IMPORTANT:
This is a link to a simple pdf version of your Her Justice manual. Please download this document and then open it in Adobe Acrobat or Google Chrome in order to access all the features of this manual, including bookmarks and page thumbnails.

Support Manual 2025

HER JUSTICE

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HER JUSTICE

SECTION 1: ORIENTATION TO HER JUSTICE

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HER JUSTICE

FREQUENTLY ASKED QUESTIONS

Thank you for taking a pro bono case through Her Justice. We hope the following frequently asked questions will help guide your representation and troubleshoot some common challenges in pro bono work. Our manuals provide additional information and guidance specific to each type of case in our program. Of course, your mentor is always available to answer questions about legal strategy and client expectations as your case progresses.

1. What is my firm's relationship with Her Justice for the purpose of this matter?

Her Justice is a consultant to the firm. We provide mentoring, training, sample documents, and will also review any written materials that you produce in the case. When we put a client on our waitlist, we explain to them that they will be represented directly by a firm, and that we will act as consultants to their lawyers. We assert attorney-client privilege over our direct communications with clients and over our communications with our pro bono teams.

We recommend that you explain this relationship to your client at your initial meeting so that they can be reminded of our relationship with the firm and understand that the firm should be their main point of contact going forward. We recommend that Her Justice be described in your retainer agreement as an outside consultant with whom you may have privileged and confidential discussions and share documents and information.

2. This is my first pro bono client and I don't feel like I understand their perspective on the case. What should I do?

Our clients' culture and individual life histories influence their perspectives and priorities in making important decisions. It is possible that your client is making certain considerations in making these decisions or forming their perspective on their case that you are not aware of. This means that the perspective our client has on their case may vary significantly from you. Take this as an opportunity to explore sensitivity and cultural humility. Do not assume. Leave space for inquiry and introspection.

For more information, please see the Best Practices and Ethical Considerations section of this manual. Consult your mentor for further guidance.

3. What is required if my client and I do not speak the same languages?

We are grateful to firms that take cases for clients with limited English proficiency, who are even less likely to have access to justice than our similarly situated clients with English fluency. In working with LEP clients it is paramount that you ensure they are accurately understanding the information you are providing them with and that you are understanding the needs they are communicating to you. To do this, work with qualified interpreters. Qualified is a relative term so please consider the nature of the conversation and the language capacity of the interpreter you are working with. It is best practice to work with a qualified interpreter - any staff member that demonstrates written and spoken fluency - at your firm that can consistently interpret during all calls and communications with your client If that is not accessible to you, think creatively about the interpretation and translation services available to you. Ask your pro bono coordinator if it is possible to retain professional interpreter services, or assist you in reviewing the internal staff language capacity. For potentially non-sensitive information it may be appropriate to have a friend or family member interpret. **It is never appropriate to have a client's child interpret**. **It is never appropriate to rely on Google Translate or similar multilingual neural machines translation service.**

For more information, please see the Best Practices and Ethical Considerations section of this manual. Consult your mentor for further guidance.

4. What special considerations are there for working with domestic violence survivors?

Approximately 80% of Her Justice clients self-identify as survivors of Intimate Partner Violence (IPV). Your representation may or may not be directly related to the abuse that they have experienced. Depending on your client's specific circumstances, there are multiple ways that your client's experiences as a survivor may impact your work together. It is best practice in the course of your representation to make your client's safety and autonomy paramount.

For more information, please see the Best Practices and Ethical Considerations, and What is Domestic Violence sections, and Appendix Resources of this manual. Consult your mentor for further guidance.

5. What special considerations are there for working with clients with physical or cognitive disabilities?

Your client may have a physical, developmental, or emotional disability. Their disability may be the result of the abuse they've experienced. Their disability may or may not be

diagnosed and may or may not be visible or obvious to you. Talk with your client about what, if any, accommodation is needed. Check in with your client periodically about what they need in order to work most effectively with you throughout your representation, e.g., instead of handing them a written paper, ask if they are comfortable reading it to themselves or if they would like you to read it out loud to them. Be mindful of potential obstacles like the accessibility of your building or public transportation to get to your office or a court building.

For more information, please see the Best Practices and Ethical Considerations section of this manual. Consult your mentor for further guidance.

6. I am having trouble getting in contact with my client. What should I do?

We emphasize to clients that your time is valuable, and that they must be responsive to their pro bono attorney's calls, and respectful of attorney time. It is important for attorneys, however, to remember that Her Justice clients typically fall within 200% of the federal poverty line (approximately $30,000 for a household of one), are juggling multiple urgent needs, and are prioritizing accordingly. For example, in light of food or housing insecurities, your client may choose to forego buying cell phone minutes in order to put food on the table. We understand how this choice may impact you and your ability to communicate with your client, however, we ask for your understanding and compassion. We encourage you to speak with your client during your initial call and establish a safe back-up contact in case this situation arises. Be creative in contacting your client and responsive to their needs. Explore alternatives like using work email, text messages, or mail.

For more information, please see the Best Practices and Ethical Considerations section of this manual. Consult your mentor for further guidance.

7. My client has been late to meetings or hasn't shown up to court or my office. What should I do?

We emphasize to clients that they should call you if they need to change or cancel their appointment, or if they are running late. It is helpful if the pro bono attorneys understand that it is not unusual for a client to have trouble keeping an appointment. Our clients are under-resourced. They may be experiencing a more pressing crisis, like an eviction, health crisis, or safety concern. It is possible that attending an appointment may require them to take time off work, pay for round-trip transportation, and coordinate childcare which they may not have the resources to do. Your client, especially at the beginning of your relationship, may feel uncomfortable or embarrassed to share why they cannot make an appointment with you. We ask for your understanding, compassion, patience, and flexibility in this matter. Please keep in mind that the handling and outcome of the case

primarily affects the client and any accommodation that can be provided is greatly appreciated.

Consider whether the firm could pay for a car service or a MetroCard for the client if transportation is a barrier to effective representation. At your first meeting with the client, ask them about their work and childcare schedules so you can select meeting dates and times that are easy to keep. For example, if your case will involve court appearances, tell the client that they should expect to meet with you or attend court during business hours, and that they will have to ask for time off from work or arrange for childcare in order to do so. Plan to meet up early on the day of a court appearance, taking into account the likelihood of the client needing extra time to get to court from home with everything they need and childcare in place. These expectations should be clear at the outset of the case so that the client can plan and does not feel surprised or overwhelmed later on. We thank you for your patience and compassion and encourage you to use your time with your client efficiently, to keep the number of meetings manageable.

For more information, please see the Best Practices and Ethical Considerations section of this manual. Consult your mentor for further guidance.

8. My client wants me to help with a new case or another issue. What should I tell them?

Remember that your firm is retained only for a specific case, and your retainer agreement should state the scope of the representation simply and specifically. For Family Court cases, we recommend that you specify the docket number for your case on the retainer, as you are not obligated to represent the client on future violation and modification petitions. While we encourage firms to assist clients if possible, with related cases, we do not recommend that the firm take on additional cases for a client without consulting with Her Justice or another legal services organization, if the new case is unrelated to family, matrimonial, or immigration work.

Be consistent with the client and maintain appropriate boundaries, remembering that you are their attorney for a discrete issue, and cannot provide social work services or unrelated legal services (for more information on these services, see Question 9, below). If the client has new legal issues, contact Her Justice for a new intake for the client. It is possible that Her Justice can provide advice or an appropriate referral. If the new issue is one that we would typically assist with, we can discuss whether the firm would like to expand its representation to include the new case (for example, the client now has an order of protection case in addition to a child support case).

9. I think my client needs to talk to a counselor or social worker. What should I do?

The litigation process can be very stressful and upsetting for clients. Many clients have underlying mental health concerns, such as depression or post-traumatic stress disorder, or would benefit from extra support in making decisions about the trajectory of their cases. Contact your mentor about connecting your client to the in-house social work program at Her Justice. If your client is a survivor of domestic violence or elder abuse, they also qualify for services at a New York City Family Justice Center (FJC). Your mentor can assist with making a referral. Many clients already have case managers assigned at their local FJC.

10. How can I get up to speed on the substantive law that affects my case?

Our manuals provide an overview of the relevant law for each type of case that we mentor. In addition, we offer live and video training on every type of case, plus some additional advanced topics such as child support enforcement and division of pensions in a litigated divorce. It is imperative that you attend or view the relevant training before you start the case so that you are competent to answer basic questions that your client will have at the first meeting. Your mentor is available to answer your substantive law questions and provide guidance on any research you need to conduct, once you have viewed the training and reviewed our manual. It is also important to remember your general obligation as an attorney to familiarize yourself with the relevant law, so be sure to review, for example, the sections of the Family Court Act, Domestic Relations Law, Civil Practice Law and Rules, or applicable immigration laws you will be relying upon in your case.

11. I have a trial coming up in the Family or Supreme Court and I don't know where to begin. What should I do?

Getting courtroom experience as the lead attorney is one reason that pro bono attorneys, and leadership at their firms, seek out our cases. Our staff attorneys have personally litigated many cases, but we are primarily your consultants on substantive law, client management, and case strategy, rather than trial advocacy skills. For general litigation practice skills (for example, understanding hearsay, entering exhibits into evidence, and conducting cross examination), remember that your firm's litigation department has in-house expertise and resources in addition to the knowledge we can provide.

12. I am going on secondment, parental or other extended leave, or leaving the firm—what happens to my client? Can Her Justice take the case back?

The client has retained your firm, not any individual attorney, for pro bono representation. Her Justice is a pro-bono-first organization. With a relatively small staff of attorneys, we are able to mentor thousands of cases a year because the firms represent the clients directly, aided by our training and mentoring. Because of this leverage model, usually it is not possible for Her Justice to take the case back. Although it is possible to take on a client as

an attorney working alone, it is best if the client has two associates in addition to a supervising partner. This will allow each attorney to accommodate very busy times for billable work and allows for seamless transition of cases in the event that an attorney leaves the firm for any reason. If you are leaving, it is imperative that you find a replacement attorney at the firm before you go. The client should meet their new attorney with you, ideally in person, before you leave, and the new attorney should take possession of all files and materials. Contact Her Justice right away if you are leaving the firm for any significant period of time. Ultimately, when a pro bono attorney is no longer available to the client, it is the responsibility of the firm to re-staff the case. If your firm has taken an uncontested divorce that has become contested, and the firm has a policy against pro-bono contested matrimonial work, speak with your mentor immediately about your options.

BEST PRACTICES AND ETHICAL CONSIDERATIONS

Thank you so much for your time, effort and energy in providing pro bono legal representation to our clients. This document is meant to provide some useful framing of the unique experiences and needs of our clients as well as some best practices and ethical considerations to guide you in your practice.

POVERTY IS A RACE AND GENDER EQUITY ISSUE

The impacts of poverty are felt disproportionately amongst communities of color and communities with Limited English Proficiency (LEP) in New York City and New York State. A comprehensive study of poverty in New York City by the Poverty Tracker Research Group at Columbia University (2021) found that, before the pandemic, nearly one in five adults (or 1.2 million people) in New York City lived in poverty and more than 350,000 children (one in five) live in poverty[1]. Research from the New York State Comptroller shows that one quarter of New York's foreign born population lived below the poverty level in 2021 compared to 15% nationwide[2]. Further, a study by the Poverty Tracker Research Group at Columbia found that every year, from 2016 to 2019, Black and Latino New Yorkers were **twice** as likely as white New Yorkers to experience poverty; 22% of Black New Yorkers, 25% of Latino New Yorkers, 21% Asian New Yorkers lived in poverty from 2016 to 2019 compared to 12% of white New Yorkers.[3] Further, due to structural racism and discrimination, "roughly 40% of Black New Yorkers and 30% of Latino New Yorkers who exited poverty were pushed back below the poverty threshold just a year later"[4]. According to researchers at the Poverty Tracker Research Group at Columbia, "the interaction between racism, discrimination, and economic inequality leaves Black and Latino New Yorkers significantly more likely to endure material hardship than white New Yorkers[5]."

[1] Poverty Tracker Research Group at Columbia University. (2021). The State of Poverty and Disadvantage in New York City. Volume 3.
[2] New Yorkers in Need: A Look at Poverty Trends in New York State for the Last Decade (2022) New York State Comptroller Thomas P. DiNapoli
[3] Poverty Tracker Research Group at Columbia University. (2021). The State of Poverty and Disadvantage in New York City. Volume 3.
[4] Poverty Tracker Research Group at Columbia University. (2021). The State of Poverty and Disadvantage in New York City. Volume 3.
[5] Poverty Tracker Research Group at Columbia University. (2021). The State of Poverty and Disadvantage in New York City. Volume 3.

People of marginalized gender identity, referring to women and individuals who identify outside of the gender binary[6], in New York City were more likely to experience all forms of disadvantage than cisgender[7] men[8]. In fact, families with female heads of household experience poverty at more than two times the rate of all families and four times the rate of married couples.[9] A study conducted by Legal Services NYC (2016) found that Black Americans in same sex couples have poverty rates at least twice of those of different sex couples and Black people in same-sex couples are more than six times as likely to be impoverished than White men in same-sex couples[10]. This same study found that transgender Americans are nearly four times more likely to have a household income under $10,000 per year than the population as a whole (15% vs. 4%)[11].

HER JUSTICE CLIENT POPULATION

Her Justice serves low-income folks of marginalized gender identities who reside in the 5 boroughs of New York with legal issues in the areas of family, matrimonial, and immigration law. Our clients' annual incomes are at or under 200% below the Federal Poverty Level (FPL), which was approximately $30,000 for a single person and approximately $62,000 for a family of 4 in 2023. Poverty is "when an individual or household does not have the financial resources to meet basic needs such as food, clothing, and shelter, or alternatively, access to a minimum standard of living".[12] Our clients are 92% women of color, 83% self-identify as survivors of intimate partner violence, and 48% have Limited English Proficiency (LEP) and would need an interpreter to effectively engage in court proceedings[13].

[6] The gender binary refers to the idea that there are only two genders
[7] Cisgender refers to someone whose gender identity is the same as the sex they were assigned at birth
[8] Poverty Tracker Research Group at Columbia University. (2021). The State of Poverty and Disadvantage in New York City. Volume 3.
[9] New Yorkers in Need: A Look at Poverty Trends in New York State for the Last Decade (2022) New York State Comptroller Thomas P. DiNapoli
[10] Legal Services NYC. (2016). Poverty is an LGBT Issue: An Assessment of the Legal Needs of Low-Income LGBT People. Legal Services NYC.
[11] Legal Services NYC. (2016). Poverty is an LGBT Issue: An Assessment of the Legal Needs of Low-Income LGBT People. Legal Services NYC.
[12] New Yorkers in Need: A Look at Poverty Trends in New York State for the Last Decade (2022) New York State Comptroller Thomas P. DiNapoli
[13] Her Justice Annual Report FY 2022

Her Justice is a pro bono first organization which means we employ a small highly-skilled staff of attorneys that use their skills and expertise to educate and mentor pro bono attorneys, like yourself, on how to effectively serve and represent our client population. In FY 2022, our model allowed us to leverage the skills and expertise of our 14 in-house attorneys to mentor 2,162 pro bono volunteer attorneys who served 5,313 women children, donating 46,092 hours of their time and energy amounting to a value of $35,958,719 in legal services[14].

BEST PRACTICES

Differences in Perspective – Cultural Humility

Her Justice clients come from diverse backgrounds. Our clients' culture and individual life histories influence their perspectives and priorities in making important decisions. It is possible that your client is making certain considerations in making these decisions or forming their perspective on their case that you are not aware of. This means that the perspective your client has on their case may vary significantly from yours. Take this as an opportunity to explore sensitivity and cultural humility.

The term cultural humility was coined by doctors Melanie Tervalon and Jann Murray-Garcia in 1998 and describes "a lifelong commitment to self-evaluation and self-critique, to redressing of power imbalances in the patient-physician dynamic, and to developing the mutually beneficial and non-paternalistic clinical and advocacy partnerships with communities"[15]. Similar to medical professionals, a power imbalance exists between legal professionals and the people they serve. We acknowledge and are grateful for your professional expertise; however, in challenging this power imbalance, it is important to recognize the client as the expert regarding their life experience and the needs of their

[14] Her Justice Annual Report FY 2022
[15] Tervalon, M. & Murray-Garcia, J. (1998). Cultural Humility Versus Cultural Competence: A Critical Distinction in Defining Physician Training Outcomes in Multicultural Education. Journal of Health Care for the Poor and Underserved. Vol 9.2. pp 117-125

family. Remember "client-centered lawyering prioritizes the client, the client's understanding of the problem, and achievement of the client's goals in the way the client deems best"[16]. Empower your client to make informed decisions by explaining the law, legal processes and possible outcomes. Don't assume things and be sure to leave space for inquiry and introspection.

Respect, Empathy & Trust

Many of our clients are survivors of various forms of victimization frequently related to their gender identity, race, ethnicity, sexual orientation, class, English language proficiency, and/or immigration status. They may have experienced further victimization in attempting to access help from agencies or individuals that did not give them the space to be understood. These experiences may cause them to feel hesitant, unsafe, or distrustful. It is important to prioritize building trust in your attorney-client relationship by approaching your client with respect, empathy, patience, and transparency.

Some suggestions for establishing a good relationship with your client are:

- Be prepared to listen. Do not be in a hurry to give advice without the complete picture
- Validate their experience and believe what they tell you unless there is clear evidence of the contrary
- Be mindful of your asks of the client. Keep in mind the other conflicting demands in their life and any existing restrictions on time or money and be as accommodating as possible
- Be realistic in your deliverables to your client and set clear boundaries
- Confirm with the client that you understand them, and they are understanding you
- Be patient in repeating information and be willing to rephrase information to improve understanding
- Listen carefully and encourage questioning
- Be responsive to the needs your client raises with you. If their need falls outside of the scope of your representation, speak with your mentor for appropriate referrals
- Empower the client's informed decision making and respect the decisions they've made

Considerations for LGBTQ+ Clients

[16] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.

LBGTQ+ clients are often among the most marginalized communities served by Her Justice[17]. In working with LGBTQ+ clients it is important to not assume their gender identity or sexual orientation. In your initial conversation with your client introduce yourself by your name and gender pronouns. Ask your client their name and if they feel comfortable sharing their gender pronouns with you. Understand that your client may not feel comfortable sharing their gender pronouns with you initially. If they do not share their gender pronouns with you, please refer to the client by name or using gender neutral pronouns (they/them/theirs). If you make a mistake in your client's gender pronouns, acknowledge the mistake and move on.

Mirror the language the client uses in referring to their gender identity and sexual orientation. Always refer to your client with the name the client gave you. Referring to a client by a name they no longer use is called "deadnaming" and is very traumatizing as it negates your client's identity[18]. If you make a mistake in referring to your client by the wrong name, acknowledge the mistake and move on.

Lastly, be an ally and advocate for your client. According to a Lamba Legal survey of 2,376 LGBTQ+ people, 19% of the survey respondents who had appeared in a court at any time in the past five years had heard a judge, attorney, or other court employee make negative comments about their sexual orientation, gender identity, or gender expression[19]. To the extent the client is comfortable, attempt to address bias in the courtroom and always respect the name, gender, and pronouns they identify with.

Considerations for Clients with Disabilities

Your client may have a physical, developmental, or emotional disability. Their disability may be the result of the abuse they've experienced. Their disability may or may not be diagnosed, and may or may not be visible or obvious to you. Talk with your client about what, if any, accommodations are needed. Be mindful of the accessibility of your building. Be patient with needing to repeat and rephrase information for your client. If you need additional resources to accommodate your client, speak to your Her Justice mentor.

Communication

Be thoughtful about the communication needs of your client. Frequently, our clients do not have experience with the legal system and may be unfamiliar with many of the terms

[17] Meyer, E. (2021). Top 7 Best Practices for Representing Transgender and Nonbinary Pro Bono Clients. Proskauer for Good. Proskauer.
[18] Meyer, E. (2021). Top 7 Best Practices for Representing Transgender and Nonbinary Pro Bono Clients. Proskauer for Good. Proskauer.
[19] as cited in Meyer, E. (2021). Top 7 Best Practices for Representing Transgender and Nonbinary Pro Bono Clients. Proskauer for Good. Proskauer.

commonly used in the court room or legal discourse. Due to circumstance, their formal education may be limited, and they may have a low level of literacy. Be mindful of the needs of your client. Ensure they are able to understand all materials presented to them to the fullest capacity. Always check for comprehension.

For limited English proficiency clients, please review the "Limited English Proficiency (LEP) Clients" on this document.

Scheduling

Before making your first phone call with your client, review the information we provided you with to ensure it is safe to call the client at the time you are calling and that it is safe to leave a voicemail. Remember that many of our clients self-identify as survivors of intimate partner violence and may still be residing with the opposing party.

In your initial conversation with your client establish what methods and times are best for you to contact your client. Keep in mind that our clients are low income and may not have sufficient resources to maintain a phone plan or continuously purchase more minutes for their phone. If possible, ask if there is a trusted friend or family member whose phone you can contact if you experience difficulty in contacting your client.

In making appointments, especially in person, be mindful of time and economic restrictions your client may be experiencing. Take into account their work and child care schedules in making these appointments. Be mindful of any safety concerns your client may have in terms of what times are most appropriate in scheduling appointments. Consider whether the firm can pay for a car service or a MetroCard for the client if transportation is a barrier to effective representation.

When scheduling in person appointments with your client, consider the security requirements to enter the building. Many law offices require guests to present a valid form of identification and intense security checks to enter. This can be extremely anxiety inducing for undocumented clients that may not have a valid form of ID, LGBTQ+ clients that may not have a valid form of ID that reflects their gender identity, and clients with limited English proficiency. Some clients have difficulty navigating large office buildings and may not know where to enter, which elevator to use, or which security desk to go to.It is a best practice to meet your client in the lobby of your building and escort them to the meeting room or your office.

Missed Appointments

We emphasize to our clients that they should call you in advance if they need to change or cancel their appointment or are running late. However, it is not unusual for clients to have trouble keeping appointments. Our clients are under-resourced. They may be experiencing

a more pressing crisis, like an eviction, health crisis, or safety concern. Or attending the appointment may require them to take time off work, pay for round-trip transportation, and coordinate childcare which they may not have the resources to do. Your client, especially at the beginning of your relationship, may feel uncomfortable or embarrassed to share why they cannot make an appointment with you. We ask for your understanding, compassion, patience, and flexibility in this matter. Please keep in mind that the handling and outcome of the case primarily affects the client and any accommodation that can be provided is greatly appreciated.

Responsiveness

Our clients typically have incomes below 200% of the federal poverty line, which was approximately $30,000 for a single person and approximately $62,000 for a family of 4 in 2024, and are typically juggling multiple urgent needs. Many of our clients do not have a phone plan and instead purchase minutes on a pre-paid phone. However, in light of food or housing insecurities, your client may choose to go without minutes to put food on the table. We understand how this choice may impact you and your ability to communicate with your client, however, we ask for your understanding and compassion. We encourage you to speak with your client during your initial call and establish a safe back-up contact in case this situation arises. Be creative in contacting your client and responsive to their needs. Explore alternatives like using work email, text messages, or mail.

Interacting with the legal system is inherently traumatizing and anxiety-inducing for many of our clients. Remember that for many of our clients the legal system is unfamiliar. This is not their area of expertise and they know they need to rely on your knowledge and support to successfully navigate their case. Be patient when fielding phone calls and questions from your client. Be transparent about your capacity and set clear boundaries with your client. For example, if you are receiving multiple calls a week from a client asking for case updates, call them back and schedule a regular check-in meeting with them that fits with your work schedule to go over any questions they have and provide any case updates. This will help ease the clients' anxiety as they know a schedule to expect regular communication from you on their case.

Interviewing

Clients are often sharing sensitive personal information with you that can be difficult to share. It is imperative to build trust in your attorney-client relationship. Remind your client that the information they share with you is confidential. When asking questions about sensitive information make sure your questioning is grounded in what is needed for the case. It may be helpful to provide the client with some additional framing when asking questions as to why the information is needed and what it will be used for. For example,

- when asking questions regarding sensitive information we suggest this framing: "I am going to ask you some questions to better understand your case and how I can help. Please be as forthcoming as possible so I can provide you with the best assistance possible. Some of these questions may ask you about sensitive or private information. I want to assure you that everything you share with me is confidential, I will not share what you tell me here without your permission. Before we begin, I just want to emphasize that you do not have to share anything with me that you do not feel comfortable sharing. Please let me know if you would like to take a break or stop at any point during our interview."

At the end of the interview thank the client for sharing this information with you. It was likely not easy for them to share that level of vulnerability with you. Reground them in what this information will be used for and provide them with any next steps.

Limited English Proficiency (LEP) Clients

As stated previously, our clients come from diverse backgrounds and speak a multitude of languages. In 2022, 6 million people in New York spoke a language other than English; of that, 2.5 million speak English less well and would be considered Limited English Proficient or LEP.[20] LEPs in New York City speak 151 different languages[21]. New York City has acknowledged the need for greater language access through NYC Local Law No. 33 (LL 30) that requires covered agencies to translate commonly distributed documents into 10 designated languages and provide telephonic interpretation in at least 100 languages[22]. However, LL 30, for the most part, does not apply to most legal organizations including legal nonprofits. This means that there is a huge gap in the legal services available for LEPs. Even in our own work we see cases for LEPs take much longer to receive services than similarly situated English speaking cases.

We greatly appreciate your effort if you are handling a case for an LEP client. In working with LEP clients it is paramount that you ensure they are accurately understanding the information you are providing them with and that you are understanding the needs they are communicating to you. To do this, work with qualified interpreters. Qualified is a relative term so please consider the nature of the conversation and the language capacity of the interpreter you are working with. It is best practice to use an in-house qualified interpreter to work with your client for the duration of the case. If that is not accessible to you, think creatively about the interpretation and translation services available to you. See if it is possible to retain professional interpreter services or review the internal staff language capacity. For potentially non-sensitive information it may be appropriate to have a friend or family member interpret. **It is <u>never</u> appropriate to have a client's child interpret**. **It is never appropriate to rely on Google Translate or similar multilingual**

[20] VOLS. (2022). Language Access in Pro Bono Practice.
[21] VOLS. (2022). Language Access in Pro Bono Practice.
[22] VOLS. (2022). Language Access in Pro Bono Practice.

neural machines translation service. The Spanish Group, an internationally recognized certified translation service list 5 reasons why you should not use Google Translate or a similar software for translations:

- Translation apps translate the text literally. Think about the number of times you speak in expressions in English. For example, the phrase "break a leg" is an expression of good luck, however, if translated literally it gives the impression that you are wishing that someone would break their leg.
- Many of these translation apps are not updated or operated by professional translators
- The translator apps do not account for the regional dialect your client may speak.
- Using a translator app frequently requires proofreading by someone fluent in the language to ensure the grammar and language choices match with the idea being expressed.
- Using a translator app for translating sensitive information is unsafe as the information may be compromised during a data breach[23]

Here are some other best practices in working with interpreters:

- Always brief the interpreter on the nature of the call before starting the meeting with client
- Consult the interpreter regarding whether a legal interpreter is more appropriate for the call
- Speak to the client directly, do not address your comments to the interpreter
- Ask the interpreter to confirm the client can understand them
- Ask the client to ensure they understand you

Managing Your Case

Even if there are no updates in your case for the client, continue to regularly check in with them. Remember our clients are facing many complex issues and conflicting demands. Without regular check-ins you may miss vital information about your client's living situation, access to phone and internet services, and safety.

Be affirmative in asking questions to your mentor and informing them of any case updates. It is your responsibility to inform your mentor in a timely fashion when documents are due to be filed in court or immigration authorities, when court dates are scheduled, and when final orders or judgements are received. Without this information we are unable to accurately report on our cases and are unable to monitor the needs of our clients.

[23] The Spanish Group. (2020). 5 Reasons why not to Use Google Translate for Business Purposes. The Spanish Group. https://thespanishgroup.org/blog/top-5-reasons-not-use-google-translate-business-purposes/

Change in Notary Requirements

On January 1, 2024 CPLR 2106 was substantially amended to allow ANY person to submit an affirmation instead of an affidavit, with essentially the same force and effect. Now, in civil proceedings, any Pro Se litigant can swear to the truth of something without the requirement of a notary.

However, we believe it is best practice to continue notarizing all documents that have previously required a notary signature. This limits liability, claims of malfeasance or fraud, and takes very little additional effort. The samples herein include the notary language.

In the event you or your firm choose to submit documents that do not require notarization without a notary signature, you can find the "non-notary" language in the courts' sample forms, located here: https://ww2.nycourts.gov/forms/familycourt/custodyvisitation.shtml

WHAT IS DOMESTIC VIOLENCE?

The United Nations defines domestic abuse or domestic violence as a pattern of behavior in any relationship that is used to gain or maintain power and control over an intimate partner, child, relative, or any other household member[1]. The epidemic of domestic violence involves physical acts of violence, emotional, psychological, verbal, sexual, legal and financial abuse against an intimate partner or family member[2]. This includes any behaviors that "frighten, intimidate, terrorize, manipulate, hurt, humiliate, blame, injure, or wound someone"[3]. Fundamentally, domestic violence is "a pattern of coercive behavior or tactics that is culturally learned and socially condoned"[4].

> **Domestic violence can impact anyone of any race, age, sexual orientation, gender identity, nationality, religion, socioeconomic background, immigration status, language of fluency, or education level**[5].

Although many domestic violence cases involve individuals in a romantic relationship (typically referred to as intimate partner violence), this may not always be the case. The individuals involved may be dating, cohabitating, married, divorced, separated, and/or have a child in common. Domestic violence can present and be interpreted differently depending on the surrounding cultural and social context of the individuals involved. However, a consistent theme is use of power and control to victimize the other party.

EXAMPLES OF ABUSIVE BEHAVIORS

Physical Abuse

This form of abuse includes acts like spitting, scratching, biting, grabbing, shaking, shoving, pushing, restraining, throwing, twisting, slapping, punching, choking, burning, forcing sexual contact, forcing alcohol and/or drug use, and other acts that inhibit physical well-being. Food and medication may be withheld and access to medical attention or police services may be prevented. They may be kidnapped or confined in an enclosed space

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[1] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse
[2] Breger, M. L., Kennedy, D.A., Zuccardy J.M., & Hon. Elkins, L.H. (2022). New York Law of Domestic Violence. Chapter 1. Domestic Violence Defined.
[3] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse
[4] New York State Coalition Against Domestic Violence (NYSCADV). (2011). Domestic Violence Handbook. NYSCADV.
[5] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse

or abandoned in an unfamiliar place. Physical abuse may or may not cause visible physical injuries[6].

Sexual Abuse

This form of abuse includes pressured sex when that is not consensual, coerced sex by manipulation or threat, physically forced sex, sexual assault accompanied by violence, or other acts the right to freely and safely express their sexuality[7].

Emotional Abuse

This form of abuse includes acts and behaviors like undermining a person's self-worth though constant criticism; belittle one's abilities; name-calling or other verbal abuse; damaging a partner's relationship with their children; and isolating a partner from friends and family[8].

Psychological Abuse

This form of abuse involves acts or behaviors causing fear or intimidation; threatening physical harm to self, a partner, or child(ren); attacking a partner's property, pets, or others acts of intimidation; and forcing isolation for anyone outside of the relationship or domestic violence situation[9].

Financial or Economic Abuse

Economic abuse occurs when control is invoked over the ability to acquire, use and maintain financial resources, such as transportation, food, clothing, shelter, insurance, credit, and money. This form of abuse involves making or attempting to make a person financially dependent by maintaining total control over financial resources, withholding access to money, committing identity theft by opening fraudulent accounts or credit lines in their name, placing sole financial responsibility for supporting their household, and/or forbidding attendance at school or employment[10].

Cyber Abuse

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[6] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse & New York State Coalition Against Domestic Violence (NYSCADV). (2011). Domestic Violence Handbook. NYSCADV.
[7] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse & New York State Coalition Against Domestic Violence (NYSCADV). (2011). Domestic Violence Handbook. NYSCADV.
[8] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse & New York State Coalition Against Domestic Violence (NYSCADV). (2011). Domestic Violence Handbook. NYSCADV.
[9] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse & New York State Coalition Against Domestic Violence (NYSCADV). (2011). Domestic Violence Handbook. NYSCADV.
[10] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse & New York State Coalition Against Domestic Violence (NYSCADV). (2011). Domestic Violence Handbook. NYSCADV.

This form of abuse includes hacking, installation of spyware, cyber stalking, spoofing, identity theft, impersonation (including deep fakes), sexual extortion (colloquially known as sextortion), and the nonconsensual distribution or threat of distribution of sexually explicit images and videos[11].

Abuse of Process

This form of abuse involves misusing and manipulating legal and social processes to weaponize them against the victimized person. This includes acts like making false reports of abuse, substance abuse, or child neglect to police or ACS, filing frivolous or fraudulent immigration or court proceedings, filing retaliatory orders of protection, intentionally delaying court or immigration proceedings, misleading or lying about their legal rights and options, threats of deportation, threats to withdraw or refusal to continue support in immigration applications, stealing newly received immigration benefits or identification – like employment authorization documents, A numbers, and social security numbers – to commit identity theft, etc.

POWER AND CONTROL WHEEL

Below is the original power and control wheel. Since its creation, subsequent power and control wheels have been developed to explore specific accepts of abuse in relation to a person's identity. It describes the tactics a responsible party may use to maintain control over the person they are victimizing[12]. This wheel is not comprehensive but provides helpful framing to understand the aspects of victimization someone may be experiencing. *Other versions of the power and control wheel specific to victimization experienced immigrants and people with a disability can be found in the Appendix section of this manual*

[11] New York Cyber Sexual Abuse Task Force. About Cyber Sexual Abuse. New York Cyber Sexual Abuse Task Force. https://cyberabuse.nyc/

[12] National Domestic Violence Hotline. (2023). Power and Control Break Free from Abuse. National Domestic Violence Hotline. https://www.thehotline.org/identify-abuse/power-and-control/

[13]

"WHY DO THEY STAY?" The Stages of Change Model

Domestic violence is a complex and multi-dimensional issue that's presentation and impact cannot be generalized. Each person processes the complexities of their relationship and their trauma from the abuse they experienced differently. This process is uniquely personal to them and often not a linear process[14]. The psychology field has developed a tool for understanding the complex needs and actions of domestic violence survivors[15]. It describes the process survivors go through when they seek to end the violence and abuse they experienced. The model includes five distinct stages:

(1) *Pre-contemplation*

a. In this stage the person experiencing the abuse is not aware of the extent of the problem and minimizes or denies the abuse. At this point they likely have no intention to change or leave the situation. They may feel responsible for

[13] Copyright by the Domestic Abuse Intervention Project, 202 East Superior Street, Duluth, MN, 55802 218-722-2781
[14] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[15] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.

the abuse they are suffering and may be modifying their actions to avoid further abuse[16].

(2) Contemplation

a. Usually in this stage the abuse has increased in its severity. The survivor begins to consider the possibility of changing their current situation and may begin building social, emotional, and financial support. They may make an initial attempt to leave. However, the survivor may express ambivalence and fluctuate between feeling troubled and unconcerned as they consider whether the situation can continue unchanged[17].

(3) Preparation

a. In this stage the survivor beings to understand the abuse they experienced differently. They become more aware of the abuse they are experiencing and attempt to determine the best course of action and develop a plan to carry it out. In this stage the survivor may set aside money; call an abuse hotline; gather information about resources, services, and legal options for survivors of domestic violence; and reconnect with people they were isolated from[18].

(4) Action

a. In this stage the survivor begins to carry out strategies to protect themselves and their children from future violence by taking actions such as going into shelter, seeking a protection order, or having others intervene in the abuse[19].

(5) Maintenance

a. This stage involves a continuation of actions by the survivor that are needed to maintain the change. These actions may involve safety planning, seeking mental health counseling, and rebuilding financial health[20].

This model is cyclical and nonlinear. In fact, it is common for survivors to fluctuate between stages as they move towards maintenance[21]. Again, a survivor's process of leaving a domestic violence situation and healing from the trauma they experienced is specific and personal to them.

OTHER MODELS AND THEIR LIMITATIONS

Two of the most common models used to understand the intricacies of domestic violence are the Battered Woman Syndrome and the Cycle of Violence. The Batter Woman Syndrome and Cycle of Violence models were developed by Lenore Walker in her 1979 book *The Battered Woman* and further developed in her 1984 book *The Battered Woman Syndrome*[22]. The Cycle of Violence describes the cyclical nature of abuse in intimate partner

[16] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[17] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[18] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[19] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[20] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[21] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[22] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.

violence. The cycle starts with building tension, acute abuse, and a honeymoon phase or a loving repentant period[23]. Walker defines battered woman syndrome as "a cluster of psychological and behavioral characteristics that abused women develop as a result of how they perceive their batterer's violence"[24]. Walker posits that abused women developed "learned helpless" as a result of the "cycle of violence"[25]. Meaning that the continued and repeated abuse and control will cause the abused women to enter "psychological paralysis" and stop trying to leave the abusive situation[26]. According to Walker, "Once the women are operating from a belief of helplessness, the perception becomes reality and they become passive, submissive, 'helpless'"[27].

This model conflates domestic violence with intimate partner violence (IPV), imposes a heteronormative cisgender understanding of IPV that positions the cisgender woman as victim and the cisgender man as abuser, disempowers the survivor, and implies the survivor is complicit in the continuation of abuse. In addition, these models are not created to understand domestic violence and intimate partner violence from the perspective of the person being victimized. It instead gives justification to view people who remain in abusive relationships as lost causes.

[23] Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[24] as cited in Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[25] as cited in Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[26] as cited in Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.
[27] as cited in Stoever, J. K. (2013). Transforming Domestic Violence Representation. Kentucky Law Journal. Vol. 101.3. Art. 3.

SECTION 2 – ORIENTATION TO YOUR CASE

HER JUSTICE

SECTION 2: ORIENTATION TO YOUR CASE

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OVERVIEW OF CHILD SUPPORT

A. Basics of Child Support

i. The Law Governing Child Support Determinations

In New York State, child support is determined pursuant to the Child Support Standards Act (CSSA). The CSSA, which was enacted in 1989, sets forth a strict formula for determination of the amount of support that the custodial and non-custodial parents are required to contribute to their children. The CSSA provisions for determining the amount of child support are found in the Family Court Act § 413 and repeated in Domestic Relations Law § 240.

The CSSA rests on two basic premises:

- Both parents are responsible for the financial well-being of their children and for providing support, regardless of their income level; and
- Children must be protected as much as possible from the reduced living standard that naturally results when separated parents maintain two separate households.

In litigating a child support case in Family Court, an attorney will rely primarily on the Family Court Act, Articles 4 and 5. Relevant law also may be found in the following sources:

- Uniform Rules of the Family Court (22 NYCRR § 205 et seq.)
- Domestic Relations Law (DRL)
- Social Services Law (SSL)
- Civil Practice Law and Rules (CPLR)
- Public Health Law (PHL)
- Tax Law
- Debtor and Creditor Law
- Lien Law
- Vehicle and Traffic Law
- Various federal statutes (e.g. Social Security Act and Internal Revenue Code)

Federal and state legislation relating to child support has developed significantly in recent years, particularly regarding enforcement mechanisms. This Overview and Practice Guide touches upon the issues which most frequently arise in representing low-income custodial

parents in Family Court child support matters. However, do not rely exclusively upon this guide when considering child support strategies within this changing legal landscape.

ii. Who is Required to Pay Child Support?

In New York State, a child's parents are the only persons obligated to pay for the child's support (FCA § 413(1)(a)), other than the obligation that the State has to support children (FCA § 515).

1. Spouses

There is a legal presumption that the spouse is the genetic parent of a child born during the marriage. FCA § 417. This is true regardless of whether their name is on the child's birth certificate. They are obligated to support a child born during the marriage unless there is an adjudication that they are not the genetic parent of the child, or that another person is the genetic parent of the child. This may occur through a paternity proceeding under Article 5 of the Family Court Act brought by the person who gave birth, the spouse, or the genetic parent.

2. Parents Never Married To One Another

Any parent of a child is obligated to support that child, even if the parents are not married or were not married at the time of pregnancy. FCA § 513. However, where the parents are not married, the genetic parent cannot be ordered to pay child support until:

- Genetic parent has executed an acknowledgment of paternity pursuant to the Public Health Law § 4135-b; OR
- An order of filiation is entered by a court pursuant to Family Court Act Article 5 (See Chapter IV, *Paternity as a Threshold Issue)*

3. Stepparents

Stepparents are required to support a stepchild who is under the age of 21 or unemancipated only if the child is in danger of becoming a public charge. SSL § 101; FCA § 415. This obligation does **not** terminate upon the separation of the stepparent from the biological parent or the commencement of a divorce action. A stepparent's obligation to support a stepchild ends upon the death of or divorce from the biological parent unless the stepparent agrees to support the stepchild. If a spouse adopts a child *after* the parties have separated, the other spouse cannot be held liable to contribute to the support of the newly adopted child. FCA § 413(2); SSL § 101.

4. Adoptive Parents

Adoptive parents have the same support obligation as birth parents. DRL §§ 110, 117.

5. Same-Sex Couples

Parentage is a developing area of law. Since the signing of New York's Marriage Equality Act on June 24, 2011, allowing same-sex couples to marry legally in New York, courts have interpreted the legislative intent in the context of parentage that "the marriages of same-sex and different-sex couples" would "be treated equally in all respects under the law." On August 30, 2016, the New York Court of Appeals held in Brooke S.B. v. Elizabeth A.C.C., (28 N.Y.3d 1, 2016) 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 N.Y. Domestic Relations Law § 70. The lower courts continue to expand on this precedent and develop this area of law as new facts are presented.

6. Parents Still Living Together

If parents are still living together, but one parent refuses to provide money to support the child, the other parent may petition for a child support order. The petitioner must be prepared to establish that the respondent, although living in the home, is not contributing to the support of the household or the child. It is typically very difficult to get a child support order while both parents are living in the same home.

7. Parents Are Separated

Where the parents are separated, the parent with whom the child is residing may petition for child support. The parent with whom the child lives does not need a custody order to seek child support. That parent is the de facto custodial parent and is entitled to collect support from the non-custodial parent. Even if the parents have a separation agreement, the Family Court may still hear and determine the issue of child support. FCA § 461(a).

8. Parents Are Divorced

When parents are already divorced, the issue of child support should have been resolved in the divorce judgment. If the divorce judgment is silent as to child support or if the issue of child support was "reserved," the custodial parent may petition the Family Court for a child support order. If a child support award was made in the divorce judgment, either parent may petition the Family Court to enforce or modify the award, unless the divorce judgment specifically provides that the Supreme Court retains exclusive jurisdiction to determine future issues between the parties.

9. Parents Have Joint Custody

Joint custody does not remove the obligation of either parent to pay child support. Where the parties have joint *legal* custody, child support may still be awarded to the

parent who has primary *physical* custody of the child. When the parents have joint *physical* custody, the parent with more actual parenting time with the child can petition for child support. When the custody arrangement is an exact 50/50 split, the parent with the lower income is the parent who can petition for child support, under the presumption that the child should benefit from their parents' resources in both households, and not just the household of the richer parent.

The court may deviate from the basic child support obligation under the statute depending on how the joint custody arrangement operates in a particular case.

iii. Who Is Entitled to Collect Child Support?

Virtually any person or entity exercising care and custody over a child is entitled to collect child support from any person obligated to pay support.

1. <u>Parent With Primary Responsibility for the Child</u>

The parent with primary responsibility for an unemancipated child is entitled to seek support for that child. For example:

- The parent with whom a child lives is entitled to seek support, even if they do not have a custody order.
- The parent with whom a child lives is entitled to seek support, even if the parents have joint legal custody.
- The custodial parent is entitled to seek child support, even if the custodial parent has sufficient means to support the child.
- The custodial parent is entitled to seek a child support order, even if the non-custodial parent is voluntarily paying child support.
- The custodial parent is entitled to seek child support, even if they never asked the non-custodial parent to voluntarily pay child support.
- The custodial parent is entitled to seek child support, even if they intentionally left the home with the child.
- The custodial parent is entitled to seek child support, even if the non-custodial parent does not have visitation rights or does not visit the child.
- The custodial parent is entitled to seek child support, even if the child does not reside with the parent, as long as the child is not emancipated (for example, while the child is at boarding school or college).

2. <u>Non-Parent</u>

A non-parent caring for a child is entitled to seek child support from both parents, even if they do not have a custody order. In this situation, the non-parent should be

prepared to establish their standing to seek support -- i.e., that the child is in the care and custody of the non-parent. FCA § 422-a.

3. The Child or Person on Behalf of the Child

A child, or a person acting on behalf of a child, is entitled to petition for child support. For example, a child may seek child support on her own behalf when her parent has refused to support her after the age of 18 years but before her emancipation (See below *Duration of Child Support*).

4. Department of Social Services

Pursuant to Social Services Law § 102, a person who receives public assistance on behalf of a child in their care and custody must assign their entitlement to collect child support to the Commissioner of Social Services. In New York City the social services agency that governs public assistance is the Human Resources Administration (HRA). The Commissioner may commence an action on behalf of a person in receipt of public assistance. After the establishment of a child support order, the Commissioner, through the SCU, collects and retains the child support to offset the public assistance grant, although up to $200 of the child support may "pass through" to the parent in addition to the parent's public assistance grant. If a child is in foster care, the Commissioner of Social Services may also seek child support from the parents. In New York City, the agency that oversees foster care is the Administration for Children's Services.

If the amount of child support collected is more than the cumulative amount of the public assistance grant, then the person is entitled to all the excess child support collected.

iv. Duration of Child Support

Parents are responsible for supporting their children from the time they are born. However, a parent can only be ordered to pay child support from the date that a paternity or child support application is filed. In other words, the parent cannot be forced to pay support from the period prior to the filing of a petition in court.

There are some limited exceptions to this rule. Under some circumstances, a genetic parent may be held liable to pay to the person that gave birth a reasonable sum for expenses incurred during the pregnancy, and from the date of birth until the date that an order of filiation was entered. FCA §545(2). Further, when the Commissioner of Social Services commences an action on behalf of a child on public assistance, the Commissioner may collect child support retroactive to the date that the child began receiving public assistance.

Generally, parents are required to continue to support their child until the child has reached the age of 21 or becomes emancipated. Although parents may agree to extend the child support obligation beyond the age of 21, they may not agree to terminate it at an earlier date, absent emancipation. The court **did not** have the power to order the payment

of child support beyond the age of 21 but that changed on October 8, 2021, when the Family Court Act and Domestic Relations Law were amended.

The amendment is found in Family Court Act §413-B and Domestic Relations Law §240-d. The new law raises the support obligation to the age of 26 if the person is developmentally disabled as defined under the Mental Hygiene Law. *See* Mental Hygiene Law §1.03(22). A custodial parent or kinship caregiver of a developmentally disabled adult child may seek support up to the age of 26. The developmentally disabled person must reside and be principally financially dependent on the person seeking support.

A finding of a developmental disability shall be supported by a diagnosis and accompanying report of a physician, licensed psychologist, registered professional nurse, licensed clinical social worker, or a licensed master social worker under the supervision of a physician, psychologist or licensed clinical social worker authorized to practice under title eight of the education law, and acting within their lawful scope of practice.

The court shall have the discretion to order payments directly to the petitioner or to the trustee of an "exception trust" as defined by Social Service Law and the Estates, Powers, and Trusts Laws if it will assist in maximizing assistance to the child. The petitioner shall not be eligible for services pursuant to section one hundred eleven g of the social services law.

Note: A child is considered a minor only until the child is 18, but the obligation to support continues until age 21, 26 if developmentally disabled, or emancipation.

Emancipation may include any event that indicates that the child is living separately and independently from a parent, or is self-supporting, e.g.:

- Child's completion of 4 academic years of college education
- Child's marriage
- Permanent residence away from the homes of the parents (residence at school, camp or college does not constitute a residence away from the parents' homes)
- Death
- Child's entry into the armed forces of the United States
- Child's full-time employment after attaining the age of 18 (except full-time employment during vacation and summer periods)
- Child's voluntary and unjustified abandonment of relationship with parent (Constructive Emancipation)

An emancipation event may be nullified if the child becomes dependent again, prior to reaching the age of 21, and the parent's obligation to support will be reinstated.

