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

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

January 2017

TABLE OF CONTENTS

I. Introduction and Executive Summary

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. On behalf of the Committee, the Chair of the Committee maintains liaisons with bar associations, legislators, and other groups active in the matrimonial field. 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.

Executive Summary

At her Investiture on February 8, 2016, Chief Judge Janet DiFiore challenged the court system to meet the goal of her Excellence Initiative, stating: "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] In an effort to meet this challenge, our Committee has been actively striving to achieve reforms in matrimonial law and practice. In the last several years, our Committee has proposed a number of major legislative and rule reforms which have met with approval by the Chief Administrative Judge and in turn have been 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 will increase excellence in matrimonial cases."[2]

Successful Legislative Reforms Adopted

The Committee was established in June, 2014 when it held its organizational meeting. It met monthly beginning in September, 2014 and prepared its 2015 Annual Report after only four meetings. It continued to meet monthly from January, 2015 through May, 2015, and after a summer hiatus, from September, 2015 through December, 2015. After submitting its 2016

[1] *See* Investiture Remarks of Chief Judge Janet DiFiore, February 8, 2016 available at http://www.nycourts.gov/whatsnew/pdf/CHDiFioreInvestiture.pdf

[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.

Annual Report, the Committee resumed monthly meetings from February, 2016 through June, 2016, and again from September, 2016 through November, 2016. [3]

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 Maintenance Guidelines Law, a compromise between different factions of the matrimonial community, assured the less affluent spouse a minimum amount of maintenance for a reasonable period of time without overly burdening those Maintenance Payors who are also paying household expenses or who are also Child Support Payors.[4] 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 DRL §237, since self-represented litigants were often 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.

The Maintenance Guidelines Law promoted greater judicial efficiency, another goal of the Excellence Initiative for "operational excellence." First, the law allows 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. 182). Second, new maintenance and child support calculators were developed by the Committee in coordination with the Department of Technology to minimize the time necessary for courts and litigants to make the new maintenance and child support calculations. Third, the Committee also prepared extensive modifications of the Uncontested Divorce Packets and new contested worksheets and forms so that the new laws could be implemented without delay on their effective dates (*see* Appendix A to this report describing the new Worksheets and Calculators). Finally, Committee members presented a number of presentations to educate the bench and bar about the new law in order to assure its smooth implementation (*see* Appendix A-1 to this report describing the Committee members' presentations).

At the same time, the Committee pursued reforms in other areas of matrimonial law in furtherance of the Chief Judge's Excellence Initiative. 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 Program, to strengthen enforcement by contempt in Supreme Court (L. 2016, C. 365). On September 30, 2016, the

[3] The January, 2016 meeting was cancelled in view of the time demands of preparing the revised forms and calculators to implement the new Maintenance Guidelines and child support legislation effective January 25, 2016. The November, 2016 meeting was cancelled as the Committee had already considered its proposals for 2017.
[4] The organizations represented in the Compromise 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.

Governor signed this measure into law. Our Committee views this legislation as another significant reform in matrimonial law.

The passage of this legislation will mean that Supreme Court will finally have relatively the same standard as Family Court regarding applications for contempt. Family Court Act §454[5] 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*).[6]

Prior to passage of this legislation the exhaustion of remedies requirement in Supreme Court often meant delay after delay for the families who need support for their immediate needs and worked to the detriment of the non-monied spouse, the custodial parent, and children while a divorce proceeding was ongoing. Exhaustion of remedies became a delaying tool which allowed the other spouse to frustrate and obstruct the laws of this State, including the child support and maintenance guideline laws, as applied by the courts. Counsel fee orders issued in a divorce proceeding pursuant to DRL §237(a) could wait years before a non-monied spouse could enforce them, thus rendering the clear words of the statute meaningless as follows: *"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 (emphasis supplied),*** *pendente lite, so as to enable adequate representation from the commencement of the proceeding."*

Not only were these delays detrimental to Payee spouses, but they were a burden on judicial resources, often necessitating numerous contempt proceedings where the Supreme Court had to make certain that the Payee spouse had exhausted other remedies such as giving of securities, enforcement of a money judgment or an income execution. When it was possible, Payee spouses would bring their enforcement actions in Family Court rather than in Supreme Court, thus increasing the Family Court's overburdened dockets.

In addition, Payee spouses often faced the additional expense of exhausting remedies at their own expense without counsel or had to pay for counsel to represent them during the exhaustion of remedies and contempt application process. In contrast, Payor spouses threatened with contempt for non-payment of support were entitled to assigned counsel pursuant to Judiciary Law 35(8) if they met the financial threshold. This created an additional hurdle for Payee spouses to overcome.

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[5] 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 …."

[6] *Powers v. Powers*, 86 N.Y.2d 63, 71, 653 N.E.2d 1154 (1995). In addition to holding that, unlike DRL §245 as then written, FCA §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 effort to pass legislation eliminating the exhaustion of remedies requirement from DRL §245 dates back to 1997-98,[7] and repeated efforts were made in succeeding years through 2009-10. The need for this proposal was highlighted by the Matrimonial Commission chaired by the now retired Appellate Division Justice Sondra Miller (who serves as Honorary Chair to this Committee) in its 2006 Report to the Chief Judge.[8]

In the spring of 2016, our Committee and Bar Association groups including the Women's Bar Association of the State of New York, the Family Law Section of the New York State Bar Association, and the New York Chapter of the American Academy of Matrimonial Lawyers, emphasized the importance of this legislation to protect families and children, and refuted unwarranted concerns that those legitimately unable to pay would be subject to immediate incarceration. The protections built into Section 756 of the Judiciary Law and Section 72 of the Civil Rights Laws for obligors faced with contempt, namely the right to notice of possible imprisonment, the cap on the length of maximum imprisonment, the right to purge, the right to prove inability to pay, the burden on the party seeking contempt to prove the elements of civil contempt under applicable case law,[9] and the right to assigned counsel for the indigent obligor,[10] all ensure that incarceration is the remedy of last resort and that the other remedies at the court's disposal will still be available and tried first. Further enforcing these protections under due process is the authority of the Supreme Court of the United States.[11]

Because of this important reform, non-monied spouses awarded child and spousal support will 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 will 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 DRL §245 which allowed monied spouses to obstruct or delay enforcement in Supreme Court is now eliminated. The legislation will also relieve Family Court overburdened caseloads by removing the incentive to bring enforcement actions in Family Court rather than Supreme Court. In

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[7] 1997-98 A.4413-B.

[8] Matrimonial Commission, Report to the Chief Judge of the State of New York [Feb.20116] available at http://www.nycourts.gov/reports/matrimonialcommissionreport.pdf at page 24.

[9] New York courts have generally imposed a heavy burden on imposition of civil contempt as a remedy. There must be "the existence of a lawful order expressing an unequivocal mandate of which the party had knowledge; the disobedience of such order; and that the rights and remedies of a party to the action were prejudiced by the violation of the order." *See*, Jeffry G. Gallet and Mareen M. Finn, Spouse and Child Support in NY §15:17; *See also McCormick v. Axelrod*, 59 N.Y.2d 574, 453 N.E.2d 508, amended, 60 N.Y.2d 652, 454 N.E.2d 1314 (1983).

[10] *See* Judiciary Law §35(8).

[11] As stated by the Supreme Court of the United State in *Turner v. Rogers*: "The record indicates that Turner received neither counsel nor the benefit of alternative procedures like those we have described. He did not receive clear notice that his ability to pay would constitute the critical question in his civil contempt proceeding. No one provided him with a form (or the equivalent) designed to elicit information about his financial circumstances. The court did not find that Turner was able to pay his arrearage, but instead left the relevant "finding" section of the contempt order blank. The court nonetheless found Turner in contempt and ordered him incarcerated. Under these circumstances Turner's incarceration violated the Due Process Clause*" Turner v. Rogers*, 564 U.S. 431, 449, 131 S. Ct. 2507, 2520, 180 L. Ed. 2d 452 (2011).

addition, hearings on contempt will be shorter and less time consuming, which will provide litigants access to relief in a more timely manner.

This legislation is a big step forward, but it is not a panacea. While delays in payment of support and other money obligations ordered during matrimonial proceedings will unfortunately continue even after passage of this legislation, just as they continue in support proceedings in Family Court, the Supreme Court will now have more resources at its disposal. The utilization of contempt and possible incarceration can be powerful tools.

We express thanks to Assemblywoman Helene Weinstein and Senator John Bonacic, respective chairs of the Judiciary Committees of the Assembly and Senate for sponsoring this legislation, to Assembly Codes Committee Chair Joseph Lentol for supporting it, to the members of the New York State Legislature for passing it, to the Bar Association groups named above who expressed their support for it, and to Governor Andrew Cuomo for signing it into law.

Successful Adoption of Proposals by the Chief Administrative Judge with the Approval of the Administrative Board

During 2016, the Chief Administrative Judge adopted a number of our proposals for form and rule revisions with the approval of the Administrative Board of the Courts. The form proposals 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. At the same time, our proposals regarding redaction of confidential information in matrimonial actions were designed to protect confidential information revealed in matrimonial actions, without imposing excessive and time consuming burdens on the courts to redact information (unless there is to be publication) or to bifurcate decisions and orders or judgments. All of these proposals further the goals of operational excellence. They also further decisional excellence by assurance that issues are dealt with in a timely manner with all the facts, and that parties' privacy is not breached.

Revised Net Worth Statement Form

In matrimonial actions, the Statement of Net Worth sets forth a party's personal and financial information in a clear, concise manner for disclosure to the Court and the other party. The form provides basic information about the family, their monthly expenses, and all assets and liabilities in their names. Although the form is required to be submitted at the Preliminary Conference, the Statement of Net Worth continues to be one of the most frequently referenced forms through all stages in a matrimonial litigation.

22 NYCRR §202.16(b) requires a Net Worth Statement to be exchanged between the parties and filed with the court pursuant to section 236 of the Domestic Relations Law. The form of the Net Worth Statement is to be substantially in compliance with "the form contained in Chapter III, Subchapter A of Subtitle D (Forms)." The original form of the Statement of Net

Worth was promulgated in 1980 when the Equitable Distribution Statute was first enacted.[12] The form was later revised in the 1990s but no further revision has been made since that time. As a result, the nature of parties' expenses and other financial information has changed, while the form has become less and less reflective of modern financial reality.

In our 2016 Annual Report, we recommended to the Chief Administrative Judge a revision of the form of Net Worth Statement. In May, 2016, at the request of the Chief Administrative Judge, we submitted the proposal for consideration by the Administrative Board of the Courts. By Administrative Order dated June 22, 2016, the new form of Net Worth Statement was promulgated by Administrative Order of the Chief Administrative Judge with approval of the Administrative Board of the Courts, effective August 1, 2016.[13] A copy of the new form of Net Worth Statement is posted on the Court's Divorce Resources website at http://www.nycourts.gov/divorce/forms.shtml#Statewide.

The revisions were designed to streamline disclosure in order to process and manage cases more efficiently. The revised form was created with the following objectives in mind:

1. Providing for the form to be gender-neutral;
2. Providing for the form to be easier for unrepresented parties to read and understand, while reducing the need for attorneys to explain the meaning of its contents to clients and supervise their completion of it;
3. Simplifying the form to eliminate or replace unnecessary and/or confusing categories; and
4. Updating the categories to make the form more applicable to modern-day expenses.

A section by section analysis of the revised Net Worth Statement form effective August 1, 2016 is attached as Appendix C to this Report.

Revised Statewide Preliminary Conference Order Form

The Preliminary Conference Order was first recommended as a uniform form required by the Uniform Rules for Trial Courts by the Matrimonial Commission in their 2006 Report to the Chief Judge, for use in contested matrimonials. The Commission noted that the Preliminary Conference was already an important factor in moving cases through the courts, but suggested that a ***uniform*** PC Order should be adopted as a means of ensuring that certain important issues be raised for consideration at the Preliminary Conference.

Despite the 2011 adoption by the Administrative Board of an amendment to the matrimonial rules for contested actions by the addition of 22 NYCRR §202.16(f)(v)(2) which specifically referenced a Preliminary Conference Order substantially in accordance with the form

[12] A sworn Statement of Net Worth is required by The Domestic Relations Law §236(B)(4) "in all matrimonial actions and proceedings in which alimony, maintenance or support is in issue."

[13] *See* Memorandum from Ronald Younkins, Executive Director of the Office of Court Administration, dated June 30, 2016 attaching AO/147/16, which adopted revised forms of Statement of Net Worth and Preliminary Conference Order for contested matrimonial actions effective August 1, 2016. Said Memorandum and Administrative Order are attached as Appendix B to this report and are available at http://www.nycourts.gov/divorce/pdfs/AO147-16.pdf.

attached thereto (*see* A/O/471/11 attached as Appendix D to this report), Preliminary Conference Orders used throughout the state continued to vary greatly.

In order to encourage greater acceptance of the statewide form, in May, 2016, the Committee recommended for consideration by the Chief Administrative Judge a revised PC Order form. While the prior form was a significant step forward in streamlining contested litigation, we believe that the revised form is even clearer and more concise. It further streamlines and clarifies what must take place at the preliminary conference so that unresolved issues will be identified for trial in an orderly fashion under the Court's direction with the active involvement of both parties.

The revised form also contains some additional new provisions to ensure greater fairness in matrimonial actions by preventing a party from unilaterally discontinuing an action once grounds are resolved. In our 2016 Annual Report, we noted that CPLR rule 3217(a) can work unfairly in matrimonial actions where parties may use the rule to discontinue the action in order 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. We included in our 2016 Annual Report a recommendation for a rule adopting a uniform statewide form of supplemental preliminary conference order/stipulation with a waiver of the right to seek a discontinuance once grounds are resolved. We included a similar provision in the revised Preliminary Conference Order so that it would not need to be a supplemental order. Instead of waiving the right to discontinue if pleadings are not filed in 60 days (which might force parties to file pleadings, thus preventing settlements), our Preliminary Conference Order provides that once grounds are resolved, either party will proceed to obtain an uncontested divorce on the no fault ground, and the parties waive the right to seek a discontinuance pursuant to CPLR rule 3217(a) except on consent of the parties. Later in this report, we include a recommendation for an amendment to CPLR rule 3217 (a) applicable only to matrimonial actions. If enacted such an amendment would have the force of a statutory mandate rather than merely a provision in a form which may not be uniformly used.

New provisions have also been added to the revised form to make sure the parties have notice of the maintenance guidelines obligation under the new Maintenance Guidelines Law (L. 2015, c. 269),[14] as well as notice of the automatic orders so that violation of the automatic orders restraints cannot be viewed as unintentional. We believe these changes will result in a fairer and more efficient litigation process and reduce the likelihood of delays caused by late identification of issues for trial. This form also contains check boxes at the end to allow an Addendum to be attached which can be used by the different Judicial Districts to incorporate their own special provisions while still adhering to the uniform form, thus encouraging use of the uniform form while accommodating local practices and procedures and allowing for judicial discretion.

[14] For Uncontested Divorce Cases, there is a new Notice of Guideline Maintenance required to be served with the summons which will ensure that unrepresented parties receive notice of the guideline obligation. While in contested divorce actions, the court has various options to ensure that unrepresented parties have notice of the new statutory obligation, including statements on the record, agreement recitations, or affidavits acknowledging notice signed by the unrepresented litigant., the revision to the Preliminary Conference Order conveniently incorporates this notice acknowledgement in the form for contested divorces.

A section by section analysis of the new form is contained in Appendix E to this report.

In May, 2016, at the request of the Chief Administrative Judge, we submitted the proposal for a Revised Preliminary Conference Order for consideration by the Administrative Board of the Courts. By Administrative Order dated June 22, 2016, the new form of Preliminary Conference Order was promulgated by Administrative Order of the Chief Administrative Judge with approval by the Administrative Board of the Courts, effective August 1, 2016 and is posted on the Court's Divorce Resources website at
http://www.nycourts.gov/divorce/forms.shtml#Statewide

We are thankful to Chief Administrative Judge Marks and the Administrative Board of the Courts for continuing to promote the efficient and smooth operation of the courts by adopting our rule proposals.

Fillable versions of Net Worth Statement and PC Conference Order Developed in 2016

The newly revised versions of the Net Worth Statement and Preliminary Conference Order became effective August 1, 2016. The Committee decided it was important to provide fillable versions of both newly revised forms. The Department of Technology in conjunction with the Committee developed fillable versions of both forms which were posted on September 30, 2016 on the Divorce Resources website at
http://www.nycourts.gov/divorce/forms.shtml#Statewide

The Net Worth Statement fillable form has a two-page rider at the end on which to include information that cannot fit on the form. The monthly expenses are automatically totaled at the end of the Monthly Expenses section. However, the Gross Income, Assets and Liabilities Sections are not totaled because many of the entries are informational.

