

**Report of the
Matrimonial Practice
Advisory and Rules
Committee**

to the Chief Administrative Judge of the
Courts of the State of New York

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TABLE OF CONTENTS

I. Introduction..... 1

II. Statewide Coordinating Judge for Matrimonial Cases 3

A. Covid-19 Pandemic Response 3

 1. Input from Matrimonial Bench and Bar..... 3

 2. Expansion of NYSCEF System for Commencement of Matrimonial Cases 4

 3. Pilot Project on Submission of Evidence for Virtual Hearings During Covid 4

 4. Updates to Divorce Resources Website to Improve Access to Covid Related Information and to Assist Self-Represented Litigants..... 5

B. Ongoing Future Projects 6

 1. Court Merger Legislative Proposal of Hon. Janet DiFiore, Chief Judge..... 6

 2. Consensual Uncontested Divorce Pilot Project 6

C. Ongoing Projects and Responsibilities..... 7

 1. Mandatory E-Filing in Matrimonial Cases Except for Self-Represented Litigants and Attorneys Lacking Technology Skills 7

 2. Presumptive Early ADR Statewide Initiative 8

 3. Matrimonial Dashboard 9

 4. New “Caps” for Maintenance and Child Support in Divorce Form 9

 5. Version 2 of Maintenance and Child Support Calculators 10

 6. Coordination with the New York State Office of Temporary and Disability on Child Support Issues in Supreme Court..... 10

D. Outreach to the Bench and Bar 12

III. Executive Summary 13

IV. New and Modified Legislative Proposals with Special Covid Related Significance.....	38
1. Proposal for Mandatory Electronic Filing in Matrimonial Actions (Modified) (Judiciary Law 212(2)(u) §§§§ (i) (A), (iv), (v), and (vi)(amended); CPLR 2111(a)(amended); CPLR 2111(b) (1) and (2) (repealed and new); CPLR 2(a) (repealed); CPLR 2111(b)(3) (amended); CPLR 2112 (amended); Court of Claims Act §11-b (1) (amended); New York City Criminal Court Act §42 (new); Uniform District Court Act §2103-a (new); Uniform City Court Act §2103-a (new); Uniform Justice Court Act §2103-a (new); Criminal Procedure Law §§§§10.40 (2)(a) amended; (b)(repealed and (c) new; old (c) and (d) (relettered (e) and (f) and amended); FCA §214(b) (repealed and new).....	38
2. Proposal to Amend DRL § 211 Regarding Commencement of Matrimonial Actions (New)....	58
3. Modified Proposal to Amend DRL § 236(B)(2)(b) Regarding Automatic Orders (New).....	60
4. Proposal to Amend DRL §§§ 236(B)(9)(b)(1), 236(B)(9) (b)(2)(iii), and 240(1)(j), and FCA §§ 451, and 455 Regarding Modification of Child Support or Maintenance Arrears During Emergency	65
V. Other New Legislative Proposals	75
1. Shared Custody Proposal [DRL§240; FCA § 413] (New)	75
2. Firearms Seizure Proposal [DRL§§240 (3)(h) and 252(9)] (New).....	78
VI. Previously-Endorsed Legislative Proposals with Special Covid Related Significance.....	81
1. Proposal Regarding Rebuttable Presumption of Expenses in Matrimonial Actions [CPLR Rule 4533-c]	81
2. Proposal for Limited Appearance by Attorneys for Counsel Fee Applications by the Non-Monied Spouse [DRL § 237(a)].....	84
VII. Other Previously Endorsed Legislative Proposals.....	91
1. Modified Statutory Proposal for Divorce Venue [CPLR 509, 514]	91
2. Proposal on Access to Forensics in Custody Cases [DRL §§ 70, 240; FCA §§ 251, 651]	99
3. Proposal to Amend the Extreme Risk Orders of Protection Act to Require that Extreme Risk Orders of Protection be Included in the Statewide Computerized Registry of Orders of Protection [CPLR 6342(7), CPLR 6343(4)] and §221-a of the Executive Law	120

4.	Proposal to Amend DRL§232 to Allow for Alternative Service of Divorce Summons by Email or Social Media	126
5.	Proposal to Amend the Domestic Relations Law to Require Marriage Licenses in All Cases [DRL §§12, 25]	131
6.	Proposal for Amendment of CPLR 3217(a) Regarding Voluntary Discontinuances in Matrimonial Actions [CPLR 3217]	136
VIII.	New or Modified Rule Proposals.....	138
1.	Proposal to Adopt 22 NYCRR 202.18-a Regarding Statements of Understanding of Forensic Evaluators with Clients in Custody Cases (New)	138
2.	Modified Proposal to Amend Automatic Orders Rule (22 NYCRR § 202.16-a) (New).....	140
IX.	Previously-Endorsed Rule Proposals.....	144
1.	Proposal to Amend 22 NYCRR 202.16(h)(3) Regarding Statements of Disposition [22 NYCRR 202.16(h)(3)]	144
2.	Custody Severance Rule Proposal [22 NYCRR § 202.16(n)]	145
3.	Amendment to 22 NYCRR § 202.16(k)(3) and Adoption of Form of Application for Counsel Fees by Unrepresented Litigant	147
X.	Previous Recommendation in Support of and Expansion on Recommendation for Increase in Assigned Counsel Fees by Commission on Parental Representation.....	149
XI.	Past, Pending and Future Committee Projects.....	150
A.	New and Ongoing Committee Projects	150
1.	Recommendations in Response to Covid	150
2.	Review of Report of Secretary Jeh Johnson with Respect to Diversity in the Bench and Bar and Implicit and Explicit Bias in Matrimonial Actions	150
3.	Gender Fairness Survey of New York State Judicial Committee on Women in the Courts	150
4.	White Paper on Forensic Reports in Custody Cases.....	151
5.	Presumptive Early ADR Statewide Initiative in Matrimonial Cases.....	151
6.	Alternative Parenting Arrangements, the Child Parent Security Act and the Committee’s White Paper on Surrogacy	152
7.	Assistance to the Judicial Institute with Training of New and Experienced Matrimonial Judges and Referees	155
8.	Mentoring of New or Newly-Assigned Matrimonial Judges.....	156

9. Matrimonial Mandatory Parent Education Pilot Projects in Coordination with the Statewide Office of Professional and Court Services	156
B. Ongoing Committee Development Efforts.....	158
1. Assistance with Coordination and Implementation of Court Merger Legislative Proposal of Hon. Janet DiFiore, Chief Judge.....	158
2. Implementation of Consensual Uncontested Divorce Pilot Project.....	158
3. Consideration of the Ramification of Changes in Federal Tax Law on Deductibility of Maintenance and Whether There is Need for Changes in the Maintenance Guidelines Law	159
XII. Special Welcome and Tribute.....	161
XIII. Subcommittees	162
XIV. Conclusion	163
XV. Appendices	164

Introduction

The Matrimonial Practice Advisory and Rules Committee is one of the standing advisory committees established by the Chief Administrative Judge pursuant to section 212(1) (q) of the Judiciary Law, consisting of judges and attorneys from around the State. The Committee annually recommends to the Chief Administrative Judge legislative proposals in the field of matrimonial law to be considered for the Chief Administrative Judge's Legislative Program. These proposals are based on the Committee's observations and studies, review of case law and legislation, and suggestions received from the bench and bar. In addition, the Committee provides its comments and recommendations to the Chief Administrative Judge on pending legislative proposals concerning matrimonial law. The Committee also assesses existing court rules and court forms and advises the Chief Administrative Judge on the need for additional rules and forms, and on the development of practices to assist judges, litigants and attorneys in the timely and productive management of matrimonial matters. The Committee also assists the New York State Judicial Institute (established pursuant to section 219-a of the Judiciary Law) with providing legal education for judges and court attorneys handling matrimonial matters. In 2020 the Committee continued its efforts to meet the challenge posed by Chief Judge Janet DiFiore at her investiture on February 8, 2016, when she said: "Starting today, and every day that I serve as Chief Judge, my team and I will be working to improve all aspects of our system and services towards achieving operational and decisional excellence in everything we do."¹ Major matrimonial legislative and rule reforms recommended by the Committee during 2015, 2016, 2017, 2018 and 2019, were approved by the Chief Administrative Judge and in turn were successfully adopted by the Legislature or by administrative order of the Chief Administrative Judge with approval of the Administrative Board of the Courts. "The cumulative effect of these changes continues to increase excellence in matrimonial cases."²

In 2020, the challenges posed by the Chief Judge took on new meaning as the court system quickly found innovative new ways to provide access to justice with operational and decisional excellence during covid-19. Beginning in March when the Governor declared a state of emergency, the Committee concentrated their efforts on assisting the court system under the auspices of Judge Sunshine as Statewide Coordinating Judge for Matrimonial Cases, with the development of a virtual justice system while simultaneously trying to address the needs of those lacking the ability or the funds to access the judicial system virtually. The heroic efforts of the staff of the Division of Technology of the Office of Court Administration were essential in helping to accomplish this. A great step forward was the expansion of the NYSCEF system to accommodate new electronic filings of matrimonial cases with exceptions for self-represented litigants and attorneys lacking technology skills. We are grateful for the invaluable assistance of Jeff Carucci, NYS Courts Director of E-Filing in promoting this expansion from 53 counties for which e-filing

¹ See Investiture Remarks of Chief Judge Janet DiFiore, February 8, 2016.

² See Article by Hon. Jeffrey Sunshine, "2015-16 Changes in Matrimonial Legislation and Rules for Matrimonial Matters," NYLJ, Friday, November 18, 2016, p. 4, Col. 4.

of matrimonial actions on a consensual basis was first available in May 2020 to what was 60 of the State's 62 counties as of October 21, 2020.³

The Committee also re-examined its legislative and rule proposals to identify those proposals with special covid related significance and to develop new proposals to deal with emergencies such as covid. This report reflects the new considerations imposed by the covid pandemic by highlighting those with special significance, while continuing to recommend general matrimonial legislative and rule reforms.

Of our two legislative priorities for 2021, one has special covid related significance, namely mandatory electronic filing in matrimonial cases with exceptions for attorneys who lack technical abilities and for self-represented litigants.

Our other priority is our omnibus divorce venue proposal which we believe will have long term benefits for matrimonial practice, serving the Excellence Initiative by greatly improving both fairness and efficiency in processing matrimonial cases.

³ See A/O 247/20 effective October 21, 2020 available at <http://www.courts.state.ny.us/whatsnew/pdf/AO.247.20.pdf>. Appendix A to the Administrative Order lists the counties for each of the trial courts, including Supreme Court, where e-filing is available on either a mandatory or consensual basis. Thanks to Jeff Carucci, Director of E-Filing for supplying these statistics.

II. Statewide Coordinating Judge for Matrimonial Cases

On June 1, 2018, Chief Administrative Judge Lawrence Marks sent a Memorandum to Administrative Judges announcing the appointment of Hon. Jeffrey Sunshine as Statewide Coordinating Judge for Matrimonial Cases.⁴ Since then, Judge Sunshine has undertaken a number of statewide matrimonial initiatives which serve the Excellence Initiative. As Hon. Janet DiFiore, Chief Judge, stated in her 2019 State of the Judiciary Address:

“Our commitment to excellence extends to matrimonial matters, which so often involve the best interests of children. We are focused on achieving better outcomes in these sensitive cases and speeding their disposition in order to minimize the financial and emotional toll on families and children. Last July, in pursuit of these vital goals, we appointed Judge Jeffrey Sunshine as our Statewide Coordinating Judge for Matrimonial Cases. Working with our Administrative Judges and the matrimonial bench and bar, Judge Sunshine is leading our efforts to streamline practice and improve the quality of justice. Among the many reform efforts underway: bringing the efficiency and convenience of e-filing to matrimonial actions; piloting matrimonial mediation in Suffolk, Kings and Monroe Counties; authorizing mandatory referral of parents to education programs in seven counties to provide information about the impact of parental breakup and conflict on children; and simplifying our uncontested divorce packet to make it easier for ordinary people to complete and file. Judge Sunshine’s appointment will ensure that there is an ongoing focus on the management and adjudication of these important cases.”⁵

During 2020, Judge Sunshine’s role as Statewide Coordinating Judge for Matrimonial Cases adapted to the pandemic response to matrimonial cases, keeping the goals of the Excellence Initiative as the guiding principle.

A. Covid-19 Pandemic Response

1. Input from the Bench and Bar

As Statewide Coordinating Judge for Matrimonial Cases, Judge Sunshine advised the Chief Administrative Judge, the Deputy Chief Administrative Judges, and the Administrative Judges on the court system’s response to the pandemic for matrimonial cases after consulting with the members of the matrimonial bar, including officers of the New York State Bar Association’s Family Law Section, New York Chapter of the American Academy of Matrimonial Lawyers, and WBASNY’s Matrimonial and Family Law Committee Chairs. He also met with the matrimonial judges and the Administrative Judges in each Judicial District at the beginning of the pandemic and continues to meet with the Judges on a District by District basis. Deputy Chief Administrative Judge Silver and the ADR Coordinators joined in the NYC meetings.

⁴ See Letter of Appointment attached as Appendix “A” to this report.

⁵ See “State of our Judiciary” address by Hon. Janet DiFiore, Chief Judge, February 26, 2019 at pp.12-13 available at http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/19_SOJ-Speech.pdf

2. Expansion of NYSCEF System for Commencement of Matrimonial Cases

When the covid pandemic began, paper filings were prohibited for non-essential actions because of safety concerns, and matrimonial actions were initially not deemed one of the essential case types. In late May, Chief Administrative Judge Marks announced that filings of new non-essential matters including divorce would commence. This took place right after Memorial Day through e-filing in those counties that already have e-filing for other civil matters, and through paper filings and delivery of documents through use of the new Unified Court System's Electronic Document Delivery System (EDDS) in counties where the NYSCEF system is unavailable.⁶ Administrative Order 111-20 dated May 15, 2020 brought counties already on the NYSCEF system for civil matters into use of NYSCEF in matrimonial actions, a significant development.⁷ Since issuance of Administrative Order 111-20, additional counties have been added by subsequent Administrative Orders. In all these Administrative Orders, the rights of unrepresented parties to file, serve and be served by paper rather than electronically is maintained.

On June 1, 2020, Administrative Order 116-20 became effective which contained rules for consensual and mandatory electronic filing in various case types in different counties on the NYCEF system. Appendix B to said Administrative Order 116-20 contained rules for consensual e-filing in matrimonial cases in Supreme Court.⁸ Appendix B is extremely important because, among other things, it protects the privacy of documents filed electronically in matrimonial actions as required by DRL 235. It also prohibits forensic reports in custody matters and other matters involving children which often contain sensitive information from being filed electronically (which might present a risk of improper dissemination). Said Administrative Order has been updated in the ensuing months, but Appendix B has remained the same. As of October 21, 2020, with invaluable assistance from Jeff Carucci, Director of E-Filing for the Courts, 60 of the State's 62 counties were on the NYSCEF system for consensual e-filing in matrimonial cases in Supreme.⁹

3. Pilot Project on Submission of Evidence for Virtual Hearings During Pandemic

Working in conjunction with NYSCEF staff and with input from the Committee, a pilot project was approved in early September 2020 using NYSCEF for the submission of evidence in matrimonial actions. After discussions with the local Administrative Judges, the following Matrimonial Parts were designated to participate in this pilot project: First, Second, Seventh, Ninth, and Thirteenth Judicial Districts. In her weekly remarks on September 28, 2020, Chief Judge Janet DiFiore thanked Judge Sunshine and Jeff Carucci for their leadership in connection with this project, saying:

⁶ See Memo of Chief Administrative Judge to all Trial Court Judges and Justices dated May 20, 2020 attached to this report as Appendix "B."

⁷ See A/O 111/20 available at <http://ww2.nycourts.gov/sites/default/files/document/files/2020-05/AO-111-20.pdf>

⁸ Appendix B to A/O 116/20, a copy of which is attached to this report as Appendix C, is available at <https://www.nycourts.gov/LegacyPDFS/divorce/pdfs/PDF%20B.pdf>.

⁹ See note 3, supra.

“Starting tomorrow, we will be taking an important step in our journey as a virtual court system when we will begin hearing a limited number of virtual bench trials and hearings in matrimonial matters in the Supreme Court in Kings, New York, Richmond, Westchester and Ontario Counties.

These virtual trials and hearings will be conducted using the Microsoft Teams platform and our NYSCEF e-filing system, which will allow lawyers and litigants to upload, in advance, witness and evidence lists, and in real time, documents that can be marked for identification and moved into evidence by the judge. During the course of the trials and hearings, documents and evidence will be shared on-screen and remain visible to the attorneys, parties and witnesses participating in the proceedings.

We will be closely monitoring the progress of this pilot program, in anticipation of expanding virtual trials and hearings to other courts and case types across the state. I want to thank Judge Jeffrey Sunshine, our Statewide Coordinating Judge for Matrimonial Cases, and Jeff Carucci, our NYSCEF Director, for their leadership in developing and piloting a model approach for how we can take virtual trials and proceedings to scale in the New York State courts.”¹⁰

4. Updates to Divorce Resources Website to Improve Access to Covid Related Information and to Assist Self-Represented Litigants

During 2020, the form Preliminary Conference Order on the Divorce Resources Website was amended to permit execution in counterparts so that parties could sign the document without having to be present together. In addition, other improvements were made to the Court System’s Divorce Resources Website at <http://ww2.nycourts.gov/divorce/index.shtml> which is maintained by Susan Kaufman, Counsel to Judge Sunshine as Statewide Coordinating Judge for Matrimonial Cases. A new category was added to the left navigation on Divorce Resources for “Covid-19 Divorce Resources.” Under this category, links were added to the website to make it easier for the public to access important information on the main Coronavirus website of the Unified Court System, including Administrative Orders of the Chief Administrative Judge, local Administrative Orders, information about electronic filing, Court Rules on Consensual E-filing in Matrimonial Cases, and the instructive video and PowerPoint on Participating in a Virtual Appearance created by the Office of Court Administration’s Access to Justice Group chaired by Hon. Edwina Mendelson, Deputy Chief Administrative Judge.

To assist self-represented litigants who are especially vulnerable during the pandemic, additions were made to the section of the website entitled “Resources for Unrepresented Litigants” already on the Divorce Resources website at http://ww2.nycourts.gov/divorce/unrepresented_help.shtml, Links were added to “Ask a Librarian,” “Help Centers,” “Free Legal Assistance,” “Maintenance and Child Support Calculators and Worksheets” and “Uncontested Divorce Forms and Instructions.” The instructive video and PowerPoint on Participating in a Virtual Appearance posted under Covid-19 Divorce Resources was also posted in the Resources for Unrepresented Litigants.

¹⁰ Transcript of Message of Chief Judge Janet DiFiore September 28, 2020.

B. Ongoing Future Projects

1. Court Merger Legislative Proposal of Hon. Janet DiFiore, Chief Judge

The Court Merger Legislative Proposal of Hon. Janet DiFiore, Chief Judge is an ongoing priority of Judge Sunshine for 2021. The proposal would eliminate New York's complicated structure of eleven trial courts, replacing it with a three level structure.¹¹

2. Consensual Divorce Pilot Projects in Second, Sixth, Seventh and Ninth Judicial Districts

During the first months after Judge Sunshine's appointment, he worked with a small working group of the Committee to develop the framework for a Consensual Divorce Program for Uncontested Divorces.¹² Judge Sunshine presented a prototype of this program to Chief Administrative Judge Marks by letter dated October 1, 2018.¹³ Further work on the Program proceeded during 2019 by Judge Sunshine and his Counsel Susan Kaufman in coordination with Christine Sisario, Director of Technology, Rochelle Klempner, formerly of the Division of Technology, and Sun Kim of the Division of Technology, and was submitted to OCA Counsel John McConnell (now OCA Executive Director) on August 20, 2019 for approval as a pilot project by the Administrative Board.

The project will further the Chief Judge's Excellence Initiative by simplifying the uncontested divorce process for a great number of litigants, thereby increasing access to justice and court efficiency simultaneously.¹⁴

¹¹ The proposal would amend Article 6 of the Constitution, in relation to consolidation of the trial courts of the unified court system, and would repeal sections 9, 10, 11, 12, 13, 14, 16, 34, 35, 36, 36-a, 36-c, and 37 and subdivision j of section 22 of article 6 of the constitution relating thereto. Among its provisions, it would merge the Family and Supreme Courts into one Supreme Court and authorize establishment of a Family Division of Supreme Court in which matrimonial matters and cases heretofore handled in Family Court will be heard. The key provisions of the legislative proposal together with the proposal itself are available at <https://ww2.nycourts.gov/sites/default/files/document/files/2019-09/CourtMergerSummaryandProposal.pdf>

¹² The small working group included Hon. Jeffrey Sunshine, Chair of the Committee and Statewide Coordinating Judge for Matrimonial Cases, Susan Kaufman, Counsel to the Committee, and Committee members RoseAnn Branda, Esq., Elena Karabatos, Esq. and Stephen McSweeney, Esq. The Committee wishes to thank the members of the small working group for their extensive work on the project, as well as Chip Mount, Director of Court Research and Technology, now retired, for his helpful advice.

¹³ See Letter from Hon. Jeffrey Sunshine to Chief Administrative Judge Marks dated October 1, 2018 introducing the Consensual Divorce Program as a prototype for the first stage of reforming the uncontested divorce process. Said Letter is attached as Appendix "B-1 to our 2020 report available at <https://www.nycourts.gov/LegacyPDFS/IP/judiciaryslegislative/pdfs/Matrimonial-MPARCReport2020.pdf>

¹⁴ It would allow for parties to jointly sign an affidavit which would meet all the statutory, factual, and legal predicates necessary for a divorce action in New York State. The forms provide for one combined Findings of Fact, Conclusions of Law and Judgment, which eliminates duplication. In as much as the only grounds available in this process are an irretrievable breakdown for a period of at least six months (DRL § 170(7)), there is no need for separate Findings of Fact, Conclusions of Law, and Judgment A combined Summons with Notice and Combined Notice of Appearance serve as a jurisdictional predicate. The Joint Affidavit of Facts and Agreement combines the multitudes of forms and pleadings now required for an uncontested divorce into one form, signed once and notarized in the form of a deed so that it satisfies the requirements of DRL §236(B)(3) for an agreement as well. There are two distinctive sets of forms,

The pilot project was approved by the Administrative Board in September 2019. It was to be implemented in Kings, Ontario, Broome and Westchester Counties in early 2020. On February 6, 2020, John W. McConnell, OCA Executive Director, sent a memo to the Administrative Judges of those counties attaching copies of the forms developed by Judge Sunshine's office and authorizing their use immediately. On February 28, 2020 a second memorandum was sent to the Administrative Judges of those counties attaching revised forms necessitated by changes in income caps and other figures used in the calculation of maintenance and child support in divorces in New York State, effective March 1, 2020. Printed copies of the forms were also sent out to the pilot counties.

Unfortunately, despite expectations that the pilot project would proceed swiftly, the pilot projects are on pause during the pandemic until parties can be together to sign the document. Plans for document assembly and fillable versions of the forms were also paused as the court system's technology staff was called upon to make possible a virtual court system in addition to fulfilling other technological requirements during the covid-19 emergency. When the pandemic is over, the pilot project will resume.

C. Ongoing Projects and Responsibilities

1. Mandatory E-Filing in Matrimonial Cases Except for Self-Represented Litigants and Attorneys Lacking Technological Skills

Judge Sunshine has been a strong advocate of Mandatory E-Filing in Matrimonial Cases except for self-represented litigants and attorneys lacking technology skills. He has worked to promote electronic filing in matrimonial cases, in accordance with his mandate from Judge Marks. He has sent letters to bar associations and continues to promote the statutory proposal as a means of increasing court efficiency and simplifying the divorce process for litigants. He believes that electronic filing will greatly alleviate problems for defendants in divorce cases when plaintiffs file divorce actions in distant counties, and will also make it easier for plaintiffs to file and prosecute divorce actions in the county of residence without the need to forum shop because divorce actions will proceed more efficiently, saving time for both judges and litigants. Judge Sunshine has received statements of support for mandatory e-filing in matrimonial action from several bar associations.¹⁵

one for parties without children and one for parties with children. There is also an Information Booklet (Form JD-1) to assist with filling out the forms. Additional forms which may be required depending on the circumstances are attached to the Information Booklet as Appendices (one for parties without children and one for parties with children).

¹⁵ See Appendix "D" to this report containing the Resolution of the Family Law Section of the NYS Bar Association and News Release of the Women's Bar Association of the State of New York ("WBASNY") available at https://www.wbasny.org/post_news/wbasny-supports-mandatory-e-filing-in-matrimonial-matters/

2. Presumptive Early ADR Statewide Initiative in Matrimonial Cases

A major priority of the Committee in 2019 and 2020 has been to provide support to local Judicial Districts with their plans for the Presumptive Early ADR Statewide Initiative in matrimonial cases that has been launched by Deputy Chief Administrative Judges Vito Caruso and George Silver with assistance from Daniel M. Weitz, Director, Professional and Court Services and Lisa Courtney, Statewide ADR Coordinator. The Initiative is designed to reduce court delays and increase access to justice for litigants, in appropriate cases. As stated in the Press Release announcing the systemwide initiative: "... except where exceptions are appropriate, parties will be referred to mediation or some other type of alternative dispute resolution, known as "ADR" "as the first step in the case proceeding in court." ¹⁶

Together with Committee member Elena Karabatos, Esq. and former Committee member Hon. Andrew Crecca (now Administrative Judge of the Courts of Suffolk County),¹⁷ Judge Sunshine sits on the Chief Judge's Advisory Committee on ADR, led by John S. Kiernan, senior litigation partner at Debevoise & Plimpton LLC and former president of the New York City Bar Association.

Since 2019, successful pilot mediation and alternative dispute resolution pilot projects in matrimonial cases have been underway in Kings and Suffolk Counties, and the 7th Judicial District. In the pilot projects, "presumptive mediation" means that cases are presumed eligible for mediation; and unless a party opts out, parties can be mandated to attend one mediation session without incurring any charge. Mediation could continue through a variety of programs, including but not limited to local community dispute resolution programs and private mediation. If a party opts out, no further inquiry is made by the court or court staff. The Initiative has now expanded throughout the State.

In September, 2020, Judge Sunshine's Statewide Suggested Matrimonial and Family Mediation Protocol to assist courts in setting up local programs, was approved by Chief Judge Janet DiFiore's and Chief Administrative Judge Marks's Statewide Alternate Dispute Resolution Committee chaired by John Kiernan. Judge Sunshine is grateful to his fellow committee members of the ADR Committee, including Judge Crecca and Elena Karabatos, as well as the following ADR Coordinators for their assistance in developing the Protocol: for the Courts Outside New York City, Bridget O'Connell of the Erie County ADR Mediation Program, and Joel Kullas, Court Attorney Referee, Deputy Chief Administrative Judge's Office for Courts Outside NYC; and for the Courts Inside NYC, Lisa Denig, Special Counsel for NYC Civil Court to Deputy Chief Administrative Judge.

¹⁶ See Press Release announcing the new initiative available at:
http://ww2.nycourts.gov/sites/default/files/document/files/2019-05/PR19_09_0.pdf

¹⁷ Judge Crecca, a valued member of our Committee, and formerly Supervising Judge of Suffolk County Matrimonial Parts, had to resign from our Committee because of his new responsibilities as Administrative Judge of Suffolk County.

In November, 2020 the Statewide ADR Office, with support from Judge Sunshine, received approval to convene family/ matrimonial/ DV-oriented/ADR stakeholders to develop:

- Uniform domestic violence screening tools and/or uniform criteria for what ought to be in screening tools
- Uniform DV/mediation training curriculum guidelines that take into account regional variations and resources, and
- Vision for how to adapt safely -- in the future -- to offer more person-centered options for those who are currently excluded from participating in mediation, but who may want to participate in mediation, and with what support

3. Matrimonial Dashboard

During 2019, a further initiative of Judge Sunshine, in coordination with the Office of Court Research, was the creation of lists of pending contested and uncontested matrimonials available to authorized personnel in a “dashboard” format in order to “help the courts reduce pending caseloads, identify problem areas, facilitate active case management, and maintain data quality.”¹⁸ This new tool has proved useful in 2020 and greatly enhanced the Excellence Initiative by promoting court efficiency.

4. New “Caps” for Maintenance and Child Support Divorce Forms

Our Committee was gratified that our proposal for amendment of the biennial adjustment of the “Income Cap” in the Maintenance Guidelines Law (A.07518/ S. 5515) was signed by the Governor on 11/20/19 as c. 523, L. 2019. We proposed this measure so that the date of adjustment of the maintenance guidelines income cap would coincide with the date of adjustment of the Child Support Standards Act income cap on March 1st every other year.

As a result of the passage of this law, revised divorce forms for both contested and uncontested divorce were prepared by Judge Sunshine’s Counsel and were adopted by Administrative Order 54/20 as of March 1, 2020. These revisions reflect the required statutory adjustment on March 1, 2020 of the combined income cap under the Child Support Standards Act from \$148,000 to \$154,000, and of the income cap of the maintenance payor under the Maintenance Guidelines Act from \$184,000 to \$192,000. Both of these adjustments are based on increases in the Consumer Price Index for all urban consumers (CPI-U) published by the United States Department of Labor. In addition, the revised forms reflect the increases as of March 1, 2020 in the Self Support Reserve from \$16,861.50, to \$17,226 and in the federal Poverty Level Income for a single person from \$12,490 to \$12,760. Forms and Calculators for both Contested and Uncontested Divorces revised March 1, 2020 reflecting these changes are posted at <http://ww2.nycourts.gov/divorce/MaintenanceChildSupportTools.shtml>. The next income cap adjustment will be required on March 1, 2022.

¹⁸ See Memorandum dated July 8, 2019 to Administrative Judges from Barry R. Clarke and John W. McConnell announcing the new Matrimonial Dashboard attached as Appendix “C” to our 2020 report available at <https://www.nycourts.gov/LegacyPDFS/IP/judiciaryslegislative/pdfs/Matrimonial-MPARCReport2020.pdf>

5. Version 2 of Maintenance and Child Support Calculator

During 2020 an updated version of the Post-Divorce Maintenance and Child Support Calculator was created to assist litigants with calculations of maintenance and child support. This updated calculator was developed by Judge Sunshine’s Counsel, Susan Kaufman, who worked with Karen Kane, Director of Court Research, and Ashley Busing and Judith Vergara of the Division of Court Research. The Child Support Standards Act requires an adjustment to the parties’ incomes for maintenance prior to calculation of child support. After enactment of the Maintenance Guidelines Act in 2015, the calculator was posted at <http://ww2.nycourts.gov/divorce/MaintenanceChildSupportTools.shtml> on the Divorce Resources website to assist litigants with the calculations. Until now, the calculator carried over only the guideline award of maintenance to the adjustment of the parties’ incomes for maintenance required under the Child Support Standards Act.

The new version, which was posted on the Divorce Resources website in early February 2020, allows litigants to calculate child support when maintenance is zero or an amount agreed to by the parties different from the guideline amount of maintenance pursuant to the Maintenance Guidelines Act. This improvement in the Calculators makes it much more useful, not just for the Joint Divorce Uncontested Program, but for all divorces with children.

6. Coordination with the New York State Office of Temporary and Disability Assistance on Child Support Issues in Supreme Court

During the summer of 2019, Judge Sunshine and Susan Kaufman met with the New York State Office of Temporary Disability (OTDA) and the New York City Human Resources Association about the need for quicker transmittal of child support orders.¹⁹ Social Services Law § 111-g requires that applications for child support services in matrimonial cases must include an express statement, signed by the applicant and delivered to the local Support Collection Unit (“SCU”), indicating that the applicant is seeking child support enforcement services pursuant to Title 6-A of the Social Services Law.²⁰ Without such a statement, the SCU is unable to provide support services – even though a court has expressly ordered that support be paid through the SCU. Although such statements are automatically delivered to the SCU in Family Court matters through the Universal Case Management System (UCMS), that functionality is not yet available in Supreme Court. Perhaps as a consequence, we have received reports that support applications in Supreme Court matrimonial matters are not received by SCU’s on a timely or consistent basis. In addition, we are told that these agencies are sometimes unable to provide the Supreme Courts with up to date account information necessary to making child support determinations. In 2019 and

¹⁹ We thank the Hon. Esther Morgenstern for bringing this issue to our attention.

²⁰ Such statement could be made in any pleading or other document that the litigant signs and submits to the court. For example, such language is contained in the UD-6 and UD-7 Uncontested Divorce Affidavits or in OTDA’S Form Application LDSS- 5143. However, these documents are quite lengthy.

early 2020 Judge Sunshine consulted with OCA Counsel and the Director of Technology about a possible means to share such information in a secure manner. This idea was being explored further by Judge Sunshine and his Counsel with the policy and information technology staff of OTDA and the OCA Division of Technology to see what was feasible, but the demands of covid on the technology staff have forced us to postpone this effort.

At the end of 2019, Judge Sunshine's Counsel developed a new Short Form Application for Child Support Services for Supreme Court to encourage litigants to provide applications for child support services to the local Support Collection Units more promptly.²¹

In early 2020, as a further measure to encourage applications for child support services, Judge Sunshine's Office amended the form of the Uncontested Divorce Judgment of Divorce (UD-11) to require that if either plaintiff or defendant requests or is receiving child support services, then such party shall send a copy of their own Application for Child Support Services together with a copy of the completed Support Collection Information Sheet (Form UD-8a) and a copy of the signed Judgment of Divorce (UD-11) to the local SCU in the county where he or she resides within twenty (20) days after the judgment of divorce is entered.²² This change should help to ensure that the Support Collection Unit has what is necessary to provide child support services when requested by one of the parties.

²¹ The Short Form Application for Child Support Services has been posted on the Divorce Resources website at <https://www.nycourts.gov/LegacyPDFS/divorce/Short%20Form%20Application%20for%20Child%20Support%20Services%20in%20Supreme%20Court.pdf>.

A memo about the new Short Form Application for Child Support Services was distributed to Administrative Judges by OCA Executive Director John W. McConnell on December 5, 2019.

²² See UD-11 revised 3/1/20 available at http://ww2.nycourts.gov/divorce/divorce_withchildrenunder21.shtml

D. Outreach to Bench and Bar

Although his travel has been curtailed due to the covid pandemic, Judge Sunshine has and will continue to seek input from the matrimonial bar and matrimonial judges, law clerks, court attorney referees, and court clerks virtually to gain greater insight into what can be done to improve the fair and efficient processing of matrimonial cases.

III. Executive Summary

The Committee was established in June 2014 when it held its organizational meeting. Since then, the Committee has met monthly, with occasional breaks during the mid-summer months and holidays. During 2020, the March meeting was cancelled due to covid, and thereafter all monthly meetings were held virtually in the interest of public safety. During 2020, the Committee met monthly starting in April through the summer.

Appendix “E “to this report contains a detailed description of the Committee’s legislative and rule proposals which were approved by the Chief Administrative Judge and adopted by the Legislature or by administrative order with approval of the Administrative Board of the Courts from 2015 through 2019. As a result of the covid pandemic, most of our Committee’s legislative and rule proposals in our 2020 Annual Report were not addressed during 2020 when legislative and court administration attention focused on the covid pandemic beginning in March.

In October, 2020 two Committee proposals designed to make the processing of matrimonial cases more efficient and fairer for self-represented litigants during the pandemic were posted for public comment by the Administrative Board with comments requested by November 30, 2020 at <http://ww2.nycourts.gov/rules/comments/index.shtml>. The proposals were approved in final form by the Administrative Board at a meeting in December 2020, and were adopted by Administrative Order of the Chief Administrative Judge.

The first was a proposal to amend the rule on motions for counsel fees and expenses in contested cases (22 NYCRR § 202.16 (k)) to cover costs of e-filing for self-represented litigants. Frequently, self-represented parties that desire to e-file are unable to have computer access or afford internet accessibility. This proposed amendment would further the legislative intent of leveling the playing field in matrimonial litigation underlying DRL§237. The amendment makes clear that a self-represented litigant lacking the ability to e-file themselves could pay someone to e-file for them (or assist them) and make a motion to have the monied spouse pay for the costs either before the consent or pendente lite or later. Under the proposal, if the self-represented party did not wish to use e-filing, he or she could still file by paper as permitted under the current statute and court rules. This measure would both increase access to justice and encourage greater use of e-filing.

The second proposal would amend 22 NYCRR § 202.16-b to expand the page limitations rule for pendente lite applications that has been in effect since 2017 as to all forms of written applications, including post-judgment applications in contested Supreme Court matrimonial actions. During and subsequent to the covid emergency, there will be numerous applications for relief, not only because of unresolved pending matters, but also because of the increased volume of new applications. Adoption of this rule will reduce the volume of the submissions and the duplication of efforts, thereby increasing court efficiency.

Proposals for 2021

For 2021, we divide our legislative proposals into those with special covid related significance and other proposals, both as to new legislative proposals and previously endorsed legislative proposal. We do this because the covid pandemic remains paramount as we begin 2021. However, we continue to endorse our other proposals.

New and Modified Legislative Proposals for 2021 with Special Covid Related Significance

Proposal on Mandatory E-Filing in Matrimonial Actions (Modified)

One of our key priorities in 2019 was a new legislative proposal that would authorize the Chief Administrative Judge to mandate e-filing of court papers in matrimonial actions. We resubmit this proposal again this year as one of our two key priorities but in a modified and expanded form.

In 2015, the Legislature enacted CPLR 2111(b)(2)(A), which authorized the Chief Administrative Judge in his or her discretion to mandate the electronic filing of court papers in all cases in Supreme Court, after consultation with the bar and county clerks and agreement from the county clerks in counties outside New York City, with only a limited number of exceptions.²³ One of those exceptions was in matrimonial actions. Since 2015, experiments with consensual electronic filing in matrimonial cases in counties such as Westchester have proven very successful, and in our 2019 report, our Committee unanimously recommended the further step of eliminating the matrimonial action exception to mandatory electronic filing. Allowing the Chief Administrative Judge to require electronic filing in such actions after consultation with and consent of the county clerks and the bar in certain counties will promote the Chief Judge's Excellence Initiative by eliminating frustration of litigants in filing papers, reducing delays by courts in reviewing submissions, and increasing confidence in the judicial process for the reasons we will outline in detail later in this report. Unfortunately, this proposal was not enacted in 2019 or 2020.

²³ The legislation provides:

2. In the rules promulgated pursuant to subdivision (a) of this section, the chief administrator may eliminate the requirement of consent to participation in this program in: (A) one or more classes of cases (excluding matrimonial actions as defined by the civil practice law and rules, ... (i) Notwithstanding the foregoing, the chief administrator shall not eliminate the requirement of consent in any county until after he or she shall have consulted with members of the organized bar including but not limited to city, state, county and women's bar associations; with institutional legal service providers; with not-for-profit legal service providers; with attorneys assigned pursuant to article eighteen-B of the county law; with unaffiliated attorneys who regularly appear in proceedings that are or have been affected by any program of electronic filing in such county that requires consent or who would be affected by a program of electronic filing in such county should the requirement of consent be eliminated; with any other persons in the county as deemed to be appropriate by the chief administrator; and with the county clerk of such county (where the affected court is the supreme court of a county outside the city of New York), and (ii) only after affording them the opportunity to submit comments with respect thereto, considering any such comments, including but not limited to comments related to unrepresented litigants and, in the instance of any county outside the city of New York, obtaining the agreement thereto of the county clerk thereof. All such comments shall be posted for public review on the office of court administration's website (N.Y. CPLR 2111 (McKinney).

In this report, we now support a new and expanded version of the legislative proposal of the Office of Court Administration which would authorize the greatest possible use of e-filing in the courts. This proposal has special significance during the covid pandemic because electronic filing through the NYSCEF system has proven invaluable in expanding litigants' ability to file matrimonial actions during this public health emergency. Under this new measure, the Chief Administrative Judge would be permitted to institute e-filing – on either a voluntary or mandatory basis – *in any or all* of the State's trial courts and in any class of cases, including courts of civil jurisdiction such as Supreme Court where matrimonial cases would be heard. The modified proposal continues the present exemptions from mandatory e-filing for unrepresented persons and for certain lawyers without technical skills or equipment. The modified proposal also continues the requirement for consultation with various bar associations and attorneys.

The importance of mandatory electronic filing in matrimonial actions cannot be overstated. In 2020, many bar associations expressed support for mandatory e-filing in matrimonial cases. Attached to this report as Appendix "D," are the Resolution of the Family Law Section of the NYS Bar Association and News Release of the Women's Bar Association of the State of New York ("WBASNY") available at https://www.wbasny.org/post_news/wbasny-supports-mandatory-e-filing-in-matrimonial-matters/. The WBASNY News Release points out that "Mandatory e-filing, with exemptions for pro se litigants and lawyers not having the necessary technology, would enable litigants to advance their cases and eliminate potential barriers to access to justice. It would also mitigate the effects of the COVID-19 outbreak on the courts." Our Committee strongly supports the modified and expanded legislative proposal put forth in this report as necessary to the fair and efficient processing of matrimonial cases, not only during the covid pandemic when it has special significance, but for the future. We urge the Legislature to enact this legislation and the Governor to sign it in 2021.

Three New and Modified Legislative Proposals with Special Covid Related Significance

We also recommend this year three new legislative proposals for matrimonial cases, all of which promote the Chief Judge's Excellence Initiative and have special covid related significance. These proposals are designed to deal with issues that have arisen in matrimonial cases during the covid pandemic or any future emergency as a result of the Governor's having declared an emergency which caused the Chief Judge or Chief Administrative Judge to issue an Administrative Order barring as non-essential the filing of actions for divorce or applications for retroactive modification of child support or maintenance. The proposals will prove useful as long as the covid pandemic continues and will be in place for future emergencies.

The first proposal relates to commencement of matrimonial actions. The exclusion of matrimonial actions from the list of essential applications was necessary since matrimonial actions may take months or years to complete, and the issues involved do not qualify as necessary for immediate relief unless there is need for an order of protection or other type of urgent relief which would qualify as essential on its own.

DRL§ 211 currently requires that matrimonial actions be commenced by filing of the summons with notice (or the summons and verified complaint). In order to permit matrimonial actions to commence during covid despite their classification as non-essential, the Office of Court Administration expanded the NYSCEF system in certain counties and accepted filings by mail in other counties, but legislative change is also needed. We propose a legislative amendment which

would require commencement of matrimonial actions by service rather than filing of the summons with notice or summons and verified complaint during an emergency declared by the Governor resulting in a prohibition on filing until normal filing is once again permitted. The proposal requires payment of an index number fee or application for poor person relief pursuant to CPLR 1101(d) within 21 days of permission to file by Administrative Order of the Chief Judge or Chief Administrative Judge, and if the poor person's relief is denied, the index fee must be paid within 120 days of the denial as required by CPRL 1101(d).

The second proposal relates to the date of effectiveness of automatic orders during an emergency declared by the Governor which resulted in a prohibition on filing the summons. The automatic orders statute (DRL § 236 (B)(2)(b)) requires that the automatic orders will become effective upon plaintiff upon filing of the summons. Our proposal modifies the statute to provide that in the event of an emergency declared by the Governor which results in a prohibition on filing the summons, the automatic orders will become effective upon plaintiff upon service of the summons on the defendant. This proposal is combined with our previous proposal in last year's annual report to update and clarify the automatic orders statute. The provisions in our previous proposal are all the more necessary in these times of economic distress due to loss of employment and furlough during covid in order to provide notice of a tax lien, foreclosure, bankruptcy or litigation to the other spouse once a divorce action has been commenced. Also, the prohibition on use of electronic devices to obtain information about the other party without their knowledge and consent during the pendency of the action is even more relevant as technology developments have moved faster through virtual meetings and work at home.

The third proposal is a composite proposal that modifies various provisions of the Domestic Relations Law and Family Court Act which presently either completely prohibit or provide that no modification shall reduce or annul arrears of child support or maintenance accrued prior to the making of such application unless the defaulting party shows good cause for failure to make application for relief prior to the accrual of such arrears.²⁴ Our proposal would clarify that the declaration by the Governor of a state of emergency which resulted in a prohibition on filing such application by the Chief Judge or Chief Administrative Judge during such emergency, shall constitute good cause for failure to make application for such relief and permit the court to grant relief retroactively to the date of declaration of the emergency or to such other subsequent date as the court in its discretion might deem appropriate. This proposal is intended to provide some relief to the payor or payee spouse who can prove entitlement for relief (eg. change of circumstances) but was prevented from filing because of the emergency; but there is a limitation of six months for the application to be filed after filing is again permitted by the Administrative Order of the Chief Judge or Chief Administrative Judge. The proposal also makes clear throughout that not only the payor but the payee will be able to apply for relief under the provision which allow the payee to seek upward modifications of support "nunc pro tunc" based on newly discovered evidence.

In the case of our proposed revisions to DRL §236(B)(9)(b) (2)(iii), and FCA §451, the

²⁴ Our proposal does not modify the provisions of either DRL §244 or FCA §460 which deal with entry and docketing of judgments where filing issues because of emergencies usually don't apply. By this point in the proceeding, the parties will have had many opportunities to seek modifications. Our decision not to modify these provisions was made on the recommendation of the Chief Administrative Judge's Family Court Advisory and Rules Committee (FCARC). We understand that FCARC is supportive of our proposal.

proposal not only clarifies that emergencies declared by the Governor resulting in a prohibition on filing qualify as good cause without any question, but also amends these statutes to remove the absolute prohibitions on the court's modifying child support awards retroactively even for good cause to conform with case law where courts have aimed at greater flexibility where applications are prevented because of "rare circumstances resulting in grievous injustice"²⁵ or "impossibility"²⁶ such as a public health emergency. As Professor Merrill Sobie comments about such cases with regard to FCA § 451 in the Practice Commentaries:

*"The subset of cases at least provides a precedent for limited relief, although even an expanded "rare circumstance" or "impossibility" prerequisite is difficult to meet. In the more usual situations, for example where the temporarily unemployed person reduces support payments without seeking a modified court order, the doctrine is of no avail. Presumably, the "rare circumstances" or "impossible" safety net may also be employed when seeking an upward modification, although every case to date has involved a downward modification petition. (Suppose, for example, the custodial parent and the child were seriously injured in an accident, precluding their petitioning for the needed and legally justified child support increase.) Applying the overly rigid rule may harm either party, and an expanded equitable exception is needed to temper the statute's impact."*²⁷

We believe all three proposals will promote the Chief Judge's Excellence Initiative by increasing access to justice during pandemics and other emergencies.

²⁵ See *Reynolds v. Oster*, 192 A.D.2d 794, 795, 596 N.Y.S.2d 545 (1993) allowing retroactive modification of child support arrears where the child had become emancipated without petitioner's knowledge and petitioner asked for relief from the time of emancipation rather than the date of filing the application. The court stated: "In denying petitioner's request, Family Court relied on Family Court Act § 451 which provides that Family Court may not "reduce or annul child support arrears accrued prior to the making of an application pursuant to this section". Nevertheless, while it is technically true that granting petitioner the abatement he requests would result in a reduction of the arrears owed, we believe that this is one of the rare circumstances where an overstrict application of this statute would result in "grievous injustice" to a parent and a form of equitable estoppel should operate..."

²⁶ See *Comm'r of Soc. Servs. v. Grant*, 154 Misc. 2d 571, 574, 585 N.Y.S.2d 961 (Fam. Ct. 1992) stating: "I find that, if it was *impossible* for the respondent to pay child support and *impossible* for him to move for relief from the order, the Hearing Examiner may relieve him of responsibility for child support from the date it became impossible for respondent to act. Impossibility of performance should not be confused with "good cause" to excuse spousal support. (Family Ct Act § 451.) Good cause is a considerably lower standard."

²⁷ N.Y. Fam. Ct. Act § 451 (McKinney).

Other New Legislative Proposals for 2021

Shared Custody Proposal

Another new legislative proposal of our Committee in 2021 relates to child support in shared custody situations. Although this measure does not have special covid related significance, we believe it is important. We now propose a legislative amendment to the Child Support Standards Act to address the situation in *Rubin v. Salla*, 107 A.D.3d 60, 71, 964 N.Y.S.2d 41 (2013).

In that case, the First Department, reversing the lower court's denial of the father's motion for summary judgment dismissing mother's action for child support, held that the father who had primary physical custody of a child in a shared custody arrangement where the time was not equally divided (over fifty % with the custodial parent father) could not be ordered to pay child support to the mother even though he had far greater income. The majority opinion by Justice Richter stated: "The mandatory nature of the statutory language undeniably shows that the Legislature intended for the noncustodial parent to be the payer of child support and the custodial parent to be the recipient. The CSSA provides for no other option and vests the court with no discretion to order payment in the other direction." (*Rubin v. Salla*, 107 A.D.3d 60, 67, 964 N.Y.S.2d 41, 47 (2013)). The dissent by Justice Acosta, Presiding Justice of the Appellate Division, First Department, raised issues as to the correctness of this approach as follows:

"I respectfully dissent from the dismissal of the mother's cause of action for child support because the majority's rigid application of the statute sacrifices the child's well-being at the altar of an arithmetic formula. It forces the child to bear the economic burden of his parents' decisions, even where, as here, the child, whose father is a millionaire, is in danger of living in poverty, solely to preserve uniformity and predictability in child support awards. I do not believe this result is what the legislature intended in drafting the Child Support Standards Act (CSSA), especially since the CSSA clearly did not envision every possible custodial situation." (*Rubin v. Salla*, 107 A.D.3d 60, 73-74, 964 N.Y.S.2d 41, 52-53 (2013)).

To address this situation which is unfair to the child as pointed out by Justice Acosta, our Committee proposes additional language to the Child Support Standards Act which allows the court to order the custodial parent to pay recurring payments to the non-custodial parent in special circumstances without changing the basic concept that child support is to be paid by the non-custodial parent to the custodial parent.

Firearms Seizure Proposal

Recently enacted into law as Chapter 55 of the Laws of 2020, were amendments to the Criminal Procedure Law and the Family Court Act which authorized courts to issue search and seizure orders regarding firearms in connection with orders of protection. Said legislation did not amend the Domestic Relations Law or otherwise address the Supreme Court's statutory authority in a matrimonial action to issue search and seizure orders regarding firearms possessed in violation of an order of protection issued thereunder. Specifically, the Legislature did not add the new

search and seizure provisions to sections 240(3)(h) and 252(9) of the Domestic Relations Law, which incorporate by reference the firearms surrender and license suspension and revocation requirements of CPL § 530.14 and Family Court Act §§ 842-a and 846-a. Notwithstanding, in both plenary and consolidated matrimonial proceedings, the Supreme Court retains inherent authority to issue such orders and may do so where necessary and proper to ensure compliance with its order and the safety of protected parties. The Supreme Court has general original jurisdiction in law and equity under the State Constitution even without statutory authorization²⁸ Despite the case law, a statutory change is in order so as to avoid confusion.

We now propose amendments conforming sections 240(3)(h) and 252(9) of the Domestic Relations Law to CPL and Family Court Act as amended by chapter 55 of the Laws of 2020.

²⁸ See *Kagen v. Kagen*, 21 N.Y.2d 532 (New York Court of Appeals 1968)).

Previously Endorsed Legislative Proposals with Special Covid Related Significance

Because of covid, we have highlighted some of our previously endorsed legislative proposals which have special covid related significance.

Rebuttable Presumption on Proof of Expenses in Matrimonial Cases

We resubmit our legislative proposal from last year for a rebuttable presumption on proof of expenses in matrimonial cases pursuant to CPLR rule 4533-c. This measure has special covid related significance because it enables parties to introduce expenses without having to produce the person who performed the service, which might be especially difficult during covid. The proposal would impose a cap of \$10,000 on invoices in matrimonial cases, a much more realistic amount than the existing \$2,000 cap on invoices in general civil cases pursuant to rule 4533-a. As Vincent Alexander observes in the Practice Commentaries regarding the general rule for all civil cases, “The amount specified in the rule as originally adopted has steadily increased by amendment over time and is long overdue for an upward adjustment.” (CPLR 4533-a (McKinney)). The rule we propose for matrimonial actions would also allow invoices for any court-ordered expenses, a much broader category than allowed under rule 4533-a and would allow more than one invoice per provider. These differences are designed to make it easier for matrimonial litigants, especially unrepresented litigants, to admit documents into evidence. We propose the new rule as a separate rule for matrimonial cases because, in family matters, it is especially frequent and necessary for small expenses to be incurred for children’s expenses for several children and other family matters.

This rule, like the general civil rule 4533-a, allows a plaintiff to prove the reasonableness and necessity for an itemized bill for services without having to produce the person who provided the invoice, provided that certain formal requirements specified are met.

Unlike CPLR 4533-a which is labelled “prima facie proof,” our rule creates a rebuttable presumption. Vincent Alexander notes, with regard to the general civil rule in CPLR 4533-a, that, even though it is labelled “prima facie proof of damages,” it allows for possible rebuttal of the expenses by requiring notice to the other party that the bill will be offered without foundation evidence at least 10 days before trial so that the other party can subpoena witnesses and gather rebuttal evidence. However, our rule is even clearer so that everyone, even self-represented litigants, will understand that the presumption can be overcome. This will prevent the rule from being abused. Our rule also provides a procedure to follow so that the party offering the proof will get notice in sufficient time that the other party intends to rebut the presumption and can prepare to subpoena witnesses or gather other proof before trial. In addition, our rule is labelled “proof of expenses” rather than “proof of damages” to reflect the fact that in matrimonial actions, the parties usually claim expenses rather than damages which are more commonly sought in tort and personal injury actions. Our new rule also uses gender neutral language by speaking of “the affiant’s employer” rather than “his employer.”

It is our hope that the proposal will be enacted in 2021. This proposal is needed more than ever during covid when filings and appearances in matrimonial actions are more limited and difficult. It is designed to make it easier for matrimonial litigants to admit documents as to their expenses into evidence.

Limited Appearance by Counsel to Apply for Counsel Fees on Behalf of The Non-Monied Spouse

We also resubmit our proposal to allow a limited appearance by counsel to apply for counsel fees on behalf of the non-monied spouse. This proposal modifies DRL § 237(a) to provide that, notwithstanding anything in CPLR 321 to the contrary,²⁹ an attorney may make a limited appearance to apply for counsel fees for the non-monied spouse in a divorce action. This proposal has special covid related significance. Non-monied spouses are especially disadvantaged during covid if they do not have counsel because it is difficult to file papers and make appearances. This proposal would make it easier for them to exercise their rights pursuant to DRL 237(a) to seek an award of counsel fees in the litigation by encouraging attorneys to make applications on their behalf for counsel fees and not be required to make a formal appearance for the entire case.

This proposal took on new significance when both the NYSBA House of Delegates³⁰ and the New York courts³¹ endorsed the concept of limited scope representation.

Our proposal is designed to encourage applications pursuant to DRL §237 for counsel fees for the non-monied spouse, thereby realizing the Legislature’s goal in enacting DRL §237 of making available funds for non-monied spouses to “equalize the playing field” in matrimonial litigation. If enacted, this legislation will reduce the number of indigent litigants that are forced to either represent themselves or rely on the limited number of pro bono and assigned counsel available to assist them. Thus, our proposal is clearly an access to justice measure furthering the Chief Judge’s Excellence Initiative.

²⁹ See our discussion later in this report of the requirements of CPLR 321 which might prohibit withdrawal of the attorney once the application for counsel fees is made.

³⁰ At their November 5, 2016 meeting, the NYSBA House of Delegates adopted a report of the State Bar’s Committee on Access to Justice endorsing Limited Scope Representation for low and moderate-income individuals in certain civil cases (see New York State Bar Association, State Bar News, “Limited scope, diversity/inclusion CLE among items House considers,” November/December 2016, Vol. 58, No. 6, pg.1).

³¹ See Joel Stashenko, “NY Courts Endorse ‘Limited-Scope’ Representation,” *NYLJ*, 12/20/16, Pg.1, Col. 5.

Other Previously Endorsed Legislative Proposals

The following proposals, although they may not be of special significance during covid, remain extremely important to the efficient and fair administration of matrimonial cases.

Modified Statutory Proposal for Divorce Venue

We once again endorse as one of our two greatest priorities this year (along with mandatory e-filing in matrimonial actions) our statutory proposal on divorce venue. It is extremely important to achieving the goals of the Excellence Initiative of access to justice and efficiency. This proposal is for an omnibus special matrimonial venue statute which requires that venue be related to residence in all divorce actions as well as actions in Supreme Court for custody and visitation, all applications to modify a Supreme Court order of custody or visitation, all post judgment proceedings, and all matrimonial actions described in DRL§ 236(B)(2).

This proposal addresses the problem of certain counties being overburdened by divorce filings caused by CPLR 509 which allows venue to be designated by the plaintiff in counties without a proper nexus to the parties or their children. Because of this feature of the law, certain counties must bear a disproportionate number of divorce filings. Our proposal is supported not just by New York County, but by many Judicial Districts throughout the State similarly burdened. The burden of CPLR 509 venue designations has been great on particular counties upstate and downstate for many years, significantly, in the 1st, 2nd, 6th, 7th, and 8th Judicial Districts. While statistics are not yet available for the full year 2020, the burden appears to continue during covid.

Designating venue in a divorce action in a distant county from the residence of the parties and children burdens the judicial resources of that county and deprives residents of that county of access to those resources. It means that judges will have to appoint and deal with counsel and mental health and other professionals in distant jurisdictions with whose work and expertise they are unfamiliar. It may also mean that parties and their children may have to travel long distances to have matters heard or meet with professionals in the venue designated. When venue is designated in a distant county, defendant is more likely to default rather than answer, giving up valuable rights in the divorce, and increasing the likelihood of post-judgment applications. In *Castenada*, Justice Cooper suggested that one of the reasons plaintiffs in distant counties may choose to file in a distant county is that they know their spouse will be likely to default if they must travel far. When these defendants begin to understand the consequences of having defaulted, in that critical issues relating to spousal support, custody and support of children, and distribution of marital property will have been inadequately addressed in the action, they try to vacate the default judgment or bring actions for post judgment relief to modify the terms.

Electronic filing will greatly alleviate problems for defendants caused by CPLR 509 venue designations and will also make it easier for plaintiffs to file and prosecute divorce actions in the county of residence without the need to forum shop because divorce actions will proceed more efficiently. But our legislative proposal will still be necessary to completely eradicate CPLR 509 designations in distant counties unrelated to residence.

Even if defendants do not default and are able to answer electronically, as long as plaintiffs can utilize CPLR 509 to designate venue in matrimonial actions in distant counties, defendants

may still be required to travel long distances. Judges may require appearances to resolve conflicts in the papers or testimony on issues where income needs to be clarified on the record, or where the mandatory records checks reveal a disclosed or undisclosed prior or present Order of Protection or pending or prior neglect proceedings, or that a party is a registered sex offender. See *Otto v. Otto*, 150 A.D.2d 57, 60, 545 N.Y.S.2d 321(Second Dept. 1989), where the court, in reversing and remanding the case to the trial court, held that there must be an inquest to determine the economic issues of a divorce where there was a default judgment.

We first introduced our divorce venue proposal in our 2017 Annual Report. This proposal was adopted as part of the OCA 2017 Legislative Program (OCA #52) and was introduced in the Legislature as 2017-18 as S. 5736. Later in this report, we will detail modifications we made to provisions of the proposal in 2019 and 2020 to address comments we received from bar groups and others.

We believe that our revised divorce venue proposal, as reflected in Assemblyman Dinowitz's 2019-2020 bill A. 7517, continues to accomplish the goals of the Excellence Initiative by ensuring that divorces will be processed more quickly statewide as the volume of divorces is more evenly distributed among counties. Residents of those counties will not have to share judicial resources in their counties with residents of other counties. This legislation will also ensure better outcomes in divorce cases by ensuring that defendants are less likely to default, that parties and their children do not have to travel long distances for in-person hearings, and that judges can appoint and deal with professional counsel and forensic evaluators in custody matters whose work and expertise they are familiar with. We urge passage of this bill as an access to justice imperative.

Access to Forensics in Custody Cases

We again resubmit our proposal on access to forensics in custody cases. The subject of access to forensic reports has been widely discussed among the legal community in the last few years. In January 2013, three different rule proposals were put out for public comment on this subject. These proposals differed with respect to the terms on which self-represented litigants would have access to the reports. Before any court rule was adopted, legislation on the subject was introduced (A. 8342-A). Consideration of the proposals by the Administrative Board of the Courts was suspended pending possible action on this legislation. A new version of said bill was introduced as A. 290 on January 7, 2015. The Committee's concerns as to A. 8342-A continued to be applicable to the 2015-16 version. The Committee expressed these concerns in our 2016 Annual Report to the Chief Administrative Judge. On January 12, 2017, a 2017-18 version of said bill was introduced as A.1533/S.6300.

As stated in our prior reports, we believe that there is a real danger that the dissemination to the public of the reports or copies thereof on the Internet could prove to cause long lasting damage and embarrassment to many, and those concerns must outweigh reasonable restrictions imposed on self-represented litigants. Attorneys and other forensic experts are subject to professional discipline if reports are released, while parties, including self-represented litigants, face only potential contempt charges which are unlikely to result in a meaningful remedy for innocent victims including children whose personal lives are exposed.

In our 2017 Annual Report to the Chief Administrative Judge, the Committee developed a new proposal on access to forensics in custody cases, which we hoped would resolve the differences as to treatment of self-represented litigants by providing access to the report and the complete evaluator's files to the parties including self-represented litigants, attorneys, independent forensic experts hired to assist the attorneys, and the attorney for the child, on terms which respect the due process rights of self-represented and represented litigants, while providing better protections against unauthorized dissemination than were contained in the original bill. As in A.1533/S.6300, access to the evaluator's file would include access to the entire file related to the proceeding including, but not limited to, all underlying notes, test data, raw test materials, underlying materials provided to or relied upon by the court-ordered evaluator and any records, photographs or other evidence. Our proposal was accepted as part of the Office of Court Administration's 2017 Legislation program and was introduced as 2017-18 S. 6579. Memoranda in opposition to 2017-18 A.1533/S.6300 and in support of 2017-18 S. 6579 were sent to legislators by the Family Law Section of the New York State Bar Association, the Women's Bar Association of the State of New York, the New York City Bar Matrimonial Law Committee and Committee on Children and the Law and the New York Chapter of the Academy of Matrimonial Lawyers.³² Also supporting our proposal was the Children's Law Center of Brooklyn.³³

Our proposal was amended in 2018 as S. 6579-A based upon changes we recommended at the suggestion of the Family Court Advisory and Rules Committee and the New York Public Welfare Association, Inc., whose concerns were addressed in the modified proposal.³⁴ These changes do not detract from the essential feature of our proposal which provides access to the reports and notes and evaluator's file to attorneys and litigants while ensuring greatly increased protections to prevent confidential information in the report from being disseminated indiscriminately (as compared to A.1533/S.6300 or the current version thereof introduced as 2019-20 A. 05621 Weinstein/S. 4686 Biaggi). While our draft permits attorneys and independent forensic evaluators hired to assist attorneys and self-represented litigants to have a copy of the forensic report upon execution of an affidavit containing assurances to the court against further dissemination and return of the report and files at conclusion of the litigation, our draft does not permit represented parties or self-represented litigants to have a copy of the report. Instead, we allow represented parties to read the report in the office of their attorney, to discuss the report with their attorney, and to make notes about the report, while we allow self-represented parties to read the report at the court or other location and to make notes about the report. For a detailed description of the key provisions of the amended proposal, see Appendix "F-1" to this report.

During 2019, a significant Second Department decision supported the view reflected in our forensics proposal that, in the interest of protecting the confidentiality of the information in forensic reports on custody which contain the most sensitive information about the parties'

³² For copies of these Memoranda in Support of our Proposal, see Appendix "H-1" to " to our 2019 Annual Report to the Chief Administrative Judge available at <https://www.nycourts.gov/LegacyPDFS/IP/judiciaryslegislative/pdfs/2019-Matrimonial.pdf>

³³ Children's Law Center, Letters to the Editor, "Parties Deserve to See Forensic Evaluations"(NYLJ March 22, 2017).

³⁴ In 2017-18, *both* our original proposal (S. 6579) as well as the Senate counterpart to A.1533 (S.6300) were before the Senate.

personal lives, it is not error to deny a pro se litigant a copy of a forensic report provided that the pro se litigant has adequate access to the report (see *Raymond v. Raymond*, 2019 NY Slip Op. 05546, 174 A.D.3d 625, 107 N.Y.S.3d 433 (Second Department 2019)). In a report on 2019-20 A.5621/S.4686 dated May 2019, the Matrimonial Law Committee and the Children and The Law Committee of the New York City Bar Association opposed A.5621/S.4686 and favored our proposal (OCA #27), stating:

“The Matrimonial Law and Children and the Law Committees of the New York City Bar Association (the “Committees”) write to provide feedback on the proposed legislation which would amend the Family Court Act and the Domestic Relations Law regarding the use of reports from court-appointed forensic evaluators (“forensics”) in child custody disputes. The Matrimonial Practice Advisory and Rules Committee of the Office of Court Administration has proposed a similar but not identical bill (OCA 27-2019).¹ The Committees support the approach taken in OCA 27-2019 with a few minor changes and clarifications detailed below. Although A.5621/S.4686 contains several valuable elements, it goes too far in guaranteeing parties access to forensic reports. We believe that OCA 27-2019 strikes a better balance among the competing interests...

The Committees are pleased that OCA 27-2019 follows our recommendation. A.5621/S.4686, however, presumptively gives represented parties the right to copies of the forensic report. In the age of smartphones and social media, that will make it all too easy for distraught parents to publicize the very personal and embarrassing information that must often be included in forensics’ reports.

OCA 27-2019 also provides more extensive mechanisms for ensuring the confidentiality of forensic reports. In particular, attorneys and others who receive access to forensic reports would be required to sign affidavits promising to not disseminate the reports without permission. Such procedures should be included in any legislation enacted on this issue.”³⁵

Although adopted as part of the OCA Legislative Program for 2019-20 as OCA #27, our proposal was not introduced in the Legislature in 2019 or 2020. Instead the current version of 2017-18. A.1533/S.6300 was introduced as 2019-20 A. 05621 Weinstein/S. 4686 Biaggi. In addition to the opposition of the New York City Bar Association Committees quoted above, there was also opposition to this bill by the Women’s Bar Association of the State of New York, the Family Law Section of the New York State Bar Association, and the American Academy of Matrimonial Lawyers, New York Chapter.³⁶ Aside from the risk of dissemination of private information about children and families, A. 05621 Weinstein S. 4686 Biaggi also creates

³⁵ See Report on Legislation by The Matrimonial Law Committee and the Children and The Law Committee of the City Bar Association dated, May 2019 attached as Appendix “F-2” to our 2020 report available at <https://www.nycourts.gov/LegacyPDFS/IP/judiciaryslegislative/pdfs/Matrimonial-MPARCReport2020.pdf> .

