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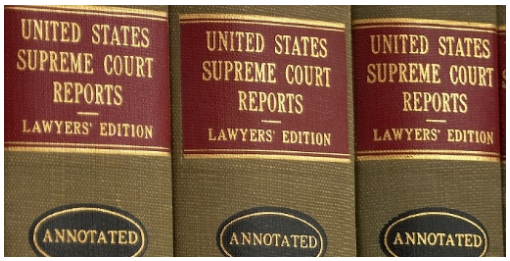

FAMILY COURT SERIES
Understanding the Support Magistrate Objection Process

Faculty
Harry Tilis, Esq.

Moderator
Hon. Jennifer A. Mendelsohn

December 15, 2021
Suffolk County Bar Association, New York

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HARRY TILIS, ESQ.

Harry is the law clerk to the Honorable Paul Hensley, County Court Judge and Acting Family Court Judge. Harry is also a past Dean of the Suffolk Academy of Law. A 1989 ***magna cum laude*** graduate of the Cornell Law School, Mr. Tilis lectures extensively for the Academy and other CLE providers on topics related to trial practices and developing trends in case law. He began his career in the corporate department of Proskauer, Rose, Goetz and Mendelsohn and has served as general counsel for industry leading companies before transitioning his practice to representation of small businesses, their entrepreneurs and their families. He is the author of The Art of Influence Simplified for Lawyers.

In addition to volunteering over 100 hours per year for the Empire Mock Trial Association and the American Mock Trial Association, Harry actively supports the American Foundation for Suicide Prevention. His work responsibilities include serving as one of the Counsel at First Appearance Attorneys in Suffolk County District Court.

OBJECTIONS TO SUPPORT ORDERS

New York State Family Court
Presented by
HARRY TILIS, ESQ.
Eagle Cove Bar Services, Inc.

Presenter Biography

HARRY TILIS, ESQ., is the immediate past Dean of the Suffolk Academy of Law and the First Vice President of the Suffolk County Criminal Bar Association. A 1989 *magna cum laude* graduate of the Cornell Law School, Mr. Tilis lectures extensively on topics related to ethics, trial practices and developing trends in case law. He began his career in the corporate department of Proskauer, Rose, Goetz and Mendelsohn and served as general counsel for industry leading companies before transitioning his practice to representation of small businesses, their entrepreneurs and their families.

Presenter Biography

Mr. Tilis now serves as the principal law clerk for Hon. Paul M. Hensley, a Suffolk County, New York County Court Judge.

THE OPINIONS EXPRESSED IN THIS PROGRAM ARE THOSE ONLY OF MR. TILIS AND NOT OF THE UNIFIED COURT SYSTEM, NOR ARE THE OPINIONS A PROMISE ABOUT HOW ANY SPECIFIC CASE WILL TURN OUT.

OBJECTIONS TO CHILD SUPPORT ORDERS

THE BASICS

FINAL ORDERS

Objections – The Basics

"Specific written objections to a final order"

Family Court Act § 439 (e)

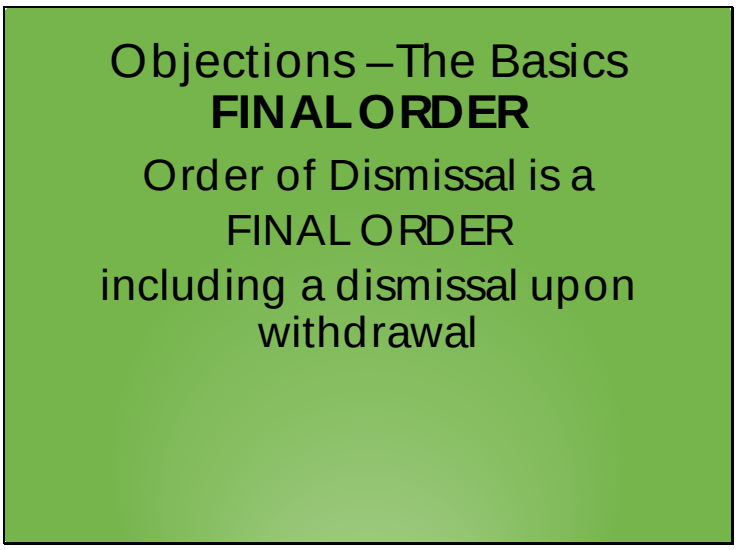
FINAL ORDER

What is a FINAL ORDER?

