

Recent Legislation, Decisions and Trends in Matrimonial Law

By Wendy B. Samuelson

Recent Legislation

New Maintenance Legislation Signed Into Law

On June 25, 2015, the New York State Legislature passed the Office of Court Administration's Maintenance Guidelines Legislation. Governor Cuomo signed the bill into law on Friday, September 25, 2015. The temporary maintenance provisions became effective 30 days thereafter (i.e., Sunday, October 25, 2015, but effective Monday, October 26, 2015), and the permanent maintenance provisions and balance of the law (i.e., eradication of valuing degrees and licenses) became effective 120 days after signing (i.e., Saturday, January 23, 2016, but effective Monday, January 25, 2016). The legislation amended Domestic Relations Law § 236 and the Family Court Act § 412.



The new legislation changes the way temporary maintenance is calculated, provides a formula for post-divorce maintenance, different calculations for households with and without children, as well as advisory guidelines as to the duration of support based on the length of the marriage. It initially capped income at \$175,000 with bi-annual CPI increases (reduced from the current cap of \$543,000), although the court has discretion to go above the cap.

Effective March 1, 2016, the income cap rose from \$175,000 to \$178,000.

The court will no longer distribute the value of the enhanced earnings of a license, degree, or celebrity goodwill, but shall consider the direct or indirect contributions of one spouse to the enhanced earning capacity of the other spouse for purposes of equitable distribution. Actual or partial retirement is now a grounds for modification. Temporary and post-divorce maintenance shall be calculated prior to child support, because the amount of temporary maintenance shall be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation.

Social Services Law § 111-I amended, effective October 14, 2015: Calculating Child Support Orders

Beginning in 2016, Social Services Law § 111-I was amended to provide that the Combined Parental Income Amount (CPIA), as set forth in the Child Support Standards Chart for the purpose of calculating child support, will be updated on March 1st every two years, rather than January 31st. The purpose of this amendment is to coordinate the effective date of the updated CPIA with the

effective date of annual updates to the Poverty Level and Self-Support Reserve. This modification will promote increased accuracy and consistency in the calculation of support obligations.

The CPIA has increased from \$141,000 to \$143,000 effective March 1, 2016.

Family Court Act § 413(1)(b)(5)(iii) and Domestic Relations Law § 240(1-b)(b)(5)(iii) amended, effective January 24, 2016: Spousal Maintenance and Child Support

The Family Court Act § 413(1) and Domestic Relations Law § 240(1-b) were amended to add a new subclause (I) to each, which requires that spousal maintenance actually paid to a spouse, who is a party to the action, must be added to the recipient spouse's income, and that the order contains an automatic adjustment in the amount of child support payable upon the termination of the maintenance award. This addition would be based upon an amount already paid, e.g., an amount reported on the recipient spouse's last income tax return, and would not simply be an estimate of future payments. This relieves the custodial parent of the burden of moving for a modification of the child support order upon the termination of maintenance.

Family Court Act § 413(1)(b)(5)(vii)(c) and Domestic Relations Law § 240(1-b)(5)(vii)(c) amended, effective January 24, 2016: Termination of Spousal Maintenance and Modification of Child Support

Subsection c of the Family Court Act § 413(1) and Domestic Relations Law § 240(1-b) were amended to clarify that the specific adjustment in the amount of child support payable upon the termination of maintenance is without prejudice to either party's right to seek a modification of the child support award.

Family Court Act Article 5-B repealed and amended, effective January 1, 2016: Uniform Interstate Family Support Act (UIFSA)

Family Court Act Article 5-B was repealed and amended, and the 2008 Uniform Interstate Family Support Act (UIFSA) will replace the 1996 version of UIFSA. In summary, the 2008 UIFSA further clarifies issues relating to the duration of support orders, choice of law considerations, order determinations, telephonic testimony, and redirection of support payments.

Domestic Relations Law § 237(a) amended, effective November 20, 2015: Counsel Fee Application for Pro Se Litigants

Domestic Relations Law § 237(a) was amended to include that, when making an application for counsel fees

and expenses, an unrepresented litigant, unlike a represented litigant, is not required to file an affidavit detailing fee arrangements, so long as that litigant submitted an affidavit of their inability to afford counsel with a statement of net worth, W-2 statements, and income tax returns annexed to the application.

