#### SUFFOLK ACADEMY OF LAW

The Educational Arm of the Suffolk County Bar Association 560 Wheeler Road, Hauppauge, NY 11788 (631) 234-5588

# HOT BUTTON TOPICS IN MATRIMONIAL & FAMILY LAW

#### **Faculty**

Margaret Schaefler, Esq. Hauppauge, NY

Christopher F. Venator, Esq. Ingerman Smith, LLP

Thomas K. Campagna, Esq. Campagna Johnson, PC

Professor Lewis A. Silverman, Esq. Family Law Clinic - Touro Law Center

**Hon. Stephen M. Behar**Suffolk County Acting Supreme Court

Dawn L. Hargraves, Esq.
Quatela, Hargraves & Mari, PLLC

William M. Sullivan, Esq. Long Tuminello, LLP

Hon. Caren Loguercio Suffolk County Family Court

Program Coordinators: Hon. John J. Leo, Hon. John Kelly, Hon. Isabel E. Buse

NOVEMBER 7, 2014 SCBA Center - Hauppauge, NY

### HOT BUTTON TOPICS IN MATRIMONIAL & FAMILY LAW

#### TABLE OF CONTENTS

I.	STUDENT RECORDS, RESIDENCY, HOMELESSNESS & RELATED ISSUES
	Christopher Venator, Esq. & Margaret Schaefler, Esq.

FERPA & Student Privacy 2			
Residency Overview			
Related Issues Concerning Guardianship & Other Non-Traditional Families			
II. ATTORNEY FEES, CHARGING & RETAINING LIENS, FEE AWARDS			
Thomas Campagna, Esq.			
22 NYCRR § 1400 - Procedure for Attorneys in Domestic Relations Matters			
Rules of the Chief Administrative Judge Part 137-Fee Dispute Resolution Program 37			
SCBA Dispute Resolution Program Rules 45			
10th JD Fee Dispute Resolution Packet Dispute Over Attorney's Fees 56			
10th JD Fee Dispute Resolution Packet Dispute Over Refund of Attorney's Fees 76			
NY Rules of Professional Conduct Rule 1.15(c)(4) Payment of Delivery of Property 96			
DR 5-103 [1200.22] Avoiding Acquisition of Interest in Litigation			
NY Judiciary Law Sec 475 - Attorney's Lien in Action, Special Proceeding 101			
Notice of Attorney Charging Lien (for Real Property) to Clerk			
Notice of Charging Lien (to Client and Counsel)			
Sample Order to Show Cause			

#### III. CUSTODY UPDATE

#### Professor Lewis A. Silverman

Custody & Visitation			
Defining Who is a Parent			
IV. POST JUDGMENT APPLICATIONS			
Hon. Stephen Behar			
Post Judgment Part - Applications for Relief	186		
Modification Order			
Instructions for Orders to Show Cause	188		
V. INTERNATIONAL & EXTRA TERRITORIAL TREATIES			
Dawn Hargraves, Esq. & William Sullivan, Esq.			
The Hague Convention	189		
Request for Entry into Children's Passport Issuance Alert Program			
Verified Petition	205		
VI. EVIDENCE ISSUES IN MATRIMONIAL & FAMILY COURT			
PROCEEDINGS	220		
Hon. Caren Loguercio			
VII. FACULTY BIOGRAPHIES	232		

# 2014 MATRIMONIAL AND FAMILY LAW CONFERENCE

Student Records, Residency, Homelessness
And Related Issues

November 7, 2014

#### PRESENTERS:

#### CHRISTOPHER VENATOR, ESQ.

Ingerman Smith, L.L.P. 150 Motor Parkway, Suite 400 Hauppauge, New York 11788

#### MARGARET SCHAEFLER, ESQ.

P.O. Box 834 Babylon, New York 11702

#### **FERPA AND STUDENT PRIVACY**

Family Educational Rights and Privacy Act. 20 U.S.C. § 1232g; see 34 C.F.R. Part 99.

#### a. Introduction

- i. Enacted in 1974 for two purposes:
  - 1. Permit access by parents and students > age 18 to student's educational records; and
  - 2. Restrict access by 3<sup>rd</sup> parties to student records (with limited exceptions).

#### b. Definitions

- i. An "education record" is any record, file, document and other material that:
  - 1. Contains information directly related to a student (information that would make it easy to trace the student's identity); and
  - 2. Is maintained by a school that receives federal funds or by a person acting for such school.

#### ii. What is not an "education record"?

- 1. Records of instructional, supervisory, and administrative personnel and educational personnel ancillary thereto which are in the sole possession of the maker thereof and which are not accessible or revealed to any other person except a substitute
- 2. Records maintained by a law enforcement unit of the school that were created by that unit for the purpose of law enforcement
- 3. In the case of persons who are employed by a school but who do not attend that school, records made and maintained in the normal course of business which relate exclusively to such person in that person's capacity as an employee and are not available for use for any other person
- 4. Records on a student who is eighteen years of age or older, or is attending an institute of postsecondary education, which are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional acting in his/her professional capacity, and which are made, maintained or used only in connection with the provision of treatment to the student, and are not available to anyone other than persons providing such treatment, except that such records can be personally reviewed by a physician or other appropriate professional of the student's choice

- iii. What is "personally identifiable information"?
  - 1. Student's name
  - 2. Name of student's parents/family members
  - 3. Address of student or student's family members
  - 4. Personal identifier, such as SSN or student ID number
  - 5. List of personal characteristics that would make student's identity easily traceable
  - 6. Other information that would make student's identity easily traceable

#### c. General Rules

- i. Apples to all schools that receive funds from the federal government (34 C.F.R. § 99.1)
- ii. Schools cannot deny parents the right to inspect and review the education records of their children
  - 1. If a record contains the information of another student, that information <u>must</u> be redacted prior to allowing the parent to inspect or review the document
- iii. If the student's parents are divorced, both parents have full rights under the Act unless a court order or legally binding document specifically revokes those rights (34 C.F.R. § 99.4)

#### **RESIDENCY OVERVIEW**

#### Plain English summary of relevant residency statutes and regulations:

#### Residency

- Education Law §3202(1): Children over 5 and under 21 are entitled to attend school in the District where they reside. This entitlement ends prior to a student reaching the age of 21 if the student earns a regular high school diploma.
  - □ The term "regular" is important in the context of students with disabilities. A classified student remains eligible for special education programming and services until the earlier of the date a regular high school diploma is earned and the school year in which he/she turns 21. A regular high school diploma includes a Regents or local diploma. It does not include and IEP diploma, the new skills and achievement credential, or a GED.
- 8 NYCRR §100.2(y): Determination of student residency. Ultimately, the Board (or its designee) is responsible for determining if a particular child is a resident. Before making a residency decision, the child's parent/guardian must be provided the opportunity to submit information concerning the child's right to attend the District's schools. Adverse residency determinations made by anyone other than the Board or its designee must include notice of how to have the decision reviewed internally. When the Board or its designee determines that a child is not entitled to attend either as a resident or as a homeless student, the Board or its designee must, within two business days, provide written notice of the decision to the child's parent/guardian. The notice must include:
  - □ that the child is not entitled to attend the District's schools:
  - □ the basis for the determination that the child is neither a District resident nor entitled to attend as a homeless student;
  - □ the date as of which the child will be excluded from the schools of the district; and
  - that the decision may be appealed to the Commissioner of Education pursuant to Education Law §310 within 30 days of the decision, and that the procedure for taking such an appeal may be obtained from the Office of Counsel at www.counsel.nysed.gov, or by mail addressed to the Office of Counsel, New York State Education Department; Office of Counsel; State Education Building; Albany, NY 12234, or by calling (518) 474-8927.

#### General Principles

- Students residing in the district may not be denied admission to school based on their status as undocumented aliens. *Plyer v. Doe*, 457 US 202 (1982).
- Districts may set policies restricting or expanding residency requirements. School districts are not required to enroll non-residents; however, they are permitted to do so with the consent of the Board of Education, pursuant to the terms prescribed by the Board, including payment of tuition. Education Law § 3202(2). School districts that admit non-resident students may not exclude students with disabilities or charge non-resident students with disabilities a higher tuition rate. See Letter to Bocketti, 32 IDELR ¶ 225 (1999).
- The party alleging a change in residence bears the burden of proof. Appeal of Virginia L., Decision No. 12,782.
  - □ To exclude a student, the District must prove that student is no longer a resident) Appeal of Altman, Decision No. 13,183.
  - □ The burden of establishing the residency of students who initially seek enrollment in the district is upon the student and the parent. Appeal of Macchia, Decision No. 16,299. Districts generally have their own policies, forms and affidavits for the purposes of registration. However, districts may have to be flexible under certain circumstances. Appeal of Caldera, Decision No. 13,579.

#### The Two Part Test:

- □ Residency for purposes of Ed. Law §3202 is established based upon two factors: (1) physical presence; and (2) intent to remain in the district. *Appeal of Mearsheimer*, Decision No. 15,402.
- ☐ A child's residency is presumed to be that of his or her parents or legal guardians. Appeal of Willis, Decision No. 15,942.
- □ For purposes of Education Law §3202, a person can have only one legal residence. *Appeal of Marshall*, Decision No. 14,911 (2003).

#### • Temporary Absence

□ Temporary absence does not constitute the abandonment of a permanent residence where actions reflect intent to return to the district. Appeal of J.V., Decision No. 15,218. The Commissioner will consider evidence regarding the family's continuing ties to the community and their efforts to return. Appeal of J.V.; Appeal of Collins, Decision No. 15,103.

#### • Property on the boundary between school districts

- Education Law §3203(1): The owner of taxable property located such that the boundary line between two school districts intersects either the dwelling itself or, if the dwelling is an owner-occupied single family home in the case of an owner-occupied single family dwelling unit, may designate either of the school districts as District of residence that children lawfully dwelling on the property will attend. Those children are entitled to attend as resident students.
- □ Education Law §3203(2): School taxes on the property will be levied and collected without reference to the designation, but the school district that is not designated as the District of residence must pay the designated school district the taxes it collects on the property.

#### Transfer of Custody

- The presumption that a child's residency is the same as his/her parents can be rebutted where it can be shown that parents have relinquished total, and presumably permanent, transfer of custody and control to someone residing within the district. Appeal of L.H., Decision No. 15,947; Appeal of Speckman, Decision No. 15,444.
- The presumption can be rebutted by examining a totality of the circumstances. Catlin v. Sobol, 155 AD2d 24, rev'd on other gnds, 77 N.Y.2d 552 (1991); Appeal of Ambris, Decision No. 12.562.
- Where the parent continues to exercise custody and control of the child and continues to support him or her, the child's residence remains with the parent. Appeal of O.E., Decision No. 14,907. This applies even where the student's parents live outside the country. Appeal of Lee, Decision No. 16,453.
- Where parents retain control over important issues such as medical and educational decisions, total control is not deemed relinquished. *Appeal of Cook*, Decision No. 15,276.
- When a child lives with someone else, an out-of-district parent providing medical insurance is not dispositive of residence. Appeal of D.H.C., Decision No. 15,053. It is not necessarily determinative that the child continues to be covered by the parent's health insurance where there is no indication that providing such coverage requires a financial contribution or involves control over medical care. Appeal of Hardick, Decision No. 14,693.
- Although a formal guardianship proceeding is not required, the guardian must demonstrate that a particular location is a child's permanent residence, and that the individual exercising control has full authority and responsibility with respect to the child's support and custody. Appeal of Wilson, Decision No. 15,773.

- A student may establish residence apart from his parents for other bona fide reasons, such as family conflict or the hardships of single parenting. *Appeal of C.F.*, Decision No. 15,113; *Appeal of Taylor*, Decision No. 14,930.
- In such cases, the mere fact that a child continues to maintain a relationship with a parent who has otherwise relinquished custody and control of the child is not determinative in resolving the question of the child's residence. Mother attending school conferences under these circumstances is not dispositive of failure to give up full custody and control. *Appeal of Taylor*, Decision No. 14,930.
- If a parent does not give up total and permanent control of the child, a determination of non-residency will be respected. The Commissioner determined that when the record shows that a child is living with an individual only until the child is 18 years, a total and permanent relinquishment of custody and control has not been established. Appeal of Ellison, Decision No. 15,437.
- When the parents provide a child with almost all of her needs other than housing, a total relinquishment of custody and control has not been established. *Appeal of James Riccinto*, Decision No. 15,435.
- When the <u>sole</u> reason a child is residing with someone other than the parent is to take advantage of the schools of the district, the child has not established residence. *Appeal of Mendoza*, Decision No. 15,698.
- Power of attorney is in and of itself insufficient to transfer permanent custody and control Appeal of a Student with a Disability, Decision No. 14,926;

#### **Divorced or Separated Parents:**

- Where the parents are divorced or legally separated, the child's residence is presumed to be that of the primary or residential custodial parent
- Where a child's parents live apart, the child can have only one legal residence. Appeal of T.K., Decision No. 14,935.
- Where a court order awards custody to one parent, the child's residence is presumed to be that of the custodial parent. *Appeal of Gurka*, Decision No. 15,072. The presumption may be rebutted.
- In cases where parents have been awarded joint custody and the child's time is "essentially divided" between two households and both parents assume day-today responsibility for the child, the decision regarding the child's residency lies ultimately with the family. Appeal of Hoyt, Decision no. 15,771, Appeal of Striano, Decision No. 15, 651.
- However, when parents claim joint custody but do not produce proof of the child's time being divided between both households, residency is to be determined by the traditional tests of physical presence in the district and the intent to remain there. Appeal of T.K., Decision No. 14,935.

- Where joint custody exists, but the child actually spends a substantial majority of his or her time with a custodial parent outside the district, the child's residence must be determined by the usual considerations, including physical presence in the district and intent to reside in the district. Appeal of Williams, Decision No. 14,756.
- A parent granted legal custody by the court may consent to have the child reside with the noncustodial parent. The child's residence is then with the noncustodial parent. Appeal of Petrie, Decision No. 13,842.

#### Ownership or control of more than one dwelling and temporary arrangements

- For purposes of Education Law §3202, a person can have <u>only one legal residence</u>. The mere fact that one rents or owns a house or property in the district, or even pays taxes in the district, does not necessarily confer residence status. *Appeal of Jones*, Decision No.15,430.
- A residence is not lost until it is abandoned and another is established through action and intent. Appeal of Lin, Decision No. 15,827. Temporary absence does not constitute the abandonment of a permanent residence where actions reflect intent to return to the district.
- A person's temporary absence from one's district of residence does not necessarily
  constitute establishment of a residence in the district where temporarily located or
  abandonment of one's permanent residence. Appeal of Grant, Decision No. 15,607.
- Where an individual claims that her present out-of-district residence is temporary and that she desires to return to the district, evidence should be presented of her trying to secure a residence in-district or of ongoing efforts to find such a residence. Bare assertions of an intention to return to the district, absent evidence demonstrating continuing efforts to secure a residence therein, is insufficient to establish legal residence. Appeal of Marshall, Decision No. 14,911; Appeal of Reeves, Decision No.14,721.
- In ascertaining an individual's intent as to whether a particular living arrangement is indeed temporary, the Commissioner must consider evidence regarding the individual's continuing ties to the community and efforts to return. Appeal of Lawrence, Decision No.15,606.

#### The Standards:

- A residency determination will not be set aside unless it is arbitrary and capricious. Appeal of Russell-Otero, Decision No. 15.975.
- Look to totality of circumstances:
  - A district must be flexible in making residency determinations for families living in non-traditional living arrangements. Appeal of Ravix, Decision Nol 13, 667. School districts "cannot exclude bona fide residents who are unable to produce documents from a prescribed list in an effort to shortcut the case by

case analysis necessary to ascertain a particular student's residency." Appeal of Caldera, Decision No. 13,579.

#### The Procedure:

- The board of education of each school district must appoint, at its annual organizational meeting, a student residency officer. The student residency officer is responsible for rendering final determinations on issues of student residency. The decision of the student residency officer can be appealed to the Commissioner of Education or the Courts. There is no mechanism in the law whereby decisions of the student residency officer are appealed to the superintendent of schools or the board of education.
- Residency determinations are made pursuant to Commissioner's Reg. §100.2(y).
- §100.2(y) provides individuals an opportunity to submit information concerning the child's right to attend school in the district <u>prior</u> to district making a <u>final</u> determination. Appeal of Geithner, Decision No. 15,047.
- The applicant for admission must also be given written notice of the determination that the child is not a district resident. The notice must include: the basis for the determination; the date the child will be excluded; and a statement regarding the right to appeal the determination to the Commissioner.
- The regulation does not require a formal evidentiary hearing or that an individual be represented by counsel. *Appeal of Jones*, Decision No. 15,430.
- Individuals have the right to reapply to the district for admission at any time should circumstances change. *Appeal of Willis*, Decision No. 15,942.
- Failure of individuals to submit proof constitutes a failure to establish residency in accordance with the administrative procedures in §100.2(y). Appeal of Bell, Decision No. 14,625.
- Conclusory allegations, standing alone, are insufficient to rebut or refute district's proof/findings. *Appeal of Conde*, Decision No. 15,711.
- In residency cases, a mistake by a school district in allowing non-resident students to attend its schools does not vest any legal right in such students to continued attendance on a tuition-free basis. *Appeal of Guitierrez*, Decision No. 15,487.

#### **Dual Property Ownership:**

• If a person owns or rents property both within and outside the school district, only one property can be considered one's legal residence. Mere fact that one rents or owns a house or property in the district, or even pays taxes in the district, does not necessarily confer residence status. Appeal of Fietta, Decision No. 16,444; Appeal of Yusupova, Decision No. 15,966.

• Pending home construction, in and of itself, does not establish residency. Petitioner must establish that her family actually resides in the house. *Appeal of Yusupova*, Decision No. 15,966; *Appeal of G.P.*, Decision No. 15,096.

#### **Evidence of Lack of Residency:**

The following are factors that weigh against residency and warrant further investigation. No single factor is determinative.

- Telephone number that is an exchange outside the district. Appeal of Short, Decision No. 14,945.
- No home phone—only cell phone.
- P.O. Box mailing address. Appeal of Bonfante-Ceruti, Decision No. 12,561.
- Mailing address outside of the district. Appeal of Kerrick and Agee, Decision No. 15,338.
- Statements from students they do not reside where their parents claim. Appeal of Harkless, Decision No. 14,566.
- Statements from neighbors that the family does not reside where parents claim. Appeal of J.V., Decision No. 15,218.
- Admissions that the sole basis for students residing with non-parental guardians is to take advantage of the schools in the district. Appeal of Cuesta, Decision No. 14,755.
- Parents driving children to and from school rather than availing themselves of bus pick-up.
- Proof that children reside with non-parental guardian only on school days and reside with parents outside of the district on the weekends.

#### Evidence that Tends to Contradict Custody and Control of Non-Parent Guardian:

The following are factors that weigh against transfer of custody to non-parent:

- Listing of child as dependent on parents' tax returns.
- Parental receipt of child's public assistance checks or child support payments from spouse.
- Parental permission slips, consents, report cards, etc. are being signed by the natural parent rather than the purported guardian.
- Children are only weekday residents with guardian and spend weekend with parents outside of the district.

• Admissions that guardianship arrangement is solely entered into for purposes of allowing the child to attend the district schools. *Appeal of Cuesta*, Decision No. 14,755.

## RELATED ISSUES CONCERNING GUARDIANSHIP AND OTHER NON-TRADITIONAL FAMILIES

Residency determinations often involve questions of who is the legal guardian or *de facto* legal guardianship. These determinations are made in accordance with the following general guidelines in mind:

#### Alleged Guardians and Custodians

- The legal presumption that a child resides with his or her parent may be rebutted when the parents relinquish total and presumably permanent care, custody and control to someone residing within the district. Appeal of C.F., supra; Appeal of Skugor, 44 Educ. Dept. Rep. 1 (2004); Appeal of D.K. and R.S., Jr., 44 Educ. Dept. Rep. 23 (2004).
- For example, in Appeal of Rea, 51 Educ. Dept. Rep. \_\_, Dec. No. 16,271 (2011), the Commissioner explained:

"[A] student may establish residence apart from his or her parents for other bona fide reasons, such as family conflict, economic hardship, or the hardships of single parenting [...]. In such cases, the mere fact that a child continues to maintain a relationship with parents who have otherwise relinquished custody and control of the child is not determinative in resolving the question of the child's residence [Appeal of A Student with a Disability, 47 Educ. Dept. Rep. 142, Dec. No. 15,652]..." (Internal citations omitted).

#### • Improper Intent to Take Advantage of District's Schools

- Where the *sole* reason the child is residing with someone other than a parent is to take advantage of the schools of the district, the child has *not* established residence. *Appeal of Cheng*, 47 Educ. Dept. Rep. 366, Dec. No. 15,726; *Appeal of Mendoza*, 47 Educ. Dept. Rep. 285, Dec. No. 15,698).
- For example, in *Appeal of Skugor*, 44 Educ. Dept. Rep. 1 (2004), the student was to live with an aunt for one year, and then would return to her parents in Brazil. In the registration materials, the aunt said the student's parents would pay for one-half of the student's expenses. The aunt admitted that the purpose of the student coming to live with her was to improve her English prior to going to college. The Commissioner ruled that the student could *not* establish residency solely to take advantage of the district's schools to improve her English.

□ Similarly, the transfer of legal guardianship of a child may not be granted merely to enroll the child in a particular school district. See e.g., In re Diego F., 84 A.D.3d 1373 (2d Dept., 2011); Matter of Proios, 443 N.Y.S. 2d 828 (1981); In re Donti Valentine Peets, 5/29/97 N.Y.L.J. 33, col. 1 (Nassau Surrogates Ct. 1997).

#### Informal Guardianship

- □ As set forth above, the residence of a child is presumed to be that of his or her parent or legal guardian. However, this presumption can be rebutted by evidence that the parent has relinquished total and presumably permanent care, custody and control to another adult who resides in the district.
- A court order or formal guardianship proceeding is <u>not</u> required to establish guardianship. However, there must be a clear transfer of full care, custody and control from the parent to the alleged guardian or custodian. Relevant factors include:
  - ♦ Whether the student intends to remain in the District permanently (since a temporary arrangement is not sufficient);
  - ♦ Whether the current arrangement is the actual and *only* residence (a child can have only one residence);
  - ♦ Whether the parent has relinquished *total* care, custody and control;
  - ♦ Whether the parent continues to provide any financial support (e.g., for room, board, clothing, health insurance and other necessities) for the student.
    - o A continuing relationship and visiting arrangements are permissible, as long as parents no longer provide support or have any control.
  - For students who are beyond the compulsory school age, whether the student is an "emancipated" student;
  - ♦ Whether there is a demonstrated family conflict (which may be sufficient but is atypical);
  - ♦ Whether the parent continues to make any educational, medical or legal decisions (since this demonstrates that the parent still retains control of the child); and
  - ♦ Whether the parent admits that the reason for the transfer is to take advantage of the District's school (which is not permissible).

- □ For example, evidence of a guardian's complete custody, care and control would include such things as evidence that the guardian claims the child as a dependent for tax purposes (*Appeal of G.M-H.*, Dec. No. 15,447 [2006]); and/or that the guardian is fully responsible for providing the child with food, shelter, clothing, financial support and health insurance.
- School districts may not require a formal court order as a prerequisite to admission. Rather, it is only necessary to "demonstrate that a particular location is a child's permanent residence, and that the individual exercising control has full authority and responsibility with respect to the child's support and custody." In other words, the district must apply the traditional residency test of: (1) physical presence in the district; and (2) intent to remain there.

#### • Court-Ordered Guardianship

□ If presented with a court order of guardianship or custody (regardless of whether the order is temporary or final), districts must honor the order and admit the student as a resident, as long as the student is actually residing in the same household with the court-appointed guardian or custodian within the District. Appeal of D.R., 45 Educ. Dept. Rep. 550 (2006).

#### Foreign Students Living with Nonparents

- ☐ At the time of registration, districts should not ask about a student's immigration status or Social Security number. Rather, focus on whether the student can satisfy the traditional two-part test of residency.
- □ Back in 1982, the U.S. Supreme Court recognized that children who are undocumented immigrants cannot be denied a free public education if they are as a factual (rather than legal) matter district residents. Plyler v. Doe, 457 U.S. 202 (1982).
- According to the Commissioner, a child living in the school district under a business/pleasure visa may still establish an "intent to remain" for residency purposes, even though one of the conditions for securing the visa is that the visa-holder must express the intent to return to his home country upon its expiration. Appeal of Plata, 40 Educ. Dept. Rep. 552 (2001).
- ☐ However, in Appeal of Plata, based on the totality of circumstances, and despite a nonimmigrant visa, the Commissioner found sufficient evidence of the petitioner's intent to remain. The Commissioner explained:

In sum, it is my conclusion that the State has not included any consideration of federal immigration status in Education Law §3202(1), for purposes of establishing a nonimmigrant child's residence in a school district, and a school district may not impose an irrebutable presumption that the holder of a nonimmigrant visa cannot

be a resident of the school district. Instead, the child's status should be determined in accordance with the traditional two-part test for residency. The fact of the nonimmigrant visa and the assurances made by the nonimmigrant at the time the visa was issued are factors that may be taken into consideration, together with other factors relevant to residency, in making the residency determination. The nonimmigrant should be afforded the opportunity to show that he or she currently meets the traditional two-part test of physical presence as an inhabitant within the district and an intent to reside in the district.

• Recent Guidance from the State Education Department ("SED"): According to SED, "school districts may not deny resident students a free public education on the basis of their immigration status, as long as they meet the age and residency requirements established by state law."
See SED Memorandum, "Student Registration Guidance" (2010), available at: <a href="https://www.pl2.nysed.gov/sss/pps/residency/studentregistrationguidance082610.pdf">www.pl2.nysed.gov/sss/pps/residency/studentregistrationguidance082610.pdf</a>. Note, SED does not require districts to collect student social security numbers for any purpose, but does require some background-related information <a href="majorated-after

#### Students Placed by Social Services

- For a nonresident student placed in a family home by a social services district or state department or agency, the cost of instruction must be paid by the district in which the student resided at the time the agency assumed responsibility for the student's support. See N.Y. Educ. Law §3202(4)(a).
- However, when the family or foster care home is the actual and only residence of the student and the student is not supported and maintained by the government agency (e.g., Department of Social Services, OCFS, etc.), then the student is considered a resident of the district in which the family home is located, and no tuition may be charged. See N.Y. Educ. Law §3202(4)(b).

#### Students in Private Childcare Institutions

- Children who are privately placed in child care institutions are *not* entitled to attend school tuition free in the school district where the institution is located *unless* they are bonafide residents of that district.
- Children living in such child care institutions are not automatically deemed residents of the school district in which a private child care institution is located merely because they attend such institution. See N.Y. Educ. Law §§3202(6) and 4002; Bd. of Educ. of the Garrison UFSD v. Greek Archdiocese Inst. of St. Basil, 18 N.Y.3d 355 (2012).

#### **Emancipated Students**

- A student may rebut the legal resumption that his or her residence is with a parent is by establishing "emancipated" status.
- An "emancipated" student must:
  - ☐ Be beyond the "compulsory school age" (in accordance with applicable law and school district policy);
    - ♦ Children must attend school until the last day of the school year (July 1 June 30) in which they turn 16. See N.Y. Educ. Law §3205(1). However, a school board can require unemployed minors to attend school until the last day of the school year in which they turn 17. See id., §3205(3).
  - □ Live separate and apart from his or her parents in a manner that is inconsistent with parental custody and control;
  - ☐ Receive no financial support from his or her parents; and
  - □ Have no intent to return home. See e.g., Appeal of Swezey, 39 Educ. Dept. Rep. 81 (1999).
- According to the Commissioner, a student who is at least 16 years old may choose
  where he or she wants to live, and the parent cannot compel his or her return. See
  Appeal of Deborah V., 29 Ed Dept Rep 176 (1989).

#### RECENT CASES

- In Appeal of G.G., 52 Educ. Dept. Rep. \_\_\_, Dec. No. 16,397 (2012) (Commissioner upheld nonresidency determination notwithstanding guardianship order)
  - □ <u>Applicable Law</u>: Where a court assigns guardianship to someone other than the natural parents, the children may continue to have a relationship with their natural parents. However, the children must still actually live in the same household with the guardian and within the school district.
  - Facts: While this outcome is rare, the Commissioner upheld the District's nonresidency determination despite the fact that the petitioner, G.G., had obtained legal guardianship of her granddaughters, N.G. and P.G. In this appeal, petitioner challenged the District's determination that both students were nonresidents because they actually lived with their natural parents outside the District, in Clarence Center, rather than in the Williamsville District with petitioner, their legal guardian. Note, the older student, N.G., graduated while this matter was pending.

Here, the Commissioner found that the District's evidence of nonresidency was persuasive. First, the District conducted surveillance on six dates between April 2 and 26, 2012. On four school mornings, an investigator observed P.G. leave the Clarence Center residence with an adult female in a white car registered to P.G.'s father and being driven to the middle school. On two weekday evenings and one Sunday afternoon, that car was observed in the driveway of the Clarence Center residence. Although surveillance was conducted at petitioner's address on only one day on March 29, 2012, P.G. was not observed there.

Second, the District also provided evidence indicating that the natural parents — not petitioner — had submitted a document to the District on P.G.'s behalf, and had used the natural mother's cell phone as the contact number on another document on file with the District. While petitioner claimed to support the students and provide food, shelter and clothing for them, petitioner submitted no evidence to substantiate such claims or to respond to the District's nonresidency evidence. Accordingly, the Commissioner upheld the District's nonresidency determination.

- In Re Bianca B., 2012 N.Y. Slip Op. 05629 (2d Dept., 2012) (Appellate Division, Second Department, granted a district's motion to dismiss a guardianship petition that was filed for the improper purpose of enrolling petitioner's grandchild in the district's public schools)
  - Applicable Law: Generally, a child's residence is presumed to be that of his or her parents or legal guardians. This legal presumption can be rebutted when there is a total and presumably permanent transfer of care, custody and control to someone residing within the district. While it is not necessary to obtain a formal guardianship order, it is necessary to demonstrate that a particular location is a child's permanent residence, and that the alleged guardian has full authority and responsibility with respect to the child's support and custody. Where a child is residing with a non-parent solely to take advantage of the school district, the child has not established residency. Similarly, in Family or Surrogate's Court, guardianship may not be awarded for the purpose of promoting the educational wishes of a parent or student. See In re Diego F., 84 A.D.3d 1373 (2d Dept., 2011); Matter of Proios, 443 N.Y.S.2d 828 (1981).
  - ☐ Facts: In 2010, a district determined that the student, Bianca B., was not entitled to attend the district's schools because she was not a bonafide resident. While the student's grandmother (i.e., petitioner) resided in the district, she was not the student's legal or de facto guardian (since the student's natural mother continued to provide care, control and financial support). Petitioner appealed to the Commissioner and requested an interim stay order, which was denied on January 25, 2011.

Petitioner then circumvented the pending Commissioner's appeal by filing a custody petition in Family Court and obtaining temporary guardianship. The District filed a motion to intervene in the guardianship matter in order to assert its determination that the student was a nonresident. The Family Court granted a temporary guardianship order while the matter was pending and, on August 29, 2011, the Commissioner dismissed the residency appeal as moot based upon the *temporary* guardianship order. See Appeal of Albany, 51 Educ. Dept. Rep. \_\_, Dec. No. 16,296 (2011).

On September 14, 2011, over the district's objection, Family Court granted the request for permanent guardianship. On October 19, 2011, the district appealed. On appeal, the district continued to argue that guardianship must be denied because: (1) it was intended solely to promote the educational wishes of petitioner, the student and her parents, to the District's detriment; (2) it was not in the student's best interest to be permanently removed from the legal custody of her natural parents; (3) Family Court misunderstood the legal standard and misapplied it to the facts; and (4) guardianship orders for student residency purposes violate the State's public policy.

In 2012, the Appellate Division reversed the guardianship order – both "on the facts and in the exercise of discretion," – denied the guardianship petition and dismissed the entire proceeding. The Court agreed that "the Family Court improvidently exercised its discretion in granting the petition for guardianship." The court also agreed that "the record does not show that the subject child's best interests would be served by transferring guardianship from the child's parents to the petitioner, her grandmother." *Id.*, (citing Matter of Diego F. [Magno V.], 84 A.D.3d 1373; Matter of Proios, 111 Misc.2d 252, 253). As a result of the decision, legal custody of the student reverted to her natural parents, who both admittedly reside outside the district. Therefore, the student was no longer entitled to attend the district's public schools.

#### • In re D.F., 37 Misc 3d 1216(A) (NY Fam Ct. 2012)

- □ Applicable Law: As set forth above, legal guardianship may not be awarded for the purpose of promoting the educational wishes of a parent or student. See In re Bianca B., 2012 N.Y. Slip Op. 05629 (2d Dept., 2012); In re Diego F., 84 A.D.3d 1373 (2d Dept., 2011); Matter of Proios, 443 N.Y.S.2d 828 (1981).
- □ Facts: The district opposed a guardianship petition on the grounds that the petitioner-grandmother only filed her petition for guardianship after the district had denied the family's request to enroll the child, D.F., in the district's public schools. However, the Court held that the existence of "extraordinary circumstances" warranted the assignment of a guardian (namely, the deep familial bond that had developed between D.F. and petitioner-grandmother throughout the student's childhood), and that assignment of petitioner-grandmother as such guardian was in the student' best interest.

### WHO IS HOMELESS? MCKINNEY-VENTO AND EDUCATION LAW § 3209

McKinney-Vento Homeless Education Assistance Improvements Act of 2001 (McKinney-Vento), 42 U.S.C. § 11301 et seq., New York Education Law § 3209, Regulations of the Commissioner of Education, 8 NYCRR § 100.2(x)

Homelessness is a lack of permanent housing resulting from extreme poverty or from the lack of a safe and stable living arrangement. Students in temporary housing may be eligible for assistance pursuant to McKinney-Vento and/or Education Law § 3209 if they meet the eligibility criteria.

<u>Definition of homeless child or youth</u>: 42 U.S.C. § 11434(a)(2); Education Law § 3209; 8 NYCRR § 100.2(x)(1) define a homeless child or youth as -

- a child or youth who lacks a *fixed*, *regular*, and *adequate* night-time residence, including a child or youth who:
  - □ shares the housing of other persons due to a loss of housing, economic hardship or a similar reason;
    - ♦ Note Districts must take care to distinguish between a family sharing housing for convenience from a family sharing housing out of necessity. Examples:
      - o Appeal of E.M.F., Decision No. 16,538 (2013) (Parent's decision to live out of district in sister's home so that she could afford to pay older son's private college tuition on her "reduced" annual salary of \$140,000 does not constitute the kind of economic hardship or sharing the dwelling of others contemplated by McKinney-Vento).
      - o Appeal of K.W., Decision No. 15,912 (2009) (Apartment in friends' home in which family lived for over 2 years constituted fixed, regular nighttime residence, and was separate unit therefore family was not sharing housing of others).
  - □ lives in motels, hotels, trailer parks, or camping grounds, due to the lack of alternative adequate accommodations;
  - □ lives in a car park, public space, abandoned building, substandard housing, bus or train station or similar setting;
  - □ is abandoned in hospitals;

- □ is awaiting foster care placement
  - Note Children already placed in foster care do not fall under the definition of a homeless child.
     8 NYCRR § 100.2(x)(1)(i)(c); or
- is a migratory child ... who qualifies as homeless under any of the clauses above or any of the clauses below in paragraph 2.
- a child or youth who has a primary nighttime location that is:
- a supervised publicly or privately operated shelter designed to provide temporary living accommodations ...; or
- a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings ....

#### Other Definitions:

#### • Designator:

- □ the parent or person in parental relation to a homeless child; or
- □ the homeless child, together with the homeless liaison designated under 8 NYCRR § 100.2(x)(7)(iii) , where applicable, in the case of an unaccompanied youth; or
- the director of a residential program for runaway and homeless youth established pursuant to article 19-H of the Executive Law, in consultation with the homeless child, where such homeless child is living in such program. 8 NYCRR § 100.2(x)(1)(ii)(a-c).
- School district of origin: the school district within the State of New York in which the homeless child was attending a public school on a tuition-free basis or was entitled to attend when circumstances arose which caused such child to become homeless, which is different from the school district of current location. 8 NYCRR § 100.2(x)(1)(iii).
- School district of current location: the public school district within the State of New York in which the hotel, motel, shelter or other temporary housing arrangement of a homeless child, or the residential program for runaway and homeless youth, is located, which is different from the school district of origin. 8 NYCRR § 100.2(x)(1)(iv).
- Regional placement: means a comprehensive regional approach to the provision of educational placements for homeless children that has been approved by the commissioner. 8 NYCRR § 100.2(x)(1)(v).

- Choice of district: The designator may select which school district a homeless child may attend from the following:
   School district of origin;
  - ☐ School district participating in regional placement plan.

School district of current location; or

• <u>Homeless Liaison</u>: School districts must appoint a homeless liaison to facilitate the enrollment of homeless students, and, in the event of enrollment disputes, provide assistance to the child/family in the appeal process.

#### Enrollment:

- Immediate enrollment: Homeless children must be immediately enrolled in the school selected, regardless of whether the child lacks records normally required for enrollment, such as previous academic records, medical records, proof of residency or other documentation. 8 NYCRR § 100.2(x)(4)(ii).
- <u>Placement</u>: School districts must either continue the student's education in the school of origin, or enroll the child in the appropriate public school in the school district of current location, depending upon which has been designated by the Designator.
  - ☐ In determining the child's best interest, the school district must, to the extent possible, keep the children in the school of origin, unless it is against the wishes of the parent or guardian. 8 NYCRR § 100.2(x)(7)(b).
  - □ The designation of placement should be made on forms specified by the Commissioner, and the names of the child, the parent/persona in parental relation, name and location of temporary housing arrangement, name of school district of origin, name of school district where child's records are located, and complete address where family was located when the child became homeless.
    - ♦ For a child living in a facility operated/approved by a social services district or a facility for runaway and homeless youth, the facility must assist the designator in completing the forms.
  - ☐ The extent to which it is feasible to place a homeless child or youth in the school of origin depends on:
    - ♦ The child's age;
    - ♦ The distance of a commute and its impact on the child's education;
    - Personal safety issues;

- ♦ The child's need for special education and related services;
- ♦ The length of the child's anticipated stay in a temporary shelter or other temporary location; and
- ♦ The time remaining in the school year.
- □ Students are permitted to remain in their schools of origin for the duration of their homelessness, as well as through the end of any academic year in which they become permanently housed.
- □ Children who become homeless in between academic years are entitled to attend their school of origin for the following academic year.
- □ Upon enrollment, the school district should request a copy of the child's records from the school district where they are located.
  - ♦ Immunizations: If the child needs to obtain immunizations or medical records, the parent/person in parental relation should be referred to the homeless liaison who should assist in obtaining immunizations or records.

#### **Transportation**

- Provided by entities other than school district:
  - □ For homeless children placed in temporary housing arrangements outside the designated district of attendance, children eligible for benefits pursuant to Social Services Law § 350-j are transported by the social services district. Education Law § 3209(4)(a).
  - □ For homeless students in a residential program for runaway and homeless youth outside the designated district of attendance, the Office of Children and Family Services is responsible for transportation. Education Law § 3209(4)(b).
- Provided by school district: In all other cases, the designated district is responsible for providing transportation. Where the student is attending the district of current location, the student is entitled to transportation on the same basis as resident students. Education Law § 3209(4)(d).
- <u>Distance limitation</u>: Unless the Commissioner certifies that transportation in excess of 50 miles is in the best interest of the child, school districts are not required to transport a homeless child or youth beyond that distance. Education Law § 3209(4)(c).

- Note: If a student becomes permanently housed, transportation is no longer required, even if the student has a continued right to attend school. For example, if a student is attending school in his school district of origin, and being transported there from a shelter, but the family obtains permanent housing during the school year, the student may continue to attend school in the district of origin for the remainder of the school year. However, transportation is no longer mandatory.
- Children whose family was evicted from home in Lansingburgh CSD continued enrollment in district as homeless children. After family became permanently housed in Albany, District informed parent that children were entitled to attend for remainder of school year, but would no longer be transported to school. Appeal of T.C., Decision No. 16,502 (2013).
- Child who voluntarily left father's home and moved out-of-district was not homeless, and therefore not entitled to transportation. Appeal of A.F., Decision No. 16,395 (2012).

#### **Dispute Resolution**

- Where the district decides that a homeless child should attend a school other than the school of origin or the school requested by the designator, or the district determines that the child is <u>not</u> homeless, the district must provide a written explanation of the rights of appeal to the parent or guardian and student.
- Even when a dispute is pending, the school district must immediately admit a homeless student in the student's school of choice and provide a written explanation of the rights of appeal to the parent, guardian and student. See 8 NYCRR § 100.2(x)(7). The school district must:
  - □ Continue the child's enrollment for a period of 30 days from the date the decision is made, to afford the parent/person in parental relation time to bring an appeal to the Commissioner of Education.
  - ☐ Explain that the homeless liaison will assist in the preparation of the appeal upon request.
  - ☐ Provide the form petition for commencing an appeal to the Commissioner.
  - ☐ The homeless liaison will accept service of the petition and transmit the petition to the Commissioner.
    - If an appeal is filed, stay any exclusion or other action until the Commissioner acts on any stay request.
      - o If the Commissioner grants a stay request, the District cannot take any action to exclude the child or change

- enrollment/transportation depending upon what has been appealed.
- o If the Commissioner denies a stay request, the District can act upon its decision.
- o If no appeal is filed, the District can act upon its decision after 30 days.
- o Note: On at least 2 occasions, after the Commissioner has denied a stay request, the family involved, with the assistance of the National Center on Poverty and Homelessness and probono counsel, brought actions in United States District Court seeking emergency relief and challenging New York's implementation of McKinney-Vento. In each of these instances, emergency relief was granted, permitting the children's continued enrollment despite the Commissioner's denial of a stay request. In both cases, the school districts had determined that the family involved was not homeless, and had followed New York State law in seeking the exclusion of the children.

#### Recovering from disaster - Irene, Sandy and other issues

- Is the family homeless?
  - ☐ Is the family living in a fixed, regular, adequate nighttime dwelling? Look to the definition of homeless to decide.
  - □ Shelter, trailer, hotel, sharing relative's home in cramped quarters with insufficient space likely entitled to the protections of McKinney-Vento.
  - □ Renting a suitable apartment or home during reconstruction likely not homeless.
- Even if a family is not homeless, the family may remain residents, even if temporarily located outside the district's boundaries.
  - □ As noted by the Commissioner of Education in *Appeal of Lin*, Decision No. 15,827 (2008) (internal citations omitted):
    - ♦ A residence is not lost until it is abandoned and another is established through action and intent.
    - ♦ A person's temporary absence from a school district of residence does not necessarily constitute either the establishment of a residence in the district where one is temporarily located, or the abandonment of one's permanent residence.