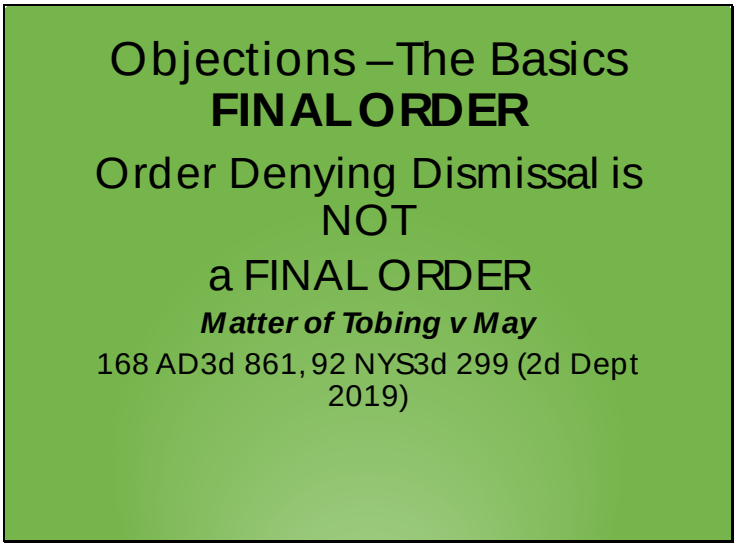
Objections – The Basics

FINAL ORDER

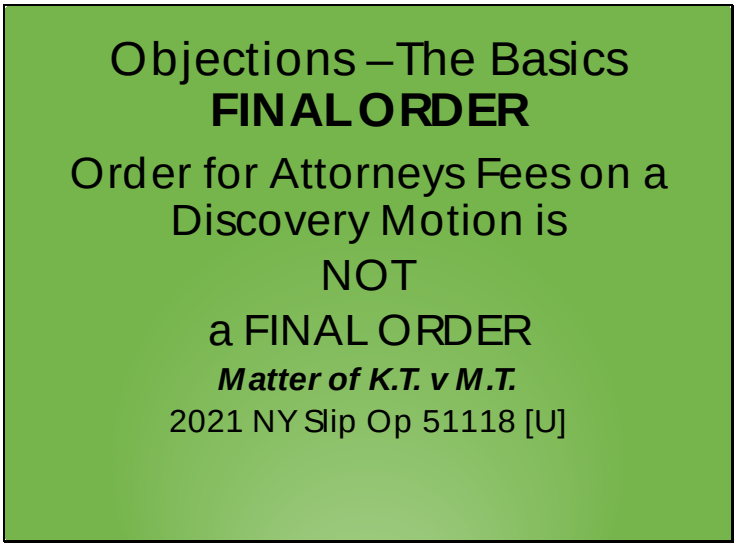
Order of Support is a FINAL ORDER



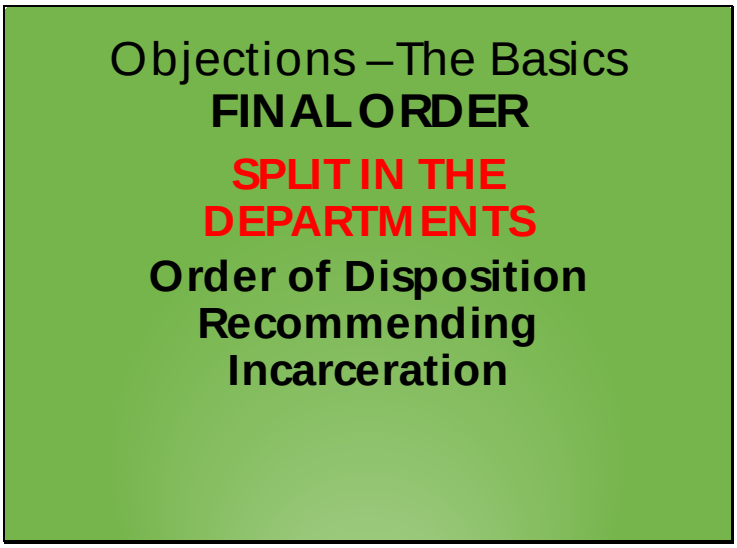
The involvement and interplay between the support collection unit and litigants creates confusing procedural situations. For example, when a parent who is owed money under an order of support and files and later withdraws an enforcement or violation petition, and in support thereof or in parallel thereto, the support collection unit files an affidavit, in effect, seeking the same relief, the order of dismissal upon the parent's withdrawal of the petition is a final order (***Matter of Saratoga County Support Collection Unit v Caudill***, 160 AD3d 1071, 75 NYS3d 299 [3d Dept 2018]).

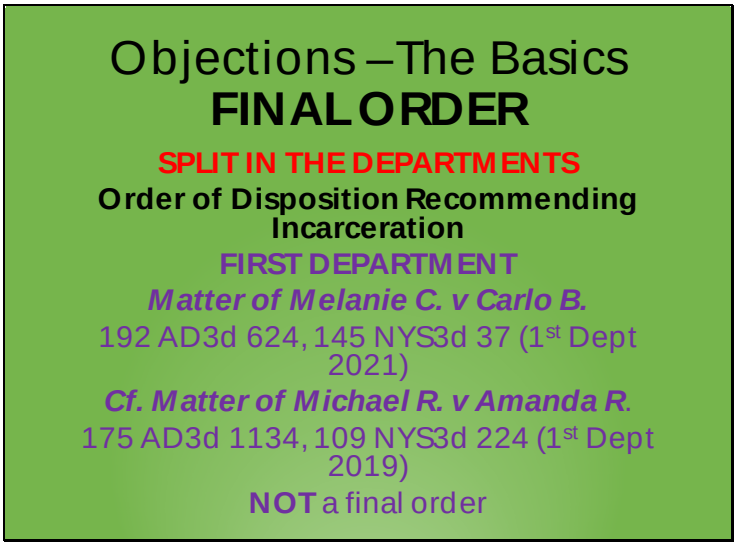


"[O]bjections from nonfinal orders made by a Support Magistrate are typically not reviewed unless they could lead to irreparable harm. Here, the father's claim that he would be forced to incur attorney fees and spend time away from work litigating a case that would ultimately be dismissed does not rise to the level of irreparable harm" (***Matter of Tobing v May***, 168 AD3d 861, 862 [2d Dept 2019] [citations and internal quotation marks omitted]). In effect, the ***Tobing*** court held that the transaction costs of litigation do not make a non-final order proper for objections.

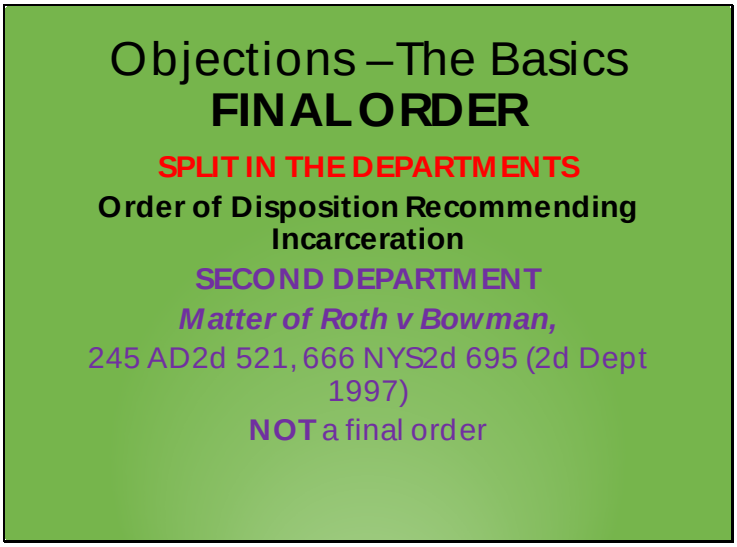


However, in that specific case, ***Matter of K.T. v M.T.***, the family court found that irreparable harm existed because of the conduct of the attorney seeking recovery of fees in a matrimonial action without having either a signed retainer agreement or a signed statement of client rights and responsibilities. The entire reported case is included in these materials beginning on page 48.





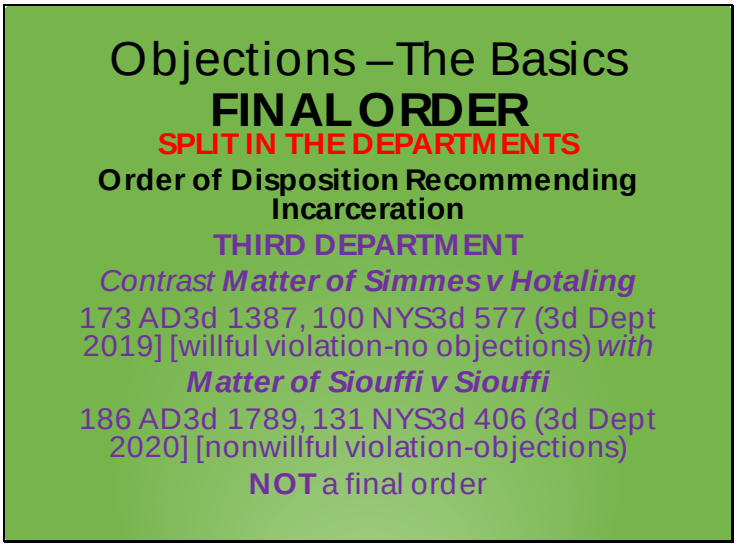
The First Department holds that the appeal of an order of commitment brings up for review the findings of fact in which the support magistrate found the willfulness that led to the order of commitment (***Matter of Melanie C. v Carlo B.***, 192 AD3d 624, 145 NYS3d 37 [1st Dept 2021]).



"Since a determination of a support magistrate recommending incarceration can have no force an effect until confirmed, and could never constitute a final order, the procedure under Family Court Act § 439 (e) concerning the filing of objections does not apply" (***Matter of Garuccio v Curcio***, 174 AD3d 804, 805, 107 NYS3d 437, 439 [2d Dept 2019]; *see also*, ***Matter of Evans v Puding***, 184 AD3d 638, 123 NYS3d 508 [2d Dept 2020]).

In ***Matter of Roth v Bowman*** (245 AD521, 666 NYS2d 695 [2d Dept 1997]), the Second Department noted that a support magistrate (then called a hearing examiner) has limited jurisdiction. Specifically, under Family Court Act § 439 (a), as it now reads, "[a] support magistrate shall have the authority to . . . make a determination that any person before the support magistrate is in violation of an order of the court as authorized by section one hundred fifty-six of [the family court act] **subject to confirmation by a judge of the court who shall impose any punishment for such violation** as provided by law." Because of the conditional nature of the support magistrate's determination, it is non-final.

The impact of this rule is considerable. A respondent may face incarceration the same day the findings of fact and the order of disposition are issued. Counsel will not have a transcript and may not have solidified your appellate arguments. Nevertheless, the confirmation hearing is part of the record below, and you must preserve positions because the preservation requirement applies to appeals from orders of commitment (***Matter of Berg v Berg***, 166 AD3d 763, 88 NYS3d 248 [2d Dept 2016]). Failure to make a searching inquiry to ensure that the waiver of the right to counsel where incarceration is a possible outcome is not subject to the preservation requirement (***Matter of Girard v Neville***, 137 AD3d 1589, 26 NYS3d 897 [4th Dept 2016]).



