Chapter 3A

Family Law/Domestic Relations Issues Affecting a High Net Worth Athlete or Coach

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§ 3A:1 Introduction

Those who represent the high net worth professional athlete or coach, inevitably, at some point during their career will be confronted with family or domestic relations issues affecting their clientele. Included among these issues are potential

disputes related to cohabitation, divorce, paternity, child custody and visitation as well as a myriad of financial matters. This chapter is intended to provide a general guideline for those who may be called upon to provide advice and recommendations to the high income athlete or coach. While many references will highlight California and New York law regarding family and domestic relations, most states follow or are aligned with the general concepts and principals applied in both the east and west coast jurisdictions. It is important to recognize that those professionals in the athletic field who have attained notoriety and great wealth can often be victimized due to ignorance of the laws and public policy of the various states in which they and/or their significant other may reside or in which property they have a possessory interest may be located. The general principles regarding custody, support, and division of property apply uniformly throughout the United States. It is also important for the athlete's representative to acknowledge and understand the best methods of providing information and data to the athlete client based upon the jurisdiction and/or venue involved. Recommendations as to proper family law representation by an experienced practitioner will serve the client well.

§ 3A:2 Non-marital and marital agreements

When an athlete or coach approaches his or her manager, representative or agent with news that he or she has become involved in a relationship with a significant other, that professional's representative should recognize the potential that ultimately money and property will become the subject of any such relationship. Even if the professional athlete gives no indications that he or she intends to marry the significant other, the fact that he or she may be intending to cohabitate or reside with the other person, may give rise to financial responsibilities in a number of jurisdictions.[1]

§ 3A:3 Non-marital and marital agreements—Explicit cohabitation agreements

If the issue relates to cohabitating or residing with the significant other, some jurisdictions will honor an explicit agree-

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[Section 3A:2]

[1]See, e.g., Cal. Fam. Code § 297 (West 2006)(establishing the requirements for domestic partnership).

ment or cohabitation agreement between the parties.[1] There is no requirement that such an agreement be in writing unless a written document is required by the statute of frauds.[2]

The cohabitation agreement can consist of a number of elements. These agreements can affirmatively provide for such factors as:

- The manner and extent to which one cohabitant is to support the other
- Directions as how expenses will be paid and by whom
- Directions as to how debts will be paid
- Specifications with respect to opening and utilizing a joint bank account
- Specifications and directions for the use, sale and/or disposition of property, whether real, personal or otherwise
- The amount and type of payments and/or property, if any, to be made by one of the parties to the other in the event the relationship is terminated or ended
- The use of mediation in the event of termination of the relationship

The cohabitation agreement may also include various waivers such as:

- Sharing in the estate of the other party upon death
- Disavowing any implicit agreement, whether it be a common law marriage or any other recognized relationship
- Sharing any appreciation or increase in value of property of either party during the cohabitation relationship
- Sharing any retirement, deferred compensation, pension plan or other such asset that one party may have
- Payment of any type of maintenance and/or support by one party to the other in the event the cohabitation relationship ends

When executed correctly, a cohabitation agreement can resolve a number of potential future problems. The cohabita-

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[Section 3A:3]

[1]*See, e.g.* Marone v. Marone, 50 N.Y.2d 481, 487, 429 N.Y.S.2d 592, 595 (1980)(holding that unmarried couples living together are free to contract with each other in relation to personal services, including domestic or "housewifely" services); Carnuccio v. Upton, 15 A.D.3d 212, 790 N.Y.S.2d 15 (1st Dep't 2005)(upholding domestic partnership agreement between unmarried couple).

[2]*Marone*, 50 N.Y.2d at 488–89, 429 N.Y.S.2d at 595; Marvin v. Marvin, 18 Cal.3d 660, 134 Cal.Rptr. 815 (1976).

tion agreement is to be executed freely, without duress, and ideally in a situation where both parties have independent counsel. Moreover, the agreement must not include sexual relations as part of the consideration, because such an agreement would be illegal, and therefore unenforceable.[3] If a cohabitation agreement contains some illegal elements but also recites legitimate consideration, and the illegal activity is incidental to the legal consideration, the illegal aspect of the agreement may be severed and the legitimate portion enforced. Such an interpretation of a cohabitation agreement is particularly likely where the injured party is less culpable and the other party could be unjustly enriched through the use of his or her own misconduct as protection from an otherwise tenable claim.[4]

§ 3A:4 Non-marital and marital agreements—Implicit cohabitation agreements

Some jurisdictions recognize a cause of action based upon an implicit or implied agreement even in the absence of a written cohabitation agreement prior to marriage.[1] For example, in California, under the *Marvin*doctrine, if it can be shown that the parties have (1) acted as if they were husband and wife, (2) pooled their financial resources, and (3) made promises such that the non-athlete party agrees to refrain from engaging in his or her occupation,[2] then significant financial damages could arise in the event the relationship ends. The representative's

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[3]*Marone,* 50 N.Y.2d at 486, 429 N.Y.S.2d at 594(citations omitted); Marvin v. Marvin, 18 Cal.3d 660, 134 Cal.Rptr. 815 (1976).

[4]Artache v. Goldin, 133 A.D.2d 596, 599, 519 N.Y.S.2d 702, 705 (2d Dep't 1987).

[Section 3A:4]

[1]*See, generally, Marvin v. Marvin, supra* (holding that express or implied contracts between unmarried cohabitors are enforceable).

[2]The *Marvin*court stated: "In summary, we base our opinion on the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights. Of course, they cannot lawfully contract to pay for the performance of sexual services, for such a contract is, in essence an agreement for prostitution and unlawful for that reason. But they may agree to pool their earnings and to hold all property acquired during their relationship in accord with the law governing community property; conversely, they may agree that each partner's earnings and the property acquired from those earnings remain the separate property of the earning partner. So long as the agreement does not rest upon illicit meretricious

awareness that a written agreement between the parties, prior to or at the immediate outset of the cohabitation, could save the professional athlete or coach significant damages, will go a long way in preserving the relationship between the representative and his or her client.

The *Marvin*court recognized over 30 years ago that the morals of society were changing and many young couples elected to cohabitate. The court articulately stated as follows:

> Although the past decisions hover over the issue in the somewhat wispy form of the figures of a Chagall painting, we can abstract from those decisions a clear and simple rule. The fact that a man and woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property or expenses. Neither is such an agreement invalid merely because the parties may have contemplated the creation or continuation of a non—marital relationship when they entered into it. Agreements between non-marital partners fail only to the extent that they rest upon a consideration of meretricious sexual services. Thus the rule asserted by the defendant, that a contract fails if it is 'involved in' or made 'in contemplation' of a non-marital relationship, cannot be reconciled with the decisions.[3]

Citing *Hill v. Estate of Westbook*,[4] the *Marvin*court found that a non-marital partner could recover in quantum meruit for the reasonable value of household services rendered, less the reasonable value of support received, if such partner can show that he rendered services with the expectation of monetary reward.[5] By recognizing the significant recovery one spouse may have against the other based upon a *Marvin*or implicit partnership relationship, it is of extreme importance that the high income athlete's representative recognizes the form of asset "protection" by way of the execution and/or recommendation to the athlete that he or she secure a written cohabitation agreement prior to entering into and/or proceeding forward with the particular living arrangement.

Under New York law, contracts may not be implied from the conduct of the parties, although express contracts between

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consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements." Marvin, 18 Cal.3d 660at 674.

[3]Marvin, 18 Cal.3d 660at 670.

[4]Hill v. Estate of Westbook, 39 Cal.2d 458, 462247 P.2d 19 (1952).

[5]Marvin, 18 Cal.3d 660at 684.

unmarried cohabitants may generally be enforced.[6] New York courts have, however, imposed constructive trusts on assets of cohabitating parties even in the absence of an express agreement when necessary to prevent the unjust enrichment of one cohabitator at the expense of another.[7] In considering whether to impose a constructive trust, courts generally look to four factors: a) the existence of a confidential or fiduciary relationship; b) a promise; c) a transfer in reliance on the promise; and d) unjust enrichment.[8] Courts are not strictly bound by these elements, and they are to be applied flexibly, not rigidly.[9] In *Sharp v. Kosmalski*, for example, the Court of Appeals ordered the imposition of a constructive trust on a dairy farm that had been transferred by a 56 year old widower to a female school teacher who was 16 years his junior. The plaintiff widower and the defendant teacher developed a close relationship shortly following the death of the plaintiff's wife, when defendant moved into plaintiff's farm, where plaintiff was still living. Defendant ordered plaintiff off the property shortly after plaintiff transferred ownership to defendant. In holding that a constructive trust should be imposed on the property to protect the plaintiff, the court considered factors including:

- the parties' age discrepancy;
- the fact that the plaintiff's education did not go beyond the eighth grade;
- plaintiff's reliance on defendant for companionship and help with the tasks of daily living;
- the fact that defendant allowed plaintiff to shower her with gifts and knew that plaintiff wanted to marry her;
- the fact that plaintiff had given defendant access to his bank account, from which she removed substantial sums;
- the numerous alterations that had been made to the farmhouse, allegedly in furtherance of the parties' "domestic plans"; and
- the fact that after defendant took possession of the home,

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[6]*Marone*, 50 N.Y.2d at 488–89, 429 N.Y.S.2d at 596.

[7]*See generally* Furguson v. Murphy, 273 A.D.2d 34, 708 N.Y.S.2d 866 (1st Dep't 2000)(citing Sharp v. Kosmalski, 40 N.Y.2d 119, 386 N.Y.S.2d 72 (1976)) (other citations omitted); Lester v. Zimmer, 147 A.D.2d 340, 542 N.Y.S.2d 855 (3d Dep't 1989); *Artache, supra*, 133 A.D.2d at 600, 519 N.Y.S.2d at 706.

[8]*Artache*, 133 A.D.2d at 600, 519 N.Y.S.2d at 706.

[9]*Sharp*, 40 N.Y.2d at 123, 386 N.Y.S.2d at 724; *Lester*, 147 A.D.2d at 341, 542 N.Y.S.2d at 856.

the farm, and all the equipment thereon, plaintiff was left with assets of $300.[10]

*Sharp v. Kosmalski*is helpful in that it illustrates the willingness of the courts of New York to impose a constructive trust on the property and/or assets of one or both cohabitators where there is a perceived imbalance of power between the parties due to factors such as discrepancies in wealth, age, education, etc. This is especially true where the party seeking the imposition of the trust reasonably expected to be provided with access to or use of the property in question due to assurances of the party against whom the trust is sought.[11]

§ 3A:5 Prenuptial agreements

Once the representative is aware that his or her professional athletic client is about to be married, the next concern would be to advise that client as to executing a premarital or prenuptial agreement. A premarital agreement is particularly important for the professional athlete. Often times, financial wealth arrives quickly for the athlete, frequently at a very young age. Drafting a premarital agreement is in the best interests of the professional athlete to protect his or her accumulation of wealth prior to the commencement of nuptials. Further, an athlete's career may be brief, and in the event of an unexpected injury, an athlete's career might be abruptly and permanently finished.

The professional athlete will want to seek legal counsel to draft a premarital agreement. In the event of dissolution, a premarital agreement will ensure that the money earned by the athlete prior to the marriage will remain in the control and possession of the athlete. A spouse will not be able to claim any of the wealth accumulated by the athlete before the marriage if the athlete chooses to draft a premarital agreement. A well-drafted prenuptial agreement, prepared by sophisticated attorneys, will be able to prevent a spouse from seeking earnings acquired before marriage, as specified in the pre-marital agreement itself. However, even with the existence of a pre-

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[10]*Sharp*, 40 N.Y.2d 120–22, 386 N.Y.S.2d at 722–23.

[11]*See generally* Leicht v. Carretta, 2009 WL 1122830, *9 (N.Y. Sup., Suffolk Cty., 2009)("A constructive trust will be erected whenever necessary to satisfy the demands of justice. Its applicability is limited only by the inventiveness of men who find new ways to enrich themselves unjustly by grasping what should not belong to them") (quoting Simonds v. Simonds, 45 N.Y.2d 233, 241, 408 N.Y.S.2d 359, 363 (1978)).

nuptial agreement, an athlete may become embroiled in a high-conflict divorce and subsequent settlement.

