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AN INTRODUCTION TO CHILD SUPPORT

October 29, 2013

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PACE UNIVERSITY LAW SCHOOL, THE PACE WOMEN'S JUSTICE CENTER, THE WESTCHESTER WOMEN'S BAR ASSOCIATION AND THE NINTH JUDICIAL DISTRICT COMMITTEE TO PROMOTE GENDER FAIRNESS IN THE COURTS

are pleased to host a CLE Program:

An Introduction to Child Support

MODERATORS:

Natanya Briendel, Esq., Pace Women's Justice Center

FACULTY:

The Honorable Allen Hochberg -- Family Court Support Magistrate Yonkers Family Court

Tracey Alter, Esq. -- Director The Pace Women's Justice Center Family Court Legal Program

Virginia Foulkrod, Esq. -- Legal Services of the Hudson Valley

John Vorperian, Esq. -- Office of the Westchester County Attorney

DATE: Tuesday, October 29, 2013

PLACE: Pace University School of Law; Moot Court Room

TIME: 6:00 p.m. – 8:15 p.m.
Coffee and cookies will be provided

TIMED OUTLINE:

6:00 TO 6:15	**Introductions**
6:15 to 6:35	**Virginia Foulkrod, Esq.**
6:35 to 6:55	**John Vorperian, Esq.**
6:55 to 7:15	**Tracey S. Alter, Esq.**
7:15 to 8:15	**The Honorable Allen Hochberg**

The contents of this presentation is for educational purposes only as an overview of the field and are not designed for or intended to be legal advice which could only be considered upon on a case by case basis. Additionally, the opinions expressed by any program presenter are the presenter's own, and do not reflect the official position of the sponsoring organizations.

Child Support Power Point

Virginia Foulkrod, Esq.
Staff Attorney
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Legal Services of the Hudson Valley

Child Support

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Staff Attorney

Veterans and Military Families Advocacy Project

Legal Services of the Hudson Valley

Relevant Law and Resources for Today's Discussion

Family Court Act (FCA)

- Article 4

- Forms can be found at your local Family Court Clerks office or online at Nycourts.gov in the family court forms section
  - http://nycourts.gov/forms/familycourt/

Child Support in New York

- The basic child support obligation is calculated according to the New York State Child Support Standards Act (CSSA),
  - the formula can be found in Family Court Act § 413 and in Domestic Relations Law § 240(1)(b)
- CSSA presumes that both parents are financially responsible for providing support for their children and determines the pro rata share for each parent.

Calculating Child Support

- FCA § 413(1)(a) establishes the formula by which the court calculates child support
  - First, the court determines the combined parental income or CPI
  - Second,the court multiplies the CPI by the appropriate percentage based on the number of children
  - Each parent's proportional share is determined based on their percentage of CPI
- If the 'combined parental income amount' exceeds a certain amount, [$136,000 as of January 31, 2012] the law permits but does not require the percentages to be applied
  - For our purposes today, assume that the income will always fall below the combined parental income amount

CSSA Percentages

Number of Children	Percentage of CPI
1	17%
2	25%
3	29%
4	31%
5 or more	35%

Sample Child Support Calculation

- Mother has custody of the parties 5 year old son. Mother earns $20,000 yearly cleaning offices. Father earns $ 57,000 yearly as a sales rep.
- Determine Combined Parental income:
  - $20,000 +$57,000= $77,000
  - CSSA Guidelines: $77,000 x 17%= $13,090
  - Father: $57,000/$77,000=.74 x 100= 74%
    - $13,090 x .74= **$9,686**
  - Mother:$20,000/$77,000=.26x 100= 26%
    - $13,090 x .26= **$ 3,404**

Statutory/Mandatory Add-Ons

- Under FCA § 413, each parent shall be responsible for their proportionate or pro-rata share of the following mandatory add-ons to the child support petition:
  - Reasonable Childcare expenses where the parent with primary custody is working, attending school, or job training [FCA § 413(1)(c)(4)]
  - Reasonable healthcare expenses not covered by health insurance [FCA § 413(1)(c)(5)]

Discretionary Add-Ons

- FCA § 413 also directs that each parent *may* be directed to pay their pro rata share or some otherwise directed amount of the following:
  - Child care expenses while the custodial parent is looking for work FCA § 413(1)(c)(6)
  - Child's educational costs, such as private school or college tuition FCA § 413(1)(c)(7)

Health Insurance

- FCA § 416 directs that any legally responsible relative who has health insurance available through an employer or organization must cover the child
- If healthcare for the child is available through one of the parents at a 'reasonable cost' the child must be enrolled in the plan and the cost shared by the parties based on their proportional share.
  - FCA § 416 (d)(3) defines 'reasonable cost' as not exceeding 5 % of the combined parental gross income.
  - The 'cost' refers to the premium and deductible attributable to adding the child or children to existing coverage or the difference between such costs for an individual only and family coverage.

Health Insurance Continued

- If no health insurance is available, the court will direct the custodial parent to maintain health insurance through Child Health Plus or similar plan
- If health insurance becomes available to a Parent or any legally responsible relative they are obligated to enroll the child. Failure to do so can leave such individual liable for all health care expenses incurred on behalf of the child from the date the coverage became available.

Exceptions to Basic Child Support

- Under FCA § 413(1)(d) - If paying child support would reduce the non-custodial parent's income below the poverty level, the total obligation is automatically reduced to $25 monthly.
  - The 2013 poverty income guideline amount for a single person as reported by the US Department of Health and Human Services is $11,490.

Exceptions to Basic Child Support Continued

- FCA § 413(1)(d) - also holds that where the annual amount of the basic child support obligation would reduce the non-custodial parent's income below the self support reserve but not below the poverty guidelines for a single person, the basic child support obligation will be $50 a month or the difference between the non-custodial parent's income and the self support reserve, whichever is greater
  - The 2013 self support amount for a single person as reported by the US Department of Health and Human Services is $15,512.

Initiating a Child Support Petition

- Petition must be filed in the appropriate court
  - Can be done where either parent lives
  - If any prior court proceedings, consider whether that is still the proper venue
- Petitioner must have custody of the child or have the right to collect support for the child by another basis
- Who may file other than the parent of the child?
  - Guardian of the child
  - Person acting in loco parentis
  - Social services official

Initiating a Child Support Petition Continued…

- Petitioner must:
  - Provide the Address for the other parent or the last known address available
  - Establish the basis for the petition and entitlement to seek child support for the child or children in question
  - Provide proof of paternity, in one of 2 ways:
    - Proof of marriage to Respondent at the time of birth; or
    - A Signed acknowledgment of paternity,

Initiating a Child Support Petition Continued…

- If paternity has not been established in one of these ways, a separate paternity petition must be filed in order to legally establish the obligation to support the child.
  - These proceedings are governed by Article 5 of the FCA and will not be covered here today.

Initiating a Child Support Petition Continued…

- Service
  - Must attempt Personal Service at least 8 days before the appearance.
  - Adjournments for service will be allowed, but consider petitioning for substituted service in cases where service will be problematic
- Initial Appearance
  - If both parties appear and consent, a final order can be issued on consent
  - If not, a temporary order is issued and a hearing date is set

Child Support Hearing

- Before the Hearing
  - Both parties must complete and provide a financial disclosure affidavit including a copy of their most recently filed tax return and three most recent paystubs, if applicable.
  - Parties will need to provide proof of their expenses in addition to their income.
- At the Hearing
  - Both parties offer testimony in addition to the documents provided.
  - If there is no dispute regarding the income of the parties, the parties can agree to a support order on consent

Child Support Hearing Continued…

- After the Hearing
  - Following submission of documents and testimony by the parties, the Magistrate issues a decision and order establishing the amount of ongoing child support and directing the payment of any arrears that have accumulated since the petition was filed.
  - Non-custodial parent will receive credit for any payments made under the temporary order
- Objections to the Order
  - Must be in writing and submitted to the court within 30 days if parties are personally served or 35 days after mailing.

Initiating a Child Support Case Continued…

- After the order is issued
  - Payment is retroactive to the date the petition was filed
  - Both parties are responsible for updating the court if there is a change in address or employment status
  - If payments have been made under the temporary support order, the amount will be credited toward arrears
- Support Collection Unit, Generally
    - If the custodial parent requests SCU services, payment is sent to SCU
    - SCU is controlled by Social Services Law

When does the order end?

- Change in custody
- Child reaches the age of 21 (absent some other agreement by the parties having been made)
- Child enlists in the armed forces
- Child becomes self supporting in a full time job
- Child resides permanently away from the home of both parents
- Child marries
- Child passes away
- Child's voluntary and unjustified abandonment of the relationship with the parent

Enforcement

- Violation petition
  - Statute of Limitations
    - Under CPLR § 211(e) the statute of limitations is 20 years from the date of default
  - Who May file
    - Custodial parent
    - Department of Social Services on behalf of the custodial parent where parent is recipient of benefits
    - Support Collection Unit can file on behalf of a parent

Enforcement

- FCA § 453 directs that where a lawful order of the court has been violated, a petition can be filed
- Violation Petition must allege
  - Petitioner has burden of showing
    - Valid order of support AND:
    - Non-payment
- Hearing on Willfulness
  - There is a presumption that failure to pay support is willful
  - Once the violation is proven, the burden shifts to Respondent to prove the violation was not willful.

Enforcement

FCA § 454: Powers of the court upon finding of Willful Violation:

- Court shall enter a money judgment
- The Court May
  - Make an income deduction order
  - Require Respondent to post an undertaking
  - Make an order of sequestration
  - Suspend Respondent's driving Privileges

Enforcement Continued…

- FCA § 454: Powers of the court upon finding of Willful Violation:
  - Suspend Respondent's state professional or business license
  - Suspend recreational licenses
  - Where DSS has paid benefits to petitioner, require respondent to participate in work activities (Title 9-B of Article 5 of the Social Services Law)
  - May require Respondent to participate in job training, employment counseling, or other programs designed to lead to employment, if such programs are available

Enforcement Continued…

- Under § 454 (3):
  - The court shall order Respondent to pay attorneys fees
  - In addition to or in lieu of all other powers, the court may:
    - Commit Respondent to jail for up to 6 months
    - Require participation in a rehabilitative program if participation would assist in compliance. Programs can include work prep and work skills programs, non-residential alcohol and substance abuse programs, and educational programs.
    - Place Respondent on Probation

Modification of Child Support Orders

- Either party may petition the court for a modification of the order
  - Upward Modification
  - Downward Modification
- Under FCA § 451, the Standard for Modification is a change in circumstances sufficient to warrant a modification
  - Change will be measured from the date of the original child support order or the most recent modification
  - Generalized statement will not be enough, parties must show actual proof

Modification of Child Support Order

- Upward Modification
  - Where one party's income has increased or decreased
  - Needs of the child have increased
- Petitioning party must be specific as to the needs of the child and the change in financial position since the order went into effect

Modification of Child Support Order

- Downward Modification
  - Petitioner must be prepared to show actual proof of:
    - Loss of Job or Income
    - Attempts to replace lost income or job through diligent job search efforts
    - If unable to work, medical proof
  - Court may modify the order on a temporary basis, so petitioner must continue to look for work during that time and if they have not found work, petition again at the expiration of the temporary period

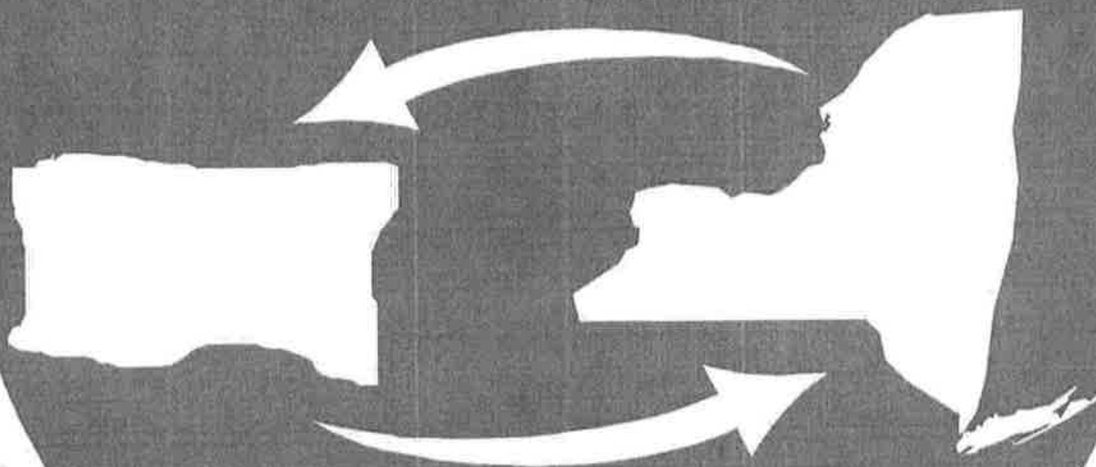
Thank you for Attending

- Please consider joining our Veterans Pro Bono Project
  - For more information please contact
    - Virginia Foulkrod, Esq.
      - Vfoulkrod@lshv.org
      - 914-949-1305 ext. 148

John Vorperian, ACA
Westchester County Attorney's Office

INTERGOVERNMENTAL ACTIONS MADE EASY

A Quick-Reference Guide for Child Support Enforcement Professionals



New York State
Office of Temporary and Disability Assistance
Division of Child Support Enforcement
Bureau of Training Management and Analysis

PROFESSIONAL
DEVELOPMENT PROGRAM
ROCKEFELLER COLLEGE
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This revision published: January 1, 2012

The 3 Basic Steps for Processing Any Intergovernmental Case

Intergovernmental = involving more than one state, territory, tribal land, country, or child support enforcement agency

State = state of the USA, tribal land, District of Columbia, Puerto Rico, Guam, US Virgin Islands, American Samoa, or country with a law similar to UIFSA

Decide what you need to get done

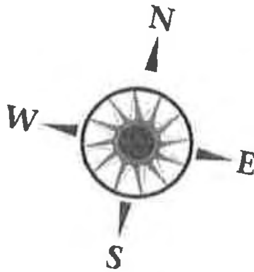
If the case has	it needs
no support order	establishment
a support order, but the person who's supposed to pay is not paying all they should when they should	enforcement
a support order and somebody wants it changed in some way	modification

Figure out where you should do it

(Your state or another state; use pages 3 - 11)

Do it

(Use pages 12 - 16)



Starting to Figure Out Where to Do It

If the case needs	you need to identify
Establishment	whether or not your state has **long-arm jurisdiction**
Enforcement	which order is the **controlling order**
Modification	which order is the **controlling order** and which state, if any, has **CEJ**
Modification and Enforcement	which order is the **controlling order** and which state, if any, has **CEJ**

Long-Arm Conditions

Your state has the authority to establish a child support order over a person who is in another state if one or more of these conditions exist in the case:

☐ The person in the other state had sex in your state and the child may have been conceived by that act.

☐ The person in the other state lived with the child in your state.

☐ The person in the other state lived in your state and, while living in your state, provided prenatal expenses or support for the child.

☐ The child lives in your state as the result of the acts or directives of the person in the other state.

☐ The person from the other state is personally served while in your state.

☐ The person in the other state submits to your state's jurisdiction.

☐ The person's parentage of the child is recorded in your state's putative father registry. (If you're not in New York, your state's law might not include this specific condition.)

☐ There is any other basis in your state's constitution or the US Constitution that gives your state jurisdiction over the person.

Identifying the Controlling Order and the State that has CEJ

Controlling Order

UIFSA section 207
New York law FCA 580-207

Has a tribunal already formally determined in writing which order is the controlling order?

Yes

That order is the determined controlling order.

No

1. List all the states that have issued child support orders that are now in effect for current support in the case.
    - Include divorce decrees that address child support.
    - Don't include orders that are no longer in effect (terminated, vacated, superseded).
2. List the states that the obligor, individual obligee, and child or children are in.
    - Obligor = person who is or should be paying support.
    - Individual obligee = person who should receive support or who has assigned support rights to the child support enforcement agency.
3. Match the number of orders in the case to the appropriate section of the charts on pages 6 - 7, and work through that section.

CEJ (Continuing, Exclusive Jurisdiction)

UIFSA section 205
New York law FCA 580-205

Have both parties agreed to give CEJ to a state that would not otherwise have it *and* both given formal notice of that agreement to the tribunal that issued the order to be modified? (Formal notice = in writing, or in an appearance during a tribunal proceeding.)

Yes

That state has CEJ.

No

1. List all the states that have issued child support orders that are now in effect for current support in the case.
    - Include divorce decrees that address child support.
    - Don't include orders that are no longer in effect (terminated, vacated, superseded).
2. List the states that the obligor, individual obligee, and child or children are in.
    - Obligor = person who is or should be paying support.
    - Individual obligee = person who should receive support or who has assigned support rights to the child support enforcement agency.
3. Match the number of orders in the case to the appropriate section of the charts on pages 6 - 7, and work through that section.

If there is NO child support order

There is no controlling order and no state has CEJ.

Once an order is issued, that order will be the controlling order, and the state that issues it will then have CEJ.

If there is ONLY ONE child support order

Does the child, or the individual obligee, or the obligor now live in the state that issued the order?

YES

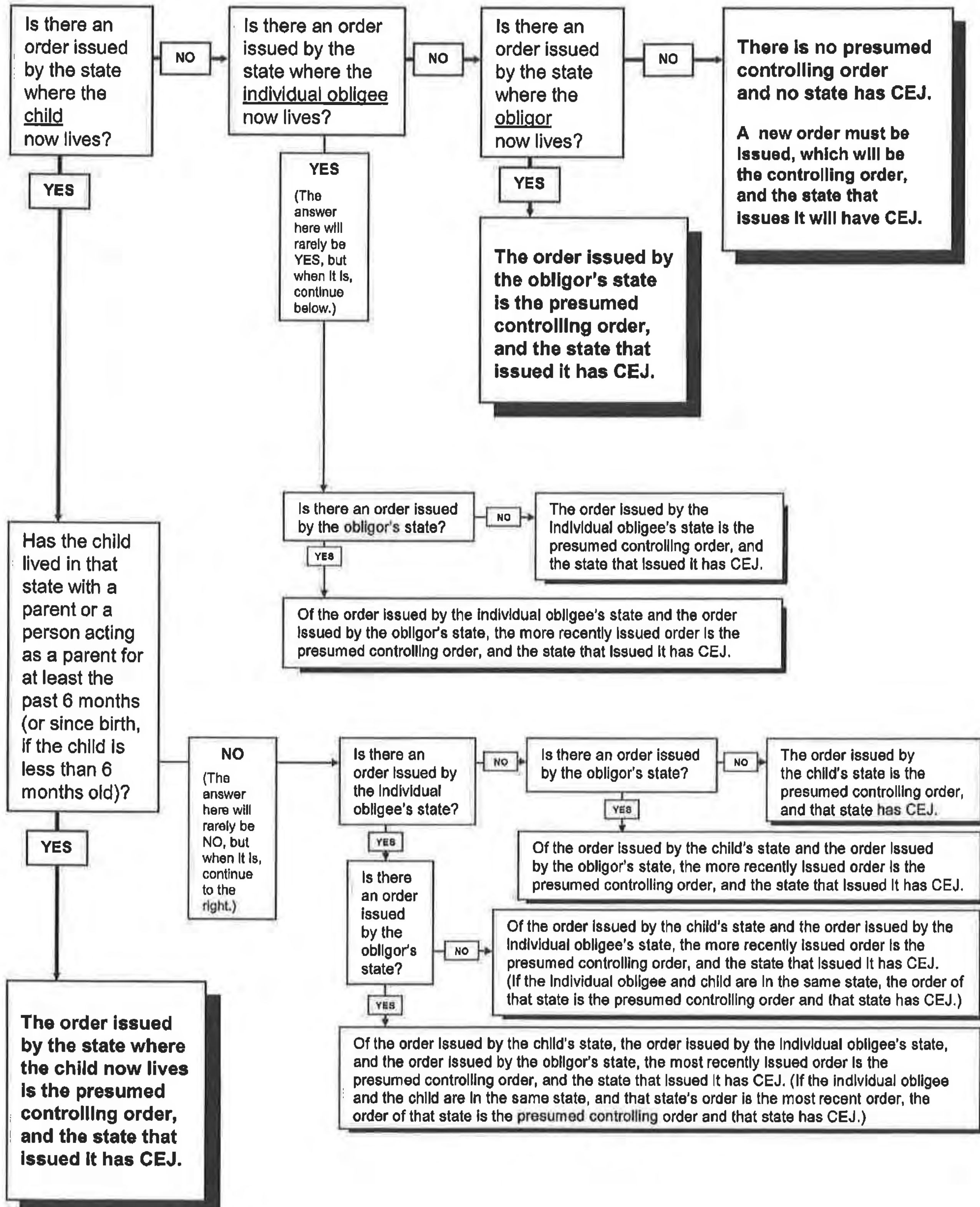
The order is the controlling order, and the state that issued it has CEJ.

NO

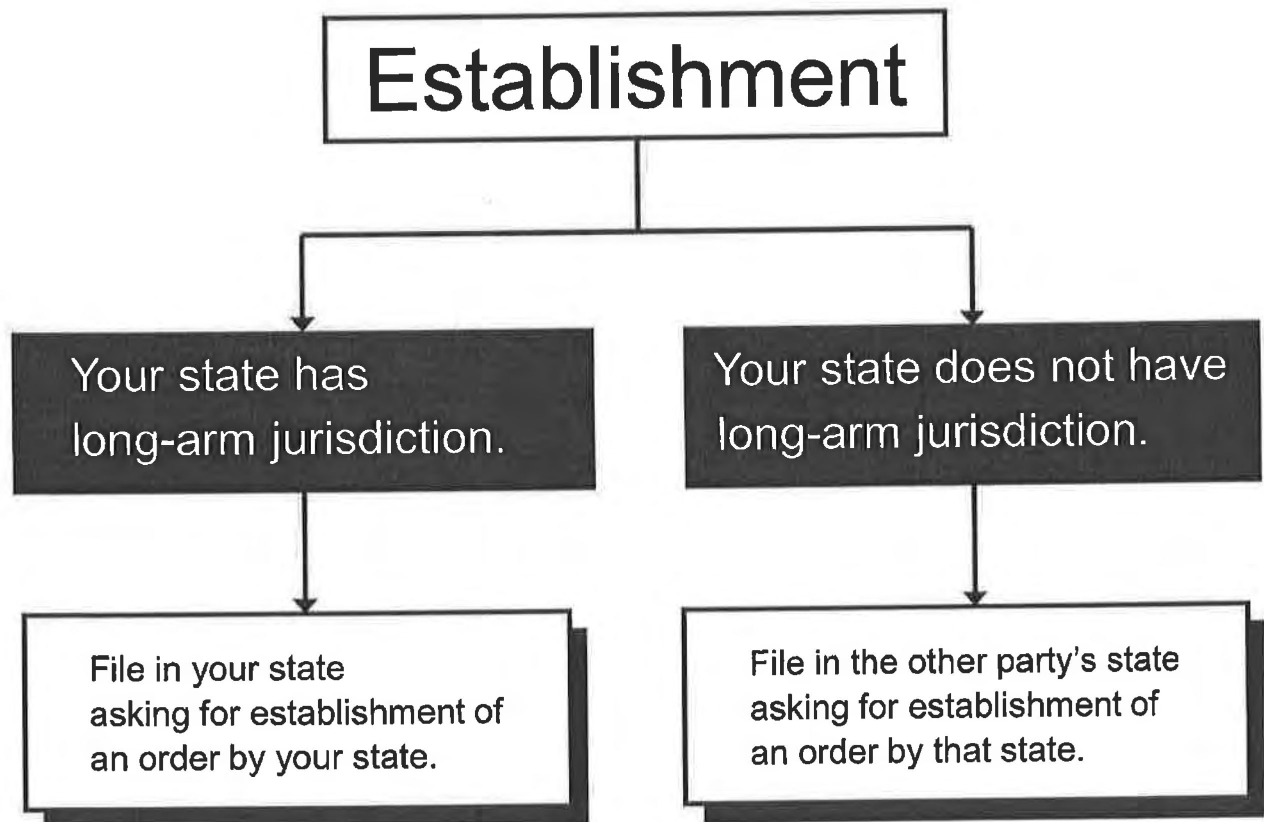
The order is the controlling order, and no state has CEJ.

If a party wants to modify the order, it must be registered for modification in the other party's state. If the order is in fact modified, that state then gains CEJ. The next time that someone wants modification, if the obligor, obligee, or child is in that state, then that state still has CEJ.

