

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF \_\_\_\_\_ PART \_\_\_\_\_**

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Plaintiff,

Index No.:

-against-

**PENDENTE-LITE ORDER**

Defendant.

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**J.:**

This is an omnibus motion by the plaintiff / defendant (hereinafter "husband"/"wife") for an order granting *pendente lite* maintenance, child support, an order of protection, custody, exclusive use and occupancy of the marital residence, injunctive relief, counsel fees, and accountant's and appraiser's fees. The plaintiff / defendant (hereinafter "husband / wife") opposes the motion.

The parties were married on \_\_\_\_\_. There is/are \_\_\_\_\_ child/children of the marriage ages \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_. The child(ren) live(s) with the husband / wife. The wife is \_\_\_\_\_ years old; she lists her occupation as \_\_\_\_\_, and earns approximately \$\_\_\_\_\_ per year plus compensation and benefits. The husband is \_\_\_\_\_ years old; he is employed as a \_\_\_\_\_, and earns approximately \$\_\_\_\_\_ per year plus compensation and benefits. The husband also has assets in his name worth approximately \$\_\_\_\_\_. The wife also has assets in her name worth approximately \$\_\_\_\_\_.  
\_\_\_\_\_.

The husband/wife claims: \_\_\_\_\_

\_\_\_\_\_.

The husband/wife states: \_\_\_\_\_

\_\_\_\_\_.

When awarding temporary maintenance, the court considers and balances the factors enumerated in Domestic Relations Law §236, Part B(6), such as the financial status of the respective parties, their age, health, necessities and obligations, the nature and duration of the marriage, the present and future capacity of each of the parties to be self-supporting, the tax consequences to the parties and the income which the parties are capable of earning by honest efforts. See *Baker v. Baker*, 120 A.D.2d 374 (1st Dept. 1986); see also, *Lowe v. Lowe*, 211 A.D.2d 595 (1st Dept. 1995); *Lasry v. Lasry*, 180 A.D.2d 488 (1st Dept. 1992). See *Bagner v. Bagner*, 207 A.D.2d 367 (2nd Dept. 1994); see also, *Kesten v. Kesten*, 234 A.D.2d 427 (2nd Dept. 1996). Moreover, the court is also to consider the standard of living established during the marriage. See *Hartog v. Hartog*, 85 N.Y.2d 36 (1995).

Guided by these principles, the court awards the wife / husband \$\_\_\_\_\_ per week/month temporary maintenance.

In awarding temporary support, the court has considered the guidelines contained

in the Child Support Standards Act (Domestic Relations Law §240 [1-b][c]) as well as the factors which permit a deviation from the standard calculation, as delineated in §240(1-b)(f), such as the financial resources of the custodial and non-custodial parent and those of the child(ren), the physical and emotional health of the child(ren), and his or her educational or vocational needs and aptitudes, as well as the non-monetary contributions that the parents will make toward the care and well-being of the child(ren). See *Formato v. Formato*, 173 A.D.2d 274 (1st Dept. 1991).

Guided by the above, the husband / wife is directed to pay \$\_\_\_\_ per week / month child support. In addition, the husband / wife is directed to pay all carrying charges, including maintenance, condo assessments, rent, mortgage payments, insurance and utilities such as gas, electricity, heat, telephone service of up to \$\_\_\_\_\_ and cable TV for the marital residence. The husband is also directed to maintain and continue in full force and effect all presently existing policies of life, medical and dental insurance on behalf of wife and the parties' child(ren) and to pay all unreimbursed non-elective pharmaceutical, medical, and dental expenses for them. The husband is also directed to pay tuition and school related expenses for the parties' child(ren). See *Connolly v. Connolly*, 83 A.D.2d 136 (1st Dept. 1987).

That branch of the motion seeking to compel the husband to pay for private schooling of the parties' child(ren) is denied. The husband has not voluntarily agreed to bear this expense and the wife has failed to demonstrate the existence of special

circumstances sufficient to obligate the husband to bear the extraordinary expense over his objection. *Samuel v. Venegas*, 126 A.D.2d 145 (1st Dept. 1987); *Jackson v. Jackson*, 138 A.D.2d 455 (2nd Dept. 1988).