Matter of Patrick v Botsford, 177 AD3d 1146, 115 NYS3d 109 [3d Dept 2019]) does not mention that a party filed objections. Therefore, a fair conclusion is that the Third Department does not consider the exhaustion of the objection process a condition precedent to filing an appeal to issues related to willfulness and confirmation.

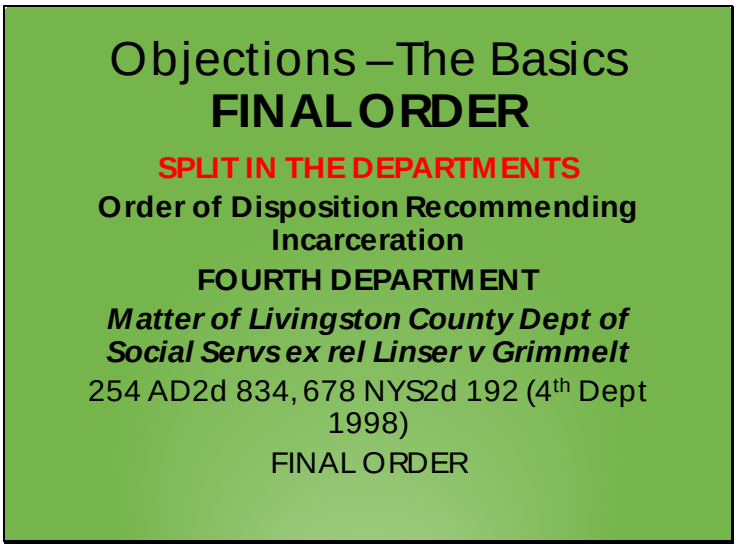
Matter of Nematy v Pirzada (165 AD3d 1403, 1404, 83 NYS3d 923, 924 [3d Dept 2018]) dismissed an appeal where the parent appealed not from the order of commitment but instead from the support magistrate's order. "[T]he [violator's] sole remedy was to await the issuance of a final order or an order of commitment of a Family Court [j]udge confirming the Support Magistrate's determination, and to appeal from that final order or order of commitment" (***Nematy***, 165 AD3d at 1404, 83 NYS3d at 924 [internal citations and quotation marks omitted]). The appellant in ***Nematy*** appeals only from the support magistrate's order; instead of holding that the support magistrate's order was not final, ***Nematy*** dismissed the appeal for lack of jurisdiction because of the failure to file objections to the support magistrate's order.

The Third Department has an exacting view of what matters an appeal brings before it. In ***Matter of Rondeau v Jerome***, 189 AD3d 1922, 134 NYS3d 827 [3d Dept 2020], the Third Department was silent about objections having been filed to the support magistrate's order recommending incarceration. In one order, the family court confirmed the willfulness finding and set the proceeding over for a sanctions hearing. The violator appealed only from the order of commitment, not from the order confirming the willfulness finding, so issues related to willfulness were not before the Third Department. Similarly, in ***Matter of Muller v Muller*** (90 AD3d 1165, 933 NYS2d 914 [3d Dept 2011], the violator appealed only from the order of commitment but not from the order confirming the willfulness finding.

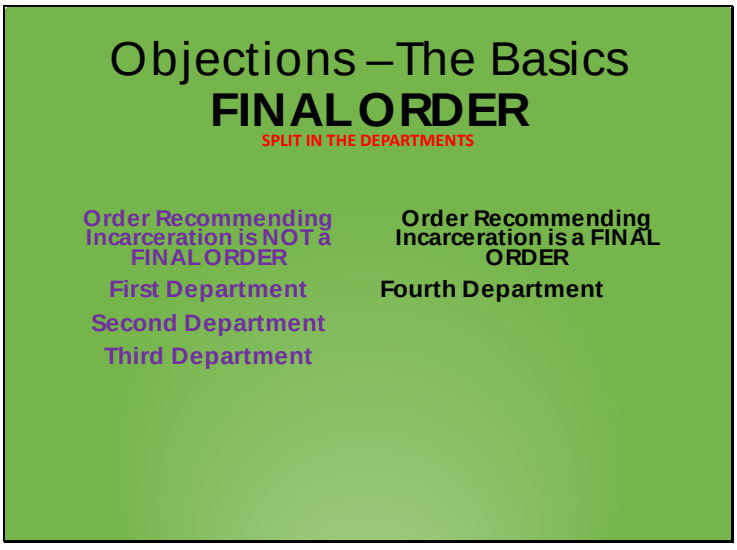
This approach seems wrong. The confirmation order is akin to the order upon fact finding in a juvenile delinquency, article ten, PINS, or family offense case, and the order of commitment is the dispositional order. In fact, under Family Court Act § 454, the confirmed willfulness finding is a

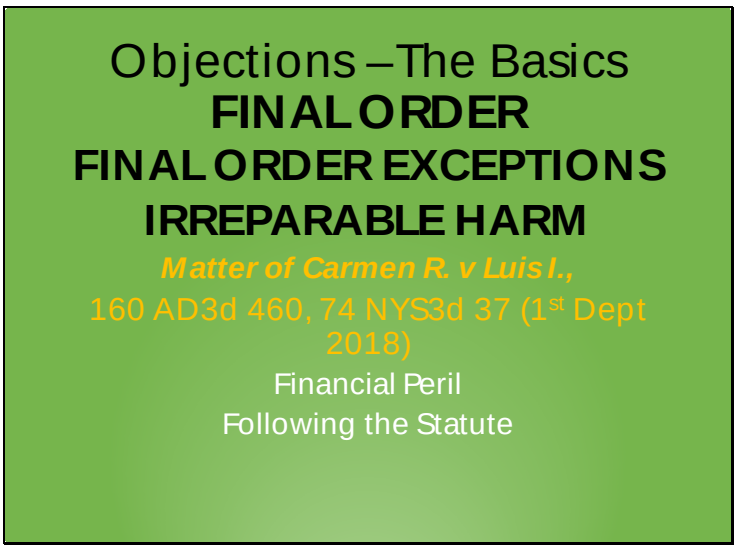
necessary precondition to the order of commitment. However, CPLR 5501 sets forth that an appeal from a final order brings up for review "any non-final judgment or order which necessarily affects the final judgment."

Often, the support magistrate hears together both a downward modification petition and violation petition. Where a litigant has a downward modification petition dismissed and a willfulness finding confirmed, the failure to object to the denial of the downward modification petition [the support magistrate's order is final as to the downward modification]—even if an appeal is taken from the order of commitment--precludes appellate review of it (***Matter of Richards-Szabo v Szabo***, 99 AD3d 1069, 953 NYS2d 312 [3d Dept 2012]).



The split in the Departments has been the subject of proposals for legislative action (***Matter of DHHS o/b/o Duell v Moss***, 2005 NY Slip Op 51055 [U] [Family Ct Monroe County]; *see*, 2004 Recommendations of the Family Court Advisory and Rules Committee to the Chief Judge of the State of New York).