A premarital agreement can work to safeguard the athlete's assets, ensuring continued financial security for the athlete in the event of a divorce, which may literally deplete the athlete's accumulated wealth.[1] There are a number of states that have specific statutes and laws with respect to prenuptial agreements. By way of example, California Family Code § 721, describes the fiduciary relationship between husband and wife, particularly as it relates to transactions between themselves, and lays the foundation for the court to determine whether the premarital agreement was voluntarily executed. Spouses occupy a confidential relationship to each other, and are subject to the general rules governing fiduciary relationships. See, e.g., *In re Marriage of Burkle*.[2] "This confidential relationship imposes the duty of the highest good faith and fair dealing on each spouse, and neither shall take any unfair advantage of the other. This confidential relationship is a fiduciary relationship subject to the same rights and duties of non-marital business partners."[3] Other states, such as New York, rely on a combination of statutory and decisional law, and some states

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[Section 3A:5]

[1]Just as athletes are encouraged to draft prenuptial agreements, an athlete has the additional opportunity to draft a postnuptial agreement following the commencement of his or her marriage. For example, as widely noted in the press, basketball player Michael Jordan made divorce history when he paid his wife of 17 years, Juanita, over $150 million in their divorce settlement. The couple entered into a postnuptial agreement after a year of marriage, and the agreement stipulated that Juanita would receive half of Michael's earnings in the event of a divorce. Though Juanita claimed only a third of Michael's earnings, the Jordan divorce stands as an example of what may happen if an athlete does not carefully and thoughtfully draft a prenuptial agreement and, if applicable, a postnuptial agreement as well.

[2]The divorce proceedings of influential businessman Ron Burkle went to the California court of appeal following his wife's claim that Mr. Burkle achieved an unfair advantage over Ms. Burkle in the signing of the postmarital agreement. Upon the trial court's disagreement with Ms. Burkle, finding no undue influence in Mr. Burkle's actions, the court of appeal upheld the decision of the trial court. To get there, the court engaged in a careful analysis of the undue influence doctrine and particularly of what constitutes an "unfair advantage" as contemplated by the doctrine. The court reached the conclusion that not all advantages arising from interspousal transactions are necessarily unfair and that unfairness giving rise to a detriment to the other spouse is a necessary component of a successful claim of undue influence. In re Marriage of Burkle, 139 Cal.App.4th 712, 729–736.

[3]Cal. Family Code § 721(b).

are signatories to the Uniform Premarital Agreement Act.[4] As used in the Uniform Premarital Agreement Act,[5] "premarital agreement" means an agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.[6] The Uniform Premarital Agreement Act, in accordance with California law, applies to any premarital agreement executed on or after January 1, 1986.[7] The validity and effect of agreements made prior to January 1, 1986, continues to be determined by the law applicable to the agreements before January 1, 1986.[8] In 1986, the California Legislature adopted most of the provisions of the Uniform Act. The California enactment, like the Uniform Act, sets out the law of premarital agreements, including such matters as the nature of property subject to such agreement, the requirement of a writing, and provisions for amendments.[9]

In California, the rules and regulations concerning prenuptial agreements are set forth in Family Code § 1610, et seq.In New York, the statutory authority for parties to enter into binding agreements in the nature of a prenuptial or "antenuptial" agreement is found in New York Domestic Relations Law ("NY DRL") § 236B, subdivision 3, which provides in pertinent part:

> An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded. Notwithstanding any other provision of law, an acknowledgment of an agreement made before marriage may be executed before any person authorized to solemnize a marriage . . . Such an agreement may include (1) a contract to make a testamentary provision of any kind, or a waiver of any right to elect against the provisions of a will; (2) provision for the ownership, division or distribution of separate property; (3) provision

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[4]Signatories to the act include: Arizona, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Dakota, Texas, Utah, Virginia and Wisconsin.

[5]California enacted the UPAA by way of California Family Code §§ 1600 to 1617.

[6]Cal. Family Code § 1610(a).

[7]Cal. Family Code § 1601.

[8]Cal. Family Code § 1503.

[9]*See* Cal. Family Code §§ 1610 to 1615.

> for the amount and duration of maintenance or other terms and conditions of the marriage relationship, . . ., and provided that such terms were fair and reasonable at the time of the making of the agreement and are not unconscionable at the time of entry of final judgment; and (4) provision for the custody, care, education and maintenance of any child of the parties, . . .

It is well settled that with respect to a deliberately prepared and executed written agreement, there is a heavy presumption the agreement manifests the true intentions of the parties.[10] Evidence of a high order is required to overcome this presumption.[11] Pursuant to NY DRL § 236(B)(5)(a), a properly executed agreement respecting the division of property must be enforced unless it can be characterized as "unconscionable" or is shown to be the result of fraud or overreaching.[12]

As the New York Court of Appeals enunciated in *Christian v. Christian*:[13]

> Generally, separation agreements which are regular on their face are binding on the parties, unless and until they are put aside. Judicial review is to be exercised circumspectly, sparingly and with a persisting view to the encouragement of parties settling their own differences in connection with the negotiation of property settlement provisions . . . . [C]ourts should not intrude so as to redesign the bargain arrived at by the parties on the ground that judicial wisdom in retrospect would view one or more of the specific provisions as improvident or one-sided. (Internal citations omitted.)

The court went on to find that "if the execution of the agreement . . . be fair, no further inquiry will be made."[14] Notably, the foregoing principle was reaffirmed as a "general rule" by the Court of Appeals in *Levine v. Levine*.[15]

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[10]Baker Management Corp. v. Acme Quilting Co., 46 N.Y.2d 211, 219, 413 N.Y.S.2d 135, 139 (1978); Bloomfield v. Bloomfield, 97 N.Y.2d 188, 738 N.Y.S.2d 650 (2001).

[11]Baker Management Corp. v. Acme Quilting Co., 46 N.Y.2d 211, 219, 413 N.Y.S.2d 135, 139 (1978); Bloomfield v. Bloomfield, 97 N.Y.2d 188, 738 N.Y.S.2d 650 (2001).

[12]Christian v. Christian, 42 N.Y.2d 63, 396 N.Y.S.2d 817 (1977).

[13]*Christian*, 42 N.Y.2d at 71–72.

[14]*Christian*, 42 N.Y.2d at 72.

[15]Levine v. Levine, 451 N.Y.S.2d 26, 56 N.Y.2d 42 (1982).

An illustration of this mandated judicial restraint can be found in *Sardi v. Barbier*,[16] where the court held:

> In determining whether a Separation Agreement is 'manifestly unfair,' it is clear that a court may not substitute its own judgment as to what constitutes a good or better bargain for the parties.

The court went further, and in dismissing the plaintiff wife's action to rescind the parties' separation agreement found that:

> . . . the agreement was not one which a reasonable and informed [party] would not sign or that an honest and fair [party] would not accept. Although this might not be an agreement that I would have recommended, under the circumstances of the case, the Separation Agreement does not shock the conscience of the court, nor would it shock the conscience or confound the judgment of any person of common sense.

As New York's Appellate Division, Fourth Department stated in *Skotnicki v. Skotnicki*:[17]

> Although the agreement here is favorable to plaintiff, it is not unconscionably so. It is not the kind of bargain that only a deluded person would make.[18]

It is important to note that "whichever spouse contests a prenuptial agreement bears the burden to establish a fact-based, particularized inequality before a proponent of a prenuptial agreement suffers the shift in burden to disprove fraud or overreaching."[19]

While the *Greiff*court highlighted that in certain circumstances, "it is incumbent upon the stronger party to show affirmatively that . . . no undue influence was used, and that all

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[16]*Sardi v. Barbier*, N.Y.L.J. March 29, 1991, at 26, col. 1 (Sup. Ct. N.Y. Co.).

[17]Skotnicki v. Skotnicki, 237 A.D.2d 974, 975, 654 N.Y.S.2d 904 (4th Dep't 1997).

[18]*See generally* Amestoy v. Amestoy, 151 A.D.2d 709, 543 N.Y.S.2d 141 (2d Dep't 1989)(courts may not intervene and redesign or vacate an agreement simply because in retrospect judicial wisdom would view one or more of the specific provisions as improvident or one-sided).

[19]In the Matter of Greiff, 92 N.Y.2d 341, 680 N.Y.S.2d 894 (1998); *see also* Costanza v. Costanza, 199 A.D.2d 988, 608 N.Y.S.2d 14 (4th Dept. 1993)

was fair, open, voluntary and well understood"[20], the cases following *Greiff*have elected not to shift the burden.[21]

*In re Buzen*amplifies the requirement of the "fact-based, particularized inequality" enunciated in *Greiff*, holding that such inequality must "manifest probable undue influence and unfair advantage." The court further sets forth "some of the relevant factors" to consider as follows:

- Detrimental reliance on the part of the poorer spouse;
- Relative financial positions of the parties;
- The formality of the execution ceremony itself;
- Full disclosure of assets as a prerequisite to a knowing waiver;
- The physical or mental condition of the objecting spouse at the time of the execution;
- Superior knowledge/ability and overmastering influence on the part of the proponent of the agreement;
- The presence of separate, independent counsel for each party;
- The circumstances under which the agreement was proposed and whether it is fair and reasonable on its face;
- Provision for the poorer spouse in the will.

Notably, the *Buzen*court refused to shift the burden to the proponent of the prenuptial agreement and upheld its validity notwithstanding: (a) the parties' were represented by the same attorney; (b) the wife had not reviewed the agreement prior to its execution; and (c) the agreement contained reciprocal waivers, including an express waiver of the right of election.

Following *Buzen*, the court in *In re Rappaport*,[22] considered each of the factors outlined in the former decision and also declined to shift the burden to the proponent of an antenuptial agreement notwithstanding: (a) the petitioner-wife waived all property in the event of death or divorce save $65,000 the respondent-husband agreed to leave her in his will; (b) the presence of independent counsel was at best questionable; and (c) the husband was in a far superior financial position to the wife at the time of entering into the agreement.

It is important to note that justices at nisi prius have acted

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[20]In the Matter of Greiff, 680 N.Y.S.2d at 896(emphasis in original).

[21]*See* In re Rappaport, 184 Misc.2d 660, 709 N.Y.S.2d 921 (2000); In re Buzen, 4/2/99 NYLJ 35, col. 1 (Surr. Ct. Nass. Co. 1999).

[22]In re Rappaport, 184 Misc.2d 660, 709 N.Y.S.2d 921 (Surr. Ct. Nass. Co. 2000).

swiftly and emphatically in summarily rejecting efforts brought belatedly by dissatisfied, greed-driven matrimonial litigants seeking to rewrite the terms of agreements voluntarily entered into years earlier.[23]

Procedurally, this dismissal generally comes in the form of a motion for summary judgment. In that regard, "the presentation of a shadowy semblance of an issue is not enough to defeat [a] motion [for summary judgment]."[24]

"An agreement will only be deemed unconscionable, and thereby set aside, if the inequality is 'so strong and manifest as to shock the conscience and confound the judgment of any [person] of common sense.' "[25] "An agreement is not set aside simply because one side has realized that he or she may have made a bad bargain."[26]

Indeed, courts will readily dismiss these types of claims even when the complaining party "gave away more than he might legally have been compelled to give."[27] Or the decision to enter into the agreement by one of the parties was "improvident."[28] This maxim holds true:

- Whether or not the party has been represented by counsel[29];

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[23]DiSalvo v. Graff, 227 A.D.2d 298, 642 N.Y.S.2d 883 (1st Dep't 1996); Bronfman v. Bronfman, 229 A.D.2d 314, 645 N.Y.S.2d 20 (1st Dep't 1996); Lederman v. Lederman, 203 A.D.2d 182, 612 N.Y.S.2d 851 (1st Dep't 1994); Haynes v. Haynes, 200 A.D.2d 457, 606 N.Y.S.2d 631 (1st Dep't 1994), *aff'd* 615 N.Y.S.2d 863, 83 N.Y.2d 954 (1994); Robinson v. Robinson, 120 A.D.2d 415, 501 N.Y.S.2d 874 (1st Dep't 1986).

[24]American Sav. Bank FSB v. Imperato, 159 A.D.2d 444, 553 N.Y.S.2d 126 (1st Dep't 1990).

[25]McCaughey v. McCaughey, 205 A.D.2d 330, 612 N.Y.S.2d 579 (1st Dep't 1994).

[26]*Landow v. Landow, NYLJ,* January 25, 2000 (Sup. Ct. N.Y. Co.)(Tolub, *J.*), *citing* Vermilyea v. Vermilyea, 224 A.D.2d 759 (3d Dep't 1996); Barzin v. Barzin, 158 A.D.2d 769, 551 N.Y.S.2d 361 (3d Dep't 1990); *see also* Ashcraft v. Ashcraft, 195 A.D.2d 963, 601 N.Y.S.2d 753 (4th Dep't 1993).