The award is retroactive to the original date of service of this application. See Domestic Relations Law §236B(6); *Dooley v. Dooley*, 128 A.D.2d 669 (2d Dept. 1987). Retroactive sums due by reason of this award shall be paid at the rate of \$ \_\_\_\_\_ per week / month in addition to the sums awarded until all arrears have been satisfied. The husband may take a credit for sums voluntarily paid for actual maintenance and support of the wife and child(ren) incurred after the making of this motion and prior to the date of this decision for which he has canceled checks or other similar proof of payment. See *Peltz v. Peltz*, 56 A.D.2d 519 (1st Dept. 1977); *Pascale v. Pascale*, 226 A.D.2d 439 (2nd Dept. 1996). The first payment hereunder shall be made within \_\_\_\_\_ days of the date of this decision and then weekly / monthly thereafter.

Domestic Relations Law §237 authorizes the court to direct either spouse to pay counsel fees in order to enable the other spouse to carry on or defend the action as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. See *DeCabrera v. Cabrera-Rosete*, 70 N.Y.2d 879 (1987). Inasmuch as it appears that the wife lacks sufficient funds of her own to compensate counsel without depleting her assets, the wife is awarded interim counsel fees in the sum of \$ \_\_\_\_\_ to be paid by the husband directly to the wife's attorney, within \_\_\_\_\_

days after the date of this decision. This award is made without prejudice to further applications for additional sums, as necessary at the time of trial or sooner. See *Ritter v. Ritter*, 135 A.D.2d 421 (1st Dept. 1987); *Jorgensen v. Jorgensen*, 86 A.D.2d 861 (2nd Dept. 1982). If the counsel fees are not paid within \_\_\_\_\_ days the clerk is directed to enter a money judgment in favor of counsel upon written affirmation. No further notice is required.

The wife's request for counsel fees is denied without prejudice to renewal before the trial court. It appears that the wife is gainfully employed and has the financial means to pay her own attorney. *Handwerker v. Handwerker*, 61 A.D.2d 966 (1st Dept. 1978); *Maimon v. Maimon*, 178 A.D.2d 635 (2nd Dept. 1991). Where the financial circumstances of the parties are comparable and a party has sufficient funds to pay counsel fees, an award of interim fees is unwarranted. See *Cvern v. Cvern*, 198 A.D.2d 197, (1st Dept. 1993); *Thomas v. Thomas*, 221 A.D.2d 621 (2nd Dept. 1995).

The application for counsel fees is denied without prejudice to renewal on proper papers which shall contain counsel's affidavit and a copy of the agreement between the wife and her attorney as to amounts, if any, received as a retainer and the agreement, if any, as to future payments. 22 NYCRR §202.16(g). See *Suter v. Suter*, 91 A.D.2d 571 (1st Dept. 1982).

That branch of the motion seeking interim accountant's and appraiser's fees is granted to the extent of awarding \$\_\_\_\_\_ for hiring an accountant and \$\_\_\_\_\_ for

an appraiser. Domestic Relations Law §237; *Baker v. Baker*, 120 A.D.2d at 376. These sums shall be paid by the husband directly to the wife's attorney within thirty (30) days after the date of this decision. This is without prejudice to an application by the wife for additional sums as necessary.

That branch of the motion seeking interim accountant's and appraiser's fees is denied without prejudice to renewal upon proper papers, which shall include an affidavit by an accountant and/or appraiser setting forth, in detail, the nature of the marital property, the difficulty involved, the services to be rendered, including an estimate of the time involved and the accountant's normal billing rate for such service and movant's financial status. See *Ahern v. Ahern*, 94 A.D.2d 53 (2nd Dept. 1983).

That branch of the motion seeking interim accountant's and appraiser's fees is granted to the extent of appointing \_\_\_\_\_ as the neutral accountant/appraiser in this action. *Zirinsky v. Zirinsky*, 138 A.D.2d 43 (1st Dept. 1988).

The neutral accountant/appraiser's fees shall be paid as follows: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_with a reallocation of the amount paid to be made by the trial court.

That branch of the motion seeking an order of protection is granted. The husband is enjoined from assaulting, menacing, threatening or harassing the wife. Domestic Relations Law §252; Family Court Act §§ 655, 656. The presentation of a copy of this

order of protection to any police or peace officer shall constitute authority to arrest the husband if charged by the wife with violating the terms of this order of protection. Family Court Action §168.

That branch of the motion seeking an order of protection is denied. The moving party has failed to make a sufficient evidentiary demonstration of the need for such a drastic remedy. *See Bagner v. Bagner*, 207 A.D.2d 367 (2nd Dept. 1994).

In the face of conflicting affidavits submitted, the court cannot decide that branch of the motion seeking an order of protection based upon the papers alone and a hearing is required. *See, Scampoli v. Scampoli*, 37 A.D.2d 614 (2nd Dept. 1971). The matter is set down for an evidentiary hearing on \_\_\_\_\_.