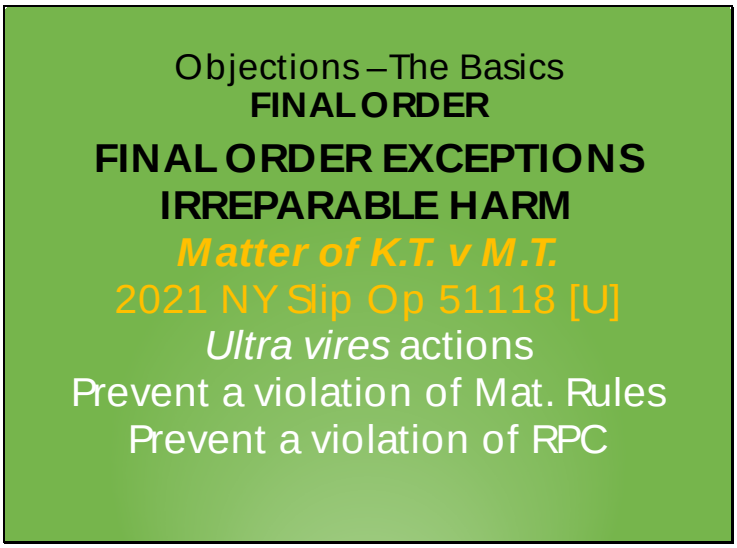


The irreparable harm doctrine provides an exception from the final order rule that seemingly originating in the Fourth Department's trial courts. In one case, the custodial parent brought an application apparently to establish an order of support. The Petitioner faced some urgency because of an overdue mortgage that threatened the children's housing and other overdue marital bills. At the first appearance, despite having information sufficient to establish a CSSA-compliant temporary order of support, the temporary order of support (Family Court Act § 434) was for less than the CSSA amount and did not meet the children's needs. The CSSA amount would have been approximately $170.00 per week, but the temporary order was only $100.00 per week. The Family Court Judge held that where "there is a clear mandate by the Legislature to see that children are receiving adequate support during the pendency of an action coupled with the threat of prejudice to the children and the [custodial parent] . . . it is within the discretion of the [family] court to consider an objection to a temporary order and that it is proper to do so" (***Matter of Heinlein v Heinlein***, 165 Misc 2d 357, 360, 629 NYS2d 679, 681 [Monroe County Family Ct 1995] *cited by* ***Matter of Carmen R. v Luis I.***, 160 AD3d 460, 74 NYS3d 37 [1st Dept 2018]). The ***Heinlein*** court relied on Second Department precedent that modified a supreme court matrimonial action pendente lite maintenance order that noted that "the best remedy for any claimed inequity in a temporary award is a speedy trial, the rule is not ironclad when the award is deficient" (***Bernstein v Bernstein***, 213 AD2d 508, 508, 624 NYS2d 45, 46 [2d Dept 1995] [internal quotation marks and citations omitted]; *see also*, ***Barra v Barra***, 191 AD3d 831, 138 NYS3d 377 [2d Dept 2021] [disallowing modification to a pendente lite award in the absence of exigent circumstances]; ***Capozzoli v Capozzoli***, 187 AD3d 834, 130 NYS3d 722 [2d Dept 2020] [allowing a modification to a pendente lite order based on "exigent circumstances"]; ***Whelan v Whelan***, 59 AD3d 437, 873 NYS2d 648 [2d Dept 2009]; ***Wald v Wald***, 44 AD3d 848, 844 NYS2d 86 [2d Dept 2007]; ***Pieri v Pieri***, 91 AD2d 1016, 457 NYS2d 889 [2d Dept 1983]).

The First Department's matrimonial jurisprudence acknowledges that exigency may permit departure from the general rule that a pendente lite award is not subject to subsequent modification

because a speedy trial will best remedy any inequity (*e.g.*, ***Arabian v Arabian***, 79 AD3d 517, 915 NYS2d 513 [1st Dept 2010]).

In ***Matter of Carmen R. v Luis I.***, (160 AD3d 460, 74 NYS3d 37 [1st Dept 2018]) the support magistrate issued a fact-finding order and directed that the proceeding remain before the support magistrate pending a further hearing regarding whether to recommend incarceration. Because the law (22 NYCRR 205.43 [g] [3]) requires that the findings of fact contain the recommendation of incarceration (or not), the support magistrate acted without authority to hold the proceeding pending a further about whether to recommend incarceration.



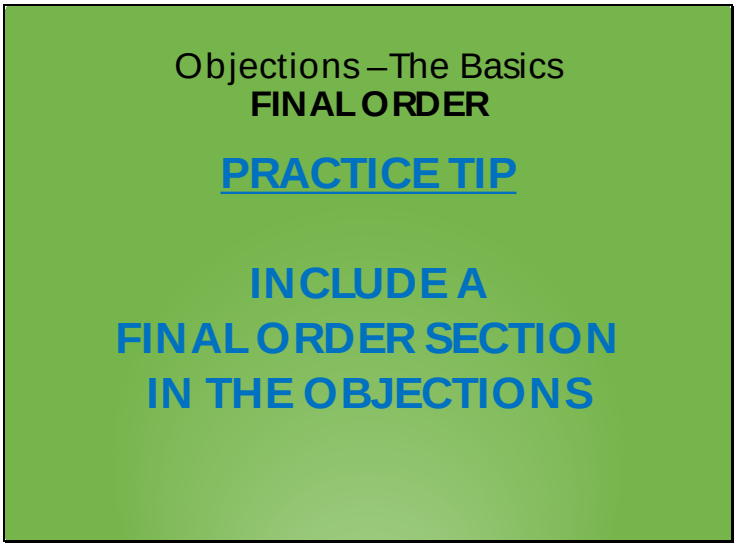
Similar to ***Matter of Carmen R. v Luis I.***, (160 AD3d 460, 74 NYS3d 37 [1st Dept 2018]) where the First Department defined irreparable harm to include *ultra vires* actions, ***Matter of K.T. v M.T.***, (2021 NY Slip Op 51118 [U] [Suffolk County Fam Ct 2021]) did the same where the support magistrate awarded attorneys fees without authority to do so.

The family court may award attorney fees only if the movant's moving papers show compliance with 22 NYCRR 1400.2 and 1400.3. Because the support magistrate awarded attorney fees without the movant having filed and served a retainer agreement signed by the client, and without the movant having adduced proof that the client furnished a written acknowledgment of having received the statement of client rights and responsibilities, the movant did not invoke the jurisdiction of the family court to award attorneys fees. Therefore, on objections to the support magistrate's order, the family court reached the merits of the nonfinal order that awarded fees.

In addition, the matrimonial rules set forth at 22 NYCRR 1400.2 and 1400.3 "are designed 'to address abuses in the practice of matrimonial law and to protect the public'" (***Matter of K.T. v M.T.***, 2021 NY Slip Op 51118 [U] [Suffolk County Family Ct 2021] at *11 *quoting* ***Julien v Machson***, 245 AD2d 122, 122, 666 NYS2d 147, 148 [1st Dept 1997] *quoted in* ***Gahagan v Gahagan***, 51 AD3d 863, 859 NYS2d 218 [2d Dept 2008]). Therefore, to protect the public, the

family court judge acted under the irreparable harm doctrine. “The judiciary must act swiftly to correct actions that contravene the public interest” (***Matter of K.T. v M.T.***, 2021 NY Slip Op 51118 [U] at *11)

Similarly, because the failure to comply with 22 NYCRR 1400.2 and 1400.3 constitutes a violation of the Rules of Professional Conduct (22 NYCRR 1200.0), and because the Rules of Professional Conduct “protect against ‘abuse of the adversary system and resulting harm to the public at large’” (***Matter of K.T. v M.T.***, 2021 NY Slip Op 51118 [U] [Suffolk County Family Ct 2021] at *12 *quoting* ***Greene v Greene,*** 47 NY2d 447, 451, 418 NYS2d 379, 381 [1979]) irreparable harm exists on these facts. Doing nothing and waiting for the possibility of an objection to the case’s final order subjects the public at large to harm, and courts should not sit idly by when facing an opportunity to prevent public injury and abuse of the system.



Even if finality is obvious, by including a section in the objections that points out that the order is final, the objections track the statute.