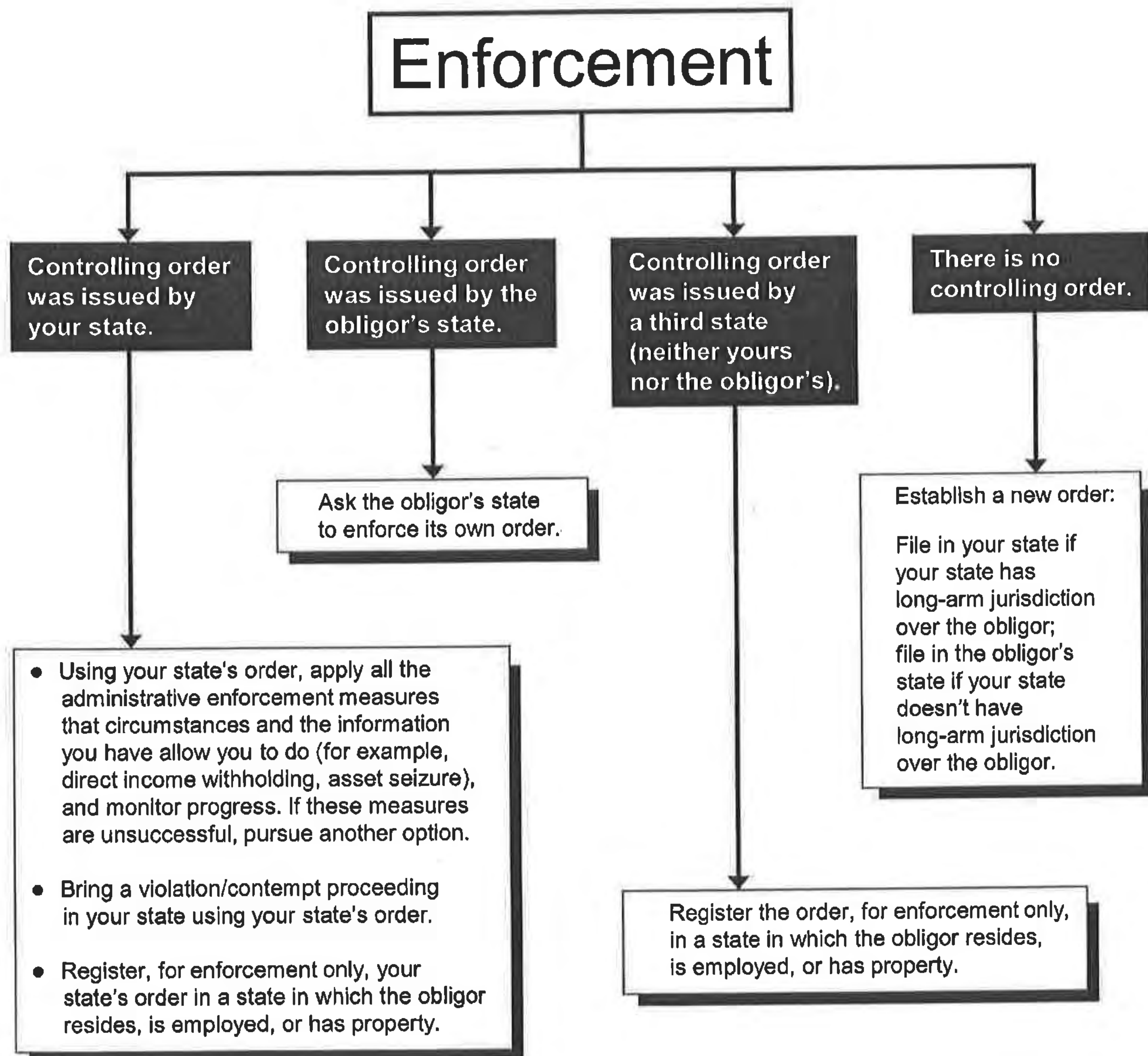
If there are TWO OR MORE child support orders



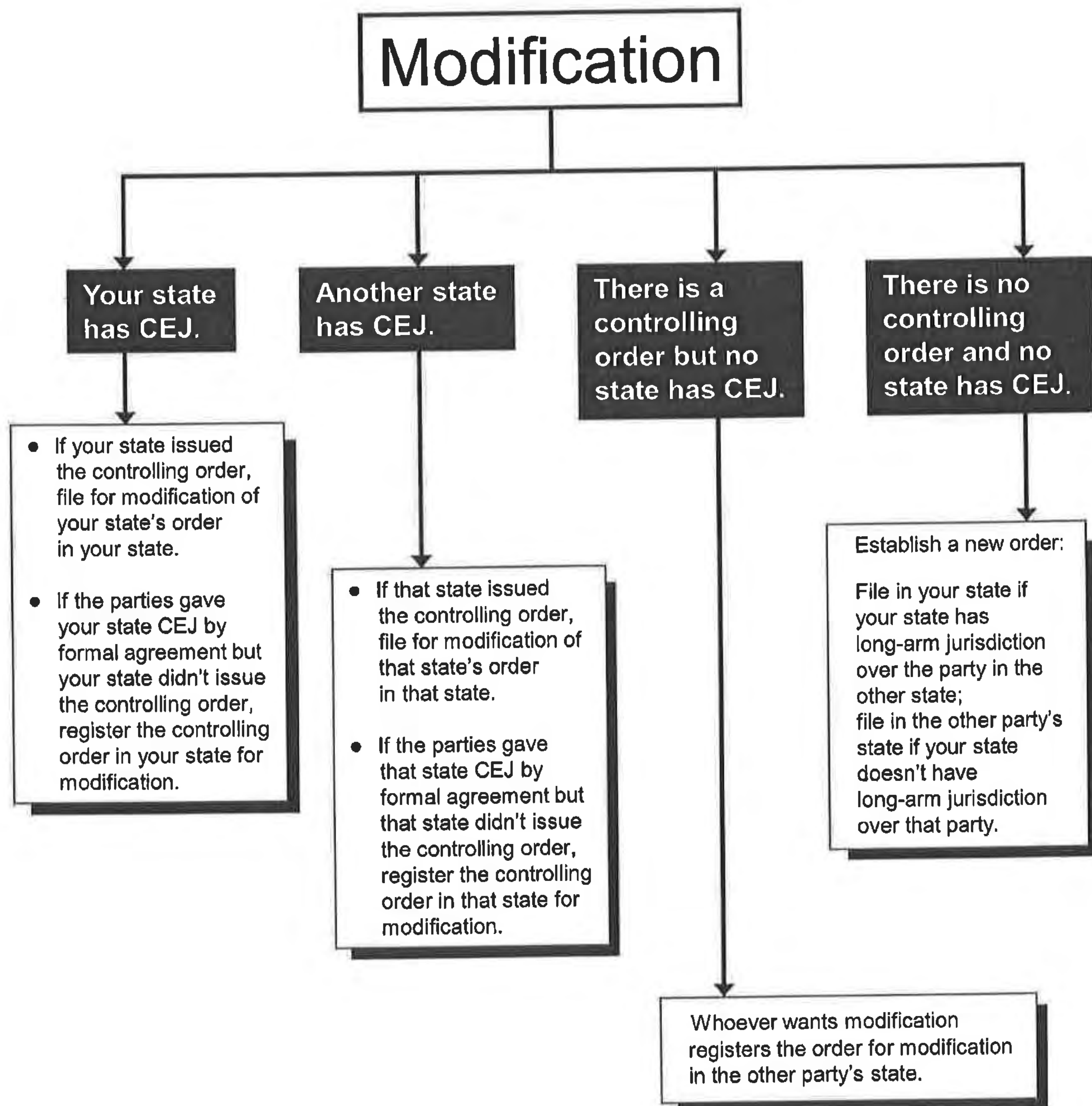
Establishment:
Relevant Possibilities and What to Do for Them



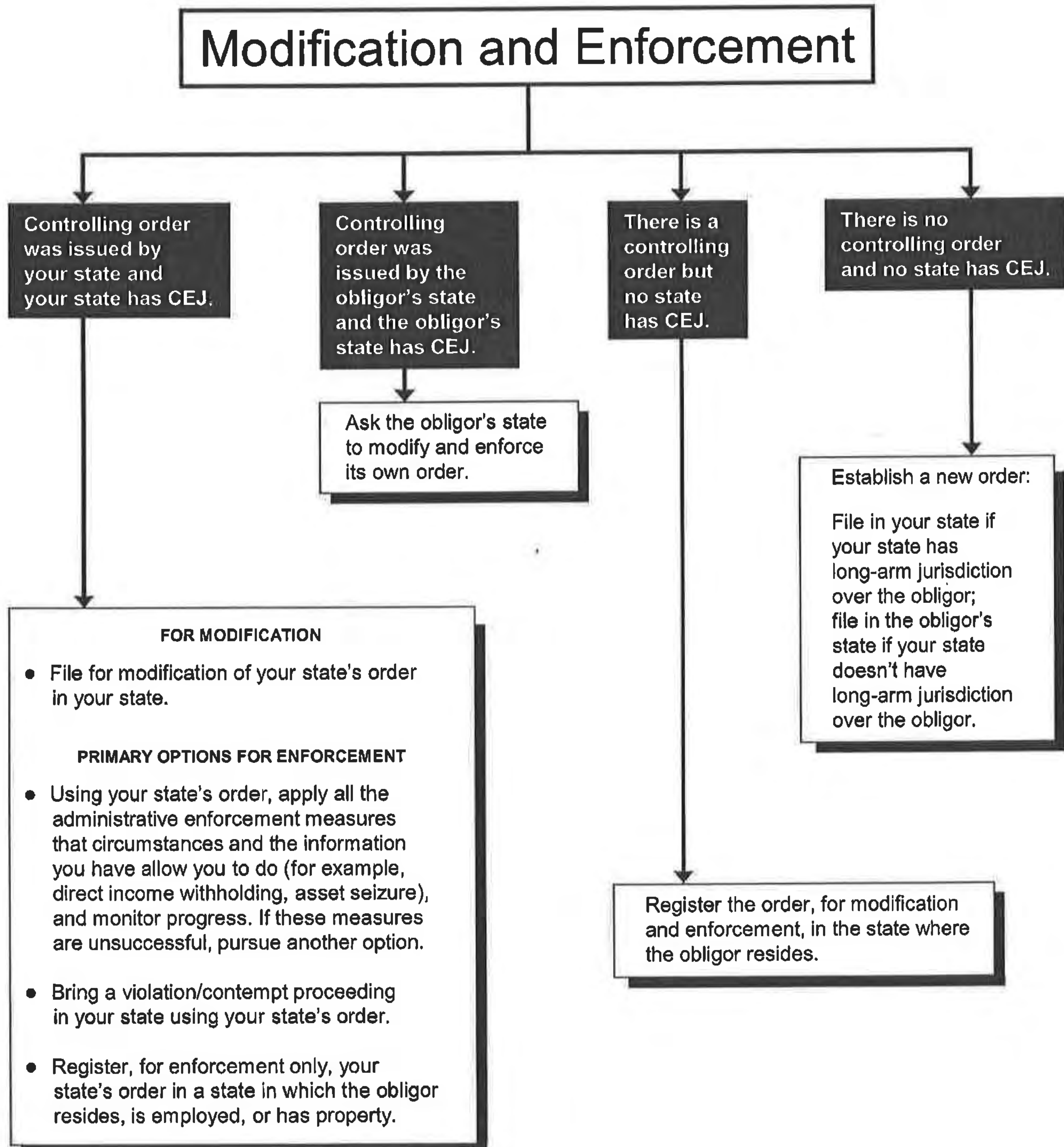
Enforcement:
Relevant Possibilities and Their Primary Enforcement Options



Modification:
Relevant Possibilities and What to Do for Them



Modification and Enforcement: Relevant Possibilities and What to Do for Them



Paperwork Needed for Intergovernmental Actions

In the appropriate section (*Establishment*, *Enforcement*, *Modification*, or *Modification and Enforcement*), find the alternative or alternatives that apply to the particular case you're dealing with. For each alternative, you'll see the required documents and where to send them.

Standard interstate forms are listed in bold type, other documents are listed in plain type.

IV-D = government child support enforcement agency.

ICR = Interstate Central Registry; part of each state's IV-D agency.

Establishment

To do this	you need these forms and/or documents	and (if you work for IV-D) you send them to
file in your state asking for establishment of an order by your state	❑ local petition/pleading ❑ any other documents regularly used for establishment in local cases in your state	local tribunal in your state (NY's tribunal = family court)
file in another party's state asking for establishment of an order by that state	❑ **CSE Transmittal # 1** ❑ **Uniform Support Petition** ❑ **General Testimony** ❑ if paternity has not been established, include **Affidavit in Support of Establishing Paternity**	ICR in other party's state

Enforcement

To do this	you need these forms and/or documents	and (if you work for IV-D) you send them to
use your state's order to apply an administrative enforcement measure	❑ due-process notices your state uses for the particular measure	people and/or place(s) they're normally sent to when measure is applied
bring a violation/ contempt proceeding in your state using your state's order	❑ local petition/pleading ❑ any other documents regularly used for enforcement in local cases in your state ❑ also see note at bottom of this page*	local tribunal in your state (NY's tribunal = family court)
ask another state to enforce its own order	❑ **CSE Transmittal # 1** ❑ also see note at bottom of this page*	ICR in state you want to enforce order
register an order for enforcement only	❑ **CSE Transmittal # 1** ❑ **Registration Statement** ❑ one certified copy of controlling order (this is the order that you should request be registered) ❑ one plain (that is, not certified) copy of controlling order ❑ also see note at bottom of this page*	if registering in another state: ICR in that state if registering in your own state: local tribunal in your state (NY's tribunal = family court)
establish a new order in your state using long-arm jurisdiction when there are multiple orders but no controlling order	❑ local petition/pleading ❑ any other documents regularly used for establishment in local cases in your state ❑ one copy of each order now in effect ❑ a payment record and/or affidavit of arrears for each order now in effect	local tribunal in your state (NY's tribunal = family court)
establish a new order in the obligor's state when there are multiple orders but no controlling order	❑ **CSE Transmittal # 1** ❑ **Uniform Support Petition** ❑ **General Testimony** ❑ one copy of each order now in effect ❑ a payment record and/or affidavit of arrears for each order now in effect	ICR in obligor's state

* if the case has multiple orders now in effect, you must also provide (or make sure that the state where the action will be carried out has):

- ❑ one copy of each order now in effect
- ❑ a payment record and/or affidavit of arrears for each order now in effect

Modification

To do this	you need these forms and/or documents	and (if you work for IV-D) you send them to
file for modification of your state's order in your state	❑ local petition/pleading ❑ any other documents regularly used for modification in local cases in your state ❑ also see note at bottom of this page*	local tribunal in your state (NY's tribunal = family court)
file for modification of another state's order in that other state	❑ **CSE Transmittal # 1** ❑ **Uniform Support Petition** ❑ **General Testimony** ❑ also see note at bottom of this page*	ICR in that other state
register an order for modification	❑ **CSE Transmittal # 1** ❑ **Uniform Support Petition** ❑ **General Testimony** ❑ **Registration Statement** ❑ one certified copy of controlling order (this is the order that you should request be registered) ❑ one plain (that is, not certified) copy of controlling order ❑ also see note at bottom of this page*	if registering in another state: ICR in that state if registering in your own state: local tribunal in your state (NY's tribunal = family court)
establish a new order in your state using long-arm jurisdiction when there are multiple orders but no controlling order	❑ local petition/pleading ❑ any other documents regularly used for establishment in local cases in your state ❑ one copy of each order now in effect	local tribunal in your state (NY's tribunal = family court)
establish a new order in the obligor's state when there are multiple orders but no controlling order	❑ **CSE Transmittal # 1** ❑ **Uniform Support Petition** ❑ **General Testimony** ❑ one copy of each order now in effect	ICR in obligor's state

* if the case has multiple orders now in effect, you must also provide (or make sure that the state where the action will be carried out has):

❑ one copy of each order now in effect

Modification and Enforcement

To do this	you need these forms and/or documents	and (if you work for IV-D) you send them to
file for modification of your state's order and use your state's order for enforcement	look in the separate sections for *Enforcement* and *Modification* to find the alternatives that apply in each of those categories, the paperwork you need for them, and where to send that paperwork	

ask the obligor's state to modify and enforce its own order	❑ **CSE Transmittal # 1**
	❑ **Uniform Support Petition**
	❑ **General Testimony**
	❑ if the case has multiple orders now in effect, you must make sure the state has:
	    ❑ one copy of each order now in effect
	    ❑ a payment record and/or affidavit of arrears for each order now in effect
		ICR in obligor's state

register an order for modification and enforcement in the obligor's state	❑ **CSE Transmittal # 1** ❑ **Uniform Support Petition** ❑ **General Testimony** ❑ **Registration Statement** ❑ one certified copy of order ❑ one plain (that is, not certified) copy of order	ICR in obligor's state
establish a new order in your state using long-arm jurisdiction when there are multiple orders but no controlling order	❑ local petition/pleading ❑ any other documents regularly used for establishment in local cases in your state ❑ one copy of each order now in effect ❑ a payment record and/or affidavit of arrears for each order now in effect	local tribunal in your state (NY's tribunal = family court)
establish a new order in the obligor's state when there are multiple orders but no controlling order	❑ **CSE Transmittal # 1** ❑ **Uniform Support Petition** ❑ **General Testimony** ❑ one copy of each order now in effect ❑ a payment record and/or affidavit of arrears for each order now in effect	ICR in obligor's state

Other Required Actions for Intergovernmental IV-D Cases

IV-D = government child support enforcement agency.

These responsibilities pertain to district child support enforcement offices in New York, per federal regulation 45 CFR 303.7 and UIFSA. In other states, local responsibilities may be assigned differently.

When you	you need to	within
have a case that needs action and you know where to file that action	file that action	20 calendar days
receive a request for a copy of an order	send the copy of the order to the requesting agency	30 working days
receive a request for a payment record	send the payment record to the requesting agency	30 working days
receive a request to assist with: • service of process • discovery • genetic testing • hearing by teleconference • administrative review	provide that assistance	the minimum amount of time possible
receive a request for information from another agency	send the information, electronically if at all possible, to the requesting agency or notify the agency of when the will be information provided (and provide it then, electronically if at all possible)	30 calendar days
obtain a determination of controlling order from your local tribunal (NY's tribunal = family court)	send: • the form *Notice of Determination of Controlling Order* • a certified copy of the order determining the controlling order to: • the tribunal of each state that issued an order in the case • the tribunal of each state where an order in the case was registered • if the case was initiated by an agency in another state, the initiating agency	30 calendar days
obtain information that any other agency involved in the case is not aware of	send the information, electronically if at all possible, to the other agency	10 working days

The following tables provide information on the age of majority and statute of limitations for each of the 50 states and its territories:

AGE OF MAJORITY FOR THE UNITED STATES AND TERRITORIES

STATE	AGE OF MAJORITY
Alabama	19
Alaska	18, 19 if unmarried and pursuing HS diploma or vocational tech training and residing with CP or guardian
Arizona	18 or graduated from HS or certified HS equivalency program whichever occurs first
Arkansas	18 or graduated from HS or end of school year after child reaches 19 whichever is earlier
California	18 unless still in HS and not married and a full-time student, must complete 12th grade or turn 19, whichever comes first
Colorado	19 unless the court finds a child is otherwise emancipated
Connecticut	18; support continues for unmarried children residing with a parent until completion of 12th grade or 19 whichever occurs first
Delaware	18 except if still in HS support continues until 19 or terminates HS whichever occurs first
District of Columbia	21 or when minor becomes self-supporting through marriage, employment or military service
Florida	18
Georgia	18, support orders after 7/1/92 may provide for an extension up to age 20 if still in HS
Guam	18
Hawaii	18
Idaho	18; can go to 19 if still in HS
Illinois	18 or up to 19 if in HS and documentation is received

STATE	AGE OF MAJORITY
Indiana	19
Iowa	18, or up to 19 if completing HS or GED requirements full-time and child is reasonably expected to graduate by 19
Kansas	18
Kentucky	18, 19 if still attending HS
Louisiana	18; can be paid for child over 18 if child is unmarried, a full-time student in good standing in secondary school and dependent on either parent
Maine	18 unless attending HS, then until child graduates, withdraws or is expelled or attains 19, whichever comes first; marries; or becomes a member of the armed forces
Maryland	18or up to 19 as long as child is enrolled in secondary school
Massachusetts	Age 18 – 23 as per the language in the court order. If there is no language in the court order, the age of emancipation is 21.
Michigan	18, or up to 19-1/2 for completion HS, or beyond 19-1/2 by agreement
Minnesota	18 or until age 20 if attending secondary school whichever occurs later
Mississippi	21 unless stated otherwise in the order
Missouri	18, if not graduated from HS up to age 21
Montana	18 or upon graduation from HS, whichever is later but no later than 19
Nebraska	19 unless child marries, dies or is emancipated by the court
Nevada	18 or up to19 if still in HS; if child is handicapped can go beyond age of majority
New Hampshire	18 or graduated from HS whichever is later; or becomes married or member of armed services; support can continue beyond 18 if otherwise ordered

STATE	AGE OF MAJORITY
New Jersey	18; however, there is no automatic termination of child support at any age. Emancipation is determined by the court on a case by case basis.
New Mexico	18 unless still in HS, then up to 19
New York	21
North Carolina	18, unless attending secondary school full-time or up to 20 whichever comes first
North Dakota	18, if in HS can extend until 19 or graduate HS whichever occurs first or if parties agree or court determines support to be appropriate
Ohio	18 or as long as child attends HS on full-time basis or court order requires support to continue; not beyond 19th birthday if not specified in court order
Oklahoma	Effective 8/31/06 – 18 or up to 20th birthday if child is regularly enrolled and attending HS
Oregon	18 or 21 years old if enrolled in school half-time or more
Pennsylvania	18 or graduated from HS, whichever occurs last
Puerto Rico	21 unless child is self-supporting through marriage, judicial decree or parental consent if child is beyond 18
Rhode Island	18
South Carolina	18 (need court order to terminate)
South Dakota	18 or until 19 years of age if full-time student in HS
Tennessee	18 or graduated from HS
Texas	18 or until graduates from HS whichever occurs later
Utah	18 or graduated HS during child's normal, expected year of graduation whichever occurs later or by court order

STATE	AGE OF MAJORITY
Vermont	18 or termination of secondary education whichever occurs later; effective 1/01/09, a Court may extend child support until age 22 in cases where the child has significant physical and/or emotional disabilities (a sunset provision of 7/1/2012 exists indicating this provision will automatically be repealed at that time.)
Virgin Islands	No information
Virginia	18 if not in HS; continues to 19 if full-time student, not self-supporting and living in home of parent until child reaches 19 or graduates HS whichever occurs first
Washington	18, may extend for special circumstances
West Virginia	18
Wisconsin	18 or until 19 if child still in HS or pursuing course of education designed to lead to HS diploma or equivalent
Wyoming	18, unless otherwise self-supporting, legally married, or active in armed forces; can continue up to 21 if still in HS and full-time student

The Honorable Allen Hochberg materials

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Hon. Allen Hochberg, Support Magistrate
Family Court State of New York
Ninth Judicial District

CHILD SUPPORT: STRATAGEMS, SECRETS AND PITFALLS

I. Introduction
   A. 1975 Social Security Amendments f 1975 enacting Title IV-D Social Security Act (Brandes article, NYLJ , 1/27/98)
      1. Eroding financial responsibility for children
      2. Need for reform "72% 41%"
   B. Commission on Women in the Courts
   C. Child Support Standards Act (Guidelines) FCA §413 L. 1989 eff. 9/15/89 (Spitalnick article, NYLJ 4/2/98)
      1. Presumption of need based upon income, ie not needs based (Ch. v.P.)
      2. Application of the "legislative cap" (**Cassano v. Cassano**, 85 NY 2nd 649)

II. Mick Jagger and Carolyn Brian
   A. Financial Disclosure
      1. on failure becomes needs based and subject to imputation (**Genender v. Genender,** 40 AD 3d 994; and 51 AD 3d 669; **Sena v. Sena**, 65 AD 3d 1244; **Mtr. Gravenese v. Marchese,** 57 AD 3d 992; Rigler, JSC, **Maddalena**)
      2. Sanctions FCA §423-a(b), but worse,
      3. cannot argue variation from the Guidelines; and
      4. has no basis for future modification

III. The ten year "Well, we really didn't follow the divorce" case pitfall
   A. The incorporated stipulation is a contract between the parties which cost them a lot of money. Why not follow it?
      1. Sacrosanct (**Matter of Encarnacion Meccicio v. Frank Meccicio**, 76 NY 2nd 822; **Rainbow v. Swisher**, 72 NY 2nd 106; **Nichols v. Nichols**, 306 NY 490, 496, rehearing den. 307 NY 677; **DeCarlo v. DeCarlo** 250 AD2d 848 ;**Merl v. Merl** , 67 NY2d 35)

CHILD SUPPORT:

Family Court Statutory Overview

Tracey S. Alter, Esq.
Director Family Court Legal Program
Pace Women's Justice Center

CHILD SUPPORT: Family Court Statutory Overview

<u>Establishing Paternity:</u>

Acknowledgment of Paternity	Family Court Act ("FCA") § 516-a
Order of Filiation (Paternity Petition)	FCA § 542; FCA 550 and 551
Presumption of Legitimacy (Marriage)	FCA § 417

<u>Seeking Child Support</u>:

Retroactive support back to Family Court petition filing date	FCA § § 440 and 449
Temporary order for child support (TOS); **TOS with temporary order of protection**	FCA § 434; **FCA § 828(4)**
Establishing "basic child support obligation" and seeking "guidelines" order as "custodial" parent **Child Support Standards Act**	**FCA § 413**
Statutory "add-ons" for child care expenses, unreimbursed health care expenses, & educational expenses; "pro rata" share	FCA § 413(1)(c)
Compulsory financial disclosure	FCA §§ 413(1)(k) and 424-a
Health ins. coverage & other elements of support	FCA §§ 413 and 416
Seeking spousal support in Family Court	FCA §§ 412 and 434-a
Support Magistrate statutory authority; objections	FCA § 439
Modification of support orders; continuing jurisdiction	FCA § 451
Violation of support orders	FCA § 453 et seq.
Effect of Supreme Court separation & divorce*	FCA § 461 et seq.

*For provisions in <u>Supreme Court</u> separation and divorce actions, see Domestic Relations Law § 236, et seq., and specifically DRL§ 240 (1-b) for the child support guidelines and DRL § 236B (5-a) for the temporary maintenance guidelines.