That branch of the motion seeking exclusive occupancy of the marital residence is granted in light of the husband's lengthy and continued absence from the home and the potential strain and turmoil which would result from his return. *See Judell v. Judell*, 128 A.D.2d 416 (1st Dept. 1986); *Preston v. Preston*, 147 A.D.2d 464 (2nd Dept. 1989). The wife has made a sufficient demonstration of necessity for such drastic relief in order to protect the safety of person or property. *See Domestic Relations Law §234; DelliVenneri v. DelliVenneri*, 120 A.D.2d 238 (1st Dept. 1986); *Hite v. Hite*, 89 A.D.2d 577 (2d Dept. 1982). It is further ordered that the husband/wife may remove his/her personalty from the marital residence on a date and at a time to be agreed to by the parties, in the presence of their respective counsel.

That branch of the motion seeking exclusive occupancy of the marital residence is

denied. The wife has failed to make a sufficient demonstration of the necessity of such drastic relief in order to protect the safety of persons or property. See *Taylor v. Taylor*, 109 A.D.2d 709 (1st Dept. 1985); *Hite v. Hite*, 89 A.D.2d 577 (2d Dept. 1982).

In the case at bar, in the face of the conflicting affidavits submitted, the court cannot decide that branch of the motion seeking exclusive occupancy based upon the papers alone and a hearing is required. See *DelliVenneri v. DelliVenneri*, 120 A.D.2d 238 (1st Dept. 1986); *Scampoli v. Scampoli*, 37 A.D.2d 614 (2d Dept. 1971). The matter is placed on the IAS Part \_\_\_\_\_ Calendar, located at \_\_\_\_\_ on \_\_\_\_\_ at \_\_\_\_\_.

That branch of the motion seeking exclusive occupancy of the marital residence is denied. However, the husband is directed to provide adequate living and housing expenses for the wife and the parties' infant child(ren) during the pendency of this motion. See *Lerner v. Lerner*, 21 A.D.2d 861 (1st Dept. 1964); *Rauch v. Rauch*, 83 A.D.2d 847 (2nd Dept. 1981).

In view of the husband's / wife's demonstrated need to occupy the marital residence for business and health reasons, he / she is granted exclusive occupancy of the marital residence on the condition that he / she pay the husband / wife increased temporary maintenance to enable him / her to relocate. See *Baylek v. Baylek*, 83 A.D.2d 816 (1st Dept. 1981).

That branch of the motion seeking exclusive occupancy of the marital residence is

denied. However, in view of the fact that there are no minor child(ren) of this marriage and the husband / wife does not work, the husband / wife is granted exclusive occupancy of the parties' alternate residence located at \_\_\_\_\_ and the husband / wife is granted exclusive occupancy of the marital residence. See *Rauch v. Rauch*, 83 A.D.2d 847, 848 (2d Dept. 1981).

That branch of the motion seeking custody and a visitation order is granted to the extent of placing the matter on the IAS Part \_\_\_\_ Calendar, located at Supreme Court, \_\_\_\_\_ New York on \_\_\_\_\_ at \_\_\_\_\_.

That branch of the motion seeking injunctive relief is denied as the movant has failed to show (1) imminent transfer, (2) that would effect a party's right to equitable distribution. See *Guttman v. Guttman*, 129 A.D.2d 537 (1st Dept. 1987).

That branch of the motion seeking injunctive relief is granted to the extent of enjoining the parties' from selling, transferring, conveying, hypothecating or otherwise disposing of marital assets pending further court order, except for ordinary and routine living and business expenses, in order to maintain the status quo for possible equitable distribution upon the plenary trial of this action. See *Leibowits v. Leibowits*, 93 A.D.2d 535 (2d Dept. 1983). The exception for "ordinary and routine living and business expenses" contemplates that payment of these expenses be paid from current income unless current income is clearly insufficient to meet the reasonable needs of the parties. The parties are cautioned that any unauthorized invasion of assets for any purpose may result in a finding

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of contempt if it is later found that current income was not exhausted prior to invasion of assets.

The parties are reminded of the preliminary conference order and the dates set therein. Should any discovery problems arise, counsel are encouraged to call chambers at (212) 374-4733 in an effort to avoid costly motion practice.

To the extent that this Court has awarded the plaintiff/defendant child support and/or maintenance, this Order shall be reviewed by this Court six (6) months from the date of this decision upon the request of either party.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the court.

Dated: \_\_\_\_\_, New York  
\_\_\_\_\_, 20

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**Justice Supreme Court**