³⁶ See Memoranda of Opposition to 2019-20 A.5621/S.4686 by the Women’s Bar Association of the State of New York, the Family Law Section of the New York State Bar Association, and the American Academy of Matrimonial Lawyers, New York Chapter attached as Appendix “F-3” to this report.

substantial risk for victims of domestic violence. As stated by the Women’s Bar Association of the State of New York in their 2019 Position Statement in Opposition, a copy of which is contained in Appendix F-3 to this report:

“We are particularly concerned that victims of domestic violence will be targeted and further harmed by this Bill. If parties are given copies of forensic reports, an abuser can easily inflict more abuse on the victim with threats and actual disclosure of the forensic report to employers, relatives and other members of the public.”

During 2020, neither our proposal, nor A. 5621/S.4686 moved forward.

Our Committee strongly supports the concept that all litigants should have the ability to read the reports. It is primarily the method of access that appears to be in dispute. It is our hope that our version of the forensics bill or a compromise between our proposal and A. 5621/S.4686 can be enacted in 2021 so that the important issue of forensic reports in custody cases can be addressed, thereby serving the dual goals of decisional and operational excellence for the court system, in furtherance of Chief Judge DiFiore’s Excellence Initiative.

Amendment to Extreme Risk Orders of Protection Act for Orders to be Included in the Statewide Computerized Registry

We continue to recommend a proposal we introduced in our 2020 report for an amendment to the recently enacted law on Extreme Risk Orders of Protection Act (L. 2019, c. 19). That law was enacted to enable courts to issue orders of protection to prevent people who pose a danger to others or themselves from possessing firearms. The law provides for the surrender or removal of such person’s firearms once the extreme risk order of protection is issued. As explained by the sponsor’s memorandum filed with the legislation before it was enacted:

“New York currently lacks a procedure permitting a court to issue an order to temporarily seize firearms from a person who is believed to pose a severe threat of harm to himself, herself, or others unless that person has also been accused of a crime or family offense.”

Once the temporary or permanent extreme risk order of protection is issued, the statute requires the court to notify and provide a copy of the order to various persons and agencies of law enforcement and the criminal justice system. However, nowhere is there a requirement for the court to notify and send a copy of the order to the statewide computerized registry of orders of protection and warrants of arrest that courts are required to check before issuing orders of custody and visitation pursuant to DRL section 240 (1) (a-1) and FCA section 651(e). It is crucial that judges issuing orders of custody and visitation have knowledge of the issuance of such extreme risk orders of protection before they entrust a vulnerable child to the care of such a person.

While CPLR 6347 states that “no finding or determination made pursuant to this article shall be interpreted as binding, or having collateral estoppel or similar effect, in any other action or proceeding, or with respect to any other determination or finding, in any court, forum or administrative proceeding,” a finding in a proceeding for an extreme risk order of protection would not be binding on a judge determining custody or visitation of a minor child, but merely a relevant

and important factor to consider in the best interest of the child. Moreover CPLR 6346 provides that, upon expiration of the extreme risk order of protection, all records shall be sealed; but specifically provides that such records shall be accessible to courts of the Unified Court System, among other necessary parties.³⁷ This language makes clear that the Legislature intended this information to be available to judges making custody and visitation decisions.

Thus, we continue to strongly recommend an amendment of the new statute to specifically require the court to provide a copy of the extreme risk order of protection to the statewide computerized registry. This proposal will help protect children from danger, and therefore further the Chief Judge's Excellence Initiative by furthering access to justice.

Proposal to Amend DRL §232 to Allow for Alternative Service of Divorce Summons by Email or Social Media

We continue to endorse again this year our proposal to amend DRL §232 to allow for alternative service of the divorce summons by email or social media. This legislation is necessary because Supreme Courts frequently feel compelled to order expensive and ineffective service by publication in matrimonial actions when personal service on the defendant cannot be made because the defendant cannot be found.

This proposal will ensure that service by publication in matrimonial cases will be used as a last resort only as the Legislature and Court of Appeals intend, and will encourage courts to authorize service by email or social media where the court is satisfied there is proof that the social media or email account is active and that the platform to be used is reasonably calculated to reach the defendant. We have defined the term "active" in our proposal to mean that it has been used within the last thirty days in order to prevent litigation.

Amendment to Domestic Relations Law to Require Marriage Licenses in all Cases

We again submit our previously-endorsed legislative proposal to amend the Domestic Relations Law to require marriage licenses in all cases. If this proposal is adopted, courts will no

³⁷ § 6346 provides:

Expiration of an extreme risk protection order. 1. A protection order issued pursuant to this article, and all records of any proceedings conducted pursuant to this article, shall be sealed upon expiration of such order...except that such records shall be made available to:

- (a) the respondent or the respondent's designated agent;
- (b) courts in the unified court system;
- (c) police forces and departments having responsibility for enforcement of the general criminal laws of the state;
- (d) any state or local officer or agency with responsibility for the issuance of licenses to possess a firearm, rifle or shotgun, when the respondent has made application for such a license; and
- (e) any prospective employer of a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law, in relation to an application for employment as a police officer or peace officer;...

longer be required to examine questions of the validity of marriages if the loopholes in the law requiring marriage licenses are eliminated, thus reducing litigation, increasing certainty, and ensuring the age of consent legislation enacted in 2017 (which was designed to protect minors from forced marriages) cannot be evaded by religious marriages.³⁸

Amendment to CPLR 3217(a) to Prevent Voluntary Discontinuance Once a Notice of Appearance is Filed

Finally, we submit our previously-endorsed legislative proposal to amend CPLR 3217(a) to prevent parties from voluntarily discontinuing actions once a notice of appearance has been filed in the action. The adoption of the revised Preliminary Conference Order form by court rule adopted by Administrative Order upon our Committee’s recommendation did much to prevent parties from voluntarily discontinuing matrimonial actions after the expenditure of time and resources.³⁹ However, the proposed CPLR amendment would still be desirable as discussed later in this report.

All our previously-endorsed legislative proposals promote the Chief Judge’s Excellence Initiative by promoting judicial efficiency and access to justice.

³⁸ The Age of Consent Law (L.2017, c. 35) was enacted to protect minors from forced marriages. The law prohibits civil marriages of minors under the age of seventeen and allows marriages of minors between the ages of seventeen and eighteen with consent of their parents or guardians, but only upon approval of the Family Court Judge or Supreme Court Justice to whom the application is made after satisfaction of considerable requirements designed as safeguards to prevent domestic violence and forced marriage.

³⁹ The adopted Preliminary Conference Order provides: “If the issue of grounds is **resolved**, the parties agree that Plaintiff/Defendant will proceed on an uncontested basis to obtain a divorce on the grounds of DRL §170(7) and the parties waive the right to serve a Notice to Discontinue pursuant to CPLR 3217(a) unless on consent of the parties.”

New or Modified Rule Proposals

Proposal to Adopt 22 NYCRR 202.18-a Regarding Statements of Understanding of Forensic Evaluators in Custody Cases (New)

There is currently much debate about forensic reports. As an Appendix H to this report, we provide a White Paper on Forensic Reports in Custody Cases to address this important topic. We also propose in this report a new matrimonial rule to increase transparency as to the process of “informed consent” in Statements of Understanding of forensic evaluators in custody cases as required by the guidelines of many mental health professional associations.

The new rule will increase transparency about forensic reports. It was drafted after consultation with the Mental Health Professionals Committee of the Appellate Divisions of the 1st and 2^d Departments. It will ensure that statements of understanding do not conflict with the orders of appointment of forensic evaluators. The rule requires that the statements of understanding must be sent upon receipt of the order of appointment by the evaluator to the attorney representing the litigant, or to any self-represented litigant, and that such statements must be reviewed, signed and returned to the Court and the evaluator within ten days. Review by counsel and self-represented litigants prior to signature will help to ensure that the parties understand the terms of the statements of understanding and that the statements of understanding comply with the orders of appointment. The ten-day time limit will make certain that often lengthy custody proceedings are not subject to further delays as a result of the procedure.

Amendment to Automatic Orders Rules

Once our modified proposal for amendment of the automatic orders statute is enacted as described in this report, we recommend a conforming amendment to the court rule (22 NYCRR § 202.16-a) as shown in this report.

Re-Submission of Previously-Endorsed Rule Proposals

We again include in this report a rule proposal we introduced last year to amend the requirement in the matrimonial rules that the Statement of Proposed Disposition must be filed with the court with the Note of Issue.⁴⁰ Our proposal would allow the Statement of Proposed Disposition to be filed later at a pre-trial conference after the Note of Issue has been filed, or as otherwise directed by the court. This would save litigants expense by not having to submit the Statement of Disposition when the issues have not been clearly defined, thereby increasing access to justice for matrimonial litigants and saving time for judges in reviewing premature submissions.

We also restate our custody severance rule proposal designed to speed custody and visitation decisions. This proposal furthers both decisional and operational excellence by promoting faster and fairer resolutions.

We also restate our proposed amendment to 22 NYCRR § 202.16(k)(3) to reform the rules related to matrimonial proceedings regarding motions for counsel fees by the non-monied spouse pursuant to DRL §237, not only as to the elimination of the attorney's affirmation, but also as to adoption of a form of affidavit to be used by self-represented litigants in applying for counsel fees. Our rule amendment proposal also makes clear what is in fact required by the statute but unfortunately is not always understood, namely, that when the non-monied spouse is represented by an attorney, the attorney for the monied spouse must submit the required billing documentation with the answering papers for the motion for counsel fees by the non-monied spouse, just as the attorney for the non-monied spouse must submit the documentation with the moving papers. Otherwise the non-monied spouse will be at a disadvantage by having to reveal details that the monied spouse could keep confidential.

⁴⁰ The Committee thanks Hon. Jeffrey Goodstein, Supervising Judge for Matrimonial Matters in Nassau County, for making this suggestion.

Previous Recommendation in Support of and Expansion on Recommendation for Increase in Assigned Counsel Fees by Commission on Parental Representation

Last year we endorsed a recommendation of the Commission on Parental Legal Representation chaired by Hon. Karen Peters (the “Commission”) for an increase in assigned counsel fees. In their Interim Report to Chief Judge Janet DiFiore dated February 2019, the Commission stated: “We recommend that the hourly rates for assigned attorneys be increased to \$150 per hour and a mechanism for periodic review and adjustment be instituted.”⁴¹ Although the Commission determined to focus on parental representation in child welfare cases in their Interim Report, they stressed that in their final report they would consider issues of parental representation in other types of cases as well. In her 2019 “State of our Judiciary Address, Chief Judge Janet DiFiore endorsed the recommendations of the Commission, including the recommendation for an increase in assigned counsel fees.”⁴²

While our Committee continues to support the Commission’s recommendation and would expand its application to matrimonial cases and to fees of counsel representing children as well as adults, we recognize that the severe budget cuts imposed by the covid -19 pandemic may necessitate postponing action on this recommendation. For a copy of our Recommendation from last year’s report, please see pages 39-40 of our 2020 report available at <https://www.nycourts.gov/LegacyPDFS/IP/judiciaryslegislative/pdfs/Matrimonial-MPARCReport2020.pdf>

⁴¹ See Recommendation 6, at page, 8, Commission on Parental Legal Representation, Interim Report to Chief Judge, February 2019, available at http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR_Commission-Report.pdf

⁴² See “State of our Judiciary” address by Hon. Janet DiFiore, Chief Judge, February 26, 2019 at p. 14 available at http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/19_SOJ-Speech.pdf

Past, Pending and Future Committee Projects

New and Ongoing Committee Projects

We discuss in this report several new projects of our Committee we began in 2020 as well as our continued efforts on ongoing projects from prior years.

Recommendations in Response to Covid-19

Our Committee's first new priority this year was to assist Judge Sunshine with his administrative duties in responding to covid. Judge Sunshine asked the Committee for their suggestions about court rules, technology and health issues relating to matrimonial practice during covid, as well for their suggestions for dealing with evidence and ways to conduct hearings and court conferences in a safe manner. Judge Sunshine incorporated these suggestions in a report on suggested protocols he presented on conducting hearings and trials during the pandemic. He also employed some of the Committee's suggestions on evidence in the pilot project with Jeff Carucci, Director of NYS Courts E-filing, to implement through NYSCEF a proposal on how to submit evidence in virtual trials during the pandemic to assure public health and safety.

Review of Report of Secretary Jeh Johnson with Respect to Diversity in the Bench and Bar and Implicit and Explicit Bias in Matrimonial Actions

A second new priority this year was to examine the subject of Diversity in the Bench and Bar and Implicit and Explicit Bias in Matrimonial Actions. Following the October 1, 2020 release of the report of Secretary Jeh Johnson, appointed by Chief Judge DiFiore as Special Adviser on Equal Justice in the Courts, our Committee reviewed the report available at www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf with a view toward examining what changes may be necessary to increase diversity and inclusion in matrimonial practice. Judge Sunshine has appointed a new Working Group on Diversity for this purpose.⁴³

Gender Fairness in the New York Courts

On November 23, 2020, the Gender Fairness Survey conducted by the New York State Judicial Committee on Women in the Courts was released. The Survey is available at www.nycourts.gov/LegacyPDFS/IP/womeninthecourts/Gender-Survey-2020.pdf. The Committee has undertaken review of the Survey in connection with ensuring gender fairness in matrimonial practice.

⁴³ The members of the Working Group on Diversity are Hon. Jeffrey Goodstein, Hon. Cheryl Joseph, Hon. La Tia Martin, Hon. Emily Ruben, Yesenia Rivera, Esq. and Zenith Taylor, Esq.

White Paper on Forensics Reports in Custody Cases

A number of bills were introduced in the Legislature in recent years regulating or prohibiting the use of forensic evaluations in custody and visitation proceedings.⁴⁴ To address concerns about forensics reports in custody cases as evidenced by some of these bills,⁴⁵ our Committee has prepared an informational White Paper which is attached as Appendix “ H ” to this report.⁴⁶ The White Paper does not discuss specific bills, but rather is intended to inform policymakers, advocates and the public at large about the purpose of forensic evaluations and the role they play in custody cases. We hope our White Paper will be a valuable information resource for the public and the Legislature in evaluating the use of forensics reports in custody cases.⁴⁷

Presumptive Early ADR Statewide Initiative in Matrimonial Cases

In 2020 we continued our efforts to assist Judge Sunshine as Statewide Coordinating Judge for Matrimonial Cases with implementation of the Statewide Presumptive Early ADR Initiative. Along with Judge Sunshine, former Committee member Hon. Andrew Crecca, (now Administrative Judge for Suffolk County), and Committee member Elena Karabatos, Esq, are members of the Chief Judge’s Advisory Committee on ADR, led by John S. Kiernan, and are actively promoting the concept of presumptive mediation and alternative dispute resolution in their local Judicial Districts. This project became a priority in 2020 since ADR proved an effective alternative to resolving certain matrimonial issues while the covid pandemic limited access judicial resources. On September 15, 2020, Suggested Statewide Family and Matrimonial Mediation Protocols were approved by the Chief Judge’s ADR Advisory Committee. Committee

⁴⁴ Some of these bills have been motivated by tragic incidents involving children. Judge Sunshine has been appointed to the NYS Unified Court System’s Advisory Council on Child Fatalities chaired by the Hon. Edwina Mendelson, Deputy Chief Administrative Judge.

⁴⁵ Some of the bills we studied included not only A. 05621 Weinstein/ S.4686 Biaggi which we discuss at length in this report in connection with our Committee’s proposal on access to forensics in custody cases, but also A. 9888 Dinowitz, A. 10424 Hevesi, and S. 8459 Sanders.

⁴⁶ As discussed elsewhere in this report, we have also proposed a new matrimonial rule to increase transparency in Statements of Understanding by forensic evaluators in custody cases.

⁴⁷ The Subcommittee on the White Paper on Forensics in Custody Cases was chaired by Hon. Laura Drager (Ret.). Members of the Subcommittee were Committee members Hon. Ellen Gesmer, Hon. Sondra Miller, (Ret.), Hon Emily Ruben, Hon. Jacqueline Silbermann,(Ret.) RoseAnn Branda, Esq., Stephen Gassman, Esq., Stephen McSweeney, Esq., and Harriet Weinberger, Esq., 2d Dept AFC Director.

The Subcommittee gratefully acknowledges information provided for this report by Hon. Mary Slisz, Supervising Matrimonial Judge Erie County Supreme Court, Alton L Abramowitz, Esq., Sharon Sayers, Esq. and Eric Tepper, Esq. of our Committee; as well as by Hon. Richard Dollinger, Acting Supreme Court Justice, Monroe County; Lisa Courtney, Statewide ADR Coordinator; Natasha Pasternack, Family Counseling Case Analyst, 2d Judicial District; Linda Kostin, AFC Director, 4th Department; Nancy Matles, 2d Department AFC Program; Bridget O’Connell, Erie County Mediation Program; Betsy Ruslander, AFC Director, 3rd Department; Lee Rosenberg, Esq (of the NYSBA Family Law Section), and Cynthia Snodgrass, Court Attorney Referee, Ontario County Supreme Court.

member Elena Karabatos of our Committee, along with other members of the Chief Judge’s ADR Advisory Committee, and the ADR Coordinators,⁴⁸ were extremely helpful in assisting Judge Sunshine in drafting the Suggested Protocols.

Alternative Parenting Arrangements, the Child Parent Security Act and the Committee’s White Paper on Surrogacy

During 2020, our Committee continued to study surrogacy in light of the landmark Court of Appeals decision in *Matter of Brooke S.B v. Elizabeth A.C.C.* (2016 NY Slip Op 05903) as we continued to follow the latest developments on alternative parenting arrangements and access rights.

We also continued our study of surrogacy legislation. In 2017 -2019 we studied a number of bills introduced by Assemblywoman Paulin and Senator Hoylman.⁴⁹ Our Committee did an intensive study of these bills as amended through June 2019 as well as of: 1) the 2017 report by the New York State Task Force on Life and the Law titled *Revisiting Surrogate Parenting: Analysis and Recommendations for Public Policy on Gestational Surrogacy* and 2) the Uniform Parentage Act published by the National Conference of Commissioners on Uniform State Laws.

While the Committee could not reach a consensus on whether to support or oppose the Hoylman/Paulin bill, the Committee adopted and prepared a “White Paper” on Surrogacy in New York State to review the issues presented, with a focus on the impact of the bill on the courts, in the hopes that it would serve as a resource as various proposals were debated in the future. The paper was attached as Appendix “H” to our 2020 report available at <https://www.nycourts.gov/LegacyPDFS/IP/judiciaryslegislative/pdfs/Matrimonial-MPARCReport2020.pdf>.⁵⁰

In 2020 just before the Governor declared covid an emergency in March, several new bills were introduced regarding surrogacy legislation which the Subcommittee studied, including S.07717/ Barrett A.09847. Ultimately, a bill entitled Judgment of Parentage of Children Conceived Through for Assisted Reproduction and Surrogacy Legitimization (S.7506B/A.9506B) was enacted as Governor’s Budget Bill as Chapter 56, Laws of 2020 eff. 2/15/21 as Article 5C of the Family Court Act.

⁴⁸ ADR Coordinators for the Courts Outside New York City are Bridget O’Connell of the Erie County ADR Mediation Program, and Joel Kullas, Court Attorney Referee, Deputy Chief Administrative Judge’s Office for Courts Outside NYC; The ADR Coordinator for the Courts Inside NYC is Lisa Denig, Special Counsel for NYC Civil Court to Deputy Chief Administrative Judge.

⁴⁹ In 2017 and 2018, we studied a bill introduced by Assemblywoman Paulin as 2017-18 A. 6959. In 2019, we studied a new version of the bill introduced by Senator Hoylman as 2019-20 S.2071-A. Assemblywoman Paulin amended her bill and reintroduced it in May 2019 as A. 1071-B. The bill was further amended in June 2019 as S. 2017-B/ A.01071C.

⁵⁰ It was drafted by a sub-committee chaired by Hon. Ellen Gesmer, Associate Justice of the Appellate Division First Department assisted by Hon. Laura Drager,(now Ret.), Hon. Jacqueline Silbermann (Ret.), Susan Bender, Esq., Kathleen Donelli, Esq., Elena Karabatos, Esq., and Michael Mosberg, Esq.

The Subcommittee is studying the enacted law in detail to see what may still require attention, but has initially concluded that its provisions are more advantageous than provisions in many of the prior bills, on points examined in the White Paper. The law legitimizes gestational surrogacy in New York and requires the intended parents to pay for medical insurance for the surrogate for twelve months after birth of the child. It also provides for informed consent of the surrogate, a Surrogate's Bill of Rights, and a six-month residency requirement. Another improvement is that if the agreement is unclear, the court will decide parentage based on the best interests of the child despite the lack of a genetic connection. Additionally, the Department of Health is required to maintain records. Many of these points were discussed in our Committee's White Paper on Surrogacy referenced above.

Assistance to the Judicial Institute with Training of New and Experienced Matrimonial Judges and Court Attorney Referees

During 2020, the Committee's assistance to the Judicial Institute with training of Judges continued despite the pandemic. Members of the Committee presented sessions at virtual summer/fall seminars on a variety of topics.

The sessions included: Overcoming Coronavirus Challenges in Matrimonial Courtrooms presented by Judge Sunshine with Supervising Matrimonial Judges;⁵¹ a two part Matrimonial Legal Update session presented by Bruce Wagner, Esq. of our Committee; An Overview of Maintenance, Child Support, Imputed Income and Support Modification;⁵² Financial and Custodial Modification Applications Amid COVID 19 – Issues and Considerations for Matrimonial Judges;⁵³ Predatory Marriage and New York's Elective Share Law;⁵⁴ Protecting the Record – An Appellate View presented by Hon. Linda Christopher and Hon. Ellen Gesmer of our Committee; Evidence presented by Stephen Gassman, Esq. of our Committee; and The Intersection of Matrimonial Law and Immigration: A Panel Discussion spearheaded by Hon. Ellen Gesmer of our Committee.⁵⁵ We thank the presenters who are not members of our Committee who participated as presenters in these sessions.

Sessions are already being planned for New Judges School in January 2021 and for a training by Judge Sunshine for Matrimonial Court Attorney Referees.

⁵¹ Supervising Judges included Judges Richard Dollinger, Jeffrey Goodstein, Joseph Lewis Lubell, La Tia Martin, and Mary Slisz.

⁵² This session was presented by Rosalia Baiamonte, Esq.

⁵³ This session was presented by Rosalia Baimonte, Esq. and Hon. Rachael Adams.

⁵⁴ Yolanda Kanesh, Maryann Stallone, and Amanda Leone presented this session.

⁵⁵ Other Panelists were Hon. Mimi Tsankov, Hon. Carol King (Ret.), and Nancy Kelly, Esq.

Mentoring of New or Newly Assigned Matrimonial Judges

Mentoring of New or Newly Assigned Judges is a continuing Committee project despite budgetary issues and covid concerns. At New Judges School in January each year, Judge Sunshine introduces new judges to matrimonial cases and discusses as part of the Chief Judge's Excellence Initiative the resources available for judges hearing matrimonial cases from his office and the Committee as well as practical concerns relating to adjudication of matrimonial cases. Many members of the Committee serve as presenters at the trainings. Judge Sunshine continues to serve as a resource to judges hearing matrimonial cases and to meet with the new judges at the training.

Matrimonial Mandatory Parent Education Pilot Projects in Coordination with the Statewide Office of Professional and Court Services

The Committee continues to support pilot projects in seven counties for mandatory parent education in coordination with the Office of Court and Professional Services. Hon. Sondra Miller (Ret.), and Hon. Jacqueline Silberman (Ret.), both Honorary Chairs of our Committee, have been active in promoting this program. In accordance with recommendations of our Committee in response to a request for comment by the Office of Court Administration on the proposal for the program in January 2018, the OCA Parent Education and Awareness Program approved on November 20, 2019 its first online parent education program pursuant to Part 144 of the Rules of the Chief Administrative Judge (22 NYCRR Part 144). This program made it easier for domestic violence victims who so desire to receive the training in safety as well as for those who do not have access to live programs, an important consideration during covid. A second on-line program by Family Kind was also approved this fall.

A program on Parent Education as part of the Judicial Seminars is scheduled by the Judicial Institute. Hon. Sondra Miller, (Ret.), Honorary Chair of the Committee, Dan Weitz, Director, Division of Court and Professional Services, Harriet Weinberger, Director of the Law Guardian Department for the Appellate Division, Second Department and member of our Committee, and Dolores Gebhardt,, Esq., a matrimonial practitioner, are to be the presenters.

B. Ongoing Committee Development Efforts

During 2021, consideration and input from the perspective of the matrimonial bench and bar on the Court Merger Legislative Proposal of Hon. Janet DiFiore, Chief Judge will remain a priority of the Committee⁵⁶ Another priority of our Committee in 2021 will be assistance with implementation of the pilot project for the consensual divorce program approved by the Administrative Board in September 2019. We will also address whether the federal tax law changes necessitate a change in the New York maintenance guidelines law and whether any other provisions in the maintenance guidelines law enacted in 2015 may need revisiting following the

⁵⁶ The proposal would eliminate New York's complicated structure of eleven trial courts, replacing it with a three level structure. See Footnote 11 supra for a description of the details of the proposal.

2020 elections.

In 2021, the Chair of the Committee, Hon. Jeffrey S. Sunshine, will continue the extensive outreach (either virtually or in person, depending as health concerns during the pandemic permit) to members of the matrimonial bench and bar. With the encouragement of Chief Administrative Judge Marks, Judge Sunshine will continue to conduct and participate in CLE programs and panels, and to gather input and insights from the bench and bar on matrimonial issues.

The Committee encourages comments and suggestions from interested members of the bench, bar, academic community and public concerning legislative proposals and the ongoing revision of matrimonial rules and forms. We invite submission of comments, suggestions and inquiries to:

Matrimonial Practice Advisory and Rules Committee:

CHAIR:

Honorable Jeffrey S. Sunshine, JSC, Kings County
Statewide Coordinating Judge for Matrimonial Cases
360 Adams Street
Brooklyn, New York 11201

COUNSEL:

Susan Kaufman, Esq.
Counsel to Statewide Coordinating Judge for Matrimonial Cases
360 Adams Street
Brooklyn, New York 11201

IV. New and Modified Legislative Proposals

1. Proposal Regarding Mandatory Electronic Filing in Matrimonial Actions (Modified)

Proposal for Mandatory Electronic Filing in Matrimonial Actions (Modified)
(Judiciary Law 212(2)(u) §§§§ (i) (A), (iv), (v), and (vi)(amended);
CPLR 2111(a)(amended); CPLR 2111(b) (1) and (2) (repealed and new);
CPLR 2(a) (repealed); CPLR 2111(b)(3) (amended); CPLR 2112 (amended);
Court of Claims Act §11-b (1) (amended); New York City Criminal Court Act
§42 (new); Uniform District Court Act §2103-a (new); Uniform City Court Act
§2103-a (new); Uniform Justice Court Act §2103-a (new); Criminal Procedure
Law §§§§§10.40 (2)(a) amended; (b)(repealed and (c) new; old (c) and (d) (relettered (e) and (f)
and amended); FCA §214(b) (repealed and new).

One of our two key priorities in 2021 is a modified and expanded version of a proposal that was first introduced in 2018, which would authorize the Chief Administrative Judge to require mandatory electronic filing in matrimonial actions. In 2015, the Legislature enacted CPLR 2111(b)(2)(A), which authorized the Chief Administrative Judge in his or her discretion to mandate the electronic filing of court papers in all cases in Supreme Court with only a limited number of exceptions.⁵⁷ One of those exceptions was in matrimonial actions. Since 2015, electronic filing experiments with consensual electronic filing in matrimonial cases in counties such as Westchester have proven very successful, and our Committee has recommended removing those exceptions for matrimonial cases for several years. The prior proposal by the Office of Court Administration, which we supported, not only eliminated the exception from mandatory e-filing for matrimonial actions, but also made further changes in the e-filing statutes to eliminate the present exclusion as to residential foreclosure and consumer debt actions from mandatory e-filing programs in Supreme Court and reset the current sunset for use of e-filing in criminal and Family Court. Unfortunately, this proposal was not enacted, but the sunset provision was extended last year.

In this report, we now support a modified and expanded version of the legislative proposal of the Office of Court Administration which would authorize the greatest possible use of e-filing in the courts. At present, the Chief Administrative Judge's statutory authority to institute e-filing in the trial courts – while much broader than it once was – is still limited in some important respects. He may not require e-filing in some major classes of civil cases in Supreme Court (*e.g.*, matrimonial and Article 78 cases), nor may he require it in more than six counties each in criminal court and Family Court. Further, no form of e-filing – whether voluntary or mandatory – may be instituted in the civil courts of lesser jurisdiction or in the local criminal courts.

Under this measure, the Chief Administrative Judge would be permitted to institute e-filing – on either a voluntary or mandatory basis – *in any or all* of the State's trial courts and in any class of cases. For purposes of matrimonial cases in Supreme Court, the relevant sections of the modified and expanded proposal are as follows:

⁵⁷ See supra note 23 for the text of the legislation requiring that the Chief Administrator consult with local bar associations and county clerks before eliminating the requirement of consent to electronic filing in any county.

- *Bill section 2.* Amends CPLR 2111(a) to extend the authority to institute e-filing in all of the State’s trial court of civil jurisdiction. Advance approval of the local county clerk is still required as to e-filing in Supreme Court and County Court.

- *Bill section 3.* Repeals paragraphs 1, 2, and 2-a of CPLR 2111(b) [provisions that now mandate that e-filing in courts of civil jurisdiction, where instituted, be voluntary unless the Chief Administrative Judge imposes mandatory e-filing – which he can only do in Supreme Court subject to prohibition upon its use in some major classes of cases, and in the New York City Civil Court in but one class of cases (*i.e.*, cases brought by health care providers against certain insurers)] – and replaces them with new paragraphs 1 and 2, permitting the Chief Administrative Judge to institute voluntary/mandatory e-filing in his discretion, without limitation as to court or class of cases. New paragraphs 1 and 2 continue the present exemptions from mandatory e-filing for unrepresented persons and for certain lawyers without technical skills or equipment. They also continue the requirement for consultation with various bar associations and attorneys.

The importance of mandatory electronic filing in matrimonial actions cannot be overstated. In October, 2018, as a further step in promoting electronic filing in matrimonial cases, Judge Sunshine sent a letter to the matrimonial bench and bar asking for their support in moving forward the instant legislative proposal.⁵⁸ The 2018 letter and subsequent letters pointed out the advantages of electronic filing in matrimonial cases, including a streamlined and economical filing process, access to case files, expeditious review of filed papers, enhanced security, easy notifications to parties and easy resubmission of papers, free and fast service of subsequent papers, and for the general community diminished reliance on paper, a greener environment, and public savings through more economical and efficient court operations.

As noted in Judge Sunshine’s 2018 letter, concerns about the need for users of the system to have the technical ability to engage in electronic filing and concerns about loss of privacy of the parties in a matrimonial action, are satisfied as follows: “(i) unrepresented parties in matrimonial cases would be automatically exempt from having to file electronically (although they could choose to do so if they wished), and (ii) attorneys in such cases who lack the knowledge or equipment needed to file electronically could opt out of doing so by the filing of a simple form. Finally, consistent with section 235 of the Domestic Relations Law, papers in a matrimonial action that is electronically filed shall not be accessible on-line to persons other than the parties and counsel therein.”⁵⁹

In 2020, many bar associations expressed support for the mandatory e-filing in matrimonial cases. See Resolution of the Family Law Section of the NYS Bar Association and the Women’s Bar Association of the State of New York (“WBASNY”) attached to this report as Appendix “D.”

⁵⁸ See letter dated October 4, 2018 from Hon. Jeffrey Sunshine, Statewide Coordinating Judge for Matrimonial Cases, to Bar Associations attached as Appendix “F-2 to our 2019 Annual Report to the Chief Administrative Judge available at <https://www.nycourts.gov/LegacyPDFS/IP/judiciaryslegislative/pdfs/2019-Matrimonial.pdf>

⁵⁹ See page 2 of letter dated October 4, 2018 from Hon. Jeffrey Sunshine, Statewide Coordinating Judge for Matrimonial Cases, to Bar Groups, *supra* note 58.

The WBASNY Resolution points out that “Mandatory e-filing, with exemptions for *pro se* litigants and lawyers not having the necessary technology, would enable litigants to advance their cases and eliminate potential barriers to access to justice. It would also mitigate the effects of the COVID-19 outbreak on the courts.”

Like the prior version, modified and expanded version of the proposal in this year’s report is abundantly clear on the matter of eliminating the prohibition against mandatory e-filing in matrimonial actions. Bill section three repeals in its entirety CPLR 2111(b)(2), which is the present section of law governing mandatory e-filing (and setting forth the prohibition upon its use in matrimonial actions and certain other proceedings), and substitutes in its place a new CPLR 2111(b)(1), which expressly authorizes the Chief Administrative Judge to establish either voluntary or mandatory e-filing programs with no prohibition on the latter programs for any class of cases. The legislation preserves, as now constituted, the exceptions for *pro se* litigants *and* lawyers not having the needed technology. Proposed CPLR 2111(b)(1) sets forth the exception for the former; CPLR 2111(b)(3), already in the law and unchanged by this proposal, sets forth the exception for the latter and, as well, restates the *pro se* litigants’ exception.

Our Committee strongly supports the modified and expanded legislative proposal put forth in this report as necessary to the fair and efficient processing of matrimonial cases, not only during the covid pandemic, but for the future. This proposal has special significance during the covid pandemic because electronic filing through the NYSCEF system has proven invaluable in expanding litigants’ ability to file matrimonial actions during this public health emergency. We hope that this legislation will be enacted by the Legislature and signed by the Governor in 2021.

Proposal:

AN ACT to amend the judiciary law, the civil practice law and rules, the court of claims act, the New York city criminal court act, the uniform district court act, the uniform city court act, the uniform justice court act, the criminal procedure law, and the family court act, in relation to filing by electronic means

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Clause (A) of subparagraph (i) of paragraph (u) of subdivision 2 of section 212 of the judiciary law and subparagraphs (iv), (v), and (vi) of such paragraph are amended to read as follows:

(A) Not later than February first in each calendar year, the chief administrator of the courts shall submit to the legislature, the governor and the chief judge of the state a report evaluating the state's experience with programs in the use of electronic means for the commencement of actions and proceedings and the service of papers therein as authorized by law and containing such recommendations for further legislation as he or she shall deem appropriate. In the preparation of such report, the chief administrator shall consult with each county clerk in whose county a program has been implemented in [civil cases in] the supreme [court] and/or county court, each district attorney in whose county a program has been implemented in criminal cases in the courts of such county, the advisory committees established pursuant to subparagraphs (ii) through (vi) of this paragraph, the organized bar including but not limited to city, state, county and women's bar associations; the office of indigent legal services; institutional legal service providers; not-for-profit legal service providers; public defenders; attorneys assigned pursuant to article eighteen-B of the county law; unaffiliated attorneys who regularly appear in proceedings that are or have been affected by any programs that have been

implemented or who may be affected by the proposed recommendations for further legislation; representatives of victims' rights organizations; and any other persons in whose county a program has been implemented in any of the courts therein as deemed to be appropriate by the chief administrator, and afford them an opportunity to submit comments with respect to such implementation for inclusion in the report and address any such comments.

Public comments shall also be sought via a prominent posting on the website of the office of court administration. All comments received from any source shall be posted for public review on the same website.

(iv) The chief administrator shall maintain an advisory committee to consult with him or her in the implementation of laws affecting the program in the use of electronic means for the commencement of civil actions and proceedings and the service and filing of papers therein in the civil court of the city of New York, the district courts, the city courts outside New York city, and the town and village justice courts. This committee shall consist of such number of members as the chief administrator shall designate, among which there shall be the chief clerk of the civil court of the city of New York; one or more chief clerks of the district courts, the city courts outside New York city, and the town and village justice courts; the president of the state magistrates' association or his or her designee; representatives of the organized bar including but not limited to city, state, county and women's bar associations; [attorneys who regularly appear in actions specified in subparagraph (C) of paragraph two of subdivision (b) of section twenty-one hundred eleven of the civil practice law and rules;] and unaffiliated attorneys who regularly appear in proceedings that are or have been affected by the programs that have been implemented or who may be affected by any recommendations for further legislation concerning the use of electronic means for the commencement of actions and proceedings and the service

and filing of papers therein in [the civil court of the city of New York] any of the courts specified in this subparagraph; and any other persons as deemed appropriate by the chief administrator.

Such committee shall help the chief administrator to evaluate the impact of such electronic filing program on litigants including unrepresented parties, practitioners and the courts and to obtain input from those who are or would be affected by such electronic filing program, including unrepresented parties, city, state, county and women's bar associations; institutional legal service providers; not-for-profit legal service providers; attorneys assigned pursuant to article eighteen-B of the county law; unaffiliated attorneys who regularly appear in proceedings that are or have been affected by the programs that have been implemented or who may be affected by any recommendations for further legislation concerning the use of the electronic filing program in any of the [civil court of the city of New York] courts specified in this subparagraph; and any other persons in whose county a program has been implemented in any of the courts therein as deemed to be appropriate by the chief administrator.

(v) The chief administrator shall maintain an advisory committee to consult with him or her in the implementation of laws affecting the program in the use of electronic means for the commencement of criminal actions and the filing and service of papers in pending criminal actions and proceedings[, as first authorized by paragraph one of subdivision (c) of section six of chapter four hundred sixteen of the laws of two thousand nine, as amended by chapter one hundred eighty-four of the laws of two thousand twelve, is continued]. The committee shall consist of such number of members as will enable the chief administrator to obtain input from those who are or would be affected by such electronic filing program, and such members shall include county clerks; chief clerks of supreme, county and other courts; district attorneys; representatives of the office of indigent legal services; not-for-profit legal service providers; public defenders; statewide and local specialty bar associations whose membership devotes a

significant portion of their practice to assigned criminal cases pursuant to subparagraph (i) of paragraph (a) of subdivision three of section seven hundred twenty-two of the county law; institutional providers of criminal defense services and other members of the criminal defense bar; representatives of victims' rights organizations; unaffiliated attorneys who regularly appear in proceedings that are or would be affected by such electronic filing program and other interested members of the criminal justice community. Such committee shall help the chief administrator to evaluate the impact of such electronic filing program on litigants including unrepresented parties, practitioners and the courts and to obtain input from those who are or would be affected by such electronic filing program, including unrepresented parties, district attorneys, not-for-profit legal service providers, public defenders, statewide and local specialty bar associations whose membership devotes a significant portion of their practice to assigned criminal cases pursuant to subparagraph (i) of paragraph (a) of subdivision three of section seven hundred twenty-two of the county law; institutional providers of criminal defense services and other members of the criminal defense bar, representatives of victims' rights organizations, unaffiliated attorneys who regularly appear in proceedings that are or would be affected by such electronic filing program and other interested members of the criminal justice community.

vi) The chief administrator shall maintain an advisory committee to consult with him or her in the implementation of laws affecting the program in the use of electronic means for the origination of [juvenile delinquency] proceedings [under article three of the family court act and abuse or neglect proceedings pursuant to article ten of the family court act] in family court and the filing and service of papers in such pending proceedings[, as first authorized by paragraph one of subdivision (d) of section six of chapter four hundred sixteen of the laws of two thousand nine, as amended by chapter one hundred eighty-four of the laws of two thousand twelve, is continued]. The committee shall consist of such number of members as will enable the chief

administrator to obtain input from those who are or would be affected by such electronic filing program, and such members shall include chief clerks of family courts; representatives of authorized presentment and child protective agencies; other appropriate county and city government officials; institutional providers of legal services for children and/or parents; not-for-profit legal service providers; public defenders; representatives of the office of indigent legal services; attorneys assigned pursuant to article eighteen-B of the county law; and other members of the family court bar; representatives of victims' rights organizations; unaffiliated attorneys who regularly appear in proceedings that are or would be affected by such electronic filing program; and other interested members of the family practice community. Such committee shall help the chief administrator to evaluate the impact of such electronic filing program on litigants including unrepresented parties, practitioners and the courts to obtain input from those who are or would be affected by such electronic filing program, including unrepresented parties, representatives of authorized presentment and child protective agencies, other appropriate county and city government officials, institutional providers of legal services for children and/or parents, not-for-profit legal service providers, public defenders, attorneys assigned pursuant to article eighteen-B of the county law and other members of the family court bar, representatives of victims' rights organizations, unaffiliated attorneys who regularly appear in proceedings that are or would be affected by such electronic filing program, and other interested members of the criminal justice community.

§2. Subdivision (a) of section 2111 of the civil practice law and rules, as added by chapter 237 of the laws of 2015, is amended to read as follows:

(a) Notwithstanding any other provision of law, the chief administrator of the courts, with the approval of the administrative board of the courts, may promulgate rules authorizing a

program in the use of facsimile transmission only in the court of claims and electronic means in the [supreme court, the civil court of the city of New York, surrogate's courts and the court of claims] courts of New York having civil jurisdiction for: (i) the commencement of civil actions and proceedings, and (ii) the filing and service of papers in pending actions and proceedings. Provided, however, the chief administrator shall consult with the county clerk of a county outside the city of New York before the use of electronic means is to be authorized hereunder in the supreme court or the county court of such county, afford him or her the opportunity to submit comments with respect thereto, consider any such comments and obtain the agreement thereto of such county clerk.

§3. Paragraphs 1, 2, and 2-a of subdivision (b) of section 2111 of the civil practice law and rules are REPEALED and new paragraphs 1 and 2 are added to such subdivision to read as follows:

1. Participation in this program may be required or may be voluntary as provided by the chief administrator, except that it shall be strictly voluntary as to any party to an action or proceeding who is not represented by counsel.

2. (A) Where participation in this program is to be voluntary:

(i) commencement of an action or proceeding by facsimile transmission or electronic means shall not require the consent of any other party; nor shall a party's failure to consent to participation in an action or proceeding bar any other party to that action or proceeding from filing and serving papers by facsimile transmission or electronic means upon the court or any other party to such action or proceeding who has consented to participation; and

(ii) all parties shall be notified clearly, in plain language, about their options to participate in filing by electronic means; and

(iii) no party to an action or proceeding shall be compelled, directly or indirectly, to participate; and

(iv) where a party is not represented by counsel, the court shall explain such party's options for electronic filing in plain language, including the option for expedited processing, and shall inquire whether he or she wishes to participate, provided however the unrepresented litigant may participate in the program only upon his or her request, which shall be documented in the case file, after said party has been presented with sufficient information in plain language concerning the program.

(B) Where participation in this program is to be required:

(i) such requirement shall not be effective in a court in a county unless, in addition to consulting with the county clerk of such county and obtaining his or her agreement thereto if the court is a supreme court or county court, the chief administrator shall:

(1) first consult with members of the organized bar including but not limited to city, state, county, and women's bar associations and, where they practice in such court in such county, with (a) institutional service providers, (b) not-for-profit legal service providers, (c) attorneys assigned pursuant to article eighteen-B of the county law, (d) unaffiliated attorneys who regularly appear in proceedings that are or have been affected by a program of electronic filing in such county, and (e) any other persons as deemed to be appropriate by the chief administrator; and

(2) afford all those with whom he or she consults pursuant to clause (i)(1) of this subparagraph the opportunity to submit comments with respect to the program, which comments,

including but not limited to comments related to unrepresented litigants, he or she shall consider and shall post for public review on the office of court administration's website; and

(ii) as provided in paragraph (3) of this subdivision, no party who is not represented by counsel nor any counsel in an affected case who opts out of participation in the program shall be required to participate therein.

§4. The opening unlettered paragraph of paragraph (3) of subdivision (b) of section 2111 of the civil practice law and rules, as added by chapter 237 of the laws of 2015, is amended to read as follows:

Where the chief administrator [eliminates the requirement of consent] requires participation in electronic filing as provided in paragraph [two] one of this subdivision, he or she shall afford counsel the opportunity to opt out of the program, via presentation of a prescribed form to be filed with the clerk of the court where the action is pending. [Said] Such form shall permit an attorney to opt out of participation in the program under any of the following circumstances, in which event, he or she will not be compelled to participate:

§5. Section 2112 of the civil practice law and rule, as amended by chapter 99 of the laws of 2017, is amended to read as follows:

§2112. Filing of papers in the appellate division by electronic means. Notwithstanding any other provision of law, and except as otherwise provided in subdivision (c) of section twenty-one hundred eleven of this article, the appellate division in each judicial department may promulgate rules authorizing a program in the use of electronic means for: (i) appeals to such court from the judgment or order of a court of original instance or from that of another appellate court, (ii) making a motion for permission to appeal to such court, (iii) commencement of any other proceeding that may be brought in such court, and (iv) the filing and service of papers in

pending actions and proceedings. Provided however, such rules shall not require an unrepresented party or any attorney who furnishes a certificate specified in subparagraph (A) or (B) of paragraph three of subdivision (b) of section twenty-one hundred eleven of this article to take or perfect an appeal by electronic means. Provided further, however, before promulgating any such rules, the appellate division in each judicial department shall consult with the chief administrator of the courts and shall provide an opportunity for review and comment by all those who are or would be affected including city, state, county and women's bar associations; institutional legal service providers; not-for-profit legal service providers; attorneys assigned pursuant to article eighteen-B of the county law; unaffiliated attorneys who regularly appear in proceedings that are or have been affected by the programs that have been implemented or who may be affected by promulgation of rules concerning the use of the electronic filing program in the appellate division of any judicial department; and any other persons in whose county a program has been implemented in any of the courts therein as deemed to be appropriate by any appellate division. To the extent practicable, rules promulgated by the appellate division in each judicial department pursuant to this section shall be uniform and may apply to any appellate term established by an appellate division.

§6. Subdivision 1 of section 11-b of the court of claims act, as added by chapter 237 of the laws of 2015, is amended to read as follows:

1. Notwithstanding any other provision of law, the chief administrator of the courts[, with the approval of the administrative board of the courts,] may authorize a program in the [voluntary] use of facsimile transmission and electronic means in the court as provided in article twenty-one-A of the civil practice law and rules.

§7. The New York city criminal court act is amended by adding a new section 42 to read as follows:

§42. Use of electronic filing authorized. 1. Notwithstanding any other provision of law, the chief administrator of the courts may authorize a program in the use of electronic means in cases in the criminal court of the city of New York as provided in section 10.40 of the criminal procedure law.

2. For purposes of this section, "electronic means" shall be as defined in subdivision (f) of rule twenty-one hundred three of the civil practice law and rules.

§8. The uniform district court act is amended by adding a new section 2103-a to read as follows:

§2103-a. Use of electronic filing authorized. 1. Notwithstanding any other provision of law, the chief administrator of the courts may authorize a program in the use of electronic means in civil cases in a district court as provided in article twenty-one-A of the civil practice law and rules, and in criminal cases as provided in section 10.40 of the criminal procedure law.

2. For purposes of this section, "electronic means" shall be as defined in subdivision (f) of rule twenty-one hundred three of the civil practice law and rules.

§9. The uniform city court act is amended by adding a new section 2103-a to read as follows:

§2103-a. Use of electronic filing authorized. 1. Notwithstanding any other provision of law, the chief administrator of the courts may authorize a program in the use of electronic means in civil cases in a city court as provided in article twenty-one-A of the civil practice law and rules, and in criminal cases as provided in section 10.40 of the criminal procedure law.

2. For purposes of this section, "electronic means" shall be as defined in subdivision (f) of rule twenty-one hundred three of the civil practice law and rules.

§10. The uniform justice court act is amended by adding a new section 2103-a to read as follows:

§2103-a. Use of electronic filing authorized. 1. Notwithstanding any other provision of law, the chief administrator of the courts may authorize a program in the use of electronic means in civil cases in a justice court as provided in article twenty-one-A of the civil practice law and rules, and in criminal cases as provided in section 10.40 of the criminal procedure law.

2. For purposes of this section, "electronic means" shall be as defined in subdivision (f) of rule twenty-one hundred three of the civil practice law and rules.

§11. Paragraph (a) of subdivision 2 of section 10.40 of the criminal procedure law, as amended by chapter 237 of the laws of 2015, is amended to read as follows:

(a) Notwithstanding any other provision of law, the chief administrator, with the approval of the administrative board of the courts, may promulgate rules authorizing a program in the use of electronic means ("e-filing") in the [supreme court and in the county court] courts of New York having criminal jurisdiction for: (i) the filing with a court of an accusatory instrument for the purpose of commencement of a criminal action or proceeding [in a superior court, as provided by articles one hundred ninety-five and two hundred of this chapter], and (ii) the filing and service of papers in pending [criminal] actions and proceedings. Provided, however, the chief administrator shall consult with the county clerk of a county outside the city of New York before the use of electronic means is to be authorized hereunder in the supreme court or county court of such county, afford him or her the opportunity to submit comments with respect thereto, consider any such comments and obtain the agreement thereto of such county clerk.

§12. Paragraph (b) of subdivision 2 of section 10.40 the criminal procedure law is REPEALED and a new paragraph (b) is added to such subdivision to read as follows:

(b) Participation in this program may be required or may be voluntary as provided by the chief administrator, except that it shall be strictly voluntary as to any party to an action or proceeding who is not represented by counsel unless such party, upon his or her request, chooses to participate.

§13. Paragraphs (c) and (d) of subdivision 2 of section 10.40 of the criminal procedure law are relettered to be paragraphs (d) and (e) and a new paragraph (c) is added to read as follows:

(c) (1) Where participation in this program is to be voluntary: (i) filing an accusatory instrument by electronic means with the court for the purpose of commencement of an action or proceeding shall not require the consent of any other party; nor shall a party's failure to consent to participation in an action or proceeding bar any other party to that action or proceeding from filing and serving papers by facsimile transmission or electronic means upon the court or any other party to such action or proceeding who has consented to participation;

(ii) all parties shall be notified clearly, in plain language, about their options to participate in filing by electronic means;

(iii) no party to an action or proceeding shall be compelled, directly or indirectly, to participate;

(iv) where a party is not represented by counsel, the court shall explain such party's options for electronic filing in plain language, including the option for expedited processing, and shall inquire whether he or she wishes to participate, provided however the unrepresented litigant may participate in the program only upon his or her request, which shall be documented in the

case file, after said party has been presented with sufficient information in plain language concerning the program.

(2) Where participation in this program is to be required:

(i) such requirement shall not be effective in a court in a county unless, in addition to consulting with the county clerk of such county and obtaining his or her agreement thereto if the court is a supreme court or county court, the chief administrator shall:

(1) first consult with and obtain the agreement of the district attorney and the criminal defense bar of such county, provide all persons and organizations, or their representative or representatives, who regularly appear in criminal actions or proceedings in the criminal courts of such county with reasonable notice and opportunity to submit comments with respect thereto and give due consideration to all such comments, and consult with the members of the advisory committee specified in subparagraph (v) of paragraph (u) of subdivision two of section two hundred twelve of the judiciary law; and

(2) afford all those with whom he or she consults pursuant to clause (i)(1) of this subparagraph the opportunity to submit comments with respect to the program, which comments, including but not limited to comments related to unrepresented litigants, he or she shall consider and shall post for public review on the office of court administration's website; and

(ii) as provided in paragraph (c) of this subdivision, no party who is not represented by counsel nor any counsel in an affected case who opts out of participation in the program shall be required to participate therein.

§14. The opening unlettered paragraph of paragraph (d) of subdivision 2 of section 10.40 of the criminal procedure law, such paragraph as relettered by section 13 of this act, is amended to read as follows:

Where the chief administrator [eliminates the requirement of consent] requires participation in electronic filing as provided in [subparagraph (ii) of] paragraph (b) of subdivision 2 of this subdivision, he or she shall afford counsel the opportunity to opt out of the program, via presentation of a prescribed form to be filed with the court where the criminal action is pending. Such form shall permit an attorney to opt out of participation in the program under any of the following circumstances, in which event, he or she will not be compelled to participate:

§15. Subparagraph (ii) of paragraph (e) of subdivision 2 of section 10.40 of the criminal procedure law, such paragraph as relettered by section 13 of this act, is amended to read as follows:

(ii) Notwithstanding any other provision of this section, no paper or document that is filed by electronic means in a criminal proceeding [in supreme court or county court] shall be available for public inspection on-line. Subject to the provisions of existing laws governing the sealing and confidentiality of court records, nothing herein shall prevent the unified court system from sharing statistical information that does not include any papers or documents filed with the action; and, provided further, that this paragraph shall not prohibit the chief administrator, in the exercise of his or her discretion, from posting papers or documents that have not been sealed pursuant to law on a public website maintained by the unified court system where: (A) the website is not the website established by the rules promulgated pursuant to paragraph (a) of this subdivision, and (B) to do so would be in the public interest. For purposes of this subparagraph, the chief administrator, in determining whether posting papers or documents on a public website is in the public interest, shall, at a minimum, take into account for each posting the following factors: (A) the type of case involved; (B) whether such posting would cause harm to any

person, including especially a minor or crime victim; (C) whether such posting would include lewd or scandalous matters; and (D) the possibility that such papers or documents may ultimately be sealed.

§16. Subdivision (b) of section 214 of the family court act is REPEALED and new subdivision (b) is added to such section to read as follows:

(b)(i) Notwithstanding any other provision of law, the chief administrator, with the approval of the administrative board of the courts, may promulgate rules authorizing a program in the use of electronic means ("e-filing") in the family court for: (1) the origination of proceedings in such court, and (2) the filing and service of papers in pending proceedings.

(ii) Participation in this program may be required or may be voluntary as provided by the chief administrator, except that it shall be strictly voluntary as to any party to an action or proceeding who is not represented by counsel unless such party, upon his or her request, chooses to participate.

§17. Subdivisions (c) through (g) of section 214 of the family court act are relettered to be subdivisions (d) through (h) and a new subdivision (c) is added to read as follows:

(c) (1) Where participation in this program is to be voluntary: (i) filing a petition by electronic means with the court for the purpose of originating a proceeding shall not require the consent of any other party; nor shall the failure of a party or other person who is entitled to notice of the proceedings to consent to participation bar any other party from filing and serving papers by electronic means upon the court or any other party or person entitled to receive notice of such proceeding who has consented to participation;

(ii) all parties shall be notified clearly, in plain language, about their options to participate in filing by electronic means;

(iii) no party to an action or proceeding shall be compelled, directly or indirectly, to participate;

(iv) where a party is not represented by counsel, the court shall explain such party's options for electronic filing in plain language, including the option for expedited processing, and shall inquire whether he or she wishes to participate, provided however the unrepresented litigant may participate in the program only upon his or her request, which shall be documented in the case file, after said party has been presented with sufficient information in plain language concerning the program;

(v) upon the filing of a petition with the court by electronic means, a party to the proceeding and any attorney for such person shall be permitted to immediately review and obtain copies of such documents and papers if such person or attorney would have been authorized by law to review or obtain copies of such documents and papers if they had been filed with the court in paper form.

(2) Where participation in this program is to be required:

(i) such requirement shall not be effective in a court in a county unless the chief administrator shall:

(A) first consult with and obtain the agreement of each authorized presentment agency, child protective agency, the family court bar providing representation to parents, and the family court bar providing representation to children (as represented by the head of each legal services organization representing parents and/or children, the head of each public defender organization, and president of the local bar association as applicable) of such county, provide all persons or organizations, or their representative or representatives, who regularly appear in proceedings in the family court of such county, in which proceedings the requirement of consent is to be

eliminated with reasonable notice and an opportunity to submit comments with respect thereto and give due consideration to all such comments, and consult with the members of the advisory committee continued pursuant to subparagraph (vi) of paragraph (t) of subdivision two of section two hundred twelve of the judiciary law; and

(B) afford all those with whom he or she consults pursuant to clause (i)(1) of this paragraph with a reasonable opportunity to submit comments with respect to the program, which comments he or she shall consider and shall post for public review on the office of court administration's website; and

(C) consult with the members of the advisory committee continued pursuant to subparagraph (vi) of paragraph (t) of subdivision two of section two hundred twelve of the judiciary law; and

(ii) as provided in paragraph (c) of this subdivision, no party who is not represented by counsel nor any counsel in an affected case who opts out of participation in the program shall be required to participate therein.

§18. Section 11 of chapter 237 of the laws of 2015 amending the judiciary law, the civil practice law and rules and other laws relating to use of electronic means for the commencement and filing of papers in certain actions and proceedings, as amended by chapter 58 of the laws of 2020, is amended to read as follows:

§11. This act shall take effect immediately[; provided that sections four, five, six and seven of this act shall each expire and be deemed repealed September 1, 2021; and provided that paragraph 2-a of subdivision (b) of section 2111 of the civil practice law and rules, as added by section two of this act, shall expire and be deemed repealed September 1, 2021].

§19. This act shall take effect immediately.

2. Proposal to Amend DRL § 211 Regarding Commencement of Matrimonial Actions (New)

This proposal relates to commencement of matrimonial actions during an emergency declared by the Governor which caused the Chief Judge or Chief Administrative Judge to bar as non-essential the filing of actions for divorce. The exclusion of matrimonial actions from the list of essential applications was necessary since matrimonial actions may take months or years to complete, and the issues involved do not qualify as necessary for immediate relief unless there is need for an order of protection or other type of urgent relief which would qualify as essential on its own.

DRL§ 211 currently requires that matrimonial actions be commenced by filing of the summons with notice (or the summons and verified complaint). In order to permit matrimonial actions to commence during covid despite their classification as non-essential, the Office of Court Administration expanded the NYSCEF system in certain counties and accepted filings by mail in other counties, but legislative change is also needed. We propose a legislative amendment which would require commencement of matrimonial actions by service rather than filing of the summons with notice or summons and verified complaint during an emergency declared by the Governor resulting in a prohibition on filing until normal filing is once again permitted . The proposal requires payment of an index number fee or application for poor person relief pursuant to CPLR 1101(d) within 21 days of permission to file by Administrative Order of the Chief Judge or Chief Administrative Judge, and if the poor person’s relief is denied, the index fee must be paid within 120 days of the denial as required by CPRL 1101(d).

Proposal

AN ACT to amend the domestic relations law, in relation to modifying the provisions regarding commencement of matrimonial action during an emergency declared by the governor

The People of the State of New York, represented in Senate and Assembly, do enact as

follows:

Section 1: Section 211 of the domestic relations law is amended to read as follows:

§211. Pleadings, proof and motions.

A matrimonial action shall be commenced by the filing of a summons with the notice designated in section two hundred thirty-two of this chapter, or a summons and verified complaint as provided in section three hundred four of the civil practice law and rules. In the event that the governor declares an emergency which results in the chief judge of the state or chief administrator of the courts issuing an administrative order which prohibits the filing of the summons or the summons and verified complaint during the emergency, a party may commence a matrimonial action by

serving the defendant with the summons with notice or a summons and verified complaint as specified above. However, an action may not be commenced in this manner unless 1) the plaintiff purchases an index number for the action within twenty-one days of the date of an administrative order by the chief judge or the chief administrator of the courts permitting the filing of the summons or the summons and verified complaint during the emergency; or 2) the plaintiff applies for poor person status pursuant to CPLR 1101(d) within twenty-one days of the date of an administrative order by the chief judge or the chief administrator of the courts permitting the filing of the summons or the summons and verified complaint during the emergency, and, in the event that the application for poor person status is denied, the plaintiff pays an index number fee within 120 days after the date of the court order denying such application. A final judgment shall be entered by default for want of appearance or pleading, or by consent, only upon competent oral proof or upon written proof that may be considered on a motion for summary judgment. Where a complaint or counterclaim in an action for divorce or separation charges adultery, the answer or reply thereto may be made without verifying it, except that an answer containing a counterclaim must be verified as to that counterclaim. All other pleadings in a matrimonial action shall be verified.

§2. This act shall take effect immediately.

3. Modified Proposal to Amend DRL § 236(B)(2)(b) Regarding Automatic Orders (New)

The automatic orders statute was adopted by the Legislature as chapter 72 of the Laws of 2009 on the recommendation of MPARC's predecessor Committee. Adoption of this legislation was a significant step forward in matrimonial practice. It prevents one spouse in a divorce action from dissipating the marital estate in order to deprive the other spouse of their property. It also saves judicial resources and legal fees because courts no longer must issue orders in individual cases to prevent the types of conduct prohibited. In 2009, a court rule (see 22 NYCRR 202.16-a) was adopted implementing the legislation. The court rule was amended in 2012 to make clear that violations of the automatic orders could be deemed a contempt of court.

We now propose to amend the date of effectiveness of automatic orders during an emergency declared by the Governor which results in a prohibition on filing. Currently the automatic orders statute makes the orders effective upon the plaintiff upon filing the summons. This proposal provides that the automatic orders shall be effective upon plaintiff upon service of the summons upon the defendant during the emergency. This proposal is combined with our previous proposal in last year's annual report to update and clarify the automatic orders statute which has been in effect now for more than ten years. We continue to advocate these revisions in this year's report.

One of the revisions we proposed in our last year's report was due to the rise in residential foreclosures that had occurred since enactment of the original automatic orders statute in 2012. The Unified Court System's Office of Policy and Planning chaired by Hon. Sherri Klein Heitler has developed procedures to make the foreclosure process fairer. Recently that Office proposed a notice of tax lien foreclosure to be sent by the court to homeowners, similar to the advance notices given to homeowners in residential foreclosures. See Request for Public Comment available at <https://www.nycourts.gov/LegacyPDFS/RULES/comments/PDF/RPC-Tax-lien-foreclosure-Feb25.pdf>

Our Committee believes that the dangers of failing to receive advance notice of residential and tax lien foreclosures and other types of legal proceedings are particularly acute in matrimonial cases and are aggravated even more during emergency situations when people lose their jobs. If one spouse receives notice but fails to notify the other of a notice of such a legal proceeding while the divorce action proceeds, it could result in the other spouse's losing their home or other property. We therefore resubmit our proposal to require a spouse, within ten (10) days after having received notice thereof, to notify the other spouse of a tax lien, foreclosure, bankruptcy, or litigation, or the filing of same, which could adversely affect the marital estate. This addition to the Automatic Orders is needed because frequently after spouses separate, they do not inform each other that important legal proceedings are taking place which may have a major effect on the marital estate. Sometimes property is titled in only one spouse's name. If the notice is sent to the other spouse alone, the spouse who does not receive the notice will have no opportunity to appear in the legal proceeding to protect their interest.

In addition to adding this provision to the automatic orders statute, our Committee also continues to propose a clarification of the language as to the duration of the Automatic Orders. The current language states that the Orders shall remain in effect "during the pendency of the action." The Committee believes that this language may leave room for a litigant, pro se or otherwise, to fail to provide notice of a tax lien, foreclosure, bankruptcy or litigation which could adversely affect the marital estate, during such period of time between the conclusion of a trial and the

rendering of a court's decision, which, at times could span several months. This lack of clarity might severely prejudice a party who fails to receive such notice. We therefore propose that the first paragraph of the statute be amended to make clear that "[t]he automatic orders shall remain in full force and effect until entry of the judgment of divorce, unless terminated, modified or amended..."

The Committee also continues to recommend that the Automatic Orders be amended to add a prohibition on use of electronic devices to obtain information about the other party without their knowledge and consent. This type of behavior occurs more and more frequently as technology broadens in scope far beyond what existed in 2009 when the Automatic Orders legislation was first adopted. Covid has made the need for this reform even more even more relevant during the covid pandemic as technology developments have moved faster through virtual meetings and work at home.

The need for this amendment of the automatic orders statute was recently demonstrated in *Strauss v. Strauss*, 171 A.D.3d 596, 99 N.Y.S.3d 7 (N.Y. App. Div. 2019). In that case, the First Department upheld an order of Supreme Court granting plaintiff's motion for an order of sanctions against the defendant and defendant's counsel. The Appellate Division stated:

"Defendant does not dispute any of the facts relied upon by the motion court in determining that he and his counsel engaged in sanctionable conduct in the context of this divorce action. The record shows that defendant obtained access to plaintiff's iPad and private text messages, falsely told her that he did not have the iPad and that it was lost, and provided the text messages to his counsel, who admittedly failed to disclose to opposing counsel or the court the fact that defendant was in possession of the iPad and text messages, until two years later when they disclosed that they intended to use the text messages at trial. Nor does defendant explain how or why he was legally permitted to retain plaintiff's iPad without her knowledge, and to access and take possession of plaintiff's personal data located on her iPad..." (See *Strauss v. Strauss*, supra at 597.

The Committee believes that the foregoing revisions to the automatic orders statute including this year's additional modification to deal with emergencies declared by the Governor which affect filing, will improve access to justice for matrimonial litigants, one of the goals of the Chief Judge's Excellence Initiative. It will also reduce potential litigation by discouraging use of electronic devices to obtain information about the other spouse before such acts occur, thereby furthering court efficiency, another goal of the Excellence Initiative. Once enacted, the Committee recommends a conforming amendment to the automatic orders court rule 22 NYCRR 202.16-a.

The provisions in our previous proposal are all the more necessary in these times of economic distress due to loss of employment and furlough during covid in order to provide notice of a tax lien, foreclosure, bankruptcy or litigation to the other spouse once a divorce action has been commenced. Also, the prohibition on use of electronic devices to obtain information about the other party without their knowledge and consent during the pendency of the action is even more relevant as technology developments have moved faster through virtual meetings and work at home.