Office of Child Support Enforcement (Support Collection Unit): <u>administrative enforcement agency mechanisms</u> include income executions, tax refund intercepts, bank account levies & suspension of drivers' licenses. See, e.g., FCA § 440; Social Services Law § 111-a et seq.; Civil Practice Law and Rules Article 52. For <u>payment of child support through OCSE</u>, petitioner

fills out and submits a NYS "Application for Child Support Services" form to OCSE personnel, in addition to filing a Family Court child support petition with the family court clerk's office.

9.25.13 Class – T. Alter

Family Court Act
§ 413. Parents' duty to support child
Effective: November 15, 2011

Effective: November 15, 2011

McKinney's Consolidated Laws of New York Annotated Currentness
Family Court Act (Refs & Annos)
Article 4. Support Proceedings (Refs & Annos)
Part 1. Jurisdiction and Duties of Support

→→ § 413. Parents' duty to support child

1. (a) Except as provided in subdivision two of this section, the parents of a child under the age of twenty-one years are chargeable with the support of such child and, if possessed of sufficient means or able to earn such means, shall be required to pay for child support a fair and reasonable sum as the court may determine. The court shall make its award for child support pursuant to the provisions of this subdivision. The court may vary from the amount of the basic child support obligation determined pursuant to paragraph (c) of this subdivision only in accordance with paragraph (f) of this subdivision.

(b) For purposes of this subdivision, the following definitions shall be used:

(1) "Basic child support obligation" shall mean the sum derived by adding the amounts determined by the application of subparagraphs two and three of paragraph (c) of this subdivision except as increased pursuant to subparagraphs four, five, six and seven of such paragraph.

(2) "Child support" shall mean a sum to be paid pursuant to court order or decree by either or both parents or pursuant to a valid agreement between the parties for care, maintenance and education of any unemancipated child under the age of twenty-one years.

(3) "Child support percentage" shall mean:

(i) seventeen percent of the combined parental income for one child;
(ii) twenty-five percent of the combined parental income for two children;
(iii) twenty-nine percent of the combined parental income for three children;
(iv) thirty-one percent of the combined parental income for four children; and
(v) no less than thirty-five percent of the combined parental income for five or more children.

(4) "Combined parental income" shall mean the sum of the income of both parents.

(5) "Income" shall mean, but shall not be limited to, the sum of the amounts determined by the application of clauses (i), (ii), (iii), (iv), (v) and (vi) of this subparagraph reduced by the amount determined by the application of clause (vii) of this subparagraph:

(i) gross (total) income as should have been or should be reported in the most recent federal income tax return. If an individual files his/her federal income tax return as a married person filing jointly, such person shall be required to prepare a form, sworn to under penalty of law, disclosing his/her gross income individually;

(ii) to the extent not already included in gross income in clause (i) of this subparagraph, investment income reduced by sums expended in connection with such investment;

(iii) to the extent not already included in gross income in clauses (i) and (ii) of this subparagraph, the amount of income or compensation voluntarily deferred and income received, if any, from the following sources:

(A) workers' compensation,
(B) disability benefits,

(C) unemployment insurance benefits,
(D) social security benefits,
(E) veterans benefits,
(F) pensions and retirement benefits,
(G) fellowships and stipends, and
(H) annuity payments;

(iv) at the discretion of the court, the court may attribute or impute income from, such other resources as may be available to the parent, including, but not limited to:
(A) non-income producing assets,
(B) meals, lodging, memberships, automobiles or other perquisites that are provided as part of compensation for employment to the extent that such perquisites constitute expenditures for personal use, or which expenditures directly or indirecly [FN1] confer personal economic benefits,
(C) fringe benefits provided as part of compensation for employment, and
(D) money, goods, or services provided by relatives and friends;

(v) an amount imputed as income based upon the parent's former resources or income, if the court determines that a parent has reduced resources or income in order to reduce or avoid the parent's obligation for child support;

(vi) to the extent not already included in gross income in clauses (i) and (ii) of this subparagraph, the following self-employment deductions attributable to self-employment carried on by the taxpayer:
(A) any depreciation deduction greater than depreciation calculated on a straight-line basis for the purpose of determining business income or investment credits, and
(B) entertainment and travel allowances deducted from business income to the extent said allowances reduce personal expenditures;

(vii) the following shall be deducted from income prior to applying the provisions of paragraph (c) of this subdivision:
(A) unreimbursed employee business expenses except to the extent said expenses reduce personal expenditures,
(B) alimony or maintenance actually paid to a spouse not a party to the instant action pursuant to court order or validly executed written agreement,
(C) alimony or maintenance actually paid or to be paid to a spouse that is a party to the instant action pursuant to an existing court order or contained in the order to be entered by the court, or pursuant to a validly executed written agreement, provided the order or agreement provides for a specific adjustment, in accordance with this subdivision, in the amount of child support payable upon the termination of alimony or maintenance to such spouse,
(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,
(E) public assistance,
(F) supplemental security income,
(G) New York city or Yonkers income or earnings taxes actually paid, and
(H) federal insurance contributions act (FICA) taxes actually paid.

(6) "Self-support reserve" shall mean one hundred thirty-five percent of the poverty income guidelines amount for a single person as reported by the federal department of health and human services. For the calendar year nineteen hundred eighty-nine, the self-support reserve shall be eight thousand sixty-five dollars. On March first of each year, the self-support reserve shall be revised to reflect the annual updating of the poverty income guidelines as reported by the federal department of health and human services for a single person household.

(c) The amount of the basic child support obligation shall be determined in accordance with the provision of this paragraph:

(1) The court shall determine the combined parental income.

(2) The court shall multiply the combined parental income up to the amount set forth in paragraph (b) of subdivision two of section one hundred eleven-i of the social services law by the appropriate child support percentage and such amount shall be prorated in the same proportion as each parent's income is to the combined parental income.

(3) Where the combined parental income exceeds the dollar amount set forth in subparagraph two of this paragraph, the court shall determine the amount of child support for the amount of the combined parental income in excess of such dollar amount through consideration of the factors set forth in paragraph (f) of this subdivision and/or the child support percentage.

(4) Where the custodial parent is working, or receiving elementary or secondary education, or higher education or vocational training which the court determines will lead to employment, and incurs child care expenses as a result thereof, the court shall determine reasonable child care expenses and such child care expenses, where incurred, shall be prorated in the same proportion as each parent's income is to the combined parental income. Each parent's pro rata share of the child care expenses shall be separately stated and added to the sum of subparagraphs two and three of this paragraph.

(5) The court shall determine the parties' obligation to provide health insurance benefits pursuant to section four hundred sixteen of this part and to pay cash medical support as provided under this subparagraph.
(i) "Cash medical support" means an amount ordered to be paid toward the cost of health insurance provided by a public entity or by a parent through an employer or organization, including such employers or organizations which are self insured, or through other available health insurance or health care coverage plans, and/or for other health care expenses not covered by insurance.
(ii) Where health insurance benefits pursuant to paragraph one and subparagraphs (i) and (ii) of paragraph two of subdivision (e) of section four hundred sixteen of this part are determined by the court to be available, the cost of providing health insurance benefits shall be prorated between the parties in the same proportion as each parent's income is to the combined parental income. If the custodial parent is ordered to provide such benefits, the non-custodial parent's pro rata share of such costs shall be added to the basic support obligation. If the non-custodial parent is ordered to provide such benefits, the custodial parent's pro rata share of such costs shall be deducted from the basic support obligation.
(iii) Where health insurance benefits pursuant to paragraph one and subparagraphs (i) and (ii) of paragraph two of subdivision (e) of section four hundred sixteen of this part are determined by the court to be unavailable, if the child or children are determined eligible for coverage under the medical assistance program established pursuant to title eleven of article five of the social services law, the court shall order the non-custodial parent to pay cash medical support as follows:
(A) In the case of a child or children authorized for managed care coverage under the medical assistance program, the lesser of the amount that would be required as a family contribution under the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law for the child or children if they were in a two-parent household with income equal to the combined income of the non-custodial and custodial parents or the premium paid by the medical assistance program on behalf of the child or children to the managed care plan. The court shall separately state the non-custodial parent's monthly obligation. The non-custodial parent's cash medical support obligation under this clause shall not exceed five percent of his or her gross income, or the difference between the non-custodial parent's income and the self-support reserve, whichever is less.
(B) In the case of a child or children authorized for fee-for-service coverage under the medical assistance program other than a child or children described in item (A) of this clause, the court shall determine the non-custodial parent's maximum annual cash medical support obligation, which shall be equal to the lesser of the monthly amount that would be required as a family contribution under the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law for the child or children if they were in a two-parent household with income equal to the combined income of the non-custodial and custodial parents times twelve months or the number of months that

the child or children are authorized for fee-for-service coverage during any year. The court shall separately state in the order the non-custodial parent's maximum annual cash medical support obligation and, upon proof to the court that the non-custodial parent, after notice of the amount due, has failed to pay the public entity for incurred health care expenses, the court shall order the non-custodial parent to pay such incurred health care expenses up to the maximum annual cash medical support obligation. Such amounts shall be support arrears/past due support and shall be subject to any remedies as provided by law for the enforcement of support arrears/past due support. The total annual amount that the non-custodial parent is ordered to pay under this clause shall not exceed five percent of his or her gross income or the difference between the non-custodial parent's income and the self-support reserve, whichever is less.
(C) The court shall order cash medical support to be paid by the non-custodial parent for health care expenses of the child or children paid by the medical assistance program prior to the issuance of the court's order. The amount of such support shall be calculated as provided under item (A) or (B) of this clause, provided that the amount that the non-custodial parent is ordered to pay under this item shall not exceed five percent of his or her gross income or the difference between the non-custodial parent's income and the self-support reserve, whichever is less, for the year when the expense was incurred. Such amounts shall be support arrears/past due support and shall be subject to any remedies as provided by law for the enforcement of support arrears/past due support.
(iv) Where health insurance benefits pursuant to paragraph one and subparagraphs (i) and (ii) of paragraph two of subdivision (e) of section four hundred sixteen of this part are determined by the court to be unavailable, and the child or children are determined eligible for coverage under the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law, the court shall prorate each parent's share of the cost of the family contribution required under such child health insurance plan in the same proportion as each parent's income is to the combined parental income, and state the amount of the non-custodial parent's share in the order. The total amount of cash medical support that the non-custodial parent is ordered to pay under this clause shall not exceed five percent of his or her gross income, or the difference between the non-custodial parent's income and the self-support reserve, whichever is less.
(v) In addition to the amounts ordered under clause (ii), (iii), or (iv) of this subparagraph, the court shall pro rate each parent's share of reasonable health care expenses not reimbursed or paid by insurance, the medical assistance program established pursuant to title eleven of article five of the social services law, or the state's child health insurance plan pursuant to title one-A of article twenty-five of the public health law, in the same proportion as each parent's income is to the combined parental income, and state the non-custodial parent's share as a percentage in the order. The non-custodial parent's pro rata share of such health care expenses determined by the court to be due and owing shall be support arrears/past due support and shall be subject to any remedies provided by law for the enforcement of support arrears/past due support. In addition, the court may direct that the non-custodial parent's pro rata share of such health care expenses be paid in one sum or in periodic sums, including direct payment to the health care provider.
(vi) Upon proof by either party that cash medical support pursuant to clause (ii), (iii), (iv) or (v) of this subparagraph would be unjust or inappropriate pursuant to paragraph (f) of subdivision one of this section, the court shall:
(A) order the parties to pay cash medical support as the court finds just and appropriate, considering the best interests of the child; and
(B) set forth in the order the factors it considered, the amount calculated under this subparagraph, the reason or reasons the court did not order such amount, and the basis for the amount awarded.

(6) Where the court determines that the custodial parent is seeking work and incurs child care expenses as a result thereof, the court may determine reasonable child care expenses and may apportion the same between the custodial and non-custodial parent. The non-custodial parent's share of such expenses shall be separately stated and paid in a manner determined by the court.

(7) Where the court determines, having regard for the circumstances of the case and of the respective parties and in the best interests of the child, and as justice requires, that the present or future provision of post-secondary, private, special, or enriched education for the child is appropriate, the court may award educational expenses. The non-custodial parent shall pay educational expenses, as awarded, in a manner determined by the court, including direct payment to the educational provider.

(d) Notwithstanding the provisions of paragraph (c) of this subdivision, where the annual amount of the basic child support obligation would reduce the non-custodial parent's income below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be twenty-five dollars per month; provided, however, that if the court finds that such basic child support obligation is unjust or inappropriate, which finding shall be based upon considerations of the factors set forth in paragraph (f) of this subdivision, then the court shall order the non-custodial parent to pay such amount of the child support as the court finds just and appropriate. Notwithstanding the provisions of paragraph (c) of this subdivision, where the annual amount of the basic child support obligation would reduce the non-custodial parent's income below the self-support reserve but not below the poverty income guidelines amount for a single person as reported by the federal department of health and human services, the basic child support obligation shall be fifty dollars per month or the difference between the non-custodial parent's income and the self-support reserve, whichever is greater, in addition to any amounts that the court may, in its discretion, order in accordance with subparagraphs four, five, six and/or seven of paragraph (c) of this subdivision.

(e) Where a parent is or may be entitled to receive non-recurring payments from extraordinary sources not otherwise considered as income pursuant to this section, including but not limited to:
(1) Life insurance policies;
(2) Discharges of indebtedness;
(3) Recovery of bad debts and delinquency amounts;
(4) Gifts and inheritances; and
(5) Lottery winnings,
the court, in accordance with paragraphs (c), (d) and (f) of this subdivision may allocate a proportion of the same to child support, and such amount shall be paid in a manner determined by the court.

(f) 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 parents's [FN1] pro-rata share of the basic child support obligation is unjust or inappropriate, which finding shall be based upon consideration of the following factors:
(1) The financial resources of the custodial and non-custodial parent, and those of the child;
(2) The physical and emotional health of the child and his/her special needs and aptitudes;
(3) The standard of living the child would have enjoyed had the marriage or household not been dissolved;
(4) The tax consequences to the parties;
(5) The non-monetary contributions that the parents will make toward the care and well-being of the child;
(6) The educational needs of either parent;
(7) A determination that the gross income of one parent is substantially less than the other parent's gross income;
(8) The needs of the children of the non-custodial parent for whom the non-custodial parent is providing support who are not subject to the instant action and whose support has not been deducted from income pursuant to subclause (D) of clause (vii) of subparagraph five of paragraph (b) of this subdivision, and the financial resources of any person obligated to support such children, provided, however, that this factor may apply 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;
(9) Provided that the child is not on public assistance (i) extraordinary expenses incurred by the non-custodial parent in exercising visitation, or (ii) expenses incurred by the non-custodial parent in extended visitation provided that the custodial parent's expenses are substantially reduced as a result thereof; and
(10) Any other factors the court determines are relevant in each case, the court shall order the non-custodial parent to pay his or her pro rata share of the basic child support obligation, and may order the non-custodial parent to pay an amount pursuant to paragraph (e) of this subdivision.

(g) Where the court finds that the non-custodial parent's pro rata share of the basic child support obligation is unjust or inappropriate, the court shall order the non-custodial parent to pay such amount of child support as the court finds just and appropriate, and the court shall set forth, in a written order, the factors it considered; the amount of each party's pro rata share of the basic child support obligation; and the reasons that the court did not order the basic child

support obligation. Such written order may not be waived by either party or counsel; provided, however, and notwithstanding any other provision of law, including but not limited to section four hundred fifteen of this part, the court shall not find that the non-custodial parent's pro rata share of such obligation is unjust or inappropriate on the basis that such share exceeds the portion of a public assistance grant which is attributable to a child or children. Where the non-custodial parent's income is less than or equal to the poverty income guidelines amount for a single person as reported by the federal department of health and human services, unpaid child support arrears in excess of five hundred dollars shall not accrue.

(h) A validly executed agreement or stipulation voluntarily entered into between the parties after the effective date of this subdivision presented to the court for incorporation in an order or judgment shall include a provision stating that the parties have been advised of the provisions of this subdivision and that the basic child support obligation provided for therein would presumptively result in the correct amount of child support to be awarded. In the event that such agreement or stipulation deviates from the basic child support obligation, the agreement or stipulation must specify the amount that such basic child support obligation would have been and the reason or reasons that such agreement or stipulation does not provide for payment of that amount. Such provision may not be waived by either party or counsel. 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. The court shall, however, retain discretion with respect to child support pursuant to this section. Any court order or judgment incorporating a validly executed agreement or stipulation which deviates from the basic child support obligation shall set forth the court's reasons for such deviation.

(i) Where either or both parties are unrepresented, the court shall not enter an order or judgment other than a temporary order pursuant to section two hundred thirty-seven of the domestic relations law, that includes a provision for child support unless the unrepresented party or parties have received a copy of the child support standards chart promulgated by the commissioner of the office of temporary and disability assistance pursuant to subdivision two of section one hundred eleven-i of the social services law. Where either party is in receipt of child support enforcement services through the local social services district, the local social services district child support enforcement unit shall advise such party of the amount derived from application of the child support percentage and that such amount serves as a starting point for the determination of the child support award, and shall provide such party with a copy of the child support standards chart.

(j) In addition to financial disclosure required in section four hundred twenty-four-a of this article, the court may require that the income and/or expenses of either party be verified with documentation including, but not limited to, past and present income tax returns, employer statements, pay stubs, corporate, business, or partnership books and records, corporate and business tax returns, and receipts for expenses or such other means of verification as the court determines appropriate. Nothing herein shall affect any party's right to pursue discovery pursuant to this chapter, the civil practice law and rules, or the family court act.

(k) When a party has defaulted and/or the court is otherwise presented with insufficient evidence to determine gross income, the court shall order child support based upon the needs or standard of living of the child, whichever is greater. Such order may be retroactively modified upward, without a showing of change in circumstances.

(*l*) In any action or proceeding for modification of an order of child support existing prior to the effective date of this paragraph, brought pursuant to this article, the child support standards set forth in paragraphs (a) through (k) of this subdivision shall not constitute grounds for modification of such support order; provided, however, that (1) where the circumstances warrant modification of such order, or (2) where any party objects to an adjusted child support order made or proposed at the direction of the support collection unit pursuant to section one hundred eleven-h or one hundred eleven-n of the social services law, and the court is reviewing the current order of child support, such standards shall be applied by the court in its determination with regard to the request for modification or disposition of an objection to an adjusted child support order made or proposed by a support collection unit. In applying such standards, when the order to be modified incorporates by reference or merges with a validly executed separation

agreement or stipulation of settlement, the court may consider, in addition to the factors set forth in paragraph (f) of this subdivision, the provisions of such agreement or stipulation concerning property distribution, distributive award and/or maintenance in determining whether the amount calculated by using the standards would be unjust or inappropriate.

2. Nothing in this article shall impose any liability upon a person to support the adopted child of his or her spouse, if such child was adopted after the adopting spouse is living separate and apart from the non-adopting spouse pursuant to a legally recognizable separation agreement or decree under the domestic relations law. Such liability shall not be imposed for so long as the spouses remain separate and apart after the adoption.

3. a. One-time adjustment of child support orders issued prior to September fifteenth, nineteen hundred eighty-nine. Any party to a child support order issued prior to September fifteenth, nineteen hundred eighty-nine on the behalf of a child in receipt of public assistance or child support services pursuant to section one hundred eleven-g of the social services law may request that the support collection unit undertake one review of the order for adjustment purposes pursuant to section one hundred eleven-h of the social services law. A hearing on the adjustment of such order shall be granted upon the objection of either party pursuant to the provisions of this section. An order shall be adjusted if as of the date of the support collection unit's review of the correct amount of child support as calculated pursuant to the provisions of this section would deviate by at least ten percent from the child support ordered in the last permanent support order of the court. Additionally, a new support order shall be issued upon a showing that the current order of support does not provide for the health care needs of the child through insurance or otherwise. Eligibility of the child for medical assistance shall not relieve any obligation the parties otherwise have to provide for the health care needs of the child. The support collection unit's review of a child support order shall be made on notice to all parties to the current support order and shall be subject to the provisions of section four hundred twenty-four-a of this article. Nothing herein shall be deemed in any way to limit, restrict, expand or impair the rights of any party to file for a modification of a child support order as is otherwise provided by law.
b. Upon receipt of an adjustment finding and where appropriate a proposed order in conformity with such finding filed by either party or by the support collection unit, a party shall have thirty-five days from the date of mailing of the adjustment finding and proposed adjusted order, if any, to submit to the court identified thereon specific written objections to such finding and proposed order.
(1) If specific written objections are submitted by either party or by the support collection unit, a hearing shall be scheduled by the court on notice to the parties and the support collection unit, who shall have the right to be heard by the court and to offer evidence in support of or in opposition to adjustment of the support order.
(2) The party filing the specific written objections shall bear the burden of going forward and the burden of proof; provided, however, that if the support collection unit has failed to provide the documentation and information required by subdivision fourteen of section one hundred eleven-h of the social services law, the court shall first require the support collection unit to furnish such documents and information to the parties and the court.
(3) If the court finds by a preponderance of the evidence that the specific written objections have been proven, the court shall recalculate or readjust the proposed adjusted order accordingly or, for good cause, shall remand the order to the support collection unit for submission of a new proposed adjusted order. Any readjusted order so issued by the court or resubmitted by the support collection unit following remand by the court shall be effective as of the date the proposed adjusted order would have been effective had no written objections been filed.
(4) If the court finds that the specific written objections have not been proven by a preponderance of the evidence, the court shall immediately issue the adjusted order, which shall be effective as of the date the order would have been effective had no written objections been filed.
(5) If the determination of the specific written objections has been made by a family court support magistrate, the parties shall be permitted to obtain judicial review of such determination by filing timely written objections pursuant to subdivision (e) of section four hundred thirty-nine of this act.
(6) If the court receives no specific written objections to the support order within thirty-five days of the mailing of the proposed order, the clerk of the court shall immediately issue the order without any further review, modification, or other prior action by the court or any judge or support magistrate thereof, and the clerk shall immediately transmit copies of the order of support to the parties and to the support collection unit.

c. A motion to vacate an order of support adjusted pursuant to this section may be made no later than forty-five days after an adjusted support order is executed by the court where no specific written objections to the proposed order have been timely received by the court. Such motion shall be granted only upon a determination by the court issuing such order that personal jurisdiction was not timely obtained over the moving party.

4. On-going cost of living adjustment of child support orders issued prior to September fifteenth, nineteen hundred eighty-nine. Any party to a child support order issued prior to September fifteenth, nineteen hundred eighty-nine on the behalf of a child in receipt of public assistance or child support services pursuant to section one hundred eleven-g of the social services law may request that the support collection unit review the order for a cost of living adjustment in accordance with the provisions of section four hundred thirteen-a of this article.

CREDIT(S)

(L.1962, c. 686. Amended L.1966, c. 256, § 44; L.1974, c. 937, § 2; L.1980, c. 281, § 28; L.1983, c. 362, § 2; L.1984, c. 745, § 5; L.1989, c. 567, § 8; L.1990, c. 818, §§ 10, 11; L.1992, c. 41, §§ 147, 148; L.1993, c. 59, §§ 18, 21; L.1994, c. 170, § 367; L.1995, c. 81, §§ 240, 241; L.1997, c. 398, §§ 97, 100, 101, eff. Jan. 1, 1998; L.2003, c. 81, § 3, eff. June 18, 2003; L.2009, c. 215, § 1, eff. Oct. 9, 2009; L.2009, c. 343, § 6, eff. Jan. 31, 2010; L.2011, c. 436, § 2, eff. Nov. 15, 2011.)

[FN1] So in original.

Current through L.2013, chapters 1 to 58 and 60 to 173, 176 to 188, 190 to 239, 241 to 245, 247 to 273, 275 to 327, 329 to 333.

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B. Waiver (**Dox v. Tynon**, 90 NY 2d 166; **Grant v. Grant**, 265 AD 2d 19)
1. Executed Contract
2. Unjust enrichment
3. Accord and satisfaction
4. A writing signed and executed in the same fashion as a deed to be filed

C. Unless Petitioner kept meticulous records for the ten years, (s)he will be unable to prove a case of arrears

D. Set offs and forgiveness

E. Cases Johnna v. Alan; Louise v. Thomas; and "Thornton Donovan"

F. FCA §451 no cancellation of arrears and the Low Income Earner Laws (L.2010, c. 182) and Judge Gallet 5/13/92, **Mtr. Of C.S.S. obo Darlene Grant v. Peter Grant.**

IV. Theater of the Absurd - The Secret of Rose Commissioner Oswego County v. Kimberly Moody Court of Appeals, (**Rose on Behalf of Clancy v. Moody**, 83 NY 2d 65, 1993)

A. FCA §413 1. (g) In no instance shall the court order child support below twenty five dollars a month.

B. FCA §413 1. (b)(vi)(E) and (F) say that SSI and welfare payments are to be deducted from income. Well, if SSI or Welfare is the payor's only income and it is deducted, then the income is ZERO. If you apply the CSSA Guidelines to ZERO, the amount of support is ZERO, apparently in violation of subd. g. So you have to make an order of $25.00 per month on ZERO income, according to how the statute was read;

C. This was done and litigated up and down through the Courts, until the Court of Appeals in **Rose** said that you can make a zero order of support, if the facts warrant it.

D. What was missed, was the intent of the statute in perhaps less than adequate wording, that there does not have to be an order at all; that there is no need for a "ZERO" order, which is a little ridiculous. The statute meant to say that there could be no order at all, under the proper financial circumstances, but that if an order was going to be made, it could not be in an amount less than $25.00, because

E. In the past, we made "trailing orders" of $1.00 or $5.00 a month, which were tiresome to follow. The statute only meant to get rid of the order for a dollar or two, to wit: It is possible that there is no order of support; that the "relief sought is denied," but if an order was to be made, it could not be for an amount less than $25.00 per month. (also **Velazquez v. State**, 201 AD 2d 413 and **Rose obo Haney v. Haney**, 188 AD 2d 999, 1992, 4th Dept.; **Mtr. Jennifer R. v. Michael C.**, 49 AD 3d 443 1st Dept..)