[27]Lavelle v. Lavelle, 187 A.D.2d 912, 590 N.Y.S.2d 557 (3d Dep't 1992); Schoradt v. Rivet, 186 A.D.2d 307, 587 N.Y.S.2d 794 (3d Dep't 1992); Amestoy v. Amestoy, 151 A.D.2d 709, 543 N.Y.S.2d 141 (2d Dep't 1989).

[28]Turk v. Turk, 276 A.D.2d 953, 714 N.Y.S.2d 566 (3d Dep't 2000); Fishof v. Grajower, 262 A.D.2d 118, 691 N.Y.S.2d 507 (1st Dep't 1999); Gaton v. Gaton, 170 A.D.2d 576, 566 N.Y.S.2d 353 (2d Dep't 1991).

[29]Brassey v. Brassey, 154 A.D.2d 293, 546 N.Y.S.2d 370 (1st Dep't 1989) ; *see also* Panossian v. Panossian, 172 A.D.2d 811, 569 N.Y.S.2d 182 (2d

- In the presence of "broad waivers",[30] mutual waivers of all property "possessed prior to the marriage or procured during the marriage" and "profits derived therefrom"[31]

In *Matter of Estate of Garbade*,[32] both parties had previously been married and divorced, with the prospective husband a wealthy executive with significant assets and the prospective wife unemployed and without any assets. The prospective wife executed the prenuptial agreement without the aid of independent counsel. The agreement contained mutual waivers of all assets titled in the name of the other, support and an elective share in the other's estate. The court in its decision stated as follows:

> Respondent [wife] presented evidence establishing at most that (1) it was decedent, and not she, who first raised the issue of a prenuptial agreement and requested that one be executed prior to the wedding, (2) the agreement was prepared by decedent's attorneys, at his request and in accordance with his direction, (3) the prenuptial agreement was executed only a few hours prior to the parties' wedding, (4) respondent did not seek or obtain independent legal counsel and the agreement was not read by her or to her before she signed it, (5) respondent was not specifically advised that the agreement provided for a waiver of her right to elect against decedent's will, and (6) respondent was not furnished with a copy of the agreement.
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> At the same time, it is uncontroverted that (1) respondent readily acceded to decedent's request that they enter into a prenuptial agreement and willingly signed the instrument because she did not want any of decedent's money or property, she only wanted to be his wife, (2) respondent was advised to obtain the services of independent counsel, (3) respondent was given an adequate opportunity to read the instrument before she signed it, and (4) prior to executing the prenuptial agreement, respondent was provided with detailed disclosure of decedent's $2.5 million net worth.
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> In our view, respondent has established nothing more than her own dereliction in failing to acquaint herself with the provisions

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Dep't 1991); Estate of Garbade, 221 A.D.2d 844, 633 N.Y.S.2d 878 (3d Dep't 1995).

[30]Bronfman v. Bronfman, 229 A.D.2d 314, 645 N.Y.S.2d 20 (1st Dep't 1996), mutual waivers of maintenance, Clanton v. Clanton, 189 A.D.2d 849, 592 N.Y.S.2d 783 (2d Dep't 1993), Cron v. Cron, 10/17/03 NYLJ 18, col. 1 (Sup. Ct. N.Y. Co. 2003).

[31]*Brassey*, 546 N.Y.S.2d at 372, or mutual waivers of both support and equitable distribution, Matter of Estate of Garbade, 633 N.Y.S.2d 878at 878.

[32]Matter of Estate of Garbade, 221 A.D.2d 844, 633 N.Y.S.2d 878 (1995).

of the agreement and to obtain the benefit of independent legal counsel. Although the dereliction may have caused her to be ignorant of the precise terms of the agreement, the fact remains that, absent fraud or other misconduct, parties are bound by their signatures. Further, the absence of independent counsel will not of itself warrant setting aside the agreement.

Many matters may be governed by a premarital agreement. Various jurisdictions may adopt additional or extended premarital provisions. However, it may be useful to refer to § 1612California Family Code § 1612:

(a) Parties to a premarital agreement may contract with respect to all of the following:

(1) The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located.

(2) The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property.

(3) The disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event.

(4) The making of a will, trust, or other arrangement to carry out the provisions of the agreement.

(5) The ownership rights in and disposition of the death benefit from a life insurance policy.

(6) The choice of law governing the construction of the agreement.

(7) Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

(b) The right of a child to support may not be adversely affected by a premarital agreement.

(c) Any provision in a premarital agreement regarding spousal support, including, but not limited to, a waiver of it, is not enforceable if the party against whom enforcement of the spousal support provision is sought was not represented by independent counsel at the time the agreement containing the provision was signed, or if the provision regarding spousal support is unconscionable at the time of enforcement. An otherwise unenforceable provision in a premarital agreement regarding spousal support may not become enforceable solely because the party against whom enforcement is sought was represented by independent counsel.

A principle often utilized by the courts is determining

whether the premarital agreement was voluntarily executed is the claim of undue influence. "Whenever [spouses] enter into an agreement in which one party gains an advantage, the advantaged party bears the burden of demonstrating that the agreement was not obtained through undue influence."[33]

Overcoming the presumption of undue influence requires the advantaged spouse to prove by a preponderance of the evidence that the parties entered into the transaction "freely and voluntarily" and "with full knowledge of all of the facts, and with the complete understanding of the effects of the transfer."[34] A finding that the advantaged spouse made a "full and fair disclosure of all that the other spouse should know for his or her benefit and protection concerning the nature and effect of the transaction" will overcome the presumption, as will a finding that the spouse "deal[t] with the other spouse at arm's length, giving him or her the opportunity of independent advice."[35]

Baseball player Barry Bonds executed a premarital agreement, and his well publicized subsequent dissolution proceedings addressed undue influence in the context of a premarital agreement. In *In re Marriage of Bonds*, supra, the court considered whether Ms. Bonds' voluntarily entered into the premarital agreement with Mr. Bonds. Though the court held that the premarital agreement was entered into voluntarily, the court of appeal reversed, concluding that because Ms. Bonds, unlike Mr. Bonds, was not represented by counsel when she signed the agreement, Ms. Bonds had not effectively waived counsel, and the voluntariness of the agreement was subject to strict scrutiny. Applying this standard, the court of appeal

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[33]In re Marriage of Bonds, 24 Cal.4th 1, 5 P.3d 815, 99 Cal. Rptr. 2d 252 (2000). The California Supreme Court explains: "The primary consequences of designating a relationship as fiduciary in nature are that the parties owe a duty of full disclosure, and that a presumption arises that a party who owes a fiduciary duty, and who secures a benefit through an agreement, has done so through undue influence [. . .] It has long been the rule '[w]hen an interspousal transaction advantages one spouse, "[t]he law, from considerations of public policy, presumes such transactions to have been induced by undue influence."" *In re Marriage of Bonds*, 24 Cal. 4th*In re Marriage of Bonds*, 24 Cal. 4th*In re Marriage of Bonds*, 24 Cal. 4that 27–28. See also In re Marriage of Haines, 33 Cal. App. 4th 277, 293 (1995).

[34]In re Marriage of Haines (1995) 33 Cal.App.4th 277, 296(quoting *Brown v. Canadian Indus. Alcohol Co.* (1930) 209 Cal. 596, 598.).

[35]In re Marriage of Baltins (1989) 212 Cal.App.3d 66, 88.; *see also* Howard S. Klein, Robert C. Brandt, Geoffrey Murry, *Under the Influence: Claims of Undue Influence Considered Under Different Standards in Family Law and Probate Matters*, Los Angeles Lawyer, Sept. 2008, at 30.

identified several factors vital to a determination of whether a premarital agreement is voluntarily executed and thus valid.

The court's established factors "in assessing the voluntariness of the agreement entered into between [spouses] are not rigidly separate considerations; rather the presence of one factor may influence the weight to be given to evidence considered primarily under another factor."[36] Applying this standard, the court of appeal analyzed several integral factors indicative of Bond's undue influence when Ms. Bonds entered into the premarital agreement: Ms. Bonds was not represented by independent legal counsel when she executed the agreement; she had limited English language skills and lacked legal or business sophistication; she did not understand the meaning of the agreement and consequences of signing it; and she was threatened with cancellation of the wedding if she did not sign.[37]

In 2001, the California Legislature nullified the Bonds holding by adding Family Code § 1615, which provides that a premarital agreement may not be deemed voluntary unless the court finds in writing or on the record, all of the following:

(1) The party against whom enforcement is sought was represented by independent legal counsel at the time of signing the premarital agreement or after being advised to seek legal counsel, expressly waived that representation in a separate writing;[38]

(2) The party against whom enforcement is sought had at least seven (7) calendar days between the time the party was first presented with the premarital agreement and advised to seek independent counsel at the time the agreement was signed;[39]

(3) The party against whom enforcement is sought, if unrepresented by independent legal counsel, was fully informed of the terms and basic effect of the premarital agreement and of the rights and obligations the party was giving up by signing the agreement, and was proficient in the language in which the explanation was made and in which the agreement was written. The explanation must be memorialized in writing and delivered to the party prior to signing the agreement. On

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[36]*In re Marriage of Bonds*, 24 Cal.4th at 37.

[37]*In re Marriage of Bonds*, 24 Cal.4th at 18.

[38]Cal. Fam. Code § 1615(c)(1).

[39]Cal. Fam. Code § 1615(c)(2).

or before signing the agreement, the unrepresented party must execute a document declaring that the party received the required explanation and indicating who provided the explanation;[40]

(4) The premarital agreement and the writings executed under Family Code section 1615(c)(1), (c)(2), (c)(3)were not executed under duress, fraud or undue influence and the parties did not lack the capacity to enter into the agreement;[41]

(5) Any other factors the court deems relevant.[42]

Further, of primary importance when considering a premarital agreement, or similarly, a cohabitation agreement, is to ensure that the agreement is not unconscionable, both when it is executed and when it is enforced. Determination of unconscionability requires analysis of a number of subjective factors. In some jurisdictions, the most important factor is that there be an exchange of appropriate consideration in some form or fashion by and between the parties. Additionally, it is essential that each party to the agreement has sufficient time to understand their rights and to consult with independent counsel. In regards to counsel, questions of independence can arise in circumstances in which one party is represented and their attorney refers the opposing party to outside counsel. Unbiased and independent representation is essential for a premarital agreement to withstand scrutiny. Of particular importance when considering the preparation and execution of a premarital agreement is to make certain that there has been some consideration passing by and between the parties. A premarital agreement which is totally one-sided and does not provide for some type of material consideration to the so-called out spouse may be challenged, if not set aside at some point in the future, when the relationship terminates when one spouse seeks to recover significant assets and/or support from the high income athlete or coach. All of the above mentioned factors must be considered when drafting a premarital or cohabitation agreement.

A proper premarital agreement will also require that each party provide a full and complete financial disclosure. A

[40]Cal. Fam. Code § 1615(c)(3).

[41]Cal. Fam. Code § 1615(c)(4).

[42]Cal. Fam. Code § 1615(c)(5); see, also, In re Marriage of Friedman (2002) 100 Cal.App.4th 65, 72.

complete financial disclosure should include a listing of all assets, obligations, debts, income, property and the corresponding value of such assets.[43]

There is no hard and fast rule as to when unconscionability is determined in the context of a matrimonial action. Generally, the court will entertain an application made during the pendency of an action which seeks either to uphold the validity of the agreement or to set it aside.[44]

Notwithstanding the presumption of validity, in several cases, the courts of New York have made an inference of overreaching where the terms of the agreement were found to be

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[43]*See, e.g.,* Cal. Fam Code § 1615(a)(2)(B) (West 2006) (noting that failure to provide full disclosure of financial affairs could render an agreement unenforceable).