- ♦ To determine one's intent as to whether a living arrangement is indeed temporary, the Commissioner must consider evidence regarding the family's continuing ties to the community and their efforts to return.
- ☐ For example, a family in the process of rebuilding a home after a fire where there are building permits, evidence of construction work, etc. retains residency where the dwelling is located.
- On the other hand, a family that purchases or rents a dwelling elsewhere, and shows no evidence that the original dwelling will be/is being rebuilt, has abandoned the original residence and established a new one.
  - ♦ One year after parent began living with his father after Hurricane Irene flooded his home, District of Origin excludes children on the basis that the family had a fixed, adequate nighttime dwelling that was neither temporary nor transitional. Commissioner upheld the District's exclusion. Appeal of T.B., Decision No. 16,521 (2013).
  - ♦ Although family home had been destroyed by fire, family moved and remained in rental home for more than one year thereafter. As there was no evidence that the rental was temporary, transitional or otherwise inadequate, the Commissioner held that the family's exclusion from the district where the destroyed house had been located was proper. Appeal of G.S. and M.S., Decision No. 16,388 (2012).

#### Other decisions of note

- Parents disagree about status: Father tells District that family has been evicted from home and is temporarily staying with in-laws in a nearby school district. Children are transported and continue to attend district of origin. Mother later expresses her surprise to the District, and states that family is permanently living with her parents. District's determination that family is not homeless upheld. Appeal of E.R., Decision No. 16,560 (2013).
- <u>Subsidized Apartments</u>: Children who live with a parent in an apartment subsidized by a federal program that provides rental assistance grants and does not require that grant recipients leave their home when the grant expires have an adequate fixed regular nighttime residence. *Appeal of D.R.*, 43 Educ. Dep't Rep. 133, Decision No. 14,944 (2003).
- Month-to-Month Rental: Rental housing on a month-to-month basis does not automatically qualify the housing as temporary or transitional, and the renter homeless, absent evidence of a need to vacate such premises. Appeal of M.W., 46 Educ. Dep't Rep. 151, Decision No. 15,471 (2006).

• <u>Potential Eviction</u>: Family that lost housing but obtained new rental apartment is not homeless by virtue of allegation that family might be evicted because property is in foreclosure. *Appeal of S.B.*, Decision No. 15,786 (2008).

#### • Family obtains new housing:

- □ Where family obtains adequate, permanent dwelling, even after condemnation of original home, family is not homeless. *Appeal of L.F.*, Decision No. 15,617 (2007).
- □ Although family home was destroyed by fire, family was not homeless where they resided in same rental dwelling for 3 years thereafter. *Appeal of G.S. and M.S.*, Decision No. 16,388 (2012).

#### • Sharing housing of others:

- □ Where mother and child live with grandparent for a few years, there was no evidence that dwelling is inadequate or that there was any time limit on duration they could remain, exclusion for lack of residency and/or homeless status upheld. Appeal of A.W., Decision No. 16,559 (2013).
- □ Where mother and children live at home of brother and children have own bedrooms, mother and children are not homeless. *Appeal of C.D.*, Decision No. 16,402 (2012).
- □ Where mother and son moved to out-of-district dwelling where other family members also resided, mother and son were not homeless where there was no demonstration that new residence was temporary, transitional or inadequate. Appeal of A.N.Z., Decision No. 16,537 (2013).
- □ Mother and child, living with relative for over 6 months, but who each have own bedrooms, are not homeless. *Appeal of D.S.*, Decision No. 16,503 (2013).
- Despite eviction and claim that house where parent and child were residing was inadequate to accommodate all the family members living there, exclusion of family upheld because parent did not meet burden to demonstrate that dwelling was temporary or transitional or that dwelling (the home of the parent's parents) was inadequate. Appeal of K.L. Decision No. 16,536 (2013).
- □ Parent's decision to live out of district in sister's home so that she could afford to pay older son's private college tuition on her "reduced" annual salary of \$140,000 does not constitute the kind of economic hardship or sharing the dwelling of others contemplated by McKinney-Vento. Appeal of E.M.F., Decision No. 16,538 (2013).

- □ Where mother and children moved into brother's home due to alleged domestic abuse, family was not homeless because brother's home was not temporary or inadequate. *Appeal of C.D.*, Decision No. 16,402 (2012).
- □ Where family moved in with parent's mother after selling home to avoid foreclosure, family could not be considered homeless where dwelling was neither temporary nor inadequate. Appeal of a Student with a Disability, Decision No 16,404 (2012).
- Joint custody, and child shifting between parents' homes: Where student's living arrangements shifting between the homes of his mother and father were of his own volition, student was not sharing housing of others due to economic hardship or similar reason. Further, where neither parent met criteria for homelessness, student did not either. Appeal of a Student with a Disability, Decision No. 16, 557 (2013).
- Allegation of homelessness only raised on appeal: For issue to be properly before Commissioner, it must have been raised to the school district, and not only before the Commissioner. Appeal of J.H., Decision No. 16,376 (2012).
- Trailer Parks and Camping Areas: Students living with their families in trailer parks
  and camping areas should only be considered homeless if they lack adequate living
  accommodations. Those living in trailer parks and camping areas designed for longterm stays in adequate accommodations should not be considered homeless.
- See SED's Revision to Q & A on Education of Homeless Students available at: http://www.nysteachs.org/media/ INF\_SED\_REV\_QA\_Jun04.doc

#### **Unaccompanied Youth:**

- An unaccompanied youth is a child who is both homeless and not in the physical custody of a parent or legal guardian. 8 NYCRR §100.2(x)(1)(vi).
  - □ Examples:
    - ♦ Runaways:
    - ♦ Students living in shelters, abandoned buildings, cars, on the streets, or in other inadequate housing;
    - ♦ Students who have been denied housing by their families;
    - ◆ Unwed mothers who live in a home for unwed mothers and have no other housing available; See SED's Revision to Q & A on Education of Homeless Students available at: http://www.nysteachs.org/media/INF\_SED\_REV\_QA\_Jun04.doc.

- □ Local Liaison should follow the same procedures for homeless children when placing these children. 8 NYCRR 100.2(x)(7)(iii). For additional information regarding the duties of the liaison, see SED's Revision to Q & A on Education of Homeless Students available at: http://www.nysteachs.org/media/INF\_SED\_REV\_QA\_Jun04.doc.
  - ♦ The term does not include a child living with someone other than a parent or guardian solely to take advantage of the District's schools. 8 NYCRR §100.2(x)(1)(vi); Appeal of D.R., 48 Educ. Dep't Rep. 60, Decision No. 15,793 (2008).
  - ♦ Child living with grandmother, where evidence does not demonstrate that mother's out-of-state residence is inadequate or that current living arrangement is temporary or transitional is not a homeless unaccompanied youth. *Appeal of L.P.*, Decision No. 16,107 (2010).
  - ♦ Where child's mother has adequate 2-bedroom apartment, but child has consistently lived with another family in a fixed, adequate nighttime dwelling, the child does not meet the definition of homeless. Appeal of J.U., Decision No. 16,095 (2010).
  - ♦ A child living with her elder sister's family in a 4-bedroom home outside her District of Residence is not a homeless unaccompanied youth. *Appeal of D.R.*, Decision No. 15,793 (2008).
  - ♦ The term "unaccompanied youth" does not automatically include a child who leaves his/her parents' home. In Appeal of G.D. and T.D., Decision No. 15,298 (2005), the Commissioner found that the child was not an unaccompanied youth because there was no evidence that indicated that the child was forced to leave his parents' home or that he could not return to it if he so chose.

# ATTORNEY FEES, CHARGING & RETAINING LIENS, FEE AWARDS

Thomas Campagna, Esq.

# 22 NYCRR § 1400 Procedure for Attorneys in Domestic Relations Matters

## NYCOURTS.GOV

#### The Law - Divorce Resources

#### PROCEDURE FOR ATTORNEYS IN DOMESTIC RELATIONS MATTERS

#### 22 NYCRR § 1400

- 1400.1. Application.
- 1400.2. Statement of Client's Rights and Responsibilities,
- 1400.3. Written Retainer Agreement.
- 1400.4. Nonrefundable Retainer Fee.
- 1400.5. Security Interests.
- 1400.6. [Repealed.]
- 1400.7. Fee Arbitration.

#### 1400.1. Application.

This Part shall apply to all attorneys who, on or after November 30, 1993, undertake to represent a client in a claim, action or proceeding, or preliminary to the filing of a claim, action or proceeding, in either Supreme Court or Family Court, or in any court of appellate jurisdiction, for divorce, separation, annulment, custody, visitation, maintenance, child support, or alimony, or to enforce or modify a judgment or order in connection with any such claims, actions or proceedings. This Part shall not apply to attorneys representing clients without compensation paid by the client, except that where a client is other than a minor, the provisions of section 1400.2 of this Part shall apply to the extent they are not applicable to compensation.

#### 1400.2. Statement of Client's Rights and Responsibilities.

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

## UNIFIED COURT SYSTEM OF THE STATE OF NEW YORK STATEMENT OF CLIENT'S RIGHTS AND RESPONSIBILITIES

Your attorney is providing you with this document to inform you of what you, as a client, are entitled to by

law or by custom. To help prevent any misunderstanding between you and your attorney please read this document carefully.

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

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

You are entitled to an attorney who will be capable of handling your case; show you courtesy and consideration at all times; represent you zealously; and preserve your confidences and secrets that are revealed in the course of the relationship.

You are entitled to a written retainer agreement which must set forth, in plain language, the nature of the relationship and the details of the fee arrangement. At your request, and before you sign the agreement, you are entitled to have your attorney clarify in writing any of its terms, or include additional provisions.

You are entitled to fully understand the proposed rates and retainer fee before you sign a retainer agreement, as in any other contract.

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

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

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

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

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

At your request, and after your attorney has had a reasonable opportunity to investigate your case, you are entitled to be given an estimate of approximate future costs of your case, which estimate shall be made in good faith but may be subject to change due to facts and circumstances affecting the case.

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

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

You are expected to be truthful in all discussions with your attorney, and to provide all relevant information and documentation to enable him or her to competently prepare your case.

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

You have the right to be present in court at the time that conferences are held.

You are entitled to make the ultimate decision on the objectives to be pursued in your case, and to make the final decision regarding the settlement of your case.

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

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

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

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

In the event of a fee dispute, you may have the right to seek arbitration. Your attorney will provide you with the necessary information regarding arbitration in the event of a fee dispute, or upon your request.

Receipt Acknowledged:	
Attorney's signature	
Client's signature	
Date ·	
Form 1400.2-1(1/95)	4

# UNIFIED COURT SYSTEM OF THE STATE OF NEW YORK STATEMENT OF CLIENT'S RIGHTS AND RESPONSIBILITIES (To be used only when representation is without fee)

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

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

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

Donoint Animarria da da da

You are entitled to an attorney who will be capable of handling your case; show you courtesy and consideration at all times; represent you zealously; and preserve your confidences and secrets that are revealed in the course of the relationship.

You are expected to be truthful in all discussions with your attorney, and to provide all relevant information and documentation to enable him or her to competently prepare your case.

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

You have the right to be present in court at the time that conferences are held.

You are entitled to make the ultimate decision on the objectives to be pursued in your case, and to make the final decision regarding the settlement of your case.

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

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

Attorney's signature	
Client's signature	
	-
Date	
Form 1400.2-2 (12/94)	

Receipt Acknowledged:

## 1400.3. Written Retainer Agreement.

An attorney who undertakes to represent a party and enters into an arrangement for, charges or collects any fee from a client shall execute a written agreement with the client setting forth in plain language the terms of compensation and the nature of services to be rendered. The agreement, and any amendment thereto, shall be signed by both client and attorney, and, in actions in Supreme Court, a copy of the signed agreement shall be filed with the court with the statement of net worth. Where substitution of counsel occurs after the filing of the net worth statement, a signed copy of the attorney's retainer agreement shall be filed with the court within 10 days of its execution. A copy of a signed amendment shall be filed within 15 days of signing. A duplicate copy of the filed agreement and any amendment shall be provided to the client. The agreement shall be subject to the provisions governing confidentiality contained in Domestic Relations Law, section 235(1). The agreement shall contain the following information:

#### **RETAINER AGREEMENT**

- 1. Names and addresses of the parties entering into the agreement;
- 2. Nature of the services to be rendered;

- 3. Amount of the advance retainer, if any, and what it is intended to cover;
- 4. Circumstances under which any portion of the advance retainer may be refunded. Should the attorney withdraw from the case or be discharged prior to the depletion of the advance retainer, the written retainer agreement shall provide how the attorney's fees and expenses are to be determined, and the remainder of the advance retainer shall be refunded to the client:
- 5. Client's right to cancel the agreement at any time; how the attorney's fee will be determined and paid should the client discharge the attorney at any time during the course of the representation;
- 6. How the attorney will be paid through the conclusion of the case after the retainer is depleted; whether the client may be asked to pay another lump sum;
- 7. Hourly rate of each person whose time may be charged to the client; any out-of-pocket disbursements for which the client will be required to reimburse the attorney. Any changes in such rates or fees shall be incorporated into a written agreement constituting an amendment to the original agreement, which must be signed by the client before it may take effect:
- 8. Any clause providing for a fee in addition to the agreed- upon rate, such as a reasonable minimum fee clause, must be defined in plain language and set forth the circumstances under which such fee may be incurred and how it will be calculated.
- 9. Frequency of itemized billing, which shall be at least every 60 days; the client may not be charged for time spent in dis-cussion of the bills received;
- 10. Client's right to be provided with copies of correspondence and documents relating to the case, and to be kept apprised of the status of the case;
- 11. Whether and under what circumstances the attorney might seek a security interest from the client, which can be obtained only upon court approval and on notice to the adversary;
- 12. Under what circumstances the attorney might seek to withdraw from the case for nonpayment of fees, and the attorney's right to seek a charging lien from the court.
- 13. Should a dispute arise concerning the attorney's fee, the client may seek arbitration; the attorney shall provide information concerning fee arbitration in the event of such dispute or upon the client's request.

## 1400.4. Nonrefundable Retainer Fee.

An attorney shall not enter into an arrangement for, charge or collect a nonrefundable retainer fee from a client. An attorney may enter into a "minimum fee" arrangement with a client that provides for the payment of a specific amount below which the fee will not fall based upon the handling of the case to its conclusion.

## 1400.5. Security Interests.

- (a) An attorney may obtain a confession of judgment or promissory note, take a lien on real property, or otherwise obtain a security interest to secure his or her fee only where:
- (1) the retainer agreement provides that a security interest may be sought;
- (2) notice of an application for a security interest has been given to the other spouse; and
- (3) the court grants approval for the security interest after submission of an application for counsel fees.

(b) Notwithstanding the provisions of subdivision (a) of this section, an attorney shall not foreclose on a mortgage placed on the marital residence while the spouse who consents to the mortgage remains the titleholder and the residence remains the spouse's primary residence.

1400.6. [Repealed.]

1400.7. Fee Arbitration.

In the event of a fee dispute between attorney and client, the client may seek to resolve the dispute by arbitration pursuant to a fee arbitration program established and operated by the Chief Administrator of the Courts and subject to the approval of the justices of the Appellate Divisions.

Web page updated: February 19, 2013

## Rules of the Chief Administrative Judge Part 137

Fee Dispute Resolution Program

## NYCOURTS.GOV

## RULES

Administrative Rules of the Unified Court System & Uniform Rules of the Trial Courts

## Rules of the Chief Administrative Judge

## PART 137. FEE DISPUTE RESOLUTION PROGRAM

137.0 Scope of program

137.1 Application

137.2 <u>General</u>

137.3 Board of governors

137.4 Arbitral bodies

137.5 Venue

137.6 Arbitration procedure

137.7 Arbitration hearing

137.8 De novoreview

137.9 Filing fees

137.10 Confidentiality

137.11 Failure to participate in arbitration

137.12 Mediation

## Section 137.0 Scope of program.

This Part establishes the New York State Fee Dispute Resolution Program, which provides for the Informal and expeditious resolution of fee disputes between attorneys and clients through arbitration and mediation. In accordance with the procedures for arbitration, arbitrators shall determine the reasonableness of fees for professional services, including costs, taking into account all relevant facts and circumstances. Mediation of fee disputes, where available, is strongly encouraged.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

#### Section 137.1 Application.

- (a) This Part shall apply where representation has commenced on or after January 1, 2002, to all attorneys admitted to the bar of the State of New York who undertake to represent a client in any civil matter.
- (b) This Part shall not apply to any of the following:
- (1) representation in criminal matters;
- (2) amounts in dispute involving a sum of less than \$1,000 or more than \$50,000, except that an arbitral body may hear disputes involving other amounts if the parties have consented;

- (3) claims involving substantial legal questions, including professional malpractice or misconduct;
- (4) claims against an attorney for damages or affirmative relief other than adjustment of the fee;
- (5) disputes where the fee to be paid by the client has been determined pursuant to statute or rule and allowed as of right by a court; or where the fee has been determined pursuant to a court order;
- (6) disputes where no attorney's services have been rendered for more than two years;
- (7) disputes where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services was rendered in New York;
- (8) disputes where the request for arbitration is made by a person who is not the client of the attorney or the legal representative of the client.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 off. June 1, 2001; June 14, 2001 off. Jan. 1, 2002.

#### Section 137.2 General.

- (a) In the event of a fee dispute between attorney and client, whether or not the attorney already has received some or all of the fee in dispute, the client may seek to resolve the dispute by arbitration under this Part. Arbitration under this Part shall be mandatory for an attorney if requested by a client, and the arbitration award shall be final and binding unless de novo review is sought as provided in section 137.8.
- (b) The client may consent in advance to submit fee disputes to arbitration under this Part. Such consent shall be stated in a retainer agreement or other writing that specifies that the client has read the official written instructions and procedures for Part 137, and that the client agrees to resolve fee disputes under this Part.
- (c) The attorney and client may consent in advance to arbitration pursuant to this Part that is final and binding upon the parties and not subject to de novo review. Such consent shall be in writing in a form prescribed by the board of governors.
- (d) The attorney and client may consent in advance to submit fee disputes for final and binding arbitration to an arbitral forum other than an arbitral body created by this Part. Such consent shall be in writing in a form prescribed by the board of governors. Arbitration in that arbitral forum shall be governed by the rules and procedures of that forum and shall not be subject to this Part.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

#### Section 137.3 Board of governors.

- (a) There shall be a Board of Governors of the New York State Fee Dispute Resolution Program.
- (b) The board of governors shall consist of 18 members, to be designated from the following: 12 members of the bar of the State of New York and six members of the public who are not lawyers. Members of the bar may include judges and justices of the New York State Unified Court System.
- (1) The members from the bar shall be appointed as follows: four by the Chief Judge from the membership of statewide bar associations and two each by the Presiding Justices of the Appellate Divisions.
- (2) The public members shall be appointed as follows: two by the Chief Judge and one each by the Presiding Justices of the Appellate Divisions.

+

- Appointing officials shall give consideration to appointees who have some background in alternative dispute resolution.
- (c) The Chief Judge shall designate the chairperson.
- (d) Board members shall serve for terms of three years and shall be eligible for reappointment. The initial terms of service shall be designated by the Chief Judge such that six members serve one-year terms, six members serve two-year terms, and six members serve three-year terms. A person appointed to fill a vacancy occurring other than expiration of a term of office shall be appointed for the unexpired term of the member he or she succeeds.
- (e) Eleven members of the board of governors shall constitute a quorum. Decisions shall be made by a majority of the quorum.
- (f) Members of the board of governors shall serve without compensation but shall be reimbursed for their reasonable, actual and direct expenses incurred in furtherance of their official duties.
- (g) The board of governors, with the approval of the four Presiding Justices of the Appellate Divisions, shall adopt such guidelines and standards as may be necessary and appropriate for the operation of programs under this Part, including, but not limited to: accrediting arbitral bodies to provide fee dispute resolution services under this Part; prescribing standards regarding the training and qualifications of arbitrators; monitoring the operation and performance of arbitration programs to insure their conformance with the guidelines and standards established by this Part and by the board of governors; and submission by arbitral bodies of annual reports in writing to the board of governors.
- (h) The board of governors shall submit to the Administrative Board of the Courts an annual report in such form as the Administrative Board shall require.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

Amended 137.3(d) on May 14, 2009 [Previous Version]

## Section 137.4 Arbitral bodies.

- (a) A fee dispute resolution program recommended by the board of governors, and approved by the Presiding Justice of the Appellate Division in the judicial department where the program is established, shall be established and administered in each county or in a combination of counties. Each program shall be established and administered by a local bar association (the arbitral body) to the extent practicable. The New York State Bar Association, the Unified Court System through the District Administrative Judges, or such other entity as the board of governors may recommend also may be designated as an arbitral body in a fee dispute resolution program approved pursuant to this Part.
- (b) Each arbitral body shall:
- (1) establish written instructions and procedures for administering the program, subject to the approval of the board of governors and consistent with this Part. The procedures shall include a process for selecting and assigning arbitrators to hear and determine the fee disputes covered by this Part. Arbitral bodies are strongly encouraged to include nonlawyer members of the public in any pool of arbitrators that will be used for the designation of multi-member arbitrator panels:
- (2) require that arbitrators file a written oath or affirmation to faithfully and fairly arbitrate all disputes that come before them;
- (3) be responsible for the daily administration of the arbitration program and maintain all necessary files,

records, information and documentation required for purposes of the operation of the program, in accordance with directives and procedures established by the board of governors;

- (4) prepare an annual report for the board of governors containing a statistical synopsis of fee dispute resolution activity and such other data as the board shall prescribe; and
- (5) designate one or more persons to administer the program and serve as a liaison to the public, the bar, the board of governors and the grievance committees of the Appellate Division.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

#### Section 137.5 Venue.

A fee dispute shall be heard by the arbitral body handling disputes in the county in which the majority of the legal services were performed. For good cause shown, a dispute may be transferred from one arbitral body to another. The board of governors shall resolve any disputes between arbitral bodies over venue.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

## Section 137.6 Arbitration procedure.

- (a)(1) Except as set forth in paragraph (2), where the attorney and client cannot agree as to the attorney's fee, the attorney shall forward a written notice to the client, entitled Notice of Client's Right to Arbitrate, by certified mail or by personal service. The notice (i) shall be in a form approved by the board of governors; (ii) shall contain a statement of the client's right to arbitrate; (iii) shall advise that the client has 30 days from receipt of the notice in which to elect to resolve the dispute under this Part; (iv) shall be accompanied by the written instructions and procedures for the arbitral body having jurisdiction over the fee dispute, which explain how to commence a fee arbitration proceeding; and (v) shall be accompanied by a copy of the "request for arbitration" form necessary to commence the arbitration proceeding.
- (2) Where the client has consented in advance to submit fee disputes to arbitration as set forth in subdivisions (b) and (c) of section 137.2 of this Part, and where the attorney and client cannot agree as to the attorney's fee, the attorney shall forward to the client, by certified mail or by personal service, a copy of the request for arbitration form necessary to commence the arbitration proceeding along with such notice and instructions as shall be required by the rules and guidelines of the board of governors, and the provisions of subdivision (b) of this section shall not apply.
- (b) If the attorney forwards to the client by certified mail or personal service a notice of the client's right to arbitrate, and the client does not file a request for arbitration within 30 days after the notice was received or served, the attorney may commence an action in a court of competent jurisdiction to recover the fee and the client no longer shall have the right to request arbitration pursuant to this Part with respect to the fee dispute at issue. An attorney who institutes an action to recover a fee must allege in the complaint.
- (i) that the client received notice under this Part of the client's right to pursue arbitration and did not file a timely request for arbitration or
- (ii) that the dispute is not otherwise covered by this Part.
- (c) In the event the client determines to pursue arbitration on the client's own initiative, the client may directly contact the arbitral body having jurisdiction over the fee dispute. Alternatively, the client may contact the attorney, who shall be under an obligation to refer the client to the arbitral body having jurisdiction over the dispute. The arbitral body then shall forward to the client the appropriate papers set forth in subdivision (a) necessary for commencement of the arbitration.

- (d) If the client elects to submit the dispute to arbitration, the client shall file the "request for arbitration form" with the appropriate arbitral body, and the arbitral body shall mail a copy of the "request for arbitration" to the named attorney together with an "attorney fee response" to be completed by the attorney and returned to the arbitral body within 15 days of mailing. The attorney shall include with the "attorney fee response" a certification that a copy of the response was served upon the client.
- (e) Upon receipt of the attorney's response, the arbitral body shall designate the arbitrator or arbitrators who will hear the dispute and shall expeditiously schedule a hearing. The parties must receive at least 15 days notice in writing of the time and place of the hearing and of the identify of the arbitrator or arbitrators.
- (f) Either party may request the removal of an arbitrator based upon the arbitrator's personal or professional relationship to a party or counsel. A request for removal must be made to the arbitral body no later than five days prior to the scheduled date of the hearing. The arbitral body shall have the final decision concerning the removal of an arbitrator.
- (g) The client may not withdraw from the process after the arbitral body has received the attorney fee response. If the client seeks to withdraw at any time thereafter, the arbitration will proceed as scheduled whether or not the client appears, and a decision will be made on the basis of the evidence presented.
- (h) If the attorney without good cause fails to respond to a request for arbitration or otherwise does not participate in the arbitration, the arbitration will proceed as scheduled and a decision will be made on the basis of the evidence presented.
- (i) Any party may participate in the arbitration hearing without a personal appearance by submitting to the arbitrator testimony and exhibits by written declaration under penalty of perjury.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

## Section 137.7 Arbitration hearing.

- (a) Arbitrators shall have the power to:
- (1) take and hear evidence pertaining to the proceeding;
- (2) administer oaths and affirmations; and
- (3) compel, by subpoena, the attendance of witnesses and the production of books, papers and documents pertaining to the proceeding.
- (b) The rules of evidence need not be observed at the hearing.
- (c) Either party, at his or her own expense, may be represented by counsel.
- (d) The burden shall be on the attorney to prove the reasonableness of the fee by a preponderance of the evidence and to present documentation of the work performed and the billing history. The client may then present his or her account of the services rendered and time expended. Witnesses may be called by the parties. The client shall have the right of final reply.
- (e) Any party may provide for a stenographic or other record at the party's expense. Any other party to the arbitration shall be entitled to a copy of said record upon written request and payment of the expense thereof.
- (f) The arbitration award shall be issued no later than 30 days after the date of the hearing. Arbitration awards shall be in writing and shall specify the bases for the determination. Except as set forth in section 137.8, all arbitration awards shall be final and binding.

- (g) Should the arbitrator or arbitral body become aware of evidence of professional misconduct as a result of the fee dispute resolution process, that arbitrator or body shall refer such evidence to the appropriate grievance committee of the Appellate Division for appropriate action.
- (h) In any arbitration conducted under this Part, an arbitrator shall have the same immunity that attaches in judicial proceedings.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

## Section 137.8 De novo review.

- (a) A party aggrieved by the arbitration award may commence an action on the merits of the fee dispute in a court of competent jurisdiction within 30 days after the arbitration award has been mailed. If no action is commenced within 30 days of the mailing of the arbitration award, the award shall become final and binding.
- (b) Any party who fails to participate in the hearing shall not be entitled to seek de novo review absent good cause for such failure to participate.
- (c) Arbitrators shall not be called as witnesses nor shall the arbitration award be admitted in evidence at the trial de novo.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

### Section 137.9 Filing fees.

Upon application to the board of governors, and approval by the Presiding Justice of the Appellate Division in the judicial department where the arbitral program is established, an arbitral body may require payment by the parties of a filing fee. The filing fee shall be reasonably related to the cost of providing the service and shall not be in such an amount as to discourage use of the program.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

## Section 137.10 Confidentiality.

All proceedings and hearings commenced and conducted in accordance with this Part, including all papers in the arbitration case file, shall be confidential, except to the extent necessary to take ancillary legal action with respect to a fee matter.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

## Section 137.11 Failure to participate in arbitration.

All attorneys are required to participate in the arbitration program established by this Part upon the filing of a request for arbitration by a client in conformance with these rules. An attorney who without good cause fails to participate in the arbitration process shall be referred to the appropriate grievance committee of the Appellate Division for appropriate action.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

#### Section 137.12 Mediation.

- (a) Arbitral bodies are strongly encouraged to offer mediation services as part of a mediation program approved by the board of governors. The mediation program shall permit arbitration pursuant to this Part in the event the mediation does not resolve the fee dispute.
- (b) All mediation proceedings and all settlement discussions and offers of settlement are confidential and may not be disclosed in any subsequent arbitration.

Historical Note

Sec. filed: Jan. 12, 2001; March 26, 2001 eff. June 1, 2001; June 14, 2001 eff. Jan. 1, 2002.

## **Standards and Guidelines**

Amended Section 5 of Appendix A & Section 8 of Appendix A on January 31, 2014

Documents in PDF format Get Adobe Reader



# Suffolk County Bar Association Dispute Resolution Program Rules

Suffolk County Bar Association

Dispute Resolution Program Rules

Suffolk County Bar Association 560 Wheeler Road Hauppauge, New York 11788-4357 (631) 234-5511

## Section 1 Establishment of Program

This program is established pursuant to part 137 of the Rules of the Chief Administrator, Title 22 of the Official Compilations of Codes, Rules and Regulations of the State of New York and the Standards and Guidelines approved as of October 3<sup>rd</sup>, 2001.

#### Section 2 Definitions

The following definitions will apply throughout these rules, except as otherwise provided: "Program" means the Suffolk County Bar Association Dispute Α. Resolution Program established pursuant to Part 137 of the Rules of the Chief Administrator "Client" means a person or entity receiving legal services or advice from a В. lawyer on a fee basis in the lawyer's professional capacity "Administrator" means the person primarily responsible for administration of C. the Program as designated by the Suffolk County Bar Association "SCBA" means the Suffolk County Bar Association D. "Arbitrator" means a person who serves as an arbitrator under the Program E. "Case" means any case or controversy cognizable under the Program F. where the amount in dispute is at least in the sum of \$1,000.00 "Board" means the Board of Governors of the Attorney-Client Fee Dispute G.

Resolution Program established under Part 137 of the Rules of the Chief Administrator
"Fee Dispute" means the committee appointed by the Suffolk County Bar

H. Association Board of Directors which oversees the Dispute Resolution Program and make decisions concerning administration of the Program.

#### Section 3 Application

These rules apply where representation has commenced on or after January 1, 2002, to all attorneys admitted to the Bar of the State of New York who undertake to represent a client in a civil matter, where the majority of legal services are performed in Suffolk County or where the attorney maintains an office for the practice of law in Suffolk County.

These rules shall not apply to any of the following:

- 1. representation in criminal matters;
- amounts in dispute involving a sum of less than \$1,000.00 or more than \$50,000.00, except that an arbitral body may hear disputes involving other amounts if the parties have consented in writing; claims involving substantial legal questions, including professional
- malpractice or misconduct;

  claims against an attorney for damages or affirmative relief other
- than adjustment of the fee;
  disputes where the fee to be paid by the client has been
- determined pursuant to statute or rule and allowed as of right by a court; or where the fee has been determined pursuant to a court order;
- disputes where no attorney's services have been rendered for more 6.
- than two years;
- disputes where the attorney is admitted to practice in another
- jurisdiction and maintains no office in the State of New York, or where no material portion of the services was rendered in New York; and
- disputes where the request for arbitration is made by a person who 8.
- is not the client of the attorney or the legal representative of the client.

#### Section 4 Arbitrators

Applicants for membership as an Attorney Arbitrator must meet or exceed the following requirements:

Minimum of five (5) years of admission to the Bar

- A.
- Member in good standing of the Suffolk County Bar Association or B. other recognized bar groups Ability to evaluate and apply legal principles
- C.
- Ability to manage the hearing process D.
- Minimum of six (6) hours of fee dispute resolution training or E. comparable training and experience in arbitration and/or other forms of dispute resolution Other relevant experience or accomplishments
- F.
- Freedom from bias and prejudice G.
- Thorough and impartial evaluation of testimony and other evidence H.
- Willingness to devote time and effort when selected to serve I.
- Willingness to successfully complete training under the guidelines J. of the Program

Applicants for membership as a Non-Attorney Arbitrator must meet or exceed requirements E through J above.

All training of arbitrators will be provided by the New York State Office of Court Administration at its sole cost and expense, or by the Suffolk County

Bar Association, or other recognized dispute resolution programs approved by the board.

Arbitrators will serve on a voluntary basis, without financial compensation.

#### Section 5 <u>Initiating the Arbitration</u>

The Submission Process

#### Client:

A client with a fee dispute starts the process by filing a request for dispute resolution with the Administrator of the Program together with the required filing fee of \$150.00 \*see Financial Hardship Policy. Forms can be obtained by calling the Administrator at 631/234-5511, extension 222, by obtaining the form in person at the Suffolk County Bar Association, located at 560 Wheeler Road, Hauppauge, New York 11788-4357 or by requesting said form by facsimile transmission to the administrator (631/234-5899) or by e-mail to the administrator at fee@scba.org between the hours of 9:00 a.m. and 5:00 p.m., Monday to Friday, or you may download forms on the SCBA wesbsite at <a href="https://www.scba.org/fee dispute/fee overview.html">www.scba.org/fee dispute/fee overview.html</a>

#### Attorney:

An attorney starts the process by sending a Notice of Right to Arbitrate and required forms to the client. If there is a prior written agreement to arbitrate, the initiating party shall submit a copy to the Administrator with their request to arbitrate. If the client fails to then file a request to arbitrate within 30 days, the attorney who's written agreement provides for such dispute resolution may file the request to arbitrate. An attorney is required to send by certified mail or by personal service, the notice of right to arbitrate with appropriate forms upon initiation of any dispute involving fees between client and attorney, and/or prior to commencement of any civil action for collection of fees.

A party may make application to the Administrator to have the filing fee waived, based upon limited financial resources which make the filing fee a financial burden or would prevent said client from utilizing this resolution program. The request must be made in writing to the Administrator who will have the discretion to grant or deny the request. Should the arbitration result in a finding in favor of the client for whom the fee was waived, the waived filing fee will be deducted from such award, and paid directly by the attorney to the Association, after deduction from said award.

The request for arbitration must contain the name and address of the

parties along with the telephone numbers of the parties to be contacted, and a brief description of the claim and the amount involved.

Upon receipt of the request for arbitration, the Administrator will mail a copy of the request for arbitration to the named attorney, together with an attorney fee response, to be completed by the attorney and returned

to the Administrator within 15 days of mailing. The attorney will include with the attorney fee response, a copy of retainer or letter of engagement, if any, and an affidavit that a copy of the response was served on the client.

Upon receipt of the attorney fee response, or if no response is received within 15 days of mailing of the attorney fee response form to the attorney, the Administrator will endeavor to appoint an arbitrator or arbitrators to the case with experience in the subject matter of the representation. Arbitrators will be assigned from a panel of neutrals who have qualified to act as arbitrators in fee dispute matters. Disputes involving a sum of less than \$10,000.00, but more than \$1,000.00, will be submitted to one attorney arbitrator. Disputes involving a sum of \$10,000.00 or more, but less than \$50,000.00 (unless by agreement of the parties), will be submitted to a panel of three arbitrators, which will include one non-lawyer, unless otherwise provided for in writing.

When a party and attorney are notified of the appointment of the arbitrator(s), any conflict of interest shall promptly be disclosed in writing but not less than five (5) days prior to the scheduled hearing.

Upon receipt of a case, the Administrator will notify the parties of a date, time, and place for the hearing, which notice will be at least fifteen (15) days prior to the scheduled date, with the identity of the arbitrator or arbitrators. All arbitrations will be held at the offices of one of the arbitrators or at the Suffolk County Bar Association.

## Section 6 Powers of arbitrator and conduct of the hearing

An arbitrator has the following powers:

- A. Issue subpoenas and administer oaths
- Take and hear evidence pertaining to the proceeding
- C. Rules of Evidence need not be observed at the hearing and either party, at his or her expense, may be represented by counsel. Representation by counsel must be disclosed on filing form or response Arbitrator(s) may adjourn or postpone the hearing
- D.

The burden will be on the attorney to prove the reasonableness of the fee by a preponderance of the evidence and to present documentation of the work performed and the billing history. The client must present his or her account of the service rendered and time expended. Witnesses may be called by the parties. Participation may be by written statement sworn to under penalties of perjury. The client will have the right of final reply.

Any party may provide for stenographic or other record at the party's expense, providing that the panel is given duplicate copy at time of hearing upon request by the panel. Any other party to the arbitration will be entitled to a copy of said record, upon written request and payment of the expense for such record.

The arbitration awards will be issued to the parties no later than thirty (30) days after the completion of the hearing. Arbitration awards will be in writing and specify the basis for the determination. Except as set forth herein, all arbitration awards will be final and binding, unless a *trial de* novo is commenced under the Rules within the time set forth therein.

Neither the Associations, nor the Committee, its Chair or members, Administrator, Arbitrator and staff person acting under these Rules, shall be a necessary party in any judicial proceeding relating to any arbitration conducted in accordance with these Rules. None of the parties listed in the preceding sentence shall be liable for any act or omission relating to any dispute in connection with any arbitration conducted under these Rules. Without limiting the scope of the preceding two sentences, it is intended that the Committee, its Chair and its members, and any Arbitrator acting under these Rules have the same immunity as a judicial officer of body would have in a court proceeding. The parties to any arbitration held under these Rules will be deemed to have conferred the immunity described above.

The hearing will be conducted by either the sole or all of the arbitrators in case of a controversy in excess of \$10,000.00, but a majority may determine any question and render an award.

#### Section 7 Trial de novo

A party aggrieved by the arbitration award may, unless there is a written agreement to the contrary, commence an action on the merits of its fee dispute (a *trial de* novo) in a court with jurisdiction over the amount in dispute, within thirty (30) days after the arbitration award has been mailed. If no action is commenced within thirty (30) days of the mailing of the arbitration award, the award shall become final and binding. Upon filling of a demand for *trial de novo*, the aggrieved party shall also mail a copy of the demands to the Administrator and other side.

Any party who does not participate in the arbitration hearing will not be entitled to a *trial de* novo absent good cause for such failure to participate.

Arbitrators shall not be called as witnesses nor shall the arbitration award or record of the proceedings be admitted in evidence at the *trial de* novo.

## Section 8 Communication with arbitrators

No party and no one acting on behalf of any party will communicate unilaterally concerning the arbitration with an arbitrator or a candidate for an arbitrator. Unless the parties agree otherwise or the arbitrator so directs, any communication from the parties to an arbitrator will be sent to the other party.

## Section 9 Enforcement of arbitration awards

Any award that has become final and binding may be entered as a judgment upon moving to confirm said decision in a court of competent jurisdiction, by appropriate notice, pursuant to the CPLR Article 75.

## Section 10 Vacancies

if, after an arbitrator is assigned to the case, the arbitrator is unable to perform his or her duties, they will promptly notify the Administrator, who will appoint a substitute arbitrator.

In the event that one arbitrator on a panel of arbitrators is unable to attend the hearing or continue, the remaining arbitrators may continue with the hearing to the determination of the controversy, unless one party objects. Upon receipt of an objection, the arbitration will be deemed terminated and the matter will be reassigned by the Administrator, who will appoint a substitute arbitrator to take the place of the arbitrator who was unable to begin or conclude the arbitration hearing.

## Section 11 Attendance at hearings

The arbitrators will maintain the privacy of the hearings unless the rules or the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend the hearing. All attorneys are required to participate in the arbitration program. The arbitrators shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It will be discretionary with the arbitrators to determine the propriety of the attendance of any other person, other than a party and its legal representatives.

## Section 12 Arbitration in the absence of a party or representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to participate or fails to obtain a postponement. An award will not be made solely on the default of a party. The arbitrator will require the party who is present to submit such evidence as the arbitrator may require to support the participant's position.

### Section 13 Waiver of rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with, and who fails to state an objection at the time of said arbitration or prior thereto, will be deemed to have waived the right to object.

## Section 14 Majority decision

When the panel consists of more than one arbitrator, unless required by law or by these rules, the majority of the arbitrators (or the remaining arbitrators in the case of a vacancy under Section 10) must make all decisions.

## Section 15 Interpretation and application of rules

The arbitrators will interpret and apply these rules in so far as they relate to the arbitrator's powers and duties. When there is more than one arbitrator, and a difference arises among them concerning the meaning or application of these rules, it will be decided by a majority vote. In the event that the Administrator or an arbitrator(s) is unable to resolve any issue concerning the arbitrator(s) duties or administration of this Program, said question will be referred to the Fee Dispute Resolution Committee for a final decision.

## Section 16 Time of award

Unless otherwise agreed by the parties, the award shall be issued not later than thirty (30) days from the date of the completion of the hearing. The Administrator will, upon receipt of the award from the arbitrator or chair of the panel, mail the same to the parties at the address given by the parties for that purpose. The decision will be accompanied by a letter advising the parties of their rights regarding the decision.

## Section 17 Record Keeping

A. The Administrator will maintain a separate folder for each "Request for Arbitration" form received. The records are to be kept at the Suffolk County Bar Association for two (2) years. At the end of the two years, they may be disposed of as the Administrator sees fit.

- B. With the exception of the award itself, all records, documents, files, proceedings, and hearing pertaining to the arbitration of a dispute under these rules, in which both parties have consented to be bound by the results, may not be open to the public or any person not involved in the dispute, and shall be confidential except to the extent necessary to take ancillary legal action with respect to this fee matter.
- The Association will maintain the names, addresses, telephone C.
  - numbers, and summary of credentials of the arbitrators and will update the same from time to time.

## Section 18 Financial Hardship Policy

The program's standard policy is to make the program accessible to all who choose to use it. Toward that end, the program maintains a reasonable fee schedule that considers the financial exigencies of the non-lawyer participants, provides extended payment plans, and/or grants full or partial fee waivers under circumstances of extreme financial hardship. Every attempt will be made to keep the names of the individuals who seek hardship assistance and the information disclosed confidential.

## Section 19 Amendment of Rules

These rules may be amended from time to time, upon majority vote of the Board of Directors of the Suffolk County Bar Association, the Board of Governors, and the Presiding Justice of the Appellate Division, 2' Department.

SCBA Fee Dispute Resolution Rules (Amended 1/31/14)

# 10<sup>th</sup> Judicial District Fee Dispute Resolution Packet

**Dispute over Attorneys Fees** 



STATE OF NEW YORK
UNIFIED COURT SYSTEM

OFFICE OF THE DISTRICT ADMINISTRATIVE JUDGE
10<sup>TH</sup> JUDICIAL DISTRICT - NASSAU COUNTY
100 SUPREME COURT DRIVE
MINEOLA, NEW YORK 11501
(516) 493-3321
FAX: (516) 493-3320

A. GAIL PRUDENTI Chief Administrative Judge

MICHAEL V. COCCOMA Deputy Chief Administrative Judge Courts Outside New York City THOMAS A. ADAMS Administrative Judge

PAUL LAMANNA, Esq.
District Executive

MARY T, CAMPBELL Sr. Court Analyst ADR / Fee Dispute Admin.

#### NASSAU PART 137-A

This local fee dispute program has been approved by the Board of Governors for the Statewide Part 137 Attorney-Client Fee Dispute Resolution Program. Website: <a href="https://www.nycourts.gov/admin/feedispute">www.nycourts.gov/admin/feedispute</a>.

Enclosed please find the following documents:

The Notice of Client's Right to Arbitrate a Dispute Over Attorneys Fees (Form UCS 137-1) or The Notice of Client's Right to Arbitrate a Dispute Over a Refund of Attorneys Fees (Form UCS 137-2);

Part 137 Local Program Rules and Procedures for the 10th Judicial District (Nassau County) Attorney-Client Fee Dispute Resolution Program:

Standard Written Instructions and Procedures to Clients for the Resolution of Fee Disputes Pursuant to Part 137 to Part 137 of the Rules of the Chief Administrator (Form UCS 137-3);

Client Request for Fee Arbitration (Form UCS 137-4a); and

Consent to Submit Fee Dispute to arbitration Pursuant to Part 137.2 of the Rules of the Chief Administrator and to Waive Right to Trial de Novo (Form UCS 137-14).