DETERMINING THE AMOUNT OF CHILD SUPPORT

i. The Basic Child Support Obligation

Under New York's Child Support Standards Act (CSSA), a court must always determine the *basic child support obligation*, even if the court ultimately deviates from this amount in formulating the final child support award. A recent Court of Appeals decision ruled that basic child support must be determined even if the parents have joint custody. See Bast v. Rossoff, 91 N.Y.2d 723; 697 N.E.2d 1009; 675 N.Y.S.2d 19; 1998 N.Y. LEXIS 1788. If the court rejects the amount derived from the CSSA, it still must calculate and set forth the statutory amount before utilizing an exception to find an appropriate award. A court may deviate from this basic child support obligation only under extraordinary circumstances, as described in the statute.

The basic child support obligation is the sum derived by applying the formula set forth in Family Court Act § 413(1)(c). Where the combined parental income is at or less than $183,000 (as of March 1, 2024), a straightforward mathematic formula is applied to determine the *basic child support obligation*:

A fixed percentage of the parent's income (less certain deductions)

plus The parent's proportional share of childcare expenses while other parent works or attends school
plus The parent's proportional share of unreimbursed medical expenses
plus Some percentage of childcare expenses while other parent looks for work, if ordered by court
plus Some percentage of private education expenses, if ordered by court

The percentage of parental income (after certain deductions permitted by statute) required to be paid is as follows:

Number of Children	% of Parental Income
One child	17%
Two children	25%
Three children	29%
Four children	31%
Five or more children	35% or more

Note: As of 2010 and every two years thereafter, the combined parental income cap will change according to the Consumer Price Index, pursuant to SSL 111-i.

a. **Income**

Since the basic child support obligation is determined primarily by reference to income, a custodial parent's greatest hurdle may be proving the non-custodial parent's income. In determining the combined parental income, all income of each parent must be considered, not just the income reported to the Internal Revenue Service. Pursuant to Family Court Act § 413(1)(b)(5), sources of income may include:

- Gross income which was reported or should have been reported in the most recent federal income tax return
- To the extent not included in "gross income," money realized from investments
- To the extent not included in "gross income":
    - Any income or compensation voluntarily deferred,
    - Worker's compensation
    - Disability benefits (both private and government)
    - Unemployment insurance
    - Social security
    - Veterans' benefits
    - Pensions and retirement benefits
    - Fellowships and stipends
    - Annuity payments
- An amount imputed from a parent's former income or resources, if the Court determines that a parent has hidden assets (money, property, other things of value) or reduced income to avoid the obligation to pay child support
- To the extent not included in "gross income," self-employment deductions claimed by the parent for (a) any deduction greater than loss calculated on a straight-line basis in determining business income; and (b) entertainment and travel allowances deducted from business income, if they reduce costs of personal expenditures

The court also has the discretion to impute income from other sources including, but not limited to:

- Non-income producing assets

- Perquisites of employment which directly or indirectly confer personal economic benefits; or business deductions, which reduce personal expenditures

- Fringe benefits provided as part of compensation (e.g., military housing)

- Money, goods, or services provided by relatives or friends

The court also may allocate income received from non-recurring (one-time) sources, including:

- Life insurance policies

- Repayments on loans; or discharges of indebtedness

- Recovery of bad debts and delinquency amounts

- Gifts and inheritances

- Lottery winnings

b. <u>Income Deductions</u>

Before the appropriate percentage is applied to the combined parental income, the court must deduct the following:

- FICA (social security) taxes actually paid

- New York City or Yonkers income tax actually paid

- Child support actually paid on behalf of another child whom the parent is legally obligated to support *pursuant to a court order or written agreement*

- Alimony or maintenance paid to a former spouse not a party to the action (not the parent of the child) *pursuant to a court order or written agreement*

- Alimony or maintenance paid to the custodial parent pursuant to a court order or written agreement; or which will be paid *pursuant to the order or written agreement* containing the child support award

- Public assistance

- Supplemental Security Income (SSI)

- Unreimbursed employee business expenses, except to the extent that they reduced the non-custodial parent's personal expenditures

The Court of Appeals has held that social security derivative benefits (benefits paid for the child as the result of a parent's entitlement to benefits) are *not* a credit against the child support obligation. Graby v. Graby, 87 N.Y.2d 605 (1996). However, the child's receipt of social security derivative benefits may be a factor that the court later considers in determining whether to deviate from the basic child support obligation.

c. Combined Parental Income

After each parent's income minus deductions is determined, the two incomes are added for the "combined parental income." Where the combined parental income is less than the specified statutory ceiling (as of March 1, 2024, $183,000), apply the appropriate percentage for the number of children.

When the combined parental income is above the specified statutory ceiling, the court has discretion how to treat the income above the cap. Broadly, the three options are: (1) apply the child support percentage to the entire amount of parental income; (2) do not apply the percentage to any amount of income above the cap; or (3) articulate some other amount of child support above the cap, but not to the full amount of the total income.

Whichever option the court chooses, it should articulate the reasons why in a written decision. FCA § 413(c)(2) and (3); Cassano v. Cassano, 85 N.Y.2d 649 (1995, 651 N.E.2d 878; 628 N.Y.S.2d 10; 1995 LEXIS 9658 (holding that the "and/or" language in the statute gives the court discretion to apply the statutory formula to income over the specified statutory maximum. If the court decides to apply the statutory formula to income over the specified statutory maximum, the court should enter a written decision that the court has considered the parties' circumstances and that it has found no reason to depart from the prescribed percentages). As the determination whether to go over the cap, and if so, by how much, is extremely fact-specific, the attorney seeking to argue that the child support should go over the statutory cap should conduct thorough legal research and be prepared to argue that the particular facts in their case, as well as the deviation factors in the CSSA, favor going above the cap.

d. Determining Each Parent's Pro-Rata Share of Combined Parental Income

Each parent is required to contribute his and her proportional share of the combined parental income, based on the percentage of the combined parental income attributable to that parent.

Each parent's pro rata share of the basic child support obligation is calculated by determining each parent's percentage of combined parental income, as follows:

Custodial parent income/combined parental income = custodial parent pro rata percentage

Non-custodial parent income/combined parental income = NCP pro rata percentage

It is important to determine each parent's pro rata percentage, because it will be applied to apportion other expenses. To arrive at the actual amount of income which a non-custodial

parent is required to pay as child support, apply the non-custodial parent's pro rata percentage to the total combined parental income and then apply the appropriate percentage:

> Non-custodial parent's pro rata percentage x combined parental income = amount of income of non-custodial parent available to be paid toward child support
>
> Amount of non-custodial parent's income x [percentage] = actual amount of annual support

e. Mandatory Add-Ons

In addition to contributing the pro rata share of income to the basic child support obligation, the court *shall* order the non-custodial parent to pay the pro rata share of the following expenses, which are commonly referred to as "mandatory add-ons":

- Reasonable childcare expenses while the custodial parent is working, attending school or job training (FCA § 413(c)(4)).
- Reasonable health care expenses that are not covered by health insurance (e.g., co-pays for doctor's visits or prescriptions) (FCA § 413(c)(5)).

After the total amount of each item above is determined, the non-custodial parent's percentage of combined parental incomes is applied to determine the non-custodial parent's pro rata share of each mandatory add-on.

f. Discretionary Add-Ons

A court also *may* require a non-custodial parent to pay a pro rata *or other* share of the following expenses, which are commonly referred to as "discretionary add-ons":

- Childcare expenses while the custodial parent is looking for work (FCA § 413(c)(6))
- Child's educational costs, such as private school or college tuition (typically when the decision to attend private school has been made jointly by the parents before the family split up) (FCA § 413(c)(7)).

After the total amount of each discretionary add-on is determined, the non-custodial parent's percentage of combined parental income may be applied to determine the non-custodial parent's pro rata share of the discretionary add-ons.

ii. Deviations from the Basic Child Support Obligation

If payment of the basic child support obligation would reduce the non-custodial parent's income to below the poverty level (under federal guidelines), then the total support obligation is automatically reduced to $25 a month. FCA § 413(1)(d). Per statute, the court may never award less than $25 per month in child support. However, there is case law that indicates that less than $25 should be awarded where the non-custodial parent receives

public assistance or other government benefits. See In the Matter of Steven D. Rose v Moody, 83 NY 2d 65, 71; 629 N.E.2d 378; 607 N.Y.S.2d 906; 1993 N.Y. LEXIS 4343 (The Federal Child Support Enforcement Act preempts provision of Child Support Act that provides for $25 minimum support award and provides that the imposition of any support obligation upon a non-custodial parent for their non-custodial child is unjust and inappropriate when the non-custodial parent is dependent on public assistance.).

Note: If the non-custodial parent is incarcerated for all or a portion of the relevant time period, the incarceration is not to be considered voluntary unemployment and may be the basis of a minimum order for the relevant time period "unless such incarceration is the result of non-payment of a child support order, or an offense against the custodial parent or child who is the subject of the order or judgment." FCA § 413(1)(b)(5)(v).

A court will not usually deviate from the basic child support obligation. There may be a deviation only where there is a finding that the amount is "unjust or inappropriate," based on the following factors, which are set forth in FCA § 413(1)(f) and (g):

- Financial resources of both parents and the child
- Physical/emotional health of the child; any special needs or aptitudes
- Standard of living the child would have enjoyed had the household not dissolved
- Tax consequences to the parties
- Non-monetary contributions of the parents towards the care of the child
- Educational needs of either parent
- Substantial differences in gross incomes of the parents
- Needs of other children under the care of the non-custodial parent [but only if financial resources of those children are less than resources available to the child requesting support]
- Extraordinary expenses of the non-custodial parent in making visitations, or expenses of the non-custodial parent in extended visitations [but only if the extended visitations substantially reduce the custodial parent's expenses]
- Any other factor which the court deems relevant

If the Court deviates from the basic child support obligation, the reasons for the deviation must be detailed in a written order that states:

- The presumptive amount of child support based on the above formula; AND

- The factors considered in deviating from the basic child support obligation; AND

- The reason for the deviation.

iii. Health Insurance

Pursuant to Family Court Act § 416, all children under the age of 21 years must have health insurance coverage. One parent must be designated as the legally responsible parent to secure and maintain health insurance coverage.

The court must determine the identity and nature of all health plans available to each party. If either parent has health insurance coverage available through an employer, that parent must maintain health insurance coverage for the unemancipated child, unless either: (i) coverage costs exceed 5% of the combined parental income or (ii) the coverage is inaccessible, meaning the plan doctors are more than 30 miles or 30 minutes away from the custodial parent. If the coverage is inaccessible, then a New York State subsidized health insurance program must be maintained for the child.

All insurance reimbursement payments must be assigned to the parent who advanced the money. In assessing available health insurance, the court may allocate any costs for obtaining the insurance between the parents on a pro rata basis.

A final child support order must direct that the legally responsible relative maintain health insurance coverage for any unemancipated child. If a parent is found to have willfully failed to provide health insurance, that parent is presumptively liable for all the medical expenses incurred by that dependent. FCA § 416(k).

Along with the child support order, the court will issue a *qualified medical child support order,* which contains the information necessary to require the insurance company to provide the coverage for the child (29 USC § 1169) pursuant to Family Court Act § 416.

iv. Child Support Settlement Agreements

Pursuant to FCA § 425, parents may enter into settlement or other written agreements regarding the payment of child support. An agreement about child support must be approved by the court, after which it becomes binding as if it is an order of the court. Family Court Act § 413(1)(h), provides that a settlement or agreement must expressly state:

- The amount of the basic child support obligation; AND

- The amount of each parent's pro rata share of that obligation; AND

- A statement that it is the presumptively correct amount of child support; AND

- If there is a deviation from the stated amount of the basic child support obligation, the reasons why the agreement does not provide for that amount

Any agreement that does not comply with the above requirements is void. FCA § 413(1)(h).

v. The Needs of the Child

The basic child support obligation is presumed to be sufficient to meet the needs of the child. However, where the non-custodial parent defaults or fails to provide sufficient income information as required by statute, the court may determine the amount of child support based on the actual needs of the child. FCA § 413(1)(k).

PATERNITY AS A THRESHOLD CHILD SUPPORT ISSUE

i. Paternity Established

Before a child support determination, the court must determine if respondent is a person legally obligated to support the child. In other words, is the respondent legally the genetic parent? A spouse is legally a child's genetic parent, and a paternity petition does not need to be filed where:

1. Parents are Married (Presumption of Paternity)

There is a legal presumption that a person who gave birth's spouse is the genetic parent of the children of the marriage, even if their name is not on the child's birth certificate. Where a person who gave birth is married to their child's genetic parent at the time of the child's birth, they do not need to take any further steps to establish paternity and may file a child support petition. If the spouse questions paternity, they may assert a claim of non-paternity, and a blood test may be ordered. FCA § 418(a).

2. Genetic Parent Signed Acknowledgment of Paternity[1]

Public Health Law § 4135-b provides that paternity may be established by execution of an "Acknowledgment of Paternity." The parties may execute an Acknowledgment of Paternity at any time, although a genetic parent usually has signed the Acknowledgment in the hospital at the time of the child's birth. Recent legislation permits the Department of Social Services to seek an Acknowledgment administratively and, in fact, to require a "putative" parent to undergo blood testing where paternity is disputed.

Pursuant to FCA § 516-a, an Acknowledgment of Paternity does not need to be notarized so long as two persons unrelated to the genetic parent witness it. The Acknowledgment contains the social security number of both parents and provides a statement that:

- The unmarried person consents to the Acknowledgment of Paternity, and the "putative" father is the only possible genetic parent; AND
- The "putative" father acknowledges that they are the genetic parent; AND
- The signing of the Acknowledgment has the same force and effect as an order of filiation, including an obligation to support the child.

[1] Only an unmarried woman could sign the acknowledgment of paternity. The same restriction does not apply to the father.

New York State courts must give full, faith and credit to an acknowledgment of paternity entered in another state (so long as it complies with the federal Social Security Act § 452(a)(7)).

ii. Paternity Must Be Established

There are many misconceptions among the general public about what is sufficient to establish paternity. **Unless the parties are married or the genetic parent has signed an Acknowledgment of Paternity, a paternity petition must be filed prior to the determination of the obligation to pay child support.** For example, although the following situations would tend to support a *claim* of paternity, they do **not** *establish* paternity as a matter of law:

1. Genetic Parent's 's Name on Birth Certificate

If the parties are not married and the genetic parent did not sign an Acknowledgment of Paternity, in the eyes of the court, they are not legally the child's parent, and a paternity petition must be filed with the child support petition. Most people are convinced that if a genetic parent's name is on a birth certificate, that person automatically has legal rights and obligations regarding the child. However, this is not true.

2. Genetic parent and Person that Gave Birth Not Married But Genetic Parent Admits Paternity

Even if the parents are not married, the genetic parent may admit paternity and hold themself out as the child's genetic parent. Nevertheless, if the genetic parent has not signed an Acknowledgment of Paternity, they cannot be obligated to pay support until a paternity order is signed.

3. Child Has Genetic Parent's Last Name

A hospital usually will not permit the person who gave birth to list their child's last name as anything other than (a) their last name; (b) their spouse's last name; or (c) the name of the genetic parent who has executed an Acknowledgment of Paternity. However, if an Acknowledgment of Paternity was not signed, the fact that the child bears the genetic parent's last name is not legally sufficient. A paternity petition must be filed before the genetic parent can be held liable for child support.

4. Person Who Gave Birth Married to Someone Other Than Child's Genetic Parent

When a person who gave birth is married to someone other than their child's genetic parent, they may file a paternity petition naming their spouse and the child's likely genetic parent. Likewise, the person who gave birth's spouse may file a paternity petition against the person who gave birth and the likely genetic parent, if the spouse believes that they are not the genetic parent of their spouse's child.

iii. Paternity Proceedings

If the parties are not married, and if there has been no prior determination or Acknowledgment of Paternity, the person who gave birth must file a paternity petition prior to or at the same time as when they file a child support petition.

The Family Court has jurisdiction over paternity proceedings, along with the Surrogate's Court. FCA § 511. In Family Court, Family Court Act Article 5 governs paternity proceedings. Prior to adjudication or determination of paternity, a child's genetic parent is referred to as the "putative father." An order that declares an indvidual to be the genetic parent of a child is called an "order of filiation."

1. Paternity Summons and Petition

Pursuant to Family Court Act § 564, a petition under Article 5 is required to be filed before an order of filiation is entered unless both parents are before the court, the genetic parent waives the filing of a petition and the right to a hearing, and the court is satisfied as to paternity from the testimony or sworn statements of the parents.

Pursuant to Family Court Act § 517, a proceeding to establish paternity may be brought at any time during the pregnancy of the person or after the birth of the child. In fact, pursuant to FCA § 514, a genetic parent may be liable for the expenses related to the person's pregnancy.

> **Note:** Hospital bills or records relating to the cost of childbirth are admissible into evidence as prima facie proof of the facts contained on the records, where they bear a certification of authenticity. CPLR § 4518.

The person who gave birth or the genetic parent may commence a paternity proceeding even if they are themselves minors. The petition shall allege that the person named as respondent (or petitioner if the case is commenced by the genetic parent) is the genetic parent of the child. The petition must be in writing and must be verified. FCA § 523.

2. Service of the Summons and Petition for Paternity

Pursuant to Family Court Act § 525, the summons and petition for paternity may be served in the same manner as the summons and petition for child and spousal support petitions. (See below, *Service of Summons and Petition for Child Support*).

3. Paternity Hearing

A support magistrate is empowered to preside over paternity cases until the matter is clearly contested. In other words, the support magistrate may enter an order of filiation upon the admission or acknowledgement of paternity by both of the parties and may order blood tests but may not make a final paternity determination in the face of a challenge.

If the respondent disputes paternity, or challenges a previously executed acknowledgement of paternity, the matter must be transferred to a judge for determination as to whether an order of filiation will be issued. If the judge issues an order of filiation, the case may be transferred back to the support magistrate for a final determination of child support. FCA § 439(b).

4. Default by Genetic Parent

The court may enter an order of filiation upon default, upon proof of personal service or service by certified mail where the genetic parent signed for the papers at the post office. FCA § 525(c). If the genetic parent does not appear after having been properly served with a paternity petition, the court may order temporary child support prior to a final determination of paternity if there is clear and convincing evidence of paternity. This temporary support will continue until the genetic parent appears in court for final determination of the paternity issue. FCA § 542(b).

5. Blood Tests

At the first court appearance the support magistrate must inform the person who gave birth and the genetic parent of their right to have an attorney and their right to have blood tests. See FCA §§ 439, 532.

If either party denies paternity, the support magistrate has the power to order that the blood tests be conducted. The court may refuse to order a blood test upon a written finding that it is not in the best interests of the child, on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married person.

> **Note:** Social Services Law was recently amended to provide that DSS may order that the parties be subjected to paternity testing. FCA § 565. The only way that the parties may be relieved of this order is to move, pursuant to FCA § 565, for an order holding that the blood test would not be in the best interests of the child.

Blood tests may be received into evidence without the necessity of further authentication. FCA § 532; CPLR § 4518(e). Where the blood tests show that paternity is at least 95 percent likely, a rebuttable presumption of paternity is created -- in other words, the burden of proof shifts to the party denying paternity. FCA § 532.

6. Other Evidentiary Issues in Paternity Cases

Pursuant to FCA § 531, a respondent in a paternity hearing shall not be compelled to testify. If the person who gave birth is married (to someone other than the genetic parent), both they and their spouse may testify to the spouse's non-access.

If the respondent claims that the person who gave birth had intercourse with someone other than them at or about the time that the person who gave birth became pregnant, that testimony is not competent or admissible unless it is corroborated by "other facts and circumstances tending to prove such access." FCA § 531.

7. Order of Filiation and Child Support

If the court determines that the male party is not the genetic parent, the petition shall be dismissed. FCA § 541. If the court finds that the male party is the genetic parent, the court shall enter an order of filiation. FCA § 542.

An order of filiation must contain the genetic parent's social security number, if any. FCA § 542(a). A temporary order of child support must be entered on the same day as the order that declares the legal genetic parent is issued. FCA § 439(b). In addition, upon the entry of an order establishing paternity, the court has the discretion to require that the genetic parent pay to the person who gave birth a reasonable amount for the needs of the child from the date of birth to the date that the order of filiation was entered. FCA § 545(2). In deciding whether to direct such a payment, the court has the discretion to consider both the means of the genetic parent and their ability to pay, as well as the needs of the child. FCA § 545(2).

SPOUSAL SUPPORT AND MAINTENANCE (Spousal support is during the marriage and maintenance is pursuant to a divorce.)

Basics of Spousal Support and Spousal Maintenance

A. The Law Governing Spousal Support and Spousal Maintenance

- FCA § 412 – *Married Person's Duty to Support Spouse*
  - In New York State, spousal support is determined pursuant to Family Court Act § 412 which sets forth a formula for the more monied spouse to pay spousal support to the less monied spouse. FCA § 412 indicates that a married person is chargeable with the support of a spouse except where the parties have entered into an agreement pursuant to FCA § 425.
- FCA § 416 - *Elements of Support*
  - An order of support may include the provision of necessary shelter, food, clothing, care, medical attention, expenses of confinement, expense of education, payment of funeral expenses and other proper and reasonable expenses.
- FCA § 437 - *Presumption of Sufficient Means*
  - A person is presumed to have sufficient means to support their spouse and children.

In litigating a spousal support case in Family Court, an attorney will rely primarily on the Family Court Act, Article 4. Relevant law also may be found in the following sources:

- Uniform Rules of the Family Court (22 NYCRR § 205 et seq.)
- Domestic Relations Law (DRL)
  - Domestic Relations Law § 236, Part B(6) – *Maintenance*
    - Except where the parties have entered into a valid agreement before or during the marriage, in any matrimonial action, the court may order temporary maintenance or maintenance in such amount as justice requires, having regard for the standard of living of the parties established during the marriage, whether the party in whose favor maintenance is granted lacks sufficient property and income to provide for their reasonable needs and whether the other party has sufficient property or income to provide for the reasonable needs of the other and the circumstances of the case and of the respective parties, based on consideration of factors enumerated in the statute.

- Social Services Law (SSL)
    - Social Services Law § 101 et seq. - *Liability of Relatives to Support*
        - The spouse of a recipient of public assistance or of a person liable to become in need thereof shall, if of sufficient ability, be responsible for the support of such person.
- Civil Practice Law and Rules (CPLR)
- Public Health Law (PHL)
- Tax Law
- Debtor and Creditor Law
- Lien Law
- Vehicle and Traffic Law
- Various federal statues (e.g. Social Security Act and Internal Revenue Code)

1. Family Court Act ("FCA") Article 4 including the following:

FCA § 412 - *Married Person's Duty to Support Spouse*

1. A married person is chargeable with the support of a spouse, and, except where the parties have entered into an agreement pursuant to section four hundred twenty-five of the article providing for support, the court, upon application by a party, shall make its award for spousal support pursuant to the provisions of this part.

2. For purpose of this section, the following definitions shall be used:

(a) "payor" shall mean the spouse with the higher income.

(b) "payee" shall mean the spouse with the lower income.

(c) "income" shall mean income as defined in the child support standards act and codified in section two hundred forty of the domestic relations law and section four hundred thirteen of this article without subtracting spousal support actually paid or to be paid to a spouse that is a party to the instant action pursuant to subclause (C) of Clause (vii) of subparagraph five of paragraph(b) of subdivision one-b of section two hundred forty of the domestic relations law and subclause (C) of clause (vii) of subparagraph five of paragraph (b) of subdivision one of section four hundred thirteen of this article.

(d) "income cap" shall mean up to and including one hundred seventy-five thousand dollars of the payor's annual income: provided, however, beginning January thirty-first, two thousand sixteen 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. As of March 1, 2024, the cap is two hundred and twenty-eight thousand dollars ($228,000).

(e) "guideline amount of spousal support" shall mean the sum derived by the application of subdivision three or four of this section.

(f) "self-support reserve" shall mean the self-support reserve as defined in the child support standards act and codified in section two hundred forty of the domestic relations law and section four hundred thirteen of this article.

(g) "agreement" shall have the same meaning as provided in subdivision three of part B of section two hundred thirty-six of the domestic relations law.

3. Where the payor's income is lower than or equal to the income cap, the court shall determine the guideline amount of spousal support as follows:

(a) Where child support will be paid for children of the marriage and where the payor as defined in this section is also the non-custodial parent pursuant to the child support standards act:

(1) the court shall subtract twenty-five percent of the payee's income from twenty percent of the payor's income.

(2) the court shall then multiply the sum of the payor's income and the payee's income by forty percent.

(3) the court shall determine the lower of the two amounts derived by subparagraphs one and three of this paragraph.

(4) the court shall determine the lower of the two amounts derived by subparagraphs one and three of this paragraph.

(5) the guideline amount of spousal support shall be the amount determined by subparagraph four of this paragraph except that, if the amount determined by subparagraph four of this paragraph is less than or equal to zero, the guideline amount of the spousal support shall be zero dollars.

(6) spousal support shall be calculated prior to child support because the amount of spousal support shall be subtracted from the payor's

income and added to the payee's income as part of the calculation of the child support obligation.

(b) Where child support will not be paid for children of the marriage, or where child support will be paid for children of the marriage, but the payor as defined in this section is the custodial parent pursuant to the child support standards act:

(1) the court shall subtract twenty percent of the payee's income from thirty percent of the payor's income.

(2) the court shall then multiply the sum of the payor's income and the payee's income by forty percent.

(3) the court shall subtract the payee's income from the amount derived from subparagraph two of this paragraph.

(4) the court shall determine the lower of the amounts derived by subparagraphs one and three of this paragraph.

(5) the guideline amount of spousal support shall be the amount determined by subparagraph four of this paragraph except that, if the amount determined by subparagraph four of this paragraph is less than or equal to zero, the guideline amount of spousal support shall be zero dollars.

(6) if child support will be paid for children of the marriage but the payor as defined in this section is the custodial parent pursuant to the child support standards act, spousal support shall be calculated prior to child support because the amount of spousal support shall be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation.

4. Where the payor's income exceeds the income cap, the court shall determine the guideline amount of spousal support as follows:

(a) the court shall perform the calculations set forth in subdivision three of this section for the income of the payor up to and including the income cap; and

(b) for income exceeding the cap, the amount of additional spousal support awarded, if any, shall be within the discretion of the court which shall take into consideration any one or more of the factors set forth in paragraph (a) of subdivision 6 of this section.

(c) the court shall set forth the factors it considered and the reasons for its decision in writing or on the record. Such a decision, whether in writing or on the record, may not be waived by either party or counsel.

5. Notwithstanding the provision of this section, where the guideline amount of spousal support would reduce the payor's income below the self-support reserve for a single person, the guideline amount of spousal support shall be the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there shall be a rebuttable presumption that no spousal support is awarded.

6. (a) The court shall order the guideline amount of spousal support up to the cap in accordance with subdivision three of this section, unless the court finds that the guideline amount of spousal support is unjust or inappropriate, which finding shall be based upon consideration of any one or more of the following factors, and adjusts the guideline amount of spousal support accordingly based upon consideration of the following factors:

(1) the age and health of the parties;

(2) the present or future earning capacity of the parties, including a history of limited participation in the workforce;

(3) the need of one party to incur education or training expenses;

(4) the termination of a child support award during the pendency of the spousal support award when the calculation of spousal support was based upon child support being awarded which resulted in a spousal award lower than it would have been had child support not been awarded;

(5) the wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a support proceeding without fair consideration;

(6) the existence and duration of a premarital joint household or a pre-support proceedings separate household;

(7) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;

(8) the availability and cost of medical insurance for the parties;

(9) the care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity;

(10) the tax consequences to each party;

(11) the standard of living of the parties established during the marriage;

(12) the reduced or lost earning capacity of the payee as a result of having forgone or delayed education, training, employment, or career opportunities during the marriage;

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

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

(b) Where the court finds that the guideline amount of spousal support is unjust or inappropriate and the court adjusts the guideline amount of spousal support pursuant to this subdivision, the court shall set forth, in a written decision or on the record, the guideline amount of spousal support, the factors it considered, and the reasons that the court adjusted the guideline amount of spousal support. Such decision, whether in writing or on the record, shall not be waived by either party or counsel.

(c) Where either or both parties are unrepresented, the court shall not enter a spousal support order unless the court informs the unrepresented party or parties of the guideline amount of spousal support.

7. When a party has defaulted and/or the court makes a finding at the time of trial that it was presented with insufficient evidence to determine income, the court shall order the spousal support award based upon the needs of the payee or the standard of living of the parties prior to commencement of the spousal support proceeding, whichever is greater. Such order may be retroactively modified upward without a showing of change in circumstances upon a showing of substantial newly discovered evidence.

8. In any action or proceeding for a modification of an order of spousal support existing prior to the effective date of the chapter of laws of two thousand fifteen which amended this section, brought pursuant to this article, the spousal support guidelines set forth in this section shall not constitute a change of circumstances warranting modification of such spousal support order.

9. In any action or proceeding for modification where spousal support or maintenance was established in a written agreement providing for spousal support made pursuant to section four hundred twenty-five of this article or made pursuant to subdivision three of part B of section two hundred thirty-six of the domestic relations law entered into prior to the effective date of the chapter of the laws of two thousand fifteen which amended this section, brought pursuant to this article, the spousal support guidelines set forth in this section shall not constitute a change of circumstances warranting modification of such spousal support order.

10. The court may modify an order of spousal support upon a showing of a substantial change in circumstance. Unless so modified, any order for spousal support issued pursuant to this section shall continue until the earliest to occur of the following:

(a) a written stipulation or agreement between the parties;

(b) an oral stipulation or agreement between the parties entered into on the record in open court;

(c) issuance of a judgment of divorce or other order in a matrimonial proceeding;

(d) the death of either party.

B. SPOUSAL SUPPORT vs. SPOUSAL MAINTENANCE

1. **Definitions**

Spousal support is required between persons **while they are married**, pursuant to FCA § 412 and Social Services Law § 101. There may be no limit on the duration of spousal support.

Spousal maintenance is a **post-divorce** award of support pursuant to DRL § 236. Maintenance may be limited in duration.

> **But note:** Courts, statutes and practitioners tend to use the phrases interchangeably (See e.g., DuJack v. DuJack, 663 N.Y.S.2d 349 (3d Dept. 1997), where court refers to provision in divorce judgment for "spousal support") although spousal support actually refers to a lifetime, statutory obligation to support one's spouse, while spousal maintenance is a court-determined obligation to support one's former spouse.

2. **Exception for Foreign Divorces**

In some cases, a spouse may obtain a divorce in another country. The validity of the foreign divorce under United States law depends on whether it was a *unilateral* divorce proceeding – that is, it depends on whether the foreign jurisdiction had jurisdiction over the other spouse.

Where the wife was not served and did not appear or otherwise submit to jurisdiction in the foreign divorce, the divorce will not be recognized under New York law. Rosenstiel v. Rosenstiel, 16 N.Y.2d 64 (1965) (unilateral Mexican divorce is not valid as against wife who was not served and did not appear or submit to jurisdiction); see also Fishberg v. Fishberg, 16 A.D.2d 629 (1st Dept. 1962); Stanley T. v. Tadeusz L., 62 Misc.2d 481, 483 (Family Court, Kings Co. 1970); Lamb v. Lamb, 61 Misc.2d 1032, 1034 (Family Court, New York County 1969).

Liability for spousal support pursuant to FCA § 412 depends upon the existence of a marital relationship. Thus, where a foreign court had no personal jurisdiction over the wife, the marital relationship was not terminated under New York Law, and the foreign divorce decree does not terminate the spousal support obligation. Rochetti v. Rochetti, 236 A.D.2d 543, 653 N.Y.S.2d 676 (2d Dept. 1997).

C. ELIGIBILITY FOR SPOUSAL SUPPORT

1. **Valid Marriage**

The threshold issue of proof in a spousal support proceeding is whether there is a valid marriage. One cannot collect spousal support where there is an invalid marriage; for example, where the supporting spouse was already legally married when they married the supported spouse. Fishberg v. Fishberg, 16 A.D.2d 629, 226 N.Y.S.2d 866 (1962).

2. **Working Spouse**

A spouse can recover spousal support even if they are working, in order to maintain the couple's pre-separation standard of living. Polite v. Polite 127 A.D.2d 465, 511 N.Y.S.2d 275 (1987) (spouse was awarded spousal support where they earned $10,000 and the other spouse earned $80,000). See also Kazim v. Kazim, 696 N.Y.S.2d 268 (3d Dept. 1999).

3. **Spouses Living Together**

Spousal support may be awarded even where a couple is still living together and neither spouse is in danger of going on public assistance. Dellaripa v. Dellaripa, 62 A.D.2d 1036, 404 N.Y.S.2d 36 (1978).

Alimony is not barred just because the former couple still lives together. This is a standard, not a rule. List v. List, 189 Misc. 261, 61 (or 01) N.Y.S.2d 809 (1946) (couple lives together but has separate bedrooms; don't eat together; haven't spoken in two years; husband pays utilities and gives her a small monthly allowance that is getting smaller; two acts of violence, threats of killing her, and fighting).

Couple can reside in the same house yet still live apart. Lowenfish v. Lowenfish, 103 N.Y.S.2d 357, 278 A.D. 716 (2d Dept. 1951).

A spouse is not precluded from obtaining a judgment of separation in their favor for non-support even though they have separated with consent and they have not offered to resume the marital relations. Steinberg v. Steinberg, 18 N.Y.2d 492, 277 N.Y.S.2d 129 (1966)

> **Note:** DRL § 236 specifically provides (related to prior actions and proceedings for alimony) that the court may award alimony even "notwithstanding that both parties continue to live in the same house and not withstanding that the court refuses to grant the relief requested by either spouse."

- In cases where the parties reside together, there should be clear evidence that bills are not being paid. Support magistrates will not act as a budgeting service for spouses who disagree on finances.
- In cases where the parties reside together, the support magistrate may order a spouse to pay an expense directly — such as rent, utilities, medical, etc. — rather than setting a cash amount of support.

4. **Spouses**

Spouses must support one another regardless of whether the spouse needs it. Spouses of all genders are equally required to support a spouse when necessary. Hirsch v. Hirsch, 37 N.Y.2d 312, 372 N.Y.S.2d 333 (1975).

D. RELATIONSHIP OF SPOUSAL SUPPORT TO PUBLIC BENEFITS

1. **Spouse's Duty to Support**

A spouse's duty to support extends to situations where the spouse is receiving public assistance or is in danger of having to rely upon public assistance.

For example:

Defendant's spouse admitted to a nursing home; they have Medicaid coverage. They are an institutionalized spouse or community spouse. Defendant refused to provide for his spouse's care. D.S.S. (Department of Social Services) permitted to sue to collect amount permitted by statutory formula contained in Social Services Law regarding sheltering of assets. Commissioner of the Department of Social Services v. Spellman, 173 Misc. 2d 979, 661 N.Y.S.2d 895 (Sup. Ct. N.Y. Co. 1997).

Spouse may be required to contribute to their spouse's support where they have the ability and the obligation, and their spouse has limited income supplemented by public assistance. Figueroa v. Figueroa, N.Y.L.J., June 19, 1998, p. 28, c. 6 (Sup. Ct. Kings Co.) (spouse required to pay spousal support in roughly the same amount as their spouse's public assistance).

If maintenance is not granted, spousal support obligation ends with divorce even if the dependent spouse would have to go on welfare. Lanese v. Lanese, 210 A.D.2d 755, 620 N.Y.S.2d 185 (3d Dept. 1994).

2. **Assignment to DSS of Right to Support**

Pursuant to Social Services Law § 101 et seq., a spouse who receives public assistance has assigned their right to collect spousal support to the DSS. Someone in receipt of public assistance cannot waive spousal support.

Pursuant to Social Services Law §§ 101, 102, if the spouse receives public assistance, the DSS may commence and maintain a spousal support proceeding for the benefit of the DSS.

- DSS may instruct a person to apply for spousal support *before* they will consider the person's application for public assistance.

3. **Maintenance**

If maintenance is not granted, the spousal support obligation ends with divorce even if the dependent spouse would have to go on welfare. Lanese v. Lanese, 210 A.D.2d 755, 620 N.Y.S.2d 185 (3d Dept. 1994). Although the spouse was entitled to lifetime maintenance and a share of their spouse's pension, the court awarded only $20 because any greater amount would have caused the spouse's public benefits to be reduced, and the court did not want to deplete the spouse's inadequate resources just to reimburse the public fisc. Gina v. Gina, N.Y.L.J., December 20, 1996, p.34, c. 5 (Sup. Ct. Queens Co.) (40-year marriage; emancipated children; husband aged 68 and wife aged 61; husband's income is social security and his pension; wife's

income is social security disability and receives SNAP (Supplemental Nutrition Assistance Program) benefits).

E. DETERMINING AMOUNT OF SPOUSAL SUPPORT[1]

There are two formulae for calculating temporary maintenance contained in Family Court Act (FCA) Section 412:

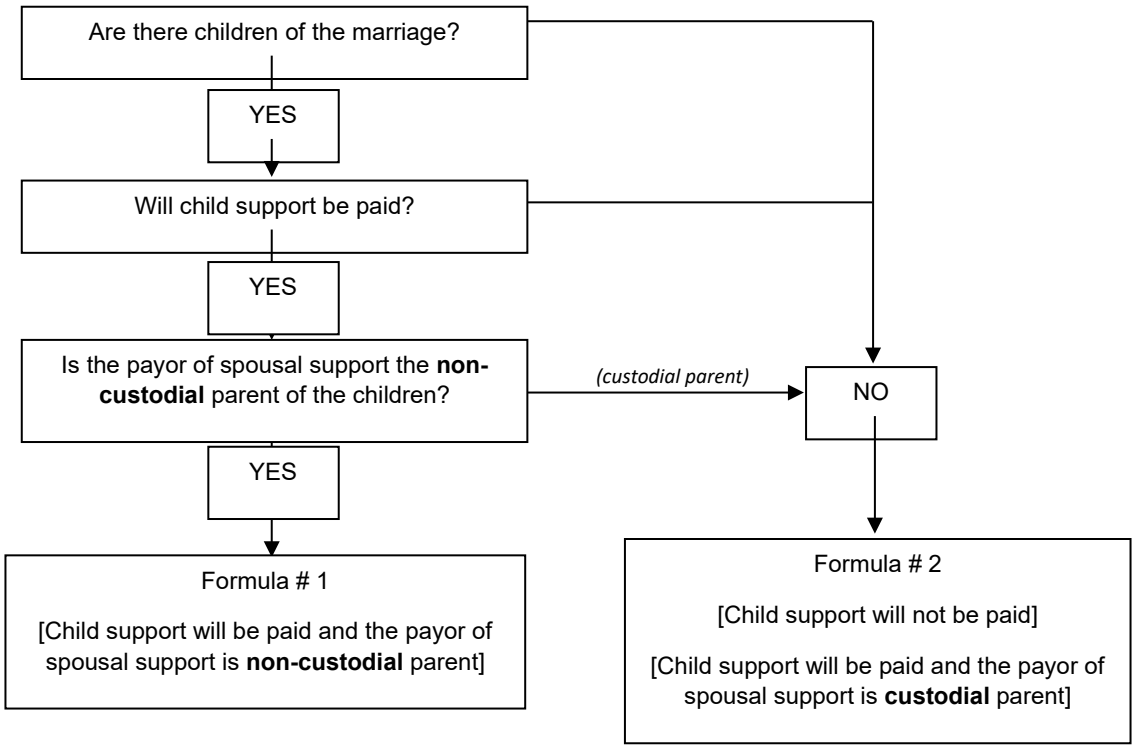
1. The first formula is used when child support will be paid for the children of the marriage AND the payor of spousal support is the non-custodial parent (pursuant to the Child Support Standards Act (CSSA) and Family Court Act (FCA) § 413).

2. The second formula is used when EITHER child support will not be paid OR child support will be paid AND the payor of spousal support is the custodial parent.

The statutory income cap limits these calculations to the first $228,000 of the payor's income. Any income above that amount will be dealt with in accordance with FCA Section 412 as discussed above.

The following flow-chart assists with determining which formula to use in any given case:

[1] There are official online calculators located at https://qfs.formsquo.com/FormsViewer/View?SPHostUrl=https%3A%2F%2Fnycourts.sharepoint.com%2Fsites%2FMatrimCalc&SPLanguage=enUS&SPClientTag=1&SPProductNumber=16.0.8613.1223&SPAppWebUrl=https%3A%2F%2Fnycourts1cee1e08ae8e41.sharepoint.com%2Fsites%2FMatrimCalc%2FFormsViewer&templateName=MatrimonialCalculator&AppOnly=true



For both sets of calculations, if the payor's income exceeds $228,000, simply use $228,000 as the value for the payor income.

Formula # 1

The calculations that apply when child support will be paid and the payor of spousal support is the non-custodial parent:

A = [20% of payor income] – [25% of payee income]

B = 40% of [payor income + payee income]

C = B – [payee income]

The spousal support amount shall be the lower of A and C.

If the lower value is $0.00 or less than $0.00, the amount of spousal support is $0.00.

Spousal support shall be calculated prior to child support because the amount of spousal support shall be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation.

Formula # 2

These calculations apply when child support will not be paid or the payor of spousal support is the custodial parent:

A = [30% of payor income] – [20% of payee income]

B = 40% of [payor income + payee income]

C = B – [payee income]

The spousal support amount shall be the lower of A and C.

If the lower value is $0.00 or less than $0.00, the amount of spousal support is $0.00.

Spousal support shall be calculated prior to child support because the amount of spousal support shall be subtracted from the payor's income and added to the payee's income as part of the calculation of the child support obligation.

A showing of inability to work is not required before an award of spousal support may be considered; a party's "ability to contribute to her own support should not foreclose an award." Venezia v. Venezia, 144 A.D.2d 948, 949 (4th Dept. 1988).

The determination of whether to award spousal support requires a delicate balancing of each party's needs and means. Polite v. Polite, 127 A.D. 465, 467 (1st Dept. 1987).

- As a practical matter: the support magistrate will consider the totality of the circumstances – the needs of the spouse seeking support and their ability to meet them.

- Some support magistrates will imply that undocumented spouses should be working off the books. Clarify on the record that the support magistrate is instructing that spouse to break the law.

3. **Relevance of Child Support**

As a practical matter, the obligation to pay spousal support will affect the amount of the award of child support as stated above. Where there is an order of combined child support and spousal support, the services of the

SCU (Support Collection Unit) may be used to collect the support. FCA § 440(b)(1).

- Spousal support is a deduction from income before a child support calculation is made. FCA § 413-1(b)(5)(vii)(C). Therefore, a hearing in a case involving spousal and child support will probably be held in two or three stages, to explore the different scenarios (i.e., more child support if less spousal support).

4. **Health Insurance**

Pursuant to FCA § 416, where a spouse has health insurance coverage available, the spouse is required to exercise the option of coverage for the dependent spouse. Therefore, even if a monetary award of spousal support is not made, the court shall issue an order regarding available health insurance.

5. **Relevance of Statutory Guidelines for Maintenance**

DRL § 236 provides factors for determining the amount of an award of maintenance (See below). This statute may be instructive in determining the amount of an award of spousal support, although spousal support tends to address the current circumstances whereas maintenance is intended to address both present and future circumstances (post-divorce).

Note: In determining spousal support, the Family Court applies a similar standard as the Supreme Court does in determining maintenance under DRL § 236. Steinberg v. Steinberg, 18 N.Y.2d 492, 277 N.Y.S.2d 129 (1966).

In determining spousal support, the Family Court is not bound to consider the factors set forth in the DRL related to maintenance.

F. DETERMINING AMOUNT OF MAINTENANCE

DRL § 236, Part B, Section 6 sets out the statutory factors to be considered by a court in determining whether to issue maintenance, and in determining the amount and duration of maintenance. **These factors are instructive in assessing the amount of spousal support.**

1. **Whether to Award Maintenance**

The court may order maintenance assuming there is no contract to the contrary, and maintenance may be temporary or permanent. In determining whether to award maintenance (temporary or permanent), the court may order such amount "as justice requires," considering:

- The standard of living of the parties established during the marriage. (Hartog v. Hartog, 85 N.Y.2d 36, 623 N.Y.S.2d 537 (1995)).

- Whether the person seeking support lacks property and income to provide for her own reasonable needs.

- Whether the other party has enough property and income to provide for the reasonable needs of the person seeking support.

2. **Amount and Duration of Maintenance**

DRL § 236, Part B lists factors which the Court may consider in its determination of maintenance. These factors include:

- Age and health of the parties

- The present or future earning capacity of the parties, including a history of limited participation in the workforce.

- The need of one party to incur education or training expenses.

- The termination of a child support award before the termination of the maintenance award when the calculation of maintenance was based upon child support being awarded which resulted in a maintenance award lower than it would have been had child support not been awarded.

- The wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration.

- The existence and duration of a pre-marital joint household or a pre-divorce separate household.

- Acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such act includes but is not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law.

- The availability and cost of medical insurance for the parties.

- The care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity.

- The tax consequences to each party.

- The standard of living of the parties established during the marriage.

- The reduced or lost earning capacity of the payee as a result of having forgone or delayed education, training, employment, or career opportunities during the marriage.

- The equitable distribution of marital property and the income or imputed income on the assets so distributed.

- The contributions and services of the payee as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party.

- Any other factor which the court shall expressly find to be just and proper.

G. DETERMINING AMOUNT OF TEMPORARY MAINTENANCE

1. Legislation Related to Temporary Maintenance

Effective October 25, 2015

Temporary maintenance may be awarded in cases of a younger, non-monied spouse who is temporarily out of the workforce, especially if that spouse will need time to obtain skills or training to re-enter the job market. Courts will not award maintenance if they believe the payor spouse cannot support themself if they pay maintenance (the self-support reserve equals $20,331 as of March 1, 2024). This award will be paid to the payee or non-monied spouse during the pendency of the divorce action.

The parties remain able to opt-out of the mandatory formulae relating to temporary maintenance, provided they comply with the opt-out requirements in DRL § 236(B)(3).

Definitions

DRL § 236(B)(5-a)(b) provides the relevant definitions for this section:

(1) "**Payor**" shall mean the spouse with the higher income.
(2) "**Payee**" shall mean the spouse with the lower income.
(3) "**Length of marriage**" shall mean the period from the date of marriage until the date of commencement of action.
(4) "**Income**" shall mean income as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act without subtracting alimony or maintenance actually paid or to be paid to a spouse that is a party to the instant action pursuant to subclause (C) of clause (vii) of subparagraph five of paragraph (b) of subdivision one-b of section two hundred forty of this article and subclause (C) of clause (vii) of subparagraph five of paragraph (b) of subdivision one of section four hundred thirteen of the family court act and without subtracting spousal support paid pursuant to section four hundred twelve of such act.
(5) "**Income cap**" shall mean up to and including one hundred seventy-five thousand dollars of the payor's annual income; provided, however, beginning January thirty-first, two thousand sixteen 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.
(6) "**Guideline amount of temporary maintenance**" shall mean the dollar amount derived by the application of paragraph c or d of this subdivision.
(7) "**Self-support reserve**" shall mean the self-support reserve as defined in the child support standards act and codified in section two hundred forty of this article and section four hundred thirteen of the family court act.
(8) "**Agreement**" shall have the same meaning as provided in subdivision three of this part.

Income over the statutory income cap (DRL Section 236 (B) (5-a)(d))

Where the payor's income exceeds the income cap, the court shall determine the guideline amount of temporary maintenance as follows:

(1) the court shall perform the calculations set forth in paragraph DRL § 236(B)(6)(c) of this subdivision for the income of the payor up to and including the income cap; and

(2) for income exceeding the cap, the amount of additional maintenance awarded, if any, shall be within the discretion of the court which shall take into consideration any one or more of the factors set forth in one of paragraph DRL § 236(B)(5-a)(h); and

(3) the court shall set for the factors it considered and the reasons for its decision in writing or on the record. Such a decision, whether in writing or on the record, may not be waived by either party or counsel.

Self-Support Reserve (DRL § 236(B)(5-a)(e))

Where the calculations above would reduce the payor's income to below the self-support reserve for a single person, the guideline amount of temporary maintenance will be the difference between the payor's income and the self-support reserve. If the payor's income is below the self-support reserve, there is a rebuttable presumption that no temporary maintenance is awarded.

Duration of Temporary Maintenance (DRL § 236(B)(5-a)(f) and (g)).