[44]Anonymous v. Anonymous, 258 A.D.2d 547, 685 N.Y.S.2d 294 (2d Dept. 1999)(husband moved for summary judgment on wife's counterclaim for permanent maintenance at or about the time the wife sought pendente lite counsel fees;court held prenuptial agreement was "enforceable and not unconscionable" and dismissed wife's counterclaim); Brassey v. Brassey, 154 A.D.2d 293, 546 N.Y.S.2d 370 (1st Dept. 1989)(plaintiff, without significant assets and without independent counsel, signed a prenuptial agreement one week before the wedding which contained mutual waivers of all property owned prior to or acquired during the marriage, including profits therefrom; notwithstanding the absence of counsel and the broad waivers, the court found that the "agreement is plain on its face and gives no indication of unconscionability); Forsberg v. Forsberg, 219 A.D.2d 615, 631 N.Y.S.2d 709 (2d Dept. 1995)(in connection with the filing of motions for pendente lite relief, the wife cross-moved for summary judgment seeking to declare the parties' prenuptial agreement invalid, or alternatively for an immediate hearing on the issue of its validity; after searching the record, the court granted the husband partial summary judgment on the issue of the validity of the agreement noting that overreaching (a component to proving unconscionability) is not established by the absence of legal representation alone); In Estate of Zach, 144 A.D.2d 19, 536 N.Y.S.2d 774 (1st Dept. 1989); (summary judgment granted upholding agreement despite the fact that only one spouse had waived his rights; standing alone, the fact that only one spouse waived rights cannot support a triable issue in view of the "heavy presumption that a deliberately prepared and executed written instrument [manifests the true intention of the parties]"); In Estate of Sunshine, 40 N.Y.2d 875, 389 N.Y.S.2d 344 (1976), *affirming* 51 A.D.2d 326, 381 N.Y.S.2d 260 (1st Dept. 1976)(agreement, exceedingly favorable to one side, was affirmed even though the wife, *inter alia*, had poor knowledge of English and "did not have an attorney present and did not read or receive a copy of the document at the time she executed it").

unfair on their face, and, in each instance, set the agreement aside.[45]

Adopting the definition of an unconscionable bargain utilized by the United States Supreme Court in *Hume v. Hume*,[46] the *Christian*court has stated "[a]n unconscionable bargain has been regarded as one 'such as no [person] in his [or her] senses and not under delusion would make on the one hand, and as no honest and fair [person] would accept on the other."[47] And, indeed, in determining whether an agreement is unconscionable, the courts at times will look to "the adequacy of the consideration."[48] Such one-sided agreements will be set aside as unconscionable.[49]

One of New York's appellate courts, confronted with a prenuptial agreement containing broad all encompassing waivers opined that a "prenuptial agreement which provides for no division of property at the end of the marriage, without regard

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[45]Gilbert v. Gilbert, 291 A.D.2d 479, 738 N.Y.S.2d 221 (2d Dep't 2002) (court found after trial "where a stipulation is manifestly unfair and one-sided due to a spouse's overreaching, it can be rescinded"); Gibson v. Gibson, 284 A.D.2d 908, 726 N.Y.S.2d 195 (4th Dep't 2001)(agreement set aside as "manifestly unfair" where "plaintiff is left with no resources and no source of income or other means of support"); Tchorzewski v. Tchorzewski, 278 A.D.2d 869, 717 N.Y.S.2d 436 (4th Dep't 2000)(after a hearing, disparity in asset distribution, absence of disclosure and independent counsel found to "provide sufficient indicia of plaintiff's overreaching to require rescission"); Tartaglia v. Tartaglia, 260 A.D.2d 628, 689 N.Y.S.2d 180 (2d Dep't 1999)(court found after trial "an agreement which results in an award of substantially all of the marital assets to one party while burdening the other party with substantial economic obligations is patently unconscionable"); Terio v. Terio, 150 A.D.2d 675, 541 N.Y.S.2d 548 (2d Dep't 1989)(court found after a hearing, the terms of the agreement "manifestly unfair to the plaintiff and were unfair when the agreement was executed); Yuda v. Yuda, 143 A.D.2d 657, 533 N.Y.S.2d 75 (2d Dep't 1988)("economic provisions of the stipulation are unconscionable"); Thomas v. Thomas, 145 A.D.2d 477, 535 N.Y.S.2d 736 (2d Dep't 1988)(after trial, purported post-nuptial agreement awarding husband marital assets worth ten times assets being distributed to wife properly set aside where "totally one-sided in favor of husband" and "born of and subsisted of inequity"); Arrow v. Arrow, 133 A.D.2d 960, 520 N.Y.S.2d 468 (2d Dep't 1987) (court found after trial agreement unconscionable which "effectively gave the defendant the parties' only substantial assets"); Stern v. Stern, 63 A.D.2d 700, 404 N.Y.S.2d 881 (2d Dep't 1978)(court found after trial agreement violative of General Obligations Law § 5-311).

[46]Hume v. Hume, 132 U.S. 406, 10 S.Ct. 134, 136 (1889).

[47]Christian, 42 N.Y.2d 71.

[48]Mandel v. Liebman, 303 N.Y. 88, 94, 100 N.E.2d 149 (1951).

[49]*Thomas v. Thomas, supra.*

for when, how or why it ends, and absolutely no right of election, is manifestly unfair."[50] Because the primary issue presented to the Appellate Division in *Bloomfield*related to whether the statute of limitations is tolled during the marriage, the court did not have to reach an ultimate determination on the unconscionability of that particular prenuptial agreement. On appeal to the Court of Appeals, the Appellate Division's holding on the statute of limitations was reversed. The Court of Appeals further noted that because the Appellate Division's finding that the agreement was "manifestly unfair" was not "essential to its ruling" that issue was remanded to the trial court to permit the defendant therein to contest the conscionability of the agreement.

In California, parties to a premarital agreement may contract with respect to the "choice of law governing the construction of the agreement."[51] A choice of law clause is one in which the contracting parties specify which state's law will apply to resolve a dispute arising under the contract. Choice-of-law clauses are particularly important in premarital agreements as states'laws vary in regards to the interpretation of a premarital agreement. A choice-of-law clause in premarital agreements is specifically used to anticipate the outcome of possible future litigation, as parties may select the choice of law from a state that may be more favorable to the outcome of the parties' litigation.

Choice-of-law clauses in premarital agreements are of significant importance for athletes due to their extensive travel. Additionally, many athletes usually do not permanently reside in the state in which their teams are located. For example, while an athlete might spend the majority of his or her time in Florida with their team, the athlete's spouse might permanently reside in California. Adding a choice-of-law clause in a premarital agreement ensures that if a dispute arises regarding the terms of the premarital agreement, the athlete may avoid uncertainty by knowing exactly which state will handle the dispute, and will know how that particular state will interpret and apply the law. A choice-of-law clause in an athlete's premarital agreement may prevent extensive disputes and/or litigation regarding which state's law should apply to the agreement.

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[50]Bloomfield v. Bloomfield, 281 A.D.2d 301, 305, 723 N.Y.S.2d 143 (2001) (internal citations omitted), *rev'd on other grounds*, 97 N.Y.2d 188, 738 N.Y.S.2d 650 (2001).

[51]See Cal. Fam. Code § 1612(a)(6).

Lastly, an additional way in which an athlete might protect his or her wealth from premarital creditors would be to consider placing his or her earnings in a separate bank account, apart from the commingled monies for both the athlete and their significant other. In California, the "earnings of a married person during marriage are not liable for a debt incurred by the person's spouse before marriage.[52] After the earnings of the married person are paid, they remain not liable so long as they are held in a deposit account in which the person's spouse has no right of withdrawal and are not commingled with other property in the community estate, except property insignificant in amount." As long as the money is kept separate prior to the marriage, and remains separate continuously during the marriage, those earnings will be deemed the separate property of the athlete and will not be subject to division in the event of a marital dissolution. It should be noted, however, that absent a premarital agreement, the separate bank account would be subject to a community property interest by the non-signatory spouse.

§ 3A:6 Paternity

Issues related to paternity are quite prevalent in the athletic arena and particularly so with respect to well-known, high-income athletes. Historically, it is all too common for athletes to become romantically involved with members of the opposite sex and, whether through deception or just plain irresponsible practices, the result is an unwanted pregnancy.[1]

The athlete may indicate that he was informed by the other party that she was using a form of contraception and as such, he had no expectations of an unwanted pregnancy, however, the courts will show no sympathy under these circumstances.[2] All that it takes is one incident of conception to place the athlete in a lifetime position of having to not only disclose his

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[52]See Cal. Fam. Code § 911(a).

[Section 3A:6]

[1]*See generally* Grant Wahl, L. Jon Wertheim, *Paternity Ward: Fathering Out-Of-Wedlock Kids Has Become Commonplace Among Athletes, Many of Whom Seem Oblivious to The Legal, Financial, And Emotional Consequences*, SPORTS ILLUSTRATED, May 4, 1998.

[2]*See* Douglas R. v. Suzanne M., 127 Misc.2d 745, 746, 487 N.Y.S.2d 244, 245 (Sup. Ct., NY Cty., 1985).

income, provide support, and pay attorney's fees but also to have the significant responsibility of being a father.[3]

Certainly, the professional's representatives can give advice to his or her client as to how to protect themselves in terms of intimacy.[4] However, those types of recommendations and suggestions can only go so far given the reality of life and the weaknesses that athletes, as is the case with all individuals, can be confronted with. This is particularly the case when athletes are traveling, visiting different cities, meeting new people all while having their own physical and human needs.[5]

Regardless of all the good advice that can be given to an athlete concerning taking precautions and avoiding those actually trying to become pregnant, the ultimate issue is how to handle the situation once the pregnancy and the demands with respect to child support arise.

Once confronted with a claim of paternity, no less than the following should be considered:

a. Testing[6];

b. Confidentiality;

c. Whether or not an agreement will be enforceable and subject to public policy;

d. How best to present evidence as to income and/or whether to produce all income data rather than to stipulate that the respondent or defendant can pay any reasonable

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[3]*See generally* Pablo S. Torre, *How (And Why) Athletes Go Broke*, SPORTS ILLUSTRATED, Chapt. III, March 23, 2009; Grant Wahl, L. Jon Wertheim, *Paternity Ward: Fathering Out-Of-Wedlock Kids Has Become Commonplace Among Athletes, Many of Whom Seem Oblivious to The Legal, Financial, And Emotional Consequences*, SPORTS ILLUSTRATED, May 4, 1998. *See also* N.Y. Fam. Ct. Act § 517.

[4]*See generally* Pablo S. Torre, *How (And Why) Athletes Go Broke*, SPORTS ILLUSTRATED, Chapt. III, March 23, 2009.

[5]*See generally* Grant Wahl, L. Jon Wertheim, *Paternity Ward: Fathering Out-Of-Wedlock Kids Has Become Commonplace Among Athletes, Many of Whom Seem Oblivious to The Legal, Financial, And Emotional Consequences*, SPORTS ILLUSTRATED, May 4, 1998.

[6]*See generally* N.Y. Fam. Ct. Act § 542(b).

amount of child support.[7] In that instance, the next issue arises as to what are the reasonable needs of the child.[8]

There are many reasons why professional athletes have children out of wedlock. However, even taking into account the added pressures and temptations, the number of children born out of wedlock to professional athletes is staggering. This issue affects baseball, football, basketball, boxing, hockey and many other sports in epidemic proportions. It is difficult to pinpoint the exact reason as to why so many professional athletes have children out of wedlock. Travel schedules, notoriety, fame, wealth, and egos all may play a part. No sport is devoid of these issues.[9] It is imperative that the professional representative recognize and impress upon his or her client the significant financial responsibilities that result from having a child out of wedlock. Indeed, child support payments can be some of the professional athlete's most significant expenses and it is an expense that can go on not only during the child's minority but for years thereafter based upon factors such as need for college, as well as moral and/or other responsibilities.[10]

The athlete looks upon his representative for guidance with regard to contracts, career decisions, management, accounting, taxes, purchase of assets, interaction, and publicity. However, the professional representative and/or agent simply cannot be with the athlete at all times, and no matter how much guidance is given, indiscretions and weaknesses will occur. When those indiscretions and weaknesses result in the birth of a child, the athlete is confronted with a lifetime responsibility. Planning for one's financial and parental responsibilities through the recommendations of appropriate family law practitioners may help to alleviate the tension and anxieties incumbent upon a parent, particularly in a situation where the pregnancy was initially unwanted. Additionally, proper analysis of the responsibilities and an understanding of how to best

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[7]*See* Estevez v. Superior Court, 22 Cal. App. 4th 423, 427 (1994); Kathy C.J. v.Arnold D., 116 A.D.2d 247, 501 N.Y.S.2d 58 (2d Dep't 1986). *See also generally* N.Y. Fam. Ct. Act §§ 542(b) to (c), 545, 563.

[8]*See generally* Niagara Cty. Dep't of Soc. Servs., 234 A.D.2d 897, 651 N.Y.S.2d 785 (4th Dep't 1996); Cal. Fam.Code § 3900 (West 2006); N.Y. Fam. Ct. Act §§ 542(b) to (c), 545, 563.

[9]*See* Grant Wahl, L. Jon Wertheim, *Paternity Ward: Fathering Out-Of-Wedlock Kids Has Become Commonplace Among Athletes, Many of Whom Seem Oblivious to The Legal, Financial, And Emotional Consequences*, SPORTS ILLUSTRATED, May 4, 1998.

[10]*See generally* N.Y. Fam. Ct. Act §§ 513, 545.

effectuate the necessities of child support and custody may very well assist the athlete in maintaining his or her efficiency on the field or in the arena.

