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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: CIVIL TERM, PART 19MM

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PAUL PATRICK VINCIGUERRA,

Plaintiff,

Index No.: 12452/94

-against-

Calender No.:

HILDA VARGAS VINCIGUERRA,

DECISION AFTER TRIAL

Defendant.

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Appearances:

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Patricia P. Satterfield , J.:

This is a matrimonial action commenced by Paul Vinciguerra (“plaintiff”) against Hilda Vinciguerra (“defendant”) for an absolute divorce on the grounds of cruel and inhuman treatment, for a declaratory judgment that the marriage between the parties was void, and declaratory judgment as to the paternity of the infant issue. Defendant counterclaimed for a divorce against plaintiff on the ground of cruel and inhuman treatment. At issue at trial were the

divorce, custody and visitation, and child support. All other issues were resolved or deemed abandoned. The trial of this action was held on October 13, 14 and 15, November 6 and 10, 1998; January 29, February 2, February 3 and 25, May 25, 26 and 27, June 23 and 30, August 12, September 15, October 26, November 19 and December 22, 1999; and January 5 and 10, and February 7, 2000. Plaintiff was represented by Gregory Rabinowitz, Esq., of counsel to Wachtel, Rabinowitz & Marshall, LLC; defendant was represented by Kim Susser, Esq. of counsel to New York Legal Assistance Group; and the Law Guardian for the child was Meryl Kovit, Esq. of Kovit & Molloy. Memoranda of law were received up to June 15, 2000.

Background

This matrimonial action was commenced by filing on June 15, 1994. Plaintiff was born May 22, 1966, and currently is 34 years of age; defendant was born in the Dominican Republic on April 16, 1963, and currently is 37 years of age.¹ The parties were married January 10, 1994, in the County of Queens, State of New York. There is one issue of the marriage: Alexander Q. Vinciguerra, born January 19, 1994. Both parties are in good health. At the time of the commencement of this action, both parties were residents of the State of New York, and had continuously resided in the State of New York for a period in excess of one (1) year. Neither plaintiff nor defendant is in the military service of the United States, and there is no judgment or decree of divorce, separation or annulment granted with respect to this marriage by this Court or any other court of competent jurisdiction and no other actions are pending at the present time. There exists no barrier, religious or otherwise, affecting the ability of either party to remarry subsequent to a divorce being granted by this Court. Both parties agree to take prior to the entry of final judgment, all steps solely within their power to remove any barrier to the other's remarriage following the divorce.

Prior Proceedings

In May, 1994, both parties filed family offense petitions in the Family Court, Queens County – plaintiff, on May 19, and defendant on May 25 -- following incidents that occurred on May 9 and May 18, 1994. Both were awarded an order of protection. Thereafter, on June 15, 1994, plaintiff commenced the instant divorce action for a divorce on the ground of cruel and inhuman treatment; for an annulment on the ground that defendant entered the marriage fraudulently claiming that she was legally married to someone else; and for a judgment declaring that he was not the father of the child. Defendant counterclaimed for a divorce on the ground of cruel and inhuman treatment.

On April 17, 1995, plaintiff filed a petition for custody in the Family Court, and obtained an ex parte order of custody; he also filed a violation of the order of protection issued in the Nassau County Family Court. Defendant filed a cross petition a day after in the same court for custody and a violation of her order of protection. On April 20, 1995, the Family Court judge in Nassau County rescinded its prior custody order based upon plaintiff's denial of paternity in the

¹Defendant became a naturalized citizen of the United States on March 4, 1997.

Supreme Court divorce proceeding. Plaintiff filed a motion to reargue in the Family Court, and contemporaneously filed an Order to Show Cause in the Supreme Court (Durante, J.), seeking custody and an order barring defendant from obtaining a passport for the child. On July 11, 1995, plaintiff's request for custody in the Supreme Court was denied; defendant was granted temporary custody and a visitation schedule was established. On November 20, 1995, after the appointment of a Law Guardian and a forensic examiner in the Supreme Court action, plaintiff filed a note of issue. The Forensic Evaluator, Dr. Kassoff, rendered a report in January 1996.

On February 13, 1996, an Inquest was held for divorce on the ground of abandonment and a stipulation of settlement was entered into before Judicial Hearing Officer ("JHO") Gartenstein. The stipulation provided that the parties would have joint custody, with plaintiff having physical custody until such time that defendant moved to the Long Beach school district; defendant would have visitation on alternating weeks from Monday at 8:00 a.m. until Thursday at 7:00 p.m.; the child's primary language would be English; the maternal grandparents would not be alone with the child; there would be no religious schooling, training or participation in any religious ceremonies for the child; the child would attend public school in the Long Beach school district.

Upon defendant's alleged failure to abide by the terms of the stipulation, plaintiff, on February 22, 1996, filed an Order to Show Cause and a Writ of Habeus Corpus, claiming that defendant "absconded" with the child. Plaintiff obtained another ex parte order for temporary sole custody until February 27, 1996, the return date of the motion and Writ. On the return date, Judge Durante denied the writ, refused to change custody, and appointed a new forensic examiner, Dr. Sandra Mandel, and a Law Guardian, Beatrice Mavaglia, Esq.. On April 1, 1996, plaintiff appealed this ruling; the appeal was denied on May 30, 1996, based upon plaintiff's failure to perfect. On April 10, 1996, Judge Durante appointed a new Law Guardian, Meryl L. Kovit, Esq.

The parties made numerous additional appearances before the Court regarding the issues of paternity, custody, visitation and child support, resulting in modifications of prior court orders pertaining to each of these issues. On November 13, 1996, after objecting to submission to DNA blood testing, plaintiff admitted paternity, thereby mooting the necessity for the blood testing that had been ordered by the Court. On December 12, 1996, plaintiff was ordered to pay \$50.00 per week in child support. On January 21, 1997, Judge Durante signed an order directing joint custody with physical residence to defendant, and directing plaintiff to pay child support, effective December 12, 1996. On March 24, 1997, plaintiff, who was in arrears in child support, was directed to pay increased child support in the amount of \$130.00 per week; defendant was directed to enroll the child, who had poor attendance at the nursery school in Long Beach, in a nursery school in Brooklyn; and plaintiff was granted visitation every weekend. Plaintiff, who had failed to meet with the Forensic Evaluator, was directed to do so. On March 26, 1997, plaintiff filed an appeal from the March 24, 1997 order. On April 4, 1997, at the request of the Forensic Examiner, Dr. Mandel, a conference was held before the Court to discuss plaintiff's failure to meet with her and plaintiff's noncompliance with court orders pertaining to child support and the child's attendance at nursery school; on April 14, 1997, Judge Durante issued an order that, *inter alia*, set another visitation schedule and directed plaintiff to pay child support in the amount of \$130.00 per week, effective March 24, 1997. On May 6, 1997, defendant filed a

contempt motion based upon plaintiff's failure to pay child support, resulting in a July 28, 1997 order directing plaintiff to pay child support weekly and to post a \$2,500.00 bond; plaintiff again was directed to contact Dr. Mandel within twenty four hours. On October 27, 1997, the court appoint Susan Silverstein, CSW, as the Forensic evaluator, to replace the now incapacitated Dr. Mandel; on October 29, 1997, plaintiff unsuccessfully filed an Order to Show Cause objecting to the appointment of Ms. Silverstein.