If your answer to Question #7 on the Client Request for Fee Arbitration Form (Form UCS 137-4a) is \$10,000 or more, please submit four (4) copies of that form in addition to the original copy (Total 5).

If your answer to that question is under \$10,000.00, please submit two (2) copies of that form in addition to the original copy (Total 3). Please retain a copy for your records.

If you elect the option of <u>Consent to Submit Fee Dispute to Arbitration Pursuant to Part 137.2 of the Rules of the Chief Administrator and to Waive Right to Trial de Novo( UCS 137-14)</u>, it will be forwarded to the Attorney Respondent for consideration as <u>the consent must be mutual.</u>

There is no filing fee for the Nassau County Program.

Mary T. Campbell Program Administrator

enclosures (8/1/14)

UCS 137-1 (11/01)

# NOTICE OF CLIENT'S RIGHT TO ARBITRATE A DISPUTE OVER ATTORNEYS FEES

The amount of \$ is due a	nd owing for the provision of legal services with
respect to:	
To any district of the state of	
	have the right to elect to resolve this dispute by
arbitration under Part 137 of the Rules of the Chic	of Administrator of the Courts. To do so, you must
file the attached Request for Fee Arbitration wit	hin 30 days from the receipt of this Notice, as set
forth in the attached instructions. If you do no	ot file a Request for Fee Arbitration within 30 days
from the receipt of this Notice, you waive the rig	ht to resolve this dispute by arbitration under Part
137, and your attorney will be free to bring a law	vsuit in court to seek payment of the fee.
Dated:	
	(Attorney's Signature)



# STANDARD WRITTEN INSTRUCTIONS AND PROCEDURES TO CLIENTS FOR THE RESOLUTION OF FEE DISPUTES PURSUANT TO PART 137 OF THE RULES OF THE CHIEF ADMINISTRATOR

Part 137 of the Rules of the Chief Administrator of the Courts provides a procedure for the arbitration (and in some cases mediation) of fee disputes between attorneys and clients in civil matters. Your attorney can provide you with a copy of Part 137 upon request or you can download a copy at <a href="www.nvcourts.gov/admin/feedispute">www.nvcourts.gov/admin/feedispute</a>. Fee disputes may involve both fees that you have already paid to your attorney and fees that your attorney claims are owed by you. If you elect to resolve your dispute by arbitration, your attorney is required to participate. Furthermore, the arbitration will be final and binding on both your attorney and you, unless either of you seeks a trial de novo within 30 days, which means either of you reject the arbitrator's decision by commencing an action on the merits of the fee dispute in a court of law within 30 days after the arbitrator's decision has been mailed. Fees disputes which may not be resolved under this procedure are described in Part 137.1 of the Rules of Chief Administrator of the Courts: representation in criminal matters; amounts in dispute involving a sum of less than \$1,000 or more than \$50,000 unless the parties consent; and claims involving substantial legal questions, including professional malpractice or misconduct. Please consult Part 137.1 for additional exclusions.

Your attorney may not bring an action in court to obtain payment of a fee unless he or she first has provided written notice to you of your right to elect to resolve the dispute by arbitration under Part 137. If your attorney provides you with this notice, he or she must provide you with a copy of the written instructions and procedures of the approved local bar association-sponsored fee dispute resolution program ("Local Program") having jurisdiction over your dispute. Your attorney must also provide you with the "Request for Fee Arbitration" form and advise that you must file the Request for Fee Arbitration with the local program within 30 days of the receipt of the notice. If you do not file the Request within those 30 days, you will not be permitted to compel your attorney to resolve the dispute by arbitration, and your attorney will be free to bring a lawsuit in court to seek to obtain payment of the fee.

In order to elect to resolve a fee dispute by arbitration, you must file the attached "Request for Fee Arbitration" with the approved local program. An updated list of local programs is available at <a href="https://www.nycourts.gov/admin/feedispute">www.nycourts.gov/admin/feedispute</a> or by calling toll-free 1-(877)-FEES-137 (1-877-333-7137). Filing of the Request for Fee Arbitration must be made

with the appropriate local program for the county in which the majority of legal services were performed. Once you file the Request for Fee Arbitration, the local program will mail a copy of the request to your attorney, who must provide a response within 15 days of the mailing. You will receive at least 15 days' notice in writing of the time and place of the hearing and of the identity of the arbitrator(s). The arbitrator(s) decision will be issued no later than 30 days after the date of the hearing. You may represent yourself at the hearing, or you may appear with an attorney if you wish.

Some local programs may offer mediation services in addition to arbitration. Mediation is a process by which those who have a fee dispute meet with the assistance of a trained mediator to clarify issues and explore options for a mutually acceptable resolution. Mediation provides the opportunity for your attorney and you to discuss your concerns without relinquishing control over the outcome and of achieving a result satisfactory to both of you. Participation in mediation is voluntary for your attorney and you, and it does not waive any of your rights to arbitration under these rules. If you wish to attempt to resolve your dispute through mediation, you may indicate your wish on the Request for Fee Arbitration form.

More information, including an updated list of local programs, is available at <a href="http://www.nycourts.gov/admin/feedispute">http://www.nycourts.gov/admin/feedispute</a> or by calling 1-(877)-FEES-137 (1-877-333-7137).

#### TENTH JUDICIAL DISTRICT

#### NASSAU COUNTY

# PART 137: ATTORNEY-CLIENT FEE DISPUTE RESOLUTION PROGRAM LOCAL PROGRAM RULES AND PROCEDURES

#### SECTION 1 - POLICY

It is the policy of the Courts of the County of Nassau, Tenth Judicial District ("Courts of Nassau County"), to encourage out-of-court resolution of fee disputes between attorneys and clients in a fair, impartial and efficient manner. The Administrative Judge of the County of Nassau, Tenth Judicial District, is designated as the Administrator of the Attorney-Client Fee Dispute Resolution program for the Courts of the County of Nassau under these Rules and may delegate duties to such officers, committees, and employees as he/she may direct.

#### **SECTION 2 - DEFINITIONS**

- A. "Answer" (also referred to as "Response to Request for Fee Arbitration") means the response to the "Request for Fee Arbitration" or "Petition".
- B. "Arbitrator" means the person(s) designated by the Administrative Judge or his/her designee to hear the evidence presented by the parties and make a final determination.
- C. "Administrator" means the Administrative Judge (or designee) of the County of Nassau, Tenth Judicial District, who oversees the Program.
- D. "Approval" by the Board of Governors means, where so required by 22 NYCRR Part 137, recommendation by the Board of Governors with approval of the Presiding Justice of the Appellate Division, Second Department.
- E. "Arbitration" means the settlement of disputes between parties by neutral third person(s) who hear both sides and render an award.
- F. "Board" means the Board of Governors of the Attorney-Client Fee Dispute Resolution Program established under Part 137 of the Rules of the Chief Administrator.
- G. "Client" means a person or entity who receives legal services or advice from an attorney on a fee basis in the attorney's professional capacity.

- H. "The Office of the Courts of Nassau County" means the Administrative Judge's Office of the County of Nassau, Tenth Judicial District.
- I. "Petition" means a "Request for Fee Arbitration" requested by either the client or the attorney.
- J. "Petitioner" means the party requesting the fee arbitration.
- K. "Program" means the Attorney-Client Fee Dispute Resolution Program established under 22 NYCRR Part 137 as administered and implemented by the Administrative Judge's Office of the County of Nassau, Tenth Judicial District, pursuant to the Rules and Procedures set forth herein.
- L. "Respondent" means the party responding to the petition in opposition to the claim.
- M. "Service" means personal service or service by certified mail.
- N. "Written Instructions" means the Standard Instructions to Clients For the Resolution of Fee Disputes Pursuant to Part 137 Of the Rules Of the Chief Administrator (Form UCS 137-3 5/02) published by the Office of Court Administration.

#### SECTION 3 - THE PROGRAM AND JURISDICTION

- A. The jurisdiction of this program, for disputes in which the majority of the legal services were performed in the County of Nassau, will be the County of Nassau.
- B. In the event of a fee dispute between an attorney and client, where the representation has commenced on or after January 1, 2002, whether or not the attorney already has received some or all of the fee in dispute, the client may seek to resolve the dispute by arbitration pursuant to the Program.

Historical Note: Administrative Order 177/01 states that the provisions of Part 136 shall continue to apply to fee disputes in all domestic relations matters subject to that Part in which representation began prior to June 1, 2001. Administrative Order 260/01, filed June 14, 2001, which supercedes Order 177/01, states that the provisions of Part 136 shall continue to apply to fee disputes in all domestic relations matters subject to that Part in which representation began prior to January 1, 2002.

- C. Arbitration under this Program shall be mandated for an attorney if requested by a client, and the arbitration award shall be final and binding unless *de novo* review is sought as further described herein.
- D. Arbitration of fee disputes between attorneys and clients in Nassau County, shall take place through this Program. However, this Program shall not apply to any of the following:
  - 1. Representation in criminal matters:
  - 2. Amounts in dispute involving a sum of less than \$1,000 or more than \$50,000, except that the Office of the Courts of Nassau County may hear disputes involving other amounts if the parties have consented;
  - 3. Claims involving substantial legal questions, including professional malpractice or misconduct;
  - 4. Claims against an attorney for damages or affirmative relief other than the adjustment of the fee;
  - 5. Disputes where the fee to be paid by the client has been determined pursuant to statute or rule and allowed as of right by a court; or where the fee has been determined pursuant to a court order.
  - 6. Disputes where no attorney's services have been rendered for more than two years;
  - 7. Disputes where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services was rendered in New York;
  - 8. Disputes where the request for arbitration is made by a person who is not the client of the attorney or the legal representative of the client.
- E. Pursuant to a written request and subsequent approval by the Administrative Judge of the County of Nassau, Tenth Judicial District, the Board of Governors and the Presiding Justice of the Appellate Division, Second Judicial Department, this Program may be administered by the Nassau County Bar Association in accordance with all the rules and procedures set forth herein.
- F. There shall be NO FEE CHARGED to any of the parties who participate in the Attorney-Client Fee Dispute Resolution Program.

- G. In the event Service becomes necessary, after having unsuccessfully attempted service by certified mail where required under these Rules and Procedures, the Petitioner must pay, in advance by check or money order made payable to the entity delegated to make such personal service the cost of such service. At the discretion of the arbitrator(s), and to the extent authorized by law, these costs may be added to the arbitrator(s) award, if previously paid by the prevailing party.
- H. 1. Arbitration under this Program shall be voluntary for the client unless:
  - (a) The client has previously consented in writing to submit fee disputes to the fee dispute resolution process by prior written agreement between the attorney and client wherein the client consented in advance to submit fee disputes to arbitration. To be valid on the part of the client, such consent must be knowing and informed. The client's consent shall be stated in a retainer agreement or other writing specifying that the client has read, pursuant to 22 NYCRR Part 137, the approved Rules and Procedures of the Office of the Courts of Nassau County and that the client consents to resolve fee disputes pursuant to the Program; or
  - (b) The attorney and client have consented in advance to submit fee disputes to arbitration that is final and binding and not subject to a trial de novo. To be valid on the part of the client, such consent must be knowing and informed and obtained in the same manner as set forth in the previous subsection of this section, except that the retainer agreement or other writing shall also state that the client understands that he/she is waiving the right to reject an arbitration award and subsequently commence a trial de novo in a court of competent jurisdiction.
  - 2. Where an agreement to arbitrate exists between the attorney and client under either subsection H.1 (a) or (b) of this section, those provisions of Section 137.6(a) and (b) of 22 NYCRR Part 137 relating to the notice of client's right to arbitrate shall not apply and no further notice of the right to arbitrate shall be required. In such circumstance, Section 137.6(a)(2) of 22 NYCRR Part 137 shall apply and either party may commence the dispute resolution process by filing a Petition with the Administrative Judge, together with a copy of the parties' agreement to arbitrate.
  - 3. The attorney and client may consent in advance to final and binding arbitration in an arbitral forum other than the one created under 22 NYCRR Part 137. To be valid on the part of the client, such consent must be knowing and informed and must be obtained in a retainer agreement or other writing. Such writing shall clearly state that the client understands

that he or she is agreeing to waive his or her rights with regard to Arbitration pursuant to Part 137, which includes the right to reject the arbitrator(s)' award by commencing an action on the merits (trial de novo) in a Court of Law. Arbitration in an arbitral forum outside Part 137 shall be governed by the rules and procedures of that forum. The Board may maintain information concerning other established arbitral programs and shall provide contact information for such programs upon request.

- 4. Fee disputes may be referred to the Administrative Judge of the County of Nassau by means not specifically described in 22 NYCRR Part 137, including but not limited to, attorney disciplinary authorities, bar associations, and employees, officers or judges of the courts. In those instances, the Administrative Office shall provide the client with information about the Program.
- I. Upon notice of appointment, the arbitrator or the arbitration chairperson designated by the Administrator may contact the parties to see if they are amenable to attempting to settle the matter themselves before proceeding with the Arbitration. However, the designee is not authorized to provide legal advice to any of the parties involved.

#### SECTION 4 - ARBITRATORS

The Office of the Courts of Nassau County shall establish and maintain a sufficient number of arbitrators in order to meet the Program's caseload. Attorneys and non-attorneys shall serve as arbitrators. In recruiting arbitrators, the Office of the Courts of Nassau County shall recruit arbitrators representing a wide range of law practices and a diversity of non-attorney professions and occupations representing a cross-section of the communities. The Office of the Courts of Nassau County shall seek the assistance of local Bar Associations in the recruitment of attorney arbitrators. Non-attorney arbitrators will be recruited by contacting established Alternative Dispute Resolution programs throughout the district as well as the Unified Court System, Office of Alternative Dispute Resolution Programs.

- A. Attorney arbitrators, approved by the Board of Governors of the New York State Fee Dispute Resolution Program, shall be appointed to provide as broad a spectrum of the Bar as possible. For any attorney to qualify for appointment as an arbitrator, the attorney must meet the following criteria:
  - 1. be admitted to the New York Bar for at least five years, and
  - 2. been engaged in the practice of law for at least three years, and
  - 3. be qualified as an arbitrator under the American Arbitration Association

- rules, by the Office of Court Administration or by the United States
  District Court through any of their arbitration programs; or
- 4. have completed a district-approved arbitration training program or the equivalent which program must be approved by the Board of Governors of the New York State Fee Dispute Resolution Program.
- B. Non-Attorney Arbitrators, approved by the Board, shall be appointed by the Administrative Judge of the County of Nassau, Tenth Judicial District, from as broad a spectrum of the general public as possible. For a non-attorney to qualify for appointment as an arbitrator, the non-attorney must meet the following requirements:
  - 1. be a resident of the 10th Judicial District or work within the district;
  - 2. be fluent in speaking, reading and writing English; and
  - 3. have completed a district-approved arbitration training program or the equivalent which program must be approved by the Board of Governors of the New York State Fee Dispute Resolution Program.
- C. The number of arbitrators assigned to hear a fee dispute matter under this Program shall depend upon the amount in dispute as follows:
  - disputes involving a sum of less than \$10,000.00 shall be submitted to one attorney Arbitrator; and
  - 2. disputes involving a sum of \$10,000,00 or greater shall be submitted to a panel of three Arbitrators, which shall include at least one attorney and one non-attorney member of the public; the chairperson of all the panels shall be an attorney and all decisions on the merits shall be decided by majority rule.
- D. Lists of attorney Arbitrators may be maintained under the following headlines: matrimonials, litigation, real estate, business and other. Attorney Arbitrators will self-identify themselves as being within one or more of these areas and where practical, matters will be assigned to Arbitrators in order of placement on the respective lists; should there be a conflict of interest pursuant to subsection G of this section requiring the Arbitrator to be recused, the Arbitrator will remain at the top of the list for appointment in the next matter to be assigned.
- E. Prospective arbitrators shall submit a summary of credentials to the Administrative Judge of the County of Nassau, Tenth Judicial District, which

- shall be kept on record.
- F. All arbitrators must sign a written oath or affirmation to faithfully and fairly arbitrate all disputes that come before them, which written oath or affirmation shall be kept on file by the Office of the Courts of Nassau County.
- G. All arbitrators must conduct a conflict of interest check within 3 business days of initial contact by the administrator prior to accepting a case. A person who has any personal bias regarding a party or the subject matter of a dispute, a financial interest in the subject matter of the dispute, or a close personal relationship or financial relationship with a party to the dispute shall not serve as an arbitrator. An arbitrator shall disclose any information that he or she has reason to believe may provide a basis for recusal.
- H. Arbitrators shall serve as volunteers. However, Continuing Legal Education ("CLE") credits may be awarded for training and/or service as an arbitrator, subject to the rules and standards of the New York State Continuing Legal Education board.
- I. In making an award, arbitrators shall specify in a concise statement, the amount of and basis for the award.
- J. Arbitrators have a duty to maintain the confidentiality of all proceedings, hearings and communications, including all papers pertaining to the arbitration conducted in accordance with Part 137 and these Rules and Procedures, except to the extent necessary in connection with ancillary legal action with respect to a fee matter. Arbitrators should refer all requests for information concerning a fee dispute to the Office of the Courts of Nassau County. Arbitrators shall not be competent to testify in a subsequent proceeding or trial de novo.
- K. Arbitrators shall complete a minimum of six hours of fee dispute arbitration training approved by the Board of Governors of the New York State Fee Dispute Resolution Program. However, the Board may take previous arbitration training and experience under consideration in determining whether the foregoing training requirement has been met. In any case, all Arbitrators must complete a short orientation program designed to introduce them to 22 NYCRR Part 137 and these Rules and Procedures. Arbitrators may be required to undergo periodic refresher courses.

## SECTION 5 - THE FEE DISPUTE RESOLUTION PROCESS

A. Where an attorney and client cannot agree as to the attorney's fee and there has been no prior written consent to arbitration as described in Section 3.H above, the

attorney shall serve a written notice to the client, entitled "Notice of Clients Rights to Arbitrate", by certified mail or personal service. The notice shall:

- 1. be in a form approved by the Board of Governors;
- contain a statement of the client's right to arbitrate;
- 3. advise that the client has 30 days from receipt of the notice in which to elect to resolve the fee dispute;
- 4. be accompanied by a copy of these Rules and Procedures;
- 5. be accompanied by a copy of Written Instructions; and
- 6. be accompanied by a copy of the petition form necessary to commence the arbitration proceeding.
- B. If the attorney serves a Notice of the Client's Right to Arbitrate as described in subsection A of this section and the client does not file a Petition with the district within 30 days after the Notice was received or served, the attorney may commence an action in a court of competent jurisdiction to recover the fee and the client no longer shall have the right to request arbitration pursuant to 22 NYCRR Part 137 with respect to the fee dispute at issue.

NOTE: An attorney who institutes an action to recover a fee must allege in the complaint (i) that the client received notice under 22 NYCRR Part 137 of the client's right to pursue arbitration and did not file a timely Request for Arbitration or (ii) that the dispute is not otherwise covered by Part 137.

- C. If, in the alternative event the client elects to pursue arbitration on his own initiative, the client may contact the Administrative Judge's Office ("The Office of the Courts of Nassau County") at (516) 493-3321 or the attorney with whom the client has the dispute. In the case of the latter, the attorney shall be under an obligation to refer the client to the Office of the Courts of Nassau County. Upon receipt, the Office of the Courts of Nassau County shall forward the Petition to the client by mail.
- D. The Petitioner shall then file the Petition with the Office of the Courts of Nassau County.
  - 1. Upon receipt of the Petition, the Office of the Courts of Nassau County shall assign a filing number to the matter.

- 2. The Office of the Courts of Nassau County shall contact the Petitioner to review the facts and circumstances supporting the Petition to insure that this is a matter within the jurisdiction of the Program. If it is determined that this is a matter not within the jurisdiction of the Program, the Office of the Courts of Nassau County shall inform the Petitioner.
- 3. If it is determined that this matter is a matter within the jurisdiction of the Program, the Office of the Courts of Nassau County shall mail, by certified mail, a copy of the Petition to the Respondent together with an answer form to be completed by the Respondent and returned to the Office of the Courts of Nassau County within 15 days of the aforesaid mailing of the Petition to the Respondent. If service cannot be made by certified mail and personal service becomes necessary, the Petitioner will be so informed and the Petitioner will be required to pay the expense of such service in advance by cashiers check or money order, made payable to the entity making such service, as designated by the Office of the Courts of Nassau County. The cost for such personal service may be added to the Arbitrator(s) award, if previously paid by the prevailing party, at the discretion of the Arbitrators, to the extent authorized by law.
- 4. The Respondent shall return its Answer to the Office of the Courts of Nassau County, together with a signed, written statement (certification) stating that a copy of the Answer was served upon the Petitioner.
- 5. Once the Answer and certification have been received or, if 15 business days have elapsed since the service of the Petition and answer form without any response from the Respondent, the Office of the Courts of Nassau County shall designate the Arbitrator(s) who will hear the dispute and shall expeditiously schedule a hearing.
- 6. At least 15 days prior to the date of the hearing, the Office of the Courts of Nassau County shall notify the parties in writing of the date, time and place of the hearing and of the identify of the Arbitrator(s). Any subsequent rescheduling will be a matter between the parties and the Arbitrator(s) at the discretion of the Arbitrator(s).
- 7. Either party may request the removal of an Arbitrator based upon the Arbitrator's personal or professional relationship to a party or party's counsel. A request for removal must be made to the Office of the Courts of Nassau County no later than 5 days prior to the scheduled date of the hearing. The Office of the Courts of Nassau County shall have the final decision concerning the removal of an Arbitrator.

- 8. The Petitioner may not withdraw from the process once an Answer has been submitted. If the Petitioner seeks to withdraw at anytime thereafter, the arbitration will proceed as scheduled whether or not the Petitioner appears, and a decision will be made on the basis of the evidence presented.
- 9. If the Respondent, without good cause, fails to respond to a petition or otherwise does not participate in the arbitration, the arbitration will proceed as scheduled and a decision will be made on the basis of the evidence presented.
- 10. Any party may participate in the arbitration hearing without a personal appearance by submitting to the Arbitrator(s) testimony and exhibits by written declaration under penalty of perjury.

#### 11. Arbitrators shall have the power to:

- a. compel, by subpoena, the attendance of witnesses and the production of books, papers, and documents pertaining to the proceeding;
- b. administer oaths and affirmations; and
- c. take and hear evidence pertaining to the proceeding.
- 12. The Rules of Evidence need not be observed at the hearing.
- 13. Either party, at its own expense, may be represented by counsel.
- 14. The burden shall be on the attorney to prove the reasonableness of the fee by a preponderance of the evidence and to present documentation of the work performed and the billing history. The client may then present his or her account of the services rendered and time expended. Witnesses may be called by the parties. The attorney shall have the right to reply. The client shall have the right of final reply.
- 15. Where there is more than one (1) Arbitrator, any disputes arising among them shall be decided by the Chairperson, consistent with 22 NYCRR Part 137 of the Rules of the Chief Administrator and the minimum Standards and Guidelines of the Board of Governors of the New York State Fee Dispute Resolution Program.
- 16. Any party may provide for a stenographic or other record at the party's expense. The other party to the arbitration shall be entitled to a copy of

said record upon written request and payment of the expense of duplication. The parties to the arbitration must stipulate at least five (5) days prior to the hearing as to what kind of record will constitute a true and authentic record of the proceeding.

17. The arbitration award shall be issued by mail with a copy forwarded to the Office of the Courts of the County of Nassau no later than 30 days after the date of the hearing. Arbitration awards shall be in writing and shall state the amount and basis for the award. If de novo review has been waived pursuant to Section 3.H(b) of these Rules and Procedures, then the arbitration award shall be final and binding.

#### SECTION 6 - DE NOVO REVIEW

If de novo review has not been previously waived in writing, either party may seek de novo review of the arbitration award by commencing an action on the merits in any court of competent jurisdiction within thirty (30) days after the Notice of Arbitration Award has been mailed. Notice of commencement of such an action shall be provided to the Office of the Courts of Nassau County. If no action is commenced within thirty (30) days of the mailing of the Notice of Arbitration Award, the award shall become final and binding. Any party who fails to participate in the hearing shall not be entitled to seek de novo review absent good cause shown for such failure to participate. Arbitrators may not be called as witnesses nor shall the arbitration award be admitted in evidence at the trial de novo.

#### SECTION 7 - NOTICES

Except as otherwise stated herein, all notices, correspondence and papers necessary and proper for the arbitration proceeding under this Program and for the entry of judgment of any arbitration award may be served upon any party by regular mail addressed to that party at that party's last known address or the party's counsel of record.

#### SECTION 8 - CORRESPONDENCE

Requests for further information and correspondence relating to this Program may be sent to the Office of Administrative Judge of the County of Nassau, Tenth Judicial District, at the following address:

Office of the Administrative Judge Alternative Dispute Resolution Office Supreme Court, Room 186 100 Supreme Court Drive Mineola, NY 11501 (516) 493-3321

### SECTION 9 - PERIODIC REVIEW

The functioning of this Program shall be reviewed periodically from the reports submitted by the Office of the Courts of Nassau County to the Board of Governors including any recommendations or suggested changes of the Program.

#### SECTION 10 - EFFECTIVE DATE

These Rules and Procedures shall take effect immediately upon Approval of the Board of Governors of the New York State Fee Dispute Resolution Program and the Presiding Justice of the Appellate Division Second Department. These Rules and Procedures and any amendments thereto shall apply in the form in effect at the time an arbitration is initiated.

(Office Use Only) Date Received:	
Case Number:	

UCS 137-4a (10/13)

### CLIENT REQUEST FOR FEE ARBITRATION

Your name, address and telephone number:
Name:
Address:
Telephone Number:
Email Address:
Name, address and office telephone number of the law firm and/or attorney who handled your matter:
Name:
Address:
Telephone Number:
Email Address (if known):
If your attorney represented you in a lawsuit, in which court and county was the lawsuit filed?
Court: County:
a. On what date did your attorney first agree to handle your case?
,20
b. On what date did your attorney last perform services on your case?
,20

the course of representing you (attach a copy of the written retainer agreement, letter of engagement, or other papers describing the fee arrangement, if any):

6.	In the space below, indicate the date, amount and purpose of each payment you made to your attorney. Attach additional sheets if necessary.						
	Date	Amount	Purpose expenses,			time,	out-of-pocket
		\$					
		\$					
		\$					
		\$					
7.		your attorney's fee i			h a copy of	your att	omey's bill, if
8.		ceived a "Notice of res, please attach a cop		Right to	Arbitrate"	from y	our attorney?
9.	Briefly describe why you believe your attorney is not entitled to the amount set forth in question 7 (use additional sheets if necessary):						

10. I elect to resolve this fee dispute by arbitration, to be conducted pursuant to Part 137 of the Rules of the Chief Administrator [22 NYCRR] and the procedures of the Tenth Judicial District, Nassau County, copies of which I have received. I understand that the determination of the arbitrator(s) is binding upon both the lawyer and myself, unless either party rejects the arbitrator's award by commencing an action on the merits of the fee dispute (trial de novo) in a court of law within 30 days after the arbitrator's decision has been mailed.

Dated: Signed:	
----------------	--

IMPORTANT: You must file this Request for Fee Arbitration with:

10th Judicial District - Nassau County
Office of the Administrative Judge
Alternative Dispute Resolution Office
Supreme Court, Room 186
100 Supreme Court Drive
Mineola, NY 11501

### 10<sup>th</sup> Judicial District Fee Dispute Resolution Packet

Dispute over Refund of Attorneys Fees



STATE OF NEW YORK
UNIFIED COURT SYSTEM

OFFICE OF THE DISTRICT ADMINISTRATIVE JUDGE
10<sup>TH</sup> JUDICIAL DISTRICT - NASSAU COUNTY
100 SUPREME COURT DRIVE
MINEOLA, NEW YORK 11501
(516) 493-3321
FAX: (516) 493-3320

A. GAIL PRUDENT! Chief Administrative Judge

MICHAEL V. COCCOMA
Deputy Chief Administrative Judge
Courts Outside New York City

THOMAS A. ADAMS Administrative Judge

PAUL LAMANNA, Esq. District Executive

MARY T. CAMPBELL Sr. Court Analyst ADR / Fee Dispute Admin.

#### NASSAU PART 137-A

This local fee dispute program has been approved by the Board of Governors for the Statewide Part 137 Attorney-Client Fee Dispute Resolution Program. Website: <a href="https://www.nycourts.gov/admin/feedispute">www.nycourts.gov/admin/feedispute</a>.

Enclosed please find the following documents:

The Notice of Client's Right to Arbitrate a Dispute Over Attorneys Fees (Form UCS 137-1) or The Notice of Client's Right to Arbitrate a Dispute Over a Refund of Attorneys Fees (Form UCS 137-2);

Part 137 Local Program Rules and Procedures for the 10th Judicial District (Nassau County) Attorney-Client Fee Dispute Resolution Program;

Standard Written Instructions and Procedures to Clients for the Resolution of Fee Disputes Pursuant to Part 137 to Part 137 of the Rules of the Chief Administrator (Form UCS 137-3);

Client Request for Fee Arbitration (Form UCS 137-4a); and

Consent to Submit Fee Dispute to arbitration Pursuant to Part 137.2 of the Rules of the Chief Administrator and to Waive Right to Trial de Novo (Form UCS 137-14).

If your answer to Question #7 on the Client Request for Fee Arbitration Form (Form UCS 137-4a) is \$10,000 or more, please submit four (4) copies of that form in addition to the original copy (Total 5).

If your answer to that question is under \$10,000.00, please submit two (2) copies of that form in addition to the original copy (Total 3). Please retain a copy for your records.

If you elect the option of Consent to Submit Fee Dispute to Arbitration Pursuant to Part 137.2 of the Rules of the Chief Administrator and to Waive Right to Trial de Novo (UCS 137-14), it will be forwarded to the Attorney Respondent for consideration as the consent must be mutual.

There is no filing fee for the Nassau County Program.

Mary T. Campbell Program Administrator

enclosures (8/1/14)

UCS 137-2 (5/02)

#### NOTICE OF CLIENT'S RIGHT TO ARBITRATE A DISPUTE OVER A REFUND OF ATTORNEYS FEES

You claim that you are entitled to a refund in connection with legal fees you have paid the undersigned in the matter of:

The undersigned disputes the refund that you are claiming. You have the right to elect to resolve this fee dispute by arbitration under Part 137 of the Rules of the Chief Administrator of the Courts. To do so, you must file the attached Request for Fee Arbitration within 30 days from the receipt of this Notice, as set forth in the attached instructions.

If you do not file a Request for Fee Arbitration within 30 days from the receipt of this Notice, you waive the right to resolve this dispute by arbitration under Part 137.	
Dated:	

(Attorney's Signature)
[print Attorney's name, address and telephone number below]



# STANDARD WRITTEN INSTRUCTIONS AND PROCEDURES TO CLIENTS FOR THE RESOLUTION OF FEE DISPUTES PURSUANT TO PART 137 OF THE RULES OF THE CHIEF ADMINISTRATOR

Part 137 of the Rules of the Chief Administrator of the Courts provides a procedure for the arbitration (and in some cases mediation) of fee disputes between attorneys and clients in civil matters. Your attorney can provide you with a copy of Part 137 upon request or you can download a copy at <a href="www.nycourts.gov/admin/feedispute">www.nycourts.gov/admin/feedispute</a>. Fee disputes may involve both fees that you have already pald to your attorney and fees that your attorney claims are owed by you. If you elect to resolve your dispute by arbitration, your attorney is required to participate. Furthermore, the arbitration will be final and binding on both your attorney and you, unless either of you seeks a trial de novo within 30 days, which means either of you reject the arbitrator's decision by commencing an action on the merits of the fee dispute in a court of law within 30 days after the arbitrator's decision has been mailed. Fees disputes which may not be resolved under this procedure are described in Part 137.1 of the Rules of Chief Administrator of the Courts: representation in criminal matters; amounts in dispute involving a sum of less than \$1,000 or more than \$50,000 unless the parties consent; and claims involving substantial legal questions, including professional malpractice or misconduct. Please consult Part 137.1 for additional exclusions.

Your attorney may not bring an action in court to obtain payment of a fee unless he or she first has provided written notice to you of your right to elect to resolve the dispute by arbitration under Part 137. If your attorney provides you with this notice, he or she must provide you with a copy of the written instructions and procedures of the approved local bar association-sponsored fee dispute resolution program ("Local Program") having jurisdiction over your dispute. Your attorney must also provide you with the "Request for Fee Arbitration" form and advise that you must file the Request for Fee Arbitration with the local program within 30 days of the receipt of the notice. If you do not file the Request within those 30 days, you will not be permitted to compel your attorney to resolve the dispute by arbitration, and your attorney will be free to bring a lawsuit in court to seek to obtain payment of the fee.

In order to elect to resolve a fee dispute by arbitration, you must file the attached "Request for Fee Arbitration" with the approved local program. An updated list of local programs is available at <a href="https://www.nycourts.gov/admin/feedispute">www.nycourts.gov/admin/feedispute</a> or by calling toll-free 1-(877)-FEES-137 (1-877-333-7137). Filing of the Request for Fee Arbitration must be made

with the appropriate local program for the county in which the majority of legal services were performed. Once you file the Request for Fee Arbitration, the local program will mail a copy of the request to your attorney, who must provide a response within 15 days of the mailing. You will receive at least 15 days' notice in writing of the time and place of the hearing and of the identity of the arbitrator(s). The arbitrator(s) decision will be issued no later than 30 days after the date of the hearing. You may represent yourself at the hearing, or you may appear with an attorney if you wish.

Some local programs may offer mediation services in addition to arbitration. Mediation is a process by which those who have a fee dispute meet with the assistance of a trained mediator to clarify issues and explore options for a mutually acceptable resolution. Mediation provides the opportunity for your attorney and you to discuss your concerns without relinquishing control over the outcome and of achieving a result satisfactory to both of you. Participation in mediation is voluntary for your attorney and you, and it does not waive any of your rights to arbitration under these rules. If you wish to attempt to resolve your dispute through mediation, you may indicate your wish on the Request for Fee Arbitration form.

More information, including an updated list of local programs, is available at <a href="http://www.nycourts.gov/admin/feedispute">http://www.nycourts.gov/admin/feedispute</a>

or by calling 1-(877)-FEES-137 (1-877-333-7137).

#### TENTH JUDICIAL DISTRICT

#### NASSAU COUNTY

## PART 137: ATTORNEY-CLIENT FEE DISPUTE RESOLUTION PROGRAM LOCAL PROGRAM RULES AND PROCEDURES

#### SECTION 1 - POLICY

It is the policy of the Courts of the County of Nassau, Tenth Judicial District ("Courts of Nassau County"), to encourage out-of-court resolution of fee disputes between attorneys and clients in a fair, impartial and efficient manner. The Administrative Judge of the County of Nassau, Tenth Judicial District, is designated as the Administrator of the Attorney-Client Fee Dispute Resolution program for the Courts of the County of Nassau under these Rules and may delegate duties to such officers, committees, and employees as he/she may direct.

#### SECTION 2 - **DEFINITIONS**

- A. "Answer" (also referred to as "Response to Request for Fee Arbitration") means the response to the "Request for Fee Arbitration" or "Petition".
- B. "Arbitrator" means the person(s) designated by the Administrative Judge or his/her designee to hear the evidence presented by the parties and make a final determination.
- C. "Administrator" means the Administrative Judge (or designee) of the County of Nassau, Tenth Judicial District, who oversees the Program.
- D. "Approval" by the Board of Governors means, where so required by 22 NYCRR Part 137, recommendation by the Board of Governors with approval of the Presiding Justice of the Appellate Division, Second Department.
- E. "Arbitration" means the settlement of disputes between parties by neutral third person(s) who hear both sides and render an award.
- F. "Board" means the Board of Governors of the Attorney-Client Fee Dispute Resolution Program established under Part 137 of the Rules of the Chief Administrator.
- G. "Client" means a person or entity who receives legal services or advice from an attorney on a fee basis in the attorney's professional capacity.

- H. "The Office of the Courts of Nassau County" means the Administrative Judge's Office of the County of Nassau, Tenth Judicial District.
- I. "Petition" means a "Request for Fee Arbitration" requested by either the client or the attorney.
- J. "Petitioner" means the party requesting the fee arbitration.
- K. "Program" means the Attorney-Client Fee Dispute Resolution Program established under 22 NYCRR Part 137 as administered and implemented by the Administrative Judge's Office of the County of Nassau, Tenth Judicial District, pursuant to the Rules and Procedures set forth herein.
- L. "Respondent" means the party responding to the petition in opposition to the claim.
- M. "Service" means personal service or service by certified mail.
- N. "Written Instructions" means the Standard Instructions to Clients For the Resolution of Fee Disputes Pursuant to Part 137 Of the Rules Of the Chief Administrator (Form UCS 137-3 5/02) published by the Office of Court Administration.

#### SECTION 3 - THE PROGRAM AND JURISDICTION

- A. The jurisdiction of this program, for disputes in which the majority of the legal services were performed in the County of Nassau, will be the County of Nassau.
- B. In the event of a fee dispute between an attorney and client, where the representation has commenced on or after January 1, 2002, whether or not the attorney already has received some or all of the fee in dispute, the client may seek to resolve the dispute by arbitration pursuant to the Program.

Historical Note: Administrative Order 177/01 states that the provisions of Part 136 shall continue to apply to fee disputes in all domestic relations matters subject to that Part in which representation began prior to June 1, 2001. Administrative Order 260/01, filed June 14, 2001, which supercedes Order 177/01, states that the provisions of Part 136 shall continue to apply to fee disputes in all domestic relations matters subject to that Part in which representation began prior to January 1, 2002.

- C. Arbitration under this Program shall be mandated for an attorney if requested by a client, and the arbitration award shall be final and binding unless *de novo* review is sought as further described herein.
- D. Arbitration of fee disputes between attorneys and clients in Nassau County, shall take place through this Program. However, this Program shall not apply to any of the following:
  - 1. Representation in criminal matters;
  - 2. Amounts in dispute involving a sum of less than \$1,000 or more than \$50,000, except that the Office of the Courts of Nassau County may hear disputes involving other amounts if the parties have consented;
  - 3. Claims involving substantial legal questions, including professional malpractice or misconduct;
  - 4. Claims against an attorney for damages or affirmative relief other than the adjustment of the fee;
  - 5. Disputes where the fee to be paid by the client has been determined pursuant to statute or rule and allowed as of right by a court; or where the fee has been determined pursuant to a court order.
  - 6. Disputes where no attorney's services have been rendered for more than two years;
  - 7. Disputes where the attorney is admitted to practice in another jurisdiction and maintains no office in the State of New York, or where no material portion of the services was rendered in New York;
  - 8. Disputes where the request for arbitration is made by a person who is not the client of the attorney or the legal representative of the client.
- E. Pursuant to a written request and subsequent approval by the Administrative Judge of the County of Nassau, Tenth Judicial District, the Board of Governors and the Presiding Justice of the Appellate Division, Second Judicial Department, this Program may be administered by the Nassau County Bar Association in accordance with all the rules and procedures set forth herein.
- F. There shall be **NO FEE CHARGED** to any of the parties who participate in the Attorney-Client Fee Dispute Resolution Program.

- G. In the event Service becomes necessary, after having unsuccessfully attempted service by certified mail where required under these Rules and Procedures, the Petitioner must pay, in advance by check or money order made payable to the entity delegated to make such personal service the cost of such service. At the discretion of the arbitrator(s), and to the extent authorized by law, these costs may be added to the arbitrator(s) award, if previously paid by the prevailing party.
- H. 1. Arbitration under this Program shall be voluntary for the client unless:
  - (a) The client has previously consented in writing to submit fee disputes to the fee dispute resolution process by prior written agreement between the attorney and client wherein the client consented in advance to submit fee disputes to arbitration. To be valid on the part of the client, such consent must be knowing and informed. The client's consent shall be stated in a retainer agreement or other writing specifying that the client has read, pursuant to 22 NYCRR Part 137, the approved Rules and Procedures of the Office of the Courts of Nassau County and that the client consents to resolve fee disputes pursuant to the Program; or
  - (b) The attorney and client have consented in advance to submit fee disputes to arbitration that is final and binding and not subject to a trial de novo. To be valid on the part of the client, such consent must be knowing and informed and obtained in the same manner as set forth in the previous subsection of this section, except that the retainer agreement or other writing shall also state that the client understands that he/she is waiving the right to reject an arbitration award and subsequently commence a trial de novo in a court of competent jurisdiction.
  - 2. Where an agreement to arbitrate exists between the attorney and client under either subsection H.1 (a) or (b) of this section, those provisions of Section 137.6(a) and (b) of 22 NYCRR Part 137 relating to the notice of client's right to arbitrate shall not apply and no further notice of the right to arbitrate shall be required. In such circumstance, Section 137.6(a)(2) of 22 NYCRR Part 137 shall apply and either party may commence the dispute resolution process by filing a Petition with the Administrative Judge, together with a copy of the parties' agreement to arbitrate.
  - 3. The attorney and client may consent in advance to final and binding arbitration in an arbitral forum other than the one created under 22 NYCRR Part 137. To be valid on the part of the client, such consent must be knowing and informed and must be obtained in a retainer agreement or other writing. Such writing shall clearly state that the client understands

that he or she is agreeing to waive his or her rights with regard to Arbitration pursuant to Part 137, which includes the right to reject the arbitrator(s)' award by commencing an action on the merits (trial de novo) in a Court of Law. Arbitration in an arbitral forum outside Part 137 shall be governed by the rules and procedures of that forum. The Board may maintain information concerning other established arbitral programs and shall provide contact information for such programs upon request.

- 4. Fee disputes may be referred to the Administrative Judge of the County of Nassau by means not specifically described in 22 NYCRR Part 137, including but not limited to, attorney disciplinary authorities, bar associations, and employees, officers or judges of the courts. In those instances, the Administrative Office shall provide the client with information about the Program.
- I. Upon notice of appointment, the arbitrator or the arbitration chairperson designated by the Administrator may contact the parties to see if they are amenable to attempting to settle the matter themselves before proceeding with the Arbitration. However, the designee is not authorized to provide legal advice to any of the parties involved.

#### SECTION 4 - ARBITRATORS

The Office of the Courts of Nassau County shall establish and maintain a sufficient number of arbitrators in order to meet the Program's caseload. Attorneys and non-attorneys shall serve as arbitrators. In recruiting arbitrators, the Office of the Courts of Nassau County shall recruit arbitrators representing a wide range of law practices and a diversity of non-attorney professions and occupations representing a cross-section of the communities. The Office of the Courts of Nassau County shall seek the assistance of local Bar Associations in the recruitment of attorney arbitrators. Non-attorney arbitrators will be recruited by contacting established Alternative Dispute Resolution programs throughout the district as well as the Unified Court System, Office of Alternative Dispute Resolution Programs.

