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

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

January 2019

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I. Introduction

Introduction

The Matrimonial Practice Advisory and Rules Committee is one of the standing advisory committees established by the Chief Administrative Judge pursuant to section 212(1) (q) of the Judiciary Law, consisting of judges and attorneys from around the State. The Committee annually recommends to the Chief Administrative Judge legislative proposals in the field of matrimonial law to be considered for the Chief Administrative Judge's Legislative Program. These proposals are based on the Committee's observations and studies, review of case law and legislation, and suggestions received from the bench and bar. In addition, the Committee provides its comments and recommendations to the Chief Administrative Judge on pending legislative proposals concerning matrimonial law. The Committee also assesses existing court rules and court forms and advises the Chief Administrative Judge on the need for additional rules and forms, and on the development of practices to assist judges, litigants and attorneys in the timely and productive management of matrimonial matters. The Committee also assists the New York State Judicial Institute (established pursuant to section 219-a of the Judiciary Law) with providing legal education for judges and court attorneys handling matrimonial matters.

In 2018, the Committee continued its efforts to meet the challenge posed by Chief Judge Janet DiFiore at her investiture on February 8, 2016, when she said: "Starting today, and every day that I serve as Chief Judge, my team and I will be working to improve all aspects of our system and services towards achieving operational and decisional excellence in everything we do."[1] During 2018, the Committee proposed several important new matrimonial rule reforms which met with approval of the Chief Administrative Judge and were adopted by administrative order with approval of the Administrative Board of the Courts. These reforms followed the major legislative and rule reforms recommended by the Committee during 2015, 2016, and 2017, which were approved by the Chief Administrative Judge and in turn were successfully adopted by the Legislature or by administrative order of the Chief Administrative Judge with approval of the Administrative Board of the Courts. "The cumulative effect of these changes continues to increase excellence in matrimonial cases."[2]

II. Appointment of Statewide Coordinating Judge for Matrimonial Cases

On June 1, 2018, Chief Administrative Judge Lawrence Marks sent a Memorandum to

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[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.

Administrative Judges announcing the appointment of Hon. Jeffrey Sunshine as Statewide Coordinating Judge for Matrimonial Cases.

His letter of appointment, a copy of which is attached as Appendix "A" to this report, stated:

> *"As you know, matrimonial cases are an important, and challenging, component of our civil case inventories. Contested matrimonials often demand extensive resources, judicial and otherwise, and are frequently plagued by delays and other complications. Members of the matrimonial bar, among others, have approached me in recent months to advocate for re-designating an experienced judge who can work with the Administrative Judges, matrimonial part judges and the matrimonial bar to better promote the goals of the Chief Judge's Excellence Initiative.*
>
> *Judge Sunshine is an ideal candidate to take on this role. He has extensive experience in the matrimonial field, both as a practitioner and as a judge in Kings County Supreme Court. He also chairs our Matrimonial Practice Advisory and Rules Committee, which has recommended numerous administrative rules and other measures that have streamlined and improved matrimonial case adjudication. In his new role, Judge Sunshine will work with all of you to develop protocols and best practice models to expedite the processing of contested cases, revise and streamline the uncontested divorce process, work to promote and expand mediation in divorce actions, act as a liaison between the court system and the matrimonial bar, promote e-filing in matrimonial cases and work with the Judicial Institute on matrimonial judicial education programs. He will also continue to serve as chair of our Matrimonial Practice Advisory and Rules Committee, and will continue to handle a matrimonial caseload in Kings Supreme Court."*

The new position of Statewide Coordinating Judge for Matrimonial Cases demonstrates the importance of the Committee's work to the fair and efficient processing of matrimonial cases. The Committee is proud of Judge Sunshine's appointment and congratulates him on this significant achievement.

In his new role, Judge Sunshine has already created a SharePoint site for matrimonial judges with assistance from the UCS Division of Technology, so that matrimonial judges can access the memoranda distributed by the Office of Court Administration about matrimonial matters more quickly. With the SharePoint site, the matrimonial judges will have immediate access to important information they need to handle their cases (including rule updates, legislation, and significant appellate case law). The SharePoint site can also be used for best practices information and for matrimonial judges to communicate as a group, subject to the caveat that posts may not include information about a case, parties or attorneys' names, index numbers, or any personal identifying information.

During the first months after Judge Sunshine's appointment as Statewide Coordinating Judge for Matrimonial Cases, he worked with a small working group to create a Consensual Divorce Program for Uncontested Divorces.[3] Judge Sunshine presented a prototype of this program to Chief Administrative Judge Marks by letter dated October 1, 2018.[4] He also worked to promote electronic filing and mediation in matrimonial cases, in accordance with his mandate from Judge Marks. These projects and others will be discussed in detail later in this report.

As Statewide Coordinating Judge for Matrimonial Cases, Judge Sunshine plans to visit with the matrimonial bar and with matrimonial judges and their law clerks, court attorney referees and clerks around the State to gain greater insight into what can be done to improve the fair and efficient processing of matrimonial cases.

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

[4] See Letter attached to this report as Appendix "B" from Hon. Jeffrey Sunshine to Chief Administrative Judge Marks dated October 1, 2018 introducing the Consensual Divorce Program as a prototype for the first stage of reforming the uncontested divorce process.

III. Executive Summary

The Committee was established in June 2014 when it held its organizational meeting. Since then, the Committee has met monthly, with occasional breaks during the mid-summer months.

Appendix "C "to this report contains a detailed description of the Committee's legislative and rule proposals which were approved by the Chief Administrative Judge and adopted by the Legislature or by administrative order with approval of the Administrative Board of the Courts from 2015 through 2017.

The following is a summary of the proposals recommended by the Committee which were adopted in 2018 and summarizes our recommendations for 2019:

2018:

New Rule as to Judgments in Matrimonial Actions; Forms (to include Instructions Addressing Transfer of Title to a Marital Home) Adopted in 2018

At the request of and in consultation with the Office of Policy and Planning, the Committee proposed an amendment to subparagraphs (2) and (4) of 22 NYCRR 202.50(b) as to the form of judgments required in matrimonial actions, after having been alerted by the Office of Policy and Planning that some defendants in residential mortgage foreclosure cases have been unable to apply for loan modifications because of title issues arising from their divorce. When parties are involved in a divorce action, it is often agreed that one spouse may remain in the marital home. Where a foreclosure action has also been brought, or is brought after the divorce judgment is signed, the spouse seeking to remain in the home cannot proceed with the loan modification if the deed is titled in the name of both spouses. The purpose of this proposed rule was to alert self-represented and represented litigants to the additional documents required for transfer of the marital residence, especially where there is a pending foreclosure action. With this amendment, parties will be alerted as part of the judgment that separate documents related to the transfer of a residence must be signed and filed, thereby allowing the spouse residing in the marital property to obtain clear title to the marital home and apply for a mortgage loan modification if a foreclosure action is commenced. Additionally, if the property is never transferred to a spouse, either when both spouses are granted the property, or it is agreed that they will maintain joint ownership post-divorce, and thereafter a foreclosure action is commenced, the non-titled spouse may never receive notice of the foreclosure action once commenced. Unfortunately, many litigants believe mistakenly that the provisions for transfer of a residence contained in an agreement, decision or judgment complete the transfer and they do not realize that a deed or other transfer documents must be executed and filed for this to be accomplished.

The modified rule was adopted by Administrative Order A/O/191/18 dated May 21, 2018, which also adopted a revised Uncontested Divorce Judgement of Divorce (Form UD-11) and Revised Uncontested Divorce Instructions in compliance with amendments to 22 NYCRR 202.50(b)(2) and new 22 NYCRR 202.50(b)(4) regarding the required form of judgments of

divorce.[5] The modified rule allows the Supreme Court, in a post judgment matrimonial action, to enforce the specific requirement of the transfer of the property contained in the new decretal paragraph required in the Judgment of Divorce. The addition to the Uncontested Divorce Instructions now alerts litigants that separate documents must be executed to transfer the residence.

Amended Rule as to Form of Decretal Clause Concerning Settlement Agreements in Judgments of Divorce Adopted in 2018

In 2018, an amendment to 22 NYCRR 202.50(b) (3) concerning the form of required decretal clauses in judgments of divorce[6] was adopted to make clear whether a Settlement Agreement referenced in the judgment has actually been entered into between the parties in each case. This rule amendment was adopted by Administrative Order 269/18 of the Chief Administrative Judge, and a further revised form of UD-11 Judgment of Divorce was posted on the Divorce Resources website on September 30, 2018 at http://ww2.nycourts.gov/divorce/divorce_withchildrenunder21.shtml. The rule allows a thirty-day grace period for papers submitted using the prior form of judgment.

Adoption of Revised and Updated Statement of Client's Rights and Responsibilities Pursuant to 22 NYCRR 1400.2 in 2018

During 2018, our Committee's proposal[7] for the Appellate Divisions to adopt a revision to the Statement of Client's Rights and Responsibilities required pursuant to 22 NYCRR 1400.2 was circulated for public comment by Memorandum from OCA Counsel John W. McConnell dated June 22, 2018 available at https://www.nycourts.gov/LegacyPDFS/RULES/comments/PDF/MatrimonialStatementClientsRightsResponsibilities.pdf. The Family Law Section of the New York State Bar Association submitted a memorandum of support available at http://ww2.nycourts.gov/sites/default/files/document/files/2018-11/PC-ClientsRightsResponsibilities.pdf

After the public comment period expired, the proposal was approved by the Administrative Board, and has been adopted by the Appellate Divisions.

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[5] See Administrative Order 191/18 available at https://www.nycourts.gov/LegacyPDFS/divorce/pdfs/AO-re-Matrimonial-J-Rule.pdf

[6] The form of required decretal clauses in judgments of divorce had previously been amended in 2017 in connection with our Committee's divorce venue rule proposal for post judgment enforcement and modification applications [22 NYCRR § 202.50(b)(3)]. However, the language as to Settlement Agreements merely required the date of the Settlement Agreement to be inserted, without clarifying whether a Settlement Agreement exists if no date is filled in. This language had been in the form of judgment for many years.

[7] The members of the Special Subcommittee on Revision of Client's Rights and Responsibilities were Hon. Jeffrey Sunshine, Chair of the Committee, Hon. Sondra Miller (Ret.), Hon. Jeffrey Lebowitz (Ret.), Hon. Hope Zimmerman, Susan Bender, Esq., and Kathleen Donelli, Esq., Susan Kaufman, Counsel to the Committee, served as Counsel, and Matthew Schwartz, then Assistant Law Clerk to Judge Sunshine, served as Reporter.

The revision updates the document which was originally adopted in 1994 and last amended in 1995 and provides clarifications of the rights and responsibilities based on actual experience of members of our Committee who are practicing matrimonial attorneys and judges familiar with matrimonial litigation as it is practiced today. Without detracting from the information provided in the prior form, the revisions will reduce the number of attorney client disputes by clarifying matters that are not clear in the prior form. Adoption of the revised form will improve satisfaction of both litigants and attorneys with the matrimonial litigation process. It will also improve court operational efficiency and further the Excellence Initiative by reducing delays caused by attorney withdrawal or substitution of counsel as well as the volume of malpractice and fee dispute litigation.

See Appendix "D" to this report for a detailed analysis of the changes in the revised form.

Recommendations for 2019

New Statutory Proposals for 2019

One of our key priorities in 2019 is a new legislative proposal that would authorize the Chief Administrative Judge to mandate e-filing of court papers in matrimonial actions. In 2015, the Legislature enacted CPLR 2111(b)(2)(A), which authorized the Chief Administrative Judge to mandate the electronic filing of court papers in all cases in Supreme Court, after consultation with the bar and county clerks and agreement from the county clerks in counties outside New York City, with only a limited number of exceptions.[8] One of those exceptions was in matrimonial actions. Since 2015, experiments with consensual electronic filing in matrimonial cases in counties such as Westchester have proven very successful, and our Committee now unanimously recommends the further step of eliminating the matrimonial action exception to mandatory electronic filing. Allowing the Chief Administrative Judge to require electronic filing in such actions after consultation with county clerks and the bar in certain counties will promote the Chief Judge's Excellence Initiative by eliminating frustration of litigants in filing papers, reducing delays by courts in reviewing submissions, and increasing confidence in the judicial process for the reasons we will outline in detail later in this report.

We also include in this report a new legislative proposal for a rebuttable presumption on proof of damages in matrimonial cases pursuant to CPLR rule 4533-c. The proposal would impose a cap of $10,000 on invoices in matrimonial cases, a much more realistic amount than the existing $2,000 cap on invoices in general civil cases pursuant to rule 4533-a. As Vincent Alexander observes in the Practice Commentaries regarding the general rule for all civil cases, "The amount specified in the rule as originally adopted has steadily increased by amendment over time and is long overdue for an upward adjustment." (CPLR 4533-a (McKinney)). The rule we propose for matrimonial actions would also allow invoices for any court-ordered expenses, a much broader category than allowed under rule 4533-a, and would allow more than one invoice per provider. These differences are designed to make it easier for matrimonial litigants,

[8] The legislation provides:

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

especially unrepresented litigants, to admit documents into evidence. We propose the new rule as a separate rule for matrimonial cases because, in family matters, it is especially frequent and necessary for small expenses to be incurred for children's expenses for several children and other family matters.

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

Unlike CPLR 4533-a which is labelled "prima facie proof," our rule creates a rebuttable presumption to make clear that it does not preclude rebuttal. Vincent Alexander notes, with regard to the general civil rule in CPLR 4533-a, that, even though it is labelled "prima facie proof of damages," it allows for possible rebuttal of the expenses by requiring notice to the other party that the bill will be offered without foundation evidence at least 10 days before trial so that the other party can subpoena witnesses and gather rebuttal evidence. However, our rule is even clearer so that everyone, even self-represented litigants, will understand that the presumption can be overcome. This will prevent the rule from being abused. Our rule also provides a procedure to follow so that the party offering the proof will get notice in sufficient time that the other party intends to rebut the presumption and can prepare to subpoena witnesses or gather other proof before trial. In addition, our rule is labelled "proof of damages" rather than "proof of expenses" to reflect the fact that in matrimonial actions, the parties usually claim expenses rather than damages which are more commonly sought in tort and personal injury actions. Our new rule also uses gender neutral language by speaking of "the affiant's employer" rather than "his employer."

New Rule Proposal for 2019

We include in this report a new rule proposal to amend the requirement in the matrimonial rules that the Statement of Proposed Disposition must be filed with the court with the Note of Issue.[9] Our proposal would allow the Statement of Proposed Disposition to be filed later at a pre-trial conference after the Note of Issue has been filed, or as otherwise directed by the court. This would save litigants expense by not having to submit the Statement of Disposition when the issues have not been clearly defined, thereby increasing access to justice for matrimonial litigants and saving time for judges in reviewing premature submissions.

Previously Endorsed Legislative Proposals

We reintroduce this year a number of our legislative proposals from prior years. First, our previously endorsed statutory proposal on divorce venue is one of our main legislative priorities this year.

Our statutory proposal on divorce venue is for an omnibus special matrimonial venue statute which requires that venue be related to residence in all divorce actions as well as actions in Supreme Court for custody and visitation, all applications to modify a Supreme Court order of custody or visitation, all post judgment proceedings, and all matrimonial actions described in DRL§ 236(B)(2). This proposal addresses the problem of certain counties being overburdened by divorce filings caused by CPLR 509 which allows venue to be designated by the plaintiff in counties without a proper nexus to the parties or their children.

In addition, the signing by the Governor of chapter 366 of the Laws of 2017 allows as an additional venue option under CPLR 503(a) the choice of venue in a county in which a substantial part of the events or omissions giving rise to the claim occurred. It is unclear how this new provision will apply to matrimonial actions.

We first introduced our divorce venue proposal in our 2017 Annual Report. This proposal was adopted as part of the OCA 2017 Legislative Program (OCA #52) and was introduced in the Legislature as 2017-18 S. 5736. In our 2018 Annual Report, we proposed a modification to said proposal. Our modified proposal eliminated the sua sponte good cause exception, in response to concerns of the Family Law Section of the New York State Bar Association whether judges might deem it good cause to transfer a case to another county for reasons of convenience (e.g. this county's judges handling matrimonial cases are overburdened while the other county's judges handling matrimonial cases have more time), even though the designated venue had a proper nexus to the parties or their children. We left in place the exception allowing the court to retain venue where designated even if improper for good cause. This requires that venue have been proper in the first place, and avoids long delays caused by venue transfers. We also conformed the proposal to changes we made in response to suggestions by Sanctuary for Families regarding our rule proposal on divorce venue post judgment

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

applications which was adopted in 2017. Rather than require a victim of domestic violence to make application for a good cause exception, a CPLR 509 designation is allowed as an option where the address of a party is not a matter of public record or is subject to a confidentiality order.

In 2019 we propose a further modification to our 2018 proposal which addresses concerns raised by Assembly legislative staff that our proposed CPLR 514 should expressly contradict CPLR 509 because the latter provides that it applies "notwithstanding any provision of this article." We have made a further technical change in our 2019 proposal to address this concern. We do so because we wish to make certain that, if enacted, our new proposal will override any unintended challenge.

We believe that our revised divorce venue proposal continues to accomplish the goals of the Excellence Initiative by eliminating excessive designations of venue in counties without a proper nexus to the parties or their children. If enacted, this revised proposal will relieve the overburdened counties that currently bear the burden of excessive divorce venue designations. Our proposal is supported not just by New York County, but by many Judicial Districts throughout the State similarly burdened. 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.

Another priority this year is our previously endorsed modified proposal for amendment of the biennial adjustment of the "Income Cap" in the Maintenance Guidelines Law. This proposal would adjust 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. It will allow the courts to adjust the income caps under the Maintenance Guidelines Law and the Child Support Standards Act simultaneously. It will prevent confusion of the public, counsel, and the court as to which cap has been increased, thereby reducing litigation delays and increasing access to justice. It will also avoid unnecessary court system expenses in revising court forms and calculators to reflect the cap increases twice within a two-month period, thus promoting the Excellence Initiative's goal of operational efficiency. This proposal has been coupled with other measures in the past and has not been enacted. It is our hope that this measure will be considered on its own merits this year. Although this measure seems ministerial in nature, its enactment would further the goals of both operational and decisional excellence.

We also resubmit our proposal on access to forensics in custody cases which was adopted as part of the OCA Legislative Program in 2017 as OCA#38. This proposal was introduced in the Legislature during 2017 and amended in 2018 as S. 6579-A based upon changes we recommended at the suggestion of the Family Court Advisory and Rules Committee and the New York Public Welfare Association, Inc., whose concerns were addressed in the modified proposal.[10] These

[10] Last year, *both* our original proposal (6579) as well as the Senate counterpart to A.1533 (S.6300) were before the Senate.

changes included revising the definition of "court-ordered evaluators" to include only forensic mental health professionals in custody and visitation proceedings, **not** court-ordered ordered evaluators in statutorily mandated investigations in child protective, permanency, destitute child or other proceedings because proceedings under Article 6 of the Family Court Act are often consolidated or held jointly with child protective or other proceedings in which assessments other than clinical evaluations are ordered and in which other considerations are relevant. This change also avoids conflicts with confidentiality laws and possible loss of federal funding for state child protective programs.[11] We also deleted a provision we had included in our prior proposal at the suggestion of the Family Law Section of the New York State Bar Association governing the times when the court may read or review the forensic report. We instead adopted a suggestion of the Family Court Advisory and Rules Committee to authorize the Chief Administrative Judge to promulgate rules and regulations authorizing a court, in particular cases where a party does not raise a legally valid objection thereto, to read or review a forensic report at particular times as the rules shall permit. By allowing the Chief Administrative Judge to promulgate rules and regulations for a court rather than impose uniform rules on all courts, we allow for the differences between the types of custody and visitation proceedings which may be handled in Family Court as contrasted with Supreme Court.

We also resubmit our proposal to allow a limited appearance by counsel to apply for counsel fees on behalf of the non-monied spouse. This proposal took on new significance last year, when both the NYSBA House of Delegates[12] and the New York courts[13] endorsed the concept of limited scope representation. During 2018, our Committee submitted comments in response to a request for public comment on proposed guidelines regarding limited scope representation in civil matters drafted by the Office of Court Administration available at https://www.nycourts.gov/LegacyPDFS/RULES/comments/PDF/LimitedScopeRepresentation.pdf . Our comments sought clarification that the proposed guidelines would not apply to pro bono and assigned counsel already performing much need limited scope representation to indigent divorce litigants.[14] We sought this clarification because we are concerned that the proposed guidelines would discourage such representation which is sorely needed. Our proposal regarding a limited appearance for counsel fees is premised on the same concern. It would allow attorneys to make application for legal fees on behalf of a non-monied spouse in a divorce action without fear of having to represent the litigant until conclusion of the matter if the fees were denied or

[11] The New York Public Welfare Association, Inc. opposed both A.1533 / S.6300 and S. 6579 because the definition of "court-ordered evaluators" included court-ordered child protective examinations. This could result in multiple problems under confidentiality laws and might also impact federal funding, which is conditioned on states following federal rules on confidentiality of child abuse and neglect reports.

[12] 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).

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

[14] See Committee Response to Request for Public Comment on Proposed Guidelines for Limited Scope Representation in Civil Matters dated September 24, 2018 attach as Appendix "E" to this report.

insufficient.[15] Our proposal is designed to encourage applications pursuant to DRL 237 for counsel fees for the non-monied spouse, thereby realizing the Legislature's goal in enacting DRL 237 of making available funds for non-monied spouses to "equalize the playing field" in matrimonial litigation. If enacted, this legislation will reduce the number of indigent litigants that are forced to either represent themselves or rely on the limited number of pro bono and assigned counsel available to assist them. Thus, our proposal is clearly an access to justice measure furthering the Chief Judge's Excellence Initiative.

We again submit our previously-endorsed legislative proposal to amend the Domestic Relations Law to require marriage licenses in all cases. If this proposal is adopted, courts will no longer be required to examine questions of the validity of marriages if the loopholes in the law requiring marriage licenses are eliminated, thus ensuring the age of consent legislation enacted in 2017 cannot be evaded by religious marriages.[16]

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

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

Re-Submission of Previously-Endorsed Rule Proposals

We are restating in this report our previously-endorsed rule proposal relating to statewide orders to expedite changes in venue, 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. These proposals further both decisional and operational excellence by promoting faster and fairer resolutions.

Finally, we also restate our proposed amendment to 22 NYCRR § 202.16(k)(3) to reform the rules related to matrimonial proceedings regarding motions for counsel fees by the non-monied spouse pursuant to DRL §237, not only as to the elimination of the attorney's affirmation, but also as to adoption of a form of affidavit to be used by self-represented litigants

[15] See our discussion of the requirements of CPLR 321 which might prohibit withdrawal of the attorney once the application for counsel fees is made.

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

in applying for counsel fees. Our rule amendment proposal also makes clear what is in fact required by the statute but unfortunately is not always understood, namely, that when the non-monied spouse is represented by an attorney, the attorney for the monied spouse must submit the required billing documentation with the answering papers for the motion for counsel fees by the non-monied spouse, just as the attorney for the non-monied spouse must submit the documentation with the moving papers. Otherwise the non-monied spouse will be at a disadvantage by having to reveal details that the monied spouse could keep confidential.

New Committee Responses to Requests for Public Comment on Rule Proposals and Submissions to Public Hearings

In this report we will discuss comments we have submitted to the Office of Court Administration in response to requests for public comment on various rule proposals, including proposed mandatory attendance in the Parent Education and Awareness Program, proposed guidelines on limited scope representation in civil matters, and proposed adoption of certain rules of the Commercial Division in all civil matters. We also discuss our submission to the Parental Representation Commission.

Past, Pending and Future Projects

Finally, we discuss several new and ongoing projects, including coordination with the Department of Technology to employ autofill and auto-calculation in the consensual divorce program we have been developing as a first step toward making the uncontested divorce process simpler and easier for litigants. Ultimately, it is our goal to streamline uncontested divorces even when they are not consensual.

We continue our efforts to explore the ramifications of changes in the federal tax code and their effect on divorce litigation, including their effect on the New York maintenance and child support laws. To further this effort, we are developing recommendations as to best practices to alert litigants and attorneys to these ramifications so that they can bring them to the court's attention where appropriate in specific cases.

We also comment on matrimonial mediation pilot projects in Erie, Kings and Suffolk created last year and new pilot projects in seven counties on mandatory parent education in coordination with the Office of ADR Programs for the New York State Unified Court System. Another project we will discuss is the development of sample form orders appointing mental health professionals. Other Committee ongoing projects include the study of alternative parenting arrangements, access rights of same sex and non-biological couples, and our continued study of the proposed Revised Parent Child Security Act (2017-18 A.6959/S. 0017) and any version thereof that may be reintroduced in 2019, in light of the landmark Court of Appeals decision in *Matter of Brooke S.B v. Elizabeth A.C.C.* (2016 NY Slip Op 05903). We also address the topics of New York's treatment of joint custody under the Child Support Standards Act, mentoring of new or newly-assigned matrimonial judges, assistance to the New York State Judicial Institute with education and training of matrimonial judges, and the impact of the new Federal Child Support Guidelines on child support in New York.

In 2019, the Chair of the Committee, Hon. Jeffrey S. Sunshine will continue the extensive outreach to members of the matrimonial bench and bar. During 2019, 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 from interested members of the bench, bar, academic community and public concerning legislative proposals and the ongoing revision of matrimonial rules and forms. We invite submission of comments, suggestions and inquiries to:

Matrimonial Practice Advisory and Rules Committee:

CHAIR:
Honorable Jeffrey S. Sunshine, JSC, Kings County
Statewide Coordinating Judge for Matrimonial Cases
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IV. New Legislative Proposals

1. *Proposal Regarding Mandatory Electronic Filing in Matrimonial Actions [CPLR 2111(b)(2)(A), CPLR 2111(b)(2-a), and § 11 of chapter 237 of the Laws of 2015]*

One of our key priorities in 2019 is a new legislative proposal, which would authorize the Chief Administrative Judge to require mandatory electronic filing in matrimonial actions. In 2015, the Legislature enacted CPLR 2111(b)(2)(A), which authorized the Chief Administrative Judge to mandate the electronic filing of court papers in all cases in Supreme Court with only a limited number of exceptions.[17] One of those exceptions was in matrimonial actions. Since 2015, electronic filing experiments with consensual electronic filing in matrimonial cases in counties such as Westchester have proven very successful, and our Committee now recommends this proposal, which would remove the exception in the statute for matrimonial actions.[18]

In our last year's report, we annexed a letter from Hon. Jeffrey Sunshine, Chair of the Committee, to Marc Bloustein, OCA Legislative Counsel, dated April 24, 2017 outlining the Committee's thoughts about advantages of electronic filing in matrimonial actions based on experience with the Westchester consensual matrimonial e-filing project.[19] These advantages include immediate remote access to files which will eliminate delays not only when a new attorney is retained, but while files are being transported to or from court locations, and also when there is urgency for the court to consider signing an Order to Show Cause granting ex parte relief. Physical loss of documents and dangers of tampering with documents will be greatly reduced, as will the time and expense lost by self-represented litigants in filing uncontested divorces and other papers. Filings can be done at any time day or night, and litigants and attorneys will have full access to the entire file at all times. For judges, decision writing will become much easier, as it will be possible to cut and paste when quoting from filed documents and even compare judgments and counter judgments, thus saving judicial resources.

In October, 2018, as a further step in promoting electronic filing in matrimonial cases, Judge Sunshine sent a letter to the matrimonial bench and bar asking for their support in moving forward the instant legislative proposal.[20] The 2018 letter reiterated and expanded upon

[17] See supra note 8 for the text of the legislation requiring that the Chief Administrator consult with local bar associations and county clerks before eliminating the requirement of consent to electronic filing in any county.