On April 27, 1998, the parties appeared before Judge Dye, at which time the parties agreed to extended visitation for plaintiff. On July 23, 1998, the parties appeared before this Court at a pre-trial conference, during which the trial issues were delineated as custody, visitation and child support; the parties waived maintenance and equitable distribution. An inquest earlier was held before JHO Gartenstein for a divorce on the ground of abandonment. As judgment never was entered, testimony was taken at trial on the parties' respective causes of action for divorce on the ground of cruel and inhuman treatment. The only ancillary issue preserved for decision after trial was defendant's application for Queens County to pay for her share of the cost of trial transcripts.

The Court has had a full opportunity to consider the evidence presented with respect to the issues in this proceeding, including the testimony offered and the exhibits received. The Court further has had an opportunity to observe the demeanor of the witnesses called to testify and has made determinations on issues of credibility with respect to these witnesses. The Court now makes the following findings of fact and conclusions of law:

A. The Divorce

Both parties seek a divorce on the ground of cruel and inhuman treatment. A party seeking a divorce on the ground of cruel and inhuman treatment must show serious misconduct, not merely incompatibility or that the marriage is "dead." Brady v. Brady, 64 NY2d 339; Martin V. Martin, 224 AD2d 597; Hirschhorn v. Hirschhorn, 194 AD2d 768; Sanford v. Sanford, 176 AD2d 932; Domestic Relations Law ("DRL") 170.1. The conduct complained of must constitute calculated cruelty so as to render cohabitation unsafe or improper. See, Feeney v. Feeney, 241 A.D.2d 510. Whether conduct constitutes cruel and inhuman treatment depends, in part on the "length of the parties' marriage; what might be considered substantial misconduct in the context of a marriage of short duration, might only be 'transient discord' in that of a long term marriage, for which courts in this State have required a high degree of proof of cruel and inhuman treatment." Brady v. Brady, *supra*, at 344.

Defendant testified as to several acts of cruelty, both prior and subsequent to this marriage of short duration. The catalyst for much of the parties' discord was defendant's pregnancy, of which she testified that plaintiff first threatened her if she did not have an abortion, and then demanded that the child be given up for adoption. She further testified that during the pregnancy, but prior to the marriage, plaintiff kicked her in the stomach. She testified that she never called the police because "[t]he police in the Dominican Republic is thoroughly different to the police over here. I didn't know I could go to the police. I didn't know I could just go there and say what was happening and they would really help me. The idea I have of the police is one

from the Dominican Republic. If I would go to the police they would probably lock me in. Why would I accuse such a great person of something that is not true. In the Dominican Republic I would end up in jail. He is the son of some doctor. . . I don't know what was going to happen. I don't know his power in here, I though maybe I would do that I would end up with a lot of big problems. So, no way I would go to the police." She testified with respect to other pre-marriage incidents in November 1993, when she fled the apartment in which she lived with plaintiff, after his mother, whom defendant had told of the pregnancy over the objection of plaintiff, warned her to "get out" because she "didn't want anything to happen to [defendant] or the baby." She further testified that later she went with plaintiff and his mother to a lawyer, where plaintiff forced her to write: "Paul is not the father of my baby and if one day I decided to say in a court or anyplace that he is the father, I would have to give baby for adoption." She signed the paper, according to her testimony, because she had no choice, "[e]ither the choice of just write down on the paper whatever he wanted me to or to be followed by him all the time, harassing me." She added that plaintiff apologized in late December 1993, and told her that he wanted to marry her. The parties married on January 10, 1994.

Conflicts then arose around defendant's parents arrival in the United States during defendant's ninth month of pregnancy. Defendant testified that he did not like her parents and would not permit her to communicate with them or other members of her family, although he did call both sets of parents and told them that they could visit defendant in the hospital following the January 19, 1994 birth of their son. Plaintiff, according to defendant's testimony, objected to her breast feeding, and demanded that she not speak Spanish in front of the child or teach him Spanish. Following the birth of the child to May 1994, the relationship between the parties was stable; however, defendant testified that he did make comments, with respect to the baby, to the effect that "I am going to put him in a microwave. I am going to throw him through the window." In early May, the parties resumed arguing. On one occasion plaintiff took the child to the door as if to give him away, while grabbing and pushing defendant from the door; the police arrived in response to plaintiff's call. Within one week, the police again was called because of plaintiff's abusive behavior, and defendant moved to her mother's home. Soon thereafter, both parties obtained orders of protections against each other.

In June 1994, defendant testified that she moved in with a friend to get away from plaintiff because he injured her and threatened her. Plaintiff nonetheless found her in late June and served her with the divorce papers. Defendant testified that in July, plaintiff sought a reconciliation, on the conditions that she not speak Spanish in front of the child, not teach him any Spanish, not teach him any religion, and not bring him to Brooklyn where her parents live. Plaintiff gave her a document labeled "Specific Performance" that spelled out these terms. The document, which was admitted in evidence, provided:

"Plaintiff assert that he and defendant had a verbal agreement prior to their marriage. Defendant Warranted that (1) if Plaintiff stayed with Defendant and accepted the child, the child would be raised in the manner plaintiff wanted.

She further warranted:

- (2) that the child would be protected from and kept away from the inner city and the dangers and pressures associated with it. Defendant specifically agreed to keep child out of the counties of Kings, the Bronx and Manhattan unless the Plaintiff was present.
- (3) that neither child nor I would be subject to listening to Spanish. The child would not be taught to speak Spanish.
- (4) Defendant was not going to have any dealings with Defendant's extended family
- (5) Plaintiff would not have to have any dealing with Defendant's family. Further they would not come to our residence.
- (6) The child would not be put in a bed other than it's own.
- (7) Plaintiff and defendant agreed that they would not procreate unless both parties agreed. The act of Intercourse alone would not be considered an implied contract to procreate.
- (8) The Child would not have religion forced upon him. The child would not be baptized, blessed or brainwashed. Only the child could decide on the religion he wanted to follow when he becomes of age to make that decision.
- (9) Defendant gives first consideration to the wishes of Plaintiff."