The duration of the temporary maintenance award is determined by considering the length of the marriage and terminates upon the issuance of the judgment of divorce or the death of either party, whichever occurs first.

Deviation from Formulae (DRL § 236(B)(5-a)(h)).

The Court shall order the guideline amount of temporary maintenance up to the income cap in accordance with DRL § 236(B)(6)(c) of this subdivision, unless the court finds that the guideline amount of temporary maintenance is unjust or inappropriate, which finding shall be based upon consideration of any one or more of the following factors, and adjusts the guideline amount of temporary maintenance accordingly based upon such consideration:

(a) the age and health of the parties;
(b) the present or future earning capacity of the parties, including the history of limited participation in the workforce;
(c) the need of one party to incur education or training expenses;
(d) the termination of a child support award during the pendency of the temporary maintenance award when the calculation of temporary maintenance was based upon child support being awarded and which resulted in a maintenance award lower than it would have been had child support not been awarded;
(e) the wasteful dissipation of marital property, including transfers or encumbrances made in contemplation of a matrimonial action without fair consideration;
(f) the existence and duration of a pre-marital joint household or a pre-divorce separate household;
(g) acts by one party against another that have inhibited or continue to inhibit a party's earning capacity or ability to obtain meaningful employment. Such acts include but are not limited to acts of domestic violence as provided in section four hundred fifty-nine-a of the social services law;
(h) the availability and cost of medical insurance for the parties;
(i) the care of children or stepchildren, disabled adult children or stepchildren, elderly parents or in-laws provided during the marriage that inhibits a party's earning capacity;
(j) the tax consequences to each party;
(k) the standard of living of the parties established during the marriage;
(l) the reduced or lost earning capacity of the payee as a result of having foregone or delayed education, training, employment, or career opportunities during the marriage; and
(m) any other factor which the court shall expressly find to be just and proper.

H. MARITAL FAULT

1. **Relevance to Spousal Support Determination**

The FCA does not address the relevance of marital fault in determining an award of spousal support, nor is there significant case law on the issue. Arguments regarding the relevance of marital fault should be made wherever there is a good faith basis for doing so. In cases of domestic violence, a spouse may have compelling reasons for requiring additional spousal support if the separation of the parties or the non-monied spouse's inability to maintain employment is a result of abuse.

I. DURATION OF SPOUSAL SUPPORT

1. **Temporary Order of Spousal Support**

Pursuant to FCA § 434-a, the Court is enabled to order a temporary order of spousal support during the pendency of a proceeding, regardless of whether information about the income of the parties is available.

When a judge makes an order of temporary spousal support, the court shall then refer issues of support to a support magistrate. Uniform Rules of the Family Court § 205.34(b).

2. **Lifetime Obligation to Support Spouse**

Pursuant to FCA § 442, a court may not limit the duration of spousal support. In other words, spouses have a lifetime obligation to support each other.

> Where divorce action is dismissed, spousal support must be for an indefinite time. Schildkraut v. Schildkraut, 223 A.D.2d 585, 636 N.Y.S.2d 411 (2d Dept. 1996) (plaintiff-husband brought a divorce procedure on the grounds of constructive abandonment which began in 1991; court dismissed for insufficient evidence).

However, the court may specify an event (such as the dependent spouse obtaining employment) that will trigger an automatic modification of the spousal support order.

3. **Termination of Spousal Support**

The FCA § 412 explicitly directs **spouses** to support one another. Once the parties are no longer married, they are no longer spouses and their obligation as to spousal support is dissolved. Trazzi v. Trazzi, 49 A.D.2d 954, 374 N.Y.S.2d 341 (2d Dept. 1975); Voss v. Voss, 54 A.D.2d 1032, 388 N.Y.S.2d 182 (3d Dept. 1976).

Note: As discussed above, a foreign divorce decree does not end spousal support obligation in New York unless the foreign court acquired personal jurisdiction over the New York spouse. Rochetti v. Rochetti, 236 A.D.2d 543, 653 N.Y.S.2d 676 (2d Dept. 1997) (Husband got divorced in Florida without serving his wife; divorce by default along with order to terminate spousal support. The court held that the order of support was not terminated; foreign default divorce decree does not affect existing support order in favor of a spouse who was never subject to the personal jurisdiction of the foreign court).

Spousal support will also end on the date an annulment is granted. Dept of Social Services on Behalf of Edgecombe v. Gilbert, 234 A.D.2d 458, 651 N.Y.S.2d 129 (1996) (marriage was annulled because of ex-wife's fraud; support terminated when the annulment was granted).

J. OUT-OF-COURT AGREEMENTS

1. **Family Court Act § 425**

An agreement to support must be written and submitted to the Family Court or the Support Magistrate. If approved, the court can enter an order of support pursuant to the agreement without a hearing, and the agreement is binding.

2. **Domestic Relations Law § 236, Part B (3)**

Any agreement of the parties before or during the marriage as to maintenance is enforceable, so long as the terms were "fair and reasonable at the time of contract."

3. **Waiver of Spousal Support or Maintenance**

Spousal support and maintenance can be waived, modified or annulled under proper conditions although child support cannot be retroactively reduced or annulled. Sheridan v. Sheridan, 174 Misc. 2d 249, 663 N.Y.S.2d 797 (Sup. Ct. Bronx Co. 1997).

FAMILY COURT PROCEDURE

A. Jurisdiction

i. Courts with Jurisdiction Over Spousal Support

Both the Family Court and Supreme Court have jurisdiction over applications for spousal support, although applications for spousal support (i.e., where the parties are still married), are typically heard in the Family Court. The existence of a separation agreement does not preclude the issuance of spousal support; FCA § 463.

1. Pending Action for Divorce

Where there is a pending divorce action, Family Court may issue an order of support only if there is no Supreme Court order of support and the spouse is likely to become a public charge. FCA § 464 (b).

- **Note:** Some practitioners report that the Family Court will *continue* to hear spousal support petitions even if a divorce action has been commenced, where the spousal support petition was filed first, and the divorce filed later.

2. Divorce Judgment

The Family Court's jurisdiction to issue an order of spousal support terminates upon issuance of a divorce judgment unless the judgment contains an order of support or makes specific referrals to Family Court for purpose of making such an order. The language must be clear and unambiguous that both courts have concurrent jurisdiction.

ii. Courts with Jurisdiction Over Child Support

1. Family Court

The Family Court has jurisdiction to hear and determine any child support matter, which may be heard in the State of New York. The Family Court may exercise jurisdiction in cases involving:

- Original applications for child support (FCA §§ 411, 461(a))
- Applications for child support which are referred to Family Court by Supreme Court (FCA § 461(c); DRL § 251)
- Enforcement of an existing child support order, unless the Supreme Court explicitly retained exclusive jurisdiction (FCA § 461(b))
- Modification of an existing child support order, unless the Supreme Court explicitly retained exclusive jurisdiction (FCA § 461(b))

- Objections to administrative actions to enforce or modify an existing order (such as automatic review and cost of living increase in the child support, or suspension of a driver's license upon accrual of arrears) (FCA §§ 413-a; 458-a through 458-c)

- Although the Family Court has jurisdiction to hear and determine child support matters, the Supreme Court may "trump" a Family Court child support order. Pursuant to Family Court § 462, any order of the Family Court requiring support terminates upon issuance of an order by the Supreme Court, unless the Supreme Court explicitly continues the Family Court order.

The effect of a divorce action on a Family Court support case

The Family Court is not required to dismiss a pending Family Court child support petition just because a divorce is commenced in Supreme Court. However, as a practical matter, a support magistrate often does dismiss a pending child support matter in Family Court once a divorce is commenced, because any final order of child support issued by the Family Court is not binding in the Supreme Court action. The support magistrate should, and usually will, issue a temporary order of child support before dismissing the Family Court petition.

2. Supreme Court

- The Supreme Court has jurisdiction to hear and determine any matter of child support that may be heard in the State of New York. Most commonly, the Supreme Court determines the issue of child support in the context of a divorce, annulment, or separation, since only the Supreme Court has jurisdiction over these actions.

- The Supreme Court has the ultimate authority over the issue of child support. As stated above, the Supreme Court has the power to "trump" any child support order issued by the Family Court or reserve to itself the power to enforce or modify a child support order. FCA § 462.

    - **Continued Order of the Family Court**
      As a practical matter, the Supreme Court does not usually override a Family Court support order. Instead, where there is an existing Family Court child support order, the Supreme Court in a divorce action often will provide that the Family Court order be "continued" rather than addressing the issue of child support de novo.

    - **Family Court Jurisdiction over Future Child Support Issues**
      If the Supreme Court issues a final order of child support, the order may specify which court shall determine any *future* child support issues which arise. The Supreme Court child support order may provide either: (1) that applications for enforcement or modification of the Supreme Court child support order shall be to the Family Court; or (2) that applications for enforcement or modification of the Supreme Court order shall be to the Supreme Court only. FCA § 466.

Where a Supreme Court child support order is silent as to future issues (i.e., does not specify which court may enforce or modify the order), Family Court is permitted to hear and determine applications for enforcement or modification of the Supreme Court order. FCA § 466(c).

iii. Other States

The Uniform Interstate Family Support Act (UIFSA) became effective December 31, 1997, replacing the former New York Uniform Support of Dependents Law (USDL). UIFSA addresses interstate support issues and is in effect in comparable statutory form in every state. New York has codified UIFSA in Family Court Act Article 5-B. Attorneys should refer to the statute itself to determine issues such as jurisdiction, choice of law and interstate enforcement and modification of support orders. Inter-state child support issues are not addressed in this Guide. For a general overview of UIFSA see Section III of this Guide.

B. Support Magistrates

- In Family Court support magistrates hear child support cases. Hearing Examiners were renamed Support Magistrates in 2003. You may hear both terms used by the courts and by practitioners. See the Uniform Rules for the Family Court, §§ 205.32-205.44 for more information regarding Support Magistrate duties and procedures. A judge will review the support magistrate's decision upon a party's objection to the decision.

- Support magistrates are appointed by the Unified Court System Chief Administrator for a three-year term, to hear and determine support proceedings. Pursuant to the Uniform Rules § 205.34, a support proceeding will immediately be assigned to a support magistrate rather than a judge. Where the issue of child support arises in another type of case before a judge (such as an order of protection or custody case), that judge will enter a temporary order of support and refer the case to a support magistrate for further proceedings.

- A support magistrate may hear *only* child support, paternity, and spousal support cases. The support magistrate is not empowered to determine any other issues between the parties. FCA § 439. Therefore, if a party wants to address issues other than support and paternity, the support magistrate usually will instruct that party to file a separate petition, which will be assigned to a judge or a referee. The other issues (such as visitation and custody) will be determined separately from the child support issue. Support cases are even assigned separate court dates from other Family Court cases pending between the parties.

C. Commencing a Case

i. Petitioner

Pursuant to Family Court Act § 422, the following persons may seek an order of support in Family Court, against any person chargeable with support:

- A parent or guardian of a child
- Any other person acting in loco parentis (in place of a parent)
- A representative of a charitable society with a legitimate interest in the petitioner
- A custodial parent, child or relative in need of public assistance or care
- A social services official, when so authorized pursuant to SSL § 102
- Commissioner of Mental Health, when so authorized pursuant to MHL Article 43

ii. Venue

Pursuant to Family Court Act § 421, a child support proceeding may be brought in the county in which either of the parties resides or is domiciled at the time of the commencement of the action. When the Commissioner of Social Services commences a case involving a New York City resident, the venue will be in New York County, regardless of where the parties reside.
Pursuant to Family Court Act § 469, in referring a case to the Family Court, the Supreme Court may designate the venue in any county within the judicial district as the county in which the application for child support is to be determined.

iii. Summons

Pursuant to Family Court Act § 426, the Summons in a child support proceeding under Article 4, must contain the following notice:

- Respondent's failure to appear shall result in the entry of an order of default, AND
- Respondent must provide the court with proof of their income and assets, AND
- An order of support will be made on the return date of the summons, AND
- Respondent's failure to appear may result in the suspension of their driving privileges; state professional, occupational, and business licenses; and recreational licenses and permits.

iv. Warrant

As with other types of Family Court proceedings, the court may issue a warrant compelling the respondent's arrest and production before the court. Pursuant to FCA §§ 428, 431, and 432, a warrant may be issued upon the filing of a petition where:

The summons cannot be served

The respondent has failed to obey the summons

The respondent is likely to leave the jurisdiction

A summons, in the court's opinion, would be ineffectual

The safety of the petitioner is endangered

A respondent on bail or on parole has failed to appear

As a practical matter, a warrant will rarely be issued on an original child support petition. A warrant may be issued in an enforcement proceeding upon particularly egregious facts. A warrant may not be issued by a support magistrate and if warrant is sought the matter must be referred to a Judge

v. Order to Show Cause

An attorney may choose to commence a child support petition by Order to Show Cause where the petitioner is seeking to restrain the non-custodial parent by court order from, for example, dissipating or transferring assets until such time as the parties may be heard. It is unclear whether support magistrates may sign orders to show cause. The Order to Show Cause should be made returnable before a support magistrate, although a judge may sign it. On an original petition for a child support order, the attorney will need to file the order to show cause in the petition room to obtain a docket number and then the matter will likely to be referred to an intake judge. On a modification or enforcement petition, the order to show cause may first be submitted to the support magistrate who will decline to sign it if she determines that it is not within her authority to do so.

vi. The Petition

1. Pro Se Petition

In most cases referred to volunteer attorneys, a child support petition was already filed. To file a pro se child support petition, a party goes first to the SCU in the Family Court where a case is opened by an SCU caseworker, who asks if the client wants SCU collection services. After the SCU interview, petitioner proceeds to the petition room and is interviewed by the petition clerk. If the parties are divorced, the clerk will require a copy of the divorce decree to be produced to assure that the Family Court has jurisdiction over the proceeding. After the interview, the Petition is generated by computer, and a Summons is issued requiring the respondent to appear in court. FCA § 426.

A computer program chooses a return date for the petition, which varies widely by jurisdiction. The petition is scheduled to be heard by a support magistrate. If there have been prior support proceedings between the parties, the case will be assigned to the same support magistrate if possible. The petitioner is given two copies of the court papers: one set to serve and one set for their own records.

An attorney retained after a party has filed a child support petition should review the pro se petition to assure it is accurate and complete.

2. Amended Petition

In other types of cases in Family Court in which pro se petitions already have been filed, attorneys are often encouraged to file an "Amended Petition." However, it is unnecessary in a child support case for an attorney to file an "Amended Petition" on an original request for child support unless the petition includes incorrect or incomplete information. The computer-generated pro se petition is very straightforward and sets out the basic elements required for a child support claim.

An attorney is more likely to draft an Amended Petition where petitioner's pro se petition was for enforcement or modification -- situations in which specific facts should and must be pleaded in support of the remedies sought.

3. Attorney-Drafted Petition

An attorney may draft and file the summons and petition in a child support proceeding. A child support petition must be sworn and verified, but the allegations in the petition may be made upon information and belief. FCA § 423. On an original petition, it is essential that in addition to the allegations required for support that, concurrent with filing the summons and petition, the attorney assures that petitioner applies for or declines SCU services. (This election is made automatically when a pro se petitioner files.) The summons and petition are submitted to the Petition Room, where the case will be assigned a Docket Number and a return date. The summons and petition will not be processed immediately; an attorney should inquire as to when it can be picked up. They will usually be ready within a few days.

Note: If preparing a summons and petition, use the official court forms located on the Unified Court System website at www.courts.state.ny.us or www.nycourts.gov (See samples in section VII of this manual).

4. Answer and Cross-Petition

The respondent in a child support case may file an answer to the petition, which may contain counterclaims. Pursuant to CPLR § 101 and FCA § 165, Family Court proceedings are governed by the CPLR except where a specific inconsistent statute controls. A petition in Family Court is the equivalent of a complaint in Supreme Court (CPLR § 402), and the answer to that petition must comply with CPLR time limits (CPLR §§ 320(a), 322(b), 3012(a), etc.) unless another statute controls. The response to the petition must adequately respond to each allegation in the petition and must be filed timely. Each allegation needs to be admitted, denied, or declined. Lawyers who fail to deny an allegation risk having the court deem it admitted, except in the limited circumstance where "no responsive pleading is permitted." CPLR § 3018. In addition, responses should track the petition paragraph by paragraph so the court can easily determine what the parties agree on and what is at issue. There is no requirement that an answer be filed. An answer and cross-

petition are most likely to be filed where the opposing party is seeking a modification of the child support order.

- **Ex Parte Order of Temporary Support:** A party will not be issued a temporary order of child support until the first court appearance. Unlike other types of proceedings in Family Court, there is no intake judge or support magistrate to determine an ex parte application for child support. When the final order of child support is issued, it will be retroactive to the date of the filing and will include a calculation of the amount of retroactive support that has accrued. FCA § 440.

- **Domestic Violence Exception:** For victims of domestic violence, there is an exception to the general rule codified in Family Court Act §§ 828, 842. A person who is filing for an order of protection may, concurrently, request an immediate temporary child support order on the order of protection docket number without a separate child support petition. The temporary child support order may be issued along with a temporary order of protection, ex parte, on the day that the petition for an order of protection is filed. FCA § 842. A person granted a temporary order of support when applying for a protection order must concurrently, or shortly after, file a separate petition for child support under Article 4.

vii. Service of the Summons and Petition

Pursuant to Family Court Act § 427, the summons and petition must be served **at least eight days** prior to the date of the court appearance. A summons and petition in a child support case may be served in any of the following ways:

- By personal delivery to respondent (FCA § 427(a)); OR
- By personal delivery to a person of suitable age and discretion at respondent's actual place of business, dwelling or usual place of abode **and** mailing a copy at their last known residence (FCA § 427(a)); OR
- By certified mail to respondent's last known address, however, the court will not issue an order on default unless there is proof that the respondent had actual notice of the case (e.g., that he signed for the certified mail) (FCA § 427(c)); OR
- Any method outlined in CPLR § 308 (1), (2), (3), or (4), if service by certified mail at respondent's correct address cannot be accomplished; OR
- Any method of substituted service ordered by the court if respondent is not served after reasonable effort at personal service (FCA § 427(b)).

It is advisable to have the summons and petition **personally delivered** to the respondent wherever possible. The summons and petition may be served by anyone over the age of 18 **except the petitioner**.

The method of service generally will become irrelevant if the respondent appears in court on the return date. If the respondent defaults, the petitioner is more likely to get a temporary or even final order in the respondent's absence if the petitioner has proof of personal delivery to the respondent. If the petitioner is unable to effect personal service, they should document each and every attempt at service. After a reasonable effort is made, the support magistrate may permit some other form of service. FCA § 427(b). On the first court date, the petition must establish service on the respondent. Make sure that you have an affidavit of service or an affidavit of attempts.

PREPARING YOUR CASE/ETHICAL CONSIDERATIONS

A. Identifying the Issues and Elements of Your Case

Pursuant to Family Court Act § 437, there is a presumption that respondent has sufficient means to support their spouse and children under the age of 21 years. Family Court Act § 440(3) provides that the amount of support calculated under the Child Support Standards Act constitutes prima facie evidence of the amount that the person can contribute. In other words, a petitioner does not have to prove that the respondent can or should pay support as calculated pursuant to the CSSA formula — it is assumed that they can or should, unless the evidence shows otherwise.

The issues and elements of a child support case will vary depending on the procedural posture of the case. An attorney should first identify the procedural posture of the case, and review the statutory authority related to that type of case. The case will be in one of the following postures:

- Initial Child Support Order (FCA § 413)
- Paternity and Initial Child Support Order (FCA Article 5, § 413)
- Modification of Existing Order (FCA §§ 451, 461)
- Enforcement of Existing Order (E.g., FCA §§ 448, 451, 453, 457, 458, 459, 460)

Using the law as a guide, an attorney should chart out their client's case, identifying:

- What they are trying to prove;
- What information they need to prove it;
- What types of disclosure and discovery are necessary to get that information.

The attorney should identify the issues and elements of the case as soon as possible after being retained, so that there is maximum time to secure the information needed for the case.

i. Ethical Considerations and the First Client Meeting

After reviewing the client's case file, telephone the client to introduce yourself. Schedule a date and time to meet with them at your office and explain the purpose of the first meeting. The purpose of the first meeting is for you to review the facts of the case with the client and establish the attorney-client relationship. Normally, the client will sign an engagement letter at the first meeting after you have explained the scope of your representation.

In your introductory call to the client, be sure to provide them with:

- Your firm's address;
- Directions via public transportation;
- Your firm's check-in procedures;
- Your full name and contact information; and
- Exact date and time of appointment.

If you are communicating with the client through an interpreter, you should also provide the client with the full name and contact information of the interpreter.

The initial client meeting may last 1-2 hours, or more depending on the circumstances of the case. You should request that the client bring photo ID, if required for building security, and any other documents that are missing from the case file or need updating (i.e., change in client's income). Inform the client that they should notify you at least 24 hours in advance if they need to reschedule, or to let you know if they are running late to the appointment.

Keep in mind that all Her Justice clients are low-income residents of New York City. Some of our clients are transgender/gender non-binary non-conforming and their preferred name does not match their legal name. Many have not experienced corporate office settings. We suggest that for the first meeting, you meet the client in the lobby and escort them to the conference room. At the beginning of this manual, you will find two best practices handouts, one for representing low-income clients and the other for representing transgender/gender non-binary non-conforming clients.

You must use your law firm's retainer agreement, as your law firm will be the attorney of record for the client, unless your firm policy states otherwise. Explain to the client what they can expect from their legal counsel, define the scope of representation, and state that no fee will be charged for legal representation. The retainer may, but need not, be translated in writing into the client's native language. So long as the contents of the documents have been orally translated to the client and the client understands the contents thereof, the documents need not be translated in writing. You may add a statement to the retainer agreement that the contents have been orally translated to the client. You should provide the client with a copy of the retainer along with your business card.

Once the retainer is signed, you can proceed to discuss the facts of the case and any documents that the client should be gathering. Refer to "Thinking Critically About Your Case," below.

Your Her Justice mentor is available to discuss with you any questions you may have after meeting with the client for the first time. You should contact your Her Justice mentor with any concerns.

ii. Gathering Information From Your Client

Once the issues have been identified, the attorney should begin to gather the relevant documents. Although photocopies of documents may be considered by a support magistrate, especially as the basis for a temporary order of support, the petitioner is required to provide "competent" proof at the hearing.

1. Petitioner's Basic Income and Expenses

At a minimum, petitioner should provide original or certified documents of any of the following documents:

- A copy of most recent tax return
- Three most recent pay stubs (if working)
- Proof of job search (if not working)
- Proof of childcare expenses
- Proof of unreimbursed medical costs
- Health insurance documentation
- Proof of any extra medical or other costs incurred because of a child's disability; proof of the disability (medical or psychological reports on child, or an SSI (Supplemental Security Income) disability certification)
- Proof of tuition for private or religious school, including proof that it has been paid
- Documentation of any extraordinary costs paid for the care of the child
- Child's birth certificate
- Any divorce decrees
- Any other child support orders
- Financial Disclosure Affidavit

A support magistrate usually will not require proof of basic expenses such as food, clothing, and sundries, unless they are extraordinary. It is assumed that a person has such expenses and the reasonableness of these expenses can be ascertained without documentation.

Regarding other expenses, petitioner should be prepared to provide proof of the expense and proof that it was paid. A receipt or canceled check is sufficient.

Many people, particularly those living in poverty, do not have checking accounts. If petitioner does not have a checking account, they should consider using money orders and retaining the receipts for these recurring or extraordinary expenses.

2. Proof of Child Care Expenses

Many childcare providers or babysitters take payment in cash and do not maintain records. If petitioner does not have canceled checks or money orders to establish childcare expenses, they should immediately start paying the childcare provider by money order. They may obtain a sworn statement or receipts from the childcare provider as to the cost of the care, but this will not be competent evidence if the matter proceeds to a contested hearing. If petitioner works and has a young child, and they testify to reasonable childcare expenses, their testimony may be sufficient competent evidence. Otherwise, it is necessary for the childcare provider to appear as a witness.

3. Petitioner's Financial Disclosure Affidavit

In a child support proceeding, financial disclosure is compulsory. Financial disclosure may not be waived by either party or by the court. FCA §§ 424-a, 413-j. Pursuant to Uniform Rules § 205.35(c), each party must provide, at least:

- Current and representative pay stub.
- Most recently filed state and federal income tax returns (including W-2s).
- Information about group health plans available to them.

The petitioner must prepare a financial disclosure affidavit that contains information about income and expenses. For items that are not regular monthly expenses, such as back-to-school clothing, the monthly amount may be calculated by determining the petitioner's annual expenditure, dividing by 12 months, and including a notation that the amount listed is the annual average.

Because expenses are not considered in determining the *basic child support obligation*, there is a tendency not to complete this section of the affidavit carefully; however, it is important to fill out this section completely. Bear in mind that expenses may be considered in whether to deviate from the basic child support obligation. Or, if the respondent defaults or fails to provide complete income information, reference to expenses will be necessary to establish the needs of the child. Also, upon any future modification petition, the court may refer to the financial disclosure affidavit in considering whether there has been a substantial change of circumstances.

Note: When preparing a Financial Disclosure Affidavit, use the official court form located on the Unified Court System website at www.courts.state.ny.us or www.nycourts.gov.

4. Evidence of Non-Custodial Parent's Income

The non-custodial parent must also bring a financial disclosure affidavit to the hearing and any proof of their income. If the non-custodial parent's income is clear from the financial disclosure affidavit and the tax return, then the support magistrate will base the child support order on that income, along with an amount for childcare and unreimbursed medical expenses, if any.

The harder case is where the non-custodial parent works completely or partially "off the books," is self-employed, or earns income illegally. If the non-custodial parent claims to make less money than the petitioner believes that the respondent makes, be creative in attempting to impute income. For example:

- Does petitioner have any older documents that show the non-custodial parent's income at some point in the past?
- Are there records from a former employer where the non-custodial parent was a W-2 wage earner?
- Do the respondent's claimed earnings exceed minimum wage?
- If the parties previously lived together, what was the standard of living? Who paid which bills?
- If the parties did not live together, what is the respondent's standard of living? Does it include, for example, an expensive car or vacations?
- What sorts of things has the non-custodial parent paid for in the past for the child? Was the child attending private school?
- What does the non-custodial parent do with the child during visitation?

The support magistrate may impute income to either party if it is shown that the party probably has more income than they have alleged on the financial disclosure form, or that the parent is purposely not working or earning as much as they could be. For example, if the non-custodial parent has taken a job with a salary lower than their previous job, the support magistrate may impute the salary from a prior job. At the very least, where it is apparent that the non-custodial parent is failing to disclose income, an attorney must assure that income is imputed which equals, at least, minimum wage.

5. Identifying Witnesses

Either party may call witnesses at a child support hearing. Petitioner may consider calling the childcare provider or any person necessary to establish an element of the basic child support obligation.

If petitioner believes that the respondent will not reveal all their income, petitioner may consider whether there are any witnesses who have personal knowledge of

respondent's income or employment, or who can testify competently to their standard of living. However, in determining whether to call witnesses, consider whether they are likely to be friendly or hostile. A hostile witness can harm your case if they lie credibly. Before calling any witness, who has not been prepared by the attorney, the attorney must consider whether that witness may be inclined to lie.

B. Uncovering Income and Assets

New York State favors full disclosure of all matter material and necessary in the prosecution or defense of an action. Practitioners should use discovery tools to seek the following to obtain full disclosure of income and assets:

i. Tax Returns

- The Individual Tax Return, IRS Form1040, reflects a party's salary and wages. The first two pages list all the schedules and attachments to the return.
    - Interest income is always derived from an asset. For example, interest income on Lines 8a and 8b of a Form 1040 will indicate that there are sums of money on deposit with banks, brokerages, partnerships, etc.
- Sometimes a party will provide the Federal and not the state return; sometimes a party will fail to supply schedules or forms reflecting income or major deductions. It is important to review both federal and state returns and all Forms 1099 and W-2.
- The following tax schedules should be examined:
    - Schedule A: itemized deductions
        - Itemized deductions, detailed on Schedule A, reflect a party's lifestyle and can reveal information useful for imputing income.
    - Schedule B: interest and dividends
        - Dividend income, reported on Line 9 and detailed on Schedule B, sets forth the name of the payor and the amount received. The amount of the principal can be calculated by knowing the dividend-per-share rate.
    - Schedule C: business and professional income (self-employed--watch for personal expenses)
        - Business income or losses are reported on Line 12 of form 1040 and detailed on Schedule C. For a self-employed individual, this should reveal the sales, expenses, and assets of the business.
        - Also included as income for CSSA purposes are investment income, depreciation, and entertainment and travel allowances deducted from business income to the extent to which they reduce personal expenditures.
    - Schedule D: gains and losses from stocks, bonds, and real estate

        - Capital gains or losses, reported on Line 13 and detailed on Schedule D, relate to assets that have been sold.
    - Schedule E: supplemental income and loss
        - Supplemental income and loss, reported on line 17 of the Form 1040 and detailed in Schedule E, reflects real estate rental income, royalty income, and income from trusts, partnerships, and S corporations.
    - Form 2119: sale of a residence
    - Form 2441: childcare expenses
    - Form 1099: miscellaneous income
    - Form 8829: business use of home
    - Form 1098: Home mortgage interest, if increasing over the years, may indicate a refinancing of the property and that one spouse has retained cash as a result. Form 1098 is sent by the mortgage company to the IRS and will list the interest paid by a homeowner.
    - Form 1120: Federal Corporate Income Tax return.
    - Form 1120-S: Federal Sub-S Corporate Income Tax return
        - Fringe benefits and perquisites which confer personal benefits found on partnership and corporate tax returns can be added to income for CSSA.

ii. Pay Stubs/W-2s

- Review the Form W-2 carefully. If early in the year, get the previous year's W-2. Determine the periodic pay and year to date income. Make sure that the respondent worked the full year. Look on the W-2 and throughout the discovery process for evidence of a benefits "package."
- Employers are required to check various boxes on the employee's Form W-2 to alert the IRS to the existence of certain important payroll deductions. The W-2 can also reveal if an employee participates in a pension plan or makes elective deferrals to a 401(k), 403(b), 457 or other retirement plan.
- Pay stubs/W-2s may also reflect voluntarily deferred income, which is added back as income for CSSA purposes.
- FICA (Medicare and Social Security) taxes actually paid and New York City or Yonkers taxes actually paid are deductible from a parent's income for CSSA purposes. Note that only the amount actually required and paid may be deducted.
- Make sure not to allow the FICA deduction to be overcounted by checking the current deduction rates.

iii. Checking and Savings Bank Account Records

- Banking records can reveal a party's cash flow and proof of income and resources.
- Review bank statements, check registers, passbooks, and cancelled checks for patterns in or unusual amounts of withdrawals or deposits and transfers to accounts or third parties.
- These records will often show a party's standard of living and can indicate regular payments to purchase or maintain property. Credit card accounts, CDs and other investments may be linked to checking and savings accounts.
- One can determine whether total expenditures set forth in the statements exceed income.
- Sometimes cancelled checks may have been removed before they were delivered for discovery. Put all the cancelled checks in order and obtain copies of missing cancelled checks from the bank, if necessary.
- Deposit slips or deposited cancelled checks can provide a paper trail regarding income and assets.

iv. Employers' Records

- Check a party's salary directly with an employer, by subpoena or release.
- These records can reveal the employee's work history and a larger context for the rate of pay and any overtime work. Investigate market rate salary for industry in which employee is working.
- Look for an increase in income that may be overdue as well as bonuses, commissions, or income that might have been deferred, to be added back to income under the CSSA.
- Where a party has left or been laid off from a job, employee records can reveal whether the parting was voluntary, or attributable to the party's wrongful behavior, for example, the result of criminal activity or a refusal to heed warnings and improve performance.

v. Additional Evidence

- Practitioners should not assume that compliance with preliminary discovery requests dissolves the need for further uncovering of income and assets. The required documentation should serve as a starting point, and not the end of the inquiry. The best practice is to carefully examine the documentation and determine if the documents reveal assets or income hidden by one spouse from the other. If so, additional discovery will be necessary.
- Check with your client for ideas regarding discovery. They often have documents that will provide a start or ideas for your search.
- Assets can be hidden in several ways, including:

    - Denying the existence of an asset
    - Transfers to third parties
    - Claims that the asset was lost, consumed, or dissipated
    - Creation of false debt
- Many types of income will not necessarily be in the tax return. Make sure to investigate possible existence of the following:
    - Veteran's benefits, including military retirement benefits and veteran's disability benefits
    - Gifts, prizes, educational grants, lottery, and gambling winnings
    - Income of a new spouse or paramour (imputed income)
    - Expense reimbursements
    - In-kind income
    - Voluntary contributions to pension, retirement, savings plans, medical spending accounts (added back under the CSSA)
    - Interest from custodial accounts
    - Voluntary debt reduction
    - Credit applications with proof of income (e.g. for automobile financing, mortgages, etc.)
    - Bankruptcy filings
    - Cab Drivers: Trip Sheet required under the TLC
    - Self Employed: 1099 forms, Tax Returns; Sole proprietor: Schedule C; Major or sole shareholder: Form 1120S or 1120; Partner: Form 1065 and schedule with K-1
    - Unemployed: Records of acceptance or denial by the Unemployment Insurance Board, Job Search Diary, Odd Job Search Diary, Resume
    - Disabled: Documents from the Social Security Administration establishing disability or application for disability benefits.

THINKING CRITICALLY ABOUT YOUR CASE

In litigating a support case refer to the following sources:

- Family Court Act Articles 4 and 5
- Uniform Rules of the Family Court (22 NYCRR § 205 et. seq.)
- Domestic Relations Law (DRL)
- Social Services Law (SSL)
- Civil Practice Law and Rules (CPLR)
- Public Health Law (PHL)
- Tax Law
- Debtor Creditor Law
- Lien Law
- Vehicle and Traffic Law
- Various federal statutes (e.g. Social Security Act and Internal Revenue Code)

What type of case do I have?

- Child and/or Spousal Support
- Initial Order of Support
- Upward Modification
- Downward Modification
- Violation for Failure to pay support
- Enforcement of Support Order
- Paternity Issues
- Client as Respondent

Gathering Information: Do I have the following preliminary documents from my client and the non-custodial parent/spouse?

- All prior orders and history of parties' court involvement
- Any other orders between the parties from other courts/states which may impact my case, i.e.: divorce judgment, out of state order

- Any other orders involving third parties which may impact my case
- Are there any other cases involving the parties, i.e.: custody/visitation, order of protection? How will this impact my case?
- FDA
- W-2 & Tax Returns
- SCU Account Summary

Financial Disclosure Affidavits

- Always present the most updated financial disclosure affidavit for your client
- Review any FDA's that your client submitted to the court on their own
- Explain away circumstances in which expenses appears to be greater than their income
- E.g. Client is living off of credit cards, client is in substantial arrears and is incurring debt, but not making payments; owes rent;
- Know how much your client's expenses are separate and apart from that of their children. The FDA does not clearly distinguish between the two.
- Review the opposing party's FDA and note discrepancies including their lifestyle as described by your client

Releases and Waivers

- Make sure to get appropriate waivers and releases from your clients before attempting to get confidential financial information. i.e., credit reports

Do I understand my client's financial situation?

- Current income/expenses, separate and apart from child(ren)?
- What are the needs of the children? What are the needs of my client if a spouse?
- Are there urgent needs? imminent eviction, insufficient food
- Are there childcare expenses and proof of such?
- Are there medical expenses?
- What insurance is available to client/non-custodial parent or spouse?
- Where is the medical provider located?
- Are there co-pays?

Mandatory Add-Ons

- Ask for Health Insurance in all cases where the child and/or your married client's do not have health insurance coverage
- Ask for copies of Health Insurance cards and policy numbers from the opposing party
- For Unreimbursed Medical Expenses – ask for specific instructions for getting reimbursed for medical bills incurred or actually paid.
- For childcare expenses make sure to provide receipts of actual payment or a letter from the childcare provider regarding payment and rates

Discretionary Expenses

- Review any divorce judgments or agreements between the parties for paying college expenses, day camp or other discretionary expenses

Do I understand the financial circumstances of the non-custodial parent or spouse?

- Are they a W-2 wage earner, off the books or self-employed?
- What is the non-custodial parent/spouse's lifestyle like?

What is the Earning Capacity/Potential of my client/non-custodial parent or spouse?

- What are their educational levels?
- What are their work histories/experiences?

Is the non-custodial parent or spouse hiding/unwilling to disclose income information?

- Have I brought this to the attention of the party, their attorney, or the Support Magistrate?
- Is a motion to compel/preclude necessary?
- What information can be obtained with interrogatories?
- What information must be obtained with a subpoena?
- What discovery devices should I be using— are they feasible?

Can the case settle?

- With a stipulation? If deviating from the CSSA, have I specified opt-out language?

What if the Adverse Party Fails to Show?

- Motion to Dismiss (if client is the respondent)
- Argue Needs of Child/Spouse

For hearings/trial:

- Preserving Record for Appeal
    - Have I stated my objections for the record?
    - Have I asked for clarification from the support magistrate?
    - Have I asked for the relief that I am seeking: temporary or final order of support?
- Have I requested?
    - Proper Calculation of Arrears
    - Spousal Support
    - Basic Child Support Order
    - Child Support Order Based on Needs
    - Mandatory Expenses
    - Discretionary Expenses
    - Temporary Orders
    - Income Deduction
    - Income Execution
    - Money Judgment
    - Other Enforcement
    - Other Relief

Direct Examination:

- What witnesses are available?
- What will they testify to?

Cross Examination:

- Will the non-custodial parent or spouse be testifying?
- Can I impute income?
- Are documents that I will be introducing certified and authenticated?

Temporary and Final Orders

- Always ask for a temporary order of support for your client in both child and spousal support cases
- Argue hardship where appropriate, i.e.: client facing eviction or likely to become a public charge
- For your records, ask the Court to issue a written Temporary Order of Support
- Ask the Court to send Final Orders of Support along with the Findings of Fact to you in care of the firm
- Provide a self-addressed envelope to the Support Magistrate so that the order can be mailed to you
- Ask for Income Deduction, Income Execution, Money Judgments, Lump Sum Payments where appropriate

For a willfulness hearing:

- Can I show that the non-custodial parent has voluntarily and willfully failed to pay the order of support?
- Can the non-custodial parent show a non-willful inability to pay the order of support?
- What relief is my client seeking: incarceration, probation, payment?

Arrears

- Know the amount of arrears owed to your client when appearing in court
- Arrears date back to the filing of the petition
- Delays in filing new petitions will reduce the amount of retroactive support your client will be entitled to receive
- Ensure that all arrears are properly calculated
- Review all Account Summaries from SCU for purposes of confirming opposing party payments and arrears
- Tell your clients who are using SCU services to get a PIN #
- Contact the SCU enforcement services or customer service line for clarification on issues dealing with arrears
- Challenge any reduction of arrears or waiver of arrears to your client

Appealing an Order: Filing Objections and Rebuttals

- Did I receive a copy of the Final Order including Findings of Fact?

- How much time do I have to respond?
- Do I need to get a transcript of the hearing?
- Is there a legal and factual basis to appeal the final order of the Support Magistrate?
- Was the basic order of support calculated correctly?
- Were the arrears properly calculated?

DISCOVERY

SUBPOENA ADVISORY

The need for subpoenas typically arises during litigation when you are unable to obtain documents directly from opposing counsel or a party through the other discovery devices. You should approach every case expecting to issue subpoenas. The most utilized subpoenas are subpoena duces tecum sent to employers and financial institutions for the parties' employment and financial records. Failing to send a subpoena when appropriate may be deemed malpractice.

A. Discovery Devices

The Family Court Act does not explicitly provide for discovery in proceedings under Article 4, nor does it explicitly limit it. The Family Court Act provides:

> The breadth of permissible discovery will be dictated on a case-by-case basis by the Court's own practice, the nature of the proceeding, and the need for the discovery (FCA § 165); AND
>
> That a compulsory financial disclosure has no effect on a party's right to disclosure and discovery (FCA § 413(j)); AND
>
> That a support magistrate has the power to direct the parties "to engage in and permit such disclosure as will expedite the disposition of issues" (FCA § 439(d))

BEST PRACTICES NOTE: You should affirmatively request permission to issue discovery requests to the support magistrate at the first appearance. Many magistrates will grant permission on an oral application, but there may be some instances where they will request a formal motion or ask to review your discovery requests before granting permission. Your request for documents or interrogatories should be granted so long as it is appropriately tailored to the case. Requests for depositions in family court are typically not granted absent a showing of need (e.g. failure to comply with less burdensome discovery). If you are denied or receive objections to your discovery requests, speak to your Her Justice mentor. In addition, if you receive or your client has already received discovery requests that appear burdensome, overbroad, or that include a notice of deposition, speak to your Her Justice mentor about objecting to the request.

Although the statutory authority is unclear, there will rarely be a challenge or objection to the two most common threshold discovery tools used by attorneys: interrogatories and a

notice to produce. Interrogatories are served pursuant to CPLR § 3131; and a Notice to Produce is governed by CPLR §§ 3120-24.

For disclosure from a nonparty witness, in addition to the relevancy requirement, CPLR § 3101(a)(4) mandates service of a "notice stating the circumstances or reasons such disclosure is sought or required.

If there is a good faith basis for any other type of discovery, the attorney should proceed according to the Civil Practice Law and Rules (relying on FCA § 413(j)). However, be prepared to respond to respondent's objections or non-compliance and to the support magistrate's possible inquiry as to the necessity for comprehensive discovery.

GENERALLY: It is best practice for the attorney to tailor the discovery requests to the facts and circumstances of each case. A support magistrate shall have the power to issue subpoenas, to administer oaths, and to direct the parties to engage in and permit such disclosure as will expedite the disposition of issues. FCA § 439(d).

1. The Financial Disclosure Affidavit/Affirmation

- Financial disclosure is compulsory. The parties in support proceedings MUST complete and exchange Financial Disclosure Affidavits, also known in Supreme Court actions as Statements of Net Worth. See FCA § 424-a(a); DRL § 236(B)(4)(a).
- A current and representative paycheck stub and recently filed federal and state tax returns must accompany the Financial Disclosure Affidavit. Information regarding available health insurance plans is also required.
- By requiring the parties to exchange and file a sworn Financial Disclosure Affidavit, along with corroborative documentation, New York State mandates the verification of income and expenses. This disclosure may not be waived by either party or by the court.
- The Court may require income verification such as: past and present federal and state income tax returns; current and representative pay stubs; W-2 forms; employer statements; corporate, business or partnership books and records; corporate and business tax returns; or receipts for expenses. See FCA § 413(1)(j).
- As a sworn statement, the Financial Disclosure Affidavit can be used for impeachment on cross-examination at trial. It is ESSENTIAL that this affidavit be accurate. If petitioner is unsure about certain information, denominate it "average estimate" or include other qualifying information.
- As circumstances change or information becomes available, submit additional or Amended Financial Disclosure Affidavits.

2. CPLR Discovery Devices

The discovery devices found in Article 31 of the CPLR are available in a Family Court support proceeding, as are sanctions for non-compliance with discovery.

NOTE: Certain Departments require leave of court to obtain discovery, e.g., 2d Department.

a. Notice to Produce/Notice for Discovery and Inspection

- This is a document served on the other party, requesting the production of discovery documents. See CPLR § 3120. This device is particularly useful to request documentary proof as to anything on a Financial Disclosure Affidavit requiring verification.

b. Subpoenas

- Disclosure against a non-party is available only upon a showing of special circumstances. To withstand a challenge to a discovery request, the party seeking discovery must first satisfy a requirement that disclosure sought is "material and necessary." See Kooper v. Kooper, 901 N.Y.S.2d 312 (N.Y. App. Div. 2d Dept. 2010).
- Article 23 of the CPLR governs subpoenas. Under CPLR § 2302, an attorney for a party may serve a subpoena on third parties at least 20 days in advance of the return date. The subpoena must specify the time, place, and manner of making the inspection or copying of documents. Pursuant to CPLR § 2303(a) and effective January 1, 2004, all parties must be served with a copy of the subpoena promptly after service on the witness.
- CPLR § 2301 distinguishes subpoenas for testimony from subpoenas for the production of books, papers, and other things (duces tecum). In addition, it requires that a trial subpoena duces tecum state, on its face, that all papers or items delivered to the court pursuant to a subpoena must be accompanied by a copy of the subpoena.
- Compare CPLR § 3120, requiring service on all parties at the same time as service on the witness. As such, it is best practice to serve a copy of the subpoena at the same time as service on the nonparty witness.
- Under CPLR § 3120, after an action is commenced, a party may serve a subpoena duces tecum "on any other person." Under this provision, similar to CPLR § 3106, the subpoena duces tecum must be served at least twenty (20) days in advance of the return date. CPLR § 3120(2). The subpoena duces tecum should be made returnable in your office during the pretrial stage of litigation unless instructed otherwise by the court.

- Additionally, CPLR § 3120(2) mandates notice to each party of the items produced in response to the subpoena.
- A party is required to pay one day's witness fee upon service of the subpoena. CPLR § 2303.
- Pursuant to CPLR § 8001(a), subpoena fees for a person are $15.00 per day plus $0.23 per mile for travel, except there is no mileage fee for travel wholly within a city. Thus, if the person subpoenaed travels wholly within the City of New York, payment for mileage is unnecessary.
- In addition, CPLR § 8001(b) states, that if a nonparty witness is subpoenaed to give testimony or produce documents at an EBT, the person shall receive an additional $3.00 for each day.
- CPLR § 3122-a provides a mechanism for the admission into evidence of business records certified by the custodian of records without the need for the custodian's testimony.
- Subpoena duces tecum: An attorney may serve third parties with a subpoena duces tecum, requesting the production of documents. The subpoena may be made returnable to your office in the pretrial stage of the action.
- Court-ordered subpoena: In some situations, a court-ordered and issued subpoena is required. Subpoenas served upon a hospital or department or bureau of a municipal corporation or of the state need to be court ordered. See CPLR §§ 2306, 2307.
- In general, CPLR § 2303 requires that subpoenas be served in the same manner as a summons pursuant to CPLR § 308. The exception to this rule is information subpoenas which may be served via registered or certified mail (CPLR §5224(a)(3)).
- Special attention should be paid to the service of judicial subpoenas upon out-of-state third parties. If the judicial subpoena is addressed to a party outside the state of New York, then assess whether that state has adopted the Uniform Interstate Depositions and Discovery Act, or has non-uniform laws governing the service of out-of-state subpoenas. If the UIDDA is adopted in that state, then the judicial subpoena should first be submitted to the clerk of the court in that state which will then issue that subpoena in the form of that state's courts. Service must comply with the laws and rules of that state. Likewise, if an out-of-state party or third-party attempts to subpoena your client, then they must comply with New York's UIDDA under CPLR § 3119 and service requirements of CPLR § 308.

  Practice tip: Although CPLR § 2303 requires that subpoenas be served in the same manner as a summons pursuant to § 308, in practice, many entities will respond to subpoenas sent via mail or even fax. Before attempting to serve a subpoena, contact the legal department of whatever agency or corporation you will subpoena to ask how they prefer to receive subpoenas. If possible, obtain an individual's name so that you can address the subpoena to their attention. However, be aware that enforcing compliance or surviving a motion to quash may depend upon proper

service under the laws of whichever state you are attempting to obtain documents from.

- CPLR § 2308 provides for sanctions if a subpoena is ignored and the time limit for compliance is exceeded. Failure to comply with a judicial subpoena is punishable as contempt of court, and the court may impose costs not to exceed one hundred and fifty dollars ($150.00).

- Pursuant to CPLR § 2308(b) non-judicial subpoenas may be enforced by filing a motion to compel in Supreme Court. Under CPLR § 2308(b), the court may order compliance and impose costs not to exceed fifty dollars ($50.00). Additional sanctions, including the striking of pleadings and preclusion of the production of evidence, may be sought under CPLR § 3126.

- The court is also empowered to issue a warrant directing the sheriff to bring a witness before the court. If the party served with the subpoena continues to ignore the subpoena and motions to compel, they may be committed to jail.