V. College "Dollar for Dollar"

A. A basic injustice was found in making orders for *tuition, room and board*: If the paying parent was already paying child support, which automatically includes shelter and food, then making

him or her pay room and board at college was causing them to pay twice (**Guiry v Guiry**, 159 AD2d 556; **Houck v. Houck**, 246 AD 2d 905; **Paro v. Paro**, 215 AD2d 965; and **Reinisch v. Reinisch**, 226 AD 2d 615) once at home and again at school.

B. An approach was devised that there should be some credit against child support in favor of the paying parent who was also paying room and board at college. Unfortunately, *Reinisch* went too far and said the credit should be "dollar for dollar." If the college room and board were greater than the child support, the child support would stop entirely

C. The custodial parent would then be heard to complain that there was no money to maintain the home for the child upon occasional return from school - breaks during the year and summer, and there was no money for transportation and sundries

D. In addition, if the order of support also included other siblings in the custodial parent's home, it was possible to winnow away all of the child support for all the children in favor of the collegiate room and board (See also **Justino v. Justino**, 238 AD 2d 549; **Sheridan v. Sperber**, 269 AD 2d 439; and **Vainchenker v. Vainchenker**, 242 AD 2d 620)

E. The courts seem to have tightened the rulings in favor of sending children to college and requiring the parents to pay for it. Beginning with **Manno v. Manno**, 196 AD 2d 488 (2nd. Dept. 1993) , the court did away with a four prong "special circumstances" requirement for sending a child to college, and in **Mtr. Of C. v. C.**, 2/28/12 (copy in folder), the 2nd Department required the father to pay both college costs and full child support with no set off, because there was no provision in the incorporated stipulation for any set off.

F. Instead of trying to reconcile the cases with each other, and trying to reconcile the cases with the realities of having a child away at school and at home, the better practice is to follow the Court of Appeals' direction to Support Magistrates, which is that there is no "automatic" formula and the Court is to provide a complete and thorough review and analysis of the parties' financial abilities to pay, and fashion a reasonable method of having the college, as well as other expenses covered (see **TA v. SC**, 36630, copy in folder)

VI. Spell out in detail the provisions for college education

A. Confer and consult **Susan A. Heinlein v. Jon K. Kuzemka**,, 49 AD 3d 996,998).

1. Absence of agreement - factors to be considered (**Chesler v. Bronstein,** 176 Misc. 2d 237 , Marilyn Diamond, JSC)

B. Admission test fees, Application fees, travel to schools fees

C. Terms of continuing at the school
   1. To 22? To 23? To graduation? Masters? Doctorate?
   2. Full time matriculating student min. 12 credits
   3. Technical/ Trade School
   4. On leave for a term? Changing Schools? Changing Major?
   5. Child support continues while in school - sundries - trans.

D. Paying for the college
   1. "SUNY CAP" (**Pamela T. v. Marc B.** 33 Misc. 3d 1001)
   2. Child's loan (**Bungart v. Bungart**, App. Div. 2n 4/26/13 ____AD 3d _____; copy provided)
   3. Scholarships, grants, incentives, sports

E. Tuition? Room? Board? Fees? Uniforms?

F. Dorm (room) or off campus (rent) refridgerator? car?

VII. Allocate the amount of support among the children

A. Spell out the terms and conditions of reducing the order upon the emancipation of each child
   1. Apply or waive the CSSA Guidelines - be specific
   2. What income to use? Original or new income? Only if higher?

D. Split custody (**Bast v. Rossoff**,91 NY 2d 723; **Baraby v. Baraby**,

E. Shared custody 250 AD 2d 201 *and hand outs in folder)*

F. Ping Pong Custody

VIII. Visitation and child support

A. Only *extra ordinary* visitation expenses

B. The non-custodial parent is not entitled to an affirmative support order from the custodial parent because of visitation

C. Air travel for visitation - who pays?

D. A *Tropea* move. Visitation. Who pays?

E. Upward modification on cessation of visitation (better if it is spelled out *ab initio)*
   1. The child does not want to visit anymore?

F. "Emancipation" from one parent or "Alienation"

IX. Who's Your Daddy? Mommy? **Shondel J. v. Mark D.**, 7 NY 3d 320

A. Old law presumption one of the most inviolate known to law (**Dar v. J**,127627 Fam. Ct. copy provided)

B. Acknowledgment of Paternity (**DSS NI v. J**, F-9011-06; **NO v.Key**, P- 10220-07; App. To Vacate Pat. Ack. - copies provided)

1. Must show the acknowledgment of paternity
2. Cannot file a Paternity Petition to vacate an Ack. Pat.
3. What if there is a good Ack Pat and a new Pat Pet by someone else?
4. Black Rob and the Hon. Rory Bellantoni - DNA test

C. *Shondel* and it progeny

1. Old law presumption is just a speed bump
2. Almost always requires a best interests - equitable estoppel hearing
3. What about other issues of equitable estoppel like back support?
4. What about Janie has two mommies and the paternity petition
   a. Courts changed it to "*parenting* application"
5. Two mommies with adoption or without adoption or with one mommy a biological, and the other not having adopted; and
   a. having to pay child support pursuant to a "parentage" petition, because she is found to be a *Shondel* best interests mommy - but then being denied visitation because she has no legal connection to the child - the "ATM Parent"; and
   b. How is this changed, if at all by same sex marriage with a child now born in-wedlock and and "legal" (copies provided **Dar adv. J Brown,** 127627; **Marilene S. v. David H.**, 110465 - both Yonkers Family Court)

X. Modification Petitions and private school education

A. Once again, judicial policy favors a hearing and review for CSSA adequacy (see **L v. E.**, F 11455-03/09P hand out)

B. The standard under a judgment of divorce is different than that where there is simply court ordered support

C. What if the JOD is not on an incorporated but non-merged stip, but rather on Findings After a Trial?

D. "Citing the well established *Boden/ Brescia/Gravlin/Merl* line of cases (**Boden v. Boden**, 42 NY 2nd 210, "In short, he asks, of what use are contracts if they provide little more than a springboard for additional litigation?"; **Brescia v. Fitts**, 56 NY 2nd 132), and

E. "Where however, as here, there are good contracts, the courts are strongly cautioned against interfering (**Matter of Encarnacion Meccicio v. Frank Meccicio**, 76 NY 2nd 822; **Rainbow v. Swisher**, 72 NY 2nd 106; **Nichols v. Nichols**, 306 NY 490, 496,

rehearing den. 307 NY 677; **DeCarlo v. DeCarlo** 250 AD2d 848; **Merl v. Merl**, 67 NY2d 359; **Susan A. Heinlein v. Jon K. Kuzemka**,, 49 AD 3d 996,998).

F. Private school education "Get me out of school 22!" (hand out F-11455-03/08M; **Manno v. Manno**, 196 AD 2d 488; **Fruchter v. Fruchter**, 288 AD 2d 942; **Lannen v. Lannen**, 231 AD 2d 931; and **Cassano v. Cassano**, 203 AD 2d 563 *affd.* 85 NY 2d 649)

1. Comes back asking for an upward modification because the expense of private school (which was denied) has gone up; and
2. Comes back asking for therapy money because the child cannot adjust to the private school.

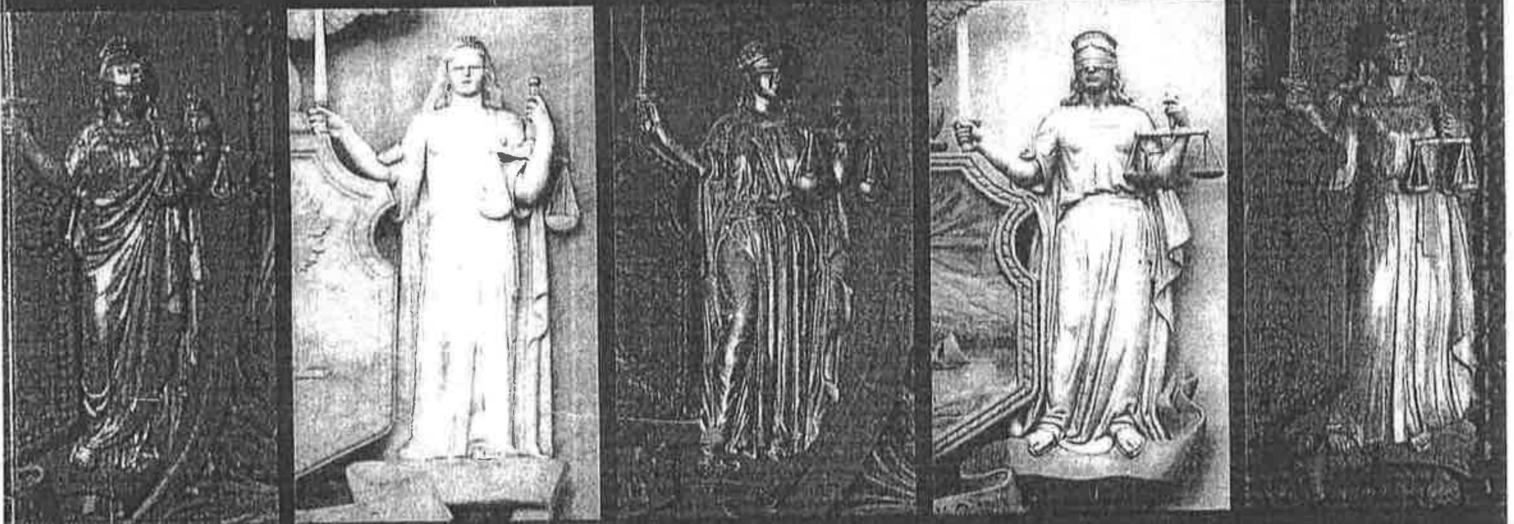
XI. Violation, Willful Violation, Defense same as the Modification (**Ter .v. Jo**, Yonkers 107432 copy provided)

XII. Concluding remarks

Respectfully submitted

Allen Hochberg

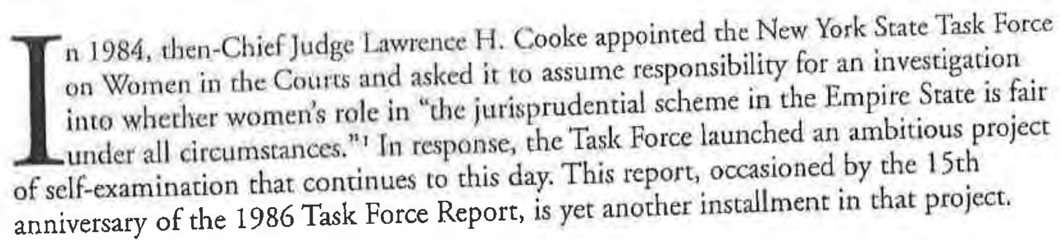
A Work in Progress



15 Years After the Report of the New York Task Force on Women in the Courts

New York State Judicial Committee on Women in the Courts

April 2002



In 1984, then-Chief Judge Lawrence H. Cooke appointed the New York State Task Force on Women in the Courts and asked it to assume responsibility for an investigation into whether women's role in "the jurisprudential scheme in the Empire State is fair under all circumstances."[1] In response, the Task Force launched an ambitious project of self-examination that continues to this day. This report, occasioned by the 15th anniversary of the 1986 Task Force Report, is yet another installment in that project.

New York's Efforts to Assess Bias Against Women in the Courts

Chief Judge Cooke's Task Force employed multiple tools in its two-year study of New York Courts. It reviewed research and literature; recruited expert advisers; held public hearings, regional meetings with judges and attorneys, and regional listening sessions; inquired into the judicial nominating process; and asked the Center for Women in Government to analyze the status of women employed in New York's court system. The Task Force also sent out 50,000 surveys canvassing attorneys about their perceptions of bias in New York's courts and tabulated the 1,759 responses.

At the conclusion of its work in 1986, the Task Force reported that "More was found in this examination of gender bias in the courts than bruised feelings resulting from rude or callous behavior. Real hardships are borne by women. An exacting price is ultimately paid by our entire society."[2]

The process Chief Judge Cooke set in motion has continued without interruption. As soon as the Task Force made its report, then-Chief Judge Sol Wachtler accepted in its totality the Task Force's powerful findings and appointed a committee, now known as the New York State Judicial Committee on Women in the Courts, to implement the recommendations and named Hon. Kathyrn McDonald chair.

Ten years later, in 1996, with Chief Judge Judith S. Kaye at the helm of New York's court system providing unwavering and unhesitating support for the agenda laid out by the Task Force, the implementation Committee issued its own report. Without attempting to re-survey New York attorneys, the Committee looked at the efforts made by the various constituencies of New York's court system and at tangible signs of change. Its 1996 report concluded that: "Educational programs have been put in place, committees have been formed and have issued reports, statutes have been changed, court decisions have clarified laws, gender neutral language has become the norm, and the number of women in the profession, in the judiciary, and in the upper ranks of the

courts' nonjudicial personnel has increased—yet women in the courthouses and the court system may still find obstacles to pursuit of their legal claims, careers, and professions that men rarely confront."[3]

Fifteen years after the Task Force issued its report, the New York State Committee on Women in the Courts found itself once again assessing progress towards the elusive but still critical goal of a court system free of bias and fair to all. Taking a somewhat different approach, the Committee embarked on two projects. First, the Committee used a questionnaire to ask those who spend their professional lives in New York's courts their thoughts about change in the past 15 years. The Committee also organized a conference, which it titled "The Miles Traveled and the Miles Yet To Go," as another vehicle for exploring the extent of progress in the decade and a half since the original 1986 Task Force Report. This conference also celebrated the lives of two heroic figures who shaped the New York's response to the challenge of bias in the courts: Chief Judge Lawrence H. Cooke and Hon. Kathryn A. McDonald, who steered the Committee's work during its first ten years.

This report has two major sections that present the fruits of those projects: an analysis of responses to the 2001 questionnaire and a compilation of the highlights of the 15th year conference. Preceding them are recommendations and a summary of findings that have been culled from the voices heard through the many hundreds of pages of responses to the questionnaire and thoughtful panelists at the conference.

Fordham Urban Law Journal

Volume 15, *Issue* 1 1986 *Article* 4

Report of the New York Task Force on Women in the Courts

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The problems women face -- rooted in a web of prejudice, circumstance, privilege, custom, misinformation, and indifference -- affect women of every age, race, region, and economic status. When women are poor or economically dependent, their problems are compounded. They often must traverse the justice system alone, facing indifference or contempt. Problems are perpetuated by some attorneys' and judges' misinformed belief that complaints by women are contrivances of overwrought imaginations and hypersensitivities.

More was found in this examination of gender bias in the courts than bruised feelings resulting from rude or callous behavior. Real hardships are borne by women. An exacting price is ultimately paid by our entire society. The courts are viewed by a substantial group of our citizenry as a male-dominated institution disposed to discriminate against persons who are not part of its traditional constituency.

Family Court

Support the Magistrate.

FAMILY COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY : YONKERS

In the matter of a petition brought
pursuant to Family Court Act, Article 4, Part 5. by 60732
CAROLYN, F 3266-05/10C
Petitioner, FINDINGS

against
BRIAN
Respondent.

Petitioner makes application by modification petition filed October 21, 2010 alleging an order of support dated November 17, 1997 for the child J, born September, and for whom there is an order of filiation of this court entered March 5, 1997 establishing Respondent as the father of the child. The petition alleges the child support to have been $131.00 per week with $95.00 per week in child care, and the Respondent was to provide the third party health benefits. The petition alleges a change in circumstances that Respondent fails to pay on time through SCU, from time to time is in arrears, and attempts to remedy the failure to pay by tendering bad checks, resulting in further delays in distribution of the collected child support money. The petition alleges as and for a further change in circumstances that Respondent's income has increased and that the corpus of a substantial family trust has been settled upon Respondent, enabling Respondent to pay more, warranting an increase, and the child's needs have increased.

The original order of support dated September 17, 1997 of $131.00 per week, since increased nominally by cost of living adjustments to $172.00 per week, with $95.00 per week child care was on the consent of the parties at the time when Respondent was limited in income to a monthly family stipend of $1850.00, in addition to some of his own earnings driving a taxi cab. A family trust was funding the Respondent's law school costs, and the record then made did not show that Respondent had income available to him by invading the capital of the trust account or accounts in his favor. Nor did the record then made show any special relationship between the Respondent and his father that would result in Respondent receiving more money than admitted to or otherwise shown. The findings continued:

> "The amount of support is not based upon (Respondent's) actual income and available funds, but is based upon his actual income together with an imputed amount of income which accrues to the trust funds controlled by his father or the trustees and to which the (Respondent) has either limited access or no access. If this were actual income, the CSSA Guidelines amount of weekly income to the (Respondent) would be $800.00."

The Petitioner's income at the time was $39,000.00.

The Petition at bar came on for proceedings January 25, 2011 and was adjourned for personal service until March 15, 2011 when both parties appeared, a denial was entered and the

matter adjourned for a hearing to May 4, 2011. Upon request of the Petitioner, the matter was again adjourned for the hearing to July 6, 2011 in order for Petitioner to ascertain Respondent's financial resources and income, upon his claimed ongoing failure otherwise to comply with CPLR demands for discovery in addition to statutorily required financial disclosure.

The record shows there to be an FCA §424-a financial disclosure affidavit by Respondent for these proceedings with virtually no usable information, all income items being marked "0," but with the listing of three parcels of real property valued all together by Respondent at approximately $975,000.00, and no more than $3,800.00 in bank accounts.

Respondent lists his expenses at $4,880.00 per month, at the same time showing no income, making suspect the credibility of his financial reporting to this Court.

Petitioner's filed financial disclosure affidavit dated March 9, 2011, which was sworn to in court and not contested by Respondent, shows net weekly income, exclusive of deferred income deductions, at $1,126.88, and weekly expenses, exclusive of debt service, at $1,993.40, a weekly shortfall to Petitioner of $866.52.

The child's expenses as separated out of the whole household expense (including shelter costs, utilities , etc.) are $376.00 per week, including Petitioner's payment of her share of medical for the child, and exclusive of a claimed legal expense for the child. Another, unsigned and undated, financial disclosure affidavit for the Petitioner, from the original proceedings, was offered at the July 6, 2011 hearing (Petitioner's exh. 3 no objection) showing a self distribution weekly income of $750.00 to Petitioner from her business, and weekly expenses exclusive of debt service at $760.00, establishing prima facie, and as uncontested by Respondent, a change in circumstances warranting an increase to Petitioner in child support.

Petitioner amended the current financial disclosure affidavit, without objection, to the extent that there is currently a new $90.00 per week charge for the child's honors geometry tutor.

Respondent admitted to the validity of the demands made upon him for sworn answers to interrogatories, discovery and inspection, and that he failed to comply. Petitioner made demand for sanctions pursuant to both the CPLR and FCA, including but not limited to precluding Respondent from claiming inability to pay, testifying as to the limits of his financial circumstances, and from objecting to an order of support made upon income imputed to him. It appears from the record that Respondent's almost total failure to disclose is not so much a matter of contumacy or contempt, but more in the nature of a purposeful strategy to allow the Court to set the amount of child support based upon whatever Petitioner's case may be, rather than to disclose his own financial resources, which Petitioner's investigation and proof, at her expense, showed to be considerable if not finally determinate for this hearing. In short, it appears that Respondent would rather take his chances on a court order for support than breach his privacy by revealing his financial circumstances.

If that is in fact the case, then Respondent will have to abide by the results of these court proceedings without being heard to claim unfairness, and more importantly, without the recourse to Objection to a Family Court Judge, or appeal. While as a concept of equity rather than law, not exactly applicable in Family Court cases, Respondent can be said to be here without clean hands and therefore in no position to complain if he is unhappy with the outcome.

Petitioner attested to the fact that pursuant to the original order of support, the child, then being six months old, did not have the needs she has now, requiring this court's reassessment of

the Respondent's support obligations. The shelter expense, for example, increased from $1200.00 per month to $3000.00 per month. While the existing order of support has been going through SCU, including the $95.00 per week child care charge to Respondent, the parties were clear that the child has not had a child care expense need since 2009. There is no need, however, for any calculation regarding a credit to Respondent for the child care charged, since Respondent knew when child care ended, and the parties, over the years, have made any and all monies collected by SCU, including the child care, a "base amount" for the child. In addition, Petitioner has collected from Respondent directly, large and regular contributions to help her in providing for all the child's ongoing needs, as the record showed, in addition to and over and above the amounts collected by SCU.

Her testimony and proof were not contested that the cost for the child's food went from $46.00 per week to $80.00 per week; the cost for medications is now $200.00 per month to Petitioner; that dental costs were $5,900.00 for braces with an ongoing $500.00 per year for dental retainer adjustments and $500.00 a year for regular dental work. The child's optical needs cost $500.00 a year, and summer program for the child at Day Camp In the Park, costs $3500.00 for the year. The child's musical endeavor with the violin costs $2,800.00 per year, and school costs (it is uncontested that the child is gifted) are $1720.00 per year including the cost for a calculator (or two) and school lunches. Clothes are $1800.00 per year, and the child's cell phone costs $50.00 per month. The claim for the child's costs for personal hygiene items at $1500.00 per year, were not contested, nor were her entertainment, enrichment and travel expenses totaling $5800.00 a year, for items such as Glee Club, Winter workshop, books, dvd's magazines and music. The child's cash allowance is $30.00 per week, and Petitioner's exhibit no. 19 , not objected to, shows the child's needs at $33,862.00 per year, including the cost of health insurance to Petitioner for the child. The record is clear and not contested that the needs of the child have increased.

Petitioner testified that the child missed her close friends at summer camp this year because, absent a contribution from the Respondent, it was not affordable to Petitioner. The child could also not attend a language immersion trip for which she qualified. Petitioner testified that in addition to the amounts through SCU, Respondent was able to and did "pay more," increasing a $125.00 per month direct contribution to a regular $200.00 per month, direct in addition to the amounts collected by SCU, for total annual child support of at least $16,284.00.

The parties, according to Petitioner "worked it out" in an elaborate cooperative co-parenting arrangement. Petitioner's exh. 21 in evidence shows that the checks "Post to account: ADDITIONAL CHILD SUPPORT" of the Respondent for $200.00 came from a M Corporation in South, and were signed by one M D.. Petitioner submitted exh. No. 23 showing periodic contributions for the child from the Respondent in amounts from $250.00 to as much as $1649.50, to meet her financial needs.

Petitioner testified that Respondent has attended to the child's financial and other needs since 1998. She told him about expenses, and he was at the bus stop every day, involved in every detail of the child's life, including after school activities and child care, telling Respondent when child care stopped. The actual cost for child care had been greater than the amount collected by SCU, and Respondent paid the increased difference directly to Petitioner.

When the cost for child care was less or eliminated all together, the parties redirected

the money to other of the child's financial needs.

Respondent told Petitioner to buy a two bedroom house with a loan from his father, and Petitioner testified as to the financial arrangements which made that possible, including the bridge loan from Respondent's father.

Beyond the limits of the existing order of support, Respondent provided for half the needs of the child until on or about October 9, 2009, when payments became late, and there was no payment for November, 2009. The last regular check was in October, 2009 when Petitioner began sending Respondent demands for financial contribution, which he paid occasionally until June or July, 2010. The SCU account also went into arrears.

Petitioner offered proof (Exh. No. 24) of the efforts between the parties to prevent the SCU account from becoming delinquent, including an offer by Respondent to provide Petitioner with a year's worth of blank checks, which she would on her honor fill out and cash or deposit with SCU pending re-payment to her by SCU. Petitioner testified that Respondent left his employment at W and had a large trust corpus settled on him at about this time, somehow related to Respondent having in his own words "flaked out," not paying and having the SCU attach his accounts for dishonored checks.

Petitioner does not know either the origin or the amount of the trust fund settled on Respondent, not for lack of having tried to find out by discovery he denied her. She determined only that the auto checks stopped, checks were dishonored, and Respondent made no voluntary payments in addition to the charges by SCU, as he had in the past, which is what he may have meant as part of "flaking out." She tried to contact him via e-mails.

Respondent graduated law school in 1999, worked in a law office for six or seven years and then was a regional vice president for W until in or about August, 2007, when the W health coverage for the child stopped, which may have signaled the end of that job and the vesting of the trust funds. He was left a large sum of money at about that time, according to the uncontested proof by Petitioner, and became a certified financial planner and trusts and estates planner. Again the details cannot be known, Respondent having provided no disclosure.

As the result of the research and investigation she was therefore compelled to conduct at her own expense, Petitioner entered into evidence Respondent's A and C records to show his cash flow. She testified without objection as to the business, trust fund and family income provided to Respondent, as well as his ownership interest without mortgages in four pieces of Westchester County, NY improved real estate. Efforts made by Respondent to counter Petitioner's proof were thwarted by the fact that his failure to disclose in pre trial discovery , to Petitioner's prejudice, prevented him from either objecting to Petitioner's proof, or explaining it away.

A trust had been established by R Laura in December, to facilitate payments to Petitioner for the child. Respondent was the trustee and wrote checks to himself from the trust funds in C to be deposited in his personal account, according to Petitioner's testimony. Petitioner is the successor trustee named, and claims a $90,000 conversion against Respondent for trust monies taken by him and not used for the child, in child support or otherwise. Respondent had provided health benefits for the child when he was at W, and when he left continued health benefits via a COBRA policy. He stopped coverage by the A Company in November, 2010, and by April , 2011 Petitioner discovered that there was no insurance, when a

physician treating the child told her there was no coverage.