- A. Attorney arbitrators, approved by the Board of Governors of the New York State Fee Dispute Resolution Program, shall be appointed to provide as broad a spectrum of the Bar as possible. For any attorney to qualify for appointment as an arbitrator, the attorney must meet the following criteria:
  - 1. be admitted to the New York Bar for at least five years, and
  - 2. been engaged in the practice of law for at least three years, and
  - 3. be qualified as an arbitrator under the American Arbitration Association

- rules, by the Office of Court Administration or by the United States District Court through any of their arbitration programs; or
- 4. have completed a district-approved arbitration training program or the equivalent which program must be approved by the Board of Governors of the New York State Fee Dispute Resolution Program.
- B. Non-Attorney Arbitrators, approved by the Board, shall be appointed by the Administrative Judge of the County of Nassau, Tenth Judicial District, from as broad a spectrum of the general public as possible. For a non-attorney to qualify for appointment as an arbitrator, the non-attorney must meet the following requirements:
  - 1. be a resident of the 10th Judicial District or work within the district;
  - 2. be fluent in speaking, reading and writing English; and
  - 3. have completed a district-approved arbitration training program or the equivalent which program must be approved by the Board of Governors of the New York State Fee Dispute Resolution Program.
- C. The number of arbitrators assigned to hear a fee dispute matter under this Program shall depend upon the amount in dispute as follows:
  - 1. disputes involving a sum of less than \$10,000.00 shall be submitted to one attorney Arbitrator; and
  - 2. disputes involving a sum of \$10,000,00 or greater shall be submitted to a panel of three Arbitrators, which shall include at least one attorney and one non-attorney member of the public; the chairperson of all the panels shall be an attorney and all decisions on the merits shall be decided by majority rule.
- D. Lists of attorney Arbitrators may be maintained under the following headlines: matrimonials, litigation, real estate, business and other. Attorney Arbitrators will self-identify themselves as being within one or more of these areas and where practical, matters will be assigned to Arbitrators in order of placement on the respective lists; should there be a conflict of interest pursuant to subsection G of this section requiring the Arbitrator to be recused, the Arbitrator will remain at the top of the list for appointment in the next matter to be assigned.
- E. Prospective arbitrators shall submit a summary of credentials to the Administrative Judge of the County of Nassau, Tenth Judicial District, which

- shall be kept on record.
- F. All arbitrators must sign a written oath or affirmation to faithfully and fairly arbitrate all disputes that come before them, which written oath or affirmation shall be kept on file by the Office of the Courts of Nassau County.
- G. All arbitrators must conduct a conflict of interest check within 3 business days of initial contact by the administrator prior to accepting a case. A person who has any personal bias regarding a party or the subject matter of a dispute, a financial interest in the subject matter of the dispute, or a close personal relationship or financial relationship with a party to the dispute shall not serve as an arbitrator. An arbitrator shall disclose any information that he or she has reason to believe may provide a basis for recusal.
- H. Arbitrators shall serve as volunteers. However, Continuing Legal Education ("CLE") credits may be awarded for training and/or service as an arbitrator, subject to the rules and standards of the New York State Continuing Legal Education board.
- I. In making an award, arbitrators shall specify in a concise statement, the amount of and basis for the award.
- J. Arbitrators have a duty to maintain the confidentiality of all proceedings, hearings and communications, including all papers pertaining to the arbitration conducted in accordance with Part 137 and these Rules and Procedures, except to the extent necessary in connection with ancillary legal action with respect to a fee matter. Arbitrators should refer all requests for information concerning a fee dispute to the Office of the Courts of Nassau County. Arbitrators shall not be competent to testify in a subsequent proceeding or trial de novo.
- K. Arbitrators shall complete a minimum of six hours of fee dispute arbitration training approved by the Board of Governors of the New York State Fee Dispute Resolution Program. However, the Board may take previous arbitration training and experience under consideration in determining whether the foregoing training requirement has been met. In any case, all Arbitrators must complete a short orientation program designed to introduce them to 22 NYCRR Part 137 and these Rules and Procedures. Arbitrators may be required to undergo periodic refresher courses.

### SECTION 5 - THE FEE DISPUTE RESOLUTION PROCESS

A. Where an attorney and client cannot agree as to the attorney's fee and there has been no prior written consent to arbitration as described in Section 3.H above, the

attorney shall serve a written notice to the client, entitled "Notice of Clients Rights to Arbitrate", by certified mail or personal service. The notice shall:

- be in a form approved by the Board of Governors;
- 2. contain a statement of the client's right to arbitrate;
- 3. advise that the client has 30 days from receipt of the notice in which to elect to resolve the fee dispute;
- be accompanied by a copy of these Rules and Procedures;
- 5. be accompanied by a copy of Written Instructions; and
- 6. be accompanied by a copy of the petition form necessary to commence the arbitration proceeding.
- B. If the attorney serves a Notice of the Client's Right to Arbitrate as described in subsection A of this section and the client does not file a Petition with the district within 30 days after the Notice was received or served, the attorney may commence an action in a court of competent jurisdiction to recover the fee and the client no longer shall have the right to request arbitration pursuant to 22 NYCRR Part 137 with respect to the fee dispute at issue.

NOTE: An attorney who institutes an action to recover a fee must allege in the complaint (i) that the client received notice under 22 NYCRR Part 137 of the client's right to pursue arbitration and did not file a timely Request for Arbitration or (ii) that the dispute is not otherwise covered by Part 137.

- C. If, in the alternative event the client elects to pursue arbitration on his own initiative, the client may contact the Administrative Judge's Office ("The Office of the Courts of Nassau County") at (516) 493-3321 or the attorney with whom the client has the dispute. In the case of the latter, the attorney shall be under an obligation to refer the client to the Office of the Courts of Nassau County. Upon receipt, the Office of the Courts of Nassau County shall forward the Petition to the client by mail.
- D. The Petitioner shall then file the Petition with the Office of the Courts of Nassau County.
  - 1. Upon receipt of the Petition, the Office of the Courts of Nassau County shall assign a filing number to the matter.

- 2. The Office of the Courts of Nassau County shall contact the Petitioner to review the facts and circumstances supporting the Petition to insure that this is a matter within the jurisdiction of the Program. If it is determined that this is a matter not within the jurisdiction of the Program, the Office of the Courts of Nassau County shall inform the Petitioner.
- 3. If it is determined that this matter is a matter within the jurisdiction of the Program, the Office of the Courts of Nassau County shall mail, by certified mail, a copy of the Petition to the Respondent together with an answer form to be completed by the Respondent and returned to the Office of the Courts of Nassau County within 15 days of the aforesaid mailing of the Petition to the Respondent. If service cannot be made by certified mail and personal service becomes necessary, the Petitioner will be so informed and the Petitioner will be required to pay the expense of such service in advance by cashiers check or money order, made payable to the entity making such service, as designated by the Office of the Courts of Nassau County. The cost for such personal service may be added to the Arbitrator(s) award, if previously paid by the prevailing party, at the discretion of the Arbitrators, to the extent authorized by law.
- 4. The Respondent shall return its Answer to the Office of the Courts of Nassau County, together with a signed, written statement (certification) stating that a copy of the Answer was served upon the Petitioner.
- 5. Once the Answer and certification have been received or, if 15 business days have elapsed since the service of the Petition and answer form without any response from the Respondent, the Office of the Courts of Nassau County shall designate the Arbitrator(s) who will hear the dispute and shall expeditiously schedule a hearing.
- 6. At least 15 days prior to the date of the hearing, the Office of the Courts of Nassau County shall notify the parties in writing of the date, time and place of the hearing and of the identify of the Arbitrator(s). Any subsequent rescheduling will be a matter between the parties and the Arbitrator(s) at the discretion of the Arbitrator(s).
- 7. Either party may request the removal of an Arbitrator based upon the Arbitrator's personal or professional relationship to a party or party's counsel. A request for removal must be made to the Office of the Courts of Nassau County no later than 5 days prior to the scheduled date of the hearing. The Office of the Courts of Nassau County shall have the final decision concerning the removal of an Arbitrator.

- 8. The Petitioner may not withdraw from the process once an Answer has been submitted. If the Petitioner seeks to withdraw at anytime thereafter, the arbitration will proceed as scheduled whether or not the Petitioner appears, and a decision will be made on the basis of the evidence presented.
- If the Respondent, without good cause, fails to respond to a petition or
  otherwise does not participate in the arbitration, the arbitration will
  proceed as scheduled and a decision will be made on the basis of the
  evidence presented.
- 10. Any party may participate in the arbitration hearing without a personal appearance by submitting to the Arbitrator(s) testimony and exhibits by written declaration under penalty of perjury.
- 11. Arbitrators shall have the power to:
  - a. compel, by subpoena, the attendance of witnesses and the production of books, papers, and documents pertaining to the proceeding;
  - b. administer oaths and affirmations; and
  - c. take and hear evidence pertaining to the proceeding.
- 12. The Rules of Evidence need not be observed at the hearing.
- 13. Either party, at its own expense, may be represented by counsel.
- 14. The burden shall be on the attorney to prove the reasonableness of the fee by a preponderance of the evidence and to present documentation of the work performed and the billing history. The client may then present his or her account of the services rendered and time expended. Witnesses may be called by the parties. The attorney shall have the right to reply. The client shall have the right of final reply.
- 15. Where there is more than one (1) Arbitrator, any disputes arising among them shall be decided by the Chairperson, consistent with 22 NYCRR Part 137 of the Rules of the Chief Administrator and the minimum Standards and Guidelines of the Board of Governors of the New York State Fee Dispute Resolution Program.
- 16. Any party may provide for a stenographic or other record at the party's expense. The other party to the arbitration shall be entitled to a copy of

said record upon written request and payment of the expense of duplication. The parties to the arbitration must stipulate at least five (5) days prior to the hearing as to what kind of record will constitute a true and authentic record of the proceeding.

17. The arbitration award shall be issued by mail with a copy forwarded to the Office of the Courts of the County of Nassau no later than 30 days after the date of the hearing. Arbitration awards shall be in writing and shall state the amount and basis for the award. If de novo review has been waived pursuant to Section 3.H(b) of these Rules and Procedures, then the arbitration award shall be final and binding.

#### SECTION 6 - DE NOVO REVIEW

If de novo review has not been previously waived in writing, either party may seek de novo review of the arbitration award by commencing an action on the merits in any court of competent jurisdiction within thirty (30) days after the Notice of Arbitration Award has been mailed. Notice of commencement of such an action shall be provided to the Office of the Courts of Nassau County. If no action is commenced within thirty (30) days of the mailing of the Notice of Arbitration Award, the award shall become final and binding. Any party who fails to participate in the hearing shall not be entitled to seek de novo review absent good cause shown for such failure to participate. Arbitrators may not be called as witnesses nor shall the arbitration award be admitted in evidence at the trial de novo.

#### SECTION 7 - NOTICES

Except as otherwise stated herein, all notices, correspondence and papers necessary and proper for the arbitration proceeding under this Program and for the entry of judgment of any arbitration award may be served upon any party by regular mail addressed to that party at that party's last known address or the party's counsel of record.

#### SECTION 8 - CORRESPONDENCE

Requests for further information and correspondence relating to this Program may be sent to the Office of Administrative Judge of the County of Nassau, Tenth Judicial District, at the following address:

Office of the Administrative Judge Alternative Dispute Resolution Office Supreme Court, Room 186 100 Supreme Court Drive Mineola, NY 11501 (516) 493-3321

#### SECTION 9 - PERIODIC REVIEW

The functioning of this Program shall be reviewed periodically from the reports submitted by the Office of the Courts of Nassau County to the Board of Governors including any recommendations or suggested changes of the Program.

#### SECTION 10 - EFFECTIVE DATE

These Rules and Procedures shall take effect immediately upon Approval of the Board of Governors of the New York State Fee Dispute Resolution Program and the Presiding Justice of the Appellate Division Second Department. These Rules and Procedures and any amendments thereto shall apply in the form in effect at the time an arbitration is initiated.

(Office Use Only) Date Received:	***************************************
Case Number:	

UCS 137-4a (10/13)

### CLIENT REQUEST FOR FEE ARBITRATION

ı.	Your name, address and telephone number:					
	Name:					
	Address:					
	Telephone Number:					
	Email Address:					
2.	Name, address and office telephone number of the law firm and/or attorney who handled					
	your matter:					
	Name:					
	Address:					
	Telephone Number:					
	Email Address (if known):					
<b>3.</b>	If your attorney represented you in a lawsuit, in which court and county was the lawsuit filed?					
	Court: County:					
•	a. On what date did your attorney first agree to handle your case?					
	h On what data did your attended to the control of					
	b. On what date did your attorney last perform services on your case?					

the course of representing you (attach a copy of the written retainer agreement, letter of engagement, or other papers describing the fee arrangement, if any):

6.	In the space below, indicate the date, amount and purpose of each payment you made to your attorney. Attach additional sheets if necessary.						
	Date	Amount		(e.g.,		time,	out-of-pocket
	<u>·</u>	\$ \$					
		\$ \$					
7.		f your attorney's fee i			h a copy of	your att	omey's bill, if
8.		ceived a "Notice of ves, please attach a cop		ight to	Arbitrate"	from y	our attorney?
9.		pe why you believe you		v is not	entitled to the	he amou	int set forth in

10. I elect to resolve this fee dispute by arbitration, to be conducted pursuant to Part 137 of the Rules of the Chief Administrator [22 NYCRR] and the procedures of the Tenth Judicial District, Nassau County, copies of which I have received. I understand that the determination of the arbitrator(s) is binding upon both the lawyer and myself, unless either party rejects the arbitrator's award by commencing an action on the merits of the fee dispute (trial de novo) in a court of law within 30 days after the arbitrator's decision has been mailed.

Signed:
5

**IMPORTANT:** You must file this Request for Fee Arbitration with:

10th Judicial District - Nassau County
Office of the Administrative Judge
Alternative Dispute Resolution Office
Supreme Court, Room 186
100 Supreme Court Drive
Mineola, NY 11501

# New York Rules of Professional Conduct Rule 1.15(c)(4) Payment or Delivery of Property

#### **New York Rules of Professional Conduct:**

#### **RULE 1.15.**

Preserving Identity of Funds and Property of Others; Fiduciary Responsibility; Commingling and Misappropriation of Client Funds or Property; Maintenance of Bank Accounts; Record Keeping; Examination of Records

(a) Prohibition Against Commingling and Misappropriation of Client Funds or Property.

A lawyer in possession of any funds or other property belonging to another person, where such possession is incident to his or her practice of law, is a fiduciary, and must not misappropriate such funds or property or commingle such funds or property with his or her own.

(b) Separate Accounts.

(1) A lawyer who is in possession of funds belonging to another person incident to the lawyer's practice of law shall maintain such funds in a banking institution within New York State that agrees to provide dishonored check reports in accordance with the provisions of 22 N.Y.C.R.R. Part 1300. "Banking institution" means a state or national bank, trust company, savings bank, savings and loan association or credit union. Such funds shall be maintained, in the lawyer's own name, or in the name of a firm of lawyers of which the lawyer is a member, or in the name of the lawyer or firm of lawyers by whom the lawyer is employed, in a special account or accounts, separate from any business or personal accounts of the lawyer or lawyer's firm, and separate from any accounts that the lawyer may maintain as executor, guardian, trustee or receiver, or in any other fiduciary capacity; into such special account or accounts all funds held in escrow or otherwise entrusted to the lawyer or firm shall be deposited; provided, however, that such funds may be maintained in a banking institution located outside New York State if such -22-

banking institution complies with 22 N.Y.C.R.R. Part 1300 and the lawyer has obtained the prior written approval of the person to whom such funds belong specifying the name and address of the office or branch of the banking institution where such funds are to be maintained.

(2) A lawyer or the lawyer's firm shall identify the special bank account or accounts required by Rule 1.15(b)(1) as an "Attorney Special Account," "Attorney Trust

Account," or "Attorney Escrow Account," and shall obtain checks and deposit slips that bear such title. Such title may be accompanied by such other descriptive language as the lawyer may deem appropriate, provided that such additional language distinguishes such special account or accounts from other bank accounts that are maintained by the lawyer or the lawyer's firm.

- (3) Funds reasonably sufficient to maintain the account or to pay account charges may be deposited therein.
  (4) Funds belonging in part to a client or third person and in part currently or potentially to the lawyer or law firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law firm
- firm shall be kept in such special account or accounts, but the portion belonging to the lawyer or law firm may be withdrawn when due unless the right of the lawyer or law firm to receive it is disputed by the client or third person, in which event the disputed portion shall not be withdrawn until the dispute is finally resolved.
- (c) Notification of Receipt of Property; Safekeeping; Rendering Accounts; Payment or Delivery of Property.

  A lawyer shall:

(1) promptly notify a client or third person of the receipt of funds, securities, or other properties in which the

client or third person has an interest;

(2) identify and label securities and properties of a client or third person promptly upon receipt and place them -23-

in a safe deposit box or other place of safekeeping as soon as practicable;

- (3) maintain complete records of all funds, securities, and other properties of a client or third person coming into the possession of the lawyer and render appropriate accounts to the client or third person regarding them; and
- (4) promptly pay or deliver to the client or third person as requested by the client or third person the funds, securities, or other properties in the possession of the lawyer that the client or third person is entitled to receive.

200

# DR 5-103 [1200.22] Avoiding Acquisition of Interest in Litigation.

### DR 5-103 [1200.22] Avoiding Acquisition of Interest in Litigation.

- 1. A. A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation he or she is conducting for a client, except that the lawyer may:
- 1. Acquire a lien granted by law to secure the lawyer's fee or expenses.
- 2. Except as provided in DR 2-106 [1200.11] (C)(2) or (3), contract with a client for a reasonable contingent fee in a civil case.
- B. While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that:
- 1. A lawyer representing an indigent or pro bono client may pay court costs and expenses of litigation on behalf of the client;
- 2. A lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and
- 3. A lawyer, in an action in which an attorney's fee is payable in whole or in part as a percentage of the recovery in the action, may pay on the lawyer's own account court costs and expenses of litigation. In such case, the fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.

# New York Judiciary Law Sec 475 Attorney's lien in action, special proceeding or other proceeding

N.Y. JUD. LAW § 475: NY Code - Section 475: Attorney's lien in action, special or other proceeding

From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien.

# Notice of Attorney Charging Lien (for Real Property) to Clerk

COU	REME COURT OF THE STATE OF NEW YORK NTY OF SUFFOLK	
78 (444.4)	Plaintiff,  -against-	Index No.:  NOTICE OF ATTORNEY CHARGING LIEN PURSUANT TO THE COMMON LAW AND JUDICIARY LAW SECTION 475  IAS Justice Assigned:
 To:	DefendantXCounty Clerk	
	(Opposing Attorney)	
	(Former Client)	

NOTICE, is hereby given that CAMPAGNA JOHNSON, P.C., an Officer of the Court, of 888 Veterans Memorial Highway, Suite 200, Hauppauge, New York 11788, claims an Attorney's Charging Lien pursuant to the Common Law an/or New York Judicial Law Section 475, which reads in relevant part: "From the commencement of an action... the attorney... has a lien upon his client's cause of action... and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment..." for services rendered to the Defendant/Plaintiff, \_\_\_\_\_\_\_, who has an equitable distribution interest in the marital residence to wit: real property located at \_\_\_\_\_\_\_, in the above-captioned pending divorce action between the parties.

The lien arose in connection with attorney CAMPAGNA JOHNSON, P.C's representation, demand for equitable distribution and counterclaim seeking equitable distribution of the above-referenced marital residence of <a href="Plaintiff/Defendant">Plaintiff/Defendant</a>, in the above-captioned matrimonial action between himself and his wife, the <a href="Plaintiff/Defendant">Plaintiff/Defendant</a>, in which the firm is representing <a href="Plaintiff/Defendant">Plaintiff/Defendant</a>, is seeking equitable distribution of marital property which includes the above-referenced real property.

This Charging Lien cannot legally be nullified or avoided by settlement between the parties. If any person or entity which knowledge of this Charging Lien distributes money or property arising our of and/or subject to this action to <a href="Plaintiff/Defendant">Plaintiff/Defendant</a>, to <a href="Plaintiff/Defendant">Plaintiff/Defendant</a>, or to a third-party on his or her behalf and thereby causes the attorney asserting the Charging Lien not to be paid, the person or entity distributing the money does so at their/its own risk and may become personally liable for the entire debt and/or lien amount.

According to the unanimous ruling of the Court in Peri v. New York Cent. & H.R.R. Co., 152 N.Y.S. 521, 46 N.E. 849 (1897),

"The lien operates as security and if the settlement entered into by the parties is in disregard of it and to the prejudice of the [parties'] attorney, by reason of the insolvency of the client, or for other sufficient cause, the Court will interfere and protect its officer by vacating the satisfaction of judgment and permitting execution to issue for the enforcement of the Judgment to the extent of the lien, or by following the proceeds in the hands of third parties, who received them before or after judgment impressed with the lien." See Rubin & Rothman v. McNelis, 130 A.D.2d 643, 515 NYS2d (2d Dept. 1987) and

# McKinney's Forms on Judiciary Law Section 475.

The recovery to wh	ich attorneys CAMPAGNA J	OHNSON, P.C's	Charging Lien attaches
may be described as follow	s: Plaintiff/Defendant,	, equitable inte	rest in the real property
	, County, District _		
	e him from the sale of that pro		
CAMPAGNA JO	HNSON, P.C's claim is for the	e contracted fee and	or for the reasonable
compensation of any recove	ery in the above-captioned case	. To date, <u>Plaintiff/</u> ]	Defendant,, has
failed to pay the sum of \$_	justly owed to his attorn	ney CAMPAGNA	JOHNSON, P.C.
Dated: Hauppauge, New Y November 3, 2014	ork		
		Yours etc.,	
		CAMPAGNA J Attorneys for	OHNSON, P.C.
		By:	emorial Highway  York 11788

### VERIFICATION

I am the attorney above-named. I have read the attached Notice and am familiar with its contents. At all times relevant to the Notice, I was and have been licensed to practice law in the State of New York. To the best of my knowledge, the contents of the Notice are true.

	CAMPAGNA JOHNSON, P.C. Attorneys for	
	By:, Esq.	
Subscribed and sworn to before me on this day of, 2014.		
Notary Public		

# ACKNOWLEDGMENT

On theday of, 2014, before me, the undersigned, personally appeared, ESQ., personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledge to me that he executed the same in his capacity, and that by his signature on the instrument, the individual or the person upon behalf of which the individual acted, executed the instrument.
Notary Public

SUPREME COURT OF THE STA		
	X	Index No.:
	Plaintiff,	ATTORNEY CERTIFICATION
-against-		IAS Justice Assigned:
	Defendant.	
STATE OF NEW YORK) : ss.: COUNTY OF SUFFOLK)		
I,ESQ., here	by certify under the pe	nalty of perjury and as an Officer of the
		the factual submissions contained in this
		T TO THE COMMON LAW SECTION
475 are false or frivolous.		
Dated: Hauppauge, New York November 3, 2014		
		, ESQ.

Notice of Charging Lien (to Client and Counsel)

SUPREME COURT OF THE STA		
	4 f <b>6 a</b> 2 d Ma <b>3 a a a a a a a a a a</b> a a a a a a a a a	Index No.:
	Plaintiff,	NOTICE OF CHARGING LIEN
-against-		IAS Justice Assigned:
	Defendant.	-X
		ction 475 of the Judiciary Law,
has a charging lien upon any of the	he proceeds of this	s action (including any property settlement
equitable distribution and counsel	fee award, but ex-	cluding maintenance and child support) in
whatever hands they may come in the	ne amount of	Dollars
(\$) in legal fees.		
This lien cannot be affected	by any settlement b	petween the parties before or after judgment,
final order or determination.		
PLEASE TAKE FURTHE	R NOTICE that pr	ursuant to Section 475 of the Judiciary Law,
anyone who disregards said lien may	be held to be persor	nally liable to the See,
Judiciary Law Section475; LMWTR	ealty Corp. B. Dav	is Agency, Inc., 85.N.Y. 2d 462, 649 N.E.2d
1183, 626 N.Y.S2d 39 (Ct. Of Appe		

Dated: Hauppauge, New York November 3, 2014

	i ours etc.,
e	CAMPAGNA JOHNSON, P.C. Attorneys for
	By:, Esq. 888 Veterans Memorial Highway Suite 200 Hauppauge, New York 11788 631-737-8200
To: 4	

# Sample Order to Show Cause

Fix Charging Lien
Direct enforcement
Restarin distribution of distributive award to former client
Granting a money judgment

	At an IAS Term, Part of the Supreme Court of the State of New York, held in and for the
	County of at the Courthouse located at
PRESENT:	day of , 2014.
HON.	
Justice.	
	X
,	Index No. 95-2731
Plaintiff,	
-against-	ORDER TO SHOW CAUSE
-agamst-	
Defendant.	
	X
Upon reading and filing the annexe	ed Notice of Charging Lien, dated,
2014, Honorable Decision After Trial	dated, 2014, the Affirmation of
, Esq., dated, 2014, upon all the	exhibits annexed hereto, and upon all the prior
pleadings and proceedings heretofore had herein,	
LET the Plaintiff/Defendant or his/	her attorney show cause before this Court, before
Honorable at the Courthouse located at	, on the day of .2014
at 9:30 o'clock in the forenoon of that day, or as	
Order should not be made and entered granting Plai	ntiff/Defendant's former counsel, CAMPAGNA
JOHNSON, P.C., the following relief:	,
1. Fixing the lien granted by Ju	diciary Law Section 475 in favor of Plaintiff's
former counsel, CAMPAGNA JOHNSON, P.C.,	for legal fees, disbursements and interest owed
to CAMPAGNA JOHNSON, P.C. by Plaintiff/	
action in the sum of \$;	

2. Directing that said lien be enforced against Plaintiff/Defendant's distributive
award of approximately \$ (specifically against the to be paid to Plaintiff/Defendant
by Plaintiff/Defendant on or before, 2014) granted to her/him pursuant to Honorable
Decision After Trial dated, 2014;
3. Granting CAMPAGNA JOHNSON, P.C. a money judgment in the sum of
\$;
4. Enjoining and restraining <u>Defendant/Plaintiff</u> , <u>his/her</u> agents and/or
representatives, from making any distributive award payments to Plaintiff/Defendant pursuant to
Honorable Decision After Trial dated, 2014 or otherwise unless and until the lien in
favor of CAMPAGNA JOHNSON, P.C. is satisfied;
5. Awarding CAMPAGNA JOHNSON, P.C. such other and further relief as the
Court may deem just and proper.
SUFFICIENT CAUSE APPEARING THEREFORE, it is
ORDERED, that Defendant/Plaintiff, his/her agents and/or representatives, are hereby
enjoined and restrained from making any distributive award payments to Plaintiff/Defendant to
Honorable Decision After Trial dated, 2014 or otherwise unless and until the lien in
favor of CAMPAGNA JOHNSON, P.C. is satisfied; and it is further
ORDERED, that service of a copy of this Order to Show Cause, together with the
papers upon which it has been granted, upon the Plaintiff/Defendant, through his/her current
attorneys,, located at,
pursuant to CPLR Section 2103(b)(6) on or before the day of, 2014 shall be deemed good
and sufficient service; and it is further
ORDERED, that service of a copy of this Order to Show Cause, together with the
papers upon which it has been granted, upon the Defendant/Plaintiff, through his/her attorneys

locate	ed at pursuan
to CPLR Section 2103(b)(6) on or before the _	day of, 2014 shall be deemed good and
sufficient service.	
	ENTER:
34	700

SUPREME COURT OF THE STATE OF NEW COUNTY OF	YYORK
	Index No.:
Plaintiff,	AFFIRMATION IN SUPPORT OF APPLICATION TO FIX AND ENFORCE A CHARGING LIEN
-against-	2112 OROS II CHARGING DIGIN
Defendant.	v
	••
	uly admitted to practice in the Courts of the State
of New York, pursuant to CPLR Section 2106 and	l under the penalties of perjury, affirms as follows:
1. As this Honorable Court is well aware	e, our firm, CAMPAGNA JOHNSON, P.C., was
Plaintiff/Defendant's counsel since commencemen	at of the above-captioned action, to wit:, 2014,
and was replaced by the firm of	_ without cause, on or about, 2014
after all matters were tried before Honorable	
Form is annexed hereto as Exhibit "A". After	being replaced, this firm forwarded a copy of
Plaintiff/Defendant's last invoice dated, 20	14 to both Plaintiff/Defendant and his/her current
attorneys. A copy of this firm's, 2014 invoi	ce is annexed hereto as Exhibit "B". Following
the submission of Post-Trial Memoranda by all sid	les, this Honorable Court issued a decision dated
, 2014 (a copy of which is annexed hereto as	Exhibit "C" for the Court's convenience).
2. As is readily apparent from reading	ng the Court's, 2014 decision, this Court
Ordered Defendant/Plaintiff to pay CAMPAGNA	JOHNSON, P.C. the sum of \$ as and for
nis/her contribution to Plaintiff/Defendant's legal	fees owed to CAMPAGNA JOHNSON, P.C.
Also apparent from the Court's decision is the fact	t that this firm worked very hard on behalf of the

Plaintiff/Defendant and obtained an outstanding result for her/him. After receiving this Court's decision, your affirmant wrote to Plaintiff/Defendant seeking to make arrangements with regard to the balance of this firm's statement for services rendered in the sum of \$\_\_\_\_\_ (which, to date, has increased to \$\_\_\_\_\_). A copy of your affirmant's correspondence dated \_\_\_\_\_\_, 2014 and statement to Plaintiff/Defendant is annexed hereto collectively as Exhibit "D". In response to this correspondence, Plaintiff/Defendant's current attorneys, \_\_\_\_\_\_\_, advised that Plaintiff/Defendant would not pay more than \$20,000.00! Given the years of hard work and dedicated effort put forth by CAMPAGNA JOHNSON, P.C., this offer was flatly rejected.

- 3. Prior to the \_\_\_\_, 2014 Decision After Trial, this Honorable Court (as well as both parties and Plaintiff/Defendant's current counsel) was well aware of our firm's request for outstanding legal fees (excluding interest) in the sum of \$\_\_\_\_\_ in that this firm had submitted Post-Trial Affirmation for counsel fees indicating the amount due after we were replaced, without cause, by Plaintiff/Defendant. A copy of this Affirmation, without exhibits, is annexed hereto as Exhibit "E". The Plaintiff/Defendant and her current attorneys were also served with our invoice dated \_\_\_\_\_, 2014. Indicating this balance due. A copy of this invoice is annexed hereto as Exhibit "B".
- 4. Throughout this firm's almost six year representation of Plaintiff/Defendant (which includes the one year prior to commencement of this action when this firm attempted to negotiate a settlement between the parties hereto), none of our billing statements were ever objected to by <a href="Plaintiff/Defendant">Plaintiff/Defendant</a> signed several affidavits in connection with her requests for interim legal fees confirming that the work performed by this firm was done in a satisfactory fashion. In addition, <a href="Plaintiff/Defendant">Plaintiff/Defendant</a> repeatedly indicated to the Court that she requested that <a href="Defendant/Plaintiff">Defendant</a> repeatedly indicated connection with her applications are annexed hereto as <a href="Exhibits">Exhibits</a> "F" and "G". In fact,

<u>Plaintiff/Defendant</u> even made partial payments on our invoices throughout this firm's representation of her.

5. Clearly, CAMPAGNA JOHNSON, P.C. is entitled to a Charging Lien. Section 475 of the Judiciary Law states, in relevant part,

"From the commencement of an action... in any court... the attorney who appears for a party has a lien upon his client's cause of action, claim or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination." (Emphasis added).

See also N.K. v. M.K., 19 Misc. 3d 1124(A), \*7, 862 N.Y.S.2d 816 (Supreme Court, Kings Co., 2008) ("it is will settled that '[u]nder Judiciary Law Section 475, a charging lien automatically comes into existence, without notice or filing, upon commencement of the action' [citation omitted]"). Of course, "an attorney need not be counsel of record at the time of the judgment or settlement fund is created in order to be entitled to the lien afforded by Judiciary Law Section 475, Klein v. Eubank, 87 N.Y.2d 459, 462, 640 N.Y.S.2d 443, 444 (1996).

6. Cases are legion that an attorney who has appeared on behalf of a client in a matrimonial action is entitled to a charging lien. See Moody v. Sorokina, 50 A.D.3d 1522, 856 N.Y.S.2d 755 (4th Dept. 2008) *lv. denied* 11 N.Y.3d 713 (2008); *Gurvitsch v. Gurvitsch*, 239 A.D.2d 465, 658 N.Y.S.2d 42 (2nd Dept. 1997); *Cohen v. Cohen*, 160 A.D.2d 571, 554 N.Y.S.2d 525 (1st Dept. 1990); *Noble v. Noble*, 2011 N.Y. Slip Op. 30835(U), 2011 WL 1430041 (Supreme Court, Albany Co., 2011); *Goldman v. Goldman*, 30 Misc. 3d 1222(A), 924 N.Y.S.2d 309 (Supreme Court, Rensselaer Co., 2011); *N.K. v. M.K.*, 19 Misc. 3d 1124(A), 862 N.Y.S.2d 816 (Supreme Court, Kings Co., 2008); *Zelman v. Zelman*, 15 Misc.3d 372, 374, 833 N.Y.S.2d 375, 377 (Supreme Court, new York Co., 2007). Thus, since this firm not only appeared on behalf of the <u>Plaintiff/Defendant</u>

in this divorce action, but prosecuted every aspect to this action (short of submitting post-trial memorandum), it is respectfully submitted that CAMPAGNA JOHNSON, P.C. is entitled to a charging lien.

- 7. Perhaps the case most directly on point with the instant application is N.K. v. M.K., supra. In N.K., Defendant's two prior attorneys (who were both terminated without cause) applied to the Court to, inter alia, fix and enforce a charging lien pursuant to Judiciary Law Section 475 for legal fees and disbursements in connection with their representation of defendant, in the underlying matrimonial action. Just as this firm did in the instant action, the defendant's two prior attorneys in N.K. served notices of their charging liens on plaintiff's and defendant's current and prior counsel. A copy of this firms Notice of Charging Lien in annexed hereto as Exhibit "H". After considering both applications and defendant's opposition thereto, the Court in N.K. held that both of defendant's prior attorneys were entitled to a charging lien. Therefore, based on the facts of this, it is clear that CAMPAGNA JOHNSON, P.C. is entitled to a charging lien.
- 8. It is further respectfully submitted that the amount of the charging lien sought by CAMPAGNA JOHNSON, P.C. to be fixed is beyond dispute. As the Court in N.K. v. M.K., supra, held, a hearing was not required in order to determine the amount of the charging lien since both attorneys established that they were entitled to an account stated.

"An account stated exists where a party to a contract receives bills or invoices and does not protest within a reasonable time' (Bartning v. Bartning, 16 AD3d 249, 250 [1 Dept., 2005] [finding that court erred in dismissing appellant attorney's claim to fix his fees and impose a lien where the attorney sent out regular invoices, including a final invoice, to which he received no objection from his client and the client also failed to establish that he objected in a timely fashion to the invoices])... the 'account stated' cause of action has been held to apply to legal fees accrued in matrimonial matters [see Bartning, 16 AD3d at 249 [1 Dept., 2005]; see also Marshall v. Marshall 264 A.D.2d 824, 825-826[[2 Dept., 1991]), lv dismissed in part and denied in part 94 N.Y.2d 899 [2000]; Paul, Weiss, Rifkind, Wharton & Garrison, 4 Misc.3d 447, 450)."

N.K., 19 Misc. 3d 1124(A) at \*8. Many other cases have also held that under similar circumstances (account stated), a hearing is not required in order to fix and enforce a charging lien. See e.g., Mintz & Gold, LLP v. Hart, 48A.D.3d 526, 852 N.Y.S.2d 248 (2<sup>nd</sup> Dept., 20208); Landa v. Dratch, 45 A.D.3d 646, 846 N.Y.S.2d 256 (2<sup>nd</sup> Dept. 2007); Lapidus & Associates, LLP v. Elizabeth Street, Inc., 25Misch.3d 1226(A), 2009 N.Y. Slip Op. 52306(U) (Supreme Court N.Y. Co. 2009).

- 9. In the matter at bar, prior to the commencement of litigation, our firm entered into an agreement with Plaintiff/Defendant for the limited purpose of attempting to negotiate a settlement between the parties. However, after approximately one year of negotiations, it became readily apparent that the parties would be unable to agree on settlement terms. Therefore, this firm entered into another express agreement with Plaintiff/Defendant for legal services in order to litigate this matter (a copy of Plaintiff/Defendant's litigation retainer is annexed hereto as Exhibit "I"), and we sent Plaintiff/Defendant invoices every month as required by Court rule which explained, in detail, all services rendered; plaintiff/Defendant made partial payments towards theses invoices, and neither the Plaintiff/Defendant nor anyone on her behalf ever objected to these invoices, even after she terminated our services. All of these documents have been provided to the Court in connection with Plaintiff/Defendant's numerous fee applications. Therefore, in light of the aforementioned facts and case law, it is respectfully submitted that CAMPAGNA JOHNSON, P.C. has established an account stated and, accordingly, no hearing is necessary to determine the amount of this firm's charging lien.
- 10. Moreover, pursuant to this firm's \_\_\_\_\_\_, 2014 correspondence (See Exhibit "D") and paragraph \_\_\_\_\_ of this firm's retainer agreement with Plaintiff/Defendant (a copy of which is annexed hereto as Exhibit "J"), the charging lien sought by CAMPAGNA JOHNSON, P.C. should include interest which accrued on the unpaid portion of Plaintiff/Defendant's legal fee in the sum of \$\_\_\_\_\_, See N.Kv. M.K., 19 Misc. 3d 1124(A) at \*(In summary, the court finds that [defendant's

prior attorneys] are both entitled to charging liens fixed in the amounts sought by them and supported by their submissions to the court, taking into account any applicable interest accrued" (emphasis added)).

- in N.K. v. M.K., supra, namely judicial estoppel. "The doctrine of judicial estoppel provides that 'a party is precluded from inequitably adopting a position directly contrary to or inconsistent with an earlier assumed position in the same proceeding' (Nestor v. Britt, 270 A.D.2d 192, 193 [1 Dept., 2000])." Id. At \*9. In fact, as was the case in N.K., Plaintiff herein was awarded substantial attorney's fees during the pendency and after the trial of this action based on the very bills and invoices which form the basis of this firm's instant application for a charging lien! Therefore, since the Plaintiff/Defendant in the instant action repeatedly represented to the court his/her satisfaction with this firm's representation of her pursuant to his/her Affidavits in support of her/his various applications for attorney's fees, she should be estopped from arguing that this firm's invoices are excessive, inflated or that CAMPAGNA JOHNSON, P.C. is not entitled to receive the full amount of our legal fees, disbursements and interest in connection with our representation of Plaintiff/Defendant in this matrimonial action.
- only entitled to a charging lien in the sum of \$\_\_\_\_\_ which should be granted without a hearing, but said lien should be enforced against Plaintiff/Defendant distributive award of approximately \$\_\_\_\_ (specifically against the \_\_\_\_\_ to be paid to Plaintiff/Defendant by Plaintiff/Defendant on or before \_\_\_\_, 2014) granted to her pursuant to Honorable \_\_\_\_\_ decision After Trial dated \_\_\_\_, 2014. See Haser v. Haser, 271 A.D.3d 253, 707 N.Y.S2d 47 (1st Dept. 2000); Noble v. Noble, 2011 N.Y. Slip Op. 30835(U), 2011 WL 1430041 (Supreme Court, Albany Co., 2011); Cohen v. Cohen, supra; Zelman v. Zelman, supra.

- 13. In addition to enforcing this lien against Plaintiff/Defendant's distributive award, this firm should also be awarded a money judgment in the sum of \$\_\_\_\_\_ which may also serve as a lien until this firm is paid in full. See Marshall v. Marshall, 264 A.D.2d 824, 696 N.Y.S.2d 60 (2nd Dept. 1999) lv. Denied 94N.Y.2d 894 (2000); Nobel v. Nobel, 2011 N.Y. Sip Op. 30835(U), 2011 WL 1430041 (Supreme Court, Albany Co., 2011); N.K. v. M.K., 19 Misc. 3d 1124(A), 862 N.Y.S.2d 816 (Supreme Court, Kings Co., 2008).
- 14. Finally, it is clear that when an attorney is seeking to enforce his or her charging lien against a party's distributive award, the Courts of this State are empowered to grant a temporary restraining order prohibiting the transfer and distribution of any funds representing distributive award payments pending the outcome of the attorney's application to enforce his or her charging lien. See Tunick v. Shaw, 6 Misc. 3d 1014(A), 800 N.Y.S.2d 358 (Supreme Court, New York Co., 2004) affi'd mod. 45 A.D.3d 145, 842 N.Y.S.2d 395 (1st Dept. 2007); White v. White, 107 Misc.2d 551, 435 N.Y.S.2d 535 (Supreme Court, Nassau Co., 1981); N.K. v. M.K., supra. Accordingly, it is respectfully submitted that this firm's request for a temporary restraining order enjoining and restraining the Defendant/Plaintiff, his/her agents and/or representatives, form making any distributive award payments to Plaintiff/Defendant pursuant to Honorable \_\_\_\_\_\_ Decision After Trial dated \_\_\_\_\_, 2014 or otherwise unless and until the lien in favor of CAMPAGNA JOHNSON, P.C. is satisfied, be granted.
- 15. Pursuant to NYCRR Section 202.7(f), the attorneys for Plaintiff and Defendant were given notice of this application via email and facsimile at approximately \_\_\_\_ pm on \_\_\_\_\_,

  2014. See Exhibit "K" annexed hereto.
- 16. Other than <u>Plaintiff/Defendant's</u> and this firm's previous applications for attorney's fees from <u>Defendant /Plaintiff</u> as set forth herein, no prior application for th same or similar relief has been made to this or any other Court.

WHEREFORE, it is respectfully requested that the Court grant CAMPAGNA.	<b>JOHNSON</b>
P.C. all of the relief requested herein.	
Dated: Hauppauge, New York November, 2014	
ESO.	

# The attached ORDER TO SHOW CAUSE and SUPPORTING PAPERS are hereby certified

pursuant to 22 N.Y.C.R.R. 130-1.1-a.

Dated: Hauppauge, New York November 3, 2014

Yours etc.,	
CAMPAGNA Attorneys for	JOHNSON, P.C.
By:	, Esq.
888 Veterans I	Memorial Highway
Suite 200	<b>33</b>
Hauppauge, N	ew York 11788

# Suffolk Academy of Law Suffolk County Bar Association

Family Court Update

# **CUSTODY and VISITATION**

Professor Lewis A. Silverman Director, Family Law Clinic Touro Law Center

November 7, 2014

# TABLE OF CONTENTS

The Standard	3
The Rules.	٠٠٠٠٠٠٠٠
The Factors	
Best Interests of the Child	6
The Factors	
Stability	6
Parental Alienation	7
Child's Preference	9
Domestic Violence	10
Religion	10
Other Factors	10
Joint Custody	13
Parent vs. Non-Parent	14
Miscellaneous	15
Modification	15
Change in Circumstances	16
Modification Denied	19
Relocation	21
Visitation	23
Compliance	27
Grandparent Visitation	27
Procedure	28
Standing	28
Hearing	30
Right to Counsel	32
Counsel Fees and Sanctions	33
In Camera (Lincoln Hearing)	33
Experts	34
Referee	35
Miscellaneous	35
UCCJEA, SIJS and Hague Convention	38
UCCJEA.	38
SIJS	40
Hague Convention	41
Supplemental Materials	43

# THE STANDARD: Best Interests of the Child

Friederwitzer v. Friederwitzer, 55 NY2d 893 (1982) Eschbach v. Eschbach, 56 NY2d 167 (1982)\*

Domestic Relations Law §240 Family Court Act §651

# THE RULES:

- 1. The court should be gender-neutral. Linda R. v. Richard E., 162 AD2d 48 (2<sup>nd</sup> Dept. 1990) Domestic Relations Law §81
- 2. Between parent and non-parent, parent is entitled to custody absent unfitness or extraordinary circumstances.