SUBPOENA CASE LAW

An opposing party is entitled to notice of all discovery from a nonparty. The leading case is Beiny v. Wynyard, 129 A.D.2d 126, 517 N.Y.S.2d 474, reargument denied with further opinion, 132 A.D.2d 190, 522 N.Y.S.2d 511 (1st Dept. 1987). In Beiny, a major law firm (Sullivan & Cromwell) obtained and used privileged documents by subpoena without giving notice to the opposing party. The Appellate Division went further than the lower court in reprimanding the offending law firm, and suppressed all materials that were obtained, disqualified the offending law firm and referred the matter to the local disciplinary committee for further investigation.

In Estate of Kochovos, 140 A.D.2d 180, 528 N.Y.S.2d 37 (1st Dept. 1988), subpoenas duces tecum were served on nonparty witnesses without giving notice to other parties to the litigation. Although none of the documents obtained were privileged, the lower court suppressed certain documents from being admitted into evidence at trial. The Appellate Division in upholding the lower court stated,

The service of subpoenas on these nonparty witnesses, requiring production of documents and attendance at a deposition, without notice to the other parties to the action violates the express provisions of CPLR 3107 and 3120(b), which require notice to all adverse parties when such discovery devices are served on non-parties. The conduct here involved evinces [sic] an unprincipled approach to the practice of litigation and is deplored. Estate of Kochovos, 140 A.D.2d at 181.

In a housing court case, Henriques v. Boitano, N.Y.L.J., October 27, 1999, p. 30, col. 1 (Civ. Ct. N.Y. Co.), a landlord's firm used subpoenas duces tecum to obtain documents from nonparties without giving the opposing attorneys notice. The 17 subpoenas issued by the petitioner landlord's firm were served on nonparties, including banks, and the subpoenas stated that the information sought "may be sent directly" to the firm. Although the offending firm claimed that the failure to

give notice was the mistake of a young associate and paralegal and that all of the documents they obtained were returned to the nonparty sources, the court nevertheless suppressed all of the materials and under Rule 130 1, 22 N.Y.C.R.R. 130-1.1, ex seq., assessed sanctions in the form of costs and attorney's fees for the firm's frivolous litigation practice.

Special note re: Credit Reports

- A judgment creditor with a "So Ordered" subpoena may access a party's credit report in accordance with a permissible purpose under the Fair Credit Reporting Act. See Baker v. Bronx-Westchester Investigations, Inc., 850 F.Supp. 260 (S.D.N.Y. 1994); Klapper v. Shapiro, 586 N.Y.S.2d 846 (1992). A party's credit report will reveal their address, assets, employment, payment history, and current credit accounts.
- Information obtained from a credit report may be used to demonstrate, in a Family Court contempt proceeding for non-payment of support, that the parent failed to pay support despite an ability to do so, i.e., a parent chose to pay credit card bills rather than child support.
- The credit report may also inspire further discovery. For example, the attorney may subpoena from the obligor's creditors their loan documents and applications and discover a sworn statement of (often-inflated) income and assets.

c. Interrogatories

- Interrogatories are written questions served by counsel requiring answers under oath. Requests for the production of documents relevant to the answers can be included. Pursuant to CPLR § 3131, interrogatories can be used in addition to depositions.
- Specific questions, rather than open-ended or overbroad questions, are more likely to elicit informative answers.
- When interrogatories, as served, are unduly burdensome, the appropriate remedy is for the court to vacate them in their entirety, rather than to edit them down to relevance.

d. Notice to Admit

- Pursuant to CPLR § 3123, an attorney may issue a notice to admit at least 20 days prior to the trial. This notice may relate to the genuineness of papers, the correctness or representation of photographs, or the truth of any contested, relevant facts.
- If the responding attorney fails to serve a statement specifically denying the facts in question or detailing why the facts cannot be truthfully admitted or denied, the facts are deemed admitted for the purposes of trial.
- Wrongfully denying facts subjects the party in error to pay expenses, including attorney's fees, incurred to prove the facts.

e. Demand for Address

- Pursuant to CPLR § 3118, a demand for the post office address and residence of a party must be furnished and verified by the party.

f. Depositions (Examinations Before Trial)

- This disclosure device is commonly used to elicit information regarding only the financial issues in an action. Discovery on issues regarding custody or grounds for divorce is not permitted in most of the Judicial Departments.
- Note: Due to the costs associated with depositions, we recommend exploring other means of gathering financial information (i.e., subpoenas, review of financial statements, interrogatories, etc.)
- A demand is served on the other attorney with the date, time, and place of the examination, and may demand the production of books, papers, and records in the control of the person to be examined.
- One should confirm with the adversary that they are ready to proceed on the date noticed. The documents produced for the deposition should be forwarded in advance of the deposition and utilized for questioning during the deposition.
- CPLR § 3106(a) provides, "After an action is commenced, any party may take the testimony of any person by deposition. . .." The procedural means for deposing a nonparty witness is through the issuance of a subpoena requiring that nonparty to attend the deposition.
- CPLR § 3106(b) states, "[w]here the person to be examined is not a party . . . [they] shall be served with a subpoena." Unless the court orders otherwise, the subpoena must be served upon each party at least twenty (20) days in advance of the deposition date. CPLR § 3106(b); CPLR § 3107. This type of subpoena is also called a "subpoena ad testificandum" or just "subpoena," for short.
- CPLR § 3111 supplements the nonparty deposition provisions of CPLR § 3106(b) by allowing a demand for production of documents in the subpoena. The statute provides, "[t]he notice or subpoena may require the production of books, papers and other things in the possession, custody or control of the person to be examined . . . reasonable production expenses of the non-party witness shall be defrayed by the party seeking discovery."
- A subpoena for the nonparty witness and documents must be returnable in the county in which the person resides or has an office. CPLR § 3110(2). For the purposes of this rule, New York City is considered one county. Ordinarily, provided the nonparty witness lives or has an office in New York City, the subpoena can be made returnable in your office during the pretrial stage of the litigation.
- The document production provisions of CPLR § 3111 and CPLR § 3120 should not be confused. CPLR § 3111 is used to obtain documents in conjunction with a deposition, whereas CPLR § 3120 provides the mechanism for discovery of documents from a nonparty through a subpoena duces tecum.

5. Authorizations and Releases

- Authorizations are commonly used to access information from a third party, for example an accountant or a pension plan. If the adverse spouse is unwilling to sign the authorization, bring the release or authorization to Court and ask the Court for a directive requiring the spouse to sign it.

6. Public Records and the Internet

- A great deal of useful information is available in the public domain, and may be accessed via the Internet, or using Westlaw or Lexis. Look for information on people and their assets through these databases.
- Real estate deeds and mortgage records are a matter of public record and can be found at the City Register's Office where the property is located. The ACRIS.com database allows one to search real property records which affect the state of title to real property, including deeds, mortgages, and UCC Financing Statements, and obtain copies online.
- Pending lawsuits, judgments, and liens can be accessed at the County Clerk's office. Financing Statements regarding a co-op (UCC-1s), security interests, security agreements, and lien filings (UCCs) can also be obtained relatively inexpensively.
- Bankruptcy schedules can reflect proof of assets, lifestyle, and expenditures.
- If locating a parent is a problem, many states have DMV and Board of Election records available online, or information may be requested from the agency for a small fee.
- Corporate information, such as the date of incorporation and the names of corporate officers can be accessed on the New York Department of Corporations website at http://www.dos.state.ny.us/corp/corpwww.html. Certificates of incorporation are on file with the County Clerk's office where the company was incorporated.
- If a parent operates a small business, check the Internet for a website or advertisements that can reveal information about the respondent's professional background, and that of the business. Dun and Bradstreet reports will reveal small business information.
- Loan applications and applications for credit cards usually contain sworn statements relating to income and assets.
- Real estate taxes paid, when checked against real property records, may indicate that additional pieces of real property are owned.

7. Social Networking Sites

- A great deal of information is available on social networking sites, such as Facebook, Twitter, etc. Social Networking Information is being used increasingly as evidence against a party (i.e., downloads and printouts of incriminating Facebook

screen shots and twitter posts). It can be used as proof of an extravagant lifestyle; e.g., if the party posts photos of themself on vacation or driving fancy cars. It can also be used for impeachment e.g., if the party claims they are not working, but has a social networking site for their business.

ETHICAL CONSIDERATION

Be careful of how this information is obtained. A lawyer cannot use deception to obtain information (i.e., "friend" requests by attorney or third party). Only information that is either publicly available or accessible to anyone who is a member of the network may be used.

The following considerations must be established in order to enter printouts from social networking sites into evidence:

- **Relevance**
  - In Romano v Steelcase Inc., 2010 N.Y. Slip Op. 32645 (N.Y. Sup. Ct. 2010), the court upheld the admissibility of the materials found from Plaintiff's account on Facebook and MySpace. 2010 N.Y. Slip Op. 20388, 1 (N.Y. Sup. Ct. 2010). The court stated that "The information is both material and necessary to the defense of this action and/or could lead to admissible evidence."

- **Authenticity**
  - A declaration (by the attorney or witness) or testimony from the downloader that the evidence accurately reflects the site content at the time.
  - Consider printing stamp info (web address, date/time, drive name). Also, point out identifiers, such as photos, profile names, login information as circumstantial evidence of authenticity.
  - In People v. Clevenstine, 2009 NY Slip Op 9556, 3 (N.Y. App. Div. 3d Dept. 2009), the court upheld the authenticity of instant message records between the victims and Defendant on MySpace, which were authenticated by third-party testimonies, including the victims, the officer who retrieved the record from the victims' computer and Defendant's wife. As a result, it seems that third-party testimony is sufficient.

- **Hearsay (offered for truth)** – use applicable exceptions, i.e., party admission

- **"Original Writing"** – best evidence, accurate reproduction, spoliation

- **Probative value** – courts are consistently rejecting privacy and unfair prejudice claims on social networking evidence (public nature), holding that relevance outweighs privacy in favor of production. See Romano (NY).

DISCOVERY MOTIONS

Motion practice is permissible in a child support proceeding. The making of motions in Family Court is governed by Uniform Rules § 205.8, which provide that any papers for signature or consideration of the Court shall be presented to the clerk, or directly to the judge's clerk and that motions shall be made returnable on a date set by the court. Uniform Rules § 205.11.

As a practical matter, this means that an attorney may not simply choose a return date for a motion, as may be done in other civil practice, but should notice the motion for the next return date of the petition; an attorney may speak to a judge's court attorney or clerk if she has concerns about how to notice the motion. If any other date is sought, or if the petitioner needs immediate relief, the motion should be brought by Order to Show Cause.

Types of Motions

Circumstances under which an attorney may decide that a motion is needed may include:

- Motion for Leave of Court to Conduct Discovery where the court is requiring a written application for the granting of permission to do discovery. Support proceedings in Family Court are considered special proceedings and pursuant to CPLR § 408 leave of court shall be required for discovery.
- Motion to Preclude where the respondent does not provide the compulsory financial disclosure required by Family Court Act § 424-a, asking the court to grant the relief demanded in the petition and to preclude respondent from offering any evidence as to their ability to pay support (FCA § 424-a(b)).
- Motion to Compel (or Preclude) where the respondent fails to respond to discovery.
- Motion for Contempt under FCA § 156 and Article 7 of the Judiciary Law where respondent fails to obey any lawful order of the court.
- Order to Show Cause with restraining order, to stay respondent's dissipation or transfer of assets, or for sequestration pursuant to FCA § 429.
- Motion for Sequestration of the respondent's property within the state and appointment of a receiver pursuant to FCA § 457.
- Motion for Contempt under Article 7 of the Judiciary Law, where a person or entity fails to comply with a judicial subpoena (FCA § 156).
- Motion to Compel pursuant to Civil Practice Law and Rules § 2308, where a person or entity fails to comply with an attorney-issued subpoena.
- Motion to Dismiss respondent's modification petition, where it is not supported in an affidavit or other evidentiary material sufficient to set forth a prima facie claim (FCA § 451).

Methods for Bringing A Motion

In civil litigation, there are two basic methods for bringing a motion before the Court (See CPLR, §§ 2211, 2214). They are summarized briefly as follows:

1. Notice of Motion
A motion is made by "Notice of Motion" where there is already a court date scheduled for the matter, and no immediate relief is necessary prior to the court date. The motion papers include a Notice of Motion, with a supporting Affidavit and/or a supporting Attorney's Affirmation, and any supporting exhibits. The attorney chooses the return date (the date the motion will be heard by the court) which is usually the next scheduled court date. Note that even if an attorney picks a different return date than the next scheduled court date, the court clerks will usually adjourn the motion to the date on which the matter is already scheduled. If you need a court date before the next scheduled court date for the court to consider the motion, you should consider filing the motion by Order to Show Cause instead (see below). A copy of the Notice of Motion with supporting papers is served upon opposing counsel (or the opposing party, if he appears pro se), usually by regular mail. An Affidavit of Service is completed by the person who did the mailing. If an attorney mails the papers herself, she may complete an "Affirmation of Service" instead of an Affidavit.

The Affidavit or Affirmation of Service is annexed to the original Notice of Motion with supporting papers, which is then filed with the clerk of the court so that it may be placed upon the court's calendar for the date specified in the Notice of Motion. The attorney does not need to appear to file the Notice of Motion and will not see a judge upon the filing of the Notice of Motion.

This type of motion is used when no immediate relief is necessary.

2. Order to Show Cause
A motion is brought by Order to Show Cause where a party seeks some form of immediate or temporary relief, outside of the regular progress of the case, prior to the return date of the motion. When a motion is brought by Order to Show Cause ("OSC"), an attorney prepares an Order to Show Cause for the support magistrate's signature to be annexed to the supporting papers. This Order to Show Cause takes the place of the "Notice of Motion." The supporting papers essentially will be the same as those prepared for a motion on notice, except that the supporting papers should also address the need for immediate or temporary relief.

On the Order to Show Cause ("OSC"), the return date of the motion is left blank and will be filled in by the judge. By signing the OSC, the support magistrate instructs the opposing party to appear and "show cause" as to why certain relief should not be granted – in other words, to show as to cause why the movant should not prevail on their motion. The support magistrate will also fill in how and by what date the opposing party needs to be served with the OSC and supporting papers.

An OSC may contain a temporary order that, like a temporary order of protection, provides immediate ex parte relief to a party. In Family Court, an OSC is submitted to a support magistrate and the attorney must be present when the Order to Show Cause is filed and argue as to why the temporary or immediate relief is necessary. An attorney should check

with the clerk of the court to find out the procedure for filing an Order to Show Cause prior to filing it because procedures can vary by borough and by hearing officer.

If temporary relief pending a hearing on the motion is not granted, the support magistrate usually still signs the order and provides a return date for the motion but crosses out the provisions in the order which provide for temporary relief.

Note: if the support magistrate refuses to sign your Order to Show Cause at all, you can seek a review by a judge in the court's intake part.

Uniform Rules of the Family Court

The Uniform Rules of the Family Court § 205.8 provide that any papers for signature or consideration of the court shall be presented to the clerk of the court or directly to the hearing examiner. Motions shall be made returnable on a date set by the court (Uniform Rules § 205.11).

As a practical matter, this means that an attorney may not simply choose a return date for a motion, as may be done in other civil practice. Courts usually will permit the filing of a Notice of Motion if the motion is returnable on the return date of the petition. If any other date is sought, however, the motion should be brought by Order to Show Cause. An attorney may speak to support magistrate or clerk if she has concerns about how to notice the motion.

COURT APPEARANCES, TRIAL & HEARING

A. Court Appearances

At the first court appearance, the support magistrate is required to inform the respondent of the contents of the petition; of respondent's right to an adjournment so that he may bring an attorney to court; and that he shall be given opportunity to be heard and to present witnesses. FCA § 433. Any party who is not represented by an attorney must be given a copy of the chart of child support calculated according to the basic formula.

Unlike other types of Family Court proceedings, child support hearings may go forward on the first court date. The support magistrate might immediately commence asking questions about income and expenses -- in essence, she may commence the hearing. If the attorney is prepared to go forward with the hearing, then this is not problematic. However, if the attorney is not prepared to go forward, she should immediately advise the support magistrate as to why a hearing should not yet be held. Where an attorney is newly retained or has other good reason for an adjournment, it is likely to be granted. The attorney must be alert and aggressive in participating in these often-fast-moving proceedings.

1. Attorney's Notice of Appearance

The Uniform Rules of the Family Court Act § 205.10 provides that attorneys shall file a notice of appearance at or upon the attorney's first appearance in court or no later than ten days after appointment or retainer, whichever is sooner.

As a practical matter, filing a Notice of Appearance in advance of the court date may result in the notice of appearance being lost or misfiled by the clerk. Most attorneys file their notice of appearance at the time of their first court appearance. Upon arrival, an attorney should go to the courtroom and provide the court officer or court clerk with their Notice of Appearance. An attorney may prepare a Notice of Appearance in advance; however, the clerk or court officer will provide a blank Notice of Appearance to any attorney appearing for the first time on a case.

2. Establishing Service of the Petition

The threshold issue to be addressed on the first court appearance is whether the respondent was served. Pursuant to Family Court Act § 167, if the respondent appears in court, it is presumed that he was served, unless he makes immediate objection to the manner of service. On the first court appearance, be certain to have an affidavit or statement of service. If petitioner was unable to serve the pleadings, be prepared to describe to the Court the petitioner's reasonable efforts to make service and to request an adjournment and further opportunity to serve the petition.

3. Respondent's Right to Counsel

The parties to a child support proceeding under Article 4 are not entitled to appointed counsel if they are indigent. A putative parent is entitled to have counsel assigned to represent them, if they are indigent, in a paternity proceeding under Article 5. FCA § 262(a)(viii). The standard for indigence is "financially unable to obtain" counsel. Courts generally assume that employed persons are financially able to hire counsel.

4. Temporary Order of Support

Pursuant to Family Court Act § 433, 434, and 435(b), at the first court date and at all times pending the final determination in the case, the support magistrate must make an order of support, even if it is only a temporary order. An attorney must be prepared to argue for the maximum amount of temporary support.

Pursuant to Family Court Act § 434, a temporary order of support must be issued even if there is no information available as to respondent's income and assets. Where there is income information, the court may (and usually does) apply the formula of the Child Support Standards Act. Where there is no income information as to respondent, the temporary child support shall be in an amount sufficient to meet the needs of the child, without a showing of immediate or emergency need. FCA § 434.

5. If Respondent Defaults

If a petitioner presents a duly executed affidavit or statement of service and the respondent does not appear at the first appearance, the support magistrate may:
Issue a temporary order of support based on the needs of the child and adjourn the case to provide respondent an opportunity to appear (FCA § 434).

Conduct an inquest and issue a final order of support based on income information provided by the petitioner or, in the absence of income information, based on the needs or standard of living of the child (FCA § 413(1)(k)).

6. Issue a warrant for respondent's arrest.

The support magistrate is unlikely to issue a final order of support if service was by mail, unless it is clear that respondent had actual notice of the proceedings. FCA § 427(c).
If the Respondent defaults at subsequent court appearances, the support magistrate is likely to view the totality of the circumstances and the respondent's prior conduct in the proceeding in determining whether to issue a final order on default. An attorney should always be prepared to seek a final order upon the respondent's default.

7. Adjournments

The support magistrate may adjourn the case for almost any reason. FCA § 435(a), (b); FCA § 533. The case may be adjourned when the respondent states that he would like to retain counsel, as he is entitled to do; or, if the petitioner has failed to complete service; or, if the respondent does not provide complete income and expense information. FCA § 435-(a)(b).

B. Trial/Hearing

Presenting Petitioner's Case

A support magistrate must conduct a support proceeding in the same procedural manner as any other non-jury civil case. Uniform Rules § 205.35. As a practical matter, the hearing may be relatively informal. It is important that the attorney assures, in this potentially informal atmosphere, that a proper record is made. Clear and organized presentation is particularly important since the proceedings are likely to be recorded mechanically rather than by a stenographer. Uniform Rules § 205.37.

If respondent is represented by counsel, an attorney should attempt to stipulate prior to or at the beginning of the hearing as to the entry of documents or records.

The petitioner presents their case first. An attorney does not need to make an opening statement unless the case involves complicated facts or a novel legal theory to which the attorney wants to alert the support magistrate prior to the testimony.

The petitioner will be the first -- and usually the only -- witness. Through the petitioner, the attorney will establish the names, birth dates, and paternity of the children. The petitioner's income must be established, as well as proof of any mandatory add-ons (childcare, medical) or discretionary add-ons (school tuition, childcare while custodial parent looks for work). If the petitioner is seeking a deviation from the Child Support Standard's Act, any factors relevant to that determination must be established.

The respondent will then testify as to their income and, if relevant, their expenses. If the respondent is pro se, the support magistrate will usually question them and then ask the petitioner's attorney if the petitioner has any questions. Again, be prepared to be flexible as to the procedure while assuring that you cover the substance of the issues and elements of petitioner's case.

Since the rules of evidence apply in proceedings before a support magistrate, just as if the case were before a judge (FCA § 439(d)), an attorney should be prepared with **competent** evidence. As a practical matter, an attorney should offer any evidence for which there is a good faith basis, even if that evidence may not strictly comply with the rules of evidence. However, this is not an invitation to cut corners -- if the petitioner does not establish the allegations of the petition by **competent proof**, the court shall dismiss the petition. FCA § 441.

If a full or partial agreement is reached by the parties during the hearing, on any of the issues, the agreement must be placed on the record and, if acceptable to the support magistrate, incorporated into a final order. Uniform Rules § 205.35.

At the conclusion of the case, the parties, or attorneys, usually are asked to self-address envelopes which the clerk will use to mail out the findings and the final order. Uniform Rules § 205.36. If the order is not received within four weeks, an attorney or the petitioner should check the court file to see whether it has been issued.

Conduct of the Hearing

The hearing will be conducted by a support magistrate in the same manner as a court, without a jury, in conformance with the CPLR and Uniform Rules of the Family Court. Uniform Rules 205.36. The allegations of the petition must be established by competent proof. FCA § 441. Rules of evidence are applicable in a support proceeding. FCA § 439(d). Spouses are competent witnesses against one another in a support hearing. FCA § 436.

Standard of Decision

The allegations must be established by competent proof, or the petition will be dismissed. FCA § 441. The determination of a support magistrate must include findings of fact. FCA § 439.

Documents To Bring

- Bring all documents that show proof of income of adverse party.
- Financial Disclosure Affidavits should be exchanged.
- Bring documentation as to expenses, especially expenses that are not being met. Also bring the Affidavit of Financial Disclosure and any documents to support such affidavit.
- Make requests for discovery if necessary

TESTIMONY PREPARATION: DIRECT EXAMINATION

The petitioner should be prepared for direct examination in advance of the hearing. Many litigants become very nervous at the idea of testifying in court. **It is extremely important to review the questions and testimony with the petitioner to alleviate this anxiety and to identify any problem areas.** Direct examination or, where appropriate, rebuttal examination, should include at least the following:

Name, address, relationship to child, child's date of birth.

Establishment that petitioner has physical custody.

Proof of petitioner's income, using pay stubs and other documents supplemented or explained by the testimony.

Review of the Financial Disclosure Affidavit; confirmation of the income and expense information listed; illumination of the information as needed.

Complete information as to any health insurance coverage (or lack thereof).

Proof and testimony as to childcare expenses.

If applicable, proof and testimony as to child's enrollment in private school; respondent's participation in the decision to send the child to private school; child's need for continued private school.

Any of the applicable factors permitting upward deviation from the basic child support obligation.

Testimony which tends to establish respondent's income (standard of living while parties were together; employment history; spending habits; etc.).

Testimony or evidence of any child support payments made since the filing of the petition (so that the court may determine retroactive support).

- Child Support
    - Petitioner must be prepared to testify about their income
    - If support is based on needs of the child, Petitioner must be prepared to testify about the needs of the child and expenses incurred in the care and custody of the child separate from the needs of the custodial parent

- Spousal Support
    - Petitioner must be prepared to testify about:
        - Expenses (tease out the difference between spouse's expenses and overall household expenses)
        - Standard of living while the parties lived together
        - Bills paid and by whom
        - What expenses are currently not being met.
            - Food, clothing, shelter?
            - Are they borrowing money or using credit cards to meet these expenses?
        - Why petitioner is not employed (if applicable)
        - Any topics that may be the subject of cross examination

- Attorneys should be prepared to elicit testimony from adverse party regarding any imputed income

General Strategies for Direct Exam

Some general things to watch out for when conducting direct examination:

Avoid Compound Questions

Only ask one question at a time. Not only is this easier on your witness, but you will not get an objection from the other side as to form of question.

Ask simple, short, open-ended questions: "Where do you work?"

Avoid Leading Questions

- Only use these for introductory matters or transitions. Allow the witness to tell the story, so the magistrate knows they are telling the truth and not a rehearsed statement.
- Avoid asking questions that can be answered with a "yes" or "no."
- Use open-ended questions.
- Start all questions with words such as: "what," "who," "where," "why," "when," and "how."

- Use verbs to start your questions, for example:
    - "Tell the court"
    - "Explain"
    - "Describe what happened"
    - "Demonstrate"

Listen to the Witness

Listen attentively. Not only will the direct exam seem less staged but also you might discover other areas to explore. In your follow-up questions, repeat some of the words used by the witness to reinforce what was said.

Always appear interested in what your witness is saying – keep eye contact, nod at answers when appropriate.

Organization

Keep the examination short and simple – don't try to bring out too many facts at one time.

Keep the questions logically organized and by topic.

Volunteer Weaknesses of Case

If you don't expose your case's weaknesses on direct, the other side will expose them in a more damaging way on cross. One way to do this is to use other witnesses (such as experts) to address your client's shortcomings.

Anticipate Objections

Especially where you anticipate your client will include hearsay in their testimony, anticipate objections and have your responses ready (such as possible hearsay exceptions).

Particular Considerations for Client Direct

Direct examination of your client is the most important part of your case, and you should spend considerable time preparing and "rehearsing" with them, so they feel ready and comfortable on the stand. Your client must tell a cohesive story to the magistrate that covers your theory of why the child in their care is entitled to the support award they are requesting.

The first step in preparing a client for their direct is to outline the areas to be covered on direct. This outline should be shared with your client so they can review what areas will be covered and in what general order. Often, using an outline of topics, rather than scripted questions, will help the attorney listen more carefully in the courtroom to the client's responses and know to follow up on important areas.

Be prepared to move from one major theme to the next as you have outlined them, prefacing your transitions with phrases such as, "Now I want to focus on the regular expenses you incur for the child…."

Particular Considerations for Expert Direct

Expert testimony usually is given in four parts. First, the expert testifies as to their qualifications, including education, work experience, and publications. You have the right to have your expert reveal all these qualifications in full on direct, despite the other side's objections or offer to concede that the witness is a qualified expert. However, the court may use its discretion in curtailing an unnecessarily protracted qualification. At the end of this testimony, you will ask the court to recognize the witness as an expert.

Second, the expert describes their investigation into the financial circumstances of the respondent and/or petitioner, explaining any observations and research conducted and any relevant documents they have analyzed.

Third, the expert offers their opinion as to the financial circumstances in question.

Fourth, the expert explains the reasoning behind their opinion. The data used to form the basis of the opinion should be put into evidence. If the expert interviewed any individuals, the expert should testify that they relied on such hearsay statements in forming their opinion.

An expert should not address the ultimate issue in controversy if the issue is one upon which a lay person is capable of forming a conclusion. For example, the expert can testify that the noncustodial parent is working and likely earns a certain income, but the magistrate must determine the appropriate amount of support. An expert is only permitted to express an opinion on the ultimate issue if a lay person would be incapable of drawing inferences because of the technical issues involved.

You will want to facilitate your expert's testimony by:

Asking questions to clarify

For example, "When you refer to the X industry, what does it mean?"

Or, "Please give the court an example of the tasks involved in that work."

Asking questions that help the expert's testimony come alive

For example, "We want to understand your focus on the industry in which the noncustodial parent has worked for many years. Please give us a picture of what it looks like to work in this industry."

CROSS-EXAMINATION

You should prepare cross-examination for the respondent and any likely witnesses that they will call. Ask your client what the respondent's theory of the case is likely to be, what they might testify about on the stand, and what witnesses they are likely to call.

Cross Examination of Respondent

In many cases, where respondent is a W-2 wage earner or files accurate tax returns, cross-examination of the respondent will be limited to confirming income and expenses considered in determining the basic child support obligation.

The most difficult cross-examination will occur in cases in which the respondent works "off the books" or is self-employed. An attorney should ask their client what the respondent is likely to say on the witness stand, and whether and how they are likely to lie. The petitioner may have a well-honed sense of what the respondent's story will be and how they will conduct themself. Consider questions that will establish the following:

- A lifestyle or possessions that are incompatible with the low income that they are reporting (For example, is the respondent wearing any expensive jewelry at the hearing? Did the respondent drive to the courthouse in an expensive car?).
- The standard of living when the parties were together.
- The abilities and skills of the respondent that would tend to indicate actual or potential increased earnings.
- The respondent's job and salary history.
- Whether the respondent and a new spouse own property, such as their marital home, that is held solely in the name of the new spouse
- What the respondent does on vacation or for recreation (Does the respondent travel frequently? Go skiing? Other expensive hobbies?).
- What the respondent does with the child during visits.

Do not engage in protracted cross-examination: focus on areas of testimony that are inconsistent or not believable or which undermine their theory of the case. Never ask open-ended questions, or questions to which you do not know the answer. Do not ask the question "why," as this gives an adverse party the chance to expound and repeat their theory of the case. Use leading questions to limit the answers to "yes" and "no." Do not argue with the witness. Finally, remember that the scope of cross-examination is limited to issues raised on direct and the credibility of the witness.

Modes of Impeachment

In addition to attacking an opposing witness's perception or recollection, you also can impeach them, demonstrating why they are not credible, in the following areas:

- Criminal Conviction
- Interest, Bias, Hostility
- Reputation for Truth and Veracity

- Prior Inconsistent Statement in writing and under oath (CPLR §4514)

Client Cross

You also should prepare your client for cross-examination by the other side. One method is to ask a colleague to sit through part of the client's rehearsal of their direct and then have that lawyer cross-examine based upon that portion of direct. This is especially useful for areas of weakness in the client's case because it might alert you and the client to questions likely to be asked by opposing counsel.

If the opposing party is pro se, it is extremely important that you prepare your client for the fact that the pro se litigant has the right to cross-exam them. This can be particularly traumatic for a client who is a survivor of domestic violence. Be particularly wary of any inappropriate questions or behavior by the pro se litigant while they are cross-examining your client. Most courts give a little more leeway to litigants who are pro se, but that does not mean that they can badger your client or flaunt the rules of evidence.

Make sure your client understands the purpose of cross-examination. Discuss with the client that opposing counsel will be trying to undermine their credibility and, that above all, they should not lose their cool on the stand. Remind and reassure them that you are there to protect them, by objecting to questions that are inappropriate in form or substance and redirecting their testimony after cross, if necessary.

C. The Decision and Order

The Order of Support

If the respondent is found to be chargeable with the support of the child, the support magistrate shall issue both a finding of fact and a final order of support. FCA § 439(e). The support magistrate must issue a final order within 30 days of final submission. If a decision is not issued within 30 days, they are required to include in a quarterly report to the Chief Administrator the reasons that the matter remains undecided after 30 days. Uniform Rules § 205.36(c).

Pursuant to Uniform Rules § 205.36, the findings of fact must be in writing and include:

Income and expenses of each party.

Basis for liability for support.

Assessment of the needs of the child.

The final order must include the respondent's social security number and name and address of their employer, if any. FCA § 440(1)(a). It must also include, on its face, a notice printed in at least eight-point bold type, which informs respondent that a willful failure to obey the order may, after court hearing, result in commitment to jail for a term not to exceed six months for contempt of court. FCA § 440(4).

Retroactive Support

Since a final order of support (for a non-public assistance recipient) is effective as of the date of the filing of the petition (FCA § 449(2)) In the final order of support, the support magistrate shall determine and order a lump sum of retroactive support, dating back to the date that the petition was filed. FCA §§ 440(1)(a), 449(2). Any temporary support paid while the proceeding was pending will be deducted from the retroactive support owed. FCA § 449(2)).

When a party is using the services of the SCU, the court may not set the schedule for the payment of retroactive support (unless the non-custodial parent is self-employed and, therefore, not easily subject to income execution). Instead, the court will determine the amount of support, and the SCU determines the method by which it will be collected. The retroactive support is considered to be "support arrears/past due support," and may be collected by enforcement mechanisms available under the law, including an income execution. FCA §§ 440 (1)(a), 449(2).

Health Insurance

The final order will also include any directions relating to health insurance coverage for the child. As stated above, pursuant to FCA § 416, a child support order must contain a directive that the legally responsible relative must either (i) secure and maintain health insurance through an employer, when available and accessible, or (ii) through a New York State subsidized plan.

State Registry of Support Orders

All orders of support entered after October 1, 1998, shall be entered into a central registry. The record will include: the amount of the order; the amount of any arrears; the amount that has been collected on the order; the distribution of the collection amounts; the birth date of all children listed in the order; and the amount of any lien imposed with the order. SSL § 111-b. This registry will be available to other state and federal agencies.

Objections to Final Order of Support

A final order of a support magistrate may not be appealed directly to the Appellate Division. Rather, where a party challenges a support magistrate's order, they must file "objections" which will cause the support magistrate's order to be reviewed by a Family Court judge. The judge's decision on the objections is appealable to the Appellate Division, as provided by Family Court Act Article 11.

Specific written objections to the support magistrate's findings and order may be filed by either party within 30 days after receipt of the order in court or by personal service, or 35 days after it is mailed to the party. FCA § 439(e). If objections are not filed, a party cannot appeal.

The Uniform Rules § 205.37 provide that an objecting party must cause the transcript of the proceeding to be prepared and to pay the cost. However, low-income clients may seek to have the cost of the transcript borne by the court system. Further, if the hearing was tape-recorded (rather than recorded by a stenographer), the judge will listen to the tape rather than require a transcript.

Objections must be served upon the opposing party, and proof of that service must be filed with the court along with the objections. FCA § 439(e); Uniform Rules § 205.37(d). The opposing party then has 13 days to serve and file a written rebuttal, with proof of service. FCA § 439(e). (Although the Family Court Act does not specify additional time to rebut when the objections are served by mail, the CPLR contemplates the addition of 5 days to any service deadline when service is by mail.)

Within 15 days after the rebuttal is filed (or should have been filed), the case shall be reviewed by a judge. The judge may do one of the following: deny the objections; make their own findings of fact and order (with or without holding another hearing); or remand some or all of the issues to the support magistrate. FCA § 439(e). The final order of support is in effect until the objections are decided. Pursuant to FCA § 439(e), a stay of the order shall not be granted.

After the objections have been reviewed and determined by a judge, the final order of the support magistrate may be appealed to the Appellate Division. FCA § 439(e).

COLLECTION AND ENFORCEMENT

A. Collecting the Child Support

The Support Collection Unit

Every person requesting a child support order must be given an opportunity to have the order made payable through the Child Support Enforcement Unit (CSEU), on the local level, known as the Support Collection Unit ("SCU"). A parent is required to submit an application to receive services, and to indicate whether they are declining such services.

The services the CSE unit provides include the establishment of paternity, child support, and medical support orders, as well as enforcement of those orders. Where there is an order of combined child support and spousal support, the services of the SCU may be used to collect the support. FCA § 440(b)(1). Note: If there is no child support, the SCU cannot be used to collect spousal support.

Annual service fee - Effective October 1, 2008, clients may be charged a $35.00 service fee once a year. The fee applies only to parents who have never received public assistance benefits and who have a case with more than $550 in support collected during the federal fiscal year (October 1–September 30 of the next year). The fee will continue to apply in each federal fiscal year.

A custodial parent receiving public assistance has assigned their support rights to the Department of Social Services. For these clients, SCU will begin the child support process, and child support collected is used to recoup public assistance expenditures.

SCU Income Execution

If the custodial parent is using the SCU services, the SCU shall issue an income execution immediately upon issuance of an order for child support or order for combined child and spousal support, and an execution for medical support enforcement. FCA § 440(1)(b)(1). SCU is required to issue an income execution unless:

- The support magistrate court finds and sets forth in writing that there is good cause not to require immediate income withholding, with "good cause" defined as "substantial harm to the debtor;" OR
- There is a written agreement between the parties setting forth some other arrangement (which may be in the form of an oral stipulation on the record, incorporated into a written agreement).

SCU Powers Upon Four or More Months of Child Support Arrears

If a non-custodial parent accrues four or more months of arrears in current child support, SCU has a whole array of remedies available for collection of the arrears:

- Interception of lottery winnings (SSL § 111-b(10))
- Interception of federal, state or city tax refunds (SSL §§ 111-b(8); (13)(a))
- Interception of unemployment insurance (SSL § 111-j)
- Imposition of a lien on real and personal property, including cars, boats, and motor homes (Lien Law § 65; SSL § 111-t)
- Forced sale of real or personal property (SSL § 111-t)
- Securing assets of the child support debtor, intercepting or seizing benefits such as settlements, bank accounts and retirement funds (SSL § 111-t)
- Suspension or revocation of licenses/permits (SSL § 111-b; FCA § 454(5)):

    Driver's license, permits or registrations

    Liquor license

    Teaching license

    Professional licenses

    Recreational licenses or permits

    Passport

Court-issued Income Deduction Order

Where a custodial parent is not using SCU services, the court must issue an income deduction order pursuant to CPLR § 5242(c), concurrent with the issuance of the final support order. FCA §§ 440(1)(b)(2), 448, 454. The court may decline to issue the income deduction order only where the court finds and sets forth in writing:

The reasons that there is good cause not to require immediate income withholding, where "good cause" is defined as "substantial harm to the debtor;" OR

That the parties have reached an alternative arrangement.

Attorney Income Execution

Pursuant to CPLR § 5241, an attorney may issue an income execution to levy upon the non-custodial parent's income, in order to collect the child support. "Income" includes any earned, unearned, taxable, or non-taxable income. CPLR § 5241(a)(6). For example, income may include salary, pension benefits, rental income, and periodic income from investments.

Note: A pro se litigant may request that a sheriff or court clerk issue an income execution. CPLR § 5241(a).

The procedure for issuing an income execution is set forth in CPLR § 5241. The employer must begin deduction within 14 days of service of the income execution upon the employer and must forward the support to the custodial parent within seven business days of the deduction from income. The maximum deduction is 50 percent of the debtor's net pay, and the permissible deduction increases depending on the amount of the arrears.

Qualified Domestic Relations Orders (QDRO)

A QDRO allows support creditors to reach pension assets. Where a spouse has defaulted on their support obligations, a QDRO, in lieu of an income execution or income deduction order pursuant to CPLR § 5241 and CPLR § 5242, may be used to enforce such orders. See York v. York, 751 N.Y.S.2d 417 (N.Y. App. Div. 2d Dept. 2002); Bumstead v. Raisbeck, 646 N.Y.S.2d 368 (N.Y. App. Div. 2d Dept. 1996); Keegan v. Keegan, 612 N.Y.S.2d 187 (N.Y. App. Div. 2d Dept. 1994); see also Renner v. Blatte, 650 N.Y.S.2d 943 (N.Y. Sup. Ct. N.Y. County 1996); Adler v. Adler, 638 N.Y.S.2d 29 (N.Y. App. Div. 1st Dept. 1996).

Qualified Domestic Relations Orders (QDROs) are an exception to ERISA provisions intending to protect qualified pension plan funds from creditors. See 29 USCA § 1056(d)(3)(d). The QDRO is drafted and proposed by the attorney, ordered by the Court, and filed with and implemented by the pension plan. See sample Qualified Domestic Relations Orders at Section II.

B. Filing and Litigating a Violation Petition

The Petition

Family Court enforcement petitions alleging that a Respondent violated a support order may seek remedies other than contempt. FCA § 453. Violation petitions seek remedies including contempt. FCA § 454. See sample Petition for Violation and Petition for Enforcement at Section II.

A hearing must be held to determine whether the respondent has failed to obey a lawful court order and to determine what enforcement remedy should be imposed. Procedure around support violation litigation is governed by Rule 205.43 of the New York Family Court rules. See 22 NYRR 205.43.

Regardless of the relief requested in the petition, the Court may use any or all of the powers conferred upon it by statute. FCA § 454(1)

Shifting Burdens of Proof

There are shifting burdens of proof in enforcement/violation proceedings. See Powers v. Powers, 629 N.Y.S.2d 984 (N.Y. 1995); Walsh v. Karamitis, 291 A.D.2d 749, 738 N.Y.S.2d 143 (N.Y. App. Div. 3d Dept. 2002).
To win an enforcement/violation hearing, the petitioner must first prove that there is a valid, unsatisfied support order and that the respondent had notice of the support proceeding, and the order. The non-payment of ordered support is prima facie evidence of a willful violation of an order of support. FCA §§ 454(3)(a), 455(5)).

Respondents are presumed to have sufficient means to pay support and must show competent, credible evidence of an inability to pay support. FCA § 437. Upon such a showing, the petitioner is given the opportunity to rebut respondent's claims.

To establish a prima facie case, establish:

- That a valid Order of Support was entered
- Jurisdiction over the Respondent had been obtained (service is not at issue)
- Respondent had knowledge of the Order and failed to pay
- No petitions to modify, lower, or suspend the Order of Support were granted
- Proof of arrears owed and the amount paid, if any, i.e., SCU A & R statement

Defenses

The Statute of Limitations for orders entered after August 1987 is 20 years. CPLR § 211(c). This defense does not apply to SCU's administrative enforcement of support orders.

Laches and waiver are affirmatives defenses. Respondents who frustrate collection should lose a defense of laches. Mere inaction in enforcing does not constitute waiver.
See Dox v. Tyson, 659 N.Y.S.2d 231 (N.Y. 1997).

In response to a petitioner's action seeking enforcement, many respondents, besides denying the allegations, file a parallel petition to modify the underlying order of support. The Court must consider respondent's alleged changed circumstances. However, the modification can be prospective only, as arrears can be reduced or cancelled only in relation to spousal support and only if the respondent can show good cause for not having made an earlier application for modification.

The failure to obey an order of support is considered to require an ability to pay the support so ordered. As such, the inability to pay is a defense to a claim that the respondent failed to pay a lawful court order as well as willfully violated a court order.

To negate a Respondent's Inability to Pay defense, offer proof that Respondent:

- had assets or income when order was in effect
- paid other debts and failed to prioritize support

- failed to seek employment
- lacks credibility
- failed to attempt to modify the order, or lost a modification petition

Relief Available

Pursuant to FCA § 454 (2), upon a finding of a failure to pay support, despite the ability to pay support, the Court:

- **Shall** order a money judgment providing for interest on arrears. FCA §§ 454(2)(a), 460.
- May make an income deduction order for support enforcement. FCA § 448 & CPLR § 5242.
- May require the posting of an undertaking. FCA §§ 432, 454(2)(c), 471.
- May order the sequestration of real or personal property. FCA §§ 429, 454(2)(d), 457.
- May order the suspension of professional, business, and motor vehicle licenses of support debtors. FCA §§ 458-a, 458-b, 458-c.
- May require the respondent, if the persons for whom the respondent has failed to pay support are applicants for or recipients of public assistance, to participate in work activities as defined in title 9-B of the SSL (Support Through Employment Program (STEP) is the current program in effect in NYC Family Court).

Pursuant to FCA § 460 and DRL § 244, the entry of a money judgment for arrears will be mandatory if the respondent cannot show good cause for failure to make a prior application for relief. The court must direct entry of a judgment for arrears of child support. The money judgment shall provide for the payment of interest on the amount of any arrears if the default was willful, at the prevailing rate of 9% per year CPLR § 5004. Any child support arrears that have accrued under a judgment or order prior to the making of an application for modification are not subject to modification or annulment. FCA § 451 and DRL § 236(B)(9)(b)

A money judgment can be enforced against any assignable or transferable real or personal property, including present and future rights or interests, vested or not. See CPLR § 5201(b).

The entry of a judgment does not preclude the use of other enforcement remedies, such as an income deduction order, sequestration, or an undertaking. FCA §§ 454(2), 460(3).

Docketing a Money Judgment and Creating a Lien

A money judgment becomes a lien against the debtor's interest in real property when docketed with the County Clerk in the county where the property is located. Once

docketed, the judgment is effective for ten years without any further action by the creditor and can be extended thereafter. These liens affect the alienability of property and are usually satisfied when the property is sold, without the need for further action of the creditor.

See FCA § 460(2) regarding the docketing of a Family Court-issued money judgment.

Willfulness and Incarceration

Where the court finds that Respondent has willfully failed to obey any lawful order of support, per FCA § 454(3) the court:

- Shall order respondent to pay counsel fees to the attorney representing petitioner; and, in addition to or in lieu of any or all of the powers conferred in FCA § 454(2) or any other section of law;
- May order incarceration for the willful violation of orders of support, for a term not to exceed six months FCA § 454(3)(a);
- May require compliance with rehabilitative programs, i.e., job training, alcohol/substance.
- May place a debtor on probation. See FCA 456.

At a willfulness hearing, the respondent shall have a right to counsel. See FCA § 262(a)(vi).

The facts and circumstances constituting the reasons for its determination must be set forth in a written memorandum of decision. FCA § 454(4)

Upon a finding of willfulness, the Court may sentence respondent to up to six months in jail, subject to purging by paying. The Court has wide discretion over the length and nature of the commitment. The Court can select any remedy or combination of remedies calculated to inspire the Respondent's compliance.

Where a person has income or assets, incarceration can serve as the catalyst needed for them to pay their support.

As the respondent cannot work if incarcerated full-time, the court may suspend the sentence so long as an arrangement for payments is made and view commitment as a remedy of last resort.

Willfulness must be established by competent proof and clear and convincing evidence. See FCA § 454(1). Consider:

- The amount of arrears owed & amount of support paid
- Whether respondent was on public assistance at the time order was in effect
- Whether respondent was in court when the order of support was entered and whether he ever appeared

- Whether respondent attempted to modify the order, and whether they failed to pay support after winning/losing modification
- Failure to complete work program

Sometimes it is best to simply seek enforcement and waive, or not request, willfulness, for example, when:

- When the order is being paid or enforced, but arrears should be established
- When a money judgment is sought so arrears will accrue or a lien can be placed on a respondent's property
- When it is believed that court activity will increase payments on an order otherwise not enforceable
- When seeking court-ordered relief, such as the suspension of a license

Willfulness Hearing: Questioning a Respondent

The attorney wants to show that respondent had income during the time period the order was in effect, but respondent paid other expenses, thus failing to prioritize paying support. The following lines of questioning should be covered:

- Income and work history, education, skills
    - Where working
    - How long
    - Hours and salary
    - Any other sources of income
    - Experience, earning potential
    - Previous employment and reasons for change in employment
    - Previous payment of child support while working
- Efforts to seek employment
    - Medical conditions preventing respondent from working
    - Applications for disability benefits
    - Efforts to find a job
- Assets
    - Savings/checking accounts
    - Real property
    - Cars, when purchased/ year, make/monthly payment
    - debt repayment-mortgage, credit cards
    - deferred income/pension and voluntary contributions
- Expenses and Lifestyle
    - Rent/mortgage/cable/phone
    - Credit cards
    - Imputed income-expenses/gifts paid by friend, family, business
    - If respondent has ever filed a petition to lower or suspend order of support

MODIFICATION OF A FINAL ORDER

Petition for Modification

Either party may file a petition to modify, set aside or vacate the child support order. The modification petition must include an affidavit and other evidentiary material (such as a certified copy of the original order) sufficient to establish a prima facie case. FCA § 451.

Pursuant to FCA § 451 (2)(a), DRL 236B (9)(b)(2)(i), and FCA § 451 (2) (b), the party petitioning for a modification must allege one of the following provisions:

1) A showing of substantial change in circumstances sufficient to warrant modification; **OR**

2) Three years have passed since the order was entered, last modified, or adjusted; **OR**

3) There has been a change in either party's gross income by fifteen percent (15%) or more since the order was entered, last modified, or adjusted.

Note, as to provision 1, the court may modify an order of child support including an order incorporating without merging an agreement or stipulation of the parties. As to provisions 2 and 3, this court may modify a child support order unless the parties have specifically opted out of these provisions in a validly executed agreement or stipulation.

An attorney drafting a modification petition should be thorough and specific in the allegations.

A modification petition may be brought based on newly discovered evidence, such as where either party failed to accurately present their income and expenses, to increase support payments nunc pro tunc (retroactively) as of the date of the original application. FCA § 451.