The Preliminary Conference Order fillable form instructs the user to indicate whether or not an Addendum is attached. This implements the provision in the new form allowing each jurisdiction to attach an Addendum with its own provisions allowing for local practices and judicial discretion.

It is important that the user be able to save data entered in the fillable forms. Otherwise the user might lose a considerable amount of work if he or she did not complete the form at a single sitting. The website alerts the user to the fact that he or she can use either the Adobe Acrobat or Foxit Reader to fill out the fillable forms. To save data entered in the fillable forms, the user must use the free Foxit Reader for which a free download is provided on the website, or use the paid Foxit software.

Redaction Rule Proposals

On March 1, 2016, new redaction rules for matrimonial actions recommended by our Committee went into effect. These proposals, were described in a packet circulated for public

comment by the Office of Court Administration on July 15, 2015).[15] The new rules addressed, among other things, questions raised in an article in the *New York Law Journal* [16] about the exemption of matrimonial actions from the new court rules which became effective January 1, 2015 regarding redaction of personal information (*see* 22 NYCRR §202.5(e)). While we agreed that greater protections for personal information revealed in matrimonial actions is warranted in this Internet age, we did not believe that a blanket rule such as section 202.5(e) should apply to all papers filed in matrimonial actions.[17] Thus we recommended to the Chief Administrative Judge a two pronged approach to better protect confidential information in matrimonial actions. First, we proposed an amendment to 22 NYCRR §202.5(e) to prevent the information or testimony revealed in a matrimonial action from being revealed in another civil action. Second, we recommended a limited rule on redaction of personal information from written decisions in contested matrimonial actions to be 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 attached as Appendix F to this report and is available at http://www.nycourts.gov/divorce/pdfs/AO192-15.pdf.

In May, 2016, we recommended to the Chief Administrative Judge revision of 22 NYCRR §202.26 (m). While the original rule applied to written decisions only, orders and judgments were expressly excluded from application of the rule because information about full names, social security numbers, birth dates and other information is required for support enforcement and other purposes in orders and judgments. As a result, Judges were unsure whether they must bifurcate decisions from orders in order to comply with the rule. A rule that would require bifurcation would lead to delays in issuing and effectuating court mandates. In addition, courts sometimes find it helpful to have complete records in their own files of their cases, including the full names and other identifying information.

At our suggestion, the rule 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, 2016[18] 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. This modified rule

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[15] *See* http://www.nycourts.gov/rules/comments/PDF/PC-Packet-Redaction-Rule-Mats.pdf

[16] *See* Peter E. Bronstein, "Sealing a Leaky Domestic Relations Law 235," New *York Law Journal*, December 2, 2014.

[17] Some of the information such as complete social security numbers, addresses, birthdates, employers' name, and names and social security numbers and birthdates of children is required by third party agencies of state government, which need the identifying information to enforce child support and maintenance laws in conformity with DRL §240-a and DRL §240-b. DRL §235 already protects as confidential most of the documents in the matrimonial action. Moreover, the trial judge may need to know other information potentially damaging to the family to make a reasoned decision on custody, visitation, support, maintenance, counsel fees, or equitable distribution, and to explain that decision as required.

[18] *See* Memorandum of Ronald Younkins, 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 attached as Appendix F-1 to this report and is available at http://www.nycourts.gov/divorce/pdfs/AO143-16.pdf.

still provides protection from public scrutiny for confidential information revealed in a matrimonial action beyond that provided by DRL §235, which does not include court decisions and orders as part of the court file it protects.[19] However, it is not necessary that the protection from public scrutiny come until the act of dissemination through publication. While there is no way to prevent a party in an action from revealing details about a matrimonial action to a tabloid irrespective of court rules even where the decisions themselves have been redacted, redaction upon publication should go far to protect the privacy of such information from identify theft and abuse in this age of social media. Moreover, the protections we previously recommended as an amendment to 22 NYCRR §202.5(e), remained in effect, thereby preventing information from matrimonial actions from being disclosed in other civil actions.

In June, 2016, the rule was also amended at our suggestion to allow either initials or the first name with the first initial. This would apply both in instances where the rule requires redaction of a party's initials and where the rule requires redaction of a minor's initials.[20] However, we were mindful that in certain cases, use of the first name with the first initial of the last name would disclose identity just as if the full name had been used. Accordingly, we added a proviso that nothing in the rule would prevent the court from granting a request to use only initials, or just "Anonymous," rather than the first name and first initial.

With these two changes, we believe the rule allows 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 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,[21]

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[19] According to Hon. Alan Scheinkman in the Practice Commentaries describing the limitations of the protections of DRL §235: "The papers which may not be revealed include pleadings, affidavits, findings of fact, conclusions of law, judgments, written separation agreements or memoranda of such agreements, or testimony (i.e., transcripts). The statute does not embrace documents received in evidence, which are treated only under subdivision 2. In addition, while the statute includes judgments, findings of fact and conclusions of law, it does not include court decisions and orders, such as orders made on motions or post-trial decisions. Indeed, the case reporters are replete with reported decisions with the parties' names stated. Official legal newspapers and even the general media report on decisions in matrimonial actions. While in some instances, decisions are publicly reported with fictitious names substituted for the true names of the parties, the statute does not completely provide for the privacy of all documents in a court matrimonial file." N.Y. Dom. Rel. Law §235 (McKinney's Consolidated Laws of New York Annotated).

[20] We are aware that subdivision "(iii)" as to minors' names may still allow for identification of a minor child of the marriage in those cases where the full names of the parties to the action are shown because they are not required to be redacted under the rule. For example; if Brenda Doe is the minor child of Jane and John Doe who are involved in a matrimonial action, including the Brenda's first name with the first initial "D" of her last name would easily identify the child's full name in instances where the parents' names are set forth in the caption. However, we decided not to require redaction of the full names of the parties in any case where there is a minor child of the marriage (the great majority of contested cases) because it would be too great a burden on the courts. If the case comes under the rule insofar as it involves allegations of domestic violence, neglect, abuse, juvenile delinquency or mental health issues, then we need to protect the child. If it does not, we just want to protect identity theft from occurring with minors.

[21] *See* Peter E. Bronstein, *supra* note 16.

while still including in orders and judgments such necessary information as is required by statute for child support enforcement and other purposes. We believe that the revised rule, together with the previously adopted amendment to 22 NYCRR §202.5(e), in coordination with the existing protections of DRL §235, now provides a flexible but reasonably effective package of protection of confidential information and prevention against identify theft for parties involved in matrimonial proceedings. 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.

New Legislative Proposal on Forensics in Custody Cases

This year we recommend as a priority a wholly new legislative proposal on forensics in custody cases which was proposed by the Chair of our Committee, Justice Sunshine, hoping to forge a compromise among the different factions of the Family Law and Matrimonial communities. The Committee has given its suggestions and the final proposal approved by the Committee is shown in this report. The proposal used the 2015-16 bill A.290 as a starting point,[22] but greatly increases the protections to prevent confidential information in the report from being disseminated indiscriminately. Knowing that treatment of self-represented litigants is the issue that is most in question, the proposal makes sure that self-represented litigants have access to the report, the notes, and everything in the evaluator's file to the same extent as attorneys and licensed experts hired by attorneys, with the only difference being that self-represented litigants, like represented litigants, may not have a copy because they are not officers of the court and would not be bound by the compunctions against unauthorized dissemination as attorneys.

One reason our Committee could not support A. 290 was that we believed that the court's power to issue a protective order when it thought necessary coupled with the remedy of contempt for a violation of such an order was not adequate to protect against indiscriminate dissemination of the most private and delicate information about the private lives of children and families. The risk of a child finding the report or the risk of an adult finding the report written about him/her as a child years later is simply too great, and could result in irreparable emotional harm. The court could not issue a protective order in every case, and when such an order was violated the contempt remedy might be useless since the damage would already have been done, and to enforce the remedy, an aggrieved party would have to incur substantial legal expenses in any event. Our proposal does not rely as heavily as A. 290 on the protective order or the contempt remedy as a deterrent, because we have built in additional protections preventing unauthorized dissemination by everyone involved, including attorneys, attorneys for children, experts, independent licensed forensic evaluators hired to assist attorneys or self-represented litigants, and represented and self-represented litigants. To the extent we rely on the contempt remedy, we

[22] *See* http://assembly.state.ny.us/leg/?bn=A00290&term=2015

have strengthened the remedy by retaining jurisdiction in the court for purposes of enforcing it, and have also provided for payment of the legal fees of the aggrieved party.

We have also inserted a clause into our forensics proposal designed to reduce the number of trial days in custody and visitation proceedings by incorporating a provision from 22 NYCRR §202.16(g)(2) which provides that written reports may be used to substitute for direct testimony at trial, that the reports shall be submitted by the expert under oath, and that the expert shall be present and available for cross-examination. Custody and visitation trials in matrimonial cases are already too lengthy. The efficiency of the court system and the needs of the litigants to have a resolution of these important issues requires this provision which was not included in A. 290. Also not covered in A. 290 was the issue whether the report could be read by the Judge in advance of being received in evidence. Our proposal deals with this issue by only allowing the Judge to read the report if agreed to by the parties and their counsel or upon application to the court for good cause shown. We also have a proviso allowing the Judge to read the report in advance of a trial or hearing subject to objection, or in advance of making a determination on accepting an agreement of the parties as to custody and visitation, subject to objection. Thus due process rights are protected while allowing the court to review what it must review in order to make a fair decision.

We believe our new proposal merits serious consideration because it strikes a fair compromise between protecting the due process rights of represented and self-represented litigants, while protecting the vulnerable against indiscriminate dissemination of the most private details of their lives. It establishes uniform standards on a statewide basis to determine access to forensic reports and files by all who need them during custody and visitation litigation. It also sets rules as to admissibility into evidence and reading of the report by the Judge which allow the court to have the information it needs but protects 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. At the same time, it prevents trials on custody and visitation from becoming excessively long as a result of questions whether the forensic report should be admitted into evidence. Thus it serves the dual goals of decisional and operational excellence for the court system, in furtherance of Chief Judge DiFiore's Excellence Initiative.

Re-Submission of Previously Endorsed Legislative Proposals

Our second legislative priority for 2017 is our previously endorsed legislative proposal for an omnibus special matrimonial venue statute which requires that venue be the residence of one of the parties 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). By providing a good cause exception to the requirement that venue in matrimonial actions shall be the residence of one of the parties, it allows courts to take into account the residence of the children where there are children, resources of various legal services organizations, or issues related to protecting the location of alleged domestic violence victims, and situations where the parties and children no longer reside in New York State. It avoids courts' having to change improper venue designations *sua sponte* because it supersedes CPLR §509. Rather than allow courts to transfer venue to the proper county, a time consuming process fraught with delays, this 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 even if the venue is not the county of residence.

Although some have questioned the ability of jurisdictions other than New York County to process uncontested divorces we believe the other counties of New York State could adapt. Moreover, it is not just New York County that is bearing the burden of excessive processing of uncontested divorces. For the smooth operation of the court system, all counties should bear this responsibility according to the cases filed in each county, and we have confidence they will be able to do so based on the fact that they handle their regular caseloads in a satisfactory manner. Moreover, divorce venue unrelated to residence of children and parties denies access to justice on the most important matters concerning children and families undergoing divorce. At the same time, it strains the limited judicial resources of the courts by encouraging venue transfers, defaults by parties unwilling to travel to distant jurisdictions, and post judgment relief.

We also propose two other new legislative measures for 2017. The first is a proposal to amend the domestic relations law to require marriage licenses in all cases. The second is a proposal to amend the civil practice law and rules to prevent parties from voluntarily discontinuing actions once a notice of appearance has been filed in the action. Both of these proposals promote the Chief Judge's Excellence Initiative by promoting judicial efficiency and access to justice. Courts will no longer be required to examine questions of the validity of marriages if the loopholes in the law requiring marriage licenses are eliminated. Similarly, judicial efficiency will be promoted if parties in matrimonial actions can no longer voluntarily discontinue actions after considerable time and resources have been expended by the parties and the court.

We also reiterate a number of other previously endorsed or modified legislative proposals from prior years. First our proposal to allow a limited appearance by counsel to apply for counsel fees on behalf of the non-monied spouse takes on new significance this year, since both the NYSBA House of Delegates[23] and the New York Courts [24] have endorsed the concept of limited scope representation. Since it relates to limited scope representation, our proposal is clearly an access to justice measure furthering the Chief Judge's Excellence Initiative. The second previously endorsed legislative proposal concerns the adjustment of the date of the income cap under the Maintenance Guidelines Law to accord with the date of adjustment of the combined income cap under the Child Support Standards Act. This measure 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 by the public as to which cap has been increased, and will avoid unnecessary Office of Court Administration printing expenses in revising court forms to reflect the cap increases twice rather than once, thus promoting the Excellence Initiative goal of operational efficiency.

[23] 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.

[24] *See* Joel Stashenko, "NY Courts Endorse 'Limited-Scope' Representation," *NYLJ*, 12/20/16, Pg.1, Col. 5.

New Rule Proposal Imposing a Page Limitation on Pendente Lite and Other Applications

In addition to the foregoing legislative measures, we propose a new rule proposal originally drafted by Hon. Jeffrey Sunshine, Chair of the Committee, imposing a page limitation on pendente lite and other applications in contested divorces. We believe this new rule will greatly improve the efficiency of the courts and result in quicker turnaround of applications. Attorneys often feel compelled to respond to voluminous motions with voluminous responses, if for no other reason than that they believe their clients will judge their performance by the size of the papers. This rule is designed to further Chief Judge DiFiore's Excellence Initiative by reducing the cost and time to have pendente lite and other applications resolved.

Re-Submission of Previously Endorsed Rule Proposals

We are also restating in this report certain previously endorsed rule proposals including our Divorce Venue Rule Proposal for Post Judgment Enforcement and Modification Applications and our Rule Proposal Relating to Statewide Orders to Expedite Changes in Venue, both designed to cure aspects of the problematic venue rules under the CPLR as they relate to matrimonial actions, thus allowing quicker and more effective resolutions of matrimonial disputes. We also restate our Custody Severance Rule Proposal designed to speed custody and visitation decisions. Both proposals further both decisional and operational excellence by promoting faster and fairer resolutions. We also restate our proposed Amendment to 22 NYCRR §202.16(k)(3) and Adoption of Form of Application for Counsel Fees by Unrepresented Litigants which will provide greater access to justice for self-represented litigants.

Committee Positon on Existing Rule Proposal

This report also includes our position on the Rule Proposal to amend Part 36 of the Rules of the Chief Judge for which public comment was requested by the Administrative Board of the Courts by November 15, 2016.

Past, Pending and Future Projects

Finally, we discuss a number of ongoing projects our Committee has been discussing, including Alternative Parenting Arrangements, Access Rights, and the Parent Child Security Act (2015-16 A. 4319 /S. 2765) in light of several 2016 decisions of significance, such as *Matter of Brooke S.B v. Elizabeth A.C.C.* (2016 NY Slip Op 05903) and *Matter of Giavonna F. P.-G. (Frank G.--Renee P.-F.*) (2016 NY Slip Op 05948) and two related cases. We also discuss these issues in light of the Report entitled "Law & Policy Implications of a Change in New York State's Ban on Surrogacy Contracts" dated April 15, 2016 provided to our Committee by Columbia Law students in a law school clinic taught by Professor Suzanne Goldberg who is Executive Vice President for University Life and the Director of the Center for Gender and Sexuality Law at Columbia University.

This Report also describes our efforts to examine the pilot project for E-Filing on Consent in Matrimonial Actions in Westchester County as a model for the State, and discusses a future Project to Reform and Streamline the Uncontested Divorce Packets. At the same time, we continue from last year our considerations of Joint Custody under the Child Support Standards

Act in New York, Renumbering and Reclassification of Certain Sections of the DRL for Easier Comprehension, and Mentoring of New or Newly Assigned Matrimonial Judges.

In 2017, the Chair of the Committee, Hon. Jeffrey S. Sunshine, will continue the extensive outreach to members of the matrimonial bench and bar on behalf of the Committee. A list of his speaking engagements and visits throughout the state during 2016 is included later in this report. During 2017, with the encouragement of Chief Administrative Judge Marks, Judge Sunshine will continue to travel around the state 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 concerning legislative proposals and the ongoing revision of matrimonial rules and forms from interested members of the bench, bar, academic community and public, and invites submission of comments, suggestions and inquiries to:

Matrimonial Practice Advisory and Rules Committee:

CHAIR:
Honorable Jeffrey S. Sunshine
Justice of the Supreme Court, Kings County and
Supervising Judge for Matrimonial Matters, Supreme Court, Kings County
360 Adams Street
Brooklyn, New York 11201

COUNSEL:
Susan Kaufman, Esq.
Counsel, Matrimonial Practice Advisory and Rules Committee
140 Grand Street, Suite 701
White Plains, New York 10601-4836

II. New Legislative Measures

1. Proposal on Forensics in Custody Cases [DRL §§70 and 240; FCA §§251 and 651 (new)]

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 (FCARC), the former Matrimonial Practice Advisory Committee, and the New York State Bar Association Committee on Children and the Law (NYSBA) 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. 8432). 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. As stated therein, we believe that there is a real danger that the dissemination to the public of the reports 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.