Issues with respect to custody of the child and/or visitation of the child should also be considered but an analysis of such issues will be more fully addressed later in this chapter.

§ 3A:7 Divorce

While the professional representative should be cognizant of premarital issues within the domestic relationship, such as cohabitation agreements, premarital agreements and issues pertaining to paternity, the most prevalent matter involved with domestic relations relates to the actual divorce or the process of the dissolution of the marriage.

Some states utilize the laws of community property,[1] whereas other states adopt a methodology which involves equitable distribution.[2] However, regardless of the state in which the athlete might reside (and there are issues as to how determine residency which will be discussed later herein), in all states the issues as to child custody, child visitation, division of property and assets, and the payment of spousal support and attorney's fees exist.

§ 3A:8 Divorce—Jurisdiction and venue

When problems arise in the domestic relationship, and the athlete or coach contacts his or her professional representative for advice and recommendations, the first issue that must be addressed is in which jurisdiction the divorce action must be filed. Typically, there is a residency requirement. In California, a divorce action may not be filed unless one of the parties of the marriage has been a resident of the state for six months

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[Section 3A:7]

[1]The following jurisdictions utilize the law of community property: Arizona; California; Idaho; Louisiana; Nevada; New Mexico; Puerto Rico; Texas; and Washington.

[2]The following states jurisdictions utilize the law of Equitable Distribution: Alabama; Alaska; Arkansas; Colorado; Connecticut; Delaware; District of Columbia; Florida; Georgia; Hawaii; Illinois; Indiana; Iowa; Kansas; Kentucky; Maine; Maryland; Massachusetts; Michigan; Minnesota; Mississippi; Missouri; Montana; Nebraska; New Hampshire; New Jersey; New York; North Carolina; North Dakota; Ohio; Oklahoma; Oregon; Pennsylvania; Rhode Island; South Carolina; South Dakota; Tennessee; Utah; Vermont; Virginia; West Virginia; Wisconsin; and Wyoming.

immediately preceding the divorce and of the county in which the divorce is filed for at least three months.[1] Other jurisdictional issues arise with regard to legal separation and/or annulment proceedings.[2] For example, New York law regarding annulment requirements is substantially similar to California's annulment requirements. A party seeking to commence an action seeking the annulment of a marriage, a divorce, a separation, or a declaration as to the nullity of a void marriage must satisfy one of five residency standards. Each of the residency standards may be met by showing that one or both of the parties are or have been a resident or domicile of New York for a prescribed period of time.[3]

[Section 3A:8]

[1]*See* Cal. Family Code § 2320.

[2]See Cal. Family Code § 2210, which generally provides that a marriage is voidable and may be adjudged a nullity if any of the following conditions existed at the time of marriage: (a) one of the parties was incapable of consenting to the marriage due to not having attained the age of 18 and if under 18, had not obtained a court order permitting the marriage; (b) one of the parties was still married to another person who has evidence to assume that the other spouse was still living; (c) one of the parties was of unsound mind; (d) the consent of one of the parties was obtained by fraud; (e) the consent of one of the parties was obtained by force; (f) either party was physically incapable of entering into the marriage. Cal. Family Code § 2210 does provide certain defenses to the grounds for nullity. As an example, consent of one party was obtained by force or fraud, yet the parties continue to freely cohabit with the other as husband and wife.

[3]See N.Y. Dom. Rel. Law § 230, which states as follows:

§ **230. Required residence of parties.**

An action to annul a marriage or to declare the nullity of a void marriage or for divorce or separation may be maintained only when:

1. The parties were married in the state and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding, or

2. The parties have resided in this state as husband and wife and either party is a resident thereof when the action is commenced and has been a resident for a continuous period of one year immediately preceding, or

3. The cause occurred in the state and either party has been a resident thereof for a continuous period of at least one year immediately preceding the commencement of the action, or

4. The cause occurred in the state and both parties are residents thereof at the time of the commencement of the action, or

5. Either party has been a resident of the state for a continuous period of at least two years immediately preceding the commencement of the action.

§ 3A:9 Divorce—Child custody

With respect to the issue of child custody, a more difficult issue arises as most athletes are traveling and are simply not in a position to be home throughout the year. At the same time, the law encourages frequent and continuing contact between the parent and the child. There is a distinction between actual legal custody as opposed to physical custody.[1] In the California, joint legal custody provides that both parties shall share in all significant decisions concerning the child's welfare, education, religion, and health.[2] In New York, the term "joint custody" applies to different arrangements for periods when the child is in the custody of each parent. Such arrangements may or may not involve alternating physical custody between the parents.[3] In circumstances where the court believes that the parties cannot work with each other or when one party may be shown to be significantly unfit, the other party may be awarded sole custody.[4]

With respect to physical custody, one party is typically awarded primary physical custody of the child subject to reasonable visitation being afforded to the other.[5]

The ultimate and most significant issue in determining child

[Section 3A:9]

[1]See generally N.Y. Dom. Rel. Law § 240.

[2]See Cal. Family Code § 3040(a)(1). In making an order granting custody to either parent, the court will consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent. The California Family Codedoes not prefer a parent as a custodian because of that parent's sex, and the court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order.

[3]Braiman v. Braiman, 44 N.Y.2d 584, 589, 407 N.Y.S.2d 449, 450 (1978)

[4]Braiman, 44 N.Y.2d at 587, 407 N.Y.S.2d at 449.

[5]Particularly when one parent is awarded sole physical custody, reasonable visitation rights must be awarded to the other parent unless it is shown that the visitation would be detrimental to the best interest of the child. See Cal. Family Code § 3100(a); *Camacho v. Camacho* (1985) 173 Cal, App.3d 214. It is the public policy of California to assure that the health, safety, and welfare of children are the court's primary concern in determining the best interest of children when making orders regarding physical or legal custody and visitation. The additional goal of California is to assure that children have frequent and continuing contact with both parents following the parents' separation or the dissolution of their marriage, as well as to encourage parents to share the rights and responsibilities of child rearing, except where the contact would not be in the best interest of the child, as

custody is to analyze what is in the "best interest" of the child.[6] For purposes of custody, typically the court considers any child through the age of 18 as a minor subject to the rules concerning custody.[7] In New York, although custody determinations may not be made after the child has attained age 18, the parents of the child may remain chargeable for his or her support until the attainment of age 21.[8]

In many divorce cases and also in paternity cases, differences may arise between the athlete and his or her spouse concerning what is in the best interest of the child. Issues concerning significant others, boyfriends, girlfriends, and other individuals to whom the child might be subjected can often lead to disputes and arguments. Such disputes and arguments may involve incurring significant court time and escalating attorney's fees.

Where appropriate facts have been demonstrated concerning difference in parenting by either parent, the parties may wish to stipulate to a custody evaluation and/or the court may impose an order at custody evaluation dependent upon the circumstances. The custody evaluation will involve the services of a mental health professional, usually a Ph.D. in clinical psychology, an M.F.C.C., or a licensed social worker.[9] The custody evaluation can cost many thousands of dollars and last anywhere from four to twelve months. The custody evaluator will interview the parties as well as interviewing the parties when the children are present, interviewing the child if the child is of sufficient age, administer various psychological tests such as the MMPI[10], the Rorschach[11], interviews with collaterals and witnesses, reviewing school records and the like. The

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provided in Cal. Family Code § 3011. The court is empowered with the authority to ensure the health, safety, and welfare of the child and the safety of all family members. Putnam v. Satriano, 18 A.D.3d 921, 794 N.Y.S.2d 493 (3d Dep't 2005); Vezina v. Vezina, 8 A.D.3d 1047, 778 N.Y.S.2d 602 (4th Dep't 2004).

[6]See Eschbach v. Eschbach, 56 N.Y.2d 167, 171–73, 451 N.Y.S.2d 658, 660–62 (1982); N.Y. Dom. Rel. Law §§ 70, 240(1).

[7]N.Y. Dom. Rel. Law § 2; N.Y. C.P.L.R. 105 (j).

[8]N.Y. Fam. Ct. Act § 413; see also Alice C. v. Bernad G.C., 193 A.D.2d 97, 602 N.Y.S.2d 623 (2 Dep't 1993).

[9]Braiman, 44 N.Y.2d at 588, 407 N.Y.S.2d at 450.

[10]The Minnesota Multiphasic Personality Inventory (MMPI) is one of the most regularly used personality tests and is frequently used in family law custody evaluations. The current MMPI consists of 567 affirmative statements, to which the test taker may respond with "true," "false" or "cannot

custody evaluator will then generate a written report that can often be as long as 60 pages in which the evaluator makes various recommendations to the court with respect to the issue of custody and visitation.

In New York, forensic evaluators are often utilized to assess the mental fitness of each parent. The evaluators will usually examine the child alone, each parent alone, and each parent with the child. Collateral sources are sometimes evaluated, as well as the opinions of prior counselors, school officials, other family members, and anyone else in a position to offer meaning-

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say." MMPI items range widely in content, covering such areas as health, psychosomatic symptoms, neurological disorders, and motor disturbances; sexual, religious, political and social attitudes; educational, occupational, family, and marital questions; as well as many well-known neurotic or psychotic behavior manifestations, such as obsessive and compulsive states, delusions, hallucinations, ideas of reference, phobias, and sadistic and masochistic trends. See Anne Anastasi Psychological Testing 6th Ed., McMillan Publishing Company (1988).

[11]The Rorschach is a projective technique employing the Rorschach inkblots. Developed by Swiss psychiatrist Herman Rorschach, this technique was first described in 1921. The Rorschach applies inkblots to the diagnostic investigation of the personality as a whole. In the development of this technique, Rorschach experimented with a large number of ink blots, administered to different psychiatric groups. As a result of such clinical observations, those responsive characteristics that differentiated between various psychiatric syndromes were generally incorporated into the scoring system. The scoring procedures were further sharpened by supplementary testing of mental retardates, normals, artists, scholars and other persons of known characteristics. The Rorschach utilizes 10 cards, on each of which is printed a bilaterally symmetrical inkblot. As the respondent is shown each inkblot, he or she is asked to tell what the blot could represent. Besides keeping verbatim record of the responses to each card, the examiner notes time of responses, position or positions in which cards are held, spontaneous remarks, emotional expressions, and other incidental behavior of the respondent during the test session. Following the presentation of all 10 cards, the examiner questions the individual systematically regarding the parts and aspects of each blot to which associations were given. During this inquiry, the respondents also have an opportunity to clarify and elaborate on their earlier responses. The treatment of content varies from one scoring system to another, although certain major categories are regularly employed. Chief among these are human figures, human details (or parts of human beings), animal figures, animal details, and anatomical details. Other broad scoring categories include inanimate objects, plants, maps, clouds, blood, X-rays, sexual objects, and symbols. A skilled clinician administering the Rorschach will have an opportunity to measure the cognitive style and perceptual organization of the test taker and in certain instances, the test results may provide the court with a better understanding of the psychological traits of a particular party. See Anne Anastasi Psychological Testing 6th Ed., McMillan Publishing Company (1988).

ful feedback. Some forensic evaluators use special tests during the evaluations. The evaluator usually issues a written report and may testify at trial.

If the athlete and his spouse or significant other can reach an understanding in writing as to the custody and visitation, significant fees can be avoided as well as the family unit having not been subjected to a potentially emotionally invasive exercise. A confident family law attorney can guide the athlete with respect to the best and most effective methods of effectuating a custody agreement which is foremost in the best interest of the child but also encourages continuing and frequent contact between the child and both parents.

One of the more frequent problems that arise with regard to custody issues involving professional athletes is the issue of long-distance parenting. Often an athlete will move from city to city as he or she contracts with various teams in his league. If the divorce transpires during the athlete's ongoing career, decisions will need to be made as to how and when the child will visit with the athlete. Since the athlete is traveling during the season, it would be difficult for a young child to be flown to and from a visiting ballpark. Accordingly, there will inevitably be significant periods of time which the athlete cannot be with his or her child. This is, of course, the case when the athlete has a happy family life. When divorce or a break-up between significant others transpires, it may be that the best alternative is to arrange visitation and custody during the off-season, recognizing that the child may still have to maintain his or her schooling and ongoing relationships with friends and the primary custodial parent.