The most common type of modification request is for upward or downward adjustment of the support, which must be based on a change of circumstances. The change of circumstances will be measured from the date of the original child support order, or most recent modification. The two factors most likely to arise and to be considered in a modification petition are:

Increase or decrease in either party's income; and

Increase or decrease in the child's needs.

In preparing for a hearing on a modification proceeding, identify each and every fact that the petitioner needs to show in order to prevail. Consider the types of proof and testimony which will establish the elements of the claim.

A custodial parent may file a petition for an upward modification where, for example:

Child's needs have increased.

The original award was minimal and did not meet the child's needs, and respondent now has the ability to pay enough to meet the child's needs.

There has been a significant increase in the cost-of-living.

Non-custodial parent's income has increased and child's needs are not being met.

In a modification proceeding, a petitioner may not rely upon conclusory or mundane allegations ("child needs the expensive sneakers"). The petitioner must establish that the change in circumstances has been substantial or that the child's needs are not being met.

Some common circumstances in which a non-custodial parent petitions for downward modification include:

Loss of a Job or Income

Mere loss of employment, demotion, or a decrease in salary or hours does not itself constitute a substantial change of circumstances. The support magistrate usually will look at a variety of factors; for example, the non-custodial parent's assets and resources, whether the job can be replaced, and whether the non-custodial parent has exercised best efforts in trying to replace the job.

If a downward modification is granted based on loss of a job or income, petitioner should request that the order be automatically reinstated after a certain time period (e.g., six months) or upon respondent's re-employment. Petitioner should also request that the respondent be required to notify petitioner when they have secured employment.

A New Family to Support

The fact that the non-custodial parent has expenses related to a "new" or second family will not usually be considered sufficient to downwardly modify a child support order. If the non-custodial parent has a second family, the custodial parent may be able to establish that the non-custodial parent actually has increased resources.

Denial of Visitation

If the non-custodial parent moves for a downward modification of child support based on alleged denial of visitation, the case must be referred to a Family Court judge (because support magistrates are not empowered to hear issues of visitation). If a judge determines that the custodial parent is *wrongfully* interfering with visitation, child support may be suspended prospectively. DRL § 241. Arrears may not be canceled.

Incarceration

If the non-custodial parent becomes incarcerated, they may seek a downward modification. Incarceration is not considered voluntary unemployment and is not by itself a bar to finding of a substantial change of circumstances "provided such incarceration is not the result of non-payment of a child support order, or an offense against the custodial parent or child who is the subject of the order or judgment." FCA § 451(3)(a).

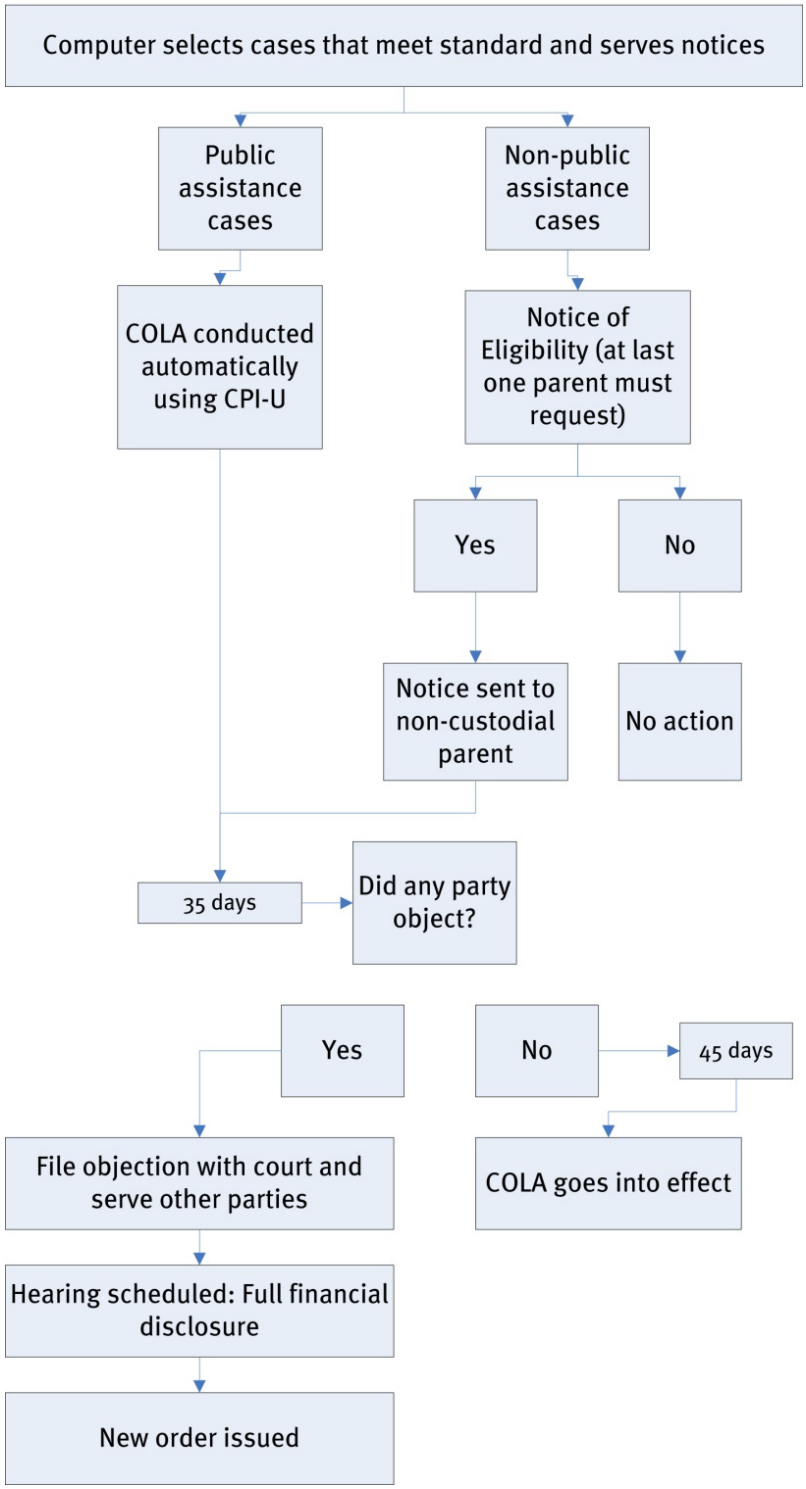
Automatic Cost-of-Living Adjustment

SCU has the authority to increase the amount of child support payable under a court order, to reflect cost of living adjustments ("COLA"), without the necessity of a court proceeding. SSL § 111-n; FCA § 413-a.

The review and adjustment process may occur at the request of either party (unless the family receives public assistance, in which case adjustment occurs automatically). FCA § 413-a. The cost-of-living increase may be imposed every two years, where the COLA has increased by at least 10 percent or at such time thereafter that the COLA meets the 10 percent threshold. The SCU may impose the increase without prior judicial approval. The new order will be forwarded to the court and appended to the prior order.

A person has 35 days to file an objection to a child support order which was issued under the review and adjustment process. Where an objection is filed, the court must hold a hearing to determine the amount of child support which would currently be required under the Child Support Standards Act. Some non-custodial parents do not file objections because, depending on the non-custodial parent's current income (as compared to their income at the time the original order was entered), the amount determined under the CSSA may be even more than the amount determined under a cost-of-living formula.

New York COLA Process



NOTARY PUBLIC LAW UPDATE, FAMILY COURT FORMS, AND E-FILING

Notary Public Law and Family Court Forms

Governor Hochul signed legislation to amend NY CPLR sec. 2106 to expand the use of an "Affirmation of Truth of Statement" in lieu of a notarized sworn statement in civil court actions in New York. This law became effective Jan. 1, 2024 to all actions pending on or commenced after that date.

From that date forward, in place of notarization on any affidavit in a civil action, the client (and any third-party affiants) may instead sign the following statement at the end of the document:

I affirm this ___ day of _____, ____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law. [signature of affiant]

While affirmations instead of affidavits are now an option for many court documents, **we do consider it best practice to continue to notarize documents except where it creates hardship to the client or in an urgent situation** (such as filing an emergency application to the court). As always, please reach out to your Her Justice mentor for guidance in a particular case.

The updated forms with the affirmation language can be found on the New York Unified Court System Website. https://ww2.nycourts.gov/forms/familycourt/index.shtml

E-Filing

The NY Family Court have begun to make use of the e-filing system NYSCEF, located at: https://iapps.courts.state.ny.us/nyscef/HomePage. However, as of March 2024, e-filing is only available in a limited number of family courts. In NYC e-filing is only available in New York (Manhattan), Queens, and Richmond (Staten Island) counties. Your supervising attorney or managing clerk/attorney at your firm may have a preference as to whether you e-file or paper file, so you should consult with them. In addition, there are certain requirements to e-filing when the other party is unrepresented, and rules covering when a case was commenced "on paper" vs. e-filing, so you should also speak to your mentor about the pros and cons of e-filing if you have a choice.

The NYC Family Courts also make use of the Electronic Document Delivery System (EDDS), located at: https://iapps.courts.state.ny.us/nyscef/SpecialDocumentTransferHome?id=1. This

is a system designed for electronic delivery of documents to family court clerks' offices as well as individual judges, referees, and magistrates. EDDS is technically not a filing system, though the family courts which do not have use of NYSCEF sometimes allow filing via EDDS.

SECTION 3 – SAMPLE DOCUMENTS

HER JUSTICE

SECTION 3: SAMPLE DOCUMENTS

A. Cover Page and TOC
B. Notice on Sample Language
C. Notice of Appearance
D. Petition for Support
E. Petition for Violation
F. Motion for Leave to Amend
G. Notice of Discovery and Inspection
H. Interrogatories
I. Judicial Subpoenas
J. Subpoena Duces Tecum on Bank
K. Subpoena Duces Tecum on Employer
L. Business Records Certification
M. Authorization and Release
N. Motion to Dismiss
O. Motion to Compel and Preclude
P. Motion to Compel, Preclude, and Resolve
Q. Stipulation Regarding Child Support
R. Post Hearing Brief Needs of the Child
S. Post Hearing Brief Willfulness
T. Objections to Order of Support
U. Rebuttal to Objections

NOTICE ON SAMPLE LANGUAGE

Her Justice acknowledges that anyone of any race, age, sexual orientation, gender identity, nationality, religion, socioeconomic background, immigration status, language of fluency, or education level may be victimized by domestic violence[1]. Therefore, we made our materials gender neutral in their discussion of domestic violence, best legal practices, and explanations of the substantive law and practical application of the law. Please note, per standard legal practice, we do not make language edits to direct quotes of legal statute.

However, when it came to our samples, we had to consider additional factors. Court room professionals commonly do not acknowledge the gender pronouns or the chosen name of LGBTQ+ people in the court room. In fact, a Lamba Legal survey of 2,376 LGBTQ+ people found that 19% of the survey respondents who had appeared in a court at any time in the past five years had heard a judge, attorney, or other court employee make negative comments about their sexual orientation, gender identity, or gender expression[2]. The blatant homophobia and transphobia in the court room may result in a client being unfairly scrutinized for gender neutral pronouns being left in court submitted documents. Therefore, we made the decision to use gender neutral names but not gendered pronouns in our samples.

The language used in affidavits, motions, orders, etc. submitted on behalf of your client should reflect the gender pronouns and name they identify with. We encourage you to advocate for your client by affirming their gender identity and sexual orientation in and outside of the court to the extent the client feels comfortable.

[1] United Nations (2023) "What is Domestic Abuse? United Nations. https://www.un.org/en/coronavirus/what-is-domestic-abuse

[2] as cited in Meyer, E. (2021). Top 7 Best Practices for Representing Transgender and Nonbinary Pro Bono Clients. Proskauer for Good. Proskauer.

Notice of Appearance

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----------X

Docket No.: F-11111-18

In the Matter of a Support Proceeding

File No. 222222

PETITIONER NAME,

Petitioner,

NOTICE OF APPEARANCE

- against -

RESPONDENT NAME,

Respondent.

----------X

PLEASE TAKE NOTICE that Her Justice hereby appears as attorney for Petitioner, PETITIONER NAME, in the above-entitled action and demands that all papers in this action be served upon the undersigned at the address stated below.

Dated: March 31, 2020
New York, New York

_____

Advocate Attorney Esq.
Her Justice
100 Broadway, 10th Floor
New York, New York 10005
212-695-9500

TO: OPPOSING COUNSEL NAME
555 Lincoln Avenue, Suite 500
White Plains, New York 10555
Attorney For Respondent
516-555-5555

Petition for Child/Spousal Support

S.S.L'' 111-g; F.C.A; 416, 421, 422,

423; CPLR 5242

Form 4-3

(Support Petition Individual) 10/2012

[**NOTE**: Personal Information Form 4-5/5-1-d, containing social security numbers of parties and dependents, must be filed with this Petition]

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF
.....
In the Matter of a Proceeding for Support
Under Article 4 of the Family Court Act

Docket No.

Petitioner,

-against-

SUPPORT PETITION (Individual)

Respondent.
.....

TO THE FAMILY COURT:

The undersigned Petitioner respectfully alleges that:

1. a. I reside at [specify]:[1]
   b. Respondent resides at [specify]:[2]

2. I am authorized to originate this proceeding because [check applicable box(es)]:

   - ☐ Respondent and I were married at on
   - ☐ Respondent and I have the child(ren) named below in common
   - ☐ Other [specify Petitioner's relationship to child(ren)]:

3. Respondent is chargeable with the support of the following spouse and dependent(s):

[1] Unless the Court has ordered the address to be confidential on the ground that disclosure would pose an unreasonable health or safety risk. *See* Family Court Act '154-b; Form 21 (available at www.nycourts.gov).
[2] Unless the Court has ordered the address to be confidential on the ground that disclosure would pose an unreasonable health or safety risk. *See* Family Court Act '154-b; Form 21 (available at www.nycourts.gov).

NAME	**DATE OF BIRTH**
SPOUSE:	
CHILD(REN):	

4. [Check applicable box(es); if children have different fathers, include separate paragraphs]:

- ☐ The father of the of the above-named child(ren) is [specify]: .
- ☐ The father was married to the child(ren)'s mother at the time of the conception or birth.
- ☐ An order of filiation was made on [specify date and court and attach true copy]:
- ☐ An acknowledgment of paternity was signed on [specify date]: by [specify who signed and attach a true copy]:
- ☐ The father is deceased.
- ☐ The father of the below-named child(ren) has not been legally established.
- ☐ A paternity agreement or compromise was approved by the Family Court of [specify county]: County on , , concerning [name parties to agreement or compromise and child(ren)]: . A true copy of the agreement or compromise is attached.

5. [Applicable to cases in which is not a party]: The name and address of the is [indicate if deceased or if address ordered to be kept confidential pursuant to Family Court Act '154-b(2) or Domestic Relations Law '254]:

6. [Check applicable box(es); if not applicable, SKIP to &7]:

Respondent has an

employer income payor, as defined in Civil Practice Law and Rules 5241(a), whose address is [specify]: , as a source of income.

7. [Check applicable box]:

- ☐ I have applied for child support services with the local Department of Social Services.
- ☐ I am now requesting child support services by the filing of this Petition.[3]
- ☐ I have continued to receive child support services after the public assistance or care case has closed.

[3] Pursuant to Section 111-g of the Social Services Law, signing this petition is deemed to be an application for child support enforcement services.

- ☐ I do not wish to make application for child support services.
- ☐ I am not eligible for child support enforcement services). [Petitioners seeking only spousal support are ineligible.]

8. Respondent had did not have a prior order of support that was payable through the Support Collection Unit.

9.No previous application has been made to any judge or court, including a Native American tribunal, or is presently pending before any judge or court, for the relief requested in this petition (except

WHEREFORE, I am requesting that this Court issue an order of support directing Respondent to pay fair and reasonable support, that Respondent be required to exercise the option of additional coverage for health insurance in favor of (his) (her) spouse and above-named child(ren), and for such other and further relief as the law provides.

NOTE: (1) A COURT ORDER OF SUPPORT RESULTING FROM A PROCEEDING COMMENCED BY THIS APPLICATION (PETITION) SHALL BE ADJUSTED BY THE APPLICATION OF A COST OF LIVING ADJUSTMENT AT THE DIRECTION OF THE SUPPORT COLLECTION UNIT NO EARLIER THAN TWENTY-FOUR MONTHS AFTER SUCH ORDER IS ISSUED, LAST MODIFIED OR LAST ADJUSTED, UPON THE REQUEST OF ANY PARTY TO THE ORDER OR PURSUANT TO PARAGRAPH (2) BELOW. SUCH COST OF LIVING ADJUSTMENT SHALL BE ON NOTICE TO BOTH PARTIES WHO, IF THEY OBJECT TO THE COST OF LIVING ADJUSTMENT, SHALL HAVE THE RIGHT TO BE HEARD BY THE COURT AND TO PRESENT EVIDENCE WHICH THE COURT WILL CONSIDER IN ADJUSTING THE CHILD SUPPORT ORDER IN ACCORDANCE WITH SECTION FOUR HUNDRED THIRTEEN OF THE FAMILY COURT ACT, KNOWN AS THE CHILD SUPPORT STANDARDS ACT.

(2) A PARTY SEEKING SUPPORT FOR ANY CHILD(REN) RECEIVING FAMILY ASSISTANCE SHALL HAVE A CHILD SUPPORT ORDER REVIEWED AND ADJUSTED AT THE DIRECTION OF THE SUPPORT COLLECTION UNIT NO EARLIER THAN TWENTY-FOUR MONTHS AFTER SUCH ORDER IS ISSUED, LAST MODIFIED OR LAST ADJUSTED BY THE SUPPORT COLLECTION UNIT, WITHOUT FURTHER APPLICATION BY ANY PARTY. ALL PARTIES WILL RECEIVE A COPY OF THE ADJUSTED ORDER.

(3) WHERE ANY PARTY FAILS TO PROVIDE, AND UPDATE UPON ANY CHANGE, THE SUPPORT COLLECTION UNIT WITH A CURRENT ADDRESS, AS REQUIRED BY SECTION FOUR HUNDRED FORTY-THREE OF THE FAMILY COURT ACT, TO WHICH AN ADJUSTED ORDER CAN BE SENT, THE

SUPPORT OBLIGATION AMOUNT CONTAINED THEREIN SHALL BECOME DUE AND OWING ON THE DATE THE FIRST PAYMENT IS DUE UNDER THE TERMS OF THE ORDER OF SUPPORT WHICH WAS REVIEWED AND ADJUSTED OCCURRING ON OR AFTER THE EFFECTIVE DATE OF THE ADJUSTED ORDER, REGARDLESS OF WHETHER OR NOT THE PARTY HAS RECEIVED A COPY OF THE ADJUSTED ORDER.

Dated:

_____

Petitioner

_____

Print or type name

_____

Signature of Attorney, if any

_____

Attorney's Name (Print or Type)

_____

_____

_____

Attorney's Address and Telephone Number

Petition for Violation

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

----------x

File No. 12345
Docket No. F-12345-16/19A

PETITIONER NAME,

Petitioner,

-against-

PETITION FOR VIOLATION OF SUPPORT AND FOR ENFORCEMENT OF AN ORDER OF SUPPORT

RESPONDENT NAME,

Respondent.

----------x

WARNING: THE PURPOSE OF THE HEARING REQUESTED IN THIS PETITION IS TO PUNISH FATHER FOR CONTEMPT OF COURT, WHICH MAY INCLUDE SANCTIONS OF A FINE OR IMPRISONMENT OR BOTH. YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT.

TO THE FAMILY COURT:

The Petitioner respectfully alleges that:

1. Petitioner, PETITIONER NAME, an individual, is the mother of the children and resides at ADDRESS. Respondent, RESPONDENT NAME, resides at ADDRESS.

2. Petitioner was the Petitioner in an action brought in the Family Court of the State of New York, Bronx County titled PETITIONER NAME v. RESPONDENT NAME, Index No. F-12345-16, and Respondent was the Respondent in the action.

3. The names and dates of birth of the children involved are:

NAME	DATE OF BIRTH
CHILD 1	DOB
CHILD 2	DOB

4. In Appendix A to her Findings of Fact, dated September 21, 2016, SUPPORT MAGISTRATE found that Respondent had an annual income of $77,639.32 from his employment with EMPLOYER. By order of this Court, dated October 15, 2016, Respondent was ordered to pay for the support of the above-named children and was directed to pay the sum of $693 bi-weekly to Petitioner through the Support Collection Unit. A true copy of the Order is attached and made part of this petition.

5. On December 3, 2016, Respondent's attorney filed an objection to the Order of Support. On January 21, 2011, pursuant to the Family Court Act §439(e), this Court dismissed the objection as untimely, as the filing occurred more than thirty-five days after the mailing of the order to the parties.

6. Under the terms of the order, the Family Court of the State of New York, Bronx County has retained exclusive jurisdiction to modify the order.

7. Upon information and belief, Respondent has failed to obey the order of this Court by failing to make the ordered payments to Petitioner. As of May 31, 2019, Respondent owed arrears totaling $15,697.75 for child support. Petitioner reserves the right to amend this Petition to include any additional arrears which shall have accrued from the commencement of this proceeding up to the date of the hearing or disposition.

8. Respondent's failure to comply was willful.

9. Petitioner is now requesting child support services by the filing of this Petition.[1]

10. Respondent had a prior Order of Support that was payable through the Support Collection Unit.

11. No previous application has been made to any judge or court, including a Native American tribunal, or is presently pending before any judge or court, for the relief requested in this petition.

WHEREFORE, Petitioner requests that the Respondent be dealt with in accordance with Article 4 of the Family Court Act, and Petitioner requests an order granting Petitioner relief as set forth in Section 454 and 458-a, 458-b of the Family Court Act and Section 5242 of the Civil Practice Law and Rules, together with such other or further relief as the Court may deem just and proper.

NOTE:[2] (1) A COURT ORDER OF SUPPORT RESULTING FROM A PROCEEDING COMMENCED BY THIS APPLICATION (PETITION) SHALL BE ADJUSTED BY THE APPLICATION OF A COST OF LIVING ADJUSTMENT AT THE DIRECTION OF THE SUPPORT COLLECTION UNIT NO EARLIER THAN TWENTY-FOUR MONTHS AFTER SUCH ORDER IS ISSUED, LAST MODIFIED OR LAST ADJUSTED, UPON THE REQUEST OF ANY PARTY TO THE ORDER OR PURSUANT TO PARAGRAPH (2) BELOW. SUCH COST OF LIVING ADJUSTMENT SHALL BE ON NOTICE TO BOTH PARTIES WHO, IF THEY OBJECT TO

[1] Pursuant to Section 111-g of the Social Services Law, signing this petition is deemed to be an application for child support enforcement services.

[2] Not applicable to out-of-state orders entered in New York State for enforcement purposes only.

THE COST OF LIVING ADJUSTMENT, SHALL HAVE THE RIGHT TO BE HEARD BY THE COURT AND TO PRESENT EVIDENCE WHICH THE COURT WILL CONSIDER IN ADJUSTING THE CHILD SUPPORT ORDER IN ACCORDANCE WITH SECTION FOUR HUNDRED THIRTEEN OF THE FAMILY COURT ACT, KNOWN AS THE CHILD SUPPORT STANDARDS ACT.

(2) A PARTY SEEKING SUPPORT FOR ANY CHILD(REN) RECEIVING FAMILY ASSISTANCE SHALL HAVE A CHILD SUPPORT ORDER REVIEWED AND ADJUSTED AT THE DIRECTION OF THE SUPPORT COLLECTION UNIT NO EARLIER THAN TWENTY-FOUR MONTHS AFTER SUCH ORDER IS ISSUED, LAST MODIFIED OR LAST ADJUSTED BY THE SUPPORT COLLECTION UNIT, WITHOUT FURTHER APPLICATION BY ANY PARTY. ALL PARTIES WILL RECEIVE A COPY OF THE ADJUSTED ORDER.

(3) WHERE ANY PARTY FAILS TO PROVIDE, AND UPDATE UPON ANY CHANGE, THE SUPPORT COLLECTION UNIT WITH A CURRENT ADDRESS TO WHICH AN ADJUSTED ORDER CAN BE SENT AS REQUIRED BY SECTION 443 OF THE FAMILY COURT ACT, THE SUPPORT OBLIGATION AMOUNT CONTAINED THEREIN SHALL BECOME DUE AND OWING ON THE DATE THE FIRST PAYMENT IS DUE UNDER THE TERMS OF THE ORDER OF SUPPORT WHICH WAS REVIEWED AND ADJUSTED OCCURRING ON OR AFTER THE EFFECTIVE DATE OF THE ADJUSTED ORDER, REGARDLESS OF WHETHER OR NOT THE PARTY HAS RECEIVED A COPY OF THE ADJUSTED ORDER.

Dated: New York, New York
June 14, 2019

FIRM
Attorneys for Petitioner

By:

_____

ATTORNEY, Esq.
FIRM ADDRESS
FIRM PHONE NUMBER

_____

Petitioner

Motion for Leave to Amend

PRESENT: HON. SUPPORT MAGISTRATE

At a Term of the Family Court of the State of New York, held in and for the County of New York at the Courthouse located at 60 Lafayette Street, in the Borough of New York on the 10th day of April 2019

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X File No. 5555555

JAY DOE, Docket No.: F-12345-19

Petitioner,

ORDER TO SHOW CAUSE FOR LEAVE TO AMEND THE PETITION FOR SUPPORT

JO DOE,

Respondent.

----------X

Upon the annexed Affirmation of ATTORNEY, Esq., dated April 9, 2019, and the exhibits annexed thereto, and upon all prior papers and proceedings filed and had herein:

LET the Respondent show cause before this Court at a Special Term, to be held before Honorable SUPPORT MAGISTRATE, at the New York County Family Court, 60 Lafayette

Street, New York, NY 10013 at ____am on _____, 2019, why an order pursuant to Civil Practice Law and Rules, Rule 3025, should not be entered in this action:

(a) granting Petitioner leave to file an Amended Petition for Child and Spousal Support, a copy of which is annexed as Exhibit A,

(b) granting Petitioner leave to serve the Amended Petition on Respondent by first class mail to: ADDRESS; and

(c) for such other and further relief as this court deems just and proper; further,

LET SERVICE of a copy of this order and the papers upon which it is based by Federal Express overnight or first-class mail to Respondent on or before _____, 2019 be deemed good and sufficient service thereof.

DATED: _____ 2019

_____

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X File No.: 55555

JAY DOE, Docket No.: F-12345-19

Petitioner, **AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO AMEND THE PETITION FOR SUPPORT**

JO DOE,

Respondent.

----------X

ADVOCATE ATTORNEY, Esq., an attorney duly admitted to practice before the Courts of the State of New York, affirms under the penalties of perjury that:

1. I am an associate at {INSERT FIRM NAME} and I make this Affirmation in support of Petitioner's motion for leave to amend, pursuant to Civil Practice Law and Rules, Rule 3025, the Petition for Support dated February 8, 2019 ("February 8, 2019 Petition"). (A copy of the proposed Amended Petition is annexed hereto as Exhibit A). I am familiar with the facts and circumstances of the instant matter from my conversations with the Petitioner and my review of the relevant documentation. Unless otherwise indicated, all statements made herein are based upon information and belief.

2. ADVOCATE ATTORNEY was retained as attorney for Petitioner on [date retainer was signed].

3. Petitioner is not a native English speaker.

4. The Petitioner prepared the February 8, 2019 Petition without benefit of my legal advice and, consequently, was not aware that she should specifically seek spousal support in addition to child support.

5. The Respondent has been served in this case and has appeared.

6. Pursuant to C.P.L.R. § 3025, "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court . . .Leave shall be freely given upon such terms as may be just . . ."

7. After having met with Petitioner to prepare for this hearing I assessed that the February 8, 2019 petition failed to set forth additional facts and/or causes of action necessary to adjudicate this case.

8. Respondent will not be prejudiced by the granting of this motion, as the case has not significantly advanced, and he will still have adequate notice and an opportunity to be heard on the spousal support claim.

WHEREFORE, Petitioner respectfully requests that the court grant Petitioner leave to file and serve an Amended Petition for Support, and for such and other relief as this Court deems just and proper.

Dated: April 9, 2019

FIRM

_____

ATTORNEY

Attorney for Petitioner
FIRM ADDRESS
FIRM PHONE NUMBER

FIRM FAX NUMBER

Notice of Discovery and Inspection

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

_____x

In the Matter of a Support Proceeding

File No. 55555

Docket No.: F-5226611-19

JAY DOE,

Petitioner

NOTICE OF DISCOVERY AND INSPECTION[1]

-against-

JO DOE,

Respondent.

_____x

PLEASE TAKE NOTICE that, pursuant to CPLR 3120(a), Petitioner, JAY DOE, is hereby required to produce and permit discovery of the following documents and things for inspection and copying at the offices of {INSERT FIRM NAME}, counsel for Respondent, JO DOE, 70 West 36th Street, Suite 903, New York, NY 10018, within twenty (20) days of the service of these demands.

DEFINITIONS

PLEASE TAKE FURTHER NOTICE that, as used herein, the following terms shall have the meaning, and be interpreted, as set forth below:

1. "JO DOE" means Respondent
2. "JAY DOE" "you" or "your" means Petitioner

[1] This sample is intentionally inclusive of many different situations that might apply to your case. You should not copy and serve this sample wholesale; rather, you should tailor it to seek only documents that specifically relate to your theory of the case.

3. "Communication" means the transmittal of information in the form of facts, ideas, inquiries or otherwise.

4. "Documents" includes writings, drawings, graphs, charts, photographs, phone records, and other electronic or computerized data compilations from which information can be obtained or translated, if necessary, by Petitioner through detection devices into reasonably usable form. A draft or non-identical copy is a separate document within the meaning of this term.

5. "Things" means all categories of tangible objects not included within the definition of "documents."

6. "Identify", when referring to a person, means to give, to the extent known, the person's full name, present or last known address and when referring to a natural person, additionally, the present or last known place of employment. Once a person has been identified in accordance with this subparagraph, only the name of that person need be listed in response to subsequent discovery requesting the identification of that person.

7. "Identify", when referring to documents, means to give, to the extent known, the (i) type of document; (ii) general subject matter; (iii) date of document; and (iv) author(s), addressee(s), and recipient(s).

8. "Person" or "Persons" means any natural person or any business, legal, or governmental entity or association.

9. "Concerning" means in whole or in part constituting, containing, referring, embodying, reflecting, describing, analyzing, identifying, stating, dealing with, or in any way pertaining to.

10. The terms "all" and "each" shall be construed as all and each.

11. The connectives "and" and "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of the discovery request all responses that might otherwise be construed to be outside of its scope.

12. The use of the singular form of any word includes the plural and vice versa.

INSTRUCTIONS

PLEASE TAKE FURTHER NOTICE of the following:

A. Where a claim of privilege is asserted in objecting to these requests, Petitioner shall identify the nature of the privilege (including work product) which is being claimed, and the following information shall be provided in the objection: (a) the type of document, e.g., letter or memorandum; (b) the general subject matter of the document; (c) the date of the document; (d) the author(s) of the document; (e) the addressee(s) of the document; (f) the recipients) of the document; and (g) where not apparent, the relationship of the author(s), addressee(s) and recipient(s) to each other.

B. If Petitioner objects to any of the requests herein, Petitioner shall state the specific grounds asserted for objecting and not producing the document or tangible thing, and to identify each such item by its nature. Furthermore, Petitioner shall identify, to the extent possible, those documents or things that Petitioner will produce notwithstanding his objection.

C. In the event that any of these requests calls for a document that has been lost or destroyed, or for information contained in such-a document, such document is to be identified by Petitioner by stating the following: (a) the type of document, e.g., letter or memorandum; (b) the general subject matter of the document; (c) the date of the document; (d) the authors) of the document; (e) the addressee(s) of the document; (f) the recipient(s) of the document; (g)where not apparent, the relationship of the author(s), addressee(s) and recipients) to each other; (h) the custodian(s) of the document or person(s) otherwise responsible for the document's safekeeping, storage or filing; (i) the date the document was lost or destroyed; and (j) the circumstances surrounding the loss of the document and, if the document was destroyed, the reason for the circumstances surrounding its destruction.

D. These requests are continuing in character. If, after producing the requested documents, Petitioner obtains or becomes aware of any further documents responsive to these

requests, Petitioner is required to produce to Respondent such additional documents. Respondent reserves the right to propound additional requests.

E. Unless otherwise indicated in a particular request, the time period covered by these requests covers from May 31, 2016, to the present.

REQUESTS FOR DOCUMENTS

1. All documents and things relating to all savings, money market, or certificate of deposit accounts, domestic or foreign, in Petitioner's name, individually, jointly with Respondent, or otherwise in conjunction with any other person or persons, whether said accounts are current or closed.

2. All documents and things relating to any checking accounts, domestic or foreign, in Petitioner's name, individually, jointly with Respondent, or otherwise in conjunction with any other person or persons, whether said accounts are current or closed, including without limitation, statements, checkbook stubs, deposit slips, canceled checks, or memoranda.

3. All documents and things relating to any brokerage, mutual fund, or custodian account in Petitioner's name, individually, jointly with Respondent, or otherwise in conjunction with any other person or persons, whether said accounts are current or closed.

4. All documents and things relating to stock certificates, bonds or other securities or investments of any kind, including without limitation, interests in real estate, partnerships or joint ventures, account in Petitioner's name, individually, jointly with Respondent, or otherwise in conjunction with any other person or persons, in any corporation, partnership or enterprise of any kind, domestic or foreign, or issued by the federal government or by any state, municipal or other governmental agency.

5. Copies of federal, state, and local income tax returns, together with the schedules and worksheets thereof, and all documents referring to any tax return and/or estimated tax payment made and/or filed by Petitioner, individually, or jointly with Respondent.

6. All documents and things concerning all insurance policies covering or owned by Petitioner, individually, through their employment, or in conjunction with any other person or persons, including, but not limited to, life, theft, floater, hazard, liability, health, accident, automobile, and homeowner's insurance.

7. Copies of all invoices for and/or appraisals of personal property, real property, or both, including, but not limited to, jewelry, art, antiques, vehicles, furnishings, and real estate owned in whole or in part by Petitioner or otherwise in Petitioner's possession, whether purchased by or for Petitioner or given to or inherited by Petitioner, individually, or in conjunction with any other person or persons.

8. All documents and things relating to, or which identifies the source, location, cost, and/or current value of all property, real and personal, owned by Petitioner, individually, or in conjunction with any other person or persons, that is claimed by Petitioner to be separate property, as the term "separate property" is used in New York Domestic Relations Law ("DRL") § 236.

9. All documents and things relating to any charge or credit card or account owned or used by Petitioner, whether such account is or was in Petitioner's name (alone or in conjunction with any other person), regardless of whether such accounts are used by Petitioner for personal or business reasons, and regardless of whether such accounts are current or closed, including, but not limited to, bills, statements, vouchers, receipts, correspondence, and memoranda.

10. All documents and things relating to any transfer of funds or assets made by Petitioner to any other person or entity other than Respondent in an amount or value in excess of $250, whether such transfer was in the nature of gift, loan, or otherwise.

11. All documents and things relating to any retirement plan, however denominated, including, but not limited to, pension, deferred compensation, profit- sharing, SEP-IRA, 401(k), stock option, stock purchase, HR-10 or Keogh offered by Petitioner's employer in which

Petitioner participates, has participated, or has the option to participate, from 1996 to the present, including, but not limited to, copies of the beneficiary designation and annual or monthly statements of Petitioner's account in each such plan.

12. All documents relating to any retirement plan, however denominated, including, but not limited to, pension, deferred compensation, profit-sharing, SEP-IRA, 401(k), stock option, stock purchase, HR-10 or Keogh in which Petitioner participates, has participated, or has the option to participate, other than those plans offered by Petitioner's employer, from 2016 to the present, including, but not limited to, copies of the beneficiary designation and annual statements of Petitioner's account in each such plan.

13. All documents relating to the rental of a safe deposit box by Petitioner.

14. All documents relating to any storage facility owned, rented, leased, or otherwise used by Petitioner.

15. All documents relating to the purchase or lease of any automobile now owned or operated by Petitioner.

16. All documents relating to any child support, spousal support, or maintenance paid to or on behalf of persons other than Respondent.

17. All documents and things relating to Petitioner's vested interests in trusts mentioned on page 8 of Petitioner's Statement of Net Worth.

18. All documents and things relating to Petitioner's Liabilities outlined in Petitioner's Financial Disclosure Affidavit.

19. All documents and things relating to any transfer, acquisition, or sale of any asset, property, fund, or security by or on behalf of Petitioner.

20. All documents and things relating to any transfer, acquisition, or sale of any asset, property, fund, or security by or on behalf of Petitioner.

PLEASE TAKE FURTHER NOTICE that your failure to respond shall be punishable by the penalties prescribed in the Civil Practice Law and Rules.

Dated: June 1, 2019

_____

ATTORNEY, Esq
FIRM
FIRM ADDRESS
Attorney for Petitioner

To: Respondent
Respondent Pro Se
ADDRESS
PHONE NUMBER

Interrogatories

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

_____x

In the Matter of a Support Proceeding

File No.: 555555

JAY DOE, Docket No.: F-52548-20

Petitioner **INTERROGATORIES AND DEMAND FOR DOCUMENTS**

-against-

JO DOE,

Respondent.

_____x

PLEASE TAKE NOTICE that pursuant to Family Court Act § 165 and Civil Practice Law and Rules §§3130 and 3131, petitioner hereby demands that respondent answer, under oath, the following interrogatories:

GENERAL / BACKGROUND

1. State your full name, date and place of birth, residence and post office address, home telephone number.

2. List the names, birth dates and present address of any and all children born to or adopted by you, whether said child(ren) is/are the child of the petitioner or otherwise.

3. Describe your educational background including but not limited to: list all schools (including technical or vocational) attended; dates of attendance for each school; any degrees or certifications conferred; and, any training courses completed or attended.

4. Describe any special training courses, specific language skills, certificates awarded, and employment skills. Annex a copy of your resume or curriculum vitae.

5. List all professional and recreational licenses issued to you in this state, or any other state or country, and describe the nature of each license; the date of issuance; and, the date of expiration. Annex copies of current professional and recreational license.

6. State the name and affiliation of any labor unions and/or professional organizations to which you belong; describe the nature and purpose of the union or organization and the dates of membership.

EMPLOYMENT / INCOME

7. State whether you filed a federal and/or state income tax return for the following years:

(a) 2016 - if yes, annex copy thereof.

(b) 2017 - if yes, annex copy thereof.

(c) 2018 - if yes, annex copy thereof.

(d) 2019 - if yes, annex copy thereof

8. The words "employer," "employment," and "work," below and herein refer to any person or entity for which you perform professional activities of any sort, including independent contracts, odd jobs, per diem or commission activities, regardless of whether said employment has actually produced income. For the year 2016, state the name and address of any person or entity for which you have worked; describe your activities; the gross compensation received; the approximate start and end dates of the employment.

9. For the year 2017, state the name and address of any person or entity for which you have worked; describe your activities; the gross compensation received; the approximate start and end dates of the employment.

10. For the year 2018, state the name and address of any person or entity for which you have worked; describe your activities; the gross compensation received; the approximate start and end dates of the employment.

11. For the year 2019, state the name and address of any person or entity for which you have worked; describe your activities; the gross compensation received; the approximate start and end dates of the employment.

12. For the period from January 2016 to date, state:

(a) Name and address of any person or entity for which you have worked.

(b) Type of work performed, position held and nature of work or business in which the employer is engaged.

(c) Whether you were provided or entered into any written document related to the terms and conditions or employment. Annex copies of any such documents.

(d) Dates and hours of employment.

(e) Whether each employment is concluded; whether it is anticipated to continue or to reoccur; and, if not, why it is not anticipated to continue or reoccur.

(f) Rate of pay or earnings, setting forth specifically your gross average weekly salary, wages, commissions, overtime pay, bonuses and gratuities,

(g) All deductions taken by the employer from your gross earnings or other emoluments, including but not limited to taxes, insurance, savings, loans, pensions, profit sharing etc.

(h) Manner in which payment was or is made, i.e., whether by cash, check, goods or otherwise.

(i) How the employment is or was obtained, i.e., through "word of mouth," through solicitation by you, through response to job advertisements etc.

(j) If such employment was terminated or not renewed, the reason for the termination or non-renewal of the employment, and the name and business address and telephone number of the person terminating or declining to renew the employment or responsible for terminating or declining to renew the employment.

(k) Whether you were given any written notice of termination or declination to renew the employment. Annex copies of any such notices.

13. For the period from January 2016 to date, describe any other work or services for which you have not been compensated; the nature and type of such work or services; and the name of person or entity for whom such work or services have been provided.

14. For each employment identified in response to interrogatory 12 above, state what benefits any employer(s) are or have been provided, or are or have been offered to be provided, to you and/or your family inclusive, but not limited to all of the following, including a brief description of the benefit and whether your family is a beneficiary of the particular benefit:

(a) Health insurance plan;

(b) Life insurance coverage;

(c) Pension, profit sharing or retirement income program;

(d) Expense and/or drawing accounts;

(e) Credit cards (include reimbursement for business expenses on personal credit cards);

(f) Disability insurance coverage;

(g) Stock purchase options;

(h) Indicate whether you are required to pay for all or any part of the benefits listed in this interrogatory and the amount of those payments and/or contributions.

15. State how much, if anything, you pay each month for insurance coverage for yourself, petitioner, and the subject children. Annex any documentation thereof

16. For each employment identified in response to interrogatory 12 above, state whether you receive or received from any employer, person, or other entity reimbursement for any of the following and for each describe the employer, person or entity, amount and frequency of the benefit received:

(a) meals

(b) lodging

(c) memberships

(d) automobiles

(e) any other perquisites provided as part of your compensation

17. For the period from January 2016, to date, describe any other property or other benefit furnished to you resulting from or related to employment.

18. For the period from January 2016, to date, state the nature, source and amount of income from any other sources including but not limited to including any type of government benefits, fellowships and stipends, annuity payments, stocks, bank interest, dividends, gifts, unlicensed or illegal activity.

19. For the period from January 2016, to date, state any money, goods or services which were provided to you by relatives or friends and for each:

(a) The name of the person who provided money, goods or services and their relationship to you

(b) The date that money, goods or services were provided

(c) The amount of money, goods or services

20. State whether you have received within the last three years, or expect to receive within the next three years monies, from the following sources, and if so state the amount received and when it was received or when it is expected to be received, and the source of each amount:

(a) life insurance policies

(b) discharge of indebtedness

(c) recovery of bad debts or delinquent accounts

(d) gifts and inheritances

(e) lottery winnings

(f) any other source

21. State whether you anticipate your income to increase or decrease for the tax year 2016 and list and describe the reasons for such anticipated increase or decrease.

22. If your income has decreased or is expected to decrease during the period December, 2016, to date, state the reason for the decrease, the date you became unemployed, and whether you are receiving unemployment benefits. If yes, how much do you receive monthly and for what period of time have you received these checks. Attach unemployment checks received and cashed.

23. If your income has decreased or is expected to decrease during the period December, 2016, to date, list all efforts you have made to find employment, to preserve and to increase your

level of income. List all persons and entities solicited; annex any and all letters and listings responded to, cover letters, employment agencies you have contacted, and any referral guides that you have consulted in your search for employment.

EXPENSES

24. List and describe alleged business expenses which you included or intend to include on Schedule C of your federal tax return. Annex receipts and documentation thereof.

ASSETS

Bank Accounts

25. List all bank accounts, time deposits, certificates of deposit, savings clubs, Christmas clubs, and checking accounts held in your name or in which you have an interest, specifying with respect to each:

(a) The name and address of each bank or other financial institution where such accounts are maintained

(b) The account number or other identifying code or characteristic

(c) The opening balance

(d) The present balance

(e) The name or names appearing on the account

26. To the extent not described above, specify and list any bank accounts from December 2000, to date, held in your name or on your behalf, or in which you have an interest, specifying with respect to each:

(a) The name and address of each bank or other financial institution where such accounts are maintained

(b) The account number or other identifying code or characteristic

(c) The date said account was opened

(d) The present balance

(e) The name or names appearing on the account

27. With regard to EAB Account No., state the amount of money that you have withdrawn from said account since [date of parties' separation]; the current location of the money withdrawn; and describe the purpose of said withdrawals.

28. With regard to EAB Account No., state the amount of money that you have withdrawn from said account since [date of parties' separation]; the current location of the money withdrawn; and describe the purpose of said withdrawals.

29. With regard to Bank of New York Account No., state the name and address of the payee of check number 410 in the amount of $2000; your relationship to the payee; and describe the purpose of the payment.

Real Property

30. If you have any interests (joint or otherwise), in any real property, within the United States, state:

(a) Street address, Country and/or State and County where the property is located.

(b) Type of property, deed references and your interest in the property (full or partial; type of tenancy; restraints on alienation).

(c) Date same was acquired.

(d) The purchase price(s).

(e) The approximate equity in the property.

(f) The amount of the present mortgage(s).

(g) The name and address of the mortgagee(s) and the mortgage number(s), if any.

(h) The present market value of the property.

(i) The present assessed valuation assigned the property for real property taxation

(j) The nature and dollar amount of any liens and/or encumbrances on the property which are not listed in a previous answer.

(k) The names and addresses of all co-owners and their interest in the property.

(l) Itemize all operation expenses, including but not limited to taxes, mortgage payments, insurance, water and maintenance.

(m) The source and amount of any income produced by the property, if not previously indicated. Attach copies of the closing statement of purchase, deeds and a copy of any appraisals obtained.

31. If you have sold or otherwise disposed of or transferred any real property in which you have had an interest within the last two (2) years, state for each property, in detail, the same information as asked above. Attach copies of each closing statement of purchase and deed.

32. If you are the holder of any real property not disclosed in a previous interrogatory, state in detail the same information as asked above.

Vehicles

33. For each vehicle of any nature in which you have any interest, including, but not limited to, automobiles, trucks, campers, mobile homes, motorcycles, snowmobiles, boats and/or airplanes, state:

(a) The nature of each vehicle.

(b) The name on each vehicle title.

(c) The name in which each vehicle is registered.

(d) The make, model, and year of each.

(e) The price paid and the date acquired for each.

(f) The principal operator of the vehicle since its purchase.

(g) The present location of the vehicle.

(h) The name and address of any co-owners.

(i) The present value of said asset.

Stocks, Bonds, Etc.

34. List all shares of stock, bonds, mutual funds, mortgages, and other securities or investments not previously disclosed above which you own or in which you have an interest, and for each state:

(a) The price paid for the asset

(b) The nature of your interest

(c) The present value of the asset

Transfers of Property

35. During the period from [date of parties' separation] to date have you sold or transferred any interest in personal or real property valued in excess of $250.00 and for each such sale or transfer, state:

(a) The name and address of the person to whom the sale or transfer was made

(b) The amount received, if any, upon the sale or transfer, or the amount of funds transferred

(c) The date of the sale or transfer

(d) The reason for the sale or transfer

LIABILITIES

36. Set forth a list of all credit card balances, stating:

(a) The name and address of the obligor.

(b) The account number for each credit card.

(c) If you have closed any credit cards within the past twelve months, state the name of the obligor, address, and account number.

(d) The total amount due at the present time and the amount due at the time of the service of the summons in this action.

(e) The minimum monthly payment on each account.

(f) The name in which the card is listed, and the names of all persons entitled to use the card.

(g) The exact nature of the charges for which the money is owed, if known.

(h) Who incurred each obligation and when. Annex copies of all credit card statements for the period from December 2016 to date.

37. Set forth in detail any outstanding obligations, including mortgages, conditional sales contracts, contract obligations, promissory notes and/or government agency loans not included in your answers to any previous interrogatories, stating for each:

(a) Whether the obligation is individual, joint, or joint and several.

(b) The names and addresses of each creditor.

(c) The form of the obligation.

(d) The date that the obligation was incurred.

(e) The consideration received for the obligation.

(f) The description of any security given for the obligation.

(g) The amount of the original obligation.

(h) The date of interest on the obligation.

(i) The present unpaid balance of the obligation.

(j) The date and the amount of each installment repayment due.

(k) Particularly itemize the disposition of the funds received for which the obligation was incurred.

38. List all judgments outstanding against you not included in your answer to a previous interrogatory, and for each state:

(a) The names of the parties and their respective attorneys.

(b) The courts in which same were entered and the index or docket number assigned to each case.

(c) The amount of each judgment.