Proposal

AN ACT to amend the domestic relations law, in relation to modifying the terms and clarifying the effectiveness during an emergency declared by the governor as well as the duration of automatic orders in matrimonial actions

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph b of subdivision 2 of part B of section 236 of the domestic relations law, as added by chapter 281 of the laws of 1980 and as amended by chapter 72 of the laws of 2009, is amended to read as follows:

b. With respect to matrimonial actions which commence on or after the effective date of this paragraph, the plaintiff shall cause to be served upon the defendant, simultaneous with the service of the summons, a copy of the automatic orders set forth in this paragraph. The automatic orders shall be binding upon the plaintiff in a matrimonial action immediately upon the filing of the summons, or summons and complaint, and upon the defendant immediately upon the service of the automatic orders with the summons. In the event that the governor declares an emergency which results in the chief judge of the state or chief administrator of the courts issuing an administrative order which prohibits the filing of the summons or the summons and verified complaint during the emergency, then the automatic orders shall be binding upon the plaintiff and the defendant immediately upon service of the summons upon defendant, but shall have no force and effect unless: 1) the plaintiff purchases an index number for the action within 21 days of the date of an administrative order by the chief judge of the state or the chief administrator of the courts permitting the filing of the summons or the summons and verified complaint during the emergency; or 2) plaintiff applies for poor person status pursuant to CPLR 1101(d) within twenty-one days of the date of an administrative order by the chief judge of the state or the chief

administrator of the courts permitting the filing of the summons or the summons and verified complaint during the emergency, and, in the event that the application for poor person status is denied, the plaintiff pays an index number fee within 120 days after the date of a court order denying the plaintiff's application for waiver of the fee pursuant to CPLR 1101(d). [The]Except as provided above, the automatic orders shall remain in full force and effect [during the pendency of the action,] until entry of the judgment of divorce unless terminated, modified or amended by further order of the court upon motion of either of the parties or upon written agreement between the parties duly executed and acknowledged. The automatic orders are as follows:

(1) Neither party shall sell, transfer, encumber, conceal, assign, remove or in any way dispose of, without the consent of the other party in writing, or by order of the court, any property (including, but not limited to, real estate, personal property, cash accounts, stocks, mutual funds, bank accounts, cars and boats) individually or jointly held by the parties, except in the usual course of business, for customary and usual household expenses or for reasonable attorney's fees in connection with this action.

(2) Neither party shall transfer, encumber, assign, remove, withdraw or in any way dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401K accounts, profit sharing plans, Keogh accounts, or any other pension or retirement account, and the parties shall further refrain from applying for or requesting the payment of retirement benefits or annuity payments of any kind, without the consent of the other party in writing, or upon further order of the court; except that any party who is already in pay status may continue to receive such payments thereunder.

(3) Neither party shall incur unreasonable debts hereafter, including, but not limited to further borrowing against any credit line secured by the family residence, further encumbering

any assets, or unreasonably using credit cards or cash advances against credit cards, except in the usual course of business or for customary or usual household expenses, or for reasonable attorney's fees in connection with this action.

(4) Neither party shall cause the other party or the children of the marriage to be removed from any existing medical, hospital and dental insurance coverage, and each party shall maintain the existing medical, hospital and dental insurance coverage in full force and effect.

(5) Neither party shall change the beneficiaries of any existing life insurance policies, and each party shall maintain the existing life insurance, automobile insurance, homeowners and renters insurance policies in full force and effect.

(6) Each party, having received notice of same, shall within ten (10 days) thereafter, send written notice to the other party of a tax lien, foreclosure, bankruptcy, or litigation, or the filing of same, which could adversely affect the marital estate.

(7) Neither party shall make use of an electronic device in the ownership, use, possession, or custody and control of the other party, including without limitation a tablet, computer, laptop, personal digital assistant, or smartphone, to obtain information about the other party without their knowledge and consent.

§ 2. This act shall take effect on the first of the calendar month next succeeding the sixtieth day after it shall have become a law.

4- Proposal to Amend DRL §§§§ 236(B)(9)(b)(1), 236(B)(9) (b)(2)(iii), 240(1)(j), and 244, and FCA §§§ 451, 455, and 460 Regarding Modification of Child Support or Maintenance Arrears During an Emergency

This proposal is a composite proposal that modifies various provisions of the Domestic Relations Law and Family Court Act which presently either completely prohibit or provide that no modification shall reduce or annul arrears of child support or maintenance accrued prior to the making of such application unless the defaulting party shows good cause for failure to make application for relief prior to the accrual of such arrears.⁶⁰ Our proposal would clarify that the declaration by the Governor of a state of emergency which resulted in a prohibition on filing such application by the Chief Judge or Chief Administrative Judge during such emergency, shall constitute good cause for failure to make application for such relief and permit the court to grant relief retroactively to the date of declaration of the emergency or to such other subsequent date as the court might deem appropriate. This proposal is intended to provide some relief to the payor or payee who can prove entitlement to relief (*e.g.*, change of circumstances) but was prevented from filing because of the emergency; but there is a limitation of six months for the application to be filed after filing is again permitted by the Administrative Order of the Chief Judge or Chief Administrative Judge. The proposal also makes clear throughout that not only the payor but the payee will be able to apply for relief under the provision which allows the payee to seek upward modifications of support “*nunc pro tunc*” based on newly discovered evidence.

The proposal not only clarifies that emergencies declared by the Governor resulting in a prohibition on filing qualify as good cause without any question, but also modifies DRL §236(B)(9)(b) (2)(iii), and FCA §451 to remove the absolute prohibitions on the court’s modifying child support awards retroactively even for good cause. This removal of the absolute prohibitions conforms with recent case law where courts have aimed at greater flexibility where applications are prevented because of “rare circumstances resulting in grievous injustice”⁶¹ or “impossibility”⁶² such as a public health emergency. As Professor Merrill Sobie comments about such cases with regard to FCA § 451 in the Practice Commentaries:

“The subset of cases at least provides a precedent for limited relief, although even an expanded “rare circumstance” or “impossibility” prerequisite is difficult to meet. In the more usual situations, for example where the temporarily unemployed person reduces support payments without seeking a modified court order, the doctrine is of no avail. Presumably, the “rare circumstances” or “impossible” safety net may also be employed when seeking an upward modification, although every case to date has involved a downward modification petition. (Suppose, for example, the custodial parent and the child

⁶⁰ Our proposal does not modify the provisions of either DRL §244 or FCA §460 which deal with entry and docketing of judgments where filing issues because of emergencies usually don’t apply. By this point in the proceeding, the parties will have had many opportunities to seek modifications. Our decision not to modify these provisions was made on the recommendation of the Chief Administrative Judge’s Family Court Advisory and Rules Committee (FCARC). We understand that FCARC is supportive of our proposal.

⁶¹ See *Reynolds v. Oster*, supra, note 25

⁶² See *Comm’r of Soc. Servs. v. Grant*, supra, note 26.

were seriously injured in an accident, precluding their petitioning for the needed and legally justified child support increase.) Applying the overly rigid rule may harm either party, and an expanded equitable exception is needed to temper the statute's impact."⁶³

Proposal

AN ACT to amend the domestic relations law and the family court act, in relation to authorizing the court to modify child support and maintenance arrears retroactively for good cause and to declare that an emergency declared by the governor constitutes good cause

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subparagraph (1) of paragraph b of subdivision 9 of part B of section 236 of the domestic relations law, as amended by chapter 182 of the laws of 2010, is amended to read as follows;

1) Upon application by either party, the court may annul or modify any prior order or judgment made after trial as to maintenance, upon a showing of the payee's inability to be self-supporting or upon a showing of a substantial change in circumstance, including financial hardship or upon actual full or partial retirement of the payor if the retirement results in a substantial change in financial circumstances. Where, after the effective date of this part, an agreement remains in force, no modification of an order or judgment incorporating the terms of said agreement shall be made as to maintenance without a showing of extreme hardship on either party, in which event the judgment or order as modified shall supersede the terms of the prior agreement and judgment for such period of time and under such circumstances as the court determines. The court shall not reduce or annul any arrears of maintenance which have been reduced to final judgment pursuant to

⁶³ N.Y. Fam. Ct. Act § 451 (McKinney)

section two hundred forty-four of this article. No other arrears of maintenance which have accrued prior to the making of such application shall be subject to modification or annulment unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears and the facts and circumstances constituting good cause are set forth in a written memorandum of decision. Such modification may increase maintenance nunc pro tunc as of the date of application based on newly discovered evidence. Notwithstanding the foregoing, the declaration by the governor of a state of emergency which resulted in a prohibition on filing such application by the chief judge of the state or chief administrator of the courts during such emergency, shall in itself without further proof from either party and without a written memorandum of decision, constitute good cause for failure to make application for such relief, in which event such relief, provided it is applied for within six months after the date of an administrative order by the chief judge of the state or the chief administrator of the courts permitting the filing of such application, may be granted retroactively to the date of declaration of the emergency or to such other subsequent date as the court in its discretion may deem proper. Any retroactive amount of maintenance due shall, except as provided for herein, be paid in one sum or periodic sums, as the court directs, taking into account any temporary or partial payments which have been made. The provisions of this subdivision shall not apply to a separation agreement made prior to the effective date of this part.

§ 2. Section (iii) of subparagraph (2) of paragraph b of subdivision 9 of part B of section 236 of the domestic relations law, as amended by chapter 182 of the laws of 2010, is amended to read as follows:

(iii) No modification or annulment shall reduce or annul any arrears of child support which have accrued prior to the date of application to annul or modify any prior order or judgment as to child support unless the defaulting party shows good cause for failure to make application for relief

from the judgment or order directing such payment prior to the accrual of such arrears. Such modification may increase child support nunc pro tunc as of the date of application based on newly discovered evidence. Notwithstanding the foregoing, the declaration by the governor of a state of emergency which resulted in a prohibition on filing such application by the chief judge of the state or chief administrator of the courts during such emergency, shall in itself without further proof from either party constitute good cause for failure to make application for such relief, in which event such relief, provided it is applied for within six months after the date of an administrative order by the chief judge of the state or the chief administrator of the courts permitting the filing of such application, may be granted retroactively to the date of declaration of the emergency or to such other subsequent date as the court in its discretion may deem proper. Any retroactive amount of child support due shall, except as provided for in this subparagraph, be paid in one sum or periodic sums, as the court directs, taking into account any temporary or partial payments which have been made. Any retroactive amount of child support due shall be support arrears/past due support. In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules. When a child receiving support is a public assistance recipient, or the order of support is being enforced or is to be enforced pursuant to section one hundred eleven-g of the social services law, the court shall establish the amount of retroactive child support and notify the parties that such amount shall be enforced by the support collection unit pursuant to an immediate execution for support enforcement as provided for by this chapter, or in such periodic payments as would have been authorized had such an execution been issued. In such case, the court shall not direct the schedule of repayment of retroactive support.

§ 3. Paragraph (j) of subdivision (1) of section 240 of the domestic relations law is amended to read as follows:

(j) The order shall be effective as of the date of the application therefor, and any retroactive amount of child support due shall be support arrears/past due support and shall, except as provided for herein, be paid in one lump sum or periodic sums, as the court shall direct, taking into account any amount of temporary support which has been paid. In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules. When a child receiving support is a public assistance recipient, or the order of support is being enforced or is to be enforced pursuant to section one hundred eleven-g of the social services law, the court shall establish the amount of retroactive child support and notify the parties that such amount shall be enforced by the support collection unit pursuant to an execution for support enforcement as provided for in subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules, or in such periodic payments as would have been authorized had such an execution been issued. In such case, the courts shall not direct the schedule of repayment of retroactive support. Where such direction is for child support and paternity has been established by a voluntary acknowledgement of paternity as defined in section forty-one hundred thirty-five-b of the public health law, the court shall inquire of the parties whether the acknowledgement has been duly filed, and unless satisfied that it has been so filed shall require the clerk of the court to file such acknowledgement with the appropriate registrar within five business days. Such direction may be made in the final judgment in such action or proceeding, or by one or more orders from time to time before or subsequent to final judgment, or by both such order or orders and the final judgment. Such direction may be made notwithstanding that the court for any reason whatsoever, other than lack of jurisdiction, refuses to grant the relief requested in the action or proceeding. Any

order or judgment made as in this section provided may combine in one lump sum any amount payable to the custodial parent under this section with any amount payable to such parent under section two hundred thirty-six of this article. Upon the application of either parent, or of any other person or party having the care, custody and control of such child pursuant to such judgment or order, after such notice to the other party, parties or persons having such care, custody and control and given in such manner as the court shall direct, the court may annul or modify any such direction, whether made by order or final judgment, or in case no such direction shall have been made in the final judgment may, with respect to any judgment of annulment or declaring the nullity of a void marriage rendered on or after September first, nineteen hundred forty, or any judgment of separation or divorce whenever rendered, amend the judgment by inserting such direction. Subject to the provisions of section two hundred forty-four of this article, no such modification or annulment shall reduce or annul arrears accrued prior to the making of such application unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears. Such modification may increase such child support nunc pro tunc as of the date of application based on newly discovered evidence. Notwithstanding the foregoing, the declaration by the governor of a state of emergency which resulted in a prohibition on filing such application by the chief judge of the state or chief administrator of the courts during such emergency, shall in itself without further proof from either party constitute good cause for failure to make application for such relief, in which event such relief, provided it is applied for within six months after the date of an administrative order by the chief judge of the state or the chief administrator of the courts permitting the filing of such application, may be granted retroactively to the date of declaration of the emergency or to such other subsequent date as the court in its discretion may deem proper. Any retroactive amount of child support due shall be support arrears/past due support and shall be paid in one lump sum or

periodic sums, as the court shall direct, taking into account any amount of temporary child support which has been paid. In addition, such retroactive child support shall be enforceable in any manner provided by law including, but not limited to, an execution for support enforcement pursuant to subdivision (b) of section fifty-two hundred forty-one of the civil practice law and rules.

§4. Subdivision 1 of Section 451 of the family court act is amended to read as follows:

1. Except as provided in article five-B of this act, the court has continuing jurisdiction over any support proceeding brought under this article until its judgment is completely satisfied and may modify, set aside or vacate any order issued in the course of the proceeding, provided, however, that the modification, set aside or vacatur shall not reduce or annul child support or other arrears accrued prior to the making of an application pursuant to this section[. The court shall not reduce or annul any other arrears] unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing payment prior to the accrual of the arrears, in which case the facts and circumstances constituting such good cause shall be set forth in a written memorandum of decision. A modification may increase support payments nunc pro tunc as of the date of the initial application for support based on newly discovered evidence.

Notwithstanding the foregoing, the declaration by the governor of a state of emergency which resulted in a prohibition on filing such application by the chief judge of the state or chief administrator of the courts during such emergency, shall in itself without a written memorandum of decision, constitute good cause for either party's failure to make application for such relief, in which event such relief, provided it is applied for within six months after the date of an administrative order by the chief judge of the state or the chief administrator of the courts permitting the filing of such application, may be granted retroactively to the date of declaration of the emergency or to such other subsequent date as the court in its discretion may deem proper.

Any retroactive amount of support due shall be paid and be enforceable as provided in section four

hundred forty of this article. Upon an application to set aside or vacate an order of support, no hearing shall be required unless such application shall be supported by affidavit and other evidentiary material sufficient to establish a prima facie case for the relief requested.

§5. Subdivisions 2 and 5 of Section 455 of the family court act are amended to read as follows:

2. Except as provided in article five-B of this act, any respondent against whom an order of commitment has been issued, if financially unable to comply with any lawful order issued under this article, upon such notice to such parties as the court may direct, may make application to the court for an order relieving him or her of payments directed in such order and the commitment order. The court, upon the hearing on such application, if satisfied by competent proof that the respondent is financially unable to comply with such order may, upon a showing of good cause until further order of the court, modify such order and relieve the respondent from the commitment order. No such modification shall reduce or annul unpaid sums or installments accrued prior to the making of such application unless the defaulting party shows good cause for failure to make application for relief from the order directing payment prior to the accrual of such arrears. Such modification may increase the amount to be paid pursuant to a lawful order issued under this article nunc pro tunc based on newly discovered evidence. Notwithstanding the foregoing, the declaration by the governor of a state of emergency which resulted in a prohibition on filing such application by the chief judge of the state or chief administrator of the courts during such emergency, shall in itself without further proof from either party constitute good cause for failure to make application for such relief, in which event such relief, provided it is applied for within six months after the date of an administrative order by the chief judge of the state or the chief administrator of the courts permitting the filing of such application, may be granted retroactively to the date of declaration of the emergency or to such other subsequent date as the court in its discretion may deem proper

5. Any respondent may assert his or her financial inability to comply with the directions contained in an order issued under this article or an order or judgment entered in a matrimonial action or in an action for the enforcement in this state of a judgment in a matrimonial action rendered in another state, as a defense in a proceeding instituted against him or her under subdivision one of section four hundred fifty-four of this article or under the judiciary law to punish him or her for failure to comply with such directions. If the court, upon the hearing of such contempt proceeding, is satisfied by competent proof that the respondent is financially unable to comply with such order or judgment, it may, in its discretion, until further order of the court, make an order modifying such order or judgment and denying the application to punish the respondent for contempt; provided, however, that if an order or judgement for child support issued by another state is before the court solely for enforcement, the court may only modify the order in accordance with article five-B of this act. No such modification shall reduce or annul arrears accrued prior to the making of such application for modification unless the defaulting party shows good cause for failure to make application for relief from the order or judgment directing such payment prior to the accrual of such arrears. Such modification may increase such support nunc pro tunc as of the date of the application based on newly discovered evidence. Notwithstanding the foregoing, the declaration by the governor of a state of emergency which resulted in a prohibition on filing such application by the chief judge of the state or chief administrator of the courts during such emergency, shall in itself without further proof from either party constitute good cause for failure to make application for such relief, in which event such relief, provided it is applied for within six months after the date of an administrative order by the chief judge of the state or the chief administrator of the courts permitting the filing of such application, may be granted retroactively to the date of declaration of the emergency or to such other subsequent date as the court in its discretion may deem proper. Any retroactive amount of support due shall be paid in one sum or

periodic sums, as the court shall direct, taking into account any amount of temporary support which has been paid.

§ 6. This act shall take effect immediately.

V. Other New Legislative Proposals

1. Shared Custody Proposal [DRL§240 (1-b) FCA § 413 (1)] (New)

Our Committee has been studying the issue of child support in shared custody situations. Although it does not have special significance related to covid, we now propose an amendment to the Child Support Standards Act to address the situation in *Rubin v. Salla*, 107 A.D.3d 60, 71, 964 N.Y.S.2d 41 (2013). In that case, the First Department, reversing the lower court's denial of the father's motion for summary judgment dismissing mother's action for child support, held that the father who had primary physical custody of a child in a shared custody arrangement where the time was not equally divided (over 50 % with the custodial parent father) could not be ordered to pay child support to the mother even though he had far greater income. The majority opinion by Justice Richter stated: "The mandatory nature of the statutory language undeniably shows that the Legislature intended for the noncustodial parent to be the payer of child support and the custodial parent to be the recipient. The CSSA provides for no other option and vests the court with no discretion to order payment in the other direction." (*Rubin v. Salla*, 107 A.D.3d 60, 67, 964 N.Y.S.2d 41, 47 (2013)). The dissent by Justice Acosta, Presiding Justice of the Appellate Division, First Department, raised issues as to the correctness of this approach as follows:

"I respectfully dissent from the dismissal of the mother's cause of action for child support because the majority's rigid application of the statute sacrifices the child's well-being at the altar of an arithmetic formula. It forces the child to bear the economic burden of his parents' decisions, even where, as here, the child, whose father is a millionaire, is in danger of living in poverty, solely to preserve uniformity and predictability in child support awards. I do not believe this result is what the legislature intended in drafting the Child Support Standards Act (CSSA), especially since the CSSA clearly did not envision every possible custodial situation." (*Rubin v. Salla*, 107 A.D.3d 60, 73-74, 964 N.Y.S.2d 41, 52-53 (2013)).

To address this situation, which is unfair to the child as pointed out by Justice Acosta, our Committee proposes additional language to the Child Support Standards Act which allows the court to order the custodial parent to make recurring payments to the non-custodial parent in special circumstances without changing the basic concept that child support is to be paid by the non-custodial parent to the custodial parent.

Proposal

AN ACT to amend the family court act and domestic relations law in relation to recurring payments to the non-custodial parent in special circumstances in child support proceedings involving joint or shared custody of children

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraphs (h) through (l) of subdivision 1 of section 413 of the family court act, as amended by chapter 567 of the laws of 1989, are renumbered to be paragraphs (i) through (m) and a new paragraph (h) is added in place of former paragraph (h) to read:

(h) Notwithstanding the above, provided that the child is not receiving temporary assistance for needy families, the court may direct the custodial parent to pay a recurring sum of money to the non-custodial parent where the court determines that: (1) the non-custodial parent has been awarded extended visitation; (2) the non-custodial parent is required to pay only the statutory minimum amount of child support to the custodial parent pursuant to paragraph (d) of this subdivision; (3) there is a vast disparity in the parties' income in favor of the custodial parent, and the non-custodial parent does not have the ability to earn sufficient income to provide for the child's basic needs when in his or her care; (4) such payment is necessary to enable the non-custodial parent to provide for the child's basic needs when in the care of the non-custodial parent; (5) directing the custodial parent to make such payment would not result in insufficient funds in the household of the custodial parent to meet the basic needs of the child; or (6) to do otherwise would not be in the child's best interests and would cause the child to unfairly bear the economic burden of the parental separation. Such payment shall be deemed child support for the purposes of enforcement and shall be deemed income to the non-custodial parent.

§2. Paragraphs (h) through (l) of subdivision (1-b) of section 240 of the domestic relations law are renumbered to be paragraphs (i) through (m) and a new paragraph (h) is added in place of former paragraph (h) to read:

(h) Notwithstanding the above, provided that the child is not receiving temporary assistance for needy families, the court may direct the custodial parent to pay a recurring sum of money to the non-custodial parent where the court determines that: (1) the non-custodial parent has been awarded extended visitation; (2) the non-custodial parent is required to pay only the statutory minimum amount of child support to the custodial parent pursuant to paragraph (d) of this subdivision; (3) there is a vast disparity in the parties' income in favor of the custodial parent, and the non-custodial parent does not have the ability to earn sufficient income to provide for the child's basic needs when in his or her care; (4) such payment is necessary to enable the non-custodial parent to provide for the child's basic needs when in the care of the non-custodial parent; (5) directing the custodial parent to make such payment would not result in insufficient funds in the household of the custodial parent to meet the basic needs of the child; or (6) to do otherwise would not be in the child's best interests and would cause the child to unfairly bear the economic burden of the parental separation. Such payment shall be deemed child support for the purposes of enforcement and shall be deemed income to the non-custodial parent.

§3. This act shall take effect on the ninetieth day after it shall have become a law.

2. Firearms Seizure Proposal [DRL 240§§ (3)(h) and 252(9)](New)

Recently enacted into law as chapter 55 of the Laws of 2020 were amendments to the Criminal Procedure Law and the Family Court Act which authorized courts to issue search and seizure orders regarding firearms in connection with orders of protection. Said legislation did not amend the Domestic Relations Law or otherwise address the Supreme Court's statutory authority in a matrimonial action to issue search and seizure orders regarding firearms possessed in violation of an order of protection issued thereunder. Specifically, the Legislature did not add the new search and seizure provisions to sections 240(3)(h) and 252(9) of the Domestic Relations Law, which incorporate by reference the firearms surrender and license suspension and revocation requirements of CPL § 530.14 and Family Court Act §§ 842-a and 846-a. Notwithstanding, in both plenary and consolidated matrimonial proceedings, the Supreme Court retains inherent authority to issue such orders and may do so where necessary and proper to ensure compliance with its order and the safety of protected parties. The Supreme Court has general original jurisdiction in law and equity under the State Constitution even without statutory authorization⁶⁴ Despite the case law, a statutory change is in order so as to avoid confusion.

We now propose amendments conforming sections 240(3)(h) and 252(9) of the Domestic Relations Law to CPL and Family Court Act as amended by chapter 55 of the Laws of 2020.

Proposal:

AN ACT to amend the domestic relations law, in relation to authorizing the court to determine the search and seizure orders of firearms in connection with orders of protection

The People of the State of New York, represented in Senate and Assembly, do enact as

follows:

Section 1. Paragraph (h) of subdivision (3) of section 240 of the Domestic Relations Law is amended to read as follows:

h. Upon issuance of an order of protection or temporary order of protection or upon a violation of such order, the court shall make a determination regarding the suspension and revocation of a license to carry, possess, repair or dispose of a firearm or firearms, ineligibility for such a license and the surrender of a [firearms] firearm, rifle or shotgun in accordance with

⁶⁴ See *Kagen v. Kagen*, 21 N.Y.2d 532 (New York Court of Appeals 1968).

sections eight hundred forty-two-a and eight hundred forty-six-a of the family court act, as applicable. Upon issuance of an order of protection pursuant to this section or upon a finding of a violation thereof, the court also may direct payment of restitution in an amount not to exceed ten thousand dollars in accordance with subdivision (e) of section eight hundred forty-one of such act; provided, however, that in no case shall an order of restitution be issued where the court determines that the party against whom the order would be issued has already compensated the injured party or where such compensation is incorporated in a final judgment or settlement of the action. The court may where the party against whom the order of protection or temporary order of protection was issued willfully refuses to surrender such firearm, rifle or shotgun pursuant to subdivisions (a) and (b) of section eight hundred forty-two-a of the family court act, or for other good cause shown, order the immediate seizure of such firearm, rifle or shotgun, and search therefor, pursuant to an order issued in accordance with article six hundred ninety of the criminal procedure law, consistent with such rights as said party may derive from this article or the constitution of this state or the United States.

§ 2. Subdivision 9 of section 252 of the domestic relations law is amended to read as follows:

9. Upon issuance of an order of protection or temporary order of protection or upon a violation of such order, the court shall make a determination regarding the suspension and revocation of a license to carry, possess, repair or dispose of a firearm or firearms, ineligibility for such a license and the surrender of a [firearms] firearm, rifle or shotgun in accordance with sections eight hundred forty-two-a and eight hundred forty-six-a of the family court act, as applicable. Upon issuance of an order of protection pursuant to this section or upon a finding of a violation thereof, the court also may direct payment of restitution in an amount not to exceed ten thousand dollars in accordance with subdivision (e) of section eight hundred forty-one of such act;

provided, however, that in no case shall an order of restitution be issued where the court determines that the party against whom the order would be issued has already compensated the injured party or where such compensation is incorporated in a final judgment or settlement of the action. The court may where the party against whom the order of protection or temporary order of protection was issued willfully refuses to surrender such firearm, rifle or shotgun pursuant to subdivisions (a) and (b) of section eight hundred forty-two-a of the family court act, or for other good cause shown, order the immediate seizure of such firearm, rifle or shotgun, and search therefor, pursuant to an order issued in accordance with article six hundred ninety of the criminal procedure law, consistent with such rights as said party may derive from this article or the constitution of this state or the United States.

§3. This act shall take effect immediately.

VI. Previously-Endorsed Legislative Proposals with Special Covid Related Significance

In this year's report, we have divided our previously endorsed legislative proposals into two categories in order to highlight those with special covid related significance during covid,

1. Proposal Regarding Rebuttable Presumption of Expenses in Matrimonial Actions [CPLR Rule 4533-c]

We reintroduce our legislative proposal from our 2019 and 2020 reports for a rebuttable presumption on proof of expenses in matrimonial cases pursuant to CPLR rule 4533-c. This measure has special covid related significance because it enables parties to introduce expenses without having the person who performed the service appear, which might be especially difficult during covid.⁶⁵ The proposal would impose a cap of \$10,000 on invoices in matrimonial cases, a much more realistic amount than the existing \$2,000 cap on invoices in general civil cases pursuant to rule 4533-a. As Vincent Alexander observes in the Practice Commentaries regarding the general rule for all civil cases, "The amount specified in the rule as originally adopted has steadily increased by amendment over time and is long overdue for an upward adjustment." (CPLR 4533-a). The rule we propose for matrimonial actions would also allow invoices for any court ordered expenses, a much broader category than allowed under rule 4533-a and would allow more than one invoice per provider. These differences are designed to make it easier for matrimonial litigants, especially unrepresented litigants, to admit documents into evidence. We propose the new rule as a separate rule for matrimonial cases because in family matters, it is especially frequent and necessary for small expenses to be incurred for children's expenses for several children and other family matters.

This rule, like rule 4533-a, allows a plaintiff to prove the reasonableness and necessity for an itemized bill for services without having to produce the person who provided the invoice, provided that certain formal requirements specified are met.⁶⁶

Unlike CPLR 4533-a which is labelled "prima facie proof," our rule creates a rebuttable presumption to make clear that it does not preclude rebuttal. Vincent Alexander notes, with regard to rule CPLR 4533-a, that, even though it is labelled "prima facie proof of damages," it allows for possible rebuttal of the expenses by requiring notice to the other party that the bill will be offered without foundation evidence at least 10 days before trial so that the other party can subpoena witnesses and gather rebuttal evidence. However, our rule is even clearer so that everyone, even self-represented litigants, will understand that the presumption can be overcome. This will prevent

⁶⁵ We thank Special Referee, Marilyn Sugarman, Esq. for bringing this issue to our attention.

⁶⁶ These formal requirements are summarized by Vincent Alexander in the Practice Commentaries regarding the general civil Rule 4533-a as follows: "The formal requirements of CPLR 4533-a are as follows: (1) the bill or invoice must be itemized; (2) the bill must be "marked paid" or a receipt, such as a cancelled check, must be introduced; (3) the person who rendered the services or made the repairs, or an authorized agent of such person, must have certified the bill and made a verified statement that (a) no part of the payment will be refunded, and (b) the charges for the services or repairs were at the provider's usual rate." (See N.Y. CPLR 4533-a (McKinney)).

the rule from being abused. Our rule also provides a procedure to follow so that the party offering the proof will get notice in sufficient time that the other party intends to rebut the presumption and can prepare to subpoena witnesses or gather other proof for the trial. In addition, our rule is labelled “proof of expenses” rather than “proof of damages” to reflect the fact that, in matrimonial actions, the parties usually claim expenses rather than damages which are more commonly sought in tort and personal injury actions. Our new rule also uses gender neutral language by speaking of “the affiant’s employer” rather than “his employer.”

Our proposal was not enacted in the 2019 or 2020 Legislative seasons, It is our hope that it will be enacted in 2021. This proposal is needed more than ever during covid when filings and appearances in matrimonial actions are more limited and difficult. It is designed to make it easier for matrimonial litigants to admit documents as to their expenses into evidence without having to produce the person who prepared the document, which might be especially difficult during the pandemic.

Proposal:

AN ACT to amend the civil practice law and rules, in relation to expenses in matrimonial actions

The People of the State of New York, represented in Senate and Assembly, do enact as

follows:

Section 1: The civil practice law and rules is amended by adding a new rule 4533-c to read as follows:

Rule 4533-c. Rebuttable presumption of expenses in matrimonial actions.

(a) This rule applies to all actions wherein all or part of the relief granted is divorce, all actions brought in supreme court for custody or visitation, all applications to modify a supreme court order of custody or visitation, all actions, wherein all or part of the relief granted is the dissolution, annulment or declaration of the nullity of a marriage, all proceedings to obtain a distribution of marital property following a foreign judgment of divorce, and all post-judgment proceedings following a judgment of divorce.

(b) Notwithstanding anything to the contrary in rule 4533-a, there shall be a rebuttable presumption that an itemized bill or invoice, receipted or marked paid, for court-ordered

obligations, child related expenses, household expenses, goods, services or repairs of an amount not in excess of ten thousand dollars shall be admissible in evidence and represents the reasonable value and necessity of such expenses, goods, services or repairs itemized therein in any action or proceeding set forth in subdivision (a), provided that it is accompanied by a sworn statement by the person, firm or corporation, or an authorized agent or employee thereof, providing such goods or services or making such repairs and charging for the same, stating that (1) it provided the goods or services or made the repairs for which the expenses were incurred in the amount indicated, (2) no part of the payment received therefor will be refunded to the debtor, and (3) the amounts itemized therein are the usual and customary rates charged for such expenses, goods, services or repairs by the affiant or the affiant's employer; and provided further that a true copy of such itemized bill or invoice together with a notice of intention to introduce such bill or invoice into evidence pursuant to this rule (indicating on its face that any objections must be in writing and set forth the basis for such objection(s)) is served upon the adverse party at least thirty days before the trial. Such presumption may be rebutted at trial only if the adverse party has served on the party submitting the expense and filed with the court a written notice of intention to rebut such bill or invoice setting forth the basis for such objection(s) at least fifteen days prior to trial.

§2. This act shall take effect on the sixtieth day after it shall have become a law and shall apply to matrimonial actions commenced on or after such effective date.

2. Proposal for Limited Appearance by Attorneys for Counsel Fee Applications by the Non-Monied Spouse [DRL § 237(a)]

We continue to recommend our previously-endorsed measure designed to encourage attorneys to make application for counsel fees by non-monied spouses in matrimonial actions by permitting them to make a limited appearance in the action for this purpose without the fear that they will become attorney of record obligated to continue the representation even if the application is denied. This proposal will make it easier for non-monied spouses to obtain counsel fees. It supplements our proposal, which was enacted in 2015 (L. 2015, c. 447), which amended DRL§ 237(a) to clarify and codify on a statewide basis that unrepresented litigants should not be required to file an affidavit detailing fee arrangement when seeking counsel fees. The enacted measure enables unrepresented litigants who cannot afford counsel to make application for counsel fees to pursue their divorce cases on an equal footing with their spouse, even though they are the “non-monied spouse” in the matrimonial action. The proposed measure also attempts to help unrepresented litigants in another way, by encouraging counsel to help unrepresented litigants whose means are moderate in comparison with those of their spouses in divorce litigation, to apply for counsel fees as the non-monied spouse pursuant to DRL§ 237(a).

This proposal modifies DRL§ 237(a). to provide that notwithstanding anything in CPLR 321 to the contrary, an attorney may make a limited appearance to apply for counsel fees for the non-monied spouse in a divorce action. This proposal has special covid related significance. Non-monied spouses are especially disadvantaged during covid if they do not have counsel because it is difficult to file papers and make appearances. This bill would make it easier for them to exercise their rights pursuant to DRL 237(a) to seek an award of counsel fees in the litigation by encouraging attorneys to make applications on their behalf for counsel fees and not be required to make a formal appearance for the entire case.

The concept of permitting a limited appearance by attorneys to make application for counsel fees by non-monied spouses in matrimonial actions was first proposed as an administrative rule by the Matrimonial Commission chaired by Hon. Sondra Miller (who serves as Honorary Chair of this Committee), in its 2006 Report, as a way to level the playing field in a divorce action between the monied spouse and the non-monied spouse.⁶⁷ However, our Committee decided that a statutory amendment to Domestic Relations Law § 237(a) dealing with applications for counsel fees by the non-monied spouse was the most effective way to proceed. Inasmuch as the rules regarding attorney appearances are contained in CPLR 321, our proposed amendment provides that it applies notwithstanding the provisions of that section. Said statute states that once a party has

⁶⁷ Matrimonial Commission, Report to the Chief Judge of the State of New York [Feb 2006], available at www.courts.state.ny.us/ip/matrimonial-commission, at page 65 provides: *“Various individuals provided testimony and submissions suggesting that special appearances or appearance on initial applications by counsel would serve to reduce delay and stress to those parties who appear without counsel and must determine how to navigate the divorce process. The Commission recommends adoption of an administrative rule to allow attorneys to make a special or limited appearance for the purpose of making an application for counsel fees at the time of the commencement of an action. The adoption of such a rule would ease the burden on litigants who would otherwise have to make applications pro se, and would encourage attorneys to make such applications, without the fear that in the event the application is denied, the attorney would then be deemed attorney of record and be compelled to continue the representation of a client without the prospect of being paid.”*

appeared in an action, such party may not act in person in the action except by consent of the court. It also states that an attorney can only withdraw from a case under certain specified conditions.⁶⁸

A 2002 Report on Unbundled Services by a State Bar Commission (the “NYSBA Report”),⁶⁹ at footnote 2, suggests language for amendment of CPLR 321 to accommodate limited scope representation.⁷⁰ In the NYSBA Report, the Commission also expressed the view that limited scope representation in a litigation context was problematic while it is often justified in a transactional context, and should be allowed in court-annexed or non-profit legal services programs that are structured to accommodate limited appearances by pro bono attorneys.⁷¹

In 2009, the Code of Professional Responsibility was replaced by the new Rules of Professional Conduct, incorporating many of the suggestions of the NYSBA Report.⁷² Rule 1.16 (c) prescribes when a lawyer may withdraw from representation. Rule 6.5 deals with limited scope representation by pro bono attorneys. Although it deals only with conflicts issues, rule 6.5 seems to authorize use of a limited appearance by specific court-annexed or non-profit legal services programs that are structured to accommodate an appearance limited in tasks and objectives.⁷³

However, rule 1.2 (c) of the Rules of Professional Conduct leaves open the question whether limited scope representation in a matter where an attorney bills time such as a matrimonial action is reasonable under the circumstances. Rule 1.2(c) provides “A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances, the client gives

⁶⁸ CPLR 321 reads as follows:

§ 321. Attorneys.

(a) Appearance in person or by attorney. A party, other than one specified in [section 1201](#) of this chapter, may prosecute or defend a civil action in person or by attorney...If a party appears by attorney such party may not act in person in the action except by consent of the court.

(b) Change or withdrawal of attorney. 1. Unless the party is a person specified in [section 1201](#), an attorney of record may be changed by filing with the clerk a consent to the change signed by the retiring attorney and signed and acknowledged by the party. Notice of such change of attorney shall be given to the attorneys for all parties in the action or, if a party appears without an attorney, to the party.

2. An attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct.”

⁶⁹ New York State Bar Association, Commission on Providing Access to Legal Services to Middle Income Consumers, Report and Recommendations on Unbundled Legal Services, December 2002.

⁷⁰ Footnote 2 of the NYSBA Report provides:

“If a limited appearance to accommodate unbundling were considered desirable, an amendment to CPLR § 321 would be required. § 321 provides that if a party appears by an attorney, the party may not act in person in the case “except with the consent of the court” and that an attorney of record may not withdraw or be changed “without an order of the court in which the action is pending”. Such an amendment could be an addition to sub-paragraph (a) substantially as follows: “An attorney may, upon written agreement with a client, enter an appearance limited on tasks and objectives. The attorney who has filed a limited appearance may withdraw when the objectives set forth in the appearance have been fulfilled.”

⁷¹ NYSBA Report, at pp.5-6.

⁷² NYS Unified Court System, Part 1200, Rules of Professional Conduct, April 1, 2009.

⁷³ See article by Juanita Bing Newton, Barbara Mule, and Susan W. Kaufman, “New Rule Helps Self-Represented Litigants,” NYLJ, July 2, 2008. The volunteer programs run by the NYC Civil Court are the types of programs contemplated by the Rule.

informed consent and where necessary notice is provided to the tribunal and/or opposing counsel.” Reasonableness in the context of a limited appearance to seek counsel fees might involve an inquiry whether the litigant is prepared to represent him/herself or hire different counsel on the remaining issues in the case if the fees are denied or only partially granted. Also, did the litigant understand the limitation in scope and the fee to be charged?

We believe these questions are answered if the attorney complies with his/her obligations under the Rules of Professional Conduct and with all applicable rules and laws of this state regarding procedures for attorneys in domestic relations matters, including the obligation to provide the client with a statement of client’s rights and responsibilities, and the obligation to sign a retainer agreement with the client making clear that the scope of services is limited to making application for counsel fees only, the amount of any fee to be charged, and that the attorney has no affirmative obligation to represent the client on any other issue in the case until a new retainer is signed (*see* 22 NYCRR § 1400.0 and rule 1.5 (d) and (e) of the New York Rules of Professional Conduct at 22 NYCRR § 1200). Our proposal contains all these requirements clearly spelled out.⁷⁴

Limited scope representation has recently been endorsed by the NYSBA House of Delegates as a means of providing sorely needed access to justice to low and moderate-income persons who do not qualify for civil legal assistance in any other way. At their meeting on November 5, 2016, the NYSBA House of Delegates unanimously approved a committee report by the President’s Committee on Access to Justice on limited scope representation which recommended that the Association support the “concept and utilization of limited scope representation for low and moderate-income individuals in certain civil cases.”⁷⁵

On December 16, 2016, an Administrative Order was signed by Chief Administrative Judge Marks with approval of the Administrative Board that declared that “limited scope legal assistance is in the best interests of both litigants and the courts when it is properly employed in such civil matters as consumer credit disputes, foreclosures, evictions, divorces and veterans’ rights cases.”⁷⁶ The Administrative Order requires, among other things, that the retainer agreement must be written clearly and show that clients gave their informed consent to what fees, if any, a lawyer is entitled. In addition, it requires that the court or tribunal the lawyer is appearing before must deem the limited appearance appropriate.

Our proposal is consistent with the Administrative Order because it requires that attorneys comply with the applicable rules and laws of this state regarding procedures for attorneys in domestic relations matters, which would include the mandates of the Administrative Order, since divorce is one of the types of civil actions specifically contemplated by the Order. In addition, our proposal expressly requires compliance with 22 NYCRR § 1400 and 22 NYCRR § 1200 which

⁷⁴ The retainer requirement would not apply where the attorney makes the application for counsel fees without compensation since 22 NYCRR § 1400.1 provides that Part 1400, which provides procedures for attorneys in domestic relations matters, does not apply to attorneys representing clients without compensation, except as to the requirement for a Statement of Client’s Rights and Responsibilities.

⁷⁵ New York State Bar Association, State Bar News, “Limited scope, diversity/inclusion CLE among items House considers,” November/December 2016, Vol. 58, No. 6, pg.1.

⁷⁶ See Joel Stashenko, “NY Courts Endorse ‘Limited-Scope’ Representation,” *NYLJ*, 12/20/16, Pg.1, Col. 5.

specify that the retainer agreement must be written clearly and show that clients gave their informed consent to what fees, if any, a lawyer is entitled.⁷⁷

Moreover, not only the New York State Bar and the New York courts, but also the New York Legislature have supported the concept of limited scope representation. By enacting Judiciary Law §35(8) in 2006, the Legislature implicitly authorized attorneys to provide unbundled or limited scope legal services to level the playing field for non-monied spouses in matrimonial actions. Although the 2006 bill memo in support of the enactment of Judiciary Law section 35(8) is silent on the subject of limited scope representation, the legislation requires Supreme Court Justices to appoint counsel to represent an indigent party in a divorce action on issues such as custody over which the Family Court could have exercised jurisdiction, while the remaining issues in the action would have to be handled *pro se* or by a different attorney on a full fee basis. Thus, it is our position that the limitation in scope of representation was justifiable in order to provide representation to the non-monied spouse in a matrimonial action. The 2006 bill memo states:

*“There is no justification for providing indigent persons an attorney in family court and not in supreme court. To further exacerbate this problem, it is possible for a monied spouse, faced with a custody case in family court, to commence a divorce action and seek to remove the custody determination to supreme court. If the other spouse qualified for an attorney in family court, such action could deprive the non-monied spouse of representation.”*⁷⁸

Our proposal seeks to make it easier for non-monied spouses in matrimonial actions to obtain counsel fees in order to level the playing field. Thus, our proposal is analogous to Judiciary Law § 35(8) which the Legislature has already enacted. Limited scope representation for this purpose, together with the protections we have built into the proposed rule to make sure the litigant understands the limited nature of the representation, is a reasonable exception to the standard rules governing attorney conduct in litigation matters.

If enacted, this legislation will reduce the number of indigent litigants that are forced to either represent themselves or rely on the limited number of pro bono and assigned counsel available to assist them.⁷⁹ Thus, our proposal is clearly an access to justice measure furthering the Chief Judge’s Excellence Initiative.

⁷⁷ 22 NYCRR§ 1400 and 22 NYCRR§ 1200 read as follows:

“An attorney who undertakes to represent a party and enters into an arrangement for, charges or collects any fee from a client shall execute a written agreement with the client setting forth in plain language the terms of compensation and the nature of services to be rendered. The agreement, and any amendment thereto, shall be signed by both client and attorney...” N.Y. Comp. Codes R. & Regs. tit. 22, § 1400.3

“A lawyer shall communicate to a client the scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible. This information shall be communicated to the client before or within a reasonable time after commencement of the representation and shall be in writing where required by statute or court rule.” Rule 1.5(b), N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.0

⁷⁸ See bill memo 2006 A. 10447 available at <https://nyassembly.gov/leg/?bn=A10447&term=2005>.

⁷⁹ See Committee Response to Request for Public Comment on Proposed Guidelines for Limited Scope Representation in Civil Matters dated September 24, 2018 attached as Appendix “E” to our 2019 Annual Report to the Chief Administrative Judge available at <https://www.nycourts.gov/LegacyPDFS/IP/judiciaryslegislative/pdfs/2019-Matrimonial.pdf>

Proposal:

AN ACT to amend the domestic relations law, in relation to a limited appearance by attorneys for counsel fee applications for the non-monied spouse

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision (a) of section 237 of the domestic relations law, as amended by chapter 447 of the laws of 2015, is amended to read as follows:

(a) In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to declare the validity or nullity of a judgment of divorce rendered against a spouse who was the defendant in any action outside the State of New York and did not appear therein where such spouse asserts the nullity of such foreign judgment, (5) to obtain maintenance or distribution of property following a foreign judgment of divorce, or (6) to enjoin the prosecution in any other jurisdiction of an action for a divorce, the court may direct either spouse or, where an action for annulment is maintained after the death of a spouse, may direct the person or persons maintaining the action, to pay counsel fees and fees and expenses of experts directly to the attorney of the other spouse to enable the other party to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. There shall be a rebuttable presumption that counsel fees shall be awarded to the less monied spouse. In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, pendente lite, so as to enable adequate representation from the commencement of the proceeding. Applications for the award of fees and expenses may be made at any time or times prior to final judgment. Both parties

to the action or proceeding and their respective attorneys, shall file an affidavit with the court detailing the financial agreement between the party and the attorney. Such affidavit shall include the amount of any retainer, the amounts paid and still owing thereunder, the hourly amount charged by the attorney, the amounts paid, or to be paid, any experts, and any additional costs, disbursements or expenses. An unrepresented litigant shall not be required to file such an affidavit detailing fee arrangements when making an application for an award of counsel fees and expenses; provided he or she has submitted an affidavit that he or she is unable to afford counsel with supporting proof, including a statement of net worth, and, if available, W-2 statements and income tax returns for himself or herself. Any applications for fees and expenses may be maintained by the attorney for either spouse in his or her own name in the same proceeding. Payment of any retainer fees to the attorney for the petitioning party shall not preclude any awards of fees and expenses to an applicant which would otherwise be allowed under this section. Notwithstanding anything to the contrary contained in CPLR 321, applications pursuant to this section on notice to the court and opposing counsel may be made by an attorney who enters an appearance for the limited purpose of seeking fees and expenses on behalf of a non-monied spouse; provided, however, that nothing herein shall exempt the attorney from complying with the applicable rules of professional conduct and with all applicable rules and laws of this state regarding procedures for attorneys in domestic relations matters, including without limitation, 22 NYCRR § 1400 and rule 1.5 of 22 NYCRR § 1200, which require the attorney to provide the client with a statement of client's rights and responsibilities, and where the attorney's services are to be provided for compensation, to enter into a signed written retainer agreement with the client making clear that the services required to be provided by the attorney are limited to the application for counsel fees and do not require the attorney to represent the client on any other issue in the case; and provided

further that until such time as a new retainer is signed, there is no affirmative obligation to represent the client on any other issue in the case.

§2. This act shall take effect immediately.

VII. Other Previously Endorsed Legislative Proposals

1. Modified Statutory Proposal for Divorce Venue in Matrimonial Cases [CPLR 509, 514] (New)

Although this measure does not have special covid related significance, we once again endorse our proposal on divorce venue this year as one of our two most important legislative priorities (along with the proposal on mandatory electronic filing in matrimonial cases). We believe this measure furthers the Chief Judge’s Excellence Initiative by improving the efficient operation of the courts’ disposition of divorce cases while at the same time furthering access to justice. Thus, it promotes both “operational” and “decisional” excellence.

Plaintiffs have for many years been regularly utilizing the mechanism allowed by CPLR 509 to designate venue in the county of their choice even though none of the parties are residents of that county. The reason why CPLR 509 designations of venue have been so frequent is partly for the convenience of attorneys who do not want to travel to file papers, and partly to take advantage of what is widely believed to be expedited processing of divorces in certain counties. The problems arising from being “A Mecca for Matrimonial Matters” were pointed out in *Castaneda v Castaneda*, 36 Misc 3d 504, at 506 [Sup Ct 2012].

Designating venue in a divorce action in a distant county from the residence of the parties and children burdens the judicial resources of that county and deprives residents of that county of access to those resources. It means that Judges will have to appoint and deal with counsel and mental health and other professionals in distant jurisdictions with whose work and expertise they are unfamiliar. It may also mean that parties and their children may have to travel long distances to have matters heard or meet with professionals in the venue designated. When venue is designated in a distant county, defendant is more likely to default rather than answer, giving up valuable rights in the divorce, and increasing the likelihood of post-judgment applications. In *Castenada*, Justice Cooper suggested that one of the reasons plaintiffs in distant counties may choose to file in a distant county is that they know their spouse will be likely to default if they must travel far. When these defendants begin to understand the consequences of having defaulted in that critical issues relating to spousal support, custody and support of children, and distribution of marital property have been inadequately addressed in the action, they try to vacate the default judgment or bring actions for post judgment relief to modify the terms.

Even if defendants do not default and are able to answer electronically, as long as plaintiffs can utilize CPLR 509 to designate venue in matrimonial actions in distant counties, defendants may still be required to travel long distances. Judges may require appearances to resolve conflicts in the papers or testimony on issues where income needs to be clarified on the record, or where the mandatory records checks reveal a disclosed or undisclosed prior or present Order of Protection or pending or prior neglect proceedings, or that a party is a registered sex offender. See *Otto v. Otto*, 150 A.D.2d 57, 60, 545 N.Y.S.2d 321(Second Dept. 1989), where the court, in reversing and remanding the case to the trial court, held that there must be an inquest to determine the economic issues of a divorce where there was a default judgment.

Compounding the need for the omnibus matrimonial venue statute we propose, was a new law enacted in 2017 amending CPLR 503 (a) to permit as another option to venue related to residence of the parties, venue in which a substantial part of the events or omissions giving rise to

the claim occurred. This new law (L. 2017, c. 366) was not designed with matrimonial actions in mind. By adding another venue option unrelated to residence without changing plaintiff's ability to designate a venue unrelated to residence pursuant to CPLR 509, which remains intact, it only underscores the immediate need for our omnibus matrimonial divorce venue legislation. Not only will our proposal override CPLR 509 designations (except where expressly permitted in cases where addresses of the parties are not a matter of public record or where confidentiality orders exist), it will also override the provisions of the new law.

Electronic filing will greatly alleviate problems for defendants caused by CPLR 509 venue designations, and will also make it easier for plaintiffs to file and prosecute divorce actions in the county of residence without the need to forum shop because divorce actions will proceed more efficiently, saving time for both Judges and litigants. However, our legislative proposal is still necessary to eliminate the abuses caused by CPLR 509 designations of venue in distant counties.

The burden of CPLR 509 venue designations has been great on particular counties upstate and downstate for many years, significantly, in the 1st, 2nd, 6th, 7th, and 8th Judicial Districts. On a trip upstate in the fall of 2015, Justice Sunshine, Chair of the Committee, met with members of the matrimonial Bench in Buffalo and Rochester.⁸⁰ He learned that a major concern of matrimonial judges in these areas is the large number of uncontested divorce actions filed in their counties. Court Research Statistics on Uncontested Divorce Filings show that Erie County where Buffalo is located and Monroe County where Rochester is located both have sizable numbers of

⁸⁰ These meetings were arranged by Hon. Sharon Townsend in Buffalo and by Hon. Richard Dollinger and Sharon Sayers, Esq. in Rochester. Justice Townsend, now retired, was then a member of the Committee, and Ms. Sayers continues to be a member of the Committee. The trip was in connection with a presentation by Justice Sunshine at the Family Violence Task Force Seminar in Rochester on October 7, 2015.

filings, as do Nassau, Suffolk and Westchester.⁸¹ The other boroughs of New York City, aside from Richmond, each have an even greater number.⁸²

A number of thoughtful proposals have been made in the last few years concerning ways to change the CPLR rules by bar association groups and judges and clerks in New York County. These proposals would have overridden the ability of plaintiffs to designate the place of trial in divorce actions by amending CPLR 509. Under existing CPLR 509, only the plaintiff has this ability, and under existing CPLR 510(1), only the defendant may demand a change in the designation.⁸³ Courts do not have the power to change designations of venue in matrimonial

⁸¹ In 2014, Erie County, where Buffalo is located, had 2,130 uncontested divorce filings, and Monroe County, where Rochester is located, had 1,281 uncontested divorce filings. Similarly, uncontested divorce filings for 2014 for Nassau County were 1,633, for Suffolk County were 2,423, and for Westchester County were 1,978 (*see* OCA Supreme Court Civil Matrimonials Filed and Disposed Comparison Report 2013 and 2014 contained in Appendix “G”). In 2015, Erie County had 1,909 uncontested divorce filings, and Monroe County had 1,367 uncontested divorce filings. Similarly, uncontested divorce filings for 2015 for Nassau County were 2,014, for Suffolk County were 2,366, and for Westchester County were 2,097 (*see* OCA Supreme Court Civil Matrimonials Filed and Disposed Comparison Report 2014 and 2015 contained in Appendix “G”). In 2016, Erie County had 1,762 uncontested divorce filings, and Monroe County had 1,339 uncontested divorce filings. Similarly, uncontested divorce filings for 2016 for Nassau County were 1,818, for Suffolk County were 2,396, and for Westchester County were 2,004 (*see* OCA Supreme Court Civil Matrimonials Filed and Disposed Comparison Report 2015 and 2016 contained in Appendix “G”). In 2017, Erie County had 1,350 uncontested divorce filings, and Monroe County had 1,285 uncontested divorce filings. Similarly, uncontested divorce filings for 2017 for Nassau County were 1,695, for Suffolk County were 2,272, and for Westchester County were 2,062 (*see* OCA Supreme Court Civil Matrimonials Filed and Disposed Comparison Report 2016 and 2017 contained in Appendix “G”). In 2018, Erie County had 1,638 uncontested divorce filings, and Monroe County had 1,226 uncontested divorce filings. Similarly, uncontested divorce filings for 2018 for Nassau County were 1,749, for Suffolk County were 2,273, and for Westchester County were 1,982 (*see* OCA Supreme Court Civil Matrimonials Filed and Disposed Comparison Report 2017 and 2018 contained in Appendix “G”). In 2019, Erie County had 1,491 uncontested divorce filings, and Monroe County had 1,385 uncontested divorce filings. Similarly, uncontested divorce filings for 2019 for Nassau County were 2,099, for Suffolk County were 2,255, and for Westchester County were 2,111 (*see* OCA Supreme Court Civil Matrimonials Filed and Disposed Comparison Report 2018 and 2019 contained in Appendix “G”). Statistics for the full year 2020 are not available yet.

⁸² In 2014 Uncontested divorce filings for the Bronx were 3,914, for Kings were 4,331, for Queens were 3,556, and for Richmond were 527 (*see* OCA Supreme Court Civil Matrimonials Filed and Disposed Comparison Report 2013 and 2014 contained in Appendix “G”). In 2015, Uncontested divorce filings for the Bronx were 3,845, for Kings were 4,389, for Queens were 4,719, and for Richmond were 543 (*see* OCA Supreme Court Civil Matrimonials Filed and Disposed Comparison Report 2014 and 2015 contained in Appendix “G”). In 2016, Uncontested divorce filings for the Bronx were 4,382, for Kings were 3,983, for Queens were 4,013, and for Richmond were 609 (*see* OCA Supreme Court Civil Matrimonials Filed and Disposed Comparison Report 2015 and 2016 contained in Appendix “G”). In 2017, Uncontested divorce filings for the Bronx were 4,365, for Kings were 3,550, for Queens were 4352, and for Richmond were 559 (*see* OCA Supreme Court Civil Matrimonials Filed and Disposed Comparison Report 2016 and 2017 contained in Appendix “G”). In 2018, uncontested divorce filings for the Bronx were 4276, for Kings were 4,652, for Queens were 4,856, and for Richmond were 557 (*see* OCA Supreme Court Civil Matrimonials Filed and Disposed Comparison Report 2017 and 2018 contained in Appendix “G”). In 2019, uncontested divorce filings for the Bronx were 4,461, for Kings were 4,800 for Queens were 4,818, and for Richmond were 602 (*see* OCA Supreme Court Civil Matrimonials Filed and Disposed Comparison Report 2018 and 2019 contained in Appendix “G”). Statistics for the full year 2020 are not available yet.

⁸³ In the Practice Commentaries, Vincent Alexander explains: “CPLR 510 specifies three grounds for a motion to change venue. Subdivision (1) provides for such motion when venue is improper, *i.e.*, plaintiff has failed to comply with the rules specified in CPLR 501 and 503-508 or some other venue-regulating statute (e.g., CPLR 7502(a)). Only

actions made by plaintiffs outside of the county of residence of one of the parties if defendants do not ask for a change in venue.⁸⁴ One such proposal to change the divorce venue rules would have applied only to divorces involving minor children of the marriage. The Committee agrees that in divorces involving minor children venue should be related to residence so that the courts can make appropriate decisions as to custody and parenting time and support as to the child, having, where appropriate, the involvement of an attorney for the child familiar with the services available where the child resides. However, our Committee believes that all divorce actions should have venue related to residence. Another such proposal by the New York State Bar Standing CPLR Committee, which our Committee was asked to review, would have applied to all matrimonial actions, but that proposal requires venue to be the county of residence of one of the parties, not taking into account at all the residence of the children.

In our prior annual reports, the Matrimonial Practice Advisory and Rules Committee put forth its own proposal to adopt a new CPLR 514, which is an omnibus matrimonial venue proposal which applies to all divorce actions, not just uncontested divorces, as well as actions in Supreme Court for custody and visitation, all applications to modify a Supreme Court order of custody or visitation, all post judgment proceedings, and all matrimonial actions described in DRL § 236(B). The proposal was included as part of the Office of Court Administration’s 2017 Legislative Program as OCA 2017-52, and introduced by Senator Bonacic as 2017-18 S. 5736.

In 2018 we modified our proposal to make it even stronger in several major respects related to good cause exceptions. First, in our previous proposal, we required that venue be the residence of one of the parties but allowed courts to take into consideration the residence of a child or children of the marriage through a good cause exception that also allowed courts to consider situations where addresses are unknown or subject to a confidentiality order. In this modified proposal, we provided that venue in matrimonial actions shall be in a county in which either party resides, or if there are minor children of the marriage, in the county where one of the parties or a child or children of the marriage resides. Thus, good cause applications will not be necessary where there are children.

In the modified 2018 proposal, we also addressed concerns expressed by Sanctuary for Families regarding our divorce venue post judgment application rule proposal about when the address of either party or their child(ren) is not a matter of public record or is subject to an existing confidentiality order.⁸⁵ The revised proposal provides that, in such cases where

the defendant may make this motion; if the plaintiff places venue in an improper county, she forfeits the right to select a proper one.” See N.Y. CPLR 510 (McKinney).

⁸⁴ “A change of venue requires a motion. That the change cannot be made by the court *sua sponte* is an old rule, generally still followed.” (16 Siegel, N.Y. Prac. § 116 (5th ed.)).

⁸⁵ See Appendix “G-2” to our 2019 Annual Report to the Chief Administrative Judge available at <https://www.nycourts.gov/LegacyPDFS/IP/judiciaryslegislative/pdfs/2019-Matrimonial.pdf>

This Appendix contains the comments of Sanctuary for Families regarding our divorce venue post judgment application rule which was adopted in 2017. We are pleased that our divorce venue rule proposal for post judgment enforcement and modification applications has been adopted by the Administrative Board and is now in effect. However, this rule is not applicable to filings of divorces, but only to applications for post judgment relief. These measures, while helpful, do not address the major problem, namely that designations of venue in counties unrelated to

confidentiality and safety are paramount concerns, the place of trial designated by plaintiff may be as specified pursuant to CPLR 509. This conforms the legislative proposal to the rule on divorce venue post judgment applications adopted in 2017, which we discussed earlier in this report.⁸⁶

Another change in the modified 2018 proposal was that there is only one good cause exception rather than two. One of the good cause exceptions in our original proposal could be read as allowing sua sponte transfers of venue by judges. Concerns were expressed to us by the New York State Bar Association Family Law Section about the possibility of sua sponte transfers of venue to a county with no nexus to the parties simply because the judges in that county were less busy, when the venue originally designated was proper to begin with. Therefore, our revised 2018 proposal retained only the second good cause exception. Rather than allow courts to transfer venue to another county, a time-consuming process fraught with delays, the second good cause exception, which was retained by our modified 2018 proposal, requires that venue be proper in the first place, but gives the court authority for good cause shown to allow the trial to proceed in the county where it was brought. This provision might be used where neither party to the divorce action or their child(ren) resides in New York State. Such designation of venue would be improper under our proposal which requires that venue be the residence of one of the parties or their child(ren). However, the plaintiff could make a motion to have it remain in the county designated under the good cause exception where, for example, the parties and their child(ren) had recently left the state. The good cause exception might also be useful to a low-income litigant who could only find pro bono or reduced fee representation in a county that was not the residence of the parties or their child(ren).

In addition to the foregoing changes, the revised 2018 proposal was much simpler and easier to understand, but we believe that it continues to accomplish its purpose of eliminating excessive venue designations in counties unrelated to residence of the parties or their child(ren), whether pursuant to CPLR 509 or, because of the recent changes adopted by chapter 366 of the Laws of 2017, in amendments to CPLR 503(a). This, in turn, will ensure that courts will have available to them in their decision-making important information about children and families that would not be available if the venue were not related to residence.

Under our revised 2018 proposal, delays in transferring venue sua sponte will be avoided. It is only when the court decides not to allow the trial to proceed when a venue transfer will be needed. Thus, the percentage of transfers of venue will be much smaller. Moreover, by having a separate CPLR rule for matrimonial venue, much the way as there is a separate rule for consumer credit in CPLR 513, the Committee's proposal avoids the cumbersome drafting problems entailed in amending sections of the CPLR (such as CPLR 509 and 510) intended to apply to all types of actions. Our proposed CPLR 514 should have no impact on non-matrimonial actions.

In 2019 we proposed one further modification to our 2018 proposal which addresses concerns raised by Assembly Counsel that our proposed CPLR 514 should expressly contradict CPLR 509 because the latter provides that it applies "notwithstanding any provision of this article." Even though our prior proposal for CPLR 514(b) provided that it applies "notwithstanding

residence deny access to justice to litigants on important questions of custody and visitation and support, and drain the limited judicial resources of the courts by encouraging post judgment relief from default judgments.

⁸⁶ See 22 NYCRR §202.50 (b)(3)

anything to the contrary contained in this article,” we made a further change in our 2019 proposal to address Assembly staff concerns. We appreciate the input from Assembly staff because we share their desire to make certain that, if enacted, our new proposal will clearly override CPLR 509 in the event of a conflict.

Our legislative proposal in its current form was introduced by Assemblyman Dinowitz as 2019-20 A.7517.⁸⁷ This bill did not find a Senate sponsor in 2019; and the need for the Legislature to focus on the budget and other pandemic related matters delayed its consideration in 2020. This legislation would avoid problems of venue designations in distant counties by requiring that venue be related to residence of the parties notwithstanding CPLR 509. It is one of our Committee’s main legislative priorities this year in addition to mandatory e-filing. It requires that venue in a divorce action be related to the residence of the parties with exception only for instances where the address of a party is not a matter of public record or is subject to a confidentiality order as suggested by Sanctuary for Families.

This legislation will ensure that divorces will be processed more quickly statewide as the volume of divorces is more evenly distributed among counties. Residents of those counties will not have to share judicial resources in their counties with residents of other counties. This legislation will also ensure better outcomes in divorce cases by ensuring that defendants are less likely to default, that parties and their children do not have to travel long distances for in-person hearings, and that Judges can appoint and deal with professional counsel and forensic evaluators in custody matters whose work and expertise they are familiar with. We urge passage of this bill as an access to justice imperative.

Proposal:

ACT to amend the civil practice law and rules, in relation to venue in matrimonial actions

The People of the State of New York, represented in Senate and Assembly, do enact as

follows:

Section 1. Section 509 of the civil practice law and rules, as amended by chapter 773 of the laws of 1965, is amended to read as follows:

⁸⁷ This bill is available at https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A07517&term=2019&Summary=Y&Memo=Y&Text=Y

§509. Venue in county designated. Notwithstanding any provision of this article except for rule 514, the place of trial of an action shall be in the county designated by the plaintiff, unless the place of trial is changed to another county by order upon motion, or by consent as provided in subdivision (b) of rule 511.

§2. The civil practice law and rules is amended by adding a new rule 514 to read as follows:

Rule 514. Venue in matrimonial actions. (a) This rule applies to all actions wherein all or part of the relief granted is divorce, all actions brought in supreme court for custody or visitation, all applications to modify a supreme court order of custody or visitation, all actions wherein all or part of the relief granted is the dissolution, annulment or declaration of the nullity of a marriage, all proceedings to obtain a distribution of marital property following a foreign judgment of divorce, and all post-judgment proceedings following a judgment of divorce.

(b) Notwithstanding anything to the contrary in this article, the place of trial in an action subject to subdivision (a) of this rule shall be in a county in which either party resides or, if there are minor children of the marriage, the place of trial may also be in the county where one of such children resides; except that where any of the addresses of these residences is not a matter of public record, or where any of these addresses is subject to an existing confidentiality order pursuant to section 254 of the domestic relations law or section 154-b of the family court act, the place of trial designated by the plaintiff in any action specified in subdivision (a) of this rule may be as specified in section 509 of this article.

(c) In any action specified in subdivision (a) of this rule, the court may, for good cause shown, allow the trial to proceed before it, notwithstanding that venue would not lie pursuant to subdivision (b) of this rule. Good cause applications shall be made by motion or order to show cause.

§3. This act shall take effect on the sixtieth day after it shall have become a law and shall apply to matrimonial actions commenced on or after such effective date.

2. Proposal on Access to Forensics in Custody Cases [DRL §§ 70, 240; FCA §§ 251, 651]

The subject of access to forensic reports has been widely discussed among the legal community in the last few years. In January 2013, three different rule proposals were put out for public comment on this subject. The Family Court Advisory and Rules Committee, the former Matrimonial Practice Advisory Committee, and the New York State Bar Association Committee on Children and the Law each submitted a proposal for a court rule regarding access to forensic evaluation reports in child custody cases by counsel, parties and self-represented litigants (*see* <http://www.nycourts.gov/rules/comments/PDF/Forensic-Reports-PC-packet.pdf>). The proposals differed with respect to the terms on which self-represented litigants would have access to the reports.

Before any court rule was adopted, legislation on the subject was introduced (A. 8342-A). Consideration of the proposed rules by the Administrative Board of the Courts was suspended pending possible action on this legislation. A new version of said bill was introduced as A. 290 on January 7, 2015. The Committee's concerns as to A. 8342-A continued to be applicable to the 2015-16 version. The Committee expressed these concerns in our 2016 Annual Report to the Chief Administrative Judge. On January 12, 2017, a 2017-18 version of said bill was introduced as A.1533/S.6300.