  Matter of Rennett v. Leffreys, 40 NV2d 543(1076)

Matter of Bennett v. Jeffreys, 40 NY2d 543(1976) Matter of Dickson v. Lascaris, 53 NY2d 204 (1981)

3. Custody should be decided for the long-term and should not be changed absent substantial change in circumstances and the child's best interests.

Dintruff v. McGreevy, 34 NY2d 887 (1974) Obey v. Degling, 37 NY2d 768 (1975) Friederwitzer v. Friederwitzer, 55 NY2d 893 (1982)

- 4. Siblings should not be separated without good reason. Obey v. Degling, 37 NY2d 768 (1975)
  Eschbach v. Eschbach, 56 NY2d 167 (1982)
- 5. Joint custody should not be awarded absent agreement of the parents. Braiman v. Braiman, 44 NY2d 584 (1978)
  Bliss o/b/o Ach v. Ach, 56 NY2d 995 (1982)
- 6. Visitation is a joint right of parent and child. Weiss v. Weiss, 52 NY2d 170 (1981)

  Matter of Granger v. Misercola, 21 NY3d 86 (2013)

### THE FACTORS:

- 1. Primary caregiver Garska v. McCoy, 167 W.Va. 59, 278 SE2d 357 (1981)
  - 2. Psychological Bond
  - 3. Work Schedule of parent
  - 4. Mental Health of parents
  - 5. Physical ability to parent
  - 6. Past Performance
  - 7. Sexual Activity of parent nexus rule
  - 8. Substance abuse
  - 9. Financial advantages (overwhelming) of one parent
  - 10.Race
- I 1. Religion

  Matter of Gribeluk v. Gribeluk, 2014 NY Slip Op 05790 (Second Dept. 8/13/2014)
- 12.Child's Preference
  Dintruff v. McGreevy, 34 NY2d 887 (1974)
  Matter of Ebert v. Ebert, 38 NY2d 700 (1976)
  Matter of Nehra v. Uhlar, 43 NY2d 242 (1977)
- 13. Facility to support contact with other parent Bliss o/b/o Ach v. Ach, 56 NY2d 995 (1982)
- 14.Domestic Violence
  Allen v. Farrow, 197 AD2d 327 (1st Dept. 1994)\*

15. False allegations about other parent

# BEST INTERESTS OF THE CHILD

#### **Factors**

Stability

Father has provided child with a safe, loving and stable home since child was removed from mother because of neglect. Father has also encouraged relationship with mother.

Matter of Kenneth H. v. Fay F., 13 A.D.3d 542 (First Dept. 2014)

Father had more stable home environment: four-bedroom home and gainful employment; mother unemployed and had resided in four different apartments since parties separated.

Matter of Cross v. Caswell, 113 AD3d 1107 (Fourth Dept. 2014)

Priority in custody disputes should usually be given to the parent who was first awarded custody because this policy assures stability in the child's life. *McCance v. DeWitt*, 118 A.D.3d 759 (Second Dept. 2014)

Although the father clearly loves the child and has been actively involved in her life, the record reflects that the mother is able to afford the child a more stable and consistent home environment and is the party more likely to facilitate and encourage a meaningful relationship between the child and the noncustodial parent. Mother had full-time employment and child had her own bedroom; father was receiving UIB and attending college online and child had to share a bed with his girlfriend's daughter when she visited. *Matter of DiMele v. Hosie*, 118 AD3d 1176 (Third Dept. 2014)

Trial court gave insufficient weight to fact that mother was primary caregiver of the childrens' entire lives, while father had limited involvement. *Matter of Fallo v. Tallon*, 118 A.D.3d 991 (Second Dept. 2014)

Father had more stable home, having resided in the same residence for years with his sister and the grandmother, who provided the child care while he was working. Mother, on the other hand, resided in three different

residences in the child's first year, was on welfare, and had domestic violence issues.

Matter of Alleyne v. Cochran, 119 A.D.3d 1100 (Third Dept. 2014)

Custody award to mother affirmed. Parties have been separated for many years and the children have resided with the mother.

Matter of Eison v. Eison, 119 A.D.3d 861 (Second Dept. 2014)

Trial court granted modification; Appellate Division reversed. Child, who had been in the primary custody of mother for five years, needed stability. *Matter of Lombardi v. Valenti*, 120 A.D.3d 817 (Second Dept. 2014)

#### Parental alienation

Mother allowed child to view her ex-husband, rather than the child's father as the "daddy", put ex-husband's name on birth certificate despite genetic testing and Order of Filiation; denigrated the father in child's presence; and made repeated and unfounded allegations of domestic violence and abuse. Custody granted to father with only supervised visitation to mother.

Matter of Khan-Soleil v. Rashad, 111 A.D.3d 728 (Second Dept. 2013)

Trial court finds mother's attitude about father's role in child's life raise a strong probability that she is unfit to be custodian.

Matter of Matthew B. v. Shanna, NYLJ 1202639617364 at \*1 (Westchester County Family Court 1/14/2014)

Mother did not advise father that one child had cancer until after surgery. Further, she limited children's ability to communicate with father on the Internet, listened in on their phone conversations and was inflexible with visitation arrangement, alienating both children from her.

Matter of Parchinsky v. Parchinsky, 114 AD3d 1040 (Third Dept. 2014)

Mother had interfered in the father's relationship with the child, including unfounded allegations of sexual abuse.

Matter of Dezil v. Garlick, 114 A.D.3d 773 (Second Dept. 2014); Matter of Fargasch v. Alves, 116 A.D.3d 774 (Second Dept. 2014).

Children's bond to alienating parent so strong that change of custody would be harmful to the child; court reversed trial court's finding of actual alienation by the father. Trial court failed to take into account mother's own conduct in alienating the child, which was not blameless. [A rather sharp criticism of the trial court, discounting virtually every finding of fact it made.]

Melissa C.D. v. Rene I.D., 117 AD3d 407 (First Dept. 2014)

Contrary to trial court's findings, record contains no evidence to support parental alienation finding against mother.

Matter of Fallo v. Tallon, 118 A.D.3d 991 (Second Dept. 2014)

Father granted custody because of mother's *anticipatory* alienation, reflected by her conduct with older (now emancipated) child. Court also affirmed separation of siblings for that reason.

Robert B. v. Linda B., 119 A.D.3d 1006 (Third Dept. 2014)

Mother's allegations of sexual abuse of the children by the father unfounded, and subjected the children to numerous interviews and examinations.

Matter of Gribeluk v. Gribeluk, 120 A.D.3d 579 (Second Dept. 2014)

Trial court reversed and mother granted custody although child with father for last six of her eight years. A somewhat complicated factual case, where it took four years to adjudicate mother's original custody petition (and two years for appeal) and child was with father entire time. But Appellate Division found that several points of evidence called into question father's ability to continue to foster the child's relationship with the mother.

Matter of Doyle v. Debe, 120 A.D.3d 676 (Second Dept. 2014)

Trial court granted modification; Appellate Division reversed. Evidence of mother's interference with father-child relationship insufficient to warrant a change in custody.

Matter of Lombardi v. Valenti, 120 A.D.3d 817 (Second Dept. 2014)

Based on assessment of the parties, mother better suited to place child's interests above her own and to foster child's relationship with the father. *Matter of Saravia v. Godzieba*, 1120 A.D.3d 821 (Second Dept. 2014)

Mother deliberately and continuously disparaged the father in the child's presence, which caused the child to develop anxiety which was further fostered by the mother's conduct, and impeded the child's visitation with the father.

Matter of Alfredo J.T. v. Jodi D., 120 A.D.3d 1138 (First Dept. 2014)

## Child's preference

The child's preference, while not determinative, may also be indicative of the child's best interests. [nine years old].

Matter of Shannon J. v. Aaron P., 111 A.D.3d 829 (Second Dept. 2013)

Preference of 13 year old child, expressed in *Lincoln* hearing, entitled to great weight.

Matter of O'Shea v. Parker, 116 A.D.3d 1051 (Second Dept. 2014)

Although the express wishes of the child are not controlling, they are entitled to great weight, particularly where the child's age and maturity would make his or her input particularly meaningful. Case involved 16 and 12 year old (14 by time Appellate Division ruled) children, whose choice to live with father was supported by attorney for the children and a neutral forensic evaluator. Trial court gave older child to father but second child to mother; reversed on the latter. [Appellate Division also reversed a trial court finding of parental alienation by father.]

Melissa C.D. v. Rene I.D., 117 AD3d 407 (First Dept. 2014)

Where father not only discussed court proceedings with the child but brought both children to his attorney's office – without their counsel present – in order to be prepped with respect to the proceedings, trial court correctly gave very little weight to children's expressed preference.

Matter of Virginia C. v. Donald C., 114 AD3d 1032 (Third Dept. 2014)

Children, then 13 and 15, expressed strong preference to live with father, and wishes of older and more mature children, while not dispositive, can support finding of change of circumstances.

Matter of Parchinsky v. Parchinsky, 114 AD3d 1040 (Third Dept. 2014)

Attorney for child initially opposed child's choice of mother, but ultimately stated that he had grown in maturity and supported his choice. Trial court disagreed, noting that the ten-year old subject child was not mature enough to intelligently weigh the factors necessary to make a wise choice. *Matter of Yves M. v. Mildred C.*, NYLJ 1202666932589 at 1 (Kings County Family Court 7/31/2014)

Father sought change in custody and trial court granted his petition and essentially reversed the existing custody/visitation schedules. Wishes of twelve year old child counted considerably in consideration of both courts. *Matter of Cisse v. Graham*, 120 A.D.3d 801 (Second Dept. 2014)

Child, then nearly thirteen, expressed his preference in two *Lincoln* hearings. Mother had left the country and returned to France in the middle of the proceeding and the court drew an adverse inference. Mother's conduct exacerbated by fact that she chose to attack child's veracity. Trial court's award of custody to father affirmed.

Cohen v. Cohen, 120 A.D.3d 1060 (First Dept. 2014)

#### Domestic violence

Court could not overcome mother's abuse of subject child (she burned his buttocks) and discredited her unclear testimony about domestic violence by the father.

Matter of Yves M. v. Mildred C., NYLJ 1202666932589 at 1 (Kings County Family Court 7/31/2014)

## Religion

Religion may be considered as a factor, but may not be determinative. Trial court denied it relied solely on mother's decision to leave Hasidic community, and passed no judgment on either parent's religious beliefs or practices. But the Appellate Division noted the potential impact of uprooting the children "from the only lifestyle they have known" which is a veiled way of doing the same thing it said could not be done, and probably unnecessary because of mother's unfounded allegations of abuse of the children by the father. [The NY courts continue to cross First Amendment lines, which most states will not do, ever since *Friederwitzer*.-Ed.] *Matter of Gribeluk v. Gribeluk*, 120 A.D.3d 579 (Second Dept. 2014)

# Other factors

Mother refused to acknowledge possible sexual abuse of older half-sibling of subject child by cousin, and in turn possibility that half-sibling could have abused subject child, or to get mental health treatment for older child. Combined with inappropriate attitude about father's role [see infra] custody granted to father.

Matter of Matthew B. v. Shanna, NYLJ 1202639617364 at \*1 (Westchester County Family Court 1/14/2014)

Father's living situation and employment considerably more stable than that of mother.

Matter of Mitchell v. Mitchell, 113 A.D.3d 775 (Second Dept. 2014)

No evidence that mother's past mental difficulties have affected her parenting abilities.

Elkin v. Labis, 113 A.D.3d 419 (First Dept. 2014)

Custody denied where father was diagnosed with "cannabis dependence" and was a regular marijuana user.

Matter of Keen v. Stephens, 114 AD3d 1029 (Third Dept. 2014)

Court considered several factors, including father's steady employment and stable housing vs. mother's repeated prison stints and pending criminal case, lack of income and housing; and child's special educational needs. Raymond A. v. Lisa M.H., 115 AD3d 553 (First Dept. 2014)

Father awarded custody. Father's employment "considerably" more stable than the mother's employment; mother lacked effort and interest regarding the children's schooling and therapy; and mother had a history of placing her own interests before the interests of the children.

Matter of Norfleet v. Williams, 116 A.D.3d 865 (Second Dept. 2014)

Mother inflicted excessive corporal punishment on child, engaged in inappropriate and bizarre behavior, and actively interfered with father's relationship with child, including removing the child from the state during the pendency of the custody proceedings. Custody awarded to father. *Matter of Jarren S. v. Shaming T.*, 117 AD3d 1109 (Third Dept. 2014)

Court awarded primary physical custody to father. Mother had moved 67 miles away with child but was still commuting back to work and had moved five times in just a few months. Father had a more regular work schedule and support of several relatives who lived in his vicinity, a location where he had lived for at least nine years. Father had also initiated child's enrollment in Head Start, which mother did not do until after hearing commenced. Father seemed more willing to actively promote child's relationship with

mother than mother was to promote child's relationship with father. Matter of Holland v. Klingbeil, 118 AD3d 1077 (Third Dept. 2014)

Trial court erred; father has shown a greater ability than mother to place child's interest above his own and to anticipate and provide for her physical, emotional, social and intellectual needs. Also, trial court would have separated siblings.

Matter of Soto v. Cruz, 119 A.D.3d 592 (Second Dept. 2014)

Mother was child's primary caregiver, assumed responsibility for his medical needs, was getting treatment for drug dependency and other ailments, had stabilized her financial situation, maintained an appropriate residence for the child, and had improved her relationship with the maternal grandmother, who lived nearby. Father, on the other hand, had only sporadic contact with the child owed \$25,000 in arrears, and refused to move from Florida to NY despite the child's strong emotional ties in NY. [Father also engaged in some self-help, although it did not appear to have made his poor custody chances worse.]

Matter of Windom v. Pemberton, 119 A.D.3d 999 (Third Dept. 2014)

Trial court's denial of modification reversed and custody awarded to father. Appellate Division found that trial court did not accord sufficient weight to child's educational difficulties while residing with mother and dramatic improvements while residing with father, as well as child's need for stability and child's preference.

Matter of Reyes v. Gill, 119 A.D.3d 804 (Second Dept. 2014)

Trial court reversed and relocation allowed for mother to take child to Georgia. A somewhat complicated factual case, where it took four years to adjudicate mother's original custody petition (and two years for appeal) and child was with father entire time. But Appellate Division found that father had signed at least two agreements acknowledging that child would reside with mother in Georgia, that mother had more suitable physical setting for child, that several points of evidence called into question father's ability to continue to foster the child's relationship with the mother.

Matter of Doyle v. Debe, 120 A.D.3d 991 (Second Dept. 2014)

Father found better suited to meet child's educational and medical needs, and mother had caused the child to have advanced bottle rot and the child

still wore a diaper at age five.

Matter of Alfredo J.T. v. Jodi D., 120 A.D.3d 1138 (First Dept. 2014)

Child's school work and grades improved dramatically during three year period father had temporary custody.

Matter of Ivory B. v. Shameccka D.B., 2014 NY Slip Op 06578 (Second Dept. 10/1/2014)

## Joint Custody

Although the parties have had disagreements, they have behaved in a relatively civilized fashion toward each other and there is no evidence that they are so hostile or antagonistic toward each other that they would be unable to put aside their differences for the good of the children. Award of joint custody affirmed.

Matter of Carter v. Carter, 111 A.D.3d 715 (Second Dept. 2013)

Parties' acrimonious relationship precludes joint custody. Elkin v. Labis, 113 A.D.3d 419 (First Dept. 2014)

Appellate Division reversed an award of sole legal and physical custody to mother, and awarded father joint legal custody because there was no evidence the parties' relationship was characterized by acrimony or mistrust. *Johanys M. v. Eddy A.*, 115 AD3d 460 (First Dept. 2014)

The relationship between the joint custodial parents deteriorated to the point where they simply cannot work together in a cooperative fashion for the good of the children; sole custody awarded.

Matter of Sonley v. Sonley, 115 AD3d 1071 (Third Dept. 2014)

Joint custody not appropriate where, given the nature of the parties' relationship and their inability to put aside their differences for the good of the child, it could only enhance familial chaos. Trial court reversed. *Irizarry v. Irizarry*, 115 A.D.3d 913 (Second Dept. 2014)

Order granting mother sole decision-making authority over medical and educational decisions; joint decision-making authority over all other custodial matters. Affirmed. [Record unclear which parent received primary residential custody.] No evidence parties are so hostile or

antagonistic toward each other that they would be unable to put aside their differences for the good of the child.

Matter of Thorpe v. Homoet, 116 A.D.3d 962 (Second Dept. 2014)

In initial custody proceeding court awarded joint legal custody and primary physical custody to father. Affirmed, but no discussion of the joint custody factor.

Matter of Holland v. Klingbeil, 118 AD3d 1077 (Third Dept. 2014)

Joint custody or equal parenting time inappropriate as parties sometimes antagonistic toward each other and demonstrated an inability to cooperate on certain important matters concerning the child.

Matter of Saravia v. Godzieba, 120 A.D.3d 821 (Second Dept. 2014)

## Parent v. Non-Parent

Extraordinary circumstances existed including the unstable and unsafe living situation the mother created to the child through her drug use and her physically and verbally abusive behavior toward the child.

Matter of Diana B. v. Lorry B., 111 A.D.3d 927 (Second Dept. 2013)

Paternal grandmother sought custody and alleged extraordinary circumstances. Child had previously been placed with her while neglect charges pending, but neglect petition ultimately dismissed as to that child and returned to mother. Trial court went through various allegations of possible extraordinary circumstances and ultimately dismissed grandmother's petition.

Rasheeda K. v Tawanna M., NYLJ 1202630531995 at \*1 (Family Court Bronx County 11/25/2103)

Grandmother established extraordinary circumstances against father based on his history of substance abuse and failure to comply with mental health treatment, father's criminal history and history of domestic violence, his inability to support the child, and the grandmother's demonstrated ability to care for the child's extraordinary needs, as well as the strong emotional bond between the child and grandmother.

Matter of Roberta W. v. Carlton McK., 112 A.D.3d 729 (Second Dept. 2013)

Custody granted to paternal grandmother. Extraordinary circumstances existed: children had been with her as a DSS placement for 2 ½ years;

father visited only sporadically; he had no involvement in the children's medical care or education; and he did not support them financially. *Matter of Aida B. v. Alfredo C.*, 114 AD3d 1046 (Third Dept. 2014)

Former foster parents had no standing to seek custody against father, and petition alleging father's arrest and incarceration did not establish extraordinary circumstances.

Matter of Washington v. Stoker, 114 AD3d 1147 (Fourth Dept. 2014)

Father's application for custody denied. Child had been placed with noparent by mother and had been there virtually since birth; father disputed paternity even after DNA test, there were few visits which ceased at the father's volition, and the father had no ability or interest in addressing child's special needs. Extraordinary circumstances existed. Matter of Campbell v. January, 114 AD3d 1176 (Fourth Dept. 2014).

Where initial order granting grandparent custody is on consent, nonparent must still prove extraordinary circumstances in modification proceeding. Appellate Division reversed trial court's finding that grandmother had not proved extraordinary circumstances, but still affirmed award of custody to father based on child's best interests.

Matter of Weinberger v. Monroe, 120 A.D.3d 583 (Second Dept. 2014)

# Miscellaneous

Court gave insufficient weight to recommendation of attorney for children. Matter of Fallo v. Tallon, 118 A.D.3d 991 (Second Dept. 2014)

#### MODIFICATION

General Quote -

Matter of Hixenbaugh v. Hixenbaugh, 111 A.D.3d 636 (Second Dept. 2013); Matter of Begy v. Begy, 115 A.D.3d 951 (Second Dept. 2014); Matter of Fargasch v. Alves, 116 A.D.3d 774 (Second Dept. 2014); Matter of Holmes v. Holmes, 116 A.D.3d 955 (Second Dept. 2014)

## Change in Circumstances

Parties' relationship had deteriorated to the point that they did not speak to each other and one of the children had moved in with the father even before court awarded him temporary custody, and the father was concerned that the mother had become involved in a relationship that would have a negative impact on the children. Trial court reversed and change of custody granted. *Matter of Bustamante v. Largue*, 112 A.D.3d 819 (Second Dept. 2013)

Mother's allegations as to the subject child's alarming behavior after previous custody agreement warrant a hearing as to whether best interests of child require a change in custody. Modification petition should not have been dismissed without a hearing.

Matter of Lore v. Sclafani, 2014 NY Slip Op 00667 (Second Dept. 2/5/2014)

Breakdown in communication between the parents [including the fact they were in criminal court the day before the hearing with competing harassment charges] demonstrated a change in circumstances requiring consideration of the children's best interests. Other factors justifying change in custody: older child struggled in school while with mother but thrived while with father; father enrolled younger child in nursery school, which mother had not even considered; mother was found to have neglected the children, and suffered from mental health issues.

Matter of Tod ZZ. V. Paula ZZ., 113 AD3d 1005 (Third Dept. 2014)

Child's commencement of kindergarten constitutes a change in circumstances necessitating modification of the prior joint physical and legal custody order.

Matter of Voland v. Stalker, 113 AD3d 1010 (Third Dept. 2014)

Removal of subject children from pre-adoptive home, where they resided for three years, constituted a change in circumstances requiring a remand to trial court to reconsider various custody and visitation petitions brought by relatives of children. Related provision of Orders terminating mother's parental rights vacated so that the custody/visitation petitions could proceed [but Appellate Division affirmed finding revoking suspended judgment against mother.]

Matter of Leval B. v. Kiona E., 115 A.D.3d 665 (Second Dept. 2014) and related cases decided therewith.

Although father aware of mother's alcohol problems when he consented to joint physical and legal custody, mother's continuing and escalating problems, coupled with alcohol related arrests and two indicated CPS reports constituted sufficient change in circumstances to justify a best interests analysis.

Matter of Kiernan v. Kiernan, 114 AD3d 1045 (Third Dept. 2014)

Mother had interfered in the father's relationship with the child, including unfounded allegations of sexual abuse.

Matter of Fargasch v. Alves, 116 A.D.3d 774 (Second Dept. 2014).

The relationship between the joint custodial parents deteriorated to the point where they simply cannot work together in a cooperative fashion for the good of the children; modification granted and sole custody awarded.

Matter of Sonley v. Sonley, 115 AD3d 1071 (Third Dept. 2014)

Sufficient change of circumstances existed where parties' relationship had deteriorated to the point that there was no meaningful communication or cooperation on behalf of the child; mother was hostile and accusatory to the father in front of the child, making the child withdrawn at drop-offs; constantly disrupted father's visitations, insisted on a police escort when transporting the child to the father's home, videotaped the custody exchanges as well as the child's body before and after the visitations, and made baseless accusations against him.

Matter of Paul A. v. Shaundell LL., 117 AD3d 1346 (Third Dept. 2014)

Parties had an arrangement where child alternated between mother who had returned to Canada and father in Broome County. Appellate Division found that child reaching school age was a change in circumstances justifying modification. Trial court's decision to alternate custody on an annual basis (opposed by both parents on appeal) was reversed; mother was given primary residential custody based on relevant factors, including father's acknowledgment that mother was the more nurturing parent.

Matter of Nelson v. Perea, 118 A.D.3d 1057 (Third Dept. 2014)

Change in circumstances existed. Mother coached child to make false allegations and attempted to alienate the child from the father. She had been involved in domestic violence with her boyfriend, with whom she continued living and then married, including incidents involving a loaded rifle and his

arrest with ten pounds of marijuana.

Matter of Joshua UU. V. Martha VV., 118 AD3d 1051 (Third Dept. 2014)

Change in custody affirmed where mother had consistently interfered with father's parenting time, moved frequently, was unemployed, had a suspended driver's license, frequently used or allowed the use of vulgar and racist language to denigrate the father, lived in deplorable conditions, and had been indicated for educational neglect of another child. Father, to the contrary, was gainfully employed and had an active family support system. *Matter of Joseph WW. v. Michelle WW.*, 118 AD3d 1054 (Third Dept. 2014)

Change in circumstances established when mother moved back to NY from North Carolina, rendering the visitation schedule impractical, and the parties unable to communicate or make joint decisions. Custody, however, granted to father, even though he had not petitioned for same.

Matter of Abbott v. Merritt, 118 AD3d 1309 (Fourth Dept. 2014)

Change of custody affirmed where record established that mother repeatedly took away child's cell phone, preventing the father from communicating with the child, and on one occasion even made a video recording of the child's tearful response. Child's disposition also changed when mother moved in with her boyfriend and his children. Child's preference also considered [no age given.]

Matter of Cheney v. Cheney, 118 AD3d 1358 (Fourth Dept. 2014)

Parties' relationship had deteriorated to the point they could not communicate and rendered them unable to engage in joint decision-making with regard to the children.

Filippi v. Filippi, 118 A.D.3d 939 (Second Dept. 2014)

Trial court detailed an extensive scheme by mother to alienate child from his father and frustrate the joint custody arrangement. Father awarded full legal custody and decision-making, although physical custody split 50/50. [Even though parties live close enough to each other to effectuate this, it seems inconsistent with some of the other findings.]

E.V. v. R.V., 44 Misc.3d 1210A (Supreme Court Westchester County, 2014).

Mother granted primary residential custody and joint legal custody. Children had lived with father, but he and step-mother had indicated CPS case because of substance and alcohol abuse and children had to be removed. Mother appeared to no longer be a risk.

Matter of Lawrence v. Kowatch, 119 A.D.3d 1004 (Third Dept. 2014)

Trial court's denial of modification reversed and custody awarded to father. Appellate Division found that trial court did not accord sufficient weight to child's educational difficulties while residing with mother and dramatic improvements while residing with father, as well as child's need for stability and child's preference.

Matter of Reyes v. Gill, 119 A.D.3d 804 (Second Dept. 2014)

The continued deterioration of the parties' relationship is a significant change in circumstances justifying a change in custody.

Lauzonis v. Lauzonis, 120 A.D.3d 922 (Fourth Dept. 2014)

Father sought change in custody and trial court granted his petition and essentially reversed the existing custody/visitation schedules. Appellate Division wrote a lengthy opinion with a spirited defense [which has some substantial gaps in both facts and logic] but essentially based its opinion on request of both mother and child to give them more quality time by reversing the custody arrangement, which gave them little because of the mother's educational choices for the child. Wishes of twelve year old child counted considerably in consideration of both courts.

Matter of Cisse v. Graham, 120 A.D.3d 801 (Second Dept. 2014)

## Modification Denied

Trial court reversed and modification denied. Evidence of child's emotional distress while residing with father and father consistently failed to obtain treatment.

Matter of Cortez v. Cortez, 111 A.D.3d 717 (Second Dept. 2013)

Trial court reversed and modification denied. Child originally resided with mother; father offered to care for her when mother needed surgery. Father had mother sign a notarized agreement so he could enroll child in NY school; he then petitioned for physical custody. Appellate Division said that trial court gave insufficient weight to fact that mother had always been primary caregiver and the father had limited involvement, the child thrived with the mother, was used to relocation as part of a military family, and

would be separated from her two half-siblings. Court also failed to take into account recommendation of attorney for the child or the child's preference. *Matter of Shannon J. v. Aaron P.*, 111 A.D.3d 829 (Second Dept. 2013)

Trial court reversed and modification denied. Appellate Division found trial court did not give sufficient weight to fact that mother had been primary caregiver for children's entire lives, had single-handedly addressed their medical and educational needs, and a change in custody would separate them from a younger sibling.

Matter of Caruso v. Cruz, 114 A.D.3d 769 (Second Dept. 2014)

Defendant's conduct post-divorce constituted a change in circumstances, but trial court correctly held that she had taken steps to resolve these issues and ameliorate any negative influence on the child.

McCance v. DeWitt, 118 A.D.3d 759 (Second Dept. 2014)

Although some evidence that mother had interfered with visitation, the fact that children had lived with mother all their lives change in custody not in best interests of the children.

Matter of Bugalia v. Calcagno, 118 A.D.3d 871 (Second Dept. 2014)

Both parties sought modification; trial court did not change custody but awarded father increased visitation and mother decision-making authority with respect to extra-curricular activities. Reversed as to the additional visitation; Appellate Division said that neither party had established a change in circumstances. Appellate Division reversed finding of fact as to strained relationship between mother and the children. Affirmed as to the grant of decision-making authority to the mother because of the acrimony between the *parents*.

Matter of Goldhaber v. Rosen, 119 A.D.3d 862 (Second Dept. 2014)

Both parents sought to modify existing order. Trial court found that both parents lacked credibility and dismissed both petitions, finding no change in circumstances. Affirmed.

Matter of Cobane v, Cobane, 119 A.D.3d 995 (Third Dept. 2014)

Trial court granted modification; Appellate Division reversed. Father's relocation closer to child's school and mother's home was not a change in circumstances. Mother's interference with father-child relationship insufficient to warrant a change in custody. Child, who had been in the

primary custody of mother for five years, needed stability. [The change in circumstances really has to be about the child, not the parent.-Ed.] *Matter of Lombardi v. Valenti*, 120 A.D.3d 817 (Second Dept. 2014)

#### Relocation

Trial court reversed; relocation denied from Rockland County to South Africa. [A rather lengthy appellate opinion that goes to great length to justify what is possibly an incorrect result. -Ed.]

Matter of Francis-Miller v. Miller, 111 A.D.3d 632 (Second Dept. 2013)

Relocation denied from Suffolk County to Florida. Mother failed to prove that the proposed move would not have a negative impact on the children's relationship with the father.

Matter of Carter v. Carter, 111 A.D.3d 715 (Second Dept. 2013)

Trial court reversed and relocation allowed from Orange County to New Rochelle (57 miles.) [Original divorce stipulation had a 100 mile relocation clause, but this did not seem to concern either the trial or appellate courts.] Appellate court found it would not affect meaningful contact with father. Matter of Caruso v. Cruz, 114 A.D.3d 769 (Second Dept. 2014)

Relocation denied from Suffolk County to Arizona. Mother failed to present sufficient proof that the children's lives would be enhanced economically or emotionally.

Matter of Christy v. Christy, 113 A.D.3d 848 (Second Dept. 2014)

Relocation denied from Orange County to Michigan.

Matter of Diaz v. Diaz, 115 A.D.3d743 (Second Dept. 2014)

Relocation allowed from Brooklyn to either Rockland or Westchester County. [The App. Div. report lists the pro se father's residence as Belfast, Maine. I wish there were a couple of more facts included in the decision. – Ed.]

Matter of Katz v. Shomron, 116 A.D.3d 777 (Second Dept. 2014)

Relocation denied from Broome County to Florida. [Questionable result, as the father initially consented and went with the mother but quickly changed his mind.]

Matter of Jones v. Soriano, 117 AD3d 1350 (Third Dept. 2014)

Relocation denied from Suffolk County to Ohio.

Matter of Ross v. Hodges, 118 A.D.3d 710 (Second Dept. 2014)

Relocation permitted from Nassau County to Michigan. Father was no fully exercising his visitation rights and not intimately involved in the child's life and was not supporting according to his means.

Matter of Ortiz v. Ortiz, 118 A.D.3d 710 (Second Dept. 2014)

Trial court reversed; relocation granted for move from Brooklyn to Georgia. Matter of Hall v. Hall, 118 A.D.3d 879 (Second Dept. 2014) [Full case included in appendix.]

Relocation denied from Suffolk County to Florida.

Matter of Haughton v. Tsang, 118 A.D.883 (Second Dept. 2014)

Relocation denied from Suffolk County, NY to Jefferson, NY. Matter of Fallo v. Tallon, 118 A.D.3d 991 (Second Dept. 2014)

Maternal grandfather, who had custody, denied permission to relocate; it would move the child four hours from the mother and would have a negative impact on mother's visitation.

Matter of Seeley v. Seeley, 119 A.D.3d 1164 (Third Dept. 2014)

While a geographic restriction agreed to by the parties and included in a separation agreement is a relevant factor, it is not dispositive. Appellate Division found that trial court, in denying a hearing, had not properly weighed factors, especially mother's averments of economic necessity. [It probably did not help father that proposed move was only a distance of 17 miles and would not disrupt his access.]

Lauzonis v. Lauzonis, 120 A.D.3d 922 (Fourth Dept. 2014)

Trial court reversed and relocation allowed for mother to take child to Georgia. A somewhat complicated factual case, where it took four years to adjudicate mother's original custody petition (and two years for appeal) and child was with father entire time. But Appellate Division found that father had signed at least two agreements acknowledging that child would reside with mother in Georgia, that mother had more suitable physical setting for child, that several points of evidence called into question father's ability to

continue to foster the child's relationship with the mother.

Matter of Doyle v. Debe, 120 A.D.3d 676 (Second Dept. 2014)

Relocation denied from Long Island to Michigan. Family Court found that move would have negative impact on the children's relationship with the father. Not clear from the decision, but implicit, were the facts that the teenaged children opposed the relocation and were, in fact, living with their father after the mother had temporarily relocated.

Matter of Gravel v. Makrianes, 120 A.D.3d 815 (Second Dept. 2014)

Relocation allowed by paternal grandmother to Guyana. Matter of Singh v. Cassadean, 2014 NY Slip Op 06833 (Second Dept. 10/8/2014)

Trial court reversed and relocation granted to Virginia. Court based its reversal on child's preference, economic and educational benefits, and fact that child's relationship with mother will not be seriously impacted because father had offered liberal access.

Dexter A. v. Georgia G., 120 A.D.3d 1106 (First Dept. 2014)

#### VISITATION

Statement of law:

Matter of Diana B. v. Lorry B., 111 A.D.3d 928 (Second Dept. 2013)

Trial court corrected vacated provision directing parents to "offer the children to the other parent" for visitation in the event that they were "unavailable for when they have the children in their care" because of acrimony between the parties.

Matter of Salmela v. Goodwin, 111 A.D.3d 642 (Second Dept. 2013)

Trial court correctly limited visitation after mother (noncustodial parent) absconded with child, caused her to miss a month of school, and continued to interfere with the child's relationship with the father. Trial court reversed, however, for delegating details of visitation to the supervisor, and directed that a visitation schedule be ordered.

Matter of Green v. Bontzolakes, 111 AD3d 1282 (Fourth Dept. 2012)

Contrary to father's contention, Family Court did not condition his ability to reapply for more liberal visitation on his participation in individual mental health treatment.

Matter of Hansen v. Balkaran, 111 A.D.3d 827 (Second Dept. 2013)

Trial court had reduced father's overnight visitation because child returning home on Sundays too tired to finish her homework and wake up rested for school on Monday. Reversed; trial court did not consider viable alternatives, including having child do some of the homework with the father.

Matter of Orellana v. Orellana, 112 A.D.3d 720 (Second Dept. 2013)

A visitation schedule that effectively deprives the custodial parent of any significant quality time with the child is excessive.

Matter of Rivera v. Fowler, 112 A.D.3d 835 (Second Dept. 2013)

Trial court correctly interpreted stipulation of settlement to enforce provision directing child attend Hebrew School.

Matter of Grill v. Genitrini, 113 A.D.3d 767 (Second Dept. 2014)

Therapeutic visitation a well-considered response to the fact that transitions between the parties have caused the child serious anxiety and father has not been visiting the child in a consistent or stable manner.

Elkin v. Labis, 113 A.D.3d 419 (First Dept. 2014)

A noncustodial parent's failure to avail himself of opportunities over a lengthy period of time is appropriately taken into account in considering whether visitation is appropriate, especially where the parent is essentially a stranger to the children. Visitation properly suspended when father had only visited once or twice in five years, did not pay child support, and the children did not know him. In fact, father did not even file visitation petition, but simply appealed from the decision (after inquest), which procedure was sharply criticized by the Appellate Division.

Matter of Owens v. Chamorro, 114 AD3d 1037 (Third Dept. 2014)

Supervised visitation was appropriate, but cannot be in the sole control of the supervisor.

Matter of Aida B. v. Alfredo C., 114 AD3d 1046 (Third Dept. 2014)

Fact that incarcerated father was relocated to a facility closer to the child's residence does not, in and of itself, constitute a change in circumstances.

Because father had failed to maintain contact with the child, his application for visitation was denied. [If you want more contact, at least utilize that which has already been granted.]

Matter of Ruple v. Cullen, 115 AD3d 1123 (Third Dept. 2014)

Trial court erred in conditioning father's visitation on his enrollment in a random drug testing facility, but should have directed father to enroll as a component of visitation. Court also improperly delegated to mother unilateral right to suspend visitation. [Semantics; if he does not enroll, mother will be right back with a violation petition and then his visitation will be suspended. – Ed.]

Matter of Welch v. Taylor, 115 A.D.3d 754 (Second Dept. 2014)

Court cannot condition visitation on permission of child's counselor. Camacho v. Camacho, 115 AD3d 1327 (Fourth Dept. 2014)

Trial court correctly eliminated telephone calls and reduced father's communication to monitored written communications. Record reflected that the phone calls with the incarcerated father was causing stress on the children that improved when the phone calls were suspended.

Matter of Clary v. McIntosh, 117 AD3d 1285 (Third Dept. 2014)

Family Court properly limited father's communication with children to such contact as they initiated. Father was incarcerated for sexual charges related to the minor friend of one of his daughters, and had been adjudicated to have sexually abused his daughters, and admitted he sent inappropriate written communications to the children in violation of a prior order of protection. [It's sad that the time and resources of the mother and children, and the financial resources of the taxpayers, were wasted on this case.- Ed.] Matter of Madden v. Ruskiewicz, 117 A.D.3d 827 (Second Dept. 2014)

In an Article 10 proceeding (abuse/neglect) an Order of Disposition may require the father to comply with drug and alcohol treatment requirements and psychiatric assessment prior to entering an Order of Visitation. [Father was apparently a sex offender.]

Matter of Bernalysa K. (Richard S.), 2014 NY Slip Op 04490 (Second Dept. 6/18/2014)

The non-custodial parent's visitation time can be reduced to take into account the children's increasingly busy schedules and extracurricular activities.

Matter of Bugalia v. Calcagno, 118 A.D.3d 871 (Second Dept. 2014)

Visitation by father suspended. The father allowed a man he met in jail to have sexual intercourse with his older daughter (16) in return for drugs. Father also experienced visual and auditory hallucinations and paranoia. *Matter of Frisbie v. Stone*, 118 A.D.3d 1471 (Fourth Dept. 2014)

Father awarded one unsupervised overnight visit every other weekend, plus midweek visits. Child only four and had never experienced unsupervised visitation with father. Father also suffered from psychiatric disorder and was unable to place the needs of the child before his own needs. Not an improvident exercise of discretion to condition overnight visitation upon the father's continued participation in therapy.

Kramer v. Griffith, 119 A.D.3d 655 (Second Dept. 2014)

Father's request for visitation in Article 10 proceeding denied. Mother convicted of severely abusing the subject child and father allowing her to do so; both also adjudicated to have abused subject child and derivatively abused siblings. No visitation ordered as both were in prison, but father applied for visitation when released. Court denied application, noting that visitation plan was not mandatory, especially in situation such as this one where permanency plan was for adoption and agency had been relieved of obligation to plan for reunification and visitation.

Matter of Allison C., NYLJ 1202667557685, at \*1. (Kings County Family

Matter of Allison C., NYLJ 1202667557685, at \*1, (Kings County Family Court 8/6/2014)

Order modifying visitation was upheld. Father was unwilling to communicate appropriately with mother about child's health and welfare, allowed the paternal grandparents (with whom he resided) to denigrate the mother in the child's presence, and father participated in such conduct. *Matter of Weiss v. Rosenthal*, 120 A.D.3d 505 (Second Dept. 2014)

Trial court correctly modified pick-up and drop-off times based on changed circumstances and the children's best interests.

Matter of Jones v. Laird, 119 AD3d 1434 (Fourth Dept. 2014)

Court order granting mother visitation on virtually every non-school day reversed; child should be allowed to spend time with school friends and custodial grandfather should have some recreational time with child. Also, child's wishes never considered.

Matter of Seeley v. Seeley, 119 A.D.3d 1164 (Third Dept. 2014)

Although father not granted sole or joint custody, he was given reasonable visitation privileges and afforded the opportunity to care for the child when mother was working before she arranged for a nonparent to babysit.

Matter of Saravia v. Godzieba, 120 A.D.3d 821 (Second Dept. 2014)

Family Court's determination not to impose geographical limitations on father's visitation has a sound and substantial basis in the record, as does granting father extended visitation.

Matter of Rodriguez v. Silva, 2014 NY Slip Op 06829 (Second Dept. 10/8/2014)

## Compliance

Interference with visitation rights can be a basis for prospectively suspending child support payments, but only where the custodial parent's actions rise to the level of deliberate frustration or active interference with the noncustodial parent's rights.

Matter of Vasquez v. Powell, 111 A.D.3d 754 (Second Dept. 2013)

Mother apparently brought motion to hold father in both civil and criminal contempt because he did not exercise his own right to visitation. Trial court denied the motion and was affirmed. [Ludicrous; visitation is a right which a parent can forego. I would have sanctioned the mother. –Ed.]

Matter of Figueroa-Rolon v. Torres, 2014 NY Slip Op. 06584 (Second Dept. 10/1/2014)

## Grandparent Visitation

Grandparent visitation petition requires a two-part inquiry: first, does standing exist; and if so, a best interests hearing. Here, given the nature and extent of the relationship between the maternal grandfather and the child, and the grandfather's efforts to maintain that relationship, the requisite standing existed. Trial court should then have conducted a best interests

hearing to determine the reasons for the mother's objections to visitation. Matter of Feldman v. Torres, 117 A.D.3d 1048 (Second Dept. 2014)

Court should not have dismissed grandparents' petition on motion. Papers submitted by both sides raised issues of fact whether standing existed regarding the extent of the grandparent-grandchild relationship, the grandparents' efforts to establish and maintain a relationship with the grandchildren, and the parents' alleged attempts to frustrate the grandparent-grandchild relationship.

Matter of Broncato v. Federico, 118 A.D.3d 986 (Second Dept. 2014).

Maternal grandmother had previously been granted an Order of Visitation, which mother sought to revoke. There was a very specific incident between mother and grandmother and mother also received an Order of Protection. Trial court noted that grandmother and one grandchild had a close relationship and continued supervised visitation; affirmed. [If one reads the facts, one has to question whether allowing any order of visitation violates mother's fundamental constitutional rights under Troxel v. Granville. – Ed.] Matter of Christina KK. V. Kathleen LL., 119 AD3d 1000 (Third Dept. 2014)

Trial court found that visitation not in best interests of child; affirmed. Court providently exercised its discretion in declining to conduct an in camera interview of the child.

Matter of Gonzalez v. Borbon, 2014 NY Slip Op 06976 (Second Dept. 10/15/2014)

#### **PROCEDURE**

## Standing

Same-sex couple married in Connecticut before effective date of NY Marriage Equality Act. Supreme Court should have afforded comity to Connecticut marriage and recognized [non-biological] parent under NY law, thereby granting standing for custody/visitation.

Counihan v. Bishop, 111 A.D.3d 594 (Second Dept. 2013). See also: Laura WW. v. Peter WW., 51 AD3d 211 (Third Dept. 2008); Matter of Ranfile, 81 AD3d 566 (First Dept. 2011); Wendy G-M. v. Erin G-M., NYLJ 1202655070125, at \*1 (Supreme Court Monroe County 5/7/2014).

Former foster parents had no standing to seek custody against father, and petition alleging father's arrest and incarceration did not establish extraordinary circumstances.