39. State the nature of any lien or security interest not indicated in your answer to a previous interrogatory to which any of the assets listed by you in previous interrogatories are subject, indicating for each:

(a) The name and address of the holder thereof.

(b) The holder's relationship to you.

(c) The amount and frequency of the payments you make thereon.

(d) The balance due.

CHILDREN'S EDUCATION

40. State whether you consented to the enrollment of your child [name] in [private school name] for the school years 2016-2017, and 2017-2018, and identify the source of funds to pay for tuition.

41. State whether you consent to your child's continued enrollment in [private school name] to complete school year 2016-2017.

42. State whether you consent to your child's enrollment in and attendance at private elementary school hereinafter.

PLEASE TAKE FURTHER NOTICE that your failure to respond shall be punishable by the penalties prescribed in the Civil Practice Law and Rules.

Dated: June 1, 2019

_____
ATTORNEY NAME
FIRM NAME
FIRM ADDRESS
Attorney for Petitioner

To: JO DOE
Respondent Pro Se
ADDRESS
PHONE NUMBER

Judicial Subpoena

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

_____x

In the Matter of a Support Proceeding

File No.: 555555

JAY DOE, Docket No.: F-558997-20

Petitioner

-against- **JUDICIAL SUBPOENA**

JO DOE,

Respondent.

_____x

TO: New York City
Deferred Compensation Plan
Legal Department
40 Rector Street, 3rd Floor
New York, NY 10006

YOU ARE HEREBY COMMANDED to produce by July 31, 2020, at 10:00 o'clock in the forenoon of that day at the office of LAW FIRM, located at FIRM ADDRESS, any and all records in your possession, custody or control pertaining to the participation of JO DOE "RESPONDENT" (SS No. XX; Date of Birth YY) in the {INSERT PLAN NAME}, including but not limited to, a copy of the plan(s) or summary plan description(s); a complete record of RESPONDENT'S account(s) from the date of RESPONDENT'S participation to present, including contributions, withdrawals, interest, investment gains and losses, and account balance; a complete record of loans or other assignments of retirement benefits from the date of RESPONDENT'S participation to present, including date of loan(s), amount of loan(s), current loan balance, loan balance on DATE OF COMMENCEMENT OF DIVORCE ACTION, as well as a current list of beneficiaries.

Such records should be accompanied by a statement stating that the records are true copies of the original records maintained at your office, that they are kept in the regular course of business and that it is in the regular course of business of this institution to make such records at the time of the events they describe.

Please take notice that these documents are necessary because they are relevant to the issues in this action, including support.

Failure to comply with this subpoena is punishable as a contempt of court and shall make you liable to the person on whose behalf this subpoena was issued for a penalty not to exceed one hundred and fifty ($150) dollars and all damages sustained by reason of your failure to comply.

WITNESS, _____, one of the Support Magistrates of said Court, at _____, Bronx, New York 10451 on _____, 2020.

_____
ATTORNEY NAME
FIRM NAME
Attorney for Petitioner
FIRM ADDRESS
(718) ##

SO ORDERED:

_____

Subpoena Duces Tecum on Bank

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

File No.: 5555555
Docket No.: F-12345-19

JAY DOE,

Petitioner,

SUBPOENA DUCES TECUM

-against-

JO DOE,

Respondent.

TO: Bank of America, N.A.
Legal Department
5701 Horatio St.
Banking Center NY7-501-01-17
Utica, New York 13502

Bank of America, N.A.
100 North Tryon Street
Charlotte, NC 28255

WE COMMAND YOU, that all business and excuses being laid aside, in connection with and in reference to the above-mentioned docket number, you produce to Petitioner's attorney, ATTORNEY NAME, FIRM NAME, FIRM ADDRESS, on or before April 4, 2020 at 9:00 a.m., any and all documents, along with the attached Certification for Business Records pursuant to CPLR § 3122-a, related to the matter herein including but not limited to:

1. Any and all records of Account No.: ACCOUNT NUMBER from January 1, 2016 through the present;

2. Any and all records of any other accounts, including but not limited to savings and/or checking accounts, held by Respondent, JO DOE, Social Security No.: SSN, date of birth DOB, either in his sole name, jointly with any other person, or under the business entity {INSERT BUSINESS NAME} from January 1, 2016 through the present.

Failure to comply with this subpoena is punishable as a contempt of Court and shall make you liable to the person on whose behalf this subpoena was issued for a penalty not to exceed

one hundred and fifty ($150) dollars and all damages sustained by reason of your failure to comply.

Please take notice that these documents are necessary because they are relevant to the issues in this action, including child support and equitable distribution of marital assets.

By: _____
ATTORNEY NAME
FIRM NAME
FIRM ADDRESS
Attorneys for Petitioner

CC: RESPONDENT NAME
Pro Se Petitioner
ADDRESS

Subpoena Duces Tecum on Employer

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

_____x

In the Matter of a Support Proceeding

File No.: 12345

JAY DOE, Docket No.: F-12345-18

Petitioner

-against- **SUBPOENA DUCES TECUM**

JO DOE,

Respondent.

_____x

TO: EMPLOYER
EMPLOYER'S ADDRESS

WE COMMAND YOU, that all business and excuses being laid aside, in connection with and in reference to the above-mentioned docket number, you produce to Petitioner's attorney, ATTORNEY NAME, FIRM NAME, FIRM ADDRESS, on or before October 4, 2018 at 9:00 a.m., any and all documents, along with the attached Certification for Business Records pursuant to section 3122-a of the Civil Practice Law and Rules, related to the matter herein including but not limited to:

1. Any and all records in your possession, custody, or control pertaining to the employment of JO DOE, "RESPONDENT", (SSN: xxx-xx-xxxx; DOB: xx/xx/1975) between October 19, 2017 and the present.
    a. Such records shall include, but are not limited, to copies of any and all documents pertaining to RESPONDENT 's salary, wages, and any other form reflecting compensation that Respondent, JO DOE, has received, including regular pay and overtime pay; and

b. Such records shall include, but are not limited to, copies of any and all documents reflecting RESPONDENT's employment benefits, including but not limited to RESPONDENT's health insurance coverage, and a rent-free apartment located at {INSERT RESPONDENT'S ADDRESS} (the "Apartment"), inhabited by RESPONDENT, and any and all information regarding the Apartment's rental market rate, the length of time RESPONDENT has inhabited the Apartment, the specifications of said Apartment, and any postings or offerings made by REAL ESTATE BROKER for apartments with the same number of bedrooms located at ADDRESS between October 19, 2017 and the present.

Such records should be accompanied by the attached Certification for Business Records stating that the records are true copies of the original records maintained at your office, that they are kept in the regular course of business and that it is in the regular course of business of this institution to make such records at the time of the events they describe.

Please take notice that these documents are necessary because they are relevant to the issues in this action, including child support.

Failure to comply with this subpoena is punishable as a contempt of court and shall make you liable to the person on whose behalf this subpoena was issued for a penalty not to exceed one hundred and fifty dollars ($150) and all damages sustained by reason of your failure to comply.

Dated: New York, New York
_____, 2018

_____
FIRM NAME
By: ATTORNEY NAME
Attorneys for Petitioner
FIRM ADDRESS
FIRM PHONE NUMBER

Business Records Certification

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

PETITIONER NAME,	:	File No.: 12345
Petitioner,	:	Docket No.: F-12345-18
	:	**BUSINESS RECORD**
	:	**CERTIFICATION PURSUANT**
	:	**TO CPLR §§ 3122-a and 4518**
-against-	:	
	:	
RESPONDENT NAME,	:	
Respondent.	:	

STATE OF NEW YORK)
COUNTY OF _____) s.s.

_____ being duly sworn, deposes and says:

1. I am the duly authorized custodian or other qualified witness of the business records and have the authority to make this certification;

2. To the best of my knowledge, after reasonable inquiry, the records or copies thereof are accurate versions of the documents described in the subpoena duces tecum that are in the possession, custody, or control of the person receiving the subpoena;

3. To the best of my knowledge, after reasonable inquiry, the records or copies produced represent all the documents described in the subpoena duces tecum, or if they do not represent a complete set of the documents subpoenaed, an explanation of which documents are missing and a reason for their absence is provided; and

4. The records or copies produced were made by the personnel or staff of the business, or persons acting under their control, in the regular course of business, at the time of the act, transaction, occurrence or event recorded therein, or within a reasonable time thereafter, and that it was the regular course of business to make such records.

Signature: _____
Print Name:

Subscribed and sworn to before me
on

_____
Notary Public

Authorization and Release

AUTHORIZATION AND RELEASE

TO: EXAMPLE: Human Resources Department
Northwest Airlines Corporation
2700 Lone Oak Parkway
Saint Paul, Minnesota 55121-1546

I _____, hereby authorize the attorney, (*attorney name)* of Law Firm, LLP to examine and obtain a copy of my employment records for the period from date of hire to the present, including but not limited to documents comprising any and all employment and wage information and records, regardless of current employment status, including but not limited to all payroll information, dates of employment, duration of employment, job description, job title, hours of employment, hourly base and overtime wages, itemized overtime pay, year-end or other bonuses or commissions, copies of pay-stubs, average number of days worked each week, average number of hours worked each day and a list of the specific dates worked during the course of employment, attendance records, copies of W-2 forms, all employment benefits including 401ks, pension, retirement and health benefits; and for the period from date of hire to the present, all promotions/disciplinary actions, work performance evaluations and other items in the employment records.

_____

Name of employee

Motion to Dismiss

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

In a Matter of a Support Proceeding

File No. 555555
Docket No. F-588784-20

JAY DOE,

Petitioner,

- against -

NOTICE OF MOTION TO DISMISS

JO DOE,

Respondent.

----------X

PLEASE TAKE NOTICE that upon the annexed affirmation of ADVOCATE ATTORNEY, Esq., dated the 13th day of December 2020, the annexed affidavit of JO DOE, the Respondent herein, sworn to on the 5th day of December 2020, and upon all the prior pleadings and proceedings heretofore and herein, the undersigned will move this Court, before the Honorable NAME, at Part 28, to be held at the Family Court, County of Kings, located at 330 Jay Street, Brooklyn, NY 11201, the 6th day of February, 2021, or as soon thereafter as counsel may be heard for an order: (1) dismissing the Petition for Modification of an Order of Support filed by Petitioner, JAY DOE, on February 7, 2020 for failure to state a cause of action pursuant to New York Civil Practice Law and Rules § 3211(a)(7); and (2) granting the Respondent such other and further relief as the Court may deem just and proper.

Dated: December 13, 2020
New York, NY

_____

ATTORNEY NAME
FIRM NAME
Attorneys for Respondent

FAMILY COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

----------X

In a Matter of a Support Proceeding

File No. 555555
Docket No. F-555511-20

JAY DOE,

Petitioner,

AFFIRMATION IN SUPPORT OF MOTION TO DISMISS

- against -

JO DOE,

Respondent.

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ATTORNEY NAME, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms under penalty of perjury the truth of the following facts, and sets forth the following propositions of law:

I. BACKGROUND

1. I am an associate with the law firm LAW FIRM, *pro bono* counsel for Respondent, JO DOE, and am fully familiar with the facts and circumstances of this matter.

2. I make this affirmation, pursuant to New York Civil Practice Law and Rules § 3211(a)(7) (the pleading fails to state a cause of action), in support of Respondent's Motion to Dismiss the "Petition for Modification of an Order of Support" filed by JAY DOE.

II. PROCEDURAL HISTORY

3. Pursuant to Article 4 of the Family Court Act ("FCA"), JO DOE filed a petition, dated June 9, 2017, requesting an order of support directing JAY DOE to pay fair and reasonable support for the parties' minor child, JEAN DOE, born on July 5, 2010. (*See* Exhibit A).

4. A hearing was held before Support Magistrate NAME. JO DOE appeared *pro se*.

5. After examination and inquiry into the facts and circumstances of the case, and after hearing the testimony and evidence offered in relation thereto, the Court issued an Order of Support and Findings of Fact on January 12, 2018. (*See* Exhibit B and Exhibit C, respectively).

6. In the Order of Support, Support Magistrate NAME ordered that "JAY DOE is chargeable with the support of JEAN DOE and is possessed of sufficient means and ability to earn such means to provide the payment of the sum of $809.83 monthly to JO DOE payable through the Support Collection Unit, such payments to commence on February 1, 2018." (Exhibit B at 2).

7. Support Magistrate NAME further ordered JAY DOE to pay additional expenses for childcare in the amount of $142.00 monthly and 71% of the unreimbursed health related expenses for JEAN DOE and calculated that JAY DOE retroactive support for JEAN DOE for the period from June 9, 2017 to January 12, 2018 is $4,287.14. (*Id.*).

8. The Order of Support further directed that "specific written objections to this order may be filed with this court within 30 days of the date the order was received in court or by personal service, or if the order was received by mail, within 35 days of the mailing of the order." (*Id*. at 1).

9. After the issuance of the Order of Support, neither party filed specific written objections within said thirty-five (35) day period.

10. On February 7, 2018, JAY DOE filed the instant "Petition for Modification of an Order of Support" (the "Petition for Modification"). (*See* Exhibit D).

III. JAY DOE APPROPRIATE REMEDY WAS TO FILE SPECIFIC WRITTEN OBJECTIONS TO THE ORDER OF SUPPORT

11. JAY DOE'S Petition for Modification should be dismissed because Jay Doe's appropriate remedy was to file specific written objections to the Order of Support.

12. Specific written objections to a final order of a Support Magistrate must be filed with the Court within thirty (30) days after receipt of the order in Court or by personal service, or thirty-five (35) days after mailing of the order. (*See* FCA § 439(e)). The Court's Order of Support includes this same directive. (*See* Exhibit B at 1).

13. JAY DOE elected not to file specific written objections to the Court's Order of Support, and the statutory deadline by which to do so has long expired. Instead, JAY DOE filed only the Petition for Modification on February 7, 2018. JAY DOE is clearly seeking to "bootstrap" his Petition for Modification in order to review the Order of Support that was issued just twenty-six (26) days prior and that has currently been in effect for less than one year.

14. JAY DOE may not circumvent the mandated process set forth in FCA § 439(e). In *Hubbard v. Barber*, the Court ruled that the Family Court lacked the authority to review an order from a Support Magistrate to which a party had not filed specific objections. 107 A.D.3d 1344, 1345-46, 968 N.Y.S.2d 245, 246 (3d Dept 2013). Here, JAY DOE seeks to "object" to the Order of Support issued on January 12, 2018, by filing a new petition rather than the appropriate objections pursuant to FCA § 439(e). JAY DOE alleges that the Order of Support was based on his prior income, and that he therefore should not be obligated to pay the amount of calculated support based on his current income. However, in the detailed Findings of Fact, the Court explicitly addressed this issue, stating that "By JAY DOE'S own admission, when he left the job, he knew that he would not earn the same income as a taxi driver," and determined to impute that prior income to JAY DOE. (*See* Exhibit C at 1-2).

IV. JAY DOE'S PETITION FOR MODIFICATION FAILS TO ALLEGE A SUBSTANTIAL CHANGE IN CIRCUMSTANCES

15. JAY DOE'S Petition for Modification should be dismissed because it fails to allege *any*, let alone a substantial, change in circumstances between the Court's January 12, 2018, Order of Support and Jay Doe's February 7, 2018, Petition for Modification filed just twenty-six (26) days later.

16. Modification of an order of child support requires a showing of a substantial change in circumstances. (*See* FCA § 451(3)(a); *see Guevara v. Villatoro*, 134 A.D.3d 1115, 1115, 22 N.Y.S.3d 557, 558 (2d Dept 2015)). Determining a substantial change in circumstances requires comparing the payor's financial circumstances at the time the current order was filed with the payor's financial circumstances at the time the modification petition was filed. (*See Guevara*, 134 A.D.3d at 1115, 22 N.Y.S.3d at 558; *see also Tomassi v. Suffolk Cty. Dept of Soc. Servs.*, 144 A.D.3d 930, 931, 41 N.Y.S.3d 540, 541 (2d Dept 2016)).

17. JAY DOE'S purported substantial change in circumstances is that "My income has decreased. The current order of support was based on my income from 2016. I do not make that much money with my current job." (Exhibit D at 1). This plainly fails to constitute a substantial, let alone any, change in circumstances between the January 12, 2018, Order of Support and JAY DOE'S February 7, 2018, Petition for Modification. JAY DOE'S income may have decreased at some point in time, but not between the period that must be used in determining changed circumstances.

18. Since JAY DOE had already decreased his income before the January 12, 2018, Order of Support was issued, and since it is clear that the decreased income that Jay Doe references in his Petition for Modification was considered by the Court in issuing the Order of Support, Jay Doe's Petition for Modification should be dismissed. (*See Guevara*, 134 A.D.3d at 1115, 22

N.Y.S.3d at 559 (modification petition was properly dismissed where party did not allege any change in his financial situation since order of support was issued)).

19. The Court, after a thorough examination and inquiry into the facts and circumstances of the case, issued Findings of Fact explicitly addressing JAY DOE'S choice to quit his 7-Eleven job despite knowing that he would earn less at another position.[1] (*See* Exhibit C at 1).

20. JAY DOE now seeks a second opportunity to present the Court with the same facts that were previously offered to and considered by the Court with the hope of reaching a different result. JAY DOE is not permitted to do so.

21. Even assuming, *arguendo*, that JAY DOE could establish a substantial change in circumstances, his Petition for Modification should be dismissed because his reduction in income was voluntary, and he offered no proof of making diligent attempts to secure commensurate employment.

22. A reduction in income is not a ground for modification of the Order of Support unless (i) the reduction was involuntary and (ii) the petitioner made diligent attempts to secure employment commensurate with the petitioner's education, ability, and experience. (*See* FCA § 451(3)(b)). JAY DOE has failed to meet both requirements.

23. First, JAY DOE'S reduction in income was caused by his own voluntary actions. As the Findings of Fact state, "JAY DOE voluntarily reduced his income significantly when [he] left a position that he held for 16 years." (Exhibit C at 1; *see Lindsay v. Lindsay-Lewis*, 156 A.D.3d 642, 642-43, 64 N.Y.S.3d 564, 565 (2d Dept 2017) (affirming denial of party's petition

[1] While the Findings of Fact state that "Respondent now represents that he is employed by Burger Joint," upon information and belief, Mr. Doe has never worked at Burger Joint. (*See* Exhibit C at 1). Rather, it is Ms. Doe who is currently employed by Burger Joint. Nonetheless, it is undisputed that Mr. Doe voluntarily left his employment at Convenience Store for a position that he knew would pay less.

for downward modification because party voluntarily left his employment and failed to show diligent efforts of seeking new employment); *see also Vasquez v. Powell*, 111 A.D.3d 754, 754, 974 N.Y.S.2d 552, 554 (2d Dept 2013)).

24. Second, the Findings of Fact state that JAY DOE "has not provided any proof of diligent efforts to find employment that could offer a similar compensation as that which he earned from EMPLOYER." (Exhibit C at 1-2). JAY DOE failed to submit to the Court any kind of proof, such as resumes that JAY DOE sent to potential employers that would be commensurate with his earning capacity. (*See Fantau v. Fantau*, 134 A.D.3d 1109, 1110, 21 N.Y.S.3d 725, 726 (2d Dept 2015) (affirming dismissal of petitioner's objections for failing to show best efforts to obtain appropriate employment)). For these reasons, dismissing JAY DOE'S Petition for Modification is appropriate.

V. THE COURT PROPERLY IMPUTED INCOME TO MR. DOE

25. The Court properly imputed income to JAY DOE based on the income reflected in his 2016 W-2 statement and tax returns. (*See* Exhibit C at 1-2).

26. It is well settled that the "Family Court has discretion to impute income to a parent based upon that parent's prior employment experience or his/her earning potential." (*Id*. at 1; *see Bibicoff v. Orfanakis*, 48 A.D.3d 680, 681, 852 N.Y.S.2d 324, 325 (2d Dept 2008) (noting that a Support Magistrate has "considerable discretion in determining whether to impute income to a parent" and that the determination may be based upon the parent's prior employment or earning capability); *see Simmons v. Simmons*, 48 A.D.3d 691, 692, 853 N.Y.S.2d 102, 103 (2d Dept 2008); *Westenberger v. Westenberger*, 23 A.D.3d 571, 571, 806 N.Y.S.2d 665, 666 (2d Dept 2005)).

27. Imputing income to a party is appropriate where the party has voluntarily left his or her employment. (*See Bustamante v. Donawa*, 119 A.D.3d 559, 560, 987 N.Y.S.2d 889, 890

(2d Dept 2014)). Imputing income to JAY DOE is thus appropriate because, as Support Magistrate NAME found, JAY DOE voluntarily left his employment at {INSERT EMPLOYER NAME}. (*See* Exhibit C at 1).

VI. CONCLUSION

28. JAY DOE'S Petition for Modification is procedurally improper. JAY DOE'S appropriate remedy was to file specific written objections to the Order of Support, which he failed to do.

29. The assertions in JAY DOE'S Petition for Modification are insufficient as a matter of law to serve as a basis for the relief requested. JAY DOE has failed to demonstrate any, let alone a substantial, change in circumstances between the January 12, 2018, Order of Support, and his February 7, 2018, Petition for Modification.

30. No previous application for this or any like relief has been made herein.

WHEREFORE, it is respectfully requested that Respondent's motion to dismiss be granted in all respects, and that the Court grant such other and further relief as to the Court deems just and proper.

Dated: December 13, 2020
New York, NY

_____
ATTORNEY NAME
FIRM NAME
Attorneys for Respondent

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

In a Matter of a Support Proceeding

File No. 555555
Docket No. F-55551-20

JAY DOE,

Petitioner,

AFFIDAVIT OF RESPONDENT IN SUPPORT OF MOTION TO DISMISS

- against -

JO DOE,

Respondent.

----------X

STATE OF NEW YORK)
) s.s.:
COUNTY OF NEW YORK)

JO DOE, hereby affirms under penalty of perjury:

1. I am the Respondent in this case and JAY DOE is the Petitioner. I make this affidavit in support of my motion to dismiss the Petition for Modification of an Order of Support, which was filed by Petitioner on February 7, 2018.

2. On June 9, 2017, I filed a petition with this Court requesting an order awarding me child support for my minor child, JEAN DOE, born on July 5, 2010. JAY DOE was named as the Respondent in my petition. I have been the primary caregiver for JEAN DOE since she was born, and I support her financial, physical, and emotional needs. I have sole legal and physical custody of JEAN DOE pursuant to a court order dated December 14, 2017. To support JEAN DOE, I have been working at Burger Joint since August 2017, and before that I worked at Donuts Place from approximately March 2017 to August 2017.

3. Hearings on my support petition were scheduled in 2017 before Support Magistrate NAME.

4. I did not have a lawyer at any of my court appearances before Support Magistrate NAME, and I represented myself in Court *pro se*. I submitted proof of my income and expenses to the Court and answered questions about my income and expenses. JAY DOE also submitted proof of his income and expenses to the Court and answered questions about his income and expenses.

5. At one of the 2017 Court appearances, JAY DOE explained to the Court that he had been working at Convenience Store for sixteen (16) years, but that he had chosen to leave this job to work as an App-Based-Contractor. JAY DOE also said in Court that he knew if he stopped working at Convenience Store to become an App-Based-Contractor, his income would decrease.

6. On January 12, 2018, Support Magistrate NAME issued an Order of Support ordering JAY DOE to pay $951.83 in monthly child support for JEAN DOE ($809.83 for basic payment and $142.00 for childcare expenses) and $4,287.14 in retroactive support for JEAN DOE.

7. Also on January 12, 2018, Support Magistrate NAME issued Findings of Fact. The Findings of Fact explain that Support Magistrate NAME was imputing income to JAY DOE based on his 2016 earnings because JAY DOE had voluntarily chosen to reduce his income and offered no proof that he had made diligent efforts to find employment with similar pay to his Convenience Store position.

8. While the Findings of Fact state that JAY DOE now works at Burger Joint (where I work), I do not remember JAY DOE saying that in Court, and to the best of my knowledge, JAY DOE and I have never worked for the same company.

9. On February 7, 2018, JAY DOE filed a Petition for Modification of an Order of Support to decrease the child support order for JEAN DOE. JAY DOE'S Petition states, "The current order of support was based on my income from 2016. I do not make that much money with my current job."

10. Support Magistrate NAME had heard in Court from JAY DOE that he had voluntarily chosen to stop working at Convenience Store, despite knowing that he would get paid less working as an App-Based-Contractor, before the Support Magistrate issued the Order of Support and Findings of Fact on January 12, 2018.

WHEREFORE, for the foregoing reasons, I request that the Court grant my Motion to Dismiss JAY DOE'S "Petition for Modification of an Order of Support" and grant such other and further relief as the Court deems just and proper.

_____
JO DOE

Sworn to before me this
___ day of _____, 2020

_____
Notary Public

Motion to Compel and Preclude

PRESENT: Support Magistrate

At a Term of the Family Court of the State of New York, held in and for the County of New York at the Courthouse located at 60 Lafayette Street, in the Borough of New York on the __ day of June 2020

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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ALEX DOE,

Petitioner,

File No. 12345
Docket Nos. F-12345-14/12A/12B

ORDER TO SHOW CAUSE

JAIME DOE,

Respondent.

----------X

PLEASE TAKE NOTICE that upon the annexed Affirmation of ATTORNEY, Esq., dated June 5, 2013, the Affidavit of ALEX DOE, dated June 4, 2013, and the exhibits annexed thereto, and upon all prior papers and proceedings filed and had herein:

LET JAIME DOE show cause before this Court at a Special Term, to be held before Support Magistrate, MAGISTRATE NAME, at the New York County Family Court, 60 Lafayette Street, New York, NY 10013 at ____ pm on _____, 2020, why an order under Civil Practice Law and Rules § 3126 and § 3124, should not be entered in this action:

(1) precluding JAIME DOE from introducing evidence, including testimony, of "no ability to pay" at the Violation Hearing scheduled for June 18, 2020, based on:

(a) JAIME DOE's refusal to respond to document requests and interrogatories;

(b) JAIME DOE's business's refusal to respond to ALEX DOE's subpoena for records, which JAIME DOE accepted service of as agent of said business;

(c) JAIME DOE's password reset of ALEX DOE's email account and obtaining access to ALEX DOE's attorney client privileged communications;

(2) dismissing JAIME DOE's petition for a Downward Modification for reasons (1)(a)-(c) above;

(3) compelling JAIME DOE, both individually and as agent of his business, to respond to all outstanding discovery requests, including the outstanding subpoena;

(4) adjourning the Upward Modification Hearing presently scheduled for June 19, 2020 based on (1)(a)-(c) above; and

(5) for such other and further relief as this Court deems just and proper; further,

LET SERVICE of a copy of this order and the papers upon which it is based by Federal Express overnight or first class mail to JAIME DOE's counsel on or before _____, 20_ be deemed good and sufficient service thereof.

DATED: June __, 20__

_____

FCSM:

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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ALEX DOE,

Petitioner,

JAIME DOE,

Respondent.

----------X

File No. 12345

Docket Nos. F-12345-14/12A/12B

AFFIRMATION IN SUPPORT OF ORDER TO SHOW CAUSE

ATTORNEY, an attorney duly admitted in the State of New York, hereby affirms under penalty of perjury as follows:

1. I am counsel with the law firm FIRM L.L.P., FIRM ADDRESS, attorneys for ALEX DOE, the petitioner. Unless otherwise indicated, all statements made herein are based upon information and belief.

2. I submit this affirmation in support of ALEX DOE's application for an Order to Show Cause to: (a) preclude respondent, JAIME DOE, from introducing evidence of "no ability to pay" at the Violation Hearing scheduled for June 18, 2013, (b) dismissing JAIME DOE's petition for a Downward Modification, (c) to compel JAMIE DOE to respond to all outstanding discovery requests and compelling JAIME DOE as agent of his business to respond to the outstanding subpoena; and (d) adjourning the Upward Modification Hearing presently scheduled for June 19, 2013.

JAIME DOE Should Be Precluded From Introducing Evidence, Including Testimony, Relating to "No Ability to Pay" at the Violation Hearing, and His Downward Modification Petition Should Be Dismissed, Due to His Failure to Respond to Discovery Requests

3. On April 9, 2013 and April 15, 2013, we served Notices of Discovery and Inspection and Interrogatories, copies of which are annexed as Exhibits A-D hereto. To date,

JAIME DOE, who is represented by counsel, has not responded. No response to these requests has been received despite our correspondence to counsel for JAIME DOE notifying him of his failure to timely respond. Our correspondence is attached as Exhibit E hereto.

4. These discovery requests are important at least because ALEX DOE requires additional information in order to present a full and fair affirmative case at the June 18-19 trial. JAIME DOE's income and assets are highly relevant to the issues that will be addressed at those hearings. For example, Requests 1-6, 10-14 and Interrogatories 4-8, 10-11 relate to these issues.

5. Of note, CPLR § 3126 does not require a party to first seek an order to compel under CPLR § 3124. *Coffey v. Orbachs, Inc.*, 254 N.Y.S.2d 596, 597 (1964) (application may be made under CPLR § 3126 for the imposition of penalties provided therein for willful failure to disclose, *or* under CPLR § 3124 to obtain an order to compel disclosure). *See also DiBartolo v. Am. Foreign Ins. Co.*, 265 N.Y.S.2d 981, 982-83 (1966). Seeking relief under CPLR § 3124 is not desirable in this case because it would require adjournment of the currently scheduled Violation Hearing date. JAIME DOE is in arrears on his child support and maintenance payments, and timely resolution of the Violation Hearing is needed for ALEX DOE and her sons. *See* ALEX DOE Affidavit at ¶ 4. Therefore, preclusion of evidence under CPLR § 3126 is the most appropriate remedy here. As to JAIME DOE's Downward Modification Petition, CPLR § 3126(3) provides that the court may dismiss the action of a disobedient party.

6. Thus, JAIME DOE should be precluded from presenting evidence, including his own testimony, at the Violation Hearing scheduled in this matter, JAIME DOE's Downward Modification Petition should be dismissed, and the Upward Modification Hearing should be adjourned.

ALEX DOE's Requested Relief Should Also Be Granted Due to JAIME DOE's Failure, as the Agent of His Employer, to Respond to ALEX DOE's Subpoena for Records

7. On February 12, 2013, we served a subpoena on JAIME DOE's employer, EMPLOYER, Inc., a copy of which is annexed as Exhibit F. To date, JAIME DOE, who accepted service (proof of service is attached as Exhibit G), has not responded.

8. The records sought by the subpoena are important at least because ALEX DOE requires additional information in order to present a full and fair affirmative case at trial. JAIME DOE's income and assets are highly relevant to the issues that will be addressed at those hearings.

9. Though JAIME DOE is represented by counsel, counsel has not confirmed whether he represents the business or JAIME DOE in his capacity as agent of the business.

10. These facts further confirm that JAIME DOE should be precluded from presenting evidence, including his own testimony, at the Violation Hearing scheduled in this matter, JAIME DOE's Downward Modification Petition should be dismissed, and the Upward Modification Hearing should be adjourned.

ALEX DOE's Requested Relief Is Also Appropriate Because JAIME DOE Gained Access to ALEX DOE's E-mail Account, Gaining Access to Attorney-Client Privileged Communications

11. In addition to the conduct described above, JAIME DOE gained an unfair advantage by gaining access to over 25 emails between FIRM L.L.P. and ALEX DOE regarding this case. *See* ALEX DOE Affidavit at ¶ 5. For this additional reason, preclusion of evidence, including JAIME DOE's testimony, is appropriate.

JAIME DOE, As Agent of His Business, Should Be Compelled to Fully Respond to ALEX DOE's Discovery Requests and the Subpoena

12. In addition to the preclusion requested above, ALEX DOE requires JAIME DOE's financial information at least in order to prepare for the Upward Modification Hearing. ALEX DOE may use a forensic accountant (also pro bono, like undersigned counsel) to analyze JAIME

DOE's tax returns, business records, and other financial documents. JAIME DOE once owned a Soup chain store, an Ice Cream franchise, and is believed to currently have an ownership interest in a EMPLOYER store. *See* ALEX DOE' Affidavit at ¶ 3. No financial records relating to these assets or employment have been provided in this case.

13. Based on the foregoing, the Court should compel JAIME DOE under CPLR § 3124 to fully respond to ALEX DOE's discovery requests, including the subpoena to his employer, EMPLOYER.

14. The Court should also adjourn the Upward Modification Hearing until JAIME DOE complies with an order to compel. Moreover, in the event that the Court declines to dismiss the Downward Modification Petition, ALEX DOE requests that the Downward Modification Hearing date also be adjourned.

15. No previous application has been made to this Court or any other court for the relief requested herein.

WHEREFORE, it is respectfully requested that ALEX DOE's application be granted in its entirety.

Dated: New York, New York
June 5, 2013

_____
ATTORNEY
FIRM L.L.P.
FIRM ADDRESS
FIRM PHONE NUMBER
FIRM FAX NUMBER
Counsel for MOTHER

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

ALEX DOE,

Petitioner,

JAIME DOE,

Respondent.

----------X

File No. 12345

Docket Nos. F-12345-14/12A/12B

AFFIDAVIT IN SUPPORT OF ORDER TO SHOW CAUSE

ALEX DOE, being duly sworn, deposes and says:

1. I am the Petitioner in Docket Nos. F-12345-14/12A/12B and the Respondent in Docket No. F-12345-14/12C and submit this affidavit in support of my application for an order (i) precluding JAIME DOE from introducing evidence at the upcoming hearings; (ii) compelling him to respond to discovery requests; and (iii) granting other and further relief as the Court deems just and proper.

2. I was married to JAIME DOE, the Respondent, for about ten years. We were married on March 21, 2001. We had two children together during the marriage. We divorced on October 13, 2011. In our Stipulation of Settlement dated June 11, 2011, signed by both JAIME DOE and myself, JAIME DOE agreed to pay $190 per week in maintenance and $158 per week in child support. JAIME DOE has not complied with this agreement, and as of today, he is over $10,000 in arrears for unpaid child support and maintenance.

3. JAIME DOE owned various businesses while we were married, including a Soup franchise and an Ice Cream franchise, and I believe he owns or has a significant interest in the EMPLOYER store at ADDRESS, New York, NY.

4. I have two special-needs children. Due to their schedules, I have been unable to work (other than babysitting or housecleaning). Therefore, we are in need of the child support and maintenance that JAIME DOE has refused to pay.

5. In late March 2020, JAIME DOE, without my permission, requested AOL to reset the password on my AOL e-mail account. Attached as Exhibit 1 are screenshots demonstrating that he did this. That e-mail account contained all of my e-mail communications with my attorneys at FIRM L.L.P. regarding this matter up until about April 6, after which I stopped actively using this account and created another email address that I now use to communicate with my attorneys.

6. No previous application has been made to this Court or any other court for the relief requested herein.

Dated: June __ , 2013
New York, New York

By: _____
ALEX DOE

Sworn to before me
this _____ day of June, 2013

_____
NOTARY PUBLIC

Motion to Compel, Preclude and Resolve

At the Family Court of the State of New York, held in the County of Bronx, at the Courthouse thereof, 900 Sheridan Avenue, Bronx, New York on the 17th day of May, 2013.

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

ALEX DOE,
Petitioner,

-against-

File #: 12345
Docket. #: F-12345-13

NOTICE OF MOTION TO COMPEL / PRECLUDE

JAIME DOE,
Respondent.

PLEASE TAKE NOTICE that upon the annexed affirmation of ATTORNEY NAME, an associate at LAW FIRM NAME, attorneys for Petitioner, duly affirmed on May ___ 2013, and upon all the pleadings, papers, and proceedings heretofore had herein, the undersigned will move this Court at the Courthouse located at 900 Sheridan Avenue, Bronx, New York, on May __, 2013, at 2:15 p.m. in the afternoon of that day or as soon thereafter as counsel may be heard:

(a) pursuant to New York Civil Practice Law and Rule 3124, compelling disclosure and, in particular, compelling Respondent to fully answer Petitioner's Second Set of Interrogatories;

(b) in the alternative, pursuant to New York Civil Practice Law and Rule 3126, deeming the issue of Respondent's child support resolved in accordance with Petitioner's claims, and precluding Respondent from providing evidence or testimony in the above-captioned action,

from making any further discovery requests, or using information contained in discovery already provided to him; and

(c) Granting Petitioner such other and further relief as the Court deems just and proper.

Pursuant to CPLR 2214(b), answering affidavits, if any, are required to be served upon the undersigned at least seven days before the return date of this motion.

Dated: _____, 2013

_____

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
----------x

ALEX DOE,

Petitioner,

-against-

File #: 123456
Docket. #: F-12345-13

AFFIRMATION IN SUPPORT OF MOTION TO COMPEL/PRECLUDE

JAIME DOE,

Respondent.
----------x

ATTORNEY, an attorney duly admitted to practice law in the courts of the State of New York, hereby affirms under the penalties of perjury as follows:

1. I am associated with LAW FIRM NAME, attorneys for the Petitioner in the above-captioned action, and submit this affirmation in support of Petitioner's request for the relief as set forth within the motion. I am fully familiar with the facts and circumstances of this matter and submit this affirmation in support of Petitioner's motion seeking to compel Respondent to respond fully to Petitioner's Second Set of Interrogatories, to produce the documents requested therein and to produce all documents required by compulsory disclosure. In the alternative, Petitioner requests that the Court preclude Respondent from providing evidence or testimony in this action, from making any further discovery requests, or using information contained in discovery already provided to him and deem the issue of Respondent's child support obligation be resolved in accordance with Petitioner's claims. This motion is made pursuant to CPLR § 3124, which provides that if a person fails to respond to or comply with any interrogatory, the party seeking

disclosure may move to compel compliance pursuant to CPLR § 3126, which provides for imposition of penalties for refusal to disclose information ought to be disclosed.

BACKGROUND

2. Petitioner ALEX DOE and Respondent JAIME DOE are the parents of JAYDEN DOE, born DOB, and PAT DOE, born DOB. The parties were divorced in Ecuador in 2000.

3. On February 2, 2011, Petitioner filed a support petition. On April 6, 2011, Support Magistrate L entered a temporary order of support which required Respondent to pay Petitioner $50 per week, effective April 15, 2011.

4. At a hearing on April 6, 2011, Support Magistrate L instructed the Respondent to return to court on June 17, 2011 and submit a financial disclosure affidavit, a copy of his tax return, pay stubs and a job search diary. (See Exhibit A, April 6, 2011 Transcript at 11:17-23) Respondent appeared in court on June 17, 2019, but did not comply with the court's direction to bring a financial disclosure affidavit or a copy of his tax return. (See Exhibit B, June 17, 2011 Transcript at 6:11-23) Support Magistrate L again instructed Respondent to bring a financial disclosure affidavit to court, along with paystubs and letters from family members detailing the support Respondent claimed they provide to him. (See Exhibit B at 9:14-23) Petitioner filed an updated financial disclosure statement on June 17, 2011.

5. At the next hearing, on August 23, 2011, Support Magistrate L questioned Respondent about his forms of income. Respondent testified that he was not working and that his sister was fully supporting him. Support Magistrate L ordered Respondent to bring his sister to court to testify regarding her support of him. (See Exhibit C, August 23, 2011 Transcript at 9:19-25) Support Magistrate L further instructed Petitioner to

serve interrogatories on Respondent and instructed Respondent that he must respond to them. (See Exhibit C at 8:16-21)

6. On September 6, 2011, counsel for Petitioner served Petitioner's First Set of Interrogatories to Respondent by mail. Petitioner's First Set of Interrogatories demanded that Respondent serve a copy of his answers by October 4, 2011.

7. Respondent appeared in court on October 4, 2011 without any documentation or other evidence regarding his finances or employment. He did not provide answers to the Petitioner's First Set of Interrogatories. (See Exhibit D, October 4, 2011 Transcript at 6:15-22) Support Magistrate L set a final hearing date of November 15, 2011 and ordered Respondent to bring back a detailed job diary, financial disclosure affidavit and notarized letters from the family members who support him. (See Exhibit D at 8:6-11)

8. In court on November 15, 2011, Respondent appeared for the final child support hearing and failed to provide the court with a financial disclosure affidavit or notarized letters substantiating his claim that his family members support him. (See Exhibit E, November 15, 2011 Transcript at 5:8-20) Petitioner appeared in court with an updated financial disclosure affidavit and answered Support Magistrate L's questions about the children's expenses.

9. Due to Respondent's failure to provide the required disclosures, Support Magistrate L calculated a needs-based support obligation under FCA §413(1)(k) and entered a Final Order of Support in the amount of $176 per week. Respondent filed an objection to the Final Order of Support on November 28, 2011, and, pursuant to the Decision and Order Upon Objections dated March 13, 2012, the matter was remanded to

reopen the record on the issue of calculating Respondent's income and earning potential. The matter was adjourned to March 29, 2012.

10. On March 23, 2012, counsel for Petitioner served Petitioner's Second Set of Interrogatories to Respondent by UPS delivery. (See Exhibit F, a copy of Petitioner's Second Set of Interrogatories) In court on March 29, 2012, counsel for Petitioner informed the court that Respondent had been served with interrogatories and provided the Court with a courtesy copy. Support Magistrate L instructed Respondent to answer the interrogatories within 30 days, by May 4, 2012. Petitioner filed a third updated financial disclosure affidavit. *Respondent has yet to submit a financial disclosure affidavit in this matter*.

11. On April 12, 2012, counsel for Petitioner re-sent Petitioner's Second Set of Interrogatories to Respondent by UPS delivery. *Respondent has yet to respond to Petitioner's Second Set of Interrogatories*.

FINANCIAL DISCLOSURE IS NECESSARY TO DETERMINE RESPONDENT'S INCOME AND EXPENSES

12. In this support action, Petitioner is seeking child support. Financial disclosure of Respondent's income, assets, lifestyle, employment, job search efforts and like evidence is necessary to resolve whether and to what extent Respondent is capable of paying child support.

13. Respondent has testified before this Court that he owns a farm and livestock in Ecuador. (See Exhibit C at 7:7-8:4) Financial disclosure is necessary to determine the value of the farm and property in Ecuador and any other land or property owned by Respondent.

14. Respondent has also testified before this Court that he is capable of working in the field of air conditioner maintenance. (See Exhibit A at 9:7-10) Financial

disclosure is necessary to determine Respondent's income to resolve whether and to what extent Respondent is capable of paying child support.

15. Respondent's income tax returns, pay stubs, bank account statements, credit card statements, evidence of job search efforts and other evidence are required to determine Respondent's financial status.

REQUEST TO COMPEL

16. Petitioner's right to obtain an expeditious determination of her action herein is being impeded, impaired, and prejudiced as a result of Respondent's willful and deliberate failure to make full and complete disclosure. Without Respondent's financial disclosure, Petitioner cannot adequately prepare for either trial or settlement of this matter. As set forth above, Respondent has repeatedly been advised of his disclosure obligations, and a good faith effort to obtain Respondent's compliance has been made.

17. Therefore, it is respectfully requested that Respondent be compelled to respond in full to Petitioner's Second Set of Interrogatories.

REQUEST TO IMPUTE INCOME AND PRECLUDE REPONDENT FROM SUBMITTING EVIDENCE

18. In the alternative, and in light of Respondent's violations of the CPLR and failure to comply with this Court's orders, Petitioner requests that the Court deem the issue of Respondent's child support be resolved in accordance with Petitioner's claims and preclude Respondent from providing evidence or testimony in this action, from making any further discovery requests, or using information contained in discovery already provided to him. CPLR 3126 provides sanctions for nondisclosure. Under CPLR 3126, "if any party . . . refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article,

the court may make such orders with regard to the failure or refusal as are just." Among the forms of relief provided for are the following:

a. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order;

b. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony . . . or from using certain witnesses; or

c. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

19. The discovery requests made upon Respondent regard information that is reasonably expected to be produced in an action for child support. Indeed, Petitioner has submitted her own financial disclosure affidavits to this Court establishing her income and the financial needs of the parties' children.

20. Respondent's delay in making financial disclosures required by the Court and in answering Petitioner's interrogatories permits an inference that the delay is willful. See, e.g., Wolfson v. Nassau County Medical Center, 141 A.D.2d 815, 530 N.Y.S.2d 27 (2d Dept 1988) (finding that the "extensive nature of the plaintiff's delay in responding to the defendant's interrogatories permits and inference that the delay was willful"); Glasburgh v. Port Authority, 193 A.D.2d 441, 597, 597 N.Y.S.2d 327 (1st Dept 1993) (upholding discovery sanctions where "willful and contumacious character" of failure to disclose could be inferred from yearlong noncompliance). Respondent has been instructed by Support Magistrate L to submit a financial disclosure affidavit and other

evidence regarding his income numerous times, beginning in April 2011. He was first served with interrogatories over eight months ago. Accordingly, Defendant's failure to comply with discovery requests should be deemed willful.

21. Courts have found that a party that fails to provide requested discovery or demonstrate a reasonable excuse after being given more than one opportunity to respond is not entitled to a final opportunity to respond. Cohen v. Cohen, 228 A.D.2d 961, 644 N.Y.S.2d 831 (3d Dept 1996). Here, Respondent should not be given yet another opportunity to delay the proceedings, when he has been on notice of the information requested for over a year and has been given ample opportunity to respond to such requests.

22. In light of the Respondent's refusal to respond fully and accurately to Petitioner's discovery requests and comply with the Court's instructions, Petitioner requests that this Court impute Respondent's income in an amount based upon the 2019 U.S. Bureau of Labor Statistics national estimates for the salary of heating, air conditioning, and refrigeration mechanics and installers.

23. A "court is not bound by a party's actual reported income . . . and instead [can] use that party's actual earning capacity or impute an amount onto the gross income reported by the party." Solis v. Marmolejos, 855 N.Y.S.2d 584, 5484-85 (2d Dept 2008). Family Courts may properly impute income based upon a party's "failure to provide any credible proof regarding [the party's] income and the facts regarding [the party's] employment." Id. at 585; Relf v. Relf, 602 N.Y.S.2d 690, 611 (2d Dept 1993) ("[T]he trial court was justified in imputing to the husband an income which was higher than that which he was willing to admit").

24. The Respondent has had more than ample opportunity to respond to Petitioner's discovery requests but has chosen not to answer interrogatories or to produce documentation to substantiate that he currently has no income. Moreover, he has failed to produce evidence of any medical condition that would prevent him from obtaining employment. Petitioner, on the other hand, has complied with her disclosure obligations by providing updated financial disclosure affidavits throughout the pendency of this matter.

25. Because Respondent has repeatedly refused to turn over any documentation concerning his current employment, it is appropriate for the court to impute an income to Respondent of that of an employee in his field of work. According to the 2011 U.S. Bureau of Labor Statistics national estimates, the mean wage estimate for an individual employed in the field of heating, air conditioning, and refrigeration mechanics and installers is $45,540 in annual wages. (See Ex. G, U.S. Bureau of Labor Statistics Occupational Employment Statistics for Heating, Air Conditioning, and Refrigeration Mechanics and Installers, dated May 2011.)

26. Accordingly, Petitioner requests that the Court impute an annual income of $45,540 to Respondent and preclude Respondent from offering evidence or testimony to the contrary, because he has failed to do so on numerous occasions.

27. In the alternative, Petitioner requests that the Court calculate the support obligation based on the needs of the children, as Petitioner outlines in her petition dated February 11, 2011. Where the court has insufficient evidence to determine gross income, the court shall order child support based upon the needs of or standard of living of the children, whichever is greater. Family Court Act § 413(1)(k); see also Denham v. Kaplan, 793 N.Y.S.2d 58 (2d Dept 2005) (holding that Support Magistrate properly determined

support obligation based on the needs of the child where the father had failed to submit requested documents, including a financial disclosure affidavit); Merchant v. Hicks, 790 N.Y.S.2d 23 (1st Dept 2005) (holding that Family Court correctly determined child support based on children's needs where father failed to provide financial details of his property and assets).

28. No previous application has been made to any court or judge for the relief herein.

Dated: New York, NY
May ,

_____

ATTORNEY NAME

Stipulation Regarding Child Support

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

----------X

ALEX DOE,
SSN

File #: 12345
Docket #: F-12345-19

Petitioner,

STIPULATION REGARDING CHILD SUPPORT

-against-

JAIME DOE,
SSN

Respondent.