[18] The proposal makes certain further changes in the e-filing statutes in addition to elimination of the present exclusion of matrimonial actions from mandatory e-filing programs in Supreme Court. It also eliminates the present exclusion as to residential foreclosure and consumer debt actions from mandatory e-filing programs in Supreme Court and resets the September 1, 2019 sunset for use of e-filing in criminal and Family Court so that it will be two years after such use actually begins. We include these changes in our proposal at the request of the Office of Court Administration.

[19] See letter from Hon. Jeffrey Sunshine to Marc Bloustein dated April 24, 2017 attached as Appendix "F-1"' to this report.

[20] See letter dated October 4, 2018 from Hon. Jeffrey Sunshine, Statewide Coordinating Judge for Matrimonial Cases, to Bar Groups attached to this report as Appendix "F-2."

the advantages of electronic filing in matrimonial cases as outlined in the 2017 letter, including a streamlined and economical filing process, access to case files, expeditious review of filed papers, enhanced security, easy notifications to parties and easy resubmission of papers, free and fast service of subsequent papers, and for the general community diminished reliance on paper, a greener environment, and public savings through more economical and efficient court operations.

As noted in the 2018 letter, concerns about the need for users of the system to have the technical ability to engage in electronic filing and concerns about loss of privacy of the parties in a matrimonial action, are satisfied as follows: " (i) unrepresented parties in matrimonial cases would be automatically exempt from having to file electronically (although they could choose to do so if they wished), and (ii) attorneys in such cases who lack the knowledge or equipment needed to file electronically could opt out of doing so by the filing of a simple form. Finally, consistent with section 235 of the Domestic Relations Law, papers in a matrimonial action that is electronically filed shall not be accessible on-line to persons other than the parties and counsel therein."[21]

Proposal:

An act to amend the civil practice law and rules, in relation to electronic filing; to amend chapter 237 of the laws of 2015 amending the judiciary law and other laws relating to use of electronic means for the commencement and filing of papers in certain actions and proceedings, in relation to the use of electronic means for the commencement and filing of papers in certain actions and proceedings; and to repeal paragraph 2-a of subdivision (b) of section 2111 of the civil practice law and rules, relating to residential foreclosure actions involving a home loan

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

Section 1. Subparagraph (A) of paragraph 2 of subdivision (b) of section 2111 of the civil practice law and rules, as added by chapter 237 of the laws of 2015, is amended to read as follows:

[21] See page 2 of letter dated October 4, 2018 from Hon. Jeffrey Sunshine, Statewide Coordinating Judge for Matrimonial Cases, to Bar Groups attached to this report as Appendix "F-2."

(A) one or more classes of cases (excluding [matrimonial actions as defined by the civil practice law and rules,] election law proceedings, proceedings brought pursuant to article seventy or seventy-eight of this chapter[,] and proceedings brought pursuant to the mental hygiene law[, residential foreclosure actions involving a home loan as such term is defined in section thirteen hundred four of the real property actions and proceedings law and proceedings related to consumer credit transactions as defined in subdivision (f) of section one hundred five of this chapter, except that the chief administrator, in accordance with this paragraph, may eliminate the requirement of consent to participate in this program insofar as it applies to the initial filing by a represented party of papers required for the commencement of residential foreclosure actions involving a home loan as such term is defined in section thirteen hundred four of the real property actions and proceedings law and the initial filing by a represented party of papers required for the commencement of proceedings related to consumer credit transactions as defined in subdivision (f) of section one hundred five of this chapter]) in supreme court in such counties as he or she shall specify, and

§2. Paragraph 2-a of subdivision (b) of section 2111 of the civil practice law and rules is REPEALED.

§3. Section 11 of chapter 237 of the laws of 2015, as amended by chapter 168 of the laws of 2018, is amended to read as follows:

§11. This act shall take effect immediately; provided that:

(a) sections four, five, six and seven of this act shall expire and be deemed repealed on the first of September [1, 2019; and provided that paragraph 2-a of subdivision (b) of section 2111 of the civil practice law and rules, as added by section two of this act, shall expire and be deemed repealed September 1, 2019] in the second calendar year following the year in which

rules authorizing a program for the use of electronic means as permitted under such sections, respectively, first take effect; and

(b) the chief administrator of the courts shall notify the legislative bill drafting commission of the date or dates rules specified in subdivision (a) of this section first take effect in order that the commission may maintain an accurate and timely effective date base of the official text of the laws of the state of New York in furtherance of effecting the provisions of section 44 of the legislative law and section 70-b of the public officers law.

§4. This act shall take effect immediately.

2. Proposal Regarding Rebuttable Presumption of Expenses in Matrimonial Actions [CPLR Rule 4533-c] (new)

We include in this report a new legislative proposal for a rebuttable presumption on proof of damages in matrimonial cases pursuant to CPLR rule 4533-c.[22] The proposal would impose a cap of $10,000 on invoices in matrimonial cases, a much more realistic amount than the existing $2,000 cap on invoices in general civil cases pursuant to rule 4533-a. As Vincent Alexander observes in the Practice Commentaries regarding the general rule for all civil cases, "The amount specified in the rule as originally adopted has steadily increased by amendment over time and is long overdue for an upward adjustment." (CPLR 4533-a). The rule we propose for matrimonial actions would also allow invoices for any court ordered expenses, a much broader category than allowed under rule 4533-a and would allow more than one invoice per provider. These differences are designed to make it easier for matrimonial litigants, especially unrepresented litigants, to admit documents into evidence. We propose the new rule as a separate rule for matrimonial cases because in family matters, it is especially frequent and necessary for small expenses to be incurred for children's expenses for several children and other family matters.

This rule, like rule 4533-a, allows a plaintiff to prove the reasonableness and necessity for an itemized bill for services without having to produce the person who provided the invoice, provided that certain formal requirements specified are met.[23]

Unlike CPLR 4533-a which is labelled "prima facie proof," our rule creates a rebuttable presumption to make clear that it does not preclude rebuttal. Vincent Alexander notes, with regard to rule CPLR 4533-a, that, even though it is labelled "prima facie proof of damages," it allows for possible rebuttal of the expenses by requiring notice to the other party that the bill will be offered without foundation evidence at least 10 days before trial so that the other party can subpoena witnesses and gather rebuttal evidence. However, our rule is even clearer so that everyone, even self-represented litigants, will understand that the presumption can be overcome. This will prevent the rule from being abused. Our rule also provides a procedure to follow so that the party offering the proof will get notice in sufficient time that the other party intends to rebut the presumption and can prepare to subpoena witnesses or gather other proof for the trial. In addition, our rule is labelled "proof of damages" rather than "proof of expenses" to reflect the fact that, in matrimonial actions, the parties usually claim expenses rather than damages which

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

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

are more commonly sought in tort and personal injury actions. Our new rule also uses gender neutral language by speaking of "the affiant's employer" rather than "his employer."

Proposal:

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

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

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

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

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

(b) Notwithstanding anything to the contrary in rule 4533-a, there shall be a rebuttable presumption that an itemized bill or invoice, receipted or marked paid, for court-ordered obligations, child related expenses, household expenses, goods, services or repairs of an amount not in excess of ten thousand dollars shall be admissible in evidence and represents the reasonable value and necessity of such expenses, goods, services or repairs itemized therein in any action or proceeding set forth in subdivision (a), provided that it is accompanied by a sworn statement by the person, firm or corporation, or an authorized agent or employee thereof, providing such goods or services or making such repairs and charging for the same, stating that

(1) it provided the goods or services or made the repairs for which the expenses were incurred in the amount indicated, (2) no part of the payment received therefor will be refunded to the debtor, and (3) the amounts itemized therein are the usual and customary rates charged for such expenses, goods, services or repairs by the affiant or the affiant's employer; and provided further that a true copy of such itemized bill or invoice together with a notice of intention to introduce such bill or invoice into evidence pursuant to this rule (indicating on its face that any objections must be in writing and set forth the basis for such objection(s)) is served upon the adverse party at least thirty days before the trial. Such presumption may be rebutted at trial only if the adverse party has served on the party submitting the expense and filed with the court a written notice of intention to rebut such bill or invoice setting forth the basis for such objection(s) at least fifteen days prior to trial.

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

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

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

Proposal

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

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

VI. Previously Endorsed Legislative Proposals

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

Continued from 2015, 2016, 2017, and 2018 as one of our two major legislative priorities this year is our effort to address the problem of venue rules in matrimonial actions pursuant to the request of the New York County matrimonial judges with our omnibus matrimonial venue proposal. 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.[24]

[24] 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. In 2016, there were 45,150 uncontested divorces filed statewide of which 11,340 were filed in New York County and 24,327 were filed in all of New York City. Thus, in 2016 approximately 25% of the statewide uncontested filings were filings in New York County and approximately 47% of New York City uncontested filings were in New York County. In 2017, there were 42,857 uncontested divorces filed statewide of which 10,382 were filed in New York County and 23,208 were filed in all of New York City. Thus, in 2017 approximately 24% of the statewide uncontested filings were filings in New York County and approximately 45% 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 from 29% to 24% of statewide uncontested filings and from 52% to 45% of New York City uncontested filings. *See* Appendix "G-1" showing court statistics attached which have been updated through 2017.

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, Justice Cooper 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 understand the consequences of having defaulted in that critical issues relating to spousal support, custody and support of children, and distribution of marital property have been inadequately addressed in the action, they try to vacate the default judgment or bring actions for post judgment relief to modify the terms. "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.[25] 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.[26] The other boroughs of New York City, aside from Richmond, each have an even greater number.[27] New York County unquestionably still bears

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

[26] In 2014, Erie County, where Buffalo is located, had 2,130 uncontested divorce filings, and Monroe County, where Rochester is located, had 1,281 uncontested divorce filings. Similarly, uncontested divorce filings for 2014 for Nassau County were 1,633, for Suffolk County were 2,423, and for Westchester County were 1,978 (*see* OCA Supreme Court Civil Matrimonials Filed and Disposed Comparison Report 2013 and 2014 contained in Appendix "G-1"). In 2015, Erie County had 1,909 uncontested divorce filings, and Monroe County had 1,367 uncontested divorce filings. Similarly, uncontested divorce filings for 2015 for Nassau County were 2,014, for Suffolk County were 2,366, and for Westchester County were 2,097 (*see* OCA Supreme Court Civil Matrimonials Filed and Disposed Comparison Report 2014 and 2015 contained in Appendix "G-1"). In 2016, Erie County had 1,762 uncontested divorce filings, and Monroe County had 1,339 uncontested divorce filings. Similarly, uncontested divorce filings for 2016 for Nassau County were 1,818, for Suffolk County were 2,396, and for Westchester County were 2,004 (*see* OCA Supreme Court Civil Matrimonials Filed and Disposed Comparison Report 2015 and 2016 contained in Appendix "G-1"). In 2017, Erie County had 1,350 uncontested divorce filings, and Monroe County had 1,285 uncontested divorce filings. Similarly, uncontested divorce filings for 2017 for Nassau County were 1,695, for Suffolk County were 2,272, and for Westchester County were 2,062 (*see* OCA Supreme Court Civil Matrimonials Filed and Disposed Comparison Report 2016 and 2017 contained in Appendix "G-1").

[27] 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

the greatest burden with its 11,340 uncontested divorce filings in 2016 and its 10,382 uncontested divorce filings in 2017.[28] Nevertheless there can be no doubt that the need for divorce venue reform is a statewide issue, not limited to New York County.

Compounding the need for the omnibus matrimonial venue statute we propose is a new law enacted in 2017 amending CPLR 503 (a) to permit as another option to venue related to residence of the parties, venue in which a substantial part of the events or omissions giving rise to the claim occurred. This new law (L. 2017, c. 366) was not designed with matrimonial actions in mind. By adding another venue option unrelated to residence without changing plaintiff's ability to designate a venue unrelated to residence pursuant to CPLR 509, which remains intact, it only underscores the immediate need for our omnibus matrimonial divorce venue legislation. Not only will our proposal override CPLR 509 designations (except where expressly permitted in cases where addresses of the parties are not a matter of public record or where confidentiality orders exist), it will also override the provisions of the new law.

A number of thoughtful proposals have been made in the last few years concerning ways to change the CPLR rules by bar association groups and judges and clerks in New York County. These proposals would have overridden the ability of plaintiffs to designate the place of trial in divorce actions by amending CPLR 509. Under existing CPLR 509, only the plaintiff has this ability, and under existing CPLR 510(1), only the defendant may demand a change in the designation.[29] 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.[30] One such proposal to change the divorce venue rules would have applied only to divorces involving minor children of the marriage. The Committee agrees that in divorces involving minor children venue should be related to residence so that the courts can make appropriate decisions as to custody and parenting time and support as to the child, having, where appropriate, the involvement of an attorney for the child familiar with the services available where the child resides. However, our Committee believes that all divorce actions should have venue related to residence. Another such proposal by the New York State Bar

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and 2014 contained in Appendix "G-1"). In 2015, Uncontested divorce filings for the Bronx were 3,845, for Kings were 4,389, for Queens were 4,719, and for Richmond were 543 (*see* OCA Supreme Court Civil Matrimonials Filed and Disposed Comparison Report 2014 and 2015 contained in Appendix "G-1"). In 2016, Uncontested divorce filings for the Bronx were 4,382, for Kings were 3,983, for Queens were 4,013, and for Richmond were 609 (*see* OCA Supreme Court Civil Matrimonials Filed and Disposed Comparison Report 2015 and 2016 contained in Appendix "G-1"). In 2017, Uncontested divorce filings for the Bronx were 4,365, for Kings were 3,550, for Queens were 4352, and for Richmond were 559 (*see* OCA Supreme Court Civil Matrimonials Filed and Disposed Comparison Report 2016 and 2017 contained in Appendix "G-1").

[28] See Appendix "G-1" showing court statistics for uncontested divorce filings in 2016 and 2017.

[29] In the Practice Commentaries, Vincent Alexander explains: "CPLR 510 specifies three grounds for a motion to change venue. Subdivision (1) provides for such motion when venue is improper, *i.e.*, plaintiff has failed to comply with the rules specified in CPLR 501 and 503-508 or some other venue-regulating statute (e.g., CPLR 7502(a)). Only the defendant may make this motion; if the plaintiff places venue in an improper county, she forfeits the right to select a proper one." See N.Y. CPLR 510 (McKinney).

[30] "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.)).

Standing CPLR Committee, which our Committee was asked to review, would have applied to all matrimonial actions, but that proposal requires venue to be the county of residence of one of the parties, not taking into account at all the residence of the children.

In our 2015, 2016, 2017, and 2018 Annual Reports, the Matrimonial Practice Advisory and Rules Committee put forth its own proposal to adopt a new CPLR 514, which is an omnibus matrimonial venue proposal which applies to all divorce actions, not just uncontested divorces, as well as actions in Supreme Court for custody and visitation, all applications to modify a Supreme Court order of custody or visitation, all post judgment proceedings, and all matrimonial actions described in DRL § 236(B). The proposal was included as part of the Office of Court Administration's 2017 Legislative Program as OCA 2017-52, and introduced by Senator Bonacic as S. 5736.

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

In this modified 2018 proposal, we also addressed concerns expressed by Sanctuary for Families regarding our divorce venue post judgment application rule proposal about when the address of either party or their child(ren) is not a matter of public record or is subject to an existing confidentiality order.[31] The revised proposal provides that, in such cases where confidentiality and safety are paramount concerns, the place of trial designated by plaintiff may be as specified pursuant to CPLR 509. This conforms the legislative proposal to the rule on divorce venue post judgment applications adopted in 2017, which we discussed earlier in this report.[32]

Another change in the modified 2018 proposal was that there is only one good cause exception rather than two. One of the good cause exceptions in our original proposal could be read as allowing sua sponte transfers of venue by judges. Concerns were expressed to us by the New York State Bar Association Family Law Section about the possibility of sua sponte transfers of venue to a county with no nexus to the parties simply because the judges in that county were less busy, when the venue originally designated was proper to begin with. Therefore, our revised 2018 proposal retained only the second good cause exception. Rather than allow courts to transfer venue to another county, a time-consuming process fraught with delays, the second good cause exception, which was retained by our modified 2018 proposal, requires that venue be proper in the first place, but gives the court authority for good cause shown to allow the trial to proceed in the county where it was brought. This provision might be used where neither party to the divorce action or their child(ren) resides in New York State.

[31] See Appendix "G-2" to this report containing the comments of Sanctuary for Families regarding our divorce venue post judgment application rule which was adopted in 2017.

[32] See 22 NYCRR §202.50 (b)(3)

Such designation of venue would be improper under our proposal which requires that venue be the residence of one of the parties or their child(ren). However, the plaintiff could make a motion to have it remain in the county designated under the good cause exception where, for example, the parties and their child(ren) had recently left the state. The good cause exception might also be useful to a low-income litigant who could only find pro bono or reduced fee representation in a county that was not the residence of the parties or their child(ren).

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

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

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 are pleased that our divorce venue rule proposal for post judgment enforcement and modification applications has been adopted and is now in effect. However, this rule is not applicable to filings of divorces, but only to applications for post judgment relief. These measures, while helpful, do not address the major problem, namely that designations of venue in counties unrelated to residence deny access to justice to litigants on important questions of custody and visitation and support, and drain the limited judicial resources of the courts by encouraging post judgment relief from default judgments.

Our original proposal was adopted as part of the OCA 2017 Legislative Program (OCA #52) and was introduced in the Legislature as S. 5736. At our recommendation, OCA #52 was modified in 2018 with the changes described above, and an amended version was introduced as 2017-18 S.5736A.[33] An Assembly version was introduced by Assemblyman Dinowitz as 2017-18 A. 9920.[34]

[33] (see https://www.assembly.state.ny.us/leg/?default_fld=%0D%0A&leg_video=&bn=S5736&term=2017&Memo=Y&Text=Y

[34] . (see https://www.assembly.state.ny.us/leg/?default_fld=&leg_video=&bn=a9920&term=2017&Memo=Y&Text=Y).

In 2019 we propose one further modification to our 2018 proposal which addresses concerns raised by Assembly Counsel that our proposed CPLR 514 should expressly contradict CPLR 509 because the latter provides that it applies "notwithstanding any provision of this article." Even though our prior proposal for CPLR 514(b) provided that it applies "notwithstanding anything to the contrary contained in this article," we have made a further change in our 2019 proposal to address Assembly staff concerns. We appreciate the input from Assembly staff because we share their desire to make certain that, if enacted, our new proposal will clearly override CPLR 509 in the event of a conflict.

Proposal:

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

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

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

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

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

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

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

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

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

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

Another legislative priority this year carried over from prior years is the amendment of the biennial date of adjustment of the "income cap" under the maintenance guidelines law to coincide with the biennial adjustment date of the "income cap" under the Child Support Standards Act.

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.[35] It was also the date that the child support combined income cap pursuant to the Child 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 to conform with the date of adjustment of the self-support reserve pursuant to Social Services Law § 111-i(2)(b). 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 all occur at the same time. This will also save unnecessary costs of reprinting the Uncontested Divorce Packets on January 31st and then again on March 1st. Not only must the forms be revised and printed twice in a two-month period, but the child support and maintenance calculators must be revised as well.

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 1st rather than January 31st 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.

Although this measure seems ministerial in nature, its enactment would further the goals of the Excellence Initiative by eliminating wasted time and resources and increasing access to justice for litigants by reducing litigation delays caused by confusion over which cap applies.

[35] L.2010, c. 182.

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:

(d) "Income cap" shall mean up to and including one hundred [seventy-five] eighty-four thousand dollars of the payor's annual income; provided, however, beginning [January thirty-first] March first, two thousand [sixteen] twenty 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] eighty-four thousand dollars of the payor's annual income; provided, however, beginning [January thirty-first] March first, two thousand [sixteen] twenty 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] <u>eighty-four</u> thousand dollars of the payor's annual income; provided, however, beginning [January thirty-first] <u>March first</u>, two thousand [sixteen] <u>twenty</u> 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.

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

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

Before any court rule was adopted, legislation on the subject was introduced (A. 8342-A). Consideration of the proposals by the Administrative Board of the Courts was suspended pending possible action on this legislation. A new version of said bill was introduced as A. 290 on January 7, 2015. The Committee's concerns as to A. 8342-A continued to be applicable to the 2015-16 version. The Committee expressed these concerns in our 2016 Annual Report to the Chief Administrative Judge. On January 12, 2017, a 2017-18 version of said bill was introduced as A.1533/S.6300. As stated in our 2016 and 2017 Annual Reports, we believe that there is a real danger that the dissemination to the public of the reports or copies thereof on the Internet could prove to cause long lasting damage and embarrassment to many, and those concerns must outweigh reasonable restrictions imposed on self-represented litigants. Attorneys and other forensic experts are subject to professional discipline if reports are released, while parties, including self-represented litigants, face only potential contempt charges which are unlikely to result in a meaningful remedy for innocent victims including children whose personal lives are exposed.

Last year, our Committee developed a new proposal on access to forensics in custody cases, which we hoped would resolve the differences as to treatment of self-represented litigants by providing access to the report and the complete evaluator's files to the parties including self-represented litigants, attorneys, independent forensic experts hired to assist the attorneys, and the attorney for the child, on terms which respect the due process rights of self-represented and represented litigants, while providing better protections against unauthorized dissemination than were contained in the original bill. As in A.1533/S.6300, access to the evaluator's file would include access to the entire file related to the proceeding including, but not limited to, all underlying notes, test data, raw test materials, underlying materials provided to or relied upon by the court-ordered evaluator and any records, photographs or other evidence. Our proposal was accepted as part of the Office of Court Administration's 2017 Legislation program and was introduced in the Legislature by Senator Avella as 2017-18 S. 6579, who also introduced S.6300, the Senate version of A.1533. Last year, memoranda in opposition to A.1533/S.6300 and in support of S. 6579 were sent to legislators by the Family Law Section of the New York State Bar Association, the Women's Bar Association of the State of New York, the New York City Bar Matrimonial Law Committee and Committee on Children and the Law and the New York Chapter of the Academy of Matrimonial Lawyers. [36]Also supporting our proposal was the

[36] See Appendix "H-1" to this report containing Bar Association positions on Forensics bills (in Support of 2017-18 A.6579 and in Opposition to 2017-18 A.1533/S,6300.

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

> "*Thus, we support the Matrimonial Practice Advisory and Rules Committee recommendation that would give both represented and pro se litigants access to, but not possession of, forensic evaluations. Such an approach would simultaneously afford parents and other parties due process while adequately safeguarding the interests of the children caught in the middle of contentious litigation. This proposal is not simply acceptable, as Mr. Tippins suggests,*[37] *but necessary to avoid placing vulnerable children at greater risk than they already are as the subjects of a custody or visitation proceeding."* [38]

During 2017 we also received some suggestions for improving our proposal from the Chief Administrative Judge's Family Court Advisory and Rules Committee and the New York Public Welfare Association, Inc. These changes included revising the definition of "court-ordered evaluators" to include only forensic mental health professionals in custody and visitation proceedings, **not** court-ordered ordered evaluators in statutorily mandated investigations in child protective, permanency, destitute child or other proceedings because proceedings under Article 6 of the Family Court Act are often consolidated or held jointly with child protective or other proceedings in which assessments other than clinical evaluations are ordered and in which other considerations are relevant. This change also avoids conflicts with confidentiality laws and possible loss of federal funding for state child protective programs.[39] We also deleted a provision we had included in our prior proposal at the suggestion of the Family Law Section of the New York State Bar Association governing the times when the court may read or review the forensic report. We adopted instead a suggestion of the Family Court Advisory and Rules Committee to authorize the Chief Administrative Judge to promulgate rules and regulations authorizing a court, in particular cases where a party does not raise a legally valid objection thereto, to read or review a forensic report at particular times as the rules shall permit.. By allowing the Chief Administrative to promulgate rules and regulations for a court rather than impose uniform rules on all courts, we

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[37] See Timothy M. Tippins, "Forensic Reform: The Time is Now!" (NYLJ March 2, 2017), to which the foregoing quotation by The Children's Law Center refers.

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

[39] The New York Public Welfare Association, Inc. opposed both A.1533 / S.6300 and S. 6579 because the definition of "court-ordered evaluators" included court-ordered child protective examinations. This could result in multiple problems under confidentiality laws and might also impact federal funding, which is conditioned on states following federal rules on confidentiality of child abuse and neglect reports. See Appendix "H-2" to this report containing the comments of the New York Public Welfare Association, Inc.

allow for the differences between the types of custody and visitation proceedings which may be handled in Family Court as contrasted with Supreme Court.[40]

These changes do not detract from the essential feature of our proposal which provides access to the reports and notes and evaluator's file to attorneys and litigants while ensuring greatly increased protections (as compared to A.1533/S.6300) to prevent confidential information in the report from being disseminated indiscriminately. In our modified proposal, we retained the additional protections preventing unauthorized dissemination by everyone involved, including attorneys, attorneys for children, experts, independent forensic evaluators hired to assist attorneys or self-represented litigants, and represented and self-represented litigants. We also retained the provisions giving self-represented litigants access to the reports and files and the ability to take notes thereon at the court or other location, as well as the ability to employ forensic evaluators who will themselves be permitted a copy of the report and access to the file upon execution of an affidavit assuring against dissemination.

We also retained a clause 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 or its successor 2017-18 A. 1533/S.6300.

We believe our revised proposal, continues to merit serious consideration this year when new bills will need to be introduced for the 2019-20 legislative session. We believe 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. 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.