Matter of Washington v. Stoker, 114 AD3d 1147 (Fourth Dept. 2014)

Same-sex spouse who was not biological parent of child (born before marriage) had no standing to seek custody. Trial court discounted arguments in favor of extraordinary circumstances, presumption of legitimacy, and equitable estoppel. An extremely thoughtful and well-written decision, where the court could probably have issued the opposite conclusion on each of the legal points.

Matter of Jann P. v. Jamie P., NYLJ 1202664272007, at \*1 (Family Court, Nassau County, Decided June 30, 2014.)

Father, an NBA player, disputing paternity (after positive DNA test) and seeking sole custody. Challenges jurisdiction of NY courts. Trial court finds that child, less than six months old, has never lived anywhere but New York, and therefore NY has jurisdiction to adjudicate custody pursuant to DRL §76(3). Court notes, without discussing statutory provision that personal jurisdiction over party not necessary to adjudicate custody. Court further notes that if Respondent continues to challenge paternity NY may not, in fact, have personal jurisdiction over him on that issue, and therefore his participation in any custody proceeding would be moot. [Apparently Respondent and his counsel have incurred the judge's ire by, among other items, attempting to remove the case to federal court. Look for sanctions down the road.]

Rajic v. George, NYLJ 1202671447670 at \*1 (Supreme Court NY County, 9/22/2014)

Mother's former husband sought custody. Child was born during marriage, but another man commenced paternity proceeding; husband defaulted and Order of Filiation issued in favor of other man. Family Court properly granted former husband's custody application as the prior finding of paternity precluded him from claiming he was a parent and there were no extraordinary circumstances.

Matter of Vega v. Vega, 120 A.D.3d 1427 (Second Dept. 2014)

Non-parent failed to allege sufficient facts to constitute extraordinary circumstances and was properly denied standing to seek custody. [No

indication of relationship, but appellant may have been same-sex partner who had not adopted the child not married the biological parent.]

Matter of A.F. v. K.H., 2014 NY Slip Op 06582 (Second Dept. 10/1/2014)

#### **Hearing**

A hearing on a modification petition is not necessary if the trial court is possessed of adequate relevant information to enable it to make an informed and provident determine of the children's best interests. Here, however, the trial court did not possess sufficient information and should have conducted a hearing.

Matter of Mandal v. Mandal, 113 A.D.3d 769 (Second Dept. 2014)

New evidence was presented to the Appellate Division which justified a remand for a reopened hearing with a new custody determination. Gillis v. Gillis, 113 A.D.3d 816 (Second Dept. 2014)

A hearing on a modification petition is not necessary if the trial court is possessed of adequate relevant information to enable it to make an informed and provident determine of the children's best interests.

Matter of Law v. Gray, 116 A.D.3d 699 (Second Dept. 2014)

Court not required to conduct full hearing on modification petition where court familiar with parties from multitude of court appearances, the court conducted an in camera interview of the 13 year old child, and reviewed an investigative report prepared by ACS.

Matter of O'Shea v. Parker, 116 A.D.3d 1051 (Second Dept. 2014)

A modification require an evidentiary showing sufficient to warrant a hearing based upon a subsequent change in circumstances such that modification is necessary to ensure the continued best interests of the child. Failure to do so results in the petition being dismissed without a hearing. *Matter of Yuan v. Sawyer*, 117 A.D.3d 961 (Second Dept. 2014)

Based on the petitions and comments at an initial appearance, trial court modified the visitation arrangement. Appellate Division reversed and remanded for a trial. While not every petition requires a hearing, especially if the court has enough information to conduct an independent review, here there were factual issues that needed to be developed more fully.

Matter of Moore v. Palmatier, 115 AD3d 1069 (Third Dept. 2014)

Court has the power to take judicial notice of its own prior proceedings, including referencing information that it obtained in the hearing it conducted two years earlier.

Matter of Gugino v. Tsvasman, 118 A.D.3d 1341 (Fourth Dept. 2014)

Mother's petition made a sufficient evidentiary showing of a change in circumstances to warrant a hearing; she alleged that the father imposed excessive and inappropriate discipline, including corporal punishment, and that he had refused to permit her to exercise visitation for four weeks. *Matter of Isler v. Johnson*, 118 A.D.3d 1504 (Fourth Dept. 2014)

Court should not have dismissed grandparents' petition on motion. Papers submitted by both sides raised issues of fact whether standing existed regarding the extent of the grandparent-grandchild relationship, the grandparents' efforts to establish and maintain a relationship with the grandchildren, and the parents' alleged attempts to frustrate the grandparent-grandchild relationship.

Matter of Broncato v. Federico, 118 A.D.3d 986 (Second Dept. 2014).

Because custody determinations depend to a great extent upon an assessment of the character and credibility of the parties and witnesses, deference is accorded to the trial court's findings and such findings will not be disturbed unless they lack a sound and substantial basis in the record.

Matter of Chamas v. Carino, 119 A.D.3d 564 (Second Dept. 2014)

No hearing required; father's assertions were unsubstantiated and conclusory or did not allege a material change in circumstances.

Magee v. Magee, 119 A.D.3d 658 (Second Dept. 2014)

At final appearance after many conferences, trial court allowed each pro se parent to make a long statement and then swore them in to ratify the statements. Reversed; not a "full and fair opportunity to be heard".

Matter of McCullough v. Harris, 119 A.D.3d 992 (Third Dept. 2014)

No hearing required; father filed modification motion only two weeks after divorce decree signed, which incorporated separation agreement.

Macchio v. Macchio, 120 A.D.3d 560 (Second Dept. 2014)

Court accepted written submissions and took testimony from the parents on relocation petition. Affirmed; court had presided over several past petitions between the parties and possessed adequate information to make an informed decision.

Matter of Gravel v. Makrianes, 120 A.D.3d 815 (Second Dept. 2014)

Father did not demonstrate any change in circumstances and therefore not entitled to a hearing on change in custody.

Klauer v. Abeliovich, 120 A.D.3d 1114 (First Dept. 2014)

Trial court's assessment of character and credibility of parties and witnesses is accorded deference on appeal and will not be disturbed unless it lacks a sound and substantial basis in the record.

Matter of Monasterska v. Burns, 2014 NY Slip Op 06982 (Second Dept. 10/15/2014)

#### Right to counsel

Mother was repeatedly advised of her right to counsel and engaged in obstructionist behavior, thereby knowingly and voluntarily waiving her right to counsel.

Matter of Paul A. v. Shaundell LL., 117 AD3d 1346 (Third Dept. 2014)

Mother knowingly, intelligently and voluntarily waived counsel. She had already had two attorneys, including one court appointed, was advised she could have another court-appointed attorney, and had prepared many documents herself, including petitions and subpoenas without counsel. *Matter of Joshua UU. V. Martha VV.*, 118 AD3d 1051 (Third Dept. 2014)

Father discharged counsel as trial was about to commence and requested assignment of a new attorney. Trial court denied application and proceeded to trial at which father declined to participate. Appellate Division affirmed, stating that 30-day stay was only where counsel was allowed to withdraw over the client's objection, which was not the situation here. Court further stated that new counsel may only be assigned for good cause, which was absent here. [Appellate Division stated right to counsel was constitutional, which it is not. It is statutory; see FCA §262(a).]

Matter of Wiley v. Musabyemariya, 118 A.D.3d 898 (Second Dept. 2014)

Family Court's inquiry concerning mother's decision to proceed pro se was insufficient to enable the court to determine whether she knowingly, intelligently and voluntarily waived her right to counsel.

Matter of Seifert v. Pastwick, 118 AD3d 1503 (Fourth Dept. 6/20/2014)

#### Counsel fees and sanctions

Sanction affirmed based on non-party's waste of judicial resources. [Apparently mother's ex-husband was actively working with her to frustrate biological father's rights.]

Matter of Khan-Soleil v. Rashad, 111 A.D.3d 727 (Second Dept. 2013)

Father was only entitled to counsel fees, based on divorce stipulation, for that part of the proceedings which involved mother's breach, not for any other matters, even if related.

Matter of Wilson v. Kilkenny, 113 A.D.3d 623 (Second Dept. 2014)

Mother was aware of order but failed to schedule, cooperate or complete the court-ordered evaluations. Civil contempt finding affirmed, as was suspended sentence and assessment of father's costs and counsel fees. [And she lost custody!]

Matter of Paul A. v. Shaundell LL., 117 AD3d 1346 (Third Dept. 2014)

After proceeding to modify visitation concluded, both parties cross-moved for counsel fees. Trial court awarded mother's application; denied father's application. Appellate Division partially reversed, dismissing mother's application, because it had not been timely made. [Moral of the case: make your application before the Order is entered.]

Matter of Silver v. Green, 119 A.D.3d 806 (Second Dept. 2014)

## In camera interview (Lincoln hearing)

Failure of trial court to conduct *Lincoln* hearing to determine children's hostility to father was, in this case, reversible error as the information was important for the court to have to render a proper determination on the underlying relocation petition.

Matter of Norback v. Norback, 114 AD3d 1036 (Third Dept. 2014)

Case considered relocation by custodial grandfather and mother's concerns about visitation. Child's wishes should have been considered and matter

remanded for consideration of whether *Lincoln* hearing would be helpful. [The case suggests that that attorney for the child adamantly opposed a *Lincoln* hearing; yet that was not the position on appeal; one can surmise that the child was represented by a different attorney on appeal.] *Matter of Seeley v. Seeley*, 119 A.D.3d 1164 (Third Dept. 2014)

#### **Experts**

The recommendations of court-appointed experts are but one factor to be considered and are entitled to some weight but are not determinative and mot be permitted to usurp the judgment of the trial court. Trial court adequately explained its direction of a different counseling program than the one recommended by the court-appointed forensic evaluator.

Matter of Pitt v. Reid, 111 A.D.3d 946 (Second Dept. 2013)

Apparently forensic evaluator was not listed in the directory for mental health professionals of the First and Second Judicial Departments. Mother, after a year into a protracted custody trial and with newly appointed counsel, made a motion for a mistrial or new forensic evaluation. Trial court's denial affirmed; court may, with good cause appoint an evaluator not on the panel. Lieberman v. Lieberman, 112 A.D.3d 583 (Second Dept. 2013)

An expert should be permitted to offer an opinion on an issue which involves a professional or scientific knowledge or skill not within the range of ordinary training or intelligence.

Matter of Islam v. Lee, 115 A.D.3d 952 (Second Dept. 2014)

Very thorough and extensive discussion of role of forensic evaluator and minimum standards for evaluation and report. Trial court ultimately vacated report and testimony of evaluator and appointed a new one. J.C. v. A.C., NYLJ 1202653656922, at \*1 (Supreme Court Nassau County 4/7/2014)

Trial court finds no special circumstances justifying motion for disclosure of notes, records and raw data of the forensic evaluator.

R.L. v. L.T., NYLJ 1202672096267 at \*1 (Supreme Court Westchester County 9/26/2014)

Trial court prepared to give both attorneys access to raw data material of forensic evaluator in advance of trial, with the parties having the opportunity to review it without making copies.

J.F.D. v. J.D., (no citation) Nassau County Supreme Court, Goodstein, J., issued 10/17/2014

#### Referee

Parties entered into a stipulation consenting to the reference. Matter of Islam v. Lee, 115 A.D.3d 952 (Second Dept. 2014)

Absent the parties' consent to a reference, the Court Attorney Referee only has the power to hear and report findings, not hear and determine.

Matter of Rivera v. Arocho, 120 A.D.3d 1350 (Second Dept. 2014)

#### Miscellaneous

The standard for determining judicial bias is whether any bias unjustly affected the result to the detriment of the complaining party.

Matter of Hixenbaugh v. Hixenbaugh, 111 A.D.3d 636 (Second Dept. 2013)

First Department reaffirmed a 2005 ruling that parent had right to object to fees of court-appointed attorney for the child by alleging malpractice. Court went on to affirm trial court's ruling that n such malpractice existed here and father was liable for his portion of the fee. [A dangerous ruling and precedent. – Ed.]

Venecia V. v. August V., 113 A.D.3d 122 (First Dept. 2013)

Adjournment and telephonic hearing properly denied where court had warned grandmother she would have to be present to pursue her petition. [One always marvels at the resistance of the judiciary to accept technology which is routinely used in business settings. Even reading the few facts in the appellate opinion make the court system look foolish.— Ed.] Matter of Sacks v. Abraham, 114 A.D.3d 799 (Second Dept. 2014)

Adjournment properly denied where father did not appear, but was represented by counsel, who never requested an adjournment. *Matter of Aida B. v. Alfredo C.*, 114 AD3d 1046 (Third Dept. 2014)

Trial court properly denied father's request for an adjournment and conducted inquest where he had missed previous appearance and notice of the hearing date was sent four months in advance. Court found his conduct a continuing pattern.

Matter of Owens v. Chamorro, 114 AD3d 1037 (Third Dept. 2014)

Trial court order directing mother to deliver child's passport to court reversed; no evidence mother posed any threat to remove child from the country without court approval.

Matter of Homad v. Risika, 117 A.D.3d 736 (Second Dept. 2014)

Fact that two children had different wishes did not require appointment of separate attorneys for the children, as younger child (9 years old) changed his mind during trial but both AFC and judge, after *Lincoln* hearing, found that child's position not knowing, voluntary and considered because of immaturity.

Matter of Shaw v. Bice, 117 A.D.3d 1576 (Fourth Dept. 2014)

Court used Attorney for the Child as investigative arm of the court and its "quarterback", and accepted negative information without holding a fact-finding hearing. Appellate Division reversed, finding that the failure of the father's attorney to object denied him the "effective assistance of counsel." *Matter of William O. v. Michele A.*, 119 A.D.3d 990 (Third Dept. 2014)

Mother waived disqualification of trial judge after he had met father once or twice and they had a mutual friend. Mother could not now raise the issue on appeal.

Matter of Gross v. Gross, 119 A.D.3d 1453 (Fourth Dept. 2104)

Order directing mother to seek court's permission before filing any future petitions or motions regarding custody or visitation is not appealable as of right.

Matter of Tedeschi v. Tedeschi, 119 A.D.3d 868 (Second Dept. 2014)

Mother filed modification of divorce decree and agreement in Family Court regarding custody and visitation. Father filed motions in Supreme Court regarding post-judgment financial issues, including a request for a new, less expensive parenting coordinator. The latter motion was denied. Mother then moved to consolidate her Family Court petitions in Supreme Court, alleging both lack of jurisdiction in Family Court and the same issues.

Supreme Court found that neither the divorce decree nor the Stipulation of Settlement retained exclusive jurisdiction in Supreme Court, and therefore Family Court had concurrent jurisdiction to hear the custody/visitation case. Court further found that as father's request to change parenting coordinator had been denied, there were no overlapping issues in both courts. Court further noted that Family Court had held at least fifteen conferences on the petitions, there were ACS reports and the child was represented. While Supreme Court did not make an explicit finding of forum shopping by the mother, it was at least implied. [Apparently the case was not going well for the mother in Family Court.]

A.M. v. A.V., NYLJ 1202666812709 at \*1 (Supreme Court, Kings County, 7/28/2014)

Fees for Attorney for Child should not have been directed out of an escrow account (containing child support payments) but should have been ordered 75% mother – 25% father based on prior court order.

Matter of Lew v. Sobel, 120 A.D.3d 1418 (Second Dept. 2014)

The right to appeal temporary orders of custody becomes moot when a final order of Custody is granted after a hearing.

Matter of Julian S. (Patricia L.), 2014 NY Slip Op 06831 (Second Dept. 10/8/2014)

Father failed to show any fraud, overreaching, mistake, or duress to set aside a custody agreement where father actively participated in the negotiation and the court conducted a proper allocution.

Klauer v. Abeliovich, 120 A.D.3d 1114 (First Dept. 2014)

On appeal after a default, appellate review is limited to whether the denial of the adjournment request was proper.

Matter of Martin v. Martin, 2014 NY Slip Op 06589 (Second Dept. 10/1/2014); Matter of Wong v. Liu, 2014 NY Slip Op 06588 (Second Dept. 10/1/2014)

Supreme Court properly denied mother's motion to vacate order on the ground of newly discovered evidence, as the evidence in question did not yet exist during the previous hearing. Further, the evidence would probably not have produced a different result.

Matter of Monasterska v. Burns, 2014 NY Slip Op 06981 (Second Dept. 10/15/2014)

## UCCJEA, SIJS and HAGUE CONVENTION

#### **UCCJEA**

New York proper home state as child born in NY and mother filed custody petition here two days later. Father's pre-birth petition in California not consistent with jurisdiction under UCCJEA as courts cannot exercise jurisdiction over custody proceedings filed prior to birth. Further Appellate Division rejected trial court declining to exercise jurisdiction because of mother's "unjustifiable conduct" in "appropriation of the body in utero" by moving from CA to NY while pregnant. [The Appellate Division corrected a rather ludicrous and unconstitutional decision by the trial court which violated an entire line of US Supreme Court cases.]

Matter of Sara Ashton McK. v. Samuel Bode M., 111 A.D.3d 474 (First Dept. 11/14/2013)

Original consent custody order (NY) gave mother in Florida primary residence but father in NY four months a year. Father's first modification petition dismissed on mother's oral motion; with second modification petition court found continuing jurisdiction. Affirmed. Appellate Division found first petition improperly dismissed without a significant connection analysis. Father's extensive parenting took place in NY, child's relationships with half-sibling and extended family were in NY, and father provided child medical care in NY. NY had continuing, exclusive jurisdiction.

Matter of Seminara v. Seminara, 111 A.D.3d 949 (Second Dept. 2013)

Although parties had agreed that NY would retain jurisdiction, trial court correctly determined that NY was an inconvenient forum because evidence of child's care, wellbeing and personal relationships is more readily available in California, which is willing to exercise jurisdiction. Further, any attorney for the child based in the same state can far more effectively communicate with the child than an attorney across the country. *Greenfield v. Greenfield*, 115 A.D.3d 645 (Second Dept. 2014)

Family Court properly determined that North Carolina was more convenient forum but should not have dismissed petition; should have stayed proceedings on condition that a child custody proceeding was promptly

commenced in that state.

Matter of McCarthy v. Brittingham-Bank, 117 A.D.3d 1060 (Second Dept. 2014)

Parties cannot, by agreement, confer jurisdiction on a state. Here, although father and children resided in North Carolina, trial court found NY more convenient forum: children had not resided in North Carolina for a long period of time; NY court had prior involvement; father had superior financial resources to travel to NY; and he was allowed to present witness testimony by telephone.

Matter of Abbott v. Merritt, 118 AD3d 1309 (Fourth Dept. 2014)

Before deciding that Florida was the more appropriate venue to determine a possible modification of custody, the Family Court should have conducted a hearing on the issue of imminent harm.

Matter of Rodriguez v. Rodriguez, 118 A.D.3d 1011 (Second Dept. 2014)

Trial court did not conduct proper inquiry to determine jurisdiction; should have inquired when mother actually moved to Pennsylvania, whether there was a previous NY order, and should have made sure incarcerated father was present by video conference.

Matter of Locklear v. Andrews, 118 A.D.3d 1001 (Second Dept. 2014)

Family Court should not have dismissed custody petition by father on grounds its guardianship order to aunt was "too old." Court should have conducted a hearing pursuant to DRL §76-a to determine whether NY retained exclusive and continuing jurisdiction and, if so, whether or not NY was an inconvenient forum.

Matter of Williams v. Davis, 119 A.D.3d 950 (Second Dept. 2014)

Where NY made initial custody determination, NY has continuing exclusive jurisdiction until the child no longer has a relevant connection with NY and substantial evidence is no longer available in NY concerning the child's care, protection, training and personal relationships. Here, although the child now resided in Connecticut, the child attended school in NY, visited her mother in NY, and there was still substantial evidence concerning her welfare in NY. Further, although the trial court found that NY was an inconvenient forum, Appellate Division reversed based on the evidence presented.

Matter of Mojica v. Denson, 120 A.D.3d 691 (Second Dept. 2014)

Father, and NBA player, disputing paternity (after positive DNA test) and seeking sole custody. Challenges jurisdiction of NY courts. Trial court finds that child, less than six months old, has never lived anywhere but New York, and therefore NY has jurisdiction to adjudicate custody pursuant to DRL §76(3). Court notes, without discussing statutory provision that personal jurisdiction over party not necessary to adjudicate custody. Rajic v. George, NYLJ 1202671447670 at \*1 (Supreme Court NY County, 9/22/2014)

Trial court failed to consider all relevant factors before it determined that New York was an inconvenient forum. Matter remanded for proper consideration pursuant to DRL §76-f(2).

Jeremy A. v. Vianca G., 120 A.D.3d 1147 (First Dept. 2014)

#### <u>SIJS</u>

Statutory requirement for SIJS status may be satisfied by a finding that reunification is not viable with just one parent, as opposed to both parents. Matter of Karen C., 111 A.D.3d 622 (Second Dept. 2013); Matter of Maria P.E.A. v. Sergio A.G.G., 111 A.D.3d 614 (Second Dept. 2013); Matter of Maria G.G.U. v. Pedro H.P., 114 A.D.3d 691 (Second Dept. 2014); Matter of Juana A.C.S. v. Dagoberto D., 114 A.D.3d 689 (Second Dept. 2014); Matter of Marisol N.H., 115 A.D.3d 185 (Second Dept. 2014); Matter of Gabriel H.M. (Juan B.F.), 116 A.D.3d 855 (Second Dept. 2014); Matter of Cristal M.R.M., 118 A.D.3d 889 (Second Dept. 6/18/2014); Matter of Saul A.F.H. v. Ivan L.M., 118 A.D.3d 878 (Second Dept. 2014); Matter of Diaz v. Munoz, 118 A.D.3d 989 (Second Dept. 2014); Matter of Miguel C.-N. (Hosman C.-N.-Cruz Ermelinda C.-N.), 119 A.D.3d 562 (Second Dept. 2014); Matter of Luis R. v. Maria Elena G., 120 A.D.3d 581 (Second Dept. 2014)

A natural parent may be appointed as guardian of his or her own child. *Matter of Maura A.R.-R* (Santos F.R.), 114 A.D.3d 687 (Second Dept. 2014); *Matter of Maria E.S.G. v. Jose C.G.L.*, 114 A.D.3d 677 (Second Dept. 2014); *Matter of Sanchez v. Bonilla*, 115 A.D.3d 868 (Second Dept. 2014); *Matter of Cecilia M.P.S. v. Santos H.B.*, 116 A.D.3d 960 (Second Dept. 2014); *Matter of Jorge A.V.G.* (Marta G.), 119 A.D.3d 566 (Second Dept. 2014)

Court affirms trial court's finding that reunification with one or both parents viable; SIJS status denied.

Matter of Kamaljit S., 114 A.D.3d 949 (Second Dept. 2014); Matter of Maria S.Z. v. Maria M.A., 115 A.D.3d 970 (Second Dept. 2014); Matter of Mira v. Hernandez, 118 A.D.3d 1008 (Second Dept. 2014); Matter of Marvin E.M. de P. (Milagro C.C. – Mario Enrique M.G.), 2014 NY Slip Op 06973 (Second Dept. 10/15/2014)

Interesting discussion by trial judge of international smuggling of children in context of application for SIJS status. Court grants guardianship and SIJS findings.

Matter of Amandeep G., NYLJ 1202661819946 at \*1 (Family Court Queens Co. 6/19/14)

Trial court reversed; should have extended guardianship to age 21 and granted SIJS finding.

Matter of Gabriele Y.U.M. (Palacios), 119 A.D.3d 581 (Second Dept. 7/2/2014)

Board of Immigration Appeals required to give full faith and credit to adoption determination of Westchester Family Court; denial of same arbitrary and capricious.

Cantwell v. Holder, 995 F.Supp.2d 316 (SDNY 2014)

## **Hague Convention**

Second Circuit affirms trial court's finding repatriating child to New Zealand as it was her habitual residence, removal was not consensual and therefore wrongful, and the child had not acclimated to life in New York. *Hollis v. O'Driscoll*, 79 F.3d 108 (Second Circuit 2014)

While Hague Convention case pending in federal court, same court declined to issue injunction against custody proceeding in Bronx Family Court, stating that there was no statutory authority or necessity, as federal court could still issue ruling contrary to Family Court, if appropriate.

Matter of DeLeon v. Cabrera, 14 Civ 703, NYLJ 1202646009506, at \*1 (SDNY 3/4/2014)

Equitable tolling does not apply in Hague Convention cases to extend the one-year period, even when the child has been concealed. Lozano v. Montoya Alvarez, 134 S.Ct. 1224 (2014)

District Court made finding that New Zealand was habitual residence of minor children that their retention in NY was in breach of the father's custody rights, and that he was exercising his custody rights at time of wrongful retention. Return to New Zealand directed. Father's request for over \$240,000 in fees reduced to \$47,031.35. The reduction was based on the fact that much of the legal fees were unnecessary after mother acquiesced to the immediate return of the children to New Zealand. In re Moss v. Moss, 1202652592835, at \*1 (SDNY 4/16/2014)

The denial by a court in the Dominican Republic of the father's application for return of the child pursuant to the Hague Convention did not preempt his custody petition in NY, the child's habitual residence under UCCJEA. A decision under the Convention is not a determination on the merits of any custody issue.

Matter of Katz v. Katz, 117 A.D.3d 1054 (Second Dept. 2014)

Trial court declined to return subject child to Dominican Republic. Court found that child had come to United States with father's consent, that U.S. was now his habitual residence, and court disbelieved much of father's testimony.

Matter of MG v. WZ, NYLJ 1202673557053, at \*1 (Family Court Bronx County 9/30/2014)

Trial court finds that children illegally detained in United States and that Israel is their country of habitual residence and they must be returned to the father.

R.B. v. K.G., NYLJ 1202672096203, at \*1 (Family Court New York County 9/5/2014)

## Suffolk Academy of Law Suffolk County Bar Association

Family Court Update

## **DEFINING WHO IS A PARENT**

Professor Lewis A. Silverman Director, Family Law Clinic Touro Law Center

November 7, 2014

#### **OUTLINE**

### Types of Proceedings:

- 1. Custody/Visitation
- 2. Child Support/paternity
- 3. Adoption
- 4. Probate

### Links to Child:

- 1. Same-Sex spouse
  - a. Presumption of legitimacy
  - b. Effect of out-of-state marriage or civil union
- 2. Biology
  - a. Mother
    - i. Gestational carrier
    - ii. Egg donor
    - iii. Genetic biological link
  - b. Father "Biology plus"
- 3. Equitable parenting and estoppel

#### **STATUTES**

## Domestic Relations Law § 10-a. Parties to a marriage

- 1. A marriage that is otherwise valid shall be valid regardless of whether the parties to the marriage are of the same or different sex.
- 2. No government treatment or legal status, effect, right, benefit, privilege, protection or responsibility relating to marriage, whether deriving from statute, administrative or court rule, public policy, common law or any other source of law, shall differ based on the parties to the marriage being or having been of the same sex rather than a different sex. When necessary to implement the rights and responsibilities of spouses under the law, all gender-specific language or terms shall be construed in a gender-neutral manner in all such sources of law.

## Domestic Relations Law § 24. Effect of marriage on legitimacy of children

- 1. A child heretofore or hereafter born of parents who prior or subsequent to the birth of such child shall have entered into a civil or religious marriage, or shall have consummated a common-law marriage where such marriage is recognized as valid, in the manner authorized by the law of the place where such marriage takes place, is the legitimate child of both birth parents notwithstanding that such marriage is void or voidable or has been or shall hereafter be annulled or judicially declared void.
- 2. Nothing herein contained shall be deemed to affect the construction of any will or other instrument executed before the time this act shall take effect1 or any right or interest in property or right of action vested or accrued before the time this act shall take effect, or to limit the operation of any judicial determination heretofore made containing express provision with respect to the legitimacy, maintenance or custody of any child, or to affect any adoption proceeding heretofore commenced, or limit the effect of any order or orders entered in such adoption proceeding.

## Domestic Relations Law § 73.

Legitimacy of children born by artificial insemination

- 1. Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, birth child of the husband and his wife for all purposes.
- 2. The aforesaid written consent shall be executed and acknowledged by both the husband and wife and the physician who performs the technique shall certify that he had1 rendered the service.

# Domestic Relations Law § 110. Who may adopt; effect of article

An adult unmarried person, an adult married couple together, or any two unmarried adult intimate partners together may adopt another person. An adult married person who is living separate and apart from his or her spouse pursuant to a decree or judgment of separation or pursuant to a written agreement of separation subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded or an adult married person who has been living separate and apart from his or her spouse for at least three years prior to commencing an adoption proceeding may adopt another person; provided, however, that the person so adopted shall not be deemed the child or step-child of the non-adopting spouse for the purposes of inheritance or support rights or obligations or for any other purposes. An adult or minor married couple together may adopt a child of either of them born in or out of wedlock and an adult or minor spouse may adopt such a child of the other spouse. No person shall hereafter be adopted except in pursuance of this article, and in conformity with section three hundred seventy-three of the social services law.

An adult married person who has executed a legally enforceable separation agreement or is a party to a marriage in which a valid decree of separation has been entered or has been living separate and apart from his or her spouse for at least three years prior to commencing an adoption proceeding and who becomes or has been the custodian of a child placed in their care as a result of court ordered foster care may apply to such authorized agency for placement of said child with them for the purpose of adoption. Final determination of the propriety of said adoption of such foster child, however, shall be within the sole discretion of the court, as otherwise provided herein.

Adoption is the legal proceeding whereby a person takes another person into the relation of child and thereby acquires the rights and incurs the responsibilities of parent in respect of such other person. A proceeding conducted in pursuance of this article shall constitute a judicial proceeding. An order of adoption or abrogation made therein by a surrogate or by a judge shall have the force and effect of and shall be entitled to all the presumptions attaching to a judgment rendered by a court of general jurisdiction in a common law action. No adoption heretofore lawfully made shall be abrogated by the enactment of this article. All such adoptions shall have the effect of lawful adoptions hereunder.

Nothing in this article in regard to a minor adopted pursuant hereto inheriting from the adoptive parent applies to any will, devise or trust made or created before June twenty-fifth, eighteen hundred seventy-three, nor alters, changes or interferes with such will, devise or trust. As to any such will, devise or trust a minor adopted before that date is not an heir so as to alter estates or trusts or devises in wills so made or created. Nothing in this article in regard to an adult adopted pursuant hereto inheriting from the adoptive parent applies to any will, devise or trust made or created before April twenty-second, nineteen hundred fifteen, nor alters, changes or interferes with such will, devise or trust. As to any such will, devise or trust an adult so adopted is not an heir so as to alter estates or trusts or devises in wills so made or created.

It shall be unlawful to preclude a prospective adoptive parent or parents solely on the basis that the adopter or adopters has had, or has cancer, or any other disease. Nothing herein shall prevent the rejection of a prospective applicant based upon his or her poor health or limited life expectancy.

#### **Domestic Relations Law Article 8**

## Domestic Relations Law § 121. Definitions

When used in this article, unless the context or subject matter manifestly requires a different interpretation:

- 1. "Birth mother" shall mean a woman who gives birth to a child pursuant to a surrogate parenting contract.
- 2. "Genetic father" shall mean a man who provides sperm for the birth of a child born pursuant to a surrogate parenting contract.
- 3. "Genetic mother" shall mean a woman who provides an ovum for the birth of a child born pursuant to a surrogate parenting contract.
- 4. "Surrogate parenting contract" shall mean any agreement, oral or written, in which:
- (a) a woman agrees either to be inseminated with the sperm of a man who is not her husband or to be impregnated with an embryo that is the product of an ovum fertilized with the sperm of a man who is not her husband; and
- (b) the woman agrees to, or intends to, surrender or consent to the adoption of the child born as a result of such insemination or impregnation.

# Domestic Relations Law § 122. Public policy

Surrogate parenting contracts are hereby declared contrary to the public policy of this state, and are void and unenforceable.

# Domestic Relations Law § 123. Prohibitions and penalties

- 1. No person or other entity shall knowingly request, accept, receive, pay or give any fee, compensation or other remuneration, directly or indirectly, in connection with any surrogate parenting contract, or induce, arrange or otherwise assist in arranging a surrogate parenting contract for a fee, compensation or other remuneration, except for:
- (a) payments in connection with the adoption of a child permitted by subdivision six of section three hundred seventy-four of the social services law and disclosed pursuant to subdivision eight of section one hundred fifteen of this chapter; or
- (b) payments for reasonable and actual medical fees and hospital expenses for artificial insemination or in vitro fertilization services incurred by the mother in connection with the birth of the child.

- 2. (a) A birth mother or her husband, a genetic father and his wife, and, if the genetic mother is not the birth mother, the genetic mother and her husband who violate this section shall be subject to a civil penalty not to exceed five hundred dollars.
- (b) Any other person or entity who or which induces, arranges or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation or other remuneration or otherwise violates this section shall be subject to a civil penalty not to exceed ten thousand dollars and forfeiture to the state of any such fee, compensation or remuneration in accordance with the provisions of subdivision (a) of section seven thousand two hundred one of the civil practice law and rules, for the first such offense. Any person or entity who or which induces, arranges or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation or other remuneration or otherwise violates this section, after having been once subject to a civil penalty for violating this section, shall be guilty of a felony.

### Domestic Relations Law § 124.

Proceedings regarding parental rights, status or obligations In any action or proceeding involving a dispute between the birth mother and (i) the genetic father, (ii) the genetic mother, (iii) both the genetic father and genetic mother, or (iv) the parent or parents of the genetic father or genetic mother, regarding parental rights, status or obligations with respect to a child born pursuant to a surrogate parenting contract:

- 1. the court shall not consider the birth mother's participation in a surrogate parenting contract as adverse to her parental rights, status, or obligations; and
- 2. the court, having regard to the circumstances of the case and of the respective parties including the parties' relative ability to pay such fees and expenses, in its discretion and in the interests of justice, may award to either party reasonable and actual counsel fees and legal expenses incurred in connection with such action or proceeding. Such award may be made in the order or judgment by which the particular action or proceeding is finally determined, or by one or more orders from time to time before the final order or judgment, or by both such order or orders and the final order or judgment; provided, however, that in any dispute involving a birth mother who has executed a valid surrender or consent to the adoption, nothing in this section shall empower a court to make any award that it would not otherwise be empowered to direct.

#### Constitutional Law Cases

Biology alone is not sufficient for a father to assert constitutional rights. He must seize the opportunity to be a father-in-fact.

Lehr v. Robertson, 463 U.S. 248 (1982)

There may be a constitutional protected liberty interest for a biological father in his relationship with the child even if the mother is married to another man at the time of conception.

Michael H. v Gerald D., 491 U.S. 110 (1989)

The living together requirement of DRL §111(1)(e) is unconstitutional as it imposes as an absolute condition an obligation only tangentially related to the parental relationship.

Matter of Raquel Marie X., 76 N.Y.2d 387 (1990)

#### Same-Sex Parenting

#### **Adoptions**

Unmarried partner of child's biological parent, whether heterosexual or homosexual, who is raising the child together with the biological parent, can become the child's second parent by mans of adoption.

Matter of Jacob, 86 N.Y.2d 651 (1995)

Children (twins) conceived in India as a result of surrogacy contract which would be illegal in New York. Court found that, where a surrogacy contract exists and an adoption has been filed to establish legal parentage, the surrogacy contract does not foreclose the adoption proceeding. Court not being asked to enforce surrogacy contract.

Matter of J.J., 44 Misc.3d 297 (Queens County Family Court 2014)

Surrogate declined to grant adoption to biological mother's same-sex spouse because, under DRL 10-a, that she was already the legal mother and stated that the purpose of adoption was to create a *new* legal relationship where one did not already exist. Mothers were concerned that Ohio, a state of possible relocation, would decline to honor New York law on parentage without an adoption decree. Court stated that issue would have to be litigated in Ohio. [Decision roundly criticized for its legal conclusions and policy determinations.]

Matter of Seb C-M, NYLJ 1202640527093, at \*1 (Surrogate Court NY County 1/6/2014).

## Presumption of Legitimacy

Child born to two women civilly united determined to be the child of both partners, including the non-biological parent. Court discarded presumption of legitimacy under Vermont law, but found statute did not limit definition of parent, and several factors supported court's determination, including the valid civil union, expectation and intent of both parties to parent the child, participation by the non-biological partner in the decision to allow artificial insemination and active participation in prenatal care and birth. Both women treated the non-biological partner as a parent during the time they resided together, and biological parent identified other partner as a parent in the dissolution petition.

Miller-Jenkins v. Miller-Jenkins, 180 Vt. 441, 912 A.2d 951 (Vermont 2006).

### Standing for Custody

Matter of Alison D. v. Virginia M., 77 N.Y.2d 651 (1991) Debra H. v. Janice R., 14 N.Y.3d 576 (2010)

In Alison D., Court of Appeals declined to adopt the concept of "de facto" parenting or "parent by estoppel." Visitation petition brought by former domestic partner of child's biological mother. Court deferred to Legislature to expand custody standing as defined in the Domestic Relations Law. Vigorous dissent by Jude Kaye called for an expanded definition of "parent" to allow the court, under doctrine of parens patriae, to consider child's best interests.

In Debra H. the Court of Appeals adhered to its previous determination and declined the invitation to overrule Alison D. or to extend the concept of equitable estoppel from paternity to custody cases and again deferred to the Legislature to establish a different policy regarding who may seek custody other than a known biological parent. But then, in a twist worthy of Agatha Christie, the Court of Appeals granted comity to the Vermont civil union which had existed between the women at the time the child was conceived and found that the Vermont statute gave the non-biological parent rights to custody and visitation. Three of the seven judges concurred in the result but would have overruled Alison D. outright.

Nonparent former same-sex domestic partner sought custody or visitation with child. Parties had another child that petitioner had adopted, but adoption had not been finalized for subject child when relationship terminated. Trial court found no extraordinary circumstances to justify a "best interests" analysis. Equally unavailing was the doctrine of equitable estoppel in a custody case, not did the doctrine of *parens patraie* justify interfering with the biological mother's constitutionally protected liberty interest in raising her child. The petition was dismissed as to that child.

Matter of C.M. v. C.H., 6 Misc.3d 361 (Supreme Court NY County 2004)

Same-sex couple married in Connecticut before effective date of NY Marriage Equality Act. Supreme Court should have afforded comity to Connecticut marriage and recognized [non-biological] parent under NY law, thereby granting standing for custody/visitation.

Counihan v. Bishop, 2013 NY Slip Op 0720149 (Second Dept. 11/6/13). See also: Laura WW. v. Peter WW., 51 AD3d 211 (Third Dept. 2008); Matter of Ranfile, 81 AD3d 566 (First Dept. 2011); Wendy G-M. v. Erin G-M., NYLJ 1202655070125, at \*1 (Supreme Court Monroe County 5/7/2014).

Same-sex spouse who was not biological parent of child (born before marriage) had no standing to seek custody. Trial court discounted arguments in favor of extraordinary circumstances, presumption of legitimacy, and equitable estoppel. An extremely thoughtful and well-written decision, where the court could probably have issued the opposite conclusion on each of the legal points.

Matter of Jann P. v. Jamie P., NYLJ 1202664272007, at \*1 (Family Court, Nassau County, Decided June 30, 2014.)

## Standing for Child Support and Paternity

Companion case to *Debra H*. Biological mother and child had returned to Canada after termination of relationship. Through UIFSA (Uniform Interstate Family Support Act) biological mother sought child support, and petition transferred to non-biological partner's court in NY. Court of Appeals reversed dismissal of petition and remanded for hearing on whether E.T. was a parent liable for support pursuant to the Child Support Standards Act. *Matter of H.M. v. E.T.*, 14 N.Y.3d 521 (2010)

Petitioner, gay man, served as sperm donor for subject child, who was raised by her mother and mother's lesbian partner, who also had a child. Father's name was not on birth certificate, but ultimately became known to the child and exercised some informal visitation. He then filed a paternity petition, which was dismissed by the trial court. In reversing, the Appellate Division narrowed the issue to whether or not he was the biological father (which was not in dispute) and therefore had a right to an Order of Filiation. The Appellate Division noted that this was not a custody, visitation, or even an adoption proceeding, where the father's consent might be required. The mother was estopped from denying the father's paternity and an Order was to be issued pursuant to Family Court Act §542(a). [Not so many years ago the child was the cover story in the *New York Times* Sunday Magazine.] *In re Thomas S. v. Robin Y.*, 209 A.D.2d 298 (First Dept. 1994)

Mother sought child support from her husband. His defense was that he was, in fact, a female and not the father of the subject children, although "he" had accepted responsibility as the "husband" before the mother was artificially inseminated. Family Court declined to dismiss the petition, stating that respondent was estopped from denying parentage for the purposes of support.

The court noted that its finding did not affect the validity of the marriage or any proceeding custody, visitation or inheritance rights.

Matter of Karin T. v. Michael T., 127 Misc.2d 14 (Family Court Monroe County 1985)

### Dissolution of Civil Union

NY should entertain a dissolution petition to dissolve a Vermont civil union. NY grants comity to the civil union and, absent a proceeding in Supreme Court, the parties will have no other remedy as they do not meet the residency requirements of Vermont law for a dissolution in that state. No custody or support issues involved.

Dickerson v. Thompson, 88 A.D.3d 121 (Third Dept. 2011)

### Surrogacy and Gestational Parents

The California Supreme Court determined that both the gestational mother and the genetic mother could arguably be considered the child's natural mother and employed an "intent" test to determine maternity.

Johnson v. Calvert, 5 Cal. 4th 84 (1993)

Wife was gestational carrier, but not genetic mother as husband's sperm had been fertilized with donated eggs and implanted in wife. Court found that "intent" test of Johnson v. Calvert was to be adopted and a declaration of maternity could be granted to wife.

McDonald v. McDonald, 196 AD2d 7 (Second Dept. 1994)

Husband and wife owned "pre-zygotes" which were defined as "eggs which have been penetrated by sperm but not yet joined genetic material." Upon divorce, wife wanted possession to implant eggs; husband wanted eggs donated to IVF program for research purposes. Court of Appeals found that parties' agreement, at time of IVF procedure was clear and unambiguous and was repeated in an informal writing shortly after their separation. Court found contract should be enforced and ordered husband to have custody of pre-zygotes.

Kass v. Kass, 91 N.Y.2d 554 (1998).

Surrogate (gestational) mother became pregnant when egg of genetic mother was fertilized with sperm of her husband and implanted in gestational mother's uterus. Action brought pre-birth sought to have genetic mother listed on birth certificate. Appellate Division found ample authority for Supreme Court to issue such a declaration without need for genetic mother to seek an adoption to establish her rights. The court also suggested that restrictions on determination of maternity based on gestation might be constitutionally suspect gender classifications.

T.V. v. New York State Department of Health, 88 A.D.3d 290 (Second Dept. 2011)

Surrogacy agreement by mother in excess of medical costs is akin to "trafficking in children" and is against public policy. [Case preceded adoption of DRL §121 – 124.]

In the Matter of Paul, 146 Misc.2d 379 (Family Court Kings County 1990)

Situation where court had to confront issue of gestational mother not being biological mother. Mother was unable to bear children, but her eggs were

fertilized with her husband's sperm and the fertilized ova were carried to term by mother's sister, who gave birth to triplets. All parties acknowledged who were the genetic parents, and court ultimately directed NYC Department of Health and Mental Hygiene to issue two sets of birth certificates: one with the name of the gestational mother to be immediately sealed, and one with the name of the genetic mother to be released to the parents.

