); *Rice v. Rice*[12] (regarding the value of an interest in an accounting firm); *Stolow v. Stolow*[13] (valuation of a philately business); and *G.K. v. L.K.*[14] (wherein a construction company was valued).

2. Asset-Based Valuation

For other entities, an asset-based approach has been preferred. *See, e.g., Chiu v. Chiu*[15] (a percentage interest in a limited liability company was valued by use of a net asset approach); *Kassab v. Kassab*[16] (where a net asset method was used to value an interest in real estate holding compa-

nies); and *Hall v. King*[17] (where the value of an interest in an antiques business was established through use of an asset approach).

3. Market Data Approach

Yet a third type of valuation is that which is conducted pursuant to a market data approach. This approach has been deemed applicable where an active market exists for the purchase and sale of the asset in question. *See, e.g., Kavanaugh v. Simeon*[18] (value of taxi medallion obtained based upon market value); and *NK v. MK*[19] (value of dental practices established by way of similar sales transactions).

4. The Excess Earnings Method

A popular, and often heavily litigated, approach frequently used in the valuation of businesses and professional practices is that which is known as the "excess earnings method" ("the formula approach"). This methodology derives from IRS Revenue Ruling 68-609. It is somewhat hybrid in nature and requires a two-part analysis. The valuator must determine both the net tangible value of the entity as well as the goodwill (an intangible value) attributable thereto. Goodwill is derived by calculating the entity's normalized earnings in excess of an expected rate of return on the net tangible assets, and by then capitalizing those "excess earnings." *See A.C. v. J.O.*[20] To normalize earnings, the valuator must deduct from total earnings of the entity an amount characterized as the "reasonable compensation" attributed to the owner. *See Boyajian v. Boyajian.*[21] To arrive at "excess earnings" the valuator subtracts a sum representing a reasonable rate of return on the company's net tangible assets. The remaining sum is generally tax impacted, and ultimately multiplied by a capitalization rate (risk multiple)—arrived at by analysis of risk associated with the business or professional practice.to establish the goodwill (i.e., intangible component) of the entity. Upon completion of these calculations the "goodwill" figure is added to the tangible assets to arrive at a final value.

A hypothetical application of the formula approach appears below. For purposes of this hypothetical, one must assume the following facts.

Hypothetical Fact Pattern: The "Schwartz" Divorce

Chaim and Golda Schwartz have been married for 16 years. They have two children who reside with Golda, the wife, in the marital residence. There is no longer a mortgage against the home. The parties have a daughter age 14, and a son age 12. Chaim is an attorney and the principal of his own firm. His income averages out at $280,000 per year. Golda is a paralegal with another firm, the Rabinowitz firm, in the same city. Her salary is $75,000 per year. The average salary for an attorney with Chaim's level of experience in the geographic area is $130,000 per year.

Average rent for a family of three is $2,500 per month. The parties' housing expenses are nearly equal. Total tuition at the children's religious schools amounts to $24,000 per year. Golda seeks maintenance, child support and equitable distribution of her husband's law practice. The parties do not have a significant amount of liquid assets, such that any portion of the professional practice awarded to the wife will have to be paid, over time, through a distributive award with interest.

Justice Goldstein, who is assigned to the Schwartz matrimonial, has a reputation for basing calculations of support by use of caps set at $250,000. That is to say she routinely caps the payor's income at $250,000 for maintenance calculations and combined parental income at $250,000 when awarding child support.

This judge assigned Kohn, Liebowitz & Grossman, CPAS (KLG) to value Chaim's law practice. By use of an excess earnings approach, KLG arrived at a value of $361,000 for the practice. This was based upon KLG's review of the practice's financial records, and assumptions made with regard to return on assets, discount rates, etc. Ultimately, the court awarded Golda a 25% interest in the law firm. The resultant distributive award ($90,250) will be paid over six years at 9% interest. Each monthly payment will be in the sum of $1,627. The annual payment for each year will be $19,524.

The Financial Awards

A breakdown of the forensic accountants' calculations looks like the following:

I. Valuation of Chaim's law practice

Husband's annual income:	$280,000
Reasonable compensation:	($130,000)
Normalized earnings:	$150,000
Net assets of practice:	$100,000
Return on net assets:	($5,000)
Excess earnings (pre-tax):	$145,000
Income taxes (projected: @ 40%):	($58,000)
Excess earnings (post-tax):	$87,000[22]
Goodwill of practice (multiple of 3):	$261,000
Value of practice (goodwill plus net assets)	$361,000

II. Calculation of maintenance

The court awarded annual maintenance to Golda in the sum of $32,684 ($2,724 per month) for a period of 6 years based upon the following calculations:

Husband's annual income: $250,000

Wife's annual income (after statutory deductions): $69,263

Step #1
20% of husband's income: $50,000

25% of wife's income: $17,316

Remainder: **$32,684 per year (lower amount) = $2,724/month**

Step #2
40% X $319,263 (combined income) = $127,705

Wife's income: $69,263

Remainder: $58,442

III. Calculation of child support

The court directed that child support, exclusive of add-on expenses and private school fees, will be paid by Chaim to Golda in the sum of $3,646 per month, based upon the following calculations:

Husband's income (after statutory deductions for FICA, Medicare and maintenance): $234,402[1] (70%)

Wife's income (after receipt of maintenance): $101,947 (30%)

Combined parental income: $336,349

Husband's child support obligation: $250,000 X .70 X .25 = **$43,750 per year ($3,646 per month)**

All told, combined payments from the husband to the wife total $95,956 per year consisting of annual payments of the distributive award ($19,524); maintenance ($32,684) and child support ($43,750). Chaim's after-tax income is projected to be about $168,000 per year (after a 40% reduction for income taxes). After deduction for maintenance, basic child support and the distributive award, he will be left with disposable income of $72,044 per year. After payment of his pro-rata share of private school tuition ($16,800 per year) and the cost of a rental apartment ($30,000 per year) he will be left with $25,244 (approximately $2,104 per month) to live off of. At the same time, Golda's after-tax income (projected to be about $48,750) will be supplemented by an additional $95,956 per year. Assuming that her housing expenses are comparable to her husband $30,000 per year) and after payment of her pro-rata share of school tuition ($7,200 per year) she will retain $107,506 to live off of. **These calculations are detailed in Chart "A" hereto.**

A limited analysis of cash flows shows the husband retaining about 19% of available monies and the wife retaining the remaining 81%.

Definition of Terms

In order to achieve a proper understanding of the double-counting dilemma, it is important to gain an understanding of terms which make their way into many of the significant valuation cases, including concepts such as "good will," "intangible assets" and "service businesses." Let's review these terms as described in legal precedent.

1. The Definition of Goodwill

A key component of the formula approach is the need to establish both the value of intangible assets (i.e., good will) and tangible assets (i.e., furniture, equipment, financial accounts, accounts receivable, etc.). Goodwill has been defined as "that asset, intangible in form, which is an element responsible for profits in a business." Quoting the New York County Supreme Court's decision in *Pett v. Spiegal.*[23]

Cases decided by New York courts, in an assortment of litigation scenarios, have consistently identified the "goodwill" of a business or practice as an intangible asset. *See, e.g., Label v. Label*,[24] *Burns v. Burns*,[25] *Matter of Blake v. Blake Agency, Inc.*,[26] and *Spaulding v. Benenati*.[27] In its 2018 decision in *Congel, et al. v. Malfitano*,[28] the Court of Appeals explored the definition of "good will" as applied to the value of a business in the throes of partnership dissolution litigation. Here, the court opined as follows:

> Goodwill is an intangible asset of a business, corresponding in this context to what a buyer would pay for the business, over and above its value as a mere sum of tangible assets, because of the patronage and support of regular customers. Goodwill consists in "every positive advantage . . . that has been acquired by a proprietor in carrying on (a) business, whether connected with the premises in which the business is conducted, or with the name under which it is managed, or with any other matter carrying with it the benefit of the business."

An interesting analysis of whether goodwill constitutes a marital asset, subject to equitable distribution, appears in a case entitled *Moll v. Moll*.[29] Here, the question posed was whether the account executive/financial advisor husband's "book of business" constituted a marital asset subject to equitable distribution. In ruling in the affirmative, the court noted that the nature of a book of business is the personal or professional goodwill which is a "thing of value" and as such a marital asset. Specifically, the court opined that "[t]his intangible career advantage possessed by and inseparable from the defendant is a valuable asset."

The understanding of goodwill as an intangible asset appears crucial to an analysis of whether double counting has become an issue in the interplay between distribution of the asset in question and calculation of maintenance.

2. The Definition of a Service-Related Business

Although it is generally easy to identify a professional practice, the definition of a "service-related business" may prove more illusory. Various publications use this term in efforts to categorize types of businesses. For instance, the North American Industrial Classification System (NAICS) includes in its literature a division for service-related businesses. This would include "establishments primarily engaged in providing a wide variety of services for individuals, businesses and government establishments providing personal, business, repair and amusement services; health, legal, engineering, and other professional services; educational institutions; membership organizations, and other miscellaneous services, are included." The Standard Industrial Code (SIC) is a system established in the United States for classifying industries by code. Service-related businesses under this code would include, inter alia, businesses which provide lodging, entertainment, dining, legal services, medical treatment, accounting, engineering work, personal services and insurance. A review of the Compilation of Codes Rules and Regulations of the State

Chart A

	Annual	Monthly
Husband Income	$ 280,000	$ 23,333.33
Wife Income	$ 75,000	$ 6,250.00
Maintenance	$ 32,684	$ 2,723.67
Child Support	$ 43,750	$ 3,645.83
Rent	$ 30,000	$ 2,500.00
Private School	$ 24,000	$ 2,000.00
Husband Tax Rate	40%	
Wife Tax Rate	35%	