As stated in our prior annual reports, we believe that there is a real danger that the dissemination to the public of the reports or copies thereof on the Internet could prove to cause long lasting damage and embarrassment to many, and those concerns must outweigh reasonable restrictions imposed on self-represented litigants. Attorneys and other forensic experts are subject to professional discipline if reports are released, while parties, including self-represented litigants, face only potential contempt charges which are unlikely to result in a meaningful remedy for innocent victims including children whose personal lives are exposed.

In our 2017 Annual Report to the Chief Administrative Judge, our Committee developed a new proposal on access to forensics in custody cases, which we hoped would resolve the differences as to treatment of self-represented litigants by providing access to the report and the complete evaluator's files to the parties including self-represented litigants, attorneys, independent forensic experts hired to assist the attorneys, and the attorney for the child, on terms which respect the due process rights of self-represented and represented litigants, while providing better protections against unauthorized dissemination than were contained in the original bill. As in A.1533/S.6300, access to the evaluator's file would include access to the entire file related to the proceeding including, but not limited to, all underlying notes, test data, raw test materials, underlying materials provided to or relied upon by the court-ordered evaluator and any records, photographs or other evidence. At the request of the Office of Court Administration, our proposal was introduced as 2017-18 S. 6579. At the same time, Memoranda in opposition to 2017-18 A.1533/S.6300 and in support of 2017-18 S. 6579 were sent to legislators by the Family Law Section of the New York State Bar Association, the Women's Bar Association of the State of New York, the New York City Bar Matrimonial Law

Committee and Committee on Children and the Law and the New York Chapter of the Academy of Matrimonial Lawyers.⁸⁸

Also supporting our proposal was the Children’s Law Center of Brooklyn. Their Letter to the Editor entitled “Parties Deserve to See Forensic Evaluations,” published in the *New York Law Journal* on March 22, 2017, emphasized that our proposal should be viewed as necessary insofar as it affords vital protections to vulnerable children, stating:

“Thus, we support the Matrimonial Practice Advisory and Rules Committee recommendation that would give both represented and pro se litigants access to, but not possession of, forensic evaluations. Such an approach would simultaneously afford parents and other parties due process while adequately safeguarding the interests of the children caught in the middle of contentious litigation. This proposal is not simply acceptable, as Mr. Tippins suggests,⁸⁹ but necessary to avoid placing vulnerable children at greater risk than they already are as the subjects of a custody or visitation proceeding.”⁹⁰

Our proposal was amended in 2018 as S. 6579-A based upon changes we recommended at the suggestion of the Family Court Advisory and Rules Committee and the New York Public Welfare Association, Inc., whose concerns were addressed in the modified proposal.⁹¹ These changes included revising the definition of “court-ordered evaluators.” We also deleted a provision governing the times when the court may read or review the forensic report. We instead adopted a suggestion of the Family Court Advisory and Rules Committee to authorize the Chief Administrative Judge to promulgate rules and regulations authorizing a court, in cases where a party does not raise a legally valid objection thereto, to read or review a forensic report at particular times as the rules shall permit. These changes do not detract from the essential feature of our proposal which provides access to the reports and notes and evaluator’s file to attorneys and litigants while ensuring greatly increased protections to prevent confidential information in the report from being disseminated indiscriminately (as compared to A.1533/S.6300 or the current version thereof introduced as 2019-20 A. 05621 Weinstein/S. 4686 Biaggi).

For a detailed description of the key provisions of the amended proposal, see Appendix “F-1” to this report.

During 2019, a significant Second Department Decision supported the view reflected in our forensics proposal that, in the interest of protecting the confidentiality of the information in

⁸⁸ For copies of these Memoranda in Support of our Proposal, see Appendix “H-1” to our 2019 Annual Report to the Chief Administrative Judge available at <https://www.nycourts.gov/LegacyPDFS/IP/judiciary/legislative/pdfs/2019-Matrimonial.pdf>

⁸⁹ See Timothy M. Tippins, “Forensic Reform: The Time is Now!” (NYLJ March 2, 2017), to which the foregoing quotation by The Children’s Law Center refers.

⁹⁰ Children’s Law Center, Letters to the Editor, “Parties Deserve to See Forensic Evaluations”(NYLJ March 22, 2017).

⁹¹ In 2017-18, both our original proposal (S. 6579) as well as the Senate counterpart to A.1533 (S.6300) were before the Senate.

forensic reports on custody which contain the most sensitive information about the parties' personal lives, it is not error to deny a pro se litigant a copy of a forensic report provided that the pro se litigant has adequate access to the report (see *Raymond v. Raymond*, 2019 NY Slip Op. 05546, 174 A.D.3d 625, 107 N.Y.S.3d 433 (Second Department 2019)). In that case, the Second Department affirmed the lower court's decision granting sole custody to the mother and denied the pro se father's petition for increased access to the child despite the fact that the pro se litigant was not given a copy of the forensic report. The Second Department noted that the pro se litigant had access to the report in that case over an extended period of time during which he could review the report and take notes on it, and that the forensic evaluator testified and was cross-examined at the hearing, and that the report was based on first hand interviews by the evaluator rather than on hearsay. The recent decision in *Raymond* is at odds with dicta in *Sonbuchner v. Sonbuchner*, 2012 NY Slip op 0493, 96 A.D.3d 566, 947 N.Y.S.2d 80 (First Department 2012).⁹² In *Sonbuchner*, despite holding that the failure to provide the pro se litigant with a copy of the forensic report prior to direct testimony of the evaluator was harmless error, the court stated in dicta : "We nonetheless reiterate, as we have previously, that counsel and pro se litigants should be given access to the forensic report under the same conditions (see *Matter of Isidro A.-M. v Mirta A.*, 74 AD3d 673 [2010]). Because defendant's attorney had a copy of the report, the court should have given the report to pro se plaintiff, even if the court set some limits on both parties' use, such as requiring that the report not be copied or requiring that the parties take notes from it while in the courthouse."⁹³ Our proposal differs from this dicta because it would not give an actual copy of the report to the pro se litigant where the represented party's attorney is given a copy, but it follows suggestions in *Sonbuchner* to set some limits on the parties' use of the report such as requiring that the report not be copied. In a report on 2019-20 A.5621/S.4686 dated May 2019, the Matrimonial Law Committee and the Children and The Law Committee of the New York City Bar Association opposed A.5621/S.4686 and favored our proposal (OCA #27), stating:

"The Matrimonial Law and Children and the Law Committees of the New York City Bar Association (the "Committees") write to provide feedback on the proposed legislation which would amend the Family Court Act and the Domestic Relations Law regarding the use of reports from court-appointed forensic evaluators ("forensics") in child custody disputes. The Matrimonial Practice Advisory and Rules Committee of the Office of Court Administration has proposed a similar but not identical bill (OCA 27-2019).¹ The Committees support the approach taken in OCA 27-2019 with a few minor changes and clarifications detailed below. Although A.5621/S.4686 contains several valuable elements, it goes too far in guaranteeing parties access to forensic reports. We believe that OCA 27-2019 strikes a better balance among the competing interests...

The Committees are pleased that OCA 27-2019 follows our recommendation. A.5621/S.4686, however, presumptively gives represented parties the right to copies of the

⁹² The court held that the failure to give the pro se litigant a copy of the report prior to direct testimony of the evaluator was harmless error since the pro se litigant was given access to the forensic report prior to cross examination of the evaluator during which the litigant questioned the evaluator at length, and the appellate court stated that the lower court's decision on custody and relocation was well supported by the record.

⁹³ *Sonbuchner v. Sonbuchner*, 96 A.D.3d 566, 568, 947 N.Y.S.2d 80, 83 (2012).

forensic report. In the age of smartphones and social media, that will make it all too easy for distraught parents to publicize the very personal and embarrassing information that must often be included in forensics' reports.

OCA 27-2019 also provides more extensive mechanisms for ensuring the confidentiality of forensic reports. In particular, attorneys and others who receive access to forensic reports would be required to sign affidavits promising to not disseminate the reports without permission. Such procedures should be included in any legislation enacted on this issue.”⁹⁴

Although adopted as part of the OCA Legislative Program for 2019-20 as OCA #27, our proposal was not introduced in the Legislature in 2019 or 2020. Instead the current version of 2017-18. A.1533/S.6300 was introduced as 2019-20 A. 05621 Weinstein/S. 4686 Biaggi. In addition to the opposition of the New York City Bar Association Committees quoted above, there was also opposition to this bill by the Women’s Bar Association of the State of New York, the Family Law Section of the New York State Bar Association, and the American Academy of Matrimonial Lawyers, New York Chapter.⁹⁵

Aside from the risk of dissemination of private information about children and families, A. 05621 Weinstein S. 4686 Biaggi also creates substantial risk for victims of domestic violence. As stated by the Women’s Bar Association of the State of New York in their 2019 Position Statement in Opposition, a copy of which is contained in Appendix F-3 to this report:

“We are particularly concerned that victims of domestic violence will be targeted and further harmed by this Bill. If parties are given copies of forensic reports, an abuser can easily inflict more abuse on the victim with threats and actual disclosure of the forensic report to employers, relatives and other members of the public.”

During 2020, neither our bill nor A. 4521/S.4686 moved forward.

The Committee strongly supports the concept that all litigants have the ability to read the reports. It is primarily the method of access that appears to be in dispute. It is our hope that our version of the forensics bill or a compromise between our bill and A. 5621/S.4686 can be enacted in 2021 so that the important issue of forensic reports in custody cases can be addressed, thereby serving the dual goals of decisional and operational excellence for the court system, in furtherance of Chief Judge DiFiore’s Excellence Initiative.

⁹⁴ See Report on Legislation by The Matrimonial Law Committee and the Children and The Law Committee of the City Bar Association dated, May 2019 attached to this report as Appendix “F -2” to this report.

⁹⁵ See Memoranda of Opposition to 2019-20 A.5621/S.4686 by the Women’s Bar Association of the State of New York, the Family Law Section of the New York State Bar Association, and the American Academy of Matrimonial Lawyers, New York Chapter attached to this report as Appendix “F-3.”

Proposal:

AN ACT to amend the domestic relations law and the family court act, in relation to child custody forensic reports

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section 70 of the domestic relations law is amended by adding a new subdivision (c) to read as follows:

(c) Court-ordered forensic evaluations in proceedings involving child custody and visitation. Where a court order is issued for an evaluation or investigation of the parties or a child by a forensic mental health professional in a custody or visitation proceeding (other than by a probation service, a child protective service or any other person authorized by statute), appointed by the court to assist with the determination of child custody or visitation pursuant to this article (hereinafter considered for purposes of this subdivision “court-ordered evaluators”), then for purposes of such court-ordered forensic evaluations and investigations:

(1) The court will determine which party is responsible for payment of the fee of the court-ordered evaluator, or in what proportions payment of the fee of the court-ordered evaluator will be shared between the parties, or otherwise paid on behalf of a party or parties, if applicable. Any report or evaluation prepared by the court-ordered evaluator, to be known as a “forensic report” for the purposes of this subdivision, shall be confidential and kept under seal except that all attorneys and the attorney for the child shall have a right to receive a copy of any such forensic report upon receipt of such a report by the court, provided that they execute an affidavit acknowledging that they will not give a copy of the report or the evaluator’s file as provided for under paragraph two of this subdivision to a party or further disseminate the report or said file,

except as otherwise expressly permitted under this subdivision, without the consent of the court, and will return the report and file to the court upon conclusion of the litigation, subject to the provisions of section three thousand one hundred three of the civil practice law and rules.

Provided, however, in no event shall a party or his or her counsel be prevented from access to or review of a forensic report in advance of and during trial. Any conditions or limitations imposed by the court pursuant to this subdivision relating to disclosure of the forensic report shall accommodate for language access and disability, except that no party to the action shall be permitted to have a copy of the report or to reproduce or disseminate all or any portion thereof.

If a party is self-represented, the court shall make reasonable accommodations for the self-represented party to review said report at a court or other location, and to make notes about the report; and if a party is represented, the party shall have a right to read the forensic report in his or her attorney's office, to discuss the report with the attorney representing him or her in the action, and to make notes about the report. Upon application by counsel or a self-represented litigant, the court shall permit a copy of the forensic report and a copy of the court-ordered evaluator's files as provided for under paragraph two of this subdivision to be provided to any independent forensic evaluator retained to assist counsel or a self-represented litigant, provided that the independent forensic evaluator executes an affidavit acknowledging that he or she may not further disseminate the report or the files absent court permission, and will return the report and the files to the court at the conclusion of the litigation, subject to the provisions of section three thousand one hundred three of the civil practice law and rules; and

(2) The court order appointing said evaluators shall provide to a party's attorney or the attorney for the child the entire file related to the proceeding including but not limited to, all underlying notes, test data, raw test materials, underlying materials provided to or relied upon by the court-ordered evaluator and any records, photographs or other evidence for inspection and photocopying, subject to the provisions of section three thousand one hundred three of the civil practice law and rules; except if an individual is self-represented, the court shall make reasonable accommodations for the self-represented party to review said entire file, including, without limitation, everything that a party's attorney or the attorney for the child is entitled to review as described above, at a court or other location and forward those items to that location for inspection and note taking, but not for photocopying or photographing or scanning; and

(3) A willful failure to comply with a court order conditioning or limiting access to a forensic report, or a willful violation of the provisions of this subdivision regarding dissemination of the forensic report or the evaluator's file or of an affidavit executed with respect thereto shall be contempt of court and may be punishable as such as provided under section seven hundred fifty or seven hundred fifty-three of the judiciary law, as the case may be. The court shall notify the parties and counsel on the record that a willful failure to comply with the court order or the provisions of this subdivision regarding dissemination of the forensic report or the evaluator's file or of an affidavit executed with respect thereto shall be contempt of court which may include punishment by a fine or imprisonment or both; and the court shall retain jurisdiction for the purposes of determining any application for contempt based on a willful failure to comply with a court order or a willful violation of the provisions of this subdivision regarding dissemination of the

forensic report or the evaluator's file or of an affidavit executed with respect thereto; and a party may seek counsel fees to enforce or defend said application for contempt pursuant to section seven hundred fifty or seven hundred fifty-three of the judiciary law, as the case may be; and

(4) In the discretion of the court, or upon stipulation of the parties, written reports may be used to substitute for direct testimony at the trial, but the reports shall be submitted by the expert under oath, and the expert shall be present and available for cross-examination. The court shall determine who is responsible for the payment of any fees for said appearance(s) by the expert; and

(5) The chief administrator of the courts may adopt rules authorizing a court, in particular cases where a party does not raise a legally-valid objection thereto, to read or review a forensic report at one or more of the following times as the rules shall permit:

(i) before the report is received in evidence at a trial or at a hearing;

(ii) at the commencement of a trial or a hearing;

(iii) before accepting an agreement between the parties to its determination concerning child custody or visitation; or

(iv) at any other time if:

(A) agreed to by the parties and their counsel in a written stipulation submitted to the court or in an agreement on the record in open court; or

(B) permitted by the court upon application thereto showing good cause therefor; and

(6) No forensic report or any portion or portions thereof shall be attached to, or quoted in, any motions, pleadings or other documents by counsel or a party.

§2. Subdivision 1 of section 240 of the domestic relations law is amended by adding a new

paragraph (a-3) to read as follows:

(a-3) Court-ordered forensic evaluations in proceedings involving child custody and visitation. Where a court order is issued for an evaluation or investigation of the parties or a child by a forensic mental health professional in a custody or visitation proceeding (other than by a probation service, a child protective service or any other person authorized by statute), appointed by the court to assist with the determination of child custody or visitation pursuant to this paragraph (hereinafter considered for purposes of this paragraph “court-ordered evaluators”), then for purposes of such court-ordered forensic evaluations and investigations:

(1) The court will determine which party is responsible for payment of the fee of the court-ordered evaluator, or in what proportions payment of the fee of the court-ordered evaluator will be shared between the parties, or otherwise paid on behalf of a party or parties, if applicable. Any report or evaluation prepared by the court-ordered evaluator, to be known as a “forensic report” for the purposes of this paragraph, shall be confidential and kept under seal except that all attorneys and the attorney for the child shall have a right to receive a copy of any such forensic report upon receipt of such a report by the court, provided that they execute an affidavit acknowledging that they will not give a copy of the report or the evaluator’s file as provided for under subparagraph two of this paragraph to a party or further disseminate the report or said file, except as otherwise expressly permitted under this paragraph, without the consent of the court, and will return the report and file to the court upon conclusion of the litigation, subject to the provisions of section three thousand one hundred three of the civil practice law and rules. Provided, however, in no event shall a party or his or her counsel be prevented from access to or review of a forensic report in advance of and during trial. Any conditions or limitations imposed

by the court pursuant to this paragraph relating to disclosure of the forensic report shall accommodate for language access and disability, except that no party to the action shall be permitted to have a copy of the report or to reproduce or disseminate all or any portion thereof. If a party is self-represented, the court shall make reasonable accommodations for the self-represented party to review said report at a court or other location, and to make notes about the report; and if a party is represented, the party shall have a right to read the forensic report in his or her attorney's office, to discuss the report with the attorney representing him or her in the action, and to make notes about the report. Upon application by counsel or a self-represented litigant, the court shall permit a copy of the forensic report and a copy of the court-ordered evaluator's files as provided for under subparagraph two of this paragraph to be provided to any independent forensic evaluator retained to assist counsel or a self-represented litigant, provided that the independent forensic evaluator executes an affidavit acknowledging that he or she may not further disseminate the report or the files absent court permission, and will return the report and the files to the court at the conclusion of the litigation, subject to the provisions of section three thousand one hundred three of the civil practice law and rules; and

(2) The court order appointing said evaluator shall provide to a party's attorney or the attorney for the child the entire file related to the proceeding including but not limited to, all underlying notes, test data, raw test materials, underlying materials provided to or relied upon by the court-ordered evaluator and any records, photographs or other evidence for inspection and photocopying, subject to the provisions of section three thousand one hundred three of the civil

practice law and rules; except if an individual is self-represented, the court shall make reasonable accommodations for the self-represented party to review said entire file, including, without limitation, everything that a party's attorney or the attorney for the child is entitled to review as described above, at a court or other location and forward those items to that location for inspection and note taking, but not for photocopying or photographing or scanning; and

(3) A willful failure to comply with a court order conditioning or limiting access to a forensic report or a willful violation of the provisions of this paragraph, regarding dissemination of the forensic report or the evaluator's file or of an affidavit executed with respect thereto shall be contempt of court and may be punishable as such as provided under section seven hundred fifty or seven hundred fifty-three of the judiciary law as the case may be. The court shall notify the parties and counsel on the record that a willful failure to comply with the court order or the provisions of this paragraph, regarding dissemination of the forensic report or the evaluator's file or of an affidavit executed with respect thereto shall be contempt of court which may include punishment by a fine or imprisonment or both; and the court shall retain jurisdiction for the purposes of determining any application for contempt based on a willful failure to comply with a court order or a willful violation of the provisions of this paragraph, regarding dissemination of the forensic report or the evaluator's file or of an affidavit executed with respect thereto; and a party may seek counsel fees to enforce or defend said application for contempt pursuant to section seven hundred fifty or seven hundred fifty-three of the judiciary law as the case may be; and

(4) In the discretion of the court, or upon stipulation of the parties, written reports may be used to substitute for direct testimony at the trial, but the reports shall be submitted by the expert

under oath, and the expert shall be present and available for cross-examination. The court shall determine who is responsible for the payment of any fees for said appearance(s) by the expert; and

(5) The chief administrator of the courts may adopt rules authorizing a court, in particular cases where a party does not raise a legally-valid objection thereto, to read or review a forensic report at one or more of the following times as the rules shall permit:

(i) before the report is received in evidence at a trial or at a hearing;

(ii) at the commencement of a trial or a hearing;

(iii) before accepting an agreement between the parties to its determination concerning child custody or visitation; or

(iv) at any other time if:

(A) agreed to by the parties and their counsel in a written stipulation submitted to the court or in an agreement on the record in open court; or

(B) permitted by the court upon application thereto showing good cause therefor; and

(6) No forensic report or any portion or portions thereof shall be attached to, or quoted in, any motions, pleadings or other documents by counsel or a party.

§3. Subdivision (c) of section 251 of the family court act is relettered to be subdivision (d) and a new subdivision (c) is added to read as follows:

(c) Court-ordered forensic evaluations in proceedings involving child custody and visitation. Notwithstanding the provisions of this section to the contrary, where a court order is issued for an evaluation or investigation of the parties or a child by a forensic mental health

professional in a custody or visitation proceeding (other than by a probation service, a child protective service or any other person authorized by statute), appointed by the court to assist with the determination of child custody or visitation pursuant to article four or six of this act (hereinafter considered for purposes of this subdivision “court-ordered evaluators”), then for purposes of such court-ordered forensic evaluations and investigations:

(1) Notwithstanding section one hundred sixty-five of this act and section four hundred eight of the civil practice law and rules, the provisions and limitations of sections three thousand one hundred one and three thousand one hundred three of the civil practice law and rules shall apply; and

(2) The court will determine which party is responsible for payment of the fee of the court-ordered evaluator, or in what proportions payment of the fee of the court-ordered evaluator will be shared between the parties, or otherwise paid on behalf of a party or parties, if applicable. Any report or evaluation prepared by the court-ordered evaluator, to be known as a “forensic report” for the purposes of this subdivision, shall be confidential and kept under seal except that all attorneys and the attorney for the child shall have a right to receive a copy of any such forensic report upon receipt of such a report by the court, provided that they execute an affidavit acknowledging that they will not give a copy of the report or the evaluator’s file as provided for under paragraph three of this subdivision to a party or further disseminate the report or said file, except as otherwise expressly permitted under this subdivision, without the consent of the court, and will return the report and file to the court upon conclusion of the litigation, subject to the provisions of section three thousand one hundred three of the civil practice law and rules.

Provided, however, in no event shall a party or his or her counsel be prevented from access to or review of a forensic report in advance of and during trial. Any conditions or limitations imposed by the court pursuant to this subdivision relating to disclosure of the forensic report shall accommodate for language access and disability, except that no party to the action shall be permitted to have a copy of the report or to reproduce or disseminate all or any portion thereof. If a party is self-represented, the court shall make reasonable accommodations for the self-represented party to review said report at a court or other location, and to make notes about the report; and if a party is represented, the party shall have a right to read the forensic report in his or her attorney's office, to discuss the report with the attorney representing him or her in the action, and to make notes about the report. Upon application by counsel or a self-represented litigant, the court shall permit a copy of the forensic report and a copy of the court-ordered evaluator's files as provided for under paragraph three of this subdivision to be provided to any independent forensic evaluator retained to assist counsel or a self-represented litigant, provided that the independent forensic evaluator executes an affidavit acknowledging that he or she may not further disseminate the report or the files absent court permission, and will return the report and the files to the court at the conclusion of the litigation, subject to the provisions of section three thousand one hundred three of the civil practice law and rules; and

(3) The court order appointing said evaluator shall provide to a party's attorney or the attorney for the child the entire file related to the proceeding including but not limited to, all underlying notes, test data, raw test materials, underlying materials provided to or relied upon by the court-ordered evaluator and any records, photographs or other evidence for inspection and

photocopying, subject to the provisions of section three thousand one hundred three of the civil practice law and rules; except if an individual is self-represented, the court shall make reasonable accommodations for the self-represented party to review said entire file, including, without limitation, everything that a party's attorney or the attorney for the child is entitled to review as described above, at a court or other location and forward those items to that location for inspection and note taking, but not for photocopying or photographing or scanning; and

(4) A willful failure to comply with a court order conditioning or limiting access to a forensic report or a willful violation of the provisions of this subdivision regarding dissemination of the forensic report or the evaluator's file or of an affidavit executed with respect thereto shall be contempt of court and may be punishable as such as provided under section seven hundred fifty or seven hundred fifty-three of the judiciary law as the case may be. The court shall notify the parties and counsel on the record that a willful failure to comply with the court order or the provisions of this subdivision regarding dissemination of the forensic report or the evaluator's file or of an affidavit executed with respect thereto shall be contempt of court which may include punishment by a fine or imprisonment or both; and the court shall retain jurisdiction for the purposes of determining any application for contempt based on a willful failure to comply with a court order or a willful violation of the provisions of this subdivision regarding dissemination of the forensic report or the evaluator's file or of an affidavit executed with respect thereto; and a party may seek counsel fees to enforce or defend said application for contempt pursuant to section seven hundred fifty or seven hundred fifty-three of the judiciary law as the case may be; and

(5) In the discretion of the court, or upon stipulation of the parties, written reports may be used to substitute for direct testimony at the trial, but the reports shall be submitted by the expert under oath, and the expert shall be present and available for cross-examination. The court shall determine who is responsible for the payment of any fees for said appearance(s) by the expert; and

(6) The chief administrator of the courts may adopt rules authorizing a court, in particular cases where a party does not raise a legally-valid objection thereto, to read or review a forensic report at one or more of the following times as the rules shall permit:

(i) before the report is received in evidence at a trial or at a hearing;

(ii) at the commencement of a trial or a hearing;

(iii) before accepting an agreement between the parties to its determination concerning child custody or visitation; or

(iv) at any other time if:

(A) agreed to by the parties and their counsel in a written stipulation submitted to the court or in an agreement on the record in open court; or

(B) permitted by the court upon application thereto showing good cause therefor; and

(7) No forensic report or any portion or portions thereof shall be attached to, or quoted in, any motions, pleadings or other documents by counsel or a party.

§4. Section 651 of the family court act is amended by adding a new subdivision (g) to read as follows:

(g) Court-ordered forensic evaluations in proceedings involving child custody and visitation.

Notwithstanding the provisions of this section to the contrary, where a court order is issued for an evaluation or investigation of the parties or a child by a forensic mental health professional in a custody or visitation proceeding (other than by a probation service, a child protective service or any other person authorized by statute), appointed by the court to assist with the determination of child custody or visitation pursuant to this article or article four of this act (hereinafter considered for purposes of this subdivision “court-ordered evaluators”), then for purposes of such court-ordered forensic evaluations and investigations:

(1) Notwithstanding section one hundred sixty-five of this act and section four hundred eight of the civil practice law and rules, the provisions and limitations of sections three thousand one hundred one and three thousand one hundred three of the civil practice law and rules shall apply; and

(2) The court will determine which party is responsible for payment of the fee of the court-ordered evaluator, or in what proportions payment of the fee of the court-ordered evaluator will be shared between the parties, or otherwise paid on behalf of a party or parties, if applicable. Any report or evaluation prepared by the court-ordered evaluator, to be known as a “forensic report” for the purposes of this subdivision, shall be confidential and kept under seal except that all attorneys and the attorney for the child shall have a right to receive a copy of any such forensic report upon receipt of such a report by the court; provided that they execute an affidavit acknowledging that they will not give a copy of the report or the evaluator’s file as provided for under paragraph three of this subdivision to a party or further disseminate the report or said file, except as otherwise expressly permitted under this subdivision, without the consent of the court, and will return the report and file to the court upon conclusion of the litigation, subject to

the provisions of section three thousand one hundred three of the civil practice law and rules.

Provided, however, in no event shall a party or his or her counsel be prevented from access to or review of a forensic report in advance of and during trial. Any conditions or limitations imposed by the court pursuant to this subdivision relating to disclosure of the forensic report shall accommodate for language access and disability; except that no party to the action shall be permitted to have a copy of the report or to reproduce or disseminate all or any portion thereof.

If a party is self-represented, the court shall make reasonable accommodations for the self-represented party to review said report at a court or other location, and to make notes about the report; and if a party is represented, the party shall have a right to read the forensic report in his or her attorney's office, to discuss the report with the attorney representing him or her in the action, and to make notes about the report. Upon application by counsel or a self-represented litigant, the court shall permit a copy of the forensic report and a copy of the court-ordered evaluator's files as provided for under paragraph three of this subdivision to be provided to any independent forensic evaluator retained to assist counsel or a self-represented litigant; provided that the independent forensic evaluator executes an affidavit acknowledging that he or she may not further disseminate the report or the files absent court permission, and will return the report and the files to the court at the conclusion of the litigation, subject to the provisions of section three thousand one hundred three of the civil practice law and rules; and

(3) The court order appointing said evaluator shall provide to a party's attorney or the attorney for the child the entire file related to the proceeding including but not limited to, all

underlying notes, test data, raw test materials, underlying materials provided to or relied upon by the court-ordered evaluator and any records, photographs or other evidence for inspection and photocopying, subject to the provisions of section three thousand one hundred three of the civil practice law and rules; except if an individual is self-represented, the court shall make reasonable accommodations for the self-represented party to review said entire file, including, without limitation, everything that a party's attorney or the attorney for the child is entitled to review as described above, at a court or other location and forward those items to that location for inspection and note taking, but not for photocopying or photographing or scanning; and

(4) A willful failure to comply with a court order conditioning or limiting access to a forensic report or a willful violation of the provisions of this subdivision regarding dissemination of the forensic report or the evaluator's file or of an affidavit executed with respect thereto shall be contempt of court and may be punishable as such as provided under seven hundred fifty or section seven hundred fifty-three of the judiciary law as the case may be. The court shall notify the parties and counsel on the record that a willful failure to comply with the court order or the provisions of this subdivision regarding dissemination of the forensic report or the evaluator's file or of an affidavit executed with respect thereto shall be contempt of court which may include punishment by a fine or imprisonment or both; and the court shall retain jurisdiction for the purposes of determining any application for contempt based a on a willful failure to comply with a court order or a willful violation of the provisions of this subdivision regarding dissemination of the forensic report or the evaluator's file or of an affidavit executed with respect thereto; and a party may seek counsel fees to enforce or defend said application for contempt pursuant to section

seven hundred fifty or seven hundred fifty-three of the judiciary law as the case may be; and

(5) In the discretion of the court, or upon stipulation of the parties, written reports may be used to substitute for direct testimony at the trial, but the reports shall be submitted by the expert under oath, and the expert shall be present and available for cross-examination. The court shall determine who is responsible for the payment of any fees for said appearance(s) by the expert;
and

(6) The chief administrator of the courts may adopt rules authorizing a court, in particular cases where a party does not raise a legally-valid objection thereto, to read or review a forensic report at one or more of the following times as the rules shall permit:

(i) before the report is received in evidence at a trial or at a hearing;

(ii) at the commencement of a trial or a hearing;

(iii) before accepting an agreement between the parties to its determination concerning child custody or visitation; or

(iv) at any other time if:

(A) agreed to by the parties and their counsel in a written stipulation submitted to the court or in an agreement on the record in open court; or

(B) permitted by the court upon application thereto showing good cause therefor; and

(7) No forensic report or any portion or portions thereof shall be attached to, or quoted in, any motions, pleadings or other documents by counsel or a party.

§5. This act shall take effect on the ninetieth day after it shall have become a law, provided, however, that effective immediately the chief administrator of the courts, with the approval of the administrative board of the courts, is authorized and directed to promulgate any

rules necessary to implement the provisions of this act on or before such effective date.

3. Proposal to Amend the Extreme Risk Orders of Protection Act to Require that Extreme Risk Orders of Protection be Included in the Statewide Computerized Registry of Orders of Protection [CPLR 6342(7) and CPLR 6343(4)] and §221-a of the Executive Law

We continue to recommend our proposal from our 2020 report to amend the recently enacted law on Extreme Risk Orders of Protection. The Extreme Risk Orders of Protection Act (L. 2019, c. 19) was enacted to enable courts to issue orders of protection to prevent people who pose a danger to others or themselves from possessing firearms. The Act provides for the surrender or removal of such person’s firearms once the extreme risk order of protection is issued. As explained by the sponsor’s memorandum filed with the legislation before it was enacted:

“New York currently lacks a procedure permitting a court to issue an order to temporarily seize firearms from a person who is believed to pose a severe threat of harm to himself, herself, or others unless that person has also been accused of a crime or family offense.”

Once the temporary or permanent extreme risk order of protection is issued, the statute requires the court to notify and provide a copy of the order to various persons and agencies of law enforcement and the criminal justice system. However, nowhere is there a requirement for the court to notify and send a copy of the order to the statewide computerized registry of orders of protection and warrants of arrest that courts are required to check before issuing orders of custody and visitation pursuant to DRL section 240 (1) (a-1) or FCA section 651(e). It is crucial that judges issuing orders of custody and visitation have knowledge of the issuance of such extreme risk orders of protection before they entrust a vulnerable child to the care of such a person.

While CPLR 6347 states that “no finding or determination made pursuant to this article shall be interpreted as binding, or having collateral estoppel or similar effect, in any other action or proceeding, or with respect to any other determination or finding, in any court, forum or administrative proceeding,” a finding in a proceeding for an extreme risk order of protection would not be binding on a judge determining custody or visitation of a minor child, but merely a relevant and important factor to consider in the best interest of the child. Moreover CPLR 6346 provides that, upon expiration of the extreme risk order of protection, all records shall be sealed; but specifically provides that such records shall be accessible to courts of the Unified Court System, among other necessary parties.⁹⁶ This language makes clear that the Legislature intended this information to be available to judges making custody and visitation decisions.

⁹⁶ § 6346 provides:

Expiration of an extreme risk protection order. 1. A protection order issued pursuant to this article, and all records of any proceedings conducted pursuant to this article, shall be sealed upon expiration of such order...except that such records shall be made available to:

- (a) the respondent or the respondent's designated agent;
- (b) courts in the unified court system;
- (c) police forces and departments having responsibility for enforcement of the general criminal laws of the state;
- (d) any state or local officer or agency with responsibility for the issuance of licenses to possess a firearm, rifle or shotgun, when the respondent has made application for such a license; and
- (e) any prospective employer of a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law, in relation to an application for employment as a police officer or peace officer;...

Thus, we strongly recommend an amendment of the new statute to specifically require the court to provide a copy of the extreme risk order of protection to the statewide computerized registry. This proposal will help protect children from danger, and therefore further the Chief Judge's Excellence Initiative by furthering access to justice.

Proposal

AN ACT to amend the civil practice law and rules and the executive law, in relation to extreme risk orders of protection

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph (a) of subdivision 7 of section 6342 of the civil practice law and rules, as added by chapter 19 of the Laws of 2019, is amended to read as follows:

(a) The court shall notify the division of state police, any other law enforcement agency with jurisdiction, all applicable licensing officers, the statewide computerized registry of orders of protection and warrants of arrest referred to in clause (ii) of subparagraph (3) of paragraph (a-1) of subdivision one of section 240 of the domestic relations law and in subdivision (e) of section 651 of the family court act, and the division of criminal justice services of the issuance of a temporary extreme risk protection order and provide a copy of such order no later than the next business day after issuing the order to such persons or agencies or registry. The court also shall promptly notify such persons and agencies and registry and provide a copy of any order amending or revoking such protection order or restoring the respondent's ability to own or possess firearms, rifles or shotguns no later than the next business day after issuing the order to restore such right to the respondent. The court also shall report such demographic data as required by the state division of criminal justice services at the time such order is transmitted thereto. Any notice or report submitted pursuant to this subdivision shall be in an electronic format, in a manner prescribed by the division of criminal justice services.

§2. Paragraph (a) of subdivision 4 of section 6343 of the civil practice law and rules, as added by chapter 19 of the Laws of 2019, is amended to read as follows:

(a) The court shall notify the division of state police, any other law enforcement agency with jurisdiction, all applicable licensing officers, the statewide computerized registry of orders of protection and warrants of arrest referred to in clause (ii) of subparagraph (3) of paragraph (a-1) of subdivision one of section 240 of the domestic relations law and in subdivision (e) of section 651 of the family court act, and the division of criminal justice services of the issuance of a final extreme risk protection order and provide a copy of such order to such persons and agencies and registry no later than the next business day after issuing the order. The court also shall promptly notify such persons and agencies and registry and provide a copy of any order amending or revoking such protection order or restoring the respondent's ability to own or possess firearms, rifles or shotguns no later than the next business day after issuing the order to restore such right to the respondent. The court also shall report such demographic data as required by the state division of criminal justice services at the time such order is transmitted thereto. Any notice or report submitted pursuant to this subdivision shall be in an electronic format, in a manner prescribed by the division of criminal justice services.

§3. Subdivision 1 of section 221-a of the executive law is amended to read as follows:

1. The superintendent, in consultation with the division of criminal justice services, office of court administration, and the office for the prevention of domestic violence, shall develop a comprehensive plan for the establishment and maintenance of a statewide computerized registry of all orders of protection issued pursuant to articles four, five, six, eight and ten of the family court act, section 530.12 of the criminal procedure law and, insofar as they involve victims of domestic violence as defined by section four hundred fifty-nine-a of the social services law, section 530.13 of the criminal procedure law and sections two hundred forty and two hundred fifty-two of the domestic relations law, extreme risk orders of protection issued pursuant to Article 63-A of the civil practice law and rules, and orders of protection issued by courts of competent jurisdiction in another state, territorial or tribal jurisdiction, special orders of conditions issued pursuant to subparagraph (i) or (ii) of paragraph (o) of subdivision one of section 330.20 of the criminal procedure law insofar as they involve a victim or victims of domestic violence as defined by subdivision one of section four hundred fifty-nine-a of the social services law or a designated witness or witnesses to such domestic violence, and all warrants issued pursuant to sections one hundred fifty-three and eight hundred twenty-seven of the family court act, and arrest and bench warrants as defined in subdivisions twenty-eight, twenty-nine and thirty of section 1.20 of the criminal procedure law, insofar as such warrants pertain to orders of protection or temporary orders of protection; provided, however, that warrants issued pursuant to section one hundred fifty-three of the family court act pertaining to articles three and seven of such act and section 530.13 of the criminal procedure law shall not be included in the registry. The superintendent shall establish and maintain such registry for the purposes of ascertaining the existence of orders of protection, temporary orders of protection, warrants and special orders of conditions, and for enforcing the provisions of paragraph (b) of subdivision four of section 140.10 of the criminal procedure law.

§4. All extreme risk orders of protection issued prior to the effective date of this act shall be included in the computerized registry of orders of protection and warrants of arrest referred to in clause (ii) of subparagraph (3) of paragraph (a-1) of subdivision one of section 240 of the domestic relations law and in subdivision (e) of section 651 of the family court act, on the effective date of this act.

§ 5. This act shall take effect 120 days from the date on which it shall have become a law.

4. Proposal to Amend DRL §232 to Allow for Alternative Service of Divorce Summons by Email or Social Media

We resubmit our previously endorsed legislative proposal to amend DRL §232 to allow for alternative service of the divorce summons by email or social media. This legislation is necessary because Supreme Courts frequently feel compelled to order expensive and ineffective service by publication in matrimonial actions when personal service on the defendant cannot be made because the defendant cannot be found.

While personal service upon a defendant is required in a divorce action pursuant to CPLR 308(1), CPLR 308 allows several other methods if delivery to the defendant is not possible pursuant to subdivision one. These include service on a person of suitable age and discretion with simultaneous mailing pursuant to subdivision two. Subdivision four of CPLR 308 allows for ‘nail and mail’ service where service pursuant to subdivisions one and two cannot be made with due diligence. Both subdivisions two and four provide an exception in matrimonial actions where service may be made pursuant to a court order in accordance with DRL § 232(a). Subdivision five of CPLR 308 provides for service “in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section.” DRL § 232 requires that if the complaint is not personally served with the summons, no default judgment may be granted unless the summons has notice of the nature of the divorce action on its face and has either been personally delivered to the defendant or served on defendant in accordance with either CPLR 308 or CPLR 315. CPLR 315 permits service by publication by court order on motion without notice as a last resort “if service cannot be made by another prescribed method with due diligence” in certain types of actions, one of which is a matrimonial action.

These provisions have caused problems in divorce actions where the plaintiff cannot locate the defendant, because the defendant has left no forwarding address or contact information. Supreme Courts frequently feel compelled to order publication as a method of last resort even though it can be extremely expensive. As stated by the Court of Appeals in upholding an order of the Third Department ordering service by publication to be paid by the county for an indigent litigant: “We are not unmindful, however, of the cost of publication in a matrimonial action and the burden it may impose on local government. Our affirmance is, therefore, without prejudice to the parties, if so advised, to apply for a determination whether, in a matrimonial action, judicially devised service (CPLR 308, subd. 5) is available as an alternative to service by publication.” *Deason v. Deason*, 32 N.Y.2d 93, 95, 296 N.E.2d 229, 230 (1973). Thus, the Court of Appeals encouraged courts to devise means of alternative service pursuant to CPLR 308(5) whenever possible.

Back in 1973 when *Deason* was decided, there was no email or social media available to use as a method of alternative service. Today, the situation is totally different as use of email and social media are becoming the most frequently used means of communication among many segments of society, both young and old. Nevertheless, although there have been cases where courts have fashioned alternative service in matrimonial cases pursuant to CPLR 308(5), use of email and social media is rarely used in Supreme Court matrimonial actions. In a 1992 case, the court refused to grant service by publication and instead ordered service by a combination of mailing to defendant’s mother, and posting in several places, stating:

“the court recognizes that where constructive means of service are sought under CPLR 308 (5), publication is traditionally requested and routinely granted either solely or in

conjunction with some other delivery means. This habit may spring from other statutes that specify publication as a means of service. But a literal reading of CPLR 308 (5) and the cases construing it and its predecessors lead this court to conclude that publication under subdivision (5) is not an essential or necessary element nor even a desirable element of judicially devised service.” (see Debra M. v. Guy M., 155 Misc. 2d 912, 914, 591 N.Y.S.2d 302 (Sup. Ct. 1992).

A 2015 trial court decision in New York County was one of the few cases where alternative service by social media has been ordered by the court in a matrimonial action (see *Baidoo v. Blood-Dzraku*, 48 Misc. 3d 309, 5 N.Y.S.3d 709 (N.Y. Sup. Ct. 2015)). In that case, the plaintiff wife never resided with the defendant spouse during their marriage of six years, the defendant’s last address known to the plaintiff was an apartment that he vacated four years prior, plaintiff had occasional telephone conversations with her spouse in which he informed her that he had no fixed address and no place of employment, defendant refused to make himself available to be served with divorce papers, plaintiff hired private investigators who were unable to locate the defendant, his pre-paid cellular telephone had no billing address, he had not left any forwarding address with the post office, and the Department of Motor Vehicles had no record of him. Justice Matthew Cooper granted the plaintiff’s ex parte motion for alternative service by use of Facebook, without requiring service by publication as a back-up method, pointing out that service by social media was not only much cheaper than publication (sometimes \$1,000 per week in New York County), but also much more likely to reach the defendant (see *Baidoo v. Blood-Dzraku*, 48 Misc. 3d 309, 315, 5 N.Y.S.3d 709, 715 (N.Y. Sup. Ct. 2015)).

In the interest of increasing the chances that defendants will receive notice of divorce actions and of reducing litigation expenses of plaintiffs, thereby furthering the Chief Judge’s Excellence Initiative, our Committee proposes to amend DRL § 232(a) to give official legislative recognition to use of social media or email as a legitimate method of court ordered alternative service pursuant to CPLR 308(5) in matrimonial actions.

We believe this proposal will ensure that service by publication in matrimonial cases will be used as a last resort only as the Legislature and Court of Appeals intend, and will encourage courts to authorize service by email or social media where the court is satisfied there is proof that the social media or email account is active and that the platform to be used is reasonably calculated to reach the defendant. We have defined the term “active” in our proposal to mean that it has been used within the last thirty days in order to prevent litigation.

An example of a case which would not satisfy the requirements of our proposal is the 2016 decision of Hon. Jeffrey Sunshine, in *Qaza v. Alshalabi*. There the court rejected an application for service by social media, stating:

“Before the Court could consider allowing service by Facebook pursuant to CPLR 308(5) the record must contain evidence that the Facebook profile was one that defendant actually uses for receipt of messages. The Court notes that anyone can create a Facebook profile using accurate, false or incomplete information and there is no way, under the application currently pending, for the Court to confirm whether the profile proffered by plaintiff is in fact the defendant’s profile and that he accesses it (see Fortunato v. Chase Bank USA, N.A.,

*No. 11 Civ 6608(JFK), 2012 WL 2086950 [S.D.N.Y., June 7, 2012]). Granting this application for service by Facebook under the facts presented by plaintiff would be akin to the Court permitting service by nail and mail to a building that no longer exists. For all of the foregoing reasons, plaintiff's application for permission to serve the summons upon defendant by Facebook is denied without prejudice.” (See *Qaza v. Alshalabi*, 54 Misc. 3d 691, 696, 43 N.Y.S.3d 713, 717 (N.Y. Sup. Ct. 2016).*

We believe that our proposal satisfies the demands of due process, which requires that defendant be given notice of the divorce action by a method reasonably calculated to reach him/her, but does not require that the defendant receive actual notice of the divorce action where the defendant cannot be located. As stated in Carmody-Wait:

“When the court formulates a method of service, to be used in lieu of other methods, the method of service must be fair, adequate, and reasonably calculated under all the circumstances to apprise the defendant of the action brought against him or her.⁴ On the other hand, constitutional due process does not require that the method of service guarantee actual notice to the defendant.⁵ Indeed, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits.⁶ Courts will generally attempt to fashion alternatives most likely to give the defendant notice under the particular circumstances,⁷ although it is recognized that court-directed methods will occasionally result in failure to bring actual notice to the defendant.⁸ Court-ordered alternatives are constitutional if reasonable and necessary under the circumstances and if judicially approved in advance, even though they may involve a highly unlikely means of affording notice.⁹”(see 3B Carmody-Wait 2d § 24:122).

Proposal

AN ACT to amend the domestic relations law, in relation to modifying the provisions regarding notice of a matrimonial action where the complaint is not personally served with the summons, by authorizing service pursuant to CPLR 308(5) through proof of an active email or social media account

The People of the State of New York, represented in Senate and Assembly, do enact as

follows:

Section 1: Section 232 of the domestic relations law, as amended by chapter 765 of the laws of 1974, subdivisions a (as amended by chapter 528 of the laws of 1978), and b, is amended to read as follows:

§ 232. Notice of nature of matrimonial action; proof of service.

a. In an action to annul a marriage or for divorce or for separation, if the complaint is not personally served with the summons, the summons shall have legibly written or printed upon the face thereof: “Action to annul a marriage”, “Action to declare the nullity of a void marriage”, “Action for a divorce”, or “Action for a separation”, as the case may be, and shall specify the nature of any ancillary relief demanded. A judgment shall not be rendered in favor of the plaintiff upon the defendant's default in appearing or pleading, unless either (1) the summons and a copy of the complaint were personally delivered to the defendant; or (2) the copy of the summons (a) personally delivered to the defendant, or (b) served on the defendant pursuant to an order directing the method of service of the summons in accordance with the provisions of section three hundred eight or three hundred fifteen of the civil practice law and rules, or served on the defendant pursuant to an order directing alternative service of the summons pursuant to CPLR 308(5) through proof of an active email or social media account of the defendant which is shown to be reasonably calculated to give notice to the defendant, shall contain such notice. As used in this subdivision, an

active email or social media account of the defendant shall be an account that has been used by the defendant in the last thirty (30) days.

b. An affidavit or certificate proving service shall state affirmatively in the body thereof that the required notice was written or printed on the face of the copy of the summons delivered to the defendant and what knowledge the affiant or officer who executed the certificate had that he or she was the defendant named and how he or she acquired such knowledge. The court may require the affiant or officer who executed the affidavit or certificate to appear in court and be examined in respect thereto.

§ 2. This act shall take effect immediately.

5. Proposal to Amend the Domestic Relations Law to Require Marriage Licenses in All Cases [DRL §§ 12, 25]

New York law requires that parties desiring to marry must first obtain a marriage license (DRL § 13) and the marriage must be solemnized by one of the statutory enumerated individuals, including public officials and members of the clergy (DRL § 11). However, DRL §§ 12 and 25 create loopholes that void the necessity of obtaining a marriage license. DRL § 25 provides:

The provisions of this article pertaining to the granting of the licenses before a marriage can be lawfully celebrated apply to all persons who assume the marriage relation in accordance with subdivision four of section eleven of this chapter. *Nothing in this article contained shall be construed to render void because of a failure to procure a marriage license any marriage solemnized between persons of full age nor to render void any marriage between minors or with a minor under legal age of consent where the consent of parent or guardian has been given and such marriage shall be for such cause voidable only as to minors or a minor upon complaint of such minors or minor or of the parent or guardian thereof. (Emphasis supplied.)*

DRL § 12 provides:

Marriage, how solemnized. No particular form or ceremony is required when a marriage is solemnized as herein provided by a clergyman or magistrate, but the parties must solemnly declare in the presence of a clergyman or magistrate and the attending witness or witnesses that they take each other as husband and wife. In every case, at least one witness beside the clergyman or magistrate must be present at the ceremony.

The preceding provisions of this chapter, so far as they relate to the manner of solemnizing marriages, shall not affect marriages among the people called friends or quakers; nor marriages among the people of any other denominations having as such any particular mode of solemnizing marriages; but such marriages must be solemnized in the manner heretofore used and practiced in their respective societies or denominations, *and marriages so solemnized shall be as valid as if this article had not been enacted. (Emphasis supplied.)*

We recommend: (1) the repeal of DRL § 25 and (2) the repeal of the second paragraph of DRL § 12 to eliminate the loophole that would remain even with the repeal of DRL § 25.⁹⁷ Although unrelated to the issue of requiring a marriage license, we further recommend the revision of the

⁹⁷ The second paragraph of DRL § 12 was enacted in 1909 and has never been amended. For over one hundred years, not a single court has cited to the second paragraph of DRL § 12 for the purposes of validating a Quaker marriage (or any other denomination). There is a single opinion from the Office of the Attorney General from 1971 with respect to the validity of Indian tribal marriages (1971 N.Y. Op. Attny Gen. No. 27 (N.Y.A.G.), 1971 WL 216931). As noted therein, peacemakers were already authorized to perform marriage ceremonies under New York law. Accordingly, the provisions of the second paragraph of DRL § 12 were wholly unnecessary as far as validating an Indian marriage. The opinion additionally notes in relevant part: “[p]roof of marriage in both instances above cited [pre 1957 and post 1957] could be by registration pursuant to the Domestic Relations Law”

language contained within the first paragraph of DRL § 12 such that the reference to “that they take each other as husband and wife” is changed to “that they take each other as his/her spouse” to conform with both the provisions of New York State and Federal law permitting same sex marriage.

In recent years, a number of cases have required New York courts to determine if a marriage solemnized in New York before a religious leader, but where no marriage license was obtained, is void. These cases arise when one party to the alleged marriage later contends that the marriage was not properly solemnized. The objections to the validity of the marriage arise either because a party claims the person who performed the ceremony did not meet the definition of a clergyman or minister as defined under Religious Corporations Law § 2 (*Ranieri v. Ranieri*, 146 A.D.2d 34 [2d Dep’t 1989]; *Oswald v. Oswald*, 107 A.D.3d 45 [3d Dep’t 2013]; *Jackson K. v. Parisa G.*, 51 Misc.3d 1215(A) [Sup. Ct., NY County, 2016]) or where it is claimed that the ceremony was not performed in accordance with the practices of the religious denomination as required under DRL § 12 (*Jackson K. v. Parisa G.*, *supra.*; *Devorah H. v. Steven S.*, 49 Misc.3d 630 [Sup. Ct., NY County 2015]; *Persad v. Balram*, 187 Misc.2d 711 [Sup. Ct., Queens County 2001]). Determining these issues can create difficulties for a judge since a court is prohibited from resolving “controversies over religious doctrine and practice.” (*Presbyterian Church of U.S. v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440, 449 [1969]; *First Presbyterian Church of Schenectady v. United Presbyterian Church in U.S.*, 62 N.Y.2d 110, 116 [1984]). To require the court to determine, as contemplated by the second paragraph of DRL § 12, whether a marriage was solemnized “in the manner heretofore used and practiced in their respective societies or religions” is in direct conflict with the aforementioned United States Supreme Court precedent. *See also*, *Weisberg*, 2014 N.Y. Misc. LEXIS 1613 [Surr. Court, N.Y. Co. 2014].

A mandatory requirement that a marriage license signed by all necessary parties, including the officiant, and returned to the office of the clerk will help avoid future litigation over the validity of a New York marriage. Requiring a license will assure that no impediments exist to the marriage and that each party has knowingly entered into the contractual relationship. *Hasna J. v. David N.*, No. XX/28, 2016 WL 5793500 (N.Y. Sup. Ct. Sept. 28, 2016). Contesting the validity of the marriage will become more difficult with the existence of a marriage license filed with the government.

Moreover, the filing of a license will help avoid litigation in a host of other areas by providing a record of the marriage to address crediting of social security benefits, health insurance coverage, inheritance rights and other marriage-related issues.⁹⁸ In many of these cases, such as

⁹⁸ As the court stated in *Ponorovskaya v. Stecklow*, 45 Misc. 3d 597, 611–12, 987 N.Y.S.2d 543 (Sup. Ct. 2014); “And then there is the problem of record keeping. If there is no executed marriage license—stating the date and place of the marriage, and signed by the spouses, the witnesses and the officiator—returned to the office of the clerk, the license cannot be recorded pursuant to Domestic Relations Law §§ 19 to 20-b. And without an official governmental record of the marriage, one will have difficulty proving they are married when applying *612 for health insurance as a covered spouse or seeking Social Security benefits as a surviving spouse. Obviously, without marriage licenses there would be no workable way of knowing and proving who is married in this state.” *See also In re Farraj*, 23 Misc. 3d 1109(A), 886 N.Y.S.2d 67 (Sur. 2009), *aff’d*, 72 A.D.3d 1082, 900 N.Y.S.2d 340 (2010)).

Ponorovskaya,⁹⁹ *Farraj*,¹⁰⁰ and *Hasna*,¹⁰¹ the court is required to examine the facts and circumstances at great length in order to determine the expectations of the parties as to whether they were legally married. Determining the validity of the marriage often requires lengthy litigation, occurring years after the alleged marriage was entered, when witnesses may no longer be available and can cause severe emotional distress to the parties, children, heirs and others, not to mention the time and expense incurred in proceeding with such court or administrative proceedings. Such litigation consumes judicial resources which could have been better spent determining important questions involved in matrimonial cases, such as custody and visitation, which have immediate consequences in the lives of families and children going through divorce. Moreover, uncertainty over whether a marriage exists can work to the detriment or the advantage of either party and allows manipulation by parties.

Marriage in New York is a civil contract (DRL § 10). We see no impediment to having an absolute requirement that a marriage license be obtained before a marriage can be solemnized in New York. At least twenty-seven states have enacted mandatory marriage license statutes without any claim of infringement on religious freedoms.¹⁰² Moreover, the absolute requirement that a license be obtained will help ensure that the parties recognize the serious commitment they make by entering into a marriage.

On July 20, 2017, chapter 35 of the Laws of 2017 went into effect (2017-18 S.4407A/A.5524A). Under the new law, the Domestic Relations Law was amended to prohibit civil marriage and issuance of a marriage license to minors under the age of seventeen. Prior to the new law, sixteen and seventeen-year-olds were allowed to marry on consent of their parents or guardians, while children fourteen and fifteen years of age must have judicial consent as well as consent of parents or guardians. The new law prohibits marriage by seventeen-year-old minors even with the consent of their parent or guardian unless the court approves the marriage after, among other things, making findings that the marriage was not forced upon the minor. The bill memo to the Assembly Bill justifies the increased steps the court must take to protect the seventeen-year-old under the new law as compared with the minimal steps required before the court could approve a marriage by a fourteen or fifteen-year-old minor under the old law as follows:

“Based on anecdotal evidence, we have learned that the court approval process under current law for the authorization of marriage of persons under sixteen years of age has not provided adequate protections for a child against abuse and fraud on the part of parents or guardians to force a child into marriage. This legislation will strengthen the process as applied to marriage of persons at least seventeen but under eighteen years of age...”

⁹⁹ *Ponorovskaya v. Stecklow*, 45 Misc. 3d 597, 987 N.Y.S.2d 543 (Sup. Ct. 2014).

¹⁰⁰ *In re Farraj*, 23 Misc. 3d 1109(A), 886 N.Y.S.2d 67 (Sur. 2009), aff'd, 72 A.D.3d 1082, 900 N.Y.S.2d 340 (2010)).

¹⁰¹ *Hasna J. v. David N.*, No. XX/28, 2016 WL 5793500 (N.Y. Sup. Ct. Sept. 28, 2016).

¹⁰² The following is a list of 27 states which, as of the end of 2016, had enacted mandatory marriage license statutes: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Kentucky, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, Pennsylvania, Tennessee, Utah, Virginia, West Virginia, and Wyoming.

While our Committee fully supports the goals of the new age of consent law, we believe it would be made more effective by the enactment of our proposal requiring that a marriage license be obtained in all cases. Under the new age of consent law, minors under eighteen can still be married in religious marriages, thereby evading the new law's protections until they come of age at which time they can remarry without seeking court approval. Only by closing the loopholes noted in DRL §§12 and 25 can we be sure that the new age of consent law will be effective.

Our proposal applies prospectively only and provides for a six-month period before it becomes effective to allow for appropriate notice to officiants and the public.

Proposal:

AN ACT to amend the domestic relations law, in relation to requiring marriage licenses in all cases

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 1. Section 12 of the domestic relations law is amended to read as follows:

§12. Marriage; how solemnized.

No particular form or ceremony is required when a marriage is solemnized as herein provided by a clergyman or magistrate, but the parties must solemnly declare in the presence of a clergyman or magistrate and the attending witness or witnesses that they take each other as [husband and wife] spouses. In every case, at least one witness beside the clergyman or magistrate must be present at the ceremony.

[The preceding provisions of this chapter, so far as they relate to the manner of solemnizing marriages, shall not affect marriages among the people called friends or quakers; nor marriages among the people of any other denominations having as such any particular mode of solemnizing marriages; but such marriages must be solemnized in the manner heretofore used and practiced in their respective societies or denominations, and marriages so solemnized shall be as valid as if this article had not been enacted.]

§ 2. Section 25 of the domestic relations law is repealed.

§ 3. This act shall take effect 180 days from the date on which it shall have become a law and shall apply prospectively only.

6. Proposal for Amendment of CPLR 3217(a) Regarding Voluntary Discontinuances in Matrimonial Actions [CPLR 3217]

In the leading New York case on discontinuances in matrimonial actions, the Court of Appeals reversed a Third Department decision overturning an Albany County Supreme Court decision, thereby allowing a party to discontinue a divorce action to take advantage of the change in equitable distribution law (*see Battaglia v. Battaglia*, 90 A.D.2d 930, 934, 457 N.Y.S.2d 915 (1982) rev'd, 59 N.Y.2d 778, 451 N.E.2d 472 (1983)). This case upheld the right of the parties to discontinue cases at the time of trial without court approval pursuant to CPLR 3217(a). However, this rule can work unfairly in matrimonial actions where parties may use the rule to discontinue to litigate another day when they believe their chances will be better, even though they have already spent years in discovery, wasting judicial resources, time and money.

The Committee believes that a special rule on discontinuances for matrimonial actions is needed because pleadings are often not served or waived in divorce actions. Parties often do not file pleadings in such cases while they negotiate and may not even be aware of all the ancillary issues until later in the case. With the advent of DRL § 170(7) allowing for no-fault divorce, a party may not even file an answer and counterclaim, believing, erroneously, that it is unnecessary. It is unfair to the court and the other party and to the children to let a party discontinue after considerable resources and effort have been spent on the case. We were gratified at the adoption of our proposal for a revised Preliminary Conference Order form containing a provision requiring the parties to waive a voluntary discontinue once grounds have been resolved.¹⁰³ However, this was a stopgap measure and a statutory amendment to the CPLR itself applicable only to matrimonial actions would be most effective.

Rather than rely on a statewide court form which contains a provision waiving voluntary discontinuance, which form may or may not be used uniformly throughout the state,¹⁰⁴ we recommend a statutory amendment to the CPLR applicable only to matrimonial actions which would prohibit a voluntary discontinuance once a notice of appearance is filed or a party has appeared in court, e.g. at the preliminary conference. Like the provision in our revised preliminary conference order form adopted in 2016, discussed earlier in this report, this provision will deny parties the option to discontinue an action in order to litigate another day when they believe their chances will be better, even though they have already spent years in discovery, but will accomplish this without requiring parties to file pleadings which might discourage settlements and which might result in extensive motion practice and hearings.

¹⁰³ This provision in our preliminary conference order was described in an article in the *New York Post* as “closing a loophole” in the law so that parties can no longer withdraw the divorce case after extensive time and discovery without consent of both parties. See article by Julia Marsh, *New York Post*, August 10, 2016.

¹⁰⁴ Based on comments we have received, we are optimistic that, because of the addendum allowing judicial districts to add their own provisions, the newly revised preliminary conference order court form will be more widely used throughout the state than the prior version of the form which was not widely utilized.

Proposal:

AN ACT to amend the civil practice law and rules, in relation to filing unilateral discontinuances in matrimonial actions

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraph 1 of subdivision (a) of rule 3217 of the civil practice law and rules is amended to read as follows:

1. by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim and filing the notice with proof of service with the clerk of the court; except in an action for divorce, separation or annulment, a notice of discontinuance cannot be filed pursuant to this subdivision if a notice of appearance has been served or a party has appeared in court, notwithstanding the fact that no pleading or responsive pleading has been filed;

or

§2. This act shall take effect immediately.

VIII. New or Modified Rule Proposals

1. Proposal to Adopt 22 NYCRR 202.18-a Regarding Statements of Understanding of Forensic Evaluators in Custody Cases (New)

There is currently much debate about forensic reports. As an Appendix H to this report, we provide a White Paper on Forensic Reports in Custody Cases to address this important topic. We also propose in this report a new matrimonial rule to increase transparency as to the process of “informed consent” in Statements of Understanding of forensic evaluators in custody cases as required by the guidelines of many mental health professional associations.

The new rule will increase transparency about forensic reports. It was drafted after consultation with the Mental Health Professionals Committee of the Appellate Divisions of the 1st and 2d Departments. It will ensure that statements of understanding do not conflict with the orders of appointment of forensic evaluators. The rule requires that the statements of understanding must be sent upon receipt of the order of appointment by the evaluator to the attorney representing the litigant, or to any self-represented litigant, and that such statements must be reviewed, signed and returned to the Court and the evaluator within ten days. Review by counsel and self-represented litigants prior to signature will help to ensure that the parties understand the terms of the statements of understanding and that the statements of understanding comply with the orders of appointment. The ten-day time limit will make certain that often lengthy custody proceedings are not subject to further delays as a result of the procedure.

Proposal:

§202.18-a Matrimonial Actions; Statements of Understanding Issued by Court Appointed Mental Health Experts to Clients with respect to Forensic Evaluations Regarding Custody or Visitation (New)

a) Applicability. This section shall be applicable to all forensic evaluations regarding custody or visitation in matrimonial actions and proceedings in the Supreme Court to which section 237 of the Domestic Relations Law applies.

b) Any statement of understanding issued to a client for a forensic evaluation by a psychiatrist, psychologist, or social worker appointed by the court to give testimony or produce a written evaluation report with respect to custody or visitation in a matrimonial action shall comply with the following requirements:

- 1) The statement of understanding shall provide information concerning the evaluator's policies, procedures, and any attendant fees in addition to the hourly rate and cap as set forth in the order of appointment.
- 2) The statement of understanding shall not contain any material terms that conflict with the provisions of the order of appointment.
- 3) Upon receipt of the order of appointment, the evaluator shall send the statement of understanding to counsel for the parties and to any self-represented litigants for their review and acknowledgement. The statement of understanding shall be reviewed, signed and returned to the evaluator and the court within 10 business days.

2. Modified Proposal to Amend Automatic Orders Rule 22 NYCRR § 202.16-a (New)

Once our proposal for amendment of the automatic orders statute is enacted as described above in this report, we recommend a conforming amendment to the court rule 22 NYCRR §202.16-a.

Proposal

Subdivisions (b) and (c) of 22 NYCRR Section 202.16-a Matrimonial Actions; Automatic Orders are amended to read as follows:

(b) Service. The plaintiff in a matrimonial action shall cause to be served upon the defendant, simultaneous with the service of the summons, a copy of the automatic orders set forth in this section in a notice that substantially conforms to the notice contained in Appendix F. The notice shall state legibly on its face that automatic orders have been entered against the parties named in the summons or in the summons and complaint pursuant to this rule, and that failure to comply with these orders may be deemed a contempt of court. The automatic orders shall be binding upon the plaintiff immediately upon filing of the summons, or summons and complaint, and upon the defendant immediately upon service of the automatic orders with the summons. In the event that the Governor declares an emergency which results in the Chief Judge of the State or the Chief Administrator of the Courts issuing an Administrative Order which prohibits the filing of the summons or the summons and verified complaint during the emergency, then the automatic orders shall be binding upon the plaintiff and the defendant immediately upon service of the summons upon defendant, but shall have no force and effect unless: 1) the plaintiff purchases an index number for the action within 21 days of the date of an Administrative Order by the Chief Judge of the State or the Chief Administrator of the Courts permitting the filing of the summons or the summons and verified complaint during the emergency; or 2) plaintiff applies for poor person status pursuant to CPLR 1101(d) within twenty-one days of the date of an Administrative Order by

the Chief Judge of the State or the Chief Administrator of the Courts permitting the filing of the summons or the summons and verified complaint during the emergency, and, in the event that the application for poor person status is denied, the plaintiff pays an index number fee within 120 days after the date of a court order denying the plaintiff's application for waiver of the fee pursuant to CPLR 1101(d). [These] Except as provided above, these orders shall remain in full force and effect [during the pendency of the action,] until entry of the judgment of divorce unless terminated, modified or amended by further order of the court or upon written agreement between the parties.

(c) Automatic Orders. Upon service of the summons in every matrimonial action, it is hereby ordered that:

(1) Neither part shall sell, transfer, encumber, conceal, assign, remove or in any way dispose of, without the consent of the other party in writing, or by order of the court, any property (including, but not limited to, real estate, personal property, cash accounts, stocks, mutual funds, bank accounts, cars and boats) individually or jointly held by the parties, except in the usual course of business, for customary and usual household expenses or for reasonable attorney's fees in connection with this action.

(2) Neither party shall transfer, encumber, assign, remove, withdraw or in any way dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401K accounts, profit sharing plans, Keogh accounts, or any other pension or retirement account, and the parties shall further refrain from applying for or requesting the payment of retirement benefits or annuity payments of any kind, without the consent of the other party in writing, or upon further order of the court, except that any party who is already in pay status may continue to receive such payments thereunder.