Doe v. New York City Board of Health, 5 Misc.3d 424 (Supreme Court NY County 2004)

Twins were genetic children of father; eggs were form an anonymous donor and a genetically unrelated surrogate was implanted (in California.)

Judgment of parental relationship issued by California court declaring husband and wife as twins' sole parents. Surrogate found NY should recognize the results of the California courts regarding parentage. Court also noted that while NY does not recognize surrogacy agreements, enforcement of the contract is not at issue, and the rights of children born as a result of surrogacy agreements are not affected by the possible illegality of the contract.

Matter of John Doe, 7 Misc.3d 352 (Surrogate's Court NY County 2005)

Action was brought against doctor who was supposed to implant the insemination. An action for breach of contract cannot be brought for failure to comply with a surrogate contract, as said contract is illegal. [Appellate Term probably got it wrong; could have drawn a distinction between assisted reproduction and surrogacy.]

Itskov v. New York Fertility Institute, Inc., 11 Misc.3d 68 (Appellate Term, Second Dept. 2006)

### Equitable estoppel

Man expressly represented that he was the father of the child, and a parent-child relationship existed between the two. He was equitably estopped from denying paternity despite genetic marker test precluding him. Paternity by estoppel should be determined before genetic marker tests are ordered, Family Court Act §§418(a), 532(a). The Court of Appeals noted that paternity by estoppel, which had its origins in case law, was now a public policy choice made by the Legislature. The Court further noted that, even if the mother committed fraud (and they found no evidence of it), the child could not have committed fraud and the child is the party denominated by the Legislature whose best interests must be considered.

Matter of Shondel J. v. Mark D., 7 N.Y.3d 320 (2006)

Petitioner sought to intervene in couple's divorce action and to have blood testing performed for purpose of being declared father of child. Appellate Division affirmed denial of his petition based on equitable estoppel, because of the presumption of legitimacy and the fact that petitioner waited nearly four years to assert his claim.

David L. v. Cindy Pearl L., 208 A.D.2d 502 (Second Dept. 1994). See also Matter of Juan A. v. Rosemarie N., 55 A.D.3d 827 (Second Dept. 2008)

Gay man agreed to donate sperm to lesbian couple, and respondent gave birth to two children. Man's name was put on birth certificate and he was consistently involved with the children, including regular visitation and they called him "Daddy." Mother estopped from claiming a waiver or an estoppel precluding father from visitation.

Matter of Tripp v. Hinckley, 290 A.D.2d 767 (Third Dept. 2002)

Petitioner was a woman living as a pre-operative male, and had entered into a marriage with the mother, who subsequently bore a child as a result of artificial insemination. When the parties separated competing custody petitions ensued, and mother tried to dismiss "father's" petition for lack of standing. Trial court ruled that, on the basis of extraordinary circumstances, including child's relationship with petitioner and respondent's active complicity in any possible fraud regarding marriage to another female, mother was estopped by denying that petitioner was the father. [This case precedes the Marriage Equality Act.]

K.B. v. J.R., 26 Misc.3d 465 (Supreme Court Kings Co. 2009)

Custody petition brought by non-biological former domestic partner of mother; mother sought to dismiss on basis of *Alison D*. and *Debra H*. Trial court distinguished those cases because biological mother had already alleged a "child in common" in order to get child support, received and estoppel hearing, and testified that the non-biological "mother" "was in fact a parent." Biological mother was judicially estopped from asserting inconsistent legal positions in different proceedings. This slightly distinguishes the case from the traditional equitable estoppel doctrine espoused in *Shondel J. Estrellita A. v. Jennifer D.*, 40 Misc.3d 219 (Family Court Suffolk Co. 2013)

Father sought, in child support proceeding, to vacate twelve-year-old Order of Filiation. Family Court ultimately denied father's application, including for a genetic marker test, and Appellate Division affirmed.

"The paramount concern in applying the doctrine of equitable estoppel...is the best interests of the subject child [citations omitted-." Here, the fifteen year-old child had visited with the father, the father attended some school functions, had telephone contact with the child and saw her on some birthdays. The child considered the father to be her father and had never known any other father.

Matter of Shawn H. v. Kimberly F., 115 A.D.3d 744 (Second Dept. 2014)

Child born 12/2010 and Acknowledgment of Paternity signed immediately. Three years later mother sought to vacate Acknowledgment believing another man to be the father, confirmed by DNA testing. Trial court dismissed mother's petition on two bases. First, the Court found the mother's original declaration that B.H. was father could not be a "mistake of fact" that he was not because she knew it as a fact (there were no sexual relations in the time period of conception) and therefore she was precluded from moving to vacate the Acknowledgment on grounds of fraud. The court further made a finding that B.H. had consistently availed himself of parenting time and opportunities and therefore mother was equitably estopped from denying he was the father. *Matter of A.S. v. B.H.*, 43 isc.3d 1231A (Onondaga County Family Court 2014)

Mother's former husband sought custody. Child was born during marriage, but another man commenced paternity proceeding; husband defaulted and Order of Filiation issued in favor of other man. Family Court properly dismissed former husband's custody application as the prior finding of paternity precluded him from claiming he was a parent and there were no extraordinary circumstances. A careful reading of the majority opinion in Debra H. suggests that the paternity adjudication in favor of a non-husband

should have had no effect on the husband's attempt to obtain custody, even on default, and he should not have been precluded and the case is wrongly decided.

Matter of Vega v. Vega, 120 A.D. 3d 1427 (Second Dept. 2014)

# POST JUDGMENT APPLICATIONS

Hon. Stephen Behar

### POST JUDGMENT PART

#### APPLICATIONS FOR RELIEF:

A. If for enforcement - Must be by Order To Show Cause, Saad v Saad,71 A.D.3d 1116, 898 N.Y.S.2d 203, (App. Div. 2<sup>nd</sup> Dept. 2010).

Domestic Relations Law § 244 provides that "[w]here a spouse in an action for divorce . . . defaults in paying any sum of money as required by the judgment or order . . . or as required by the terms of an agreement or stipulation incorporated by reference in a judgment, such direction shall be enforceable . . . The court shall make an order directing the entry of judgment for the amount of arrears of any other payments so directed . . . unless the defaulting party shows good cause for failure to make application for relief from the judgment or order . . . The application for such order shall be upon such notice to the spouse or other person as the court may direct" (Domestic Relations Law § 244). This language implicitly requires that such an application be brought by an order to show cause (see Urban v Urban, 90 AD2d 793, 794 [1982]; Fishbach v Fishbach, 4 Misc 2d 760 [1957]).

B. All other applications may be in either form, Motion or Oder to Show Cause. HOWEVER; POST JUDGMENT MOTIONS ARE ALMOST NEVER SERVED UPON ATTORNEYS BECAUSE, UNTIL AN ATTORNEY APPEARS, THE PARTIES THEMSELVES MUST BE SERVED PERSONALLY

Therefore, O.S.C. may be preferable!

### 22 NY ADC 202.7 provides:

(b) The notice of motion shall read substantially follows: The suggested form includes the following: Pursuant to CPLR 2214(b), answering affidavits, if any, are required to be served upon the undersigned at least seven days before the return date of this motion.

This requirement could be included in an O.S.C.

Footnote 1 of the suggested form states:

If any party is appearing pro se, the name, address and telephone number of such party shall be stated.

### C. TEMPORARY INJUNCTIVE RELIEF

# 22 NY ADC 202.7 (f) provides:

Any application for temporary injunctive relief, including but not limited to a motion for a stay or a temporary restraining order, shall contain, in addition to the other information required by this section, an affirmation demonstrating there will be significant prejudice to the party seeking the restraining order by the giving of notice. In the absence of a showing of significant prejudice, the affirmation must demonstrate that a good faith effort has been made to notify the party against whom the temporary restraining order is sought of the time, date and place that the application will be made in a manner sufficient to permit\* the party an opportunity to appear in response to the application. This subdivision shall not be applicable to orders to show cause or motions in special proceedings brought under article 7 of the Real Property Actions and Proceedings Law, nor to orders to show cause or motions requesting an order of protection under section 240 of the Domestic Relations Law, unless otherwise ordered by the court.

\*PART 18 strongly prefers notice of the entire application (serving a complete copy), at least, 24 hours before request to Court!

	At aTerm, Part 18, of the Supreme Court of the State of New York, held in and for the County of Suffolk, at the Courthouse thereof located at 400 Carleton Avenue, Central Islip, New York 11772, on the day of, 2014	
SUPREME COURT OF THE STATE OF NI COUNTY OF SUFFOLK		
Plaintif	Index No.	
-against-	ORDER	
Defendant.		
	X	
That both parties agree that the Modificated , 20 , and filed with the settles, and disposes of, all issues raised in Modification.	cation to (Stipulation) or (Separation Agreement) e Suffolk County Clerk on , 20 , otion Sequence, and	
Upon the joint application of the parties, it is hereby		
ORDERED, that the Modification date County Clerk on , 20 , is here of Divorce, entered , 20 , and the only as to the extent that the said Modification and/or Agreement(s).	by incorporated, but not merged, into the Judgment at said Judgment is hereby modified by this Order.	
Dated:		
Central Islip, NY		
- H	ION. STEPHEN M. BEHAR	
	A.J.S.C.	

# YOU HAVE BEEN SERVED AN ORDER TO SHOW CAUSE!

Whenever you are involved in court proceedings, you have the right to hire an attorney to represent you. If you hire an attorney, they attorney will respond to these court papers on your behalf. If you do not have an attorney you **must** respond to these court papers in writing as set forth below.

If you agree that the Court should grant all of the relief requested by the moving party in this Order to Show Cause you need not answer or oppose the order, but you should send a letter to the Court (and a copy to the moving party) indicating that you do not oppose the relief requested. The Court will then review the relief requested and issue a decision granting or denying such relief.

If you disagree with any, or all, of the relief requested in this Order to Show Cause, you must oppose this request, in writing.<sup>1</sup> The writing should contain the title of the action, the Court index number and you should label the document "Affidavit in Opposition." Such a document must be signed, and sworn to, before a Notary Public. The Notary Public must execute a jurat below your signature in the following form:

State of New York )	
County of) Sworn to before me this day of	ss.:
	Notary Public (with notary stamp)

Your Affidavit in Opposition, along with any exhibits you wish to attach, must be filed with the Clerk of the Supreme Court, before the "return"date (the date upon which you are ordered to show cause<sup>2</sup>). Prior to filing it with the Clerk you must serve a complete copy on the other party (or their lawyer) and you must attach proof of such service<sup>3</sup> to the "Affidavit of Opposition" that you file with the Court. ALL FILINGS MUST CONTAIN THE ADDRESS WHERE YOU RECEIVE MAIL.

There is no need to appear in Court on the return date, unless there is a specific direction by the Court to do so. When the Court decides the motion, you will receive a copy of the Court's decision in the mail at the address you have supplied.

<sup>&</sup>lt;sup>1</sup>Personal appearances are not permitted unless the Court has scheduled a hearing.

<sup>&</sup>lt;sup>2</sup>Any request for an extension of time to oppose the relief requested by this order, must be made to the Court in writing, on notice to the moving party, before the return date of this Order to Show Cause.

<sup>&</sup>lt;sup>3</sup>Proof of service, is usually in the form of an "Affidavit of Service". Such Affidavit of Service states that the Affidavit in Opposition had been served upon the moving party at least one (1) day before the return date, the date upon which you are ordered to show ca 188 his affidavit also requires a notary jurat.

# THE HAGUE CONVENTION

It's Impact on Custody Matters

By

Dawn L. Hargraves, Esq.

&

William M. Sullivan, Esq.

# **FOUNDATION**

THREE (3) HAGUE CONVENTIONS AND WHAT YOU NEED TO KNOW

- 1.1980: Convention on the Civil Aspects of International Child Abduction.
- 2.1993: Protection of Children and Co-Operation in Respect of Intercountry Adoption
- 3.1996: International Protection of Children

# **IMPORTANT DEFINITIONS**

- "STATE": COUNTRIES ARE REFERRED TO BY THE DESIGNATION "STATE"
- "HABITUAL RESIDENCE": WHERE A CHILD "HABITUALLY" RESIDED BEFORE WRONGFUL REMOVAL. (Note that there is no hard and fast rule, it is an analysis.)
- "CENTRAL AUTHORITY": This is the body within each Contracting State
  which is the first Point of Contact in the event of "wrongful removal" or
  "Wrongful Retention." This entity is tasked with finding a Child upon
  application of a parent or guardian, and contacting the Central Authority of
  that State. (For the U.S. it is the Office of Children's Issues, Department of
  State.
- "Return Order": Order issued pursuant to Hague and issued by the State where the Child is located directing the return of a Child to the State of the Child's Habitual Residence.

# Convention on the Civil Aspects of International Child Abduction

#### Purpose

"The Convention of 25 October 1980 on the Civil Aspects of International Child Abduction seeks to combat parental child abduction by providing a system of co-operation between Central Authorities and a rapid procedure for the return of the child to the country of the child's habitual residence." See Article 1

#### Best Interest Presumption

"The Convention is based on a presumption that, save in exceptional circumstances, the wrongful removal or retention of a child across international boundaries is not in the interests of the child, and that the return of the child to the State of the habitual residence will promote his or her interests . . . ."

#### Factors:

"the right of the child to have contact with both parents,"

"supporting continuity in the child's life, and"

"ensuring that any determination of the issue of custody or access is made by the most appropriate court having regard to the likely availability of relevant evidence"

#### Return Order

The primary function of the 1980 Convention was to put into place the "return order," the purpose of which is to restore the *status quo*. A return order is NOT a custody determination and is NOT a decision on the merits. A Hague case is limited only to the issue of determining which jurisdiction is most proper to determine custody. See **Articles 16 and 19**.

#### Prima Facie case

- •The Petitioner must establish that the child was "habitually residing in the other State" and
- 1. "the removal or retention of the child constitutes a breach of custody rights attributed by the law of that State" (a custody order is not required, may be sufficient to establish parentage or marriage); and
- 2. "applicant was actually exercising those rights at the time of the wrongful removal or retention" See Article 3(b)

# <u>Possible Denial</u>

However, be careful! The application may still be rejected based upon the following:

- Article 12: The Court has discretion to reject return order if application is made 1 year after the removal/retention and the child is now settled
- · Article 13:
- If consent or subsequent acquiescence can be shown OR
- If there is a grave risk that return would expose the child to physical/psychological harm OR
- The return would otherwise place the child in an intolerable situation OR
- If the child has attained sufficient age and maturity then their preference may be basis for refusal
- · Article 20:
- If the return order would not be permitted by the fundamental rules relating to the protection of human rights and fundamental freedoms of the state addressed
- Each signatory county (a list is included in the packet) has a Central Authority, which is in charge
  of providing assistance in locating the child and in achieving a voluntary return or otherwise
  amicable resolution.

### **Central Authority**

In the United States the Central Authority is the Office of Children's Issues. <a href="http://travel.state.gov/content/childabduction/english.html">http://travel.state.gov/content/childabduction/english.html</a>

- Resources
- The National Center for Missing & Exploited Children (NCMEC) provides technical assistance, even to attorneys.
   <a href="http://www.missingkids.com/LegalResources/International">http://www.missingkids.com/LegalResources/International</a>
- Guide to Good Practice: each guide is focused on a specific area (i.e., mediation)
- <a href="http://www.incadat.com/index.cfm?act=text.text&id=9&lng=1">http://www.incadat.com/index.cfm?act=text.text&id=9&lng=1</a>
- INCADAT: akin to Westlaw, but for Hague cases
- http://www.incadat.com/index.cfm?act=text.text&lng=1&id3=3

# The Hague Convention of 1993

Protection of Children and Co-Operation

•The best interests of the child are paramount. Adoption

The Convention contains certain rules to ensure that adoptions take place in the best interests of the child and with respect for his or her fundamental rights. For example, States must: consider national solutions first (implement the principle of subsidiarity); ensure the child is adoptable; preserve information about the child and his / her parents; evaluate thoroughly the prospective adoptive parents; match the child with a suitable family; impose additional safeguards where needed.

- Subsidiarity principle
- "Subsidiarity" in the Convention means that Contracting States recognize
  that a child should be raised by his or her birth family or extended family
  whenever possible. If that is not possible or practicable, other forms of
  permanent care in the State of origin should be considered. Only after due
  consideration has been given to national solutions should intercountry
  adoption be considered, and then only if it is in the child's best interests.
  As a general rule, institutional care should be considered as a last resort for
  a child in need of a family.
- · Safeguards to protect children from abduction, sale and trafficking
- States should establish safeguards to prevent abduction, sale and trafficking in children for adoption by: protecting birth families from exploitation and undue pressure; ensuring only children in need of a family are adoptable and adopted; preventing improper financial gain and corruption; regulating agencies and individuals involved in adoptions by accrediting them in accordance with Convention standards.

- Co-operation between States and within States
- The Convention envisages a system in which all Contracting States work together to ensure the protection of children. Co-operation between Contracting States is essential to ensure the effectiveness of any safeguards put in place (Art. 1 b)). In practice, this principle is implemented first through international co-operation between Central Authorities, and between other public authorities and accredited bodies performing the functions of Central Authorities (Art. 7); second, through intra-State co-operation between authorities and agencies regarding Convention procedures (Art. 7(1)); and third, through co-operation to prevent abuses and avoidance of the Convention (Art. 33).

#### Automatic recognition of adoption decisions

•The 1993 Hague Convention achieved a major breakthrough in establishing a system of automatic recognition of adoptions made in accordance with the Convention. Every adoption, whether a simple or full adoption, which is certified to be made in accordance with Convention procedures, is recognised "by operation of law" in all other Contracting States (Art. 23). In other words, the Convention gives immediate certainty to the status of the child, and eliminates the need for a procedure for recognition of orders, or re-adoption, in the receiving State.

#### Competent authorities, Central Authorities and accredited bodies

- \*The Convention requires that only competent authorities should perform Convention functions. Competent authorities may be Central Authorities, public authorities, including judicial or administrative authorities, and accredited bodies. The Convention provides for a system of Central Authorities in all Contracting States and imposes certain general obligations on them, such as: cooperation with one another through the exchange of general information concerning intercountry adoption; the elimination of any obstacles to the application of the Convention (Art. 7(2) b)); and a responsibility to deter all practices contrary to the objects of the Convention (Art. 8). Central Authorities also have specific obligations under Chapter IV in respect of individual adoptions.
- \*Accredited bodies may perform some of the functions of Central Authorities. The process of accreditation of bodies is one of the Convention's safeguards to protect children in adoption. Any private adoption body or agency must be accountable to a supervising or accrediting authority (see Arts 6-13). They must play an effective role in upholding the principles of the Convention and preventing illegal and improper practices in adoption. If accredited bodies are

# HAGUE CONVENTION 1996 International Protection of Children

The advantages of breaking cultural barriers has also increased the risks of cross-frontier abduction/retention.

Issues that result:

- Custody
- Relocation
- Parental abduction
- Problems maintaining contact between child and both parents
- Child support

The 1996 Convention is "much broader in scope than the first two, covering as it does a very wide range of civil measures of protection concerning children, from orders concerning parental responsibility and contact to public measures of protection or case, and from matters of representation to the protection of children's property." [ BF TO PROVIDE]

Purpose

The 1996 Convention created uniform rules that:

- "avoid the possibility of conflicting decisions"
- "give primary responsibility to the authorities of the country where the child has his or her habitual residence" BUT
- "also allow any country where the child is present to take necessary emergency or provisional measures of protection"

Basically, the 1996 Convention determines which country's laws are applied and then requires reciprocity.

- HOWEVER, it is worth noting that the 1996 Convention does not CREATE a uniform international law → that was done in the 1989 United Nations Convention on the Rights of the Child
- http://www.unicef.org/crc/files/Rights overview.pdf
- "The function of the 1996 Hague Convention is to avoid legal and administrative conflicts and to build the structure for effective international co-operation in child protection matters between the different systems.

# OTHER TREATIES THAT MAY APPLY

- UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD (1989)- Important Articles:
- Article 9 (Separation from parents): Children have the right to live with their parent(s), unless it is bad for them. Children whose parents do not live together have the right to stay in contact with both parents, unless this might hurt the child.
- Article 10 (Family reunification): Families whose members live in different countries should be allowed to move between those countries so that parents and children can stay in contact, or get back together as a family.

- Article 11 (Kidnapping): Governments should take steps to stop children being taken out
  of their own country illegally. This article is particularly concerned with parental
  abductions. The Convention's Optional Protocol on the sale of children, child prostitution
  and child pornography has a provision that concerns abduction for financial gain.
- Article 18 (Parental responsibilities; state assistance): Both parents share responsibility
  for bringing up their children, and should always consider what is best for each child.
  Governments must respect the responsibility of parents for providing appropriate
  guidance to their children the Convention does not take responsibility for children
  away from their parents and give more authority to governments. It places a
  responsibility on governments to provide support services to parents, especially if both
  parents work outside the home.
- Article 19 (Protection from all forms of violence): Children have the right to be protected from being hurt and mistreated, physically or mentally. Governments should ensure that children are properly cared for and protect them from violence, abuse and neglect by their parents, or anyone else who looks after them. In terms of discipline, the Convention does not specify what forms of punishment parents should use. However any form of discipline involving violence is unacceptable. There are ways to discipline children that are effective in helping children learn about family and social expectations for their behavior ones that are non-violent, are appropriate to the child's level of development and take the best interests of the child into consideration. In most countries, laws already define what sorts of punishments are considered excessive or abusive. It is up to each government to review these laws in light of the Convention.

- Article 20 (Children deprived of family environment): Children who cannot be looked after by their own family have a right to special care and must be looked after properly, by people who respect their ethnic group, religion, culture and language.
- Article 21 (Adoption): Children have the right to care and protection
  if they are adopted or in foster care. The first concern must be what is
  best for them. The same rules should apply whether they are
  adopted in the country where they were born, or if they are taken to
  live in another country.

# WAYS THAT WE BECOME INVOLVED WITH HAGUE:

- Contacted by Parent that Has Concerns Regarding the other Parent's International Travel (Married/Unmarried Couple with no Custody Order.)
- Contacted by Parent that Has Concerns Regarding the other Parent's International Travel (Married/Unmarried Couple with Custody Order.)
- Representing a Parent in a Matrimonial/Family Matter that Has Concerns Regarding the other Parent's current or future International Travel during the pendency.

# WHAT TO DO?

- FIRST THINGS FIRST
  - IS THE COUNTRY IN QUESTION A "MEMBER" OF HAGUE
  - JUST BEING A MEMBER IS NOT THE ANALYSIS AND YOU MUST WATCH FOR THIS TRAP
  - YOU MUST MAKE CERTAIN THAT YOUR COUNTRY IN QUESTION IS A PARTY TO HAGUE CONVENTION THAT YOU ARE SEEKING TO APPLY
  - TO AID WITH THIS, REMEMBER
    - MEMBERS: http://www.hcch.net/index\_en.php?act=states.listing
    - NON-MEMBERS: http://www.hcch.net/index\_en.php?act=states.nonmember

# 1. If No Order(s):

Employ Preventative Measures – Consider Severe Actions

# 2. If Order(s):

- review same to ascertain rights/ protections/ steps to be taken.
- •Review Stipulation of Settlement, if any.
- Employ Preventative Measures
- •Contact Other Parent / Counsel for Other Parent / Attorney for Child
- •File Application to Court of Competent Jurisdiction
- •Consider Severe Actions (e.g. take custody of child and file emergency application.)

# HOW DO I RECOVER MY CHILD?

- FIRST: CONTACT THE U.S. CENTRAL AUTHORITY AND FILE AN APPLICATION REGARDING THE WRONGFULLY REMOVED OR RETAINED CHILD.
- SECOND: U.S. CENTRAL AUTHORITY CONTACTS THE CENTRAL AUTHORITY OF THE STATE WHERE THE CHILD IS WRONGFULLY REMOVED OR RETAINED.
- THIRD: FOREIGN CENTRAL AUTHORITY LOCATES CHILD AND DETERMINE THE CORRESPONDING LEGAL ENTITY THAT WILL MAKE A HAGUE "DETERMINATION"

# HOW DO I RECOVER MY CHILD? (CONT'D)

- FOURTH: RETAIN COUNSEL OR HAVE COUNSEL APPOINTED BY THE U.S. CENTRAL AUTHORITY.
- FIFTH: COUNSEL FILES A PETITION SEEKING A RETURN ORDER UNDER THE HAGUE CONVENTION
  - Note: The Responding Legal Authority will make a determination of whether you can proceed Ex-Parte or On Notice (based upon factors such as flight risk)
- SIXTH: THERE WILL BE A HEARING AS TO WHETHER THAT ENTITY WILL ISSUE A RETURN ORDER FOR THE CHILD.

AND THIS IS WHY PREVENTION IS SO IMPORTANT!

# **DID YOU KNOW**

- NEW YORK IS GOVERNED BY THE UCCJEA WHEN IT COMES TO INTERNATIONAL CUSTODY MATTERS WHEN WE ARE THE "HOME STATE" (HABITUAL RESIDENCE)
- NOTE THE ONE YEAR TIME WINDOW
  - THIS IS CRITICAL AND CAN BE FATAL TO YOUR CASE
- NOTE ARTICLE 13 OF HAGUE 1980 IF THE CHILD UNDER THE AGE OF 16, A STATE MAY RETURN BUT IF NOT THEY WILL NOT — ALSO OLDER CHILDREN (E.G. 14) WILL BE ASSESSED FOR MATURITY AND THEN PREFERENCE
- UCCJEA TREATS THE FOREIGN COUNTRY AS A FOREIGN STATE. (CPLR 311)
- ICARA INTERNATIONAL CHILD ABDUCTION REMEDIES ACT —This is a congressional act providing that the U.S. will follow the Hague Conventions

# CENTRAL AUTHORITY FOR THE U.S.

- FOR THE US IT IS THE OFFICE OF CHILDREN ISSUES
- WEBSITE: http://travel.state.gov/content/childabduction/english.html
- Office of Children's Issues
- Once you contact the Office of Children's Issues in the Department of State's Bureau of Consular Affairs to report a child's abduction or wrongful retention, the Office of Children's Issues can access consular databases and other systems that may provide additional resources in locating children outside the United States. The Office of Children's Issues can also connect with both domestic and foreign partners to locate missing children and can serve as a liaison with INTERPOL and other law enforcement authorities noted below

# THE National Center for Missing & Exploited Children (NCMEC)

- Formerly the Central Authority for the U.S. but now they are a private organization that provides significant resources and technical assistance to those who need help
- Has a list of countries that are non-compliant with Hague even though they are members.

# UNIFORM CHILD ABDUCTION PREVENTION ACT (UCAPA) – Private

# PREVENTATIVE MEASURES

- 1. PASSPORT ALERTS from U.S. State Department (See Form Provided.)
- 2. U.S. LAW ENFORCEMENT WILL GENERALLY NOT PREVENT A CHILD FROM LEAVING THE COUNTRY WITHOUT A COURT ORDER! (necessary language for stipulation.)
- 3. Uniform Child Abduction Prevention Act (UCAPA)
- •http://www.uniformlaws.org/ActSummary.aspx?title=Child%20Abduction%20Prevention
- •An independent organization, the Uniform Law Commission, created UCAPA to aid in the prevention of family abduction (both domestic and abroad).
- •"In particular, the act requires courts to consider whether the party in question is likely to take a child to a country that isn't a party to the Hague Convention on the Civil Aspects of International Child Abduction, or to a country that places the child at risk, has laws that would restrict access to the child, that is on the current list of state sponsors of terrorism, or is engaged in an active military action or war."

- UCAPA was drafted "to be compatible with and to augment existing state law"
- It provides a procedure by which abduction can be prevented → submit a petition

Said petition must include:

- child's biographical information,
- risk factors for abduction.
  - · previous abductions
  - attempts at abduction
  - · threats of abduction
  - · abuse, DV, negligence, refusal to obey child custody order
  - abandoning employment
  - liquidating assets
  - obtaining travel documents/tickets
  - · requesting child's school and medical records
- · addresses of the child and potential abductor and
- prior actions that give rise to concern (as well as any other additional information)

- Preventative actions that may be imposed by the court:
- "Travel restrictions"
- "Prohibiting an individual from removing the child from the State or other set geographic area"
- United States Department of State's Child Passport Issuance Alert Program
- Require the foreign country to obtain a custody order identical to that of the home country's



#### U.S. Department of State

\*OMB APPROVAL NO. 1405-0169
EXPIRATION DATE: 1/31/2016
ESTIMATED BURDEN: 30 Minutes\*

# REQUEST FOR ENTRY INTO CHILDREN'S PASSPORT ISSUANCE ALERT PROGRAM

REQUEST FORM An alert request may be filed with respect to an unmarried child under the age of 18. This request can be filed by concerned parents of U.S. citizen children, their appointed agents, or other persons having legal custody of the child. Complete one form for each child, and submit the completed request along with proper documents to Passport Services by e-mail, fax or mail. By signing this form you are affirming that your parental rights to this child have not been terminated by court order. Please provide information about the child in order to make the alert system effective. Please print clearly or type the information. Date of Birth (mm-dd-yyyy) Child's Full Name (Last, First, Middle) Place of Birth Child's Sex Social Security Number U.S. Passport Number(s), if any Female Male Please provide the following information about yourself so that we can acknowledge your request, and alert you in the future. Your Full Name (Last, First, Middle) **Documentation of Identity Provided** Other Form of Photo Driver's License Identification with Signature Passport Relationship to Child Documentation of Parentage, Guardianship, Legal Custody OR Authority to Act on Behalf of Parent or Legal Guardian, as Shown Above applicable Birth Certificate Consular Report of Birth Abroad (CRBA) **Adoption Decree** Current Custody/ Evidence of Authority to Act on **Guardianship Court** Other Behalf of Parent or Legal Custodian Order(s) Mailing Address City Postal Code State or Country Since the Department will need to contact you, it is very important that you keep us informed in writing or by telephone of any changes to your contact information. Failure to notify this office of your correct address and phone number may result in passport issuance for your child without your knowledge. Home Phone Work Phone Cell Phone Email Address(es) 3. I request that the U.S. Department of State notify me if it receives a U.S. passport application for the above-mentioned child, or if an application is currently pending, or if there is any U.S. passport still valid for the child's travel. I object to the Issuance of a U.S. Passport to the Aforementioned Child, but I understand that under prescribed circumstances (see 22 CFR 51.28) the Department is authorized to issue the passport nonetheless. Signature Date (mm-dd-yyyy) Please read the Dual Nationality for Children information accompanying this form. It relates to a child who may have a foreign nationality in addition to U.S. nationality. Please submit via e-mail, fax, or mail the completed form along with the proper copies of the original documents to the U.S. Department of State, Overseas Citizen Services, Children's Issues; Attention: Children's Passport Issuance Alert Program; SA-17, 9th Floor, Washington, DC

20522-1707; Email: PreventAbduction@state.gov; Telephone Number 1-888-407-4747, Fax Number 202-485-6222.

#### **DUAL NATIONALITY FOR CHILDREN**

Many children, born in the U.S. or born abroad to a U.S. citizen parent, are citizens of both the U.S. and another country. A child may acquire the citizenship of a foreign country, for example, through the child's birth abroad, or through a parent. There is no requirement that a U.S. citizen parent consent to a child's acquisition of another nationality. Even though U.S. law may prevent one parent from obtaining a U.S. passport for a child (for example, because of the two-parent signature requirement), a parent may still be able to obtain a foreign passport for a dual national child from the embassy or government of the other country. Under U.S. law, a United States citizen child is required to enter and depart the United States on his or her United States passport. However, please be advised that, since there are currently no exit controls from the United States, U.S. citizen children can still exit the United States undetected on foreign passports.

U.S. law and regulations concerning the issuance of U.S. passports do not apply to foreign governments when they issue passports to people (including children) whom they consider to be citizens of their country, whether or not the foreign passport is issued in the United States and/or to a person the United States considers to be a U.S. citizen. If you think there is a possibility that your child may have another nationality, you are encouraged to contact the relevant country's embassy or consulate directly to inquire about the rules governing the issuance of that country's passport to your child, including the possible availability of mechanisms to prevent the issuance to your child of that country's passport without your consent. The address and telephone numbers for the embassies and consulates for foreign countries within the United States can be found on the Consular Affairs web page at >>travel.state.gov<< under each foreign country's Country Specific Information.

#### PRIVACY ACT STATEMENT

AUTHORITY: The information solicited on this form is requested pursuant to provisions in Titles 8 and 22 of the U.S. Code, as well as the corresponding federal regulations, including specifically 22 U.S.C. § 211a and Public Law 106-113, Div. B, §1000(a)(7) [Div. A., Title II, §236] of the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Fiscal Years 2000 and 2001 and Executive Order 11295 (Aug. 5, 1966), and the regulations contained in 22 C.F.R. § 51.28.

PURPOSE: The primary purpose for soliciting the information is to enable the U.S. Department of State to notify you of any pending U.S. passport applications for the child identified on the form and of any U.S. passport held by the child that is still valid for travel. The child's social security number is requested because that number is a unique identifier used to establish the identity of the passport holder.

ROUTINE USES: The information solicited on this form may be made available as a routine use to other government agencies, to assist the U.S. Department of State in adjudicating passport applications and requests for related services, and for law enforcement and administrative purposes. It may also be disclosed pursuant to court order. The information may be made available to foreign government agencies to fulfill passport control and immigration duties. The information may also be provided to foreign government agencies, international organizations and, in limited cases, private persons and organizations to investigate, prosecute, or otherwise address potential violations of law or to further the Secretary's responsibility for the protection of U.S. nationals abroad. This would include, among other entities and agencies, disclosure to The National Center for Missing and Exploited Children, Central Authorities of countries party to the Hague Convention on the Civil Aspects of International Child Abduction ("the Convention"), attorneys of record and legal aid services to assist in facilitating operations under the Convention; local police in connection with notification of next-of-kin and child custody disputes; social services agencies; and parents involved in cases brought under the Convention. The information may also be made available to private U.S. citizen 'wardens' designated by U.S. embassies and consulates. For a more detailed listing of the routine uses to which this information may be put, see the Prefatory Statement of Routine Uses and the listing of routine user set forth in the System of Records Notice (SORN) for Overseas Citizens Services Records (State-05)., found at: http://www.state.gov/m/a/ips/c25533.htm

DISCLOSURE: Filing a request through the Children's Passport Issuance Alert Program and providing the information requested on this form, including the child's social security number, is voluntary. Failure to complete the form may result in a passport being issued to your child without your knowledge.

#### PAPERWORK REDUCTION ACT STATEMENT

Public reporting burden for this collection of information is estimated to average 30 minutes per response, including time required for searching existing data sources, gathering the necessary documentation, providing the information and/or documents required, and reviewing the final collection. You do not have to supply this information unless this collection displays a currently valid OMB control number. If you have comments on the accuracy of this burden estimate and/or recommendations for reducing it, please send them to: U.S. DEPARTMENT OF STATE, CA/OCS/L, 10th Floor, WASHINGTON, DC 20522-1707.

# Verified Petition

	TATES DISTRICT COURT ON DISTRICT OF GEORGIA	FILED IN CLERK'S OFFICE U.S.D.C Atlanta
	TA DIVISION	JUL 2 9 2011
IN RE THE APPLICATION OF	)	INTERNATION CIPIL
Plaintiff/Petitioner,	) ) )	4
v.	) ) Civil Action File Np. • )	
Defendant/Respondent.	) ) )	WSD

## VERIFIED COMPLAINT AND PETITION FOR RETURN OF THE CHILDREN

Plaintiff and Petitioner leaves respectfully shows this Court as follows:

### I. INTRODUCTION

1. This action is brought by "("Mr. J."" or "Petitioner"), a citizen of Spain, to secure the return of his six-year-old daughter, A. J. J. I. J. A. A. J. J. H. M. (together, "Children"; individually, "Child"), who were, without Petitioner's consent or acquiescence, wrongfully removed from Spain and brought to the Northern District of Georgia by

the Children's mother, Defendant/Respondent ("Ms. Harmen").

- 2. This Petition is filed pursuant to the Convention on the Civil Aspects of International Child Abduction (the "Hague Convention" or the "Convention") and the International Child Abduction Remedies Act ("ICARA"). A copy of the Hague Convention is attached hereto as Exhibit A. The Hague Convention came into effect in the United States of America on July 1, 1988, and has been ratified between, among other Contracting States, the United States of America and Spain.
  - 3. The objects of the Hague Convention are:
    - Article 1(a): To secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
    - Article 1(b): To ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.

(Id.)

4. The Hague Convention authorizes a federal district court to determine the merits of a claim for the wrongful removal or retention of a child; it does not,

<sup>&</sup>lt;sup>1</sup> Oct. 25, 1980, T.I.A.S. No. 11,670 at 1, 22514 U.N.T.S. at 98, reprinted in 51 Fed. Reg. 10494 (1986).

<sup>&</sup>lt;sup>2</sup> 42 U.S.C. §§ 11601-11610 (2011).

however, permit the district court to consider the merits of any underlying custody dispute.

#### II. JURISDICTION AND VENUE

5. This Court has jurisdiction over this case pursuant to 42 U.S.C. § 11603(a) (jurisdiction under the Hague Convention) and 28 U.S.C. § 1331 (federal question jurisdiction). Venue is proper pursuant to 42 U.S.C. § 11603 and 28 U.S.C. § 1391(b) because, upon information and belief, the Children and Respondent are residing at the home of the Respondent's boyfriend, Perez also known as in the Atlanta Division of the Northern District of Georgia at Roswell, Georgia 30076. A copy of a letter from the United States Postal Service concerning the residence at Roswell, Roswell, Georgia is attached hereto as Exhibit B.

#### III. STATEMENT OF FACTS

6. As noted above, Petitioner and Respondent are the parents of the Children. Petitioner and Respondent have never been married but lived together in Benacazon, Seville, Spain prior to Respondent's wrongful removal of the Children on November 30, 2010. A certified copy of the census of residents of the town council of Benacazon and translation thereof are attached hereto as Exhibit C.

- 7. On 2004, Ms. H gave birth to A in Seville, Spain. A copy of A J H is so birth certificate and a translation thereof are attached hereto as Exhibit D.
- 8. On 2006, Ms. Harmonian gave birth to F J H Harmonian in Seville, Spain. A copy of F J H Harmonian shift birth certificate and a translation thereof are attached hereto as Exhibit E.
- 9. Until the date of the separation between Mr. Jan and Ms. Harmon, as detailed below, Mr. Jan, Ms. Harmon, and the Children lived together at their familial residence at Rio Guadiamar Street, No. 9, Benacazon, Seville, Spain. See Exhibit C. In total, Mr. Jan and Ms. Harmon lived together in Spain for seven years.
- 10. The Children attended school at C.E.I.P. Talhara School of Benacazon (Seville) in Spain until their wrongful removal. A copy of a certified letter from the school and a translation thereof are attached hereto as Exhibit F.
- 11. In April 2010, Mr. Jazz and Ms. Harmonian separated. After the separation, Mr. Jazz continued to exercise his parental rights and maintained his relationship with the Children.

- 12. On September 15, 2010, Mr. J sought provisional measures from a Spanish court in San Lucar La Mayor due to the separation. A copy of an affidavit from Luis Zarraluqui Navarro and translation thereof are attached hereto as Exhibit G.
- 13. The Court of First Instance No. 4 of San Lucar La Mayor issued an opinion on November 24, 2010 that provides that Mr. Jam's request for a "provisional measures" is "admissible." A copy of the November 24, 2010 opinion and a translation thereof are attached hereto as Exhibit H.
- 14. The opinion further demands that both Mr. Jam and Ms. Hamman appear before the court on December 15, 2010. See Exhibit H, p. 2.
- ordered by the Spanish court, Ms. Hamana called Mr. Jam on his mobile phone and informed him that she moved to the United States with the Children.
- 16. That same day, Mr. Jam received a fax from Ms. Harming him that she and the Children were in the United States. In the fax, Ms. Harming acknowledges the parental relationship between Mr. Jam and the Children. A copy of the fax from Respondent to Mr. Jam and a translation thereof are attached hereto as Exhibit I.
- 17. Ms. Hand abducted Apply I Hand and F Jim.

  H from Spain without Mr. J. Transition.

- 18. On December 9, 2010, the Court of the First Instance and Preliminary
  Investigation No. 4 of San Lucar La Mayor issued an opinion prohibiting the Children
  from leaving Spain. A copy of the December 9, 2010 opinion of the court and its
  translation thereof is attached hereto as Exhibit J.
- 19. On the same day, an Indictment against Ms. Hamilton was filed before the Court of the First Instance and Preliminary Investigation No. 4 of San Lucar La Mayor. The Indictment and translation thereof are attached hereto as Exhibit K.
- 20. On December 28, 2010, the Spanish Court issued an opinion which provides how there is the "possible existence of a penal infringement" and that Mr. Jam should attend a hearing on February 4, 2011 to declare his damages. The December 28, 2010 opinion and translation thereof are attached hereto as Exhibit L.
- 21. Upon information and belief, the Children are currently being kept in the company of Respondent, their mother and her boyfriend, at Roswell, Georgia 30076. See Exhibit B.
- 22. In February of 2011, Mr. J. received from the Fulton County Probate

  Court for the State of Georgia a notice of a petition for the appointment of a

  temporary guardian, the mother's boyfriend, Perez, for the Children.

  A copy of the notice is attached hereto as Exhibit M.

- 23. Mr. Just submitted a swom statement objecting to the appointment of Mr. Perez as the Children's guardian. A copy of the swom statement and a translation thereof is attached hereto as Exhibit N.
- 24. On March 3, 2011, the Probate Court for Fulton County, based on Mr.

  Jew's objection, dismissed the Petition for Appointment of a Temporary Guardian for the Children. A copy of the Orders are attached hereto as Exhibit O.
- 25. On May 12, 2011, Petitioner's Request for Return for the Children was submitted to the United States Department of State through the Spanish Central Authority. A copy of the Petitioner's Request for Return and a translation thereof are attached hereto as Exhibit P.

# IV. WRONGFUL REMOVAL AND RETENTION OF CHILDREN BY RESPONDENT: CLAIM FOR RELIEF UNDER THE HAGUE CONVENTION

- 26. As set forth above, on or about November 30, 2010, Respondent wrongfully removed the Children within the meaning of Article 3 of the Convention and continues to wrongfully retain the Children in the state of Georgia, United States, in violation of Article 3 and despite Petitioner's efforts to have the Children returned to Spain.
- 27. Petitioner has never acquiesced or consented to the removal of the Children from Spain to the United States or to their living outside of Spain.

- 28. Respondent's removal and retention of the Children is wrongful within the meaning of Article 3 of the Convention because:
  - (a) It is in violation of Petitioner's rights of custody as established by the Spanish law. A copy of Articles 108, 154, 156, 158, 159 and 160 of the Spanish Civil Code and Article 225 of the Spanish Penal Code are attached hereto respectfully as Exhibits Q & R. Specifically, Respondent's removal and retention of the Children is in violation of Petitioner's right as a physical custodian to determine the Children's place of residence. See Hague Convention, Art. 5(a) (defining "rights of custody" under Article 3 to include "in particular, the right to determine the child's place of residence");
  - (b) At the time of the Children's removal from Spain, Petitioner was actually exercising his rights of custody within the meaning of Articles 3 and 5 of the Convention and, but for Respondent's removal and retention of the Children, Petitioner would have continued to exercise those rights; and

- (c) The Children were habitually resident with Petitioner in Spain within the meaning of Article 3 of the Convention immediately before their removal and retention by Respondent.
- 29. Respondent is presently wrongfully retaining the Children in the State of Georgia, County of Fulton.
- 30. Upon information and belief, Respondent is keeping the Children at Respondent's boyfriend's residence, Roswell, Georgia 30076.
- 31. The Children are now six and five years old. The Hague Convention applies to children under sixteen (16) years of age and thus applies to both Children.
- 32. This Petition is filed less than one year from Respondent's wrongful removal of the Children. Petitioner has never consented or acquiesced to Respondent's wrongful removal or retention of the Children.