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6
Husband - Chaim						
Pre-Tax Income	$ 280,000	$ 280,000	$ 280,000	$ 280,000	$ 280,000	$ 280,000
Less: Income Tax	(112,000)	(112,000)	(112,000)	(112,000)	(112,000)	(112,000)
After-Tax Income	$ 168,000	$ 168,000	$ 168,000	$ 168,000	$ 168,000	$ 168,000
Less :						
ED Practice-Principal	(11,881)	(12,996)	(14,215)	(15,548)	(17,007)	(18,602)
ED Practice-Interest	(7,640)	(6,526)	(5,307)	(3,973)	(2,515)	(919)
Maintenance	(32,684)	(32,684)	(32,684)	(32,684)	(32,684)	(32,684)
Child Support	(43,750)	(43,750)	(43,750)	(43,750)	(43,750)	(43,750)
Disposable Income	$ 72,044	$ 72,044	$ 72,044	$ 72,044	$ 72,044	$ 72,044
Less:						
Private School	$ (16,800)	$ (16,800)	$ (16,800)	$ (16,800)	$ (16,800)	$ (16,800)
Rent	(30,000)	(30,000)	(30,000)	(30,000)	(30,000)	(30,000)
Annual Available Cash	$ 25,244	$ 25,244	$ 25,244	$ 25,244	$ 25,244	$ 25,244
Monthly Available Cash	$ 2,104	$ 2,104	$ 2,104	$ 2,104	$ 2,104	$ 2,104
Wife - Golda						
Pre-Tax Income	$ 75,000	$ 75,000	$ 75,000	$ 75,000	$ 75,000	$ 75,000
Less: Income Tax	(26,250)	(26,250)	(26,250)	(26,250)	(26,250)	(26,250)
After-Tax Income	$ 48,750	$ 48,750	$ 48,750	$ 48,750	$ 48,750	$ 48,750
Plus :						
ED Practice-Principal	11,881	12,996	14,215	15,548	17,007	18,602
ED Practice-Interest	7,640	6,526	5,307	3,973	2,515	919
Maintenance	32,684	32,684	32,684	32,684	32,684	32,684
Child Support	43,750	43,750	43,750	43,750	43,750	43,750
Disposable Income	$ 144,706	$ 144,706	$ 144,706	$ 144,706	$ 144,706	$ 144,706
Less:						
Private School	$ (7,200)	$ (7,200)	$ (7,200)	$ (7,200)	$ (7,200)	$ (7,200)
Rent	(30,000)	(30,000)	(30,000)	(30,000)	(30,000)	(30,000)
Annual Available Cash	$ 107,506	$ 107,506	$ 107,506	$ 107,506	$ 107,506	$ 107,506
Monthly Available Cash	$ 8,959	$ 8,959	$ 8,959	$ 8,959	$ 8,959	$ 8,959

of New York (N.Y.C.R.R.) indicates that types of businesses are categorized in a section entitled "Eligibility Criteria for Businesses" (5 N.Y.C.R.R. 220.6). This law, which concerns eligibility for participation in the START-UP NY Program, distinguishes businesses involved in the retail and wholesale sector from those which provide services such as restaurants, real estate brokerage firms, law firms, hospitality services, medical practices, accounting firms and financial firms. An understanding of the concept of a "service-related business" becomes important as we work our way through the decisions set forth below.

Prior to the arrival of the *Keane* decision, the New York appellate courts had frequently weighed in on the issue of double counting as it pertains to the property division-spousal support overlap vis-à-vis professional practices and service-related businesses.

The Cases

1. *McSparron* and *Grunfeld*

A sampling of earlier cases, involving the double counting issue, is set forth below. Probably, the best place to start a historical analysis would be by revisiting the Court of Appeals 1995 opinion in *McSparron v. McSparron*,[30] and its 2000 opinion in *Grunfeld v. Grunfeld*.[31]

McSparron, involved an analysis of monies available for making a maintenance award when the payor's income was also utilized to value his professional license. In addressing the double counting issue, the court's instructive was as follows:

> Moreover, care must be taken to ensure that the monetary value assigned to the license does not overlap with the value assigned to the other marital assets that are derived from the license such as the licensed spouse's professional practice.
>
> The courts must also be meticulous in guarding against duplication in the form of maintenance awards that are premised on earnings derived from professional licenses.