(3) Neither party shall incur unreasonable debts hereafter, including but not limited to further borrowing against any credit line secured by the family residence, further encumbering any assets, or unreasonably using credit cards or cash advances against credit cards, except in the usual course of business or for customary or usual household expenses, or for reasonable attorney's fees in connection with this action.

(4) Neither party shall cause the other party or the children of the marriage to be removed from any existing medical, hospital and dental insurance coverage, and each party shall maintain the existing medical, hospital and dental insurance coverage in full force and effect.

(5) Neither party shall change the beneficiaries of any existing life insurance policies, and each party shall maintain the existing life insurance, automobile insurance, homeowners and renters insurance policies in full force and effect.

(6) Each party, having received notice of same, shall within ten (10) days thereafter send written notice to the other party of a tax lien, foreclosure, bankruptcy, or litigation, or the filing of same, which could adversely affect the marital estate.

(7) Neither party shall make use of an electronic device in the ownership, use, possession, or custody and control of the other party, including without limitation a tablet, computer, laptop, personal digital assistant, or smartphone, to obtain information about the other party without their knowledge and consent.

(8) These automatic orders shall remain in full force and effect [during the pendency of the action] until entry of the judgment of divorce unless terminated, modified or amended by further order of the court or upon written agreement between the parties.

(9) The failure to obey these automatic orders may be deemed a contempt of court.

IX. Previously-Endorsed Rule Proposals

1. Rule Proposal to Amend 22 NYCRR 202.16(h)(3) Regarding Statements of Disposition [22 NYCRR 202.16(h)(3)]

The Committee again recommends a proposal we introduced in our 2019 report to amend the requirement in the matrimonial rules that the Statement of Proposed Disposition must be filed with the court with the Note of Issue. It is too early in the litigation to require the Statement of Proposed Disposition when the Note of Issue is filed as is required by 22 NYCRR 202.16(h) at present. We recommend that the rule be amended to require that the Statement of Proposed Disposition be filed later at a pre-trial conference after the Note of Issue has been filed, or as otherwise directed by the court. This would save litigants expense by not having to submit the Statement of Disposition when the issues have not been clearly defined. It would also save judicial resources in reviewing submissions.

Proposal

22 NYCRR 202.16(h)(3) is hereby amended to read as follows:

(3) The statement referred to in paragraph (1) of this subdivision, with proof of service upon the other party, shall [, with the note of issue,] be filed with the court at a pre-trial conference after the note of issue has been filed, or as otherwise directed by the court. The other party, if he or she has not already done so, shall file with the court a statement complying with paragraph (1) of this subdivision within 20 days of such service.

2. Custody Severance Rule Proposal [22 NYCRR § 202.16(n)]

Justices hearing matrimonial cases often conduct bifurcated trials allowing the issues pertaining to custody to be determined before issues pertaining to financial relief. Early resolution of custody is often in the best interests of the children of the marriage. Moreover, financial and custody issues may not easily lend themselves to being tried together. However, if the custody issues are tried first, a significant passage of time, often more than one or two years, may occur between the date of the court's custody decision and the entry of the judgment of divorce. Without entry of a judgment, the custody decision is not subject to appeal.¹⁰⁵ A party who wishes to appeal the custody decision is left without an immediate remedy, to the possible detriment of the children. By the time the judgment of divorce is entered, the facts heard at the custody trial may be stale due to the passage of time. Appellate justices hearing the appeal may feel constrained to send the matter back to the trial court for a new hearing to update the facts.

To remedy this problem, the Committee recommends adding a new section 202.16(n) to the Uniform Civil Rules for the Supreme Court and the County Court. The rule requires the trial judge in a divorce action where a decision has been reached on custody, but other ancillary issues have not been litigated or resolved, to sever the custody issues resolved from the remaining issues in the case, and to direct entry of judgment thereon, thus allowing immediate appeal, if sought, of the custody issues resolved.¹⁰⁶

This procedure is authorized under CPLR 5012 which provides:

“The court, having ordered a severance, may direct judgment upon a part of a cause of action or upon one or more causes of action as to one or more parties.”

We believe that the possibility of immediate appeal from a custody decision in a divorce action is in the best interest of the children. Final resolution of custody issues is essential to the ability of children to adapt to the significant and often traumatic changes that divorce frequently requires of them. Families also must adapt to changes. The sooner the decision is final, parties can begin to make the necessary changes in their lives. The rule provides a mechanism, where appropriate, to seek expedient appellate review. In actions based on DRL § 170(7), the no-fault ground, the court is free to enter judgment on the remaining issues while the custody issues are

¹⁰⁵ See Memorandum dated March 7, 2008 from Hon. A. Gail Prudenti, then Presiding Justice of the Appellate Division of the Second Judicial Department, advising of the requirements in the CPLR for custody and visitation decisions (rather than orders) which can then be followed by judgments which are appealable. Said Memorandum is attached as Appendix I to this report.

¹⁰⁶ Professor Siegel in the Practice Commentaries states that: “A judgment as to part of an action under this rule would be final and appealable; the time to appeal would begin to run from its entry. Difficulty was encountered with rule 54(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., early in its history because of the conflict between the final judgment limitation on appeal ability and an apparently strained use of the new rule to escape the rigors of that limitation. No such difficulty should be anticipated in this state with its tradition of interlocutory appeals. Accordingly, the Federal limitation requiring “an express determination that there is no just reason for delay” is omitted”. (see N.Y. CPLR rule 5012 (McKinney)).

being appealed, since all ancillary issues will have been resolved at the time of entry of the final judgment of divorce.

This rule will provide a statewide, uniform procedure to enable the immediate appeal of a custody decision while the rest of the divorce action remains pending.

The proposed rule has been approved by the Chief Administrative Judge's Advisory Committee on Civil Practice.

Proposal:

22 NYCRR§ 202.16 is amended by adding a new subdivision (n) to read as follows:

(n) Severance of Custody After Trial and Entry of Judgment. Where custody is at issue for an annulment or dissolution of a marriage, for a divorce, for a separation, for a declaration of the nullity of a void marriage or nullity of a marriage, simultaneous with the issuance of a Decision after Trial (or Decisions and Order after Trial) finally resolving the issue of custody, the Court shall sever the issues so resolved and direct the entry of judgment thereon pursuant to CPLR rule 5012.

3. Amendment to 22 NYCRR § 202.16(k)(3) and Adoption of Form of Application for Counsel Fees by Unrepresented Litigant

In 2015, the Legislature passed and the Governor signed into law, as chapter 447 of the laws of 2015, our proposal to amend § 237(a) to clarify and codify on a statewide basis what is implicit in *Prichep v. Prichep*, 52 A.D.3d 61, 858 N.Y.S.2d 667 (2d Dept. 2008), i.e., unrepresented litigants¹⁰⁷ should not be required to file an affidavit detailing fee arrangements when seeking counsel fees. We now propose an amendment to 22 NYCRR § 202.16 (k) (3) to mirror the statutory amendment exempting unrepresented litigants from the detailed fee affidavit requirement, and to adopt a new statewide form, i.e., “Unrepresented Litigant Application for Counsel Fees.” It consists of an order to show cause together with an affidavit in support. The new form is designed to make it easier for pro se litigants to apply for counsel fees. Without funds to hire counsel to make a formal motion for counsel fees, pro se litigants often do not know where to start in making the application. Compounding the problem is the unwillingness of many attorneys to make a motion on their behalf for counsel fees because of fear of becoming attorney of record in the matter.¹⁰⁸ We believe that unrepresented litigants will benefit by having a form available they can fill out themselves to obtain the fees to hire counsel to prosecute their matters. The Committee thought it prudent to leave out of the form instructions on filing because procedures might differ from county to county. The Committee also provided in the order that the fees be paid directly to an attorney retained by the unrepresented litigant to ensure that the fees would be used for the purpose intended.

As amended, the rule would make clear that an unrepresented litigant would not be required to file an affidavit detailing fee arrangements with an attorney, either in making a motion for counsel fees, or in defending a motion for counsel fees, provided he or she has submitted an affidavit that he or she is unable to afford counsel with supporting proof.

The rule amendment also clarifies that, as required by DRL § 237(a), as amended by our Committee’s 2015 legislative proposal, the represented litigant is required to file an affidavit detailing fee arrangements with an attorney in answering papers, as well as on moving papers, on a motion for counsel fees. This clarification in the rule was suggested by several members of the Committee who reported that monied spouses represented by counsel were frequently ignoring the requirement in DRL § 237(a) for both parties to submit an affidavit detailing fee arrangements with counsel because the current version of the rule imposes requirements on the moving party only. Thus, non-monied spouses represented by counsel in fee applications are being put at a disadvantage in the litigation by having to reveal the details of their fee arrangements with counsel while the other side is revealing nothing. Admittedly, the statutory requirement which requires affidavits by both parties should control over the rule, thus making the change unnecessary. However, the Committee recommends a clarification in the interest of protecting represented non-monied spouses making applications for counsel fees.

Proposal:

¹⁰⁷ The terms “unrepresented litigants,” “pro se litigants,” and “self-represented litigants” are often used interchangeably to refer to litigants who are not represented by counsel.

¹⁰⁸ See our proposal discussed earlier in this report for a statutory provision for a limited appearance by attorneys for application for counsel fees on behalf of the non-monied spouse.

22 NYCRR § 202.16 (k) (3) is amended to read as follows:

(3) No motion for counsel fees and expenses shall be heard unless the moving papers also include the affidavit of the movant's attorney stating the moneys, if any, received on account of such attorney's fee from the movant or any other person on behalf of the movant, the hourly amount charged by the attorney, the amounts paid, or to be paid, to counsel and any experts, and any additional costs, disbursements or expenses, and the moneys such attorney has been promised by, or the agreement made with, the movant or other persons on behalf of the movant, concerning or in payment of the fee. An unrepresented litigant shall not be required to file such an affidavit when making an application for an award of counsel fees and expenses; provided he or she has submitted an affidavit that he or she is unable to afford counsel with supporting proof, including a statement of net worth and if available, W-2 statements and income tax returns for himself or herself. However, the party opposing such motion, if represented by counsel, must still promptly submit such an affidavit as part of the answering papers as still required pursuant to section 237 of the Domestic Relations Law. An affidavit attached to an Order to Show Cause or motion filed by an unrepresented litigant shall comply with this rule if it is substantially in compliance with an Appendix to 22 NYCRR § 202.16 to be promulgated.¹⁰⁹ Fees and expenses of experts shall include appraisal, accounting, actuarial, investigative and other fees and expenses to enable a spouse to carry on or defend a matrimonial action or proceeding in the Supreme Court. (See Form of Proposed Application for Counsel Fee by Unrepresented Litigant attached as Appendix “J” to this report to be promulgated as an Appendix to 22 NYCRR § 202

¹⁰⁹ This is written in anticipation of future promulgation of an Appendix to 22 NYCRR § 202.16 containing the form Application for Counsel Fees by an Unrepresented Litigant attached as Appendix “J” to this report.

X. Previous Recommendation in Support of and Expansion on Recommendation for Increase in Assigned Counsel Fees by Commission on Parental Representation)

We once again endorse this year a recommendation of the Commission on Parental Legal Representation chaired by Hon. Karen Peters (the “Commission”) for an increase in assigned counsel fees. In their Interim Report to Chief Judge Janet DiFiore dated February 2019, the Commission stated: “We recommend that the hourly rates for assigned attorneys be increased to \$150 per hour and a mechanism for periodic review and adjustment be instituted.”¹¹⁰ Although the Commission determined to focus on parental representation in child welfare cases in their Interim Report, they stressed that in their final report they would consider issues of parental representation in other types of cases as well. In her 2019 State of Our Judiciary Address, Chief Judge Janet DiFiore endorsed the recommendations of the Commission, including the recommendation for an increase in assigned counsel fees.”¹¹¹

While our Committee continues to support the Commission’s recommendation and would expand its application to matrimonial cases and to fees of counsel representing children as well as adults, we recognize that the severe budget cuts imposed by the covid-19 pandemic will necessitate postponing action on this recommendation. For a copy of our Recommendation from last year’s report, please see pages 39-40 of our 2020 report available at <https://www.nycourts.gov/LegacyPDFS/IP/judiciaryslegislative/pdfs/Matrimonial-MPARCReport2020.pdf>

¹¹⁰ See Recommendation 6, at page, 8, Commission on Parental Legal Representation, Interim Report to Chief Judge, February 2019, available at http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR_Commission-Report.pdf

¹¹¹ See “State of our Judiciary” address by Hon. Janet DiFiore, Chief Judge, February 26, 2019 at p. 14 available at http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/19_SOJ-Speech.pdf

X. Past, Pending and Future Committee Projects

A. New and Ongoing Committee Projects

1. Recommendations in Response to Covid-19

Our Committee's first new priority this year was to assist Judge Sunshine with his administrative duties in responding to covid. Judge Sunshine asked the Committee for their suggestions about court rules, technology and health issues relating to matrimonial practice during covid, as well for their suggestions for dealing with evidence and ways to conduct hearings and court conference in a safe manner. Judge Sunshine incorporated some of these suggestions in a report on suggested protocols he presented on conducting hearings and trials during the pandemic. He also employed some of the Committee's suggestions on evidence in the pilot project with Jeff Carucci, Director of NYS Courts E-filing, to implement through NYSCEF a proposal on how to submit evidence in virtual trials during the pandemic to assure public health and safety. The Pilot Project on Evidence permits the upload of proposed evidence prior to trial for purposes of being marked for identification. Said proposed evidence then can be moved into evidence at the beginning or during the trial. There is also the ability to upload proposed evidence for impeachment purposes for cross examination.

2. Review of Report of Secretary Jeh Johnson with Respect to Diversity in the Bench and Bar and Implicit and Explicit Bias in Matrimonial Actions

A second new priority this year was to examine the subject of Diversity in the Bench and Bar and Implicit and Explicit Bias in Matrimonial Actions. Following the October 1, 2020 release of the report of Secretary Jeh Johnson, appointed by Chief Judge DiFiore as Special Adviser on Equal Justice in the Courts, our Committee reviewed the report available at www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf with a view toward examining what changes may be necessary to increase diversity and inclusion in matrimonial practice. Judge Sunshine has appointed a new Working Group on Diversity for this purpose.¹¹²

3. Gender Fairness Survey of New York State Judicial Committee on Women in the Courts

On November 23, 2020 ,the Gender Fairness Survey conducted by the New York State Judicial Committee on Women in the Courts was released. The Survey is available at www.nycourts.gov/LegacyPDFS/IP/womeninthecourts/Gender-Survey-2020.pdf The Committee has undertaken review of the Survey in connection with ensuring gender fairness in matrimonial practice.

¹¹² The members of the Working Group on Diversity are Hon. Jeffrey Goodstein, Hon. Cheryl Joseph, Hon. La Tia Martin, Hon. Emily Ruben, Yesenia Rivera, Esq. and Zenith Taylor, Esq.

4. White Paper on Forensics Reports in Custody Cases

A number of bills were introduced in the Legislature in recent years regulating or prohibiting the use of forensic evaluations in custody and visitation proceedings.¹¹³ To address concerns about forensics reports in custody cases as evidenced by some of these bills,¹¹⁴ our Committee has prepared an informational White Paper which is attached as Appendix “ H ” to this report. The White Paper does not discuss specific bills, but rather is intended to inform policymakers, advocates and the public at large about the purpose of forensic evaluations and the role they play in custody cases from the court’s perspective. We hope our White Paper will be a valuable information resource for the public and the Legislature in evaluating the use of forensics reports in custody cases.¹¹⁵

5. Presumptive Early ADR Statewide Initiative in Matrimonial Cases

In 2020 we continued our efforts to assist Judge Sunshine as Statewide Coordinating Judge for Matrimonial Cases with implementation of the Statewide Presumptive Early ADR Initiative. Along with Judge Sunshine, former Committee member Hon. Andrew Crecca, (now Administrative Judge for Suffolk County), and Committee member Elena Karabatos, Esq, are members of the Chief Judge’s Advisory Committee on ADR, led by John S. Kiernan, and are actively promoting the concept of presumptive mediation and alternative dispute resolution in their local Judicial Districts. This project became a priority in 2020 since ADR proved an effective alternative to resolving certain matrimonial issues while the covid pandemic limited access judicial resources. On September 15, 2020, Suggested Statewide Family and Matrimonial Mediation Protocols were approved by Chief Judge Janet DiFiore’s and Chief Administrative Judge Marks’s Statewide Alternate Dispute Resolution (ADR) Committee chaired by John Kiernan. MPARC Committee member Elena Karabatos along with other members of the Chief Judge’s Advisory Committee on ADR, was extremely helpful in assisting Judge Sunshine in drafting the Suggested Protocols.

¹¹³ Some of these bills have been motivated by tragic incidents involving children. Judge Sunshine has been appointed to the NYS Unified Court System’s Advisory Council on Child Fatalities chaired by the Hon. Edwina Mendelson, Deputy Chief Administrative Judge.

¹¹⁴ Some of the bills we studied included not only A. 05621 Weinstein/ S.4686 Biaggi which we discuss at length in this report in connection with our Committee’s proposal on access to forensics in custody cases, but also A. 9888 Dinowitz, A. 10424 Hevesi, and S. 8459 Sanders.

¹¹⁵ See note 47 supra for the members of the Subcommittee on the White Paper on Forensics in Custody Cases..

6. Alternative Parenting Arrangements, the Child Parent Security Act and the Committee's White Paper on Surrogacy

During 2020, our Committee continued to study surrogacy in light of the landmark Court of Appeals decision in *Matter of Brooke S.B v. Elizabeth A.C.C.* (2016 NY Slip Op 05903) as we continued to follow the latest developments on alternative parenting arrangements and access rights.

We also continued our study of surrogacy legislation. In 2017 and 2018, we studied a bill introduced by Assemblywoman Paulin as 2017-18 A. 6959. In 2019, we studied a new version of the bill introduced by Senator Hoylman as 2019-20 S.2071-A. Assemblywoman Paulin amended her bill and reintroduced it in May 2019 as A. 1071-B. The bill was further amended in June 2019 as S. 2017-B/ A.01071C.

Our Committee did an intensive study of the bill as amended through June 2019 as well as of :1) the 2017 report by the New York State Task Force on Life and the Law titled *Revisiting Surrogate Parenting: Analysis and Recommendations for Public Policy on Gestational Surrogacy* and 2) the Uniform Parentage Act published by the National Conference of Commissioners on Uniform State Laws.

While the Committee could not reach a consensus on whether to support or oppose the Hoylman/Paulin bill, the Committee adopted and prepared a "White Paper" on Surrogacy in New York State to review the issues presented, with a focus on the impact of the bill on the courts, in the hopes that it would serve as a resource as various proposals were debated in the future. The paper was attached as Appendix "H" to our 2020 report available at <https://www.nycourts.gov/LegacyPDFS/IP/judiciaryslegislative/pdfs/Matrimonial-MPARCReport2020.pdf>.¹¹⁶

In 2020 just before the Governor declared covid an emergency in March, several new bills were introduced regarding surrogacy legislation which the Subcommittee studied, including S.07717/ Barrett A.09847. Ultimately, a bill entitled Judgment of Parentage of Children Conceived Through for Assisted Reproduction and Surrogacy Legitimization (S.7506B/A.9506B). was enacted as Governor's Budget Bill as Chapter 56, Laws of 2020 eff. 2/15/21 as Article 5C of the Family Court Act.

The Subcommittee is studying the enacted law in detail to see what may still require attention, but has initially concluded that it contains provisions which are more advantageous than provisions in prior bills on points examined in the White Paper. The law legitimizes gestational surrogacy in New York and requires the intended parents to pay for medical insurance for the surrogate for twelve months after birth of the child. It also provides for informed consent of the surrogate, a Surrogate's Bill of Rights, and a six-month residency requirement. Another improvement is that if the agreement is unclear, the court will decide parentage based on the best interests of the child despite the lack of a

¹¹⁶ It was drafted by a sub-committee chaired by Hon. Ellen Gesmer, Associate Justice of the Appellate Division First Department assisted by Hon. Laura Drager,¹¹⁶ Hon. Jacqueline Silbermann (Ret.), Susan Bender, Esq. Kathleen Donelli, Esq., Elena Karabatos, Esq., and Michael Mosberg, Esq.

genetic connection, The Department of Health is required to maintain records. Many of these points were discussed in our Committee’s White Paper.

Our Committee also continues to follow development of the law in this important area as it has developed after the enactment of the Marriage Equality Act (L. 2011, c. 95)¹¹⁷, the 2015 ruling of the Supreme Court of the United States in *Obergefell v Hodges*,¹¹⁸ and the 2016 decision of the New York Court of Appeals holding that “where a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together, the non-biological non-adoptive partner has standing to seek visitation and custody under Domestic Relations Law 70.” (see *Matter of Brooke S.B v. Elizabeth A.C.C.* (2016 NY Slip Op 05903 at 2).

Our work on the White Paper on Surrogacy built upon our efforts to study changes in the law on alternative parenting arrangements and surrogacy dating back to the Brooke decision in 2016. The Committee first considered what legislative changes should be made to protect the rights of same sex couples in alternative parenting arrangements. We discussed a simple proposal to amend section 73 of the Domestic Relations Law to establish the co-motherhood rights of the non-biological mother in lesbian couples. However, we decided to table this proposal pending further study because it may not go far enough in protecting children born to married men by artificial insemination using their sperm. The Committee was reluctant to recommend a proposal establishing rights of same sex female couples without protecting rights of same sex male couples. However, we were mindful that any proposal which protects rights of married men regarding children born by artificial insemination raises issues of surrogate parenting. Thus, the Committee decided further study was needed. Based on the recommendation of our Ad Hoc Committee on Alternative Parenting Arrangements,¹¹⁹ we decided to accept the gracious offer of Professor Suzanne Goldberg of Columbia Law School, who is Executive Vice President for University Life and the Director of the Center for Gender and Sexuality Law, to provide our Committee with a team of four clinic students to work on this as a project under supervision by members of our Committee¹²⁰ in order to assist our Committee in formulating a recommendation to the Chief Administrative Judge. At our April 15, 2016 Committee meeting, the students submitted a report entitled “Law & Policy Implications of a Change in New York State’s Ban on Surrogacy Contracts”, (the Columbia Students Report’).¹²¹ The report served as a valuable resource to our Committee.

¹¹⁷ This act adopted section 10(a) of the Domestic Relations Law providing that a marriage is valid regardless whether the parties are of the same or different sex.

¹¹⁸ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed.2d 609 (Supreme Court 2015 where the Supreme Court, in 2015, held that the right to marry is a fundamental right and upheld the rights of same-sex couples to marry.

¹¹⁹ Members of the Ad Hoc Committee on Alternative Parenting Arrangements were Hon. Jacqueline Silbermann, Hon. Laura Drager, Hon. Ellen Gesmer, Susan Bender, Esq., and Michael Mosberg, Esq.

¹²⁰ Hon. Ellen Gesmer and Susan Bender, Esq. supervised the students’ work during the project which ran from January through April 2016.

¹²¹ The Columbia Students Report is available online at https://www.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/columbia_sexuality_and_gender_law_clinic_-_surrogacy_law_and_policy_report_-_june_2016.pdf

The Committee has also followed development of the case law since *Brooke S.B. v. Elizabeth A.C.C.* to assist its review of surrogacy and the proposed Parent Child Act. In *Frank G. v. Renee P.-F.*,¹²² one of the related cases to the case cited above, although the court found the surrogacy agreement unenforceable, the court nevertheless found that the surrogacy agreement was evidence of the parties' unequivocal intention that the two male partners had become the parents of the children and found standing for petitioner to seek custody and visitation. In *Dawn M. v. Michael M.*, 55 Misc. 3d 865, 47 N.Y.S.3d 898 (N.Y. Sup. Ct. March 2017), the court granted shared legal tri-custody to a wife in a divorce proceeding with her husband who was the biological father as well as with the biological mother. In *K v. C.*, 55 Misc. 3d 723, 51 N.Y.S.3d 838 (N.Y. Sup. Ct. April 2017), the court dismissed the petition for custody on the basis that petitioner failed to prove that the parties had a plan to adopt and raise the child together that was continuous without interruption. In *A.F. v. K.H.*, 57 N.Y.S.3d 352 (Fam. Ct. 2017), the court granted an order of filiation/parentage to a non-biological non-adoptive parent of children conceived by the biological parent after the parents had registered as domestic partners prior to the date that same sex marriage became legal in New York. At the end of 2017, a Family Court Judge in Nassau County found that a former non-married female partner in a same sex relationship had standing to seek custody even though there was no preconception agreement, based on equitable estoppel. As pointed out by Andrew Denney in an article in the New York Law Journal on September 27, 2017, this ruling was an expansion of the ruling in *Brooke S.B. v. Elizabeth A.C.C.*

In 2018, a Second Department decision held that the petitioner did not sustain her burden of establishing standing to seek visitation. In that case the biological mother had died, and the same sex partner of the biological mother argued that the mother had consented to a parent-like relationship because the same sex partner had moved in before the child was born and played a role in the child's daily upbringing until the mother died, even though there was no pre-conception agreement. The Appellate Division stated: "*while Matter of Brooke S.B. v. Elizabeth A.C.C...expanded the definition of "parent" beyond biological and adoptive parents to include a person who establishes, by clear and convincing evidence, that he or she agreed with the biological parent of the child to conceive and raise the child as co-parents, ...The petitioner failed to demonstrate that the mother consented to anything more than the petitioner assisting her with child-rearing responsibilities.*" The court noted as a key factor in their decision the fact that the mother executed a will naming the respondents rather than petitioner as guardians of the child after learning she had terminal cancer (see *Garnys v. Westergaard*, 158 A.D.3d 762, 763–64, 71 N.Y.S.3d 5a54 (N.Y. App. Div. 2018)).

In 2019, Susan L. Bender, Esq., a member of our Committee, presented together with Eric I. Wrubel, Esq., a CLE session at the Judicial Institute on alternative parenting case law development since the *Brooke S.B. v. Elizabeth A.C.C.* decision.¹²³ We note the significant Second Department decision in *Matter of Chimienti v. Perperis*, (2019 NY Slip Op. 02866) which was discussed in the program. The case is significant because it expands upon *Brooke S.B. v. Elizabeth A.C.C.* to find standing to seek custody and visitation based on equitable estoppel. It also allows equitable estoppel to be applied where the presumption of legitimacy had been conclusively rebutted.

¹²² *Frank G. v. Renee P.-F.*, 142 A.D.3d 928, 37 N.Y.S.3d 155 (N.Y. App. Div.), *leave to appeal dismissed*, 28 N.Y.3d 1050, 65 N.E.3d 1282 (2016).

¹²³ The session was entitled "Who Says You Are a Parent? Issues Evolving Since *Brooke S.B.*"

In 2020, a decision of the Appellate Division Fourth Department held that petitioner lacked standing under DRL § 70(a) to seek joint custody of, and visitation with a child which would result in a tri-custodial arrangement among the biological mother and father of the child, and the mother's partner. (*see Tomeka N.H. v. Jesus R.*, 183 A.D.3d 106, 107–08, 122 N.Y.S.3d 461, 463, leave to appeal denied, 185 A.D.3d 1480, 125 N.Y.S.3d 620 (2020)). Although the petitioner had a close relationship with the child and although the mother and petitioner had agreed after conception and after the relationship with the father ended to help raise the child together, the Court relied on the fact that nothing in the *Brooke* decision “would ever countenance a tri-custodial arrangement, and in fact the decision shows the opposite. As noted, the Court highlighted that Domestic Relations Law § 70 was limited to two parents...” *Tomeka N.H. v. Jesus R.*, *Supra* at 112, 466. But for an apparently conflicting view from a lower court, see *Raymond T. v. Samantha G.*, 59 Misc. 3d 960, 961, 74 N.Y.S.3d 730, 731 (N.Y. Fam. Ct. 2018).

Our Committee continues to follow this evolving area of the law in order to advise the Chief Administrative Judge.

7. Assistance to the Judicial Institute with Training of New and Experienced Matrimonial Judges and Referees

During 2020, the Committee's assistance to the Judicial Institute with training of Judges continued despite the pandemic. Members of the Committee presented sessions at virtual summer/fall seminars on a variety of topics.

The sessions included: Overcoming Coronavirus Challenges in Matrimonial Courtrooms presented by Judge Sunshine with Supervising Matrimonial Judges;¹²⁴ a two part Matrimonial Legal Update session presented by Bruce Wagner, Esq. of our Committee; An Overview of Maintenance, Child Support, Imputed Income and Support Modification;¹²⁵ Financial and Custodial Modification Applications Amid COVID 19 – Issues and Considerations for Matrimonial Judges;¹²⁶ Predatory Marriage and New York's Elective Share Law;¹²⁷ Protecting the Record – An Appellate View presented by Hon. Linda Christopher and Hon. Ellen Gesmer of our Committee; Evidence presented by Stephen Gassman, Esq. of our Committee; and The Intersection of Matrimonial Law and Immigration: A Panel Discussion spearheaded by Hon. Ellen Gesmer of our Committee.¹²⁸ We thank the presenters who are not members of our Committee who participated as presenters in these sessions.

¹²⁴ Supervising Judges included Judges Richard Dollinger, Jeffrey Goodstein, Joseph Lewis Lubell, La Tia Martin, and Mary Slisz.

¹²⁵ This session was presented by Rosalia Baiamonte, Esq.

¹²⁶ This session was presented by Rosalia Baimonte, Esq. and Hon. Rachael Adams.

¹²⁷ Yolanda Kanés, Maryann Stallone, and Amanda Leone presented this session.

¹²⁸ Other Panelists were Hon. Mimi Tsankov, Hon. Carol King (Ret.), and Nancy Kelly, Esq.

Sessions are already being planned for New Judges School in January 2021 and for a training by Judge Sunshine for Matrimonial Court Attorney Referees.

8. Mentoring of New or Newly-Assigned Matrimonial Judges

An important issue our Committee continues to study is mentoring of new or newly-assigned matrimonial judges. The need for mentoring was noted in the Matrimonial Commission Report as follows:

“An important aspect of this integration to the new assignment is to pair each new judge with a more senior judge. The senior judge should be available to assist the new judge during the entire training period and for a period of at least one year following the assignment.”¹²⁹

This recommendation of the Matrimonial Commission was made prior to the severe budget cuts that the courts experienced in recent years. Limited resources do not always make it possible today for a senior judge to be available to mentor new or newly-assigned matrimonial judges. Moreover, senior judges often assume heavy caseloads, leaving little time for mentoring their peers.

The new judges trainings on matrimonial law at the Judicial Institute are planned by Judge Sunshine with our Committee’s Education Subcommittee. These sessions train new matrimonial judges on various aspects of handling matrimonial cases. At the 2021 new judges trainings sponsored by the Judicial Institute, the Statewide Coordinating Judge for Matrimonial Cases will introduce new judges to matrimonial cases and discuss as part of the Chief Judge’s Excellence Initiative the resources available for judges hearing matrimonial cases from his office and the Committee as well as practical concerns relating to adjudication of matrimonial cases. Many members of the Committee serve as presenters at the trainings. Judge Sunshine continues to serve as a resource to judges hearing matrimonial cases and to meet with the new judges at the training.

9. Matrimonial Mandatory Parent Education Pilot Projects in Coordination with the Statewide Office of Professional and Court Services

The Committee continues to work to implement an Administrative Order effective October 1, 2018 creating mandatory parent education pilot projects in seven counties “as early as practicable.”¹³⁰ The Administrative Order requires parents in contested matrimonial cases to attend mandatory parent education and awareness training. In order to make sure matrimonial judges in the seven counties have the necessary information, Judge Sunshine as Statewide Coordinating Judge for Matrimonial Cases, has posted material on the SharePoint site for matrimonial judges about the programs including a draft data form, a list of providers, a proposed

¹²⁹ Matrimonial Commission, Report to the Chief Judge of the State of New York [Feb 2006], available at www.courts.state.ny.us/ip/matrimonial-commission, at page 16.

¹³⁰ See AO/252/18 creating parent education pilot projects attached as Appendix “N” to our 2019 Annual Report to the Chief Administrative Judge available at <https://www.nycourts.gov/LegacyPDFS/IP/judiciary/legislative/pdfs/2019-Matrimonial.pdf>

participant satisfaction survey, the Parent’s Handbook, Rule 144, the Pilot Administrative Order, and procedures for administration of the program. Hon. Sondra Miller (Ret.), and Hon. Jacqueline Silberman (Ret.), both Honorary Chairs of our Committee, have been active in promoting this program. In accordance with recommendations of our Committee the OCA Parent Education and Awareness Program approved on November 20, 2019 its first online parent education program pursuant to Part 144 of the Rules of the Chief Administrative Judge (22 NYCRR Part 144). This program will make it easier for domestic violence victims who so desire to receive the training in safety as for those who do not have access to live programs.¹³¹ A second on-line program by Family Kind was also approved this fall.

A program on Parent Education as part of the Judicial Seminars is scheduled by the Judicial Institute. Hon. Sondra Miller, (Ret.), Honorary Chair of the Committee, Dan Weitz, Director, Division of Court and Professional Services, Harriet Weinberger, Director of the Law Guardian Department for the Appellate Division, Second Department and member of our Committee, and Dolores Gebhardt, a matrimonial practitioner, are to be the presenters.

¹³¹ See Committee Comments on JROPE Proposal dated January 25, 2018 attached as Appendix “M” to our 2019 Annual Report to the Chief Administrative Judge available at <https://www.nycourts.gov/LegacyPDFS/IP/judiciaryslegislative/pdfs/2019-Matrimonial.pdf>

B. Ongoing Committee Development Efforts

1. Assistance with Court Merger Legislative Proposal of Hon. Janet DiFiore, Chief Judge

The Committee will continue its consideration and input to the courts about the Court Merger Legislative Proposal of Hon. Janet DiFiore, Chief Judge. It will assist Judge Sunshine with coordination and implementation when the proposal is adopted by the Legislature and approved by the voters.¹³²

2-Implementation of Consensual Uncontested Divorce Pilot Project

In 2017 the Chair of our Committee appointed a Special Subcommittee to reform and streamline the uncontested divorce packets.¹³³ The challenge was to reform and streamline the packets without creating many different packets applicable to each type of situation, which might be confusing to the public and create a burden on matrimonial clerks. Compounding the complexity of the project is the wide variation in procedures among the sixty-two counties. In 2018, the Special Subcommittee examined uncontested divorce packets and forms from other jurisdictions which we assembled with the assistance of the Academy of Matrimonial Lawyers.

By the end of the summer of 2018, a small working group,¹³⁴ with guidance from then Director of Technology and Court Research Chip Mount, now retired, after considerable effort, produced a prototype for a consensual divorce program designed as the first step to simplifying the uncontested divorce process. The package includes an Agreed Upon Joint Affidavit of Facts and a Combined Findings of Fact and Conclusions of Law and Judgment of Divorce. The program allows only a no-fault divorce since that is the ground most commonly employed in New York since the enactment of DRL § 170 (7) in 2010 (ch. 384, L.2010). Judge Sunshine introduced the program to Chief Administrative Judge Marks on October 1, 2018 as a prototype for uncontested divorce reform.¹³⁵

Further work on the Program proceeded during 2019 by Judge Sunshine and Committee Counsel Susan Kaufman in coordination with Christine Sisario, Director of Technology, Rochelle Klempner, formerly of the Division of Technology, and Sun Kim of the Division of Technology, and was submitted to OCA Counsel John McConnell by Judge Sunshine on August 20, 2019 for approval as a pilot project by the Administrative Board.

¹³² See Footnote 11 of this report for a description of the proposal.

¹³³ Members of the Special Subcommittee were Hon. Linda Christopher, Hon. Ellen Gesmer, Hon. Cheryl Joseph, Hon. Emily Ruben, Hon. Jacqueline Silbermann, RoseAnn Branda, Esq., Elena Karabatos, Esq., Stephen McSweeney, Esq., Michael Mosberg, Esq., and Yesenia Rivera, Esq.

¹³⁴ The small working group included Hon. Jeffrey Sunshine, Chair of the Committee and Statewide Coordinating Judge for Matrimonial Cases, Susan Kaufman, Counsel to the Committee, and Committee members RoseAnn Branda, Esq., Elena Karabatos, Esq. and Stephen McSweeney, Esq.

¹³⁵ See note 13 supra.

The pilot project was approved by the Administrative Board in September 2019. It was to be implemented in the Second, Sixth, Seventh and Ninth Judicial Departments in early 2020. However just as the new forms were being distributed to the Pilot courts, the projects are on pause until parties can be together to sign the document. The pilot projects will resume when the pandemic is over. At that time the Committee will assist with ensuring that the pilot projects proceed smoothly.

3-Consideration of the Ramification of Changes in Federal Tax Law on Deductibility of Maintenance and Whether There is Need for Changes in the Maintenance Guidelines Law

Another significant issue which our Committee is studying is the repeal of the alimony deduction under the Federal Tax Cuts and Jobs Act (Public Law 115-97). Under this law, maintenance payments are no longer deductible by the payor or included in the income of the payee spouse.

Because of this change in federal law, at least one state has amended its maintenance statute on the theory that its maintenance guidelines law was formulated based on the premise that payments would be deductible to the payor and taxable to the payee. This tax treatment had been part of the federal tax code since 1942.¹³⁶ Complicating the matter is the fact that in New York State, maintenance is still deductible to the payor. The Illinois legislature has passed legislation which changes the definition of income in their maintenance statute from gross income to net income, thereby attempting to alleviate the problems caused by the federal legislation.¹³⁷ Before the new federal law was enacted, the New York State Bar Family Law Section issued a memo of opposition to the possible effects of the treatment of alimony in the new law, stating:

“The elimination of the alimony deduction could significantly decrease combined net after-tax income for divorced family households (particularly in the middle class tax bracket), and could increase the cost of obtaining a divorce through the prolongation of litigation.”¹³⁸

During 2020, we will continue our efforts to explore the ramifications of changes in the federal tax code and their effect on divorce litigation, including their effect on the New York maintenance and child support laws. To further this effort, our members Elena Karabatos, Esq. and Eric Tepper, Esq. presented judicial trainings at Summer Seminars 2019 on what judges should look for when reviewing requests for deviations from guideline maintenance based on the change in the federal tax law.

Our Committee is considering whether the federal tax law changes necessitate a change in the New York Maintenance Guidelines Law in view of the fact that the Maintenance Guidelines Law already includes tax considerations as a factor for deviations. We are also aware of the

¹³⁶ See “A Change Is Needed: The Taxation of Alimony and Child Support,” 48 Clev. St. L. Rev. 361 (2000).

¹³⁷ See Illinois Public Act 100-0293 enacted in 2018.

¹³⁸ See NYSBA Family Law Section Memorandum of Opposition attached as Appendix “P” to our 2019 Annual Report to the Chief Administrative Judge available at <https://www.nycourts.gov/LegacyPDFS/IP/judiciaryslegislative/pdfs/2019-Matrimonial.pdf>

possibility that the federal tax law could be further revised after the 2020 elections. Our Committee is also considering whether any other provisions in the maintenance guidelines law enacted in 2015 may need revisiting.

XII. Special Welcome and Tribute

Our Committee welcomed three new members in 2020: Judges La Tia Martin, Supervising Judge Matrimonial Bronx County, Jeffrey Goodstein, Supervising Judge Nassau County and Natasha Ingram Esq, an attorney with the civil division of the Legal Aid Society, Bronx County, who were appointed to the Committee by Chief Administrative Judge Lawrence Marks on September 16 and 17, 2020.

We also pay tribute to Judge Hope Zimmerman (Ret.) who retired from our Committee in 2020. We wish her well on her retirement. We regretfully recognize her resignation from the Committee and thank her for her years of service and invaluable insights and assistance.

XIII. Subcommittees

BEST PRACTICES

Alton L. Abramowitz
Hon. Laura Drager, Reporter
Hon. Betty Weinberg Ellerin
Hon. Ellen Gesmer
Christopher S. Mattingly
Stephen P. McSweeney
Hon. Sondra Miller
Hemalee J. Patel
Florence Richardson
Yesenia Rivera-Sepés
Hon. Jacqueline Silbermann
Zenith T. Taylor

EDUCATION

Rose Ann C. Branda
Kathleen Donelli
Hon. Betty Weinberg Ellerin
Donna England
Stephen J. Gassman
Elena Karabatos
Florence Richardson
Sharon Kelly Sayers
Bruce J. Wagner
Harriet Weinberger

FORMS

Hon. Linda Christopher
Kathleen Donelli
Hon. Cheryl A. Joseph
Elena Karabatos
Susan Kaufman, Reporter
Stephen P. McSweeney
Sharon Kelly Sayers
Hon. Mary Slisz
Zenith T. Taylor

LEGISLATION

Susan L. Bender, Reporter
Hon. Laura Drager
Stephen J. Gassman
Hon. Ellen Gesmer
Hon. Jeffrey D. Lebowitz
Hon. La Tia Martin
Hon. Sondra Miller
Michael A. Mosberg
Emily Ruben
Eric A. Tepper
Harriet Weinberger

RULES

Rose Ann C. Branda
Susan L. Bender
Hon. Jeffrey Goodstein
Natasha Y. Ingram
Elena Karabatos
Christopher S. Mattingly
Hemalee J. Patel, Reporter
Sharon Kelly Sayers
Hon. Jacqueline Silbermann
Eric A. Tepper
Bruce J. Wagner

XIV. Conclusion

The Committee will continue to meet regularly to study and discuss all significant Matrimonial Law proposals with the goal of improving the divorce process for litigants and their children. We stand ready to confer with the Chief Administrative Judge's other Advisory Committees on issues of mutual interest and concern. We are grateful to the Chief Judge and to the Chief Administrative Judge for their support and for the opportunity to assist in their efforts to improve the administration of justice by striving for "operational and decisional excellence" in accordance with the Chief Judge's Excellence Initiative.

January 2021

Respectfully submitted,
Honorable Jeffrey S. Sunshine, Chair
Alton L. Abramowitz, Esq.
Susan L. Bender, Esq.
Rose Ann C. Branda, Esq.
Honorable Linda Christopher
Kathleen Donelli, Esq.
Honorable Laura E. Drager [Ret.]
Honorable Betty Weinberg Ellerin [Ret.], Hon. Chair
Donna England, Esq.
Steven J. Eisman, Esq. (deceased)
Stephen J. Gassman, Esq.
Honorable Ellen Gesmer
Honorable Jeffrey Goodstein
John J. Grimes, Esq.(deceased)
Natasha Y. Ingram, Esq.
Honorable Cheryl A. Joseph
Elena Karabatos, Esq.
Honorable Jeffrey D. Lebowitz [Ret.]
Honorable La Tia W. Martin
Christopher S. Mattingly, Esq.
Stephen P. McSweeney, Esq.
Honorable Sondra Miller [Ret.], Hon. Chair
Michael A. Mosberg, Esq.
Hemalee J. Patel, Esq.
Florence Richardson, Esq.
Yesenia Rivera, Esq
Emily Ruben, Esq.
Sharon Kelly Sayers, Esq.
Honorable Jacqueline W. Silbermann [Ret.], Hon. Chair
Hon. Mary Slisz
Zenith T. Taylor, Esq.
Eric A. Tepper, Esq.
Bruce J. Wagner, Esq.
Harriet Weinberger, Esq.
Susan W. Kaufman, Esq. Counsel

XV. Appendices

A - Chief Administrative Judge Marks's Letter of Appointment of Hon. Jeffrey Sunshine as Statewide Coordinating Judge for Matrimonial Cases

B -Memorandum from Chief Administrative Judge Marks dated May 20, 2020

C- Rules Governing Consensual E-Filing in Matrimonial Actions found in Appendix B to Administrative Order 116/20

D- Bar Association Support for Mandatory E-Filing in Matrimonial Actions

E - Description of Committee's Legislative and Rule Proposals Adopted from 2015-2019

F-1 - Excerpt from Committee's 2018 Annual Report Describing Proposal on Access to Forensics in Custody Cases

F-2 - Report by the Matrimonial Law Committee and the Children and the Law Committee of the New York City Bar Association dated May 2019

F-3 - Memoranda of Opposition to 2019-20 A.5621/S.4686 by the Women's Bar Association of the State of New York, the Family Law Section of the New York State Bar Association, and the American Academy of Matrimonial Lawyers, New York Chapter

G - OCA Court Statistics on Divorce Filings Full Year 2011 – 2019

H- White Paper on Forensics in Custody Cases

I- Memorandum from then Presiding Justice A. Gail Prudenti (Ret.) dated March 7, 2008.

J- Form of Proposed Application for Counsel Fees by Unrepresented Litigant

Appendices to 2021 Annual Report of the Matrimonial Practice Advisory and Rules Committee to the Chief Administrative Judge

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Appendix A

State of New York
Unified Court System



Lawrence K. Marks
Chief Administrative Judge

25 Beaver Street
New York, N.Y. 10004
(212) 428-2100

MEMORANDUM

June 1, 2018

TO: Administrative Judges

FROM: Lawrence K. Marks *LM*

SUBJECT: Statewide Coordinating Judge for Matrimonial Cases

It is my pleasure to announce the appointment of Hon. Jeffrey S. Sunshine as Statewide Coordinating Judge for Matrimonial Cases. Some of you may recall that a similar position existed some years ago, but was not continued when Hon. Jacqueline Silbermann retired from the bench.

As you know, matrimonial cases are an important, and challenging, component of our civil case inventories. Contested matrimonials often demand extensive resources, judicial and otherwise, and are frequently plagued by delays and other complications. Members of the matrimonial bar, among others, have approached me in recent months to advocate for re-designating an experienced judge who can work with the Administrative Judges, matrimonial part judges and the matrimonial bar to better promote the goals of the Chief Judge's Excellence Initiative.

Judge Sunshine is an ideal candidate to take on this role. He has extensive experience in the matrimonial field, both as a practitioner and as a judge in Kings County Supreme Court. He also chairs our Matrimonial Practice Advisory and Rules Committee, which has recommended numerous administrative rules and other measures that have streamlined and improved matrimonial case adjudication. In his new role, Judge Sunshine will work with all of you to develop protocols and best practice models to expedite the processing of contested cases, revise and streamline the uncontested divorce process, work to promote and expand mediation in divorce actions, act as a liaison between the court system and the matrimonial bar, promote e-filing in matrimonial cases and work with the Judicial Institute on matrimonial judicial education programs. He will

also continue to serve as chair of our Matrimonial Practice Advisory and Rules Committee, and will continue to handle a matrimonial caseload in Kings Supreme Court.

Judge Sunshine will be a valuable resource for all of you in your efforts to successfully manage your matrimonial inventories. He will be reaching out to you in the coming weeks.

cc: Hon. Janet DiFiore
Hon. Michael V. Coccoma
Hon. George J. Silver
Hon. Edwina G. Mendelson

Appendix B

State of New York
Unified Court System



Lawrence K. Marks
Chief Administrative Judge

25 Beaver Street
New York, N.Y. 11204
(212) 428-2100

MEMORANDUM

May 20, 2020

TO: All Trial Court Justices and Judges

FROM: Lawrence K. Marks *LM*

SUBJECT: Filing of New Cases

I hope you and your families are all doing well. As you know, among the series of steps we have taken in recent weeks to restore judicial services in the Unified Court System has been the return this week of judges and designated staff to courthouses in upstate counties in which the Governor has eased restrictions on commercial activity. In addition to expanding judicial services, courts and county clerk's offices in those counties are now accepting the filing of new non-essential matters through the New York State Electronic Filing System (NYSCEF).

Consistent with the goal of expanding court activity while maintaining appropriate standards of public health and safety, we will be taking another important operational step commencing Monday, May 25. Beginning that day, e-filing through the NYSCEF system -- including the filing of new non-essential matters -- will be restored in those counties of the state that have not yet met the benchmarks required to participate in the Governor's regional reopening plan. Those counties include the five New York City counties, Nassau and Suffolk counties, and Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster, and Westchester counties.

In recognition of the continued curtailment of in-court activities of court personnel and the public -- and in contrast to the usual practice in consensual e-filing matters -- this restoration of NYSCEF usage will be limited to cases in which represented parties file and serve all papers electronically. (Unrepresented litigants may continue to file, serve and be served papers through non-electronic means in those cases).

This expanded use of NYSCEF will permit a significant broadening of civil litigation in a manner that continues to ensure the highest measure of health and safety to judges, court personnel and the public. As always, thank you for your cooperation and support.

cc: Chief Judge Janet DiFiore
Hon. George Silver
Hon. Vito Caruso
Administrative Judges
County Clerks

Appendix C

APPENDIX B

Rules Governing the Consensual Electronic Filing of Matrimonial Actions in Supreme Court

(a) Application

(1) On consent, documents may be filed and served by electronic means in matrimonial actions in the Supreme Court of authorized counties subject to the conditions set forth below. Except as otherwise required by this order/appendix, the provisions of 22 NYCRR § 202.5-b shall apply.

(2) For purposes of this order/appendix:

(i) "Matrimonial actions" shall mean those actions set forth in CPLR § 105(p) and DRL § 236 wherein:

(A) the action is contested, and addresses issues including, but not limited to, alimony, counsel fees, pendente lite, maintenance, custody and visitation, child support or the equitable distribution of property; or

(B) the action is uncontested; or

(C) the action is a post-judgment application that either (1) addresses an underlying matrimonial action that was commenced electronically, or (2) is electronically initiated with the purchase of a new index number.

(ii) A "party" or "parties" shall mean the party or parties to the action or counsel thereto (as set forth in 22 NYCRR § 202.5-b(a)(2)(viii)) and the attorney(s) for the minor child(ren).

(3) No paper or document filed by electronic means in a matrimonial action shall be available for public inspection on-line or at any computer terminal in the courthouse or the office of the County Clerk.

(4) Nothing in this section shall be construed to abrogate existing personal service requirements as set forth in the domestic relations law, family court act or civil practice law and rules.

(5) Unless otherwise directed by the court, forensic evaluation reports in custody, visitation and other matters concerning children shall not be filed electronically.

(6) Service of the initiating documents in post-judgment applications subject to consensual e-filing must be effectuated in hard copy and accompanied by a notice regarding availability of electronic filing in post-judgment matrimonial proceedings on a form to be approved by the Chief Administrator. Proof of hard copy service shall be filed by electronic means.

Appendix D

Bar Association Support for Mandatory E-Filing in Matrimonial Actions

1- Resolution of the Family Law Section of the NYS Bar Association, July 9, 2020

2- News Release of the Women's Bar Association of the State of New York ("WBASNY"), August 28, 2020, available at https://www.wbasny.org/post_news/wbasny-supports-mandatory-e-filing-in-matrimonial-matters/

NEW YORK STATE BAR ASSOCIATION
FAMILY LAW SECTION
Meeting of the Executive Committee, July 9, 2020

RESOLUTION TO SUPPORT E-FILING IN MATRIMONIAL ACTIONS

WHEREAS, electronic filing in all civil matters is a safe alternative to in-person filings in order to mitigate the effects of the COVID-19 outbreak upon the judicial officers, staff, and users of the Unified Court System, and is an efficient, convenient and practical tool to afford the legal community access to courts;

NOW, THEREFORE, IT IS HEREBY RESOLVED,

The Family Law Section of the New York State Bar Association reiterates and reaffirms its continuing support for mandatory e-filing in both contested and uncontested matrimonial actions. Mandatory e-filing provides a safe and easy way to litigate those actions and, with the present exemption for *pro se* litigants and lawyers not having the necessary technology, eliminates the potential to deprive individuals of access to justice.

LEGISLATION

Independent Immigration Courts – 2020

2020 – Court Restructuring

[View more »](#)

WBASNY SUPPORTS MANDATORY E-FILING IN MATRIMONIAL MATTERS

(New York, NY, Friday, August 28, 2020) – The Women’s Bar Association of the State of New York (WBASNY) supports mandatory electronic filing (e-filing) in both contested and uncontested matrimonial actions throughout the Unified Court System. Mandatory e-filing, with exemptions for *pro se* litigants and lawyers not having the necessary technology, would enable litigants to advance their cases and eliminate potential barriers to access to justice. It would also mitigate the effects of the COVID-19 outbreak on the courts.

Currently, procedural inconsistencies among the different judicial departments and districts throughout the state make it increasingly complicated and cumbersome for attorneys and litigants. For example, it can be difficult to convert a traditional matrimonial case into an e-file case, resulting in delays that may negatively affect clients’ cases. The lack of in-person accessibility to the courts during the height of the COVID-19 crisis and the continuing recommendations from the Centers for Disease Control and Prevention to avoid gatherings and to socially distance, impacts numerous issues in matrimonial litigation, including, but not limited to, establishing valuation dates, procuring dates of commencement for the purposes of establishing support, and managing the delicate issue of parenting schedules, which involve the rights of parents and children and their health and safety.

WBASNY considers establishing statewide mandatory e-filing in matrimonial matters to be an important step toward promoting the fair and equal administration of justice.

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The Women’s Bar Association of the State of New York (WBASNY) is the professional membership organization of choice for more than 4,000 attorneys throughout New York State, and the largest statewide women’s bar association in the country. For four decades, WBASNY has been a singularly important resource for women lawyers, with professional networking, continuing legal education programming, leadership training, and advocacy

for the rights of women, children, and families. Through involvement with WBASNY's 20 regional chapters and its 40-plus substantive law committees, WBASNY's members collaborate with one another on a variety of issues and perform public and community service, in furtherance of its mission to promote the advancement of the status of women in society and women in the legal profession; to promote the fair and equal administration of justice; and to act as a unified voice for its members with respect to issues of statewide, national and international significance to women generally and women attorneys in particular. WBASNY holds United Nations NGO status with the U.N.'s Department of Public Information, and Special Consultative status in association with the U.N. Economic and Social Council (ECOSOC). WBASNY is also a founding member of the National Conference of Women's Bar Associations.

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Appendix E

**Legislative and Rule Proposals of Matrimonial Practice Advisory and Rules Committee
Adopted from 2015 through 2019**

2015

Maintenance Guidelines Law and Simplification of Counsel Fee Affidavits for Self-Represented Litigants in 2015

In the very first year of the Committee's existence, the Maintenance Guidelines Law (L. 2015, c. 269) and the law eliminating the requirement for self-represented litigants to provide a supporting affidavit from counsel regarding fee arrangements when making application for counsel fees as the non-monied spouse in a divorce action (L.2015, c. 447) were enacted into law, after having been adopted as part of the Office of Court Administration's Legislative Program upon the recommendation of our Committee. Both laws were significant accomplishments in furthering "decisional excellence," a goal of the Chief Judge's Excellence Initiative.

The Committee considers the passage of the maintenance guidelines law as one of the most significant accomplishments in the field of matrimonial law since the enactment of no-fault divorce in 2010. Our maintenance guidelines proposal was a compromise reached by a working group¹ with widely divergent positions, brought together by Justice Jeffrey Sunshine, Chair of the Committee, in order to end the divisions within the matrimonial community that had existed over the enactment of post-divorce maintenance guidelines and over whether there should be a continuation of temporary maintenance guidelines enacted in 2010 [L. 2010, c. 371]. It assured the less affluent spouse a minimum amount of maintenance for a reasonable period without overly burdening those maintenance payors who are also paying household expenses or who are also Child Support Payors. The Maintenance Guidelines Law also promoted greater judicial efficiency, by allowing judges the option to justify their decisions about guidelines deviations on the record, rather than having to produce a written decision in every case, as had been required by the previous Temporary Maintenance Guidelines Law (L. 2010, c 371).

The elimination of the attorney's affirmation about counsel fee arrangements enables self-represented litigants to more easily exercise their right to apply for counsel fees as the non-monied spouse in a divorce action pursuant to D.R.L. § 237. Prior to this reform, self-represented litigants had often been unable to obtain the affidavit from attorneys who did not want to be committed to represent the party in the action if the fee application was denied.

¹ The organizations represented in the working group included the Family Law Section of the New York State Bar Association, the New York Maintenance Standards Coalition, the Women's Bar Association of the State of New York, and the New York Chapter of the American Academy of Matrimonial Lawyers. Sandra Rivera, Esq. and Michelle Haskins, Esq. represented the Women's Bar Association of the State of New York; Alton Abramowitz, Esq. and Eric Tepper, Esq. represented the Family Law Section of the New York State Bar Association; Elena Karabatos, Esq. represented the New York Chapter of the American Academy of Matrimonial Lawyers; and Emily Ruben, Esq. (now Hon. Emily Ruben) and Kate Wurmfeld, Esq. represented the NYS Maintenance Standards Coalition.

2016

Law Strengthening Enforcement by Contempt in Supreme Court Enacted in 2016

In the summer of 2016, we were gratified by the passage of a measure we proposed which the Chief Administrative Judge had approved as part of the Office of Court Administration’s 2015 and 2016 Legislative Programs, to strengthen enforcement by contempt in Supreme Court (L. 2016, C. 365). On September 30, 2016, the Governor signed this measure into law. This legislation is another significant reform in matrimonial law.

The passage of this legislation meant that Supreme Court would finally have relatively the same standard as Family Court regarding applications for contempt. Family Court Act § 454² allows Family Court Judges to immediately enforce non-compliance of support obligations with contempt without exhausting other remedies (see New York Court of Appeals decision in *Powers v. Powers*).³

Because of this important reform, non-monied spouses awarded child and spousal support have a better chance to receive funds needed to support their families without having to take out loans or sell assets; and non-monied spouses awarded counsel fees have a better chance to hire counsel to represent them early in the case so that they can have their matters fairly heard. The discrimination against the non-monied spouse inherent in the prior version of D.R.L. §245 which allowed monied spouses to obstruct or delay enforcement in Supreme Court of monetary obligations in a divorce was eliminated. The legislation also relieves Family Court overburdened caseloads by removing the incentive to bring enforcement actions in Family Court rather than Supreme Court. In addition, hearings on contempt are shorter and less time consuming, which provides litigants access to relief in a more timely manner.

Revised Matrimonial Form Proposals Adopted in 2016

During 2016 the Chief Administrative Judge adopted a number of our proposals for form revisions with the approval of the Administrative Board of the Courts. The form revision proposals (for a Revised Net Worth Statement and a Revised Preliminary Conference Order) were designed to streamline the efficiency of the matrimonial litigation process by ensuring that financial information about the parties was clearly revealed and available to the parties and the court, and by making sure that contested issues in the action were dealt with in an orderly fashion.

² Family Court Act § 454(3)(a) reads as follows:

“3. Upon a finding by the court that a respondent has willfully failed to obey any lawful order of support, the court shall order respondent to pay counsel fees to the attorney representing petitioner pursuant to section four hundred thirty-eight of this act and may in addition to or in lieu of any or all of the powers conferred in subdivision two of this section or any other section of law:

(a) commit the respondent to jail for a term not to exceed six months. For purposes of this subdivision, failure to pay support, as ordered, shall constitute prima facie evidence of a willful violation ...”

³ *Powers v. Powers*, 86 N.Y.2d 63, 71, 653 N.E.2d 1154 (1995). In addition to holding that, unlike D.R.L. § 245 as then written, F.C.A. § 454 does not require exhaustion of remedies before enforcement by contempt, the court also stated: “For purposes of section 454, moreover, failure to pay support as ordered itself constitutes “prima facie evidence of a willful violation” (Family Ct. Act § 454[3][a]). Thus, proof that respondent has failed to pay support as ordered alone establishes petitioner's direct case of willful violation, shifting to respondent the burden of going forward ...” *Powers v. Powers*, 86 N.Y.2d 63, 69, 653 N.E.2d 1154, 1157 (1995).

The Net Worth Statement and Preliminary Conference Order are two of the most important forms required in contested matrimonial litigation. See our 2017 Annual Report at <http://www.nycourts.gov/ip/judiciaryslegislative/pdfs/2017-MatrimonialPractice-ADV-Report.pdf> for a detailed description of the revisions in the Net Worth Statement and Preliminary Conference Order.⁴ One of the noteworthy provisions in the revised Preliminary Conference Order form requires the parties to waive a voluntary discontinue once grounds have been resolved, thereby preventing parties from discontinuing after considerable resources and effort have been spent on the case. The revisions of these widely used forms further the goal of operational excellence. They also further decisional excellence by assuring that issues are dealt with in a timely manner with all the facts required to be disclosed to the court and the other spouse.

Redaction Rule Proposals Adopted in 2016

On March 1, 2016, new redaction rules for matrimonial actions recommended by our Committee went into effect. First, 22 NYCRR § 202.5(e) was amended to prevent the information or testimony revealed in a matrimonial action from being revealed in another civil action. Second, a limited rule on redaction of personal information from written decisions in contested matrimonial actions was added to the matrimonial rules as 22 NYCRR § 202.16(m) which requires the court to omit or redact certain personal information from written decisions. After public comment, these proposals were adopted by Administrative Order 192/15 available at <http://www.nycourts.gov/divorce/pdfs/AO192-15.pdf>.

At our suggestion, 22 NYCRR § 202.16(m) was modified by Administrative Order of Chief Administrative Judge Lawrence K. Marks, with the advice and consent of the Administrative Board of the Courts, in June, 2016⁵ to limit its application to situations where the court is submitting a decision, order, judgment, or combined decision and order or judgment for publication, while allowing the unpublished version to remain unredacted. The amended rule allowed more flexibility, while retaining the basic protections for which the rule was intended. By making the rule easier to understand and comply with, it would be more widely followed, and

⁴ These forms, together with fillable versions thereof, are available on the Divorce Resources website at <http://ww2.nycourts.gov/divorce/forms.shtml#Statewide>

⁵ See Memorandum of Ronald Younkens, Executive Director of the Office of Court Administration dated June 23, 2016 with attached Administrative Order 143/16 adopting revisions to 22 NYCRR 202.16(m), which is available at <http://www.nycourts.gov/divorce/pdfs/AO143-16.pdf>.

would better achieve the goal of protecting privacy and preventing identify theft and abuse. The rule allows the courts to continue to satisfy their statutory mandate to justify in writing their decisions on important matrimonial issues,⁶ while still including in orders and judgments such necessary information as is required by statute for child support enforcement and other purposes. In keeping with the goal of operational excellence of the Chief Judge's Excellence Initiative, the revised rule does not burden courts with redaction responsibilities except when publication is going to take place, and it does not require courts to bifurcate orders or judgments from decisions, an unnecessary waste of judicial effort.

2017:

***New Rule on Page Limitation for Pendente Lite and other Applications
[22 NYCRR § 202.16-b] Adopted in 2017***

In furtherance of Chief Judge DiFiore's Excellence Initiative, the Committee proposed a new court rule in our 2017 Annual Report imposing a page limitation on pendente lite motion practice in an effort to expedite matrimonial proceedings while a contested divorce is pending. In response to comments received from the Family Law Section of the New York State Bar Association after public comment was sought on the proposed rule,⁷ the Committee recommended to the Chief Administrative Judge in April 2017 a modified version of said proposal which was adopted by Administrative Order 99/17 dated May 22, 2017 available at <http://www.nycourts.gov/divorce/pdfs/PDF%20B%20AO-99-17-Applications.pdf> upon consultation with and approval by the Administrative Board of the Courts, effective July 1, 2017.

This rule imposes page limitations on pendente lite applications unless such limitations are waived by the judge for good cause. Attorneys often feel compelled to respond to voluminous motions with voluminous responses. This rule eliminates the incentive for attorneys to have the longest motion papers as a means of impressing their clients. It promotes the Chief Judge's Excellence Initiative by saving judicial time and resources. It speeds the time within which applications can be granted or denied, thereby making the divorce process proceed more quickly.

Where practicable, the rule requires that all motions and orders to show cause and cross motions will be requested in one application to avoid repeated motion practice where possible, still recognizing that new issues may arise during the course of the action which could not have been foreseen. Requirements are imposed as to formatting conventions, (including matters such as printing sides, paper size, font, margins, ink, spacing and tabbing of exhibits) to ensure that papers submitted are legible and can be scanned in and copied, while allowing self-represented litigants the option to submit handwritten applications provided they are legible and otherwise comply with the rule. There are specific page limits on different types of affidavits

⁶ See article by Peter E. Bronstein in the *New York Law Journal* on December 2, 2014.

⁷ See Memorandum by John McConnell dated January 18, 2017 available at <http://www.nycourts.gov/rules/comments/PDF/MatrimonialApplications.pdf>

and affirmations,⁸ with a three-inch size limitation on exhibits. However, specific exhibits required by, or necessary in order to comply with, the matrimonial rules or statutes are exempted from the size limitation on exhibits.⁹ The rule defers to local practice by providing that nothing therein will prevent a judge or justice of the court or of a Judicial District within which the court sits from having his or her own local part rules to the contrary or in addition to the rule. However, where local practice is silent, the rule provides some basic ground rules to the extent that there is no conflict with the C.P.L.R. or other statute. The provisions of 22 NYCRR § 202.16(k) still apply where applicable.

The rule provides a preference for emergency applications for processing and signature but provides that designating an application as an emergency without good cause may be punishable by sanctions, thus making it more likely that true emergencies will be dealt with on an emergency basis. A provision was added in the final proposal adopted by the Chief Administrative Judge which states that where any application is designated an emergency without good cause, it shall be processed and considered in the ordinary course of court procedures. This provision satisfies concerns expressed by the Family Law Section of the New York State Bar Association about the possibility of differing views as to what constitutes good cause for designating an emergency. At the suggestion of the Family Law Section, the adopted proposal also includes a clear definition of which types of pendente lite applications (including cross motions) are subject to the rule, and there is also a mechanism for submitting applications exceeding the page limits without creating an overburdening process requiring a party or counsel to seek prior approval which could be difficult when a case has not been assigned to a judge. We thank the Family Law Section for the comments which resulted in many of the changes to the final proposal.

New Divorce Venue Rule Proposal for Post Judgment Enforcement and Modification Applications [22 NYCRR § 202.50(b)(3)] Adopted in 2017

On January 18, 2017, public comment on the Committee’s proposal for a new court rule applicable to post judgment applications for modification or enforcement of judgments of divorce in Supreme Court was sought on behalf of the Administrative Board of the Courts by Memorandum of OCA Counsel John W. McConnell.¹⁰ The court rule proposed was contained in our 2017 Annual Report. In response to the request for public comment, the Office of Court Administration received comments from Sanctuary for Families dated March 7, 2017 regarding this proposal, which comments were forwarded to the Committee.¹¹ In response, the Committee modified its proposal and resubmitted it to the Chief Administrative Judge. By Administrative Order dated May 22, 2017, the Chief Administrative Judge, with the approval of the Administrative Board of the Courts, adopted the new rule effective August 1, 2017.