Proposal:

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

[40] For a detailed description of the key provisions of the modified proposal, See Appendix "H-3" to this report containing an excerpt of pp. 16-21 of our 2018 report available at https://www.nycourts.gov/ip/judiciaryslegislative/pdfs/2018-MatrimonialPractice-ADV-Report.pdf

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

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

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

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

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

(2) The court order appointing said evaluators shall provide to a party's attorney or the

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

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

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

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

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

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

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

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

(iv) at any other time if:

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

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

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

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

new paragraph (a-3) to read as follows:

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

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

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

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

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

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

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

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

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

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

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

(iv) at any other time if:

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

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

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

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

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

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

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

except as otherwise expressly permitted under this subdivision, without the consent of the court, and will return the report and file to the court upon conclusion of the litigation, subject to the provisions of section three thousand one hundred three of the civil practice law and rules. Provided, however, in no event shall a party or his or her counsel be prevented from access to or review of a forensic report in advance of and during trial. Any conditions or limitations imposed by the court pursuant to this subdivision relating to disclosure of the forensic report shall accommodate for language access and disability, except that no party to the action shall be permitted to have a copy of the report or to reproduce or disseminate all or any portion thereof. If a party is self-represented, the court shall make reasonable accommodations for the self-represented party to review said report at a court or other location, and to make notes about the report; and if a party is represented, the party shall have a right to read the forensic report in his or her attorney's office, to discuss the report with the attorney representing him or her in the action, and to make notes about the report. Upon application by counsel or a self-represented litigant, the court shall permit a copy of the forensic report and a copy of the court-ordered evaluator's files as provided for under paragraph three of this subdivision to be provided to any independent forensic evaluator retained to assist counsel or a self-represented litigant, provided that the independent forensic evaluator executes an affidavit acknowledging that he or she may not further disseminate the report or the files absent court permission, and will return the report and the files to the court at the conclusion of the litigation, subject to the provisions of section three thousand one hundred three of the civil practice law and rules; and

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

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

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

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

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

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

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

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

(iv) at any other time if:

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

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

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

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

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

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

(2) The court will determine which party is responsible for payment of the fee of the court-ordered evaluator, or in what proportions payment of the fee of the court-ordered evaluator will be shared between the parties, or otherwise paid on behalf of a party or parties, if applicable. Any report or evaluation prepared by the court-ordered evaluator, to be known as a "forensic report" for the purposes of this subdivision, shall be confidential and kept under seal except that all attorneys and the attorney for the child shall have a right to receive a copy of any such

forensic report upon receipt of such a report by the court; provided that they execute an affidavit acknowledging that they will not give a copy of the report or the evaluator's file as provided for under paragraph three of this subdivision to a party or further disseminate the report or said file, except as otherwise expressly permitted under this subdivision, without the consent of the court, and will return the report and file to the court upon conclusion of the litigation, subject to the provisions of section three thousand one hundred three of the civil practice law and rules. Provided, however, in no event shall a party or his or her counsel be prevented from access to or review of a forensic report in advance of and during trial. Any conditions or limitations imposed by the court pursuant to this subdivision relating to disclosure of the forensic report shall accommodate for language access and disability; except that no party to the action shall be permitted to have a copy of the report or to reproduce or disseminate all or any portion thereof. If a party is self-represented, the court shall make reasonable accommodations for the self-represented party to review said report at a court or other location, and to make notes about the report; and if a party is represented, the party shall have a right to read the forensic report in his or her attorney's office, to discuss the report with the attorney representing him or her in the action, and to make notes about the report. Upon application by counsel or a self-represented litigant, the court shall permit a copy of the forensic report and a copy of the court-ordered evaluator's files as provided for under paragraph three of this subdivision to be provided to any independent forensic evaluator retained to assist counsel or a self-represented litigant; provided that the independent forensic evaluator executes an affidavit acknowledging

that he or she may not further disseminate the report or the files absent court permission, and will return the report and the files to the court at the conclusion of the litigation, subject to the provisions of section three thousand one hundred three of the civil practice law and rules; and

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

(4) A willful failure to comply with a court order conditioning or limiting access to a forensic report or a willful violation of the provisions of this subdivision regarding dissemination of the forensic report or the evaluator's file or of an affidavit executed with respect thereto shall be contempt of court and may be punishable as such as provided under seven hundred fifty or section seven hundred fifty-three of the judiciary law as the case may be. The court shall notify the parties and counsel on the record that a willful failure to comply with the court order or the provisions of this subdivision regarding dissemination of the forensic report or the evaluator's

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

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

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

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

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

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

(iv) at any other time if:

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

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

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

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

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

We continue to recommend our previously-endorsed measure designed to encourage attorneys to make application for counsel fees by non-monied spouses in matrimonial actions by permitting them to make a limited appearance in the action for this purpose without the fear that they will become attorney of record obligated to continue the representation even if the application is denied. This proposal will make it easier for non-monied spouses to obtain counsel fees. It supplements our proposal, which was enacted in 2015 (L. 2015, c. 447), which amended DRL§ 237(a) to clarify and codify on a statewide basis that unrepresented litigants should not be required to file an affidavit detailing fee 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.[41] However, our Committee decided that a statutory amendment to Domestic Relations Law **§** 237(a) dealing with applications for counsel fees by the non-monied spouse was the most effective way to proceed. Inasmuch as the rules regarding attorney appearances are contained in CPLR 321, our proposed amendment provides that it applies notwithstanding the provisions of that section. Said statute states that once a party has 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.[42]

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[41] 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."

[42] CPLR 321 reads as follows:
§ 321. Attorneys.
(a) Appearance in person or by attorney. A party, other than one specified in section 1201 of this chapter, may prosecute or defend a civil action in person or by attorney…If a party appears by attorney such party may not act in person in the action except by consent of the court.

A 2002 Report on Unbundled Services by a State Bar Commission (the "NYSBA Report"),[43] at Footnote 2, suggests language for amendment of CPLR 321 to accommodate limited scope representation.[44] In the NYSBA Report, the Commission also expressed the view that limited scope representation in a litigation context was problematic while it is often justified in a transactional context, and should be allowed in court-annexed or non-profit legal services programs that are structured to accommodate limited appearances by pro bono attorneys.[45]

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.[46] 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.[47]

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?

(b) Change or withdrawal of attorney. 1. Unless the party is a person specified in section 1201, an attorney of record may be changed by filing with the clerk a consent to the change signed by the retiring attorney and signed and acknowledged by the party. Notice of such change of attorney shall be given to the attorneys for all parties in the action or, if a party appears without an attorney, to the party.
2. An attorney of record may withdraw or be changed by order of the court in which the action is pending, upon motion on such notice to the client of the withdrawing attorney, to the attorneys of all other parties in the action or, if a party appears without an attorney, to the party, and to any other person, as the court may direct."

[43] 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.

[44] 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."

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

[46] NYS Unified Court System, Part 1200, Rules of Professional Conduct, April 1, 2009.
[47] *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.

We believe these questions are answered if the attorney complies with his/her obligations under the Rules of Professional Conduct and with all applicable rules and laws of this state regarding procedures for attorneys in domestic relations matters, including the obligation to provide the client with a statement of client's rights and responsibilities, and the obligation to sign a retainer agreement with the client making clear that the scope of services is limited to making application for counsel fees only, the amount of any fee to be charged, and that the attorney has no affirmative obligation to represent the client on any other issue in the case until a new retainer is signed (*see* 22 NYCRR § 1400.0 and rule 1.5 (d) and (e) of the New York Rules of Professional Conduct at 22 NYCRR § 1200). Our proposal contains all these requirements clearly spelled out.[48]

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."[49]

On December 16, 2016, an Administrative Order was signed by Chief Administrative Judge Marks with approval of the Administrative Board that declared that "limited scope legal assistance is in the best interests of both litigants and the courts when it is properly employed in such civil matters as consumer credit disputes, foreclosures, evictions, divorces and veterans' rights cases."[50] The Administrative Order requires, among other things, that the retainer agreement must be written clearly and show that clients gave their informed consent to what fees, if any, a lawyer is entitled. In addition, it requires that the court or tribunal the lawyer is appearing before must deem the limited appearance appropriate.

Our proposal meets the requirements of the Administrative Order because it requires that attorneys comply with the applicable rules and laws of this state regarding procedures for attorneys in domestic relations matters, which would include the mandates of the Administrative Order, since divorce is one of the types of civil actions specifically contemplated by the Order. In addition, our proposal expressly requires compliance with 22 NYCRR § 1400 and 22 NYCRR § 1200 which 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.[51]

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[48] 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.

[49] 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.

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

[51] 22 NYCRR§ 1400 and 22 NYCRR§ 1200 read as follows:

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) is silent on the subject of limited scope representation, the legislation requires Supreme Court Justices to appoint counsel to represent an indigent party in a divorce action on issues such as custody over which the Family Court could have exercised jurisdiction, while the remaining issues in the action would have to be handled *pro se* or by a different attorney on a full fee basis. Thus, it is our position that the limitation in scope of representation was justifiable in order to provide representation to the non-monied spouse in a matrimonial action. The 2006 bill memo states:

"There is no justification for providing indigent persons an attorney in family court and not in supreme court. To further exacerbate this problem, it is possible for a monied spouse, faced with a custody case in family court, to commence a divorce action and seek to remove the custody determination to supreme court. If the other spouse qualified for an attorney in family court, such action could deprive the non-monied spouse of representation."[52]

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

If enacted, this legislation will reduce the number of indigent litigants that are forced to either represent themselves or rely on the limited number of pro bono and assigned counsel available to assist them.[53] Thus, our proposal is clearly an access to justice measure furthering the Chief Judge's Excellence Initiative.

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

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

[52] *See* bill memo 2006 A. 10447 attached as Appendix "I" to this report.

[53] See Committee Response to Request for Public Comment on Proposed Guidelines for Limited Scope Representation in Civil Matters dated September 24, 2018 attached as Appendix "E" to this report

Proposal:

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

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

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

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

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

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

§2. This act shall take effect immediately.

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

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

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

DRL § 12 provides:

> Marriage, how solemnized. No particular form or ceremony is required when a marriage is solemnized as herein provided by a clergyman or magistrate, but the parties must solemnly declare in the presence of a clergyman or magistrate and the attending witness or witnesses that they take each other as husband and wife. In every case, at least one witness beside the clergyman or magistrate must be present at the ceremony.
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> 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.[54] Although unrelated to the issue of requiring a marriage license, we further recommend the

[54] 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 …."

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. These cases arise when one party to the alleged marriage later contends that the marriage was not properly solemnized. The objections to the validity of the marriage arise either because a party claims the person who performed the ceremony did not meet the definition of a clergyman or minister as defined under Religious Corporations Law § 2 (*Ranieri v. Ranieri, 146 A.D.2d 34 [2d Dep't 1989]; Oswald v. Oswald, 107 A.D.3d 45 [3d Dep't 2013]; Jackson K. v. Parisa G., 51 Misc.3d 1215(A) [Sup. Ct., NY County, 2016])* or where it is claimed that the ceremony was not performed in accordance with the practices of the religious denomination as required under DRL§ 12 (*Jackson K. v. Parisa G., supra.; Devorah H. v. Steven S., 49 Misc.3d 630 [Sup Ct., NY County 2015]; Persad v. Balram, 187 Misc.2d 711 [Sup. Ct., Queens County 2001]).* Determining these issues can create difficulties for a judge since a court is prohibited from resolving "controversies over religious doctrine and practice." (*Presbyterian Church of U.S. v. Mary Elizabeth Blue Hull Mem. Presbyterian Church, 393 U.S. 440, 449 [1969]; First Presbyterian Church of Schenectady v. United Presbyterian Church in U.S., 62 N.Y.2d 110, 116 [1984]).* To require the court to determine, as contemplated by the second paragraph of DRL § 12, whether a marriage was solemnized "in the manner heretofore used and practiced in their respective societies or religions" is in direct conflict with the aforementioned United States Supreme Court precedent. *See also, Weisberg, 2014 N.Y. Misc. LEXIS 1613 [Surr. Court, N.Y. Co. 2014]*.

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

Moreover, the filing of a license will help avoid litigation in a host of other areas by providing a record of the marriage to address crediting of social security benefits, health insurance coverage, inheritance rights and other marriage-related issues.[55] In many of these

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

cases, such as *Ponorovskaya*,[56] *Farraj*, [57] and *Hasna*,[58] the court is required to examine the facts and circumstances at great length in order to determine the expectations of the parties as to whether they were legally married. Determining the validity of the marriage often requires lengthy litigation, occurring years after the alleged marriage was entered, when witnesses may no longer be available and can cause severe emotional distress to the parties, children, heirs and others, not to mention the time and expense incurred in proceeding with such court or administrative proceedings. Such litigation consumes judicial resources which could have been better spent determining important questions involved in matrimonial cases, such as custody and visitation, which have immediate consequences in the lives of families and children going through divorce. Moreover, uncertainty over whether a marriage exists can work to the detriment or the advantage of either party and allows manipulation by parties.

Marriage in New York is a civil contract (DRL § 10). We see no impediment to having an absolute requirement that a marriage license be obtained before a marriage can be solemnized in New York. At least twenty-seven states have enacted mandatory marriage license statutes without any claim of infringement on religious freedoms.[59] Moreover, the absolute requirement that a license be obtained will help ensure that the parties recognize the serious commitment they make by entering into a marriage.

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

"Based on anecdotal evidence, we have learned that the court approval process under current law for the authorization of marriage of persons under sixteen years of age has not

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

[57] *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)).

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

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

provided adequate protections for a child against abuse and fraud on the part of parents or guardians to force a child into marriage. This legislation will strengthen the process as applied to marriage of persons at least seventeen but under eighteen years of age…"

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

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

Proposal:

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

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

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

§12. Marriage; how solemnized.

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

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

in their respective societies or denominations, and marriages so solemnized shall be as valid as if this article had not been enacted.]

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

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

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

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

The Committee believes that a special rule on discontinuances for matrimonial actions is needed because pleadings are often not served or waived in divorce actions. Parties often do not file pleadings in such cases while they negotiate and may not even be aware of all the ancillary issues until later in the case. With the advent of DRL § 170(7) allowing for no-fault divorce, a party may not even file an answer and counterclaim, believing, erroneously, that it is unnecessary. It is unfair to the court and the other party and to the children to let a party discontinue after considerable resources and effort have been spent on the case. We were gratified at the adoption of our proposal for a revised Preliminary Conference Order form containing a provision requiring the parties to waive a voluntary discontinue once grounds have been resolved.[60] 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,[61]we recommend a statutory amendment to the CPLR applicable only to matrimonial actions which would prohibit a voluntary discontinuance once a notice of appearance is filed or a party has appeared in court, e.g. at the preliminary conference. Like the provision in our revised preliminary conference order form adopted in 2016, discussed earlier in this report, this provision will deny parties the option to discontinue an action in order to litigate another day when they believe their chances will be better, even though they have already spent years in discovery, but will accomplish this without requiring parties to file pleadings which might discourage settlements and which might result in extensive motion practice and hearings. There

[60] 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.

[61] 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.

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 here propose a statutory amendment.

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.

VII. Previously-Endorsed Rule Proposals

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

We continue to recommend an amendment of the matrimonial rules to add a new section 202.16-c[62] 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-designated 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 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.

[62] In our prior reports, this proposal was for a new section 202.16-b. However, since a new section 202.16-b was adopted in 2017 on Submission of Written Applications in Contested Matrimonial Actions, we now propose this new section as 202-16-c.

Proposal:

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

§202.16-c. 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]

2. 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. [63] 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.[64]

This procedure is authorized under CPLR 5012 which provides:

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

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

[63] See Memorandum dated March 7, 2008 from Hon. A. Gail Prudenti, then Presiding Justice of the Appellate Division of the Second Judicial Department, advising of the requirements in the CPLR for custody and visitation decisions (rather than orders) which can then be followed by judgments which are appealable.

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

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

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

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

Proposal:

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

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

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

In 2015, the Legislature passed and the Governor signed into law, as chapter 447 of the laws of 2015, our proposal to amend § 237(a) to clarify and codify on a statewide basis what is implicit in *Prichep v. Prichep* , 52 A.D.3d 61, 858 N.Y.S.2d 667 (2d Dept. 2008), i.e., unrepresented litigants[65] should not be required to file an affidavit detailing fee arrangements when seeking counsel fees. We now propose an amendment to 22 NYCRR **§** 202.16 (k) (3) to mirror the statutory amendment exempting unrepresented litigants from the detailed fee affidavit requirement, and to adopt a new statewide form, *i.e.*, "Unrepresented Litigant Application for Counsel Fees." It consists of an order to show cause together with an affidavit in support. The new form is designed to make it easier for pro se litigants to apply for counsel fees. Without funds to hire counsel to make a formal motion for counsel fees, pro se litigants often do not know where to start in making the application. Compounding the problem is the unwillingness of many attorneys to make a motion on their behalf for counsel fees because of fear of becoming attorney of record in the matter.[66] 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.

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[65] 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.

[66] *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.[67] 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 "L" to this report to be promulgated as an Appendix to 22 NYCRR § 202.16).

[67] This is written in anticipation of future promulgation of an Appendix to 22 NYCRR § 202.16 containing the form Application for Counsel Fees by an Unrepresented Litigant attached as Appendix "L" to this report.

VIII. Committee Responses to Request for Public Comment

1. Proposed Amendment to 22 NYCRR § 144.3 to Mandate Attendance in the New York State Parent Education and Awareness Program

In 2017 and 2018, the Committee considered the proposal (the "JROPE Proposal") circulated for public comment by the Office of Court Administration in a memorandum from John W. McConnell, OCA Counsel, dated November 27, 2017 available at https://www.nycourts.gov/LegacyPDFS/RULES/comments/PDF/ParentEd.pdf. The proposal would require judges to order parents to attend parent education and awareness programs in annulment, divorce, separation, and custody matters unless the court has specifically found "that the program would be inappropriate due to the existence of domestic violence or other enumerated factors." The proposal was developed by a Committee for Judicial Restoration of Parent Education composed of members of the bench and bar chaired by Hon. Sondra Miller (Retired) and Hon. Jacqueline Silbermann (Retired), both Honorary Chairs of the Matrimonial Practice Advisory and Rules Committee.

The Committee issued a letter of comments on the JROPE Proposal dated January 25, 2018.[68] The Committee supported the proposal for mandatory attendance in contested matrimonial cases where a Request for Judicial Intervention (RJ1) has been filed if there are minor children of the marriage, regardless of whether or not custody is at issue with discretion given to the judge to waive the requirement. In order to provide for a uniform standard statewide, the Committee proposed that there should be an OCA produced online program, limited only to children's issues (not legal issues) that is no more than ninety (90) minutes in length. On October 1, 2018, an Administrative Order was signed by the Chief Administrative Judge creating pilot projects in seven counties requiring parents to attend mandatory parent and education and awareness training in contested matrimonial cases.[69] Later in this report we will discuss our Committee's ongoing efforts to implement the Administrative Order in coordination with the Statewide Office of ADR programs.

2. Proposed Guidelines for Attorneys Providing Limited Scope Representation in Civil Matters

By letter dated June 22, 2018, OCA Counsel John W. McConnell, on behalf of the Administrative Board of the Courts, requested public comments on proposed guidelines for attorneys providing limited scope representation in civil matters.[70] On September 24, 2018, the Committee submitted a letter to OCA Counsel John W. McConnell requesting clarification that

[68]See letter from Hon. Jeffrey Sunshine to John W. McConnell dated January 25, 2018 regarding the Committee's comments on the parent education proposal which is attached to this report as Appendix "M."

[69] See Administrative Order AO/262/18 dated August 9, 2018 creating parent education pilot projects attached to this report as Appendix "N."

[70] A copy of said letter requesting public comments on the proposed guidelines for attorneys providing limited scope representation in civil matters is available at https://www.nycourts.gov/LegacyPDFS/RULES/comments/PDF/LimitedScopeRepresentation.pdf

the proposed guidelines are not intended to apply to certain limited scope representation programs already in existence which provide much needed legal representation to indigent litigants in matrimonial actions.[71] The Committee noted that in many of those programs, counsel make limited appearances when cases are bifurcated. Without such clarification, we fear that the guidelines will discourage such representation. By enacting Judiciary Law §35(8) in 2006, the Legislature implicitly authorized attorneys to provide unbundled or limited scope legal services to indigent spouses in matrimonial actions. Judiciary Law 35(8) requires Supreme Court Justices to appoint counsel to represent an indigent party in a divorce action on issues such as custody and visitation or orders of protection over which the Family Court could have exercised jurisdiction. This important legislation ensured that non-monied spouses would have the same right to paid representation in Supreme Court that they would have had pursuant to FCA 262 in Family Court with respect to those issues. However, there is no statutory authority to appoint counsel for indigent litigants on financial issues in matrimonial cases. Divorce litigation involves not only issues over which the Family Court could have exercised jurisdiction, but also financial issues over which the Family Court is divested of authority once a Supreme Court action is instituted (see *Poliandro v. Poliandro,* 119 AD2d 577, 500 NYS2d 744 [2 Dept.,1986]), and over which the Family Court has no statutory authority such as issues of distribution of marital property or maintenance. To fill the gap, private matrimonial attorneys have been accepting limited scope representation on the ancillary issues in divorce actions with bifurcated representation of indigent litigants pursuant to Judiciary 35(8). In addition, successful limited scope pro bono programs have been developed by bar associations such as the Women's Bar Association of the State of New York and pro bono projects in Brooklyn and New York County with the assistance and encouragement of the New York State Judicial Committee on Women in the Courts chaired by the Hon. Betty Weinberg Ellerin. Our Committee applauds these efforts and wants them to continue.

The Committee is concerned that the proposed guidelines will discourage attorneys from taking assignments pursuant to Judiciary Law 35(8). Attorneys taking Judiciary Law 35(8) assignments should not have to obtain judicial consent to the assignments or complete certified training courses, since it is the court making the assignment from a panel of attorneys who have already been certified as qualified. Moreover, the case by case analysis of whether the proposed representation is reasonable should not be required since the Legislature has already mandated that such representation on limited issues in a matrimonial proceeding over which Family Court would have had jurisdiction such as custody is reasonable. Thus, we submit there should be an exception to the requirements in the proposed guidelines.

Similarly, when a private attorney takes on responsibility for the remaining limited financial issues in the case, judicial consent should also be unnecessary. Attorneys who agree to

[71] See letter from Hon. Jeffrey Sunshine and Susan W. Kaufman to John W. McConnell on behalf of the Committee dated September 24, 2018 commenting on the proposed guidelines, which is attached to this report as Appendix "E." These comments are also available under Public Comment at https://www.nycourts.gov/LegacyPDFS/RULES/comments/PDF/received/Guidelines%20on%20Limited%20Scope%20-%20PC%20received%20OCR.pdf

represent indigent litigants on just the financial issues in a divorce action should not fall under the umbrella of limited scope representation. To impose new certification requirements now on those attorneys would severely limit access to justice for many indigent matrimonial litigants.

The Committee is also concerned that the requirements in the proposed guidelines will discourage pro bono attorneys from participating in existing pro bono programs successfully supervised by courts, government agencies, bar associations, or not for profit legal service organizations to fill the gap in legal representation as to financial issues arising in divorce litigation. The guidelines acknowledge that competency for pro bono attorneys participating in such programs can be built through training at a legal services agency and through mentoring and co-counseling, but the guidelines nevertheless seem to require such pro bono attorneys to complete the certified training program required for private attorneys.

We submit that there should be a second exception to the requirements in the proposed guidelines for legal representation of indigent litigants in matrimonial cases by private or pro bono counsel as to financial issues which supplements or bifurcates representation by assigned counsel pursuant to Judiciary Law 35(8) in such cases. Such types of limited scope representation have proven successful since 2006 when Judiciary Law 35(8) was first enacted. The protections of the New York Rules of Professional Conduct combined with the requirements of 22 NYCRR 1400 have proven adequate protection against incompetent representation. We note that Part 1400 specifically applies to divorce actions and requires a written retainer and Statement of Client's Rights and Responsibilities in all such actions. Where compensation is not paid by the client, as in the case of State paid assigned counsel and pro bono counsel, only the Statement of Client's Rights and Responsibilities is required by Part 1400 because adequate protections already exist. For private attorneys handing limited scope financial issues in matrimonial litigation, both the retainer agreement and Statement of Client's Rights and Responsibilities are required.

The Committee does welcome the availability of limited scope representation for attorneys who desire to and are eligible to participate in limited parts of a divorce action with prior court approval, regardless of the client's indigency. In matrimonial actions, that would be consistent with a privately paid attorney or an attorney serving pro bono for a limited part of a financial matter such as an examination before trial or preparation of an Affidavit of Net Worth. In these limited situations, especially in a matrimonial action, a written agreement should be required and would be consistent with Part 1400. We also suggest that Part A VI be clarified as to how notice and consent of the court is obtained, and if consent is not granted by the court, whether there should be a provision that a stay would be granted in order to give the litigant an opportunity to hire counsel. Finally, we have concerns that the guidelines appear to dispense with the verification requirement pursuant to Rule 130 and certification would be avoided even though the attorney was making an appearance in the action. In our view, only if attorneys do not make an appearance in the action should they be exempt from sanctions pursuant to Rule 130. Otherwise certain litigants could simply hire limited scope attorneys to avoid certification. We suggest that the form Model Limited Representation Agreement be modified accordingly.

3. Submission to Parental Representation Commission

The Unified Court System issued a Notice of Public Hearings by the NYS Commission on Legal Representation chaired by the Hon. Karen Peters. The Notice requested any person wishing to submit oral or written testimony to the Commission to do so by August 16, 2018. On August 15, 2018, at the request of Judge Sunshine, a written submission to the Commission was submitted by Susan Kaufman, Counsel to the Committee, pointing out that parental representation is an issue in Supreme Court as well as in Family Court. Judiciary Law 35(8) (L. 2006, c. 538) requires Supreme Court Justices to appoint counsel to represent an indigent party in a divorce action on issues such as custody and visitation or orders of protection over which the Family Court could have exercised jurisdiction. This important legislation and funding ensured that non-monied spouses would have the same right to paid representation in Supreme Court that they would have had pursuant to FCA 262 in Family Court with respect to those issues.

The Committee is concerned about the lack of a rate increase since 2004 for attorneys for children and attorneys assigned pursuant to Judiciary Law 35(8). Although Judiciary Law ensures the right to paid representation of such matters, in reality that right is being threatened by the inadequate rate of compensation paid to such attorneys. The current rate of $75 per hour with a statutory maximum of $4400 was set in 2004 and is woefully inadequate. Compared to fees earned by matrimonial attorneys in the private sector, this rate of compensation discourages many attorneys from joining panels which would require them to accept assignments to represent indigent clients on matters involving important issues of custody and visitation and domestic violence. Our Committee's concerns are shared by the New York State Bar Association which approved a resolution on June 18, 2018 calling for legislation increasing assigned counsel rates, including rates pursuant to Judiciary Law 35(8).[72]

4. Proposal to Adopt Certain Rules of the Commercial Division in all Civil Cases

On October 15, 2018, a Request for Public Comment was posted regarding a proposal by the Advisory Committee on Civil Practice regarding adoption of certain rules of the Commercial Division in all Civil Cases.[73]

After a discussion and analysis of the recommendations, the Committee concluded that many of these rules are inapplicable and inappropriate in matrimonial litigation, and that matrimonial cases should continue to be governed by the provisions of 22 NYCRR Sections 202.16 and 202.16-a and 202.16-b. Judge Sunshine sent a letter of comments regarding specific

[72] **See "**June 18, 2018: State Bar Association Creates Section on Women in Law, Calls for Mandated Counsel Rate Increases and Exemption of Puerto Rico from Merchant Marine Act Provisions, available at http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=84135

[73] The Request for Public Comment is available at http://ww2.nycourts.gov/sites/default/files/document/files/2018-10/UsingCommercialDivRulesOct15.pdf

rules as enumerated below to OCA Counsel John W. McConnell by letter dated December 11, 2018.[74]

Rules 3(a) and 3(b) Appointment of a court-annexed mediator and settlement conference before a judge not assigned to the case

Matrimonial cases have their own protocols for mediation which must consider issues of allegations or findings of domestic violence or power imbalances. There are no (summary) jury trials in matrimonial cases. In fact, with the enactment of DRL 170 (7), most divorces are resolved on the grounds of an irretrievable breakdown in the marital relationship for a period more than six months. The only issue that a jury can be demanded on is the issue of grounds, and there are few if any jury trials statewide. Certainly, trials on the issues of custody, parenting time, orders of protection, child support and maintenance would not be appropriate for summary jury trials.

Referring cases to a different Judge in a matrimonial action for a conference would defeat the one judge/one family concept, especially in a non-jury case where the Judge has handled the matter from inception to trial. The additional strain on judicial resources would make the rule impracticable in matrimonial actions.

Rule 7 Preliminary Conferences

There are specific rules contained in 22 NYCRR Section 202.16(f)(1) regarding attendance at Preliminary Conferences. As required by said court rule, many judges in matrimonial actions require the parties to appear given the emotional, personal nature of the litigation and the need for the parties to participate in the conference and hear from the Judge.

Rules 11-a and 11-d Limitations on interrogatories and depositions.

These rules are contrary to the fundamental principles of broad discovery in matrimonial actions governed by DRL Section 236(B)(4), where the goal is to obtain as much information as possible about the parties' financial circumstances. Additionally, interrogatories are particularly important in cases with self-represented litigants who are better able to access this discovery tool because it is easier and less expensive. In the First and Second Departments, there is no discovery on the issue of grounds, custody or orders of protection absent special circumstances. A limitation on depositions would lead to longer trials and fewer settlements. Certainly, trial judges should have the right to limit discovery if it is a fishing expedition, and for the most part, that has been successful.

[74] See Letter of Hon. Jeffrey Sunshine to OCA Counsel John McConnell dated December 11, 2018 attached as Appendix "O" to this report.