Civil Practice Law and Rules § 5231 amended, effective December 11, 2015: Service of an Income Execution

CPLR 5231 was amended to clarify that in the event of a default by the judgment debtor after s/he was served with a notice of income execution, service of an income execution upon the person or entity from whom the judgment debtor is receiving or will receive money *must* be within a county that the person or entity operates a business.

Civil Practice Law and Rules 3212(b) amended, effective December 11, 2015: Motion for Summary Judgment

CPLR 3212(b) was amended to include that, where an expert affidavit is submitted in support of, or in opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit on the basis that an expert exchange was not furnished prior to the submission of the affidavit.

Court of Appeals Roundup

Civil contempt

***El-Dehdan v. El-Dehdan*, 26 NY3d 19 (2015)**

The trial court found the husband in civil contempt for failing to deposit the proceeds of sale of various properties in the wife's escrow account as required by a court order. The Appellate Division affirmed. The Court of Appeals affirmed. The husband argued that a finding of civil contempt requires a "wilful violation of the underlying order" and that his invocation of his Fifth Amendment right against self-incrimination at the contempt hearing could not result in the trial court drawing a negative inference against him. The Court of Appeals, noting that a finding of wilfulness is not a required element of civil contempt, found that the wife met her burden of establishing that a lawful order of the court was in effect; the husband disobeyed the order; the husband had knowledge of the court's order, and the wife was prejudiced by the husband's non-compliance.

Abuse and neglect

***Matter of Trenasia J.*, 25 NY3d 1001 (2015)**

Affirming the decision of the Appellate Division, the Court of Appeals held that an 11-year-old child's uncle constituted a "person legally responsible" for the child as defined by the Family Court Act and a finding of derivative neglect was supported by the evidence. According to the evidence presented during a child protective proceeding, the uncle allegedly entered the bathroom, while the subject child was in the shower, and attempted to have sexual intercourse with her. In determining whether the uncle was a person legally responsible for the child, the

Court of Appeals considered "the frequency and nature of the contact," "the duration of the [uncle's] contact with the child," and "the nature and extent of the control exercised by the [uncle] over the child's environment."

The responding police officer testified that the child was staying at the uncle's home for a week prior to the incident in question and the child's mother testified that the child visited the uncle's home approximately nine times, four of those visits being overnight, in the year preceding the incident. On these bases, the Family Court correctly found that the contacts between the uncle and the child were significant. With respect to the extent of the uncle's control over the child's environment, the evidence demonstrated that the uncle was the only adult present at the time of the incident and that he was expected to care for the child in the mother's absence.

Other Cases of Interest

Grounds/Residency Requirement

No-fault divorce ground does not constitute a "cause" sufficient to satisfy the duration residency requirement in DRL § 230(3)

***Stancil v. Stancil*, 47 Misc. 3d 873 (Sup. Ct. New York County 2015)**

The parties were married in Norfolk, Virginia. The marital residence was located in South Carolina, the wife was domiciled in South Carolina, and the husband was a resident of Virginia. The wife moved to New York for a graduate school internship 14 months prior to filing for divorce, using New York's no-fault divorce ground.

In a matter of first impression, the wife argued that she met the residency requirements of DRL § 230(3), which provides that an action for divorce may be maintained when "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." She claimed that the parties' marriage had broken down for a period of six months or more and the breakdown (the "cause") occurred in New York. However, the court held that the irretrievable breakdown of marriage did not amount to "cause" within the meaning of the statute, and that the legislature did not intend for no-fault divorce to be considered a "cause" for this purpose. The court reasoned that:

Unlike an act of adultery or abandonment, which objectively occurs at a specific time and place, an irretrievable breakdown is in the eye of the beholder, a subjective state of mind...From the plain meaning of DRL § 230(3), which simply says "cause" rather than "cause of action" or "grounds for divorce," the legislature was referring to a specific act or acts which must be pled. Based on the plain meaning of DRL § 170(7) and the case law interpreting it, irretrievable breakdown is not a specific act.

It is contrary to the purpose of New York's no-fault statute to seek to determine when a marriage actually broke down. In addition, the court stated:

If almost every divorce is commenced using § 170(7), and if irretrievable breakdown of the marriage could be construed as a specific act or "cause" under § 230(3), then DRL § 230(5), which now sets the prevailing standard of two years, would be rendered obsolete and the residency requirement would effectively be reduced to one year.