Petitioner is self employed and had to provide health insurance for the child at a cost to her of $237.00 per month. Petitioner reports her 2010 income at $77,000 and her 2009 income at $100,000.00.

On cross examination she testified that the parties kept the child in the A after school program through June, 2008, and the child went to camp five days a week at a cost of $700.00 per month.

Petitioner testified, with documentation as the result of her research and investigation , that Respondent is the owner of properties in Westchester County , NY at Tarrytown, in Yonkers, a property at Hastings, and another in Hastings , all with no recorded mortgages. She testified that the purchase price for was $563,000.00, for which Petitioner offered a copy of the check purchasing the property from G LLC , signed by B, to D for $563,333.33, with the legend "purchase 21. "

Respondent sought to argue that there could be unrecorded mortgages, which was found to be speculative on objection, and in addition, Respondent was precluded from seeking to offer proof on issues as sanctioned where as the uncontested record showed, demand for discovery and inspection had been made and he admittedly failed to comply, seek protective relief, or otherwise respond, leaving him without the recourse of criticizing, rebutting, or explaining away Petitioner's case.

The record also showed Respondent to be the owner of an LLC entity , referred to as (LLC) cited above, which is used as a conduit for funds, there being no other explanation in the record for its existence.

Respondent's cash flow, which he could not contest as sanctioned for failing to comply with statutory and otherwise demanded disclosure, was shown by Petitioner to be $908,138.00 in 2008, for which she calculated a required pre tax income of $1,297,340.00. She then added cash transfers from Respondent to himself, bring the total to $1,343,913.00.

DISCUSSION :

UPON FATHER'S FAILURE TO SUBMIT COMPULSORY FINANCIAL DISCLOSURE, THE SUPPORT MAGISTRATE PROPERLY DETERMINED THE AMOUNT OF SUPPORT BASED UPON THE EVIDENCE ADDUCED AT THE HEARING WHICH INCLUDED, INTER ALIA, EVIDENCE OF THE CHILD'S NEEDS, AS WELL AS EVIDENCE OF THE FATHER'S DEMONSTRATED EARNING POTENTIAL *(Matter of Thompson v. Perez, 42 AD 3d 503 2nd Dept. 2007)**

A cornerstone of the child support provisions of the Family Court Act (gen. Article 4) is the requirement that the parties provide financial disclosure, which is compulsory (FCA sec. 424-a(a) and cannot be waived or otherwise dispensed with. *Basic* financial disclosure consists of recent tax returns, proof of income (usually pay stubs or W-2 forms), and a schedule of

income, assets, liabilities and expenses, traditionally referred to as a financial disclosure affidavit. These basic financial items must be provided, and even the Court cannot waive production. Collectively as the *basic Financial Disclosure*, these items must be provided prior to the support hearing in time to be reviewed and analyzed, and not more than ten days after the first appearance at which time the date for the support hearing is usually set. There should be enough time for the exchange and review of the financial information. Respondent at bar continued to provide nothing for review by Petitioner.

With good reason, the law makes provision for disclosure well beyond the *basic* financials of FCA sec. 424-a. In the Guidelines provisions of the Family Court Act (sec. 413), specifically subdivisions (j) and (k), an exhaustive disclosure of the parties' joint and separate entire financial picture may be required. The court is not limited in its review to the face disclosure of tax returns, for example, but has the duty to require competent probative evidence of what either party may claim to be his or her financial condition.

For example, a large deduction for depreciation may misrepresent the fact that a property has actually appreciated in value. While a party may show staggering debt service payments on large borrowings, the court may require disclosure sufficient to show the disposition of the loan proceeds to be sure they were not taken to weaken the paying parent's financial picture, with the funds to be restored after the proceedings.

The rigorous requirements for full and honest disclosure reflect a legislative and judicial awareness of the strong inclination by the payee to overstate expenses and minimize income, and the corresponding urge by the paying parent to under report income sources and overstate expenses.

Without complete and honest financial disclosure, the court is placed in the often embarrassing position of being unable to render a well reasoned quantitative analysis of the parties' respective financial circumstances, need, and ability to pay. An improperly skewed order can result, which is why the *financials* are the sine qua non of support proceedings. Respondent at bar has created a frustrating situation by his acknowledged failure and refusal to provide any financials according to law and as demanded in discovery.

Neither party is afforded the opportunity to deprive the court of the opportunity to fully review the financials by withholding disclosure or misrepresenting his or her financial circumstances. To that end, serious sanctions have been provided.

Pursuant to FCA sec. 424-a, the legislature provided the severe sanction in a separate and particular subdivision (b) of precluding the respondent (non-custodial parent payor) from offering evidence as to his or her financial ability to pay support. The consequence of this sanction is clear. In one sweep, it prevents the paying parent from showing any expenses in mitigation of his or her obligation to pay, and precludes that parent from offering any rebuttal to the presumption of ability to pay provided for by FCA sec. 437 **Presumption of Sufficient Means**:

> A respondent is prima facie presumed in a hearing under section four hundred thirty - three (to set the amount of child support) and section four hundred fifty-four (violation proceeding for failure to pay the support amount set) to have sufficient means to support his or her spouse and children under the age of twenty - one years.

Accordingly, a sanction consequence to the (non-compliant) paying parent of failing to provide financials pursuant to FCA sec. 424-a (a) and (b) is that he or she is in no position to rebut the statutory presumption of ability to pay, or file objections to the outcome.

Pursuant to FCA sec. 413(j) and (k), where there is a dearth of financial disclosure, or finances are concealed or misrepresented, the court may dispense all together with a review and analysis of the non-disclosing party's finances and "*...**shall** order child support based upon the needs or standard of living of the child, whichever is **greater.**"* (emphasis added). In addition, where there has been deception or non-disclosure, the short - changed party has the right to an (upward) modification, and is excused from the usual requirement of alleging or proving any change of circumstances. The Draconian nature of the legislatively provided sanctions is not accidental.

In order to fill the gap between the mis-reported, or as in this case, unreported financials by the non-custodial parent, and the establishment of a meaningful child support order, the court has the discretion and even the duty to impute income (see eg. *Matter of Westenberger, v. Westenberger* , 23 AD 3d 571.)

The burden to establish the non-custodial parent's ability to pay, is not on the custodial parent in the first instance. That ability to pay is presumed from his or her shown or imputed ability to earn or any income from all financial resources.

.. The custodial parent is most often in no position to know, less prove, the financial circumstances of the non-custodial parent. Secondly, the law is clear that upon a good and valid showing of income and ability to earn by the non-custodial parent, the application of the CSSA Guidelines (gen. FCA sec. 413) renders the *presumptively correct* amount of child support. The rest of the proceeding is the paying parent's attempt to rebut this presumption. The custodial parent is not under the obligation in the first instance.

At bar, Petitioner was able to and did show substantial financial resources of the Respondent. Respondent did not disclose and accordingly was barred as sanctioned from discrediting Petitioner's research. More importantly, by failing to provide the required financial disclosure, Respondent precluded himself, from either rebutting Petitioner's case or establishing independently his own financial resources and ability to pay.

Part of the legislative history of what are known as the CSSA Guidelines, was the goal of providing children with adequate child support without the obligation to prove need, which is presumed based upon the parental income(s). The non-custodial parent has the obligation of (truthfully) divulging his or her income and financial circumstances, and from that the presumptively correct amount (*Cassano v. Cassano,* 85 NY 2d 649) of child support is calculated.

The custodial parent might contest the veracity of the paying parent's financial revelations, but is not bound to prove them in the first instance. That is the burden of the non-custodial parent. The elegance of the legislative design for providing adequate child support post 1985 should not be overlooked.

The presumption of the Guidelines may be rebutted by either party and the amount of support may be varied higher or lower upon adequate proof of factors for variation (FCA sec. 413 {f} and {g}). Before celebrating the success of a reduced order, however, the paying parent must provide full and complete financial disclosure in order to permit the court an opportunity

for a meaningful and probative quantitative analysis. Indeed, the *nisi prius* court is bound, on pain of reversal, to render a detailed finding with regard to the Guidelines application to the parties' incomes, expenses, financial need, ability to pay, and reasons for any variation from the Guidelines.

Where, as here, the paying parent (Respondent) has failed to comply with the law, has not been forthcoming, and has not provided either the required initial disclosure of his income and income sources, and then further has failed to provide any financial disclosure including ability to earn, income and expenses, he might be said to have unleashed upon himself a cascade of inferences, imputations, sanctions and presumptions which cannot be rebutted perforce of the absent financial material, as in the case at bar, effectively negating claims that he cannot afford the support as ordered, or that the order is unjust or unfair, ie. grounds for "subd. *f.* 1-10 and *g.*" variations. (FCA §413 1. [f] and [g]).

At the same time, as noted, Respondent has deprived himself of the opportunity to prove that he is entitled to consideration, in his favor, of one or more of the variations reducing the financial obligation to his child.

In short, there is a manifest structure and purpose to the applicable sections of law discussed above , and in failing and refusing to provide the required financial disclosure, including on good demand for CPLR discovery, Respondent disregarded the rule of law, failed to comply with the statute, frustrated this Court in any efforts toward crafting a meaningful quantitative analysis of his finances and ability or inability to pay, forced the Petitioner to offer the court some basis upon which to determine the ability to pay. The result is based upon the statutory presumption, in a financial vacuum, that he can, rather than the reality of his (undisclosed) financial circumstances. Any opportunity this Court may have had to consider circumstances mitigating in his favor toward a lesser order of support is foreclosed.

Including the $90.00 per week for the honors geometry tutor, the record made by Petitioner is uncontested that the financial needs of the child total $38,542.00 per year, without the base expenses , including but not limited to shelter, utilities, and transportation, which could easily place the child's annual needs at $40,000.00.

Were an order of support to be fashioned upon imputed income to Respondent pursuant to Petitioner's calculation at $1,343,913.00 per year , the resulting order , without variation, would be in the area of $227,000.00. There is no reasonable way, on the record at bar, to account for $187,000.00 annual child support, in excess of all of the needs of the child, as claimed and proven by Petitioner.

The resulting order could be criticized for inuring more toward the enhanced lifestyle of the custodial parent, than it would to providing for the reasonable needs of the child (see eg. *In the matter of Kathy G.J. v. Arnold D. [Englebert Humperdinck]*, 116 AD 2d 247 , 2nd Dept. 1986).

On the other hand, with as much financial resource as is apparently available, there is no reason for the Petitioner and/or the child, to struggle with financial uncertainty on a daily basis due to an order sculpted, refined and limited to only what the Petitioner can show at a hearing to be the needs of the child.

The financial comfort of both the child and the Petitioner, in her role of caretaker and provider, can be provided for in great measure by a proper child support order herein.

It is noted that neither party made any application for consideration of the $130,000 cap

(FCA §413 1.[c]), and neither party made any claim for variation from the Guidelines pursuant to FCA §413 *f and g.*

In consideration of the foregoing, Petitioner requested that the order of support be fashioned upon imputation to Respondent of the ability to pay child support as though he had income available to him at $250,000.00 per year, representing the reasonable income to a family in Westchester County, New York, with the lifestyle of the parties, instead of the $908,000 to $1.4 million per year Petitioner spread out on the record. There was no objection by Respondent, and the resulting child support order at $40,936.00 per year child support order (after deduction of $9,200.00 in FICA and Medicare) would reflect both the demonstrated needs of the child, and at $787.23 per week, also fill the $800.00 per week budget shortfall shown by Petitioner. It is noted that, pursuant to Petitioner's submission of proof, for October 5, 2010 through March 22, 2011, Respondent's spending in restaurants and bars averaged $1982.00 per week, or two and half times more than the child support order, lest Respondent attempt to claim an inability to pay the child support.

Although Respondent's non-disclosure has rendered this case not susceptible of strict compliance with the CSSA Guidelines and calculations, there is still basis for using the parties' incomes to apportion the child's other needs, such as contribution to her medical, health and health related requirements not covered by health insurance.

Importantly, by what appears to be his calculated refusal and failure to disclose his financials for these proceedings, Respondent may well have precluded himself from any future attempt to reduce the child support, because to do so he would, as a matter of proof, be required to show a change in circumstances, namely his financial circumstances at the time of his (future) reduction application as compared with his financial circumstances now, when the order is made. Since he failed to establish his financial circumstances now, he will have no basis for comparison to show the differential in support of the relief he may then be seeking.

In accordance with the foregoing, ORDER SHOULD ENTER , *that the relief sought herein be and hereby is granted to the extent that child support is $787.23 per week ($40,936.00 per year) payable through SCU effective beginning September 2, 2011, with date of petition arrears to Petitioner set at $23,930.58, with a claim for attorney fees reserved to Petitioner, and Respondent is to provide the health insurance for the child, and until such time as he establishes good health insurance for the child, he is to pay an additional $55.00 per week cash medical support through SCU, effective September 2, 2011 with an additional retro thereon set at $2,530.00 and pay 100% of any and all of the child's medical, health and health related needs not covered by insurance, and at such time as Respondent may provide the health insurance, his obligation for the said uninsured portions will be 72% and Petitioner's will then be 28% ; and the foregoing is without prejudice to Petitioner, pursuant to statute as set forth above, to make application for further modification herein without the need to allege or prove any change in circumstances upon Respondent's failure and continued failure to provide good financial disclosure until he may cure such failure; AND it is further ordered that the parties share 72% Respondent and 28% Petitioner, or in any other proportion as the parties may otherwise agree, in any of the future needs of the child not presently included by Petitioner in these proceedings as part and parcel of the child's claimed needs and increased needs.*

In establishing the within order the following factors have been considered, although neither party made any claim for variation from the guidelines or for consideration of : (1) the financial resources of the custodial and non-custodial parent, with the custodial parent having shown substantial needs of the child which she cannot meet without the order of support herein, and with Respondent having financial resources far in excess of those of the Petitioner; and (2) the child herein is gifted and in need of enhanced entertainment, cultural and educational experiences which talents both parties advanced and neither contested nor denied; and (3) the child is found entitled to support from Respondent, consistent with the standard of living the child should enjoy given the lifestyle of either or both parents, and the financial resources of the Respondent if the household was intact and the child could benefit from the combined income of both parents in one household; and (4) neither party raised the issue of tax consequences, although it appears that they should alternate the years of any deduction or exemption with Petitioner taking the odd years (2011) and Respondent taking the even years, beginning with 2010; and (5) neither party introduced any evidence of non-monetary contributions either party makes or will make toward the care and well being of the children; (6) neither party introduced evidence regarding the educational needs of either parent; (7) The parties' incomes are disparate as discussed above with Respondent's financial resources being up to 13 times that of the Petitioner; and (8) neither party provided evidence or raised any issue concerning the needs of other children not in issue in these proceedings; and (9) neither party raised any issue or offered proof of any visitation expenses; (10) there are no other factors for consideration of a variation insofar as the evidence adduced herein permits and the child support obligation is neither unjust nor inappropriate.

Dated: August 17, 2011

SUPPORT MAGISTRATE

Family Court
Bronx

F.C.A.§§ 413, 416, 439(e)   4-SM-3 11/2008

FAMILY COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

In the Matter of a **UIFSA** Proceeding		**File #:** 111452
		Docket #: U-30706-09
Ch		
	Petitioner,	**CSMS #:** NV67653J1
- against -		
		FINDINGS OF FACT
Pe		
	Respondent.	

Harold E. Bahr III, being the Support Magistrate before whom the issues of support in the above-entitled proceeding were assigned for determination, makes the following findings of fact:

Ch . petitioned on December 1, 2009 to establish support for the following:

Name	Date of Birth	Social Security #
I	4/18/	XXX-XX-

P . appeared on June 8, 2010 and submitted to the jurisdiction of the court. P s failed to appear on August 31, 2010. On his default, the court entered a final order of child support.

Cl s and Pe were married on June 26, 2C , and are still husband and wife. Pe s is liable for the support of the above-named child because the child is issue of the parties' marriage. Le resides with C

C , has submitted the following proof of income, expenses, and/or support of others: financial statement. The court relied upon her sworn statement, contained in her general testimony, to calculate her income.

P submitted a 2006 income tax return and a 2008 W-2. On June 8, 2010, respondent admitted that in 2009 he had worked as an assistant manger in Radio Shack, earning $35,000 annually. He further admitted that he was fired for cause from that job. Although Family Court Act § 413 (1) (k) mandates a needs- or lifestyle-based, when the respondent has defaulted and/or has presented insufficient financial information, the court interprets the statute to mean that the court can choose either condition or both conditions as the predicate to set a needs-based order (*see Matter of Cassano v Cassano*, 85 NY2d 649, 654-655 [1995]). If the statute were written in the disjunctive only, then the existence of either default or the lack of information would require the entry of a needs-based order. But the conjunction allows the court to enter a needs-based order when both default and a lack of information exist; if respondent defaults, the court can also require a lack of financial information before being required to enter the needs-based order. In other words, a court is not required to enter a needs-based order whenever respondent defaults.

The court's reading of the statute avoids an inequitable result. Suppose that a respondent (noncustodial parent) works full-time, earning a substantial income. And, suppose the petitioner

(custodial parent) receives a public assistance budget. Assume that the CSSA calculation would result in a higher support obligation than the needs-based order, which would be respondent's share of the public assistance budget. A savvy respondent, to lower his or her support obligation, could not show up to court, avoiding the higher CSSA-calculated obligation to pay the lower needs-based order. Certainly, an obligor should not be able to deprive his or her child of adequate support by avoiding the legal process.

Respondent's admission of having earned a $35,000 annual salary constitutes a sufficient evidentiary basis upon which to impute income to him (*Gorelik v Gorelik*, 71 AD3d 730, 731 [2d Dept 2010]. The court exercises its discretion to impute his former salary because child support is determined by a parent's ability to provide for his or her child rather than the parent's current financial situation (*K. v B.*, 13 AD3d 12, 20 [1st Dept 2004]; *lv dismissed* 4 NY3d 776 [2005]; *rearg denied* 4 NY3d 878 [2005]; *Matter of Collins v Collins*, 241 AD2d 725, 727 [3d Dept 1997], *lv denied* 91 NY2d 829 [1997]; *Matter of Zwick v Kulhan*, 226 AD2d 734, 734 [2d Dept 1996]).

An itemization of income and deductions of the parents and calculation of pro rata shares is annexed as Appendix A.

The basic child support obligation for support of the following child is $718.59 monthly:

Name	Date of Birth	Social Security #
L	4/18/20	XXX-XX

C is the custodial party, whose pro rata share of the basic child support obligation is $222.29 monthly.

P is the non-custodial party, whose pro rata share of the basic child support obligation is $496.30 monthly.

The court has determined that child support shall be paid by P to C. in the amount of $496.00 monthly.

A rebuttable presumption exists that the amount of child support calculated under the statutory guidelines is correct (Family Court Act § 413 [1] [a]; 42 USC § 667 [b]; *see also Matter of Burr v Fellner*, 73 AD3d 1041, 1042 [2d Dept 2010]; *Veitch v Veitch*, 6 AD3d 1094 [4th Dept 2004]; *Matter of Maddox v Doty*, 186 AD2d 135 [2d Dept 1992]). The presumption may be rebutted, and the support obligation adjusted, upon the court's finding that the noncustodial parent's support obligation is "unjust or inappropriate" (§ 413 [1][f]; 42 USC § 667; *see also Matter of Cassano v Cassano*, 85 NY2d 649, 653 [1995]). Put differently, the formula under Family Court Act § 413 must be used, unless the factors in Family Court Act § 413 (1) (f) permit a deviation (*Harmon v Harmon*, 173 AD2d 98, 110 [1st Dept 1992] [The CSSA mandates strict application of the statutory formula to the combined parental income under $80,000 to determine the child support obligation and the noncustodial parent's pro rata share thereof unless the court finds that the noncustodial parent's pro rata share is 'unjust or inappropriate'[,] based on a consideration of specifically enumerated factors"]; *Gelb v Brown*, 163 AD2d 189 [1st Dep't 1990]).

In this case, neither party offered evidence to rebut the presumption; thus, the noncustodial

party's basic support obligation is just and appropriate.

Health insurance availability for each party is as follows:

C . Health insurance is not offered through an employer or organization;
P Party not present in court.

Health insurance coverage is to be provided as follows:

The custodial party, C. , shall continue the child in the New York State "Child Health Plus Program" and the New York State Medical Assistance Program or the publicly funded health insurance program in the State where the custodial parent resides. The court directs that, when health insurance becomes available to either party, that party shall enroll the subject child into that health plan with premiums to be paid by that party, provided that the plan is reasonable in cost and reasonably accessible (Family Court Act § 416 [d]).

F is responsible for 67% of future and reasonable unreimbursed medical, prescription drug, dental, orthodontic, and optical expenses, up to his annual cash medical support obligation of $1,750.

The retroactive support for the period from August 17, 2009 to September 15, 2010 is $6,441.20. P s has paid $75.00, leaving a balance due of $6,366.20.

Dated: September 17, 2010

Harold E. Bahr III, Support Magistrate

Hochberg

UPON FATHER'S FAILURE TO SUBMIT COMPULSORY FINANCIAL DISCLOSURE, THE SUPPORT MAGISTRATE PROPERLY DETERMINED THE AMOUNT OF SUPPORT BASED UPON THE EVIDENCE ADDUCED AT THE HEARING WHICH INCLUDED, INTER ALIA, EVIDENCE OF THE CHILD'S NEEDS, AS WELL AS EVIDENCE OF THE FATHER'S DEMONSTRATED EARNING POTENTIAL *(Matter of Thompson v. Perez, 42 AD 3d 503 2nd Dept. 2007)**

SEE ALSO S[redacted]

At a term of the Family Court of the State of New York, held in and for the County of Orange at Goshen, NY on July 2, 2007.

PRESENT : ALLEN HOCHBERG
Support Magistrate

affd. 51 AD 3rd 669

In the Matter of a Proceeding
Diane G[redacted],
Respondent,

v. Benjamin G[redacted],
Appellant.

Appellate Division, 2nd Department
2006-06395
Fam. Ct. File # 46,337
Docket # F-6717/05
Additional Findings Pursuant to
Order Entered May 22, 2007
Appellate Division, 2nd Dept.

An order of support having been entered herein March 28, 2006 (Hon. Allen Hochberg, Support Magistrate) directing that B[redacted] G[redacted], Appellant herein (Appellant), contribute toward the support of his four children in the amount of $327.00 per week and pay an additional $73.00 per week toward the cost of the children's medical and health related needs, all through Support Collection Unit beginning March 17, 2006; and

Appellant having duly filed Objections to a Judge of this Family Court (Hon. Lori Currier Woods, JFC) , which Objections were denied in accordance with a Decision and Order entered May 24, 2006; and

Appellant having duly appealed said Decision and Order of the Hon. Judge Woods to the Appellate Division of the Supreme Court of the State of New York, Second Department by Notice of Appeal filed in Family Court on June 22, 2006; and

The matter having there been determined to the extent that a Decision and Order was entered in the Appellate Division on May 22, 2007, directing that the matter be remitted to the Family court to specify Appellant's sources of income, the actual dollar amount assigned to each category, and the resultant calculations; and

The matter having been referred to the undersigned Support Magistrate this 2nd day of July, 2007 by the Family Court, Orange County, NY for further FINDINGS consistent with the directions of the Appellate Division, IT IS FOUND AS FOLLOWS:

1. Inasmuch as Appellant failed and refused to provide the required financial

disclosure information, the Court used the income amount Appellant reported on his 2003 tax return of $42,971.00 as representative of Appellant's established ability to earn (FCA sec. 413 1. {b}{5}{v}).

2. Appellant sought to claim an income reduced to $400.00 per week ($20,800.00 per year) in workers' compensation pay due to a claimed injury or medical condition, which was not proved, and the Court could not conclude that Appellant did not continue to be able to earn at his established ability of some $43,000.00 per year (FCA sec. 413 1. {b}{5}{v} *"... a parent has reduced resources or income in order to reduce or avoid [his or her] obligation for child support."*).

3. In addition, one Ms. G[redacted], an adult person in Appellant's household established her own gross income on the record of $37,000.00 per year, and more importantly, that with her income, she was fully able to, did and continues to provide Appellant with any and all the needs he himself may be unable to pay for or afford (FCA sec. 413 1. {b}{5}{iv}{D}).

On Appellant's annual income alone, his CSSA Guidelines amount of child support for four children would be $237.34 per week. If no more than $16,310.00 of Ms. [redacted] income is imputed to Appellant, his CSSA Guidelines amount of child support would be the $327.00 per week ordered. In actuality, according to the record made, Ms. G[redacted] has placed her entire $37,000.00 per year income at Appellant's disposal, whenever he needs it, effectively making it his income, subject to a dollar for dollar imputation to him.

4. In addition to the particular quantitative analysis of Appellant's financial resources, there is a common sense qualitative analysis which supports the order as set:

At the ordered $327.00 per week, Appellant is contributing less than $12.00 per day for each of his four children, which is $4.00 per meal, and does not include any other needs of the custodial parent (D[redacted]) for shelter, clothes, education, transportation and extracurricular activities for the parties' children.

At a contribution of no more than $4.00 per meal for each of his children, Appellant cannot be heard to claim an impropriety in directing his available income to his children, especially when he has the resources to establish a new intact household with Ms. G[redacted], have a child with her (*Windwer v. Windwer*, 39 AD 2d 927, affd. 33 NY 2d 599), and is in the admitted position of being fully supported by her – whether or not he has any income of his own. In other words, the amount of money the extant order provides to Appellant's children is so minimal, that he cannot be heard to claim a right to pay even less, in light of the fact that he has been able to start a new family and has all of Ms. G[redacted] financial resources available to him as the father of her child.