Rule 11-b Privilege Logs

Privilege logs are rarely if ever used in matrimonial ligation.

Rule 11e- Responses and Objections to Document Requests

This rule is inapplicable to matrimonial discovery in that broad and complete disclosure is already mandated.

Rule 19-a Motions for Summary Judgment; Statement of Material Facts

Summary judgment motions for the most part are not utilized in contested matrimonial cases.

Rule 20 Temporary Restraining Orders- Copies of Papers

The Committee believes this rule can be useful in matrimonial ligation and recommends the application of this rule with a limitation that only the Order to Show cause portion of the application need be provided in advance and continuing the exception in Uniform Rule 202.7(f) for requests for Orders of Protection. Often in matrimonial litigation, the supporting affidavit is signed at the Courthouse when the papers are submitted. Pre-arranged times for these application with judges and parts where practicable should be encouraged.

Rule 34 Staggered court appearances

The committee notes that most matrimonial judges allow for staggered court appearances as the needs of any case or attorneys dictate. However, given that many matrimonial practitioners also practice in the Family Courts, where in some Counties the cases have specific time requirements and cannot be delayed, the efficacy of this rule would be lost in a matrimonial part. Family Court cases are often scheduled on short notice due to a 1028 or 1029 application or the arrest of a juvenile and take precedence under certain circumstances over a divorce case. We believe this calendar management tool should be left to the sound discretion of the judges and local practice.

Rule 21 – Courtesy Copies

Lastly, contrary to the recommendation of the Advisory Committee on Civil Practice, the Committee agrees with Commercial Division's Rule 21 which bars courtesy copies on motions submitted in hard copy and requires courtesy copies on motions submitted by electronic filing. This rule is consistent with the needs and practices of the matrimonial bar and judges generally, but additionally, the Committee believes this can also be left to the discretion of the judge.

IX. Past, Pending and Future Projects

1. Coordination with the Department of Technology on New Consensual Divorce Program

In 2017 the Chair of our Committee appointed a Special Subcommittee to reform and streamline the uncontested divorce packets.[75] The challenge was to reform and streamline the packets without creating many different packets applicable to each type of situation, which might be confusing to the public and create a burden on matrimonial clerks. Compounding the complexity of the project is the wide variation in procedures among the sixty-two counties. In 2018, the Special Subcommittee examined uncontested divorce packets and forms from other jurisdictions which we assembled with the assistance of the Academy of Matrimonial Lawyers.

By the end of the summer of 2018, a small working group,[76] with guidance from then Director of Technology and Court Research Chip Mount, now retired, after considerable effort, produced a prototype for a consensual divorce program designed as the first step to simplifying the uncontested divorce process. The package includes an Agreed Upon Joint Affidavit of Facts and a Combined Findings of Fact and Conclusions of Law and Judgment of Divorce. The program allows only a no-fault divorce since that is the ground most commonly employed in New York since the enactment of DRL 170 (7) in 2010 (ch. 384, L.2010). An instruction booklet must still be prepared. Judge Sunshine introduced the program to Chief Administrative Judge Marks on October 1, 2018 as a prototype for uncontested divorce reform.[77]

It is contemplated that ultimately auto-fill will complete most of the forms and calculations based on the entry by the litigants of certain information which should only have to be entered once rather than multiple times as is the case with the current uncontested divorce packets. Judge Sunshine has been working on implementation of the program with a group chaired by Rochelle Klempner, Chief Counsel of the Division of Technology, and the new Director of the Division of Technology, Christine Sisario.

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[75] Members of the Special Subcommittee were Hon. Linda Christopher, Hon. Ellen Gesmer, Hon. Cheryl Joseph, Hon. Emily Ruben, Hon. Jacqueline Silbermann, RoseAnn Branda, Esq., Elena Karabatos, Esq., Stephen McSweeney, Esq., Michael Mosberg, Esq., and Yesenia Rivera, Esq. Susan Kaufman serves as Counsel to the Special Subcommittee and Matthew Schwartz, former Assistant Law Clerk to Judge Sunshine.

[76] The small working group included Hon. Jeffrey Sunshine, Chair of the Committee and Statewide Coordinating Judge for Matrimonial Cases, Susan Kaufman, Counsel to the Committee, and Committee members RoseAnn Branda, Esq., Elena Karabatos, Esq. and Stephen McSweeney, Esq

[77] See supra note 4.

2. Exploration of Ramifications of Changes in Federal Tax Code on Divorce and Development of Best Practices to Educate Attorneys and Litigants about the Changes

Another significant and immediate issue which our Committee is studying is the repeal of the alimony deduction under the Federal Tax Cuts and Jobs Act (Public Law 115-97). Under this law, maintenance payments will no longer be deductible by the payor or included in the income of the payee spouse.

Because of this change, at least one state has amended its maintenance statute on the theory that its maintenance guidelines law was formulated based on the premise that payments would be deductible to the payor and taxable to the payee. This tax treatment had been part of the federal tax code since 1942.[78] Complicating the matter is the fact that in New York State, maintenance is still deductible to the payor. The Illinois legislature has passed legislation which changes the definition of income in their maintenance statute from gross income to net income, thereby attempting to alleviate the problems caused by the federal legislation.[79] Before the new federal law was enacted, the New York State Bar Family Law Section issued a memo of opposition to the possible effects of the treatment of alimony in the new law, stating:

"The elimination of the alimony deduction could significantly decrease combined net after-tax income for divorced family households (particularly in the middle class tax bracket), and could increase the cost of obtaining a divorce through the prolongation of litigation."[80]

Our Committee is following the issue to see what is recommended after the provisions regarding alimony in the federal law goes into effect. In the meantime, our Committee plans to develop ways to educate the public about the new law and its impact on divorce.

3. Matrimonial Mediation Pilot Projects in Coordination with the Statewide Office of ADR Programs

The Committee endorses the three "presumptive mediation" pilot projects that have been or are about to be launched in Kings County, Suffolk County and Rochester. With the guidance of OCA Statewide ADR Coordinator Lisa Courtney and of Director of the Division of Professional and Court Services Dan Weitz, Judge Sunshine and Committee members Hon. Andrew Crecca, RoseAnn Branda and Elena Karabatos have been promoting presumptive mediation pilot

[78] See "A Change Is Needed: The Taxation of Alimony and Child Support," 48 Clev. St. L. Rev. 361 (2000).

[79] See Illinois Public Act 100-0293 enacted in 2018.

[80] See NYSBA Family Law Section Memorandum of Opposition attached as Appendix "P" to this report.

projects in these three jurisdictions. "Presumptive mediation" means that cases are presumed eligible for mediation; and unless a party opts out, parties can be mandated to attend one mediation session without incurring any charge. Mediation could continue through a variety of programs, including but not limited to local community dispute resolution programs and private mediation. If a party opts out, no further inquiry is made by the court or court staff. As he travels around the State, Judge Sunshine continues to explain and promote the concept of presumptive mediation and will follow up with the Administrative Judges on the status of the pilot projects during the year.

4. Matrimonial Mandatory Parent Education Projects in Coordination with the Statewide Coordinator of the Office of ADR Programs

The Committee is working in coordination with the Statewide Office of ADR Programs to implement an Administrative Order effective October 1, 2018 creating mandatory parent education pilot projects in seven counties "as early as practicable."[81] The Administrative Order requires parents in contested matrimonial cases to attend mandatory parent education and awareness training. In order to make sure matrimonial judges in the seven counties have the necessary information, Judge Sunshine as Statewide Coordinating Judge for Matrimonial Cases, has posted material on the SharePoint site for matrimonial judges about the programs including a draft data form, a list of providers, a proposed participant satisfaction survey, the Parent's Handbook, Rule 144, the Pilot Administrative Order, and procedures for administration of the program.

5. Development of Best Practices Sample Clauses for Appointment Orders of Mental Health Professionals in Custody Cases

A new project the Committee has undertaken this year is the development of sample clauses for Appointment Orders of Mental Health Professionals. There are already sample forms available on the Second Department website at http://www.nycourts.gov/courts/ad2/pdf/2013%20Mental%20Health%20Professionals%20Handbook.pdf.

The Committee will try to develop additional sample clauses that judges might want to insert in orders appointing mental health professionals, depending on the facts of the case, using their judicial discretion. For example, such a clause might order parties to come before the court at a pre-trial conference to resolve issues as to how the forensic evaluator will be paid for items related to trial (e.g. testimony at trial and expense of turning over notes).

[81] See Appendix "N" to this report containing AO/252/18 creating parent education pilot projects.

6. Alternative Parenting Arrangements, Access Rights, and the Parent Child Security Act

In 2011, New York State enacted 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*,[82] 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 considered what legislative changes should be made to protect the rights of same sex couples in alternative parenting arrangements. We discussed a simple proposal to amend section 73 of the Domestic Relations Law to establish the co-motherhood rights of the non-biological mother in lesbian couples. However, we decided to table this proposal pending further study because it may not go far enough in protecting children born to married men by artificial insemination using their sperm. The Committee 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,[83] we decided to accept the gracious offer of Professor Suzanne Goldberg of Columbia Law School, who is Executive Vice President for University Life and the Director of the Center for Gender and Sexuality Law, to provide our Committee with a team of four clinic students to work on this as a project under supervision by members of our Committee[84] 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"). 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 indicated the following as of 2016: costs for surrogacy contracts in the United States vary from a few thousand dollars to $200,000.[85] Four

[82] *Obergefell v. Hodges*, 135 S. Ct. 2584, 192 L. Ed.2d 609 (Supreme Court 2015).

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

[84] Hon. Ellen Gesmer and Susan Bender, Esq. supervised the students' work during the project which ran from January through April 2016.

[85] This includes medical costs, legal costs, agency fees and surrogate fees.

states, including New York, ban surrogacy, while 14 states regulate it, including Florida and California. Thirty-two states have no legislation, but many of 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 countries 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 proposed in 2015-16 A. 4319 /S. 2765, in light of the students' research. This bill required 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. During 2017, a revised version of the Parent Child Security Act (2017-18 A.6959/S. 00017) was introduced. The Committee has reviewed the revised version and is monitoring legislative developments to see what is introduced in the 2019 -20 session before taking a position. Should we decide to support the bill, we would recommend simplifying the language, clarifying the procedures, and tightening the enforcement measures in the current bill.

The 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. However, the Governor's Task Force on Life and the Law issued its report at the end of 2017 regarding surrogacy contracts in New York (available at https://www.health.ny.gov/regulations/task_force/reports_publications/docs/surrogacy_report.pdf). The Introduction to the report acknowledged the controversial nature of the subject and sharply divided views even among the Task Force, although the majority favored legalizing surrogacy, stating:

> "*Surrogacy remains a controversial topic. The Task Force itself is sharply divided and therefore did not reach a unanimous decision; yet a majority of the members support changing New York law so as to permit and regulate gestational surrogacy. Specifically, the Task Force recommends that: (1) compensated gestational surrogacy, subject to specific regulations should be permitted in New York; (2) protections be implemented to safeguard the well-being of all parties; and (3) surrogacy agreements not in compliance with the recommended protections should remain unenforceable. The Task Force concludes that this course of action will best protect surrogates, intended parents, and children born through surrogacy, and is in the best interest of New Yorkers."*

The Committee has also been following development of the case law since *Brooke* S.*B. and Estrellita A.* to assist its review of surrogacy and the proposed Parent Child Act. In *Frank G. v. Renee P.-F.*,[86] one of the related cases to the case cited above, although the court found the surrogacy agreement unenforceable, the court nevertheless found that the surrogacy agreement was evidence of the parties' unequivocal intention that the two male partners had become the parents of the children and found standing for petitioner to seek custody and visitation. In *Dawn M. v. Michael M.*, 55 Misc. 3d 865, 47 N.Y.S.3d 898 (N.Y. Sup. Ct. March 2017), the court granted shared legal tri-custody to a wife in a divorce proceeding with her husband who was the

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

biological father as well as with the biological mother. *In K v. C*, 55 Misc. 3d 723, 51 N.Y.S.3d 838 (N.Y. Sup. Ct. April 2017), the court dismissed the petition for custody on the basis that petitioner failed to prove that the parties had a plan to adopt and raise the child together that was continuous without interruption. In *A.F. v. K.H.*, 57 N.Y.S.3d 352 (Fam. Ct. 2017), the court granted an order of filiation/parentage to a non-biological non-adoptive parent of children conceived by the biological parent after the parents had registered as domestic partners prior to the date that same sex marriage became legal in New York. At the end of 2017, a Family Court Judge in Nassau County found that a former non-married female partner in a same sex relationship had standing to seek custody even though there was no preconception agreement, based on equitable estoppel. As pointed out by Andrew Denney in an article in the New York Law Journal on September 27, 2017, this ruling was an expansion of the ruling in *Brooke* S*.B. and Estrellita A.*

However more recently, a Second Department decision held that the petitioner did not sustain her burden of establishing standing to seek visitation. In that case the biological mother had died and the same sex partner of the biological mother argued that the mother had consented to a parent-like relationship because the same sex partner had moved in before the child was born and played a role in the child's daily upbringing until the mother died, even though there was no pre-conception agreement. The Appellate Division stated: *"while Matter of Brooke S.B. v. Elizabeth A.C.C…expanded the definition of "parent" beyond biological and adoptive parents to include a person who establishes, by clear and convincing evidence, that he or she agreed with the biological parent of the child to conceive and raise the child as co-parents, ...The petitioner failed to demonstrate that the mother consented to anything more than the petitioner assisting her with child-rearing responsibilities."* The court noted as a key factor in their decision the fact that the mother executed a will naming the respondents rather than petitioner as guardians of the child after learning she had terminal cancer (see *Garnys v. Westergaard*, 158 A.D.3d 762, 763–64, 71 N.Y.S.3d 554 (N.Y. App. Div. 2018).

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

7. 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 non-custodial parent who needs the support to be able to provide for the child during parenting time.[87]

[87] *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).").

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.*"[88] 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."*[89]

A Fourth Department decision shed further light on the issue, making clear that where parties share time equally with the child(ren), even where one of them has sole legal custody, the party with the higher income is deemed the non-custodial parent for purposes of paying child support. The court stated: " *Thus, under the circumstances of this case—where plaintiff has sole legal custody, but the residency schedule affords the parents equal time with the children—an award of child support to defendant will best "assure that [the] children will realize the maximum benefit of their parents' resources and continue, as near as possible, their preseparation standard of living in each household" (Baraby, 250 A.D.2d at 204, 681 N.Y.S.2d 826). We therefore conclude that the judgment should be modified accordingly, and the matter is remitted to Supreme Court for a determination of the appropriate amount of child support to be awarded to defendant." (Leonard v. Leonard*, 109 A.D.3d 126, 129, 968 N.Y.S.2d 762, 764 (2013).

We are aware that other states have many different approaches to this issue.[90] We continue to study these alternative approaches before making a recommendation.

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

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

[90] For example, regarding the approach in Illinois, see *In re Marriage of Turk,* 2014 IL 116730, ¶ 16, 12 N.E.3d 40, 44–45 stating:

"Steven interprets section 505 to mean that the obligation to pay child support may be imposed only on noncustodial **45 *45 parents and that a custodial parent may never be ordered to pay child support to a noncustodial parent. The terms of the [Illinois] statute do not support such a view. In contrast to the child support laws of some states which single out noncustodial parents for payment of child support (see, *e.g., Rubin v. Salla,* 107 A.D.3d 60, 964 N.Y.S.2d 41, 47 (2013) (applying New York law); *Daigrepont v. Daigrepont,* 458 So.2d 637, 638–39 (La.Ct.App.1984) (applying the law of Louisiana)), section 505 expressly confers on courts the option to "order *either or both parents* owing a duty of support to a child of the marriage to pay an amount reasonable and necessary

8. Mentoring of New or Newly-Assigned Matrimonial Judges

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

"An important aspect of this integration to the new assignment is to pair each new judge with a more senior judge. The senior judge should be available to assist the new judge during the entire training period and for a period of at least one year following the assignment."[91]

This recommendation of the Matrimonial Commission was made prior to the severe budget cuts that the courts experienced in recent years. Limited resources do not always make it possible today for a senior judge to be available to mentor new or newly-assigned matrimonial judges. Moreover, senior judges often assume heavy caseloads, leaving little time for mentoring their peers. The new judges trainings on matrimonial law at the Judicial Institute under the leadership of Dean Juanita Bing Newton, are planned by our Committee's Education Subcommittee chaired by Hon. Andrew Crecca, in coordination with Judge Sunshine and Susan Kaufman. [92] These sessions train new matrimonial judges on various aspects of handling matrimonial cases. At the 2019 new judges trainings, the Statewide Coordinating Judge for Matrimonial Cases will introduce new judges to matrimonial cases and discuss as part of the Chief Judge's Excellence Initiative the resources available for judges hearing matrimonial cases from his office and the Committee as well as practical concerns relating to adjudication of matrimonial cases. Many members of the Committee serve as presenters at the trainings.[93] Judge Sunshine continues to serve as a resource to judges hearing matrimonial cases.

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for the support of the child, without regard to marital misconduct." (Emphasis added.) 750 ILCS 5/505(a) (West 2012). The statute further provides that in addition to support, the court may, in its discretion, "order *either or both parents* owing a duty of support to a child of the marriage to contribute to [various] expenses, if determined by the court to be reasonable," including health needs not covered by insurance. (Emphasis added.) 750 ILCS 5/505(a)(2.5) (West 2012).

[91] 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.

[92] Judge Crecca is Curriculum Advisor to the Judicial Institute for Family and Matrimonial Law.

[93] The following members of the Committee will serve as presenters at New Judges Seminar 2019: Hon. Linda Christopher, Hon. Andrew Crecca, Hon. Laura Drager, Hon. Ellen Gesmer, Hon. Cheryl Joseph, Hon. Jeffrey Sunshine, Hon. Hope Zimmerman, and Harriet Weinberger, Esq. Other presenters will include Hon. Matthew Cooper, Hon. Catherine DiDomenico, Hon. Jeffrey Goodstein, Hon. Anne-Marie Jolly, Hon. Lewis Lubell, Hon. Karen Lupuloff, Hon. Janet Malone, Hon. Barbara Panepinto, Hon. Carol Stokinger, and Harold Deiters, CPA.

9. Assistance to the Judicial Institute with Education and Training of Matrimonial Judges

In addition to new judges trainings, members of the Committee regularly participate as presenters at judicial trainings for matrimonial judges conducted by the Judicial Institute under the leadership of Hon. Juanita Bing Newton, Dean. At the judicial seminars in July and August of 2018, [94] Judge Sunshine spoke with the matrimonial judges for 45 minutes at each of the three seminars sessions. He also made a presentation to the Administrative Judges. Other sessions also included many of our Committee members as Faculty. Hon. Andrew Crecca, Hon. Jeffrey Sunshine, Hon. Bruce Wagner, Hon. Hope Zimmerman, Stephen Gassman, Esq., Elena Karabatos, Esq., and Harriet Weinberger, Esq. all presented at the Seminars. The Sessions included In Camera Interviews, Getting to Know Social Media and Technology in the Courtroom; Addressing the Needs of Unrepresented Litigants; How to Assess a Forensic Report in a Custody Case; Pendente Lite Applications; Matrimonial Legal Update; and Innovative Techniques for Matrimonial Judges.[95]

10. Monitoring of New Federal Child Support Guidelines

On December 20, 2016, the flexibility, efficiency and modernization in child support enforcement programs final rule was adopted, which was the first major revision of child support statutes since their adoption. States must comply in order to continue to receive funding under Title IV-D of the Social Security Act and must adopt a state plan implementing the requirements. The final rule is intended to increase timely payments to families, reduce the non-payment rate, increase the number of non-custodial parents working and supporting their children, increase responsibilities of child support agencies regarding contempt, improve collection rates, reduce child support arrears, improve technological advances in collection, and improve the rights of non-custodial parents in connection with child support orders. The final rule makes major changes regarding imputation of income and rules regarding incarceration of non-custodial parents, requiring that incarceration may not be treated as voluntary unemployment. Our Committee has been monitoring implementation of these changes and studying their effect on existing New York law. At the 2017 summer judicial seminars, a presentation on this subject was made by Michael Mosberg, Esq., a member of the Committee.

[94] These trainings were planned for the Judicial Institute by the Chair of the Committee's Education Subcommittee, Hon. Andrew Crecca who is the Advisor to the Judicial Institute for Family and Matrimonial Law, in coordination with the Hon. Jeffrey Sunshine, Chair of the Committee and Susan Kaufman, Esq., Counsel to the Committee.

[95] The Committee also wishes to thank the following judges, who presented on matrimonial topics at the 2018 Summer Sessions: Hon. Matthew Cooper, Hon. Philip Cortese, Hon. Catherine DiDomenico, Hon. Douglas Hoffman, Hon. Sandra Sciortino, Hon. Gretchen Walsh, and Hon. Lillian Wan. The Committee also thanks the following attorney presenters: Andrew Ste. Ana, Esq., Robin Carton, Esq., Bryan Skarlatos, Esq., and Susan Smith, Esq. We also thank Harold Deiters, CPA, and mental health professionals. Dr. Jeffrey Wittmann and Dr. Albert Yohananoff. Andrew Crecca, Jr., a student at Notre Dame and Stephanie Schneider, Esq., deserve special thanks for their role-playing parts as the child in the In-Camera sessions.

X. Committee Outreach

Committee Chair and Statewide Coordinating Judge for Matrimonial Cases Hon. Jeffrey Sunshine continues outreach to the Matrimonial bench and bar throughout the year.

During 2018, Judge Sunshine met with matrimonial judges in Queens, New York County, Nassau, and Richmond, as well as in the Fourth and Sixth Judicial Districts, He also made a presentation at the Association of the Supreme Court Judges in October at Watkins Glen.

He has also been in contact with Administrative Judges around the state and serves as a resource to the court system.

XI. 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. Andrew Crecca, Chair
Rose Ann C. Branda
Kathleen Donelli
Hon. Betty Weinberg Ellerin
Donna England
Stephen J. Gassman
Elena Karabatos
Florence Richardson
Sharon Kelly Sayers
Bruce J. Wagner
Harriet Weinberger
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
Hon. Andrew Crecca
Hon. Laura Drager
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
Christopher S. Mattingly
Elena Karabatos
Hemalee J. Patel, Reporter
Sharon Kelly Sayers
Hon. Jacqueline Silbermann
Eric A. Tepper
Bruce J. Wagner
Hon. Hope Zimmerman

XII. 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 2019

Respectfully submitted,

Honorable Jeffrey S. Sunshine, Chair
Alton Abramowitz, Esq.
Susan L. Bender, Esq.
Rose Ann C. Branda, 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.(deceased)
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.
Bruce J. Wagner, Esq.
Harriet Weinberger, Esq.
Honorable Hope Zimmerman

Susan W. Kaufman, Esq. Counsel

XIII. Appendices

A - Chief Administrative Judge Marks's Letter of Appointment of Hon. Jeffrey Sunshine as Statewide Coordinating Judge for Matrimonial Cases

B - Letter from Hon. Jeffrey Sunshine to Chief Administrative Judge Marks Introducing Consensual Divorce Program

C - Description of Committee's Legislative and Rule Proposals Adopted from 2015-2017

D - Memorandum re Proposed Changes in Form of Statement of Client's Rights and Responsibilities

E - Committee Response to Request for Public Comment on Proposed Guidelines for Limited Scope Representation in Civil Matters

F-1- Letter from Hon Jeffrey Sunshine to OCA Legislative Counsel Marc Bloustein regarding E-Filing in Matrimonial Actions dated April 24, 2017

F-2- Letter from Hon. Jeffrey Sunshine to Bar Groups regarding E-Filing in Matrimonial Actions dated October 4, 2018

G-1- OCA Court Statistics on Divorce Filings Full Year 2011 – 2017

G-2- Comment by Sanctuary for Families on Proposed Divorce Venue Post Judgment Rule

H-1- Bar Association Positions on Forensics Bills (in Support of 2017-18 A.6579 and in Opposition to 2017-18 A.1533/S.6300)

H-2-New York Public Welfare Association Comment on Application of Forensic Bills Applications to Court-Ordered Child Protective Examinations

H-3- Excerpt from Committee's 2018 Annual Report Describing Modified Proposal on Access to Forensics in Custody Cases

I - 2006 A. 10447 Bill Memo

J - Form of Proposed Statewide Order to Expedite Changes in Venue

K - Memorandum from then Presiding Justice A. Gail Prudenti (Ret.) dated March 7, 2008

L - Form of Proposed Application for Counsel Fees by Unrepresented Litigant

M - Committee Comments on JROPE Proposal dated January 25, 2018

N - Administrative Order 252/18 on Parent Education Pilot Projects dated August 9, 2018

O - Committee Comments on Proposal to Adopt Certain Commercial Division Rules in Civil Cases dated December 11, 2018

P - NYSBA Family Law Section Memorandum in Opposition to Federal Tax Cuts and Jobs Act of 2017

Appendix A

State of New York
Unified Court System

25 Beaver Street
New York, N.Y. 10004
(212) 428-2100

Lawrence K. Marks
Chief Administrative Judge

MEMORANDUM

June 1, 2018

TO: Administrative Judges

FROM: Lawrence K. Marks LM

SUBJECT: Statewide Coordinating Judge for Matrimonial Cases

It is my pleasure to announce the appointment of Hon. Jeffrey S. Sunshine as Statewide Coordinating Judge for Matrimonial Cases. Some of you may recall that a similar position existed some years ago, but was not continued when Hon. Jacqueline Silbermann retired from the bench.

As you know, matrimonial cases are an important, and challenging, component of our civil case inventories. Contested matrimonials often demand extensive resources, judicial and otherwise, and are frequently plagued by delays and other complications. Members of the matrimonial bar, among others, have approached me in recent months to advocate for re-designating an experienced judge who can work with the Administrative Judges, matrimonial part judges and the matrimonial bar to better promote the goals of the Chief Judge's Excellence Initiative.

Judge Sunshine is an ideal candidate to take on this role. He has extensive experience in the matrimonial field, both as a practitioner and as a judge in Kings County Supreme Court. He also chairs our Matrimonial Practice Advisory and Rules Committee, which has recommended numerous administrative rules and other measures that have streamlined and improved matrimonial case adjudication. In his new role, Judge Sunshine will work with all of you to develop protocols and best practice models to expedite the processing of contested cases, revise and streamline the uncontested divorce process, work to promote and expand mediation in divorce actions, act as a liaison between the court system and the matrimonial bar, promote e-filing in matrimonial cases and work with the Judicial Institute on matrimonial judicial education programs. He will

also continue to serve as chair of our Matrimonial Practice Advisory and Rules Committee, and will continue to handle a matrimonial caseload in Kings Supreme Court.

Judge Sunshine will be a valuable resource for all of you in your efforts to successfully manage your matrimonial inventories. He will be reaching out to you in the coming weeks.

cc: Hon. Janet DiFiore
Hon. Michael V. Coccoma
Hon. George J. Silver
Hon. Edwina G. Mendelson

Appendix B

STATE OF NEW YORK
UNIFIED COURT SYSTEM
360 ADAMS STREET
BROOKLYN, NY 11201
(347) 296-1527

LAWRENCE K. MARKS
Chief Administrative Judge

JEFFREY S. SUNSHINE
Statewide Coordinating Judge for
Matrimonial Cases

October 1, 2018

Hon. Lawrence Marks
Chief Administrative Judge
25 Beaver Street
New York, NY 10004

Re: Uncontested Divorce Reform

Dear Judge Marks,

Attached you will find a prototype for the first stage of reforming the uncontested divorce process which I hope we can roll out as a pilot. If we are successful in our e filing efforts this would enhance this prototype's effectiveness. The prototype was created by a subcommittee which I formed of the Matrimonial Practice Advisory and Rules Committee. It streamlines the process and is for individuals who wish to jointly file for divorce.