Examples:

> The [date of order] [caption of order] [(Magistrate’s name)] is a final order to which these objections may be filed (Family Court Act § 439 [e]).

> Although the [date of order] [caption of order] [(Magistrate’s name)] is a not final order to which these objections would ordinarily be permitted to be filed (Family Court Act § 439 [e]), the irreparable harm exception to the final order requirement applies [cite the strongest case in your client’s favor].

OBJECTIONS TO CHILD SUPPORT ORDERS

THE BASICS

35 DAY RULE

Objections – The Basics

"[W]ritten objections ... may be filed by either party within ... thirty-five days after mailing of the order to such party or parties."

Family Court Act § 439 (e)

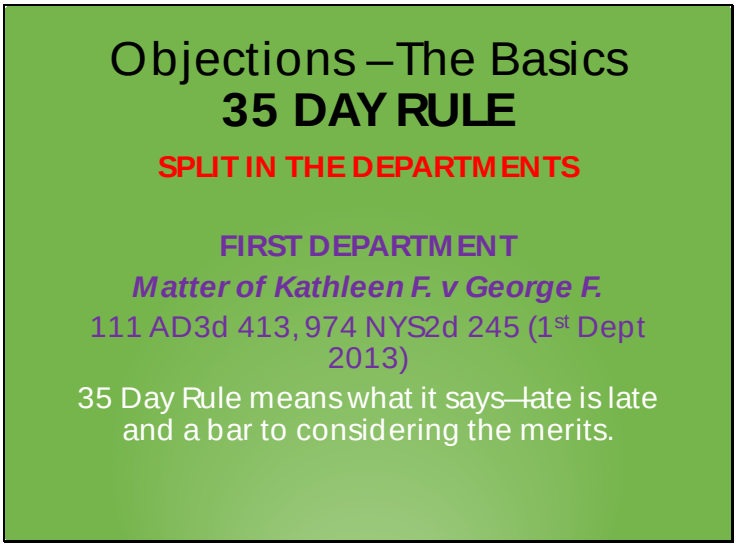
35 DAY RULE

Objections – The Basics

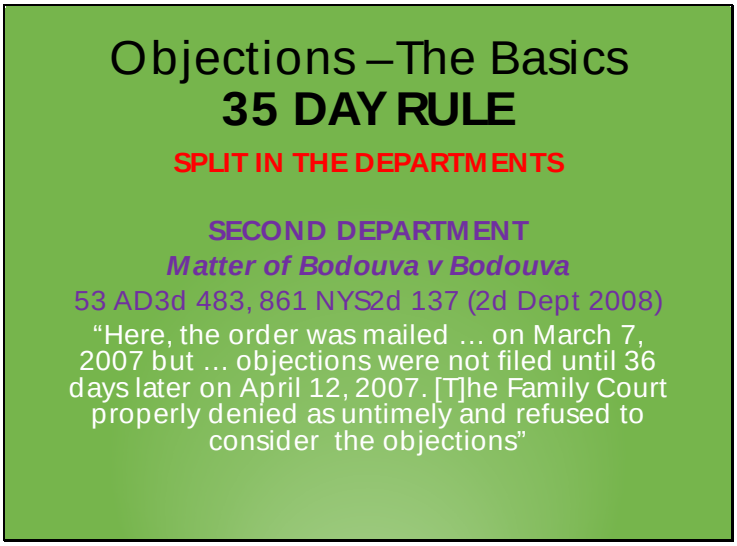
35 DAY RULE

SPLIT IN THE DEPARTMENTS

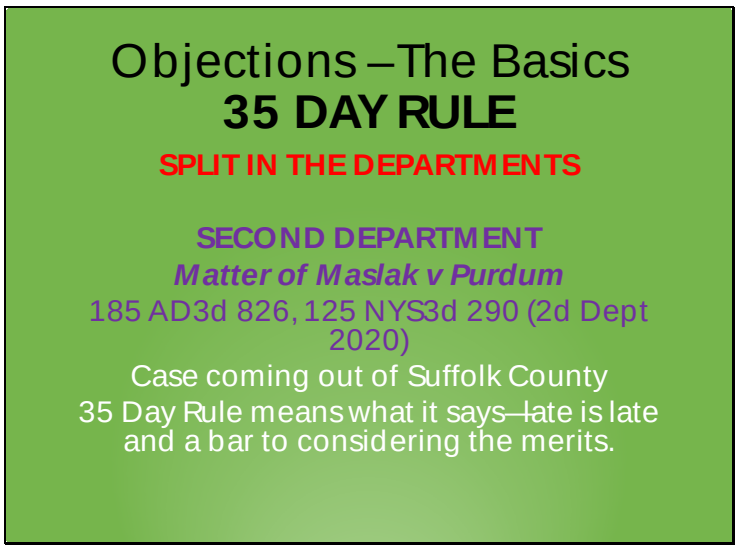
35 DAY RULE



The First Department offers no facts about when the Petitioner filed the objections in ***Matter of Kathleen F. v George F.*** (111 AD3d 413, 974 NYS2d 245 [1st Dept 2013]), but the case cites to a 36 day case—one day late—from the Second Department, ***Matter of Bodouva v Bodouva*** (53 AD3d 483, 861 NYS2d 137 [2d Dept 2008]). Interestingly, in ***Kathleen F.***, the objection, if granted, would have clarified and likely increased the amount of support due. The issues appear to be only of law because the ***Kathleen F.*** support magistrate did not calculate retroactive support (Family Court Act § 440 [a]) or the allocation of responsibility for health insurance premiums that the custodial parent paid in respect of the child.

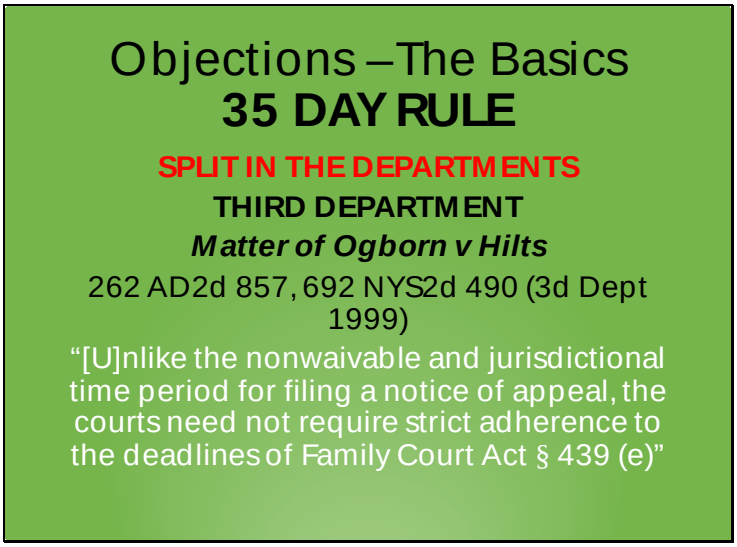


Besides ***Matter of Bodouva v Bodouva*** (53 AD3 483, 861 NYS2d 137 [2d Dept 2008]) standing for the proposition that the Second Department deems the 35-day rule a bright line jurisdictional rule, the case helpfully illustrates the calculation of the number of days. For April 12, 2007 to be day number 36, March 8, 2007, the day AFTER mailing must be day one (*see*, Gen. Constr. L. § 20 [compute "exclusive of the calendar day from which the reckoning is made"]).