5. The uncontroverted record made by D[redacted], shows her monthly expenses to exceed her net monthly income by $1407.00. This establishes for her the minimum financial need ($327.00 per week) she is unable to meet with her own financial resources. Pursuant to FCA sec. 437, Appellant is **presumed** to be able to meet this need. He had the opportunity to rebut this presumption, but precluded himself from doing so by failing and refusing to file the very financial disclosure through which he could have attempted to show his inability to pay and rebut the presumption. Instead, he seeks to do so for the first time on objection

and appeal.

Facts of the Case

The predicate support petition herein was filed by D[redacted] G[redacted] (D[redacted]) on December 30, 2005, with an amended petition filed February 6, 2006. She sought a contribution from the Appellant toward the financial needs of their four children, the oldest then being 14 years of age. The matter came on to be heard before the undersigned Support Magistrate on February 6, 2006. D[redacted] was represented by counsel, filed and exchanged FCA sec. 424 financial disclosure, and made demand for Appellant's. He had no financials and was warned by the Court that he had to serve and file his financial disclosure pursuant to FCA sec. 424 -a, or face the sanctions of subdivision (b) of that section. The matter again came on to be heard March 8, 2006 when, after a wait for Appellant's counsel to appear, witnesses were sworn and the hearing commenced.

D[redacted]'s counsel first made an application for sanctions against Appellant pursuant to FCA sec. 424-a subd. (b) for failure to serve and file any financial disclosure. She claimed irreparable prejudice by the last minute offer of an incomplete financial disclosure over the table at the hearing. Appellant had not even shared his meager financial disclosure with his own attorney, as the colloquy in the record shows (T. p. 8, l. 17-24).

D[redacted] attested to the truth of her financial disclosure affidavit, previously sworn to January 23, 2006, and testified, essentially establishing (1) Appellant's legal obligation to contribute financially to the support of their children, and (2) his failure to do so. Appellant, by his attorney, sought on cross examination to establish the fact that Appellant absolved himself of any financial responsibility to his children by signing the marital residence, then valued at $250,000.00, over to D[redacted] – which is not the law. He further sought to establish that D[redacted] had undisclosed income, which turned out to be a de minimus $1000.00 as the proceeds from over 200 e-Bay transactions.

Ms. G[redacted] was then called by D[redacted] to testify pursuant to subpoena. She testified that she and Appellant reside together in an intact household, and have done so since March, 2005. They have a child together who was four months old at the time of the hearing. She testified that from the March, 2005 date, Appellant worked for W[redacted] and was making financial contribution toward her expenses, utilities and mortgage with maintenance totaling $780.00 a month. Appellant paid her for food and bought groceries. When Appellant claimed the inability to pay, Ms. G[redacted]e paid the full amount (T. pg. 28, l. 25), effectively supporting Appellant and paying for all his needs out of her $37,000.00 a year salary (T. pg. 27, l. 10 - pg. 29, l. 10). She did not give him money (T. pg. 29, l. 12-16). Appellant had income from his disability check, but the witness had to pay child care herself for services five days a week (T. pg. 29, l.21 – pg. 30, l. 14). There was no explanation on the part of Appellant as to why he did not save Ms. Gable the cost of child care by caring for their child while he was not working, allegedly disabled.

The witness testified that everything is in her name as far as bills are concerned, "So I pretty much, it comes out of my checking account when I deposit money. I take care of his bills."

The record is not completely clear on cross examination that Appellant's contribution

toward his household with Ms. G[redacted] was between $6.00 and $8.00, or $600.00 and $800.00 for February, 2006, "A. Yeah. At times he paid with groceries. Q. Do you know? A. No." (T. pg. 33, l. 9 – l. 17).

D[redacted] then rested and Appellant testified, attesting to the truth of his just produced and offered financial disclosure affidavit. It is not probative in that it fails to disclose any income other than workers' compensation of $400.00 per week effective December 9, 2005. His claimed expenses (items j. through v.) are not decipherable, for among other reasons, they are stated without consistency as monthly, annually and weekly. Something attempting to show an auto expense reflects insurance and fees at "$862.00 a year," with another unexplained number "+1560+" next to it. Appellant intended to rely on otherwise inadmissable hearsay material, purported to have been written by a physician and W[redacted], to show that he was out of work as medically not able to work and receiving disability benefits (T. pg. 36, l. 11). No application was made to offer any documents into evidence concerning Appellant's medical condition or ability to work, and none went into evidence as an exhibit, or otherwise (T. pg. 43, l. 21- pg. 48, l. 9). To the extent that part of Appellant's documentary proof may have been a determination by an administrative agency such as the Workers' Compensation Board, the Family Court is not bound by such administrative review, and may require its own direct and probative proof on the issue, which is also absent in this case.

On cross examination, D[redacted]'s attorney elicited from the Appellant substantially the same information about his then current living circumstances as Ms. G[redacted] testified to, and that his trouble with his legs or knees had been ongoing since 1979 (T. pg. 43, l. 23). His 2003 W-2 form shows that he earned $42,971.00 that year from W[redacted] Food Company.

When both sides rested, the court reserved decision, but made initial findings on the record regarding a temporary order of support. Appellant was found to be fully supported by the person with whom he lives, and although he makes occasional voluntary financial contribution to that household, he is under no obligation to do so. Accordingly, the income he receives in the reduced amount of $400.00 per week was found to be available for the support of the parties' four children, allocated $327.00 per week in child support and $73.00 per week toward the children's health and medical needs.

The Decision and Order of Support dated March 8, 2006 and entered March 28, 2006, objected to and appealed from herein, finds that D[redacted] has a monthly shortfall of $1,407.00 ($327.00 per week) in expenses in excess of net monthly income, effectively establishing at a minimum the amount of money she needs from Appellant to provide for their children. Since Appellant is presumed pursuant to FCA sec. 437 to be able to pay this amount, and since he precluded himself from being able to rebut this presumption by his refusal to comply with the requirements of financial disclosure, the order was entered as within the mandate of the applicable law. The predicate Findings further conclude, pursuant to the record, that Appellant's available income is $400.00 per week, and that Ms. G[redacted], the person with whom he lives can, does, and in the future will provide for Appellant any and all of his living expenses which he does not or cannot provide for himself, thus freeing his $400.00 per week workers' compensation income for the benefit of his four minor children.

The record at bar showed an established earning ability for the Appellant of $42,971.00 in 2003. In light of FCA sec. 413 1. (b)(5)(iv), and in the absence of evidence in this record to the contrary, and pursuant to the cited sanctions attendant Appellant's failure to file financial disclosure, Appellant left the Court free in its discretion to give weight to that ability to earn in formulating a child support order, which according to Guidelines is $237.00 per week. As of the

date of the hearing, however, Appellant's financial circumstances were found adequate to provide $1407.00 per month ($327.00 per week) toward the support of his children because Ms. G[redacted] effectively made Appellant the beneficiary of her $37,000.00 per year income by paying all his expenses, with no required contribution at all from Appellant. Appellant's obligation to contribute toward the support of his children does not, as a matter of law, stop at the $1,407.00 Di[redacted] may not have at the end of the month to support the children. The amount of support to be paid by the non-custodial parent is not based upon or limited to a "needs" basis as shown by the household to be supported. Rather, the standard is that the paying parent is obligated to contribute to the full extent of his or her ability to pay (whether or not imputed) , which in the case at bar was found to be $327.00 per week out of Appellant's $400.00 per week in compensation, being the entire shortfall of $1,407.00 per month.

While a taking from Appellant of child support of $327.00 per week out of his $400.00 per week in workers' compensation may seem drastic at first, it amounts to no more than $12.00 per day or $4.00 per meal for each of his children without any contribution toward shelter, clothing, education, extracurricular activities or entertainment, for example. Since Ms. Gable fully supports Appellant, regardless of his own financial resources, there is no reason that Appellant's children should not have the full benefit of whatever income he has, which was limited to the $400.00 per week compensation at the time of the hearing.

A standard CSSA Guidelines calculation shows: Di[redacted]'s parental income adjusted for Guidelines $379.56 per week plus Appellant's parental income ($42,971.00 per year) $763.15 for a combined parental income of $1142.71 x 31% for four children equals a combined weekly parental obligation for child support of $354.24 allocated 33% Di[redacted] ($116.90 per week), and 67% ($237.34 per week) Appellant. Appellant should however pay $327.00 per week for the reasons that (1) that is the need of the custodial household which Diane is not able to meet with her income, and Appellant failed to rebut the FCA sec. 437 presumption that he is able to meet the support needs of his children; and (2) Appellant has income imputed to him in the amount of at least $16,000.00 per year out of the $37,000.00 annual salary of Ms. [redacted], who testified that she can and does fully provide for all Appellant's living needs.

Variation from the guidelines is considered herein using the following factors to the extent the parties provided evidence on the record which would permit review: (1) the financial resources of the custodial and non-custodial parent and those of the children as discussed herein, namely the fact that Di[redacted] has a deficit of $1407.00 per month and Appellant has $1,732.00 per month in net discretionary income; (2) neither party claimed or introduced evidence regarding the physical and emotional health of the children or special needs or aptitudes; (3) there was no sufficient evidence adduced at the hearing for a consideration of the standard of living the children would have enjoyed had the marriage or household not been dissolved; (4) neither party raised the issue of tax consequences; (5) neither party introduced any evidence of non-monetary contributions either party makes or will make toward the care and well being of the children; (6) neither party introduced evidence regarding the educational needs of either parent; (7) Respondent's gross annual income is $21,372.00 , while Appellant's, absent any financial disclosure or rebuttal of the presumption, ability to earn is $43,264.00 per year, making Di[redacted]'s ability to earn less than half of Appellant's. Given that disparity, the CSSA order of support should be varied upward to $327.00 per week to meet the financial needs of Appellant's children, which Di[redacted] showed she is unable to meet; (8) neither party provided evidence or raised any issue concerning the needs of other children not in issue in these proceedings, except to the extent that Appellant established a new family and a child with Ms. G[redacted] which circumstance

was not shown to bear legally on the proceedings at bar (*Windwer v. Windwer*, 39 AD 2d 927 affd. 33 NY 2d 599); (9) neither party raised any issue or offered proof of any visitation expenses; (10) As discussed, Appellant's income is sufficiently enhanced by the contribution toward his needs by Ms. G[redacted] that he has the ability to provide D[redacted] with his compensation money for the benefit of their children. The child support obligation is neither unjust nor inappropriate.

The Law

A cornerstone of the child support provisions of the Family Court Act (gen. Article 4) is the requirement that the parties provide financial disclosure, which is compulsory (FCA sec. 424-a(a) and cannot be waived or otherwise dispensed with. *Basic* financial disclosure consists of recent tax returns, proof of income (usually pay stubs or W-2 forms), and a schedule of income, assets, liabilities and expenses, traditionally referred to as a financial disclosure affidavit. These basic financial items must be provided, and even the Court cannot waive production. Collectively as the *basic Financial Disclosure*, these items must be provided prior to the support hearing in time to be reviewed and analyzed, and not more than ten days after the first appearance at which time the date for the support hearing is usually set. There should be enough time for the exchange and review of the financial information.

With good reason, the law makes provision for disclosure well beyond the *basic* financials of FCA sec. 424-a. In the Guidelines provisions of the Family Court Act (sec. 413), specifically subdivisions (j) and (k), an exhaustive disclosure of the parties' joint and separate entire financial picture may be required. The court is not limited in its review to the face disclosure of tax returns, for example, but has the duty to require competent probative evidence of what either party may claim to be his or her financial condition. For example, a large deduction for depreciation may not represent the actual fact that a property has significantly appreciated in value. While a party may show staggering debt service payments on large borrowings, the court may require disclosure sufficient to show the disposition of the loan proceeds.

The rigorous requirements for full and honest disclosure reflect a legislative and judicial awareness of the strong inclination by the payee to overstate expenses and minimize income, and the corresponding urge by the paying parent to under report income sources and overstate expenses.

Without complete and honest financial disclosure, the court is placed in the often embarrassing position of being unable to render a well reasoned quantitative analysis of the parties' respective financial circumstances, need, and ability to pay. An improperly skewed order can result, which is why the *financials* are the sine qua non of support proceedings. Appellant at bar has created a frustrating situation by his repeated failure and refusal to provide any financials according to law. When they were finally provided, they were incomplete and too late for review.

Neither party is afforded the opportunity to deprive the court of the opportunity to fully review the financials by withholding disclosure or misrepresenting his or her financial circumstances. To that end, serious sanctions have been provided.

Pursuant to FCA sec. 424-a, the legislature provided the severe sanction in a separate and particular subdivision (b) of precluding the respondent (non-custodial parent payor) from

offering evidence as to his or her financial ability to pay support. The consequence of this sanction is clear. In one sweep, it prevents the paying parent from showing any expenses in mitigating his or her obligation to pay, and precludes that parent from offering any rebuttal to the presumption of ability to pay provided for by FCA sec. 437 **Presumption of Sufficient Means**:

> A respondent is prima facie presumed in a hearing under section four hundred thirty - three (to set the amount of child support) and section four hundred fifty-four (violation proceeding for failure to pay the support amount set) to have sufficient means to support his or her spouse and children under the age of twenty - one years.

Accordingly, a sanction consequence to the (non-compliant) paying parent of failing to provide financials pursuant to FCA sec. 424-a (a) and (b) is that he or she is in no position to rebut the statutory presumption of ability to pay.

Pursuant to FCA sec. 413(j) and (k), where there is a dearth of financial disclosure, or finances are concealed or misrepresented, the court may dispense all together with a review and analysis of the non-disclosing party's finances and "*...**shall** order child support based upon the needs or standard of living of the child, whichever is **greater*** (emphasis added). In addition, where there has been deception or non-disclosure, the short - changed party has the right to an (upward) modification, and is excused from the usual requirement of alleging or proving any change of circumstances. The Draconian nature of the legislatively provided sanctions is not accidental.

In order to fill the gap between the unreported or mis-reported financials by the non-custodial parent and the establishment of a meaningful child support order, the court has the discretion and even the duty to impute income (see eg. the remitting order herein App. Div. Decision and Order entered May 22, 2007 citing *Matter of Westenberger, v. Westenberger* , 23 AD 3d 571 et seq.)

In paragraph four of Appellant's Objections filed April 28, 2006 pursuant to FCA sec. 439-e and addressed to the Family Court Judge, Appellant's counsel states: "Since the burden is on the petitioner (D[illegible]) to prove Mr. Genender's income ... Support Magistrate Hochberg committed error." The legislative intent and resulting law could not be more contrary to counsel's assertion. Firstly, the custodial parent is most often in no position to know, less prove, the financial circumstances of the non-custodial parent. Secondly, the law is clear that upon a good and valid showing of income and ability to earn by the non-custodial parent, the application of the CSSA Guidelines (gen. FCA sec. 413) renders the *presumptively correct* amount of child support. The rest of the proceeding is the paying parent's attempt to rebut this presumption. The custodial parent is not under the obligation Appellant's counsel argues.

Part of the legislative history of what are known as the CSSA Guidelines, was the goal of providing children with adequate child support without the obligation to prove need, which is presumed. The non-custodial parent has the obligation of (truthfully) divulging his or her income and financial circumstances, and from that the presumptively correct amount (*Cassano v. Cassano*, 85 NY 2d 649) of child support is calculated. The non-custodial parent may contest the veracity of the paying parent's financial revelations, but is not bound to prove them in the first instance. That is the burden of the non-custodial parent. The elegance of the legislative design for providing adequate child support post 1985 should not be thwarted by uninformed mis-representations of the law.

The presumption of the Guidelines may be rebutted by either party and the amount of support may be varied higher or lower upon adequate proof of factors for variation (FCA sec. 413 {f} and {g}). Before celebrating the success of a reduced order, however, the paying parent must provide full and complete financial disclosure in order to permit the court an opportunity for a meaningful and probative quantitative analysis. Indeed, the *nisi prius* court is bound, on pain of reversal, to render a detailed finding with regard to the Guidelines application to the parties' incomes, expenses, financial need, ability to pay, and reasons for any variation from the Guidelines.

Where, as here, the paying parent (respondent) has failed to comply with the law, has not been forthcoming, and has not provided either the required initial disclosure of his income and income sources, and then further has failed to provide any financial disclosure including ability to earn, income and expenses, he has unleashed upon himself a cascade of inferences, imputations, sanctions and presumptions which cannot be rebutted perforce of the absent financial material, as in the case at bar, effectively negating Appellant's bare claims that he cannot afford the support as ordered, or that the order is unjust or unfair.

At the same time, Appellant has deprived himself of the opportunity to prove that he is entitled to consideration, in his favor, of one or more of the variations reducing the financial obligation to his four children.

In short, there is a manifest structure and purpose to the applicable sections of law discussed above , and in failing and refusing to provide the required financial disclosure, even to his own counsel, Appellant disregarded the rule of law, failed to comply with the statute, frustrated this Court in any efforts toward crafting a meaningful quantitative analysis of his finances and ability or inability to pay, forced this Court to impute to him the ability to pay based upon the statutory presumption that he can, rather than the reality of his (undisclosed) financial circumstances, and foreclosed any opportunity this Court may have had to consider circumstances mitigating in his favor toward a reduced order of support, upon his claims of lack of income and inability to pay, which he has jealously guarded, choosing to reveal for the first time to the Appellate Division on appeal.

Respectfully submitted:

____

SUPPORT MAGISTRATE

Sana
vs
Sena

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IN THE MATTER OF SENA v. Sena, 2009 NY

2009 NY Slip Op 03524

IN THE MATTER OF EVELIN SENA, respondent,
v.
JEOVANNI SENA, appellant. (Docket No. F-7794-05)

2008-01665, 2008-07792.

Appellate Division of the Supreme Court of New York, Second Department.

Decided April 28, 2009.

65 AD3d 1244

Eliezer Rodriguez, Bronx, N.Y., for appellant.

Before: Robert A. Spolzino, J.P., Fred T. Santucci, Ruth C. Balkin, Cheryl E. Chambers, JJ.

DECISION & ORDER

ORDERED that the matter is remitted to the Family Court, Westchester County (Hochberg, S.M.), to report on the specific sources of income imputed, the actual dollar amount assigned to each category, and the resultant calculations pursuant to Family Court Act § 413(1)(c), and the appeals are held in abeyance in the interim. The Family Court, Westchester County, shall file its report with all convenient speed.

Upon review of the order dated September 11, 2007, and findings of fact of the Support Magistrate, it is evident that he imputed income to the father in calculating the father's basic support obligation pursuant to the Child Support Standards Act. A Support Magistrate is permitted to impute income in calculating a support obligation where he or she finds that the party's account of his or her finances is not credible or is suspect (*see Matter of Genender v Genender*, 40 AD3d 994, 995; *Matter of Westenberger v Westenberger*, 23 AD3d 571; *Peri v Peri*, 2 AD3d 425, 427; *Lilikakis v Lilikakis*, 308 AD2d 435, 436; *Rohrs v Rohrs*, 297 AD2d 317, 318). "However, in exercising the discretion to impute income to a party, a Support Magistrate is required to provide a clear record of the source from which the income is imputed and the reasons for such imputation," and the resultant calculations (*Matter of Kristy Helen T. v Richard F.G.*, 17 AD3d 684, 685; *see* Family Ct Act § 413 [1][c]; *Matter of Genender v Genender*, 40 AD3d at 995; *Matter of Wienands v Hedlund*, 305 AD2d 692, 693; *Matter of Sweedan v Baglio*, 269 AD2d 724, 725-726). In the case at bar, the Support Magistrate failed to specify the sources of income imputed, the actual dollar amount assigned to each category, and the resultant calculations. The record thus is not sufficiently developed to permit appellate review. Accordingly, the matter must be remitted to the Family Court, Westchester County (Hochberg, S.M.) to provide this information, and the appeals must be held in abeyance pending receipt by this Court of the report.

SPOLZINO, J.P., SANTUCCI, BALKIN and CHAMBERS, JJ., concur.

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D34102
C/kmb

_____AD3d_____

Submitted - February 6, 2012

REINALDO E. RIVERA, J.P.
DANIEL D. ANGIOLILLO
JOHN M. LEVENTHAL
JEFFREY A. COHEN, JJ.

2010-10353

DECISION & ORDER

In the Matter of C. , respondent,
v C , appellant.

(Docket No. F-03535-00/09D) F-#64872

Carol , T , N.Y., appellant pro se.

In a child support proceeding pursuant to Family Court Act article 4, the mother appeals from an order of the Family Court, Westchester County (Malone, J.), entered September 3, 2010, which denied her objections to an order of the same court (Bowman, S.M.), dated March 5, 2010, which, after a hearing, granted the father's petition, in effect, for a downward modification of his child support obligation.

ORDERED that the order entered September 3, 2010, is reversed, on the law and the facts, with costs, the objections are granted, the order dated March 5, 2010, is vacated, and the father's petition is denied.

In December 1994 the parties entered into a "Stipulation and Agreement" (hereinafter the agreement), which provided, inter alia, that the father would pay the mother specified child support until the subject child was emancipated, as that term was defined therein, and that "[i]n addition to the child support heretofore agreed," the parties would each equally contribute to the cost of the child's college education. The agreement defined emancipation as the happening of any one of several events, including the child's permanent residence away from the residence of his mother, but expressly stated that residence at college "is not to be deemed a residence away from the residence of the mother sufficient to constitute emancipation." The parties were divorced by a judgment entered August 15, 1995, and the agreement was incorporated but not merged into the judgment of divorce.

The father filed the subject petition dated May 29, 2009, in effect, for a downward modification of his child support obligation, alleging that there had been a change in circumstances in that the subject child was "living away at college." At a hearing on the petition, the father stated that he was paying his "half share" of the subject child's college expenses and that the mother did not have to pay certain expenses when the child received room and board at the college. By order dated March 5, 2010, the Support Magistrate found that the father's contribution toward the child's college room and board expenses was duplicative of the child support, and therefore directed that his child support obligation be modified accordingly. The mother filed objections, contending, among other things, that the parties were contributing equally toward the child's college expenses, rather than proportionately to their respective incomes, and that the agreement expressly provided that child support would continue when the subject child was at college. The Family Court denied the mother's objections, she appeals, and we reverse.

A stipulation or separation agreement that is incorporated but not merged into a judgment of divorce is "an independent contract binding on the parties unless impeached or challenged for some cause recognized by law" (*Merl v Merl*, 67 NY2d 359, 362; *see Matter of Gravlin v Ruppert*, 98 NY2d 1, 5; *Kleila v Kleila*, 50 NY2d 277, 283). Where 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 Boden v Boden*, 42 NY2d 210, 213; *see Matter of Gravlin v Ruppert*, 98 NY2d at 5; *Matter of Brescia v Fitts*, 56 NY2d 132, 138).

Here, pursuant to the clear terms of the agreement, the father's obligation to pay child support continued while the child was away at college, and was not diminished by any amount he contributed towards college expenses. Inasmuch as the father did not establish that the agreement was not fair and equitable when entered into, or that there was an unanticipated and unreasonable change in circumstances (*see Matter of Gravlin v Ruppert*, 98 NY2d at 5; *Matter of Boden v Boden*, 42 NY2d at 213), he was not entitled to a downward modification of his child support obligation, and the mother's objections should have been granted.

RIVERA, J.P., ANGIOLILLO, LEVENTHAL and COHEN, JJ., concur.

ENTER:

Aprilanne Agostino

Aprilanne Agostino
Clerk of the Court

SUPREME COURT, STATE OF NEW YORK
APPELLATE DIVISION SECOND DEPT.
I, APRILANNE AGOSTINO, Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, do hereby certify that I have compared this copy with the original filed in my office on FEB 28 2012 and that this copy is a correct transcription of said original.
IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this Court on FEB 28 2012
Aprilanne Agostino

FAMILY COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY : YONKERS

In the matter of a petition brought pursuant to Family Court Act, Article 4, Part 5. by TA ,

Petitioner,

against
SC ,

Respondent.

36630
Findings
F 3312-04/11C
MCO

Petitioner makes application by modification petition filed September 22, 2011 alleging an order of support dated August 20, 2004 for the child S , born September 24, , in the total amount of $120.00 per week (including a now antiquated $15.00 per week child care contribution), and making demand for an increase in the support and contributions alleging a change in circumstances that the needs of the child are greater and the child requires a contribution from the Respondent for college expenses.

A review of the court record herein shows that there was an order of filiation entered 4/25/94 after genetic testing, with an order of support in the amount of $25.00 per week to the Westchester County Department of Welfare for the child. The order was increased to $28.00 per week by Cost of Living Adjustment effective December 24, 1999, and then was similarly increased again effective March 26, 2004 to $31.00 per week.

Proceedings in this court on August 20, 2004 resulted in an order to the Petitioner herein for the child at the $105.00 per week with $15.00 per week child care, alleged herein, with Respondent to contribute 45% of the child's medical, health and health related needs not covered by insurance. The Findings (Appendix A) show that the respective earnings of the parties were $48,700.00 a year for the Petitioner , and $35,000.00 per year for the Respondent. The order took into account that Respondent had two other children.

The matter at bar came on for proceedings January 17, 2012 and was adjourned for a hearing to March 12, 2012, Respondent having been granted a telephonic hearing, but not having responded to the Court's call at that time. An interim order adjourned the matter, with specific directions that the parties comply with the requirements of financial disclosure. Respondent did not.