In *Grunfeld*, the husband's law license and law practice were valued. To value the practice an excess earnings analysis was used (pursuant to Revenue Ruling 68-609). The trial court excluded the excess earnings of the law practice (the income above reasonable compensation) in making its maintenance award. The Court of Appeals found no error in this application of the law. However, relying on its decision in *McSparron*, the court found error in the trial court's use of income used to calculate the value of the license being also figured into its calculations of the husband's maintenance obligation. In its opinion the Court of Appeals reiterated the concept that "[t]here is no double counting to the extent that maintenance is based upon spousal income which is not capitalized and then converted into and distributed as marital property." Of course, the right to equitable distribution of a professional license in New York, which then

Chart B

	Annual	Monthly
Husband Income	$ 280,000	$ 23,333.33
Wife Income	$ 75,000	$ 6,250.00
Maintenance	$ 6,464	$ 538.67
Child Support	$ 48,125	$ 4,010.42
Rent	$ 30,000	$ 2,500.00
Private School	$ 24,000	$ 2,000.00
Husband Tax Rate	40%	
Wife Tax Rate	35%	

	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6
Husband - Chaim						
Pre-Tax Income	$ 280,000	$ 280,000	$ 280,000	$ 280,000	$ 280,000	$ 280,000
Less: Income Tax	(112,000)	(112,000)	(112,000)	(112,000)	(112,000)	(112,000)
After-Tax Income	$ 168,000	$ 168,000	$ 168,000	$ 168,000	$ 168,000	$ 168,000
Less :						
ED Practice-Principal	(11,881)	(12,996)	(14,215)	(15,548)	(17,007)	(18,602)
ED Practice-Interest	(7,640)	(6,526)	(5,307)	(3,973)	(2,515)	(919)
Maintenance	(6,464)	(6,464)	(6,464)	(6,464)	(6,464)	(6,464)
Child Support	(48,125)	(48,125)	(48,125)	(48,125)	(48,125)	(48,125)
Disposable Income	$ 93,889	$ 93,889	$ 93,889	$ 93,889	$ 93,889	$ 93,889
Less:						
Private School	$ (18,480)	$ (18,480)	$ (18,480)	$ (18,480)	$ (18,480)	$ (18,480)
Rent	(30,000)	(30,000)	(30,000)	(30,000)	(30,000)	(30,000)
Annual Available Cash	$ 45,409	$ 45,409	$ 45,409	$ 45,409	$ 45,409	$ 45,409
Monthly Available Cash	$ 3,784	$ 3,784	$ 3,784	$ 3,784	$ 3,784	$ 3,784
Wife - Golda						
Pre-Tax Income	$ 75,000	$ 75,000	$ 75,000	$ 75,000	$ 75,000	$ 75,000
Less: Income Tax	(26,250)	(26,250)	(26,250)	(26,250)	(26,250)	(26,250)
After-Tax Income	$ 48,750	$ 48,750	$ 48,750	$ 48,750	$ 48,750	$ 48,750
Plus :						
ED Practice-Principal	11,881	12,996	14,215	15,548	17,007	18,602
ED Practice-Interest	7,640	6,526	5,307	3,973	2,515	919
Maintenance	6,464	6,464	6,464	6,464	6,464	6,464
Child Support	48,125	48,125	48,125	48,125	48,125	48,125
Disposable Income	$ 122,861	$ 122,861	$ 122,861	$ 122,861	$ 122,861	$ 122,861
Less:						
Private School	$ (5,520)	$ (5,520)	$ (5,520)	$ (5,520)	$ (5,520)	$ (5,520)
Rent	(30,000)	(30,000)	(30,000)	(30,000)	(30,000)	(30,000)
Annual Available Cash	$ 87,341	$ 87,341	$ 87,341	$ 87,341	$ 87,341	$ 87,341
Monthly Available Cash	$ 7,278	$ 7,278	$ 7,278	$ 7,278	$ 7,278	$ 7,278

existed, has been abolished. Under the prior law, this type of an "enhanced earning" asset would generally be valued by comparing anticipated earnings of the titled spouse both with and without the license.

2. The Pre-*Keane* Era

Prior to *Keane*, we see a steady flow of decisions with a level of consistency.

In *Douglas v. Douglas*,[32] the wife's expert's testimony, as to the appreciation of the husband's law partnership, was in question. The trial court accepted the valuation of this expert, which was based upon an excess earnings approach. On appeal, the husband argued that the trial court had engaged in double-counting when making its maintenance award. The Appellate Division disagreed, noting that the lower court's maintenance award was based solely on the uncapitalized portion of the husband's earnings (i.e., the reasonable compensation) which the forensic expert attributed to him.

Siegel v. Siegel[33] involved the valuation of the husband's accounting practice as well as a calculation of his maintenance obligation. The husband alleged that the trial court had engaged in double-counting by using the same stream of income both in valuing the practice and in setting his maintenance payments. The Appellate Division agreed, indicated that this was impermissible, and remitted the matter for a recalculation of maintenance.

In *Sodaro v. Sodaro*,[34] the husband's psychiatric practice was valued by use of an excess earnings approach. The trial court calculated the amount by which the husband's income from the practice exceeded the reasonable compensation for the services the husband rendered to the practice over a period of time. The wife received a distribution of a portion of the practice, as well as maintenance. Since the maintenance award was based upon income utilized to value the psychiatric practice (the excess earnings) the Appellate Division found that impermissible double-counting had occurred.