Defendant refused to return to plaintiff, who continued to call her.

On the weekend of Labor Day, the parties did meet. On September 3, 1994, they went to the beach, returning that night to defendant's office where they argued. According to defendant's testimony, plaintiff again demanded that she agree that defendant was not the child's father, which she would not do. She testified that plaintiff became enraged, grabbed the child, who was crawling, from the floor, and removed a knife from his desk drawer, stating: "I am going to kill him if you don't say I am not the father." She testified that she was able to calm plaintiff down and grabbed the baby, but was prevented from leaving the office until the next morning, when defendant drove her to her parents' home, where she left the baby. She testified that she and plaintiff then went to the beach, where she felt more comfortable talking to him because people were around. According to her testimony, they continued to argue at the beach, and then returned to plaintiff's office. Defendant testified that "he wouldn't let me go back home any more. That I wouldn't - I wouldn't - that I was going to be with him without Alex all the time." She tried to leave, but he would not let her. She further testified that he "grabbed [me] to the back of my neck and pushed me against the bed, on the pillow and I couldn't breath anymore, so I lost consciousness;" she woke up in hysterics and with screams. Plaintiff called his parents and asked them to come and pick her up, which they did. Defendant sought medical attention for the injuries she sustained, described by the doctor, who was called to testify, as "small ecchymosis on right side of the neck;" "contusion of soft tissue in the neck." Defendant filed a police report, resulting in plaintiff's arrest and subsequent prosecution in the Criminal Court of the City of New York; the case was adjourned for six months in contemplation of dismissal ("ACD") and a one year order of protection was issued.

From October 1994 to March 1995, defendant and the child lived with defendant's parents. Defendant agreed to meet with plaintiff only in the presence of her parents so that plaintiff could see the child. In November 1995, the parties went to see plaintiff's psychologist, Dr. Steven Alter; according to defendant's testimony, plaintiff represented to her that he was in therapy and that he had changed. Plaintiff started sending her cards and flowers. In March 1995, defendant and the child moved back in with plaintiff at his home in Long Beach, where he imposed the same restrictions: no Spanish food, no Spanish, no church, no Spanish television shows, no parents. Within three days of the expiration of the ACD, plaintiff resumed his controlling behavior, resulting in plaintiff telling him, on April 15, 1995, that she wanted to return to her parent's home to live. According to defendant's testimony, plaintiff grabbed her by the hair and tried to throw her out of the house. Plaintiff arranged a meeting that night at a diner with his lawyer-friend, plaintiff's father and defendant for the purpose of defendant's signing of a document stating the plaintiff was not the child's father. She signed the document, and plaintiff's father drove her home, where, because she did not have a key, gained access through an open window. Upon his return home, plaintiff called the police, claiming that defendant had broken into the house. The police came, and allowed defendant to leave with Alex and suggested that the parties go to court to resolve custody. The next day, defendant filed a petition for custody in the Family Court.

The conduct which a party alleges as the basis for a cause of action must be viewed in the context of the entire marriage, including its duration, in deciding whether particular actions can properly be labeled as cruel and inhuman treatment. Brady v. Brady, *supra*, 64 NY2d at 895. Courts of this state have found sufficient basis for the grant of a divorce on the ground of cruel and inhuman treatment in marriages of short duration, where there is verbal abuse and physical harassment by one spouse against the other. See, e.g., Soto v. Soto, 216 AD2d 391; Hirschhorn v. Hirschhorn, *supra*, 194 AD2d at 769. The credible evidence established that plaintiff's conduct during this marriage of short duration constituted a course of conduct so endangering to plaintiff's mental, as well as physical, well being as to render it unsafe or improper for cohabitation to continue. Domestic Relations Law, section 170[1]; Ahrend v. Ahrend, 123 AD2d 731. See, Feeney v. Feeney, *supra*; Reiss v. Reiss, 170 AD2d 365. Accordingly, defendant is granted an absolute divorce against defendant on the ground of cruel and inhuman treatment. See, Tongue v. Tongue, 61 NY2d 809, affirming 97 AD2d 638; Lischynsky v. Lischynsky, 95 AD2d 111; Vail-Berserini v. Berserini, 237 AD2d 658.

Plaintiff's testimony concerning the events described by defendant confirm that the parties had "bad times" and "arguments." His testimony consisted of a different version of what allegedly took place, and purported to raise issues of credibility as to whether defendant, as claimed, was fearful, really felt threatened or was manufacturing evidence. He testified that on one occasion, defendant threatened to get a gun, and that on the night of April 15, 1995, defendant scratched him on the side. Although portions of defendant's testimony strained credibility, plaintiff's testimony was far less credible.

The testimony and exhibits, as well as the demeanor of plaintiff and defendant during

their testimony, establish to the satisfaction of this Court that defendant was subjected to abusive conduct by plaintiff, both physically and emotionally. Plaintiff's testimony clearly showed that he disdained defendant's cultural and religious upbringing, resented her family and considered defendant and her relatives to be of a lower class than he. While evidence of defendant's guile and deceit suggested a well-orchestrated strategy to escape the Dominican Republic, plaintiff's manipulative and demeaning conduct indicated an attempt to control, dominate and imprison an individual whose low self-esteem made her vulnerable to victimization. Plaintiff's conduct can best be characterized as mean-spirited, retaliatory and vengeful. Here, defendant's testimony regarding the defendant's abusive conduct towards, his forcing her to flee the marital residence on several occasions sufficiently established a reasonable apprehension of violence or conduct of such a character that seriously affected her health and threatened to permanently impair it.

Accordingly, defendant is granted an absolute divorce against plaintiff on the ground of cruel and inhuman treatment. See, Tongue v. Tongue, 61 NY2d 809, affirming 97 AD2d 638; Lischynsky v. Lischynsky, 95 AD2d 111; Vail-Berserini v. Berserini, 237 AD2d 658. As his testimony concerning the alleged cruel and inhuman treatment by defendant lack credibility, plaintiff's counterclaims for divorce hereby are dismissed.

B. Custody and Child Support

i. Custody

This matrimonial action presents a tragic situation for a little boy, who has never experienced any normalcy with an intact family. He was born nine days after his parents married, and lived with both of his parents for only a brief four-month period. The relationship between his parents was marked with discord, as the parents have done battle in the Family, Criminal and Supreme Court. His mother, defendant, is a native of the Dominican Republic and apparently has lived a life of distrust, deceit, and low self-esteem, notwithstanding having obtained a medical degree prior to her 1989 illegal entry into the United States. As set forth above, his father, plaintiff, a self-employed computer specialist engaged in medical supplies, presents as controlling, manipulative and vengeful. Both parties seek custody of the infant issue of the marriage, who has lived almost continuously with his mother since birth and has visited consistently with his father throughout this bitterly contested custody battle.