⁸ In the Rule as adopted, Page limits of Supporting or Opposing Affidavits or Affirmations or Memoranda of Law may be twenty (20) pages, while Page Limits of Expert Affidavits may be eight (8) pages, and Page Limits of Reply Affidavits or Affirmations may be ten (10) pages.

⁹ Exempted exhibits include Affidavits of Net Worth, Retainer Agreements, maintenance guidelines worksheets and/or child support worksheets, and counsel fee billing statements or affirmations or affidavits related to counsel fees.

¹⁰ See Memorandum available at <http://www.nycourts.gov/rules/comments/PDF/MatrimonialFormOfJudgment.pdf>

¹¹ See Comments of Sanctuary for Families dated March 7, 2017 attached as Appendix “A” to our 2018 report available at

The rule adds a new paragraph (3) to 22 NYCRR § 202.50(b) which prescribes new language required to be contained in judgments of divorce, both contested and uncontested.¹² The rule is designed to cure aspects of the problematic venue rules under the C.P.L.R. as they relate to post judgment relief in matrimonial actions, thus allowing quicker and more effective resolutions of matrimonial disputes in furtherance of the Excellence Initiative.

In the past, most post judgment applications seeking enforcement or modification of judgments of divorce were brought in the same county in which the original divorce proceeding occurred. While the designation of that county may have been proper at the time of commencement, often by the time that post judgment litigation ensues neither the parties nor the children have a nexus to that county. Similarly, the initial filing at commencement may have been made pursuant to C.P.L.R. 509, notwithstanding the fact that neither party had any nexus to the jurisdiction at the time, simply because it was a more convenient forum for the attorneys or because of backlogs in one county or another county. This resulted in certain counties being burdened with a disproportionate volume of uncontested and contested divorces in comparison to other counties, which resulted eventually in post judgment litigation subsequently being heard in that same county.

The new court rule lessens the burden on those counties and on litigants. It provides a means for parties to correct the injustice resulting from an initial inappropriate C.P.L.R. 509 designation once post judgment litigation ensues by requiring the post judgment litigation in a more appropriate venue. It also allows parties who have moved away to pursue post judgment litigation without having to travel back to the county where the judgment was entered.

The rule requires that applications should be brought in the county where one of the parties, or a child or the children reside. To address special concerns, there is a good cause exception which leaves it up to the judge's discretion whether there is good cause to make an exception. Such exception might be useful to low income litigants who reside in counties with scarce legal resources and consequently might select venue according to the availability of pro bono or reduced fee legal assistance in a particular county. It might also be useful where neither party is a resident of New York State. However, in order to save victims of domestic violence the burden of having to make application for a good cause exception where confidentiality or danger is at issue, at the suggestion of Sanctuary for Families, the final rule provides that where the address of either party and a child or children is not a matter of public record or is subject to an existing confidentiality order, such applications may be brought in the county where the judgment of divorce was entered. The final rule also clarifies that the retention of jurisdiction for the

¹² 22 NYCRR § 202.50(b) already delineated language requirements for proposed judgments in matrimonial actions. The first part of the rule requires that the Supreme Court specify in the judgment of divorce that it shall retain jurisdiction for enforcement of the settlement agreement or for enforcement or modification of the judgment, provided that such jurisdiction shall be concurrent with the Family Court to hear certain applications to enforce the settlement agreement with regard to maintenance, support, custody, or visitation. Similar language is already required in the forms approved under subdivisions 1 and 2 of 22 NYCRR § 202.50(b). However, the language in the rule is broader than enforcement of settlement agreements alone and supersedes said language to the extent of any inconsistency. The second part of the rule requires that the judgment contain an order as to venue related to residence for post judgment enforcement or modification applications in Supreme Court.

purpose of modifications of maintenance, support, custody and visitation is only to the extent permitted by law so as to avoid inadvertently conflicting with statutory provisions regarding such modifications as are contained in D.R.L. §236 (B)(9)(2). It also provides that good cause applications shall be made by motion or order to show cause. The Committee is grateful to Sanctuary for Families for their helpful suggestions.

On August 1, 2017, the effective date of the rule, a revised form of UD-11 Judgment of Divorce was posted on the Divorce Resources website at http://www.nycourts.gov/divorce/forms_instructions/ud-11.pdf. This revised form, which was adopted by Administrative Order 138/17 of the Chief Administrative Judge, contained the provisions required by the new rule, providing some relief to the overburdened counties and litigants. See Memorandum from Ronald Younkins, OCA Executive Director, dated July 20, 2017 attaching Administrative Order and New Rule on Divorce Venue Post Judgment Enforcement and Modification (22 NYCRR 202.50(b)(3)), attached as Appendix “B” to our 2018 report available at <http://www.nycourts.gov/ip/judiciaryslegislative/pdfs/2018-MatrimonialPractice-ADV-Report.pdf>

Ultimately, we hope that our omnibus statutory proposal for a new divorce venue proposal applicable to matrimonial actions will be enacted so that the burden on certain counties of plaintiffs’ inappropriate designation of venue in the initial divorce action will cease. See our omnibus statutory special matrimonial venue proposal for a new C.P.L.R. 514 set forth later in this report.

2018:

New Rule as to Judgments in Matrimonial Actions; Forms (to include Instructions Addressing Transfer of Title to a Marital Home) Adopted in 2018

At the request of and in consultation with the Office of Policy and Planning, the Committee proposed an amendment to subparagraphs (2) and (4) of 22 NYCRR 202.50(b) as to the form of judgments required in matrimonial actions, after having been alerted by the Office of Policy and Planning that some defendants in residential mortgage foreclosure cases have been unable to apply for loan modifications because of title issues arising from their divorce. When parties are involved in a divorce action, it is often agreed that one spouse may remain in the marital home. Where a foreclosure action has also been brought, or is brought after the divorce judgment is signed, the spouse seeking to remain in the home cannot proceed with the loan modification if the deed is titled in the name of both spouses. The purpose of this proposed rule was to alert self-represented and represented litigants to the additional documents required for transfer of the marital residence, especially where there is a pending foreclosure action. With this amendment, parties will be alerted as part of the judgment that separate documents related to the transfer of a residence must be signed and filed, thereby allowing the spouse residing in the marital property to obtain clear title to the marital home and apply for a mortgage loan modification if a foreclosure action is commenced. Additionally, if the property is never transferred to a spouse, either when both spouses are granted the property, or it is agreed that they will maintain joint ownership post-divorce, and thereafter a foreclosure action is commenced, the non-titled spouse may never receive notice of the foreclosure action once commenced. Unfortunately, many litigants believe mistakenly that the provisions for transfer of a residence contained in an agreement, decision or judgment complete the transfer and they do not realize that a deed or other transfer documents must be executed and filed for this to be accomplished

The modified rule was adopted by Administrative Order A/O/191/18 dated May 21, 2018, which also adopted a revised Uncontested Divorce Judgment of Divorce (Form UD-11) and Revised

Uncontested Divorce Instructions in compliance with amendments to 22 NYCRR 202.50(b)(2) and new 22 NYCRR 202.50(b)(4) regarding the required form of judgments of divorce.¹ The modified rule allows the Supreme Court, in a post judgment matrimonial action, to enforce the specific requirement of the transfer of the property contained in the new decretal paragraph required in the Judgment of Divorce. The addition to the Uncontested Divorce Instructions now alerts litigants that separate documents must be executed to transfer the residence.

Amended Rule as to Form of Decretal Clause Concerning Settlement Agreements in Judgments of Divorce Adopted in 2018

In 2018, an amendment to 22 NYCRR 202.50(b) (3) concerning the form of required decretal clauses in judgments of divorce² was adopted to make clear whether a Settlement Agreement referenced in the judgment has actually been entered into between the parties in each case. This rule amendment was adopted by Administrative Order 269/18 of the Chief Administrative Judge, and a further revised form of UD-11 Judgment of Divorce was posted on the Divorce Resources website on September 30, 2018 at http://ww2.nycourts.gov/divorce/divorce_withchildrenunder21.shtml. The rule allows a thirty-day grace period for papers submitted using the prior form of judgment.

Adoption of Revised and Updated Statement of Client's Rights and Responsibilities for Representation with Fee Pursuant to 22 NYCRR 1400.2 adopted in 2018

During 2018, our Committee's proposal³ for the Appellate Divisions to adopt a revision to the Statement of Client's Rights and Responsibilities required pursuant to 22 NYCRR 1400.2 was circulated for public comment by Memorandum from OCA Counsel John W. McConnell dated June 22, 2018 available at <https://www.nycourts.gov/LegacyPDFS/RULES/comments/PDF/MatrimonialStatementClientsRightsResponsibilities.pdf>. The Family Law Section of the New York State Bar Association submitted a memorandum of support available at <http://ww2.nycourts.gov/sites/default/files/document/files/2018-11/PC-ClientsRightsResponsibilities.pdf>. After the public comment period expired, the proposal was approved by the Administrative Board, and was adopted by the Appellate Divisions effective February 15, 2019. It is available on the Divorce Resources website at <https://ww2.nycourts.gov/divorce/part1400.shtml>. The revision updates the document which was originally adopted in 1994 and last amended in 1995 and provides clarifications of the rights and responsibilities based on actual experience of members of our Committee who are practicing matrimonial attorneys and judges familiar with matrimonial litigation as it is practiced today. Without detracting from the information provided in the prior form, the revisions will reduce the number of attorney client disputes by clarifying matters that are not clear in the prior form. Adoption of the revised form will improve satisfaction of both litigants and

¹ See Administrative Order 191/18 available at <https://www.nycourts.gov/LegacyPDFS/divorce/pdfs/AO-re-Matrimonial-J-Rule.pdf>

² The form of required decretal clauses in judgments of divorce had previously been amended in 2017 in connection with our Committee's divorce venue rule proposal for post judgment enforcement and modification applications [22 NYCRR § 202.50(b)(3)]. However, the language as to Settlement Agreements merely required the date of the Settlement Agreement to be inserted, without clarifying whether a Settlement Agreement exists if no date is filled in. This language had been in the form of judgment for many years.

³ The members of the Special Subcommittee on Revision of Client's Rights and Responsibilities were Hon. Jeffrey Sunshine, Chair of the Committee, Hon. Sondra Miller (Ret.), Hon. Jeffrey Lebowitz (Ret.), Hon. Hope Zimmerman, Susan Bender, Esq., and Kathleen Donelli, Esq., Susan Kaufman, Counsel to the Committee, served as Counsel, and Matthew Schwartz, then Assistant Law Clerk to Judge Sunshine, served as Reporter.

attorneys with the matrimonial litigation process. It will also improve court operational efficiency and further the Excellence Initiative by reducing delays caused by attorney withdrawal or substitution of counsel as well as the volume of malpractice and fee dispute litigation.

See Memorandum from Susan W. Kaufman to John W. McConnell for a detailed analysis of the changes in the revised form attached as Appendix D to our 2019 Annual Report to the Chief Administrative Judge which is available at <https://www.nycourts.gov/LegacyPDFS/IP/judiciaryslegislative/pdfs/2019-Matrimonial.pdf>.

2019

Our Committee's proposal for amendment of the biennial adjustment of the "Income Cap" in the Maintenance Guidelines Law (A.07518/ S. 5515) was signed by the Governor on 11/20/19 as c. 523, L. 2019. We proposed this measure so that the date of adjustment of the maintenance guidelines income cap would coincide with the date of adjustment of the CSSA income cap on March 1st every other year.⁴ This proposal will allow the courts to adjust the income caps under the Maintenance Guidelines Law and the Child Support Standards Act simultaneously. It will prevent confusion of the public, counsel, and the court as to which cap has been increased, thereby reducing litigation delays and increasing access to justice. It will also avoid unnecessary court system expenses in revising court forms and calculators to reflect the cap increases twice within a two-month period, on January 31st and again on March 1st every other year. Although this measure seems ministerial in nature, its enactment will further the goals of both operational and decisional excellence.

Following the adoption of the revised Client's Rights and Responsibilities for representation with fee which was adopted by Joint Order of the Appellate Divisions at the end of 2018 upon the recommendation of our Committee to the Chief Administrative Judge, the Committee recommended a second Joint Order further revising 22 NYCRR 1400.2 to conform the version of the Client's Rights and Responsibilities in domestic relations matters when representation is without fee to the version where the attorney is being paid a fee. Both versions are available at <https://ww2.nycourts.gov/divorce/part1400.shtml>. The version for representation with fee, which was effective February 15, 2019, focuses on reducing the number of attorney client disputes by clarifying matters that are not clear in the existing form, not only as to the attorney client relationship, but also to what is often the subject of the greatest contention between attorneys and litigants in the matrimonial litigation process where the attorney is being paid a fee, namely, retainer agreements and attorney's fees. Like the version for representation with fee, the version for representation without fee is much clearer regarding responsibilities of both attorneys and litigants, but omits provisions concerning fees and retainer agreements. The Proposal was adopted by Joint Order of the Presiding Justices of the Appellate Divisions on April 16, 2019 effective June 1, 2019. Memoranda of Counsel outlining the provisions of both versions is attached as Appendix "E" to our 2020 report to the Chief Administrative Judge available at <https://www.nycourts.gov/LegacyPDFS/IP/judiciaryslegislative/pdfs/Matrimonial-MPARCReport2020.pdf>

In 2019, the Consensual Divorce Pilot Project was also approved by the Administrative Board.

⁴ An identical proposal (which was coupled with a proposal put forth by the Family Court Advisory and Rules Committee authorizing temporary spousal support in connection with temporary orders of protection) which we also supported was also signed by the Governor as c. 335, L. 2019.

Appendix F-1

Excerpt from 2018 Report of the Matrimonial Practice Advisory and Rule Committee to the Chief Administrative Judge regarding Key Provisions of Modified Proposal on Forensics in Custody Cases in Response to Suggestions from the theChief Administrative Judge’s Family Court Advisory and Rules Committee and the New York Public Welfare Association, Inc.

Access to the Forensic Report and Files

The revised proposal continues to differ from A.1533/S.6300 in that the degree of protections against dissemination are more stringent for parties and self-represented litigants than they are for attorneys and attorneys for the children who are officers of the court. While our draft permits attorneys and independent forensic evaluators hired to assist attorneys and self-represented litigants to have a copy of the forensic report upon execution of an affidavit containing assurances to the court against further dissemination and return of the report and files at conclusion of the litigation, our draft does not permit parties or self-represented litigants to have a copy of the report. Instead, we allow represented parties to read the report in the office of their attorney, to discuss the report with their attorney, and to make notes about the report, while we allow self-represented parties to read the report at the court or other location and to make notes about the report.

Similarly, our proposal continues to permit independent forensic evaluators hired to assist attorneys or self-represented litigants to have access to the complete evaluator’s file upon execution of an affidavit containing assurances to the court against further dissemination and return of the report and files at conclusion of the litigation.

As in our original proposal, attorneys are provided access to the file for inspection and photocopying without having to make a demand under C.P.L.R. 3120. This avoids needless motion practice which results in delays and expense. The complete file must also be forwarded and made available to self-represented litigants at a court or other location for inspection and note taking, but not for photocopying. The proposal strikes a common-sense compromise. By assuring self-represented litigants the right to inspect and take notes on what is in the file, and by giving access to the complete evaluator’s file to independent forensic evaluators hired by self-represented litigants, we enable self-represented litigants to represent themselves at trial, but guard against dissemination of materials in the file by photocopying. The revised proposal retains the language in the bill that access to the report and files in all cases is subject to the provisions of C.P.L.R. 3101 as to the court’s issuance of a protective order.

Definition of Court-Ordered Evaluators

In accordance with a suggestion from the Family Court Advisory and Rules Committee, we have this year revised our proposal’s definition of “court-ordered evaluators” to include only forensic mental health professionals in custody and visitation proceedings, **not** court-ordered

²⁸ See note 18, *supra*.

evaluators in statutorily-mandated investigations such as Probation Departments, local Departments of Social Services or the NYC Administration for Children’s Services who perform investigations in child protective, permanency, destitute child or other proceedings in which assessments other than clinical evaluations are ordered and in which different considerations are relevant. A similar suggestion was made in comments received from the New York Public Welfare Association, Inc. who opposed both A.1533/ S.6300 and S. 6579 on the basis that, if the requirements in said bills about turning over forensic reports and notes and contents of files are applicable to child protective examinations, there could be multiple problems under various state confidentiality laws which in turn might also impact federal funding requirements that states follow federal rules on confidentiality of reports in child protective proceedings.²⁹ The modified definition of “court-ordered evaluators” addresses this issue.

The Remedy of Contempt

Our revised proposal retains the provision in A.1533/S.6300 that willful failure to comply with a court order conditioning or limiting access to a forensic report shall be contempt of court. Because contempt for dissemination in violation of a court order years after a case is resolved is not a practical or legally enforceable remedy as the case law now requires,³⁰ S. 6579 and our revised proposal provide that the court shall retain jurisdiction for purposes of an application for contempt and expand the contempt provisions to apply not just to violations of a protective order issued by the court, but also to violations of the statute regarding restrictions on dissemination of the report or the file or of an affidavit with regard thereto. Our revised proposal, like S.6579, allows the moving party to seek counsel fees to enforce or defend the application for contempt, which helps alleviate the unfair burden and expense of making such a motion while recognizing that movants would nevertheless face a hardship in moving for contempt. While these provisions do not make the remedy of contempt sufficient in itself to protect against dissemination of private information of innocent parties, and do not protect non parties, we recommend them as an additional safeguard to the essential protections against dissemination.

Admissibility of Forensic Reports into Evidence

A. 1533/S.6300 contains a provision that forensic reports and the evaluator’s file shall be subject to objection pursuant to the rules of evidence and subject to cross-examination. In custody and visitation trials and hearings, such a rule will result in substantial delays if the report is not admitted in lieu of direct testimony. Instead, we inserted into our original proposal last year and continue to recommend in our revised proposal this year a provision from 22 NYCRR § 202.16(g)(2) which provides that written reports may be used to substitute for direct testimony at

²⁹ New York Public Welfare Association, Inc.’s comments are attached to this report as Appendix “C”.

³⁰ See *Blatt v. Rae*, 37 Misc. 2d 85, 233 N.Y.S.2d 54 (Sup. Ct. 1962) stating that “A judgment determines the rights of the parties to an action (Civ. Prac. Act, § 472) and after the entry thereof the action is no longer pending and the provisions of section 753 of the Judiciary Law have no application since, by the very language of such section, its provisions are limited to pending actions.” See also *Kenford Co. v. Cty. of Erie*, 185 A.D.2d 658, 587 N.Y.S.2d 877 (1992), stating: “A motion must be addressed to a pending action, and Supreme Court was without jurisdiction to entertain a motion almost two years after final judgment was entered.” See also *EB v. EFB*, 7 Misc. 3d 423, 427–28, 793 N.Y.S.2d 863 (Sup. Ct.), *aff’d sub nom. Bjornson v. Bjornson*, 20 A.D.3d 497, 799 N.Y.S.2d 250 (2005), *Little Prince Prods., Ltd. v. Scoullar*, 258 A.D.2d 331, 685 N.Y.S.2d 442 (1999).

trial, that the reports shall be submitted by the expert under oath, and that the expert shall be present and available for cross-examination. Without this provision, trial days will be increased. This provision is part of the matrimonial rules for calendar control contained in 22NYCRR §202.16, first filed on January 9, 1986. This provision respects the rights of the parties to confront the expert through cross-examination. The right to object to portions of the report is in accordance with a suggestion made by Judge Alan Scheinkman in West McKinney's Forms.³¹ At the same time, it avoids wasting the court's time ruling on motions about admissibility. It is designed to reduce delays in divorce proceedings in furtherance of the Excellence Initiative.

Review of the Report in Advance of a Trial or Hearing

In our proposal last year, at the request of the Family Law Section of the New York State Bar Association, we included a provision restricting the court from reading or reviewing the forensic report until it is received in evidence at a trial or hearing, unless the parties consent by agreement on the record or by stipulation submitted to the court, or upon application to the court for good cause shown. We also included in last year's proposal a proviso that the court may read or review the report at commencement of a trial or hearing (so as to avoid the need to halt a trial or hearing to first read the report), subject to further objection, or before accepting an agreement between the parties in its determination concerning child custody in its role as *parens patriae*, also subject to further objection.

Concerns were expressed by the Chief Administrative Judge's Family Court Advisory and Rules Committee about these provisions insofar as they might involve different considerations for custody and visitation proceedings in Family Court than for matrimonial proceedings involving custody and visitation in Supreme Court. Therefore, in our 2018 Annual Report, we propose to eliminate these provisions and instead authorize the Chief Administrative Judge to promulgate rules and regulations authorizing a court, in particular cases where a party does not raise a legally-valid objection thereto, to read or review a forensic report at particular times as the rules shall permit. We believe our revised proposal protects due process because the rules and regulations to be promulgated authorize the report to be read or reviewed only where a party does not raise a legally valid objection. A legally valid objection might be raised where the forensic report is filled with unscientific and/or unsubstantiated or non-professionally reliable hearsay allegations.³² It is conceivable that courts could sustain an objection after having reviewed the report, but take into account inadmissibility of evidence just as courts take into account admissibility of evidence they see every day in the courtroom as they must do under

³¹ See § 17:35. Court rules governing matrimonial actions—Expert witnesses; reports and testimony as follows: “In an effort to reduce trial time, the court may allow the written report of the expert to be used in lieu of direct testimony at trial. 22 NYCRR § 202.16(g)(2); N.Y. Ct. Rules, § 202.16(g)(2) (Uniform Civil Rules for the Supreme Court and the County Court). However, doing so may run the risk that inadmissible material, such as inadmissible hearsay, set forth in the report comes into evidence. The court may need to offer the parties the opportunity to object to admission of particular portions of the report. (West McKinney's Forms, 2016 Update).”

³² See *State v. Hall*, 96 A.D.3d 1460, 947 N.Y.S.2d 856 (2012); *Greene v. Robarge*, 104 A.D.3d 1073, 1074–75, 962 N.Y.S.2d 470 (2013); and *In re Kaitlyn X.*, 122 A.D.3d 1170, 1171–72, 997 N.Y.S.2d 777 (2014), all upholding lower courts' reliance on the professionally reliable hearsay exception “which enables an expert witness to provide opinion evidence based on otherwise inadmissible hearsay, provided it is demonstrated to be the type of material commonly relied on in the profession” (*Hinlicky v. Dreyfuss*, 6 N.Y.3d 636, 648, 848 N.E.2d 1285 (2006)).

New York law (see *Johnson v. Lutz*, 253 N.Y. 124, (1930)). The rules and regulations to be promulgated will have to balance the equities of the need for redaction of the inadmissible portion with the need to allow the court to have information it requires (e.g. information as to domestic violence or abuse which is statutorily-mandated to be factored into a custody decision). Also, forensic reports sometimes enable courts to encourage settlements because the court is aware of detrimental information against the parties.

Self-Represented Litigants

Our Committee continues to believe that our proposal strikes a fair balance between due process concerns, as expressed in the First Department decision in *Sonbuchner v. Sonbuchner*, 96 A.D.3d 566, 947 N.Y.S.2d 80, 83 (App. Div. 2012), and rights of innocent parties not to have the most intimate details of their lives disseminated over the Internet and by other improper means. Self-represented litigants are often individuals who could afford counsel or who could have assigned counsel appointed for them pursuant to Judiciary Law § 35(8) or Family Court Act § 262 in a custody and visitation proceeding, but who choose to represent themselves. If self-represented litigants refuse assigned counsel, or discharge their counsel in order to represent themselves, they in effect assume the risk that they will not be given a copy of the report and the file, but will only be allowed to read it and take notes, and could be so allocuted. For those few self-represented litigants who would like to be represented by counsel but do not qualify for assigned counsel, there are help centers and law libraries at courthouses around the state where self-represented litigants may read and take notes on forensic reports and research issues that arise with regard to custody issues raised by the forensic reports. In addition, programs by many bar associations throughout the state provide low cost legal consultations, and many legal service organizations provide low cost and/or no cost legal services for low income individuals who qualify.³³

In addition, we note that there are other circumstances where attorneys and self-represented litigants are treated differently in the judicial process and these instances do not constitute due process violations. These differences in treatment range from how litigants enter a courthouse, to the screening that they must undergo, to the requirements as to attorneys being escrow agents while self-represented litigants are not. In certain instances, judicial discretion allows self-represented litigants greater leeway than represented litigants, such as the ability to testify in the narrative or to introduce an exhibit without formality. The Committee believes that reasonable advantages afforded to self-represented litigants along with reasonable restrictions imposed upon self-represented litigants are, to some extent, unavoidable consequences of the fact that self-represented litigants are not trained and licensed members of the bar.

Summary

Some have argued that forensic reports should be subject to higher standards of scientific reliability and that the preparers of such reports should be subject to more rigorous examination as to their qualifications. We share these concerns and recommend that Counsel and the parties should be encouraged to utilize the Mental Health Professionals Certification Committee

³³ See the CourtHelp website on the UCS Internet Site designed for self-represented litigants at <http://www.nycourts.gov/courthelp/GoingToCourt/gettingHelp.shtml>

established in the First and Second Departments to review qualifications and report complaints as to forensic evaluators.³⁴ When prepared competently and utilized by the court, forensic reports are a valuable and necessary tool for the court to access important information prepared by experts in the field which can lead to better custody and visitation decisions. It is important that uniform standards be established on a statewide basis to determine access to such reports and files by all who need them during custody and visitation litigation. It is also important to set rules as to admissibility into evidence and reading of the report which allow the court to have the information it needs but which protect the rights of parties to raise objections to the qualifications of the expert or to inadmissible hearsay in the report and to cross examine the expert. We believe our proposal continues to accomplish these goals in a fair manner, protecting due process with adequate safeguards against violation of privacy, while at the same time promoting the efficiency of the custody and visitation litigation process by eliminating unnecessary motion practice and trials related to direct testimony contributing to delays in custody determinations where practicable.

The changes we have made in our revised proposal in response to suggestions from the Family Court Advisory and Rules Committee and others make the measure more workable in types of cases other than matrimonial, and avoid conflicts with confidentiality laws and possible loss of federal funding in connection with state child protective, permanency and other proceedings. It is our hope that these revisions will be supported by the Chief Administrative Judge, members of the Legislature, and by members of the Bench and Bar.

³⁴ See 22NYCRR §623, Rules of the Supreme Court, Appellate Division, First Department, at http://inside-ucs.org/ji/MatriSeminar/2011/materials/Part_623_Mental_Health_Professionals_Panel.pdf, and 22 NYCRR § 680, Rules of the Supreme Court, Appellate Division, Second Department,, at http://inside-ucs.org/ji/MatriSeminar/2011/materials/Part_680_Mental_Health_Professionals_Panel.pdf

Appendix F-2

CONTACT

POLICY DEPARTMENT

MARIA CILENTI

212.382.6655 | mcilenti@nycbar.org

ELIZABETH KOCIENDA

212.382.4788 | ekocienda@nycbar.org

**REPORT ON LEGISLATION BY
THE MATRIMONIAL LAW COMMITTEE AND
THE CHILDREN AND THE LAW COMMITTEE**

**A.5621
S.4686**

**M. of A. Weinstein
Sen. Biaggi**

AN ACT to amend the domestic relations law and the family court act, in relation to child custody forensic reports

THIS BILL IS OPPOSED

The Matrimonial Law and Children and the Law Committees of the New York City Bar Association (the “Committees”) write to provide feedback on the proposed legislation which would amend the Family Court Act and the Domestic Relations Law regarding the use of reports from court-appointed forensic evaluators (“forensics”) in child custody disputes. The Matrimonial Practice Advisory and Rules Committee of the Office of Court Administration has proposed a similar but not identical bill (OCA 27-2019).¹

The Committees support the approach taken in OCA 27-2019 with a few minor changes and clarifications detailed below. Although A.5621/S.4686 contains several valuable elements, it goes too far in guaranteeing parties access to forensic reports. We believe that OCA 27-2019 strikes a better balance among the competing interests.

When custody of, or access to, minor children is disputed, the report of the neutral forensic becomes a critical piece of evidence. As Prof. Timothy M. Tippens has argued for years,² due process requires that counsel have access not only to the forensics’ reports but also to their notes in order to cross-examine the forensic thoroughly and explore any omissions or possible bias. Courts, however, have recognized that right only inconsistently. Both legislative proposals would establish a right for attorneys to access forensics’ “entire file related to the proceeding,” unless a protective order under CPLR §3103 provides otherwise. The Committees welcome that change, with the understanding that all files will be redacted to prevent dissemination of confidential information that could compromise the safety of a domestic violence victim.

¹ See “Report of the Matrimonial Practice Advisory and Rules Committee to the Chief Administrative Judge of the Courts of the State of New York,” Jan. 2019 at 34, <https://www.nycourts.gov/LegacyPDFS/IP/judiciarylegislative/pdfs/2019-Matrimonial.pdf> (“Previously-Endorsed Legislative Proposal #3).

² See, e.g., “Custody Forensics: Reform on the Horizon?”, N.Y. Law J., March 7, 2013.

REASONS FOR SUPPORTING OCA 27-2019

A difficult issue in drafting these legislative proposals is the pro se litigants' access to forensic reports. On that issue, in March 2013, after much discussion and internal debate, the City Bar concluded that:

“[G]iven the harm that can be done by providing parents with a copy of the report (harm that would not be undone by any sanction nor prevented by any affirmation/affidavit), the court rule should not allow parents to receive a copy of the forensic report. Instead, the court rule should allow represented litigants to review the report in their attorneys' offices, and should allow unrepresented parties to review the report in the courthouse and to have access to the report in the courtroom during trial.”³

As the Children's Law Center in Brooklyn recently noted, parents who gain possession of forensic reports have shared them inappropriately and used them to attack children and each other.⁴

The Committees are pleased that OCA 27-2019 follows our recommendation. A.5621/S.4686, however, presumptively gives represented parties the right to copies of the forensic report. In the age of smartphones and social media, that will make it all too easy for distraught parents to publicize the very personal and embarrassing information that must often be included in forensics' reports.

OCA 27-2019 also provides more extensive mechanisms for ensuring the confidentiality of forensic reports. In particular, attorneys and others who receive access to forensic reports would be required to sign affidavits promising to not disseminate the reports without permission. Such procedures should be included in any legislation enacted on this issue.

Another difference between OCA 27-2019 and A.5621/S.4686 is that OCA 27-2019 limits judges' ability to read a forensic report before the parties have presented an agreement on child custody for judicial approval or before a trial or hearing has commenced. A.5621/S.4686 includes no such restrictions. The Committees believe that restrictions on when judges can read forensic reports are unnecessary and potentially harmful. Judges appropriately seek to avoid contested trials or hearings on custody disputes. In order to bring the parties to a compromise on such matters, judges need to read the forensic report. And if there is to be a trial or hearing, the judge should be able to prepare for it by reviewing the forensic report in advance.

³ Comment on Office of Court Administration's Proposal Regarding Access to Forensic Evaluation Reports in Child Custody and Visitation Cases, at 1, <http://www2.nycbar.org/pdf/report/uploads/20072434-ForensicReportsinChildCustodyMatters.pdf>.

⁴ Karen P. Simmons et al., "Parties Deserve to See Forensic Evaluations" (letter to the editor), N.Y. Law J., Mar. 22, 2017.

SUGGESTED CHANGES TO OCA 27-2019

The Committees recommend some small changes to OCA 27-2019. First, the bill should clarify that an attorney for the child has the sole discretion to decide whether or not to show the forensic report to the minor child, without giving the child a copy. Both OCA 27-2019 and A.5621/S.4686 appropriately guarantee the attorney for the child access to the report and notes. Such access is necessary for those attorneys to perform their role effectively. Access also forces attorneys for the children to decide how much they will show or tell their clients -- the minor children. Exposing parents' secrets and their unvarnished opinions to children in that way could be very damaging, depending on what exactly is in the report and the child's level of maturity. If, however, a child wants to see a report about him/herself and his/her parents, and the attorney for the child has access to that report, it is difficult for the attorney for the child to refuse to share the report with his or her client. Refusing to share information with the child, although it is in the child's long-term interest, could damage the attorney / client relationship of trust. The statute should allow the attorney for the child to weigh those competing interests and make a final decision. Such a provision would treat attorneys for the children the same as attorneys for adult parties, who can disclose the contents of the report to their clients but cannot provide copies to them.

We also recommend minor changes to the language regarding retained experts.⁵ OCA 27-2019 appropriately allows experts who have been retained to assist counsel to review independent forensics' reports and notes. However, the bill provides that such access will be "[u]pon application" to the court. The problem is that applications to the court must generally be on notice to all parties. If one side wishes to use an expert to review the forensics' report and advise counsel about it, the application will disclose that expert's name. The contemplated procedure will therefore impinge on the traditional right of counsel to consult with non-testifying experts in total confidence. Currently, most judges will allow another expert to access a forensic report after the retaining attorney presents that expert informally in the judges' chambers. Any legislation on forensic reports should clarify that such an ex parte procedure suffices as an "application" with regard to a non-testifying expert.⁶

The Committees also recommend the language in OCA 27-2019 be clarified to allow self-represented litigants to review forensic reports at a courthouse "or other location." We recognize that in rural counties of the State, courthouses may be inconveniently located. We are not sure, however, where else any measures could be effectively taken to prevent a self-represented litigant from copying the report.

We appreciate the effort that the Matrimonial Practice Advisory and Rules Committee put into keeping material in forensic reports from being disseminated as part of other documents, which must be shared with the parties. In particular, OCA 27-2019 prohibits litigants from quoting forensics' reports in any "motions, pleadings or other documents." We doubt, however, that the effort will succeed. Counsel will still be allowed to quote forensic reports in hearings or

⁵ This language also appears in A.5621/S.4686.

⁶ OCA 27-2019 refers to such experts retained by counsel or parties as "independent licensed forensic evaluators." That term could be misleading, because there is no particular "license" such experts might have. We recommend that "person retained to assist counsel," as in A.5621/S.4686, or another general term be used instead.

trials. It will be difficult to make arguments, and impossible to cross-examine forensics, without such quotes. Once that happens, anyone present in the courtroom (which cannot be closed during testimony) will be able to hear the contents of the report. The quotes will also appear in the court reporter's transcript. Furthermore, information in the forensic evaluation can sometimes play a crucial role in motion practice that implicates the safety of a party or child. We therefore recommend omitting that provision of the bill.

Finally, OCA 27-2019 requires that reports be returned to the court upon conclusion of the litigation. We suggest that this provision be modified so that the attorneys be permitted to maintain the document in their files, confidentially, for use in any appeals or subsequent, related litigation.

CONCLUSION

In sum, the Committees recommend that the Legislature give further consideration to the enactment of OCA 27-2019, with the minor changes discussed above, rather than A.5621/S.4686. The Committees remain happy to work with OCA and the Legislature on the topic further.

Children and the Law Committee
Sara Hiltzik, Chair

Matrimonial Law Committee
Jenifer Foley, Chair
Matthew A. Feigin, Member (mfeigin@katskykorins.com)

Reissued May 2019

Appendix F-3

**Appendix F-3 to 2021 Report of Matrimonial Practice Advisory and Rules
Committee to Chief Administrative Judge**

Memoranda of Opposition to 2019-20 A.5621/S.4686 by:

- 1- Women's Bar Association of the State of New York
- 2- Family Law Section of the New York State Bar Association
- 3- American Academy of Matrimonial Lawyers, New York Chapter



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2019 – A.5621 / S.4686

Position Statement – 2019

A.5621 (Weinstein) / S.4686 (Biaggi)

Oppose

WBASNY strongly opposes those portions of A.5621/S-4686 that provide for release of forensic reports, notes and raw data to the parties, including pro se litigants. We are particularly concerned about the great potential for the irreparable harm that will result from intentional or unintentional dissemination of the contents of forensic reports, notes and raw data to the parties' children and the public. Contempt is not enough of a deterrent and will have no impact on this irreparable harm to parents and children resulting from the release of such information via the Internet and/or social media. In addition, this will create a very real potential for editing and falsifying the evaluation. A contempt proceeding, if any, will only add to the cost and delay of custody litigation which is not in the best interest of children and their families.

We are particularly concerned that victims of domestic violence will be targeted and further harmed by this Bill. If parties are given copies of forensic reports, an abuser can easily inflict more abuse on the victim with threats and actual disclosure of the forensic report to employers, relatives and other members of the public.

Providing forensic evaluation reports to parents directly will have a chilling effect on the formulation and use of forensic evaluations, which are an important tool in custody matters, because courts will be reluctant to order forensic reports knowing how they may be misused and parties will be reluctant to be open and honest with evaluators. The bill will burden already overburdened courts with the need to issue protective orders and delay cases, which will harm children and families.

It is not a violation of due process to have pro se litigants and parties read the report in court or an attorney's office. This is still significant access to the report. There has been a history of extreme caution in protecting the report. The forensic reports have always been part of a court record that is sealed

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LEGISLATION

2019 – A.2477-B / S.5343**2019 – A.3876 / S.2992**[View more »](#)

and not available to the public. This Bill could result in public disclosure of those sealed court files without a court Order. Since a pro se litigant has a right to defend or put forth the report, then he/she has a right to view it – but that should be done with safeguards recognizing that both parties and pro se litigants can sometimes lose sight of their children’s interests in favor of their own and use the report in wholly unintended and inappropriate ways, including posting on the Internet.

We firmly believe that the Bill should require counsel and retained experts who receive forensic reports and files to execute confidentiality agreements acceptable to the Court. This is the practice in many courts and should be a uniform rule throughout New York State.

We oppose the Bill’s provision that admissibility of forensic reports and files shall be subject to objection pursuant to the rules of evidence and subject to cross-examination. Such a provision will result in trial delays and additional expense.

We do, however, support that portion of the Bill that allows for the release of a forensic examiner’s entire file to counsel only, and to pro se litigants for review in Court prior to litigation. We do not believe that a CPLR 3120 demand is necessary; the forensic examiner’s notes and raw data should be as available to counsel as the report itself. Decisions from Nassau and Westchester counties have directed the release of the entire file to counsel with strong pronouncements in favor of such release: “Custody determinations should not be made based upon a black box. All of the underlying information, which is unquestionably relevant and material, must be provided to counsel, who must be fully equipped to cross-examine the forensic evaluator and establish for the Court, as trier of fact, the credibility and reliability of the opinions and conclusions expressed by the neutral forensic evaluator.” *K.C. v. J.C.*, 50 Misc.3d 892, 25 N.Y.S.3d 798 (Supreme Court, Westchester Co. 2015). We are in favor of a codification of the holding in *K.C. v. J.C.*, and *J.F.D. v. J.D.*, 45 Misc.3d 1212(A) (Supreme Court, Nassau Co. 2014).

Custody determinations are made to promote the best interests of children. There is no argument as to due process since the restriction is only as to the actual possession of a physical copy of the forensic report and raw data. In all circumstances, there should not be a restriction to the access and review of the forensic report and raw data under court or attorney supervision. Accordingly, all court procedures and rights should be fashioned so as not to interfere with achieving a result that is in the best interests of children in New York State.

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March 19, 2019

REPORT NO. 1

PREPARED BY FAMILY LAW SECTION COMMITTEE ON LEGISLATION

A05621

Sponsored by: M. of A. Weinstein, Seawright, Taylor

Multi-sponsored by: M. of A. Braunstein, Cook, Glick, & Jaffee

Effective Date: The ninetieth day after the bill becomes a law.

A **BILL** to amend Domestic Relations Law §70 and §240, as follows (the “Bill”): 1) to provide that all parties, their counsel and the attorney for the child shall have a right to a copy of the court-ordered forensic report and a copy of the forensic evaluator’s file in child custody cases, subject to the issuance of a protective order pursuant to Section 3103 of the Civil Practice Law and Rules (“CPLR”); and 2) upon application to the court, any person retained to assist counsel or any party shall be provided with a copy of the forensic report, again subject to the issuance of a protective order; and 3) to amend §251(c) and (d) and §651 of the Family Court Act to provide that Sections 3101 and 3103 of the CPLR apply to pre-trial discovery of court-ordered forensic reports in child custody cases.

RULE & SECTION OF LAW REFERRED TO: DRL §70 and §240; FCA §251 and §651.

THE FAMILY LAW SECTION OPPOSES THIS BILL

The Family Law Section supported a prior version of the Bill (A08342) introduced in the 2013-2014 legislative session. However, at that time, the Family Law Section had concerns about inappropriate use of forensic reports by litigants in custody proceedings, and believed that there were other ways in which the Bill could be improved. Unfortunately, those concerns have not been addressed in the current version of the Bill.

While the Bill seeks to provide uniformity in the law with respect to access to court-ordered forensic reports in custody cases, and protect a litigant’s due process rights to adequately challenge such reports, the Bill gives litigants (including pro se litigants) unfettered access to the reports with insufficient safeguards. Furthermore, while the Bill seeks to address longstanding due process concerns about prohibiting litigants from obtaining copies of forensic reports, the procedural provisions are unclear and lack specificity.

Our issues with the Bill are summarized below:

First, there remain legitimate concerns about a litigant in a child custody case – especially a *pro se* litigant – showing the report to the subject children or others, and the negative effects of such exposure could be irreparably harmful. While the Bill allows a motion for a protective order to be made in order to preserve the confidentiality of the forensic examiner’s report and raw data, the Bill fails to address the specific logistical process and timing for doing so. Once the report is disseminated, it may be too late for a protective order to serve its intended purpose. Moreover, it is questionable whether the prospect of a possible contempt finding will be a sufficient deterrent to prevent a *pro se* litigant from improperly disseminating the forensic report.

Second, the Bill requires an application to the court in order for a party or attorney to provide a retained expert a copy of the report and the raw data file of the examiner. Since each party will likely retain the services of an expert to review the examiner’s report and raw data, there is no logical rationale to require the parties to apply to the court for permission to give the report and data to a retained expert. This will only result in costly motion practice and delay. The Bill should allow for the right of retained experts to review the report and data of the examiner subject to signing a confidentiality agreement.

Third, to enhance the Bill’s effectiveness and ensure a better-informed court, any revised Bill should include a provision authorizing the court to obtain a copy of the forensic report from a prior custody proceeding involving the same parties and child(ren). Such a provision will assist the court in understanding how the initial custody determination was made.

Finally, the Family Law Section recommends that any revised Bill include a directive prohibiting a court from reading/reviewing the forensic report until it is received in evidence at trial, unless otherwise agreed-to by the parties and their counsel in a written stipulation submitted to the Court.

Based upon the foregoing the Family Law Section OPPOSES this legislation as drafted.

Chair of the Section: Eric A. Tepper, Esq.

Opinions expressed are those of the Committee preparing this resolution and cannot represent those of the entire New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

AMERICAN ACADEMY

AAML

OF MATRIMONIAL LAWYERS
NY CHAPTER

<http://ny.aaml.org>

americanacademyny@gmail.com

OFFICERS

PRESIDENT

Ronnie Schindel
12 East 49th Street, 32nd Floor
New York, NY 10017
(212) 521-3518
Schindel@amsllp.com

VICE PRESIDENTS

Joan Adams
Donald Schuck
Leigh Baseheart Kahn
Pamela Sloan

TREASURER

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Susan Bender

A. 5621

AN ACT to amend the domestic relations law and the family court act, in relation to child custody forensic reports.

LAW AND SECTION REFERRED TO: DRL §70 and §240; FCA §251 and §651.

The New York Chapter of the American Academy of Matrimonial Lawyers opposes this legislation and supports the memorandum in opposition prepared by the Family Law Section of the New York State Bar Association dated March 19, 2019.

Ronnie Schindel
President
American Academy of Matrimonial Lawyers
New York Chapter

NY CHAPTER

PAST PRESIDENTS

Norman M. Sheresky
Michael J. Ostrow
Willard H. DaSilva
Samuel G. Fredman
Paul Ivan Birzon
Sanford S. Dranoff
Elliot D. Samuelson
Timothy M. Tippins
Barbara Ellen Handschu
Alton L. Abramowitz
Joel C. Bender
Sylvia Goldschmidt
Patrick C. O'Reilly
Bruce Wagner
Allan Mantel
Allan Mayefsky
Christopher Mattingly
Michael Stutman
Elena Karabatos
Charles P. Inclima

NATIONAL ACADEMY

President:
Peter Walzer

**NATIONAL ACADEMY
BOARD OF GOVERNORS**

Charles P. Inclima
Ronnie Schindel
Leigh Baseheart Kahn,
National Secretary
Lee Rosenberg, Parliamentarian

April 18, 2019

By: M. of A. Weinstein
Assembly Committee: Judiciary
Effective Date: 90th day after it shall
have become a law

Appendix G

**SUPREME COURT CIVIL - MATRIMONIALS FILED & DISPOSED
COMPARISON REPORT: 2010 vs 2011**

UNCONTESTED MATRIMONIALS

CONTESTED MATRIMONIALS

Location	Full Year 2010 (01/04/2010 - 01/02/2011)		Full Year 2011 (01/03/2011 - 01/01/2012)		2010 vs 2011		Full Year 2010 (01/04/2010 - 01/02/2011)		Full Year 2011 (01/03/2011 - 01/01/2012)		2010 vs 2011	
	Filed	Disposed	Filed	Disposed	% Change Filed	% Change Disposed	Filed	Disposed	Filed	Disposed	% Change Filed	% Change Disposed
TOTAL STATE	45,618	47,263	49,785	47,379	9%	0%	13,849	14,238	14,538	14,736	5%	3%
NYC	25,470	26,266	27,687	24,094	9%	-8%	3,185	3,169	3,426	3,213	8%	1%
NEW YORK	12,737	12,591	14,352	14,143	13%	12%	971	1,147	995	1,140	2%	-1%
BRONX	2,086	3,012	2,647	2,620	27%	-13%	267	252	434	260	63%	3%
KINGS	5,068	5,546	5,267	2,646	4%	-52%	723	729	797	760	10%	4%
QUEENS	4,992	4,581	4,818	4,403	-3%	-4%	857	705	819	736	-4%	4%
RICHMOND	587	536	603	282	3%	-47%	367	336	381	317	4%	-6%
Outside NYC	20,148	20,997	22,098	23,285	10%	11%	10,664	11,069	11,112	11,523	4%	4%
ALBANY	524	596	677	671	29%	13%	181	266	232	319	28%	20%
ALLEGANY	146	139	135	123	-8%	-12%	38	41	46	33	21%	-20%
BROOME	319	386	381	442	19%	15%	164	179	166	231	1%	29%
CATTARAUGUS	135	162	199	186	47%	15%	72	85	60	83	-17%	-2%
CAYUGA	134	157	151	181	13%	15%	54	88	75	89	39%	1%
CHAUTAUQUA	304	274	401	384	32%	40%	160	127	160	119	0%	-6%
CHEMUNG	196	191	230	214	17%	12%	60	64	66	67	10%	5%
CHENANGO	134	112	163	155	22%	38%	54	45	44	56	-19%	24%
CLINTON	264	268	255	266	-3%	-1%	65	67	91	78	40%	16%
COLUMBIA	121	121	88	142	-27%	17%	47	39	57	47	21%	21%
CORTLAND	137	127	175	176	28%	39%	35	36	32	35	-9%	-3%
DELAWARE	95	81	92	61	-3%	-25%	41	37	27	24	-34%	-35%
DUTCHESS	607	582	670	677	10%	16%	296	252	341	329	15%	31%
ERIE	1,187	1,291	1,476	1,634	24%	27%	1,305	1,313	1,159	1,287	-11%	-2%
ESSEX	75	59	95	113	27%	92%	25	36	32	27	28%	-25%
FRANKLIN	113	106	144	127	27%	20%	40	38	36	55	-10%	45%
FULTON	174	189	163	180	-6%	-5%	65	60	51	89	-22%	48%
GENESEE	111	128	133	150	20%	17%	76	89	51	67	-33%	-25%
GREENE	100	104	131	98	31%	-6%	41	28	56	57	37%	104%
HAMILTON	0	0	0	0	0%	0%	0	0	0	0	0%	0%
HERKIMER	125	124	112	117	-10%	-6%	81	89	66	75	-19%	-16%
JEFFERSON	478	539	537	651	12%	21%	132	145	85	131	-36%	-10%
LEWIS	63	73	81	78	29%	7%	24	29	18	15	-25%	-48%
LIVINGSTON	152	174	166	186	9%	7%	62	36	50	49	-19%	36%
MADISON	142	141	152	135	7%	-4%	47	68	79	47	68%	-31%
MONROE	1,403	1,399	1,294	1,542	-8%	10%	734	719	655	891	-11%	24%
MONTGOMERY	101	80	129	130	28%	63%	37	41	42	44	14%	7%
NASSAU	1,826	1,825	1,826	1,850	0%	1%	1,168	1,185	1,208	1,067	3%	-10%
NIAGARA	311	318	349	340	12%	7%	282	261	270	253	-4%	-3%
ONEIDA	383	334	452	393	18%	18%	259	260	282	292	9%	12%
ONONDAGA	959	1,355	1,014	1,380	6%	2%	521	564	615	549	18%	-3%
ONTARIO	188	231	211	273	12%	18%	125	130	148	114	18%	-12%
ORANGE	318	641	214	743	-33%	16%	356	327	391	363	10%	11%
ORLEANS	94	96	85	136	-10%	42%	28	30	34	34	21%	13%
OSWEGO	214	215	273	273	28%	27%	147	174	181	171	23%	-2%
OTSEGO	113	109	134	120	19%	10%	37	46	62	51	68%	11%
PUTNAM	137	136	147	144	7%	6%	117	133	97	95	-17%	-29%
RENSSELAER	288	320	371	387	29%	21%	120	170	151	191	26%	12%
ROCKLAND	393	416	424	417	8%	0%	221	287	238	325	8%	13%
ST LAWRENCE	279	271	334	322	20%	19%	70	80	87	73	24%	-9%
SARATOGA	583	542	687	624	18%	15%	204	199	295	236	45%	19%
SCHENECTADY	349	334	438	400	26%	20%	145	136	132	91	-9%	-33%
SCHOHARIE	47	44	83	68	77%	55%	20	15	29	23	45%	53%
SCHUYLER	46	42	53	54	15%	29%	11	19	9	22	-18%	16%
SENECA	56	64	43	67	-23%	5%	20	25	36	36	80%	44%
STEBEN	178	241	215	279	21%	16%	68	48	79	78	16%	63%
SUFFOLK	2,403	2,384	2,589	2,506	8%	5%	1,563	1,773	1,630	1,768	4%	0%
SULLIVAN	197	202	174	183	-12%	-9%	42	49	51	63	21%	29%
TIOGA	159	161	166	209	4%	30%	51	34	46	51	-10%	50%
TOMPKINS	242	222	277	247	14%	11%	48	37	56	58	17%	57%
ULSTER	304	279	515	394	69%	41%	127	145	180	143	42%	-1%
WARREN	185	178	221	218	19%	22%	78	72	77	71	-1%	-1%
WASHINGTON	184	170	194	185	5%	9%	50	69	58	54	16%	-22%
WAYNE	156	165	175	181	12%	10%	96	84	76	103	-21%	23%
WESTCHESTER	2,083	1,959	2,031	1,894	-2%	-3%	688	620	728	720	6%	16%
WYOMING	112	110	135	135	21%	23%	40	43	59	50	48%	16%
YATES	21	30	38	44	81%	47%	26	37	30	34	15%	-8%

**SUPREME COURT CIVIL - MATRIMONIALS FILED & DISPOSED
COMPARISON REPORT: 2011 vs 2012**

UNCONTESTED MATRIMONIALS

CONTESTED MATRIMONIALS

Location	Full Year 2011 (01/03/2011 - 01/01/2012)		Full Year 2012 (01/02/2012 - 12/30/2012)		2011 vs 2012		Full Year 2011 (01/03/2011 - 01/01/2012)		Full Year 2012 (01/02/2012 - 12/30/2012)		2011 vs 2012	
	Filed	Disposed	Filed	Disposed	% Change Filed	% Change Disposed	Filed	Disposed	Filed	Disposed	% Change Filed	% Change Disposed
TOTAL STATE	50,312	47,379	46,201	49,804	-8%	5%	14,538	14,736	13,652	15,115	-6%	3%
NYC	27,687	24,094	24,465	26,362	-12%	9%	3,426	3,213	3,379	3,161	-1%	-2%
NEW YORK	14,352	14,143	13,519	13,413	-6%	-5%	995	1,140	911	1,023	-8%	-10%
BRONX	2,647	2,620	3,356	3,485	27%	33%	434	260	741	290	71%	12%
KINGS	5,267	2,646	3,379	5,358	-36%	102%	797	760	628	737	-21%	-3%
QUEENS	4,818	4,403	3,662	3,328	-24%	-24%	819	736	722	736	-12%	0%
RICHMOND	603	282	549	778	-9%	176%	381	317	377	375	-1%	18%
Outside NYC	22,625	23,285	21,736	23,442	-4%	1%	11,112	11,523	10,273	11,954	-8%	4%
ALBANY	677	671	644	664	-5%	-1%	232	319	174	338	-25%	6%
ALLEGANY	135	123	120	137	-11%	11%	46	33	42	46	-9%	39%
BROOME	381	442	416	434	9%	-2%	166	231	196	178	18%	-23%
CATTARAUGUS	199	186	193	204	-3%	10%	60	83	64	84	7%	1%
CAYUGA	151	181	174	186	15%	3%	75	89	65	90	-13%	1%
CHAUTAUQUA	401	384	383	394	-4%	3%	160	119	137	162	-14%	36%
CHEMUNG	230	214	215	208	-7%	-3%	66	67	70	54	6%	-19%
CHENANGO	163	155	145	133	-11%	-14%	44	56	55	51	25%	-9%
CLINTON	255	266	281	287	10%	8%	91	78	69	96	-24%	23%
COLUMBIA	88	142	86	124	-2%	-13%	57	47	43	31	-25%	-34%
CORTLAND	175	176	149	135	-15%	-23%	32	35	24	39	-25%	11%
DELAWARE	92	61	101	99	10%	62%	27	24	28	30	4%	25%
DUTCHESS	670	677	658	691	-2%	2%	341	329	295	382	-13%	16%
ERIE	1,476	1,634	1,446	1,745	-2%	7%	1,159	1,287	1,118	1,191	-4%	-7%
ESSEX	95	113	88	100	-7%	-12%	32	27	29	40	-9%	48%
FRANKLIN	144	127	120	122	-17%	-4%	36	55	24	77	-33%	40%
FULTON	163	180	161	187	-1%	4%	51	89	66	83	29%	-7%
GENESEE	133	150	143	159	8%	6%	51	67	69	81	35%	21%
GREENE	131	98	111	105	-15%	7%	56	57	29	46	-48%	-19%
HAMILTON	0	0	0	0	0%	0%	0	0	0	0	0%	0%
HERKIMER	112	117	94	122	-16%	4%	66	75	44	57	-33%	-24%
JEFFERSON	537	651	558	615	4%	-6%	85	131	106	122	25%	-7%
LEWIS	81	78	71	72	-12%	-8%	18	15	25	14	39%	-7%
LIVINGSTON	166	186	148	157	-11%	-16%	50	49	44	56	-12%	14%
MADISON	152	135	142	111	-7%	-18%	79	47	63	61	-20%	30%
MONROE	1,294	1,542	1,370	1,512	6%	-2%	655	891	645	898	-2%	1%
MONTGOMERY	129	130	106	136	-18%	5%	42	44	34	33	-19%	-25%
NASSAU	1,826	1,850	1,822	1,681	0%	-9%	1,208	1,067	1,097	1,038	-9%	-3%
NIAGARA	349	340	366	358	5%	5%	270	253	262	303	-3%	20%
ONEIDA	452	393	439	350	-3%	-11%	282	292	269	308	-5%	5%
ONONDAGA	1,014	1,380	972	1,368	-4%	-1%	615	549	606	561	-1%	2%
ONTARIO	211	273	208	248	-1%	-9%	148	114	103	135	-30%	18%
ORANGE	741	743	755	814	2%	10%	391	363	367	422	-6%	16%
ORLEANS	85	136	48	107	-44%	-21%	34	34	31	41	-9%	21%
OSWEGO	273	273	262	258	-4%	-5%	181	171	153	176	-15%	3%
OTSEGO	134	120	135	134	1%	12%	62	51	46	34	-26%	-33%
PUTNAM	147	144	160	167	9%	16%	97	95	112	90	15%	-5%
RENSSELAER	371	387	303	377	-18%	-3%	151	191	122	211	-19%	10%
ROCKLAND	424	417	373	459	-12%	10%	238	325	269	372	13%	14%
ST LAWRENCE	334	322	276	291	-17%	-10%	87	73	100	96	15%	32%
SARATOGA	687	624	621	688	-10%	10%	295	236	233	299	-21%	27%
SCHENECTADY	438	400	396	415	-10%	4%	132	91	116	106	-12%	16%
SCHOHARIE	83	68	68	82	-18%	21%	29	23	41	33	41%	43%
SCHUYLER	53	54	44	43	-17%	-20%	9	22	14	18	56%	-18%
SENECA	43	67	51	69	19%	3%	36	36	30	43	-17%	19%
STEBEN	215	279	198	264	-8%	-5%	79	78	64	78	-19%	0%
SUFFOLK	2,589	2,506	2,456	2,760	-5%	10%	1,630	1,768	1,368	1,912	-16%	8%
SULLIVAN	174	183	188	203	8%	11%	51	63	43	75	-16%	19%
TIOGA	166	209	176	136	6%	-35%	46	51	44	52	-4%	2%
TOMPKINS	277	247	218	212	-21%	-14%	56	58	69	54	23%	-7%
ULSTER	515	394	381	406	-26%	3%	180	143	149	139	-17%	-3%
WARREN	221	218	232	238	5%	9%	77	71	62	70	-19%	-1%
WASHINGTON	194	185	184	216	-5%	17%	58	54	59	69	2%	28%
WAYNE	175	181	181	209	3%	15%	76	103	84	98	11%	-5%
WESTCHESTER	2,031	1,894	1,958	1,903	-4%	0%	728	720	742	699	2%	-3%
WYOMING	135	135	104	90	-23%	-33%	59	50	40	44	-32%	-12%
YATES	38	44	38	57	0%	30%	30	34	20	38	-33%	12%

**SUPREME COURT CIVIL - MATRIMONIALS FILED & DISPOSED
COMPARISON REPORT: 2012 vs 2013**

Location	UNCONTESTED MATRIMONIALS						CONTESTED MATRIMONIALS					
	Full Year 2012 (01/02/2012 - 12/30/2012)		Full Year 2013 (12/31/2012 - 01/05/2014)		2012 vs 2013		Full Year 2012 (01/02/2012 - 12/30/2012)		Full Year 2013 (12/31/2012 - 01/05/2014)		2012 vs 2013	
	Filed	Disposed	Filed	Disposed	% Change Filed	% Change Disposed	Filed	Disposed	Filed	Disposed	% Change Filed	% Change Disposed
TOTAL STATE	46,201	49,804	47,500	49,023	3%	-2%	13,652	15,115	13,208	15,525	-3%	3%
NYC	24,465	26,362	26,051	25,745	6%	-2%	3,379	3,161	3,434	3,437	2%	9%
NEW YORK	13,519	13,413	14,479	15,139	7%	13%	911	1,023	851	1,068	-7%	4%
BRONX	3,356	3,485	3,926	3,490	17%	0%	741	290	783	534	6%	84%
KINGS	3,379	5,358	3,497	3,498	3%	-35%	628	737	722	759	15%	3%
QUEENS	3,662	3,328	3,621	3,036	-1%	-9%	722	736	737	716	2%	-3%
RICHMOND	549	778	528	582	-4%	-25%	377	375	341	360	-10%	-4%
Outside NYC	21,736	23,442	21,449	23,278	-1%	-1%	10,273	11,954	9,774	12,088	-5%	1%
ALBANY	644	664	610	697	-5%	5%	174	338	186	303	7%	-10%
ALLEGANY	120	137	92	93	-23%	-32%	42	46	39	50	-7%	9%
BROOME	416	434	446	470	7%	8%	196	178	137	255	-30%	43%
CATTARAUGUS	193	204	170	155	-12%	-24%	64	84	66	80	3%	-5%
CAYUGA	174	186	150	155	-14%	-17%	65	90	73	98	12%	9%
CHAUTAUQUA	383	394	351	360	-8%	-9%	137	162	133	135	-3%	-17%
CHEMUNG	215	208	223	223	4%	7%	70	54	50	68	-29%	26%
CHENANGO	145	133	139	121	-4%	-9%	55	51	34	64	-38%	25%
CLINTON	281	287	294	285	5%	-1%	69	96	75	77	9%	-20%
COLUMBIA	86	124	129	129	50%	4%	43	31	66	61	53%	97%
CORTLAND	149	135	150	134	1%	-1%	24	39	49	41	104%	5%
DELAWARE	101	99	74	89	-27%	-10%	28	30	33	49	18%	63%
DUTCHESS	658	691	668	673	2%	-3%	295	382	308	371	4%	-3%
ERIE	1,446	1,745	1,972	2,251	36%	29%	1,118	1,191	997	1,103	-11%	-7%
ESSEX	88	100	108	100	23%	0%	29	40	18	29	-38%	-28%
FRANKLIN	120	122	118	115	-2%	-6%	24	77	35	55	46%	-29%
FULTON	161	187	166	169	3%	-10%	66	83	47	68	-29%	-18%
GENESEE	143	159	140	142	-2%	-11%	69	81	58	74	-16%	-9%
GREENE	111	105	122	124	10%	18%	29	46	35	33	21%	-28%
HAMILTON	0	0	0	0	0%	0%	0	0	0	0	0%	0%
HERKIMER	94	122	81	101	-14%	-17%	44	57	54	61	23%	7%
JEFFERSON	558	615	515	584	-8%	-5%	106	122	144	127	36%	4%
LEWIS	71	72	71	88	0%	22%	25	14	21	38	-16%	171%
LIVINGSTON	148	157	117	141	-21%	-10%	44	56	44	71	0%	27%
MADISON	142	111	115	142	-19%	28%	63	61	53	79	-16%	30%
MONROE	1,370	1,512	1,455	1,444	6%	-4%	645	898	656	741	2%	-17%
MONTGOMERY	106	136	88	103	-17%	-24%	34	33	33	59	-3%	79%
NASSAU	1,822	1,681	1,680	1,739	-8%	3%	1,097	1,038	1,053	1,387	-4%	34%
NIAGARA	366	358	261	251	-29%	-30%	262	303	237	277	-10%	-9%
ONEIDA	439	350	459	368	5%	5%	269	308	256	221	-5%	-28%
ONONDAGA	972	1,368	962	1,277	-1%	-7%	606	561	593	621	-2%	11%
ONTARIO	208	248	244	307	17%	24%	103	135	115	157	12%	16%
ORANGE	755	814	367	672	-51%	-17%	367	422	378	381	3%	-10%
ORLEANS	48	107	59	130	23%	21%	31	41	31	39	0%	-5%
OSWEGO	262	258	249	230	-5%	-11%	153	176	144	135	-6%	-23%
OTSEGO	135	134	129	112	-4%	-16%	46	34	40	41	-13%	21%
PUTNAM	160	167	123	133	-23%	-20%	112	90	109	103	-3%	14%
RENSSELAER	303	377	299	298	-1%	-21%	122	211	115	159	-6%	-25%
ROCKLAND	373	459	393	415	5%	-10%	269	372	196	290	-27%	-22%
ST LAWRENCE	276	291	286	268	4%	-8%	100	96	60	87	-40%	-9%
SARATOGA	621	688	583	564	-6%	-18%	233	299	227	258	-3%	-14%
SCHENECTADY	396	415	396	444	0%	7%	116	106	126	176	9%	66%
SCHOHARIE	68	82	59	70	-13%	-15%	41	33	26	39	-37%	18%
SCHUYLER	44	43	51	54	16%	26%	14	18	14	21	0%	17%
SENECA	51	69	45	71	-12%	3%	30	43	22	35	-27%	-19%
STEUBEN	198	264	201	263	2%	0%	64	78	66	89	3%	14%
SUFFOLK	2,456	2,760	2,514	2,762	2%	0%	1,368	1,912	1,328	2,022	-3%	6%
SULLIVAN	188	203	159	242	-15%	19%	43	75	48	94	12%	25%
TIOGA	176	136	130	208	-26%	53%	44	52	36	44	-18%	-15%
TOMPKINS	218	212	223	266	2%	25%	69	54	62	79	-10%	46%
ULSTER	381	406	438	368	15%	-9%	149	139	126	154	-15%	11%
WARREN	232	238	231	237	0%	0%	62	70	77	82	24%	17%
WASHINGTON	184	216	192	192	4%	-11%	59	69	47	54	-20%	-22%
WAYNE	181	209	212	204	17%	-2%	84	98	73	71	-13%	-28%
WESTCHESTER	1,958	1,903	1,796	1,903	-8%	0%	742	699	675	718	-9%	3%
WYOMING	104	90	99	94	-5%	4%	40	44	32	37	-20%	-16%
YATES	38	57	45	48	18%	-16%	20	38	18	27	-10%	-29%