This only applies to parties in complete agreement when the only grounds are irretrievable breakdown and thus we can do a joint findings and judgment. The original bifurcation of findings and judgments were created years ago to keep grounds issues out of the judgment for privacy purposes. With irretrievable breakdown now the most common form of uncontested divorces that concern no longer exists.

The finding and judgment can be mostly auto filled (once built) from the joint affidavit clearly eliminating errors and inconsistencies. Our vision is the calculators do the calculations right from the joint affidavit also reducing errors and inconsistencies. Once finalized we will need to create an instruction booklet. We have tried to simplify the language and make it gender neutral mindful that some language is statutory and other required by case law. The multiple forms and affidavits currently in existence are replaced by a 10-page joint affidavit.

My thanks to the subcommittee for the many hours of work on this project and to Chip Mount for setting us on hopefully the right path. I will be in touch with Chip and advise you of our progress.

Subcommittee:

Hon. Jeffrey Sunshine

Susan Kaufman Esq.

RoseAnn Branda Esq.

Elena Karabatos Esq.

Stephen McSweeney Esq.

Sincerely,

Jeffrey S. Sunshine

J.S.C.

CC: John McConnell Esq.
Chip Mount
Susan Kaufman Esq.

Appendix C

Legislative and Rule Proposals of Matrimonial Practice Advisory and Rules Committee Adopted from 2015 through 2017

2015

Maintenance Guidelines Law and Simplification of Counsel Fee Affidavits for Self-Represented Litigants in 2015

In the very first year of the Committee's existence, the Maintenance Guidelines Law (L. 2015, c. 269) and the law eliminating the requirement for self-represented litigants to provide a supporting affidavit from counsel regarding fee arrangements when making application for counsel fees as the non-monied spouse in a divorce action (L.2015, c. 447) were enacted into law, after having been adopted as part of the Office of Court Administration's Legislative Program upon the recommendation of our Committee. Both laws were significant accomplishments in furthering "decisional excellence," a goal of the Chief Judge's Excellence Initiative.

The Committee considers the passage of the maintenance guidelines law as one of the most significant accomplishments in the field of matrimonial law since the enactment of no-fault divorce in 2010. Our maintenance guidelines proposal was a compromise reached by a working group[1] with widely divergent positions, brought together by Justice Jeffrey Sunshine, Chair of the Committee, in order to end the divisions within the matrimonial community that had existed over the enactment of post-divorce maintenance guidelines and over whether there should be a continuation of temporary maintenance guidelines enacted in 2010 [L. 2010, c. 371]. It assured the less affluent spouse a minimum amount of maintenance for a reasonable period of time without overly burdening those maintenance payors who are also paying household expenses or who are also Child Support Payors. The Maintenance Guidelines Law also promoted greater judicial efficiency, by allowing judges the option to justify their decisions about guidelines deviations on the record, rather than having to produce a written decision in every case, as had been required by the previous Temporary Maintenance Guidelines Law (L. 2010, c 371.

The elimination of the attorney's affirmation about counsel fee arrangements enables self-represented litigants to more easily exercise their right to apply for counsel fees as the non-monied spouse in a divorce action pursuant to D.R.L. § 237. Prior to this reform, self-represented litigants had often been unable to obtain the affidavit from attorneys who did not want to be committed to represent the party in the action if the fee application was denied.

[1] The organizations represented in the working group included the Family Law Section of the New York State Bar Association, the New York Maintenance Standards Coalition, the Women's Bar Association of the State of New York, and the New York Chapter of the American Academy of Matrimonial Lawyers. Sandra Rivera, Esq. and Michelle Haskins, Esq. represented the Women's Bar Association of the State of New York; Alton Abramowitz, Esq. and Eric Tepper, Esq. represented the Family Law Section of the New York State Bar Association; Elena Karabatos, Esq. represented the New York Chapter of the American Academy of Matrimonial Lawyers; and Emily Ruben, Esq. (now Hon. Emily Ruben) and Kate Wurmfeld, Esq. represented the NYS Maintenance Standards Coalition.

2016

Law Strengthening Enforcement by Contempt in Supreme Court Enacted in 2016

In the summer of 2016, we were gratified by the passage of a measure we proposed which the Chief Administrative Judge had approved as part of the Office of Court Administration's 2015 and 2016 Legislative Programs, to strengthen enforcement by contempt in Supreme Court (L. 2016, C. 365). On September 30, 2016, the Governor signed this measure into law. This legislation is another significant reform in matrimonial law.

The passage of this legislation meant that Supreme Court would finally have relatively the same standard as Family Court regarding applications for contempt. Family Court Act § 454[2] allows Family Court Judges to immediately enforce non-compliance of support obligations with contempt without exhausting other remedies (see New York Court of Appeals decision in *Powers v. Powers*).[3]

Because of this important reform, non-monied spouses awarded child and spousal support have a better chance to receive funds needed to support their families without having to take out loans or sell assets; and non-monied spouses awarded counsel fees have a better chance to hire counsel to represent them early in the case so that they can have their matters fairly heard. The discrimination against the non-monied spouse inherent in the prior version of D.R.L. §245 which allowed monied spouses to obstruct or delay enforcement in Supreme Court of monetary obligations in a divorce was eliminated. The legislation also relieves Family Court overburdened caseloads by removing the incentive to bring enforcement actions in Family Court rather than Supreme Court. In addition, hearings on contempt are shorter and less time consuming, which provides litigants access to relief in a more timely manner.

Revised Matrimonial Form Proposals Adopted in 2016

During 2016 the Chief Administrative Judge adopted a number of our proposals for form revisions with the approval of the Administrative Board of the Courts. The form revision proposals (for a Revised Net Worth Statement and a Revised Preliminary Conference Order) were designed to streamline the efficiency of the matrimonial litigation process by ensuring that financial information about the parties was clearly revealed and available to the parties and the court, and by making sure that contested issues in the action were dealt with in an orderly fashion.

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[2] Family Court Act § 454(3)(a) reads as follows:
"3. Upon a finding by the court that a respondent has willfully failed to obey any lawful order of support, the court shall order respondent to pay counsel fees to the attorney representing petitioner pursuant to section four hundred thirty-eight of this act and may in addition to or in lieu of any or all of the powers conferred in subdivision two of this section or any other section of law:
(a) commit the respondent to jail for a term not to exceed six months. For purposes of this subdivision, failure to pay support, as ordered, shall constitute prima facie evidence of a willful violation …."

[3] *Powers v. Powers*, 86 N.Y.2d 63, 71, 653 N.E.2d 1154 (1995). In addition to holding that, unlike D.R.L. § 245 as then written, F.C.A. § 454 does not require exhaustion of remedies before enforcement by contempt, the court also stated: "For purposes of section 454, moreover, failure to pay support as ordered itself constitutes "prima facie evidence of a willful violation" (Family Ct. Act § 454[3][a]). Thus, proof that respondent has failed to pay support as ordered alone establishes petitioner's direct case of willful violation, shifting to respondent the burden of going forward …" *Powers v. Powers*, 86 N.Y.2d 63, 69, 653 N.E.2d 1154, 1157 (1995).

The Net Worth Statement and Preliminary Conference Order are two of the most important forms required in contested matrimonial litigation. See our 2017 Annual Report at http://www.nycourts.gov/ip/judiciaryslegislative/pdfs/2017-MatrimonialPractice-ADV-Report.pdf for a detailed description of the revisions in the Net Worth Statement and Preliminary Conference Order.[4] One of the noteworthy provisions in the revised Preliminary Conference Order form requires the parties to waive a voluntary discontinue once grounds have been resolved, thereby preventing parties from discontinuing after considerable resources and effort have been spent on the case. The revisions of these widely used forms further the goal of operational excellence. They also further decisional excellence by assuring that issues are dealt with in a timely manner with all the facts required to be disclosed to the court and the other spouse.

Redaction Rule Proposals Adopted in 2016

On March 1, 2016, new redaction rules for matrimonial actions recommended by our Committee went into effect. First, 22 NYCRR § 202.5(e) was amended to prevent the information or testimony revealed in a matrimonial action from being revealed in another civil action. Second, a limited rule on redaction of personal information from written decisions in contested matrimonial actions was added to the matrimonial rules as 22 NYCRR § 202.16(m) which requires the court to omit or redact certain personal information from written decisions. After public comment, these proposals were adopted by Administrative Order 192/15 available at http://www.nycourts.gov/divorce/pdfs/AO192-15.pdf.

At our suggestion, 22 NYCRR § 202.16(m) was modified by Administrative Order of Chief Administrative Judge Lawrence K. Marks, with the advice and consent of the Administrative Board of the Courts, in June, 2016[5] to limit its application to situations where the court is submitting a decision, order, judgment, or combined decision and order or judgment for publication, while allowing the unpublished version to remain unredacted. The amended rule allowed more flexibility, while retaining the basic protections for which the rule was intended. By making the rule easier to understand and comply with, it would be more widely followed, and

[4] These forms, together with fillable versions thereof, are available on the Divorce Resources website at http://ww2.nycourts.gov/divorce/forms.shtml#Statewide

[5] See Memorandum of Ronald 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 available at http://www.nycourts.gov/divorce/pdfs/AO143-16.pdf.

would better achieve the goal of protecting privacy and preventing identify theft and abuse. The rule allows the courts to continue to satisfy their statutory mandate to justify in writing their decisions on important matrimonial issues,[6] while still including in orders and judgments such necessary information as is required by statute for child support enforcement and other purposes. In keeping with the goal of operational excellence of the Chief Judge's Excellence Initiative, the revised rule does not burden courts with redaction responsibilities except when publication is going to take place, and it does not require courts to bifurcate orders or judgments from decisions, an unnecessary waste of judicial effort.

2017:

New Rule on Page Limitation for Pendente Lite and other Applications
[22 NYCRR § 202.16-b] Adopted in 2017

In furtherance of Chief Judge DiFiore's Excellence Initiative, the Committee proposed a new court rule in our 2017 Annual Report imposing a page limitation on pendente lite motion practice in an effort to expedite matrimonial proceedings while a contested divorce is pending. In response to comments received from the Family Law Section of the New York State Bar Association after public comment was sought on the proposed rule,[7] the Committee recommended to the Chief Administrative Judge in April 2017 a modified version of said proposal which was adopted by Administrative Order 99/17 dated May 22, 2017 available at http://www.nycourts.gov/divorce/pdfs/PDF%20B%20AO-99-17-Applications.pdf upon consultation with and approval by the Administrative Board of the Courts, effective July 1, 2017**.**

This rule imposes page limitations on pendente lite applications unless such limitations are waived by the judge for good cause. Attorneys often feel compelled to respond to voluminous motions with voluminous responses. This rule eliminates the incentive for attorneys to have the longest motion papers as a means of impressing their clients. It promotes the Chief Judge's Excellence Initiative by saving judicial time and resources. It speeds the time within which applications can be granted or denied, thereby making the divorce process proceed more quickly.

Where practicable, the rule requires that all motions and orders to show cause and cross motions will be requested in one application 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

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[6] *See* article by Peter E. Bronstein in the *New York Law Journal* on December 2, 2014.
[7] See Memorandum by John McConnell dated January 18, 2017 available at http://www.nycourts.gov/rules/comments/PDF/MatrimonialApplications.pdf

and affirmations,[8] with a three-inch size limitation on exhibits. However, specific exhibits required by, or necessary in order to comply with, the matrimonial rules or statutes are exempted from the size limitation on exhibits.[9] The rule defers to local practice by providing that nothing therein will prevent a judge or justice of the court or of a Judicial District within which the court sits from having his or her own local part rules to the contrary or in addition to the rule. However, where local practice is silent, the rule provides some basic ground rules to the extent that there is no conflict with the C.P.L.R. or other statute. The provisions of 22 NYCRR § 202.16(k) still apply where applicable.

The rule provides a preference for emergency applications for processing and signature, but provides that designating an application as an emergency without good cause may be punishable by sanctions, thus making it more likely that true emergencies will be dealt with on an emergency basis. A provision was added in the final proposal adopted by the Chief Administrative Judge which states that where any application is designated an emergency without good cause, it shall be processed and considered in the ordinary course of court procedures. This provision satisfies concerns expressed by the Family Law Section of the New York State Bar Association about the possibility of differing views as to what constitutes good cause for designating an emergency. At the suggestion of the Family Law Section, the adopted proposal also includes a clear definition of which types of pendente lite applications (including cross motions) are subject to the rule, and there is also a mechanism for submitting applications exceeding the page limits without creating an overburdening process requiring a party or counsel to seek prior approval which could be difficult when a case has not been assigned to a judge. We thank the Family Law Section for the comments which resulted in many of the changes to the final proposal.

New Divorce Venue Rule Proposal for Post Judgment Enforcement and Modification Applications [22 NYCRR § 202.50(b)(3)] Adopted in 2017

On January 18, 2017, public comment on the Committee's proposal for a new court rule applicable to post judgment applications for modification or enforcement of judgments of divorce in Supreme Court was sought on behalf of the Administrative Board of the Courts by Memorandum of OCA Counsel John W. McConnell.[10] The court rule proposed was contained in our 2017 Annual Report. In response to the request for public comment, the Office of Court Administration received comments from Sanctuary for Families dated March 7, 2017 regarding this proposal, which comments were forwarded to the Committee.[11] In response, the Committee modified its proposal and resubmitted it to the Chief Administrative Judge. By Administrative Order dated May 22, 2017, the Chief Administrative Judge, with the approval of the Administrative Board of the Courts, adopted the new rule effective August 1, 2017.

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[8] In the Rule as adopted, Page limits of Supporting or Opposing Affidavits or Affirmations or Memoranda of Law may be twenty (20) pages, while Page Limits of Expert Affidavits may be eight (8) pages, and Page Limits of Reply Affidavits or Affirmations may be ten (10) pages.

[9] Exempted exhibits include Affidavits of Net Worth, Retainer Agreements, maintenance guidelines worksheets and/ or child support worksheets, and counsel fee billing statements or affirmations or affidavits related to counsel fees.

[10] See Memorandum available at http://www.nycourts.gov/rules/comments/PDF/MatrimonialFormOfJudgment.pdf

[11] See Comments of Sanctuary for Families dated March 7, 2017 attached as Appendix "A" to our 2018 report available at http://www.nycourts.gov/ip/judiciaryslegislative/pdfs/2018-MatrimonialPractice-ADV-Report.pdf

The rule adds a new paragraph (3) to 22 NYCRR § 202.50(b) which prescribes new language required to be contained in judgments of divorce, both contested and uncontested.[12] The rule is designed to cure aspects of the problematic venue rules under the C.P.L.R. as they relate to post judgment relief in matrimonial actions, thus allowing quicker and more effective resolutions of matrimonial disputes in furtherance of the Excellence Initiative.

In the past, most post judgment applications seeking enforcement or modification of judgments of divorce were brought in the same county in which the original divorce proceeding occurred. While the designation of that county may have been proper at the time of commencement, often by the time that post judgment litigation ensues neither the parties nor the children have a nexus to that county. Similarly, the initial filing at commencement may have been made pursuant to C.P.L.R. 509, notwithstanding the fact that neither party had any nexus to the jurisdiction at the time, simply because it was a more convenient forum for the attorneys or because of backlogs in one county or another county. This resulted in certain counties being burdened with a disproportionate volume of uncontested and contested divorces in comparison to other counties, which resulted eventually in post judgment litigation subsequently being heard in that same county.

The new court rule lessens the burden on those counties and on litigants. It provides a means for parties to correct the injustice resulting from an initial inappropriate C.P.L.R. 509 designation once post judgment litigation ensues by requiring the post judgment litigation in a more appropriate venue. It also allows parties who have moved away to pursue post judgment litigation without having to travel back to the county where the judgment was entered.

The rule requires that applications should be brought in the county where one of the parties, or a child or the children reside. To address special concerns, there is a good cause exception which leaves it up to the judge's discretion whether there is good cause to make an exception. Such exception might be useful to low income litigants who reside in counties with scarce legal resources and consequently might select venue according to the availability of pro bono or reduced fee legal assistance in a particular county. It might also be useful where neither party is a resident of New York State. However, in order to save victims of domestic violence the burden of having to make application for a good cause exception where confidentiality or danger is at issue, at the suggestion of Sanctuary for Families, the final rule provides that where the address of either party and a child or children is not a matter of public record or is subject to an existing confidentiality order, such applications may be brought in the county where the judgment of divorce was entered. The final rule also clarifies that the retention of jurisdiction for the

[12] 22 NYCRR § 202.50(b) already delineated language requirements for proposed judgments in matrimonial actions. The first part of the rule requires that the Supreme Court specify in the judgment of divorce that it shall retain jurisdiction for enforcement of the settlement agreement or for enforcement or modification of the judgment, provided that such jurisdiction shall be concurrent with the Family Court to hear certain applications to enforce the settlement agreement with regard to maintenance, support, custody, or visitation. Similar language is already required in the forms approved under subdivisions 1 and 2 of 22 NYCRR § 202.50(b). However, the language in the rule is broader than enforcement of settlement agreements alone, and supersedes said language to the extent of any inconsistency. The second part of the rule requires that the judgment contain an order as to venue related to residence for post judgment enforcement or modification applications in Supreme Court.

purpose of modifications of maintenance, support, custody and visitation is only to the extent permitted by law so as to avoid inadvertently conflicting with statutory provisions regarding such modifications as are contained in D.R.L. §236 (B)(9)(2). It also provides that good cause applications shall be made by motion or order to show cause. The Committee is grateful to Sanctuary for Families for their helpful suggestions.

On August 1, 2017, the effective date of the rule, a revised form of UD-11 Judgment of Divorce was posted on the Divorce Resources website at http://www.nycourts.gov/divorce/forms_instructions/ud-11.pdf. This revised form, which was adopted by Administrative Order 138/17 of the Chief Administrative Judge, contained the provisions required by the new rule, providing some relief to the overburdened counties and litigants. See Memorandum from Ronald Younkins, OCA Executive Director, dated July 20, 2017 attaching Administrative Order and New Rule on Divorce Venue Post Judgment Enforcement and Modification (22 NYCRR 202.50(b)(3)), attached as Appendix "B" to our 2018 report available at http://www.nycourts.gov/ip/judiciaryslegislative/pdfs/2018-MatrimonialPractice-ADV-Report.pdf

Ultimately, we hope that our omnibus statutory proposal for a new divorce venue proposal applicable to matrimonial actions will be enacted so that the burden on certain counties of plaintiffs' inappropriate designation of venue in the initial divorce action will cease. See our omnibus statutory special matrimonial venue proposal for a new C.P.L.R. 514 set forth later in this report.

Appendix D

MEMORANDUM

To: John W. McConnell, OCA Counsel
From: Susan W. Kaufman, Counsel to the Matrimonial Practice Advisory and Rules Committee
cc: Hon. Jeffrey S. Sunshine, Chair of the Matrimonial Advisory and Rules Committee
Date: May 22, 2018

Re: Proposed Revision to 22NYCRR 1400.2
Statement of Client's Rights and Responsibilities

The Matrimonial Practice Advisory and Rules Committee recommends that the Chief Administrative Judge consider a proposal for the Appellate Divisions to adopt a revision to the Statement of Client's Rights and Responsibilities required pursuant to 22 NYCRR 1400.2. The proposed revision (copy attached) would update the document which was originally adopted in 1994 and last amended in 1995, and would provide certain clarifications of the rights and responsibilities based on actual experience of members of our Committee who are practicing matrimonial attorneys and Judges familiar with matrimonial litigation as it is practiced today. Without detracting from the information provided in the existing form, the revisions will reduce the number of attorney client disputes by clarifying matters that are not clear in the existing form. Adoption of the revised form will improve satisfaction of the both litigants and attorneys with the matrimonial litigation process. It will also improve court operational efficiency and further the Excellence Initiative by reducing delays caused by attorney withdrawal or substitution of counsel as well as the volume of malpractice and fee dispute litigation.

The revised form is much clearer regarding responsibilities of the client. The existing form provides that a prospective client is entitled to a written retainer agreement detailing the fee arrangement in plain language, and is entitled to have the attorney clarify any terms of the retainer agreement before the client signs it. The revised form adds that the client and the attorney are both required to sign the retainer agreement before the attorney is hired, and that the client is responsible to read the agreement and ask the attorney any questions about it before signing it. Similarly, the revised form provides that it is the *responsibility, (rather than merely a right as specified in the existing form)*, of the prospective client to be present and on time at conferences, oral arguments, hearings and trials, unless excused by the court. While the existing form provides that the attorney must show the client courtesy and represent the client zealously and preserve the client's confidences, the revised form adds that the duty to preserve confidences is to the extent permitted by law, recognizing that the attorney may have an ethical duty not to preserve client confidences in certain instances. This takes into account changes in the professional ethics requirement since the statement was first created. The revised form imposes on the prospective client, not just the attorney, the responsibility to communicate honestly, civilly and respectfully with the attorney. Under the revised form, both attorney and client are expected to be available for open communications during regular business hours, a basic requirement which is unfortunately not always adhered to.

The most common issue that arises in attorney client disputes is the amount of the attorney's fees. The existing form provides that the client is entitled to understand the retainer fee and the proposed rates. Understanding the retainer fee and the rates would arguably include understanding that the retainer fee may not be sufficient to pay for all the hours billed on the case. However, this is often a basis for misunderstanding if not clarified. Thus, the revised form makes this clear. Clients are also put on notice that they must raise any objections to bills from their attorney *in writing, rather than just promptly.* This will prevent disputes arising as to whether the client in fact raised a timely objection. Additionally, the revised form adds that estimates of future costs by the attorney given in good faith are not guarantees. Clients are also advised about the possibility of their attorney obtaining a retaining lien to secure payment of their unpaid fees, while the existing form mentions only the possibility of a charging lien.

Disputes between attorneys and clients often result in requests by attorneys to withdraw from the case. The revised form makes clear that the attorney may only withdraw from the case *with Court permission* unless the client consents. The revision also points out that the attorney may send the client written communications if the attorney disagrees with the client about how the case should be handled. and the attorney may seek to be relieved if a client is not truthful with them.

Attorney client relations often suffer when clients are surprised by additional fees and costs in the litigation, quite apart from the attorney's fees. For this reason, the form puts clients on notice that they may be ordered to contribute to their spouse's counsel fees and expenses, or that their spouse may be ordered to contribute to their counsel fees and expenses, and that those expenses may include court filing fees, and fees for experts and process servers. Notice is also given that frivolous conduct may result in sanctions or fines. Moreover, rather than advise the client about the right to seek arbitration in the event of a fee dispute in general terms as in the existing form, the revised form refers the client directly to Part 137 of the Rules of the Chief Administrative Judge and provides specifics about the jurisdictional amounts to qualify.

The revised form reinforces the recently adopted amendments to 22 NYCRR 202.50(b) designed to protect parties regarding issues of title to the marital home during a divorce, especially where there is a foreclosure action. The revised form points out that the attorney should not be expected to prepare and file documents to transfer title to the marital home unless the retainer agreement so specifies, and that an agreement or court order requiring transfer of title to the marital home is not sufficient to transfer title without a separate document being prepared and filed. The revised form also alerts the client that a new retainer agreement is required once the Judgment of Divorce is signed if the client wants to retain the attorney for further services.

The revised form, unlike the existing form, advises clients to expect their attorney to discuss with them certain key provisions of matrimonial law as it has evolved to date, including the Automatic Orders, the Child Support Standards Act, and the Maintenance Guidelines Law.

Finally, the attorney is referenced in the revision as "the attorney" rather than "your attorney" to make clear that the form must be given to the prospective client before an attorney client relationship is formed, especially where the statement is provided during a consultation

prior to retention. Similarly references to the attorney as “he or she” are changed to “the attorney” for purposes of gender neutrality.

22 NYCRR 1400.2.
Statement of Client's Rights and Responsibilities
Proposal of Matrimonial Practice Advisory and Rules Committee 4/20/18

An attorney shall provide a prospective client with a statement of client's rights and responsibilities in a form prescribed by the Appellate Divisions, at the initial conference and prior to the signing of a written retainer agreement. If the attorney is not being paid a fee from the client for the work to be performed on the particular case, the attorney may delete from the statement those provisions dealing with fees. The attorney shall obtain a signed acknowledgment of receipt from the client. The statement shall contain the following:

UNIFIED COURT SYSTEM OF THE STATE OF NEW YORK

STATEMENT OF CLIENT'S RIGHTS AND RESPONSIBILITIES

[Your] An attorney is providing you with this document to inform you of what you, as a client, are entitled to by law or by custom. To help prevent any misunderstanding between you and [your] the attorney, please read this document carefully.

If you ever have any questions about these rights, or about the way your case is being handled once you retain the attorney, [do not hesitate] you are responsible to ask your attorney. [He or she] Your attorney should be readily available to represent your best interests and to keep you informed about your case.

An attorney may not refuse to represent you on the basis of race, creed, color, sex, sexual orientation, age, national origin or disability.

You are entitled to an attorney who will be capable of handling your case; show you courtesy and consideration at all times; represent you zealously; and preserve your confidences and secrets that [are revealed] you reveal in the course of the relationship, to the extent permitted by law. You are responsible to communicate honestly, civilly and respectfully with your attorney.

If you are hiring an attorney you and your attorney are [entitled] required to sign a written retainer agreement which must set forth, in plain language, the nature of the relationship and the details of the fee arrangement. Before you sign the retainer agreement, you are responsible to read it and ask the attorney any questions you have before you sign it. At your request, and before you sign the agreement, you are entitled to have your attorney clarify in writing any of its terms, or include additional provisions.

You are entitled to fully understand the proposed rates and retainer fee before you sign a retainer agreement, as in any other contract. The retainer fee you pay to the attorney, as is written in the retainer agreement, may not be enough money to pay for all the time that the attorney works on your case.

You may refuse to enter into any fee arrangement that you find unsatisfactory.

[Your] An attorney may not request a fee that is contingent on the securing of a divorce or on the amount of money or property that may be obtained.

[Your] An attorney may not request a retainer fee that is non-refundable. That is, should you discharge [your] the attorney, or should [your] the attorney withdraw from the case with Court permission, before the retainer [is] has been used up, [he or she] the attorney is entitled to be paid commensurate with the work performed on your case and any expenses [but must return the balance of the retainer to you]. The attorney must return to you any balance of the retainer that has not been used. However, [your] the attorney may enter into a minimum fee arrangement with you that provides for the payment of a specific amount below which the fee will not fall based upon the attorney's handling of the case to its conclusion.

You are entitled to know the approximate number of attorneys and other legal staff members who will be working on your case at any given time and what you will be charged for the services of each.

You are entitled to know in advance how you will be asked to pay legal fees and expenses, and how the retainer, if any, will be spent.

You may be responsible at the beginning of the case or before or after the trial to contribute to or pay the other party's attorney's fees and other costs if the Court has ordered you to do so.

The other party may be responsible to contribute to or to pay your attorney's fees, if the Court orders the other party to do so. However, if the other party fails to pay the Court ordered fee, you are still responsible for the fees owed to your attorney and experts in your case.

You are required to pay for court filing fees, process servers as well as fees for expert reports, testimony, depositions and/or trial testimony and you may seek reimbursement from the other party.

If you engage in conduct which is found to be frivolous or meant to intentionally delay

the case you could be fined or sanctioned and/or responsible for additional fees.

At your request, and after your attorney has had a reasonable opportunity to investigate your case, you are entitled to be given an estimate of approximate future costs of your case [, which]. That estimate shall be made in good faith but may be subject to change due to facts and circumstances [affecting the] that develop during your case. There are no guarantees that the cost of your case will be as originally estimated.