§ 3A:10 Divorce—Child support

When there are children involved in a divorce, there will inevitably be issues related to the amount and duration of child support. Typically, child support is based upon the respective comparison of the income of each spouse, the needs of the child or children, and the amount of custodial time each spouse has with the child or children.[1]

Since professional athletes and even high level amateur

[Section 3A:10]

[1]See Childress v. Samuel, 27 A.D.3d 295, 811 N.Y.S.2d 372 (1st Dep't 2006); Somerville v. Somerville, 5 A.D.3d 878, 773 N.Y.S.2d 483 (3d Dep't 2004).

athletes and their coaches and managers travel for great periods of time, those representing such athletes and/or coaches and managers will need to expect that the child support numbers will be large and that the duration will be great. California and New York,[2] like most states, usually base child support upon an algebraic formula set forth in statutes.

In California, the basic denominators include the income of the parties, the respective child custody timeshare and certain deductions. Some of those deductions may be the amount of health insurance that the athlete is paying on behalf of the children in the family unit. Because of the complexities of analyzing the algebraic guidelines, there are a number of software programs marketed that are most useful in determining the amount of child support. Of course, the court also reserves jurisdiction to modify child support based upon an appropriate showing of a change of circumstances.

In New York, the formula utilized by NY DRL § 240(1-b)(c) involves the parents' combined income. The determination of each party's income is based on factors including actual earning capacity, past earnings, educational background, and the earnings of others with similar professional and educational

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[2]Cal. Family Code § 4055sets forth actual algebraic/mathematical components to be utilized with respect to the setting of child support. These components include, but are not necessarily limited to the amount of both parent's incomes, the approximate percentage of time that the higher earner will have primary physical responsibility, and disposable income. The California Family Codealso provides instances in which the court may deviate from the statewide uniform guidelines for determining spousal support. See Cal. Family Code § 4057. Additionally, and this is particularly important for the high income athlete who elects to cohabit with or marry a partner who has a child from another marriage, Cal. Family Code § 4057.5provides that the income of a parent's subsequent spouse or non-marital partner will not be considered in determining or modifying child support unless there are exceptions. Those exceptions would be of an extraordinary nature and would include a situation in which excluding that income would lead to extreme and severe hardship to any child subject to the child support award. The representative of the high income athlete who has a client electing to reside or marry a party with a child from another relationship may wish to be cognizant of these issues in providing guidance and recommendations to that client. These recommendations may include the execution of a cohabitation and/or premarital agreement. See Cal. Family Code § 4057.5(2)(e); See N.Y. Dom. Rel. Law § 240(1-b)(c).

backgrounds.[3] The first $80,000 of the combined income is then multiplied by one of several set percentages; the determination of the particular percentage to be used is based on the number of children at issue. The resulting figure, known as the "basic" child support obligation, is then allocated between the parents "in the same proportion as each parent's income is to the combined parental income."[4] With respect to combined income above $80,000, the court may choose to apply this same formula to, and/or may apply additional discretionary factors listed in N.Y. D.R.L. § 240(1-b)(c)(f)in calculating the parties' respective support obligations.[5]

What is also very important to recognize is that child support obligations will most likely continue long after an athlete is no longer on the playing field. In most states, the duty of support continues to an unmarried child who has attained the age of 18 years, is a full-time high school student, and who is not self-supporting until the time the child completes the 12th grade or attains the age of 19 years (or, in other states including New York, the age of 21 years), whichever occurs first.[6] Accordingly, it is important to advise the athlete to manage his finances and to ensure that money will be available to meet the child's needs as time goes on.

In most child support stipulations and stipulated orders, it is helpful to set forth financial assumptions upon which the child support is based. By having those assumptions, it may be easier to seek a modification when the athlete is no longer making the same kind of money he or she was making when the large support payments were first effectuated.

Generally speaking, the courts will always reserve or maintain jurisdiction to entertain a request to modify child support based upon a change in facts and circumstances.[7]

It is important again to recognize the complexity of where the athlete resides, as the child support laws differ from state to state. Accordingly, it is in the best interest of the athlete to

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[3]See Bittner v. Bittner, 296 A.D.2d 516, 745 N.Y.S.2d 559 (2d Dep't 2002); Liepman v. Liepman, 279 A.D.2d 686, 717 N.Y.S.2d 790 (3 Dep't 2001)

[4]N.Y. Dom. Rel. Law § 240(1-b)(c).

[5]Cassano v. Cassano, 85 N.Y.2d 649, 628 N.Y.S.2d 10 (1995); Gianniny v. Gianniny, 256 A.D.2d 1079, 683 N.Y.S.2d 769 (4th Dep't 1998).

[6]Cal. Family Code § 3901(a); N.Y. Fam. Ct. Act § 413.

[7]See N.Y. Dom. Rel. Law § 240(1-b)(f), (g); N.Y. Fam. Ct. Act § 461(b)(ii)

retain representation by an attorney who has expertise in the area of child support. In California, any attorney licensed by the state has the right to provide guidance to the athlete with respect to all family law matters. However, California provides for a certification of attorneys who have attained a higher level of expertise in various fields. The State Bar of California Board of Legal Specialization offers an examination every two years for the purposes of determining those attorneys applying for certification who have mastered various tasks, educational requirements, settlement instruments and of course, trial time.

Child support considerations are applicable in non-marital relationships, paternity, and, of course, the basic family law termination of marriage.

When an athlete is making a significant sum of money, it may be inappropriate to utilize the guidelines and algebraic formulas.[8] In such instances, it may be appropriate to advise the athlete to represent to the other party and/or to the court that he or she has the ability to pay reasonable child support. By making this representation, the necessity of providing full and complete information concerning assets, income and obligations may be avoided, although in California some disclosure as to income including tax returns will be required.

High income deviations from the child support guidelines often occur with celebrities and of course, high income athletes.[9]

§ 3A:11 Spousal support

When the athlete is married and domestic problems arise, not only will the athlete be confronted with the long-term responsibilities associated with child support when there are children involved but also issues related to alimony and/or spousal support.[1] The amount of spousal support that may be paid by the athlete to his spouse is often much greater, more significant, and longer than the child support obligations.

While child support jurisdiction will generally terminate when the child reaches majority or the age of 18, the possibility of continuing spousal support may extend for periods much

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[8]Mitnick v. Rosenthal, 260 A.D.2d 238, 688 N.Y.S.2d 150 (1st Dep't 1999).

[9]In re Marriage of Morrison (1978) 20 Cal.3d 437.

[Section 3A:11]

[1]Spousal support is referred to as "maintenance" in New York. N.Y. Dom. § 236, Part B(6).

longer. In California, any marriage that lasts more than 10 years between the date of marriage and the date of separation is considered a lengthy marriage.[2] This may mean that the payor athlete may have a potential obligation to pay spousal support until the death of either party, the remarriage of the supported spouse, or further order of court. Those general factors could mean that the support could be paid for many years. In California, there are a number of factors that are utilized in determining the amount and extent of spousal support. Factors[3] that the court may review can include the following:

a. Extent to which the earning capacity of each party is sufficient to maintain the standard of living established during the marriage, taking into account all of the following:

i. The marketable skills of the supported party; the job market for those skills; the time and expenses required for the supported party to acquire the appropriate education or training to develop those skills; and the possible need for retraining or education to acquire other, more marketable skills or employment.

ii. The extent to which the supported party's present or future earning capacity is impaired by periods of unemployment that were incurred during the marriage to permit the supported party to devote time to domestic duties.

b. The extent to which the supported party contributed to the attainment of an education, training, a career position, or a license by the supporting party.

c. The ability of the supporting party to pay spousal support, taking into account the supporting party's earning capacity, earned and unearned income, assets, and standard of living.

d. The needs of each party based on the standard of living established during the marriage.

e. The obligations and assets, including the separate property, of each party.

f. The duration of the marriage.

g. The ability of the supported party to engage in gainful employment without unduly interfering with the interests of the dependent children in the custody of the party.

h. The age and health of the parties.

i. Documented evidence of any history of domestic violence, as defined in Section 6211, between the parties, including,

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[2]In re Marriage of Morrison (1978) 20 Cal.3d 437.

[3]See Cal. Family Code § 4320.

but not limited to, consideration of emotional distress resulting from domestic violence perpetrated against the supported party by the supporting party, and consideration of any history of violence against the supporting party by the supported party.

j. The immediate and specific tax consequences to each party.

k. The balance of the hardships to each party.

While the factors set forth in the California Family Codeare applicable for permanent support or support that may be paid at the negotiated time of a settlement or trial, for purposes of temporary support during the actual divorce, the support payments may be much larger than what would otherwise be payable at the time of the divorce or at settlement.

While California does not have statewide guidelines for spousal support as it does for purposes of child support, there are certain counties that have adopted a guideline formula. The amount of spousal support payable by a high income athlete can be staggering.

As a general rule of thumb, the amount of spousal support in California can sometimes be anywhere from 20% to 35% of the athlete's gross monthly cash flow after business-related expenses. However, there are numerous factors that provide the court with flexibility and discretion. While typically the spousal support is taxable to the recipient and deductible by the payor, the athlete will still be confronted with an impact in his monthly cash flow based upon his or her obligation to pay spousal support.

If the marriage between the athlete and his or her spouse has not been long, then the athlete may be able to argue that the marital standard of living immediately prior to the separation did not warrant the type of support that would otherwise be payable based upon artificial guidelines or even the specific rules of that state. A careful analysis of the parties' marital standard of living during the marital period and/or the use of forensic accountants are most often the best methods of making certain that the athlete does not overpay his or her spouse with respect to spousal support. There are a number of factors that also must be considered with respect to the advice given to an athlete as it relates to the issue of spousal support. If the supported spouse is residing or cohabiting with a member of the opposite sex, a presumption may arise as to a decreased

need for spousal support.[4] However, even if cohabitation is transpiring, the burden will be on the high income earning spouse to prove that the spouse is being supported by the individual residing with him or her.

In New York, the substantive aspects of spousal support are governed by NY DRL § 236, Part B(6). NY DRL § 236, Part B(6)(a)provides that "the court may order temporary maintenance or maintenance in such amount as justice requires, having regard for the standard of living of the parties established during the marriage, and further states that:

In determining the amount and duration of maintenance the court shall consider:

(1) the income and property of the respective parties including marital property distributed pursuant to subdivision five of this part;

(2) the duration of the marriage and the age and health of both parties;

(3) the present and future earning capacity of both parties;

(4) the ability of the party seeking maintenance to become self-supporting and, if applicable, the period of time and training necessary therefor;

(5) reduced or lost lifetime earning capacity of the party seeking maintenance as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage;

(6) the presence of children of the marriage in the respective homes of the parties;

(7) the tax consequences to each party;

(8) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;

(9) the wasteful dissipation of marital property by either spouse;

(10) any transfer or encumbrance made in contemplation of a matrimonial action without fair consideration; and

(11) any other factor which the court shall expressly find to be just and proper.

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[4]Cal. Family Code § 4323(a).

An award of maintenance terminates upon the death or the remarriage, either valid or invalid, of the recipient.[5] Maintenance awards do not necessarily continue indefinitely; the court has the authority and discretion order that maintenance will only continued for a specific period of time.[6] In determining the amount and duration of maintenance, the parties' pre-divorce standard of living should be considered a preeminent factor.[7] The fact that a recipient spouse may have some ability to earn a living does not necessarily disentitle her to lifetime maintenance. However, a luxurious pre-divorce lifestyle does not ensure a spouse of a lifetime of support. The payee spouse's reasonable needs and the couple's pre-divorce standard of living should be considered in the context of the other statutory factors.[8]

Durational limitations on maintenance awards may be modified if the recipient spouse cannot attain economic independence within the period contemplated by the agreement, either because of unexpected circumstances or because the original period proved to be unrealistic.[9] It has been held that the duration of a maintenance award should not be limited when the recipient spouse is unlikely to be completely self-supporting.[10] Maintenance awards may be structured to encourage the payee to become financially independent.[11]

The court may consider the parties' separate property and

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[5]N.Y. Dom § 236, Part B(1)(a).

[6]Blisko v. Blisko, 149 A.D.2d 127, 544 N.Y.S.2d 670 (2d Dep't 1998).

[7]Hartog v. Hartog, 85 N.Y.2d 36, 623 N.Y.S.2d 537 (1995); Ganin v. Ganin, 92 A.D.2d 489, 459 N.Y.S.2d 85 (1st Dep't 1983).

[8]See, e.g., Sergeon v. Sergeon, 228 A.D.2d 354, 644 N.Y.S.2d 264 (1st Dep't 1996); Fleitz v. Fleitz, 223 A.D.2d 946, 636 N.Y.S.2d 911 (3d Dep't 1996); Garvey v. Garvey, 223 A.D.2d 968, 636 N.Y.S.2d 893 (3d Dep't 1996); Kelly v. Kelly, 223 A.D.2d 625, 636 N.Y.S.2d 840 (2d Dep't 1996); Nadel v. Nadel, 220 A.D.2d 565, 632 N.Y.S.2d 631 (2d Dep't 1995); Damato v. Damato, 215 A.D.2d 348, 626 N.Y.S.2d 221 (2d Dep't 1995).