----------X

IT IS HEREBY STIPULATED by and between Petitioner ALEX DOE and Respondent JAIME DOE (the "Parties") in the above-entitled action, that the same be and is hereby settled pursuant to the following terms, conditions and provisions:

BASIC CHILD SUPPORT

1. The parties have been advised of the provisions of New York Domestic Relations Law §240(1-b) and New York Family Court Act §413(1)(b) ("The Child Support Standards Act" ("CSSA")).

2. In accordance therewith, the parties have also been advised that the "basic child support obligations" provided in New York Domestic Relations Law §240(1-b) and New York Family Court Act §413(1)(b) would presumptively result in the correct amount of child support to be awarded. In the event that this Stipulation deviates from the "basic child support obligation," the foregoing statutes require this Stipulation to specify the amount that such Stipulation does not provide for payment of that amount, in order to assure that the parties are

Commented [AO1]: This stipulation provides a few different examples of language that can be negotiated for, or if inapplicable, left out. It is not intended to be an exhaustive collection of all available remedies or agreements. As you negotiate with the other side, you should be in constant contact with your Her Justice mentor to discuss the negotiations and possible stipulation provisions.

Commented [AO2]: The language in this section is required by statute and cannot be negotiated away. The only available negotiation points in this section are (1) what numbers go into each party's income; (2) what is the final number of basic child support to be paid; and (3) what is the pro rata share of ancillary expenses.

aware of their rights and obligations under the Child Support Standards Act and knowingly waive such rights. Such provision may not be waived by either party or counsel.

3. Domestic Relations Law Section 240(1-b) and New York Family Court Act Section 413(1)(b) provide the court shall calculate the "basic child support obligation", and the non-custodial parent's pro rata share of the basic child support obligation. Unless the court finds that the non-custodial parent's pro-rata share of the basic child support is unjust or inappropriate, after considering ten enumerated factors, it must order the non-custodial parent to pay his or her pro rata share of the "basic child support obligations." In arriving at the "basic child support obligation" the Court must calculate the "combined parental income" and multiply it by the appropriate "child support percentage." The "child support percentage" is defined as: 17% of the combined parental income for one child; 25% of the combined parental income for two children; 29% of the combined parental income for three children; 31% of the combined parental income for four children; and no less than 35% of the combined parental income for five or more children. Where there are five or more children, the court must exercise its discretion as to the amount of the child support percentage. Where the combined parental income exceeds $183,000 per year, after the court determines the non-custodial parent's share of the basic child support obligation, it must next determine the amount of child support for the amount of combined parental income in excess of $183,000. It may do so, in the exercise of its discretion, through consideration of ten discretionary factors and/or the child support percentage. There are two additional items of support which are part of and which the court must consider in determining the "basic child support obligation" and two items it may consider in determining the non- custodial parent's share of the "basic child support obligation." When a custodial parent is working or receiving education leading to employment, reasonable childcare expenses must be apportioned pro rata, in the same proportion as each parent's income is to the

Commented [AO3]: Make sure this number and all the other places where this number appears is update to the most recent statutory cap.

combined parental income. Health care expenses must also be apportioned pro rata in the same proportion as each parent's income is to the combined parental income. If the custodial parent is seeking work, childcare expenses as a result thereof may be apportioned. Educational expenses may also be awarded. They need not be apportioned. These expenses are discretionary and not based on a percentage of $183,000. Childcare expenses for seeking work and educational expenses need not be awarded in proportion to the combined parental income. The parties have considered all of the foregoing elements of the "basic child support obligation" and intend that the payments provided for in this stipulation encompass the entire "basic child support obligation."

4. The following calculation does not contain "attributed" or "imputed income" because only a Court of competent jurisdiction can determine whether to attribute or impute income. The calculation of the "basic child support obligation" in accordance therewith is as follows:

(a) Respondent had an adjusted gross income in the year 2018 of $56,508;

(b) Petitioner had an adjusted gross income in the year 2018 of $38,200;

(c) The combined Adjusted Family Income is $94,708, and the applicable child support percentage is 17%.

(d) The presumptive child support obligation of the Respondent is 17% of his share of the Combined Adjusted Family Income of $94,708, or $9,600 per year or $800 per month, plus his pro rata share childcare expenses and unreimbursed medical expenses. **[If childcare expenses are fixed and known: can include exact dollar amount of childcare expenses here.]**

(e) The parties' pro rata share is calculated as follows:

(i) The Petitioner's pro rata share shall be the Petitioner's adjusted gross

Commented [AO4]: If the income is based not on any actual documents (like tax returns or W2s), but just on the parent's representation of their income, you can use the language "The Father represents that his income in 2018 was $_____."

Commented [AO5]: Use the most recent full year, especially if the calculations are based on tax returns or W2s.

income divided by the parties' combined adjusted gross income;

(ii) The Respondent's pro rata share shall be the Respondent's adjusted gross income divided by the parties' combined adjusted gross income;

(iii) The parties adjusted gross income shall be determined by the parties previous year's W-2 or tax return.

The parties have been advised of the provisions of the New York Domestic Relations Law ("DRL") §140(1-b) and the New York Family Court Act § 413(1)(b) (the "Child Support Standards Act"), and that the basic child support obligation provided for therein would presumptively result in the correct amount of child support to be awarded.

Based upon the foregoing calculation, the "basic child support obligation" of the Respondent as the non-custodial parent would have been $9,600 per year or $800 per month on the combined parental income.

5. The reason or reasons that this Stipulation provides for a downward deviation of the basic child support obligation is that the Respondent's income varies substantially from month to month; the Respondent must incur travel costs to exercise parenting time with the Child; and the Child's needs are being met.

[If the Stipulation provides for an upward deviation, reasons can be, for example: "Respondent has agreed to an upward deviation in recognition of the fact that Petitioner has primary custody and significant parenting time with the child; Respondent has additional resources available to him, can afford to make additional child support payments, and wishes the children to enjoy a higher standard of living."]

6. Respondent shall pay directly to Petitioner **[OR: Respondent shall pay to Petitioner, through the Support Collection Unit,]** $550 per month for basic child support, beginning on the first of the month after the date of execution of this Stipulation and on the

first of every month thereafter, until the Child turns 21 or is otherwise emancipated. **[If childcare expenses are fixed and known: "Respondent shall pay to Petitioner an additional $____ per week/month for childcare expenses."]**

MODIFICATION

Each party has a right to seek a modification of the child support order upon a showing of: (i) a substantial change in circumstances; or (ii) that three years have passed since this Stipulation was executed, last modified or adjusted; or (iii) there has been a change in either party's gross income by fifteen percent or more since the execution of this Stipulation.

The parties acknowledge that this order of child support may be adjusted by the application of a cost-of-living adjustment at the direction of the Support Collection Unit no earlier than twenty-four months after this Stipulation is executed, last modified or last adjusted, upon the request of any party to the order or pursuant to paragraph (2) below. Nothing in this Stipulation shall be construed as a waiver of either party to seek or challenge a cost-of-living adjustment, or a waiver of either party's right or obligations, as delineated in the Family Court Act or Domestic Relations Law.

--OR--

Petitioner and Respondent hereby knowingly and voluntarily waive their respective rights to a de novo review every three (3) years and in the event of a 15% change in either party's gross income since the order was entered, last modified or adjusted.

Petitioner hereby waives her right to a Cost-of-Living Adjustment (COLA) for the purposes of recalculating child support obligations.

The knowing and voluntary waivers in this section are a result of Petitioner and Respondent's agreement to an upward deviation in Respondent's basic monthly child support obligations from the Child Support Standards Act and as a result of Respondent's voluntary agreement to provide for additional add-on expenses for the parties' child.

EMANCIPATION

Commented [AO6]: The emancipation events enumerated in this sample stipulation are also included in the legal definition of emancipation, so it isn't necessary to define them specifically here. However, many practitioners do like to include a list of emancipation events, and it is important that if your adversary wishes to include any other ones that are not listed here, you should consider whether this will disadvantage your client.

The Child Support payments provided for in this Stipulation shall be paid until the occurrence of the earliest of the following events: (a) the attainment of the age of 21 years (22 years, if the Child enters and continues to attend college); (b) the marriage of the Child; (c) entry by the Child in the military service of the United States; (d) the engaging by the Child in full-time employment (but not employment limited to vacation and summer periods) subsequent to attaining the age of 18 years; (e) the establishment of permanent residence by the Child away from the residence of the Petitioner (other than residence at a school, camp or college); or (f) the death of the Child. The Petitioner shall promptly notify the Respondent of the occurrence of any event that would terminate or reduce the payments to be made hereunder.

DEPENDENT TAX EXEMPTION

Commented [AO7]: This shows an example of the parties agreeing that the father can take the tax deduction. Consider in your client's case whether she would benefit from taking the deduction instead; if she is working and paying taxes.

Respondent may claim the two children _____ each year as dependents on federal and state income tax returns beginning in tax year 2019 so long as the following conditions are met:

a) Respondent earns sufficient income to have a tax liability; AND

b) Respondent is fully compliant with his child support obligation as of December 31 of the given tax year.

"Fully compliant" means that as of December 31, arrears as calculated by the Support Collection Unit are $0 for all children and Respondent owes no arrears to Petitioner for unreimbursed medical expenses.

Petitioner shall comply with completion of any necessary IRS or state tax forms for this purpose within ten (10) days of Respondent delivering any such form to her.

Respondent shall notify Petitioner within twenty-four (24) hours upon filing his federal tax return if he does not claim either the child ____ or the child ____ in any given year, and Petitioner shall be free to claim either or both of the children for that year.

Notwithstanding the above, the parties may deviate from this Stipulation with respect to the dependency-exemption in any given year the parties agree that they would benefit financially from an alternative arrangement.

HEALTH INSURANCE

The children of the marriage are currently covered under the _____ group health plans through Respondent's employer. The parties agree that Respondent shall be legally responsible for ensuring that each child remains enrolled in a group health care plan until the age of 21 years. The parties agree that they will share the cost of unreimbursed medical expenses of the minor children according to their respective pro rata shares of their child support obligation. If Respondent should fail to maintain health insurance coverage available through his employer or union for the minor children, Respondent shall be responsible for 100% of all unreimbursed medical expenses. **[OR: Parties shall split the unreimbursed medical expenses 50/50 OR any other pro rata share that the parties agree to.] Respondent** is to remit payment to Petitioner within ten (10) days of written notice of any unreimbursed medical expenses.

--OR--

Respondent does not have employer-provided health insurance available to him at this time and, therefore, the parties agree that Petitioner shall be the legally responsible relative and that the Children shall be covered under the Child Health Plus, or a college health insurance plan, at all times until each Child is Emancipated. If at any time either parent has employer-provided medical insurance at a reasonable cost, and, if available, dental health insurance plan, at such time that parent shall be a legally responsible relative at all times until each Child is emancipated. The parties will consult with each other to determine which health insurance plan offers the best coverage for the Children at the lowest cost. In the event that neither Child Health Plus, nor an employer-provided plan is available for the Children, the parties will

consult with each other and choose the best available plan for the Children at the lowest price and the parties shall share the cost of any medical insurance pro rata.

The party arranging for the Children's health insurance shall promptly provide the other with the appropriate insurance identification cards, and with information or correspondence sent to or received from the plan (including but not limited to information concerning changed benefits, reimbursements, and coverage.) Any reimbursements received by one party for an expense paid by the other shall be forwarded to the other party within seven days of receipt.

CHILD CARE

Except as otherwise set forth in this Stipulation, Respondent shall pay 75%, and Petitioner shall pay 25%, of reasonable child-care costs incurred while Petitioner is working, receiving elementary education or secondary education or higher education or vocational training or attending school, which will reasonably lead to employment and incurs reasonable childcare expenses as a result thereof. Reasonable child-care expenses may include, but are not limited to, an after-school program, activities programs, and/or a private caregiver. Petitioner will consult with Respondent as to child-care options, but the final decision shall remain with Petitioner. Respondent's obligation for child care expenses shall extend until the youngest child reaches twelve years of age. Under no circumstances shall child care expenses exceed one thousand five hundred ($1,500.00) dollars per month total.

--OR--

Except as otherwise set forth in this Stipulation, Petitioner shall pay all child-care costs. However, if Respondent misses visitation during a time that Petitioner is working, Respondent will pay for any necessary childcare to enable Petitioner to work, up to a maximum of $75 per day.

EXTRACURRICULAR ACTIVITIES/SUMMER CAMP

Commented [AO8]: Work-related child care expenses are often simply dealt with in the "basic child support" section when the pro rata shares are calculated. Include a separate section on child care if the parties want to have more limitations (or more freedom) in selecting and paying for child care. Included in this section are a couple of examples of ways the parties can structure their child care payments, but again, these examples are not exhaustive.

Commented [AO9]: These expenses are typically considered "discretionary"; one exception could be if the summer camp was being used in lieu of child care during the summer.

Summer camp costs shall be divided between the parties according to their pro rata share; with Respondent paying 75% and Petitioner paying 25% of the cost. Petitioner shall consult with Respondent as to summer camp options, but the final decision shall remain with Petitioner.

Respondent has agreed to help Petitioner pay for certain child support add-on expenses for the Child in proportionate shares ("pro rata,"), 75% by Respondent and 25% by Petitioner. Respondent agrees to pay for the Child's **[list the specific expenses; e.g. piano lessons; private tutoring in algebra; Tae Kwon Do tuition and uniform costs; soccer league fees, uniform costs and travel expenses to varsity soccer games; etc.]**. In the event that the Child wishes to participate in other activities, Petitioner shall consult with Respondent regarding his contribution to those additional activities, but Petitioner shall not impose a financial obligation upon Respondent without his express consent in writing, including email.

COLLEGE EXPENSES

Commented [AO10]: Statutory child support goes until 21. Parties may sometimes wish to provide college tuition for their children beyond age 21, but that has to be specifically provided for in a stipulation. It is also common to require a child to take out all possible financial aid packages and scholarships before the payor's share is calculated, and it is typical to include a cap on the maximum amount of tuition that payor will pay. If the tuition includes room and board, then the payor of child support is also entitled to a dollar-for-dollar reduction of his regular child support for the times that he is paying his share of room and board.

[Longer language:] The parties mutually acknowledge their desire for their children to receive a college education, notwithstanding the present tender age of the children, the aptitudes of the children and the uncertain costs of college at the time each of the children will be of age to attend college.

"College expenses" as used herein shall mean tuition, room, board, registration and application fees, PSAT and SAT preparatory courses and fees for such testing, required books and laboratory materials, and transportation within the continental United States between the child's residence and the college for up to four round trips per academic year, as well as reasonable spending money while each child is actually residing at the college or university.

Petitioner and Respondent shall share equally **[or whatever proportion they agree on; it can be the pro rata share]** the children's college expenses until each child reaches the age of 22. Notwithstanding the foregoing, however, Respondent's responsibility for college shall not exceed **[___%]** the costs and expenses which would have been incurred at the time of

enrollment had the child attended a college or university which is a member college or university of the State University of New York.

Commented [AO11]: This is known by practitioners as the "SUNY Cap"

Additionally, there shall be deducted from Respondent's obligation for college, half the amount of any loans, grants, scholarships, or gifts which are awarded to the child. The parties shall encourage the use of grants, scholarships, student loans and other financial aid available to their children to assist in the payment of college education expenses, and the parties agree to cooperate with each other, and with the children, toward that end; provided, however, that neither party shall not be obligated to borrow any money in his/her own name, or to guarantee any college loans which may be taken by the children.

Respondent shall receive a dollar-for-dollar credit toward his basic monthly child support obligation for his share of the cost of the Child's college room and board.

--OR--

[Shorter language:] Respondent will pay __% and Petitioner will pay __% of Necessary College Expenses. Necessary College Expenses shall include, but not be limited to registration fees for standardized testing (e.g. PSAT, SAT, ACT), preparation courses for standardized testing, and applications for college, and tuition and room and board up to the level of the State University of New York, for a four-year course of study. All such payments shall be made by Respondent within ten days of receipt of an invoice from the provider or from Petitioner.

Dated:

_____ _____

{Petitioner Name}, Petitioner {Respondent Name}, Respondent

_____ _____

Counsel Counsel

STATE OF NEW YORK
ss:
COUNTY OF NEW YORK

On the _____ day of _____ in the year 2019 before me, the undersigned, a Notary Public in and for said State, personally appeared Petitioner _____, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that she executed the same in her capacity, and that by her signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
Notary Public

STATE OF NEW YORK
ss:
COUNTY OF NEW YORK

On the _____ day of _____ in the year 2019 before me, the undersigned, a Notary Public in and for said State, personally appeared Respondent _____ personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

_____
Notary Public

Post-Hearing Brief – Needs of the Child

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
----------X
JAY DOE,

File No.: 11111
Docket No.: F-11111-12/12A

Petitioner,

PETITIONER'S SUMMATION

-against-

JO DOE,

Respondent.
----------X

ADVOCATE ATTORNEY, an attorney duly licensed to practice law before the courts of the State of New York, hereby affirms the following under penalties of perjury:

1. I am of counsel to Her Justice, the attorneys for the Petitioner, JAY DOE, ("Petitioner"), and, as such, I am fully familiar with all of the facts and circumstances of this case.

2. I submit this summation in support of Petitioner's request for child support for the subject child, JEAN DOE ("Child"), born on October 26, 1996, based on the needs of the child, which are approximately $1000 per month.

PETITIONER'S MOTION TO PRECLUDE WAS GRANTED

3. On March 14, 2012, JAY DOE, ("Petitioner"), petitioned this Court seeking upward modification of a June 1, 2009 Support Order of the New York County Family Court in the amount of $127.00 per month.

4. Petitioner took this action because Petitioner discovered that JO DOE, ("Respondent"), was the owner, partner, or agent of multiple businesses, including a hotel,

which Respondent had never previously disclosed to Petitioner. In fact, Respondent had previously told Petitioner—and the court—that he did "maintenance work" for a company called COMPANY. (See **EXHIBIT A) Petitioner** later learned that Respondent was actually the *owner* of COMPANY, a corporation that also does business as COMPANY B. Respondent's counsel has confirmed that Respondent is the owner of COMPANY, and that he has been since 2001. (See **EXHIBIT B**)

5. On November 9, 2012, Petitioner sent subpoenas to the multiple businesses of which Respondent is or was an owner, partner, or agent. Among other things, the subpoenas requested tax returns, bank statements, and articles of incorporation. Respondent's counsel was provided with copies of the subpoenas. Respondent did not respond to the subpoenas.

6. On January 18, 2013, Respondent defaulted on the parties' court appearance, and Magistrate SP issued a Temporary Modifying Order of Support by Default, increasing Respondent's support obligation to $650.00 per month.

7. On June 27, 2013, Magistrate SP So Ordered a Notice for Discovery and Inspection, directing the Respondent to provide documentation and information regarding the financial situation of his businesses and his personal finances, including COMPANY. Respondent failed to provide the documents and information as directed by Magistrate SP, despite several follow-up requests from Petitioner's counsel.

8. On December 20, 2013, Petitioner filed a Motion to Preclude (*Supplemental A, Motion Sequence 3*) requesting that Respondent be precluded from offering evidence or testimony relevant to his financial situation, on the ground that Respondent had willfully failed and refused to comply with Petitioner's demands for disclosure of that financial information.

9. On January 6, 2014, Magistrate SP granted Petitioner's Motion to Preclude, stating that the parties would proceed to inquest based on the needs of the Child.

THE NEEDS OF THE CHILD ARE APPROXIMATELY $1000 PER MONTH

10. On January 6, 2014, Petitioner testified to the following needs of the child, which are also outlined in the Financial Disclosure Affidavit and Exhibits that Petitioner submitted to the Court:

Monthly Expenses	**Amount Petitioner Spends Each Month (total household)**	**Amount Petitioner Spends Each Month on Subject Child**
Rent	$1,650 (**see paragraph 12*)	$412
Utilities (gas, cable, electric)	$195	$49
Telephone service	$200 (for petitioner and subject child)	$100
Food	$820 ($520 in food stamps)	$205
Public Transportation	$120	$30
Clothing	$100	$25
Laundry and Dry Cleaning	$80	$20
Education (fees for school projects and events)	$80	$20
Childcare	$240	$0
Entertainment	$100	$25
Personal Care Items (deodorant, shampoo, toothpaste, acne cream for Child, etc.)	$140	$40
TOTAL:		**$926 per month**

11. Petitioner, who is of Moroccan dissent and does not speak fluent English, testified through an Arabic interpreter that she lost her job as a cleaning lady when the company she cleaned for shut down. Petitioner made $217 per week when she was employed. Petitioner testified that even when she was working full-time, she had trouble making ends meet and supporting the Child. Petitioner testified that she was in arrears in excess of $3000 on her rent and was only able to avoid eviction because members of her Mosque raised money to support her and her children.

12. Petitioner further testified that she is currently paying $1,185 per month to live in a one-bedroom apartment with the subject Child, who is seventeen years old, and his two half-siblings, aged nine and two. The subject Child does not have a bedroom, and instead sleeps in the living room. He also attempts to do his homework in the living room, but his younger brother spilled water on the Child's computer, and Petitioner has been unable to afford a new one. The Child should be sleeping and studying in a proper bedroom. As Petitioner testified, a two-bedroom apartment in Petitioner's building costs $1,650 per month.

13. In addition to the reoccurring monthly expenses outlined above, the Child needs support for other major expenses that occur less frequently. Petitioner testified that the Child needs braces. The Child had started a round of orthodontia that was cancelled after the Child's insurance changed. The Child's braces had to be removed because Petitioner could not afford to complete the orthodontia. Petitioner testified that completing the orthodontia will cost approximately **$1500**.

14. Further, as mentioned in paragraph 12, Petitioner testified that the Child's computer broke when his younger brother spilled water on it, because the Child does not have a room to store his belongings. The Child needs a computer for his homework

assignments and college applications, but Petitioner cannot afford to buy him a new one. Petitioner has estimated that a new computer would cost approximately **$500**.

15. In addition, the Child is about to begin his senior year of high school. He will be applying for colleges and will need money for application fees and for tuition.

16. Given the monthly reoccurring expenses that must be paid to support the Child, in the amount of $926 per month, and given the other major expenses that are necessary for the child's health and education, a child support award should be calculated based on the needs of the Child at $1000 per month.

RESPONDENT DOES NOT DOUBT
PETITIONER'S ACCOUNT OF THE CHILD'S NEEDS

17. Respondent's counsel had the opportunity to cross-examine Petitioner on January 06, 2014, and again on June 06, 2014. Respondent's counsel did not raise any doubts or questions about Petitioner's account of the Child's needs.

18. Respondent also had the opportunity to testify about the needs of the child. On June 6, 2014, Respondent testified that he did not know the needs of the Child, because he has not seen the child in years. Respondent did not offer any testimony or evidence to raise any doubts or questions about Petitioner's account of the Child's needs.

19. Under the temporary order issued by this court, Respondent is currently ordered to pay $650.00 per month to support the Child. Petitioner respectfully requests that a final order be entered in an amount no less than $650.00, to be retroactive to the initial date of filing.

20. No previous application for the relief sought herein has been made to this or any other Court.

WHEREFORE, I respectfully ask that this Court grant JAY DOE the relief requested in the within application in its entirety.

Dated: New York, New York
July 3, 2014

_____
ADVOCATE ATTORNEY, Esq.

Post-Hearing Brief – Willfulness

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX
----------X
ALEX DOE,

Petitioner,

File No.: 12345
Docket No.: F-12345-14
CSMS No.: ABC12345

- against -

JAIME DOE,

Respondent.
----------X

SUMMATION AND POST-TRIAL MEMORANDUM OF LAW OF PETITIONER

Petitioner respectfully submits this written summation and post-trial memorandum of law in further support of her petition, pursuant to Section 454 of the Family Court Act, for a finding that the Respondent, JAIME DOE, has willfully failed to pay his child support obligations on behalf of their child, PAT DOE (the "Willfulness Petition"), and in further opposition to JAIME DOE's petition for a downward modification of his child support obligations (the "Downward Modification Petition").

PRELIMINARY STATEMENT

It is undisputed that, in the 86 weeks between November 16, 2010 and July 17, 2012 (the date on which ALEX DOE filed her Willfulness Petition), JAIME DOE paid his bi-weekly child support obligations only twice. This uncontroverted record of habitual nonpayment, as a matter of law, itself establishes willfulness. JAIME DOE thus had the burden of presenting evidence

competent to establish a legally valid defense. He did not and cannot present any such evidence. Controlling precedent thus compels a finding that this sustained nonpayment was willful.

Since JAIME DOE's failure to secure employment was willful, it cannot be used to justify a downward modification. Furthermore, to gain a downward modification, JAIME DOE needs to prove that he has experienced a substantial and negative change in circumstances since the entry of the present support order. The present support order was entered by the Bronx Family Court on August 4, 2011. By JAIME DOE's own admission, he was not working and had no income as of August 4, 2011. As of the September 1, 2013 hearing on this matter, JAIME DOE had gained full-time employment. Thus, if anything, JAIME DOE's ability to pay child support has increased in the relevant period. Certainly, JAIME DOE has not met his burden of showing the sort of substantial change in circumstances necessary to obtain a downward modification.

Petitioner therefore respectfully requests that this Court: deny Respondent's petition for a downward modification entirely; deem his failure to pay child support willful; and, as a result of this willfulness, recommend that he be sentenced to a term of incarceration of sufficient duration to convince him of the seriousness of his errant conduct and the importance of meeting his ongoing support obligations.

PROCEDURAL HISTORY

On May 18, 2007, this Court entered a final Order of Support under which JAIME DOE was obligated to pay $248.00 bi-weekly (including $66.00 bi-weekly for childcare) to ALEX DOE for and toward the support of PAT DOE. The final Judgment of Divorce entered on May 4, 2010 kept JAIME DOE's support obligations in place. On August 4, 2011, without objection from JAIME DOE, this Court entered an Adjusted Order of Support pursuant to a cost-of-living adjustment under which his bi-weekly child support obligations were increased by $22.00 to

$270.00 (still including the $66.00 bi-weekly for childcare). The effective date of the adjusted order was August 29, 2011.

On July 17, 2012, ALEX DOE filed the Willfulness Petition and a separate petition for upward modification of the child support order (the "Upward Modification Petition"). In response, JAIME DOE filed the Downward Modification Petition on October 26, 2012. At a hearing on January 14, 2013, this Court assigned ATTORNEY to represent JAIME DOE. Testimony was heard on April 29, August 20, and September 1, 2013. The undersigned counsel for ALEX DOE first appeared in this case at a hearing on May 14, 2013. During the hearing on August 20, 2013, ALEX DOE dropped the Upward Modification Petition.

BACKGROUND

A. Child Support Arrears Accrued During Relevant Period for Willfulness Petition

Support Collection Unit ("SCU") records, attached hereto as Exhibit 4, show that during the 86 weeks between November 16, 2010 and July 17, 2012, JAIME DOE's child support payments totaled only $589.66. His court-ordered support obligation during that time was $11,148.00. His arrears thus total $10,558.34. A spreadsheet documenting this history of willful non-payment in detail is attached hereto as Exhibit 5.

B. JAIME DOE's Credentials and Ability to Work

JAIME DOE graduated from COLLEGE. (Tr. at 23:16 – 23:17). Thereafter, he was a multinational lending officer for EMPLOYER. (Tr. at 23:18 – 23:21). He worked in the financial industry from 1981 to 1994. (Tr. at 25:3 – 26:24).[1] From 1994 to 2000, JAIME DOE worked in

[1] While FATHER's resume indicates that he spent all fourteen years at Chemical Bank, FATHER explained that his resume was not intended to be literally true, but instead was composed "for the sake of simplicity, it's [for] getting in the door with persons -- they don't want to be bothered with a four-page resume." (Tr. at 25:3 – 26:24). FATHER apparently spent time during the fourteen year period at various financial institutions including EMPLOYERS. (Tr. at 25:11 – 25:13).

the EMPLOYER as an elementary school teacher. (Respondent's Exh. A). JAIME DOE began working at the EMPLOYER at the beginning of 2001 and continued working there until the end of 2010. (Tr. at 13:12 – 13:16). From the time he was initially ordered to pay child support in 2007 to the point when he stopped attending work at EMPLOYER, JAIME DOE paid all of his child support obligations. (Tr. at 18:4 – 18:15).

JAIME DOE alleged that, as a result of a severe depressive incident, he was unable to continue working at EMPLOYER. (Tr. at 12:11 – 12:24). JAIME DOE testified that similar bouts of depression had caused him employment difficulties in the past. Specifically, he testified that he had lost his job at EMPLOYER due to severe depression. (Tr. at 13:1 – 14:6).[2] JAIME DOE noted that "medication and intensive talk therapy will often times bring me out of [depression]." (Tr. at 13:24 – 14:1). However, he did not consistently stay on medication or remain in talk therapy during his time at EMPLOYER. (Tr. at 20:5 – 21:11).

JAIME DOE asserted during testimony that he did not use illegal drugs, including cocaine, between May 8, 2010 and July 17, 2012. (Tr. at 31:19 – 32:8). Going further, JAIME DOE testified that he "certainly can't remember any time" during which he used illegal drugs. (Tr. at 28:21 – 28:25). However, JAIME DOE's treatment records from HOSPITAL, admitted by motion of JAIME DOE's counsel as Respondent's Exhibit E and attached hereto as Exhibit 6, document that, as of April 14, 2012, JAIME DOE told hospital staff that he had ingested a "sm amount" of cocaine nasally about "6 weeks ago[.]"[3] (Ex at 28). The same exhibit, referring to the same hospital visit, notes that JAIME DOE's "last cocaine use was approx 6 weeks ago used

[2] ALEX DOE testified, however, that JAIME DOE told her that he lost this position at one "financial institution[]" (though perhaps not EMPLOYER) due to his drug abuse and stealing from that financial institution. (Tr. at 45:2 – 45:6).

[3] The quotations discussed in this section appear in an "INTAKE" report apparently composed by DOCTOR. The abbreviations are directly quoted from the report.

1 line w friend. Before that he reports was 1 yr ago." (Ex at 33). The records finally reveal JAIME DOE's admission that he had a long history of abuse of cocaine:

> Pt. endorses a long hx of substance abuse dating back to 80's. He reports he began to use cocaine heavily in 80s using over 200$ /day. He reports being clean x 10 yrs from 1994-2004 and reports that his use did not coincide w his hospitalization or depressive episodes.

(Ex at 33).

JAIME DOE further testified that he had never been diagnosed with a cocaine-induced mood disorder. (Tr. at 32:9 – 32:12). However, the HOSPITAL medical records demonstrate that he was twice diagnosed with "Cocaine-Induced Mood Disorder." The first diagnosis occurred on April 14, 2012 (by DOCTOR). The second diagnosis is dated September 18, 2012 (by DOCTOR). (Ex at 37, 65). The records indicate that JAIME DOE himself was aware of and at least partially concurred with this diagnosis. As stated therein, "pt endorses that substance use could easily play a large part of his current depressive episodes but believes that he is also depressed." (Ex at 33).

Beyond cocaine, the evidence at trial revealed JAIME DOE's history of alcohol abuse. He claimed at trial that he was never drunk during the entire period from May of 2010 to July of 2012. (Tr. at 32:23 – 33:3). This blanket denial was contrary to the testimony of ALEX DOE, who observed JAIME DOE to be impaired with "alcohol on his breath, staggering, red eyes, loud, yelling[]" about "80 percent of the time[s]" that she saw him during that period. (Tr. at 46:5 – 47:4).[4]

JAIME DOE's alcohol and drug abuse were compounded by his lack of interest in retaining gainful employment. At trial, JAIME DOE admitted that he had many chances to preserve his job at EMPLOYER during the period between when he stopped attending work in

[4] MOTHER further testified that FATHER had at least once attempted to hide his level of intoxication from her during their marriage. (Tr. at 48:7 – 48:13).

November of 2010 and when he was formally terminated in June of 2011, but that he neglected to avail himself of any of them. (Tr. at 14:10 – 15:4). During this period, specifically on January 22, 2011, JAIME DOE told a nurse at HOSPITAL that he "feels he is ready to return to work." (Tr. at 7:8 – 9:14). He never did.

C. RESPONDENT's Efforts to Obtain Work and Pay Child Support

Even though JAIME DOE stopped working at EMPLOYER in November of 2010, he does not even claim to have sought a new job until the second quarter of 2012. (Tr. at 22:17 – 22:23). They testified that he began the "job search process . . . I guess, [in] March or April of 2012." (Tr. at 24:7 – 24:11). His only evidence of a job search prior to ALEX DOE's filing of the Willfulness Petition is two letters and an email, admitted as Respondent's Exhibit C. The first letter, dated May 8, 2012, forwarded JAIME DOE's resume to EMPLOYER. The email, dated June 3, 2012, was in response to an apparently successful interview with EMPLOYER. The second and last letter, dated July 16, 2012 (one day prior to the filing of the Willfulness Petition), requested a position at EMPLOYER.

Once he finally sought out work, JAIME DOE quickly found it. By June of 2012, apparently shortly after his email to EMPLOYER, JAIME DOE began full time seasonal work at EMPLOYER. (Tr. at 24:20 – 25:9). Despite working throughout the months of June of 2012 and July of 2012, JAIME DOE did not pay any child support to ALEX DOE. (Tr. at 25:10 – 26:25).[5]

Nor did JAIME DOE ever use his assets to pay child support. (Tr. at 35:12 – 36:25). JAIME DOE had savings when he lost his job, which he used to pay the rent on his apartment and to pay for a cell phone. (Tr. at 34:9 – 35:23); (Tr. at 30:8 – 30:11). Furthermore, he maintained the car for almost a year and a half after he stopped regularly working at

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[5] Three payments were paid out in August and September of 2012, after the filing date of the Willfulness Petition. *See* SCU Records (attached hereto as Exhibit 4). These three payments constituted the last child support payments that ALEX DOE has received from JAIME DOE.

EMPLOYER. (Tr. at 27:10 – 27:12). JAIME DOE twice emphasized that he offered ALEX DOE $200 from the $400 he obtained from finally selling his car. (Tr. at 27:10 – 30:3); (Tr. at 35:12 – 36:21). However, JAIME DOE admitted that he reneged on this offer once ALEX DOE insisted, appropriately, that he pay through SCU.

D. JAIME DOE's Financial Condition during the Period Relevant to the Downward Modification Petition

The dates relevant to JAIME DOE's request for a downward modification of his support obligation are the date of entry of the present support order and the time of trial. According to JAIME DOE's testimony, he had no income when the present support order was entered on August 4, 2012. (Tr. at 22:17 – 22:23). In contrast, by the time of trial on September 1, 2013, JAMIE DOE testified that he had obtained full-time employment. (Tr. at 40:20 – 41:17).[6]

ARGUMENT

I. JAIME DOE HAS FAILED TO SHOW A VALID DEFENSE FOR HIS NONPAYMENT OF CHILD SUPPORT.

A. This Court properly determined that the SCU records by themselves constitute *prima facie* evidence of willfulness.

This Court properly determined that the SCU records constitute *prima facie* evidence that JAIME DOE willfully failed to pay child support. (Tr. at 5:19 – 9:1); *see Saintime v. Surin*, 40 A.D.3d 1103, 1104 (2d Dep't 2007) ("The account statements from the special collections units indicating that the father failed to pay support constituted prima facie evidence of his willful violation of the order of support.") (citations omitted). Indeed, as shown in the spreadsheet attached hereto as Exhibit 5, the SCU records establish that JAIME DOE accrued arrears of $10,558.34 in child support between November 16, 2010 and when filed the Willfulness Petition on July 17, 2012. The burden thus shifted to JAIME DOE to "offer[] some competent, credible

[6] JAIME DOE admitted that he had not notified SCU of his new employment or begun paying child support from his newfound income. (Tr. at 41:16 – 41:17). As of the filing of this brief, ALEX DOE has yet to receive a child support payment since September 4, 2012.

evidence of his inability to make the required payments." *Saintime*, 40 A.D.3d at 1104 (citation omitted) (emphasis added). As will be shown *infra*, the evidence presented by JAIME DOE is neither credible nor competent.

B. JAIME DOE failed to present legally competent evidence to support a defense to a finding of willfulness on grounds of depression.

A diagnosis of depression or a mood disorder is not, in itself, sufficient to provide a defense against a *prima facie* showing of willfulness by nonpayment. *See Sutton-Murley v. O'Connor*, 61 A.D.3d 1054, 1055 (3d Dep't 2009); *see also Greene v. Holmes*, 31 A.D.3d 760, 762 (2d Dep't 2006) (holding a father's diagnosis of bipolar disorder insufficient to defend nonpayment absent proof of the father's "inability to obtain employment due to his mental illness"). Instead, JAMIE DOE was required to introduce "competent medical proof that his mental condition prevented him from maintaining employment." *Sutton-Murley*, 61 A.D.3d at 1055.

JAMIE DOE offered no such proof. Instead, his medical records from HOSPITAL contain JAMIE DOE's admission that he felt he could return to work as of January 22, 2011 (two months after he had stopped attending work at EMPLOYER, five months before he was terminated). (Tr. at 7:8 – 9:14).

The evidence also revealed that JAMIE DOE failed to consistently seek out treatment that he himself testified had frequently been effective at treating the depression he claimed made it difficult for him to work.[7] Specifically, JAMIE DOE testified that medication and talk therapy "often times bring me out of [depression]" and that he had suffered from acute depression regularly both at EMPLOYER and in his prior employment. (Tr. at 12:11 – 14:6). Under those

[7] It is worth noting that FATHER was able to work at and receive salary from EMPLOYER for the period from 2001 to 2010, despite allegedly suffering from five or six "periods during which I suffered from acute depression[]" during that time. (Tr. at 18:4 – 19:7).

circumstances, JAIME DOE had an obligation to his daughter and to ALEX DOE to continue taking medication and participating in talk therapy. JAIME DOE instead allowed his treatment to lapse. (Tr. at 20:5 – 21:11). Having made that choice, JAIME DOE should not be able to use its inevitable consequence to excuse his failure to maintain employment.

This failure is even less excusable in light of EMPLOYER keeping JAIME DOE's position open for him during the seven months between November of 2010 and June of 2011. (Tr. at 14:10 – 15:4). In an analogous situation, the court in *Gaudu v. Gaudu* ruled as follows on a Downward Modification Petition:

> Alcoholism is a recognized disease. It is also recognized as one which is treatable, however. Here the Petitioner not only testified that it was a relapse that resulted in his losing his job, but that he was told by his employer that if he sought treatment he could keep his position. He elected not to do so. While this Court commends the Petitioner for again returning to sobriety, it cannot, under the facts of this case, excuse his "relapse" as being beyond his control, any more than it could excuse him for driving while under the influence of alcohol.

171 Misc. 2d 511, 512 (Fam. Ct., Seneca County 1997).

C. Because JAIME DOE's mental illness was caused by his abuse of alcohol and cocaine, it cannot excuse his unemployment

Like the father in *Gaudu*, JAIME DOE's problems ultimately stem from his substance abuse. Indeed, HOSPITAL, in the medical records attached hereto as Exhibit 6, did not give JAIME DOE a simple diagnosis of depression: instead, he received a "*Primary*" diagnosis of "Cocaine-Induced Mood Disorder" and a "*Secondary*" diagnosis of "Major Depressive Disorder, Recurrent, In Partial Rem[.]" (Ex at 37, 65). Those same medical records reveal JAIME DOE's history of abuse of cocaine, leading up to this diagnosis of Cocaine-Induced Mood Disorder. (Ex at 28, 33). Beyond cocaine, ALEX DOE testified to JAIME DOE's history of alcohol abuse and belligerent inebriation. (Tr. at 32:23 – 33:3, 46:5 – 47:4, 53:1 – 53:9). JAIME DOE himself admitted to medical staff that "substance use could easily play a large part of his current

depressive episodes[.]" (Ex at 33). The evidence strongly suggests that JAIME DOE's substance abuse had exactly that effect.

New York courts have ruled that employment difficulties caused by substance abuse cannot excuse nonpayment of child support. *E.g.*, *Snyder v. Snyder*, 277 A.D.2d 734, 735 (3d Dept 2000) (noting that a father's history of cocaine dependence and alcohol abuse "neither explains nor justifies [his] decision to place his own alleged expenses ahead of his obligation to support his son"); *Minter v. Minter*, No. F892-93/05E, 11 Misc. 3d 1081(A), at *4 (Fam. Ct., Monroe County Feb. 1 2006) ("For courts to allow substance abusers or alcoholics to reduce child support for accelerating their use to the point of job loss would be to reward them for their serious mistakes, and in the case of drug addiction, for breaking the law.") (footnote omitted). JAIME DOE's substance abuse seems to have resulted in a mood disorder that made it difficult for him to maintain work. Under New York law, that is simply no excuse for failing to do so.

D. JAIME DOE ultimately lost his job because, without legal justification, he stopped attending work and refused entreaties to return.

As a parent with support obligations, JAIME DOE had a duty to keep working at EMPLOYER and earning enough to support his daughter. *See Feliciano v. Nielsen*, 282 A.D.2d 783 (3d Dept 2001). Instead, JAIME DOE stopped attending work and, by his own testimony, repeatedly ignored entreaties from EMPLOYER to return:

> A. Well, and I hadn't -- I hadn't [attended work at EMPLOYER] for months. I hadn't -- you know, and besides the point where I used up all the sick leave I had, and I wasn't getting paid. And the agency had -- reached out and, you know, they sent a correspondence to me, but I wasn't opening my mail. I was barely alive. And so when they began to request, they list it, you know, if you're -- if you are -- I mean, I had -- I had one of those people from Human Resources ended up calling. And I think she was able to -- she came by and slipped a message under the door with his number. But I never followed up on that, you know, with that. After a certain point, and after a certain number of episodes, there's not an awful lot, I guess, the Human Resources can do to keep you on the payroll. So it wasn't -- it wasn't -- it wasn't something new to them. They were aware of my situation.

> But -- I guess, you know, by State law, if I didn't respond to their request, and reach out and – and, you know, get some help, they had nothing -- well, I guess I'm terminated. That's what happened. But you know, at that time, like I said, I wasn't thinking right. And I didn't care about much of anything.

(Tr. at 14:10 – 15:4). Ultimately, JAIME DOE was terminated from EMPLOYER because he chose not to do any work there for a seven-month period. That choice represented a willful violation of JAIME DOE's support obligations.

E. JAIME DOE's evidence of alleged efforts to search for a job was insufficient as a matter of law.

To excuse his failure to work, JAIME DOE was required to introduce "documentation about his efforts to obtain employment, such as a resume, job applications, or a job search diary." *Virginia S. v. Thomas S.*, 58 A.D.3d 441, 442 (1st Dep't 2009). JAMIE DOE failed to work from November 16, 2010 until June of 2012. He does not even claim to have looked for a job until "March or April of 2012." (Tr. at 24:7 – 24:11). He only introduced two letters and one email as documentation of his job search, the earliest of which was dated May 8, 2012. (Respondent's Exh. C). The earlier letter and the email were both directed to EMPLOYER, an organization which hired JAMIE DOE within a month of his application. (Tr. at 24:20 – 25:9). The evidence establishes that JAIME DOE did not make any real effort to seek work for seventeen of the twenty months between when he left EMPLOYER and when ALEX DOE filed the Willfulness Petition. The evidence also establishes that when JAIME DOE actually tried to find a job, he could quickly and easily find one. Ultimately, JAIME DOE chose not to do so for a period of seventeen months during which he racked up $10,558.34 in arrears. This choice, again, represented a willful violation of JAIME DOE's support obligations.

F. During the relevant period, JAIME DOE improperly paid other expenses out of available savings and income, rather than paying the child support owed to PAT DOE.

It has been held that a parent's "failure to pay court-ordered support during a period in which he had sources of income will support a finding that he willfully violated a support order, even when he is currently indigent and unable to make any payments." *St. Lawrence County Support Collection Unit v. Cook*, 57 A.D.3d 1258, 1259 (3d Dept 2008) (citations and internal quotation marks omitted), *appeal denied* 12 N.Y.3d 707 (2009). This is true even if the "income" was from odd jobs done for a relative who in exchange paid a portion of rent. *Crystal v. Corwin*, 274 A.D.2d 683, 685 (3d Dept 2000). JAMIE DOE admitted to having full-time income during June and July of 2012, prior to ALEX DOE's filing of the Willfulness Petition. (Tr. at 24:20 – 25:9). JAMIE DOE further admitted that none of this income went to the child support owed to PAT DOE. (Tr. at 25:10 – 26:25). Under the rule of *St. Lawrence*, this failure supports a finding that JAMIE DOE's nonpayment was willful.

Furthermore, during the period when JAMIE DOE was unemployed but still had assets, such as his savings account, he was required to use those assets to pay child support. *See Bell v. Bell*, 181 A.D.2d 978 (3d Dep't 1992). JAMIE DOE never did so. (Tr. at 36:22 – 36:25). Instead, until he ran out of money, JAMIE DOE paid rent on his apartment, paid for a cell phone, and maintained a car. (Tr. at 34:9 – 36:25). That choice provides still further support for a finding of willfulness.

II. JAIME DOE HAS NOT MET HIS BURDEN OF ESTABLISHING ANY "SUBSTANTIAL CHANGE OF CIRCUMSTANCES" SUFFICIENT TO JUSTIFY A

DOWNWARD MODIFICATION.

A. JAIME DOE presented no evidence of a decrease in his material circumstances during the relevant time period.

In order to obtain a downward modification, JAIME DOE had to prove that he experienced a substantial and negative change in circumstances between August 4, 2011 and the date of trial. JAIME DOE had no income on August 4, 2011. (Tr. at 22:17 – 22:23). By contrast, as of the September 1, 2013 hearing on this matter, he had gained full-time employment. (Tr. at 40:20 – 41:17).

Thus, rather than demonstrate a substantial negative change in circumstances sufficient to justify a downward modification, the evidence presented at trial actually establishes that JAIME DOE had significantly greater ability to pay by the time of trial than he did at the beginning of the relevant period. While, as discussed *infra*, there are multiple other reasons to reject JAIME DOE's Downward Modification Petition, this fact in itself is more than sufficient.

B. Because JAIME DOE had no legally valid excuse for his failure to work, that failure cannot be used as a basis for downward modification.

Even if this Court were to allow JAIME DOE to use the loss of his position at EMPLOYER to support his Downward Modification Petition, the evidence would still compel this Court to reject the petition. In order to use his job loss as a basis for downward modification, JAMIE DOE had to prove: (1) that he did not lose his job through any "fault of his own" and (2) that he "diligently sought reemployment." *See Greene*, 31 A.D.3d at 762. JAIME DOE did not and could not meet either prong of that test.

Instead, the evidence clearly shows that JAIME DOE was at fault for his job loss. First, as shown *supra* in section I(C), the HOSPITAL medical records show that substance abuse led to the "Cocaine-Induced Mood Disorder" that made it difficult for JAIME DOE to work. (Ex at 33, 37, 65). Employment difficulties caused by substance abuse are the fault of the abuser and

cannot form the basis for a downward modification. *Minter*, 11 Misc. 3d 1081(A), at *4. Second, as shown *supra* in section I(D), JAIME DOE could have kept his job if he merely had gone to work during the seventh month period from November of 2010 until June of 2011. His failure to do so is inexcusable and resides solely with JAIME DOE. (Tr. at 14:10 – 15:4).

The evidence equally shows that JAIME DOE was in no way diligent in seeking reemployment. As shown *supra* in section I(E), JAIME DOE presented no evidence of any attempt to seek a new job for seventeen of the twenty months between when he stopped working at EMPLOYER and when ALEX DOE filed the Willfulness Petition. Furthermore, within one month of his first documented job application, JAIME DOE had a full-time position. (Tr. at 24:20 – 25:9). JAIME DOE was required to introduce documentary evidence proving that he diligently sought reemployment. *Virginia S.*, 58 A.D.3d at 442. The evidence introduced at trial established the opposite.

Finally, as shown *supra* in Section I(B), JAIME DOE did not meet his burden of introducing "competent medical evidence" to show that he had a mental illness that prevented him from working. *See Greene*, 31 A.D.3d at 762. Instead, the medical records show that, shortly after he stopped going to work at EMPLOYER, JAIME DOE told a nurse that he was still able to work. (Tr. at 7:8 – 9:14). Furthermore, the evidence revealed that, contrary to his legal responsibilities, s*ee Gaudu*, 171 Misc. 2d at 513, JAIME DOE failed to maintain a treatment regimen of talk therapy and medication that he himself claimed was effective in treating his claimed depression. (Tr. at 20:5 – 21:11); (Tr. at 12:11 – 14:6). Indeed, on March 12, 2013, JAIME DOE was discharged from HOSPITAL because he was "Non-adherent with treatment[.]" (Ex at 65). Having failed to establish either a debilitating mental illness or consistent commitment to treatment, JAIME DOE cannot rely on mental illness to excuse his sustained

unemployment. And that sustained unemployment compels rejection of the Downward Modification Petition.