Last spring, Memoranda echoing these concerns in opposition to the bill were sent to legislators by the Family Law Section of the State Bar Association, Women's Bar Association of the State of New York, and the New York Chapter of the Academy of Matrimonial Lawyers. In addition, Hon. Sondra Miller, former Chairwoman of the Miller Commission[25] and an Honorary Chair of our Committee, sent her own letter of opposition to Senator Diane Savino, Sponsor of the Senate version of A. 290, S. 7089. Copies of such letters are attached as Appendix G to this report.

Mindful that there are differing views among the legal communities as to dissemination of forensic reports in custody cases to self-represented litigants, the Chair of the Matrimonial Practice Advisory and Rules Committee, Hon. Jeffrey Sunshine, has drafted a proposed bill and submitted it to the Committee for consideration. After discussion with the Committee, and incorporation of some additional suggestions, we have developed the proposal below, which we hope will 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, licensed independent forensic experts hired to assist the attorneys, and the attorney for

[25] *See* 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.

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 the bill introduced last year, access to the evaluator's file will 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. The proposal incorporates many of the provisions suggested by the various groups and individuals whose memos of opposition are contained in Appendix G to this report. Some of the key provisions in the proposal, which we present for consideration by the Chief Administrative Judge, are as follows:

Access to the Forensic Report and Files

The proposal differs from the bill submitted 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 licensed 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 would permit licensed 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. Attorneys are provided access to the file for inspection and photocopying without having to make a demand under CPLR rule 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, we enable them to represent themselves at trial, but guard against dissemination of materials in the file by photocopying. The proposal retains the language in the bill that access to the report and files in all cases is subject to the provisions of CPLR §3101 as to the court's issuance of a protective order.

The Remedy of Contempt

Our proposal retains the provision in the bill that willful failure to comply with a court order conditioning or limiting access to a forensic report shall be contempt of court. However, 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,[26] we have added provisions that the court shall retain jurisdiction for purposes of an application for contempt. We have also expanded 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 proposal also 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; but we recognize 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 bill introduced last year. Ultimately, it is the additional protections against dissemination in our proposal that provide the essential safeguards.

Admissibility of Forensic Reports into Evidence

A. 290 contained 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 have inserted a provision from 22 NYCRR §202.16(g)(2) which provides that written reports may be used to substitute for direct testimony at 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 without wasting time of the court ruling on motions about admissibility. It is designed to reduce delays in divorce proceedings. In addition to the right of cross-examination of the expert, we have included the request put forth by the Family Law Section of the New York State Bar to restrict the Judge's reading the report as discussed below,[27] with a proviso allowing the Judge to read the report at commencement of trial or hearing or before accepting an agreement of the parties, subject to objections made at any time. The right to object to portions of the report is in accordance with a suggestion made by Alan Scheinkman in West McKinney's Forms.[28]

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[26] *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).

[27] Our proposal permits the Judge to read the report on consent of the parties and their counsel or upon application to the court for good cause shown.

[28] 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).

Review of the Report in Advance of a Trial or Hearing

We have inserted a new 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. This provision was added to protect due process rights of persons mentioned in the report negatively. However, courts should not make decisions on child custody or visitation without reading a forensic report in existence which might contain information the court must take into account if it withstands objection (*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. Therefore, we have added a proviso that the court may read or review the report at commencement of a trial or hearing (so as not have 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. Thus we believe our proposal protects due process while at the same time allowing the court to have information it should have. If the forensic report is filled with unscientific and/or unsubstantiated or non-professionally reliable hearsay allegations,[29] the proposal permits objections to be made at any time, before or after the trial or hearing or the determination as to custody. If the objection is made after the Judge has reviewed the report, and if the court sustains the objection, the court will take into account the inadmissibility of the report and will provide for redaction of inadmissible portions, just as courts take into account inadmissibility of evidence they see every day in the courtroom as they must do under New York law (*see Johnson v. Lutz,* 253 N.Y. 124, (1930).

Self-Represented Litigants

Our Committee believes 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

29 *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)).

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 available to self-represented litigants, in addition to programs by many bar associations providing low cost legal representation.[30]

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 established in the First and Second Departments to review qualifications and report complaints as to forensic evaluators.[31] 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 accomplishes 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.

[30] *See* the CourtHelp website on the UCS Internet Site designed for self-represented litigants at http://www.nycourts.gov/courthelp/GoingToCourt/gettingHelp.shtml

[31] *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 690, 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

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, a probation service, a child protective service or any other person authorized by statute, all of whom shall be considered "court ordered evaluators" for purposes of this subdivision, appointed by the court to assist with the determination of child custody or visitation pursuant to this article, 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 (c) 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 licensed forensic evaluator retained to assist counsel or a self-represented litigant, provided that the independent licensed 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 statute 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 statute 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 of 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 statute 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 court shall not read or review the forensic report until it is received in evidence at trial or at a hearing, unless otherwise 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 upon application to the court for good cause shown; provided, however, that the court may read or review the forensic report at commencement of a trial or a hearing, subject to further objection made prior to or after the trial or hearing, and may read the report before accepting an agreement between the parties in its determination concerning child custody or visitation pursuant to this article, subject to further objection made prior to or after such determination; 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, a probation service, a child protective service or any other person authorized by statute, all of whom shall be considered "court ordered evaluators" for purposes of this subdivision, appointed by the court to assist with the determination of child custody or visitation pursuant to this subdivision, 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 paragraph two of this subdivision to a party or further disseminate the report or said file except as otherwise expressly permitted under this subdivision(c) 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 subparagraph two of this paragraph to be provided to any independent licensed forensic evaluator retained to assist counsel or a self-represented litigant,

provided that the independent licensed 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 statute 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 statute 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 of 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 statute 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 court shall not read or review the forensic report until it is received in evidence at trial or at a hearing, unless otherwise 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 upon application to the court for good cause shown; provided, however, that the court may read or review the forensic report at commencement of a trial or a hearing, subject to further objection made prior to or after the trial or hearing, and may read the report before accepting an agreement between the parties in its determination concerning child custody or visitation pursuant to this article, subject to further objection made prior to or after such determination; 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 subdivision (d) and a new subdivision (c) is added to read as follows:

(c) Court ordered forensic evaluations in child custody and visitation proceedings. 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, a probation service, a child protective service or any other person authorized by statute, all of whom shall be considered "court ordered evaluators" for purposes of this subdivision, appointed by the court to assist with the determination of child custody or visitation pursuant to article four or six of this act, 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 two of this subdivision to a party or further disseminate the report or said file, except as otherwise expressly permitted under this subdivision(c) 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 licensed forensic evaluator retained to assist counsel or a self-represented litigant, provided that the independent licensed 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 statute 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 statute 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 of 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 statute 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 court shall not read or review the forensic report until it is received in evidence at trial or at a hearing, unless otherwise 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 upon application to the court for good cause shown; provided, however, that the court may read or review the forensic report at commencement of a trial or a hearing, subject to further objection made prior to or after the trial or hearing, and may read the report before accepting an agreement between the parties in its determination concerning child custody or visitation pursuant to this article, subject to further objection made prior to or after such determination; 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 child custody and visitation proceedings. 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, a probation service, a child protective service or any other person authorized by statute, all of whom shall be considered "court ordered evaluators" for purposes of this subdivision, appointed by the court to assist with the determination of child custody or visitation pursuant to this article or article four of this act, 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 two of this subdivision to a party or further disseminate the report or said file except as otherwise expressly permitted under this subdivision(c) 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 licensed forensic evaluator retained to assist counsel or a self-represented litigant; provided that the independent licensed 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 statute 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 statute 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 of 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 statute 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 court shall not read or review the forensic report until it is received in evidence at trial or at a hearing, unless otherwise 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 upon application to the court for good cause shown; provided, however, that the court may read or review the forensic report at commencement of a trial or a hearing, subject to further objection made prior to or after the trial or hearing, and may read the report before accepting an agreement between the parties in its determination concerning child custody or visitation pursuant to this article, subject to further objection made prior to or after such determination; 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.

2. Proposal to Amend the Domestic Relations Law to Require Marriage Licenses in All Cases [DRL §§12 and 25 (new)]

New York law requires that parties desiring to marry must first obtain a marriage license (D.R.L §13) and the marriage must be solemnized by one of the statutory enumerated individuals, including members of the clergy and ministers (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 by reason 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.[32]

[32] 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 …."

Although unrelated to the issue of requiring a marriage license, we further recommend the revision of the 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. The litigations arise when one party to the alleged marriage 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.[33] In many of these

[33] 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

cases, such as *Ponorovskaya*,[34] *Farraj*, [35] and *Hasna*,[36] 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 wastes 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.[37] 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.

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:

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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)).

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

[35] *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)).

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

[37] The following is a list of 27 states which have 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.

§1. The second unlettered paragraph of section 12 of the domestic relations law is repealed.

§2. The first unlettered paragraph of section 12 of the domestic relations law is amended to read as follows:

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] his/her spouse. In every case, at least one witness beside the clergyman or magistrate must be present at the ceremony.

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

§4. This act shall take effect 180 days from the date hereof and shall apply prospectively only.

3. Proposal to Amend CPLR Rule 3217(a) Regarding Voluntary Discontinuances in Matrimonial Actions (new)

In the leading New York decision on discontinuances in matrimonial actions, the Court of Appeals reversed a Third Department decision overturning an Albany 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 rule 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.[38] 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,[39]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 recently adopted revised Preliminary Conference Order form discussed earlier in this report,[40] 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. There is no doubt that the CPLR has greater authority than a provision in a Preliminary Conference Order which may not be uniformly followed. Thus we propose the statutory amendment for consideration by the Chief Administrative Judge.

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[38] 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.

[39] 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.

[40] *See* note 13, *supra.*

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.

III. New Rule Proposal

1. Proposed Rule on Page Limitation for *Pendente Lite* and Other Applications [22 NYCRR §202.16-c (new)]

In furtherance of Chief Judge DiFiore's Excellence Initiative, Committee Chair Hon. Jeffrey Sunshine proposed a new rule imposing a page limitation on *pendente lite* motion practice in an effort to expedite matrimonial proceedings while a contested divorce is pending. This rule imposes page limitations on such 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 will eliminate the incentive for attorneys to have the longest motion papers as a means of impressing their clients.

The rule on page limitations is designed to promote the Chief Judge's Excellence Initiative by saving judicial time and resources. It will speed the time within which applications can be granted or denied, thereby making the divorce process proceed more quickly. The rule provides a preference for emergency applications for processing and signature, but provides that designating an application as an emergency without good cause shall be punishable by sanctions, thus making it more likely that true emergencies will be dealt with on an emergency basis. Where practicable, the rule requires that all *pendente lite* relief will be requested in one application so as 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 and affirmations, with a two-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.[41] 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 in conflict with or in addition to the rule. However, where local practice is silent, the rule will provide some basic ground rules to the extent that there is no conflict with the CPLR or other statute. The provisions of 22 NYCRR §202.16(k) still apply where applicable.

After discussion and suggestions from the Committee the following proposal was approved by the Committee, and was submitted for consideration by Chief Administrative Judge Marks.

[41] 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.

Proposal:

A new 22 NYCRR §202.16-c is added to read as follows:

§202.16-c. Submission of Written Applications in Contested Matrimonial Actions.

(1) Applicability. This section shall be applicable to all contested matrimonial actions and proceedings in Supreme Court authorized by subdivision (2) of Part B of section 236 of the Domestic Relations Law.

(2) Unless otherwise expressly provided by any provision of the CPLR or other statute, and in addition to the requirements of 22 NYCRR §202.16 (k) where applicable, the following rules and limitations are required for the submission of papers unless said requirements are waived by the judge for good cause shown:

(i) Applications that are deemed an emergency must comply with 22 NYCRR §202.7 and provide for notice, where applicable, in accordance with same. These emergency applications shall receive a preference by the clerk for processing and the court for signature. Designating an application as an emergency without good cause shall be punishable by the issuance of sanctions pursuant to Part 130 of the Rules of the Chief Administrative Judge.

(ii) Where practicable, all applications for *pendente lite* relief should be made in one order to show cause or motion or cross-motion.

(iii) All orders to show cause and motions shall be submitted on one-sided copy, or electronically where authorized, with one-inch margins on eight and one half by eleven (8.5 x 11) paper with all additional exhibits tabbed. They shall be in Times New Roman font 12 and double-spaced. They must be of sufficient quality ink to allow for the reading and proper scanning of the documents. Self-represented litigants may submit handwritten applications provided that the handwriting is legible and otherwise in conformity with these rules.

(iv) The supporting affidavit or affidavit in opposition shall not exceed fifteen (15) pages. Any expert affidavit required shall not exceed five (5) additional pages. Any attorney affirmation in opposition or memorandum of law shall contain only discussion and argument on issues of law. Any reply affidavits or affirmations to the extent permitted shall not exceed seven (7) pages. Sur-reply affidavits can only be submitted with prior court permission.

(v) Except for affidavits of net worth (pursuant to 22 NYCRR §202.16 (b)), retainer agreements (pursuant to Rule 1400.3 of the Joint Rules of the Appellate Division), maintenance guidelines worksheets and/ or child support worksheets, or counsel fee billing statements or affirmations or affidavits related to counsel fees (pursuant to Domestic Relations Law §237 and 22 NYCRR §202.16(k)), all exhibits annexed to any motion, order to show cause, opposition or reply may not be greater than two (2) inches thick without prior permissions of the court. All exhibits must contain exhibit tabs.

(3) Nothing contained herein shall prevent a judge or justice of the court or of a Judicial District within which the court sits from establishing local part rules to the contrary or in addition to these rules.

IV. Previously Endorsed Legislative Proposals

1. Statutory Proposal for Divorce Venue [CPLR Rule 514 (new)]

Continued from 2015 and 2016 are our efforts to address the problem of venue rules in matrimonial actions pursuant to the request of the New York County Matrimonial Judges. We believe this measure furthers the Chief Judge's Excellence Initiative by improving the efficient operation of the courts' disposition of uncontested divorce cases while at the same time furthering access to justice. Thus it promotes both "operational" and "decisional" excellence.

Plaintiffs regularly utilize the mechanism allowed by CPLR §509 to designate venue in the county of their choice (often New York County), even though none of the parties are residents of that county. The reason why CPLR §509 designations of venue are 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 such as New York County. 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], where Justice Matthew Cooper discussed the burden on New York County's judicial resources, especially for uncontested divorces.[42]

Besides pointing out the huge burden on resources of New York County and the unfairness to residents of New York County who must compete for limited judicial resources, he noted that CPLR §509 designations increase the likelihood that defendants who reside in foreign counties will not respond to a summons and will default in the action. Rather than travel to a distant county which may be expensive and time consuming, defendant is more likely to do nothing or mail back the defendant's affidavit consenting to the uncontested divorce. Justice Cooper suggests that one of the reasons plaintiffs in distant counties may choose to file in New York County is that they know their spouse will be likely to default if they must travel to Manhattan. As a result, divorce mills flourish, and the number of uncontested divorces processed in counties like New York County increases. When these defendants begin to

[42] Court statistics show that in 2011 there were 49,785 uncontested divorces filed statewide of which 14,352 were filed in New York County and 27,687 were filed in all of New York City. Thus, in 2011, approximately 29% of the statewide uncontested filings were filings in New York County and approximately 52% of New York City uncontested filings were in New York County. In 2012, there were 46,201 uncontested divorces filed statewide of which 13,519 were filed in New York County and 24,465 were filed in all of New York City. Thus, in 2012, approximately 29% of the statewide uncontested filings were filings in New York County and approximately 55% of New York City uncontested filings were in New York County. In 2013, there were 47,500 uncontested divorces filed statewide of which 14,479 were filed in New York County and 26,051were filed in all of New York City. Thus, in 2013, approximately 30% of the statewide uncontested filings were filings in New York County and approximately 56% of New York City uncontested filings were in New York County. In 2014, there were 46,974 uncontested divorces filed statewide of which 13,662 were filed in New York County and 25,990 were filed in all of New York City. Thus, in 2014 approximately 29% of the statewide uncontested filings were filings in New York County and approximately 53% of New York City uncontested filings were in New York County. In 2015, there were 47,358 uncontested divorces filed statewide of which 12,799 were filed in New York County and 26,295 were filed in all of New York City. Thus, in 2015 approximately 27% of the statewide uncontested filings were filings in New York County and approximately 49% of New York City uncontested filings were in New York County. These figures show that the burden on New York County has remained constant since 2011, but has decreased slightly in 2015. *See* Appendix H showing court statistics attached which have been updated through 2015.

understand the consequences of having defaulted in that important 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. "A good portion of the post judgment matrimonial motions heard in this county are those brought by out-of-county defendants seeking to vacate default judgments." (*Castaneda v Castaneda*, *supra*, at 511). Clearly, CPLR §509 designations of venue in counties not related to the residence of the parties or their children works at cross purposes to the goals of efficiency and access to justice.