This Court, at the outset, rules out any consideration of a joint or shared custodial arrangement. Such is inappropriate where, as here, the parties have demonstrated an inability or unwillingness to cooperate in making decisions on matters relating to the care and welfare of the children. Bliss v. Ach, 56 NY2d 995; Braiman v. Braiman, 44 NY2d 584; Foranzo v. Scuderi, 224 AD2d 385. The shared parenting plan, which was put in effect during the pendency of this action, did not work because of the substantial acrimony that exists between the parties, and the total lack of trust that the parties exhibited between each other. During the pendency of this action, the parents constantly relied upon their respective attorneys and the Law Guardian as the mode of communication with each other. The level of animosity between the parties, the level of distrust between the parties and the adverse effect their interactions have upon the child all

militate against joint or shared custody. See, Braiman v. Braiman, *supra*. The question presented thus is which of the parents should have sole custody of the child. In resolving this question, the primary concern is the best interests of the child. Eschbach v. Eschbach, 56 NY2d 1572; Friederwitzer v. Friederwitzer, 55 NY2d 89; Vogel v. Vogel, 149 AD2d 501.

Proceeding from the premise, established by both case and statutory law, that neither party has a prima facie right to custody (Nehra v. Uhlar, 43 NY2d 242; Domestic Relations ("DRL"), section 240), this Court has pondered the well-established factors to be considered in determining the best interests of the child, which include "the parental guidance the custodian provides for the child; the ability of each parent to provide for the emotional and intellectual development; the financial status and ability of each parent to provide for the child; [and] the overall relative fitness of the parties." Eschbach v. Eschbach, *supra*, Friederwitzer v. Friederwitzer, *supra*; Vogel v. Vogel, 149 AD2d 501; Notley v. Schmeid, 220 AD2d 509, 511; Matter of Rosiana C. v. Pierre S., 191 AD2d 432, 434. This Court also has considered the issue of domestic violence, which it is statutorily mandated to consider. Section 240 of the DRL provides that the court "must consider the effect of such domestic violence upon the best interests of the child" in instances in which allegations of domestic violence made by one spouse against the other are "proven by a preponderance of the evidence." After consideration of these factors, the report and testimony of the court appointed neutral evaluator, the testimony of the child's social worker, the recommendation and views of the Law Guardian, and this Court's own observations of the parties during trial, this Court awards custody to defendant.

Susan Silverstein, CSW, the Court appointed neutral evaluator recommended that the child be placed in the custody of his father, plaintiff, and that his mother, defendant, enjoy extensive and liberal visitation with the child. This recommendation was based upon her findings that defendant was manipulative and deceitful, that she "continues to struggle with personal issues which impact upon her judgment and ability to make decisions which are in Alex's best interests," and that the "relationship that she has maintained with Mr. Voesack evidences a neediness, on her part, to be controlled, and possibly abused, within the relationship." Ms. Silverstein also found persuasive defendant's inconsistency in answers given during the evaluation, setting forth in her report that she "initially told me that she was at home full-time studying for her medical licensing boards in this country. She then told me she worked on occasion, approximately once a month painting an office that utilized Mr. Voesack's company for cleaning services. And then later on in the evaluation she told me that she was working fairly regularly and always had been working fairly regularly as a cleaner for Mr. Voesack."

Ms. Silverstein recommended that plaintiff be awarded custody of the child because of defendant's lack of credibility, her failure to have consistent employment and the presence of Greg Voesack, defendant's boyfriend. Ms. Silverstein's expression of doubt as to defendant's credibility was based upon her perception that she was lying on occasion and inconsistent with her responses. She opined that defendant has too many personal issues to be able to care for the child sufficiently, specifically with reference to Greg Voesack, defendant's boyfriend, and her sense that there was domestic violence between defendant and Mr. Voesack. Ms. Silverstein was

of the view that Mr. Voesack was controlling and that his presence was not good for the child, who she found to be fearful of Mr. Voesack.²

By contrast, Ms. Silverstein expressed disbelief that plaintiff was violent or was capable of being violent. She found that plaintiff "has committed to therapy in assisting him to resolve issues which existed within his marital relationship, as well as to understand and explore personal issues and issues which impact upon Alexander." She further found that plaintiff's "statements evidence an ability, as well as willingness, to validate the importance of Alexander's relationship with his mother," and that his "parenting skills indicate an ability to be effective within the parent-child relationship, as well as the ability to allow Alex to grow and develop as an individual." The trial testimony belied many of the findings of Ms. Silverstein, the court appointed neutral expert.

It is beyond cavil that a court cannot disregard the report of its neutral expert, and is required to give it due consideration. Even after due consideration, the Court, as the ultimate determinant of the issues before it, nonetheless may refuse to accept the recommendation of its own expert, where the totality of the facts and circumstances so require. As the Appellate Division, Second Department, stated in Gago v. Acevedo, 214 A.D.2d 250, 251, "the court's determination depends to a great extent upon its assessment of the credibility of the witnesses and the character, temperament, and sincerity of the parents." Similarly the Appellate Division, Second Department, stated in Young v. Young, 212 A.D.2d 114: "While it is true that the recommendations of court-appointed experts are but one factor to be considered in making any custody determination and are not determinative (citation omitted), such recommendations are entitled to some weight (citations omitted), as is the case with respect to the recommendations and findings of the court-appointed Law Guardian (citations omitted), unless such opinions are contradicted by the record (citation omitted)." In the instant case, not only does this court have its neutral forensic evaluator's report and testimony to consider, but is compelled to consider the testimony of the child's social worker, who has been in continuous, ongoing interactions with the child, as well as the testimony of the child's teacher.

Here, notwithstanding Ms. Silverstein's finding to the contrary, the record is replete with instances of domestic violence between the parties that placed the child in peril, including criminal prosecution. That the parties engaged in frequent arguments is undisputed. Those verbal altercations, standing alone, bear on the father's fitness for custody of the children. See, Smith v. Purnell, 256 A.D.2d 619 [dissenting opinion criticizes majority opinion for failing to admit and adequately consider evidence relevant to serious incidents of domestic violence that bear on the father's fitness for custody of three young children]. Initially, the very existence of

²Following the rendering of Ms. Silverstein's report, defendant terminated her relationship with Mr. Voesack and took the child for counseling with the Jewish Board of Family and Children's Services, in response to her suggestion that Alex was confused over her relationship with Mr. Voesack, and out of defendant's concern that he was anxious and confused.

the child was at the heart of the marital discord, marked by plaintiff's denial that he was the father, his insistence that the child be put up for adoption, and, subsequently, his insistence that the child be isolated from his mother's family and her cultural and religious heritage. Plaintiff's propensity for violent eruptions was highlighted by the testimony of the child's teacher, Patricia Coiro.