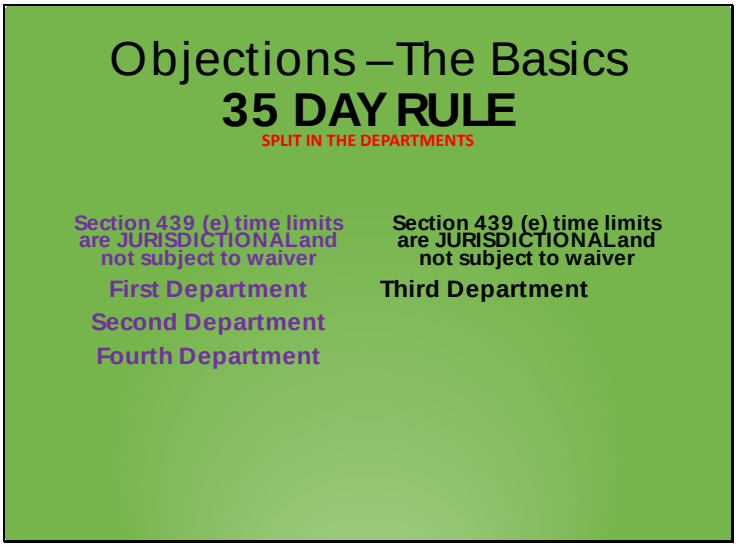


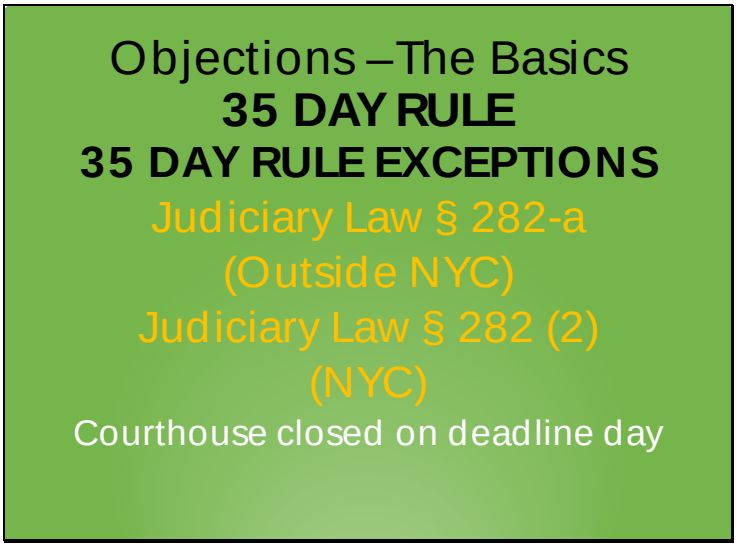
The support magistrate issued an order of disposition and an order entry money judgment on November 1, 2018. The objecting party filed objections on January 9, 2019. "Here, the order dated November 1, 2018, contains a notation directly below the Support Magistrate's signature indicating that it was mailed to the parties on November 8, 2018" (***Matter of Maslak v Purdum***, 185 AD3d 826, 827, 125 NYS3d 290 [2d Dept 2020]).

The notations in the electronic file of the family court and any notations on the orders are presumptively true (***Matter of Bosse v Simpson***, 173 AD3d 856, 100 NYS3d 539 [2d Dept 2019]). The law on postmarks differs depending on the purpose that the postmark is being put. If the postmark is used to rebut the notations, the postmark is insufficient (***Id.***). But, if the postmark is used to establish the date of mailing, the postmark, if unrefuted, is sufficient (***Matter of Juliya V. v Aleksandr V.***, 170 AD3d 530, 94 NYS3d 433 [1st Dept 2019]).

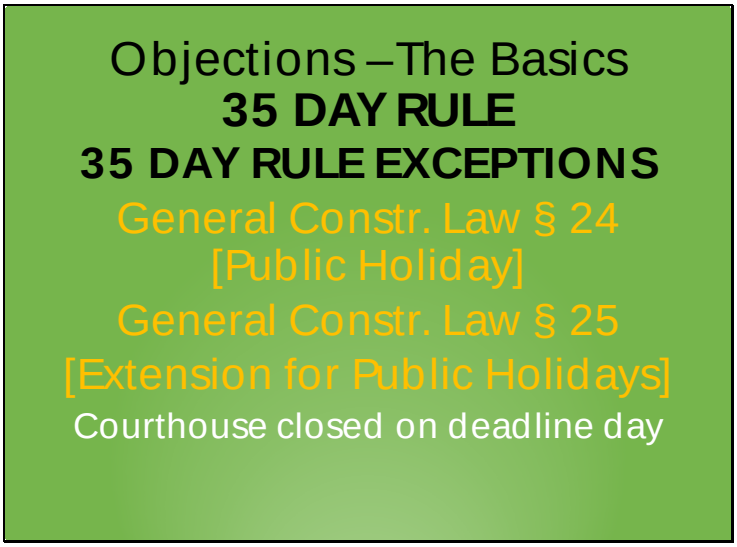


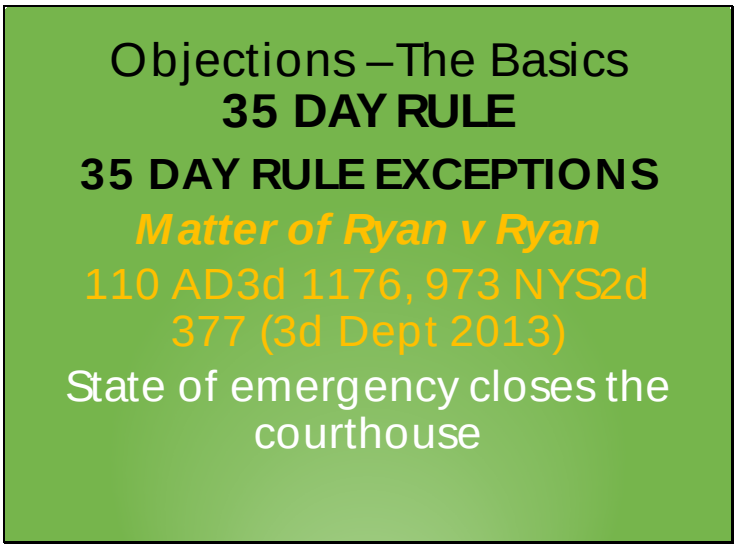
Matter of Ogborn v Hilts (262 AD2d 857, 692 NYS2d 490 [3d Dept 1999]) sets forth the Third Department rule that the deadlines in Family Court Act § 439 (e) are nonjurisdictional (*see also*, ***Matter of Alberino v Alberino***, 154 AD3d 1139, 62 NYS3d 612 [3d Dept 2017]; ***Matter of Hobbs v Wansley***, 143 AD3d 1138, 39 NYS3d 298 [3d Dept 2016]; ***Matter of Ryan v Ryan***, 110 AD3d 1176, 973 NYS2d 377 [3d Dept 2013]; ***Matter of Latimer v Cartin***, 57 AD3d 1264, 870 NYS2d 554 [3d Dept 2008]). The Second Department has cited to ***Matter of Ryan v Ryan*** (110 AD3d 1176, 973 NYS2d 377 [3d Dept 2013]) for the proposition that timely filing is a jurisdictional requirement even though ***Ryan*** grows out of a line of cases that hold to the contrary (***Matter of Redd v Burrell***, 145 AD3d 786, 41 NYS3d 909 [2d Dept 2016]).