During 2015, we learned that the problem is not limited to New York County. 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.[43] 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 filings, as do Nassau, Suffolk and Westchester.[44] The other boroughs of New York City, aside from Richmond, each have an even greater number.[45] New York County unquestionably still bears the greatest burden with its 13,662 uncontested divorce filings in 2014 and 12,799 uncontested divorce filings in 2015.[46] Nevertheless there can be no doubt that the need for divorce venue reform is a statewide issue, not limited to New York County.

Also contributing to the burden faced by courts in these overburdened counties is the increasing number of E-filed applications for matrimonial relief that have no nexus to the jurisdiction. As the use of E-filing increases in matrimonial actions throughout the state, this burden will increase, and for this reason corrective action should be taken sooner rather than later. Later in this Report we discuss our examination of E-filing in Westchester on consent as a model for the state.

The Committee is aware of concerns that CPLR §509 plaintiff designations of venue in uncontested divorces are necessary for the efficient processing of uncontested divorces by the courts. The Committee believes that efficient processing of uncontested divorces is possible throughout the State. Indeed, efficiency can best be achieved not by placing the entire burden on

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[43] These meetings were arranged by Hon. Sharon Townsend in Buffalo and by Hon. Richard Dollinger and Sharon Sayers, Esq. in Rochester. Both Justice Townsend and Ms. Sayers are members 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.

[44] 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 H). 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 H).

[45] 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 H). 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 H).

[46] *See* Appendix H showing court statistics for uncontested divorce filings in 2014 and 2015.

certain counties, but instead by requiring venue for divorce actions to be related to residency. Above all, fairness to litigants must take precedence over concerns about processing because a system that provides an incentive to parties to default is not providing access to justice. When important information as to the best interests of the children is not revealed to the court as a result, there may be irreparable harm to families and children.

A number of thoughtful proposals have been made in the last few years concerning ways to change the CPLR rules in actions 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 rule 511, only the defendant may demand a change in the designation. Courts do not have the power to change designations of venue in matrimonial 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, even though CPLR §503(a) requires venue to be the county of residence.[47] 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 divorces involving minor children are in need of venue 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.

The Matrimonial Practice Advisory and Rules Committee has 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). By providing a good cause exception to the requirement that venue in matrimonial actions shall be the residence of one of the parties, it allows courts to take into account the residence of the children where there are children, resources of various legal services organizations, issues related to protecting the location of alleged domestic violence victims, and situations where the parties and children no longer reside in New York State. It avoids courts' having to change improper venue designations *sua sponte* because it supersedes CPLR §509. Rather than allow courts to transfer venue to the proper county, a time consuming process fraught with delays, this 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 even if the venue is not the county of residence. Thus delays in transferring venue *sua sponte* will be avoided, although the defendant is still free to demand a change of venue pursuant to CPLR rule 511. 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

[47] "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.)).

CPLR rule for matrimonial venue, much the way as there is a separate rule for consumer credit in CPLR §513, the Committee's new proposal avoids the cumbersome drafting problems entailed in amending sections of the CPLR (such as CPLR §509 and rule 511) intended to apply to all types of actions. Our proposed CPLR §514 should have no impact on non-matrimonial actions.

The Committee is aware that certain attorneys will find the rule burdensome. The Committee intends that the good cause exception will address this issue.[48] The good cause exception is also intended to address other special situations such as the need to maintain confidentiality of a party or child's address because of domestic violence concerns, or situations where the parties and children no longer reside in New York State, to name but a few. Subdivision (d) of the new proposal expressly permits the court for good cause shown to "allow the trial to proceed before it, notwithstanding that venue would not lie pursuant to subdivision (b) of this section." Similarly, subdivision (b) of the new proposal contains a good cause exception to the requirement that venue shall be in the county where either party resides. This will prevent forum shopping by agreement to the detriment of the children whose cases will be heard in venues unfamiliar to the court.

As discussed later in this report, the Committee continues to recommend a rule proposal for a uniform form venue order requiring expedited transfer of files to the proper county. We also recommend a divorce venue rule proposal for post judgment enforcement and modification applications.[49]

These proposals will not affect the processing of uncontested divorces, since expedited transfer of files to the proper county can only improve the efficient processing of divorce actions, whether they be contested or uncontested. However, these measures, while helpful, do not address the major problem, namely that CPLR §509 designations unrelated to residence of children and parties 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.

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:

[48] The Committee acknowledges that a rule which requires venue in the county of residence may require lawyers upstate to travel long distances to file papers and may inconvenience *pro bono* and legal aid attorneys handling large caseloads who must travel to a different county to file papers. The Committee intends that the good cause exception in the proposal should include situations where it is not practical to travel to file papers.

Section 1. 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 section 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.

(b) Notwithstanding anything to the contrary in section 503 or elsewhere 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, except for good cause shown.

(c) Notwithstanding anything to the contrary in section 509 or elsewhere in this article, the place of trial designated by the plaintiff in an action specified in subdivision (a) of this rule shall be as specified in subdivision (b) of this rule.

(d) 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.

§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) (new)]

Last year we proposed a new 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 arrangements 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 §237(a).

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.[50] However, our Committee decided that a statutory amendment to the 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 CPLR §321. Said statute states that once a party has 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.[51]

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[50] 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."

[51] CPLR §321 reads as follows:
(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.

A 2002 Report on Unbundled Services by a State Bar Commission (the "NYSBA Report"),[52] at Footnote 2, suggests language for amendment of CPLR §321 to accommodate limited scope representation.[53] 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 a limited appearance by *pro bono* attorneys.[54]

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.[55] 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.[56]

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 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

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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."

[52] 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.

[53] 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."

[54] NYSBA Report, supra, at pp.5-6.

[55] NYS Unified Court System, Part 1200, Rules of Professional Conduct, April 1, 2009.

[56] *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.

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 of these requirements clearly spelled out.[57]

Our proposal is especially relevant this year because 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."[58]

On December 16, 2016, as we were preparing this Annual Report, 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."[59] The new Administrative Order requires attorneys to have completed a certified training course to be developed and administered by the Office of Court Administration. It also requires 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.

Although our proposal was drafted last year before the Administrative Order was issued, and was included in our 2016 Annual Report, it meets the requirements of the new 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 new 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 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.[60]

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[57] 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.

[58] 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.

[59] See Joel Stashenko, "NY Courts Endorse 'Limited-Scope' Representation," *NYLJ*, 12/20/16, Pg.1, Col. 5.

[60] 22NYCRR §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*

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 Judiciary Law section 35(8)[61] 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, implicitly, the Legislature was saying 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."[62]

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.

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:

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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

[61] *See* bill memo 2006 A. 10447 attached as Appendix I to this report.
[62] *Supra*, at note 54.

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 section 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.

3. Proposal for Amendment of Biennial Adjustment of "Income Cap" in Guidelines Law [FCA §412(2)(d), DRL §236(B)(5-a)(b)(5), and DRL §236(B)(6)(b)(4)]

The Maintenance Guidelines Law enacted as chapter 269 of the Laws of 2015 provided that the maintenance income cap would be set initially at $175,000 and would increase pursuant to an adjustment formula keyed to increases in the CPI on January 31, 2016 and every two years thereafter. January 31st was the date set for adjustment of the temporary maintenance income cap under the temporary maintenance law enacted in 2010 in effect prior to enactment of the Maintenance Guidelines Law.[63] It was also the date that the child support combined income cap pursuant to the Childs Support Standards Act would have been adjusted. However, effective January 31, 2016, 90 days after the Governor signed into law chapter 347 of the Laws of 2015, the date of adjustment of the Child Support Combined Income Cap was changed to March 1st rather than January 31st so as to conform with the date of adjustment of the Self Support Reserve pursuant to Social Services Law §111-i(2)(b).[64] The adjustment date of the maintenance income cap should be changed as well because it will be simpler and more efficient for the public and matrimonial bench and bar to understand if the adjustments in the maintenance and child support income caps occur at the same time. This will also save unnecessary printing costs of reprinting the Uncontested Divorce Packets on January 31st and then again on March 1st.

We propose to amend the Family Court Act §412(2)(d) and Domestic Relations Law §236B(5-a) (b)(5) and §236B(6)(b)(4) to fix the date of the biennial adjustment of the temporary, post-divorce and spousal maintenance "income caps" at March 1, 2018 rather than January 31, 2018 as currently provided. By making the date March 1st rather than January 31st, the adjustment of the maintenance income cap would coincide with the date of adjustment of the Child Support Combined Parental Income Cap, as well as the date of adjustment of the federal poverty income level and self-support reserve.

[63] L.2010, c. 182.

[64] The date of adjustment of the Child Support Combined Income Cap was changed to March 1st by chapter 347 of the Laws of 2015 so as to conform with the date of adjustment of the Self Support Reserve pursuant to Social Services Law §111-i(2)(b).

Proposal:

AN ACT to amend the family court act and the domestic relations law, in relation to the date of adjustment of the spousal maintenance cap

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

Section 1. Paragraph (d) of subdivision 2 of section 412 of the family court act, as amended by chapter 269 of the laws of 2015, is amended to read as follows:

2. (d) "income cap" shall mean up to and including one hundred [seventy-five] seventy-eight thousand dollars of the payor's annual income; provided, however, beginning [January thirty-first] March first, two thousand [sixteen] eighteen and every two years thereafter, the income cap amount shall increase by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI-U) as published by the United States department of labor bureau of labor statistics for the prior two years multiplied by the then income cap and then rounded to the nearest one thousand dollars. The office of court administration shall determine and publish the income cap.

§2. Subparagraph (5) of paragraph (b) of subdivision 5-a of part B of section 236 of the domestic relations law, as amended by chapter 269 of the laws of 2015, is amended to read as follows:

(5) "Income cap" shall mean up to and including one hundred [seventy-five] seventy-eight thousand dollars of the payor's annual income; provided, however, beginning [January thirty-first] March first, two thousand [sixteen] eighteen and every two years thereafter, the income cap amount shall increase by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI–U) as published by the United States department of labor bureau of labor statistics for the prior two years multiplied by the then

income cap and then rounded to the nearest one thousand dollars. The office of court administration shall determine and publish the income cap.

§3. Subparagraph (4) of paragraph (b) of subdivision 6 of part B of section 236 of the domestic relations law, as amended by chapter 269 of the laws of 2015, is amended to read as follows:

(4) "Income cap" shall mean up to and including one hundred [seventy-five] seventy-eight thousand dollars of the payor's annual income; provided, however, beginning [January thirty-first] March first, two thousand [sixteen] eighteen and every two years thereafter, the income cap amount shall increase by the sum of the average annual percentage changes in the consumer price index for all urban consumers (CPI–U) as published by the United States department of labor bureau of labor statistics for the prior two years multiplied by the then income cap and then rounded to the nearest one thousand dollars. The office of court administration shall determine and publish the income cap.

§4. This act shall take effect immediately.

V. Previously Endorsed Rule Proposals

1. Divorce Venue Rule Proposal for Post Judgment Enforcement and Modification Applications [22 NYCRR §202.50(b)(3) (new)]

As in 2015 and 2016, we have again submitted for consideration by the Chief Administrative Judge a proposal for a new court rule applicable to post judgment applications for modification or enforcement of judgments of divorce in Supreme Court. The rule proposal would add a new paragraph (3) to 22 NYCRR §202.50(b).[65] The rule is designed to cure aspects of the problematic venue rules under the CPLR 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.

At present, most post judgment applications seeking enforcement or modification of judgments of divorce are brought in the same county that 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 CPLR §509, notwithstanding the fact that neither party had any nexus to the jurisdiction at the time, other than it was a more convenient forum for the attorneys or, because of backlogs in one county or another county, became the venue of choice. This results in certain counties being forced to process a disproportionate volume of uncontested and contested divorces in comparison to other counties, which results eventually in post judgment litigation subsequently being heard in that same county.

We propose a court rule to lessen the burden on those counties and on litigants. Our rule proposal would provide a means for parties to correct the injustice resulting from an initial inappropriate CPLR §509 designation once post judgment litigation ensues by requiring the post judgment litigation in a more appropriate venue. It would also allow parties who have moved away to pursue post judgment litigation without having to travel back to the county where the judgment was entered. The proposal would apply to all divorce actions, contested or uncontested, with or without minor children.[66]

To address the special concerns when there are minor children of the marriage, our Committee recommends that the applications should be brought in the county where one of the

[65] 22 NYCRR §202.50(b) already delineates language requirements for proposed judgments in matrimonial actions. The first part of our rule proposal would require 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, our language 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.

[66] Admittedly, cases with minor children present the most compelling case for venue related to residence because of the need to appoint an Attorney for the Child and provide other appropriate services.

parties, or a child or the children reside, except for good cause,[67] leaving it up to the judge's discretion whether there is good cause to make an exception. It might also apply to ease the burden on attorneys or legal staff of certain poverty law programs with limited resources who must travel long distances to file papers, to protect confidentiality of addresses of a party or child in cases of domestic violence, or to address situations where parties and children have moved out of state. In such circumstances, the court would have discretion to accept venue in a county within New York State that is other than the county of residence of the parties or the children.

We recommend that the rule apply to post judgment applications for modification as well as enforcement. Previously, we recommended a rule applicable to enforcement *only* because we were concerned about violating the controlling venue rules in Article 5 of the CPLR, which pertain to "the trial of an action."[68] However, even if the "trial of an action" is read to apply to the divorce action and the post judgment action as separate actions, the retention of jurisdiction by Supreme Court to hear the post judgment application resolves our concerns about violating the CPLR venue rules for a separate action. Therefore, we now expand our proposal to cover post judgment modification as well.[69] Our request to include modification in addition to enforcement is predicated upon the substantial number of cases where enforcement applications result in motions for modification as well.

Ultimately, we hope that CPLR §509 will be modified by legislation so that the burden on certain counties of plaintiffs' inappropriate designation of venue in the initial divorce action will cease. In the context of matrimonial actions, CPLR §509 is unfair to residents of the counties who must compete for limited judicial resources, and it is unfair to parties who have to travel long distances at great expense to challenge venue or appear in the action, and are therefore likely to default or consent to the divorce (*see Castaneda v Castaneda*, 36 Misc 3d 504 [Sup Ct 2012]. *See* our omnibus statutory special matrimonial venue proposal for a new CPLR §514 set forth earlier in this report. Inasmuch as this proposal is applicable only to matrimonial actions and is separate from CPLR §509, it will have no impact on non-matrimonial actions.

Until such time as there is legislative action regarding CPLR §509, it is our hope to provide some relief to the courts in overburdened counties and to litigants by our rule proposal regarding post judgment enforcement and modification.

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[67] To specify that post judgment applications involving minor children always be in the county where the child or children reside might be too rigid in certain cases. Similarly, to specify that applications involving children always be in the county where one of the parties resides might result in forum shopping by the parents, without taking into account the child (ren)'s needs.

[68] CPLR §509 reads as follows: "Notwithstanding any provision of this article, 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."

[69] We cannot recommend that our rule apply to applications to vacate a judgment of divorce which we believe must be controlled by Article 5 of the CPLR Applications to set aside a judgment of divorce (*e.g.*, defendant never served, error in judgment, *etc.*) would still have to be heard in the county where judgment was entered.

Proposal:

A new paragraph (3) is added to 22 NYCRR §202.50(b) to read as follows (new):

(3) Additional Requirement with Respect to Uncontested and Contested Judgments of Divorce. In addition to satisfying the requirements of paragraphs (1) and (2) of this subdivision, every judgment of divorce, whether uncontested or contested, shall include language substantially in accordance with the following decretal paragraphs which shall supersede any inconsistent decretal paragraphs currently required for such forms:

ORDERED AND ADJUDGED that the Settlement Agreement entered into between the parties on the day of , ❑ *an original* **OR** ❑ *a transcript* of which is on file with this Court and incorporated herein by reference, shall survive and shall not be merged into this judgment,* and the parties are hereby directed to comply with all legally enforceable terms and conditions of said agreement as if such terms and conditions were set forth in their entirety herein; and it is further

*: In contested actions, this paragraph may read either [shall survive and shall not be merged into this judgment] or [shall not survive and shall be merged into this judgment].