Ms. Coiro, who teaches at St. Marks, testified that she, together with the child, had been exposed to plaintiff's angry eruptions. She described one incident resulting from her failure to dismiss the child to plaintiff, having escorted him to the office instead. According to her testimony, plaintiff "was coming up the stairs, and he was angry. And he went into the office. And he was yelling. And he was saying that this whole thing was contrived, and that Mrs. Vinciguerra was doing this on purpose. And that he was sick and tired of this. And that he was going to go not to the Court, and he was going to put a stop to this once and for all." Ms. Coiro testified that during plaintiff's outburst, she and the child were sitting on a bench in close proximity. She further testified that her attempts to explain that the mistake was hers were rebuffed; plaintiff persisted in yelling, notwithstanding her request that he "please be sensitive to the fact that Alex was sitting on the bench." On a positive note, she testified that Alex is an above average student, that she observed much warmth between Alex and his mother, who participates in many school activities with Alex, and that Alex, at Thanksgiving, when asked what he was thankful for, responded that he was thankful for Greg. She further testified that she did not observe the same warmth between Alex and plaintiff as she sees between Alex and defendant, and that Alex comes to school on Monday mornings, following his weekend visitations with his father, with disheveled clothes. She added that defendant had made no effort to inquire or volunteer for activities, and that his only contact was picking him up and dropping him off at school three times a month.

Milagros Dueno, CSW, who is employed by the Jewish Board of Family & Children's Services and who specializes in working with children between the ages of two to eight, testified that she became Alex's counselor on September 17, 1998, after having met with defendant in August. She meets with him once a week for one hour, as well as with the parents, and meets with defendant once or twice monthly to ascertain how Alex "is doing medically, physically and in school, is he eating well, how is he sleeping, if she's having a difficult time, if he's not following instructions or directions, what kind of techniques she could use with regard to behavior modification, charts. And also I give her reading so she could familiarize herself with more of the temperaments of behavior development, child development - ." In addition to obtaining a history from the parent or parents, Ms. Dueno testified that she also maintained contact with the child's school and his pediatrician. She further testified to comments Alex made while role playing with the doll house, describing that "he was very attached to the doll house" and that "He's very good at saying that he's rescuing mommy or he's keeping mommy away from daddy." Ms. Dueno further testified that Alex enjoys discussing school with her and singing the songs that he learns in school. According to her testimony, Alex enjoys a positive relationship with his maternal grandparents, whom she has met with, as well as his cousins. She expressed an interest in meeting with plaintiff, notwithstanding the one encounter in which he inquired of Alex "if she were going to turn into a monster," and stated to Ms. Dueno that "Alexander did not need any therapy and there was all BS." Ms. Dueno testified that Alex was

during excellently in school, that he was much more verbal, and that he had a warm, loving relationship with his mother, whose interactions with him were positive and effective. She opined that any change in his currently living arrangements or in schooling would create chaos and confusion for him, and could result in his acting out.

The recommendations of Ms. Silverstein, the court-appointed expert, are in conflict with and diametrically opposed to those of the Law Guardian, as well as the child's teacher and therapist. Moreover, her testimony, as well as that of defendant's, cast doubt upon her objectivity in this particular case. Her characterizations of plaintiff as being a nonvolatile person were counter indicated by all other testimony, including the testimony of plaintiff. The trial testimony established not only that plaintiff is prone to violent eruptions, but showed that plaintiff demonstrated a lack of sound judgment and irresponsibility in exposing the child to dangerous and potentially dangerous situations, including his driving without a license.³ Plaintiff's actions, including the position that he took in commencing this action and his initial stance at the early stage of the litigation underscore that the "best interest of the child" may not have been the motivating factor underlying his later and zealous fight for custody. This Court has no doubt that there now exists a strong bond between Alex and his father; however, this Court is not convinced that this bond would be sufficient to overcome plaintiff's well-articulated prejudices as to defendant's heritage, religious or her family ties. While, defendant has demonstrated a consistency in promoting and facilitating liberal visitation between Alex and plaintiff, this Court is of the view that plaintiff, as the custodial parent, would do every thing in his power to thwart visitation unless defendant adhered to unreasonable conditions set by him. The "[i]nterference with the relationship between a child and a noncustodial parent by the custodial parent is an act so inconsistent with the best interests of the child that it raises, by itself, a strong probability that the offending party is unfit to act as a custodial parent (citations omitted)." *Gago v. Acevedo*, *supra*, 214 A.D.2d at 251. As set forth above, in adjudicating custody and visitation rights, the most important factor for the court to consider is the best interests of the child (see, *Eschbach v. Eschbach*, 56 N.Y.2d 167, 451 N.Y.S.2d 658, 436 N.E.2d 1260; *Matter of Schmidt v. Schmidt*, 234 A.D.2d 465, 650 N.Y.S.2d 809), which requires an evaluation of the "totality of the circumstances" (*Friederwitzer v. Friederwitzer*, 55 N.Y.2d 89, 95, 447 N.Y.S.2d 893, 432 N.E.2d 765)." *Coakley v. Goins* 240 A.D.2d 573.

Here, the totality of the circumstances, including the fact that defendant has been the child's primary caretaker since birth, establishes that the best interests of the child compels the award of custody to defendant. This Court does not take lightly defendant's character flaws, and the extraordinary lengths that she took to gain illegal entry into this County – the forged marriage and birth certificates; her subsequent purchase of a false divorce document in the Dominican Republic, and her questionable marriage thereafter that resulted in her obtaining a green card.

³During the trial, the Court was notified that a warrant of arrest had been issued against plaintiff arising from his failure to answer a summons on three occasions and his failure to pay an imposed fine. Between April 1996 and December 1998, plaintiff's driver's license was suspended five times.

Nor does this Court minimize the adverse effects that her relationship with Mr. Voesack may have had upon fostering Alex's confusion. Moreover, although she anticipates fulfilling the requirements to enable her to obtain a license to practice medicine in the United States, including employment as a resident that will require her working long hours, her need to expend time in that effort and to secure child care for Alex does not diminish the conclusion that the best interests of the child dictate that she be the custodial parent. Accordingly, this Court rejects Ms. Silverstein's recommendation.