Therefore, the action was dismissed for lack of jurisdiction.

Child Support

Emancipation not found despite daughter working full-time

Melgar v. Melgar, 132 AD3d 1293 (4th Dept. 2015)

In this post-judgment matrimonial proceeding, the father moved to terminate child support for his daughter on the ground of emancipation. The court below erred in granting that part of the motion without conducting a hearing and the matter was remitted to the trial court. On remittal, the father submitted proof that the child was working full-time, but the court declined to deem the child emancipated, because the father failed to submit proof that the child was economically independent, including failing to provide proof of where she lived or who paid her bills. Additionally, as the cause of the lack of communication between the father and the daughter was not established, a hearing is required to determine whether there was constructive emancipation.

Child support modification

Lueker v. Lueker, 132 AD3d 739 (2d Dept. 2015)

The parties were divorced, which judgment incorporated, but did not merge a parenting agreement executed by the parties in 2006. The agreement provided that the parties intended that their children continue to attend private school through grade 12, subject to an order of the court or a financial agreement between the parties. In addition, each party was responsible for paying their *pro rata* share of the children's private school education. In 2013, the mother moved for an order directing the father to post a bond to guarantee payment of his *pro rata* share of the daughter's private school tuition, and in turn, the father cross-moved for a downward modification of his child support obligation and to vacate the judgment's provision that required him to pay a *pro rata* share of the cost of the children's private school educations.

The trial court granted the mother's motion and denied the relief requested in the father's cross-motion. On appeal, the Second Department found that, while the father's financial situation had declined since 2008, he

still had sufficient means available to him to permit him to comply with his child support obligation.

However, the Appellate Division reversed the trial court's decision to direct the father to post a bond to guarantee payment of his *pro rata* share of the daughter's private school tuition and vacated the provision requiring the parties to pay their *pro rata* shares of the children's private school educations. The court reasoned that the children had been attending public school in a neighborhood that the mother relocated to in 2009, the parties had already agreed on the public high school that their son would attend, and neither party had the means to afford private school tuition.

Child Custody

Modification of grandparent visitation

Matter of Ordone v. Campbell, 132 AD3d 1246 (4th Dept. 2015)

The Family Court properly determined that it was not in the children's best interests to continue visitation with their grandmother because the grandmother failed to abide by court orders, had significant animosity toward the father (who was the residential custodial parent), and frequently undermined the children's relationship with their father.

Supervised visitation based on parent's use of illegal drugs

Matter of Creek v. Dietz, 132 AD3d 1283 (4th Dept. 2015)

Based on the father's use of illegal drugs, including marijuana, heroin, and cocaine, the mother petitioned the Family Court for modification of a child custody and visitation order by directing that the father's visitation with the parties' child be supervised. The mother established that the father had a long history of substance abuse and that recent changes in the father's behavior, such as failing to exercise parenting time with the child, were similar to behavioral patterns that the father exhibited while using illegal drugs on prior occasions. Moreover, the father admitted to using illegal drugs just a few weeks before the hearing. Therefore, the mother established a sufficient change in circumstances "that reflects a genuine need for the modification so as to ensure the best interests of the child." The father appealed, and the Appellate Division, explaining that the Family Court made specific findings relating to the potential danger of unsupervised visitation to the child, affirmed the Family Court's decision.

Where a parent relocates in an initial custody proceeding, the court does not need to strictly apply the factors relevant to relocation and may instead use the "child's best interests" standard

Matter of Wright v. Stewart, 131 AD3d 1256 (2d Dept. 2015)

The parties were never married and have one child in common. Without any formal custody arrangement in place, the mother, the father and the child all resided

with the child's paternal grandmother in Queens, New York for approximately six years. Thereafter, the mother moved to Texas and then to Georgia, leaving the child in Queens with the father and paternal grandmother. Upon the mother's out-of-state move, the father petitioned for custody of the parties' child, and in response, the mother filed a separate petition for physical custody of the child and permission to relocate to Georgia. While the mother's out-of-state relocation prompted the start of the proceedings, the Family Court ultimately found that the central focus of the case was an initial custody determination, not a relocation petition. Thus, the court was not bound by the factors applicable to relocation proceedings, and instead, used the best interests of the child standard in reaching its decision to grant the parties joint legal custody of the child, with physical custody to the father. The Appellate Division affirmed the Family Court's decision.