CONCLUSION

For the 86 weeks from November 16, 2010 to July 17, 2012, JAIME DOE paid child support only twice and racked up $10,558.34 in arrears. For the first seven months of that period, JAIME DOE was repeatedly contacted by his employer and asked to return to work. He did not, and eventually EMPLOYER was forced to fire him. He had a savings account and other assets at the beginning of the period. Rather than use any of his assets to pay child support, he spent every cent on himself, paying rent, keeping a cell phone, and maintaining a car. Eventually, seventeen months later, he ran out of money. Only then did JAIME DOE try to find a job. Within a month, he was employed. This did not, however, lead him to resume paying child support.

JAIME DOE seeks to excuse his action by asserting that he was depressed. Yet the medical evidence he introduced clearly shows that his mental state was actually caused by his repeated and inexcusable substance abuse. JAIME DOE has failed to present evidence sufficient to rebut ALEX DOE's *prima facie* case of willful nonpayment or to justify a downward modification of the support award.

JAIME DOE has a daughter, PAT DOE. While he has done his best to ignore this fact, he has obligations to this daughter, not just moral obligations but child support obligations under the order of this Court. JAIME DOE has blatantly disregarded these obligations, instead choosing not to work and not to pay.

JAIME DOE has presented no evidence justifying a downward modification, and ALEX DOE therefore respectfully requests that this Court deny JAIME DOE's petition for one. JAIME DOE has presented no evidence excusing his demonstrated nonpayment of child support, and

ALEX DOE therefore respectfully requests that this Court grant ALEX DOE's violation petition and find that JAIME DOE has willfully violated his support obligations.

As to a recommended sentence, ALEX DOE has no desire for JAIME DOE to be incarcerated if he instead find the ability to pay all arrears owed. However, until and unless all the arrears are paid, ALEX DOE does ask this Court to recommend a term of incarceration of sufficient duration to convince him of the seriousness of his errant conduct and the importance of meeting his ongoing support obligations. If JAIME DOE starts paying both child support as it becomes due and portions of the arrears that he owes, ALEX DOE would have no objection to JAIME DOE serving a term of incarceration in such a way that allows him to maintain employment.

Dated: New York, New York
October 1, 2013

By: ATTORNEY, Esq.

_____

FIRM
FIRM ADDRESS
FIRM NUMBER
Attorneys for Petitioner

Objections to Order of Support

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

In the Matter of a Support Proceeding ALEX DOE, Petitioner, -against- JAIME DOE, Respondent.	File #: 111111 Docket #: F-11111-16/16A **OBJECTIONS TO FINAL ORDER OF SUPPORT**

I, ATTORNEY, of FIRM, attorneys for Petitioner ALEX DOE, hereby submit objections to Support Magistrate MAGISTRATE's Order of Support dated DATE, 2017, ordering Respondent JAIME DOE to pay $533.00 monthly for the support of PAT DOE, the subject child ("Court Order"), as well as objections to the Magistrate's rejection of a Stipulation of Settlement previously reached by the parties.

The following objections are hereby timely submitted as the Order of Support was mailed to FIRM by first-class mail on May 31, 2017.

OBJECTIONS

On DATE, 2017, Support Magistrate MAGISTRATE of the Queens County Family Court issued a court order in the matter of ALEX DOE v. JAIME DOE (File # 111111, Docket # F-11111-16/16A) (attached as Exhibit A) regarding the child support for the parties' daughter PAT DOE. The Court Order and actions of the Magistrate manifest errors as a matter of law, regarding which the Petitioner, pursuant to Family Court Action Section 439(e), files these objections. The Court Order and actions of the Magistrate demonstrate 1) an abuse of discretion in rejecting the

validly-executed Settlement and Stipulation Agreement ("Stipulation") independently reached and executed between the parties regarding their child support obligations in the best interest of their child; and 2) an error of law in crediting notarized letters and thereby deducting $6,000 annually from the support income of the non-custodial parent based on voluntary and informal payments the Respondent makes for the support of a non-subject child that are not pursuant to a court order or written agreement as required by the Family Court Act. In light of these errors of law, and in the interest of justice, the petitioner ALEX DOE moves for the court to (A) vacate the Magistrate's order and instead so-order the valid Stipulation between the parties; or, (B) in the alternative, to calculate and order the respondent's child support obligation without crediting the $6,000 annual deduction.

1) The Magistrate abused her discretion by rejecting the valid Stipulation executed by the parties, which was in the best interest of the child.

Prior to the DATE, 2017 appearance before the Magistrate, the parties reached an agreement regarding the Respondent's child support obligation, memorialized in a validly executed Stipulation (attached as Exhibit B). In reaching the terms of the Stipulation, the parties consulted and understood the requirements of the Child Support Standards Act ("CSSA"), which they recited in the Stipulation. *See* Exhibit B, at pages 2-4. Based on the disclosed incomes of the parties and the formula in the CSSA, the parties agreed that the Respondent had a presumptive child support obligation of $611.54 per month. *See* Exhibit B, at page 4. The parties agreed that the Respondent should instead pay $600 per month in child support to the custodian ALEX DOE. They agreed to this minor deviation in light of the fact that the Respondent pays out-of-pocket health insurance premiums for the child, and that the child's needs would be adequately met by $600 per month from the Respondent. The Stipulation properly recited the reasons for the small deviation from the CSSA formula. *See* Exhibit B, at page 4.

At the DATE, 2017 hearing before the Magistrate, the parties presented the Stipulation to be so-ordered. The Magistrate spent no time reviewing or considering the parties' stipulation agreement before rejecting it out of hand. The transcript of the hearing bears out the consideration given by the Magistrate and reads as follows on the issue (a full transcript of the DATE, 2017 hearing is attached as Exhibit C):

> "[The court requests financial materials from both parties]
> ALEX DOE: Well, we actually reached upon an agreement.
> Magistrate: And, what is what? What is the agreement? [Petitioner hands over stipulation regarding child support.] Respondent's income. Zero as her income. I cannot do this order. I will not sign off on this one, but we will see what you agreed on. Six hundred a month, is that what you agreed on? Speak up.
> JAIME DOE: Yes.
> [The court requests financial materials from JAIME DOE]"

ALEX DOE v. JAIME DOE Hearing Transcript 3:20–4:7.

The court did not make any further inquiry regarding the Stipulation. Moreover, the court's written order does not even mention the Stipulation or provide a rationale for why it was not incorporated into the order.

The Child Support Standards Act expressly articulates the rights of the parties to voluntarily reach agreement regarding a child support modification: "Nothing contained in this subdivision shall be construed to alter the *rights of the parties* to voluntarily enter into validly executed agreements or stipulations which deviate from the basic child support obligation provided such agreements or stipulations comply with the provisions of this paragraph." FCA 413(1)(h) (emphasis added). As long as the disclosures required by FCA 413(1)(h) are present in the agreement, courts typically do not disturb them. *See Bhandary v. Bhandary*, 50 A.D.3d 612, 855 N.Y.S.2d 592 (Second Dept. 2008)(2008 WL 900973)(Apr. 01, 2008) (affirming denial of stay of stipulation that satisfied requirements of the CSSA); *Woods v. Velez-Shanahan*, 308 A.D.2d 593, 765 N.Y.S.2d 517 (Second Dept. 2003)(2003 WL 22234979) (2003 N.Y. Slip Op. 16914)(Sep 29,

2003) (reinstating stipulation agreement where parties knowingly opted out of CSSA provisions); *Sullivan v. Sullivan*, 46 A.D.3d 1195, --- N.Y.S.2d --- (Third Dept. 2007) (2007 WL 4441111) (2007 N.Y. Slip Op. 10015) (Dec. 20, 2007) (where statutory requirements of CSSA are met, miscalculation of basic child support obligation does not invalidate stipulation agreement); and *Cheruvu v. Cheruvu*, 59 A.D.3d 876, 874 N.Y.S.2d 296 (Third Dept. 2009) (2009 WL 467573) (2009 N.Y. Slip Op. 01373) (Feb. 26, 2009) (denying motion to vacate child support provisions of stipulation that satisfies requirements of CSSA and favored one party).

In fact, appellate courts have articulated a public policy in favor of honoring the right of parties to reach an agreement. For example, the Appellate Division of the Supreme Court of the State of New York, Second Department, in *In the Matter of Thomas G. Woods v. Denise E. Velez-Shanahan*, 308 A.D.2d 593, 765 N.Y.S.2d 517 (App. Div. 2003) held:

> [S]tipulations of settlement, especially those whose terms are placed upon the record in open court, are met with judicial favor. Absent a showing of fraud, overreaching, mistake, or duress, the stipulation should not be disturbed by the court" (Wieners v Wieners, 239 AD2d 493, 494 [1997]; see Lafferty v Lafferty, 256 AD2d 445 [1998]). […] In the presence of the Hearing Examiner, the respondent mother clearly consented to the terms of the stipulation. The parties knowingly agreed to opt out of the CSSA and the order, dated May 16, 2002, entered upon consent, specified the amount that the obligation would have been under the standards and the reason that the stipulation did not provide for payment of that amount (see Mauriello v Mauriello, supra; Family Ct Act § 413 [1] [h]). Accordingly, we reinstate the order dated May 16, 2002.

Other courts have agreed that simply because a stipulation may be in favor of one party over the other is not grounds to set it aside. *Cheruvu v. Cheruvu*, 59 A.D.3d 876, 874 N.Y.S.2d 296 (App. Div. 2009), ("[a]n agreement will not be set aside simply because it entitles a spouse to more than the law would have provided (*see Lounsbury v Lounsbury*, 300 AD2d at 814) or because it constitutes a bad bargain (*see Broer v Hellermann*, 2 AD3d 1247, 1248 [2003]).").

Aside from concerns of fraud, duress, mistake, or unconscionability—none of which the Support Magistrate raised in this case—courts do sometimes modify parties' stipulations when

there is a concern that the subject child may not have their needs met. *Keller-Goldman v. Goldman*, 2017 N.Y. Slip Op 2723 (App. Div. 2017) ("Despite the fact that a *separation agreement is entitled to the solemnity and obligation of a contract*, when children's rights are involved, the contract yields to the welfare of the children.") (emphasis added). Implicit in the holding of the *Keller-Goldman* court is the proposition that, *absent* a conflict with the best interest of the subject children, the right of the party to contract regarding child support should be honored and respected. Indeed, the dissent opinion avers such a position and provides further explanation:

> Equally troubling is that the parties, during the negotiations and in the agreement, fully complied with the provisions of section 240(1-b)(h) of the Domestic Relations Law, which provides that '[n]othing contained in this subdivision shall be construed to alter the rights of the parties to voluntarily enter into validly executed agreements or stipulations which deviate from the basic child support obligation provided such agreements or stipulations comply with the provisions of this paragraph.' … Furthermore, while, generally, "[a] parent's duty to support his or her child until the child reaches the age of 21 years is a matter of fundamental public policy in New York" (Matter of Cellamare v Lakeman, 36 AD3d 906, 906 [2d Dept 2007], appeal dismissed 8 NY3d 975 [2007]), "[w]here the parties have included child support provisions in the agreement, it is presumed that in the negotiation of the terms of the agreement the parties arrived at what they felt was a fair and equitable division of the financial burden to be assumed in the rearing of the child" (Matter of Trester v Trester, 92 AD3d 949, 950 [2d Dept 2012] (internal quotation marks omitted).

The dissent advances the position that where the two parties have knowingly and deliberately engaged in a process leading to a stipulation agreement in good faith, that agreement should be honored for their sake and as a matter of public policy.

The following quote from *Elizabeth B. v. Emanuel K.,* 175 Misc. 2d 127, 667 N.Y.S.2d 1004 (Ulster Cty. Fam. Ct. 1997) adds further weight to the proposition that where the public policy goals to advance the best interest of the child and to respect independent contracting of parties align, it should not be usurped or disregarded by the court using its limited resources without warranted cause:

> Family Court Act § 413 (1) (h) states that enactment of the CSSA did not take away the parties' rights to establish support by contract provided such contract is made with full knowledge of the provisions and applications of the CSSA. Such contract

> is subject to approval by the Hearing Examiner as in the best interests of the children. It is unrealistic to expect that parties can always agree as to what the outcome of a fact-finding will be in advance of the fact-finding and ultimate decision by the Hearing Examiner. To require every contested support matter to be tried to conclusion and a decision rendered by the Hearing Examiner before the parties can validly contract differently is an unrealistic expectation. The resolution achieved by the stipulation is a realistic balancing of the interests of the parents to end litigation and the interests of the children in receiving adequate support.

Elizabeth B. v. Emanuel K., 175 Misc. 2d 127, 667 N.Y.S.2d 1004 (Ulster Cty. Fam. Ct. 1997).

In this case, the Stipulation included all of the procedural and required items and elements mandated in the Act. The parties agreed to a very small ($11 per month) deviation from the formula, based on what they both agreed were their respective incomes. The parties affirmed and agreed that the child's needs would be met. There were no unfair or unconscionable practices alleged by either party, or by the court. The Magistrate gave no rationale at all for her decision to reject the Stipulation out of hand. She then proceeded to conduct an inquest, after which she ordered *less* support than the parties had agreed on—eliminating any possibility that the Magistrate rejected the settlement out of concern for the needs of the child. For a Magistrate to usurp the desires of consenting parents to provide more resources for their child is not in the best interest of said child and is manifesting judicial error or abuse of discretion. For these reasons, the order of the Magistrate should be vacated, and the parties' Stipulation re-instated and so-ordered by this Court.

2) Even if there had been no valid stipulation, the Support Magistrate erred by improperly crediting Respondent for informal child support payments.

In the alternative, the Magistrate erred as a matter of law on independent grounds that the Act does not allow the deduction of alleged child support payments for non-subject children which are not pursuant to court order or written agreement.

During the DATE, 2017 hearing, the Magistrate asked the Respondent whether he was supporting other children. The Respondent replied that he supports one other child, but he could

not produce evidence of paternity, and Respondent admitted that the money he gave to the other child's parent was not pursuant to any court order or executed stipulation. Instead, he merely provided a notarized letter from the child's parent saying that he provides the child's parent with $500 a month. ALEX DOE v. JAIME DOE Hearing Transcript 8:8–10:4. In her Findings of Fact, the Magistrate improperly credited the respondent with a $6,000 annual deduction from his available income.

The Act, in salient parts, allows a deduction from the non-custodial parent's income *only* for "(D) child support actually paid *pursuant to court order or written agreement* on behalf of any child for whom the parent has a legal duty of support and who is not subject to the instant action," (Family Court Act § 413(1)(b)(5)(vii)(D) (emphasis added). The New York legislature was purposeful when it required a "written agreement" to allow a deduction, as opposed to any informal or verbal understanding. *See Jelfo v. Jelfo*, 81 A.D.3d 1255, 916 N.Y.S.2d 427 (App. Div. 2011) ("[i]t is undisputed that there was neither a court order nor a written agreement with respect to the support of those [non-subject] children, and thus the court properly […] refused to reduce defendant's income by the amount of those payments in calculating his instant child support obligation").

Other cases agree that notarized letters regarding informally made child support payments are wholly insufficient to give the non-custodial parent a deduction from income. In *Matter of Samantha LG. v. Maurice O.*, 2017 N.Y. Slip Op 50639 (Fam. Ct. 2017), the respondent attempted to be credited a deduction for child support payments to a non-subject child by presenting two notarized handwritten letters from the child's parent attesting to support payments. The court held that such notarized letters are not a "valid written agreement", executed by both the Respondent and the non-subject child's parent, under the statute. *See also Matter of Ranallo v Ranallo*, 301 AD2d 605 [2nd Dept. 2003]).

The *Jelfo* case concedes that a court may consider child support resources for non-subject children when considering whether the pro-rata share of defendant's child support obligation is unjust or inappropriate, but "only if the resources available to support such children are less than the resources available to support the children who are subject to the instant action[.]" *Jelfo v. Jelfo*, 81 A.D.3d 1255, 1256 (App. Div. 2011)**.** In this case, however, the Respondent *agreed* to the amount of child support for the subject child, so there was no allegation that he did not have enough funds to support both the subject and the non-subject children.

As in *Matter of Samantha LG*, Respondent did not substantiate his alleged support of a non-subject child with a court order or written agreement, but rather with a notarized letter from the non-subject child's parent. The statute is clear by its plain text, which the case law affirms, that a court order or written agreement is required to merit a deduction based on child support to other children. The Magistrate clearly acted outside of her statutory authority by granting a deduction without evidence of either of the aforementioned required documents. Moreover, there is no evidence that without the deduction, there would not be adequate resources for JAIME DOE to support both the subject child and the non-subject child. For these reasons, this Court should eliminate the $6,000 deduction from the support income of the non-custodial parent and re-calculate the support obligation without this credit.

WHEREFORE, I respectfully request that this Court:

A. Vacate the Order of Support dated DATE, 2017, so-order the Stipulation reached between the parties, attached hereto as Exhibit B, and order the Respondent to pay $600/month in child support for the subject child; OR

B. In the alternative, amend the Order of Support dated DATE, 2017 to remove the $6,000 deduction for "child support" to the Respondent, recalculate the Order without this deduction, and order that the Respondent pay $621.51 on the basis of Respondent's revised income; AND

C. Any and all other relief deemed appropriate by the Court.

Dated: New York, New York
July 5, 2017

Respectfully submitted,

_____
ATTORNEY
FIRM
Attorneys for Petitioner

Rebuttal to Objections

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X File #: 111111

In the Matter of a Support Proceeding

Docket #: F-11111-18

ALEX DOE,

Petitioner,

REBUTTAL TO OBJECTIONS

- against -

JAIME DOE,

Respondent.

----------X

Petitioner ALEX DOE, by and through her attorneys, Her Justice, Inc., located at 100 Broadway, 10th Floor, New York, NY 10005, hereby responds to Respondent JAIME DOE'S written objections to the Order of Child Support. Petitioner's Rebuttal is timely pursuant to N.Y. Family Court Act §439(e). The Objections were postmarked on January 28, 2019, and received in Petitioner's counsel's office on January 31, 2019. A copy of the post-marked envelope is attached as Exhibit A.

Respondent's current counsel that he has hired to submit these Objections did not represent Respondent in the proceedings below, was not present at the trial on DATE, 2018, and does not attach or cite to a transcript of the proceedings in the Objections. Conversely, Her Justice was the attorney of record in the underlying trial, which was held before Support Magistrate MAGISTRATE on DATE, 2018. Unfortunately, a written transcript of the proceedings could not be procured from the Family Court before the deadline for this rebuttal; however, the undersigned

attorney, ATTORNEY, conducted the trial for the Petitioner, and any reference to the proceedings below is based on personal knowledge or on information and belief.

PRELIMINARY STATEMENT

Respondent is inappropriately trying to re-litigate the case on objections by repeating assertions that the Magistrate already considered in making her decision below, as well as attempting to introduce new facts and arguments that he did not raise at trial.

Further, in these Objections, Respondent is selectively presenting only the facts that he believes are beneficial to him, focusing on a letter from his employer that was not admitted into evidence, while ignoring that this letter contradicts other of his own evidence that was admitted; namely his tax returns and W2s. It was this contradiction of Respondent's testimony with his own evidence, as well as the Petitioner's credible testimony that she had direct knowledge that he works on diesel trucks and brings home cash on top of his declared income, that led the Magistrate to impute income to the Respondent after a full hearing.

Respondent's selective presentation of evidence in his Objections is exactly the reason that a Magistrate's decision should be given great deference on review, because only the Magistrate was in the position to hear all testimony, review all documents in evidence, and assess the demeanor of the witnesses. The Magistrate's determination that the Respondent was incredible, and that his actual or potential earnings were far above what he claims to earn, should not be disturbed, and the Respondent's objections should be denied.

FACTS

Support Magistrate MAGISTRATE conducted a full evidentiary hearing of this matter on DATE, 2018. Petitioner was represented by ATTORNEY of Her Justice. Respondent was given an opportunity to retain counsel, but elected to proceed *pro se*.

At the trial, the Petitioner testified regarding her own employment and income, and submitted an Income and Expenses Statement. She also testified regarding her personal knowledge of Respondent's employment and income, based on their 20 years of marriage and co-habitation. Petitioner testified that Respondent has worked at the same mechanic shop for 18 years. She testified that she had gone to the Respondent's workplace and observed him working on diesel trucks there. The Petitioner also testified that she had observed the Respondent studying for various certifications relating to diesel trucks. She submitted some of those certifications as evidence. She also specifically testified regarding the Respondent's form of wages from his employer. The Petitioner testified that the Respondent had an arrangement with his employer to receive $370 per week on the books, and the rest of his wages in cash. She testified that she had seen the Respondent bringing home large amounts of cash during the time that they lived together, and that Respondent had directly spoken to the Petitioner of this pay arrangement.

The Support Magistrate conducted her own examination of the Respondent, since he was *pro se*. He testified that he earned $370 per week and had earned that wage for the past six years without variation. Respondent also presented his 2016 and 2017 tax returns and W2s, an Income and Expenses Statement, and some paystubs. Petitioner did not object to these documents, and they were admitted into evidence. He offered a letter from his employer, but the Petitioner objected to that letter on hearsay grounds, and it was excluded from evidence.

After hearing the testimony and observing the demeanor of the parties, Support Magistrate MAGISTRATE determined that she found Petitioner's testimony to be credible, and Respondent's testimony to be incredible. Accordingly, based on Petitioner's credible testimony about Respondent's skills and experience working on diesel trucks, the Magistrate exercised her discretion to impute to Respondent the mean wage for a bus and truck mechanic in the NY-NJ Metropolitan Area, and calculated the child support award on that income.

ARGUMENT

I. Imputation of income was proper because the Respondent's accounting of his own finances was incredible.

It is well established that a Support Magistrate has considerable discretion in determining whether to impute income to a parent. *See* Mongelluzzo v. Sondgeroth, 95 A.D.3d 1332, 1332, 944 N.Y.S.2d 908 (2d Dept. 2012); Julianska v. Majewski, 78 A.D.3d 1182, 1183, 911 N.Y.S.2d 655, 656 (2d Dept. 2010). Furthermore, Support Magistrates' credibility determinations are given deference. *See* Ross v. Ross, 90 A.D.3d 669, 669, 933 N.Y.S.2d 885 (2d Dept. 2011); Feng Lucy Luo v. Yang, 89 A.D.3d 946, 947, 933 N.Y.S.2d 80 (2d Dept. 2011). An imputation of income will only be rejected when "the amount imputed was not supported by the record, or the imputation was an improvident exercise of discretion." Ambrose v. Felice, 45 A.D.3d 581, 582, 845 N.Y.S.2d 411, 413 (2d Dept. 2007).

In Kasabian v. Chichester, the Support Magistrate appropriately used statistics from the United States Department of Labor to impute the Respondent's income when the Magistrate had determined that Respondent's "testimony on the whole lacked credibility." Kasabian v. Chichester, 72 A.D.3d 1141, 1142, 898 N.Y.S.2d 293, 294 (3d Dept. 2010). The Appellate Division found that this imputation of the average amount earned by a general freight trucker was appropriate, even with no evidence that the Respondent had actually attempted to obtain employment as a commercial trucker. Id.

Similarly, here, Respondent's testimony in the underlying trial lacked credibility, as it was not only internally inconsistent, but belied by his own submitted evidence. Presented with credible evidence from Petitioner that Respondent had both past work experience and certifications relating to diesel trucks, it was appropriate for the Support Magistrate to impute to Respondent the average income in that field and geographical area.

A. Respondent's testimony about his employment and income was internally inconsistent, and directly contradicted by his own documents.

On Respondent's presentation of his case, he submitted four documents that were admitted into evidence:

(1) his 2016 W2 and tax return (Respondent's Exhibit #1);

(2) his 2017 W2 and tax return (Respondent's Exhibit #2);

(3) his Income & Expenses Statement (Respondent's Exhibit #3); and

(4) a selection of pay stubs from July-August 2018 (Respondent's Exhibit #4).

Respondent did not attach any of these documents to his Objections, so they are attached here for the court's convenience, as Exhibits B through E.

At trial, Respondent testified on direct that he has worked for EMPLOYER in TOWN, NJ, since 2003, that he has held the title and position of Mechanic Assistant since 2012, and for the last 6 years has earned exactly the same income every week, $370 per week for 40 hours a week, without any variation whatsoever, no matter how late he stays or how much overtime he works. In his Income and Expenses Statement that was accepted into evidence (Respondent's Exhibit #3), he essentially repeated these assertions, except in that document, he stated that he worked a 50-hour week (M-F 8am-6pm)[1].

However, on cross-examination, Respondent admitted to several glaring inconsistencies:

1. Despite his direct testimony that his occupation was "Mechanic Assistant," in both 2016 and 2017, he submitted tax returns to the IRS that stated that his occupation was "Mechanic" (Respondent's Exhibits #1-2).
2. Despite his direct testimony that he had earned $370 per week, no more, no less, for six years running, comparing his 2016 and 2017 W2s revealed a variation in

[1] If true, this would put his hourly wage at $7.40: below the minimum wage in New Jersey of $8.60 per hour at the time of trial, and well below the new $10/hour minimum wage which will be in effect on July 1, 2019.

wages from year to year (Respondent's Exhibits #1-2). To explain this inconsistency, he testified on cross, in sum and substance, that "the more you work, the more you get paid" – a declaration in complete opposition to his earlier testimony that he earned the same amount no matter how many hours he worked.

3. Despite his direct testimony that he worked a 40-hour week, or his Income and Expenses Statement that he worked a 50-hour week, the paystubs that he submitted showed him being paid $370 for one hour of work per week (Respondent's Exhibit #4).

The documents that the Respondent submitted at the hearing were inconsistent on their face, and defied common sense, given his long work history and relationship with that employer. The multiple inconsistencies within his testimony, and as between his testimony and his documents, provided more than enough basis in the record for the Magistrate to find that his account of his finances was incredible and for her to impute income to him.

B. The exclusion of the letter from Respondent's employer was neither material nor prejudicial, as it only repeats information already in the record, and itself is inconsistent with Respondent's other evidence.

The letter from his employer that was excluded as hearsay does not rescue Respondent's case from being contradictory, improbable, and incredible. The letter states simply his employment address, job title, hours, and weekly rate of pay – information that was also contained in Respondent's Income and Expenses Statement (Respondent's Exhibit #3).

Respondent's rate of pay is also reflected on the paystubs that were admitted (Respondent's Exhibit #4). The pay stubs, being business records, are the most reliable evidence of his weekly pay, and therefore, the employer's letter did not add anything to this evidence.

As discussed above, however, the job title on the letter directly *contradicts* the job title that he put on his tax returns filed with the IRS, and the work hours listed are belied by his pay stubs

(also prepared by his employer). Therefore, if anything, the letter's admission would likely have only bolstered the Magistrate's conclusion that the Respondent was incredible.

C. Petitioner presented credible testimony of her first-hand knowledge of Respondent's employment, income, and finances.

It is simply incorrect for the Respondent to claim in his Objections that there was no basis in law or fact for the Magistrate to exercise her discretion to impute income to the Respondent. The Petitioner testified that she and the Respondent had been living together for 20 years, and that the Respondent had been working at his current place of employment for around 18 years of that time. The Petitioner testified that she had direct knowledge of his employment situation and income because (1) her father originally got Respondent that job, (2) Respondent regularly discussed his job and income with the Petitioner, and (3) The Petitioner directly observed the Respondent at his workplace working on large trucks.

The Magistrate in her written findings of fact specifically stated that "[t]he Petitioner was credible in her testimony that the Respondent preforms [sic] repair on diesel trucks including brake repairs," and "[t]he court credits the testimony of the mother that the Respondent received a salary and off the books income from his employer when the parties resided together." Respondent's Objections, Exhibit B, Findings of Fact.

Petitioner also testified as to her direct knowledge of Respondent studying for, and passing, certification exams relating to diesel trucks. She submitted, without objection, copies of some of Respondent's certifications relating to heavy trucks. The Respondent has made numerous factual assertions in his Objections regarding the import of the certifications, some (but not all) of which he also made at trial. Support Magistrate MAGISTRATE mentions these certifications in her Findings of Fact, in the same paragraph that she states that she found credible the Petitioner's testimony about the Respondent's employment repairing diesel trucks. Since the Magistrate clearly did not rely solely on these certifications to determine that Respondent worked on heavy diesel

trucks, even accepting Respondent's assertions of fact about his certifications as true (which is an inappropriate standard of review), there is still other evidence in the record to support the Magistrate's exercise of discretion.

II. Even if Respondent's accounting of his finances *had* been credited by the Magistrate, he has far higher earning potential than his declared income.

Even taking at face value Respondent's assertion that he earns $370 a week for 40-50 hours of work, this salary is below the minimum wage, and, given his lengthy experience in the field, he certainly has the capacity to find more gainful employment. Respondent has been working for this employer for more than a decade, which is ample opportunity for him to seek other employment with a competitive salary that, at a minimum, complies with federal and state labor laws.

To the extent that the Respondent is arguing in his Objections that his lack of a GED contributes to his purportedly low salary, he testified on direct that for periods of time during the marriage, he only worked part-time or not at all. When questioned by the Magistrate about what he did in his spare time during these periods of unemployment, Respondent testified, in sum and substance, "hang around." Respondent cannot decline to use his free time to study for and receive a GED, and then rely on his lack of GED to avoid his child support obligations.

By his own testimony, the Respondent has more than a decade of experience working on heavy trucks. Moreover, if his account is to be believed, he has worked in the same job for the same employer, making below or barely above the minimum wage, without any raise or cost-of-living increase, for six years. Any reasonable person under these circumstances would have attempted to take their skills and experience to an employer willing to pay at least the market rate; however, Respondent did not submit any evidence that he has sought more lucrative employment in the last six years. The Magistrate therefore was also within her discretion to impute income to Respondent "based on [his] prior employment experience and future earning capacity." Kasabian, 72 A.D.3d at 1141.

III. The admission of Petitioner's letters was not material or prejudicial, as Petitioner testified about her income and employment, and Respondent never put Petitioner's income at issue in the proceedings below.

At an appearance before Magistrate MAGISTRATE on May X, 2018, prior to the trial, at which Her Justice was representing the Petitioner, the Magistrate specifically instructed the Petitioner to provide the court with letters from her employers and her health care providers. Petitioner submitted these letters at trial because the Magistrate ordered her to do so. However, nothing in the letters contradicts the income information from Petitioner's sworn Income and Expenses Statement, or her direct testimony. The Petitioner testified directly about her income and employment during the trial, which testimony the court found credible ("[t]he Petitioner testified credibly regarding her income as a childcare provider," Respondent's Objections, Exhibit B, Findings of Fact). Therefore, even if the letters had been excluded, there was other credible evidence in the record of Petitioner's income.

More importantly, Respondent did not object to the admission of these letters, nor did he cross-examine Petitioner about her testimony regarding her income, or object to her accounting of her income or medical circumstances.[2] In fact, Respondent gave no indication whatsoever in the proceedings below that Petitioner's employment or income were at issue, and Respondent cannot raise this issue for the first time in these Objections. Hammill v. Mayer, 66 A.D.3d 1196, 1998 (3d Dept. 2009) ("[A]n order from a Support Magistrate is final and Family Court's review under Family Ct Act § 439 (e) is tantamount to appellate review and requires specific objections for issues to be preserved", citing Renee XX. v John ZZ., 51 AD3d 1090, 1092 [2008]).

[2] Nor can Respondent rely on the fact that he was *pro se* at trial to claim that he did not know how to object. He was given ample opportunity to retain counsel to represent him at the trial, and specifically declined to do so.

CONCLUSION

Respondent's Objections are a naked attempt to get a second bite at the apple and re-litigate the issue of his credibility and finances, while only presenting a portion of the complete record that the Magistrate had at trial. They should be denied in their entirety.

Dated: February 7, 2019

_____

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TO: LAW FIRM
Attorneys for Respondent

APPENDIX

HER JUSTICE

APPENDIX

A. Appendix cover page and table of contents
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E. Disability Power and Control Wheel
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HER JUSTICE

NATIONAL Center on Domestic Violence, Trauma & Mental Health

EXCERPT FROM

Representing Domestic Violence Survivors Who Are Experiencing Trauma and Other Mental Health Challenges:

A Handbook for Attorneys

Written by

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On behalf of the

National Center on Domestic Violence, Trauma & Mental Health

Edited by

Carole Warshaw, MD

December 2011

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Section One: Interviewing

Do Not Exacerbate the Harm or Risks

Lawyers working with survivors who are experiencing trauma and other mental health-related challenges should aim to ensure that their representation does not exacerbate the harm done to a client or create additional harms. Every domestic violence survivor faces risks. Some risks are batterer-generated; some risks are life-generated.[4] Survivors who are experiencing trauma or other mental health challenges may face additional risks when they come in contact with systems and individuals who are ill equipped to address their particular mental health needs. Thus, attorneys must take steps to ensure that their relationship with the client does not exacerbate the risks or further harm the mental health of the survivor.

Be Aware of the Signs of Trauma

Lawyers working with survivors of domestic violence should be aware of signs of trauma and mental health challenges, such as:

- The client does not talk about her experience(s) in a linear manner. She may go off on tangents or her speech may not seem coherent.
- What would seem to be highly emotional facets of her experience are expressed with little emotion both in terms of facial expression and body language, and in terms of the tone of her voice (sometimes referred to as "flat affect"). She may be intellectually present but emotionally detached.
- The client develops a deep, blank stare or an absent look during meetings with her; this could be a sign that she is dissociating.
- The client is unable to remember key details of the abuse.

If you notice any of the above signs, you will want to take steps to avoid triggering feelings that are disruptive to your client as you work together on her case. While an attorney cannot ensure that an individual remains present and does not dissociate or otherwise disengage, there are steps you can take to remove as many barriers as possible to help your client be psychologically present for her own advocacy.

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[4] *See* Jill Davies, Eleanor Lyon, and Diane Monti-Catania, *Safety Planning with Battered Women: Complex Lives/Difficult Choices* (Sage Publications 1998).

Survivor-Defined Representation When the Client is Living with Trauma-Related or Other Mental Health Conditions

Survivor-defined advocacy requires that attorneys tailor their advocacy approach to meet the individualized needs of survivors. For survivors facing mental health challenges, this means that lawyers must:

- Gain an understanding of the ways in which *this client's* challenges impact her ability to engage in the advocacy process, and
- Tailor interviewing and counseling approaches to meet the needs of and maximize the self-determination of each individual client.

Survivors facing mental health challenges will often require more time and resource-intensive advocacy than other survivors. To use their time and resources wisely, lawyers must consider how to tailor their advocacy approach to be responsive to the issues and needs of survivors experiencing trauma related conditions and mental health concerns.

Begin a Dialogue about the Survivor's Mental Health Needs

The lawyer should begin a dialogue with the survivor about her mental health needs as it relates to the lawyer/client relationship. This type of conversation provides a space for the survivor to explain her circumstances and for both lawyer and survivor to develop strategies for accommodating those challenges in the course of their relationship.

Lawyers need not, and should not, try to gather the client's entire mental health history at this stage in the process. Rather, these preliminary conversations about the client's mental health should focus upon how any mental health challenges affect her functioning. To get this conversation going, lawyers might ask, "Is there anything that I should know to help us work better together?" Or, "How can I, as your lawyer, accommodate what you need in this process?" For example, if the lawyer's office creates too much sensory stimulation or causes sensory overload, your client might suggest meeting somewhere else. If she has difficulty focusing for long periods of time, the attorney might suggest taking several breaks or scheduling shorter appointments.

It is best practice for lawyers working with survivors to take the time necessary to build relationships and trust with their clients. Trust is key to developing the type of lawyer-client relationship required for effective representation. There are times, however, when lawyers have a limited amount of time or are meeting clients just before a hearing. In these situations, you need to gather as much information as possible, as quickly as possible, in preparation for your case. It is important to know that, when working under such tight deadlines, your client may not feel comfortable enough yet to disclose details about trauma

and mental health conditions. In those situations, you are not likely to get complete and accurate information about this from your client. Under such circumstances, you may want to partner with an advocate who has been working with the survivor to assist in gathering this information and to provide you with the context necessary to understand and advocate for the comprehensive and individual needs of the survivor.

Techniques for Building Trust and Ensuring Informed Consent with Survivors Who Experience Trauma and/or Mental Health Symptoms

Survivor-centered interviewing skills are critical to providing comprehensive, individualized advocacy to survivors of domestic violence, whether or not a survivor has experienced trauma or mental health concerns. First, by offering a survivor the space to tell her own story, from her own perspective, an attorney can begin to lay the foundation for building trust. Second, when an attorney actively listens to a survivor's story, she gains a more comprehensive, contextual understanding of the survivor's needs. This rich understanding, when combined with a working relationship based on trust and respect for survivor agency, forms the basis of an effective survivor-attorney partnership that can work toward the expressed goals and objectives of the survivor.

Oftentimes in the lives of survivors, people were abusive or let them down, service providers responded ineffectively to them, and/or systems ignored or added to their pain. Each survivor has a unique perspective of these realities and lives with the effects of these negative experiences. A survivor's cultural background will also impact the way in which she perceives her prior experiences.

Many survivors who have experienced violence from an intimate partner and/or have trauma related concerns are often likely to accommodate what they think you want. This can play out in different ways. A client may ask you directly, "What do you think I should do?" Or, a client may intuitively pick up from your discussion with her what she believes you want her to do. You may think the survivor is making an informed decision when in fact she is trying to do what she thinks you want.

To overcome the distrust that survivors who are dealing with trauma-related or other mental health symptoms experience, lawyers must take steps to nurture a respectful working relationship with them. Lawyers should:

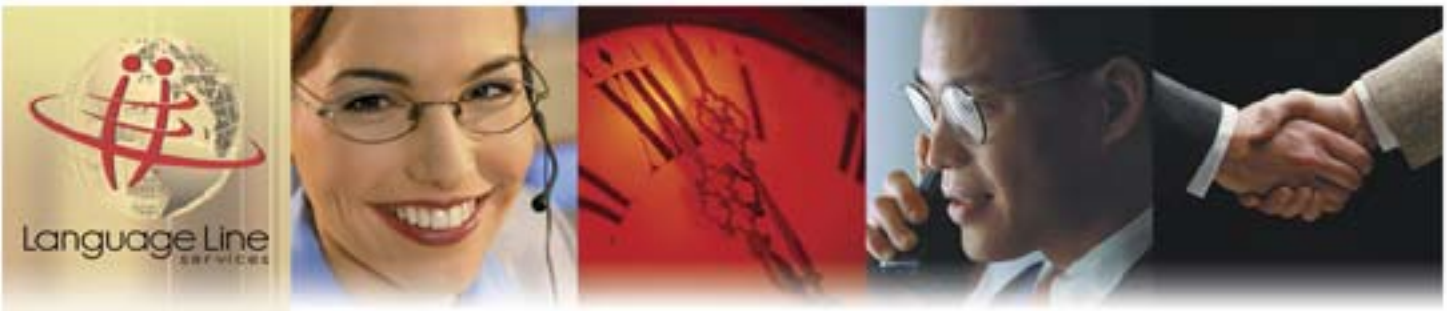
- Develop a basic understanding of trauma-related and mental health conditions that survivors may experience;
- Be skilled in listening and asking questions to understand a survivor's perspective and needs; and
- Know how to decide what information and options to offer to meet those needs.

It is within the context of a respectful relationship that lawyers can provide opportunities for survivors experiencing trauma and mental health challenges to access the resources they need and to exercise more control over their own lives.

Jill Davies has crafted a list of the ways in which advocates can offer concrete assistance to survivors who have experienced trauma resulting from multiple victimizations. Attorneys for survivors who are dealing with mental health challenges can assist clients by:

- Recognizing that survivors may be unable to access all of the details;
- Providing options and the time and space for survivors to make fully-informed decisions;
- Validating the survivor's feelings throughout the process;
- Being responsive to a survivor's requests for information and support, even if she asks for the same information several times;
- Partnering with survivors to identify alternative coping strategies, when they are engaging in self-harming behaviors;
- Finding supports for developing alternative or additional coping strategies;
- Connecting survivors who are experiencing a mental health crisis with a trusted mental health referral/resource; and
- Offering support to survivors who are using alcohol and/or drugs by safety planning and strategizing to the greatest extent possible at the time (including assessing risks and developing strategies that mitigate the risks posed by alcohol and drug use) and encouraging them to contact you again.[5]

[5] Adapted from Jill Davies, Helping Sexual Assault Survivors with Multiple Victimizations and Needs, A Guide for Agencies Serving Sexual Assault Survivors (July 2007).



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TIPS FOR WORKING WITH AN INTERPRETER

1. **BRIEF THE INTERPRETER -** Identify the name of your organization to the interpreter, provide specific instructions of what needs to be done or obtained, and let him/her know whether you need help with placing a call. If you need the interpreter to help you place a call to the Limited English Proficient (LEP) customer, you may ask the interpreter for a dial-out. There is a limited amount of time allotted for placing a dial-out once the interpreter is on the phone. Therefore, it is important that you provide a brief introduction and specific instructions to the interpreter in a timely manner.
2. **SPEAK DIRECTLY TO THE CUSTOMER -** You and your customer can communicate directly with each other as if the interpreter were not there. The interpreter will relay the information and then communicate the customer's response directly back to you.
3. **SPEAK NATURALLY, NOT LOUDER -** Speak at your normal pace, not slower.
   - SEGMENTS - Speak in one sentence or two short ones at a time. Try to avoid breaking up a thought. Your interpreter is trying to understand the meaning of what you're saying, so express the whole thought if possible. Interpreters will ask you to slow down or repeat if necessary. You should pause to make sure you give the interpreter time to deliver your message.
   - CLARIFICATIONS - If something is unclear, or if the interpreter is given a long statement, the interpreter will ask you for a complete or partial repetition of what was said, or clarify what the statement meant.
4. **ASK IF THE LEP UNDERSTANDS -** Don't assume that a limited English-speaking customer understands you. In some cultures a person may say 'yes' as you explain something, not meaning they understand but rather they want you to keep talking because they are trying to follow the conversation. Keep in mind that a lack of English does not necessarily indicate a lack of education.
5. **DO NOT ASK FOR THE INTERPRETER OPINION -** The interpreter's job is to convey the meaning of the source language and under no circumstances may he or she allow personal opinion to color the interpretation. Also, do not hold the interpreter responsible for what the customer does or does not say. For example, when the customer does not answer your question.
6. **EVERYTHING YOU SAY WILL BE INTERPRETED -** Avoid private conversations. Whatever the interpreter hears will be interpreted. If you feel that the interpreter has not interpreted everything, ask the interpreter to do so. Avoid interrupting the interpreter while he/she is interpreting.
7. **AVOID JARGON OR TECHNICAL TERMS -** Don't use jargon, slang, idioms, acronyms, or technical medical terms. Clarify unique vocabulary, and provide examples if they are needed to explain a term.
8. **LENGTH OF INTERPRETATION SESSION -** When you're working with an interpreter, the conversation can often take twice as long compared with one in English. Many concepts you express have no equivalent in other languages, so the interpreter may have to describe or paraphrase many terms you use. Interpreters will often use more words to interpret what the original speaker says simply because of the grammar and syntax of the target language.
9. **READING SCRIPTS -** People often talk more quickly when reading a script. When you are reading a script, prepared text, or a disclosure, slow down to give the interpreter a chance to stay up with you.
10. **CULTURE -** Professional interpreters are familiar with the culture and customs of the limited English proficient (LEP) customer. During the conversation, the interpreter may identify and clarify a cultural issue they may not think you are aware of. If the interpreter feels that a particular question is culturally inappropriate, he or she might ask you to either rephrase the question or ask the interpreter to help you in getting the information in a more appropriate way.
11. **CLOSING OF THE CALL -** The interpreter will wait for you to initiate the closing of the call. When appropriate, the interpreter will offer further assistance and will be the last to disconnect from the call. Remember to thank the interpreter for his or her efforts at the end of the session.

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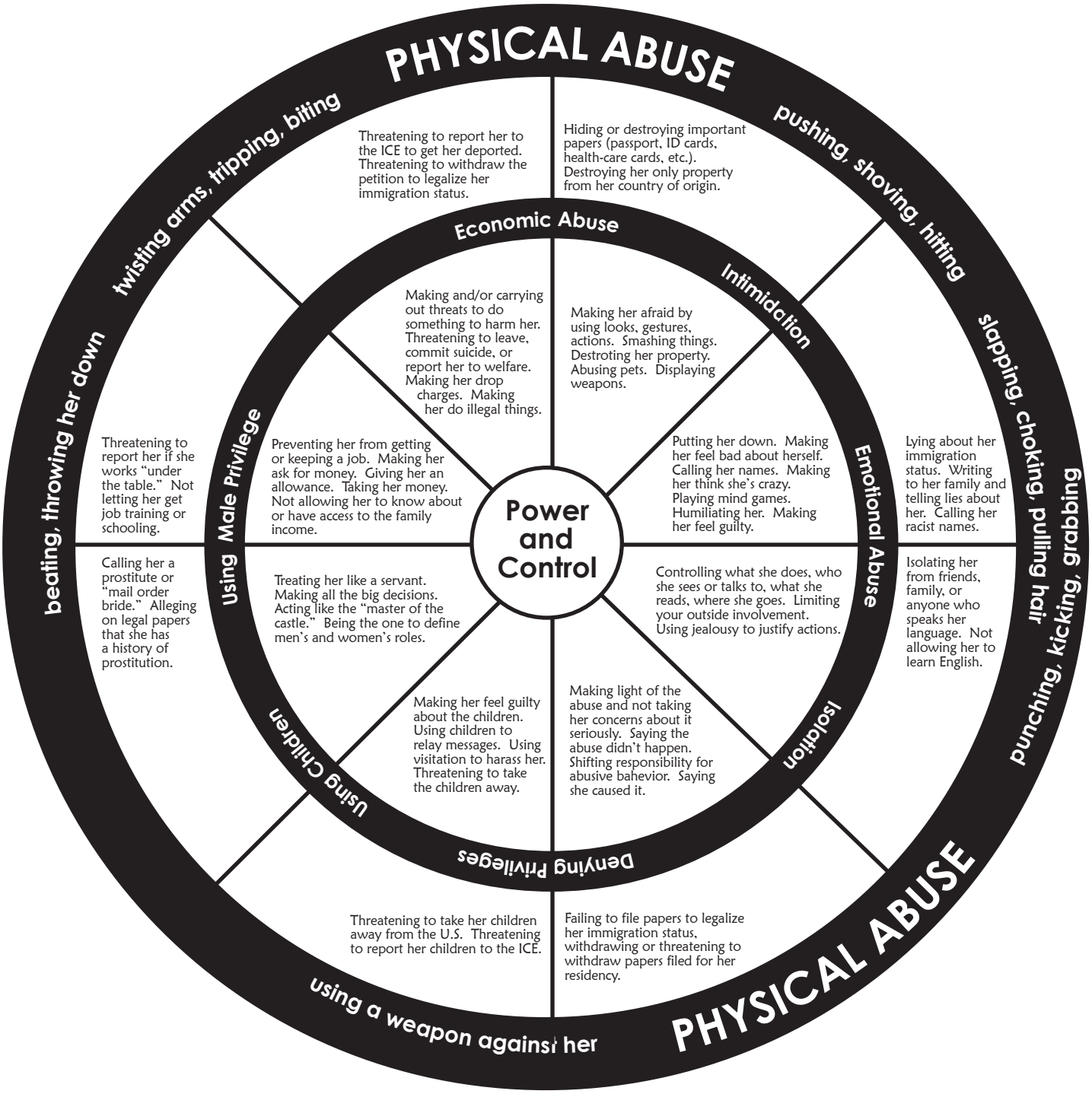

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Lawyer's Manual on Domestic Violence

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Mary Rothwell Davis, Dorchen A. Leidholdt and Charlotte A. Watson

Supreme Court of the State of New York, Appellate Division, First Department

The New York State Judicial Committee on Women in the Courts

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Hon. Luis A. Gonzalez, Presiding Justice

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