Respondent did appear by telephone for the hearing, but with no served or filed financials. Petitioner made demand for sanctions against Respondent for having failed in all respects to provide both the statutorily required financial disclosure and for failing in all respects to provide the documents, and information required by Petitioner's demand for discovery and inspection. Respondent admitted that he provided no financial or other discovery.

Petitioner's motion for sanctions is granted to the extent that Respondent is precluded from contesting the findings herein or from claiming that the calculations are incorrect or that he was not given proper regard for expenses, since he left both the Petitioner and the court with no

opportunity to review and clarify his financials before or even during the hearing. Petitioner could have been awarded all the relief she sought on her say so, Respondent having failed to comply.

Instead, Respondent has been given the opportunity , as a courtesy , to present such financials as he can, but due to his untimely submission, without any opportunity for cross examination, clarification or any other inquiry, in order that there be at least some consideration of such claims as he is able to make on paper, subject to interpretation without input from him at the hearing or after.

In short, with such blatant disregard for the law , Petitioner's demands, and the Court's directions, Respondent may not be heard to complain that he does not agree with the outcome or otherwise objects.

He did provide financials received March 21, 2012 after the close of the hearing. Petitioner, who was also served, moves (Letter filed March 28, 2012) that the material not be considered, the late submission two weeks after the hearing, resulting in prejudice to Petitioner.

Petitioner points out that Respondent is not forthcoming in that he failed to disclose the fact that he owns his residence, while at the same time claiming the mortgage payments and realty taxes thereon as expenses. Respondent counters that the omission was an oversight.

Petitioner also argues that despite Respondent's denials regarding financial contribution for the child at bar, he shows savings of $37,000.00, and an annual income of $93,000.00, more than two and a half times more that what it was when the order of support was set at $120.00 per week. He argues that the $37,000 in savings is a reasonable and required "cushion," for himself and his family.

Respondent argues in his responding letter received by the Court on April 5, 2012 , that the extra curricular activities budget for the two children in his household is substantial, because they are "exemplary," and "award honored." He argues (covering letter received March 21, 2012 with financials) that he was not consulted about college for the child S , and that he himself was constrained to attend a publicly funded State college (see eg. *Heinlein v. Kuzemka*, App. Div. 3rd Dept. slip 502752 March 13, 2008 regarding consultation , unreasonable objection and failure to consult).

Petitioner testified that the school was chosen for , College of Art and Design, because she too is "exemplary," and "award honored," talented and exceptional in her own right, in particular, that the School is giving the child no less than four artistic honors scholarships totaling $9,500.00 a year.

There appears to be no reason in this record for Respondent to accord the exceptional qualities of S any less recognition than he gives to the children living with him. There is nothing in the record save Respondent's complaints, that the College of Art and Design was not properly chosen for the child, or is beyond the reasonable financial abilities of the Petitioner to afford, with the expected assistance of the Respondent.

Petitioner showed by testimony and documentation that there was a cost of $8157.00 paid in 2010 the summer program, "Rising Star," (6 college credits) attended by the child while she was still in high school. The petition is filed after this date, and any consideration of retroactive liability is limited to the date the petition was filed.

The full cost for the school is $45,000 a year, and of that the tuition is $20,340.00, the bulk

of the balance being room and board. There is $22,000 in aid and scholarships, and the Petitioner is and will be liable for sequential loans of $31,000.00 per year, according to her testimony. She makes demand that Respondent's contribution be set at $13,000.00 per year for four years, or $52,000.00.

According to **the documents for the loans**, Petitioner will pay a total of $58,017.96 over the **course of 14.3 years,** at an average of $338.10 per month, unless accelerated. The question at bar is: For how much of that monthly amount should Respondent be liable? (ans. 46% or $154.27 per month) *

Travel for the child will total $1260.00 per year for three round trips by air.

The dorm set up was a one time cost of $738.00.

Petitioner expects to be depositing $500.00 per month into a joint account (Wells Fargo) for the use of the child at school.

Petitioner testified that Respondent could not be located after 2007 in order for her to make any demands with regard to his obligation for contributing to the child's expenses. It is noted that $105.00 per week reflects an order pursuant to Guidelines based upon an annual income of approximately $35,000.00 per year. According to this record, Respondent has been earning substantially more than that in the succeeding years, with no concomitant increase in child support.

Petitioner further testified that the child was only ten years of age when the last order of support was made, and that she now plays guitar, fences, is on the swim team, and is involved in religious education, with attendant costs.

As noted, the record herein reflects that Respondent's income has been at least twice that over the years, which would have required an order of $158.00 per week, allowing for the two children in Respondent's household. Over the last four or five years, Respondent has effectively avoided a review of his finances and between $7,904.00 and $11,130.00 in child support which he does not have to pay, either as the result of Petitioner's inaction, or her inability to find him.

Prior to 2004, when the amount of support was raised to about $17.00 a day, Respondent's nominal obligations of support were at $25.00 per week, $31.00 per week, or $38.00 per week, hardly amounts which could be considered adequate contribution toward the child's needs.

With Petitioner's income or earning ability established at the hearing at $86,609.90 per year, and Respondent's at $93,000.00, pursuant to his pay stub, Respondent would be liable for 52% of the cost of the child's college education, or at least $175.00 per month as his share of Petitioner's out-of-pocket on the loans.

Clearly, Petitioner did not choose a college for the parties' daughter at a cost of more than half her full annual gross income without consideration of her entire family income. Her financial disclosure shows that she and the child have been and continue to be part of a household with two other children and Petitioner's income earning spouse.

The household income totals $143,131.90, which makes more sense in having chosen an expensive school for the child.

Similarly calculated, the total income of Respondent's household is $120,117.00 .

The incomes of the parties' spouses is imputed only for the purpose of calculating the percentage amount of contribution toward S college costs. There is no part of the calculation which requires that the spouse of either party contribute directly towards the child's

education. The contribution towards the child's college education remains the obligation of each party only and not their respective spouses, but the availability to each party of substantial additional monies for living, contributed by the spouse of each, cannot be disregarded.

Both parties avail themselves on a daily basis of the income of their spouses allowing for a greater standard of living, and a greater contribution toward S college by each, than if there were no other income. Accordingly imputation as set forth above is more appropriate.

Moreover, there has been and continues to be no visitation or "parenting time" involved at bar, when the child would be with the Respondent and avail herself of the resources of his household. There are two separate households, the child in one and having no contact with the other. Each household provides for all the needs of each of the parties therein, rendering it reasonable to include all the household income available to each party in the calculation of their respective obligation toward S college costs.

*Accordingly, Respondent would be liable for 46% of the cost, or $154.27 per month of the $338.10 per month loan repayment owed by the Petitioner, or a savings to Respondent of $20.73 per month, as opposed to calculations based upon the income of each party only.

It is noted that Respondent reports an additional amount of income: net unemployment benefit income of $3440.00 for 2011 , which might be attributable to Respondent before he obtained his current regular work. It is not included in these calculations as prospectively speculative.

His contribution toward the child's required and reasonable travel for school is $48.30 per month.

The order of support as it exists at $105.00 per week, was not shown to over reach or be inadequate as and for Respondent's contribution to provide for the child's non-educational needs at school and at home, when there is no school (In any event, neither party raised this issue, (see generally *Litwak v. Litwak* , 237 AD 2d 580; *Reinisch v. Reinisch*, 226 AD 2d 615; *Vainchenker v. Vainchenker*, 242 AD 2d 620; *Justino v. Justino*, 238 AD 2d 549).

Accordingly, were Respondent to be ordered by these proceedings to pay his share of the tuition loan, transportation costs, and the child's sundries, the resulting order totals $654.07 per month, an increase of only $138.07 (for college) over his his current (and stale) order of $516.00 a month. The next question is whether or not Respondent's finances are sufficient to fulfill this obligation? **

His financials show net household monthly income of $7078.80 and total household expenses each month of $6440.68, exclusive of debt service ($132.19 student loan repay), leaving Respondent $638.12 net monthly income in excess of his expenses (one of which is $330.00 per month for the enrichment and musical talents of the children in his household) , or $15.95 amonth shy ** of the $654.07 per month he would need to cover his pro rata share of the needs and college expenses of his daughter with Petitioner. The answer is, according to Respondent's financials, that he can meet this obligation. **

To this extent, Petitioner's request for any other increase cannot be granted as clearly beyond the ability of the Respondent to pay.

Petitioner established that she has past expenses for the child toward which Respondent should have contributed a 45% share over the last few years, according to the existing order of

support:

1. $196.20 on a dermatology bill 12/18/07 through 3/22/10
2. $ 89.37 on a dental bill 9/18/07 through 1/31/09
3. $213.30 on an optical service 9/17/07
4. $145.35 on an optical bill 12/6/08
5. $154.35 on an optical bill 8/18.09
6. $ 33.75 on an optical bill 6/10/10
7. $ 33.75 on an optical bill 7/19/11
8. $ 94.04 on an optical bill 7/20/11
9. $776.25 10/24/07 through 1/3/08 therapy for depression

$1736.36

In light of the fact that Respondent failed to comply with disclosure, Petitioner objected to any evidence Respondent sought to adduce on the record . Subject to the sanctions set forth above, namely that Respondent cannot be heard to disagree with the outcome of these proceedings where he failed to cooperate or comply with the law, he was in any event and as a courtesy heard over Petitioner's objections.

He testified that his present work is contractual and it is not certain that he will continue; that he has to work in another state; that he has a wife and two children for whom he provides food , shelter and clothing, which is not a new circumstance; that he lives upstate because it is cheaper; that his mortgage is between $900.00 and $1000.00 per month together with fees of $800.00 per month; that he has had third party health benefits for fourteen years; that his medically significant Crohns condition is at times disabling, for which he needs medication and exploratory procedures covered by his insurance, except for minimal co-pays; that he has a 14 year old daughter.

On cross examination, he testified that his present salary income is $4000.00 per month (actually closer to bi-weekly) gross; that he puts $100.00 per month into a 401K retirement fund; that in 2010 he earned $88,773.00; that his wife works three different jobs totaling income at $13,000.00 a year, which was later shown to be more than twice that. Respondent then called his wife, Irene, to testify, but there was nothing either relevant or material which was added to the record. He offered , over objection, to send in his financial disclosure after the hearing. There was no offer with regard to the material Petitioner demanded in her discovery and inspection notice, and the sanctions against Respondent continue therefor.

DISCUSSION

The record at bar established that the needs of the child have increased at least to the extent that Respondent should contribute toward her college education; that the child is considered to be gifted, and an appropriate school was chosen for the child by petitioner.

Respondent cannot be heard to complain that he was not included in the choice of school or that the child should be limited to a state school, because there was no offer of proof by Respondent that insofar as he was concerned, there was any ongoing involvement or

participation in the child's well being, education or life.

Respondent argues that he is unable to tolerate any further financial incursion into the life of his current family , his savings of $37,000.00 notwithstanding. He does not indicate that he had any cause or right to expect that his entire obligation to the child would be limited to a court order of $35.00 or $105.00 per week in child support.

Respondent would have done better in being responsive to this Court, having been granted a telephonic hearing, by being available for the hearing the first time and having timely disclosed. At the least , the additional adjournment gave him the added opportunity, with a specific written direction from the Court, and Petitioner's written and served demand for discovery and inspection, to put his papers together, serve and file them, which he still failed to do.

Instead he chose to forego his opportunity to show the Court his financial circumstances at the hearing, where there could have been testimony, cross examination, explanation, and clarification. He provided only some of the required paperwork long after the hearing. He is in no position , therefore, to object to the outcome of these proceedings as unfair, improper, or otherwise.

In accordance with the foregoing, order to enter *that as of the date of entry hereof, Respondent will owe $26,472.73 toward the present and future cost of college tuition, room and board and will owe an additional $2318.40 toward the present and future cost of college travel for the child Scyanne, all totaling $28,791.13*

*Which **cost for college and college transportation** is to be paid, effective May 4, 2012 and each week thereafter **through SCU, at the rate of $47.11 per week for 124 weeks, until September 19, 2014,** at which time Respondent will have paid $5841.64, and owe $22,949.49;*

Respondent will then commence to pay that balance in 60 equal monthly installments through SCU of $382.49 effective October 1, 2014, until fully paid, with leave to Petitioner to make application for a greater amount of payment of that balance over a shorter period of time, or in the alternative, for a judgment for the balance; and in addition

*Respondent **continue to pay effective May 4, 2012 through SCU** the basic child support of **$105.00 per week for the next 124 weeks until September 19, 2014,** when the child will be emancipated by age; and*

In the event that the child may no longer be a full time student in a matriculating program (at least 8 credits a term on the current trimester basis) at the Savannah College of Art and Design, Respondent may make due application for modification of the within order; and

***Retro to be set through SCU** in the amount of **$1736.36** for Respondent's prior share of the un-reimbursed expenses for the child for medical, health and health related needs not covered by insurance; together with **another retro amount of $339.48** as and for Respondent's share of the room set up, and*

Effective May 4, 2012, Respondent's new contributory share is 46% on medicals not reimbursed by insurance. Petitioner is to make good written demand upon Respondent with proof of the service, the name of the provider, the type of service, the amount insurance paid, the cost to the Petitioner, proof that Petitioner paid her portion and the amount owed by the Respondent, subject to a violation petition in the event the demand is not complied with in THIRTY (30) DAYS from presentment without good cause; and

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

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C/hu

___AD3d_____

Submitted - April 26, 2013

WILLIAM F. MASTRO, J.P.
REINALDO E. RIVERA
PLUMMER E. LOTT
JEFFREY A. COHEN, JJ.

2012-01875

DECISION & ORDER

Elizabeth A. Bungart, appellant, v John H. Bungart, respondent.

(Index No. 10559/06)

Lynn Poster-Zimmerman, P.C., Huntington, N.Y., for appellant.

Christine E. Grobe, Stony Brook, N.Y. (Nicholas E. Tishler and Carey Anne M. Berdan of counsel), for respondent.

In a matrimonial action in which the parties were divorced by judgment entered June 8, 2006, in which the terms of the parties' stipulation of settlement were incorporated by reference and not merged, the plaintiff appeals, as limited by her brief, from so much of an order of the Supreme Court, Suffolk County (McNulty, J.), dated January 4, 2012, as denied her motion to direct the defendant to pay the amounts he owes as his share of college expenses for the parties' children, or for leave to enter a money judgment against the defendant for those amounts, and for an award of counsel fees pursuant to the parties' stipulation of settlement.

ORDERED that the order is reversed insofar as appealed from, on the law, with costs, and the matter is remitted to the Supreme Court, Suffolk County, for further proceedings in accordance herewith.

The plaintiff moved to have the Supreme Court direct the defendant to contribute toward the college expenses of the parties' children, including student loans which the children were responsible to repay, up to the monetary cap set forth in the parties' stipulation of settlement that was incorporated by reference but not merged into the judgment of divorce. The Supreme Court denied the motion, reasoning that the amounts of the student loans should be deducted from the college

expenses that the parties were required to pay pursuant to the stipulation.

Contrary to the Supreme Court's determination, "[i]n the absence of a clear and unambiguous provision to the contrary in the stipulation of settlement concerning the matter, '[i]n determining the parents' respective obligations towards the cost of college, a court should not take into account any college loans for which the student is responsible'" (*Matter of Korosh v Korosh*, 99 AD3d 909, 911, quoting *Matter of Yorke v Yorke*, 83 AD3d 951, 952; *see Matter of Rashidi v Rashidi*, 102 AD3d 972; *Matter of Kent v Kent*, 29 AD3d 123, 133-134). Here, the parties' stipulation of settlement did not contain a clear and unambiguous provision expressly authorizing the deduction of the children's student loans from the college expenses toward which the parties were required to contribute. Accordingly, the Supreme Court erred in denying the plaintiff's motion, and the matter must be remitted for a hearing and determination as to the parties' respective obligations for college expenses and for an award of counsel fees to the mother, as provided for in the parties' stipulation of settlement.

MASTRO, J.P., RIVERA, LOTT and COHEN, JJ., concur.

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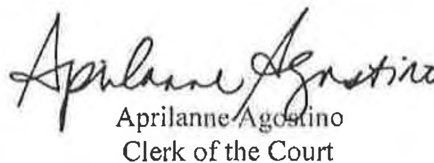

Aprilanne Agostino
Clerk of the Court

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*33 Misc. 3d 1001, *; 930 N.Y.S.2d 857, **;*
*2011 N.Y. Misc. LEXIS 4779, ***; 2011 NY Slip Op 21355*

Pamela T., Plaintiff, v Marc B., Defendant.

311980/2005

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

33 Misc. 3d 1001; 930 N.Y.S.2d 857; 2011 N.Y. Misc. LEXIS 4779; 2011 NY Slip Op 21355

October 7, 2011, Decided

SUBSEQUENT HISTORY: Affirmed by *Tishman v Bogatin*, 94 AD3d 621, 942 NYS2d 516, 2012 NY App Div LEXIS 3078 (N.Y. App. Div. 1st Dep't, 2012)

CASE SUMMARY

OVERVIEW: A father was ordered to contribute 40 percent of the costs of his son's college expenses at a private university under Domestic Relations § 240(1-b)(c)(7). The **SUNY cap** was not applied. The father could contribute to the son's college education. The fact that the private school was more expensive that a public college was not a reason to interfere with the child's school choice. While the mother had considerable more savings than the father and a pension plan, the father's net income was over $ 100,000 and his child support obligation was low.

OUTCOME: Application granted, in part, and denied, in part.

CORE TERMS: cap, attend, private colleges, college education, child support, tuition, private school, divorce, obligation to pay, educational, younger, ranking, child support, preparation, state university, substantial change, premature, attended, learning, elder, best interests, learning disability, separation agreement, providently, obligated, attending, justice requires, financial ability, public high school, public schools

LEXISNEXIS® HEADNOTES - Hide

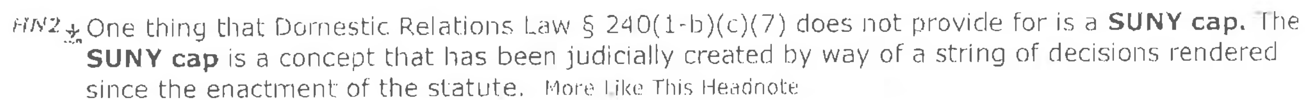
Civil Procedure > Judicial Officers > Judges > Discretion

Family Law > Child Support > Obligations > Types > General Overview

HN1 The enactment of Domestic Relations Law § 240(1-b)(c)(7) reflects the New York legislature's realization of the important role that college plays in the lives of New York's young people and it

confers upon the courts of New York the authority to direct a parent to contribute to a child's private college education, even in the absence of special circumstances or a voluntary agreement. The statute provides that when a court exercises its discretion to direct such a contribution from a parent, it is to do so having regard for the circumstances of the case and the parties, the best interests of the child, and the requirements of justice. § 240(1-b)(c)(7). Case law from both the New York Appellate Term, First and Second Departments has augmented the provisions of § 240 (1-b)(c)(7) by setting forth specific factors that are to be considered in determining whether to award college expenses. These factors include the educational background of the parents and their financial ability to provide the necessary funds, the child's academic ability and endeavors, and the type of college that would be most suitable for the child. More Like This Headnote

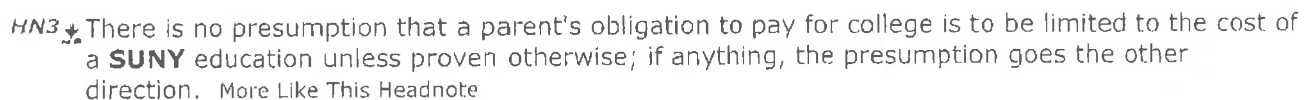
Family Law > Child Support > Obligations > Types > General Overview



HN2 One thing that Domestic Relations Law § 240(1-b)(c)(7) does not provide for is a **SUNY cap.** The **SUNY cap** is a concept that has been judicially created by way of a string of decisions rendered since the enactment of the statute. More Like This Headnote

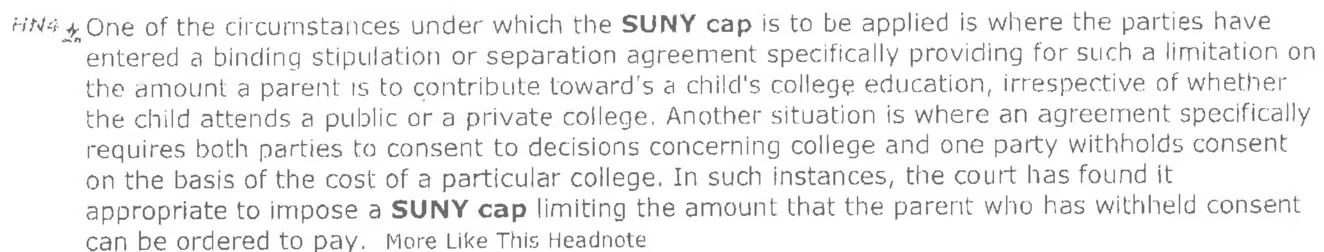
Evidence > Inferences & Presumptions > Presumptions > Creation of Presumptions

Family Law > Child Support > Obligations > Types > General Overview



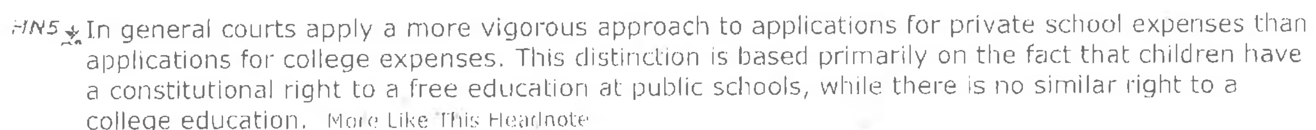
HN3 There is no presumption that a parent's obligation to pay for college is to be limited to the cost of a **SUNY** education unless proven otherwise; if anything, the presumption goes the other direction. More Like This Headnote

Family Law > Child Support > Obligations > Types > General Overview



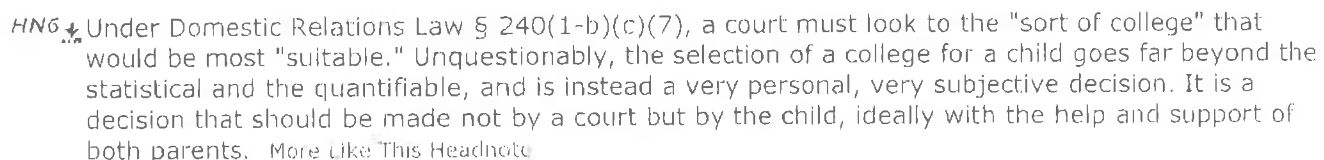
HN4 One of the circumstances under which the **SUNY cap** is to be applied is where the parties have entered a binding stipulation or separation agreement specifically providing for such a limitation on the amount a parent is to contribute toward's a child's college education, irrespective of whether the child attends a public or a private college. Another situation is where an agreement specifically requires both parties to consent to decisions concerning college and one party withholds consent on the basis of the cost of a particular college. In such instances, the court has found it appropriate to impose a **SUNY cap** limiting the amount that the parent who has withheld consent can be ordered to pay. More Like This Headnote

Family Law > Child Support > Obligations > Types > General Overview

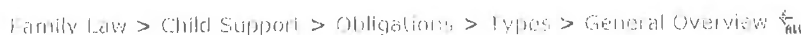


HN5 In general courts apply a more vigorous approach to applications for private school expenses than applications for college expenses. This distinction is based primarily on the fact that children have a constitutional right to a free education at public schools, while there is no similar right to a college education. More Like This Headnote

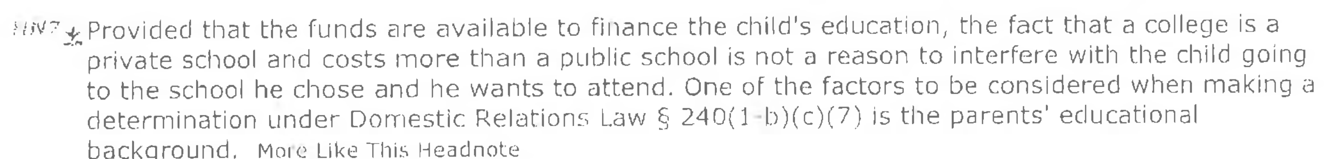
Family Law > Child Support > Obligations > Types > General Overview



HN6 Under Domestic Relations Law § 240(1-b)(c)(7), a court must look to the "sort of college" that would be most "suitable." Unquestionably, the selection of a college for a child goes far beyond the statistical and the quantifiable, and is instead a very personal, very subjective decision. It is a decision that should be made not by a court but by the child, ideally with the help and support of both parents. More Like This Headnote



Family Law > Child Support > Obligations > Types > General Overview



HN7 Provided that the funds are available to finance the child's education, the fact that a college is a private school and costs more than a public school is not a reason to interfere with the child going to the school he chose and he wants to attend. One of the factors to be considered when making a determination under Domestic Relations Law § 240(1-b)(c)(7) is the parents' educational background. More Like This Headnote

Family Law > Child Support > Obligations > Types > General Overview

HN8 There is no basis to impose the **SUNY cap,** to the extent that it should be imposed at all, where the party seeking to invoke the **cap** has the financial ability to contribute towards the actual amount of his or her child's college expenses. More Like This Headnote

Family Law > Child Support > Obligations > Types > General Overview

HN9 With respect to a divorced parent's obligation to contribute to a child's college expenses, a financial burden is not the same as an inability to pay. More Like This Headnote

Civil Procedure > Judicial Officers > Judges > Discretion

Family Law > Child Support > Obligations > Types > General Overview

HN10 The court has the discretion to direct parents to pay the costs of their children's college expenses when the separation agreement or other stipulation between the parents is silent in this respect. Domestic Relations Law § 240(1-b)(c)(7). However, such a directive is premature when college is several years away, the choice of college and the cost of tuition are uncertain, and the child's academic interests and abilities are not supported by evidence. More Like This Headnote

Evidence > Procedural Considerations > Burdens of Proof > Allocation

Family Law > Child Support > Obligations > Modification > Changed Circumstances

HN11 Where a party seeks to modify the child support provisions of an order or judgment, the movant bears the burden of demonstrating an unanticipated and "substantial change in circumstances." Domestic Relations Law § 236(B)(9)(b)(2). In determining whether there has been a sufficient change in circumstances, the court may consider the increased needs of the children, the increased cost of living insofar as it results in greater expenses for the children, a loss of income or assets by a parent or substantial improvement in the financial condition of a parent, and the current and prior lifestyles of the children. More Like This Headnote

HEADNOTES / SYLLABUS

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HEADNOTES

Parent and Child -- Support -- College Expenses -- "SUNY Cap"

1. Defendant father could not invoke a "**SUNY cap**" to limit his contribution to his child's college expenses to no more than what he would have had to pay if the child had opted to attend a school in the State University of New York (**SUNY**) system, rather than the considerably more expensive, private school the child attended. Domestic Relations Law §240 (1-b) (c) (7) confers on courts the discretion to order a parent to contribute to a child's private college education, having regard for the circumstances of the case and of the respective parties and in the best interests of the child, and as justice requires, but without explicit mention of a **SUNY cap**. Factors include the parents' educational background and financial ability and, principally, the type of school that would be best for the particular child; the party opposing the **SUNY cap** need not prove that a private school is better than a comparable **SUNY** school. Here, where no judgment, order or agreement addressed college expenses, the child determined that the private school would be best for him; it offered strong programs in his fields of interest, and special learning groups, which may have assisted the child with his learning disability. The parties both went to private colleges. Finally, although plaintiff mother was wealthier and her share was made higher, defendant had substantial income and assets and had paid only a small amount in basic child support and add-ons. He was obligated to contribute 40% of the total cost of child's private college expenses.