Custody based on off-the-record conferences with counsel is error

***Minjin Lee v. Jianchuang Xu*, 131 AD3d 1013 (2d Dept. 2015)**

In a divorce action, both the mother and the father sought sole custody of the parties' child. The trial court awarded the mother sole legal and residential custody of the parties' child based on lengthy *in camera* discussions with counsel concerning controverted allegations of excessive corporal punishment and parental alienation. The trial court refused to permit testimony on the controverted allegations and directed that only positive aspects of the parties' parenting be presented on the record. On appeal by the father, the Appellate Division held that this was error, and reversed and remitted the matter for a new trial on the issue of custody.

The trial court declined to rule on whether the husband was entitled to a \$27,000 credit against equitable distribution for a loan he made to his wife. On appeal, the appellate court held that, since the issue remains pending and undecided, it is not properly before the appellate court and should be decided by the trial court on remittal.

Equitable Distribution

Spouse's wasteful dissipation of marital assets entitled other spouse to 70% of marital assets where there were insufficient liquid assets to make her whole

***Kerley v. Kerley*, 131 AD3d 1124 (2d Dept. 2015)**

The parties to this divorce action were married for sixteen years and have three unemancipated children. The husband was employed as an account executive for a television network, earning between \$270,000 and \$450,000 per year, and the wife worked as a public school teacher, earning between \$125,000 and \$150,000 per year. From the commencement of the action in 2009 to the time of trial, the husband was in and out of rehabilitation for substance abuse, frequently traveled to gambling casinos, and withdrew over \$200,000 from various accounts without any

explanation as to the use of such funds. After considering the statutory factors relevant to an equitable distribution determination, the trial court concluded that the wife was entitled to 70% and the husband was entitled to 30% of the marital assets, based on the wife's health problems, the husband's substance abuse issues, the husband's wasteful dissipation of marital assets, the substantial disparity in income between the parties, and the lack of liquid marital assets.

In addition, the trial court awarded the wife \$80,000 in counsel fees to compensate for the prolonged trial and substantial attorneys' fees she incurred as a result of the husband's "erratic, unpredictable, and uncooperative behavior throughout the litigation...and his lack of candor with respect to finances and his drug addiction."

On appeal, the Appellate Division affirmed, stating that the absence of an award of maintenance to the wife as well as the husband's wasteful dissipation of marital funds on gambling and drugs warranted the wife's receipt of a greater share of the remaining marital assets, and that the trial court providently exercised its discretion in awarding counsel fees to the wife on the basis of the husband's litigious behavior. It should be noted that the case does not specify the totality of the remaining marital assets.

Wasteful dissipation of marital assets: wife's egregious economic fault in transferring millions in assets

***Stewart v. Stewart*, 133 AD3d 493 (1st Dept. 2015)**

The trial court properly awarded the husband a greater share of the marital estate in light of the wife's "egregious economic fault" in claiming to have given away jewelry and property worth over \$10 million, failing to disclose her offshore and foreign accounts, and secreting millions more in assets. The court below properly awarded the wife stock based on the parties' agreement to adopt their son-in-law's valuation of the shares. Additionally, the wife took issue with the court's distribution of only \$8,520,000 of jewelry to her. Based on the evidence at trial, the wife's jewelry collection, which was kept in Switzerland and New York, amounted to over \$18 million. However, the wife testified that she transferred her jewelry to either another entity or her daughter-in-law, but offered no documentary proof of such transfers. Notably, even if the wife did transfer the jewelry, this would constitute a wasteful dissipation of marital assets. The trial court correctly relied on a "hypothetical fair market value" jewelry appraisal to value the jewelry that was missing from the valuation since the wife secreted the jewelry. Similarly, the trial court did not err in awarding the wife two Swiss chalets worth a total of \$4 million, because there was no evidence to support the wife's claim that she transferred one of the chalets, and even if she had, this would be an improper dissipation of marital assets.