You are entitled to receive a written, itemized bill on a regular basis, at least every 60 days.

You are expected to review the itemized bills sent [by counsel] to you by your attorney, and to raise any objections or errors in a timely manner in writing. Time spent in discussion or explanation of bills will not be charged to you.

You are [expected] responsible to be honest and truthful in all discussions with your attorney, and to provide all relevant information and documentation to enable [him or her] her or him to competently prepare your case. Attorneys and clients must make reasonable efforts to maintain open communication during business hours throughout the representation. An attorney may seek to be relieved as your attorney if you are not honest and truthful with her or him.

You are entitled to be kept informed of the status of your case, and to be provided with copies of correspondence and documents prepared on your behalf or received from the court or your adversary.

Your attorney is required to discuss the following with you: a) the automatic orders that are in effect once either party files a summons with notice; b) the law that provides for the financial support of the children, the Child Support Standards Act, if you and the other party have children under the age of twenty-one; and c) the law that provides for the financial support of the parties, the Maintenance Guidelines Statute.

You [have the right] are responsible to be present and on time in court at the time that conferences [are held], oral arguments, hearings and trials are conducted unless excused by the Judge or the part rules of the assigned Judge.

You are entitled to make the ultimate decision on the objectives to be pursued in your case, and to make the final decision regarding the settlement of your case. Your attorney has the right to send you written communications if your attorney disagrees with how you want your case handled.

Your attorney's written retainer agreement must specify under what circumstances he or she might seek to withdraw as your attorney for nonpayment of legal fees. If an action or proceeding is pending, the court may give your attorney a "charging lien," which entitles your attorney to payment for services already rendered at the end of the case out of the proceeds of the final order or judgment. In some cases your attorney may exercise a "retaining lien" which, subject to Court proceedings, may allow them to keep your file as security.

You are under no legal obligation to sign a confession of judgment or promissory note, or to agree to a lien or mortgage on your home to [cover] pay for legal fees. Your attorney's written retainer agreement must specify whether, and under what circumstances, such security may be requested. In no event may such security interest be obtained by your attorney without prior court approval and notice to your adversary. An attorney's security interest in the marital residence cannot be foreclosed against you.

You are entitled to have your attorney's best efforts exerted on your behalf, but no particular results can be guaranteed.

If you entrust money with an attorney for an escrow deposit in your case, the attorney must safeguard the escrow in a special bank account. You are entitled to a written escrow agreement, a written receipt, and a complete record concerning the escrow. When the terms of the escrow agreement have been performed, the attorney must promptly make payment of the escrow to all persons who are entitled to it.

Once your Judgment of Divorce is signed, if you are re-retaining an attorney you must sign a new retainer agreement.

If you are expecting your attorney to prepare and file documents related to the transfer of a house, co-op or lease, that must be specified in the retainer agreement. The signing of an agreement or Court order that transfers title does not transfer a co-op apartment or a house. A separate document must be prepared and filed.

In the event of a fee dispute, you may have the right to seek arbitration pursuant to Part 137 of the Rules of the Chief Administrative Judge where the dispute involves a sum of more than $1,000.00 or less than $50,000.00 unless you agree otherwise. Your attorney will provide you with the necessary information regarding arbitration in the event of a fee dispute, or upon your request.

Receipt Acknowledged:

_____ Attorney's signature

_____ Client's signature

_____ Date Form 1400.2-1(1/95)

Appendix E

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

September 24, 2018

Response of the Matrimonial Practice Advisory and Rules Committee to Public Comment Request re Proposed Guidelines for Attorneys Providing Limited Scope Legal Assistance to Clients in Civil Matters

The Chief Administrative Judge's Matrimonial Practice Advisory and Rules Committee ("the Committee") is requesting clarification that the proposed guidelines are not intended to apply to certain limited scope representation programs already in existence which provide much needed legal representation to indigent litigants in matrimonial actions. In many of those programs, counsel make limited appearances when cases are bifurcated. Without such clarification, we fear that the guidelines will discourage such representation.

By enacting Judiciary Law §35(8) in 2006, the Legislature implicitly authorized attorneys to provide unbundled or limited scope legal services to indigent spouses in matrimonial actions. Judiciary Law 35(8) requires Supreme Court Justices to appoint counsel to represent an indigent party in a divorce action on issues such as custody and visitation or orders of protection over which the Family Court could have exercised jurisdiction. This important legislation ensured that non-monied spouses would have the same right to paid representation in Supreme Court that they would have had pursuant to FCA 262 in Family Court with respect to those issues. However, there is no statutory authority to appoint counsel for indigent litigants on financial issues in matrimonial cases. Divorce litigation involves not only issues over which the Family Court could have exercised jurisdiction, but also financial issues over which the Family Court is divested of authority once a Supreme Court action is instituted (see *Poliandro v. Poliandro,* 119 AD2d 577, 500 NYS2d 744 [2 Dept.,1986]), and over which the Family Court has no statutory authority such as issues of distribution of marital property or maintenance. To fill the gap, private matrimonial attorneys have been accepting limited scope representation on the ancillary issues in divorce actions with bifurcated representation of indigent litigants pursuant to Judiciary 35(8). In addition, successful limited scope pro bono programs have been developed by bar associations such as the Women's Bar Association of the State of New York and pro bono projects in Brooklyn and New York County with the assistance and encouragement of the New York State Judicial Committee on Women in the Courts chaired by the Hon. Betty Weinberg Ellerin. Our Committee applauds these efforts and wants them to continue.

The Committee is concerned that the proposed guidelines will discourage attorneys from taking assignments pursuant to Judiciary Law 35(8). Attorneys taking Judiciary Law 35(8) assignments should not have to obtain judicial consent to the assignments or complete certified training courses, since it is the court making the assignment from a panel of attorneys who have already been certified as qualified. Moreover, the case by case analysis of whether the proposed

representation is reasonable should not be required since the Legislature has already mandated that such representation on limited issues in a matrimonial proceeding over which Family Court would have had jurisdiction such as custody is reasonable. Thus, we submit there should be an exception to the requirements in the proposed guidelines.

Similarly, when a private attorney takes on responsibility for the remaining limited financial issues in the case, judicial consent should also be unnecessary. Attorneys who agree to represent indigent litigants on just the financial issues in a divorce action should not fall under the umbrella of limited scope representation. To impose new certification requirements now on those attorneys would severely limit access to justice for many indigent matrimonial litigants.

The Committee is also concerned that the requirements in the proposed guidelines will discourage pro bono attorneys from participating in existing pro bono programs successfully supervised by courts, government agencies, bar associations, or not for profit legal service organizations to fill the gap in legal representation as to financial issues arising in divorce litigation. The guidelines acknowledge that competency for pro bono attorneys participating in such programs can be built through training at a legal services agency and through mentoring and co-counseling, but the guidelines nevertheless seem to require such pro bono attorneys to complete the certified training program required for private attorneys.

We submit that there should be a second exception to the requirements in the proposed guidelines for legal representation of indigent litigants in matrimonial cases by private or pro bono counsel as to financial issues which supplements or bifurcates representation by assigned counsel pursuant to Judiciary Law 35(8) in such cases. Such types of limited scope representation have proven successful since 2006 when Judiciary Law 35(8) was first enacted. The protections of the New York Rules of Professional Conduct combined with the requirements of 22 NYCRR 1400 have proven adequate protection against incompetent representation. We note that Part 1400 specifically applies to divorce actions and requires a written retainer and Statement of Client's Rights and Responsibilities in all such actions. Where compensation is not paid by the client, as in the case of State paid assigned counsel and pro bono counsel, only the Statement of Client's Rights and Responsibilities is required by Part 1400 because adequate protections already exist. For private attorneys handing limited scope financial issues in matrimonial litigation, both the retainer agreement and Statement of Client's Rights and Responsibilities are required.

The Committee does welcome the availability of limited scope representation for attorneys who desire to and are eligible to participate in limited parts of a divorce action with prior court approval, regardless of the client's indigency. In matrimonial actions, that would be consistent with a privately paid attorney or an attorney serving pro bono for a limited part of a financial matter such as an examination before trial or preparation of an Affidavit of Net Worth. In these limited situations, especially in a matrimonial action, a written agreement should be required and would be consistent with Part 1400. We also suggest that Part A VI be clarified as to how notice and consent of the court is obtained, and if consent is not granted by the court, whether there should be a provision that a stay would be granted in order to give the litigant an opportunity to hire counsel.

Finally, we have concerns that the guidelines appear to dispense with the verification requirement pursuant to Rule 130 and certification would be avoided even though the attorney was making an appearance in the action. In our view, only if attorneys do not make an appearance in the action should they be exempt from sanctions pursuant to Rule 130. Otherwise certain litigants could simply hire limited scope attorneys to avoid certification. We suggest that the form Model Limited Representation Agreement be modified accordingly.

For the Committee:

Hon. Jeffrey S. Sunshine, Chair, and
Statewide Coordinating Judge for
Matrimonial Cases

Susan W. Kaufman
Counsel to the Committee

Appendix F-1

Supreme Court
of the
State of New York

JUSTICES' CHAMBERS
360 ADAMS STREET
BROOKLYN, NY 11201

JEFFREY S. SUNSHINE
Justice

MEMORANDUM

TO: Marc Bloustein, OCA Legislative Counsel

FROM: Justice Jeffrey Sunshine, J.S.C., Chair of the Chief Administrative Judge's Matrimonial Practice Advisory and Rules Committee

RE: E-filing in Matrimonial Actions

DATE: April 24, 2017

I had an opportunity Friday morning to raise the issue of e-filing in matrimonial actions with members of the Chief Administrative Judge's Matrimonial Practice Advisory and Rules Committee. Participating in the discussion were both judges and lawyers from across the State and of particular note there was overwhelming support from the attorneys in Westchester County (and the Supervising Matrimonial Judge in Westchester County) which is already participating in the e-filling project for matrimonial cases.

I would like to highlight a few of the various reasons why the bench and bar appear encouraged by the possibility of statewide e-filing in matrimonial actions:

1) Immediate remote access by a newly retained attorney to a file, and the attorney will no longer need to wait to obtain the file from predecessor counsel or review the file for the first time at the court house;

2) The ability to have the entire court file accessible at remote locations when drafting motions and orders to show cause and preparing agreements;

3) Once notified that an order to show cause has been filed, the Judge and chambers staff can see and read the OSC and assess its urgency prior to it being processed through the clerk's office. Often allowing earlier access to the document and the Court's ability to be prepared to sign the OSC and consider ex parte relief once actually received;

4) From a judicial perspective: The ability to prevent tampering and the removal of physical documents is of great benefits, when documents are e-filed and there are far less missing documents;

5) Self -represented litigants will not have to miss time from employment or arrange child care to file or have access to court documents especially for those filing uncontested divorces;

6) Attorneys and litigants will have full access to court files and files and documents that are in Courtrooms waiting appearance dates or adjourned dates can easily be accessed from remote locations. Similarly files and documents that are in chambers while motions are being decided, or awaiting transport, will be accessible to litigants and counsel;

7) Filings are not limited a 5 PM end of day restriction and parties can read fillings earlier, not having to wait for mailings. Additionally, the cost of mailings will be reduced for self-represented litigants and counsel;

8) Throughout the State in each County there are multiple court locations that files travel in between before they get to the Judge and then back to the attorney. Access to documents will no longer be restricted due to the file being transported and there will be less time lapse between filing, calendaring and delivering files and motion papers.

9) Judges will be able to cut and paste when quoting from filed documents and even compare judgments and counter judgments in a more efficient manner that will certainly expedite these processes and save judicial time and resources.

As always, if you have any questions regarding the possibility of expanding e-filing to matrimonial actions please do not hesitate to contact me.

Appendix F-2

STATE OF NEW YORK
UNIFIED COURT SYSTEM
360 ADAMS STREET
BROOKLYN, NY 11201
(347) 296-1527

LAWRENCE K. MARKS
Chief Administrative Judge

JEFFREY S. SUNSHINE
Statewide Coordinating Judge for Matrimonial Cases

October 4, 2018

Re: Electronic Filing of Court Papers

Dear Counsel:

I write to ask your help concerning a proposal for expanding the use of mandatory electronic filing of court papers to matrimonial actions.

In 2015, the Legislature enacted CPLR 2111(b)(2)(A), which authorized the Chief Administrative Judge to mandate the electronic filing of court papers in all cases in Supreme Court with only a limited number of exceptions, notably matrimonial actions. This enactment represented the culmination of more than 15 years of steady incremental growth in the breadth of electronic filing in the courts. Since 2015, and in response to strong expressions of interest from segments of the community, the Office of Court Administration has considered proposing a further step in the expansion of electronic filing: legislative elimination of the matrimonial action exception from mandatory electronic filing. Accordingly, as we approach the 2019 legislative session – during which action will be taken to give effect to the proposal – we are inviting the support of the matrimonial bar for this effort.

Over the past two decades, the electronic filing of court papers in cases in the New York courts has grown increasingly common. As of today, more than 1.3 million cases have been filed electronically in Supreme Court and in other courts. With the aforementioned exceptions (for matrimonial actions, CPLR Article 70 and 78 proceedings, Election Law proceedings, cases under the Mental Hygiene Law and certain residential foreclosure and consumer debt actions), electronic filing is required in most classes of cases in 28 counties and in at least one class of cases in another two counties. It also is permitted, where the parties consent, in some or all classes of cases in all of these counties plus another eight. Of particular note is the fact that, of the 38 counties now using some form of electronic filing, 28 permit consensual electronic filing in matrimonial actions, with the result that, over the past five years, there have been 10,316 such actions electronically filed across the State.

Each time efforts to expand electronic filing in New York have been considered, the Chief Administrative Judge has sought input from bar groups to establish whether lawyers across the State are comfortable with such expansion, and whether they believe it can benefit their clients. Electronic filing can only be successful where the bar is supportive of the process and fully committed to its effectiveness as a means of furthering client interests and the administration of justice. Thus, we believe it essential now to enlist your assistance in our forthcoming effort.

Attached is a copy of the legislation that we wish to propose. I point out that this legislation would not by itself mandate the electronic filing of papers in matrimonial actions across the State. The legislation would, instead, permit the Chief Administrative Judge to establish such a mandate for individual counties, after consulting with the local bench and bar and securing the approval of the County Clerks of those counties. Moreover, as is the case with mandatory electronic filing in all other classes of

cases where it has been instituted: (i) unrepresented parties in matrimonial cases would be automatically exempt from having to file electronically (although they could choose to do so if they wished), and (ii) attorneys in such cases who lack the knowledge or equipment needed to file electronically could opt out of doing so by the filing of a simple form. Finally, consistent with section 235 of the Domestic Relations Law, papers in a matrimonial action that is electronically filed shall not be accessible on-line to persons other than the parties and counsel therein.

As has been amply demonstrated over the past two decades, during which time electronic filing has gradually been introduced in most classes of civil Supreme Court cases in New York, the benefits of the practice are many. For litigants and the bar, they include: a streamlined, easily-mastered process for the filing of litigation documents in courts across the State that is far more economical than traditional paper filing; convenient access by parties to case files; easier, more expeditious review of filed papers by court staff; enhanced security for all filings; convenient and easy notification where a party's papers require correction, and equally convenient and easy re-submission of the corrected papers; free and fast service of subsequent papers upon all other parties who are electronically filing in a case; and instantaneous notification of signed orders and judgments. For the community, they include: diminished reliance upon paper, which promotes a greener environment; and public savings through the more economical and more effective operations in court and County Clerks' offices that electronic filing enables.

The bar has consistently showed its strong support for electronic filing of civil cases in Supreme Court. I ask that you extend that support to our effort to expand use of electronic filing in matrimonial cases. To this end, I would welcome any comments or suggestions as to the attached draft of legislation. Please send them, not later than November 15, 2018, to OCA's Legislative Counsel, Marc Bloustein, by email (mblouste@nycourts.gov) or at the following address:

Marc C. Bloustein
First Deputy & Legislative Counsel
Unified Court System
4 ESP
Suite 2001
Albany, New York 12223

Thank you for your time and cooperation.

Very truly yours,

Jeffrey S. Sunshine

cc: Hon. Lawrence K. Marks, *Chief Administrative Judge*
John W. McConnell, Esq., *UCS Counsel*
Marc C. Bloustein, Esq., *UCS First Deputy & Legislative Counsel*
Jeffrey Carucci, *Statewide Coordinator for Electronic Filing*

ATTACHMENT

An act to amend the civil practice law and rules, in relation to electronic filing

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

Section 1. Subparagraph (A) of paragraph 2 of subdivision (b) of section 2111 of the civil practice law and rules, as added by chapter 237 of the laws of 2015, is amended to read as follows:

(A) one or more classes of cases (excluding [matrimonial actions as defined by the civil practice law and rules,] election law proceedings, proceedings brought pursuant to article seventy or seventy-eight of this chapter, proceedings brought pursuant to the mental hygiene law, residential foreclosure actions involving a home loan as such term is defined in section thirteen hundred four of the real property actions and proceedings law and proceedings related to consumer credit transactions as defined in subdivision (f) of section one hundred five of this chapter, except that the chief administrator, in accordance with this paragraph, may eliminate the requirement of consent to participate in this program insofar as it applies to the initial filing by a represented party of papers required for the commencement of residential foreclosure actions involving a home loan as such term is defined in section thirteen hundred four of the real property actions and proceedings law and the initial filing by a represented party of papers required for the commencement of proceedings related to consumer credit transactions as defined in subdivision (f) of section one hundred five of this chapter) in supreme court in such counties as he or she shall specify, and

§2. This act shall take effect immediately.

Appendix G-1

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%

NEW YORK STATE UNIFIED COURT SYSTEM

SUPREME CIVIL MATRIMONIAL CASES FILED AND DISPOSED - TWO YEAR COMPARISON

	UNCONTESTED MATRIMONIALS						CONTESTED MATRIMONIALS					
	2015		2016		2015 vs 2016		2015		2016		2015 vs 2016	
Location	Filed	Disposed	Filed	Disposed	% Chg Filed	% Chg Disp	Filed	Disposed	Filed	Disposed	% Chg Filed	% Chg Disp
TOTAL STATE	47,358	45,988	45,150	48,282	-5%	5%	12,569	13,660	12,090	14,480	-4%	6%
NYC	26,295	24,283	24,327	25,910	-7%	7%	3,474	3,173	3,295	3,507	-5%	11%
NEW YORK	12,799	10,391	11,340	12,995	-11%	25%	815	944	823	902	1%	-4%
BRONX	3,845	4,985	4,382	3,918	14%	-21%	814	341	724	526	-11%	54%
KINGS	4,389	3,601	3,983	4,074	-9%	13%	761	673	687	899	-10%	34%
QUEENS	4,719	4,798	4,013	4,209	-15%	-12%	749	853	774	834	3%	-2%
RICHMOND	543	508	609	714	12%	41%	335	362	287	346	-14%	-4%
Outside NYC	21,063	21,705	20,823	22,372	-1%	3%	9,095	10,487	8,795	10,973	-3%	5%
ALBANY	556	547	579	590	4%	8%	187	265	166	285	-11%	8%
ALLEGANY	94	124	83	89	-12%	-28%	32	45	34	42	6%	-7%
BROOME	471	434	549	372	17%	-14%	119	137	167	159	40%	16%
CATTARAUGUS	205	161	166	140	-19%	-13%	43	52	52	40	21%	-23%
CAYUGA	121	151	127	170	5%	13%	55	99	45	108	-18%	9%
CHAUTAUQUA	339	315	274	295	-19%	-6%	99	118	82	88	-17%	-25%
CHEMUNG	270	277	251	248	-7%	-10%	66	75	50	57	-24%	-24%
CHENANGO	110	101	121	126	10%	25%	43	51	48	45	12%	-12%
CLINTON	243	242	207	237	-15%	-2%	60	72	67	78	12%	8%
COLUMBIA	134	112	142	131	6%	17%	35	38	39	32	11%	-16%
CORTLAND	235	214	320	303	36%	42%	26	37	30	26	15%	-30%
DELAWARE	85	81	94	108	11%	33%	28	49	30	55	7%	12%
DUTCHESS	678	698	601	608	-11%	-13%	257	316	272	256	6%	-19%
ERIE	1,909	2,358	1,762	2,173	-8%	-8%	856	894	830	830	-3%	-7%
ESSEX	77	61	82	105	6%	72%	13	26	19	21	46%	-19%
FRANKLIN	130	114	85	77	-35%	-32%	44	71	45	57	2%	-20%
FULTON	136	136	138	138	1%	1%	48	45	52	76	8%	69%
GENESEE	133	143	111	128	-17%	-10%	46	64	40	53	-13%	-17%
GREENE	99	87	101	113	2%	30%	35	51	21	39	-40%	-24%
HERKIMER	70	67	63	66	-10%	-1%	64	68	61	47	-5%	-31%
JEFFERSON	406	520	413	411	2%	-21%	145	169	126	141	-13%	-17%
LEWIS	51	61	46	54	-10%	-11%	29	29	9	37	-69%	28%
LIVINGSTON	134	153	136	134	1%	-12%	50	48	49	66	-2%	38%
MADISON	102	118	132	157	29%	33%	56	65	67	70	20%	8%
MONROE	1,367	1,458	1,339	1,335	-2%	-8%	712	732	614	801	-14%	9%
MONTGOMERY	79	80	107	124	35%	55%	28	42	27	46	-4%	10%
NASSAU	2,014	1,688	1,818	1,719	-10%	2%	1,054	1,094	1,063	1,124	1%	3%
NIAGARA	199	180	318	275	60%	53%	237	218	208	274	-12%	26%
ONEIDA	349	197	384	295	10%	50%	249	285	232	286	-7%	0%
ONONDAGA	852	1,289	773	1,126	-9%	-13%	518	514	495	450	-4%	-12%
ONTARIO	289	327	458	478	58%	46%	117	155	78	147	-33%	-5%
ORANGE	546	609	549	672	1%	10%	302	360	293	396	-3%	10%
ORLEANS	87	159	61	79	-30%	-50%	28	32	19	20	-32%	-38%
OSWEGO	239	191	205	192	-14%	1%	121	133	122	122	1%	-8%
OTSEGO	116	105	119	122	3%	16%	32	24	26	39	-19%	63%
PUTNAM	106	108	128	120	21%	11%	94	113	90	138	-4%	22%
RENSSELAER	327	355	307	344	-6%	-3%	107	140	91	139	-15%	-1%
ROCKLAND	324	497	374	472	15%	-5%	180	261	164	269	-9%	3%
SARATOGA	520	541	524	545	1%	1%	187	208	225	348	20%	67%
SCHENECTADY	374	383	357	432	-5%	13%	119	127	103	196	-13%	54%
SCHOHARIE	58	31	51	39	-12%	26%	27	15	22	21	-19%	40%
SCHUYLER	57	34	49	69	-14%	103%	11	15	8	16	-27%	7%
SENECA	44	60	50	71	14%	18%	23	26	24	43	4%	65%
ST LAWRENCE	194	189	219	238	13%	26%	46	35	78	92	70%	163%
STEUBEN	211	276	215	266	2%	-4%	61	99	57	79	-7%	-20%
SUFFOLK	2,366	2,065	2,396	2,883	1%	40%	1,254	1,632	1,237	1,868	-1%	14%
SULLIVAN	128	139	135	174	5%	25%	50	70	46	70	-8%	0%
TIOGA	115	130	103	117	-10%	-10%	39	55	34	45	-13%	-18%
TOMPKINS	200	203	205	178	3%	-12%	40	59	50	58	25%	-2%
ULSTER	356	403	363	374	2%	-7%	141	170	139	162	-1%	-5%
WARREN	191	172	192	191	1%	11%	50	73	54	58	8%	-21%
WASHINGTON	190	178	174	253	-8%	42%	55	56	42	95	-24%	70%
WAYNE	137	143	136	132	-1%	-8%	72	99	72	76	0%	-23%
WESTCHESTER	2,097	2,102	2,004	1,958	-4%	-7%	643	688	637	721	-1%	5%
WYOMING	108	97	99	83	-8%	-14%	47	46	31	46	-34%	0%
YATES	35	41	28	43	-20%	5%	15	27	13	20	-13%	-26%

6/ 20/ 2017

NEW YORK STATE UNIFIED COURT SYSTEM

SUPREME CIVIL MATRIMONIAL CASES FILED AND DISPOSED - TWO YEAR COMPARISON

	UNCONTESTED MATRIMONIALS						CONTESTED MATRIMONIALS					
	2016		2017		2016 vs 2017		2016		2017		2016 vs 2017	
Location	Filed	Disposed	Filed	Disposed	% Chg Filed	% Chg Disp	Filed	Disposed	Filed	Disposed	% Chg Filed	% Chg Disp
TOTAL STATE	**45,150**	**48,282**	**42,857**	**46,054**	**-5%**	**-5%**	**12,090**	**14,480**	**11,335**	**13,795**	**-6%**	**-5%**
NYC	**24,327**	**25,910**	**23,208**	**24,476**	**-5%**	**-6%**	**3,295**	**3,507**	**3,307**	**3,309**	**0%**	**-6%**
NEW YORK	11,340	12,995	10,382	10,440	-8%	-20%	823	902	753	979	-9%	9%
BRONX	4,382	3,918	4,365	4,915	0%	25%	724	526	739	551	2%	5%
KINGS	3,983	4,074	3,550	4,247	-11%	4%	687	899	669	632	-3%	-30%
QUEENS	4,013	4,209	4,352	4,351	8%	3%	774	834	804	803	4%	-4%
RICHMOND	609	714	559	523	-8%	-27%	287	346	342	344	19%	-1%
Outside NYC	**20,823**	**22,372**	**19,649**	**21,578**	**-6%**	**-4%**	**8,795**	**10,973**	**8,028**	**10,486**	**-9%**	**-4%**
ALBANY	579	590	570	618	-2%	5%	166	285	160	297	-4%	4%
ALLEGANY	83	89	71	72	-14%	-19%	34	42	25	39	-26%	-7%
BROOME	549	372	376	366	-32%	-2%	167	159	180	169	8%	6%
CATTARAUGUS	166	140	129	161	-22%	15%	52	40	42	47	-19%	18%
CAYUGA	127	170	124	138	-2%	-19%	45	108	48	76	7%	-30%
CHAUTAUQUA	274	295	241	225	-12%	-24%	82	88	87	85	6%	-3%
CHEMUNG	251	248	194	190	-23%	-23%	50	57	49	51	-2%	-11%
CHENANGO	121	126	105	110	-13%	-13%	48	45	32	59	-33%	31%
CLINTON	207	237	207	235	0%	-1%	67	78	71	86	6%	10%
COLUMBIA	142	131	139	145	-2%	11%	39	32	32	64	-18%	100%
CORTLAND	320	303	598	591	87%	95%	30	26	27	33	-10%	27%
DELAWARE	94	108	72	114	-23%	6%	30	55	31	44	3%	-20%
DUTCHESS	601	608	598	608	0%	0%	272	256	191	257	-30%	0%
ERIE	1,762	2,173	1,350	1,862	-23%	-14%	830	830	720	935	-13%	13%
ESSEX	82	105	64	66	-22%	-37%	19	21	30	21	58%	0%
FRANKLIN	85	77	88	99	4%	29%	45	57	28	71	-38%	25%
FULTON	138	138	160	130	16%	-6%	52	76	38	77	-27%	1%
GENESEE	111	128	126	117	14%	-9%	40	53	52	54	30%	2%
GREENE	101	113	78	97	-23%	-14%	21	39	36	33	71%	-15%
HERKIMER	63	66	76	90	21%	36%	61	47	45	76	-26%	62%
JEFFERSON	413	411	371	450	-10%	9%	126	141	121	196	-4%	39%
LEWIS	46	54	50	53	9%	-2%	9	37	12	28	33%	-24%
LIVINGSTON	136	134	145	145	7%	8%	49	66	24	52	-51%	-21%
MADISON	132	157	86	92	-35%	-41%	67	70	52	71	-22%	1%
MONROE	1,339	1,335	1,285	1,332	-4%	0%	614	801	485	569	-21%	-29%
MONTGOMERY	107	124	98	82	-8%	-34%	27	46	29	36	7%	-22%
NASSAU	1,818	1,719	1,695	2,424	-7%	41%	1,063	1,124	936	1,200	-12%	7%
NIAGARA	318	275	267	308	-16%	12%	208	274	185	216	-11%	-21%
ONEIDA	384	295	297	287	-23%	-3%	232	286	196	256	-16%	-10%
ONONDAGA	773	1,126	771	1,187	0%	5%	495	450	535	442	8%	-2%
ONTARIO	458	478	386	417	-16%	-13%	78	147	64	109	-18%	-26%
ORANGE	549	672	584	639	6%	-5%	293	396	267	356	-9%	-10%
ORLEANS	61	79	77	77	26%	-3%	19	20	22	24	16%	20%
OSWEGO	205	192	237	206	16%	7%	122	122	118	129	-3%	6%
OTSEGO	119	122	104	95	-13%	-22%	26	39	36	33	38%	-15%
PUTNAM	128	120	132	150	3%	25%	90	138	85	82	-6%	-41%
RENSSELAER	307	344	295	299	-4%	-13%	91	139	104	156	14%	12%
ROCKLAND	374	472	312	473	-17%	0%	164	269	170	223	4%	-17%
SARATOGA	524	545	526	496	0%	-9%	225	348	177	292	-21%	-16%
SCHENECTADY	357	432	342	268	-4%	-38%	103	196	117	148	14%	-24%
SCHOHARIE	51	39	49	60	-4%	54%	22	21	18	21	-18%	0%
SCHUYLER	49	69	45	41	-8%	-41%	8	16	12	9	50%	-44%
SENECA	50	71	30	42	-40%	-41%	24	43	19	18	-21%	-58%
ST LAWRENCE	219	238	230	249	5%	5%	78	92	106	148	36%	61%
STEUBEN	215	266	200	252	-7%	-5%	57	79	48	80	-16%	1%
SUFFOLK	2,396	2,883	2,272	1,872	-5%	-35%	1,237	1,868	1,167	1,704	-6%	-9%
SULLIVAN	135	174	153	181	13%	4%	46	70	32	83	-30%	19%
TIOGA	103	117	109	111	6%	-5%	34	45	23	30	-32%	-33%
TOMPKINS	205	178	188	182	-8%	2%	50	58	36	38	-28%	-34%
ULSTER	363	374	347	347	-4%	-7%	139	162	131	194	-6%	20%
WARREN	192	191	180	200	-6%	5%	54	58	50	63	-7%	9%
WASHINGTON	174	253	138	150	-21%	-41%	42	95	38	63	-10%	-34%
WAYNE	136	132	107	120	-21%	-9%	72	76	55	59	-24%	-22%
WESTCHESTER	2,004	1,958	2,062	2,123	3%	8%	637	721	598	737	-6%	2%
WYOMING	99	83	86	107	-13%	29%	31	46	32	36	3%	-22%
YATES	28	43	27	27	-4%	-37%	13	20	4	11	-69%	-45%

Appendix G-2

Sanctuary for Families

P.O. Box 1406
Wall Street Station
New York, NY 10268-1406
Tel: 212.349.6009
Fax: 212.349.6810
sanctuaryforfamilies.org

March 7, 2017

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

Re: Proposed Amendment of the Form of Judgment in Matrimonial Actions (22 NYCRR §202.50[b])

Dear Mr. McConnell:

I am writing on behalf of Sanctuary for Families to provide comments with respect to the proposed Amendment of the Form of Judgment in Matrimonial Actions (22 NYCRR §202.50[b]). Sanctuary for Families thanks the Office of Court Administration ("OCA") for this opportunity to provide feedback.