Parent and Child -- Support -- College Expenses

2. Plaintiff mother's motion to compel defendant father to contribute to their 16-year-old child's college expenses was premature, as college was still more than a year and a half away for the child, and it would have been unduly speculative to attempt to assess what the child's college plans and costs would be. While the court has discretion to order parents to pay such expenses (Domestic Relations Law §240 [1-b] [c] [7]), to do so is premature when college is several years away, the choice of college and cost of tuition are uncertain, and the child's academic interests and abilities are not supported by evidence.

Parent and Child -- Support -- Modification -- Change in Circumstances

3. Plaintiff mother was not entitled to modification of defendant father's child support obligations to account for their children's college preparation courses, tutors, and application fees, as those expenses were not new and were not significant, and did not bring about a substantial change in circumstances. The party seeking to modify existing child support provisions bears the burden of demonstrating a substantial change in circumstances, which may include increased needs of the children, increased cost of living resulting in greater expenses for the children, a substantial change in the financial condition of a parent, and the current and prior lifestyles of the children. Here, while plaintiff sufficiently identified the expenses she relied on, they had already been considered in establishing the existing support provisions.

COUNSEL: **[***1]** ***Pamela*** *T.*, plaintiff pro se. *Marc B.*, defendant pro se.

JUDGES: Matthew F. Cooper, J.S.C.

OPINION BY: Matthew F. Cooper

OPINION

[858]** **[*1002]** Matthew F. Cooper, J.

The college application process can be an extremely stressful experience in a young person's life. Not only is there the prospect of living away from home, often for the very first time, and concerns about making new friends and adjusting to a new environment, but there are difficult decisions to be made as to where to apply and then, if accepted, the crucial choice as to which college or university to actually attend. Unfortunately, for the child of a high-conflict divorce, the anxiety surrounding the process is made that much more intense by the child's awareness that his or her choice of a college will provide yet another opportunity for parental strife. In many cases the strife will center on how much the parent who is obligated to pay child support will have to contribute towards the cost of the child's college education. And in New York, the battle is often over what is known as the "**SUNY cap**."

[*1003] This divorce is by every definition high-conflict, and it is one where money has always been a major issue. The parties, both of whom are attorneys, have regularly **[***2]** returned to court since the entry of the judgment of divorce in 2008 to litigate an endless succession of postjudgment motions. This motion, their sixteenth, results from what one would normally assume to be a cause for celebration: the acceptance of their elder child, who has struggled with a learning disability, to Syracuse University and his decision to attend that institution of higher learning. Instead, the parties are before the court because the defendant father insists that he should be able to invoke the **SUNY cap** and not be made to pay any more than he would have had to pay if the child had opted to attend a state-funded public school in the State University of New York (**SUNY**) system, like the State University of New York at Binghamton (**SUNY** Binghamton), as opposed to a non-state-funded private school, like Syracuse.

This motion calls for the court to examine the **SUNY cap** and determine whether it is indeed an actual established tenet of matrimonial law, and if so, when and how it should be applied. Although the **SUNY cap** is often referred to directly in agreements that set forth the parties' responsibilities when it comes to college and is regularly raised during litigation **[***3]** over the payment of college tuition and expenses, there are surprisingly few reported decisions dealing with it. Almost all of the decisions in which the **SUNY cap** is mentioned come from the Appellate Division, Second Department. The Appellate Division, First Department, has not addressed the issue at all and, in fact, there appears to be no First Department case, either at the appellate or trial level, where the term "**SUNY cap**" is used even in passing. As will become clear, the thrust

of this decision is that the **SUNY cap**--to the extent that it stands for the proposition that before a parent can be compelled to contribute towards the cost of a private college **[**859]** there must be a showing that a child cannot receive an adequate education at a state college--is a doctrine that in many cases is harmful to the children of divorced parents, acts to discriminate against them, and is largely unworkable.

Background

The parties were divorced on December 23, 2008. They have two sons, one who is 18 and one who is 16. The judgment of divorce incorporated a custody agreement and a stipulation of **[*1004]** settlement by which the parties had resolved all issues of the divorce except for those concerning child support. **[***4]** The judgment, which was amended on February 26, 2009, also incorporated a decision rendered on August 27, 2007 by another justice of this court ordering defendant father to pay plaintiff mother, who is the custodial parent, the sum of $686 a month as basic child support for the two children as well as 22% of the children's camp, unreimbursed medical, dental and therapy expenses.[1] No mention was made in either the decision, the custody agreement or the stipulation of settlement as to the payment of the children's college tuition and expenses. As a result, both the judgment and the amended judgment of divorce are silent on the matter..

FOOTNOTES

1 The child support award rendered in 2007 was based on defendant's 2005 gross taxable income of $55,222 from his law practice and plaintiff's 2005 gross taxable income of $61,604 in job earnings, $85,858 in capital gains, and $21,187 in tax-exempt interest. Although defendant's income has nearly doubled since that time, he has continued to pay child support at the rate of $686 monthly.

At the end of 2009, when the older child was still in high school and had not yet applied or been accepted to college, plaintiff made a motion seeking the same relief she seeks **[***5]** here with regard to the payment of college expenses. This court, in a decision and order dated August 30, 2010, denied that application, without prejudice, as having been made prematurely.

In 2007, the elder child was diagnosed with "moderate emotional difficulty" and learning/anxiety disorders, which necessitated certain educational accommodations (e.g., extra time for exams). Despite this diagnosis, he graduated in 2011 from Beacon High School, a selective public high school in Manhattan. He was accepted at Syracuse University, **SUNY** Binghamton and **SUNY** Buffalo, along with a number of other schools.[2] Syracuse, which awarded him $3,000 in financial aid, costs approximately $53,000 a year to attend as an undergraduate, while **SUNY** Binghamton and **SUNY** Buffalo cost only about $18,000 a year. Although the child visited Binghamton and gave serious consideration to going there, he ultimately decided to attend Syracuse. He is now a freshman there studying computer engineering and computer graphics.

FOOTNOTES

2 The other schools to which the child was accepted include George Washington University, Rochester Institute of Technology, the University of Maryland, and the University of Delaware.

The younger **[***6]** child is currently a junior at Stuyvesant High School. Stuyvesant is one of the most selective public high **[*1005]** schools in New York City. At this point in the younger child's junior year, he has yet to begin applying to colleges. Inasmuch as most Stuyvesant graduates attend college, it can be reasonably assumed that this child will be college bound at some point.

The parties are both practicing attorneys in New York City. Plaintiff works for the Metropolitan Transit Authority Inspector General's Office and defendant is self-employed as a solo practitioner. Plaintiff's 2010 federal income tax return reports an adjusted gross income of $109,896. Defendant's 2010 federal income tax return reports **[**860]** an adjusted gross income of $105,135. Both parties have savings and retirement accounts, largely as a result of inheritances. Plaintiff's net worth statement shows she has assets of approximately $1,230,000. Defendant's net worth statement shows he has approximately $580,000. Both plaintiff and defendant went to private undergraduate colleges and law schools, with plaintiff graduating from Northwestern University and New York University School of Law, and defendant graduating from Columbia University **[***7]** and Benjamin N. Cardozo School of Law.

The Parties' Contentions

Plaintiff asserts that defendant should be ordered to contribute equally to the cost of sending the older child to Syracuse and the cost of sending the younger child to college when the time comes for him to apply. Specifically, plaintiff requests that defendant be directed to pay one half of the following expenses for both children: all college related tuition, fees, housing, and meal costs, and all college preparation costs including tutors, entrance exam study courses, and application fees.

In opposing plaintiff's motion, defendant does not oppose an order directing him to contribute to his older child's college education, but he asks the court to apply the **SUNY cap** and limit his responsibility to a percentage of the costs of a state university education rather than to a percentage of a private college education. Defendant's position in this regard is based on his claim that he is unable to meet the financial demands of paying for private college and on his belief that his son can receive as good an education at **SUNY** Binghamton as he can at Syracuse. With respect to the younger child's college education, defendant asserts **[***8]** that any determination at this time would be premature and unduly speculative in that the child has yet to reach the college application process. Finally, defendant argues that the law of the case requires that plaintiff's application for **[*1006]** contribution toward college preparation and application fees for both boys be denied as this court has previously denied her application for this relief.

Analysis

I. College Expenses for the Elder Child

[1] Prior to September 1989, a court, "[a]bsent unusual circumstances or a voluntary agreement," was without the authority to order a parent to pay college expenses. (*Samuels v Venegas*, 126 AD2d 145, 151, 513 NYS2d 136 [1st Dept 1987]; *Tannenbaum v Tannenbaum*, 50 AD2d 539, 375 NYS2d 329 [1st Dept 1975].) As society changed and a college education became more a necessity than a luxury, the law changed as well. HN1 The enactment of Domestic Relations Law § 240 (1-b) (c) (7) reflected the legislature's realization of the important role that college played in the lives of our young people and it conferred upon the courts of this state the authority to "direct **[***9]** a parent to contribute to a child's private college education, even in the absence of special circumstances or a voluntary agreement." (*Manno v Manno*, 196 AD2d 488, 491, 600 NYS2d 968 [2d Dept 1993]; *see also e.g. Otero v Otero*, 222 AD2d 328, 636 NYS2d 22 [1st Dept 1995]; *Matter of Ocasio v Smith*, 70 AD3d 952, 953, 895 NYS2d 472 [2d Dept 2010].) The statute provides that when a court exercises its discretion to direct such a contribution from a parent, it is to do so "having regard for the circumstances of the case and of the respective parties and in the best interests of the child, and as justice requires." (Domestic Relations Law § 240 [1-b] [c] [7].) Case law from both the First and Second Departments has augmented the provisions of Domestic Relations Law § 240 (1-b) (c) (7) by setting forth specific factors that are to be considered in determining whether to award college expenses. These factors include the educational background **[**861]** of the parents and their financial ability to provide the necessary funds, the child's academic ability and endeavors, and the type of college that would be most suitable for the child. (*See Rosado v Hughes*, 23 AD3d 318, 806 NYS2d 477 [1st Dept 2005]; *Matter of Naylor v Galster*, 48 AD3d 951, 851 NYS2d 683 [3d Dept 2008]; *Reiss v Reiss*, 56 AD3d 1293, 870 NYS2d 177 [4th Dept 2008].)

To be clear, defendant **[***10]** is not claiming that he should not have to pay anything towards the costs of his son attending Syracuse. His position is that his obligation should be based on what it would cost for his son to attend **SUNY** Binghamton, which is about a third of what it costs to go to Syracuse. Given defendant's concession that some contribution is indeed proper here, **[*1007]** there is no need for the court to determine whether defendant is obligated in the first place to contribute towards his child's college education. Instead, the court can proceed directly to the issue in genuine dispute: whether defendant's obligation to pay for the child's college expenses under Domestic Relations Law § 240 (1-b) (c) (7) should be limited, by way of a **SUNY cap**, to a percentage of the cost of a **SUNY** education.

HN2 One thing that Domestic Relations Law § 240 (1-b) (c) (7) does not provide for is a **SUNY cap**. The **SUNY cap** is a concept that has been judicially created by way of a string of decisions rendered since the enactment of the statute. These decisions, all of which defendant cites in his papers as supporting his position that his obligation to pay for college should be significantly limited, include *Maurer v Maurer* (57 AD3d 548, 869 NYS2d 159 [2d Dept 2008]); *Powers v Wilson* (56 AD3d 642, 868 NYS2d 241 [2d Dept 2008]); **[***11]** *Reiss v Reiss* (56 AD3d at 1294); *Matter of Holliday v Holliday* (35 AD3d 468, 828 NYS2d 96 [2d Dept 2006]); and *Sheridan v Sperber* (269 AD2d 439, 702 NYS2d 894 [2d Dept 2000]). The problem with

these cases is that they provide little in the way of instruction as to when a **SUNY cap** might be properly applied over the objection of the parent who is seeking an award for college expenses. In *Maurer v Maurer*, *Reiss v Reiss*, and *Sheridan v Sperber*, the parent seeking the award apparently had no objection, at least at the appellate level, to the contribution being limited to the cost of a **SUNY** school. In each of the cases, the appeal was taken by the parent who had been ordered to pay college expenses and was objecting to having to contribute anything at all towards the costs of his or her child's college education. Thus, the analysis in *Maurer*, *Reiss* and *Sheridan* centers not on the limitation of the obligation under the **SUNY cap**, but on a parent's obligation to pay for college in general. This is in direct contrast to the situation here, where plaintiff most certainly objects to defendant's obligation being capped at the **SUNY** rate and where defendant is not contesting his obligation to pay for college, but is simply contesting **[***12]** his obligation to pay any amount above the **SUNY** rate.

The two other cases cited above, *Holliday v Holliday* and *Powers v Wilson*, though more applicable to the issue presented here in that they involve the imposition of the **SUNY cap** over the objection of the parent receiving support and at the behest of the parent paying support, are, in the end, no more instructive than *Maurer v Maurer*, *Reiss v Reiss*, or *Sheridan v Sperber*. In *Holliday v Holliday*, the Appellate Division, Second **[*1008]** Department, in reversing the lower court's failure to impose the **SUNY cap**, stated:

> "In the instant case, the Family Court improvidently exercised its discretion in requiring the father to pay approximately 50% of the cost of his daughter's education at a private university ... *Under the circumstances presented* **[**862]** *here*, the father's contribution should have been limited to 50% of what it would annually cost to send his daughter to a college in the State University of New York (hereinafter **SUNY**) system." (35 AD3d at 469 [emphasis added].)

In *Powers v Wilson*, the same court, citing *Holliday v Holliday*, affirmed the lower court's imposition of the **SUNY cap** by stating:

> "*Under the circumstances of this case*, the Supreme **[***13]** Court providently exercised its discretion in requiring the plaintiff to pay only 60% of the highest college tuition charged by the **SUNY** system ... Similarly, the court providently exercised its discretion in requiring the plaintiff to pay for only 60% of the parties' children's overall college expenses." (56 AD3d at 643 [emphasis added].)

Unfortunately, in neither *Holliday* nor *Powers* did the appellate court give any hint as to what those circumstances were that led it to find that one lower court acted improvidently in not imposing the **SUNY cap** and another lower court acted providently in imposing it. Thus, the cases provide little guidance for this court as it attempts to providently exercise its discretion in this instance.

There are, however, a number of Appellate Division, Second Department, cases, all of which again are cited by defendant, that do provide some guidance as to when and when not to base a parent's obligation for college expenses on the **SUNY** rate. In *Berliner v Berliner* (33 AD3d 745, 748, 823 NYS2d 189 [2d Dept 2006]), the court stated as follows:

> "The Supreme Court improperly imposed a so-called '**SUNY "cap"**' on the former husband's contribution to the children's college expenses, limiting **[***14]** his contribution to what it would be if the children attend public New York State colleges. There is no basis in this record for so doing, especially in view of the fact that the children attend private boarding secondary school."

[*1009] The holding in *Berliner* is not directly applicable here in that the child did not go to a private boarding school; he went to a select public high school. It is instructive, however, in two regards. One is that the court's statement that there "is no basis in this record" for imposing the **SUNY cap** implies that the burden falls on the proponent of the **cap** to demonstrate that it is warranted. The inference to be drawn is that HN9 there is no presumption that a parent's obligation to pay for college is to be limited to the cost of a **SUNY** education unless proven otherwise; if anything, the presumption goes the other direction. The second way it is instructive is that the decision's reference to the "*so-called* '**SUNY cap**' " (emphasis added) can be seen as an indication that even the Second Department views the **SUNY cap** as something less than an

established doctrine firmly ensconced in the fabric of family law. At most, it is a concept that comes into play under certain **[***15]** limited circumstances.

HN4 One of the circumstances under which the **SUNY cap** is to be applied is where the parties have entered a binding stipulation or separation agreement specifically providing for such a limitation on the amount a parent is to contribute towards a child's college education, irrespective of whether the child attends a public or a private college. Another situation, and the one that appears to have been addressed most often in the Second Department's cases, is where an agreement specifically requires both parties to consent to decisions concerning college and one party withholds consent on the basis of the cost of a particular college. In such instances, the court has found it appropriate to impose a **SUNY cap** limiting the amount that **[**863]** the parent who has withheld consent can be ordered to pay. (*See e.g. Balk v Rosoff*, 280 AD2d 568, 720 NYS2d 559 [2d Dept 2001]; *Halligan v Wesdorp*, 264 AD2d 466, 694 NYS2d 149 [2d Dept 1999]; *Matter of Collins v Collins*, 222 AD2d 584, 635 NYS2d 655 [2d Dept 1995].)

If there was a provision in the separation agreement or in the judgment requiring plaintiff to obtain defendant's consent as to the choice of the child's college, then *Balk v Rosoff*, *Halligan v Wesdorp* and *Collins v Collins* would **[***16]** be far more relevant to this case. Because there is no such provision, the cases are of limited applicability. Nevertheless, defendant relies heavily on them, citing the cases for the proposition that the **SUNY cap** should be applied where the proponent of private education fails to establish that the private college in question provides a superior education to that of a state college. In so doing, however, defendant is expanding the reach of these decisions far **[*1010]** beyond their particular facts. What defendant has done is seized upon language in the cases that might appear to support his position that if Syracuse University and **SUNY** Binghamton are of similar academic caliber then his contribution should be pegged to what it costs to attend Binghamton.

The language that defendant points to in *Balk v Rosoff* reads: "With regard to tuition, room, and board, Boston University costs over three times more than **SUNY** at Binghamton, while the academic rankings of the two schools are similar." (280 AD2d at 569.) The language he points to in *Collins v Collins* reads: "The petitioner cited no compelling reason why her daughter's best interests were served by her attendance at the private college she attended **[***17]** instead of **SUNY.** She merely noted that State universities were large and intimidating." (222 AD2d at 584.) What defendant fails to note, however, is that these two cases, as well as *Halligan v Wesdorp* (264 AD2d at 467[father's obligation to pay for child's attendance at Marist College held not to exceed the "the tuition and related expenses he would have incurred had (the child) attended **SUNY** at New Paltz"]) were not decided using a Domestic Relations Law § 240 (1-b) (c) (7) analysis of "the circumstances of the case and of the respective parties and in the best interests of the child, and as justice requires." They were all decided within the specific context of there being separation agreements in each case that provided the father with the right to reasonably withhold his consent, on the basis of finances, to the child attending a private college. It bears repeating that there is no such agreement in the instant case. Thus, the analysis applied in *Balk v Rosoff*, *Halligan v Wesdorp* and *Collins v Collins*, which is whether the father in each case unreasonably withheld the consent required under the separation agreement for the child to attend private college, is inapplicable to the situation presented here.

What **[***18]** defendant wants, despite the fact that consent does not come into play here, is for plaintiff to be required to prove that Syracuse is a better school than **SUNY** Binghamton in order for him to be required to pay Syracuse's higher expenses. If this were to happen, the court would be placed in the position of being a kind of judicial college evaluator. For a number of reasons, this is something that this court cannot and will not do. While courts have occasionally been called upon to evaluate the difference between a public and private school education, this has almost always been within the context of private elementary and high school. (*See* **[*1011]** *Matter of Cassano v Cassano*, 203 AD2d 563, 565, 612 NYS2d 160 [2d Dept 1994] ["Moreover, there is nothing in the record which would indicate that the education provided by the private school in question is of better quality than that provided by **[**864]** the public schools"].)[3] To extend this evaluative process to the arena of individual state and private colleges, which is in effect what defendant is advocating, would require a court to take on a role as a "college rating entity," a role normally associated with the college guides published each year, such as U.S. News **[***19]** &World Report: Best Colleges; Barron's, Profiles of American Colleges; Forbes, America's Best Colleges; and The Princeton Review, The Complete Book of Colleges.

FOOTNOTES

3 As stated in Scheinkman, New York Law of Domestic Relations §16:41 (11 West's NY Prac Series 2011):

> HN5 "In general, courts apply a more rigorous approach to applications for private school expenses than applications for college expenses.
>
> "This distinction is based primarily on the fact that children have a constitutional right to a free education at public schools, while there is no similar right to a college education."

Even if the court were willing to enter the college ratings arena, there are no judicially manageable standards to use in a postjudgment divorce proceeding for determining the quality of education a student will receive at Syracuse University as compared to **SUNY** Binghamton, or for that matter as compared to any of the approximately 4,000 other colleges and universities in the United States. One can only imagine weeks of testimony with regard to each school on such things as the SAT scores of the incoming freshman class, the credentials of each faculty member, the success rate of the school's alumni, **[***20]** the quality of campus facilities, the size of the classes and the amount of individual attention a student can expect to receive, and the overall level of satisfaction or dissatisfaction that the student body experiences. And then in order to have persuasive witnesses with the requisite personal knowledge, there is the prospect of the parties calling the admissions director, dean, provost, department chairs, librarian, alumni director, and even students from the particular college that each side is championing as the finer bastion of academic excellence. Under these circumstances, it is difficult to conceive of a workable procedure--let alone a methodology--for a court to make a finding that one college is "better" than another.

It might be fair then to ask why a court just can't "go to the books," as it were, and make its determination based simply on the rankings assigned to a school by the various college guides. **[*1012]** After all, colleges live and die by these rankings, and families of college applicants often come to regard the college guides as veritable bibles. The problem with the guides, however, as the writer Malcolm Gladwell recently observed in his article, *The Order of Things*, **[***21]** in the February 14, 2011 issue of The New Yorker, is that ranking colleges is "an act of real audacity" given the complexity of the matter. As Gladwell explains, popular college ranking entities typically employ methodologies based on evaluators' prejudices that use ineffective proxies for quality, producing rankings systems that essentially measure institutional wealth. Consequently, the guides are of limited evidentiary value, not only because they constitute inadmissible hearsay, but because of the highly subjective nature of their conclusions.

In any event, whether the college rankings are valid or reliable is not really the issue. Nor is the real issue what college or university is considered the best in some general way, or the most highly rated, or the most highly ranked. The real issue is what college or university is the best for the individual child in question in the ways that matter most to that particular child. (*See Rosado v Hughes*, 23 AD3d at 318 HN6 [under Domestic Relations Law § 240 (1-b) (c) (7), a court must look to the "sort of college" that would be most "suitable"].) Unquestionably, the selection **[**865]** of a college for a child goes far beyond the statistical and the quantifiable, and is instead **[***22]** a very personal, very subjective decision. It is a decision that should be made not by a court but by the child, ideally with the help and support of both parents.

Here, the child chose to attend Syracuse University instead of **SUNY** Binghamton because he evidently felt that it would be the better school for him. One of the major reasons given as to why he felt this way and made the decision he did is that Syracuse is the only college to have accepted him that provides strong programs in both of his desired fields of study, computer engineering and computer graphics. An equally important reason is that Syracuse has what are known as Learning Communities, several which focus on science. These Learning Communities, as was explained by plaintiff at oral argument, group students of similar academic interests into specific residences. This type of arrangement would seem to offer the child, who suffers from learning disabilities and social anxiety, an environment designed to help him achieve success both academically and socially.

[*1013] There could be countless other reasons a child, and this child in particular, would choose to go to a private college over a **SUNY** college. One is that private colleges **[***23]** tend to have a geographically diverse student body coming from all the states in the union as opposed to largely coming from New York. Another is that many private colleges will be more likely to have active and organized alumni networks throughout the country, and even the world, that can provide graduates with important business and social connections. Other considerations might include such things as the size of the school, the type of campus, the architectural distinction of the buildings, the nature of its athletic programs, the services provided to students