[9]Sass v. Sass, 276 A.D.2d 42, 716 N.Y.S.2d 686 (2d Dep't 2000).

[10]Spencer v. Spencer, 230 A.D.2d 645, 646 N.Y.S.2d 674 (1st Dep't 1996) ; Roffey v. Roffey, 217 A.D.2d 864, 630 N.Y.S.2d 114 (3d Dep't 1995).

[11]Costa v. Costa, 46 A.D.3d 495, 849 N.Y.S.2d 204 (1st Dep't 2007). See, also In re Marriage of Gavron (1988) 203 Cal.App.3d 705, which is frequently cited in California dissolution judgments, referring to an admonition from the court requiring the supported spouse to become self-supporting within a reasonable period of time. The reasonable period of time is dependent upon the duration of the marriage. If the marriage is less than ten years, the supported spouse is expected to be self-supporting within half the length of the

any additional property that may be reasonably forthcoming in the future, in determining maintenance.[12] Moreover, a substantial equitable distribution award may influence the determination of maintenance.[13]

Pursuant to NY DRL § 236, Part B(3), the court may not order either temporary or permanent maintenance where the parties have entered into a separation or antenuptial agreement.[14] However, NY DRL § 236, Part B(3)further provides that the terms of the agreement must be fair and reasonable at the time of the making of the agreement and not unconscionable at the time of entry of final judgment.

If the athlete and his spouse during the course of the divorce work out a settlement, and each party is receiving significantly large assets, that factor may also serve to alleviate the necessity of paying long-term or high level spousal support. In particular, if the asset awarded to the spouse throws off passive or other income, that factor can be analyzed with respect to the setting of spousal support. Not only is the athlete confronted with the necessity to pay child and spousal support, there will also be issues concerning the implementation of medical insurance and the maintaining of life insurance for purposes of security for child and/or spousal support. Careful planning and the securing of annuities as well as effectuating reasonable levels of life insurance are exercises that the representative can work out with appropriate experts in the particular field, where it be life insurance and/or health insurance.

In New York, NY DRL § 236, Part B(8)(a)empowers the court to direct one spouse to purchase, maintain, or assign an insurance policy covering "health and hospital care and related services" for the other spouse or the children, and further empowers the court to provide a policy of life insurance on the life of either spouse with the other spouse or children designated beneficiaries. The payor spouse's obligations end, and the

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marriage, measured between the date of marriage and the date of separation. A marriage with a duration of more than ten years has no such rule.

[12]Kay v. Kay, 302 A.D.2d 711, 754 N.Y.S.2d 766 (3d Dep't 2003); Cerabona v. Cerabona, 302 A.D.2d 346, 754 N.Y.S.2d 349 (2d Dep't 2003).

[13]Chalif v. Chalif, 298 A.D.2d 348, 751 N.Y.S.2d 197 (2d Dep't 2002).

[14]"An agreement by the parties, made before or during the marriage, shall be valid and enforceable in a matrimonial action if such agreement is in writing, subscribed by the parties, and acknowledged or proven in the manner required to entitle a deed to be recorded." N.Y. Dom § 236, Part B(3). See also Gotthainer v. Gotthainer, 107 Misc.2d 221, 435 N.Y.S.2d 444 (Fam. Ct. Ulster Cty., 1980).

beneficiary's interest terminates, when the maintenance, child support, or distributive award cease being paid.[15]

Of course, with respect to the issue of medical insurance, once the spouses are divorced, the non-employee spouse will not be considered dependent for purposes of maintaining medical insurance. In accordance with COBRA[16] regulations, the athlete spouse may be entitled to an ongoing right to personally pay for the group medical policy associated with the athlete's professional contract.[17] Again, these are issues which the professional representative can discuss with the athlete's family law counsel.

§ 3A:12 Spousal support—Community property and equitable property issues

During the marriage, the athlete and his spouse will have accumulated assets. Those assets may include a residence, retirement plans, bank accounts, cars, furnishings, artwork, and/or investment accounts. If the various assets and property acquired from and after the date of marriage and through typically the date of separation, under the rules of most states, those assets must be equally divided between the parties upon divorce. California is a community property state. New York is an equitable distribution state. In a community property state, all community property is to be equally divided. In an equitable distribution state, dependent upon the circumstances of the divorce, one party might be entitled to a greater proportion of the assets.

In California, except as otherwise provided by statute, all property real or personal, wherever situated, acquired by a married person during the marriage while domiciled in the

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[15]See Hartog, supra, 85 N.Y.2d at 36, 623 N.Y.S.2d at 537; Hendricks v. Hendricks, 13 A.D.3d 928, 788 N.Y.S.2d 190 (3d Dep't 2004).

[16]Certain individuals, including spouses and employees, have what are considered COBRArights. An eligible defendant covered under a group health plan (one of the medical plans or one of the dental plans) or the health care spending account, have the option to purchase a temporary continuation of health care coverage at full group rates, plus a 2% administration charge in certain instances when coverage would otherwise end. This is called the COBRAcoverage. COBRAstands for the Consolidated Omnibus Budget Reconciliation Act of 1985. In a divorce or legal separation, COBRAcontinuation will last up to a total of 36 months.

[17]See generally Brown v. Brown, 20 Misc.3d 756, 860 N.Y.S.2d 904 (Sup. Ct., Nassau Cty., 2008).

state is community property.[1] Cal. Family Code § 770defines what constitutes the separate property of a married person. § 770provides as follows:

(A) separate property of the married person includes all of the following:

(1) All property owned by the person before marriage;

(2) All property acquired by the person after marriage by gift, bequest, device, or descent.

(3) The rents, issues and profits of the property described in this section.

(B) A married person may, without the consent of the person's spouse, convey the person's separate property.[2]

Often an athlete may be advised by his or her manager, agent, or accountant to make investments in limited partnerships and businesses. To the extent those investments are made during the marriage, the non-athletic spouse will be entitled to share in those revenues.

It is particularly interesting to deal with long-term contracts. If an athlete signs a $20 million contract that will last for 10 years but then gets divorced the fifth year into the contract, typically the spouse is not going to be entitled to share equally in that portion of the contract in which payments have not yet been made and/or will be made based upon the actual performance of the athlete. At the same time, if the contract is guaranteed based upon the service to be provided by the athlete, then questions arise as to whether or not the totality of the contract is to be equally divided between the spouses upon divorce.

Under New York law, marital property is deemed to be

[Section 3A:12]

[1]See Cal. Family Code § 760. Assuming the parties are unable to reach a settlement regarding the characterization of individual property items held by the parties as community property or separate property, the court is specifically vested with jurisdiction to determine the property rights of the parties during the course of proceedings for dissolution of marriage, legal separation or nullity. See Cal. Family Code § 2010(e). The jurisdiction to determine the property rights of the parties includes the power to characterize property as either community property or separate property. Porter v. Superior Court (1977) 73 Cal.App. 3d793.

[2]The status of property as community or separate is normally determined at the time of its acquisition, (Trimble v. Trimble (1933) 219 Cal. 340, 343) and by the law in effect at the time of its acquisition (Marriage of Bouquet (1976) 16 Cal.3d 583).

jointly owned by the parties and is divided equitably. Separate property is solely owned by one party, and is not divided between the spouses. "Marital property" is, by definition, very broad, and includes all property that is not classified as "separate property" or otherwise prevented by law from distribution between spouses. Anything of value—i.e., of provable economic worth—acquired during marriage may be classified as "marital property."[3] However, the parties are free to modify the applicable definition of marital and separate property by prenuptial or antenuptial agreement.[4]

NY DRL § 236(B)(1)(c) to (d)provides that upon divorce, the property of the parties should be divided into the classifications of marital or separate:

> c. The term "marital property" shall mean all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held, except as otherwise provided in agreement pursuant to subdivision three of this part. Marital property shall not include separate property as hereinafter defined.
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> d. The term separate property shall mean:
>
> (1) property acquired before marriage or property acquired by bequest, devise, or descent, or gift from a party other than the spouse;
>
> (2) compensation for personal injuries;
>
> (3) property acquired in exchange for or the increase in value of separate property, except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse;
>
> (4) property described as separate property by written agreement of the parties . . .

If a spouse places his or her separate property into joint names, a presumption of gift arises; unless the presumption is rebutted, the property will be deemed marital.[5] Accordingly, funds held in a joint account are presumed to be marital as-

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[3]O'Brien v. O'Brien, 66 N.Y.2d 576, 498 N.Y.S.2d 743 (1985).

[4]See Parker v. Parker, 196 Misc. 2d 672, 766 N.Y.S.2d 315 (Sup Ct., Nassau Cty., 2003).

[5]N.Y. Banking Law § 675(b); Kosovsky v. Zahl, 257 A.D.2d 522, 684 N.Y.S.2d 524 (1st Dep't 1999); Judson v. Judson, 255 A.D.2d 656, 679 N.Y.S.2d 465 (3d Dep't 1998).

sets, regardless of the intended use of the funds.[6] However, where a spouse maintains separate property in an investment account and has no role in the management of the account, the account is viewed as a "passive asset," and any appreciation in the value of the account is treated as separate property.[7] *Price v. Price*[8] established a three-part test for determining whether appreciation in separate property may be viewed as marital:

(1) there must be appreciation;

(2) the appreciation was due in part to the efforts of the titled spouse; and

(3) the efforts of the titled spouse were aided, directly or indirectly, by the non-titled spouse.

There is a presumption that property acquired during the marriage is marital, and the burden of establishing that property is separate is on the party seeking to have the property in question classified as separate.[9] To overcome this presumption, the property in question must either be traced to separate property or it must be demonstrated that separate property was the only possible source.[10] If a spouse argues unsuccessfully that particular property his or her separately, the spouse may be granted a credit for the property determined to be a marital asset.[11]

Property acquired after a matrimonial action has com-

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[6]Wortman v. Wortman, 11 A.D.3d 604, 783 N.Y.S.2d 631 (App. Div. 2d Dep't 2004). See, also, Cal. Family Code § 760. The presumption of Cal. Family Code § 760with respect to property acquired during marriage and prior to separation, can often be characterized as the general community property presumption. See Marriage of Lucas (1980) 27 Cal.3d 808. See, also, Marriage of Ruelas (2007) 154 Cal.App.4th 339, 64 Cal. Rptr. 3d 600(wife who took title to condominium in her own name did so for benefit of her parents who funded acquisition; Cal. Family Code § 760was rebutted, resulting trusts arose for parents, and husband's only remedy was nominal community property reimbursement).

[7]See Rheinstein v. Rheinstein, 245 A.D.2d 1024, 667 N.Y.S.2d 156 (4th Dep't 1997).

[8]Price v. Price, 69 N.Y.2d 8, 511 N.Y.S.2d 219 (1986).

[9]Solomon v. Solomon, 307 A.D.2d 558, 763 N.Y.S.2d 141 (3d Dep't 2003) , leave to appeal dismissed, 1 N.Y.3d 546, 775 N.Y.S.2d 242, 807 N.E.2d 292 (2003).