Moreover, based on the substantial award of equitable distribution to the wife, the income she would continue to receive from her ownership interest in stock and the parties' income trust, and the wife's secreting of millions of

dollars in marital assets, the trial court properly denied the wife's request for an award of maintenance.

Finally, considering the husband's payment of counsel fees on behalf of the wife in the amount of \$410,000 and the financial positions of both parties, the court providently exercised its discretion in denying the wife's request for an additional award of counsel fees from the husband.

Wife's pre-marital residence transferred into a partnership with dentist husband during the marriage deemed separate property

***Cohen-McLaughlin v. McLaughlin*, 132 AD3d 716 (2d Dept. 2015)**

The wife owned the marital residence prior to the marriage. During the marriage, the wife managed the husband's dental practice. The wife transferred the deed into a partnership owned by her and her husband as a form of asset protection. The court below properly found that the home remained the wife's separate property, because the transfer was only intended to protect it from third parties and not to change the character of the residence from marital to separate. In addition, since the husband failed to present any proof of his contributions to the appreciation in value of the residence, the court properly declined to award any appreciation.

It is unclear from this decision why the wife needed to transfer the house into a partnership when she was not the owner of the dental practice, and therefore, it does not appear that this transfer was necessary to protect against malpractice suits.

9% post-judgment interest on award of law practice

***Cohen v. Cohen*, 132 AD3d 627 (2d Dept. 2015)**

The court below properly awarded the wife a 25% share of the husband's law practice, but erred in awarding the wife 5% post-judgment interest on the award, rather than the statutorily prescribed 9%. The case does not state the length of the parties' marriage nor the contributions the wife made towards the husband's law practice.

50% distribution of CPA license and practice to housewife

***Mula v. Mula*, 131 AD3d 1296 (3d Dept. 2015)**

The parties were married for forty-three years and have three emancipated children. Over the course of the marriage, the husband was the primary wage earner, earning his certified public accountant license in 1981 and becoming the sole proprietor of an accounting practice in 1997. The wife was a homemaker and the primary caregiver of the parties' children. In consideration of the parties' lengthy marriage and the wife's contributions to the establishment of the husband's professional practice, namely caring for the home and the children to permit the husband to pursue his career, the trial court correctly distributed 50% of the husband's certified public accountant license and practice to the wife. The court improperly

double-counted the husband's income stream by failing to reduce the maintenance award to the wife by the amount of the distributive award of the husband's CPA license and practice. This case bucks the trend of awarding housewives less than 40% of the husband's license and practice, but perhaps the court relied on the fact that the parties were married for over 40 years.

The wife's father conveyed real estate to the wife during the marriage. Prior to the conveyance, the parties lived in the home for ten years and paid \$250/month to the father with marital funds, which funds were used to pay the real estate taxes and utilities. The wife claimed the house to be her separate property. However, the husband testified that the \$250 fee that the parties paid to the wife's father each month for ten years was in an effort to purchase the property, and that the deed was solely in the wife's name as a matter of convenience to reduce any personal risk should the husband be sued in his capacity as a CPA. Despite the court determining that the home was marital property, the wife was awarded 100% of this asset.

Where wife failed to timely submit QDRO, court awarded arrears

***Kraus v. Kraus*, 131 AD3d 94 (2d Dept. 2015)**

The parties were married for approximately thirty-three years and have four emancipated children. In 1996, the parties were divorced by judgment, which incorporated, but did not merge, the parties' stipulation of settlement, which provided that the husband's and the wife's pensions were to be divided pursuant to the *Majauskas* formula and Qualified Domestic Relations Orders (QDROs) were to be prepared. Unlike the husband, however, the wife failed to submit a QDRO to the court in order to effectuate payment of her share of the husband's pension.

The husband later remarried, proceeded to take a loan against his pension, elected a survivorship benefit in favor of his second wife, and ultimately retired in 2008. In 2012, approximately 16 years after the parties' judgment of divorce was entered and 4 years after the husband's retirement, the wife submitted a QDRO to the court for signature, claiming that she was never notified of the husband's retirement.