Murphy v. Murphy,[35] addressed the double counting issue as it pertained to equitable distribution of the husband's business and his maintenance obligation to his wife. The husband's business was valued and distributed by means of an excess earnings approach. The trial court also awarded the wife maintenance. The Appellate Division, Second Department found that the trial court had received a valuation of the husband's business that had been made by use of an income stream which was also included in his income for purposes of maintenance. This was improper. The matter was remitted to the trial court to recalculate maintenance and the wife's distributive award.

Shortly after its decision in *Murphy*, the Second Department decided *Miklos v. Miklos*.[36] Here, the wife received 50% of the value of the marital portion of the husband's law license, 40% of the value of his interest in a law practice, along with maintenance. The percentage amounts of the wife's claims against the license and practice were modified on appeal. In addition thereto, the appellate court identified issues of double counting and remitted these matters to the trial court to address same. The Supreme Court had converted a portion of the husband's future income stream into the value of the license and potentially into the valuation of the husband's interest in the professional practice. This technique was in contravention of the directives of *Grunfeld* and *McSparron* to avoid double counting.

3. The *Keane* Decision

The introductory language of *Keane*, reads as follows:

> In *Grunfeld v. Grunfeld* (94 N.Y.2d 696 [2000]) and *McSparron v. McSparron* (87 N.Y.2d 275 [1995]) we made clear that in divorce actions a court should not twice count the income associated with a professional license, an intangible asset, when making distributive and maintenance awards.
>
> We are now called upon to determine whether this principle extends to the distribution of a tangible, income-producing asset and the subsequent award of maintenance from income deriving from that asset.

Here, the husband was the sole owner of a real estate entity that held two assets, one being real property leased to a car repair shop, the other a mortgage note. Both of these assets produced income. The rental property was valued at $290,000 using a capitalization of income approach and at $324,000 using a market approach. These valuations would likely have taken into account the rental income for the property. The Appellate Division, citing *McSparron* and *Grunfeld*, held that the wife was not entitled to maintenance based upon that portion of the husband's income which derived from his ownership of the car repair shop. The Court of Appeals reversed and held that double counting exists only where the subject asset is "totally indistinguishable" and has "no existence separate from" the income which it generates. Here the car repair shop, as an asset, was not found to be indistinguishable from the income stream derived from its lease. The court further opined as follows:

> Double counting may occur when marital property includes intangible assets such as professional licenses or goodwill, or the value of a service business.

Because the majority of cases involving the double counting analysis involve a valuation of the intangible asset known as "goodwill" attendant to a service-related businesses, it would seem that efforts to avoid double counting need be made with regularity. However, appellate decisions following *Keane* have often restricted the double counting analysis only to those cases which involved professional licenses. Since enhanced earning claims against educational attainments have now been abolished in New York prospectively, it would seem that there is diminishing utility to double counting claims following the logic of such cases.

4. Cases Decided After *Keane*

In recent years, there appears to be a departure in approach between the "upstate" Departments of the Appellate Division and the Appellate Division, Second Department. While the Third and Fourth Departments appear to take a broader approach in preventing double counting of income, the Second Department has largely restricted the use of the doctrine based upon its interpretation of *Keane*.

Early in the post-*Keane* era, the Second Department decided *Groesbeck v. Groesbeck*.[37] At issue was the distribution of the husband's home improvement contracting business vis-à-vis his maintenance obligation. There was no discussion in the court's decision concerning the value of the business or the valuation methodology employed. However, the court's holding was to the effect that there could be no issue of double counting of income because the business was a tangible income-producing asset (citing *Keane* and its own decision in *Griggs v. Griggs*).[38]

A few years later, the Second Department decision reverted to pre-*Keane* methodology in *Rodriguez v. Rodriguez*.[39] Here, the trial court awarded the wife maintenance, 30% of the value of the husband's medical license and 25% of his medical practice. An excess earnings approach was viewed to value the medical practice. This involved the conversion of a certain amount of the husband's future income stream into an asset. The trial court awarded maintenance based upon the husband's total income, which necessarily included the practice's excess earnings. This was found be double counting of income on appeal, which was improper. The matter was remitted to the trial court to recalculate maintenance and the wife's distributive award.

The valuation of the husband's business in *Ripka v. Ripka*,[40] an opinion rendered by the Appellate Division, Fourth Department, was accomplished by a method which did not involve the capitalization of income. The trial court's maintenance award to the wife was based upon the husband's total income. However, the wife received no percentage of the husband's business. The court therefore found no issue of double counting of income, which its opinion indicated would otherwise be proscribed by the holding in *Grunfeld*.

Weintraub v. Weintraub[41] concerned a plumbing and fire sprinkler business. The business was valued at $429,000. There is no indication in the court's decision as to how the business was distributed. The wife received maintenance. The Second Department's holding indicates that there could not be a double counting issue because the business was a tangible income-producing asset (citing *Keane* and *Kerrigan v. Kerrigan*).[42]

An interesting analysis of the double counting issue can be found in the Albany County Supreme Court's decision in *V.M. v. N.M.*[43] The parties had stipulated that the husband's diamond business was worth $8.4 million. The valuation was based upon inventory alone. After trial, the court awarded the wife 30% of the value of the business. The court characterized the business as a "service business" (as alluded to in *Keane*) and, therefore double-counting concepts would apply. To adjust for the overlap between property and maintenance awards, the wife was entitled to a spousal support award based upon 70% of the husband's income. This would offset the income which had been capitalized and distributed as an asset.