#### V. PROVISIONAL REMEDIES (42 u.s.c. § 11604 & Hague Convention, Article 16)

33. Petitioner requests that this Court issue an immediate order restraining Respondent from removing the Children from the jurisdiction of this Court, and a warrant seeking immediate physical custody of the Children, directing any United States Marshal or other law enforcement officer to bring the Children before this Court. Petitioner also asks that this Court schedule an expedited hearing on the merits of this Petition.

#### VI. ATTORNEY FEES AND COSTS (42 U.S.C. § 11607)

- 34. To date, Petitioner has incurred attorneys' fees and costs as a result of the wrongful retention of the Children by Respondent.
- 35. Petitioner respectfully requests that this Court award him all costs and fees, including transportation costs, incurred to date as required by 42 U.S.C. § 11607.

#### VII. NOTICE OF HEARING (42 U.S.C. § 11603(c))

36. Pursuant to 42 U.S.C. § 11603(c), Respondent shall be given notice of these proceedings in accordance with the laws governing notice in interstate child custody proceedings.

#### VIII. RELIEF REQUESTED

WHEREFORE, Petitioner prays for the following relief:

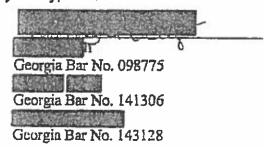
(a) An immediate temporary restraining order prohibiting the removal of the Children from the jurisdiction of this Court pending a hearing on the merits of this Verified Complaint, and further providing that no person acting in concert or participating with Respondent shall take any action to remove the Children from the jurisdiction of this Court pending a determination on the merits of the Verified Complaint;

- (b) The scheduling of an expedited preliminary injunction hearing on the merits of the Verified Complaint; an order that Respondent show cause at this hearing why the Children should not be returned to Spain, and why such other relief requested in the Verified Complaint should not be granted; and, pursuant to Federal Rule of Civil Procedure 65, an order that the trial of the action on the merits be advanced and consolidated with the hearing on the Verified Complaint;
- (c) A final judgment in Petitioner's favor establishing that the Children shall be returned to Spain, where an appropriate custody determination can made by a Spanish court under Spanish law;
- (d) An Order requiring that Respondent pay Petitioner's expenses and costs, including transportation costs, under 42 U.S.C. § 11607, such expenses and costs to be resolved via post-judgment motion, consistent with the procedure outlined under Local Rule 54.2(A) of this Court; and
- (c) For any such further relief as may be just and appropriate under the circumstances of this case.

#### Respectfully submitted, this 29th day of July, 2011.

KILPATRICK TOWNSEND & STOCKTON LLP
Suite 2800
1100 Peachtree Street
Atlanta, Georgia 30309-4530
Telephone (404) 815-6500
Facsimile (404) 815-6555

@ktslaw.com
@ktslaw.com
@ktslaw.com



Attorneys for Plaintiff/Petitioner

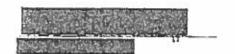
#### **VERIFICATION**

This 29th day of July, 2011.



#### CERTIFICATE OF FONT AND POINT SELECTION

I HEREBY CERTIFY that the foregoing was prepared in Times New Roman font in 14 point type in compliance with Local Rule 5.1(B).



# EVIDENCE ISSUES IN MATRIMONIAL AND FAMILY COURT PROCEEDINGS

HIPAA, SUBPOENAS AND PRIVILEGE

Hon. Caren Loguercio Family Court Judge

## EVIDENCE ISSUES IN MATRIMONIAL AND FAMILY COURT PROCEEDINGS

HIPAA, SUBPOENAS AND PRIVILEGE

Hon. Caren Loguercio Family Court Judge

What federal and state statutes impact Family
Court and Supreme Court (matrimonial
proceedings)?

- Oftentimes, the mental health and/or physical condition of a litigant in Family Court is an issue in either a child protective proceeding or a custody/visitation case.
- Likewise, the mental health and/or physical condition of a party in a matrimonial case is raised in the context of custody and visitation.
- Sometimes, the mental health and/or physical condition of a child is relevant to these proceedings.
- How can these medical and psychological records be obtained and offered into evidence?
- How are subpoenss properly used to obtain this information?
- \* What is the interplay with the doctor-patient privilege and HIPAA?

•	HIPAA	regulations	(45	C.F.R.	<b>§164.500</b>	et. seq.
---	-------	-------------	-----	--------	-----------------	----------

- CPLR Article 23 (Subpoenas, Oaths and Affirmations)
- CPLR Article 31 (Disclosure)
- CPLR Article 45 (Evidence)
- Family Court Act Article 6 (Permanent Termination of Parental Rights, Adoption, Guardianship and Custody)
- Family Court Act Article 10 (Child Protective Proceedings)
- Mental Hyglene Law Article 33 (Rights of Patients)

	322			
			<u> </u>	
				•
			<u> </u>	
		-		
· · · · · · · · · · · · · · · · · · ·				

#### **HIPAA**

- The Health Insurance Portability and Accountability Act of 1996 (HIPAA) is federal legislation that created national standards to protect the privacy of patients' medical records and other personal health information.
- The HIPPA Privacy Rule provides protections for "Individually identifiable health Information" held by "covered entities" and gives patients certain rights with respect to that information. The Privacy Rule is balanced however, to permit the disclosure of health information needed for patient care and other important purposes.
- The Security Rule provides a series of safeguards for covered entities to use to assure the confidentiality, integrity and availability of electronic protected health information.
- The HIPAA regulations are codified at 45 C.F.R. 164.500 et. seq.

## Covered Entities and Protected Health Information

- HiPAA rules apply to "covered entities" and business associates. The definitions
  of these terms are found at 45 C.F.R. §160.103.
- A covered entity is one of the following: a health care provider such as a doctor, psychologist, pharmacy, dentist, etc.; a health plan such as a health insurance company or HMO, medicare, Medicaid, etc., or a health care clearinghouse (an entity that processes health information they receive from another entity).
- emily that processes nearm information they receive from another entity).

  "Protected health information" is defined as "individually identifiable health information", which in turn is defined as health information that "is created or received by a health care provider, health plan, employer, or health care clearinghouse; and relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; and (i) that identifies the individual; or (ii) with respect to which there is a reasonable basis to believe the information can be used to identify the individual."

#### Disclosure

• The purpose of the privacy regulations is to prevent unauthorized disclosure and ensure that disclosure only takes place upon the explicit written consent of the patient or, without the patient's consent, where disclosure is otherwise "required by law". A disclosure is required by law if it is a "mandate contained in a law that compels an entity to make disclosure of protected health information that is enforceable by law." It includes but is not limited to "court orders and court ordered warrants, subpoenas or summons issued by court order". 45 CFR §164.103. See, Matter of 8. Children, 23 Misc. 3d 1119(A), 886 N.Y.S.2d 70 (Fam. Ct. Kings Co. 2009).

#### Standards for Disclosure under HIPAA

- 45 C.F.R. §164.512(e) governs disclosure of protected health information pursuant to an order in Judicial and administrative proceedings. The regulation states that:
  - (1) Permitted Disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding;
    - (i) in response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information authorized by such order.

#### **Privilege**

- HIPAA regulates disclosure of medical information by medical providers, but does not create any new privileges. The privileges are found in state law. HIPAA does not preempt state statutes related to confidentiality of clinical records but rather the privacy rule sets the floor of privacy protections under which state laws contrary to the rule were preempted unless specific exception applied.
- In New York, the statutory privileges are located in CPLR Article 45.
- CPLR §4504. Physician, dentist, podlatrist, chiropractor and nurse.
- CPLR §4507. Psychologist.
- CPLR §4508. Social worker.

#### **SUBPOENAS**

- CPLR Article 23 generally governs the issuance of subpoenas.
- CPLR §2301. Scope of subpoena.
  - A subpoena requires the attendance of a person to give testimony. A subpoena duces tecum requires production of books, papers and other things.... A trial subpoena duces tecum shall state on its face that all papers or other items delivered to the court pursuant to such subpoena shall be accompanied by a copy of such subpoena.

 <u></u>	 
 <u> </u>	
	 <del>.</del> .

CDI	62302	Authority to Jesus	

• (a) Without court order. Subpoenas may be issued without a court order by the clerk of the court, a judge where there is no clerk, the attorney general, an attorney of record for a party to an action, an administrative proceeding or an arbitration, an arbitrator, a referee, or any member of a board, commission or committee authorized by law to hear, try or determine a matter or do any other act, in an official capacity, in relation to which proof may be taken or the attendance of a person as a witness may be required; provided, however, that a subpoena to compel production of a patient's clinical record maintained pursuant to the provisions of section 33.13 of the mental hygiene law shall be accompanied by a court order (emphasis added).

- MHL §31.33 provides for the confidentiality of mental health records, and provides that such records shall not be released unless pursuant to specified exceptions, including but not limited to:
  - (c)(1) pursuant to an order of a court of record requiring disclosure upon o finding by the court that the interests of justice significantly outweigh the need for confidentiality, provided, however, that nothing herein shall be construed to affect existing rights of employees in disciplinary proceedings (emphasis added).

- CPLR §2306. Hospital records; medical records or department of bureau of a municipal corporation or of the state.
  - (a) Transcript or reproduction. Where a subpoena duces tecum is served upon a hospital, or upon a department or bureau of a municipal corporation or of the state, or an officer thereof, requiring the production of records relating to the condition or treatment of a patient, a transcript or a full sized legible reproduction certified as correct by the superintendent or head of the hospital, department or bureau or his assistant, or the officer, may be produced unless otherwise ordered by a court. Such a subpoena shall be served at least three days before the time fixed for the production of the records unless otherwise ordered by a court.

#### CPLR §3103. Protective orders

- (a) Prevention of abuse. The court may at any time on its own initiative, or on motion of any party or of any person from whom discovery is sought, make a protective order, denying, limiting, conditioning or regulating the use of any disclosure device. Such order shall be designed to prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.
- (b) Suspension of disclosure pending application for protective order.
   Service of a notice of motion for a protective order shall suspend disclosure of the particular matter in dispute.
- (c) Suppression of information improperly obtained. If any disclosure under this article has been improperly or irregularly obtained so that a substantial right of a party is prejudiced, the court, on motion, may make an appropriate order, including an order that the information be suppressed.

#### Custody

- In Ascoillo v. Ascoillo, 43 A.D.3d 1160, 844 N.Y.S.2d 339 (2d Dept. 2007), a F.C.A. Article 6 custody proceeding, the Family Court refused to permit the mother to call the child's therapist as a witness.
- The Second Department affirmed noting that the Law Guardian did not consent to the disclosure of the confidential communication between the child and his therapist and this was not a proceeding pursuant to Family Court Act Article 10.
- the Fourth Department found that the Family Court, in a modification of custody case, properly admitted evidence of a communication from the child to her therapist. The Court held that the communication was admitted with the consent of the Law Guardian, and was material and necessary to the court's determination of the child's best interests.

Liberatore v. Liberatore, 37 Misc.3d 1034, 955 N.Y.S.2d 762 (Sup. Ct. Monroe Co. 2012)

- Amended Trial Court decision in a custody proceeding in the context of a divorce. The father obtained the notes and records of the child's psychologist and clinical psychologist via a HIPAA release only.
- psychologist and clinical psychologist via a HIPAA release only.

  The Court held that in a child custody proceeding "communications between an unemancipated minor and her therapist may not be disclosed to the parties or counsel in the absence of judicial process sufficient to afford the court opportunity to exercise its obligation to determine 'the best interest of the child' in its role as parens patriae in determining the custody of a minor child" and for the child, through the attorney for the child, to assert her statutory privilege protecting such disclosure. Consequently, records obtained without a judicial subpoena duces tecum or other court order, is information improperly or irregularly obtained, and they must be returned to the therapist or otherwise destroyed. CPLR 3103."

#### Liberatore, contd.

- The Court engaged in an extensive discussion of the privileges between a patient and a psychotherapist, psychiatrist and psychologist contained in CPLR §54504 and 4507 and the purpose of these protections to encourage the patient's full disclosure without fear of later revelation. This purpose is "eviscerated" when a party is able to obtain the psychiatrist's and therapist's notes via an "exp parte self help" measure such as a HIPAA release executed by one of the parents/parties to the custody proceeding.
- A party seeking to obtain this otherwise privileged material as it pertains to a minor child must use a judicial process sufficient to give notice to the court and treatment provider by motion or application for a judicial subpoena duces tecum on notice to the parties and treatment provider.
- The Court must then determine whether the communications at issue were material and necessary to the court's determination of the child's best interest such that the privilege should be suspended, waived or exercised.

#### Liberatore, contd.

- The Court <u>rejected</u> the argument that the HIPAA statue requires a therapist to give a parent access to his or her child's personal health records in the context of custody litigation.
- HIPAA patient/personal representative access rules do not override state privilege statutes.
- A health care provider may withhold information from a parent, if they
  determine it is not in the best interests to treat the parent as the personal
  representative.
- · Ultimately, the court found that it is in best interests of the child that neither the parties nor their respective counsel have access to the notes and records of the clinical psychologist or psychiatrist and that all records in the possession of either party be returned to the treatment provider or give to the attorney for the child for destruction.

## F.C.A. §651-a. Reports of child abuse and maltreatment; admissibility

in any proceeding brought pursuant to this section to determine the custody or visitation of minors, a report made to the statewide central register of child abuse and maltrestment pursuant to title six of article six of the social services (aw, or a portion thereo), which is otherwise admissible as a business record pursuant to rule forty-five hundred eligitates of the civil practice law and rules shall not be admissible in evidence, notwithstanding such rule, unless an investigation of such report conducted pursuant to title six of article six of the social services law has determined that there port has been notified that the report is indicated. In addition, if such report has been reviewed by the state commissioner of social services or his designee and has been determined to be unfounded, it shall not be admissible in evidence. If such report has been so reviewed and has been amended to delete any finding, each such deleted finding shall not be admissible. If the state commissioner of social services or his designee has amended the report to add any new finding, such such new finding, together with any portion of the original report on deleted by the commissioner or its designee, shall be admissible if it meets the other requirements of this section and is otherwise admissible as a business record. If such report, or portion thereof; is admissible in evidence but its uncomborated, it shall not be sufficient to make a fact finding of abuse or maltreatment in such proceeding. Any other evidence tending to support the realiability of such report shall be sufficient corroboration.

#### **Child Protective Proceedings**

- F.C.A. §1038. Records and discovery involving abuse and neglect.
- Each hospital and any other public or private agency having custody of any records, photographs or other evidence relating to abuse or neglect, upon the subpoena of the court, the corporation counsel, county attorney, district attorney, counsel for the child, or one of the parties to the proceeding, shall be required to send such records, photographs or evidence to the court for use in any proceeding relating to abuse or neglect under this article. Notwithstanding any other provision of law to the contrary, service of any such subpoena on a hospital may be made by certified mail, return receipt requested, to the director of the hospital. The court shall establish procedures for the receipt and safeguarding of such records.

• FCA §1038(d) Unless otherwise proscribed by this article, the provisions and limitations of article thirty-one of the civil practice law and rules shall apply to proceedings under this article. In determining any motion for a protective order, the court shall consider the need of the party for the discovery to assist in the preparation of the case and any potential harm to the child from the discovery. The court shall set a schedule for discovery to avoid unnecessary delay. (emphasis added).

#### §1046. Evidence.

- (a) In any hearing under this article
- In any hearing under this article

  (iv) any writing, record or photograph, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any condition, act, transaction, occurrence or event relating to a child in an abuse or neglect proceeding of any hospital or any public or private agency shall be admissible in evidence in proof of that condition, act, transaction, occurrence or event, if the judge finds that it was made in the regular course of the business of any hospital, or any other public or private a gency and the tweeting the regular course of the business of the public or sevent as a proper of the sevent or the regular course of the public or sevent in the regular course of the business of the tweeting of the business of the whospital or agency what that it was made in the regular course of the business of the hospital or agency and that it was in the regular course of such business to the hospital or agency and that it was in the regular course of such such as the proof of the condition, act, transaction, occurrence or event, or within a reasonable lime thereafter, shall be prima face evidence of the facts contained in such certification. A certification by someone other than the head of the hospital or agency and by such other employee. All other charmstances of the making of the memorandum, record or photograph, including lack of personal showledge of the maker, may be proved to affect its weight, but they shall not affect its admissibility.

#### §1046 Evidence (contd.)

- (v) any report filed with the statewide central register of child abuse and maltreatment by a person or official required to do so pursuant to section four hundred thirteen of the social services law shall be admissible in evidence; and
- (vi) previous statements made by the child relating to any allegations of abuse or neglect shall be admissible in evidence, but if uncorroborated, such statements shall not be sufficient to make a fact-finding of abuse or neglect. Any other evidence tending to support the reliability of the previous statements, including, but not limited to the types of evidence defined in this subdivision shall be sufficient corroboration. The testimony of the child shall not be necessary to make a fact-finding of abuse or neglect;

#### §1046. Evidence (cont'd.)

• (a)(vii) neither the privilege attaching to confidential communications between husband and wife, as set forth in section forty-five hundred two of the civil practice law and rules, nor the physician-patient and related privileges, as set forth in section forty-five hundred four of the civil practice law and rules, nor the psychologist-client privilege, as set forth in section forty-five hundred seven of the civil practice law and rules, nor the social worker-client privilege, as set forth in section forty-five hundred eight of the civil practice law and rules, nor the rape crisis counselor-client privilege, as set forth in section forty-five hundred ten of the civil practice law and rules, shall be a ground for excluding evidence which would otherwise be admissible.

## F.C.A. §1046(a)(iv) exception in Article 6 custody cases

- Courts have extended the F.C.A. §1046(a)(vi) exception allowing admission
  of a child's out-of-court statements of abuse or neglect when corroborated
  into evidence in custody proceedings, on the basis that such statements
  are pertinent to a child custody and visitation determination.
- See, e.g., Matter of Mildred S.G. v. Mark G., 62 A.D.3d 460 (1<sup>st</sup> Dept. 2009); Albert G. v. Denise B., 181 A.D.2d 731 (2d Dept. 1992); Nilda S. v. Dawn K., 302 A.D.2d 237 (1<sup>st</sup> Dept. 2003); Matter of Sutton v. Sutton, 74 A.D.3d 1838 (4<sup>th</sup> Dept. 2010).
- Note: Court would not allow the use of the §1046(a)(vi) exception in a family offense proceeding, distinguishing custody proceedings in this regard. See, Matter of Kahn-Solell v. Rashad, 108 A.D.3d 544, 969 N.Y.S.2d 104(2d Dept. 2013).

ept. da S. v. ton, 74			
nina	 		
his 9 N.Y.S.2d			
228		<del>-</del>	

• In re Dean T., 117 A.D.3d 492, 985 N.Y.S.2d 518 (1st Depat 2014). In an Article 10 abuse and neglect proceeding, the First Department held in abeyance the Bronx Family Court's finding of abuse and neglect, pending an In camera review of the child's mental health records. The lower court denied the respondent father's motion for a subpoena for the records without first reviewing the records in camera. The Appellate Court found that the records were relevant to the child's credibility and the Family Court should have reviewed them In camera prior to ruling. There was also a discussion in this case of whether the child placed his mental state in issue, pursuant to CPLR §3121 (holding that it did not), and the interplay between the balancing test required by FCA §1038(d) and the restrictions placed on the release of mental health records as set forth in Mental Hygiene Law §33.13(c).

Reports by mandated reporter	Re	ports	bγ	mandated	reporters
------------------------------	----	-------	----	----------	-----------

- Social Services Law §415 sets forth the procedure for reporting suspected child abuse or maltreatment. That section specifically provides that notwithstanding the privileges contained in C.P.L.R. Article 45, mandated reporters who make a report are required to comply with requests for records by child protective services relating to such report, including records relating to diagnosis, prognosis, treatment and clinical records necessary for a full investigation of the allegations. Disclosure of substance abuse treatment records, however, still must be in accordance with federal law.
- Written reports by mandated reporters are admissible in evidence in child protective proceedings.

## Confidentiality of Alcohol and Drug Treatment Records

42 USCS §290dd-2(a) specifies "(a) Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e), be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b)."

<ul> <li>Disclosure is p</li> <li>with the prior</li> </ul>	ermitted written consent of the patient (§290dd-	.2/61/110
	personnel in an emergency (§290dd-2(b)(2)(A)	
for researe {\$290dd-2(b}{2	th, audits, or program evaluation when no indi- )(B)); and	vidual patient is identifie
. If authorize which the Cour injury to the passervices. Upon against unauthors.	ed by an appropriate court order, upon a findin it weighed the public interest and the need for stitlent, and/or the physician-patient relationship granting such order, the Court, shall impose ap orized disclosure [ (\$290dd-2(b){2})[ C).	g of good cause, after disclosure against the p, and/or the treatment opropriate safeguards
. If authorize which the Cour injury to the pa services. Upon against unauth	ed by an appropriate court order, upon a findin it weighed the public interest and the need for stitlent, and/or the physician-patient relationship granting such order, the Court, shall impose ap- orized disclosure ( (§ 290dd-2(b)(2)( C).	g of good cause, after disclosure against the o, and/or the treatment propriete safeguards
. If authorize which the Cour injury to the passervices. Upon against unauthorized the court of the cour	ed by an appropriate court order, upon a finding tweighed the public interest and the need for titlent, and/or the physician-patient relationship granting such order, the Court, shall impose a portized disclosure [ (§290dd-2(b)(2)[ C).	g of good cause, after disclosure against the o, and/or the treatment propriete safeguards
. If authorize which the Cour injury to the pa services. Upon against unauth	ed by an appropriate court order, upon a findin t weighed the public interest and the need for stituen, and/or the physician-patient relationship granting such order, the Court, shall impose ap orized disclosure ( (\$290dd-2(b)(2)( C).	g of good cause, after disclosure against the o, and/or the treatment propriete safeguards

 Note that "the prohibitions of this section do not apply to the reporting under Stata law of incidents of suspected child abuse and neglect to the appropriate State or local authorities." The procedures and criteria for orders authorizing disclosure of alcohol and drug treatment records (non-criminal purposes) are set forth in 42 CFR 2.54 a person having a legally recognized interest in disclosure may apply for such an order;

the application must use a firthlous name (i.e. John Doe ) to refer to the patient and may not contain or disclose any patient identifying information unless the patient is the applicant or has given written content;

the patient and the person/agency holding the records from whom disclosure is sought must be given adequate notice (in a way that does not identify the patient), an opportunity to life a written response to the application or to appear in person and the hearing must be conducted in such a way that patient identifying information is not disclosed.

	<del></del>
<del></del>	类
	,
·-·	
	<del></del>

4	other wops of statement the information are not qualities or effectives	nd .

#### **Juvenile Delinquency**

- Matter of Antonia E., 16 Misc.3d 637, 838 N.Y.S.2d 872 (Fam. Ct. Queens Co. 2007).
- This was a juvenile delinquency proceeding, where the respondent
  was alleged to have committed acts which, were she an adult, would
  constitute the crimes of assault in the second and third degrees,
  attempted assault in the second degree and criminal possession of a
  weapon in the fourth degree.
- The Court denied the application by the presentment agency for a subpoena duces tecum for (hospital) medical records relating to the treatment of the victim.

-				
-	 	 		
-	 	 	 	
-	 	 	 	
_		 	 	 _
	 	 	 	 _
		 <u> </u>	 	

## **FACULTY BIOGRAPHIES**

#### STEPHEN M. BEHAR, SR. 19 Hollister Lane, Islip N.Y. 11751

Born Brooklyn, New York, February 28, 1944

#### **EDUCATION**

Brooklyn College - B.A. Political Science - June 1965

George Washington University, National Law Center - Jurist Doctorate June 1968

Law Review - Editorial Staff

Ordained, Deacon, Diocese of Rockville Center - May 1999

#### **BAR ADMISSIONS**

State of New York -Second Judicial Department

**United States Federal Court:** 

Eastern District ,Ne w York Southern District, New York Second Circuit Court of Appeals

#### **EMPLOYMENT**

Trial Attorney, United States Department of Justice, Antitrust Division

June 1968 - December 1971

Assistant United States Attorney - Eastern District of New York, Criminal Division -December 1971 December 1975

Assistant Attorney General, State of New York - Chief Assistant Special Prosecutor for Suffolk County
December 1975 - June 1977

Private practice of law in Suffolk County, New York, June 1977-June 1997

Primarily engaged in ligation.

Numerous appointments as Special Assistant District Attorney (i.e. complainant or subject of investigation a member of Suffolk County District Attorney's staff or the judiciary)

Special Council to villages in Suffolk County (election counsel or evaluation and investigation of local Police Department)

Special Council to Suffolk County (civil matters involving Federal litigation)

Member Suffolk County Bar Association - committee service - Civil Rights, Federal Courts, Supreme Court and Judicial Screening; Chairman - Federal Courts Committee; Chairman - Judicial Screening Committee

Recipient -Suffolk County Bar Association Award for Outstanding Service as Chairman Judicial Screening Committee 1987-1988

Deputy Town Attorney - Town of Islip - 1993 - 1997

Appointed Judge of Suffolk County District Court - June 1, 1997 Elected Judge Suffolk County District Court - November, 1997 Re-elected Judge Suffolk County District Court - November 2003

Appointed Acting County Court Judge, Domestic Violence Part, January 1, 2005
Reappointed Acting County Court Judge, Domestic Violence Part, January 1, 2006, 2007, 2008

Re-elected Judge Suffolk County District Court - November 2009

Elected Judge Suffolk County Court - November, 2010
Appointed Acting Justice Supreme Court, January 1, 2011, 2012, 2013 and 2014
all service primarily in matrimonial litigation
January 1, 2013 assigned to matrimonial protracted trial part
July1, 2013 also assigned matrimonial post j 233 ent part

**Judicial Achievements** 

President - Suffolk County District Court Judges Association (Two Terms)

Secretary - New York State District Court Judges Association

Decisions published in the Official New York State Reporter and the New York Law Journal

**Community Service** 

President - Suffolk County Catholic Lawyers Guild 2011-to present

Presently: Deacon, Saint Mary's Roman Catholic Church, East Islip, N.Y. 2013- to present

Administrator - Wedding Program

Previously: Deacon, Mary Immaculate Parish, Bellport, N.Y. 2005-2013

Member - Pastoral Team,

Administrator - Baptism Program, Weekly Wake Service Presider

Deacon, Our Lady of Lourdes Roman Catholic Church, West Islip, N.Y. 1999-2005

Member - Pastoral Team and Pastoral Counsel.

Administrator - Baptism Program, Coordinator - Ignation Retreat,

Weekly Wake Service Presider and Mass Homilist

Member and Officer Central Islip and East Islip Lions Clubs

Member, Board of Directors, American Heart Association - Suffolk County,

Founder Central Islip Youth Development Corporation

Islip Town Volunteer of the Year - 1980

Saint Mary's Roman Catholic Church, East Islip, N.Y.

Board of Directors of Parish Outreach,

Chairman, Saint Mary's School Recruitment Committee,

Chairman, Saint Mary's School Annual Golf Outing,

Coordinator Catholic Charities Volunteer Lawyer's Initiative

Associate Member and Counsel to Ancient Order of Hibernians, Division 7

**Operation Children Parent six years** 

Member Sons of Italy

Thomas K. Campagna served as the 2010 President to the Matrimonial Bar Association in Suffolk County and remains a Director of the Association. He has litigated cases in all five boroughs of the City of New York, Nassau and Suffolk Counties, and upstate counties in New York State.

Mr. Campagna has been a guest lecturer to the Suffolk County Bar Association. He has also been a featured guest speaker on both television and radio as the invited speaker on the topic of matrimonial law and family law.

Mr. Campagna has argued successfully before the Appellate Division and the Court of Appeals.

His clients include accomplished people in the fields of business, public service, the professions, and entertainment. He has extensive experience in litigating and negotiating matters in all areas of family and divorce law including complex matters in all areas of family law; including divorce, child support, pre-nuptial and post-nuptial agreements, custody and visitation, spousal maintenance, child support, parental alienation, grandparent's visitation, license and professional practice valuations, business valuations, enforcement and modification proceedings, awards of counsel fees and experts fees.

Mr. Campagna is a graduate of the State University of New York at Stony Brook and a 1987 graduate of Brooklyn Law School.

#### DAWN L. HARGRAVES

888 Veterans Memorial Highway, Suite 530 Hauppauge, New York 11788

Phone: (631) 482-9700 E Mail: dhargraves@ahmlaw.com

Cell: (631) 804-2741

#### **EDUCATION**

## TOURO COLLEGE JACOB B. FUCHSBERG LAW CENTER, Huntington, New York J.D., 1999

Awards:

Suffolk County Women's Bar Association - Outstanding Woman Law Graduate National Association of Women Lawyers - Outstanding Woman Law Graduate

Activities:

President, Touro Women's Bar Association 1997 - 1999 Student Liaison Suffolk County Bar Association Student Bar Association Representative, Finance Comm. 1997 - 1999 1996 - 1998 Trial Advocacy Competition Board, Exec. Board Member 1996 - 1998

UNIVERSITY OF STATE OF NEW YORK, Regents College, Albany, New York B.S. Economics, 1989

#### **EXPERIENCE**

#### Quatela, Hargraves & Mari, PLLC f/k/a Hagney, Quatela, Hargraves & Mari, PLLC

2011 - Present

Partner and trial attorney concentrating in the areas of complex matrimonial and family Law including all aspects of client representation including but not limited to, settlement negotiations, preparation of motions and settlement agreements, trials, etc. Also, responsible for aspects of firm Business and marketing.

#### Dawn L. Hargraves, P.C., Hauppauge, New York Owner

2007 - 2011

Sole practitioner. Specializing in matrimonial/family law litigation.

#### Reynolds, Caronia, Gianelli, Hagney, LaPinta & Hargraves, LLP, Hauppauge, New York Partner 2005-2007

Responsible for all aspects of representation of clients in matrimonial/family law area, including but not limited to settlement negotiations, preparation of motions and settlement agreements, trials, etc. Also, responsible for aspects of firm business, including hiring of employees, maintenance of retirement plans, employee handbooks.

#### Reynolds, Caronia, Gianelli & Hagney, LLP, Hauppauge, New York Associate

1999 - present

Draft motions, agreements and stipulations. Interview clients for preparation of motions. Oversee and organize discovery materials in preparation for trial. Conduct research and draft memoranda in areas of domestic relations, family law, criminal law and general civil practice. Attended and participated in court proceedings.

#### Law Office of Andrea Christiansen Lannak, Esq., Islandia, New York Paralegal/Law Intern

1993-1999

Interviewed clients. Drafted agreements, stipulations and motions. Reviewed and organized discovery materials in preparation for trial. Conducted research and drafted memoranda in areas of domestic relations, family law and criminal law. Prepared all calendar documents to process divorce actions. Attended court proceedings.

#### Judicial Clerkship Clinic, Touro Law Center Hon. David R. Freundlich, Supervising Judge, Family Court of the State of New York

Spring 1999

Observed trials. Attended pre-trial conferences. Conducted research and prepared instructive guidelines.

Family Law Clinic, Touro Law Center Law Clerk

Fall 1998

Interviewed and prepared witnesses. Represented clients in hearings to obtain orders of protection. Conducted research. Prepared motions and memoranda in the areas of domestic relations and family law.

### Law Office of Dennis O'Doherty, Jr., Esq., Sayville, New York

1991 - 1993

Conducted research and drafted documents and motions in the areas of civil litigation and criminal law. Developed client billing system. Oversaw day to day office operation.

#### **MEMBERSHIP**

New York State Bar Association
Appointed Member – Lawyer's Assistance Committee
Suffolk County Bar Association

Member Lawyer's Assistance Committee
Appointed Member Professional Ethics Committee
Family Court Committee (Co-Chair 2004 – present)
Suffolk Academy of Law (Officer 2002-2006; Advisory Committee 2006-present)
Suffolk County Women's Bar Association (Director 2002-2003)
Suffolk County Matrimonial Bar Association (Board of Directors 2005 – present)

#### **COMMUNITY ACTIVITIES**

Town Wide Fund of Huntington (Executive Board Member 2001-2006) Tikkun (Board Member) Splashes of Hope (Board Member)

#### CAREN LOGUERCIO

Judge Loguercio began serving on the bench of the Family Court of Suffolk County in January, 2011 and handles child protective proceedings, Family Treatment Court, custody and visitation and juvenile delinquency cases.

Judge Loguercio was previously the Principal Law Clerk to Supreme Court Justice Emily Pines. Prior to serving as Judge Pines' Principal Law Clerk, Judge Loguercio served as an Assistant Town Attorney in the Town of Brookhaven where she practiced zoning and land use, tax certiorari and condemnation, general municipal law and criminal and civil prosecutions of town ordinance violations.

Judge Loguercio graduated from the University of Florida with a bachelor's degree in Criminal Justice in 1989 and a Juris Doctorate, with Honors in 1992.

In 2011, Judge Loguercio was named Public Citizen of the Year by the Suffolk County Chapter of the Association of Social Workers.

In 2007, the Town of Brookhaven honored Judge Loguercio as Woman of the Year in Law.

Judge Loguercio is a member of the Suffolk County Bar Association and a member of the Professional Ethics and Civility Committee, the Suffolk County Women's Bar Association and the Suffolk County Matrimonial Bar Association where she is a member of the Board of Directors, and served as past President in 2013-2014. Judge Loguercio has previously lectured for the Suffolk Academy of Law regarding custody and neglect proceedings.

Judge Loguercio previously served as a member of the Board of Directors of the Osteogenesis Imperfecta Foundation, a not-for-profit corporation dedicating to helping the lives of people afflicted with this brittle bone disease and Every Child's Dream, a not-for-profit corporation which assists children and families living in homeless shelter's on Long Island.

#### Margaret Schaefler, Esq.

1770 Motor Parkway, Suite 300 Hauppauge, New York 11749 mschaefler@aol.com

#### Fax: 631-422-4921 Cell: 631-786-3367

Office: 631-236-4440

#### Experience

#### Margaret Schaefler, Esq. Hauppauge, New York

2004-Present

 Practice limited to family and matrimonial law including divorce, custody, child support, orders of protection, neglect proceedings and appeals. Member of Suffolk County Family and Supreme Court Law Guardian Panel and Family Court 18(b) Panel

#### Nassau/Suffolk Law Services Committee, Inc., Islandia, New York

1991-2004

- Staff Attorney 1991-1996
  - Represented indigent clients in the Civil, Welfare and Domestic Violence Units
- Senior Staff Attorney Domestic Violence Unit 1996-2004

Supervised Staff Attorneys and support staff; represented victims of domestic violence in matrimonial and family court matters including child support, custody/visitation proceedings, orders of protection.

Supervised Domestic Violence Clinic. Provided training and direct supervision to law students representing clients in Family Court. The students were responsible for all aspects of the case from client interviews, case preparation, discovery, negotiations to trials. The students were carefully supervised to ensure the best representation for their clients while allowing them to gain hands on experience.

#### Bernstein, Hurley & Shank, Mineola, New York

1982-1990

Associate in general litigation practice with an emphasis on commercial litigation

#### Education

#### JD - Brooklyn Law School, Brooklyn, New York

1982

Editor in Chief – Brooklyn Journal of International Law 1981-1982

#### BA - Lehman College, Bronx, New York

1974

#### LEWIS A. SILVERMAN

Touro College Jacob D. Fuchsberg Law Center
225 Eastview Drive
Central Islip, NY 11722
(631) 761-7092
LewisS@tourolaw.edu

#### **BAR ADMISSIONS**

New York State; United States District Court for the Eastern District of New York

#### **EXPERIENCE**

#### Touro Coilege Jacob D. Fuchsberg Law Center, Central Islip, NY

Associate Professor of Clinical Law/Director of Family Law Clinic

1995 - Present

Established Family Law Clinic. Duties include teaching and supervising student interns in clinical legal education program encompassing all aspects of family law including divorces, domestic violence, child support and mediation. Supervision includes judicial proceedings, student-client relations, case management, and supervision of internships and externships. Preparation of grant proposals. Moot Court faculty advisor and chair of Awards and Graduation Committee.

Director of Externship Programs

2009 - 2013

Direct five seminar externship programs and independent externships. Meet with students and arrange externship placements. Secure new potential placements with private attorneys and government offices, and public interest organizations. Supervise adjuncts teaching externship seminars to ensure academic viability of program. Preparation of Strategic Planning Report.

Classes taught: Family Law Clinic, Civil Procedure, Family Law, Rights of Children, Advanced Family Law, Sexual Orientation & Law, Pre-Trial Litigation.

Awards: Judge George C. Pratt Moot Court Award in Appellate Advocacy: 1996, 2000, 2009;

The Dean's Award for Distinguished Service; Socrates Professor of the Year;

Student Bar Association "Professor of the Year"

#### St. John's University School of Law, Jamaica, NY

Adjunct Professor of Law
Taught Family Law course.

Fall 2012

#### Hofstra University School of Law, Hempstead, NY

Adjunct Professor of Law Taught Family Law course.

Fall 2008

#### Village of Lake Grove, Lake Grove, NY

1995 - 2006

Presided over Court, hearing misdemeanors and violations of Vehicle & Traffic Law and Lake Grove Village Code.

#### Suffolk County Family Court, Central Islip, NY

Hearing Examiner

1985 - 1995

Heard and determined Family Court child support and spousal maintenance cases. Presided at hearings conducted pursuant to the Family Court Act and Civil Practice Law and Rules (CPLR). Researched relevant statutory and decisional law. Drafted and issued memorandum decisions and orders (decisions published in the New York Law Journal). Supervised auxiliary staff and personnel, including uniformed court officers, court clericals, and law school interns. Prepared, reviewed, and implemented administrative forms and procedures.

#### LEWIS A. SILVERMAN

Page 2

#### New York State Hearing Examiners Association, New York, NY

*President* 1987 – 1995

Liaised with Office of Court Administration. Assisted members with personnel issues. Taught and advised continuing education programs for members. Edited newsletter, including review of legal decisions issued by colleagues.

#### Suffolk County Department of Law, Hauppauge, NY

Assistant County Attorney

1976 - 1985

Responsible for civil prosecution of all Family Court matters and proceedings, including child support, paternity, juvenile delinquency, PINS, and child abuse and neglect. Supervised Abuse/Neglect Unit (four attorneys). Counsel to Suffolk County Department of Social Services. Conducted legal research and drafted pleadings, memoranda of law, and appellate briefs. Advised departmental personnel and conducted in-service training programs.

#### Suffolk County Board of Ethics, Hauppauge, NY

Counsel

1979 - 1985

Served as legal advisor to county administrative board. Drafted advisory opinions interpreting Suffolk County Code of Ethics.

#### **PUBLICATIONS**

"Vermont Civil Unions, Full Faith and Credit, and Marital Status", 89 Kentucky Law Journal 1075, (2000-2001).

"Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of a Child of the Union", 102 West Virginia Law Review 411 (1999).

"New York's Uniform Support of Dependent's Law: A Call for a More Uniform Interpretation", Journal of the Suffolk Academy of Law, vol. 5, 1988, pp. 34-47.

"Contempt for Non-Payment of Support: Roadblocks Removed", New York Law Journal, October 17, 1995, page 1.

"Adoption, Custody, and the Rights of Children", chapter in DEFENDING SAME-SEX MARRIAGE, Volume I, "'Separate but Equal' No More", Praeger Press, 2006.

"What's Sex Got To Do With It - Sexual Relations and the Marriage Contract", work in progress.

"Same-Sex Marriage in New York", 1 TOURO J. RACE GENDER & ETHNICITY 37 (2006), accessible at http://www.tourolaw.edu/journrge/ Issues/Issue1/Silverman.pdf

*Presenter*: International Society of Family Law, North American Regional Conference, 1999; West Virginia University School of Law, *Symposium on Family Law in the Year 2000*, 2000; International Society of Family Law, 12<sup>th</sup> World Conference, 2005.

#### LEWIS A. SILVERMAN

Page 3

#### PROFESSIONAL ASSOCIATIONS

American Bar Association, Family Law Section International Society of Family Law New York State Bar Association:

Chair, Committee on Social Services, 1989 - 1993

Law Guardian Task Force

Special Committee on LGBT People and the Law, 2008 - present

Suffolk County Bar Association:

Chair, Family Court Committee, 1996

Officer, Suffolk Academy of Law, 1987-1991

Chair, Law Day Committee, 1990-1991 (Program received Public Service Award from ABA Committee on Matrimonial and Family Law)

Award of Recognition, 1989, 1991

Certificate of Merit, 1990

Pro Bono Attorney of the Month: January 1996, September 1999, September 2005, April 2011

Pro Bono Recognition Award, 1997, 2000, 2012

Matrimonial Bar Association of Suffolk County LeGal (Lesbian & Gay Law Association of Greater New York)

#### COMMUNITY SERVICE

Task Force to Prevent Family Violence, Suffolk County, NY, member For Our Children and Us, Inc. (FOCUS), Board of Trustees, Vice-President Lecturer in Law (numerous civic and education groups)

#### **EDUCATION**

**Boston University School of Law**, Boston, MA Juris Doctor, 1976

New York University, New York, NY Bachelor of Arts in Political Science, 1973 William M. Sullivan is a duly licensed and practicing attorney of the State of New York having been admitted to practice by the Appellate Division, Second Judicial Department in December of 1992. His practice is limited to Matrimonial and Family Law related matters. Will is a member of the Suffolk County Bar Association and also a member of the Suffolk County Matrimonial Bar Association. He is currently the President of the Suffolk County Matrimonial Bar Association and a member of both its executive committee and its board of directors. Will has filed appellate briefs and has appeared for oral argument before the Appellate Division Second Judicial Department. He has lectured for the Suffolk County Bar Association on matrimonial law. Will serves as a mentor for the Suffolk Bar Association's *Pro Bono* project. Prior to entering the field of Matrimonial and Family Law, Will served as Director of Compliance and General Counsel to the investment management and broker/dealer subsidiaries of a Fortune 500, mono-line bond insurance company.



Christopher Venator, Partner Albany State, B.S., 1982; University of Miami, J.D., 1985

Mr. Venator has been engaged in the practice of law over twenty-eight years. Mr. Venator is a skilled litigator and has been principal trial counsel in numerous employment law and civil rights cases before administrative tribunals, and state and federal courts for our municipal and school district clients. He has tried many special education student matters before administrative tribunals and in the courts, including appearances before federal district courts and the United States Court of Appeals for the Second Circuit, as well as before the New York State Court of Appeals. Additionally, he frequently litigates before teacher tenure and employee discharge tribunals, before the State Division of Human Rights and before the Public Employment Relations Board. He has a substantial practice representing our school district clients in collective bargaining and related arbitration proceedings. Mr. Venator's litigation skills were honed during his service as an Assistant District Attorney when he prosecuted numerous felony trials. Mr. Venator has worked for prestigious law firms in Manhattan and Nassau County where he concentrated in commercial litigation, product liability and labor law.