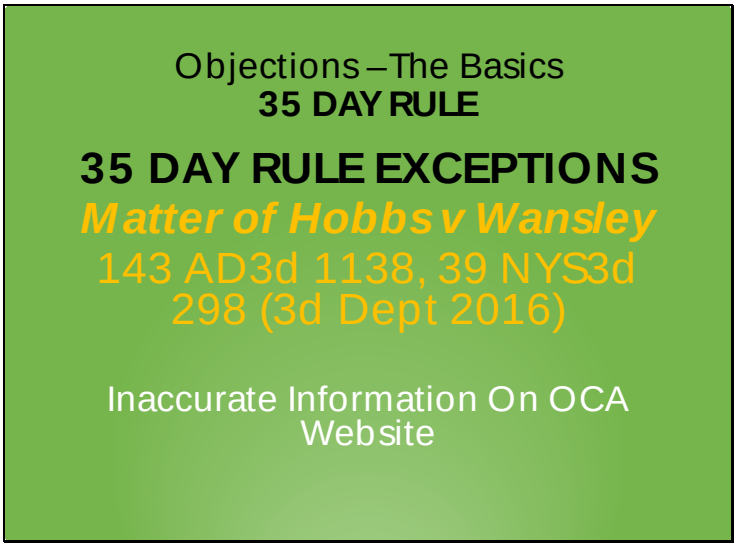


"Whenever the last day on which any paper is required to be filed with a clerk of a court outside the city of New York expires on a Saturday, Sunday, a public holiday or a day when the office of such clerk is closed for the transaction of business, the time therefor is hereby extended to and including the next business day such office is open for the transaction of business" (Judiciary L § 282-a). This statutory provision automatically extends the filing deadline (*e.g.*, ***Matter of Ryan v Ryan***, 110 AD3d 1176, 973 NYS2d 377 [3d Dept 2013]). The same language applies in New York City (Judiciary Law § 282 [2]). Little known is that in New York City, the Family Court clerk closes, by statute, at 4:00 p.m. every day, except "in the months of July and August when said offices shall remain open for the transaction of business from nine o'clock in the forenoon to two o'clock in the afternoon except Saturdays, Sundays and holidays" (Judiciary Law § 282 [1]).

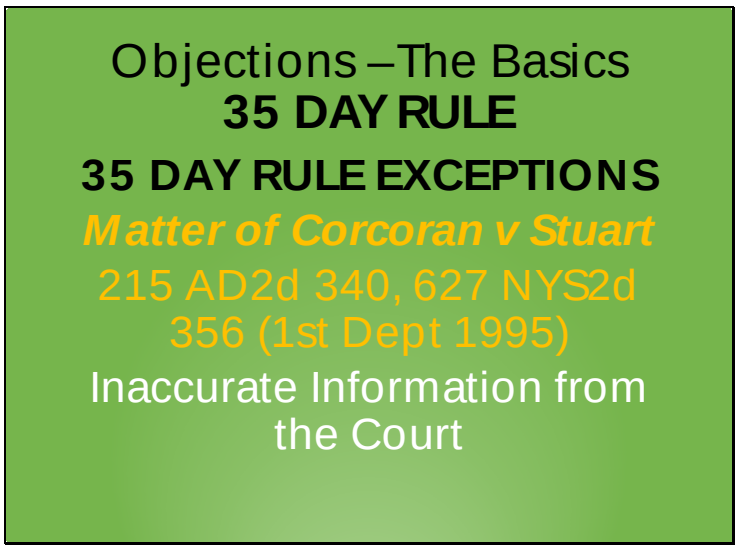




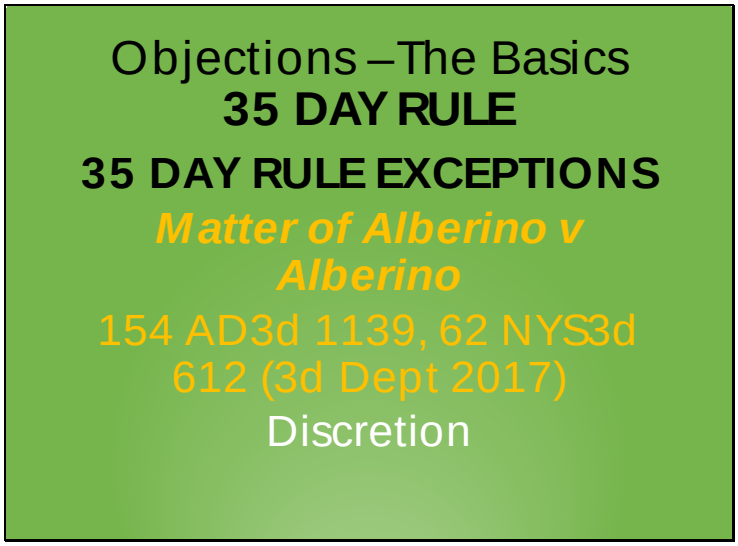
In ***Matter of Ryan v Ryan*** (110 AD3d 1176, 973 NYS2d 377 [3d Dept 2013]), the deadline to file the objections was a Friday during which the county was under a state of emergency because of a tropical storm caused flooding. The exact filing date was either Monday or Tuesday first following the Friday on which the courthouse was closed. The Third Department held that if the filing was made the first day that the clerk's office was open after the closure, then the filing was timely (Judiciary Law § 282-a), but if the filing was made on Tuesday, the second day that the clerk's office was open after the closure, then the filing was still timely "just after the court reopened from its closure due to the extraordinary weather conditions" (***Ryan***, 110 AD3d at 1179, 973 NYS2d at 380 [3d Dept 2013]).

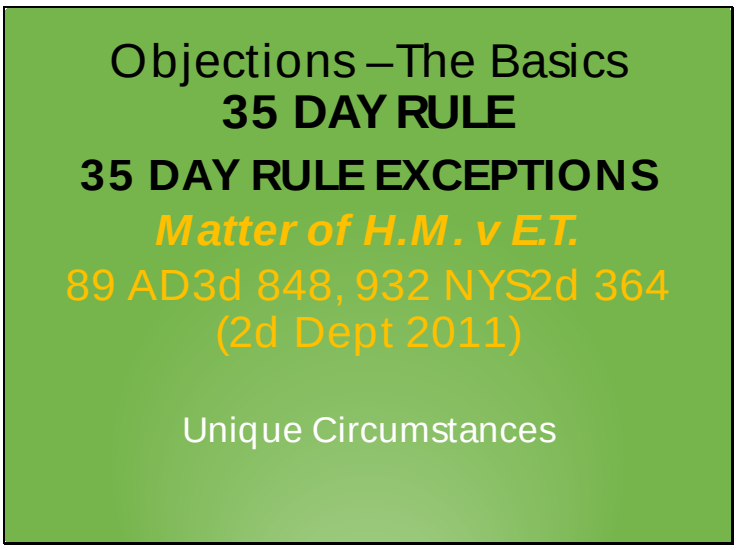


In ***Hobbs***, the OCA website listed the closing hour of the courthouse as 5:00 p.m. The objecting party arrived at 4:45 p.m. only to find the courthouse closed. In fact, the courthouse closed at 4:30 p.m. Because the objecting party would have filed timely but for the error on the OCA website (despite arriving after 4:30 p.m.), the family court should have considered the objections' merits.

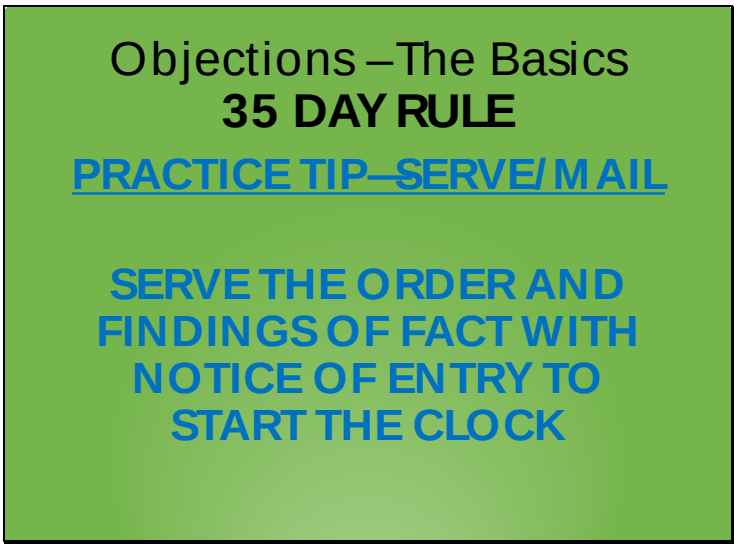


In ***Matter of Corcoran v Stuart*** (215 AD2d 340, 627 NYS2d 356 [1st Dept 1995]), a 17 day delay between entry of the order and mailing to a self-represented litigant occurred. The family court judge apparently denied the objections as untimely. The First Department reversed because, in beautifully vague passive voice, the objecting party "was apparently misinformed with respect to the time period in which she was required to submit her objections" (Id. at 340, 627 NYS2d at 356). ***Corcoran*** also highlights the need to identify the mailing date, especially where the date of the order in the caption differs from the date next to the signature (which may differ from the mailing date). A section in the objections that establishes timeliness clarifies these sorts of issues and avoids the possibility of a denial of the objections based on the untimeliness.