E.G. v. D.G.,[44] concerned the valuation and distribution of a restaurant. The Westchester County Supreme Court determined the value of this business based upon a percentage of annual revenue. No double-counting analysis was performed as part of the maintenance award. The trial court characterized the business as a tangible income-producing asset such that double counting would not apply.

Using a pre-Keane approach, the Third Department applied double counting principles in *Mula v. Mula*.[45] The husband's accounting practiced was valued. He was able to keep the practice as a trade off for other marital assets. The trial court used the husband's entire income in making its maintenance award. The Appellate Division found this to be in error. It deemed the accounting practice a "service business" thereby requiring an adjustment to the husband's income before setting the maintenance obligation.

Adhering to the same methodology as used in *Mula*, the Third Department rendered another double-counting decision, later in 2015, entitled *Gifford v. Gifford*.[46] In this action the husband was a self-employed engineer. The parties settled all issues of equitable distribution. The wife was awarded maintenance after trial. It was the husband's contention that the trial court had erred in using his entire income in its maintenance calculation, as some part of that income had been capitalized and distributed as an asset. The Appellate Division deemed the husband's firm a "service business." Since the wife had received a share of the business, an income adjustment needed to be made for maintenance purposes. The court opined that only the husband's baseline earnings (that income which has not been capitalized) was available for payment of maintenance.

The application of the *Keane* holding has seemed to differ throughout the state, depending on which judicial department the case is heard in. In 2016, the Second Department revisited the double counting issue in rendering its decision in *Palydowycz v. Palydowycz*.[47] Here, the husband owned two medical practices and a 1% interest in an ambulatory surgical center. The parties settled maintenance claims. The husband thereafter took the position that the wife had no entitlement to a distributive award against his business interests. He argued that any such award would run afoul of prohibitions against double counting because his maintenance obligation had been arrived at by use of his entire business income.

The wife's expert valued the husband's business interests based upon a capitalization of income approach. The Supreme Court accepted the husband's argument and denied the wife a distributive award. It held that the income streams that were capitalized in the assets valuation had already been accounted for in determining maintenance. Re-

lying on *Keane*, and specifically rejecting its own methodology, as previously used in *Rodriguez*, the Appellate Division reversed the trial court's ruling.

The *Palydowycz* court concluded that the husband's interests in medical practices and ambulatory center were not "intangible assets" nor indistinguishable from the income stream utilized in the maintenance determination. The wife was not precluded from making property claims against the husband's business interests notwithstanding the prior resolution of maintenance claims.

Consistent with *Palydowycz*, the Second Department decided *Culen v. Culen*[48] in 2018. Here, the parties stipulated to the value of the husband's diving service business as being worth $421,000. After trial, the wife was awarded 25% of the value of the business and she received eight years of maintenance. The husband raised a double counting issue. This argument was rejected with the court citing *Palydowycz* for the proposition that there could be no issue of double counting where the business in question was a "tangible income producing asset."

In its last reported foray into this area, the Second Department decided *Westbrook v. Westbrook*.[49] In this decision the court's analysis is a bit confusing in light of prior Second Department precedent.

In *Westbrook*, the husband owned a chimney cleaning/masonry business. By use of an excess earnings approach, the business was valued at $304,000. The Appellate Division affirmed the trial court's decision to award the wife a one-third interest in the business and maintenance for 53 months.

Addressing the overlap between income used for valuation and that which figured into maintenance calculations, the court's opinion is a bit murky. First the court opined that there was no risk of double counting because the trial court had excluded the husband's excess earnings from its maintenance calculation (a type of pre-*Keane* reasoning). The decision then states that the husband's business is a "tangible income producing asset" (within the meaning of *Palydowycz*) which would render double-counting inapplicable. The court noted that the husband's business owned four vehicles, had four employees and possessed $134,000 in "tangible assets" such as cash, inventory, equipment, etc. There was no explanation as to the significance of the trial court's exclusion of capitalized income, which would seem to be irrelevant in a *Palydowycz* analysis. Nor did the court indicate whether the items which it deemed "tangible assets" were already figured into the excess earnings valuation and, as such, already accounted for. It is difficult to understand the court's reasoning vis-a-vis its earlier decisions.

The "Schwartz" Divorce With Application of Double Counting Principles

If the court were to adopt an analysis based upon avoidance of double counting of income in the "Schwartz's" matter, adjustments to our calculations would need to be made. To do so, we have utilized Chaim's reasonable compensation ($130,000) for purposes of maintenance calculations. That figure being used under the rationale that this is the portion of income which has not been capitalized to perform the valuation of the professional practice.