SUPREME COURT CIVIL - MATRIMONIALS FILED & DISPOSED
COMPARISON REPORT: 2013 vs 2014

Location	UNCONTESTED MATRIMONIALS						CONTESTED MATRIMONIALS					
	Full Year 2013 (12/31/2012 - 01/05/2014)		Full Year 2014 (01/06/2014 - 01/04/2015)		2013 vs 2014		Full Year 2013 (12/31/2012 - 01/05/2014)		Full Year 2014 (01/06/2014 - 01/04/2015)		2013 vs 2014	
	Filed	Disposed	Filed	Disposed	% Change Filed	% Change Disposed	Filed	Disposed	Filed	Disposed	% Change Filed	% Change Disposed
TOTAL STATE	47,500	49,023	46,974	46,540	-1%	-5%	13,208	15,525	12,919	14,069	-2%	-9%
NYC	26,051	25,745	25,990	25,124	0%	-2%	3,434	3,437	3,454	3,118	1%	-9%
NEW YORK	14,479	15,139	13,662	13,099	-6%	-13%	851	1,068	875	976	3%	-9%
BRONX	3,926	3,490	3,914	4,313	0%	24%	783	534	817	396	4%	-26%
KINGS	3,497	3,498	4,331	3,572	24%	2%	722	759	656	650	-9%	-14%
QUEENS	3,621	3,036	3,556	3,742	-2%	23%	737	716	763	767	4%	7%
RICHMOND	528	582	527	398	0%	-32%	341	360	343	329	1%	-9%
Outside NYC	21,449	23,278	20,984	21,416	-2%	-8%	9,774	12,088	9,465	10,951	-3%	-9%
ALBANY	610	697	627	639	3%	-8%	186	303	153	286	-18%	-6%
ALLEGANY	92	93	105	117	14%	26%	39	50	36	35	-8%	-30%
BROOME	446	470	395	358	-11%	-24%	137	255	151	192	10%	-25%
CATTARAUGUS	170	155	223	160	31%	3%	66	80	64	62	-3%	-23%
CAYUGA	150	155	145	183	-3%	18%	73	98	65	118	-11%	20%
CHAUTAUQUA	351	360	325	288	-7%	-20%	133	135	99	110	-26%	-19%
CHEMUNG	223	223	232	245	4%	10%	50	68	58	49	16%	-28%
CHENANGO	139	121	125	144	-10%	19%	34	64	49	65	44%	2%
CLINTON	294	285	249	255	-15%	-11%	75	77	58	83	-23%	8%
COLUMBIA	129	129	127	90	-2%	-30%	66	61	71	56	8%	-8%
CORTLAND	150	134	133	138	-11%	3%	49	41	20	34	-59%	-17%
DELAWARE	74	89	91	94	23%	6%	33	49	33	50	0%	2%
DUTCHESS	668	673	612	606	-8%	-10%	308	371	267	282	-13%	-24%
ERIE	1,972	2,251	2,130	2,333	8%	4%	997	1,103	899	911	-10%	-17%
ESSEX	108	100	80	87	-26%	-13%	18	29	22	19	22%	-34%
FRANKLIN	118	115	124	118	5%	3%	35	55	25	45	-29%	-18%
FULTON	166	169	131	124	-21%	-27%	47	68	46	46	-2%	-32%
GENESEE	140	142	90	108	-36%	-24%	58	74	46	65	-21%	-12%
GREENE	122	124	104	100	-15%	-19%	35	33	47	29	34%	-12%
HAMILTON	0	0	0	0	0%	0%	0	0	0	0	0%	0%
HERKIMER	81	101	56	85	-31%	-16%	54	61	66	64	22%	5%
JEFFERSON	515	584	524	465	2%	-20%	144	127	143	190	-1%	50%
LEWIS	71	88	70	66	-1%	-25%	21	38	25	21	19%	-45%
LIVINGSTON	117	141	94	111	-20%	-21%	44	71	46	52	5%	-27%
MADISON	115	142	124	95	8%	-33%	53	79	75	55	42%	-30%
MONROE	1,455	1,444	1,281	1,260	-12%	-13%	656	741	631	732	-4%	-1%
MONTGOMERY	88	103	106	104	20%	1%	33	59	34	48	3%	-19%
NASSAU	1,680	1,739	1,633	1,502	-3%	-14%	1,053	1,387	1,091	1,222	4%	-12%
NIAGARA	261	251	199	217	-24%	-14%	237	277	239	248	1%	-10%
ONEIDA	459	368	366	254	-20%	-31%	256	221	270	286	5%	29%
ONONDAGA	962	1,277	911	1,505	-5%	18%	593	621	520	642	-12%	3%
ONTARIO	244	307	209	236	-14%	-23%	115	157	129	136	12%	-13%
ORANGE	367	672	596	714	62%	6%	378	381	306	358	-19%	-6%
ORLEANS	59	130	80	165	36%	27%	31	39	24	45	-23%	15%
OSWEGO	249	230	229	187	-8%	-19%	144	135	118	119	-18%	-12%
OTSEGO	129	112	91	91	-29%	-19%	40	41	34	44	-15%	7%
PUTNAM	123	133	126	139	2%	5%	109	103	125	111	15%	8%
RENSSELAER	299	298	296	316	-1%	6%	115	159	110	134	-4%	-16%
ROCKLAND	393	415	331	462	-16%	11%	196	290	179	284	-9%	-2%
ST LAWRENCE	286	268	294	282	3%	5%	60	87	65	63	8%	-28%
SARATOGA	583	564	550	514	-6%	-9%	227	258	205	211	-10%	-18%
SCHENECTADY	396	444	353	358	-11%	-19%	126	176	106	123	-16%	-30%
SCHOHARIE	59	70	78	54	32%	-23%	26	39	18	11	-31%	-72%
SCHUYLER	51	54	36	34	-29%	-37%	14	21	12	14	-14%	-33%
SENECA	45	71	62	86	38%	21%	22	35	30	37	36%	6%
STEUBEN	201	263	238	325	18%	24%	66	89	61	87	-8%	-2%
SUFFOLK	2,514	2,762	2,424	2,062	-4%	-25%	1,328	2,022	1,346	1,718	1%	-15%
SULLIVAN	159	242	149	158	-6%	-35%	48	94	44	70	-8%	-26%
TIOGA	130	208	135	119	4%	-43%	36	44	35	49	-3%	11%
TOMPKINS	223	266	218	212	-2%	-20%	62	79	63	64	2%	-19%
ULSTER	438	368	430	425	-2%	15%	126	154	158	153	25%	-1%
WARREN	231	237	203	194	-12%	-18%	77	82	65	74	-16%	-10%
WASHINGTON	192	192	180	166	-6%	-14%	47	54	41	53	-13%	-2%
WAYNE	212	204	154	153	-27%	-25%	73	71	85	83	16%	17%
WESTCHESTER	1,796	1,903	1,978	1,958	10%	3%	675	718	709	758	5%	6%
WYOMING	99	94	101	119	2%	27%	32	37	34	32	6%	-14%
YATES	45	48	31	36	-31%	-25%	18	27	14	23	-22%	-15%

NEW YORK STATE UNIFIED COURT SYSTEM
SUPREME CIVIL MATRIMONIAL CASES FILED AND DISPOSED - TWO YEAR COMPARISON

Location	UNCONTESTED MATRIMONIALS						CONTESTED MATRIMONIALS					
	2014		2015		2014 vs 2015		2014		2015		2014 vs 2015	
	Filed	Disposed	Filed	Disposed	% Chg Filed	% Chg Disp	Filed	Disposed	Filed	Disposed	% Chg Filed	% Chg Disp
TOTAL STATE	46,973	46,540	47,358	45,988	1%	-1%	12,919	14,069	12,569	13,660	-3%	-3%
NYC	25,990	25,124	26,295	24,283	1%	-3%	3,454	3,118	3,474	3,173	1%	2%
NEW YORK	13,662	13,099	12,799	10,391	-6%	-21%	875	976	815	944	-7%	-3%
BRONX	3,914	4,313	3,845	4,985	-2%	16%	817	396	814	341	0%	-14%
KINGS	4,331	3,572	4,389	3,601	1%	1%	656	650	761	673	16%	4%
QUEENS	3,556	3,742	4,719	4,798	33%	28%	763	767	749	853	-2%	11%
RICHMOND	527	398	543	508	3%	28%	343	329	335	362	-2%	10%
Outside NYC	20,983	21,416	21,063	21,705	0%	1%	9,465	10,951	9,095	10,487	-4%	-4%
ALBANY	627	639	556	547	-11%	-14%	153	286	187	265	22%	-7%
ALLEGANY	105	117	94	124	-10%	6%	36	35	32	45	-11%	29%
BROOME	395	358	471	434	19%	21%	151	192	119	137	-21%	-29%
CATTARAUGUS	223	160	205	161	-8%	1%	64	62	43	52	-33%	-16%
CAYUGA	145	183	121	151	-17%	-17%	65	118	55	99	-15%	-16%
CHAUTAUGUA	325	288	339	315	4%	9%	99	110	99	118	0%	7%
CHEMUNG	232	245	270	277	16%	13%	58	49	66	75	14%	53%
CHENANGO	125	144	110	101	-12%	-30%	49	65	43	51	-12%	-22%
CLINTON	249	255	243	242	-2%	-5%	58	83	60	72	3%	-13%
COLUMBIA	127	90	134	112	6%	24%	71	56	35	38	-51%	-32%
CORTLAND	133	138	235	214	77%	55%	20	34	26	37	30%	9%
DELAWARE	91	94	85	81	-7%	-14%	33	50	28	49	-15%	-2%
DUTCHESS	612	606	678	698	11%	15%	267	282	257	316	-4%	12%
ERIE	2,130	2,333	1,909	2,358	-10%	1%	899	911	856	894	-5%	-2%
ESSEX	80	87	77	61	-4%	-30%	22	19	13	26	-41%	37%
FRANKLIN	124	118	130	114	5%	-3%	25	45	44	71	76%	58%
FULTON	131	124	136	136	4%	10%	46	46	48	45	4%	-2%
GENESEE	90	108	133	143	48%	32%	46	65	46	64	0%	-2%
GREENE	104	100	99	87	-5%	-13%	47	29	35	51	-26%	76%
HERKIMER	56	85	70	67	25%	-21%	66	64	64	68	-3%	6%
JEFFERSON	524	465	406	520	-23%	12%	143	190	145	169	1%	-11%
LEWIS	70	66	51	61	-27%	-8%	25	21	29	29	16%	38%
LIVINGSTON	94	111	134	153	43%	38%	46	52	50	48	9%	-8%
MADISON	124	95	102	118	-18%	24%	75	55	56	65	-25%	18%
MONROE	1,281	1,260	1,367	1,458	7%	16%	631	732	712	732	13%	0%
MONTGOMERY	106	104	79	80	-25%	-23%	34	48	28	42	-18%	-13%
NASSAU	1,633	1,502	2,014	1,688	23%	12%	1,091	1,222	1,054	1,094	-3%	-10%
NIAGARA	199	217	199	180	0%	-17%	239	248	237	218	-1%	-12%
ONEIDA	366	254	349	197	-5%	-22%	270	286	249	285	-8%	0%
ONONDAGA	911	1,505	852	1,289	-6%	-14%	520	642	518	514	0%	-20%
ONTARIO	209	236	289	327	38%	39%	129	136	117	155	-9%	14%
ORANGE	596	714	546	609	-8%	-15%	306	358	302	360	-1%	1%
ORLEANS	80	165	87	159	9%	-4%	24	45	28	32	17%	-29%
OSWEGO	229	187	239	191	4%	2%	118	119	121	133	3%	12%
OTSEGO	91	91	116	105	27%	15%	34	44	32	24	-6%	-45%
PUTNAM	126	139	106	108	-16%	-22%	125	111	94	113	-25%	2%
RENSSELAER	296	316	327	355	10%	12%	110	134	107	140	-3%	4%
ROCKLAND	331	462	324	497	-2%	8%	179	284	180	261	1%	-8%
SARATOGA	550	514	520	541	-5%	5%	205	211	187	208	-9%	-1%
SCHENECTADY	353	358	374	383	6%	7%	106	123	119	127	12%	3%
SCHOHARIE	78	54	58	31	-26%	-43%	18	11	27	15	50%	36%
SCHUYLER	36	34	57	34	58%	0%	12	14	11	15	-8%	7%
SENECA	62	86	44	60	-29%	-30%	30	37	23	26	-23%	-30%
ST LAWRENCE	294	282	194	189	-34%	-33%	65	63	46	35	-29%	-44%
STEBEN	238	325	211	276	-11%	-15%	61	87	61	99	0%	14%
SUFFOLK	2,423	2,062	2,366	2,065	-2%	0%	1,346	1,718	1,254	1,632	-7%	-5%
SULLIVAN	149	158	128	139	-14%	-12%	44	70	50	70	14%	0%
TIOGA	135	119	115	130	-15%	9%	35	49	39	55	11%	12%
TOMPKINS	218	212	200	203	-8%	-4%	63	64	40	59	-37%	-8%
ULSTER	430	425	356	403	-17%	-5%	158	153	141	170	-11%	11%
WARREN	203	194	191	172	-6%	-11%	65	74	50	73	-23%	-1%
WASHINGTON	180	166	190	178	6%	7%	41	53	55	56	34%	6%
WAYNE	154	153	137	143	-11%	-7%	85	83	72	99	-15%	19%
WESTCHESTER	1,978	1,958	2,097	2,102	6%	7%	709	758	643	688	-9%	-9%
WYOMING	101	119	108	97	7%	-18%	34	32	47	46	38%	44%
YATES	31	36	35	41	13%	14%	14	23	15	27	7%	17%

NEW YORK STATE UNIFIED COURT SYSTEM
SUPREME CIVIL MATRIMONIAL CASES FILED AND DISPOSED - TWO YEAR COMPARISON

Location	UNCONTESTED MATRIMONIALS						CONTESTED MATRIMONIALS					
	2015		2016		2015 vs 2016		2015		2016		2015 vs 2016	
	Filed	Disposed	Filed	Disposed	% Chg Filed	% Chg Disp	Filed	Disposed	Filed	Disposed	% Chg Filed	% Chg Disp
TOTAL STATE	47,358	45,988	45,150	48,282	-5%	5%	12,569	13,660	12,090	14,480	-4%	6%
NYC	26,295	24,283	24,327	25,910	-7%	7%	3,474	3,173	3,295	3,507	-5%	11%
NEW YORK	12,799	10,391	11,340	12,995	-11%	25%	815	944	823	902	1%	-4%
BRONX	3,845	4,985	4,382	3,918	14%	-21%	814	341	724	526	-11%	54%
KINGS	4,389	3,601	3,983	4,074	-9%	13%	761	673	687	899	-10%	34%
QUEENS	4,719	4,798	4,013	4,209	-15%	-12%	749	853	774	834	3%	-2%
RICHMOND	543	508	609	714	12%	41%	335	362	287	346	-14%	-4%
Outside NYC	21,063	21,705	20,823	22,372	-1%	3%	9,095	10,487	8,795	10,973	-3%	5%
ALBANY	556	547	579	590	4%	8%	187	265	166	285	-11%	8%
ALLEGANY	94	124	83	89	-12%	-28%	32	45	34	42	6%	-7%
BROOME	471	434	549	372	17%	-14%	119	137	167	159	40%	16%
CATTARAUGUS	205	161	166	140	-19%	-13%	43	52	52	40	21%	-23%
CAYUGA	121	151	127	170	5%	13%	55	99	45	108	-18%	9%
CHAUTAUQUA	339	315	274	295	-19%	-6%	99	118	82	88	-17%	-25%
CHEMUNG	270	277	251	248	-7%	-10%	66	75	50	57	-24%	-24%
CHENANGO	110	101	121	126	10%	25%	43	51	48	45	12%	-12%
CLINTON	243	242	207	237	-15%	-2%	60	72	67	78	12%	8%
COLUMBIA	134	112	142	131	6%	17%	35	38	39	32	11%	-16%
CORTLAND	235	214	320	303	36%	42%	26	37	30	26	15%	-30%
DELAWARE	85	81	94	108	11%	33%	28	49	30	55	7%	12%
DUTCHESS	678	698	601	608	-11%	-13%	257	316	272	256	6%	-19%
ERE	1,909	2,358	1,762	2,173	-8%	-8%	856	894	830	830	-3%	-7%
ESSEX	77	61	82	105	6%	72%	13	26	19	21	46%	-19%
FRANKLIN	130	114	85	77	-35%	-32%	44	71	45	57	2%	-20%
FULTON	136	136	138	138	1%	1%	48	45	52	76	8%	69%
GENESEE	133	143	111	128	-17%	-10%	46	64	40	53	-13%	-17%
GREENE	99	87	101	113	2%	30%	35	51	21	39	-40%	-24%
HERKIMER	70	67	63	66	-10%	-1%	64	68	61	47	-5%	-31%
JEFFERSON	406	520	413	411	2%	-21%	145	169	126	141	-13%	-17%
LEWIS	51	61	46	54	-10%	-11%	29	29	9	37	-69%	28%
LIVINGSTON	134	153	136	134	1%	-12%	50	48	49	66	-2%	38%
MADISON	102	118	132	157	29%	33%	56	65	67	70	20%	8%
MONROE	1,367	1,458	1,339	1,335	-2%	-8%	712	732	614	801	-14%	9%
MONTGOMERY	79	80	107	124	35%	55%	28	42	27	46	-4%	10%
NASSAU	2,014	1,688	1,818	1,719	-10%	2%	1,054	1,094	1,063	1,124	1%	3%
NIAGARA	199	180	318	275	60%	53%	237	218	208	274	-12%	26%
ONEIDA	349	197	384	295	10%	50%	249	285	232	286	-7%	0%
ONONDAGA	852	1,289	773	1,126	-9%	-13%	518	514	495	450	-4%	-12%
ONTARIO	289	327	458	478	58%	46%	117	155	78	147	-33%	-5%
ORANGE	546	609	549	672	1%	10%	302	360	293	396	-3%	10%
ORLEANS	87	159	61	79	-30%	-50%	28	32	19	20	-32%	-38%
OSWEGO	239	191	205	192	-14%	1%	121	133	122	122	1%	-8%
OTSEGO	116	105	119	122	3%	16%	32	24	26	39	-19%	63%
PUTNAM	106	108	128	120	21%	11%	94	113	90	138	-4%	22%
RENSSELAER	327	355	307	344	-6%	-3%	107	140	91	139	-15%	-1%
ROCKLAND	324	497	374	472	15%	-5%	180	261	164	269	-9%	3%
SARATOGA	520	541	524	545	1%	1%	187	208	225	348	20%	67%
SCHENECTADY	374	383	357	432	-5%	13%	119	127	103	196	-13%	54%
SCHOHARIE	58	31	51	39	-12%	26%	27	15	22	21	-19%	40%
SCHUYLER	57	34	49	69	-14%	103%	11	15	8	16	-27%	7%
SENECA	44	60	50	71	14%	18%	23	26	24	43	4%	65%
ST LAWRENCE	194	189	219	238	13%	26%	46	35	78	92	70%	163%
STEBBEN	211	276	215	266	2%	-4%	61	99	57	79	-7%	-20%
SUFFOLK	2,366	2,065	2,396	2,883	1%	40%	1,254	1,632	1,237	1,868	-1%	14%
SULLIVAN	128	139	135	174	5%	25%	50	70	46	70	-8%	0%
TIOGA	115	130	103	117	-10%	-10%	39	55	34	45	-13%	-18%
TOMPKINS	200	203	205	178	3%	-12%	40	59	50	58	25%	-2%
ULSTER	356	403	363	374	2%	-7%	141	170	139	162	-1%	-5%
WARREN	191	172	192	191	1%	11%	50	73	54	58	8%	-21%
WASHINGTON	190	178	174	253	-8%	42%	55	56	42	95	-24%	70%
WAYNE	137	143	136	132	-1%	-8%	72	99	72	76	0%	-23%
WESTCHESTER	2,097	2,102	2,004	1,958	-4%	-7%	643	688	637	721	-1%	5%
WYOMING	108	97	99	83	-8%	-14%	47	46	31	46	-34%	0%
YATES	35	41	28	43	-20%	5%	15	27	13	20	-13%	-26%

NEW YORK STATE UNIFIED COURT SYSTEM
SUPREME CIVIL MATRIMONIAL CASES FILED AND DISPOSED - TWO YEAR COMPARISON

Location	UNCONTESTED MATRIMONIALS						CONTESTED MATRIMONIALS					
	2016		2017		2016 vs 2017		2016		2017		2016 vs 2017	
	Filed	Disposed	Filed	Disposed	% Chg Filed	% Chg Disp	Filed	Disposed	Filed	Disposed	% Chg Filed	% Chg Disp
TOTAL STATE	45,150	48,282	42,857	46,054	-5%	-5%	12,090	14,480	11,335	13,795	-6%	-5%
NYC	24,327	25,910	23,208	24,476	-5%	-6%	3,295	3,507	3,307	3,309	0%	-6%
NEW YORK	11,340	12,995	10,382	10,440	-8%	-20%	823	902	753	979	-9%	9%
BRONX	4,382	3,918	4,365	4,915	0%	25%	724	526	739	551	2%	5%
KINGS	3,983	4,074	3,550	4,247	-11%	4%	687	899	669	632	-3%	-30%
QUEENS	4,013	4,209	4,352	4,351	8%	3%	774	834	804	803	4%	-4%
RICHMOND	609	714	559	523	-8%	-27%	287	346	342	344	19%	-1%
Outside NYC	20,823	22,372	19,649	21,578	-6%	-4%	8,795	10,973	8,028	10,486	-9%	-4%
ALBANY	579	590	570	618	-2%	5%	166	285	160	297	-4%	4%
ALLEGANY	83	89	71	72	-14%	-19%	34	42	25	39	-26%	-7%
BROOME	549	372	376	366	-32%	-2%	167	159	180	169	8%	6%
CATTARAUGUS	166	140	129	161	-22%	15%	52	40	42	47	-19%	18%
CAYUGA	127	170	124	138	-2%	-19%	45	108	48	76	7%	-30%
CHAUTAUQUA	274	295	241	225	-12%	-24%	82	88	87	85	6%	-3%
CHEMUNG	251	248	194	190	-23%	-23%	50	57	49	51	-2%	-11%
CHENANGO	121	126	105	110	-13%	-13%	48	45	32	59	-33%	31%
CLINTON	207	237	207	235	0%	-1%	67	78	71	86	6%	10%
COLUMBIA	142	131	139	145	-2%	11%	39	32	32	64	-18%	100%
CORTLAND	320	303	598	591	87%	95%	30	26	27	33	-10%	27%
DELAWARE	94	108	72	114	-23%	6%	30	55	31	44	3%	-20%
DUTCHESS	601	608	598	608	0%	0%	272	256	191	257	-30%	0%
ERIE	1,762	2,173	1,350	1,862	-23%	-14%	830	830	720	935	-13%	13%
ESSEX	82	105	64	66	-22%	-37%	19	21	30	21	58%	0%
FRANKLIN	85	77	88	99	4%	29%	45	57	28	71	-38%	25%
FULTON	138	138	160	130	16%	-6%	52	76	38	77	-27%	1%
GENESEE	111	128	126	117	14%	-9%	40	53	52	54	30%	2%
GREENE	101	113	78	97	-23%	-14%	21	39	36	33	71%	-15%
HERKIMER	63	66	76	90	21%	36%	61	47	45	76	-26%	62%
JEFFERSON	413	411	371	450	-10%	9%	126	141	121	196	-4%	39%
LEWIS	46	54	50	53	9%	-2%	9	37	12	28	33%	-24%
LIVINGSTON	136	134	145	145	7%	8%	49	66	24	52	-51%	-21%
MADISON	132	157	86	92	-35%	-41%	67	70	52	71	-22%	1%
MONROE	1,339	1,335	1,285	1,332	-4%	0%	614	801	485	569	-21%	-29%
MONTGOMERY	107	124	98	82	-8%	-34%	27	46	29	36	7%	-22%
NASSAU	1,818	1,719	1,695	2,424	-7%	41%	1,063	1,124	936	1,200	-12%	7%
NIAGARA	318	275	267	308	-16%	12%	208	274	185	216	-11%	-21%
ONEIDA	384	295	297	287	-23%	-3%	232	286	196	256	-16%	-10%
ONONDAGA	773	1,126	771	1,187	0%	5%	495	450	535	442	8%	-2%
ONTARIO	458	478	386	417	-16%	-13%	78	147	64	109	-18%	-26%
ORANGE	549	672	584	639	6%	-5%	293	396	267	356	-9%	-10%
ORLEANS	61	79	77	77	26%	-3%	19	20	22	24	16%	20%
OSWEGO	205	192	237	206	16%	7%	122	122	118	129	-3%	6%
OTSEGO	119	122	104	95	-13%	-22%	26	39	36	33	38%	-15%
PUTNAM	128	120	132	150	3%	25%	90	138	85	82	-6%	-41%
RENSSELAER	307	344	295	299	-4%	-13%	91	139	104	156	14%	12%
ROCKLAND	374	472	312	473	-17%	0%	164	269	170	223	4%	-17%
SARATOGA	524	545	526	496	0%	-9%	225	348	177	292	-21%	-16%
SCHENECTADY	357	432	342	268	-4%	-38%	103	196	117	148	14%	-24%
SCHOHARIE	51	39	49	60	-4%	54%	22	21	18	21	-18%	0%
SCHUYLER	49	69	45	41	-8%	-41%	8	16	12	9	50%	-44%
SENECA	50	71	30	42	-40%	-41%	24	43	19	18	-21%	-58%
ST LAWRENCE	219	238	230	249	5%	5%	78	92	106	148	36%	61%
STEBEN	215	266	200	252	-7%	-5%	57	79	48	80	-16%	1%
SUFFOLK	2,396	2,883	2,272	1,872	-5%	-35%	1,237	1,868	1,167	1,704	-6%	-9%
SULLIVAN	135	174	153	181	13%	4%	46	70	32	83	-30%	19%
TIOGA	103	117	109	111	6%	-5%	34	45	23	30	-32%	-33%
TOMPKINS	205	178	188	182	-8%	2%	50	58	36	38	-28%	-34%
ULSTER	363	374	347	347	-4%	-7%	139	162	131	194	-6%	20%
WARREN	192	191	180	200	-6%	5%	54	58	50	63	-7%	9%
WASHINGTON	174	253	138	150	-21%	-41%	42	95	38	63	-10%	-34%
WAYNE	136	132	107	120	-21%	-9%	72	76	55	59	-24%	-22%
WESTCHESTER	2,004	1,958	2,062	2,123	3%	8%	637	721	598	737	-6%	2%
WYOMING	99	83	86	107	-13%	29%	31	46	32	36	3%	-22%
YATES	28	43	27	27	-4%	-37%	13	20	4	11	-69%	-45%

NEW YORK STATE UNIFIED COURT SYSTEM
SUPREME CIVIL MATRIMONIAL CASES FILED AND DISPOSED - TWO YEAR COMPARISON

Location	UNCONTESTED MATRIMONIALS						CONTESTED MATRIMONIALS					
	2017		2018		2017 vs 2018		2017		2018		2017 vs 2018	
	Filed	Disposed	Filed	Disposed	Filed % Chg	Disp % Chg	Filed	Disposed	Filed	Disposed	Filed % Chg	Disp % Chg
TOTAL STATE	42,857	46,054	43,847	47,788	2%	4%	11,335	13,796	11,553	13,926	2%	1%
NYC	23,208	24,476	23,789	24,772	3%	1%	3,307	3,309	3,402	3,479	3%	5%
BRONX	4,365	4,915	4,276	5,053	-2%	3%	739	551	760	489	3%	-11%
KINGS	3,550	4,247	4,652	4,365	31%	3%	669	632	758	873	13%	38%
NEW YORK	10,382	10,440	9,448	9,871	-9%	-5%	753	979	763	932	1%	-5%
QUEENS	4,352	4,351	4,856	4,915	12%	13%	804	803	838	863	4%	7%
RICHMOND	559	523	557	568	0%	9%	342	344	283	322	-17%	-6%
Outside NYC	19,649	21,578	20,058	23,016	2%	7%	8,028	10,487	8,151	10,447	2%	0%
ALBANY	570	618	555	607	-3%	-2%	160	297	186	315	16%	6%
ALLEGANY	71	72	104	103	46%	43%	25	39	26	37	4%	-5%
BROOME	376	366	344	337	-9%	-8%	180	169	159	180	-12%	7%
CATTARAUGUS	129	161	159	180	23%	12%	42	47	36	52	-14%	11%
CAYUGA	124	138	105	138	-15%	0%	48	76	43	72	-10%	-5%
CHAUTAUQUA	241	225	287	275	19%	22%	87	85	80	89	-8%	5%
CHEMUNG	194	190	189	189	-3%	-1%	49	51	53	58	8%	14%
CHENANGO	105	110	98	112	-7%	2%	32	59	19	45	-41%	-24%
CLINTON	207	235	190	188	-8%	-20%	71	86	53	65	-25%	-24%
COLUMBIA	139	145	151	143	9%	-1%	32	64	44	45	38%	-30%
CORTLAND	598	591	777	743	30%	26%	27	33	23	33	-15%	0%
DELAWARE	72	114	80	67	11%	-41%	31	44	35	58	13%	32%
DUTCHESS	598	608	598	624	0%	3%	191	257	221	299	16%	16%
ERIE	1,350	1,862	1,638	2,063	21%	11%	720	935	833	1,112	16%	19%
ESSEX	64	66	71	56	11%	-15%	30	21	14	25	-53%	19%
FRANKLIN	88	99	104	85	18%	-14%	28	71	26	64	-7%	-10%
FULTON	160	130	123	123	-23%	-5%	38	77	47	61	24%	-21%
GENESEE	126	117	118	130	-6%	11%	52	54	42	66	-19%	22%
GREENE	78	97	91	86	17%	-11%	36	33	31	36	-14%	9%
HERKIMER	76	90	62	93	-18%	3%	45	76	31	47	-31%	-38%
JEFFERSON	371	450	362	374	-2%	-17%	121	196	126	156	4%	-20%
LEWIS	50	53	61	86	22%	62%	12	28	14	23	17%	-18%
LIVINGSTON	145	145	147	216	1%	49%	24	52	37	32	54%	-38%
MADISON	86	92	114	82	33%	-11%	52	71	49	66	-6%	-7%
MONROE	1,285	1,332	1,226	1,300	-5%	-2%	485	569	459	548	-5%	-4%
MONTGOMERY	98	82	101	92	3%	12%	29	36	28	36	-3%	0%
NASSAU	1,695	2,424	1,749	1,845	3%	-24%	936	1,200	968	1,266	3%	6%
NIAGARA	267	308	229	258	-14%	-16%	185	216	183	198	-1%	-8%
ONEIDA	297	287	346	333	16%	16%	196	256	219	230	12%	-10%
ONONDAGA	771	1,187	844	1,344	9%	13%	535	442	536	582	0%	32%
ONTARIO	386	417	336	357	-13%	-14%	64	109	74	101	16%	-7%
ORANGE	584	639	605	677	4%	6%	267	356	311	350	16%	-2%
ORLEANS	77	77	77	76	0%	-1%	22	24	27	25	23%	4%
OSWEGO	237	206	202	187	-15%	-9%	118	129	95	89	-19%	-31%
OTSEGO	104	95	105	87	1%	-8%	36	33	34	43	-6%	30%
PUTNAM	132	150	123	137	-7%	-9%	85	82	65	73	-24%	-11%
RENSSELAER	295	299	288	306	-2%	2%	104	156	105	121	1%	-22%
ROCKLAND	312	473	278	476	-11%	1%	170	223	159	226	-6%	1%
SARATOGA	526	496	506	487	-4%	-2%	177	292	179	270	1%	-8%
SCHENECTADY	342	268	316	311	-8%	16%	117	148	107	120	-9%	-19%
SCHOHARIE	49	60	69	55	41%	-8%	18	21	11	29		38%
SCHUYLER	45	41	38	40	-16%	-2%	12	9	9	14	-25%	56%
SENECA	30	42	53	59	77%	40%	19	18	17	25	-11%	39%
ST LAWRENCE	230	249	253	275	10%	10%	106	148	81	105	-24%	-29%
STEBEN	200	252	201	212	1%	-16%	48	80	35	56	-27%	-30%
SUFFOLK	2,272	1,872	2,273	3,489	0%	86%	1,167	1,704	1,132	1,617	-3%	-5%
SULLIVAN	153	181	147	165	-4%	-9%	32	83	42	72	31%	-13%
TIOGA	109	111	89	80	-18%	-28%	23	30	32	35	39%	17%
TOMPKINS	188	182	203	168	8%	-8%	36	38	28	48	-22%	26%
ULSTER	347	347	330	304	-5%	-12%	131	195	144	139	10%	-29%
WARREN	180	200	190	196	6%	-2%	50	63	47	65	-6%	3%
WASHINGTON	138	150	161	163	17%	9%	38	63	33	46	-13%	-27%
WAYNE	107	120	120	149	12%	24%	55	59	72	65	31%	10%
WESTCHESTER	2,062	2,123	1,982	2,191	-4%	3%	598	737	636	761	6%	3%
WYOMING	86	107	63	62	-27%	-42%	32	36	40	36	25%	0%
YATES	27	27	27	35	0%	30%	4	11	15	20	275%	82%

NEW YORK STATE UNIFIED COURT SYSTEM, DIVISION OF TECHNOLOGY AND THE OFFICE OF COURT RESEARCH 1/16/2020
 SUPREME CIVIL MATRIMONIAL CASES FILED AND DISPOSED

Location	UNCONTESTED MATRIMONIALS						CONTESTED MATRIMONIALS					
	Full Year 2018		Full Year 2019		2018 vs 2019		Full Year 2018		Full Year 2019		2018 vs 2019	
	Filed	Disposed	Filed	Disposed	F% Chg	D% Chg	Filed	Disposed	Filed	Disposed	F% Chg	D% Chg
TOTAL STATE	43,844	47,756	44,531	48,328	2%	1%	11,527	13,577	11,179	14,136	-3%	4%
NYC	23,789	24,772	23,815	24,450	0%	-1%	3,402	3,479	3,193	3,500	-6%	1%
Bronx	4,276	5,053	4,461	5,530	4%	9%	760	489	795	625	5%	28%
Kings	4,652	4,365	4,800	4,484	3%	3%	758	873	682	771	-10%	-12%
New York	9,448	9,871	9,134	8,850	-3%	-10%	763	932	743	940	-3%	1%
Queens	4,856	4,915	4,818	4,865	-1%	-1%	838	863	709	862	-15%	0%
Richmond	557	568	602	721	8%	27%	283	322	264	302	-7%	-6%
Outside NYC	20,055	22,984	20,716	23,878	3%	4%	8,125	10,098	7,986	10,636	-2%	5%
Albany	555	607	590	622	6%	2%	186	315	179	245	-4%	-22%
Allegany	104	103	93	99	-11%	-4%	26	37	19	36	-27%	-3%
Broome	344	337	295	333	-14%	-1%	159	180	131	267	-18%	48%
Cattaraugus	159	180	161	167	1%	-7%	36	52	52	59	44%	13%
Cayuga	105	138	141	191	34%	38%	43	72	57	134	33%	86%
Chautauqua	287	275	275	232	-4%	-16%	80	89	66	69	-18%	-22%
Chemung	189	189	186	181	-2%	-4%	53	58	55	60	4%	3%
Chenango	98	112	152	179	55%	60%	19	45	32	64	68%	42%
Clinton	190	188	216	168	14%	-11%	53	65	77	79	45%	22%
Columbia	151	143	120	114	-21%	-20%	44	45	33	33	-25%	-27%
Cortland	777	743	856	879	10%	18%	23	33	25	43	9%	30%
Delaware	80	67	75	89	-6%	33%	35	58	20	55	-43%	-5%
Dutchess	598	624	540	561	-10%	-10%	221	299	209	291	-5%	-3%
Erie	1,638	2,052	1,491	2,084	-9%	2%	826	924	782	1,118	-5%	21%
Essex	71	56	69	66	-3%	18%	14	25	21	22	50%	-12%
Franklin	104	85	113	113	9%	33%	26	64	28	62	8%	-3%
Fulton	123	123	151	142	23%	15%	47	61	39	79	-17%	30%
Genesee	118	130	95	123	-19%	-5%	42	66	44	93	5%	41%
Greene	91	86	87	98	-4%	14%	31	36	34	37	10%	3%
Herkimer	62	93	44	83	-29%	-11%	31	47	29	54	-6%	15%
Jefferson	362	374	449	524	24%	40%	126	156	110	194	-13%	24%
Lewis	61	86	39	56	-36%	-35%	14	23	14	25	0%	9%
Livingston	147	216	123	122	-16%	-44%	37	32	35	43	-5%	34%
Madison	114	82	120	86	5%	5%	49	66	54	34	10%	-48%
Monroe	1,220	1,291	1,385	1,778	14%	38%	453	524	424	760	-6%	45%
Montgomery	101	92	106	95	5%	3%	28	36	23	36	-18%	0%
Nassau	1,749	1,845	2,099	1,820	20%	-1%	968	1,266	959	1,110	-1%	-12%
Niagara	229	258	273	296	19%	15%	183	198	174	289	-5%	46%
Oneida	346	333	428	352	24%	6%	219	230	185	221	-16%	-4%
Onondaga	844	1,344	752	1,264	-11%	-6%	536	582	585	550	9%	-5%
Ontario	336	357	281	331	-16%	-7%	74	101	90	111	22%	10%
Orange	605	677	610	846	1%	25%	311	350	257	317	-17%	-9%
Orleans	77	76	88	88	14%	16%	27	25	26	24	-4%	-4%
Oswego	202	187	189	178	-6%	-5%	95	89	117	98	23%	10%
Otsego	105	87	93	92	-11%	6%	34	43	33	37	-3%	-14%
Putnam	123	137	144	207	17%	51%	65	73	74	92	14%	26%
Rensselaer	289	305	294	398	2%	30%	105	121	110	164	5%	36%
Rockland	278	476	352	456	27%	-4%	159	226	194	214	22%	-5%
Saratoga	506	487	501	515	-1%	6%	179	270	176	205	-2%	-24%
Schenectady	316	311	341	298	8%	-4%	107	120	91	157	-15%	31%
Schoharie	69	55	36	71	-48%	29%	11	29	19	27		-7%
Schuyler	38	40	45	32	18%	-20%	9	14	4	6	-56%	-57%
Seneca	53	59	44	44	-17%	-25%	17	25	17	29	0%	16%
St. Lawrence	253	275	218	243	-14%	-12%	81	105	93	88	15%	-16%
Steuben	201	212	210	225	4%	6%	35	56	47	32	34%	-43%
Suffolk	2,273	3,489	2,255	2,952	-1%	-15%	1,132	1,617	1,154	1,440	2%	-11%
Sullivan	147	165	148	158	1%	-4%	42	72	39	38	-7%	-47%
Tioga	89	80	112	101	26%	26%	32	35	24	33	-25%	-6%
Tompkins	203	168	207	142	2%	-15%	28	48	35	37	25%	-23%
Ulster	330	304	366	338	11%	11%	144	139	165	164	15%	18%
Warren	190	196	142	168	-25%	-14%	47	65	48	64	2%	-2%
Washington	161	163	164	175	2%	7%	33	46	50	56	52%	22%
Wayne	120	149	125	139	4%	-7%	72	65	33	66	-54%	2%
Westchester	1,984	2,180	2,111	2,635	6%	21%	623	624	557	932	-11%	49%
Wyoming	63	62	82	78	30%	26%	40	36	31	29	-23%	-19%
Yates	27	35	34	51	26%	46%	15	20	7	14	-53%	-30%

Appendix H

**Matrimonial Practice Advisory and Rules Committee
A White Paper on Forensic Evaluations in Custody Cases
December 2020**

Hon. Jeffrey S Sunshine, Chair
Statewide Coordinating Judge
for Matrimonial Cases

Susan W. Kaufman, Counsel
Counsel to the Statewide Coordinating
Judge for Matrimonial Cases

Subcommittee

Hon. Laura E. Drager (Ret.), Chair

Hon. Ellen Gesmer

Hon. Sondra Miller (Ret.)

Hon. Emily Ruben

Hon. Jacqueline W. Silbermann (Ret.)

RoseAnn C. Branda, Esq.

Stephen J. Gassman, Esq.

Stephen P. McSweeney, Esq.

Harriet Weinberger, Esq.

TABLE OF CONTENTS

Introduction..... 3

A. History..... 4

B. Expertise of Evaluator..... 7

 1. Methodology Employed..... 7

 2. Scientific Basis for any Articulated Opinion..... 9

 3. Opinion – Do Experts Opine on Issues not Within Recognized Expertise? 10

 a) Mental Health Issue of Party or Child..... 11

 b) Parenting Capacity..... 12

 c) Custodial Arrangement: Decision-Making, Access Schedule..... 12

C. Who Are Qualified Mental Health Forensic Experts..... 13

D. Discovery..... 22

E. Disclosure of Forensic Reports to Counsel and Parties Including Self-Represented Litigants..... 28

F. Evidence..... 32

 1. Evidence from Collaterals..... 32

 2. Hearsay Exceptions..... 34

 3. Patient-Physician Privilege..... 35

 4. Frye Issues..... 36

 5. Reports in Lieu of Direct Testimony..... 36

G. Collateral Consequences of Forensic Evaluations..... 38

1. Negative Collateral Consequences of Forensic Evaluations..... 38

 a) The Amount of Time for Reports to Be Completed While Temporary Custodial Arrangements Exist..... 38

b) Consequences of a Poor Report.....	40
c) Costs of Report.....	41
d) Language and Cultural Barriers, Limiting Ability of Mental Health Professional from Accessing Litigants.....	42
2. Positive Collateral Consequences of Forensic Evaluations	
a) Reports Assist in Settling Cases	42
b) Evaluation Helps Court’s Access Family Dynamics Affected by Mental Health Issues	43
Conclusion.....	44

Introduction

Forensic evaluations by mental health professionals are frequently ordered by courts in contentious custody litigations. Much has been written and debated about forensic evaluations by trial and appellate courts, members of bar associations, advocates, legislators, forensic evaluators and the public at large. Various legislative proposals have been made to address or limit the use of such evaluations in custody cases.

The purpose of this Paper is to inform those concerned about the purpose of custody evaluations by forensic evaluators and the role they play in custody cases. This Paper will discuss why evaluations are ordered, the qualifications of evaluators, what the evaluators' reports contain, how they are used, the dissemination of an evaluation, the evidentiary value of evaluations, and the debate that surrounds custody evaluations.

Issuance of this Paper now is particularly timely. Present legislative proposals range from eliminating any forensic evaluations to making a forensic evaluation the cornerstone of any judicial decision. The framework of the debate needs to be tempered with an understanding of what evaluators can accomplish within the confines of their professional responsibilities and expertise, the time necessary to complete a quality evaluation, and the availability of evaluators in different regions of the state.

This Paper emphasizes that any custodial decision is made by the Judge and that a forensic evaluation is only one specific type of evidence considered by a court in reaching the very difficult decision of awarding custody of children. Forensic evaluations are typically ordered when the intensity of a custody litigation suggests to a Judge that mental health issues as they affect parental fitness, access to children, and/or decision making need to be explored, including possible domestic violence. In ordering such evaluations, courts understand the time it takes to perform a meaningful evaluation and that any delay in finalizing custody may, itself, have an impact on a child's relationship with a parent. Judges appreciate the enormous cost to both private parties who, in some parts of the state, are ordered to pay for the evaluation or to the State of New York which pays for all evaluations in other parts of the state or where the parties are indigent. This Paper also discusses the ongoing debate concerning access to the evaluator's Report, particularly if a party is self-represented. This Paper also addresses the administrative function of the Appellate Divisions in providing oversight of forensic evaluators and evaluations.

Concerns have been raised about the role of the judiciary and forensic evaluations in the tragic death or injury of children arising in custodial disputes. Courts have long recognized the difficulties in resolving custody cases. A forensic evaluator's task in assessing a family's behavior and mental health is not comparable to assessing facts governed by the absolute laws of physical science. Similarly, a judicial decision in awarding custody can only be premised on the evidence made available to the court. It is our hope that this Paper assists the community at large to better understand the role and function of the forensic evaluation in a custody /parenting dispute, and the limitations on both forensic evaluators and the courts in predicting the future behavior of family members.

A. History

New York courts have long recognized the difficulty inherent in trying custody cases. Deciding the custodial arrangement for a child is an awesome task. A judge is guided by the seemingly simple, but in fact complex, statutory mandate that a custody order must be in the “best interest of the child.” DRL 240 (1) (a). Case law has elaborated on factors a court should consider in determining custody:

Primary among those circumstances to be considered is the quality of the home environment and the parental guidance the custodial parent provides for the child. (*citations omitted*) While concerns such as the financial status and the ability of each parent to provide for the child should not be overlooked by the court, an equally valid concern is the ability of each parent to provide for the child's emotional and intellectual development (*citations omitted*).

Eschbach v. Eschbach, 56 N.Y.2d 167, 172, 436 N.E.2d 1260 (1982)

In addition, where an act of domestic violence is proven by a preponderance of the evidence, “the court must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant...” DRL 240 (1) (a). *In re Fayona C.* 103 A.D.3d 424, 959 N.Y.S.2d 183 (1st Dept. 2013); *cf. Mohen v. Mohen*, 53 A.D.3d 471, 862 N.Y.S.2d 75 (2d Dept. 2008). *See also Wissink v. Wissink*, 301 A.D.2d 36, 749 N.Y.S.2d 550 (2002).

In most other lawsuits, courts award relief based on past events. In a custody case the court endeavors to determine what custodial arrangement into the future will be in a child’s best interest. In making this determination, relying on evidence of past events, well suited to the adversarial process, may only serve as a partial guide to what a child will likely experience going forward. Understanding how the family members interact with each other and third parties (e.g., teachers, doctors), as well as whether any family member evidences mental health issues that impairs parenting ability, are important factors for a court to consider in formulating a parenting plan that is in a child’s best interest. To gain an understanding of the dynamics of family

interactions in litigious custody cases, courts have turned to the expertise of mental health professionals.

Almost sixty years ago, the Court of Appeals stated that it was within a trial court's discretion to appoint a qualified mental health professional to assess the members of a family in a custody case, provided the expert is subject to cross-examination at trial.

In disposing of the custody of children, courts are not so "limited that they may not depart from strict adversary concepts" in certain respects. (*citation omitted*). Custodial questions have sociological implications, and we are confronted here by a situation where common-law adversary proceedings and social jurisprudence are not entirely harmonious and where some reconciliation between them is necessary. *Kessler v. Kessler*, 10 N.Y.2d 445, 451–52, 180 N.E.2d 402, reargument denied, remittitur amended, 11 N.Y.2d 716, 181 N.E.2d 220 (1962)

Since then, "the value of forensic evaluations of the parents and children has long been recognized" *Matter of Volpe v. Volpe*, 61 A.D.3d 691, 692, 878 N.Y.S.2d 72 (2d Dep't. 2009), quoting *Ekstra v. Ekstra*, 49 A.D.3d 594, 595, 854 N.Y.S.2d 439 (2d Dep't. 2008). As a general rule, the determination of custody is left to the sound discretion of the trial court and rarely set aside on appeal. However, on occasion, it has been held that the failure to order a forensic evaluation may constitute an abuse of discretion by the trial court. *Giraldo v. Giraldo*, 85 A.D.2d 164, 447 N.Y.S.2d 466 (1st Dep't. 1982), appeal dismissed, 56 N.Y.2d 804. Use of mental health forensic experts in custody cases has been incorporated into the rules of the court. 22 NYCRR 202.16 (f) (3); (g).

Nonetheless, it is well recognized, that such expert testimony cannot alone be determinative of a custody dispute; rather, such reports must be considered in the context of all the other evidence presented in a case.

“[C]ourts will call to their aid the expert services of specialists trained in the social and medical sciences, and should not be deterred by such a narrow application of the rules of evidence as will deprive them of information of real value in attaining the goal sought. ... What must be borne in mind, however, is that they are only aids and, if not woven into the fabric of the record, should not form the base for the decision. “*People ex rel. Fields v. Kaufmann*, 9 A.D.2d 375, 376–78, 193 N.Y.S.2d 789 (1st Dept 1959)

Courts are free to reject the testimony of a court appointed expert if other evidence is more persuasive or the expert’s testimony shows bias. *State ex rel. H.K. v. M.S.*, 187 A.D.2d 50, 53–54, 592 N.Y.S.2d 708 (1st Dept 1993); *Zelnik v. Zelnik*, 196 A.D.2d 700, 700, 601 N.Y.S.2d 701 (1st Dept 1993); *Zafran v. Zafran*, 306 A.D.2d 468 (2d Dep’t. 2003) *In the Matter of John A. v. Bridget M.*, 16 AD3d 324 (1st Dept. 2005); *Bruno v. Bruno*, 47 A.D.3d 606, 849 N.Y.S.2d 598 (2008). As one court noted recently:

“[t]he recommendations of court-appointed experts are but one factor to be considered” (*citations omitted*) and, although entitled to some weight, such recommendations are not determinative and should not usurp the trial court's independent impressions of the evidence and conclusions drawn from that evidence. *Montoya v. Davis*, 156 A.D.3d 132, 138, 66 N.Y.S.3d 350 (2d Dep’t. 2017)

In the final analysis, the opinion of a mental health expert should be considered, but “(a) court may not delegate its ultimate responsibility to determine what custodial arrangement will best serve a child's best interests to a psychological or psychiatric expert...” *Donald G. v. Hope H.*, 160 A.D.3d 1061, 1062, 74 N.Y.S.3d 135 (3d Dep’t. 2018)

B. Expertise of Evaluator

1. Methodology Employed

In New York State the admissibility of expert evidence is governed by the Frye Standard: an expert opinion is admissible if the scientific technique on which the opinion is based is “generally accepted” as reliable in the relevant scientific community. As stated in Frye, “...the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” *Frye v U.S.*, 293 F. 1013 (D.C. Circuit 1923).¹ See, Admitting Expert Testimony Under the Frye Standard: The Ultimate Guide, Angelica Cappellino, J.D., Expert Institute (see expertinstitute.com).

The Association of Family and Conciliation Courts Model Standards (AFCC) of Practice for Child Custody Evaluations is the gold standard for forensic evaluations available at <https://www.afccnet.org/Portals/0/ModelStdsChildCustodyEvalSept2006.pdf> (the “AFCC Guidelines”).² Evaluators should follow these standards, coupled with the standards of their own disciplines, including the American Psychological Association (APA) Ethical Principles and Code of Conduct (these standards are more general); APA’s Specialty Guidelines for Forensic Psychologists; APA’s Guidelines for Child Custody Evaluations in Family Law Proceedings; American Academy of Child and Adolescent Psychiatry’s (AACAP) Practice Parameters for Child and Adolescent Forensic Evaluations (newer); the AACAP’s Practice Parameters for Child Custody Evaluations (older); and the Code of Ethics of the National Association of Social Workers (NASW) available at <https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English>.

The American Academy of Matrimonial Lawyers (AAML) also adopted what they called “Child Custody Standards” in 2013. They specifically indicate that the Frye and Daubert standards were incorporated into those standards. Their standards rely heavily on the AFCC

¹ The *Frye* standard, still relied on in New York, is no longer followed by Federal courts and some states which apply the more liberal *Daubert* standard. *Daubert v Morrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). See, *Federal Rules of Evidence*.

² The AFCC is an interdisciplinary, international association of professionals dedicated to resolving family conflict. Its members include leading practitioners, researchers, educators and policy makers dedicated to improving the lives of children and families through the resolution of family conflict.

Standards and acknowledge the APA forensic guidelines (see above). However, The AAML states that the standards set by them are not intended to supersede the ethical precepts of each profession.

The methodology used by mental health professionals conducting forensic evaluations, is intended to be multi-method and multi-source, and it is intended to be a balanced, accurate evaluation process that utilizes reliable and valid methods.

The AFCC Guidelines state that a child custody evaluator shall have specialized knowledge and training in topics related to child custody work and shall keep abreast of new developments in the field. The evaluator shall have at least a Master’s degree in a mental health field and “education and training in child development, child and adult psychopathology, interviewing techniques, and family systems. In addition, by formal education or by supervised work experience, evaluators shall possess advanced knowledge of the complexities of the divorce or separation process, a working knowledge of the legal issues in divorce or separation in their jurisdictions of practice, knowledge of the sources of evaluator bias and methods for maintaining neutrality, and an understanding of the many issues—legal, social, familial, and cultural—involved in custody and access.” (AFCC Guidelines, §1.2).

The evaluator shall use multiple data gathering methods to increase accuracy and objectivity. In doing so, the evaluator is to use empirically-based methods and practices (AFCC Guidelines §§5.4, 5.6).

The forensic evaluator should, when possible and appropriate, undertake varied methods of data collection, seeking corroboration of significant pieces of information when such is feasible. The notion of convergent validity is considered a basic tenet of forensic assessment. An evaluation will include at least one – but typically several- in-person clinical sessions with each parent. In addition, if age appropriate, the evaluator will conduct at least one individual clinical session with each child and a session with the child or children and each parent. The Guidelines require evaluators to collect information from collateral sources (e.g., relatives and friends in close contact with the family, teachers, childcare providers, doctors) (AFCC Guidelines §§ 11.1; 11.2). A forensic evaluator may also conduct relevant personality or I.Q. testing, review court

papers and other documents, and order appropriate specialized testing (e.g. substance abuse). *See, Comprehensive Custody Evaluations for the Courts: Guidelines Addressing the Function, Process and Content of the Psychological Evaluation and Resulting Report, Elizabeth Critz Schockmel, Psy.D.*

The scope of the evaluation will be set forth in the Order issued by the court. The evaluator will issue a report detailing the methods employed and the opinion reached by the evaluator to the questions posed in the court Order.

2. Scientific Basis for Any Articulated Opinion

“Opinions expressed by child custody evaluators shall be based upon information and data obtained through the application of reliable principles and methods. Evaluators shall differentiate among information gathered, observations made, data collected, inferences made, and opinions formulated. Evaluators shall only provide opinions and testimony that are a) sufficiently based upon facts or data; b) the product of reliable principles and methods; and c) based on principles and methods that have been applied reliably to the facts of the case. In their reports and in their testimony, evaluators shall be careful to differentiate among information gathered, observations made, data collected, inferences made, and opinions formulated. Evaluators shall explain the relationship between information gathered, their data interpretations, and opinions expressed concerning the issues in dispute. There shall be a clear correspondence between the opinions offered and the data contained in both the forensic report and the case file.” *See, AFCC Model Standards of Practice for Child Custody Evaluations, 12.2, Articulation of the Bases for Opinions Expressed.*

“An evaluator shall provide written or oral evidence about the personality characteristics of a particular individual only when the evaluator has conducted a direct examination of that individual and has obtained sufficient information or data to form an adequate foundation for the information provided and/or opinions offered.” *See, AFCC Model Standards of Practice for Child Custody Evaluations, 12.3, Adequacy of Data.*

“In reports and in testimony evaluators shall articulate any limitations to the evaluation with respect to methodology, procedure, data collection, and data interpretation. [Refer to 5.4.]

When the available data do not enable evaluators to opine responsibly on the relative advantages and disadvantages of different parenting plans under consideration, they shall decline to offer an opinion.” See, AFCC Model Standards of Practice for Child Custody Evaluations, 12.4 Articulation of Limitations.

Although not all evaluators cite literature/research in their reports, the AFCC guidelines recommends that: "Evaluators are strongly encouraged to utilize and make reference to pertinent peer-reviewed published research in the preparation of their reports. Where peer-reviewed published research has been alluded to, evaluators shall provide full references to the cited research.” See, AFCC Model Standards of Practice for Child Custody Evaluations, 4.6 Presentation of Findings and Opinions (b).

3. Opinion – Do Experts Opine on Issues not Within Recognized Expertise?

Per the AFCC Guidelines, mental health experts need specialized training and should be up to date with the current literature in the field to perform custody evaluations. The AFCC guidelines list those areas in which one is expected to have received training and education to be a custody evaluator. There is also a list of 'special issues' for which an evaluator would require 'areas of additional specialized training' in order to offer an opinion on those issues. Those areas are copied below from the AFCC Model Standards of Practice for Child Custody Evaluations, Training, Education, & Competency Issues 1.2 (c) (1) – (5).

(4) the assessment of substance abuse; and,

(5) the assessment of child abuse and domestic violence and the assessment of safety plans for both parents and children.

Areas of additional specialized training include:

(1) the assessment of allegations of child sexual abuse issues;

(2) the assessment of children’s resistance to spending time with a parent or parent figure and allegations of attempts to alienate children from a parent, parent figure, or significant other;

(3) the assessment of children’s best interests in the context of relocation (move-away) requests by one parent;

a) Mental Health Issue of Party or Child

Clinicians with appropriate training and licensure can opine on mental health issues, but their opinion cannot be a substitute for the judgment of the court. *Donald G. v. Hope H.*, 160 A.D.3d 1061, 1062, 74 N.Y.S.3d 135 (3d Dep’t. 2018); *Montoya v. Davis*, 156 A.D.3d 132, 138, 66 N.Y.S.3d 350 (2d Dep’t. 2017)

It is important to keep in mind that the purpose of such assessment/opinion is to be able to address the parenting/custody issues:

The evaluation focuses upon parenting attributes, the child's psychological needs and the resulting fit.

Rationale: From the court's perspective, the most valuable contributions of evaluators are those that reflect a clinically astute and scientifically sound approach to legally relevant issues. Issues that are central to the court's ultimate decision-making obligations include parenting attributes, the child's psychological needs and the resulting fit. The training of mental health professionals provides them with unique skills and qualifications to address these issues.

Application: Evaluators attempt to provide the court with information specifically germane to its role in apportioning decision making, caretaking and access. The most useful and influential evaluations focus upon skills, deficits, values and tendencies relevant to parenting attributes and a child's psychological needs. Comparatively little weight is afforded to evaluations that offer a general personality assessment without attempting to place results in the appropriate context. Useful contextual considerations may include the availability and use of effective treatment, the augmentation of parenting attributes through the efforts of supplemental caregivers, and other factors that could affect the potential impact of a clinical condition upon parenting. *See, American Psychological Association Guidelines for Child Custody Evaluations, I (3) Orienting Guidelines, Purpose of the Child Custody Evaluation.*

b) Parenting Capacity

Pursuant to APA Guidelines, the child custody evaluator has expertise in assessment of parenting capacity, which is ultimately the focus of a child custody evaluation.

c) Custodial Arrangement: Decision-Making, Access Schedule

There is little disagreement among professionals that a mental health evaluator can opine about each parent's mental health or family dynamics and the implication of these issues to parenting. Whether evaluators should address 'ultimate issues' such as which parent should have custody and what should be the parenting access schedule, remain a source of contention within the mental health field and the legal/judicial arena owing partly to the lack of research to back up what are essentially predictions.

Timothy Tippins, Esq. and Jeffrey Wittman, Ph.D. have written extensively on this topic, arguing that there is insufficient research to enable a mental health professional to opine on the best custodial arrangement;³ some prominent mental health professionals agree with Mr. Tippins, others do not.⁴ In 2006, the Matrimonial Commission, created by the Hon. Judith S. Kaye, late Chief Judge of New York State, to make recommendations to improve the administration of

³ Timothy M. Tippins & Jeffrey P. Wittmann, *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 Fam. Ct. Rev. 193 (2005).

⁴ See Footnote 50 to Lauren Barth, Consultant Conduct in Anticipation of A Child Custody Evaluation: Ethical and Social Dilemmas and the Need for Neutral Parent Education, 49 Fam. Ct. Rev. 155 (2011) as follows: "There is much debate about the appropriateness of custody recommendations made by forensic custody evaluators. See, e.g., Timothy M. Tippins & Jeffrey P. Wittmann, *Empirical and Ethical Problems with Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance*, 43 Fam. Ct. Rev. 193 (2005); Jonathan W. Gould & David A. Martindale, *Commentary To Tippins And Wittmann: A Second Call For Clinical Humility And Judicial Vigilance: Comments On Tippins And Wittmann*, 43 Fam. Ct. Rev. 253 (2005); Arline S. Rotman, *Commentary To Tippins And Wittmann: Commentary on "Empirical and Ethical Problems with Custody Recommendations: A Call for New Family Court Priorities*, 43 Fam. Ct. Rev. 242 (2005); Lorraine Martin, *Commentary To Tippins And Wittmann: To Recommend Or Not To Recommend: That Is Not The Question: A Response To Tippins And Wittmann's Article "Empirical And Ethical Problems With Custody Recommendations: A Call for Clinical Humility and Judicial Vigilance,"* 43 Fam. Ct. Rev. 246 (2005); Mary Kay Kisthardt & Barbara Glesner Fines, *Commentary to Tippins and Wittmann: Making a Place at the Table: Reconceptualizing the Role of the Custody Evaluator in Child Custody Disputes*, 43 Fam. Ct. Rev. 229 (2005)."

justice in divorce litigations, concluded that the decision to ask the evaluator to make a recommendation on ultimate custody issues should be left to the discretion of the trial judge.⁵

The Order of appointment will set forth whether the evaluator should opine as to an ultimate custody arrangement. In doing so, however, the evaluator should acknowledge that it is being done from a narrower perspective than the Court's decision, insofar as the evaluator is addressing 'mental health best interests' with a recognition that other factors can and will be considered by the Court in its ultimate decision. If opining on the ultimate issue, providing various 'options', with their pros and cons, is one way of approaching this, but the evaluator must always identify the psychological or psychiatric data (e.g., parenting capacity; judgement; communication skills; co-parenting ability; etc.) that underlies the recommendation.

Also, when 'opining' on certain specialized issues (e.g., relocation; infant/toddler overnights; resist-refuse; etc.), the evaluator should have specialized training/expertise, and utilize available research-based, predictive models.

C. Who Are Qualified Mental Health Forensic Experts

In 2008, the First and Second Judicial Departments promulgated rules of the Appellate Divisions creating a Committee to Certify Mental Health Professionals. (22 NYCRR Part 623; 22 NYCRR Part 680).⁶ The Committee is charged with creating and implementing procedures to

⁵ "Forensic Report v. Recommendation. The Commission received a substantial amount of information regarding the ongoing debate over whether forensic experts should be required to make recommendations to the court regarding the ultimate determination of custody. Approximately 34% of judges surveyed stated that no recommendation should be included, while 37% responded that they believed such a recommendation should be made. Those in favor of a recommendation opined that the expert was the most knowledgeable and best suited to draw conclusions in this regard. Additionally, judges recognized that the court retained the ultimate discretion and could reject the recommendation if it did not find it appropriate. Those who felt that the recommendation should not be required stated that it may be deemed an abdication of judicial authority and that the recommendation may unduly sway the court. Ultimately, a majority of the Commission concluded that the judge should have discretion to decide whether she/he wants an opinion or an opinion with a recommendation from the expert. To that end, the Commission recommends that the order appointing a forensic expert should state the judge's request (opinion and/or recommendation) and define the scope of the expert's investigation." Matrimonial Commission Report, February 2006.

⁶ See 22 NYCRR Part 623 and 22 NYCRR Part 680. The First Department encompasses Bronx and New York counties. The Second Department encompasses Queens, Brooklyn, Richmond, Nassau, Suffolk, Westchester, Rockland, Orange, Dutchess and Putnam counties.

certify psychiatrists, psychologists and social workers who perform evaluations in custody and visitation, delinquency, persons in need of supervision, child abuse and neglect, termination of parental rights, family offense and adoption cases in both Supreme Court and Family Court. The Committee is chaired by the Directors of the Offices of Attorneys for Children for the Appellate Divisions in the First and Second Departments. The members of the Committee consist of judges, psychiatrists, psychologists, social workers and lawyers, each appointed by the Presiding Justices of the First and Second Departments.

The Appellate Division rules of the First and Second Departments set forth eligibility requirements and how a mental health professional may apply for certification:

Establishment of Mental Health Professionals Panel

(a) Eligibility Requirements

A member of the mental health professionals panel shall:

- (1) be a social worker, psychologist, or psychiatrist licensed by the State of New York;**
- (2) complete six hours of introductory training approved by the Presiding Justices of the Appellate Division of the First and Second Judicial Departments;**
- (3) demonstrate that he or she has forensic experience, including having testified as an expert and/or having submitted a clinical report in connection with one or more of the following types of court proceedings: custody and visitation, delinquency, persons in need of supervision, child abuse and neglect, termination of parental rights, family offense, and adoption;**
- (4) maintain professional malpractice insurance; and**
- (5) meet such additional requirements as shall be established by the mental health professionals certification committee with**

the approval of the Presiding Justices of the Appellate Divisions of the First and Second Judicial Departments.

(b) Application

Licensed social workers, psychologists, and psychiatrists may apply for membership on the mental health professionals' panel for the First and Second Judicial Departments by completing a questionnaire in the form prescribed by the mental health professionals certification committee.

(c) Appointments to Panel

(1) The mental health professionals committee shall review applications and identify those mental health professionals who meet the eligibility requirements.

(2) The Presiding Justices of the Appellate Division in the First and Second Judicial Departments shall, by joint order, appoint the members of the mental health professionals panel from among those social workers, psychologists and psychiatrists recommended by the committee.

(3) Appointments to the panel shall be for a term of three years. Panel members may be reappointed to successive terms. Any panel member may be removed prior to the expiration of his or her term by the joint order of the Presiding Justices of the Appellate Divisions of the First and Second Judicial Departments upon the recommendation of the committee.

22 NYCRR 623.4; 22 NYCRR 680.4

Each application is reviewed by a subcommittee consisting of two members of the Committee, typically a lawyer or judge and a mental health professional of the same discipline as the applicant. The subcommittee makes its recommendation regarding acceptance or denial of the applicant to the full Committee which makes the final decision. The Committee is in the

process of finalizing amended rules to enable the expansion of the panel to include less experienced but qualified mental health professionals to conduct evaluations. These new rules will allow for a younger and more diverse panel of experts.

The Presiding Justices of the First and Second Departments appoint the mental health professionals to the panel, after reviewing the recommendations.

A certified professional must apply for re-certification every three years. The Committee reviews the professional's work product and considers recommendations or complaints before granting re-certification. The Committee, which meets four times a year, specifically seeks input from Judges about the usefulness of forensic evaluations in cases over which they preside.⁷ In addition, the Committee investigates any filed complaints unrelated to re-certification and may recommend to the Presiding Justices removal of a professional at any time. 22 NYCRR 623.8, 623.9; 22 NYCRR 680.8, 680.9. At the request of the Committee, after investigation, there have been professionals removed from the panel, not re-certified, or counseled.⁸

The Committee is charged with training certified professionals. 22 NYCRR 623.7; 22 NYCRR 680.7. These programs include a six-hour introductory program and continuing education programs. Domestic violence issues are part of the curriculum. Annexed please find the introductory program curriculum and past continuing education programs (Exhibit A).

Moreover, as previously discussed in Section B, even without court oversight of the appointment of forensic evaluators, each profession, as well as the AFCC and the AAML, have developed guidelines for the methodology to be employed in conducting evaluations against which an expert's abilities and report can be assessed during the examination of the witness at trial.⁹

⁷ Judges may not be able to provide that information while a case is still pending, including during the appellate process.

⁸ See the Mental Health Professionals Handbook of the First and Second Departments provided to Mental Health Professionals available at <http://www.nycourts.gov/courts/ad2/pdf/2013%20Mental%20Health%20Professionals%20Handbook.pdf>

⁹ American Academy of Child and Adolescent Psychiatry-Practice Parameters for Child Custody Evaluations; American Psychological Association-Guidelines for Child Custody Evaluations in Family Law Proceedings; Association of Family and Conciliation Courts – Model Standards of Practice for Child Custody Evaluations.