ORDERED AND ADJUDGED, that the Supreme Court shall retain jurisdiction to hear any applications to enforce the provisions of said Settlement Agreement or to enforce or modify the provisions of this judgment, provided the court retains jurisdiction of the matter concurrently with the Family Court for the purpose of specifically enforcing, such of the provisions of that

(separation agreement)(stipulation agreement) as are capable of specific enforcement, to the extent permitted by law, and of making such further judgment with respect to maintenance, support, custody or visitation as it finds appropriate under the circumstances existing at the time application for that purpose is made to it, or both; and it is further

ORDERED AND ADJUDGED, that any applications brought in Supreme Court to enforce the provisions of said Settlement Agreement or to enforce or modify the provisions of this Judgment shall be brought in a County wherein one of the parties reside; provided that if there are minor children of the marriage, such applications shall be brought in a County wherein one of the parties or the child or children reside, except for good cause shown; and it is further

2. Rule Proposal Relating to Statewide Orders to Expedite Changes in Venue [22 NYCRR §202.16-b) (new)]

In addition to our omnibus statutory proposal on matrimonial venue and out post judgment enforcement and modification proposal on matrimonial venue, our third recommendation regarding matrimonial venue is the amendment of the matrimonial rules to add a new section 202.16-b requiring a statewide order to expedite and prioritize transfer of files in matrimonial venue. Compounding the issues discussed herein regarding improper designations of venue in counties where none of the parties reside is the fact that when courts do order changes in venue, the process of getting the case and files transferred to the Supreme Court in the newly designed county is fraught with delays. A number of reasons may contribute to these delays, including slow mail, incorrect service by attorneys on the county clerk, and short staffed clerk's offices due to budget problems. The order to be adopted by the new rule would require attorneys to serve the change of venue order on the county clerk of the transferor county rather than merely filing it with the transferor county. The attorney would have to fill in the correct room and window number so that the order will be properly received. Upon receipt of service of the order, the order requires the county clerk of the transferor county to transfer all the papers and the file to the county clerk of the county to which venue is transferred pursuant to CPLR rule 511(d) expeditiously. Upon receipt of the file, the county clerk of the latter county must issue a new index number without fee and transfer any pending documents to the Supreme Court for assignment and calendaring. The order also requires that it be entered forthwith. The order will clarify and compel what needs to happen to transfer venue efficiently. Keeping in mind the problems faced in *Mendon Ponds Neighborhood Ass'n. v. Dehm,* 98 N.Y.2d 745, 781 N.E.2d 883 (2002), the order will avoid mistakes which may result in venue transfer orders being held in the wrong office, as the order requires the attorney to serve a specific window or room number in the office of the county clerk.

This proposal will promote the Excellence Initiative by reducing delays in venue transfers, thus allowing parties quicker access to justice.

Proposal:

A new 22 NYCRR §202.16-b is added to read as follows:

§202.16-b. Order to Expedite Changes in Venue. (a) Applicability. This section shall be applicable to all matrimonial actions and proceedings in the Supreme Court authorized by subdivision (2) of Part B of section 236 of the Domestic Relations Law.

(b) Whenever a Judge orders venue to be transferred to another county in a matrimonial action, the order shall read substantially as follows: [*see* Appendix J to this report for the proposed form Order to Expedite Changes in Venue]

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

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. 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.[70]

This procedure is authorized under CPLR rule 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 being appealed, since all ancillary issues will have been resolved at the time of entry of the final judgment of divorce.

[70] 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)).

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.

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

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)), that unrepresented litigants[71] 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). The new rule amendment both mirrors the statutory amendment exempting unrepresented litigants from the detailed fee affidavit requirement, and also adopts 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.[72] 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 recently 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.

[71] 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.

[72] *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.

Proposal:

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. 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 K to this report to be promulgated as an Appendix to 22 NYCRR §202.16.

VI. Position on Existing Rule Proposal

1. Position on Proposed Amendments to Part 36 of the Rules of the Chief Judge

In a letter dated September 12, 2016, John McConnell, Counsel to the Office of Court Administration, requested comments on behalf of the Administrative Board of the Courts on Proposed Amendments to Part 36 of the Rules of the Chief Judge (22 NYCRR Part 36) by November 15, 2016. Justice Sunshine, Chair of the Committee, raised concerns on behalf of the Committee with the proposed amendments, namely, that there is language in the recommendations on page 12 that a case will not be closed until the court signs a final order approving the compensation of the attorney for the child and a UCS-875 approving compensation when required. This language saying that the case will not be closed might be interpreted as meaning that the judgment of divorce in a matrimonial action cannot be filed until the final order has been signed and the forms have been filed. The Committee agreed with these concerns. Attached to this report as Appendix L is a copy of the letter dated November 15, 2016 that Justice Sunshine on behalf of the Committee sent to John McConnell in response to his request for public comments on the proposed amendments.

VII. Past, Pending and Future Projects

1. Alternative Parenting Arrangements, Access Rights, and the Parent Child Security Act (2015-16 A. 4319 /S. 2765)

In 2011, New York State adopted the Marriage Equality Act (L. 2011, c. 95) which 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. In *Obergefell v Hodges*,[73] 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. In 2016, the New York Court of Appeals held 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).

In light of these changes in the law, our Committee has been considering 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 is reluctant to recommend a proposal establishing rights of same sex female couples without protecting rights of same sex male couples. However, we are 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 is needed. Based on the recommendation of our Ad Hoc Committee on Alternative Parenting Arrangements,[74] 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 a team of four clinic students to work on this as a project under supervision by members of our Committee[75] 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" dated April 15, 2016 (the Columbia Students Report"), and presented the report to our members. The Columbia Students Report described the key definitions of full and partial surrogacy, and revealed that surrogacy is an industry worth about six billion dollars per year. Their report indicates the following: Costs for surrogacy contracts in the United States vary from a few thousand dollars to $200,000.[76] Four states, including New York, ban surrogacy, while 14 states regulate it, including Florida and California. Thirty-two states have no legislation, but many of

[73] *Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed.2d 609 (Supreme Court 2015).
[74] Members of the Ad Hoc Committee on Alternative Parenting Arrangements are Hon. Jacqueline Silbermann, Hon. Laura Drager, Hon. Ellen Gesmer, Susan Bender, Esq., and Michael Mosberg, Esq.
[75] Hon. Ellen Gesmer and Susan Bender, Esq. have volunteered to supervise the students' work during the project which will run from January through April, 2016.
[76] This includes medical costs, legal costs, agency fees and surrogate fees.

these states have case law about surrogacy. In Rhode Island, the Chief Judge presides over every surrogacy case. Internationally, 45 countries prohibit surrogacy, including most of Europe. Eight states permit some form of surrogacy, including Israel which has special rules related, *inter alia*, to religious observances.

The Columbia Students Report also examined the Parent Child Security Act (2015-16 A. 4319 /S. 2765), in light of the students' research. This bill requires insurance for the surrogate, and provides for a Judgment of Parentage and counsel for the parties. The bill incorporates some, but not all, of the best practices in surrogacy regulation.

However, since the Governor's Task Force on Life and the Law has not made a recommendation for making surrogacy legal in New York, and since the recent Second Department decision in *Matter of Giavonna F. P.-G. (Frank G.--Renee P.-F.*) (2016 NY Slip Op 05948) and two related cases have reinforced the rule that surrogacy contracts are illegal in New York, the Committee has tabled the issue of surrogacy and the Parent Child Security Act until such time as there is momentum in favor of legalizing surrogacy in New York.

We are also waiting to see how the case law develops regarding access rights of non-biological parents and same sex parents after *Brooke S.B. and Estrellita A.*

2. Examination of E-Filing on Consent in Matrimonial Actions in Westchester County as a Model for the State

Currently, the court rules (22 NYCRR §202.5-bb) permit E-Filing in matrimonial actions on consent, and it has only been tried in certain courts such as Westchester. Several members of our Committee practice in Westchester and have observed it in operation. In addition, Honorable Linda Christopher, Supervising Judge for Matrimonial Matters in the 9th Judicial District, is a member of our Committee, and has reported to our Committee that she found it to be very successful in matrimonial actions in Westchester. Not only do the attorneys appreciate that they need not go to court to file papers, but the Judges are pleased to have more immediate information accessible on line.

Some members raised concerns about hacking which is unfortunately a risk inherent in almost everything we do online. However, we believe that E-filing in matrimonials will speed up the acceptance and rejection of papers, and on balance the benefits to be gained for the court system outweigh the risks. We will continue to study the operation of matrimonial E-Filing in courts besides Westchester, and make recommendations as to how the system may be improved.

3. Project to Reform and Streamline Uncontested Divorce Packets

Our Committee has discussed undertaking a new project to reform and streamline the uncontested divorce packets. The forms in the Packets apply to every type of divorce on any of the seven grounds, whether with or without children. This fact alone makes the packets voluminous. In addition, there are various provision mandated by the Legislature to be included in the packets under the Child Support Standards Act and the Maintenance Guidelines Law, to name just a few statutory mandates. For parties without children or who do not seek

maintenance, these provisions do not apply. The challenge is 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. Our Forms Subcommittee will be considering the parameters of the project, and we hope the Committee will be able to make a recommendation about this in the coming year.

4. Joint Custody Under Child Support Standards Act in New York

One commentator describes New York's position as more extreme than other jurisdictions in not permitting payments by the custodial parent to the non-custodial parent in shared custody cases, even when the custodial parent has far greater assets than the noncustodial parent who needs the support to be able to provide for the child during parenting time.[77] In a 2013 First Department decision, the Appellate Division, stated: "*In finding that the father could be considered the noncustodial parent, the motion court improperly focused on the parties' financial circumstances rather than their custodial status.*"[78] Accordingly, the Appellate Division reversed the trial court as to the child support award to the mother. The court cited the Court of Appeals decision in *Bast v. Rossoff*, 91 N.Y.2d 723, 675 N.Y.S.2d 19, 697 N.E.2d 1009 [1998] for the proposition that the clear language of the statute required no exceptions to the Child Support Standards Act formula requiring payment by the non-custodial parent to the custodial parent in shared custody situations, notwithstanding the circumstances of the case.

The dissent by Acosta, J. 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.*"[79]

We are aware that other states have many different approaches to this issue. We continue to study some of these alternative approaches before making a recommendation as to how to correct what may be too rigid an application of the statute.

5. Renumbering and Reclassification of Certain Sections of the DRL for Easier Comprehension

Certain sections of the Domestic Relations Law are so long that they are very difficult to understand, even for experienced matrimonial attorneys. The numbering of certain sections is

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[77] *See* Emma J. Cone-Roddy, *Payments to Not Parent? Noncustodial Parents As the Recipients of Child Support,* 81 U. Chi. L. Rev. 1749, 1750 (2014) (contrasting the New York approach in *Rubin v. Salla* with the California approach in *In re Marriage of Cryer*, 131 Cal Rptr 3d 424, 428 (Cal App 2011), and stating "These particular results represent extremes. More jurisdictions would allow Mara (Rubin) to recover than Sarah (Cryer).").

[78] *See Rubin v. Salla,* 107 A.D.3d 60, 71, 964 N.Y.S.2d 41 (2013)).

[79] *Rubin v. Salla*, 107 A.D.3d 60, 73-74, 964 N.Y.S.2d 41, 52-53 (2013).

extremely confusing, using reverse sequences of numbers which make sense to those skilled in the art of legislative drafting, but which leave the layman perplexed. For example, DRL §240 has a subdivision 1 which requires the court to verify the status of any child of the marriage as to custody and support, a subdivision 1(a) which authorizes the court to grant visitation to grandparents, a subdivision (a-1) requiring the court to review decisions and reports of the Central Registry in making custody decisions; and a subdivision (1-a) regarding admissibility of reports made to the Central Registry. One could easily confuse these provisions since they all use the number "1" and the letter "a" in some fashion. There is also a DRL §240(a-2) concerning Military Status, a DRL §240(b) regarding availability and requirements as to what the court should order as to health insurance for the children, a DRL §240(1-b) which includes the Child Support Standards Act, and a DRL §240(2) regarding child support enforcement.

Moreover, while DRL §240 contains provisions regarding custody and visitation, child support, and orders of protection, these topics are also covered elsewhere in the Domestic Relations Law. To name but a few examples of overlap, a writ of habeas corpus for custody may be sought pursuant to DRL §70; and while DRL §240 (1-b) covers the obligation to pay child support and expenses for child care, health insurance, and educational expenses, DRL §236(B) (8)(a) also authorizes the court to require that health insurance policies protect the spouse and or children of the marriage as long as maintenance or child support or a distributive award is due. Similarly, DRL §236(B) (9) contains provisions regarding enforcement and modification of orders or judgments in matrimonial actions, while DRL §240(2) addresses child support enforcement as well. Orders of protection are provided for in DRL §240(3) as well as DRL §252. The overlap between parts of the Domestic Relations Law adds to the difficulties in understanding.

Our Committee will continue to explore suggestions for the Legislature to consider to renumber and reclassify sections such as DRL §240 to make them easier to understand. With the number of unrepresented litigants increasing, it is important to make sure the laws applicable to matrimonial actions can be understood.

6. 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."[80]

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

[80] 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.

their peers. The New Judges Trainings at the Judicial Institute,[81] which includes an Introduction to Matrimonial Law for New and Newly Assigned Matrimonial Judges, helps introduce new Judges to the new subject matter. In 2016 there was a basic track at the Matrimonial Seminar held in March, 2016 for New and Newly Assigned Judges, who were able to attend the sessions for experienced Judges as well. Despite budget difficulties, we plan to explore ways to follow up the trainings at the Judicial Institute with one on one mentoring. This is only fair to the new Judges and the litigants who come before them.

[81] These trainings are planned by the Hon. Sharon Townsend, Vice Dean of the NYS Judicial Institute for Family and Matrimonial Law, who is also Chair of the Committee's Education Subcommittee, in coordination with the Hon. Jeffrey Sunshine, Chair of the Committee and Susan Kaufman, Esq., Counsel to the Committee, as well as members of the Education Subcommittee.

VIII. Committee Outreach

On behalf of the Committee, the Honorable Jeffrey S. Sunshine, Chair of the Committee, maintains contact with bar associations, legislators, and other groups active in the matrimonial field throughout the State. Through this outreach, the Chair of the Committee is able to provide valuable feedback and communication and recommendations to the Committee regarding issues of importance in the field of Matrimonial Law. For example, on a visit to Buffalo and Rochester in October, 2015, Justice Sunshine learned that the impact of CPLR section 509 designations is an upstate as well as downstate issue as described earlier in this report regarding our Divorce Venue proposals.

During the 2016 calendar, Hon. Jeffrey Sunshine, Chair of the Committee, had the following speaking engagements as a presenter or panelist:

Bay Ridge Lawyer's Association, November 30, 2016.