The QDRO submitted by the wife proposed that her share of the husband's pension be calculated based on the maximum potential annual allowance, rather than the actual annual allowance, which had been reduced by the husband's loan and survivorship deductions. Additionally, the wife proposed that the husband pay the pension arrears that accrued between the date of the husband's retirement and the date that the wife submitted her proposed QDRO to the court. The husband opposed the wife's proposed QDRO. The trial court, ruling in favor of the husband, signed a QDRO that would make payments to the wife based on the reduced, actual annual allowance and declined to direct the husband to pay arrears to the wife.

In a matter of first impression, the Second Department held that the wife was entitled to an award of the arrears

that accumulated from the date of the husband's retirement to the date that the QDRO was signed, and that the QDRO was to be modified to the extent of calculating the wife's share of the husband's pension benefits against an amount unreduced by the husband's loan. However, since the parties' stipulation of settlement did not prohibit the reduction in monthly payments resulting from survivorship benefits provided to either party's second spouse, the trial court properly determined that the wife's share of the husband's pension benefits would be calculated against an amount reduced by the survivorship benefits to the husband's second wife.

Counsel Fees

Waiver of equitable distribution of asset does not limit ability to collect against said asset when enforcing a money judgment

Ioppolo v. Ioppolo, 132 AD3d 727 (2d Dept. 2015)

The parties were married in 1995 and divorced pursuant to a judgment entered in 2013, which incorporated, but did not merge, the parties' stipulation of settlement. According to the parties' stipulation, the wife waived any interest in the proceeds of an Allstate life insurance annuity, which was received by the husband in 1998 upon settlement of a personal injury action, and the wife's request for counsel fees would be determined by the Supreme Court. Subsequently, the Supreme Court awarded the wife \$75,000 in counsel fees to be paid by the husband in three scheduled installments of \$25,000 and provided the wife with permission to file a money judgment against the husband without leave of court in the event that the husband failed to make timely payment.

Thereafter, the husband failed to make the three scheduled payments and three separate money judgments in the amount of \$25,000 each were entered against the husband. Upon information that the next installment payment due to the husband under the life insurance annuity was in the amount of \$75,000, the wife then moved for an order directing Allstate to pay the \$75,000 annuity payment due to the husband directly to her in satisfaction of the counsel fees. The Supreme Court granted the wife's motion without a hearing and the husband appealed.

On appeal, the husband argued that a hearing was required and that the wife "expressly waived her right to enforce the judgments entered against the [husband] using funds due to the [husband] under the Allstate annuity contract" in the parties' stipulation of settlement. Affirming the decision of the Supreme Court, the Second Department found that the wife only waived an interest in the annuity as equitable distribution, but did not waive the right to enforce money judgments against the husband from said funds.

Attorney for party has standing to appeal denial of counsel fees even after withdrawal from the case

Saunders v. Guberman, 130 AD3d 510 (1st Dept. 2015)

Following the trial court's denial of the husband's motions for \$75,000 in interim counsel fees and \$150,000 in interim counsel fees for trial, the law firm that represented the husband appealed the decision on the husband's behalf, and after withdrawing as counsel based on nonpayment of counsel fees, the non-party law firm maintained the appeal for \$225,000 in counsel fees from the wife. In opposition, the wife contended that the non-party law firm lacked standing to appeal.

The Appellate Division held that the non-party law firm had standing to maintain the appeal that was filed on behalf of the husband even after the law firm was granted leave to withdraw from representation. DRL § 237(a) provides that where an attorney of the less-monied spouse is discharged without cause, the former attorney may seek counsel fees from the monied spouse, and further, that any application for fees may be maintained by the attorney in his or her own name. This right includes the right to appeal the denial of such fees.

After reaching this conclusion, the First Department turned to the merits of the case, and held that the trial court improperly denied the husband's applications for counsel fees. Notably, the Appellate Division found that by incorrectly focusing on the current incomes of the parties, rather than the parties' earning history and earning potential, the trial court gave excessive weight to the fact that the wife was unemployed at the time of trial, and failed to consider that the wife earned substantially more than the husband over the course of the parties' marriage. Moreover, the trial court did not give sufficient weight to the value of each party's assets, and instead, exempted the wife's assets from the analysis on the basis of being non-income producing assets. The appellate court found that the trial court severely distorted the financial position of each party, and in so doing, erroneously failed to designate the husband as the less-monied spouse. The appellate court, therefore, awarded the husband's counsel \$125,000 in counsel fees.

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