Sanctuary for Families, the largest non-profit organization in New York State dedicated exclusively to the needs of domestic violence victims and their children, serves over 17,000 individuals each year by providing shelter, counseling, legal assistance, and resources for economic and housing stability. Each year, Sanctuary's Center for Battered Women's Legal Services represents hundreds of domestic violence survivors in matrimonial and family law matters.

With respect to the three proposed paragraphs to be added to judgments of divorce, our input is as follows:

A declaration that prior settlement agreement are incorporated by reference in the judgment, and shall survive and not be merged.

This is a standard provision that most matrimonial attorneys are already including in their proposed judgments of divorce. As such, we do not have any objection to this proposed provision.

Retention of jurisdiction of the matter concurrently with the Family Court

With respect to this provision, we suggest a clarification in the proposed language that says courts have jurisdiction "for the purpose . . . of making such further judgment with respect to maintenance, support, custody or visitation as it finds appropriate under the circumstances existing at the time." It is our hope and belief that this provision is not intended to change Domestic Relations Law ("DRL") § 236B(9) or other existing law governing applications for modification of the terms of an agreement incorporated into a judgment. However, the language "as it finds appropriate under the circumstances" may appear to suggest a broader jurisdiction to alter the terms of an agreement or judgment than is permissible under current law.

We believe this potential ambiguity can be resolved by changing the provision to read as follows: "for the purpose . . . of modifying such judgment with respect to maintenance, support, custody or visitation to the extent permitted by law."

Requirement that enforcement or modification proceedings relating to any settlement agreement shall be brought in a county where a party or minor child resides, absent good cause shown

Sanctuary for Families shares OCA's concerns regarding efficiency in the court system, especially with regard to family law cases, which involve important issues in the lives of litigants and their children. We also understand the court system's desire to ensure that the burden of handling post-judgment matters does not fall disproportionately upon particular counties nor strategically disadvantage defendants/respondents who reside far away from the place of trial. We have, however, some drafting concerns with respect to the proposed requirement.

We are particularly concerned about determination of venue in post-judgment matters in which one or more parties has a confidential or unknown address. Current law, DRL § 254, allows victims of domestic violence and other parties who may be at risk to appear in court while keeping their addresses confidential. Indeed, many of our clients make applications to keep their home addresses confidential in their matrimonial and family court actions. If the judgment of divorce contained the language proposed, a victim of abuse who needed post-judgment relief would face the difficult decision between proceeding in their abuser's county of residence and proceeding in the victim's own county of residence. Repeatedly traveling to the abuser's county for litigation could be difficult and expensive. Filing in the victim's own home county would risk exposing the confidential address and jeopardizing their safety.

Even more serious problems could arise if neither party's address were public knowledge. There are many cases in which one party resides at a confidential address and the other party's residential address is unknown, leaving a litigant with uncertainty as to where a post-judgment action may properly be filed. We have seen some cases in which both parties' addresses are kept confidential. In such situations, under the proposed form of judgment, neither party would know of any county in which they could file without revealing their home county.

Furthermore, determining venue based on current residence will waste resources in some contested divorce matters, in which there is an extensive litigation history before a particular judge. In many of those matters, the parties may change their county of residence during the matter or after its conclusion. When such matters return to the court for post-judgment enforcement or modification proceedings, the cause of efficiency and the fair administration of justice is better served by keeping the matter before the same judge if he/she is still available to preside than by requiring a new judge in a different county to learn the substantive and procedural history of a complex matter in order to properly rule upon a post-judgment modification application. Without any guidance regarding what constitutes "good cause," there can be no assurance that this continuity of judicial oversight of complex matters could be considered.

Finally, obtaining representation can be extremely difficult for lower-income litigants and those who reside in counties where legal services resources are few. Sometimes the venue chosen is a result of the location of accessible pro bono legal services in a neighboring county and a restriction based upon residency alone poses an unnecessary burden upon the parties.

If this proposal is adopted, Sanctuary for Families asks OCA to consider how it applies to cases in which a party has obtained an Order to Maintain Address Confidential. Judgments of divorce might simply allow such parties to file post-judgment motions in the county where the judgment of divorce was

issued, in addition to excluding their home address from the judgment. OCA might also, in the rule itself or in the letter explaining it, give more details about what will constitute "good cause" for a different venue and how good cause will be determined.

We do not wish to rely on the "good cause" exception in the proposal to address the above concerns. The rule itself does not set forth the procedure for determining whether the venue selected is appropriate nor procedures and standards for determining "good cause" to override this venue restriction. "Good cause" is a discretionary standard without any prior case law to which litigants may cite in their applications to permit them to proceed in a given venue. The requirement of showing good cause may prove unduly burdensome, particularly for unrepresented litigants.

We urge OCA to craft a rule that will address the issue of post-judgment venue in a way that takes into consideration these concerns. While we applaud efforts to curb frivolous behavior in litigation that is aimed to create difficulty for a defendant/respondent, we hope that it can be accomplished in a manner that increases access to justice without erecting additional unnecessary barriers to litigants seeking their day in a court.

Sanctuary for Families would be happy to work with you on drafting modified language that would include the above changes. You may contact Amanda Norejko at anorejko@sffny.org or (212) 349-6009 ext. 257 for further discussion of these comments. Thank you for your consideration.

Sincerely,

Hon. Judy Harris Kluger
Executive Director

Appendix H-1

Memos in Opposition to A.1533/S.6300 and In Support of S.6579

1. NYSBA Family Law Section Opposition to A.1533/S.6300 dated May 15, 2017
2. NYSBA Family Law Section Support for S.6579 dated June 13, 2017
3. Position Statement of Women's Bar Association of the State of New York in Opposition to A.1533/S6300
4. Position Statement of Women's Bar Association of the State of New York in Support of S.6579
5. NYC Bar Report on Legislation By the Matrimonial Law Committee and The Children And The Law Committee. June 2017

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 # 1 — May 15, 2017

A. 1533 — By: M. of A. Weinstein
S. 6300 — By: Senator Avella
Assembly Committee: Codes
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

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.

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

Memorandum in Support

FAMILY LAW SECTION

FLS # 2 June 13, 2017

S. 6579

By: Senator Avella
Senate Committee: Rules
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 SUPPORTS THIS BILL

The Family Law Section (Section) supports this Bill (S. 6579). We have opposed other bills on this issue because they did not provide certain safeguards. *See* attached Memorandum. We believe this Bill provides the safeguards that previous bills did not. Most importantly, this Bill addresses our concerns about a litigant in a child custody case -- especially a *pro se* litigant -- showing the report to the subject children or others. Additionally, other aspects of the Bill maximize efficiency. For example, attorneys and experts retained by attorneys are permitted to have a copy of the forensic report without having to issue a demand pursuant to the CPLR.

In a prior Memorandum (*see* attached), we recommended the inclusion of a directive prohibiting the courts from reading/reviewing the forensic report prior to its receipt, if any, in evidence in a custody case unless the parties and their counsel agree otherwise in a written stipulation submitted to the court. This Bill would authorize the court to read the forensic report at the commencement of a trial or hearing -- subject to further objection made prior to or at such trial or hearing -- prior to accepting an agreement between the parties in connection with its determination concerning child custody matters. The Section continues to hold the view that the court should not be permitted to read/review the forensic report before being admitted in evidence in a custody case, unless the parties and their counsel agree otherwise in writing.

The Section suggests that this limited issue could be left to a further determination by the Chief Administrative Judge as to whether or not it would nonetheless be appropriate for judges to read/review forensic reports in particular types of cases (*e.g.*, abuse, neglect) at the commencement of a trial or hearing.

Therefore we recommend that the Chief Administrative Judge should receive input from practitioners and judges in the domestic relations bar for the purpose of determining the scope of such excepted cases.

The Family Law Section reaffirms its prior objections to A. 1533; S. 6300 as set forth in the our May 15, 2017 Memorandum—FLS#1, attached.

Based on the foregoing, the Family Law Section **SUPPORTS** this Bill (S. 6579).

WBASNY
WOMEN'S BAR ASSOCIATION of the STATE OF NEW YORK

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2017 – A.1533 / S.6300

Position Statement -2017

Access to Forensic Mental Health Evaluations

A.1533 / S.6300

Oppose

WBASNY strongly opposes those portions of A.1533/S-6300 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.

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 significant access to the report. There has 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 to execute confidentiality agreements acceptable to the Court.

We oppose the Bill's provision that admissibility of forensic reports and files shall be subject to objection pursuant to the rules of evidence and subject to cross-examination. Such a provision will result in trial delays and additional expense.

We do, however, support that portion of the Bill that allows for the release of a forensic examiner's entire file to counsel only, and to pro se litigants to review in Court prior to litigation. We do not believe that a CPLR 3120 demand is necessary; the forensic examiner's notes and raw data should be as available to counsel as the report itself. Decisions from Nassau and Westchester counties have directed the release of the entire file to counsel with strong pronouncements in favor of such release: "Custody determinations should not be made based upon a black box. All of the underlying information, which is unquestionably relevant and material, must be provided to counsel, who must be fully equipped to cross-examine the forensic evaluator and establish for the Court, as trier of fact, the credibility and reliability of the opinions and conclusions expressed by the neutral forensic evaluator." K.C. v. J.C., 50 Misc.3d 892, 25 N.Y.S.3d 798 (Supreme Court, Westchester Co. 2015). We are in favor of a codification of the holding in K.C. v. J.C., and J.F.D. v. J.D., 45 Misc.3d 1212(A) (Supreme Court, Nassau Co. 2014).

We strongly support the proposal contained in the January 2017 Report of the Matrimonial Practice Advisory and Rules Committee ("MPARC"), chaired by the Hon. Jeffrey S. Sunshine. MPARC's proposal permits attorneys and

experts retained to assist attorneys and self-represented parties to have a copy of the forensic report and the forensic examiner's entire file, without having to make a demand pursuant to CPLR 3120. Represented parties can read and take notes about the report in their attorney's office; self-represented litigants may read and take notes about the report in the courthouse.

MPARC's proposal provides that willful failure to comply with a court order conditioning or limiting access to the forensic report shall be contempt of court. However, because the wrongful dissemination of the report may occur well after the case is concluded, the proposal provides that the court shall retain jurisdiction for purposes of an application for contempt. While we agree with MPARC that contempt is not a sufficient remedy for dissemination of the report, we also agree that these additional safeguards are necessary and appropriate.

MPARC's proposal provides that the written forensic report may substitute for direct testimony at trial, pursuant to 22 NYCRR § 202.16(g) (2).

WOMEN'S BAR ASSOCIATION OF THE STATE OF NEW YORK

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Position Statement -2017

Access to Forensic Mental Health Evaluations

S.6579

Support

The Women's Bar Association of the State of New York ("WBASNY") and our 19 chapters across the state strongly supports S.6579 (Avella) introduced at the request of the Office of Court Administration. This bill is identical to the proposed bill contained in the January 2017 Report of the Matrimonial Practice Advisory and Rules Committee ("MPARC"). WBASNY's memo in opposition to A.1533 (Weinstein) /S.6300 (Avella) referenced support for MPARC's proposal. Below is a restatement of this support.

We strongly support the proposal contained in the January 2017 Report of the Matrimonial Practice Advisory and Rules Committee ("MPARC"), chaired by the Hon. Jeffrey S. Sunshine. MPARC's proposal permits attorneys and experts retained to assist attorneys and self-represented parties to have a copy of the forensic report and the forensic examiner's entire file, without having to make a demand pursuant to CPLR 3120. Represented parties can read and take notes about the report in their attorney's office; self-represented litigants may read and take notes about the report in the courthouse.

MPARC's proposal provides that willful failure to comply with a court order conditioning or limiting access to the forensic report shall be contempt of court. However, because the wrongful dissemination of the report may occur well after the case is concluded, the proposal provides that the court shall retain jurisdiction for purposes of an application for contempt. While we agree with MPARC that contempt is not a sufficient remedy for dissemination of the report, we also agree that these additional safeguards are necessary and appropriate.

MPARC's proposal provides that the written forensic report may substitute for direct testimony at trial, pursuant to 22 NYCRR § 202.16(g) (2).

For the foregoing reasons, WBASNY supports this legislation.

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REPORT ON LEGISLATION BY THE MATRIMONIAL LAW COMMITTEE AND THE CHILDREN AND THE LAW COMMITTEE

S.6579 **Sen. Avella**

AND

A.1533 **M. of A. Weinstein**
S.6300 **Sen. Avella**

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

S.6579 IS APPROVED WITH RECOMMENDATIONS

The Matrimonial Law and Children and the Law Committees of the New York City Bar Association (the "Committees") write to provide feedback on proposed legislation, S.6579, to amend the Family Court Act and the Domestic Relations Law regarding the use of reports from court-appointed forensic evaluators ("forensics") in child custody disputes. The Matrimonial Practice Advisory and Rules Committee of the Office of Court Administration proposed this legislation in its 2017 report. A similar but not identical bill is also pending in the Legislature as A.1533 (Weinstein) / S.6300 (Avella).[1]

The Committees support S.6579 with a few minor changes and clarifications detailed below. Although A.1533/S.6300 contains several valuable elements, it goes too far in guaranteeing parties access to forensic reports. We believe that S.6579 strikes a better balance among the competing interests.

When custody of, or access to, minor children is disputed, the report of the neutral forensic becomes a critical piece of evidence. As Prof. Timothy M. Tippens has argued for years,[2] due process requires that counsel have access not only to the forensics' reports but also to their notes in order to cross-examine the forensic thoroughly and explore any omissions or possible bias. Courts, however, have recognized that right only inconsistently. Both legislative proposals would establish a right for attorneys to access forensics' "entire file related to the proceeding," unless a protective order under CPLR §3103 provides otherwise. The Committees

[1] As of the issuance of this report, A.1533/S.6300 had passed the Assembly and is pending in the Senate Rules Committee. S.6579 was introduced on June 5, 2017 into the Senate Rules Committee.

[2] See, e.g., "Custody Forensics: Reform on the Horizon?", N.Y. Law Jl., March 7, 2013.

welcome that change, with the understanding that all files will be redacted to prevent dissemination of confidential information that could compromise the safety of a domestic violence victim.

REASONS FOR SUPPORTING S.6579

A difficult issue in drafting these legislative proposals is the pro se litigants' access to forensic reports. On that issue, in March 2013, after much discussion and internal debate, the City Bar concluded that:

> "[G]iven the harm that can be done by providing parents with a copy of the report (harm that would not be undone by any sanction nor prevented by any affirmation/affidavit), the court rule should not allow parents to receive a copy of the forensic report. Instead, the court rule should allow represented litigants to review the report in their attorneys' offices, and should allow unrepresented parties to review the report in the courthouse and to have access to the report in the courtroom during trial."[3]

As the Children's Law Center in Brooklyn recently noted, parents who gain possession of forensic reports have shared them inappropriately and used them to attack children and each other.[4]

The Committees are pleased that S.6579 follows our recommendation. A.1533/S.6300, however, presumptively gives represented parties the right to copies of the forensic report. In the age of smartphones and social media, that will make it all too easy for distraught parents to publicize the very personal and embarrassing information that must often be included in forensics' reports.

S.6579 also provides more extensive mechanisms for ensuring the confidentiality of forensic reports. In particular, attorneys and others who receive access to forensic reports would be required to sign affidavits promising to not disseminate the reports without permission. Such procedures should be included in any legislation enacted on this issue.

Another difference between S.6579 and A.1533/S.6300 is that S.6579 limits judges' ability to read a forensic report before the parties have presented an agreement on child custody for judicial approval or before a trial or hearing has commenced. A.1533/S.6300 includes no such restrictions. The Committees believe that restrictions on when judges can read forensic reports are unnecessary and potentially harmful. Judges appropriately seek to avoid contested trials or hearings on custody disputes. In order to bring the parties to a compromise on such matters, judges need to read the forensic report. And if there is to be a trial or hearing, the judge should be able to prepare for it by reviewing the forensic report in advance.

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[3] Comment on Office of Court Administration's Proposal Regarding Access to Forensic Evaluation Reports in Child Custody and Visitation Cases, at 1, http://www2.nycbar.org/pdf/report/uploads/20072434-ForensicReportsinChildCustodyMatters.pdf.

[4] Karen P. Simmons et al., "Parties Deserve to See Forensic Evaluations" (letter to the editor), N.Y. Law Jl., Mar. 22, 2017.

SUGGESTED CHANGES TO S.6579

The Committees recommend some small changes to S.6579. First, the bill should clarify that an attorney for the child has the sole discretion to decide whether or not to show the forensic report to the minor child, without giving the child a copy. Both S.6579 and A.1533/S.6300 appropriately guarantee the attorney for the child access to the report and notes. Such access is necessary for those attorneys to perform their role effectively. Access also forces attorneys for the children to decide how much they will show or tell their clients -- the minor children. Exposing parents' secrets and their unvarnished opinions to children in that way could be very damaging, depending on what exactly is in the report and the child's level of maturity. If, however, a child wants to see a report about him/herself and his/her parents, and the attorney for the child has access to that report, it is difficult for the attorney for the child to refuse to share the report with his or her client. Refusing to share information with the child, although it is in the child's long-term interest, could damage the attorney / client relationship of trust. The statute should allow the attorney for the child to weigh those competing interests and make a final decision. Such a provision would treat attorneys for the children the same as attorneys for adult parties, who can disclose the contents of the report to their clients but cannot provide copies to them.

We also recommend minor changes to the language regarding retained experts.[5] S.6579 appropriately allows experts who have been retained to assist counsel to review independent forensics' reports and notes. However, the bill provides that such access will be "[u]pon application" to the court. The problem is that applications to the court must generally be on notice to all parties. If one side wishes to use an expert to review the forensics' report and advise counsel about it, the application will disclose that expert's name. The contemplated procedure will therefore impinge on the traditional right of counsel to consult with non-testifying experts in total confidence. Currently, most judges will allow another expert to access a forensic report after the retaining attorney presents that expert informally in the judges' chambers. Any legislation on forensic reports should clarify that such an ex parte procedure suffices as an "application" with regard to a non-testifying expert.[6]

The Committees also recommend the language in S.6579 be clarified to allow self-represented litigants to review forensic reports at a courthouse "or other location." We recognize that in rural counties of the State, courthouses may be inconveniently located. We are not sure, however, where else any measures could be effectively taken to prevent a self-represented litigant from copying the report.

We appreciate the effort that the Matrimonial Practice Advisory and Rules Committee put into keeping material in forensic reports from being disseminated as part of other documents, which must be shared with the parties. In particular, S.6579 prohibits litigants from quoting forensics' reports in any "motions, pleadings or other documents." We doubt, however, that the effort will succeed. Counsel will still be allowed to quote forensic reports in hearings or trials. It

[5] This language also appears in A.1533/S.6300.

[6] S.6579 refers to such experts retained by counsel or parties as "independent licensed forensic evaluators." That term could be misleading, because there is no particular "license" such experts might have. We recommend that "person retained to assist counsel," as in A.1533 / S.6300, or another general term be used instead.

will be difficult to make arguments, and impossible to cross-examine forensics, without such quotes. Once that happens, anyone present in the courtroom (which cannot be closed during testimony) will be able to hear the contents of the report. The quotes will also appear in the court reporter's transcript. Furthermore, information in the forensic evaluation can sometimes play a crucial role in motion practice that implicates the safety of a party or child. We therefore recommend omitting that provision of the bill.

Finally, S.6579 requires that reports be returned to the court upon conclusion of the litigation. We suggest that this provision be modified so that the attorneys be permitted to maintain the document in their files, confidentially, for use in any appeals or subsequent, related litigation.

CONCLUSION

In sum, the Committees recommend that the Legislature give further consideration to the enactment of S.6579, with the minor changes discussed above, rather than A.1533/S.6300. The Committees remain happy to work with OCA and the Legislature on the topic further.

Children and the Law Committee
Sara Hiltzik, Chair

Matrimonial Law Committee
Jenifer Foley, Chair
Matthew A. Feigin, Member (mfeigin@katskykorins.com)

June 2017

Appendix H-2

New York
Public Welfare Association, Inc.

Founded in 1869

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Sheila Harrigan, *Executive Director*

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June 9, 2017

Memo in Opposition
S.6579 (Avella)

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

The New York Public Welfare Association (NYPWA) **OPPOSES** legislation (S.6579) currently before lawmakers which provides for court ordered forensic evaluations in child custody and visitation cases. The NYPWA is the statewide organization of local social services departments with responsibility for services for children and families in counties. This bill mirrors legislation (A.1533/S.6300) the NYPWA has previously opposed—and unfortunately, this new bill contains the same troublesome issues.

Both measures essentially affect forensic reports in private custody cases. As such, NYPWA has no opinion on this important issue since local social services departments (LDSS) are not parties in private custody cases in a direct way. To the extent that LDSS is involved when a child is in foster care and someone petitions for custody, we would take no position on outside forensic reports and access to them. However, our concern is that court-ordered child protective investigations are included in the bill's definitions and would result in multiple problems with current confidentiality laws—some of which are federally required.

There are two ways that courts can request (or order) "investigations" by CPS when a private custody case is before the court. First, there is a statute which requires a full CPS investigation and a "report" to the court, which is found under Family Court Act 1034(1). There is no clarity in the law that this statutorily-mandated report is to be given to anyone but the Judge. Many districts take the position that there is no ability for the court to give information, which is confidential under Social Services Law 422, to anyone else. This issue has even caused some appellate reversals in cases where the court did share CPS information without a specific statutory authority to do so under SSL 422. Although there may be an argument that the parties are entitled to a FCA 1034(1) report based on SSL 422 (4)(A)(d), there has never been clarity that an attorney for a child is entitled to the report as SSL 422 only covers the child and not counsel. The issue is even more complicated if the FCA 1034(1) report results in an "unfounded" CPS report—as it most often does in these cases. Then the law is more problematic as SSL 422 (4) exceptions to confidentiality of CPS records only relates to pending and indicated cases and not unfounded ones. Under SSL 422 (5) A(a), unfounded reports are available to a subject of a report and not to the child. Further, there is the complication of SSL 422 (4)(B) and (7) both of which gives DSS the authority to prohibit the release of data that identifies persons who cooperated—in essence potential witnesses to the custody case. All of these provisions directly contradict this bill, which presumes that

this confidential CPS information will simply be turned over and that the report—and the notes that form the basis of the report—will be available to all.

Next is a problem of admissibility. Again, here the proposal seems to ignore Family Court Act 651-a—as well as SSL 422 (5)(b)—which prohibits the introduction of records of an unfounded CPS investigation in a private custody case except by the subject who is also alleging false reporting. We do not believe the parent can allege "false reporting" against a Judge who issued the investigation order under FCA 1034(2). This is interpreted by LDSS to also mean that caseworker notes and caseworker testimony on issues in the unfounded investigation are not admissible. There is no reference to how this contradiction would be resolved.

A second way that the court can order a forensic report would be under Family Court Rules 205.56. Contradictory issues appear here as well. First, this is not via court "order" but by "request of the court". It also says a written report is provided to the court—it does not say it is provided to the parties, and again LDSS have interpreted this to mean that the parties may not receive copies of the report as it in fact may also contain information from agency records which are confidential under other statutes.

If the bill is to include reports from LDSS, then all of the many statutes involving the confidentiality of child protective records must be looked at in detail. In addition, since federal funding requires that states follow federal rules on consequentiality of CPS records, all of those requirements would need to be reviewed as well. For these reasons we urge lawmakers to **OPPOSE** this bill as written.

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Appendix H-3

Excerpt from 2018 Report of the Matrimonial Practice Advisory and Rule Committee to the Chief Administrative Judge regarding Key Provisions of Modified Proposal on Forensics in Custody Cases in Response to Suggestions from the theChief Administrative Judge's Family Court Advisory and Rules Committee and the New York Public Welfare Association, Inc.