FamilyKind Symposium at the NYC Bar Association, October 27, 2016

Nassau County Bar Association and Maurice A. Deane School of Law - Hofstra University, October 19, 2016

Family Violence Task Force, Judicial Institute, September 21, 2016

Family Law Section of the New York State Bar Association Executive Committee Meeting, The Equinox Resort, Manchester, VT July 7, 2016

Joint Session of the Appellate Divisions, Appellate Division, Second Department, May 11, 2016

American Academy of Matrimonial Lawyers, New York Chapter, May 6, 2016

Nassau County Bar Association, March 19, 2016

Judicial Seminar, Judicial Institute, White Plains, NY, March 9-10 2016

Brooklyn Bar Association, Judgments of Divorce and Maintenance Guidelines, February 25, 2016

Richmond County Bar Association, February 3, 2016

New Judge's Training, Judicial Institute, White Plains, New York, January 6, 2016

IX. Subcommittees

BEST PRACTICES
Alton 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-Sepes
Hon. Jacqueline Silbermann
Zenith T. Taylor
Hon. Hope Zimmerman

EDUCATION
Hon. Sharon Townsend, Chair
Rose Ann C. Branda
Hon. Andrew Crecca
Kathleen Donelli
Hon. Betty Weinberg Ellerin
Donna England
Stephen J. Gassman
John J. Grimes
Elena Karabatos
Florence Richardson
Sharon Kelly Sayers
Bruce J. Wagner
Harriet Weinberger
Hon. Hope Zimmerman

FORMS
Hon. Linda Christopher
Kathleen Donelli
Hon. Cheryl A. Joseph
Elena Karabatos
Susan Kaufman, Reporter
Stephen P. McSweeney
Sharon Kelly Sayers
Zenith T. Taylor
Hon. Hope Zimmerman

LEGISLATION
Susan L. Bender, Reporter
Thomas R. Cassano
Hon. Andrew Crecca
Hon. Laura Drager
Steven J. Eisman (deceased)
Stephen J. Gassman
Hon. Ellen Gesmer
Hon. Jeffrey D. Lebowitz
Hon. Sondra Miller
Michael A. Mosberg
Emily Ruben
Eric A. Tepper
Harriet Weinberger

RULES
Rose Ann C. Branda
Susan L. Bender
John J. Grimes
Christopher S. Mattingly
Elena Karabatos
Hemalee J. Patel, Reporter
Sharon Kelly Sayers
Hon. Jacqueline Silbermann
Eric A. Tepper
Bruce J. Wagner
Hon. Hope Zimmerman

X. 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, 2017

Respectfully submitted,

Honorable Jeffrey S. Sunshine, Chair
Alton Abramowitz, Esq.
Susan L. Bender, Esq.
Rose Ann C. Branda, Esq.
Thomas R. Cassano, Esq.
Honorable Linda Christopher
Honorable Andrew Crecca
Kathleen Donelli, Esq.
Honorable Laura A. Drager
Honorable Betty Weinberg Ellerin [Ret.], Hon. Chair
Donna England, Esq.
Steven J. Eisman, Esq. (deceased)
Stephen J. Gassman, Esq.
Honorable Ellen Gesmer
John J. Grimes, Esq.
Honorable Cheryl A. Joseph
Elena Karabatos, Esq.
Honorable Jeffrey D. Lebowitz [Ret.]
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 Silbermann [Ret.], Hon. Chair
Zenith T. Taylor, Esq.
Eric A. Tepper, Esq.
Honorable Sharon S. Townsend
Bruce J. Wagner, Esq.
Harriet Weinberger, Esq.
Honorable Hope Zimmerman

Susan W. Kaufman, Esq. Counsel

XI. Appendices

A - Worksheets and Calculators to Implement Maintenance Guidelines Law
A-1 - Presentations about Maintenance Guidelines Law by Committee members
B - Memorandum of Ronald Younkins about Revised Matrimonial Forms dated 6/30/16
C - Section by Section Analysis of Revised Net Worth Statement form
D - Administrative Order 471/11 Adopting Statewide Preliminary Conference Order
E - Section by Section Analysis of Revised Preliminary Conference Order form
F - Administrative Order 192-15 regarding new Redaction Rules
F-1 - Memorandum of Ronald Younkins about Revised Redaction Rule dated 6/23/16
G - Bar Association Position Memos regarding A.290
H - OCA Court Statistics on Divorce Filings Full Year 2011, 2012, 2013 and 2014 and 2015
I - 2006 A. 10447 Bill Memo
J - Form of Proposed Statewide Order to Expedite Changes in Venue
K - Form of Proposed Application for Counsel Fees by Unrepresented Litigant
L - Letter by Justice Jeffrey Sunshine to John McConnell regarding Proposed Amendments to Part 36 of the Rules of the Chief Judge dated November 15, 2016.

Appendix A

New Worksheets and Calculators to Implement Maintenance Guidelines Law

On September 25, 2015, the Governor signed the new Maintenance Guidelines Legislation (L.2015, c. 269). The new law made changes to the existing formulas for temporary spousal maintenance [Domestic Relations Law §236B(5-a)], established guidelines for setting post-divorce (final) maintenance, [Domestic Relations Law §236B (6)] and applied both the temporary and final maintenance statutes to spousal support awards in Family Court [Family Court Act §412]. Once the law took effect, it was necessary for the Committee in conjunction with the Office of Court Administration, to implement the law in a timely manner in accordance with the time deadlines set by the Legislature.

By October 25, 2015, the effective date for the temporary maintenance guidelines, we posted a new temporary maintenance worksheet and temporary maintenance calculator developed by the Committee in collaboration with the Office's Department of Technology to replace the temporary maintenance guidelines worksheet and calculator in effect pursuant to D.R.L. § 236(B)(5-a) enacted in 2010. The prior versions were retained on the website to assist Judges and litigants to calculate temporary maintenance for divorces commenced prior to October 25, 2015.

On January 25, 2016, the effective date for the post-divorce maintenance guidelines, new and revised forms for use in Uncontested Divorce actions in Supreme Court were adopted by Administrative Order 0004/16 effective on said date. The new and revised forms, developed by the Committee, implemented the new Maintenance Guidelines Law (L. 2015, c. 269) as well as L. *2015 c. 387* (the new law as to treatment of maintenance in child support calculations). The new forms were posted on the Divorce Resources website on January 25, 2016 at http://www.nycourts.gov/divorce/forms.shtml, and included, a new Notice of Guideline Maintenance to ensure that unrepresented litigants had notice of the new statute, a new Annual Income Worksheet Form UD-8(1), a new Maintenance Guidelines Worksheet (Form UD-8(2)) and a new Child Support Worksheet Form UD-8(3). In addition, there were revisions to the Uncontested Divorce Instructions and revisions of ten existing Uncontested Divorce Forms, with new findings about Maintenance Award Computations in the Findings of Fact and Conclusions of Law (Form UD-10). The Affidavits of the Parties acknowledge the Notice of Guideline Maintenance.

On January 31, 2016, the maintenance guidelines law required an increase in the annual income cap of the maintenance payor for temporary and final (post-divorce) maintenance from $175,000 to $178,000 per year based on CPI increases. Revised forms for use in Uncontested Divorce actions in Supreme Court were adopted by Administrative Order 12/16 effective January 31, 2016. The revised forms were posted on the Divorce Resources website by said date.A version of these forms suitable for use in contested actions in Supreme Court (a Post-Divorce Maintenance and Child Support Worksheet) was posted on the Divorce Resources website on January 25, 2016, and was modified on January 31st and again on March 1st to reflect the required increases in the income caps described above.

On March 1, 2016, another set of revisions were adopted by Administrative Order 64/16 to reflect the required increase in the combined income cap under the Child Support Standards Act on March 1, 2016 to $143,000 per year based on CPI increases as required by Social

Services Law 111(i)(b). In addition, the revisions further clarified instructions regarding use of the Uncontested Divorce Packet forms and reflected the increases as of March 1, 2016 in the Self Support Reserve to $16,038 and in the Poverty Level Income for a single person to $11,880 (see https://childsupport.ny.gov/dcse/child_support_standards.html).

At the beginning of April, 2016, after considerable testing conducted by the Committee in coordination with the Department of Technology using different scenarios, the Post-Divorce Maintenance and Child Support Calculators were posted on the Divorce Resources Website on a new page entitled "Maintenance and Child Support Tools" at http://www.nycourts.gov/divorce/MaintenanceChildSupportTools.shtml. This new page is a comprehensive maintenance and child support resource, which includes the Temporary Maintenance Calculators and Worksheets, the Post-Divorce Maintenance Calculators and Worksheets for both Contested and Uncontested Divorces, and Instructions on how to use the Calculators.

The Instructions for the Post Divorce Maintenance and Child Support Calculators explain that there are two types of Post-Divorce Maintenance and Child Support Calculators: an Excel version for which software is required but on which work can be saved for future use, and an Online Calculator for use with a web browser such as Internet Explorer. The web version requires no software but work cannot be saved for future use.[1]

[1] The Instructions also make clear that the new Calculators are only for Divorces commenced on or after January 25, 2016 when the new Maintenance Guidelines and Child Support Laws took effect, and that they can only be used for computing maintenance and child support combined where the maintenance award is the guideline amount, or for computing guideline maintenance only. They were not designed for computing only child support where neither party seeks maintenance or where there is an award of maintenance different from the guideline amount of maintenance. It should also be noted that the Calculators do not compute Post-Judgment modification applications, or guideline maintenance on income above the $178,000 cap. Income above the cap must be decided by the court based on the 15 Factors for Post-Divorce Maintenance. See DRL 236(B)(6)(d).

Appendix A-1

Presentations about new Maintenance Guidelines Law by Members of Matrimonial Practice Advisory and Rules Committee in 2016

- October 30, 2015, Judicial Institute Lunch and Learn training session on the fundamentals of the new law; (Justice Jeffrey Sunshine, Chair of the Committee, moderated the session. Elena Karabatos, Esq. and Eric Tepper, Esq., both members of the Committee, were presenters).
- January 6, 2016, Session on Maintenance at the Judicial Institute's New Judges School 2016.; (Justice Jeffrey Sunshine, presented with Elena Karabatos, Esq.)
- January 25, 2016, Judicial Insitute Lunch and Learn broadcast about the new post-divorce forms and calculators; (Susan Kaufman, Esq. Counsel to the Committee, presented an overview of the new forms and calculators, while Hemalee Patel, Esq., Special Referee in Richmond County, and Susan Kaufman presented examples of calculations from actual cases. Abigail Mattaro, Esq., Principal Law Clerk to Committee Chair Jeffrey S. Sunshine, was scheduled to co-present with them, but an emergency prevented her from doing so).
- March 10, 2016, another session on Maintenance Guidelines was presented at the Matrimonial Seminar; (Justice Jeffrey Sunshine presented with Elena Karabatos, Esq. and Eric Tepper, Esq.)
- May 11, 2016, Justice Jeffrey Sunshine spoke about maintenance guidelines to Justices from the four Appellate Divisions at the Second Department
- A number of other members of the Committee, lectured on the maintenance guidelines legislation at various bar association meetings throughout the year, including Justice Andrew Crecca, Elena Karabatos, Esq. and Eric Tepper, Esq.

Appendix B

NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

RONALD P. YOUNKINS, ESQ.
EXECUTIVE DIRECTOR

MEMORANDUM

June 30, 2016

To: Hon. Fern A. Fisher
Hon. Michael V. Coccoma

From: Ronald Younkins RY

Re: Revised Forms for Matrimonial Actions

Attached please find a copy of AO/147/16, effective August 1, 2016, that promulgates a revised Preliminary Conference Stipulation/Order - Contested Matrimonial ("PC Order") and a revised Statement of Net Worth, pursuant to sections 202.16 (f)(2)(v) and 202.16(b) of the Uniform Rules for the Supreme and County Courts. These form revisions were recommended by the Unified Court System's Matrimonial Practice Advisory and Rules Committee (chaired by the Hon. Jeffrey S. Sunshine), and were approved by the Administrative Board of the Courts.

The revised PC Order is designed to streamline and clarify preliminary conferences in contested matrimonial actions, and to provide greater fairness to parties. New provisions prohibit unilateral discontinuance once grounds are resolved, ensure that parties have received important notices of guidelines maintenance and automatic orders required under the Domestic Relations Law, reduce the likelihood of delays caused by late identification of issues for trial, and – by providing for an Addendum to be used by different Judicial Districts to incorporate their own special provisions – encourage more widespread use of the uniform form.

The Statement of Net Worth, required by DRL § 236(B)(4) "in all matrimonial actions and proceedings in which alimony, maintenance or support is in issue," was initially promulgated in 1980 and last revised in the 1990s. The revised form is gender-neutral, designed for better understanding by unrepresented parties, and updated to reflect family finances in 2016.

The revised forms will be posted effective August 1, 2016 in lieu of the prior versions of said forms on the Divorce Resources Website at http://www.nycourts.gov/divorce/forms.shtml#Statewide. Questions about the revised forms may be directed to Susan Kaufman, Counsel to the Matrimonial Practice Advisory and Rules Committee (914-824-5541; skaufma1@nycourts.gov).

Please distribute this memorandum to judges, court attorney referees, and staff assigned to matrimonial matters. As always, thank you for your assistance.

cc. Administrative Judges
Hon. Jeffrey Sunshine
Barry Clarke, Esq.
John George, Esq.
Maria Logus, Esq.
Maria Barrington
District Executives
NYC Chief Clerks
County Clerks
Susan Kaufman, Esq.

25 BEAVER STREET, NEW YORK, NEW YORK 10004 • PHONE: 212-428-2120 • FAX: 212-428-2188 • RYOUNKIN@NYCOURTS.GOV

EXHIBIT A

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, I hereby promulgate for use in contested matrimonial matters in Supreme Court, effective August 1, 2016, the forms attached hereto as Exh. A ("Preliminary Conference Stipulation/Order - Contested Matrimonial") and Exh. B ("Statement of Net Worth"), pursuant to section 202.16(f)(2)(v) and 202.16(b), respectively, of the Uniform Rules for the Supreme and County Courts. Prior versions of these forms are hereby repealed.

Chief Administrative Judge of the Courts

Dated: June 22, 2016

AO/147/16

Appendix C

SECTION BY SECTION ANALYSIS OF THE CHANGES IN THE REVISED NET WORTH STATEMENT FORM EFFECTIVE AUGUST 1, 2016

SECTION I: FAMILY DATA

The Family Data section has been revised to remove terms such as "Husband" and "Wife" in order to make the form gender-neutral. Throughout the revised form, parties are referred to as "Plaintiff," "Defendant," or "yourself/your spouse." Information that may lead to confusion and is not relevant to the parties' financial net worth (*e.g.* "date separated") has also been removed.

Other categories have been explained more clearly and in greater detail, such as the distinction between "children" born of the subject marriage and "children" born from another relationship. The revised Family Data section includes information concerning all minor children of the deponent but the line pertaining to "dependents" is moved, more appropriately, to the Gross Income section (Section III).

The revised form also requires that dates of birth be provided for children of the subject marriage, rather than current ages. This enables Courts and counsel to rely on the information provided well after the date of the form's execution.

SECTION II: EXPENSES

First and foremost, the introductory paragraph of the Statement of Net Worth has been revised to make it clear to the litigant that, in addition to his or her Net Worth, this Statement also provides information pertaining to expenses. The instructions also provide for expenses to be computed on a monthly basis only. This will not only reduce confusion and provide clearer directions to litigants, but it will also provide uniformity and avoid situations in which one litigant prepares his or her expenses on a weekly basis while the other party lists them monthly, making the figures difficult to compare. In addition, the instructions have been clarified to require the disclosure of current expenses, as many litigants have expressed confusion as to whether they should report their pre-commencement or post-commencement expenses. The form states that, if their expenses have changed recently, those changes should also be noted. This will provide for more uniformity in Statements of Net Worth submitted by both parties in an action.

Due to the passage of time since the form's last revision, the "Expenses" section in the current version is extremely outdated. For example, in the "Utilities" section, the current form provides only for one "telephone" expense, which may be interpreted by a litigant as pertaining to cellular service, landline service, or both. Furthermore, "telephone" expenses are listed as a "utility" yet cable television service is listed under the "Recreational" category. The Committee has determined that this has led to confusion among litigants, as cable television service today is commonly purchased along with landline telephone service and Internet service (which is also unrepresented in the current form). As a result, the Committee has noted both duplication and omission of those expenses in matrimonial litigation. The form has also been updated to refer to satellite television service.

The revised form provides a separate line item for landline telephone and cellular telephone service in the utilities section. Separate lines are also provided in the utilities section for cable/satellite television service and for Internet service. Clarifying the expenses, which are overbroad in light of modern technology, and including them in the same section will make it easier for litigants to understand which line refers to which household expense.

Similarly, other expenses have been re-categorized in order to clarify the type of expense and put it in the more logical category (*e.g.* "school lunches" have been moved from the "Food" category to the "Education Costs" category to make it more clearly applicable as an expense for the children). The "Clothing" section has been revised to pertain only to the litigant preparing the form (removing the gender labels) and to the children, as many parties have expressed confusion over how to determine the other spouse's clothing expense. Other duplicative items have been consolidated, such as "Household Maintenance," which no longer requires separate lines for each type of repair as well as cleaning supplies (which may be duplicative of the "grocery" purchases). Miscellaneous obsolete items, such as tapes, CDs, and video rentals have also been removed.

The Expenses section has been revised to make the form more relevant to a typical modern household's expenses. Certain confusing items have been relabeled and/or placed in a more appropriate category and unnecessary and/or obsolete items have been removed altogether. The proposed revision to the Expenses section is far more self-explanatory to a layperson, unfamiliar with the form.

SECTION III: GROSS INCOME

The instructions pertaining to the Gross Income section have been modified to provide for clearer disclosure. Pursuant to the revised instructions, if the party's income has changed within the last year, he or she must provide an "explanation" of the change. This change provides for more substantive and relevant information than the old form, which requires that only the identity of the employer and wage paid be disclosed in the event of such a change. In addition, the current form's instructions seem to suggest that a party need only disclose the prior year's tax return or Form W-2 if there has been a change in his or her income. We have revised that instruction to clarify that a party's most recently filed income tax return must be attached, in all circumstances.