I. Recalculation of maintenance (based upon undistributed income)

Husband's annual income (after statutory deductions): $120,055

Wife's annual income (after statutory deductions): $69,263

Step #1
20% of husband's income: $24,011

25% of wife's income: $17,316

Remainder: $6,695

Step #2
40% X $189,318 (combined income) = $75,727

Wife's income: $69,263

Remainder: **$6,464 (lower amount) = $539 per month**

II. Calculation of child support

Husband's income (after statutory deductions): $260,622 (77%)

Wife's income (after receipt of maintenance): $75,727 (23%)

Combined parental income: $336,349

Husband's child support obligation: $250,000 X .77 X .25 = $48,125 per year or $4,010 per month.

Here, combined annual payments of maintenance ($6,464) child support ($48,125) and the distributive award ($19,524) total a somewhat more affordable $74,113 per year. After deduction for maintenance, basic child support and the distributive award from his net income ($168,000 per year) Chaim will be left with disposable income of $93,887 per year. After payment of his pro-rata share of private school tuition and the cost of a rental apartment ($48,480 per year) he will retain approximately $45,409 (approximately $3,784 per month) to live off of. Golda's after-tax income ($48,750) will be supplemented by an additional $74,113 per year. After payment of her housing expenses ($30,000 per year) and her percentage of private school tuition ($5,520) she is left with approximately $87,341 per year at her disposal. **These calculations are detailed in Chart "B" hereto.**

In this limited analysis of cash flows, the husband, who is the non-custodial parent of two children, retains about 34% of available monies. While the wife, who is the custodial parent, retains about 66% of available monies. It might be stated, under this scenario, that the primary residential

parent would require twice as much available monies as does the non-residential parent.

Conclusion

Property awards, premised upon distribution of goodwill for service-related businesses and practices, without concomitant adjustment of income streams in calculating spousal support would seem to defy logic. Moreover, the failure to adjust for double counting of income in such scenarios often creates an almost insurmountable burden for the payor spouse, in all but the most lucrative marital estates. Pending further clarification on this issue from the Court of Appeals, it is the authors' belief that the approach utilized by the upstate Departments of the Appellate Division, as illustrated in the cases cited above, is the more equitable and practical approach.