Plaintiff, however, argues that the parties entered into a stipulation concerning custody and visitation that is binding upon this Court. He referenced the February 13, 1996, agreement entered into in open court before JHO Gartenstein in which it was stipulated that the parties would have joint custody of the child, with plaintiff having physical custody. That stipulation further provided, inter alia, that defendant would have expanded visitation only if she relocated and resided within the Long Beach School District. Plaintiff argues that the stipulation entered into before JHO Gartenstein should be honored. Defendant testified as to why she believed the terms were not in the child's best interest, stating:

I am Catholic, I think it's good that Alex learn something. It doesn't matter if it would be any other religious thing, he would teach Alex. The best thing is that he will learn and ... be more afraid of doing anything bad because he would have a belief. It was good for his moral to have a belief in God.... It was not good that Alex wouldn't speak Spanish because it is my language, it is all my relatives. My parents doesn't speak English... A lot of friends and family in the Dominican Republic doesn't speak in English, it is good for Alex to learn Spanish... it gives him more opportunity... he could speak Chinese, anything, it gives him more opportunity in the future.

It is well settled that Stipulations of Settlement meet with judicial favor, especially where, as here, the party seeking to vacate the stipulation was represented by competent counsel. Bossom v. Bossom, 141 AD2d 794; Schieck v. Schieck, 138 AD2d 691; Ianielli v. North Riv. Ins. Co., 119 AD2d 317. Absent a showing that the stipulation was the product of fraud, overreaching, mistake or duress, such a stipulation will not be disturbed by the court. Hallock v. State of New York, 64 NY2d 224; Matter of Frutiger, 29 NY2d 143; Blossom, supra. Although the court may look to the terms of the stipulation as well as the surrounding circumstances to determine whether there has been overreaching, the general rule is that if the execution of the stipulation was fair, no further inquiry will be made. Christian v. Christian, 42 NY2d 63; Tuck v. Tuck, 129 AD2d 792. Furthermore, such a stipulation will not be overturned merely because it was improvident or not the most advantageous to the dissatisfied party (Warren v. Rabinowitz, 228 AD2d 492; Amestoy v. Amestoy, 151 AD2d 709; Sontag v. Sontag, 114 AD2d 892), and the fact that one spouse gave away more than he or she might legally have been compelled to give does not mean that the agreement was the product of overreaching by the other spouse. Groper v. Groper, 132 AD2d 492.

It is equally well-settled that stipulations of settlement involving custody and visitation are subject to vacation when the Court determines that the agreement is not in the best interests of the child. In determining whether a stipulation entered into by the parents with respect to custody should be modified, a court must consider "the quality of the home environment and the parental guidance the custodial parent provides for the child * * * the ability of each parent to provide for the child's emotional and intellectual development * * * the financial status and ability of each parent to provide for the child * * * the relative fitness of the respective parents, as well as the length of time the present custody has continued" (Keating v. Keating, 147 A.D.2d 675, 677, 538 N.Y.S.2d 286; see, also, Matter of Sullivan v. Sullivan, 190 A.D.2d 852, 594 N.Y.S.2d 276). Prete v. Prete, 193 A.D.2d 804. Here, the agreement relied upon has been totally eviscerated, as it was subject to frequent and significant modifications by Judge Durante, who expressed misgivings as to its efficacy. Judge Durante, on December 12, 1996, modified the stipulation by changing the child's physical residence from that of his father to that of his mother, an arrangement that has continued to the present. Changes thereafter also were made with respect to plaintiff's visitation. The original stipulation thus has no continued vitality. In any event, "[n]o agreement of the parties can bind the court to a disposition other than that which a weighing of all of the factors involved shows to be in the child's best interest." Friederwitzer v. Friederwitzer, supra, 55 N.Y.2d at p. 95.

This Court does not doubt that both parents love their child, and that the child will benefit greatly from sustained interactions with both parents, notwithstanding that neither parent is free of imperfections. The conduct of the parties during this protracted trial with respect to visitation has demonstrated their capacity to at least reach an accord on that issue. However, the history of the parties' interaction negates any expectation that the parties can resolve disputes concerning Alex's religious, educational or cultural upbringing. Thus, after consideration of all relevant factors, the totality of the circumstances, and an assessment of the credibility of the witnesses and upon the character, temperament, and sincerity of the parents, this Court finds that it is in the best interest of the child that sole custody be awarded to defendant, with liberal visitation for plaintiff. As sole custodial parent, defendant shall have the right to make decisions with respect to the religious, educational and cultural upbringing of the child. See, De Luca v. De Luca, 202 A.D.2d 580; Stevenot v. Stevenot, 133 A.D.2d 820; Parrinelli v. Parrinelli, 138 Misc.2d 49; Matter of Paoletta v. Phillips, 27 Misc.2d 763. Defendant, however, should keep plaintiff fully informed of religious, educational and other activities of the child, and to afford him an opportunity to participate.

ii. Visitation

Clearly it is in the best interest of the child that he have frequent and liberal visitation with her father, who has provided enriching experiences for Alex during previous visitations, including trips to museums, the theater, the beach, and exposure to computer technology, Such visitation, however, must be structured to avoid undue conflict and discord. Unless otherwise mutually agreed upon by the parties, plaintiff shall have liberal visitation, as follows:

- a. Plaintiff shall have liberal visitation on alternating weekends, with such visitation

commencing after school on Friday and ending at the beginning of the school day on Monday, and on Wednesdays, from 4:00 p.m. to 8:00 p.m. In the alternative, the parties may continue the current arrangement, with plaintiff having visitation for three weeks each month.

b. Each party shall have visitation with the child on holidays and vacations as follows:

Plaintiff:

In even numbered years on Christmas recess from school (excluding New Year's Eve and New Year's Day), Easter Sunday, Independence Day and Columbus Day, between the hours of 9:00 a.m. and 6:00 p.m. on one day holidays or between 9:00 a.m. on the first day and 6:00 p.m. on the last day of multiple day holidays; in odd numbered years on New Year's Eve and New Year's Day, spring school recess (excluding Easter Sunday), Martin Luther King Day, Memorial Day, Labor Day and Thanksgiving school recess, between the hours of 9:00 a.m. and 6:00 p.m. on one day holidays or between 9:00 a.m. on the first day and 6:00 p.m. on the last day of multiple day holidays; on the Husband's birthday and on Father's Day (and similarly, there shall be no visitation rights hereunder on the wife's birthday or on Mother's day).