In addition to requiring the attachment of the party's most recently filed return, the revised form also requires that the party attach all Forms W-2 and 1099, as well as Schedules K-1 received in connection with the attached tax return. This would provide the other party and the Court with a better understanding of not only the extent of the deponent's income, but also the source(s) of that income.

The Gross Income section has been revised to simplify it by requiring less detail. The revised form makes it clear that the litigant is to provide his or her total annual income (and payroll deductions are no longer defined as "weekly" in order to avoid confusion), as it should be reported on his or her most recently filed tax return.

SECTION IV: ASSETS

The proposed revised form lists the assets in categories that are more understandable to a layperson. For example, we have added a category for "Retirement Assets," which includes both vested and contingent interests, to assist unrepresented litigants.

The order in which assets are listed has been changed to allow for parties with simple financial portfolios to avoid confusion and "skip" to the next section if they do not hold more "complex" assets, such as business interests, securities, tax shelters, etc., which have all been moved to the end of the "Assets" section.

In addition, a line has been added to all accounts to provide information of the balance not only as of the date the form is signed, but also as of the date of commencement. Disclosure of those values early on (and likely at a time when the applicable statements are still available for free download on the Internet) will aid the parties and the Court in determining the values of those assets that are subject to equitable distribution later on at trial.

SECTION V: LIABILITIES

The proposed changes will make it easier for litigants to understand which sections apply to their specific debts and liabilities. This will help avoid not only the litigants' confusion, but the Court's and counsel's as well when interpreting the forms submitted. For example, a section specifically intended to address "credit card debt" has been added to the Liabilities section. This change makes it easier for litigants to better categorize their debts, which they may not recognize as an "account payable". In addition, home equity lines of credit have been distinguished from regular mortgages. Other minor changes include clarification of labels and other terms used to describe certain items.

SECTION VI: ASSETS TRANSFERRED

(unchanged)

SECTION VII: LEGAL AND EXPERT FEES

Sections VII, VIII, and IX of the current form ("Support Requirements," "Counsel Fee Requirements," and "Accountant and Appraisal Fees Requirements," respectively) have been consolidated into one section, which provides only the amounts paid to attorneys and experts by that party. The reason for this change is that it is confusing to many litigants that the Statement of Net Worth appears to serve an application for *pendente lite* relief in the form of support and interim counsel and expert fees. In order to make it clear that the Statement of Net Worth does not constitute an application, the "requests" for those interim items should be removed. With regard to the support payments made and received, that information has been added to the "Expenses" and "Gross Income" sections and need not be presented again here. Accordingly, the revised version of the form simplifies, rather than duplicates, the information to be provided by each party. Moreover, we note that the information removed from the form in the proposed revision pertains largely to expert fees and appraisals, which is addressed in the Preliminary Conference form.

SIGNATURE SECTION

The revised Statement of Net Worth form makes it clear that the litigant is signing it "under oath, subject to the penalties of perjury." While this has always been true because the litigant's signature is required to be notarized, it has now been explicitly stated in the form for

litigants to read and understand the significance of notarizing their signature. Finally, the litigant is asked to indicate whether the Statement of Net Worth being filled out is his or her first, second, third, (*etc.*) such Statement. Given the length of litigation, this line will make it easier for counsel, parties and Judges to label and distinguish between older and more current Statements.

While the foregoing examples are but some of the changes contained in the proposed revision to the current form, the clarification and simplification of many of the terms used, as well as the removal and replacement of obsolete items, will make the form easier to understand for litigants, attorneys, and Courts alike. Where the language is clearer and is less subject to interpretation – and misinterpretation – the parties' finances will be portrayed more accurately and the Statement of Net Worth will hold even greater value to all of those involved.

Appendix D

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, and with the advice and consent of the Administrative Board of the Courts, I hereby amend, effective immediately, section 202.16(f)(2) of the Uniform Civil Rules for the Supreme and the County Courts, relating to the preliminary conference in matrimonial actions, to read as follows:

202.16(f) Preliminary Conference.

* * *

(2) (iv) the establishment of a timetable for the completion of all disclosure proceedings ..., unless otherwise shortened or extended by the court depending upon the circumstances of the case; ~~and~~

(v) **the completion of a preliminary conference order substantially in the form contained in Appendix "G " to these rules, with attachments; and**

(vi) any other matters which the court shall deem appropriate.

Chief Administrative Judge of the Courts

Dated: April 1, 2011

AO/ 471 /11

Appendix E

SECTION BY SECTION ANALYSIS OF THE CHANGES IN THE REVISED PRELIMINARY CONFERENCE ORDER FORM EFFECTIVE AUGUST 1, 2016

Section A. Background Information:

The most important background information is now stated first in this section, namely, the date the summons was filed, the date of the marriage, and the names and dates of birth of the children. Information as to attorneys and information as to filing of net worth statements and retainer agreements is placed second. Instead of referring to Orders of Protection and other Orders as "outstanding," they are referred to as "in effect," a term more easily understandable. The section concerning other orders has been consolidated with the section on premarital, marital or separation agreements asserted, thus saving almost an entire page, especially if there are no other Orders in effect to list.

While the existing form required that challenges to such agreements be made by a certain date, the revised form provides that if such agreements are not challenged by such date, the challenge is waived, unless for good cause shown. This new provision is important because it will prevent parties from bringing up new issues after extensive discovery has already proceeded, or on the eve of trial, thereby expediting the processing of cases.

Section B. Grounds for Divorce

This section has been revised to eliminate reference to the issue of fault having been resolved, recognizing that with the enactment of no-fault divorce, the issue of fault is often not relevant and it is no longer necessary to resort to the cruel and inhuman punishment ground. Accordingly, where grounds are resolved, the provision requiring the parties to proceed to seek an uncontested divorce on the ground of DRL§ 170(1), has been eliminated. A new provision is added to the revised form which provides that if the issue of grounds is resolved, either Plaintiff or Defendant will proceed on an uncontested basis pursuant to DRL§ 170(7), and the parties waive the right to serve a Notice of Discontinuance pursuant to CPLR§ 3217(a) except on consent of the parties. The waiver of the right to seek a discontinuance where grounds are resolved is extremely important in matrimonial actions where the no fault ground is used, since parties often do not file pleadings until late in the action waiting to settle, and then one of them decides to discontinue after judicial time has been spent and discovery has been completed. The revised form also retains the provision as to whether grounds are resolved, but adds information about whether a complaint, responsive pleading or counterclaim has been or will be served.

Section C. Custody

The existing form delineated custody issues into three parts: custody, parenting time, and decision making. The revised form reflects more current practices and delineates custody in two parts: parenting time and decision making. It provides an incentive to the parties to resolve

custody issues themselves more quickly because it requires the parties to submit an agreement on custody, including parenting time and decision making by a date certain, while the existing form required only the submission of a parenting plan by a date certain. The parties are asked to check off whether they are seeking an Attorney for the Child ("AFC") or Guardian Ad Litem or Forensic Evaluator appointment and to specify how the services of the AFC, Guardian Ad Litem or Forensic Evaluator will be paid, while in the existing form these decisions were delayed until a further court conference and the Order of Appointment**.**

D. Financial Issues

The revised form Order has added counsel fees to the list of financial issues to be resolved. The form now lists maintenance, child support, counsel fees and Equitable Distribution. The parties must indicate whether these issues are resolved or unresolved. Section E. allows for listing of other causes of action and ancillary relief that are unresolved.

F. Pendente Lite Relief

Instead of providing in the PC Order what the court orders or the parties stipulate as to pendente lite relief, the revised form requires the parties to attach either the court Order or the Stipulation. This simplifies the form and ensures that the actual Order or Stipulation has been completed and attached to the PC Order in final form, thus bypassing an additional step.

G. Discovery

The provisions regarding document production have been restated to require deadlines not only for the Notice of Discovery and Inspection, Service of Interrogatories, and Depositions by each party, but also Responses to such items. Duplicative language about non-compliance resulting in sanctions has been replaced by one final statement in bold at the end of the section. The 45 day deadline for the parties to exchange the documents listed has been deleted to allow the court to insert the number of days to conduct the exchange to expedite cases where appropriate and allow flexibility based upon the particular issues.

H. Valuation/Financial Experts

This section has been reorganized into three categories: Neutral Experts, Experts Retained by a party, and Additional Experts. The list of the assets to be valued is now incorporated into the first section on Neutral Experts, and the list of assets has been simplified to include the types of assets most commonly requiring valuation with a catch all category at the end. In addition the wording of the paragraph regarding Additional Experts has been clarified. A provision has been added permitting exchange of expert reports 30 days after receipt of the report of the neutral expert, even if that date is later than 60 days prior to trial.

Confidentiality/Non-Disclosure Agreements

The provisions in the current form regarding Confidentiality/Non-Disclosure Agreements have been eliminated as not essential to most PC Orders. If such an agreement is needed, the party can raise the issue.

J. Automatic Statutory Restraints (DRL§ 236[B](2)

A new provision requiring each party to acknowledge the automatic orders restraints imposed by statute and court rule has been added to the form, thus documenting that any non-compliance with the automatic orders restraints is not accidental should the court wish to impose sanctions.

L. Alternate Dispute Resolution/Mediation

Collaborative processes have been added to the types of alternate dispute resolution as to which the parties are made aware.

M. Notice of Guideline Maintenance

A new provision has been added requiring the parties to acknowledge receipt of notice of the guideline maintenance obligation pursuant to Ch. 269, L. 2015. This provision ensures that the requirement in the new maintenance guidelines statute that unrepresented parties are notified of the guideline obligation by the court is satisfied, should either of the parties in the action be unrepresented.

N. A provision requiring the parties to be prepared to discuss settlement at the compliance conference has been added as means of encouraging settlement. Also new is a provision stating that all discovery is expected to be completed by the compliance conference. The provisions requiring filing the Note of Issue and setting the trial date have been retained to encourage compliance with Standards and Goals.

Addendum Provision

A new provision has been added to the end of the form for the parties to check off whether an Addendum is attached. This provision is designed to encourage greater use of the uniform statewide form by allowing each jurisdiction to attach an Addendum with its own provisions allowing for local practices and judicial discretion**.**

In May, 2016, at the request of the Chief Administrative Judge, we submitted the proposal for a Revised Preliminary Conference Order for consideration by the Administrative Board of the Courts. By Administrative Order dated June 22, 2016, the new form of Preliminary Conference Order was adopted effective August 1, 2016 and is posted on the Court's Divorce Resources website at http://www.nycourts.gov/divorce/forms.shtml#Statewide

Appendix F

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, and with the advice and consent of the Administrative Board of the Courts, I hereby amend section 202.5(e) of the Uniform Rules for the Supreme and County Courts, and section 202.16 of the Uniform Rules for the Supreme and County Courts, effective March 1, 2016, to read as follows.

§ 202.5. Papers Filed in Court

* * *

(e) Omission or Redaction of Confidential Personal Information

(1) Except in a matrimonial action, or a proceeding in surrogate's court, or a proceeding pursuant to article 81 of the mental hygiene law, or as otherwise provided by rule or law or court order, and whether or not a sealing order is or has been sought, the parties shall omit or redact confidential personal information in papers submitted to the court for filing. For purposes of this rule, confidential personal information ("CPI") means:

i. the taxpayer identification number of an individual or an entity, including a social security number, an employer identification number, and an individual taxpayer identification number, except the last four digits thereof;

ii. the date of an individual's birth, except the year thereof;

iii. the full name of an individual known to be a minor, except the minor's initials; ~~and~~

iv. a financial account number, including a credit and/or debit card number, a bank account number, an investment account number, and/or an insurance account number, except the last four digits or letters thereof~~.~~; and

v. any of the documents or testimony in a matrimonial action protected by Domestic Relations Law section 235 or evidence sealed by the court in such an action which are attached as exhibits or referenced in the papers filed in any other civil action. For purposes of this rule, a matrimonial action shall mean: an action to annul a marriage or declare the nullity of a void marriage, an action or agreement for a separation, an action for a divorce, or an action or proceeding for custody, visitation, writ of habeus corpus, child support, maintenance or paternity.

* * *

§ 202.16. Matrimonial actions; calendar control of financial disclosure in actions and proceedings involving alimony, maintenance, child support and equitable distribution; motions for alimony, counsel fees pendente lite, and child support; special rules.

* * *

(m) Omission or Redaction of Confidential Personal Information from Matrimonial Decisions.

(1) Except as otherwise provided by rule or law or court order, and whether or not a sealing order is or has been sought, the court shall redact the following confidential personal information in issuing written decisions in matrimonial matters subject to this section.

i. the taxpayer identification number of an individual or an entity, including a social security number, an employer identification number, and an individual taxpayer identification number, except the last four digits thereof;

ii. the actual home address of the parties to the matrimonial action and their children;

iii. the full name of an individual known to be a minor under the age of eighteen (18) years of age, except the minor's initials;

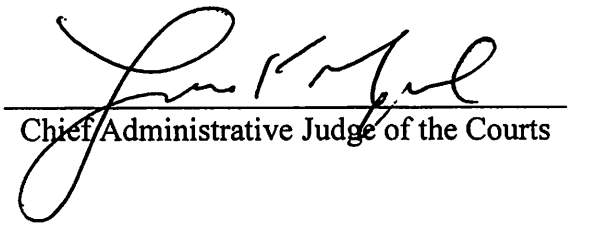
iv. the date of an individual's birth (including the date of birth of minor children), except the year of birth;

v. the full name of either party where there are allegations of domestic violence, neglect, abuse, juvenile delinquency or mental health issues, ex cept the party's initials; and

vi. a financial account number, including a credit and/or debit card number, a bank account number, an investment account number, and/or an insurance account number (including a health insurance account number), except the last four digits or letters thereof.

(2) Nothing herein shall require parties to omit or redact personal confidential information as described herein or 22NYCRR § 202.5(e) in papers submitted to the court for filing; nor shall this rule apply to judgments or orders entered by the court.

(3) Nothing herein shall prevent the court from omitting or redacting more personal confidential information from a written decision than is required by this rule, either on motion or sua sponte.



Chief Administrative Judge of the Courts

Dated: December 23, 2015

AO/192/15

Appendix F-1

NEW YORK STATE
Unified Court System

OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

RONALD P. YOUNKINS, ESQ.
EXECUTIVE DIRECTOR

MEMORANDUM

June 23, 2016

To: Hon. Fern A. Fisher
Hon. Michael V. Coccoma

From: Ronald Younkins RY

Re: Revised Redaction Rule for Matrimonial Actions

As you may recall, upon the recommendation of the Matrimonial Practice Advisory and Rules Committee and following a period of public comment, Chief Administrative Judge Lawrence K. Marks signed administrative order AO/192/15 in December 2015 (effective March 1, 2016), promulgating 22 NYCRR §202.16(m) and providing for the limited redaction of personal information from written decisions in contested matrimonial actions.

At the further recommendation of the Committee, Judge Marks recently signed AO/143/16 (attached), clarifying that the redaction requirement set forth in the rule applies only where the court is submitting a decision, order, judgment, or combined decision and order or judgment for publication, and that unpublished rulings may remain unredacted. The revised rule also clarifies conventions as to identification of the parties or minor children in published court rulings in matrimonial actions. These revisions are designed to simplify application of the redaction rule, while still protecting privacy of parties and preventing identity theft.

Questions about the revised rule may be directed to Susan Kaufman, Counsel to the Matrimonial Practice Advisory and Rules Committee (914-824-5541; skaufma1@nycourts.gov).

Please distribute this memorandum to judges and court attorney referees and staff assigned to matrimonial matters. And as always, thank you for your assistance.

Enclosure

cc. Administrative Judges
Hon. Jeffrey Sunshine
Barry Clarke, Esq.
John George, Esq.
Maria Logus, Esq.
Maria Barrington
District Executives
NYC Chief Clerks
County Clerks
Susan Kaufman, Esq.

25 BEAVER STREET, NEW YORK, NEW YORK 10004 • PHONE: 212-428-2120 • FAX: 212-428-2188 • RYOUNKIN@NYCOURTS.GOV

ADMINISTRATIVE ORDER OF THE
CHIEF ADMINISTRATIVE JUDGE OF THE COURTS

Pursuant to the authority vested in me, and with the advice and consent of the Administrative Board of the Courts, I hereby amend section 202.16(m) of the Uniform Rules for the Supreme and County Courts, addressing the omission or redaction of confidential personal information from matrimonial decisions, to read as follows, effective immediately:

---

§202.16. Matrimonial actions; calendar control of financial disclosure in actions and proceedings involving alimony, maintenance, child support and equitable distribution; motions for alimony, counsel fees pendente lite, and child support; special rules.