Endnotes

1. *Keane v. Keane*, 8 N.Y.3d 115, 828 N.Y.S.2d 283 (2006).
2. *Heller v. Heller* 2008 Ohio 3296 (Ohio App. 2008).
3. 214 Ill. 2d 154 (2005).
4. 62 Mass. App. Ct. 366 (2004).
5. *Holbrook v. Holbrook*, 103 Wis. 2d 327 (1981).
6. *Burns v. Burns*, 84 N.Y.2d 369, 618 N.Y.S.2d 761 (1994), *Amodio v. Amodio*, 70 N.Y.2d 5, 516 N.Y.S.2d 923 (1987); *Davenport v. Davenport*, 2021 N.Y. Slip Op. 05946 (2d Dep't 2021).
7. 187 A.D.3d 1443, 134 N.Y.S.3d 540 (3d Dep't 2020).
8. *Gifford v. Gifford*, 132 A.D.3d 1123, 19 N.Y.S.3d 102 (3d Dep't 2015).
9. *Rubino v. Rubino*, 4 A.D.3d 516, 772 N.Y.S.2d 377 (2d Dep't 2004).
10. *Sodaro v. Sodaro*, 286 A.D.2d 434, 729 N.Y.S.2d 731 (2d Dep't 2001).
11. *Vail-Beserini v. Beserini*, 237 A.D.2d 658, 654 N.Y.S.2d 471 (3d Dep't 1997).
12. *Rice v. Rice*, 222 A.D.2d 493, 634 N.Y.S.2d 761 (2d Dep't 1995).
13. *Stolow v. Stolow*, 149 A.D.2d 683, 540 N.Y.S.2d 484 (2d Dep't 1989).
14. *G.K. v. L.K.*, 27 Misc. 3d 1239(A), 932 N.Y.S.2d 420 (Sup. Ct., Kings Co. 2010).
15. *Chiu v. Chiu*, 125 A.D.3d 824, 4 N.Y.S.3d 279 (2d Dep't 2015).
16. *Kassab v. Kassab*, 56 Misc. 3d 1213(A), 65 N.Y.S.3d 492 (Sup. Ct., Queens Co. 2017).
17. *Hall v. King*, 177 Misc. 2d 126, 675 N.Y.S.2d 810 (Sup. Ct., Queens Co. 1998).
18. *Kavanaugh v. Simeon*, 24 Misc. 3d 1221(A), 897 N.Y.S.2d 670 (Sup. Ct., Queens Co. 2009).
19. *NK v. MK*, 17 Misc. 3d 1123(A), 851 N.Y.S.2d 71 (Sup. Ct., Kings Co. 2007).
20. *A.C. v. J.O.*, 40 Misc. 3d 1236(A), 975 N.Y.S.2d 707 (Sup. Ct., Kings Co. 2013).
21. *Boyajian v. Boyajian*, 194 Misc. 2d 756, 755 N.Y.S.2d 571 (Sup. Ct., Nassau Co. 2003).
22. Citing, *inter alia*, *Oppenheim v. Oppenheim*, 168 A.D.3d 1085, 93 N.Y.S.3d 92 (2d Dep't 2019); *Sheehan v. Sheehan*, 161 A.D.3d 912, 77 N.Y.S.3d 152 (2d Dep't 2018); *Nadassi v. Nadel-Nadassi*, 153 A.D.3d 1346, 60 N.Y.S.3d 488 (2d Dep't 2017); *Sutaria v. Sutaria*, 123 A.D.3d 909, 2 N.Y.S.3d 124 (2d Dep't 2014).
23. *Pett v. Spiegal*, 202 N.Y.S. 650 (Sup. Ct., New York Co. 1923).
24. *Label v. Label*, 70 A.D.3d 898, 895 N.Y.S.2d 192 (2d Dep't 2010).
25. *Burns v. Burns*, 84 N.Y.2d 369, 618 N.Y.S.2d 761 (1994).
26. *Blake v. Blake Agency, Inc.*, 107 A.D.2d 139, 486 N.Y.S.2d 341 (2d Dep't 1985).
27. *Spaulding v. Benenati*, 57 N.Y.2d 418, 456 N.Y.S.2d 733 (1982).
28. *Congel et al. v. Malfitano*, 31 N.Y.3d 272, 76 N.Y.S.3d 873 (2018).
29. *Moll v. Moll*, 187 Misc. 2d 770, 722 N.Y.S.2d 732 (Sup. Ct., Monroe Co. 2001).
30. *McSparron v. McSparron*, 87 N.Y.2d 275, 639 N.Y.S.2d 265 (1995).
31. *Grunfeld v. Grunfeld*, 94 N.Y.2d 696, 709 N.Y.S.2d 486 (2000).
32. *Douglas v. Douglas*, 281 A.D.2d 709, 722 N.Y.S.2d 87 (3d Dep't 2001).
33. *Siegel v. Siegel*, 284 A.D.2d 389, 726 N.Y.S.2d 288 (Mem) (2d Dep't 2001).
34. *Sodaro v. Sodaro*, 286 A.D.2d 434, 729 N.Y.S.2d 731 (2d Dep't 2001).
35. *Murphy v. Murphy*, 6 A.D.3d 678, 775 N.Y.S.2d 370 (2d Dep't 2004).
36. *Miklos v. Miklos*, 9 A.D.3d 397, 780 N.Y.S.2d 622 (2d Dep't 2004).
37. *Groesbeck v. Groesbeck*, 51 A.D.3d 722, 858 N.Y.S.2d 707 (2d Dep't 2008).
38. *Griggs v. Griggs*, 44 A.D.3d 710, 844 N.Y.S.2d 351 (2d Dep't 2007).
39. *Rodriguez v. Rodriguez*, 70 A.D.3d 799, 894 N.Y.S.2d147 (2d Dep't 2010).
40. *Ripka v. Ripka*, 77 A.D.3d 1384, 908 N.Y.S.2d 570 (4th Dep't 2010).
41. *Weintraub v. Weintraub*, 79 A.D.3d 856, 912 N.Y.S.2d 674 (2d Dep't 2010).
42. *Kerrigan v. Kerrigan*, 71 A.D.3d 737, 896 N.Y.S. 443 (2d Dep't 2010).
43. *V.M. v. N.M.*, 43 Misc. 3d 1204, 990 N.Y.S.2d 440 (Sup. Ct., Albany Co. 2014).
44. *E.G. v. D.G.*, 53 Misc. 3d 1201, 43 N.Y.S.3d 766 (Sup. Ct., Westchester Co. 2014).
45. *Mula v. Mula*, 131 A.D.3d 1296, 16 N.Y.S.3d 868 (3d Dep't 2015).
46. *Gifford v. Gifford*, 132 A.D.3d 1123, 19 N.Y.S.3d 102 (3d Dep't 2015).
47. *Palydowycz v. Palydowycz*, 138 A.D.3d 810, 29 N.Y.S.3d 479 (2d Dep't 2016).
48. *Culen v. Culen*, 157 A.D.3d 926, 69 N.Y.S.3d 702 (2d Dep't 2018).
49. *Westbrook v. Westbrook*, 164 A.D.3d 939, 83 N.Y.S.3d 560 (2d Dep't 2018).

Mark I. Plaine is an attorney in Forest Hills, N.Y. specializing in matrimonial law. He is a member of the Nassau County Bar Association, Queens County Bar Association and a fellow of the American Academy of Matrimonial Lawyers. He may be contacted at mplaine@plainelaw.com.

David L. Gresen, CPA/ABV/CFF, CFE is a partner in the firm of KLG Business Valuators & Forensic Accountants, LLC (KLG). Gresen assists attorneys and judges in forensic accounting, business valuation and litigation support matters. He may be contacted at david@goKLG.com.