Defendant:

In odd numbered years on Christmas recess from school (excluding New Year's Eve and New Year's Day), Easter Sunday, Independence Day and Columbus Day, between the hours of 9:00 a.m. and 6:00 p.m. on one day holidays or between 9:00 a.m. on the first day and 6:00 p.m. on the last day of multiple day holidays; in odd numbered years on New Year's Eve and New Year's Day, spring school recess (excluding Easter Sunday), Martin Luther King Day, Memorial Day, Labor Day and Thanksgiving school recess, between the hours of 9:00a.m. and 6:00 p.m. on one day holidays or between 9:00 a.m. on the first day and 6:00 p.m. on the last day of multiple day holidays; on the Wife's birthday and on Mother's Day (and similarly, there shall be no visitation rights hereunder on the Husband's birthday or on Father's day).

c. The child shall spend no less than two hours with either plaintiff or defendant on that parent's birthday and the parties shall share the child's birthday, if practicable, otherwise the child's birthday shall be alternated each year with plaintiff having the next birthday.

d. The summer vacation, defined as the end of school in June to the beginning of school in September, shall be divided equally between the parties, with plaintiff having the right to determine his weeks of vacation on even numbered years, and plaintiff on odd

number years. In addition, plaintiff shall have additional summer visitation to make up any day lost during an alternate weekend visitation during the winter months. The weeks of vacation shall not be consecutive, but shall be in two weeks block. Each party shall notify the other party of the weeks selected no later than Memorial Day. The parties, by mutual agreement, may deviate from this vacation schedule.

e. Each party shall have reasonable, daily telephone access to the child when she is with the other parent. Each parent shall advise the other of his or her up-to-date telephone number and address, as well as any telephone number and address of where he or she is taking the child for a trip of more than one day in duration.

Defendant shall inform plaintiff of all school activities, including parent-teacher conferences, and shall provide him with copies of school records. She also shall notify plaintiff of any medical emergencies, and shall authorize his access to Alex's medical records.

iii. Child Support

The Child Support Standards Act ("CSSA") [Domestic Relations Law, section 240] sets forth a three step method for determining the basic child support obligation. Cassano v. Cassano, 85 NY2d 649. Domestic Relations Law 240(1-b)(c) provides, inter alia, that in determining the amount of the basic child support obligation, the court shall: (1) determine the combined parental income, (2) multiply the combined parental income up to \$80,000 by the appropriate child support percentage, and prorate that amount in the same proportion as each parent's income to the combined parental income, and (3) where the combined income exceeds \$80,000, determine the amount of child support by considering facts set forth in Domestic Relations Law 240(1-b)(f) and/or the appropriate child support percentage. Cassano v. Cassano, *supra*; Bast v. Rossoff, 91 NY2d 723. Pursuant to Cassano, the court has "discretion to apply the 'paragraph (f)' factors, or to apply the statutory percentages, or to apply both in fixing the basic child support obligation on parental income over \$80,000." *Id.* at p. 655. The Cassano decision further holds that "[g]iven that the statute explicitly vests discretion in the court and that the exercise of discretion is subject to review for abuse, some record articulation of the reasons for the court's choice to apply the percentage is necessary to facilitate that review." *Id.* Similarly, if the court rejects the amount derived from the statutory formula, "it must set forth in a written order 'the amount of each party's pro rata share of the basic child support obligation' and the reasons the court did not order payment of that amount (Domestic Relations Law 240[1-b][g])." Bast v. Rossoff, *supra*, 91 NY2d at 727.

Section 240 of the Domestic Relations Law also empowers the Court, in its discretion, to impute income in instances in which a party has been less than forthcoming as to the actual income received. Such imputation may be based upon consideration of such other resources as may be available to a party, including money, goods or services provided by relatives and friends. "In determining a party's maintenance or child support obligation, a court need not rely upon the party's own account of his or her finances, but may impute income based upon the party's past income or demonstrated earning potential (citations omitted)." Brown v. Brown, 239 AD2d 535.

See , McGrath v. McGrath, 261 A.D.2d 369; Matter of Diamond v. Diamond, 254 A.D.2d 288; Liadis v. Liadis, 207 AD2d 331; Davis v. Davis, 197 AD2d 622; Matter of Ladd v. Suffolk Co. Dept. of Social Services, 199 AD2d 393; Collins v. Collins, 241 AD2d 725, 727. Both parties provided some evidence tending to show their present income or lack thereof.

Indeed, throughout these proceedings, questions constantly were raised as to whether defendant was working or not, whether she had income or not, whether she was secreting income or not. Plaintiff offered into evidence tax records, including W-2s, 1099 forms and tax returns , for each year since 1991. In 1992, she earned \$26,000.00; in 1993, she earned \$34,000.00 from employment in a doctor's office. After the birth of Alex, the evidence showed that her income dropped precipitously, with her working part-time at an hourly rate of between \$6.00 and \$10.00 per hour in a medical office, and for a cleaning company, owned by her boyfriend, Mr. Voesack. Her earnings for those years fluctuated, with her most recent tax return for 1999, showing earnings of \$11,731.00, based upon an hourly wage of \$10.00 for the collection of blood and urine samples from patients. She testified that the court proceedings, including the lengthy trial, made it difficult for her to maintain a full time position. Plaintiff's attempts to show that she earned unreported income through showing significant deposits in her bank account, the writing of large amounts from her checking account and her credit card expenditures were successfully refuted by defendant's explanations, which this Court finds credible, as to each.

Plaintiff, by contrast, wholly failed to disclose his income, stating repeatedly that he earned about \$50,000.00 a year. Notwithstanding that he owned his own computer consulting company, Integrated Laboratory Systems, which he sold in 1994, and Mission Critical, which he started in 1997, plaintiff submitted no tax returns, either personal or corporate. He did submit copies of 1099 forms for 1997, reflecting that he was paid in that year 1997 \$31,320.00 by J2 Resources, \$45,000.00 by OAO, and \$30,745.00, in 1998, by OAO for work done in 1997. Defendant also submitted as an attachment to his reply memorandum of law a statement from OppenheimerFunds, for the period January 1, 1999 through December 31, 1999, showing that he depleted his retirement account, which had an opening balance of \$22,563.37. Ironically, plaintiff had sufficient funds to maintain a retirement account during the same period that he was refusing to pay child support.