It has been proposed that a statewide Committee develop a code of ethics for professionals conducting forensic evaluations. However, each mental health profession has its own code of ethics, not created by the court system or statutorily based. The codes are developed by members of the profession familiar with the training, practices and obligations of the profession. The imposition of a separate code developed by a Statewide Committee could create unresolvable conflicts with the established ethical codes for the different mental health professionals. Moreover, the persons appointed to the Statewide Committee might have insufficient knowledge of a discipline to create a code of ethics for professions which are governed by their own national and local professional associations. For instance, a layperson or social worker would not have professional knowledge of psychiatry to create a code of ethics for psychiatrists. And, as previously stated, professional codes for conducting custody forensic evaluations already exist.¹⁰

It has been suggested that the Office of Court Administration (OCA) submit an annual report in which it would determine the number of times the courts deviate from the recommendation of the evaluator, and an explanation for the deviation. This suggestion fails to recognize that many judges do not ask for a “recommendation” from the evaluator; rather judges often ask the evaluator to focus solely on the parties’ mental health issues as they relate to parenting. Indeed, as previously noted, the issue of recommendations has been the subject of much debate as to theory, efficacy and appropriateness amongst the legal and mental health professions. It is the obligation of the court, not the mental health evaluator, to decide the appropriate custody order in each case. Appellate Courts have long held that a judge is free to reject the findings of a forensic evaluator and must make its own independent decision on the issue before the court. The law in New York State is clear that a third-party cannot decide for a parent nor can a third-party substitute the judgment of the Court in custody matters as the forensic evaluator is not the ultimate authority. *See, Zafran v. Zafran*, 306 A.D.2d 468 (2 Dept.,2003); *Zelnik v Zelnik*, 196 AD2d 700, 700, 601 NYS2d 701 [1s Dept.,1995]; *Matthew W. v. Meagan R.*, 68 A.D.3d 468, 469, 891 N.Y.S.2d 30, 32 [1 Dept. 2009]).

¹⁰ American Academy of Child and Adolescent Psychiatry-Practice Parameters for Child Custody Evaluations; American Psychological Association-Guidelines for Child Custody Evaluations in Family Law Proceedings; Association of Family and Conciliation Courts – Model Standards of Practice for Child Custody Evaluations.

Moreover, it would be inappropriate for the Office of Court Administration to ask a court its reasons for deviations from a position taken by an expert witness, whose testimony and credibility are subject to direct and cross examination. This would be an intrusion on the court's decision-making authority and the independence of judicial decision making. The establishment of an oversight committee on judicial decision making would also infringe on the role of the Appellate Courts who are constitutionally mandated to provide oversight on judicial decision making. Similarly, it would be inappropriate for an independent committee to infringe on judicial decision making.

In addition, forensic reports are highly sensitive documents, containing personal information about the family members. Judges are required by long established appellate authority to consider a host of factors in determining custody.¹¹ One such factor includes an on

¹¹ In the First Department, see *Deanna V. v. Michael C.*, 179 A.D.3d 445, 446, 117 N.Y.S.3d 189, 190 (N.Y. App. Div. 1 Dept. 2020) stating: : “Factors to consider in determining the best interests of the child include the quality of each parent's home environment; the length of time the child has resided with each parent; the parents' past performance and relative fitness as a parent; their respective abilities to provide for the child's emotional and intellectual growth/development; the quality of the home environment and the parental guidance provided; and the willingness of each to foster a positive relationship with the other parent...”

In the Second Department, see *Romero v. Herrera*, 121 N.Y.S.3d 875, 876 (N.Y. App. Div. 2 Dept., 2020) stating: “The factors to be considered in determining the custody arrangement that is in the child's best interests include the quality of the home environment and the parental guidance the custodial parent provides for the child, the ability of each parent to provide for the child's emotional and intellectual development, the financial status and ability of each parent to provide for the child, the relative fitness of the respective parents, and the effect an award of custody to one parent might have on the child's relationship with the other parent” (*Matter of Wood v. Lozada*, 152 A.D.3d 531, 532, 58 N.Y.S.3d 147 [internal quotation marks omitted]).”

In the Third Department, see *Carol E. v. Robert E.*, No. 528216, 2020 WL 2561008, at *2 (N.Y. App. Div. May 21, 2020) stating: “2 In gauging best interests, courts may consider a number of factors, “includ[ing] the nature and quality of the relationship between the grandparent and the child[], the grandparent's ability to nurture the child[], his or her attitude toward the custodial parent[s], reasons for any objections to visitation and the child[]'s preference...”

In the Fourth Department, see *Gilbert v. Nunez-Merced*, 181 A.D.3d 1210, 1210–11, 118 N.Y.S.3d 481 (N.Y. App. Div. 2020), stating: “In making an initial custody determination, the court is “required to consider the best interests of the child by reviewing such factors as maintaining stability for the child, ... the home environment with each parent, each parent's past performance, relative fitness, ability to guide and provide for the child's overall well-being, and the willingness of each parent to foster a relationship with the other parent” (*Matter of Buckley v. Kleinahans*, 162 AD3d 1561, 1562, 78 N.Y.S.3d 569 [4th Dept. 2018] [internal quotation marks omitted]). We agree with the court that those factors weigh in the father's favor, particularly in light of the mother's efforts to interfere with the father's contact with the child, and thus the record supports the court's determination *1211 that it is in the child's best interests to award sole custody to the father (see *Matter of Athoe v. Goodman*, 170 AD3d 1532, 1533, 94 N.Y.S.3d 528 [4th Dept. 2019]).”

the record interview by the judge of the child outside of the presence of either parent or their attorneys. This record remains under seal except under extremely limited circumstances (See: *Lincoln v. Lincoln*, 24 N.Y.2d 270, 273, 247 N.E.2d 659 (Court of Appeals 1969)). Under the proposed bill the sanctity of that process could be impaired if the Court were to have to explain in a written decision why it did not follow the recommendations of a forensic evaluator based upon the in camera interview and that in and of itself could place a child in danger. To allow a statewide committee, consisting of members who are not court employees or parties to the action, to have access to information in these reports would be a violation of DRL 235.¹²

Concern for oversight of judicial reliance on mental health forensic reports arises from the legitimate unease that since 2008, 700 children nationwide have been killed by a parent or parent-figure during a custody dispute. Concern has also been raised about instances in New York where a child was killed after a court granted unsupervised visits. It is a tragedy that any child has died at the hands of a parent. However, there is insufficient evidence that a flawed forensic evaluation has led to the tragic death of a child. Unfortunately, in some instances forensic evaluations are incomplete because a parent refuses to cooperate in the forensic

¹² DRL 235 reads as follows:

§ 235 . Information as to details of matrimonial actions or proceedings

1. An officer of the court with whom the proceedings in a matrimonial action or a written agreement of separation or an action or proceeding for custody, visitation or maintenance of a child are filed, or before whom the testimony is taken, or his clerk, either before or after the termination of the suit, shall not permit a copy of any of the pleadings, affidavits, findings of fact, conclusions of law, judgment of dissolution, written agreement of separation or memorandum thereof, or testimony, or any examination or perusal thereof, to be taken by any other person than a party, or the attorney or counsel of a party, except by order of the court.
2. If the evidence on the trial of such an action or proceeding be such that public interest requires that the examination of the witnesses should not be public, the court or referee may exclude all persons from the room except the parties to the action and their counsel, and in such case may order the evidence, when filed with the clerk, sealed up, to be exhibited only to the parties to the action or proceeding or someone interested, on order of the court.
3. Upon the application of any person to the county clerk or other officer in charge of public records within a county for evidence of the disposition, judgment or order with respect to a matrimonial action, the clerk or other such officer shall issue a “certificate of disposition”, duly certifying the nature and effect of such disposition, judgment or order and shall in no manner evidence the subject matter of the pleadings, testimony, findings of fact, conclusions of law or judgment of dissolution derived in any such action.
4. Any county, city, town or village clerk or other municipal official issuing marriage licenses shall be required to accept, as evidence of dissolution of marriage, such “certificate of disposition” in lieu of a complete copy of the findings of fact, conclusions of law and judgment of dissolution.
5. The limitations of subdivisions one, two and three of this section in relation to confidentiality shall cease to apply one hundred years after date of filing, and such records shall thereupon be public records available to public inspection.

N.Y. Dom. Rel. Law § 235 (McKinney)

evaluation process. But, a forensic evaluation is only one specific type of evidence considered by the court. The testimony of the parents, third party witnesses, persons conducting supervised visits, school and medical records should also be considered by a Judge. Ultimately, it is a Judge who decides on an award of custody or the need to continue supervised visitation.

Recently, legislation has been proposed that would mandate supervised visits if an instance of domestic violence is alleged. Unsupervised access would not be restored until a hearing is held to determine if the allegations are proven by a preponderance of the evidence.¹³ If so proven, unsupervised visits would only occur if a therapist trained in the relevant form of violence determines that the child is comfortable with unsupervised visits. However, the proposal does not address whether a sufficient number of therapists with documented expertise in particular areas of abuse exist statewide, the additional cost to courts to conduct more hearings, and the current lack of funding for supervised visits by indigent parents. There is already an acute shortage, especially for Supreme Court cases, of supervised visitation programs with many having long waiting lists, and no public financing for these programs.

Not only does the proposal fail to address the availability of qualified therapists and funding for supervised visitation programs, it is also questionable whether the proposal will result in better decisions on custody and visitation. In order to protect children, this proposal would prioritize domestic violence over any other factor considered by courts in determining the best interests of a child. It would hamstring Judges from considering the more nuanced factors that should be addressed in a custody determination as well as the context of the domestic violence. This proposal unnecessarily duplicates the statutory safeguards already provided in the law such as orders of protection pursuant to DRL 240 (3)(h), DRL § 252(9) and FCA § 842(a). It also duplicates record checking requirements as to each case with children pursuant to DRL § 240 (1) (a-1) and FCA § 651(e) which require that if a record check results in a finding of a history of child abuse or neglect or an order of protection or that a parent is a sex offender, then Courts must make inquiry and conduct hearings if necessary before approving custody and visitation.

¹³ The hearing must be held within 30 days, which is almost impossible given the time necessary for an RJI to be filed in Supreme Court and for appointments of Attorneys for Children, Supervised Visitation Supervisors, Assigned Counsel and Mental Health Experts to be made. There will also be need for additional funding for assigned counsel and Attorneys for Children as well as judicial staff for these hearings.

Moreover, the proposal fails to recognize that supervised visitation can have its own negative consequences. Large numbers of children might be torn from being with their parent on a widescale basis, or even from the child's home, based on a mere allegation. A child's relationship with a parent may be severely damaged. The proposal potentially puts too much control regarding access with a parent in the hands of a child because it requires that a therapist or forensic evaluator with documented experience verify that the child is comfortable with the access. A child may object to seeing a parent not because he or she is fearful of abuse, but because the other parent is inappropriately influencing the child's decision. Contrary to the proposed legislation, the present statutes governing orders of protection allow a court to impose supervision or other limitations of access between a parent and child based on an assessment of the unique circumstances presented in each case.

It should also be noted that sole reliance on a forensic evaluation without a full evidentiary hearing in a custody dispute has been held to be reversible error by the New York Court of Appeals. In remanding a case back to the trial court for further proceedings, the Court of Appeals stated: "in rendering a final custody award without a hearing, Supreme Court appeared to rely on, among other things, hearsay statements and the conclusion of a court-appointed forensic evaluator whose opinions and credibility were untested by either party. A decision regarding child custody should be based on admissible evidence, and there is no indication that a "best interest" determination was ever made based on anything more reliable than mere "information."(*S.L. v. J.R.*, 27 N.Y.3d 558, 564, 56 N.E.3d 193, 196 (2016)).

Indeed, the limitations of forensic evaluations has been the subject of extensive writings by Timothy M. Tippins and Jeffrey P. Wittman as previously noted.¹⁴ A recent article by Mr. Tippins on the subject emphasized that the court should not assume that there is any connection between a forensic diagnosis of a mental disorder and a parent's ability to parent a child. He

¹⁴ See Timothy M. Tippins and Jeffrey P. Wittman, "A Call for Clinical Humility and Vigilance," supra note 3; see also Timothy M. Tippins, "Forensic Custody Reports: Where's the Science?," NYLJ September 4, 2019 available at <https://www.law.com/newyorklawjournal/2019/09/04/forensic-custody-reports-wheres-the-science/>

points out the deficiencies in the most widely used method of diagnosis, the *Diagnostic and Statistical Manual of Mental Disorders* (DSM), promulgated by the American Psychiatric Association (NYLJ, June 6, 2019).

In sum, downstate, where a large pool of mental health professionals exists, the court system developed a thorough certification process to assure that qualified professionals conduct mental health evaluations in custody cases. Upstate, without the same numbers of mental health professionals, lawyers and judges rely on the well-established professional standards developed for conducting forensic evaluations against which a neutral evaluator's qualifications can be tested during trial examination.

D. Discovery

The extent to which mental health forensic evaluations should be subject to discovery before trial has long been debated. Discovery issues include who should have access to the report and when, should the evaluator's notes and raw data be made available to counsel and the litigants before trial, and should the forensic evaluator be deposed.

Whether a court allows discovery in a custody litigation depends on if the court is located in the Third and Fourth Departments or the First and Second Departments. This divergence has existed for decades stemming from whether discovery was allowed on the issue of the grounds for a divorce. The Third and Fourth Departments held that matrimonial cases are subject to the same panoply of CPLR disclosure provisions as for any other type of litigation. Thus, courts allowed discovery on the issue of fault (e.g., cruelty, adultery) notwithstanding the embarrassment caused to a party. A court can limit the potential harshness of full disclosure by issuing appropriate protective orders. *Lemke v Lemke* 100 A.D. 2d 735 (4th Dep't 1984); *Nigro v Nigro* 121 A. D. 2d 833-834 (3rd Dept 1986). This open discovery approach is the established practice for custody litigation in upstate courts, resulting in bills of particular and depositions of the parties. See, e.g. *In the Matter of Beauregard v, Millwood-Beauregard*, 207 A.D.2d 633 (3d Dept. 1994).

In contrast, the First and Second Departments feared that allowing discovery on the issue of fault would constitute an "exacerbating circumstance" in divorce litigation, preventing reconciliation or the ability of the parties to have amicable relations after the divorce was granted. *Hunter v. Hunter*, 10 AD2d 291 (1st Dept 1960). Even after the enactment of the equitable distribution law in 1980, which required discovery on the financial issues in a divorce

action (DRL 236B (4)), the First and Second Departments continued, as a general rule, to preclude discovery for other issues in a divorce action, including custody *McMahon v. McMahon*, 100 AD2d 826 (1st Dept. 1984); *Ginsberg v. Ginsberg*, 104 AD2d 482 (2d Dept 1984). An exception to this general rule could occur, on a case-by-case basis, but only upon a showing of “unusual circumstances.” *McMahon, supra*. Thus, downstate courts generally prohibited discovery, including depositions of the parties and bills of particulars, in custody litigations. *Garvin v. Garvin*, 162 AD2d 497 (2d Dept. 1990); *Ginsberg, supra*.

These broad Departmental discovery approaches have not resulted in clearly defined discovery practices with respect to mental health forensic reports in a custody litigation.¹⁵ As previously noted, these reports contain particularly sensitive information about the family members. Public dissemination of a report would be detrimental to the children and to the parties themselves. Disclosure of the report to a child inadvertently, or intentionally, is of grave concern.¹⁶ There is no uniform court practice as to how attorneys and the parties may access the report in advance of trial. Some courts require the report to be read in chambers. *Matter of Morrissey v. Morrissey*, 225 A.D.2d 779 (2d Dept. 1996); *Scuderi-Forzano v. Forzano*, 213 A.D.2d 652 (2d Dept. 1993). More recently, some courts have allowed counsel to receive one copy of the report, but each court may set its own rules governing the use of the report. For instance, counsel may be precluded from duplicating the report; the client may be allowed to read the report, but only under the supervision of counsel; the report must be returned to the court if the attorney withdraws from the case. These rules are not uniform throughout the state.

The potential for harm that the unfiltered disclosure of the contents of a report to a child may create special considerations for attorneys for children in custody litigations in assessing the appropriate extent of disclosure of the contents of a report to his or her client. The American Bar Association Section of Family Law Standards of Practice for Lawyers Representing Children in

¹⁵ One commentator noted that a forensic report is, in and of itself, a form of pre-trial discovery. H.N. Cohen “Limiting Discovery in Custody Cases,” NYLJ 7/14/03.

¹⁶ L. Rosenberg, A Justifiable Double Standard: The Dangers of Access to Forensic Custody Reports by the Self-Represented, 51 NYSBA Family Law Review 1 (Summer/Fall 2019).

Custody Cases Approved by the American Bar Association House of Delegates in August 2003,¹⁷ states:

The lawyer should meet with the child, adapting all communications to the child's age, level of education, cognitive development, cultural background and degree of language acquisition, using an interpreter if necessary. The lawyer should inform the child about the court system, the proceedings, and the lawyer's responsibilities. (Section E).

An attorney for a child may well have to balance an obligation to disclose information about the proceedings to his or her client with sensitivity to the harm that may be done to a child's relationship with a parent or others that full disclosure of the contents of the report may cause. In a case of apparent first impression, a 14-year old who was the subject of her parents' dispute regarding access requested through the attorney for the child to receive and read a copy of the mental health forensic report. The request was denied by the Court with a finding that it would be inappropriate and not in the child's best interests to grant the relief, as the doctrine of *parens patriae* is not superseded by Rule 7.2 ("Function of the Attorney for the Child, of the Rules of the Chief Judge). *Clarence M. v Martina M.*, 68 Misc3d 457, 124 NYS3d 160 (Supreme Court, Kings Co., 2020, Sunshine, J.)

In addition to the disclosure of the final forensic report, discovery issues have arisen with respect to the evaluator's notes and raw data used to prepare the report. The evaluator's file may contain, for example, notes of the interviews conducted with the parties, children or collateral sources; observations made during home visits; and the raw data of psychological or intelligence tests. Attorneys seek these files to better understand the evaluator's conclusions and to use during cross-examination.

Historically, trial courts prohibited any discovery of neutral mental health forensic evaluators beyond allowing review of the evaluator's report. In *Ochs v. Ochs*, 193 Misc.2d 502

¹⁷ See American Bar Association Section of Family Law Standards of Practice for Lawyers Representing Children in Custody Cases available at https://www.afccnet.org/Portals/0/PublicDocuments/Guidelines/aba_standards.pdf

(*Sup Ct. 2002*) the court held a party was not entitled to the raw notes and testing data compiled by the neutral forensic evaluator:

Custody cases are difficult, at best, not merely because the correct result is often elusive, but also because the adversarial process that is most conducive to reaching the truth is often detrimental to the relationships it is intended to protect. Thus, while it is true that the court should exercise every means possible to ensure that it has all relevant information before making a custody determination (*citations omitted*) the court must also be cognizant of the great burden that such litigation places on the parties and the children. The process should not be permitted to defeat, through an excess of zeal in discovering every last ounce of relevant information, the beneficial effects that are intended to be achieved in the result.¹⁹³ Misc.2d 506-07.

The *Ochs* court went on to find that a party seeking disclosure of a forensic evaluator's file must show something more than mere displeasure with the report. Disclosure "should be granted only upon a showing, on the basis of the report itself or through extrinsic evidence, of special circumstances, such as a deficiency in the report, a potential bias or other cause." *Id.* at 510, 749 N.Y.S.2d 650. Without special circumstances, such as bias, discovery of an evaluator's raw data was not allowed. *See also, CP v. AP, 32 Misc.3d 1210(A) (Sup Ct. NY County 2011); Feuerman v. Feuerman, 112 Misc.2d 961 (Sup.Ct., Nassau County 1982).*¹⁸

Recently, however, some trial courts have authorized discovery of the forensic evaluator's file, including notes, raw data and test results used to prepare the report even though no special circumstances were found to exist. As one court noted:

As times continue to change, so too must certain standards in the law. Specifically, this Court does not believe that "special circumstances" need to be present to direct the release of the raw data, notes and test results, or any other material which creates the forensic evaluator's entire file. This Court fails to understand how a party can show bias

¹⁸ Downstate trial courts have allowed limited pre-trial discovery in custody cases where special circumstances existed. *Ferguson v. Ferguson, 2 Misc.3d 277 (Sup Ct. 2003)* (deposition of the child's school administrator allowed where quality of the child's education at issue); *Johnson v. Johnson, 235 A.D.2d 217 (1st Dep't. 1997)*; *M.C. v. R.C., 20 Misc. 3d 397 (Sup Ct. 2008)* (pre-trial discovery of surveillance tapes authorized).

on the part of the evaluator or a deficiency in the report without the careful review of the raw data and notes of the forensic evaluator. Otherwise, the litigator is limited to cross examination of the forensic evaluator and a forensic report without knowing which questions to ask and without being able to properly establish to the Court, the trier of fact in matrimonial cases, any deficiencies in the report or bias on the part of the evaluator. The Court is tasked with applying a certain amount of weight to the conclusions in a forensic report, and it is the parties' job to bring any deficiencies in the report to the Court's attention and same cannot be properly completed, or attempted, without the raw data and notes available during trial preparation.

J.F.D. v. J.D., 45 Misc. 3d 1212(A), 3 N.Y.S.3d 285 (N.Y. Sup. Ct. 2014)

That court further noted that disclosure of the mental health evaluator's file is consistent with the production of the files of other expert witnesses (e.g. forensic accountants). *See also, KC v. JC* 50 Misc.3d 892 (Sup. Ct., Westchester Co. 2015. Informal canvassing of attorneys and trial judges in the First and Second Departments reveals that disclosure of the evaluator's file in advance of trial is now increasingly authorized by downstate trial courts. Anecdotally, in the Third Department and Fourth Department, the evaluator typically brings the file on the day the evaluator testifies and it is reviewed by counsel only at that point in time

Although a forensic evaluator could be subject to a deposition under the more open discovery practices upstate, anecdotal information from attorneys indicates that such examinations rarely happen. Conducting such examinations would result in significant litigation costs. It is unclear if the state would pay the costs for the evaluator to be deposed To date, Courts in the First and Second Department have not authorized the deposition of a custody forensic evaluator unless there are special circumstances. (See *Nimkoff v. Nimkoff*, 36 A.D.3d 498, 830 N.Y.S.2d 27, 27 (2007) stating: "The circumstances here do not suggest the need for a departure from the general rule that depositions are not permitted in custody disputes.")

The reaction of attorneys downstate to whether depositions of forensic evaluators should be allowed is mixed. On the one hand, there is concern about the additional litigation costs that would be incurred if mental health evaluators are deposed. The cost of a forensic evaluation for private-paid cases can run from \$15,000 to over \$50,000. To add the cost of a deposition may be

insurmountable for all but the wealthiest families. It is unknown if this cost can be added to the state's budget in those cases where the custody litigation is paid by the government. On the other hand, depositions might lead to settlements or shorten the length of trials.

It should be borne in mind that custody litigation differs markedly from other kinds of litigation in that the first concern of the court in a custody dispute is and must be the welfare of the child. Accordingly, while the goals of adhering to principals of due process and of ascertaining the truth at trial are extremely important, in custody litigation it is imperative that the court also ensure that the interests of the child are protected, including during the litigation process. For example, in *Lincoln v. Lincoln*, 24 N.Y.2d 270 (1969), the Court of Appeals held that a court deciding the issue of custody has the right to conduct a confidential interview with the child, outside the presence of the parents and their attorneys, because the first responsibility of the court is and must be the welfare and interests of the child. As the *Lincoln* court stated (at 272):

It requires no great knowledge of child psychology to recognize that a child, already suffering from the trauma of a broken home, should not be placed in the position of having its relationship with either parent further jeopardized by having to publicly relate its difficulties with them or be required to openly choose between them. The trial court however, if it is to obtain a full understanding of the effect of parental differences on the child, as well as an honest expression of the child's desires and attitudes, will in many cases need to interview the child. There can be no question that an interview in private will limit the psychological danger to the child and will also be far more informative and worthwhile than the traditional procedures of the adversary system — an examination of the child under oath in open court.

Courts are faced with these same tensions in balancing the extent to which discovery and disclosure of the evaluator's file should be allowed in custody litigations.

The Court of Appeals has not addressed the competing custody litigation discovery issues among the Departments. Similarly, the Court of Appeals has not addressed whether the forensic evaluator's file should be disclosed before trial or if the evaluator should be deposed.¹⁹

E. Disclosure of Forensic Reports to Counsel and Parties, Including Self-Represented Litigants

The issue of the disclosure of forensic reports to counsel and parties, including self-represented litigants in custody disputes poses significant concerns. As previously noted, forensic reports contain particularly sensitive and potentially inflammatory assertions and information about family members. This may well include statements by the parties and by the children as related by the evaluator; observations about the family members by the evaluator; hearsay statements by relatives, teachers, childcare providers tutors, and other individuals involved with the family; recommendations to the court by the evaluator; purported diagnoses of psychological conditions; purported results of psychological testing; and claims about child abuse, domestic violence or addiction. All this material is also, at least upon its initial release, not in evidence in the proceeding, not challengeable by cross examination, and could be inaccurate.

Public dissemination of such material is potentially extremely detrimental to the subject children and the parties. Disclosure of the report to a child inadvertently, or intentionally, is of particular concern.²⁰ A vindictive litigant showing a copy of the report to a child in order to attempt to sully the child's view of the other parent could do serious harm to the child's relationship with the other parent. Moreover, in the age of the internet, there is a real danger that the dissemination of a report to the public on-line could cause long lasting embarrassment and

¹⁹ The Court of Appeals has authorized a pretrial physical examination in a matrimonial action where a party has put his or her physical condition in controversy: "Since the defendant alleged in her counterclaim that she was suffering from certain specified ailments in addition to general poor health, her "physical condition" was "in controversy" within the meaning of CPLR 3121 and the plaintiff was entitled to request a physical examination. CPLR 3121 does not prohibit such examinations in matrimonial actions, and although we recognize the potential for abuse in these cases, the court's broad discretionary power to grant a protective order "to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (CPLR 3103) should provide adequate safeguards". *Wegman v. Wegman*, 37 N.Y.2d 940, 941, 343 N.E.2d 288 (1975)

²⁰ L. Rosenberg, A Justifiable Double Standard: The Dangers of Access to Forensic Custody Reports by the Self-Represented, *supra* note 16.

damage to a child or parent. An abusive party could threaten public release of the report to maintain a power imbalance over the other party.²¹

It has long been held that it is a denial of due process and reversible error for a court to consider a “confidential” forensic report in custody litigation without allowing the parties or their counsel access to the report. *Kessler v. Kessler*, 10 NY2d 445 (1962)

In 2006, a Matrimonial Commission chaired by the Hon. Sondra Miller (Ret.), appointed by the Chief Judge recommended a procedure to protect the confidentiality of forensic reports. The proposal would provide copies of the report to counsel for the parties and the attorney for the child, with an express instruction by the court that no additional copies are to be made or disseminated without permission. The parties would be permitted to review the report only at their attorney’s office. In the case of a self-represented party, the Commission recommended that a separate copy of the report should be maintained at the courthouse for use by a pro se litigant to review and make confidential notes. The pro se litigant would not be permitted to remove this copy from the courthouse. (New York State Matrimonial Commission, Report to the Chief Judge of the State of New York at 54 [Feb. 2006] available at: [\http://www.nycourts.gov/reports/matrimonialcommissionreport.pdf\](http://www.nycourts.gov/reports/matrimonialcommissionreport.pdf))

This Committee has proposed similar procedures in a legislative proposal to address the balancing of the relevant considerations. See Report of the Matrimonial Practice Advisory and rules Committee to the Chief Administrative Judge of the Courts of the State of New York, January 2020, page 54 available at <https://www.nycourts.gov/LegacyPDFS/IP/judiciaryslegislative/pdfs/Matrimonial-MPARCReport2020.pdf>. There are some who believe that physical possession of the report by all parties including self-represented litigants as provided in one alternative legislative proposal is required by due process.

One significant consideration in not allowing unrepresented parties to have or make copies of the report is that attorneys and forensic experts are subject to professional discipline if

²¹ Legislators and the courts have long been sensitive to the needs of maintaining confidentiality of records in divorce cases. Court records in divorce cases are sealed. DRL 235 and, as previously noted, court interviews of children are sealed. *Lincoln v. Lincoln*, *supra*.

reports are released, while parties, including self-represented litigants, face only potential contempt charges which are unlikely to result in a meaningful remedy for innocent victims, including for children whose lives are damaged by the dissemination of the report. However, assigned counsel fees would not be payable to a party damaged by dissemination of the report because a contempt action for a violation of restrictions on dissemination would be punished under section 753 of the judiciary law pursuant to current legislative proposals, which section is excluded from coverage of assigned counsel fees under FCA 262.²² Moreover, even if there were no exclusion for contempt punishable under the judiciary law in FCA 262, it is ironic that under that statute, the party seeking a contempt application has no right to court assigned counsel, but a party who is the subject of the contempt application can be assigned counsel at government expense if they cannot afford counsel.

DRL section 235 requires that court records in a matrimonial case remain sealed absent good cause for a period of 100 years. The policy behind that statute recognizes the sensitive nature of the divorce process. To allow litigants to maintain their own copies of the evaluation in their home where it might be discovered by a child would seem inconsistent with this legislative goal.

In light of these considerations, many trial courts have fashioned rules allowing access to forensic reports by self-represented litigants analogous to the Matrimonial Commission's recommendations, by allowing a pro se litigant to read the report and to take notes on the report, but not allowing that litigant to remove a copy of the report or the litigant's notes from the courthouse. Such procedures have been upheld where an equitable balance of the competing considerations ensure: (a) sufficient access to the report by the pro se litigant to ensure due process and (b) the confidentiality of the report to protect family members from harm, have been maintained. In *Matter of Isidro A.-M. v. Mirta A.*, 74 A.D. 3d 173 (2010), the First Department denied the pro se petitioner's application that he be given a copy of the forensic report to prepare

²² See FCA 262 (vi) (applicable in Supreme Court pursuant to Judiciary Law 35(8)) provides for payment of assigned counsel for "any person in any proceeding before the court in which an order or other determination is being sought to hold such person in contempt of the court or in willful violation of a previous order of the court, **except for a contempt which may be punished summarily under section seven hundred fifty-five of the judiciary law (emphasis supplied).**

for the custody trial, but nevertheless modified the order of the lower court to permit the pro se petitioner to take notes about the report while reviewing it under court supervision.

In *Sonbuchner v. Sonbuchner*, 96 A.D.3d 566 (1st Dep't 2012), a pro se litigant, argued that the trial court erred by not permitting him to review the report prior to the forensic expert's direct testimony. The First Department held that this was error, but that it was harmless error, since plaintiff was given access to the report prior to his cross-examination of the expert, had previously had the opportunity to review the report before direct examination with his counsel when he had been represented by counsel, and also had the opportunity to review the report with a court-appointed social worker long before the trial commenced. The dissent pointed out, however, that plaintiff had not had access to the report that was consistent with the Commission's recommendations or with *Isidro*, since a copy of the report had not been maintained at the courthouse where it could be accessed by the plaintiff for his use in the proceeding.

Despite its holding, the *Sonbuchner* Court cautioned:

We nonetheless reiterate, as we have previously, that counsel and pro se litigants should be given access to the forensic report under the same conditions [citing to *Isidro*]. Because defendant's attorney had a copy of the report, the court should have given the report to pro se plaintiff, even if the court set some limits on both parties' use, such as requiring that the report not be copied or requiring the parties take notes from it while in the courthouse. (*Sonbuchner*, supra at 568).

In *Matter of Raymond v. Raymond*, 174 A.D.3d 625 (2019), the Second Department held that the Family Court did not improvidently exercise its discretion in denying a pro se litigant, a copy of the forensic report, since the Court provided the litigant with liberal access to the report over an extended period of time during which he could review the report upon request and take notes with regard to its contents. Moreover, the litigant failed to show that his ability to prepare for the hearing was prejudiced by his not having his own physical copy of the report.

Assuming a court, in fashioning procedures for access by a pro se litigant, strikes a reasonable balance of the considerations outlined above, as suggested by the 2006 Matrimonial

Commission, it appears it is feasible to give reasonable access to the report to self-represented litigants while taking measures to prevent the public dissemination of the report.

F. Evidence

The receipt by a court of mental health forensic reports and testimony in custody cases involves a host of evidentiary issues. The most prevalent issue is the hearsay rule, particularly as mental health forensic reports in custody cases routinely allude to third parties who have imparted information to the evaluator - teachers, nannies, therapists, relatives, etc. - often referred to as collaterals or collateral contacts.

1. Evidence from Collaterals

To understand the proper role of collaterals in the evaluative process²³, there must imprimis be a review of the basis of expert testimony, whatever the case type. The opinion of the forensic expert witness without a proper basis is entitled to no probative value. *Kaluga v. Korytonsky*, 269 AD3d 566 (2d Dept. 2000). Rather, expert opinion must be based on one of the following: (1) Personal knowledge of the expert, often obtained by direct observation and analysis as result of clinical examinations²⁴, administering of psychological testing, review of relevant documents, etc. (2) Facts in the Record. Although the expert may not have personal

²³ / The purpose of a forensic evaluation is not to evaluate the child's mental health for purposes of therapeutic intervention - that is the parents' responsibility. The purposes of a forensic evaluation are solely to aid the court in making a best interest determination. *R.M. v. C.C.*, 68 Misc3d 1201(A) (Family Ct., Kings Co., 2020, Waksberg, J.)

²⁴ / There is nothing in the rules of evidence which would prevent a qualified expert from giving a professional opinion on the basis of direct observations, no matter how they arose." *Matter of Faith Z.*, 92 AD2d 990 (3d Dept. 1983); see also, *Donald G. v. Hope H.*, 160 AD3d 1061(3d Dept. 2018) (Family Court did not abuse its discretion in allowing child's treating sexual abuse counselor, who was qualified as an expert in sexual abuse treatment, to opine upon the respective fitness of each parent as custodians, in action to modify prior order of custody, where counselor's opinions on the parties' relative fitness were based upon her observations of them and upon her professional analysis of evidence in the record, and Family Court's written decision revealed that it neither improperly delegated its authority to the counselor nor relied solely upon her opinion of the parties' fitness in making its custody determination.); *Gregory D. v. Athena Q.*, 149 AD3d 542 (1st Dept. 2017) (Error for referee to dismiss the observations and conclusions of the neutral, court-appointed evaluator, regarding, inter alia, the party's respective interactions with the children, while crediting the testimony of two experts who had never met the mother or evaluated her parenting ability.)

knowledge of the facts, the opinion is based on segments of the testimony and exhibits received in evidence. This is often accomplished by posing hypothetical questions to the witness (CPLR 4515), and asking the witness to assume certain evidentiary facts from the record, as long as the facts recited are “fairly inferable from the evidence” (*Tarlowe v. Metropolitan Ski Slopes, Inc.* 28 NY2d 410 [1971]), and then opine as to the issue at hand. (3) Professionally Reliable Hearsay. An expert can rely upon specific, inadmissible out-of-court material to formulate an opinion, provided it is of a kind accepted in the profession as reliable as a basis in forming a professional opinion (*Wagman v. Bradshaw*, 292 AD2d 84 [2d Dept. 2002]), and there is evidence presented establishing the reliability of the out-of-court material referred to by the witness (*Hambusch v. NYC Tr. Auth.*, 63 NY2d 723[1984]), provided the out-of-court material is not the principal basis of the expert’s opinion, but rather a link in the chain upon which the expert relied. (*Borden v. Brady*, 92 AD2d 983 [3d Dept.1983]; *O’Shea v. Sarro*, 106 AD2d 435 [2d Dept. 1984]).

If an expert relies upon out-of-court material, i.e., hearsay, which does not meet the professional reliability test, it is still proper for the expert to rely upon such evidence provided the declarant of the hearsay testifies and is subject to cross examination. *Hambusch v. NYC Tr. Auth.*, *supra*; *Flamio v. State*, 132 AD2d 594 (2d Dept. 1984)

The issue arises as to whether otherwise inadmissible evidence which qualifies under the professional reliability test so that the expert has a proper basis provides justification for the expert to repeat to the trier of fact all the hearsay information so gathered. In *Peo. v. Goldstein*, 6 NY3d 119 (2005), the Court of Appeals noted that this remains an open question in New York. The issue was answered in part by the Appellate Division, First Department, in *Straus v. Strauss*, 136 AD3d 419 (2016), where the Court stated:

The forensic report does not rely to a significant extent on hearsay statements. A review of the report reveals that the primary source of the report's conclusions are the forensic evaluator's firsthand interviews with the parties. In any event, defendant intends to call as witnesses at any future custody hearing anyone to whom the forensic evaluator spoke; thus, the declarants will be subject to cross-examination, rendering admissible any opinion evidence based on their statements (*see Wagman v Bradshaw*, 292 AD2d 84, 86-87 [2d Dept 2002]). To the extent that any hearsay declarants are not cross-examined, the motion court acknowledged that those portions of the report containing inadmissible

hearsay should be stricken or not relied upon (*see Lubit v Lubit*, 65 AD3d 954, 956 [1st Dept 2009], *lv denied* 13 NY3d 716 [2010], *cert denied* 560 US 940 [2010]). (*Straus v. Strauss*, 136 A.D.3d 419, 420, 24 N.Y.S.3d 76 (2016).

It does not follow, however, that where a forensic evaluator interviews collaterals who are not called as witnesses, that the report and testimony of such examiner is always fatally flawed. In *Ashmore v. Ashmore*, 92 AD3d 817(2d Dept. 2012), the forensic evaluator’s report and testimony was properly received in evidence where he interviewed the parents and children and nine collateral witnesses who did not testify at trial. The forensic evaluator testified at trial that her conclusions were based on her interviews with the parties and the children. Moreover, some of the evidence referred to by the collateral witnesses was eventually admitted at trial through other witnesses. Under these circumstances, and “(i)n light of the sharply conflicting testimony regarding the conduct of the parties, and evidence suggesting that the children were exhibiting behavioral problems,” the Supreme Court properly admitted the forensic evaluator's testimony and report. See also, *Raymond v. Raymond*, 174 AD3d 625 (2d Dept. 2019) (Copy of forensic report prepared by court-appointed forensic evaluator was admissible at a hearing on the mother's petition for sole custody and the father's petition for increased parental access; parties received access to report well in advance of scheduled hearing; forensic evaluator testified and was cross-examined by the parties; the parties had opportunity to rebut forensic evaluator's findings; and the conclusions in the report were based primarily on forensic evaluator's firsthand interviews rather than on hearsay statements made by non testifying declarants.)

2. Hearsay Exceptions

There are other means for out-of-court relevant evidence to be admissible as part of the forensic process. If the information imparted to and relied upon by the forensic evaluator, albeit hearsay, is related to diagnosis and treatment of the subject of the evaluation, a hearsay exception is extant, and the evidence is admissible. *Freeman v. Shtogaj*, 174 AD3d 448 (1st Dept. 2019) (The court upheld the admissibility of a treating physician’s entire medical file containing reports from other physicians where those reports related to the diagnosis and treatment of plaintiff’s injuries and were relied upon by the treating physician).

In *Jill Q. v James R.*, 185 AD3d 1106, 127 NYS3d 190 (3d Dept. 2020), the testimony of child's mental health counselor regarding hearsay statements made by child that formed the basis

for the counselor's diagnosis and treatment of the child was admissible under the hearsay exception for statements germane to diagnosis and treatment in proceeding for modification of prior visitation order, where counselor testified that child suffered from adjustment disorder stemming from child's difficulty in adjusting to father's sudden presence in her life, child developed situational depression and clinical depression thereafter, evidence suggested child's distress was attributable to engaging in parenting time with father, and hearsay statements were potentially relevant to determining cause of child's distress as well as what parenting time provisions were in child's best interests.

3. Patient-Physician Privilege

It is the general rule that a party waives his/her right to the psychologist-client privilege (and patient-physician privilege) by actively contesting custody, thereby putting the party's mental and emotional well-being into issue. *Baecher v. Baecher*, 58 AD3d 821 (2d Dept. 1977). The general rule, however, is not without some restriction. In *Bruzzese v. Bruzzese*, 152 AD3d 563 (2d Dept. 2017), it was held that while a party waives the physician-patient privilege concerning his or her mental or physical condition by actively contesting custody, there first must be a showing beyond mere conclusory statements that resolution of the custody issue requires revelation of the protected material. The otherwise protected material may be too remote by time or topic to be relevant to the present custody dispute. Similarly, in *Penny B. v. Gary S.*, 61 AD3d 589 (1st Dept. 2009), the Court stated that it was not error for the trial court to refuse to compel the father's therapist to testify or to release his records to the mother. The court acted properly when it conducted an in camera review of the therapist's notes, and then, in order to satisfy the mother's concern about whether the father had been consistently attending therapy sessions, the court permitted her to review the therapist's appointment sheets. Furthermore, the court informed the parties that the therapist had determined that the father did not pose a risk to the child, and it was unnecessary to release the therapist's notes or for him to testify since the court had sufficient information about the father from other sources.

Courts are justifiably concerned that a custody litigation should not interfere with a child's or litigant's ongoing mental health treatment. An assessment of the reason for the course of treatment by the forensic evaluator may enable the treatment to continue. A treating

mental health professional drawn into litigation may conclude that he or she can no longer provide therapy.

4. Frye Issues

The seminal case of *U.S. v. Frye*, 293 F.1013 (D.C. Cir 1923) requires that novel or innovative scientific evidence be “based on a principle or procedure which has ‘gained general acceptance’ in its specified field”. *Peo. v. Wesley*, 83 NY3d 417 (1994). The particular procedure need not be “unanimously endorsed” by the scientific community but must be “generally accepted as reliable”. *Cornell v. 360 West 51st Street Realty, LLC*, 22 NY3d 762 (2014). The burden is upon the proponent to “show the generally accepted *reliability* of such procedure in the relevant scientific community through judicial opinions, scientific or legal writings, or expert opinion other than that of the proffered expert. *Zafran v Zafran*, 191 Misc2d 60 (Supreme Court, Nassau Co., 2002, Ross, J.).

In the context of mental health forensic reports in custody cases, the Appellate Division, First Department, in *Straus v. Strauss, supra*, held that *Frye v. U.S* (293 F. 1013) does not require that a forensic report cite specific professional literature in support of the report’s analyses and opinions. Nevertheless, “[T]he opposing side, however, is free to cross-examine the forensic evaluator regarding the lack of citations, as such an omission is relevant to the weight to be accorded to the evaluator’s opinion, not to its admissibility.” While inclusions in mental health forensic reports in custody cases of citations to professional literature and authorities has to date been scant, the admonition in *Straus* should be a clarion call to the mental health evaluators to include such citations. See, AFCC Guidelines, *supra*.

5. Reports in Lieu of Direct Testimony

In the discretion of the Court, mental health forensic reports in custody cases can be received in evidence in lieu of direct testimony of the evaluator, subject to conditions. Specifically, 22 NYCRR 202.16(g)(a) provides that “[I]n the discretion of the court, written reports may be used to substitute for direct testimony at the trial, but the reports shall be submitted by the expert under oath, and the expert shall be present and available for cross-examination. In the discretion of the court, in a proper case, parties may be bound by the expert's

report in their direct case.” This rule was part of the recommendations to the late Chief Judge Judith Kaye by the Committee to Examine Lawyer Conduct in Matrimonial Actions chaired by E. Leo Milonas, some of which related to Improving Case Management. This rule expanded the disclosure requirements of CPLR 3101(d) by requiring the exchange and submission to the court of the reports within a certain time period, and by permitting the Court discretion to admit the report as a substitute for direct testimony at trial upon proper safeguards, as well as permitting the court discretion to hold a party bound by their expert’s report in their direct case. These rules along with other provisions in the matrimonial rules in 22 NYCRR 202.16 have help to improved case management of matrimonial contested cases. In her 2004 State of the Judiciary Address, Chief Judge Kaye stated: “Today, with the strong, early case management prescribed by the rules, a contested matrimonial is resolved, on average, in less than half the time it took ten years ago— down from 796 days to 319 days.” Today, sixteen years after 2004, these rules continue to reduce the time needed to resolve contested divorces. A current legislative proposal conflicts with this rule by requiring that forensic reports and files shall be subject to objection pursuant to the rules of evidence and subject to cross-examination. This proposal will result in trial delays and expense which are unnecessary since the rule ensures due process by requiring that the “ expert reports shall be submitted by the expert under oath, and the expert shall be present and available for cross-examination.”

The litigant’s right of cross examination of the forensic evaluator is essential to due process not only as a condition to the court rule allowing the report to be admitted in lieu of direct testimony at trial, but also regarding updated reports. In certain cases, due to the occurrence of events subsequent to the issuance of the mental health forensic report in a custody case, the mere passage of time, a court will order an updated forensic examination and report. While such an order is clearly within the court’s discretion, the updated report, similar to the initial report, must be made available to the parties with the parties’ rights to cross examination preserved. In *E.V. v. R.V.*, 140 AD3d 920 (2d Dept. 2015), it was held that in ordering and receiving an updated forensic mental health evaluation, the Supreme Court should have permitted the plaintiff to cross-examine the forensic evaluator with respect to the updated report

G. Collateral Consequences of Forensic Evaluations

Whether one believes forensic evaluations are ordered too frequently or not frequently enough, these reports undeniably have both negative and positive collateral consequences. For this reason, it is imperative that attorneys requesting forensics and jurists ordering forensics clearly articulate the reasons that the perspective of a mental health evaluator is necessary to assist the court in determining the best interest of the children involved.

1. Negative Collateral Consequences of Forensic Evaluations

a) The amount of time for reports to be completed while temporary custodial arrangements exist

Not all custody litigations require a forensic evaluation. Evaluations are ordered typically when the court determines that the parties are intensely contesting issues such as parental fitness, access to children, decision making or all three. In the interim and until the reports are completed and a trial on the matter can be had, one parent can be deprived of decision making relating to their children and/or regular and frequent contact with their children. In a worst-case scenario, a parent can suffer a suspension of parenting time and loose contact completely with the children during the course of the litigation or, in other instances, harmful contact between a parent and child could continue.

Issues that are generally raised by the parties and investigated during a forensic evaluation include, but are not necessarily limited to:

- Physical custody/parenting time
- Decision making
- Domestic Violence
- Substance abuse
- Mental illness
- Interference with Parental Rights/Alienation/Resist-Refuse Dynamic
- Relocation requests, and
- Grandparent Visitation

At a minimum, each parent is seen by the evaluator independently, for one or more sessions, the children of appropriate ages are seen alone and with each respective parent.

Interviews are also conducted with collateral contacts, suggested by the respective parties, identified by the Court or deemed important by the evaluator after interviews with the respective parties and children.

The parties generally are seen on multiple occasions to obtain sufficient history and or information from each that generally includes:

- The parties understanding of why the evaluation is taking place and the reasons for the custodial dispute;
- Family history;
- Personal history;
- Past medical and psychiatric history;
- The marital or relationship history;
- Mental status examinations, psychological and other testing including drug and alcohol testing;
- Examination of domestic violence allegations;
- An analysis of the present functioning of each parent and the children;
- Information to assist in the evaluator's formation of an opinion as to which parent would foster a relationship with the other parent including who supports the other parent with the children and who interferes with the parental relationship;
- How each parent interacts with the respective children.
- Parenting skills, custodial strengths and limitations;-past and present caretaking abilities
- Present home environment of the respective parties
- the parent's comparative ability to meet the children's needs

See, Hon. Sondra Miller, Commission Report to the Chief Judge of the State of New York, February 2006, p. 50.

A forensic evaluator will also review the history of the litigation and court documents. Once the interviews and evaluations of the parties, children and others are concluded, the evaluator prepares a detailed report provided to the Court which includes opinions and recommendations, where requested.

Needless to say, the above procedure is very time consuming and generally takes several months or longer to complete depending on the complexities of specific issues raised, length of marriage, number of children and time constraints of the evaluator, parties and collateral contacts, delay in payments by the litigants and delay in access to information requested by the evaluator.

Delays of this nature can have a monumental impact and effect on the parent-child relationship. Cessation and or limitation of contact between a parent and child will likely solidify any alienation and or resist- refuse dynamic, could disrupt with younger children's development of attachment to a parent and potential new step siblings. Exposure of the children to one parent and potentially that parent's extended family's persistent negative attitudes and or alienating behavior towards the other parent with limited or no influence by the other parent can further psychologically and emotionally damage the parent child relationship. Conversely, unimpeded parenting time with children during the course of a lengthy evaluation period could exacerbate harm to the children.

On the other hand, without access to the information provided by a forensic evaluation, a court may not be able to determine what parental arrangement is in a child's best interest. The suggestion that a meaningful assessment of the family can be achieved in as short a period of time as 30 days as has been proposed is unrealistic.

b) Consequences of A Poor Report:

While the value of the forensic evaluation is a well-established part of custody litigation, intended to provide the court with an unbiased professional opinion, weaknesses have been recognized in the evaluation process, and it has been noted by both legal and mental health professionals, that many such evaluations are based on **“empirically unanchored, intuitive, subjective opinions”** rather than scientific conclusions. Timothy M Tippins, Custody Evaluations- Part X: ‘Daubert’ and its Progeny Parsed, *N.Y.L. J.*, Jan 7,2005, 3(col.1). There is a significant need to ensure that a court receives scientifically valid mental health information, and the court must have the ability to evaluate the validity of the expert's opinion. *Id.* Cross examination of the expert and rebuttal testimony that is based on a full critique of the evaluation and a careful analysis of the facts, which form the basis for his or her conclusions aids the court in evaluating the scientific validity of any evaluator's conclusions.

Forensic reports are the work product of a human being and therefore are “subject to all human frailties.” *See, K.T. v. C.S.*, N.Y.L.J., July 6, 2000, at Pg. 3, col. 1 (2nd Dep’t). It is possible that a forensic evaluator could unfairly skew a report based on a dislike for one of the parties. This dislike could occur for a myriad of reasons stemming from a lack of candor and or honesty during the forensic process by a party or even a predisposed bias on the part of the evaluator. In addition, an evaluator’s lack of specific kinds of training, experience and knowledge (i.e. domestic violence, trauma informed therapy) could lead to assessments and conclusions harmful to children and families. *See, Ira Daniel Turkat, Harmful Effects of Child Custody Evaluations on Children, Court Review*, Vol. 52, Ct. Rev. 160-167 (2016).

Given the importance of custody determinations, evaluations must be conducted with proper regard for scientific methods, extant behavioral science research, ethical standards and professional practice guidelines. *See, Mary Johanna McCurley et al., Protecting Children from Incompetent Forensic Evaluations and Expert Testimony*, 19 *J. Am. Acad. Matrim. Law.* 277 (2005).

c) Costs of reports

Based on the time that is required to produce a quality forensic report, the costs of the forensic process, even when capped by court order, have become prohibitive for working middle class and low income earning parties. *See, Hon. Sondra Miller, Commission Report to the Chief Judge of the State of New York*, February 2006, p. 54-55. While public funds exist for forensic evaluations for parties with limited means pursuant to Judiciary Law section 35 for litigants in Supreme Court and pursuant to County Law section 722c for litigants in Family Court and IDV Court, payment by the state to evaluators is still lower than that for private pay evaluators, especially in the First and Second Departments, despite the increase in guideline advisory rates effective January 1, 2018 to \$250 for a psychiatrist or physician and corresponding increases for psychologists, social workers, and other non-lawyer professionals pursuant to Administrative Order 446/17. We understand that some counties upstate will not pay for forensic evaluators out of their limited budgetary resources.

d) Language and Cultural Barriers, Limiting Ability of Mental Health Professional from Accessing Litigants

Ideally, evaluations should be conducted by a mental health provider fluent in the language of the parties, but this is often not possible and an interpreter is required. If an interpreter is not truly competent in the language, he or she may omit important information and editorialize. These types of omissions are particularly concerning in the context of patients with psychosis because leaving out evidence of a disordered thought process may affect diagnosis. *See, Wagoner RC. The Use of an Interpreter During a Forensic Interview: Challenges and Considerations, Psychiatric Serv. (2017).*

Language proficiency is not the only factor that can determine the quality of interpretation services. The “cultural competence” of an interpreter is an important aspect of the evaluation process, given that the forensic evaluator should consider the traditions, values, and behavioral norms of the evaluatee. *Id.* The interpreter’s ability to understand not only the evaluatee’s statements but also the culturally unique meanings attached to those statements can be invaluable in a forensic assessment. The issue of cultural competence is not unique to foreign-born individuals, given that ethnocultural minority groups and racialized groups may face distinctive stressors associated with social status. Thus cultural considerations are important in a broad array of interview situations. *See, Hon. Sondra Miller, Commission Report to the Chief Judge of the State of New York, February 2006, p. 58-61.*

2. Positive Collateral Consequences of Forensic Evaluations

a) Reports Assist in Settling Cases

A quality forensic report can help the parties, their attorneys and the court understand why a particular custody case is highly litigious. With better understanding of their behaviors, the parties may be able to reach a settlement. The report may also inform the parties with respect to behaviors they each need to modify to enable them to better parent their children. *See, Journal of the American Academy of Matrimonial Lawyers Vol. 19 (2005).*

While the financial cost required to conduct a forensic evaluation may be high, the information provided by mental health professionals may reduce the overall cost of the litigation

if the report leads to a settlement. The evaluation may also help to promote settlement by bringing to light facts about the family dynamics.

Utilization of a neutral, independent court appointed forensic evaluator causes less stress than reliance on each party employing his or her own mental health expert if a case cannot settle. If each party retains an aligned mental health professional, the trial will result in a ‘Battle of the Experts.’ The result would be particularly jarring in child custody litigation. Reliance on a court-appointed, neutral forensic evaluator enables the trial to retain the adversarial nature of the process while at the same time minimizing the abuses. *Matter of Kenneth C. v. Delonta R.*, 814 N.Y.S.2d 562 (2 Dept. 2006).

b) Evaluation Helps Court’s Access Family Dynamics Affected by Mental Health Issues

The court may not be able to discover potential mental illness, addiction, domestic abuse or negative behavior by a parent without the aid of a professional, a forensic evaluation, necessary in deciding the best parental arrangement for a child in a custody litigation. *See*, Keith I. Rieger, The Need for Mental Health Professionals in Custody/Access Litigation, *NYSBA Family Law Review*, Vol. 52 No. 2 (2020).









Conclusion

It is our hope that this White Paper acts as a catalyst for discussion of the varying views articulated over the past few years. We are sure there will be other views and issues as well. As a community we recognize the diverse, often different approaches and desires. With a healthy respectful discourse there will always be differences. The one constant we can all agree on is the well-being of children and families is the primary goal of the entire legal and forensic community.²⁵

²⁵ We gratefully acknowledge information provided for this report by Hon. Mary Slisz, Supervising Matrimonial Judge Erie County Supreme Court, Alton L Abramowitz, Esq., Sharon Sayers, Esq. and Eric Tepper, Esq. of our Committee; as well as by Hon. Richard Dollinger, Acting Supreme Court Justice, Monroe County; Lisa Courtney, Statewide ADR Coordinator; Natasha Pasternack, Family Counseling Case Analyst, 2d Judicial District; Linda Kostin, AFC Director, 4th Department; Nancy Matles, 2d Department AFC Program; Bridget O’Connell, Erie County Mediation Program; Betsy Ruslander, AFC Director, 3rd Department; Lee Rosenberg, Esq (of the NYSBA Family Law Section), and Cynthia Snodgrass, Court Attorney Referee, Ontario County Supreme Court.

Exhibit A

Supreme Court of the State of New York
Mental Health Professionals
Appellate Division Second Judicial Department

-  General Information
  Rules of Procedure
  E-Filing
  Ancillary Programs
  Calendars
 Decisions
 About the Court
  UCS Website

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Hon. John Kelly-Suffolk County Family Court

An Historical/Cultural Perspective of Custody Litigation

Hon. Sara Schechter-Retired Family Court Judge, New York County

Cultural Diversity Including Gender and Disabilities

Dr. Richard G. Dudley, Jr.,-Psychiatrist, Private Practice

Family Offense/Domestic Violence Legal Aspects & Psychological Dynamics

Hon. Patricia Henry-Kings County Supreme Court

Dawn M. Hughes, Ph.D., ABPP-Clinical and Forensic Psychologist

(course material in pdf format)

Part II:

(Video I) and (Video II) (1 hour, Professional Practice; 2 hours, Skills)

Content of Forensic Reports

Rodrigo Pizzaro, M.D.-Psychiatrist, Private Practice

Bernice H. Schaul, Ph.D.-Psychologist, Private Practice
 Trial and Courtroom Procedure
 Myrna Felder, Esq.-The Law Office of Myrna Felder
 Stephen Gassman, Esq.,-Gassman, Baiamonte, Betts & Tannebaum, P.C.
 Rodrigo Pizzaro, M.D.-Psychiatrist, Private Practice
 Hon. Jacqueline W. Silbermann (Retired)-Of Counsel, Blank Rome LLP
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- [How a Case is Decided](#)
- [Public Notice](#)
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- [Oral Argument Archives](#)

Rules of Practice

- [Appellate Division Rules of Practice \(effective 9/17/18\)](#)
- [Local Rules of Practice of the Second Department \(effective 9/17/18\)](#)

E-filing

- [Electronic Filing](#)
- [Electronic Filing Rules](#)

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- [Appellate Term](#)
- [Attorney for the Child](#)
- [Civil Appeals Management Program \(CAMP\)](#)
- [Grievance Committees](#)
- [Independent Judicial Election Qualification Commission](#)
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- [Mental Hygiene Legal Service](#)
- [Assigned Counsel Plan, 2nd, 11th and 13th Judicial Districts](#)
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Court Decisions

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About the Court

- [Justices of the Court](#)
- [Clerk of the Court](#)
- [History of the Court](#)
- [The Courthouse](#)

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Mental Health Professionals Panel
Appellate Division Second Judicial Department

-  General Information
-  Rules of Procedure
-  E-Filing
-  Ancillary Programs
-  Calendars
-  Decisions
-  About the Court
-  UCS Website

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**Assessment of Intimate Partner Violence: Using the New AFCC Guidelines for
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Part 1, Part 2

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Honorable Jane Pearl - New York County Family Court

Robin M. Deutsch, Ph.D., ABPP - William James College, Newton, MA

Leslie M. Drozd, Ph.D. - Newport Beach, CA

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Thursday, June 9, 2016

Empirically Anchored Custody Reports:

Giving Courts the Best We Have

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Jeffrey P. Wittmann, Ph.D. - The Center for Forensic Psychology, Albany, NY
Honorable Laura E. Drager - New York County Supreme Court
Honorable Jane Pearl - New York County Family Court
Seymour Moscovitz, Ph.D. - Psychologist
Rodrigo A. Pizarro, M.D. - Psychiatrist
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Judicial and Clinical Perspectives on Current Issues in Forensic Evaluations
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Hon. Sidney Gribetz - Judge, Bronx County Family Court
Richard Mayer, MD - Psychiatrist, Private Practice
Bernice H. Schaul, Ph.D. - Psychologist, Private Practice
Sherill R. Sigalow, Ph.D. - Psychologist, Private Practice
Marcia Werchol, MD - Director, Family Court Mental Health Services
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Howard M. Krieger, Ph.D. - Connecticut Resource Group, LLC, Psychological Services for Children, Adolescents & Adults
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Harriet R. Weinberger, Esq. - Director, Office of Attorneys for Children
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Hon. Paula J. Hepner - Supervising Judge, Kings County Family Court
Harriet R. Weinberger, Esq. - Director, Office of Attorneys for Children
Nancy Guss Matles, LMSW - Support Services Coordinator, Office of Attorneys for Children
Course material in PDF format

Calendars

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December 2020**

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Susan L. Bender, Esq.
Rose Ann C. Branda, Esq.
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Honorable Betty Weinberg Ellerin [Ret.], Hon. Chair
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Hemalee J. Patel, Esq.
Florence Richardson, Esq.
Yesenia Rivera, Esq.
Emily Ruben, Esq.
Sharon Kelly Sayers, Esq.
Honorable Jacqueline W. Silbermann [Ret.], Hon. Chair
Hon. Mary Slisz
Zenith T. Taylor, Esq.
Eric A. Tepper, Esq.
Bruce J. Wagner, Esq.
Harriet Weinberger, Esq.
Susan W. Kaufman, Esq., Counsel

Appendix I

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

M E M O R A N D U M

To: All Administrative Judges
From: Presiding Justice A. Gail Prudenti
Date: March 7, 2008
Re: Custody orders in matrimonial actions

The purpose of this memorandum is to bring to your attention a recurrent problem concerning certain orders that are being issued in matrimonial actions. It appears that a number of Justices in the matrimonial parts are conducting bifurcated trials to allow the issues of custody and/or visitation to be determined before those of equitable distribution and/or grounds for matrimonial relief. Courts are issuing *orders* that purport to finally determine the issues of custody and visitation. Making an order in these circumstances is not proper procedurally and such orders present appealability problems that I wish to bring to your attention.

Generally, an order decides a motion (CPLR 2219) and not the issues raised by the pleadings. When an action is tried by a court without a jury, its determination with respect to disputed issues of fact that are raised by the pleadings is to be made in a decision, not an order (*see*, CPLR 4213). An interlocutory or final judgment is then issued on the decision (*see*, CPLR 5011). As stated by CPLR 5011 “[a] judgment is the determination of the rights of the parties in an action or special proceeding and may be either interlocutory or final. A judgment shall refer to, and state the result of, the verdict or decision.”

Where the Supreme Court holds a trial on the issues of custody and/or visitation separately from the trial on the issues of equitable distribution and/or grounds for matrimonial relief, it should render a decision and not an order at the end of the trial. The entry of a custody and/or visitation “order” following a trial of those issues does not comply with the CPLR. Even if such an order were proper, an appeal therefrom would require leave of either the Justice who made it or of the Appellate Division. CPLR 5701(a)(2) states: “[a]n appeal may be taken to the appellate division as of right in an action originating in the Supreme Court . . . from an order . . . where the motion it decided was made upon notice”. The custody and/or visitation orders that are being issued after a trial are not appealable as of right as they do not decide a motion made upon notice.

The appropriate course for the Supreme Court after a bifurcated trial limited to the issues of custody and/or visitation is to render a decision and to direct the parties to settle or submit an interlocutory judgment concerning those issues. Such an interlocutory judgment is appealable as of right (*see* CPLR 5011; 5012; 5701[a][1]).

Appendix J

(This section will be filled in by the Court)
At IAS Term Part ____ of the Supreme Court
of the State of New York, held in and for the
County of _____ at the Courthouse
located at _____, New York
on the ____ day of _____, 20__.

PRESENT: HON. _____
Justice of the Supreme Court

-----X

**UNREPRESENTED LITIGANT
ORDER TO SHOW CAUSE
FOR COUNSEL FEES
IN MATRIMONIAL ACTION
PURSUANT TO DRL§ 237**

[Fill in Name] Plaintiff,

Index No. _____

-against-

[Fill in Name] Defendant.

-----X

Upon reading and filing the affidavit of _____,
[Insert your name here]

sworn to on _____, 20__,
[Insert Date the Affidavit Was Sworn to Before a Notary Public]

and upon the following exhibits attached to the affidavit:

[Applicant Must attach financial documentation including Statement of Net Worth, W-2's and Tax Returns for herself/himself and spouse (if available) in Support of Application for Counsel Fees],

_____.

Let the **plaintiff** OR **defendant** or his/her attorney show cause at
(Check one for spouse)

(Leave the next two lines blank. The Court will fill in this information)

Part _____, of the Supreme Court, at the Courthouse, located at _____, New York,
on the _____ day of _____, 20____, at _____ a.m./ p.m. or as soon as
there after as the parties may be heard, why an order should not be made directing the payment of
counsel fees by the **plaintiff** OR **defendant** for the benefit of the movant
(Check one for spouse)

directly to an attorney retained by the movant, in the amount of

\$ _____, pursuant to DRL §237.
(Insert the amount of money you are requesting)

(Leave the next paragraph blank, the court will fill in the information)

Sufficient cause appearing therefore, let service of a copy of this order, together with the
papers upon which it was granted, upon **plaintiff** OR **defendant** and/or his/her
attorney _____ by _____
on or before the _____ day of _____, 20____ be deemed good and sufficient.

ENTER

HON.
Supreme Court Justice

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF _____**

-----X

[Fill in Name] Plaintiff,

vs.

**AFFIDAVIT IN SUPPORT OF
UNREPRESENTED LITIGANT
ORDER TO SHOW CAUSE
FOR COUNSEL FEES**

Index No. _____

[Fill in Name] Defendant.

-----X

STATE OF NEW YORK

COUNTY OF _____ ss: [County where Notarized]

_____, being duly sworn, deposes and says:

[Insert your name here]

1. I am the **plaintiff** OR **defendant** in this action. I make this affidavit in support
(Check one for yourself)

of my order to show cause directing my spouse pay for counsel fees on my behalf in connection with
this matrimonial action. I am requesting that my spouse pay \$ _____.
(Insert amount you are requesting)

2. I married the the **plaintiff** OR **defendant** on _____
(Check one for spouse) (Date of Marriage)

in _____. We have _____ children of the marriage:
(Place of Marriage: City or Town & State) (Number of children)

(Please list names and ages of children)

3. The Court should grant my motion because: I require the assistance of an attorney to represent me in this case and I am financially unable to afford to pay for the services of an attorney to represent me in this matrimonial action. I believe that my spouse has sufficient money and means to pay the amount I am requesting for counsel fees.

4. I believe my spouse earns a gross yearly income (before taxes) of \$_____.
(Spouses yearly income)

My current yearly gross income before taxes is \$_____. I have attached copies of
(Your yearly income)
my prior year's w-2's, tax returns, Net Worth Statement and other financial proof I have for myself and my spouse (if available) to substantiate this claim.

5. I have not yet retained an attorney to represent me in connection with this action.

6. If the Court awards me counsel fees I plan to hire an attorney or law firm to represent me in connection with this matter.

7. *(If applicable)* I have consulted with one or more attorneys and I was quoted a fee of \$ _____ by the Attorney for the initial retainer fee.
(Insert amount of fee)

Check One:

- I have attached a copy of the proposed retainer agreement.
- I have not attached the retainer agreement because the lawyer only told me the amount and did not give me a written retainer agreement.

8. Applications for Prior Relief:

Check One:

- No prior application has been made for the relief sought herein.
- A prior application(s) has been made for the relief sought herein. [List all prior requests for the same relief made in this court or any other court and the results of those applications.]

WHEREFORE, I respectfully ask for an order directing the **plaintiff** OR **defendant**
(Check one for spouse)
to show cause why counsel fees in the amount of \$_____ should not be awarded on
my behalf to be paid directly to an attorney I retain in connection with the above matrimonial action.

X _____
[Sign Your Name Herein the Presence of a Notary Public]

[Print Your Name Here]

Subscribed and sworn to before me
this ____ day of _____ 20 ____.

[NOTARY PUBLIC]