Access to the Forensic Report and Files

The revised proposal continues to differ from A.1533/S.6300 in that the degree of protections against dissemination are more stringent for parties and self-represented litigants than they are for attorneys and attorneys for the children who are officers of the court. While our draft permits attorneys and independent forensic evaluators hired to assist attorneys and self-represented litigants to have a copy of the forensic report upon execution of an affidavit containing assurances to the court against further dissemination and return of the report and files at conclusion of the litigation, our draft does not permit parties or self-represented litigants to have a copy of the report. Instead, we allow represented parties to read the report in the office of their attorney, to discuss the report with their attorney, and to make notes about the report, while we allow self-represented parties to read the report at the court or other location and to make notes about the report.

Similarly, our proposal continues to permit independent forensic evaluators hired to assist attorneys or self-represented litigants to have access to the complete evaluator's file upon execution of an affidavit containing assurances to the court against further dissemination and return of the report and files at conclusion of the litigation.

As in our original proposal, attorneys are provided access to the file for inspection and photocopying without having to make a demand under C.P.L.R. 3120. This avoids needless motion practice which results in delays and expense. The complete file must also be forwarded and made available to self-represented litigants at a court or other location for inspection and note taking, but not for photocopying. The proposal strikes a common-sense compromise. By assuring self-represented litigants the right to inspect and take notes on what is in the file, and by giving access to the complete evaluator's file to independent forensic evaluators hired by self-represented litigants, we enable self-represented litigants to represent themselves at trial, but guard against dissemination of materials in the file by photocopying. The revised proposal retains the language in the bill that access to the report and files in all cases is subject to the provisions of C.P.L.R. 3101 as to the court's issuance of a protective order.

Definition of Court-Ordered Evaluators

In accordance with a suggestion from the Family Court Advisory and Rules Committee, we have this year revised our proposal's definition of "court-ordered evaluators" to include only forensic mental health professionals in custody and visitation proceedings, **not** court-ordered

[28] See note 18, *supra.*

evaluators in statutorily-mandated investigations such as Probation Departments, local Departments of Social Services or the NYC Administration for Children's Services who perform investigations in child protective, permanency, destitute child or other proceedings in which assessments other than clinical evaluations are ordered and in which different considerations are relevant. A similar suggestion was made in comments received from the New York Public Welfare Association, Inc. who opposed both A.1533/ S.6300 and S. 6579 on the basis that, if the requirements in said bills about turning over forensic reports and notes and contents of files are applicable to child protective examinations, there could be multiple problems under various state confidentiality laws which in turn might also impact federal funding requirements that states follow federal rules on confidentiality of reports in child protective proceedings.[29] The modified definition of "court-ordered evaluators" addresses this issue.

The Remedy of Contempt

Our revised proposal retains the provision in A.1533/S.6300 that willful failure to comply with a court order conditioning or limiting access to a forensic report shall be contempt of court. Because contempt for dissemination in violation of a court order years after a case is resolved is not a practical or legally enforceable remedy as the case law now requires,[30] S. 6579 and our revised proposal provide that the court shall retain jurisdiction for purposes of an application for contempt and expand the contempt provisions to apply not just to violations of a protective order issued by the court, but also to violations of the statute regarding restrictions on dissemination of the report or the file or of an affidavit with regard thereto. Our revised proposal, like S.6579, allows the moving party to seek counsel fees to enforce or defend the application for contempt, which helps alleviate the unfair burden and expense of making such a motion while recognizing that movants would nevertheless face a hardship in moving for contempt. While these provisions do not make the remedy of contempt sufficient in itself to protect against dissemination of private information of innocent parties, and do not protect non parties, we recommend them as an additional safeguard to the essential protections against dissemination.

Admissibility of Forensic Reports into Evidence

A. 1533/S.6300 contains a provision that forensic reports and the evaluator's file shall be subject to objection pursuant to the rules of evidence and subject to cross-examination. In custody and visitation trials and hearings, such a rule will result in substantial delays if the report is not admitted in lieu of direct testimony. Instead, we inserted into our original proposal last year and continue to recommend in our revised proposal this year a provision from 22 NYCRR § 202.16(g)(2) which provides that written reports may be used to substitute for direct testimony at

[29] New York Public Welfare Association, Inc.'s comments are attached to this report as Appendix "C".

[30] See *Blatt v. Rae*, 37 Misc. 2d 85, 233 N.Y.S.2d 54 (Sup. Ct. 1962) stating that "A judgment determines the rights of the parties to an action (Civ. Prac. Act, § 472) and after the entry thereof the action is no longer pending and the provisions of section 753 of the Judiciary Law have no application since, by the very language of such section, its provisions are limited to pending actions." See also *Kenford Co. v. Cty. of Erie*, 185 A.D.2d 658, 587 N.Y.S.2d 877 (1992), stating: "A motion must be addressed to a pending action, and Supreme Court was without jurisdiction to entertain a motion almost two years after final judgment was entered." See also *EB v. EFB,* 7 Misc. 3d 423, 427–28, 793 N.Y.S.2d 863 (Sup. Ct.), *aff'd sub nom. Bjornson v. Bjornson,* 20 A.D.3d 497, 799 N.Y.S.2d 250 (2005), *Little Prince Prods., Ltd. v. Scoullar,* 258 A.D.2d 331, 685 N.Y.S.2d 442 (1999).

trial, that the reports shall be submitted by the expert under oath, and that the expert shall be present and available for cross-examination. Without this provision, trial days will be increased. This provision is part of the matrimonial rules for calendar control contained in 22NYCRR §202.16, first filed on January 9, 1986. This provision respects the rights of the parties to confront the expert through cross-examination. The right to object to portions of the report is in accordance with a suggestion made by Judge Alan Scheinkman in West McKinney's Forms.[31] At the same time, it avoids wasting the court's time ruling on motions about admissibility. It is designed to reduce delays in divorce proceedings in furtherance of the Excellence Initiative.

Review of the Report in Advance of a Trial or Hearing

In our proposal last year, at the request of the Family Law Section of the New York State Bar Association, we included a provision restricting the court from reading or reviewing the forensic report until it is received in evidence at a trial or hearing, unless the parties consent by agreement on the record or by stipulation submitted to the court, or upon application to the court for good cause shown. We also included in last year's proposal a proviso that the court may read or review the report at commencement of a trial or hearing (so as to avoid the need to halt a trial or hearing to first read the report), subject to further objection, or before accepting an agreement between the parties in its determination concerning child custody in its role as *parens patriae,* also subject to further objection.

Concerns were expressed by the Chief Administrative Judge's Family Court Advisory and Rules Committee about these provisions insofar as they might involve different considerations for custody and visitation proceedings in Family Court than for matrimonial proceedings involving custody and visitation in Supreme Court. Therefore, in our 2018 Annual Report, we propose to eliminate these provisions and instead authorize the Chief Administrative Judge to promulgate rules and regulations authorizing a court, in particular cases where a party does not raise a legally-valid objection thereto, to read or review a forensic report at particular times as the rules shall permit. We believe our revised proposal protects due process because the rules and regulations to be promulgated authorize the report to be read or reviewed only where a party does not raise a legally valid objection. A legally valid objection might be raised where the forensic report is filled with unscientific and/or unsubstantiated or non-professionally reliable hearsay allegations.[32] It is conceivable that courts could sustain an objection after having reviewed the report, but take into account inadmissibility of evidence just as courts take into account admissibility of evidence they see every day in the courtroom as they must do under

[31] See § 17:35. Court rules governing matrimonial actions—Expert witnesses; reports and testimony as follows: "In an effort to reduce trial time, the court may allow the written report of the expert to be used in lieu of direct testimony at trial. 22 NYCRR § 202.16(g)(2); N.Y. Ct. Rules, § 202.16(g)(2) (Uniform Civil Rules for the Supreme Court and the County Court). However, doing so may run the risk that inadmissible material, such as inadmissible hearsay, set forth in the report comes into evidence. The court may need to offer the parties the opportunity to object to admission of particular portions of the report. (West McKinney's Forms, 2016 Update)."

32 See *State v. Hall*, 96 A.D.3d 1460, 947 N.Y.S.2d 856 (2012); *Greene v. Robarge*, 104 A.D.3d 1073, 1074–75, 962 N.Y.S.2d 470 (2013); and *In re Kaitlyn X.*, 122 A.D.3d 1170, 1171–72, 997 N.Y.S.2d 777 (2014), all upholding lower courts' reliance on the professionally reliable hearsay exception "which enables an expert witness to provide opinion evidence based on otherwise inadmissible hearsay, provided it is demonstrated to be the type of material commonly relied on in the profession" (*Hinlicky v. Dreyfuss*, 6 N.Y.3d 636, 648, 848 N.E.2d 1285 (2006)).

New York law (see *Johnson v. Lutz,* 253 N.Y. 124, (1930)). The rules and regulations to be promulgated will have to balance the equities of the need for redaction of the inadmissible portion with the need to allow the court to have information it requires (e.g. information as to domestic violence or abuse which is statutorily-mandated to be factored into a custody decision). Also, forensic reports sometimes enable courts to encourage settlements because the court is aware of detrimental information against the parties.

Self-Represented Litigants

Our Committee continues to believe that our proposal strikes a fair balance between due process concerns, as expressed in the First Department decision in *Sonbuchner v. Sonbuchner*, 96 A.D.3d 566, 947 N.Y.S.2d 80, 83 (App. Div. 2012), and rights of innocent parties not to have the most intimate details of their lives disseminated over the Internet and by other improper means. Self-represented litigants are often individuals who could afford counsel or who could have assigned counsel appointed for them pursuant to Judiciary Law § 35(8) or Family Court Act § 262 in a custody and visitation proceeding, but who choose to represent themselves. If self-represented litigants refuse assigned counsel, or discharge their counsel in order to represent themselves, they in effect assume the risk that they will not be given a copy of the report and the file, but will only be allowed to read it and take notes, and could be so allocuted. For those few self-represented litigants who would like to be represented by counsel but do not qualify for assigned counsel, there are help centers and law libraries at courthouses around the state where self-represented litigants may read and take notes on forensic reports and research issues that arise with regard to custody issues raised by the forensic reports. In addition, programs by many bar associations throughout the state provide low cost legal consultations, and many legal service organizations provide low cost and/or no cost legal services for low income individuals who qualify.[33]

In addition, we note that there are other circumstances where attorneys and self-represented litigants are treated differently in the judicial process and these instances do not constitute due process violations. These differences in treatment range from how litigants enter a courthouse, to the screening that they must undergo, to the requirements as to attorneys being escrow agents while self-represented litigants are not. In certain instances, judicial discretion allows self-represented litigants greater leeway than represented litigants, such as the ability to testify in the narrative or to introduce an exhibit without formality. The Committee believes that reasonable advantages afforded to self-represented litigants along with reasonable restrictions imposed upon self-represented litigants are, to some extent, unavoidable consequences of the fact that self-represented litigants are not trained and licensed members of the bar.

Summary

Some have argued that forensic reports should be subject to higher standards of scientific reliability and that the preparers of such reports should be subject to more rigorous examination as to their qualifications. We share these concerns and recommend that Counsel and the parties should be encouraged to utilize the Mental Health Professionals Certification Committee

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

established in the First and Second Departments to review qualifications and report complaints as to forensic evaluators.[34] When prepared competently and utilized by the court, forensic reports are a valuable and necessary tool for the court to access important information prepared by experts in the field which can lead to better custody and visitation decisions. It is important that uniform standards be established on a statewide basis to determine access to such reports and files by all who need them during custody and visitation litigation. It is also important to set rules as to admissibility into evidence and reading of the report which allow the court to have the information it needs but which protect the rights of parties to raise objections to the qualifications of the expert or to inadmissible hearsay in the report and to cross examine the expert. We believe our proposal continues to accomplish these goals in a fair manner, protecting due process with adequate safeguards against violation of privacy, while at the same time promoting the efficiency of the custody and visitation litigation process by eliminating unnecessary motion practice and trials related to direct testimony contributing to delays in custody determinations where practicable.

The changes we have made in our revised proposal in response to suggestions from the Family Court Advisory and Rules Committee and others make the measure more workable in types of cases other than matrimonial, and avoid conflicts with confidentiality laws and possible loss of federal funding in connection with state child protective, permanency and other proceedings. It is our hope that these revisions will be supported by the Chief Administrative Judge, members of the Legislature, and by members of the Bench and Bar.

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[34] See 22NYCRR §623, Rules of the Supreme Court, Appellate Division, First Department, at http://inside-ucs.org/ji/MatriSeminar/2011/materials/Part_623_Mental_Health_Professionals_Panel.pdf, and 22 NYCRR § 680, Rules of the Supreme Court, Appellate Division, Second Department,, at http://inside-ucs.org/ji/MatriSeminar/2011/materials/Part_680_Mental_Health_Professionals_Panel.pdf

Appendix 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

Supreme Court of the State of New York

Appellate Division: Second Judicial Department

M E M O R A N D U M

To: All Administrative Judges

From: Presiding Justice A. Gail Prudenti

Date: March 7, 2008

Re: Custody orders in matrimonial actions

The purpose of this memorandum is to bring to your attention a recurrent problem concerning certain orders that are being issued in matrimonial actions. It appears that a number of Justices in the matrimonial parts are conducting bifurcated trials to allow the issues of custody and/or visitation to be determined before those of equitable distribution and/or grounds for matrimonial relief. Courts are issuing *orders* that purport to finally determine the issues of custody and visitation. Making an order in these circumstances is not proper procedurally and such orders present appealability problems that I wish to bring to your attention.

Generally, an order decides a motion (CPLR 2219) and not the issues raised by the pleadings. When an action is tried by a court without a jury, its determination with respect to disputed issues of fact that are raised by the pleadings is to be made in a decision, not an order (*see*, CPLR 4213). An interlocutory or final judgment is then issued on the decision (*see*, CPLR 5011). As stated by CPLR 5011 "[a] judgment is the determination of the rights of the parties in an action or special proceeding and may be either interlocutory or final. A judgment shall refer to, and state the result of, the verdict or decision."

Where the Supreme Court holds a trial on the issues of custody and/or visitation separately from the trial on the issues of equitable distribution and/or grounds for matrimonial relief, it should render a decision and not an order at the end of the trial. The entry of a custody and/or visitation "order" following a trial of those issues does not comply with the CPLR. Even if such an order were proper, an appeal therefrom would require leave of either the Justice who made it or of the Appellate Division. CPLR 5701(a)(2) states: "[a]n appeal may be taken to the appellate division as of right in an action originating in the Supreme Court . . . from an order . . . where the motion it decided was made upon notice". The custody and/or visitation orders that are being issued after a trial are not appealable as of right as they do not decide a motion made upon notice.

The appropriate course for the Supreme Court after a bifurcated trial limited to the issues of custody and/or visitation is to render a decision and to direct the parties to settle or submit an interlocutory judgment concerning those issues. Such an interlocutory judgment is appealable as of right (*see* CPLR 5011; 5012; 5701[a][1]).

Appendix L

(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 M

Supreme Court
of the
State of New York

HON. JEFFREY S. SUNSHINE

JUSTICES' CHAMBERS
360 ADAMS STREET
BROOKLYN, NY 11201

January 25, 2018

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

Re: MPARC Response to Request
for Comment on JROPE Parent
Education Proposal

Dear Mr. McConnell:

The Matrimonial Practice Advisory and Rules Committee (MPARC) thanks Judge Sondra Miller (Ret.) and Judicial Restoration of Parent Education (JROPE) for their thoughtful proposal.

The majority of the MPARC believes that Parent Education should be mandatory in a contested action for divorce, annulment or separation where a Request for Judicial Intervention (RJI) has been filed if there are minor children of the marriage, regardless of whether or not custody is at issue. While agreeing that in this situation Parent Education should be mandatory, the MPARC believes that the Judge should have discretion to waive the requirement.

In order to provide for a uniform standard statewide, the MPARC proposes that there should be an OCA produced online program, limited only to children's issues (not legal issues) that is no more than ninety (90) minutes in length. The film produced by OCA should be similar in nature to the film shown to new jurors.

In addition the MPARC proposes that this film be accessible online and shown on a monthly basis in courthouses for those who do not have access to the internet. The online version should be available in multiple languages as well as sign language. By having an online version of the Parent Education program, it will: 1) allow victims of domestic violence access to the program in a safe environment; 2) allow child care providers access from home after hours; and 3) not impact on

employment. The online and in-court alternative to having private vendors create the films would permit access to the Parent Education program at no cost to litigants, which makes a mandated program fairer and assures access to all. It will provide a standard approved format that does not exceed the limitation that Parent Education be limited to children's issues. The MPARC further suggests adequate funding be assured for this program and there be periodic review and updating of the film. The proposal would also limit the costs of ongoing oversight and certification of individual programs.

Finally, the Committee recommends that the failure of a party to attend the parent education course should not be a basis to deny signing of a judgment.

If you have any questions please feel free to contact me.

Very truly yours,

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

JSS/mjs

cc:
Hon. Lawrence Marks
Susan Kaufman, Esq.
Members of the MPARC

Appendix N

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 authorize the establishment of a pilot program for the mandatory referral of parents to attend a parent education and awareness program pursuant to 22 NYCRR Part 144 in the following counties, courts, and matters:

Counties:

1. Monroe
2. New York
3. Nassau
4. Ontario
5. Tompkins
6. Washington
7. Westchester

Courts:

Supreme Court

Matters:

all contested matrimonial matters involving the custody of or visitation with children commenced on or after the effective date of this order.

Notwithstanding any contrary provisions of 22 NYCRR §144.3(b) and (c), and excepting matters set forth below, the court shall, as early as practicable in all actions and proceedings subject to this pilot program, order both parents to attend a parent education and awareness program. Parents shall not attend the same class session of any such program. The court shall not mandate attendance at a program in cases where (1) there is any history, or specific allegations or pleadings, of domestic violence or other abuse involving the parents or their children, or (2) the court specifically determines that such attendance would cause substantial hardship to a parent or a child.

This order shall take effect on October 1, 2018 and remain in effect until further order.

Chief Administrative Judge of the Courts

Dated: August 9, 2018

AO/252/18

Appendix O

STATE OF NEW YORK
UNIFIED COURT SYSTEM
360 ADAMS STREET
BROOKLYN, NY 11201
(347) 296-1527

LAWRENCE K. MARKS
Chief Administrative Judge

JEFFREY S. SUNSHINE
Statewide Coordinating Judge for
Matrimonial Cases

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

December 11, 2018,

Re: Matrimonial Practice and Rules Committee Response to Request for Comment on the Proposed Adoption of Certain Rules of the Commercial Division in other Courts of Civil Jurisdiction

Dear Mr. McConnell:

The Matrimonial Practices Advisory and Rules Committee (the "Committee") has concerns about the adoption of certain rules and recommendations of the Commercial Division of the Supreme Court to matrimonial cases.

After a discussion and analysis of the recommendations, the Committee has concluded that many of these rules are inapplicable and inappropriate in matrimonial litigation, and that matrimonial cases should continue to be governed by the provisions of 22 NYCRR Sections 202.16 and 202.16-a and 202.16-b. We have the following comments regarding specific rules:

Rules 3(a) and 3(b) Appointment of a court-annexed mediator and settlement conference before a judge not assigned to the case
Matrimonial cases have their own protocols for mediation which must consider issues of allegations or findings of domestic violence or power imbalances. There are no (summary) jury trials in matrimonial cases. In fact, with the enactment of DRL 170 (7), most divorces are resolved on the grounds of an irretrievable breakdown in the marital relationship for a period more than 6 month. The only issue that a jury can be demanded on is the issue of grounds, and there are few if any jury trials statewide. Certainly, trials on the issues of custody, parenting time, orders of protection, child support and maintenance would not be appropriate for summary jury trials.

Referring cases to a different Judge in a matrimonial action for a conference would defeat the one judge/one family concept, especially in a non-jury case where the Judge has handled the matter from inception to trial. The additional strain on judicial resources would make the rule impracticable in matrimonial actions.

Rule 7 Preliminary Conferences
There are specific rules contained in 22 NYCRR Section 202.16(f)(1) regarding attendance at Preliminary Conferences. As required by said court rule, many judges in matrimonial actions require the parties to appear given the emotional, personal nature of the litigation and the need for the parties to participate in the conference and hear from the Judge.

Rules 11-a and 11-d Limitations on interrogatories and depositions.
These rules are contrary to the fundamental principles of broad discovery in matrimonial actions governed by DRL Section 236(B)(4), where the goal is to obtain as much information as possible about the parties' financial circumstances. Additionally, interrogatories are particularly important in cases with self-represented litigants who are better able to access this discovery tool because it is easier and less expensive. In the First and Second Departments, there is no discovery on the issue of grounds, custody or orders of protection absent special circumstances. A limitation on depositions would lead to longer trials and fewer settlements. Certainly, trial judges should have the right to limit discovery if it is a fishing expedition, and for the most part, that has been successful.

Rule 11-b Privilege Logs
Privilege logs are rarely if ever used in matrimonial ligation.

Rule 11e- Responses and Objections to Document Requests
This rule is inapplicable to matrimonial discovery in that broad and complete disclosure is already mandated.

Rule 19-a Motions for Summary Judgment; Statement of Material Facts
Summary judgment motions for the most part are not utilized in contested matrimonial cases.

Rule 20 Temporary Restraining Orders- Copies of Papers
The Committee believes this rule can be useful in matrimonial ligation and recommends the application of this rule with a limitation that only the Order to Show cause portion of the application need be provided in advance and continuing the exception in Uniform Rule 202.7(f) for requests for Orders of Protection. Often in matrimonial litigation, the supporting affidavit is signed at the Courthouse when the papers are submitted. Pre-arranged times for these application with judges and parts where practicable should be encouraged.

Rule 34 Staggered court appearances
The committee notes that most matrimonial judges allow for staggered court appearances as the needs of any case or attorneys dictate. However, given that many

matrimonial practitioners also practice in the Family Courts, where in some Counties the cases have specific time requirements and cannot be delayed, the efficacy of this rule would be lost in a matrimonial part. Family Court cases are often scheduled on short notice due to a 1028 or 1029 application or the arrest of a juvenile and take precedence over a divorce case We believe this calendar management tool should be left to the sound discretion of the judges and local practice.

Rule 21 – Courtesy Copies

Lastly, contrary to the recommendation of the Advisory Committee on Civil Practice, the Committee agrees with Commercial Division's Rule 21 which bars courtesy copies on motions submitted in hard copy and requires courtesy copies on motions submitted by electronic filing. This rule is consistent with the needs and practices of the matrimonial bar and judges generally, but additionally, the Committee believes this can also be left to the discretion of the judge.

Very truly yours,

Jeffrey S. Sunshine

cc: Susan Kaufman, Esq.

Appendix P

MEMORANDUM IN OPPOSITION
FAMILY LAW SECTION

November 20, 2017

Legislation: H.R. 1 Tax Cuts and Jobs Act

Law & Section Referred To: *Sec. 1309. Repeal of deduction for alimony payments.*

THE FAMILY LAW SECTION OPPOSES THIS BILL

The Tax Cuts and Jobs Act of 2017, passed by the United States House of Representatives on November 16, 2017, includes language that would eliminate the deductibility of alimony payments. It is the position of the Family Law Section that such elimination would cause significant harm for middle class divorcing families who depend on the alimony deduction as a means to exit the divorce process in the most economically sustainable fashion. It would also cause unnecessary and significant disruption to the day-to-day practice of matrimonial attorneys and their clients.

The history of the extant law regarding deductibility of alimony and the availability of that deduction to divorced spouses has a history that extends back to 1942, with the current iteration having been enacted in 1986. The elimination of the alimony deduction could significantly decrease combined net after-tax income for divorced family households (particularly in the middle class tax bracket), and could increase the cost of obtaining a divorce through the prolongation of litigation.

The availability of the deduction for spousal support as it presently exists is a significant tool for matrimonial litigators when it comes to resolving litigation. The elimination of that option will make the obtaining of settlements in a great number of contested matrimonial actions more difficult to reach, which will in turn mean that: 1) the cost of obtaining a divorce will increase for the parties through the prolongation of litigation, and 2) the already over-crowded court calendars in many of the matrimonial parts of the Supreme Court of the State of New York will have a new impediment added to the existing challenges faced by attorneys and litigants when attempting to resolve a matter. Indeed, the proposed amendment may have an amplifying effect given that the loss of the alimony deduction may apply not only to divorces subsequent to December 31, 2017, but also to the subsequent modification of spousal support provisions contained in agreements executed and judgments entered prior to December 31, 2017.

The proposed elimination of the alimony deduction would presumably force a complete re-examination of the temporary maintenance guidelines as well. Significant time and effort was dedicated to establishing such guidelines as a means to provide a greater degree of certainty and fairness when determining interim maintenance awards (particularly with respect to lower income households). The temporary maintenance guidelines are predicated on the assumption that the presumptive award of maintenance is taxable (to the payee, and deductible by the payor). The proposed elimination would undo such assumption and effectively render the guidelines unfit for use (in their current form) by matrimonial attorneys and Justices in New York.

However, of more long-term significance to litigants, and especially the children that are often most effected by divorce, the proposed amendment will increase the already difficult economic circumstances for divorced families. Proponents of this amendment have argued that existing law provides a benefit to divorced families -- a benefit that is not available to intact families. That argument has no basis in fact. The intention of the proposed elimination, as set forth in the Report of the Committee on Ways and Means (Report 115-409), is as follows:

> *The Committee believes that the repeal of the deduction for alimony payments from the payor spouse and repeal of the corresponding inclusion in gross income by the recipient spouse simplifies the tax code and prevents divorced couples from reducing income tax through a specific form of payments unavailable to married couples.*

That argument in favor of the amendment ignores the fact that, while the deduction does allow for alimony to be taxed at the rates applicable to the lower earner, the tax brackets applicable to divorced individuals are already significantly higher than those applicable to married couples filing jointly. Income tax rates increase at a vastly slower rate for those filing as Married Filing Jointly, or as a Qualifying Widow(er) with Dependent Child, than for those filing Single, or as Head of Household. The amendments to the tax brackets contained within H.R. 1 Tax Cuts and Jobs Act, while changing the number of brackets and the income levels at which they will apply, retains the vastly disparate application of those brackets to those filing as single or head of household when compared to the application of those same brackets as applied to those married filing jointly. (*See* Sec. 1001. Reduction and simplification of individual income tax rates of H.R. 1 Tax Cuts and Jobs Act.)

Currently, the deductibility of alimony lessens the negative impact of the higher tax brackets generally applicable to divorced households, resulting in tax savings that allow divorced families to obtain a measure of economic parity with that of the intact family. This adjustment is both just and necessary given that the divorced family has higher costs than an intact family because of the need for duplication of essential resources, such as shelter.

It has been noted, by some family law practitioners, that the proposed elimination of the alimony deduction would, in fact, create a "divorce penalty", a view born out by the indisputable fact that the proposed amendment would reduce, potentially by many thousands of dollars depending upon each family's circumstances, the net after-tax income available to divorced households, and thereby placing those families at a significant financial disadvantage when compared with the net after-tax resources of an intact family earning similar income. This added financial strain can only serve to further deteriorate the conditions under which children of divorce often find themselves in, conditions that the New York State Court System has long sought to treat as a priority of the state for amelioration. (*See* Report of the Chief Judge of the State of New York: Matrimonial Commission, Hon. Sondra Miller, Chairperson, February, 2006.)

Based upon the foregoing, the Family Law Section **OPPOSES** the elimination of the alimony deduction.

Memorandum prepared by: Erik Kristensen, Esq.
Alan Feigenbaum, Esq.
Dylan Mitchell, Esq.

Chair of the Section: Mitchell Y. Cohen, Esq.