[10]Sarafian v. Sarafian, 140 A.D.2d 801, 528 N.Y.S.2d 192 (3d Dep't 1988)

[11]Myers v. Myers, 255 A.D.2d 711, 680 N.Y.S.2d 690 (3d Dep't 1998); Maczek v. Maczek, 248 A.D.2d 835, 669 N.Y.S.2d 749 (3d Dep't 1998); Rheinstein v. Rheinstein, 245 A.D.2d 1024, 667 N.Y.S.2d 156 (4th Dep't 1997).

menced, however, is generally not marital property.[12] Typically, "separation" occurs when either party does not intend to resume the marriage and his or her action demonstrates the finalization of the marital relationship. Usually, significantly problems have so impaired the marital relationship that the legitimate objects of matrimony have been destroyed and there is no reasonable possibility of eliminating, correcting or resolving these problems. Pursuant to California law, dissolution of the marriage or legal separation of the parties may be based either on irreconcilable differences, which have caused the irremediable breakdown of the marriage, or the incurable insanity of one of the spouses.[13] Determining the date of separation and its effect upon finances and property may be an issue that can often confront the high income athlete and/or coach who is involved in a marital dissolution or separation. In In re Marriage of Norviel, 102 Cal. App. 4th 1152at 1162 (2002), the court expressly held that "living apart physically is an indispensable threshold requirement to separation, whether or not it is sufficient, by itself, to establish separation." Support for this conclusion may be found in the statutory language itself. Earnings are separate property only when spouses are "living separate and apart." In re Marriage of Norviel, 102 Cal. App. 4th 1152at 1162[14]. The *Norviel*court concluded that "living separate and apart" requires the contemporaneous conjunction of intent to separate and conduct evidencing that intent." In re Marriage of Norviel, 102 Cal. App. 4th 1152at 1164. Additional support for this conclusion may be found in earlier decisions in California, which suggest that physical separation is required. Pursuant to *Makeig v. United Security Bank and Trust Co.*, 112 Cal. App.138 at 143 (1931), "living separate and apart applies to a condition where the spouses have come to a parting

[12]Spinello v. Spinello, 129 A.D.2d 694, 514 N.Y.S.2d 456 (2d Dep't 1987); Lynch v. Lynch, 122 A.D.2d 589, 505 N.Y.S.2d 741 (4th Dep't 1986). See, also, Cal. Family Code § 771, which provides that property acquired by either spouse during marriage but after separation (i.e., "while living separate and apart") is ordinarily the acquiring spouse's separate property. The phrase "living separate and apart" in California Family Code § 771(a)requires both a parting of the ways with no present intention of resuming marital relations and, more important, conduct evidencing a complete and final break in the marital relationship. Marriage of Manfer (2006) 144 Cal4th 925, 50CR.3d 785; Marriage of Baragry (1977) 73 Ca.3d 44, 140 CR 779; *Marriage of von der Nuell* (1994) 23 Ca.4th 730, 28 CR.2d 447.

[13]Marriage of Harden (1995) 38 Cal.App.4th 448at 451; See also Cal. Fam. Code § 2310.

[14]See also Cal. Fam. Code § 771a).

of the ways and have no present intention of resuming the marital relations and taking up life together under the same roof."[15] Moreover, property acquired prior to the marriage in one party's sole name is usually considered separate property, even if the property was acquired to be used as a marital residence.[16]

One of the goals of equitable distribution is to address situations where one spouse acquires a professional practice, license or degree with the help of the other spouse, either directly (such as where the spouse works in her attorney-spouse's law office) or indirectly (such as where a spouse enables her husband to become a successful attorney by providing child care, maintaining the martial residence, etc.).[17] In *Litman v. Litman*[18], it was held that a professional practice, acquired during marriage, is marital property subject to equitable distribution.[19]

§ 3A:13 Spousal support—Celebrity goodwill/assets

A spouse's celebrity status can be marital property.[1] Moreover, the career and earnings of professional athletes can be

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[15]See also, e.g. Patillo v. Norris (1976) 65 Cal.App.3d 209, 214, 218(parties were not separating during temporary reconciliation, when they lived in same house but slept in different rooms); Romancheck v. Romanchek (1967) 248 Cal.App.2d 337, 342(parties were not separate when husband lived in "separate quarters" during apparent attempt to reconcile); Popescu v. Popescu (1941) 46 Cal.App.2d 44, 52(divorce granted even though parties were still living in the same house; wife unsuccessfully sought order evicting husband from home, occupied separate, locked rooms, refused to speak to husband, and called police on two occasions when husband entered her rooms).

[16]Zelnik v. Zelnik, 169 A.D.2d 317, 573 N.Y.S.2d 261 (1st Dep't 1991); Nell v. Nell, 166 A.D.2d 154, 560 N.Y.S.2d 426 (1st Dep't 1990).

[17]Price, 69 N.Y.2d at 8, 511 N.Y.S.2d at 219.

[18]Litman v. Litman,93 A.D.2d 695, 463 N.Y.S.2d 24 (2d Dep't 1983), order aff'd, 61 N.Y.2d 918, 474 N.Y.S.2d 718 (1984)

[19]See also O'Brien, supra, 66 N.Y.2d at 576, 498 N.Y.S.2d at 743.

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[1]Elkus v. Elkus, 169 A.D.2d 134, 572 N.Y.S.2d 901 (1st Dep't 1991) (opera singer's celebrity status held to be marital property subject to equitable distribution where husband was her voice teacher and coach). Contrary to New York law, there are no appellate decisions and/or statutes in the State of California which mandate that upon dissolution of marriage the court will have the authority to value a spouse's celebrity status, whether that status is based upon fame arising from a business, communications, or any athletic endeavor. This is not to be construed with businesses and/or as-

classified as marital property.[2] In *Gastineau v. Gastineau*,[3] the salary that New York Jets quarterback Mark Gastineau would have been paid had he completed the 1988 season,[4] as well as the couple's real property, were classified as marital property and divided between the parties.[5] Plaintiff Lisa Gastineau was given a credit for the portion of the salary that Mr. Gastineau forfeited when he breached his contract with the Jets with 10 games remaining in their sixteen game season. Ms. Gastineau was awarded 30% of the marital assets but actually received substantially more than 30% of the existing marital assets as a result of her credit.[6]

When large and significant assets are involved in the divorce of a high income athlete, it is almost inevitable that the attorney representing that athlete will recommend to the athlete that the services of a forensic accountant be secured. In that circumstance, the athlete will not only be confronted with the payment of the fees to his own attorney and/or a payment and/or a contribution of fees to his spouse's attorney but also required to advance the fees for the forensic accountant. These payments may be costly but will hopefully be appropriate and necessary. The forensic accountant will analyze and provide valuations as to business interests and investment accounts while also conducting a property balance sheet.

In certain circumstances involving professional athletes, the athlete may become married after already having earned significant monies as an athlete and having secured assets. In that circumstance, the necessity of determining the separate property interest in the business, asset or residence will be

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sets that may have independently been acquired as a result of that spouse's income and assets arising from his or her fame.

[2]Golub v. Golub, 139 Misc.2d 440, 527 N.Y.S.2d 946, 950 (Sup. Ct., N.Y. Cty., 1988)("This court . . . holds that the skills of an artisan, actor, professional athlete, or any person whose expertise in his or her career has enabled him or her to become an exceptional wage earner should be valued as martial property subject to equitable distribution.") (emphasis provided).

[3]Gastineau v. Gastineau, 151 Misc.2d 813, 573 N.Y.S.2d 819 (Sup. Ct., Suffolk Cty., 1991)

[4]Mark Gastineau left the Jets in 1988 to be with his ailing girlfriend, actress Brigitte Nielsen, after the Jets had played six games. His departure breached his contract with the Jets, who did not pay his salary for the remaining ten games of the season, all of which Gastineau missed. Gastineau, 151 Misc. 2dat 815–16, 573 N.Y.S.2d at 820–21.

[5]Gastineau, 151 Misc. 2dat 815–16, 573 N.Y.S.2d at 820–21.

[6]Gastineau., 151 Misc. 2dat 818–19, 573 N.Y.S.2d at 822–23.

necessary. It will also be necessary to then determine what percentage or portion of the asset belongs to the community or the marital estate. Tax considerations and valuations will be required.

When real estate is involved, additional issues arise as to when and how to list the property for sale and/or whether the property should be awarded to one party dependent upon an equalization figure and/or buy out. Typically, when one party buys the other party out of the residence, the buy out is considered non-taxable whereas if the property is sold, there will be the necessity of determining whether or not there are any capital gains taxes to be paid as well as allocating who is to pay those taxes.

The retirement plans that an athlete possesses are also subject to division upon divorce. The retirement plans can often be divided on a pro rata basis dependent upon how much was contributed and/or paid into the plan prior to the marriage or during the marriage and how much was paid into the plan after marriage. The family law practitioner will often recommend that an actuary be hired or a retirement expert be retained in order to not only prepare appropriate orders concerning retirement but to value the community interest in the retirement plans in the event a buy out is to be effectuated.

The family law practitioner will need to review and analyze along with the services of a forensic accountant the actual contract the professional athlete has entered into recognizing union regulations and those contractual provisions associated with the particular sport and/or team. Moreover, in determining how to best effectuate a division of assets, the commissions and/or fees paid by the athlete to his or her agent or manager must also be factored in as it would be inappropriate to solely charge the athlete for those fees when those fees were incurred in order to benefit the community and/or marital estate.

§ 3A:14 Privacy of proceedings for the high income athlete

A significant concern for a well-known and high income athlete's representatives pertains to the issue of protecting the privacy and confidentiality of legal matters for their clients, not only for contractual dealings, but with respect to litigation that may arise with personal family matters. The public's fascination with celebrity athletes is heightened when the popular athlete has legal matters concerning his or her domes-

tic relations. Public scrutiny of high-income athletes usually intensifies when news breaks regarding alleged infidelities, marital divorce or separation, and paternity matters.

The athlete's representative should recognize that communications between the athlete's employees, agents and various experts that might be hired with the lawyer with respect to a divorce or domestic relations proceedings will be governed and subjected to various privileges, including the attorney work product rule and the attorney-client privilege.[1]

While paternity proceedings, whether they involve the establishment of paternity, awarding of child custody and/or the payment of child support and attorney's fees, are confidential in nature and not open to the public, actual family law proceedings including divorce and separation or, for that matter, a cohabitation or *Marvin*lawsuit are subject to public scrutiny.[2] While the court will seldom close family law proceedings to the public or seal a family law file[3] in certain high profile cases where celebrities may be involved, the court may, when presented with a stipulated confidentiality order provide for the redaction of certain documents and/or the lodging of such documents rather than having them filed with the court on a permanent basis. Nonetheless, the ultimate right of the public to have access to the court is of paramount concern as to the trier of fact.

In 2008, Cynthia Rodriguez, wife of New York Yankees player Alex Rodriguez, filed for divorce following ongoing public speculation the baseball player was having an extra-marital affair with famed pop star, Madonna. In her divorce petition, Ms. Rodriguez blamed her husband's "long periods of infidelity"

[Section 3A:14]

[1]See Cal. Evidence Code § 952, which involves confidential communication between client and lawyer. Please also see, Mills Landon Water Co. v. Golden West Redining Company (1986) 186 Cal.App.3d 116.

[2]See Cal. Code of Civil Procedure § 124, which states: "Except as provided in section 214 of the Family Codeor any other provision of law, the sittings of every court shall be public." Cal. Family Code § 214states: "Except as otherwise provided in this Code or by court rule, the court may, when it considers it necessary in the interest of justice and the persons involved, direct the trial of any issue of fact joined in a proceeding under this Code to be private, and may exclude all persons except the officers of the court, the parties, their witnesses and counsel." However, this provision does not necessarily preclude the public from ultimately reviewing the record of the proceedings.

[3]See Estate of Hearst (1977) 67 Cal.App.3d 777.

for wrecking their marriage and accused him of "emotionally abandoning" her and their two children. Following the public release of Ms. Rodriguez's divorce petition, both parties deliberately engaged in private negotiations to resolve the dissolution of their marriage. Details of the settlement were never made public, in a calculated attempt to protect the parties' privacy.

When the necessary hurdles to provide confidentiality in open court cannot be overcome, the high income athlete's representative may elect to recommend that the proceedings be conducted by a private judge. In accordance with California law, the parties may stipulate to refer the matter to a private judge or referee.[4] Although the high income athlete who proceeds through a divorce may effectuate a stipulation with the other party to have the proceedings conducted privately, that proceeding must still be open to the public upon request.[5] Generally, settlement between the parties will alleviate inconvenience, anxiety, and escalating fees and costs. Settlement will also lead to a reduction of information which the athlete may not otherwise wish to share with the public. The high income athlete's representative should always be cognizant of securing a mediation and/or settlement conference at the earliest possible time.

§ 3A:15 The interaction between the high income athlete's representative/agent/lawyer and the domestic relations family lawyer

Family law disputes, whether involving marriage or nonmarital relationships, are a fact of life. They affect all sections of the public, whether they are blue collar, white collar, or high income athletes. The athlete's representative, whether he or she is an agent or an attorney, will be able to better serve his or her client by having at his or her disposal an appropriate arsenal of experts. Those experts should include family and domestic relations practitioners as well as accountants and other experts in the area of family and domestic relations law. The attorney-client and work product rule will often apply as be-

[4]See Cal. Rules of Court 3.920 to 3.927.

[5]See Cal. Rules of Court 3.926, which states: "A reference ordered under Code of Civil Procedure § 639entitles the party to the use of court facilities and court personnel to the extent provided in the order of reference. The proceedings may be held in a private facility, but, if so, the private facility must be open to the public upon request of any person."

tween the sports representative/agent and the family law practitioner. Effective teamwork and coordination on the part of the high income athlete's representatives will serve the athlete well by not only protecting his or her overall financial and occupational security but also by assisting in minimizing the inconvenience and anxiety that domestic relations disputes can cause the athlete and his or her family.