As set forth above, a "court is not bound by a party's account of his finances, and when a party's account of his finances is not believable, the court is justified in finding an actual or potential income greater than that claimed (see, Matter of Vetrano v. Calvey, 102 A.D.2d 932, 933, 477 N.Y.S.2d 522; Felton v. Felton, 175 A.D.2d 794, 572 N.Y.S.2d 926; Rosenberg v. Rosenberg, 155 A.D.2d 428, 547 N.Y.S.2d 90)." Mobley-Jennings v. Dare, 226 A.D.2d 730; Mellen v. Mellen, 260 A.D.2d 609. "Child support is determined by the parents' ability to provide for their child rather than their current economic situation * * * An imputed income amount is based, in part, upon a parent's past earnings, actual earning capacity, and educational background." Zwick v. Kulhan, 226 A.D.2d 734; Morrissey v. Morrissey, 259 A.D.2d 472; 226 A.D.2d 734. The award of child support, made in accordance with Domestic Relations Law §240 (1-b) and guided by decisional law, is based upon the following findings:

- (a) The child of the marriage entitled to receive parental support is Alex, born January 19, 1994.
- (b) The gross income of defendant, the custodial parent, based upon her demonstrated earning ability, is imputed to be \$34,000.000, the amount that she earned in 1993. Her adjusted income, after deduction of \$2,601.00 for Social Security and Medicare taxes (7.65%) and \$1101.60 for New York City taxes (3.24%), is \$30,297.40.
- (c) The imputed adjusted gross income of plaintiff, who is the noncustodial parent, for child support purposes is found to be \$107,065.00 annually, based upon the only financial records made available to this Court, showing his earnings for 1997.
- (d) The combined adjusted income of the parties is \$141,065.00. Plaintiff's proportionate share of the combined adjusted income is 75.90%; defendant's proportionate share of the combined adjusted income is 24.10%. The applicable child support percentage is 17%; basic child support on the first \$80,000.00 of the combined adjusted income of the parties is \$13,600.00. Plaintiff's child support obligation based upon the first \$80,000.00 is \$10,322.00, annually, or \$198.50, weekly.
- (e) Pursuant to subsection (1-b)(b)-(c) of section 240 of the Domestic Relations Law, this Court explicitly is vested with the discretion to apply the stated percentage, or 17%, to the income over \$80,000, which in this case is \$61,065.00, 17% of which is \$10,381.05. As set forth above, plaintiff's proportionate share of the first \$80,000 of the combined income is \$110,322.00 annually or \$198.50, weekly; plaintiff's proportionate share of the combined income over \$80,000 is \$7,879.22, annually or \$151.52, weekly, which would result in a total weekly child support obligation of \$350.02.
- (f) This Court has considered carefully the parties' circumstances, including that plaintiff earns substantially more than defendant; that defendant and the child have limited financial resources, evidenced by defendant's reliance upon Medicaid to provide funding for counsel for the child, and her removal of discarded furniture from the street to furnish her apartment, her reliance upon family and friends for temporary financial support, her reliance upon discount stores for clothing for the child and herself; defendant's need to successfully pass the medical boards and to obtain a residency, and the related expenses associated therewith. Moreover, the record is clear that the child would have enjoyed a higher standard of living had the marriage not ended, including more spacious living quarters. Thus, after consideration of the statutory factors, as well as this protracted

trial that impacted upon defendant's capacity to maintain a full-time job, the court finds no reason "why there should be a departure from the prescribed percentage." Cassano v. Cassano, *supra*, at p. 655. See, also, Matter of Bill v. Bill, 214 AD2d 84. The court finds that based on the facts and circumstances of this particular case, setting child support at \$350.02 per week or \$18,201.04 annually, consistent with the statutory percentage set forth in Domestic Relations Law §240(1-b)(3), would result in a just and appropriate award for child support. Matter of Cassano v. Cassano, *supra*.

- (g) Plaintiff's pro rata share of the basic child support obligation, effective the date of initial application, July 11, 1995, is calculated as follows:
1. \$350.02 per week or \$18,201.04 per year.
 2. 75.90% of child care costs, if any.
 3. 75.90 % of future reasonable health care expenses, including unreimbursed medical and dental expenses. See, Domestic Relations Law § 240[1-b][c][5]; McNally v. McNally, 251 A.D.2d 302; Junkins v. Junkins, 238 A.D.2d 480.
 4. 75.90% of the educational costs, including tuition and other educational related expenses. Pursuant to Domestic Relations Law § 240(1-b)(c)(7),⁴ the court may direct a parent to contribute to a child's education, even in the absence of special circumstances or a voluntary agreement of the parties, as long as the court's discretion is not improvidently exercised in that regard. See, Matter of Cassano v. Cassano, 203 A.D.2d 563, , affd 85 N.Y.2d 649; Allen L. v. Myrna L., 224 A.D.2d 495 Cohen v. Cohen, 203 A.D.2d 411; Manno v. Manno, 196 A.D.2d 488. "In determining whether to award educational expenses, the court must consider the circumstances of the case, the circumstances of the respective parties, the best interests of the children, and the requirements of justice." Manno v. Manno, *supra*, at 491.
 5. Child support arrears, after credit for child support paid, shall be

⁴Section 240(1-b)(c)(7) reads: "Where the court determines, having regard for the circumstances of the case and of the respective parties and in the best interests of the child, and as justice requires, that the present or future provision of post-secondary, private, special, or enriched education for the child is appropriate, the court may award educational expenses. The non-custodial parent shall pay educational expenses, as awarded, in a manner determined by the court, including direct payment to the educational provider."

paid at the rate of \$50.00 per week until fully paid. Defendant contends that plaintiff owes \$57,706.00 in arrears, calculated as follows: (1) \$12,036 for the period between August 1, 1995 through January 1, 1997, based upon an income of \$50,000.00, and (2) \$66,080.00 for the period January 1, 1997 through May 1, 2000, the date of her submission, based upon an income of \$107,065.00, and (3) a credit for \$20,410.00, representing the child support paid. As child support payments may have been made since May 1, 2000, and child support arrears have accrued since that date, the parties are directed to submit with the proposed Judgment of Divorce, affidavits setting forth the child support arrears.

- (g) The child support shall not be deductible by the payor spouse or taxable to the payee spouse. Plaintiff shall take the child as a tax exemptions, until such time that defendant's adjusted gross income exceeds \$35,000.00, at which time the parties shall alternate taking the child as a tax exemption.
- (h) Plaintiff further is directed to purchase and maintain until the child is emancipated a life insurance policy naming the child as beneficiary and defendant as trustee in an amount sufficient to meet his child support obligations in the event of his demise.
- (i) All child support payments shall be paid through Support Collection Unit of the State of New York, based upon plaintiff's history of either failing to pay or tardiness in paying child support.

C. Transcript Costs

With respect to allocation of the costs of the transcripts, this Court directs defendant reimburse plaintiff for 24.10% the cost of transcripts. Defendant's request that her share of the costs be paid by Queens County or the City of New York, pursuant to section 1102(b) of the CPLR, is denied.

Dated: August 14 2000

J.S.C.