* * *

(m) Omission or Redaction of Confidential Personal Information from Matrimonial Decisions.

(1) Except as otherwise provided by rule or law or court order, and whether or not a sealing order is or has been sought, **prior to submitting any decision, order, judgment, or combined decision and order or judgment in a matrimonial action for publication,** the court shall redact the following confidential personal information: ~~[in issuing written decisions in matrimonial matters subject to this section.]~~

i. the taxpayer identification number of an individual or an entity, including a social security number, an employer identification number, and an individual taxpayer identification number, except the last four digits thereof;

ii. the actual home address of the parties to the matrimonial action and their children;

iii. the full name of an individual known to be a minor under the age of eighteen (18) years of age, except the minor's initials **or the first name of the minor with the first initial of the minor's last name; provided that nothing herein shall prevent the court from granting a request to use only the minor's initials or only the word "Anonymous;"**;

iv. the date of an individual's birth (including the date of birth of minor children), except the year of birth;

v. the full name of either party where there are allegations of domestic violence, neglect, abuse, juvenile delinquency or mental health issues, except the party's initials **or the first name of the party with the first initial of the party's last name; provided that**

nothing herein shall prevent the court from granting a request to use only the party's initials or only the word "Anonymous;"; and

vi. a financial account number, including a credit and/or debit card number, a bank account number, an investment account number, and/or an insurance account number (including a health insurance account number), except the last four digits or letters thereof.

(2) Nothing herein shall require parties to omit or redact personal confidential information as described herein or 22NYCRR § 202.5(e) in papers submitted to the court for filing[~~, nor shall this rule apply to judgments or orders entered by the court~~].

(3) Nothing herein shall prevent the court from omitting or redacting more personal confidential information [~~from a written decision~~] than is required by this rule, either **upon the request of a party** [~~on motion~~] or sua sponte.

Chief Administrative Judge of the Courts

Dated: June 22, 2016

AO/143/16

Appendix G

New York State Bar Association
One Elk Street, Albany, New York 12207 • 518/463-3200 • http://www.nysba.org

Memorandum in Opposition
FAMILY LAW SECTION

FLS # 8

April 22, 2016

A. 290
S. 7089

By: M. of A. Weinstein
By: Senator Savino
Assembly Committee: Judiciary
Senate Committee: Children and Families
Effective Date: 90th day after it shall have become a law

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 FAMILY LAW SECTION OPPOSES THIS BILL

The Family Law Section supported the previous 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

Opinions expressed are those of the Section/Committee preparing this memorandum and do not represent those of the New York State Bar Association unless and until they have been adopted by its House of Delegates or Executive Committee.

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 date 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.

Memorandum prepared by: Jane K. Cristal, Esq. and Benjamin E. Schub, Esq.
Chair of the Section: Mitchel Y. Cohen, Esq.

LEGISLATION

2016 – S.8175

2016 – Gun Trafficking and Crime Prevention Act

View more »

2016 – A.290 / S-7089

Position Statement

A.290 / S-7089

Oppose

WBASNY strongly opposes those portions of A.290/S-7089 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 intentional or unintentional release 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 a contempt proceeding will only add to the cost and delay of custody litigation. In this regard, we concur with the position of the NYSBA Family Law Section.

We are particularly concerned that victims of domestic violence will be harmed by this Bill. If parties are given copies of forensic reports, an abuser can easily inflict more abuse on the victim by making the contents of the report public.

Providing forensic evaluation reports to parents directly will have a chilling effect on the 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. The bill will burden 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 access to the report. There has always been a history of extreme caution in protecting the report. 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 properly 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 should execute confidentiality agreements acceptable to the Court.

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 to review file in Court prior to Litigation. We do not believe that a CPLR 3120 demand is even necessary; the Forensic's notes and raw data should be as available to counsel as the report itself. Recent 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).

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AAML
OF MATRIMONIAL LAWYERS
NY CHAPTER
http://ny.aaml.org
americanacademyny@gmail.com

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200 Garden City Plaza, Ste. 301
Garden City, New York 11530
(516) 877-1800
ekarabatos@soklaw.com

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May 12, 2016

A. 290
S. 7089

By: M. of A. Weinstein
By: Senator Savino
Assembly Committee: Judiciary
Senate Committee: Children and Families
Effective Date: 90th day after it shall have become a law

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 April 22, 2016.

Elena Karabatos
President
American Academy of Matrimonial Lawyers
New York Chapter

McCarthy Fingar LLP
Counselors at Law

11 Martine Avenue, 12th Floor
White Plains, NY 10606-1934
Phone : 914-946-3700 Fax : 914-946-0134
E-mail : info@mccarthyfingar.com
Web : www.mccarthyfingar.com

Direct Line: 914-385-1015
E-Mail: smiller@mccarthyfingar.com

May 17, 2016

VIA FEDERAL EXPRESS

Senator Diane J. Savino
315 Legislative Office Bldg
Room 315LOB
Albany , NY 12247

Senator Diane J. Savino
36 Richmond Terrace
Suite 112
Staten Island, NY 10301

Dear Senator Savino:

I write to urge you not to support the "forensic Bill" (A290:S2089) relating to court ordered forensic evaluations and reports in child custody and visitation proceedings, which provides, *inter alia,* all litigants, including *pro se* litigants access to forensic reports without safeguards necessary to protect parties and particularly their children from suffering irreversible, serious detriment. While the proposed legislation seeks to address due process concerns regarding *pro se* litigants, it fails to recognize that those concerns are presenting appropriately addressed in many courts and can and should be uniformly addressed in all courts, without jeopardizing the wellbeing of the parties and their children.

The proposed legislation has been disfavored by the Family Law Section of the New York State Bar Association, the Women's Bar Association of the State of New York, the American Academy of Matrimonial Lawyers and the Office & Court Administration's Matrimonial Practice Advisory Committee, chaired by Justice Jeffrey Sunshine. I enclose with this letter relevant statements indicating some of their positions, as well as a letter from Dr. Lawrence Loeb, a noted Board Certified psychiatrist, who served as a forensic for many years and testified in cases in the Family and Supreme Courts. Dr. Loeb advises that the enactment of this legislation would be detrimental to the best interest of children in custody contests.

I write to you as one fully familiar with the serious foreseeable consequences that would result should this legislation be enacted. I have served as a Judge for 21 years, in the Westchester Family Court (1983-1986), the New York State Supreme Court (1986-1990) and the Appellate Division Second Department (1990-2006) when I

retired and have since been serving as Chief Counsel to the firm of McCarthy Fingar LLP in White Plains, New York where I concentrate on Mediation/Arbitration, custody litigation and appeals. I have authored several decisions dealing with the "best interests of children," which are often cited. I served as Chairperson of the "Matrimonial Commission" to which I was appointed by Judge Judith Kaye in 2004, which issued its report in 2006. Our purpose was to "examine every fact of the divorce and custody determination process and recommend reforms to reduce trauma, delay and costs to parents and children." The Commission addressed the crucial issues presented above and disfavored the unfettered distributions of forensic reports to the litigations. The Report provides:

> "Access to reports should be made uniform. Copies of the reports should be given to counsel for the parties and the attorney for the child, with the express instruction that no additional copies be made or disseminated without court permission. Clients can review the report at the attorney's office. If a litigant is self-represented, a separate copy of the report should be maintained at the courthouse for use by that litigant to review and make confidential notes. The litigant would not be permitted to remove this copy from the courthouse."

My colleagues and I are available to meet with you and other Senators, in person or by phone, to discuss this important legislation should you so desire. Thank you for your interest and attention.

Very truly yours,

Sondra Miller

SMM/lp

Sondra M. Miller

Enclosures: Laurence Loeb, M.D. letter
NYS Bar Association Family Law Section Memorandum

Appendix H

SUPREME COURT CIVIL - MATRIMONIALS FILED & DISPOSED
COMPARISON REPORT: 2010 vs 2011

Location	UNCONTESTED MATRIMONIALS						CONTESTED MATRIMONIALS					
	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%
STEUBEN	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: 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

	UNCONTESTED MATRIMONIALS						CONTESTED MATRIMONIALS					
	2014		2015		2014 vs 2015		2014		2015		2014 vs 2015	
Location	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%
CHAUTAUQUA	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%
STEUBEN	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%

Appendix I

A10447 Summary:

BILL NO A10447

SAME AS SAME AS

SPONSOR Weinstein (MS)

COSPNSR Bradley

MLTSPNSR Arroyo, Bing, Brennan, Cahill, Carrozza, Cohen A, Colton, Coc
Espaillat, Fields, Galef, Gordon, Gottfried, Grannis, Gunther
Hikind, John, Lafayette, Lavelle, Lavine, Maisel, Markey, McE
Millman, Nolan, O'Donnell, Paulin, Perry, Pheffer, Reilly, Rc
Sweeney, Weisenberg, Wright, Zebrowski

Amd S35, Judy L

Requires a supreme court to assign counsel to an indigent person pursuan
the family court act when the proceeding is one over which the family cc
could have exercised jurisdiction.

A10447 Actions:

BILL NO A10447

03/24/2006 referred to judiciary
05/23/2006 reported referred to ways and means
06/13/2006 reported referred to rules
06/15/2006 reported
06/15/2006 rules report cal.822
06/15/2006 ordered to third reading rules cal.822
06/19/2006 substituted by s8096
S08096 AMEND= SKELOS
06/06/2006 REFERRED TO RULES
06/14/2006 ORDERED TO THIRD READING CAL.1764
06/15/2006 PASSED SENATE
06/15/2006 DELIVERED TO ASSEMBLY
06/15/2006 referred to ways and means
06/19/2006 substituted for a10447
06/19/2006 ordered to third reading rules cal.822
06/19/2006 passed assembly
06/19/2006 returned to senate
08/04/2006 DELIVERED TO GOVERNOR
08/16/2006 SIGNED CHAP.538

A10447 Votes:

There are no votes for this bill in this legislative session.

A10447 Memo:

BILL NUMBER: A10447

TITLE OF BILL : An act to amend the judiciary law, in relation to assignment of counsel to the indigent by supreme court in proceedings over which family court has jurisdiction

PURPOSE OF BILL : This bill provides that supreme court shall appoint counsel for indigent litigants in the same manner as family court is required to appoint such counsel.

SUMMARY OF PROVISIONS OF BILL : The bill amends section 35 of the judiciary law to provide that whenever supreme court shall exercise jurisdiction over a matter which the family court could have exercised jurisdiction had such action been commenced in family court, supreme court shall appoint counsel for indigent persons in the same manner as required by section 262 of the family court act.

JUSTIFICATION : Presently, an indigent person involved in a custody dispute in family court is entitled to a court appointed attorney. See, FCA section 262. If the same dispute is heard in supreme court, the right to an attorney is not available. This inconsistency results in a denial of representation simply based on the venue of the case. Clearly, a custody dispute in supreme court should be handled in the same manner as a custody dispute in family court. 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. Similarly, a monied spouse can commence a divorce action in supreme court to insure his or her indigent spouse cannot benefit from FCA section 262 with respect to the custody determination. Although it is true that a non-monied spouse can apply for attorney's fees in a divorce action, such determination is discretionary, and fundamentally different than the mandatory assignment of counsel contained in FCA section 262. Consequently, an indigent litigant in supreme court is not entitled to counsel, while an indigent litigant in family court is eligible for an assigned attorney, notwithstanding that both indigent litigants are addressing the same legal issue. See, McGee v. McGee, 180 Misc. 2d 575 (Suffolk County, 1999)

LEGISLATIVE HISTORY : New Bill, 2006.

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS : To be determined.

EFFECTIVE DATE : Immediately.

A10447 Text:

S T A T E O F N E W Y O R K

10447

I N A S S E M B L Y

March 24, 2006

Introduced by M. of A. WEINSTEIN, BRADLEY -- Multi-Sponsored by - A. ARROYO, A. COHEN, COOK, FIELDS, GALEF, GOTTFRIED, GRANNIS, JOHN, LAFAYETTE, LAVELLE, LAVINE, MAISEL, MARKEY, McENENY, M O'DONNELL, PAULIN, PERRY, PHEFFER, SWEENEY, WEISENBERG, ZEBRC read once and referred to the Committee on Judiciary

AN ACT to amend the judiciary law, in relation to assignment of to the indigent by supreme court in proceedings over which court has jurisdiction

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND BLY, DO ENACT AS FOLLOWS:

Section 1. Section 35 of the judiciary law is amended by addin subdivision 8 to read as follows:

8. WHENEVER SUPREME COURT SHALL EXERCISE JURISDICTION OVER A WHICH THE FAMILY COURT MIGHT HAVE EXERCISED JURISDICTION HAD SUCH OR PROCEEDING BEEN COMMENCED IN FAMILY COURT OR REFERRED THERETO ANT TO LAW, AND UNDER CIRCUMSTANCES WHEREBY, IF SUCH PROCEEDING PENDING IN FAMILY COURT, SUCH COURT WOULD BE REQUIRED BY SECT HUNDRED SIXTY-TWO OF THE FAMILY COURT ACT TO APPOINT COUNSEL, COURT SHALL ALSO APPOINT COUNSEL AND SUCH COUNSEL SHALL BE COMP IN ACCORDANCE WITH THE PROVISIONS OF THIS SECTION.

S 2. This act shall take effect immediately.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in b [ ] is old law to be omitted.

LBD155

Appendix J

At an 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 _____ 201___.

P R E S E N T:

_____,
Justice.

- -x

Index No.:

Plaintiff,

EXPEDITED
CHANGE OF VENUE ORDER
FOR A
MATRIMONIAL ACTION

- against -

Defendant.

- -x

Upon ☐ motion or ☐ consent, it is hereby,

ORDERED, that the above captioned matrimonial action pending in the County of _____, captioned _____v. _____, index number _____/_____ is hereby transferred to the County of _____.

ORDERED, that the attorney for the _____ shall serve a copy of this order upon the County Clerk of this county by delivering a copy of this order to room _____, window _____.

ORDERED, that the County Clerk of this county shall forthwith deliver to the County Clerk to which venue is changed all papers filed in the action and certified copies of all minutes and entries, which shall be filed, entered or recorded, as the case requires, in the office of the

latter clerk pursuant to CPLR §511 (d)

ORDERED, that upon receipt of the file and a copy of this Order, the County Clerk of the latter county shall issue a new index number, without fee, and transfer any pending documents to the Supreme Court for assignment and calendaring of the matter.

This shall constitute the order of the court.

E N T E R Forthwith,

_____

J. S. C.

Appendix K

(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

_____
[*Fill in Name*] Plaintiff,

-against-

_____
[*Fill in Name*] Defendant.

----------X

UNREPRESENTED LITIGANT
ORDER TO SHOW CAUSE
FOR COUNSEL FEES
IN MATRIMONIAL ACTION
PURSUANT TO DRL§ 237

Index No. _____

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 <u>Must</u> 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,

AFFIDAVIT IN SUPPORT OF UNREPRESENTED LITIGANT **ORDER TO SHOW CAUSE FOR COUNSEL FEES**

vs.

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]

Appendix L

Supreme Court
of the
State of New York

HON. JEFFREY S. SUNSHINE

JUSTICES' CHAMBERS
360 ADAMS STREET
BROOKLYN, NY 11201

November 15, 2016

John W. McConnell, Esq.
Counsel, Office of Court Administration
25 Beaver Street, 11th Fl,
New York, NY 10004

Re: Request for Public Comment on a Proposal to Amend Part 36 of the Rules of the Chief Judge

Dear Mr. McConnell:

In response to your September 12, 2016 request for comment related to the Proposal to Amend Part 36 of the Rules of the Chief Judge we are concerned that the requirement in the Recommendations on page 12 that a case not be closed until an Attorney for the Children has filed the necessary forms and the court has signed a final order approving the compensation. Our concern is that this amendment could be interpreted that a judgment of divorce not be signed until the appointed attorney has complied (thereby allowing the court to sign the final order approving compensation). Such an interpretation would place an undue burden upon litigants who would be prevented from re-marrying, seeking enforcement or opening Support Collection Unit accounts until the attorney for the child is in compliance. Such an interpretation might also cause uncertainty about the effective date of the divorce, impact the time to appeal the judgment of divorce, and in some cases affect the efficient disposition of cases.

I believe an alternative should be considered that the fiduciary clerk request the assigned judge to calendar a matter for a post-dispositional hearing if the attorney for the child has not filed the appropriate forms after a uniform period of time established by court rule.

Thank you and I am of course available if I can be of any further assistance.

Very truly yours,

Jeffrey S. Sunshine, J.S.C.
Chair, Chief Administrative Judge's
Matrimonial Practice Advisory and Rules Committee

JSS/mjs
cc: Susan Kaufman, Esq.