The Second Department offered no explanation of what the "unique circumstances" were in ***Matter of H.M. v E.T.*** (89 AD3d 848, 932 NYS2d 364 [2d Dept 2011]), nor did it give any background in ***Matter of Scott v Jacques-Scott*** (156 AD3d 890, 65 NYS3d 746 [2d Dept 2017]).



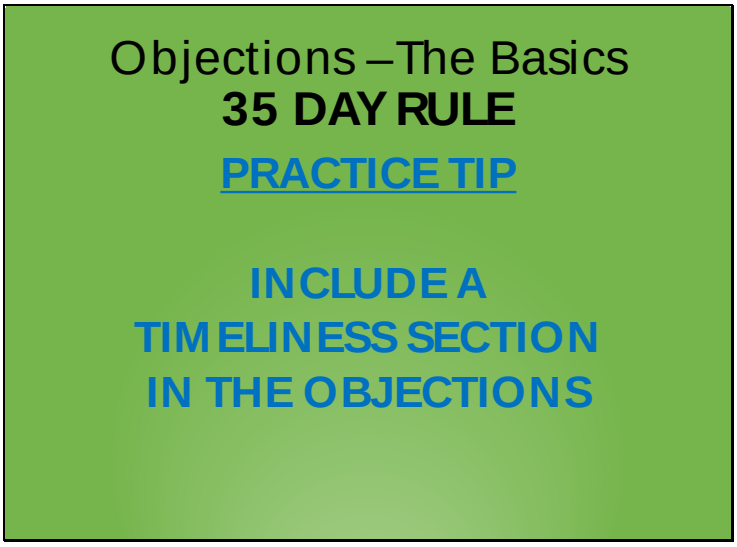
Although 22 NYCRR 205.36 requires that the clerk of the court "cause a copy of the findings of fact and order of support to be served either in person or by mail upon the parties to the proceeding or their attorneys" errors in the clerk's service redound to the non-aggrieved party's detriment under ***Matter of Odunbaku v Odunbaku*** (28 NY3d 223, 43 NYS3d 799 [2016]). There, the clerk apparently did not serve a party's attorney. Thus, the aggrieved party's time to file objections never began to run, and objections filed 41 days after mailing to the party—but not to the attorney—were remanded to the family court for determination on the merits (*see*, ***Matter of Hughes v Leo***, 185 AD3d 1032, 126 NYS3d 416 [2d Dept 2020]).

▌[caption—notice of entry]

TO: [opposing counsel][1] [counsel's address]

PLEASE TAKE NOTICE THAT attached hereto is a true, complete, and correct copy of the [date of order] [caption of order] [Magistrate's name] entered on the [day] day of [month] [year].

[signature block]

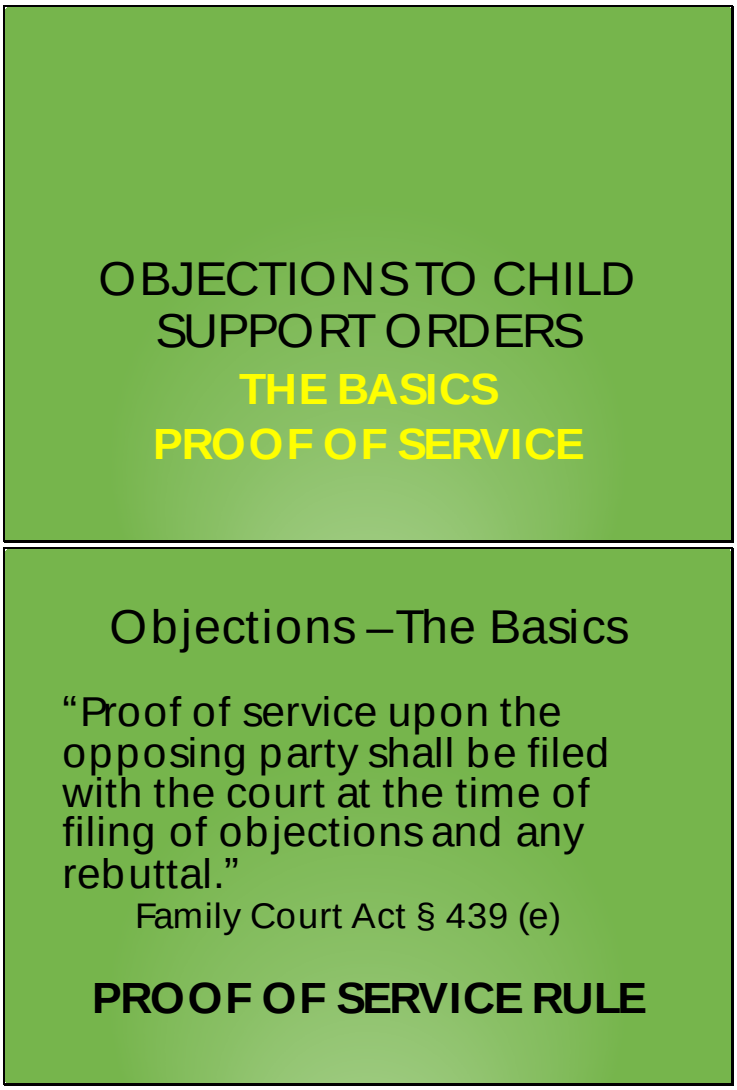


In at least three of the four departments, timely filing is jurisdictional. "[A] court's lack of subject matter jurisdiction is not waivable, but may be [raised] at any stage of the action, and the court may, *ex mero motu* [on its own motion], at any time, when its attention is called to the facts, refuse to proceed further and dismiss the action" (***Financial Indus. Regulatory Auth., Inc. v Fiero***, 10 NY3d 12, 17, 853 NYS2d 267, 269 [2008] quoting ***Matter of Fry v Village of Tarrytown***, 89 NY2d 714, 658 NYS2d 205 [1997] cited by ***Matter of Jose M. v Angel V.***, 99 AD3d 243, 951 NYS2d 159 [2d Dept 2012]). This rule applies in child support proceedings (***Matter of Saratoga County Dept of Social Servs. v Caudill***, 160 AD3d 1071, 75 NYS3d 299 [3d Dept 2018]). A section of the objections that sets forth jurisdiction avoids having the court make an adverse decision on its own motion. Moreover, the attentiveness to detail establishes counsel's thorough analysis of the case.

The [date of order] [caption of order] [Magistrate's name] was [mailed/emailed/faxed/etc.] to counsel on [date]. Thus, the thirty-five day rule, not the thirty day rule, set forth in Family Court Act section 439 (e) applies. The deadline to file the Objections is [date], making these Objections timely filed. {{Although the thirty-fifth day would have been

[1] If the other party is a self-represented litigant, list the litigant and the litigant's mailing address. Email service is not permitted on a self-represented litigant (CPLR 2103 [c]).

[date], [source of law] extends the deadline to [date], so these Objections are timely filed.

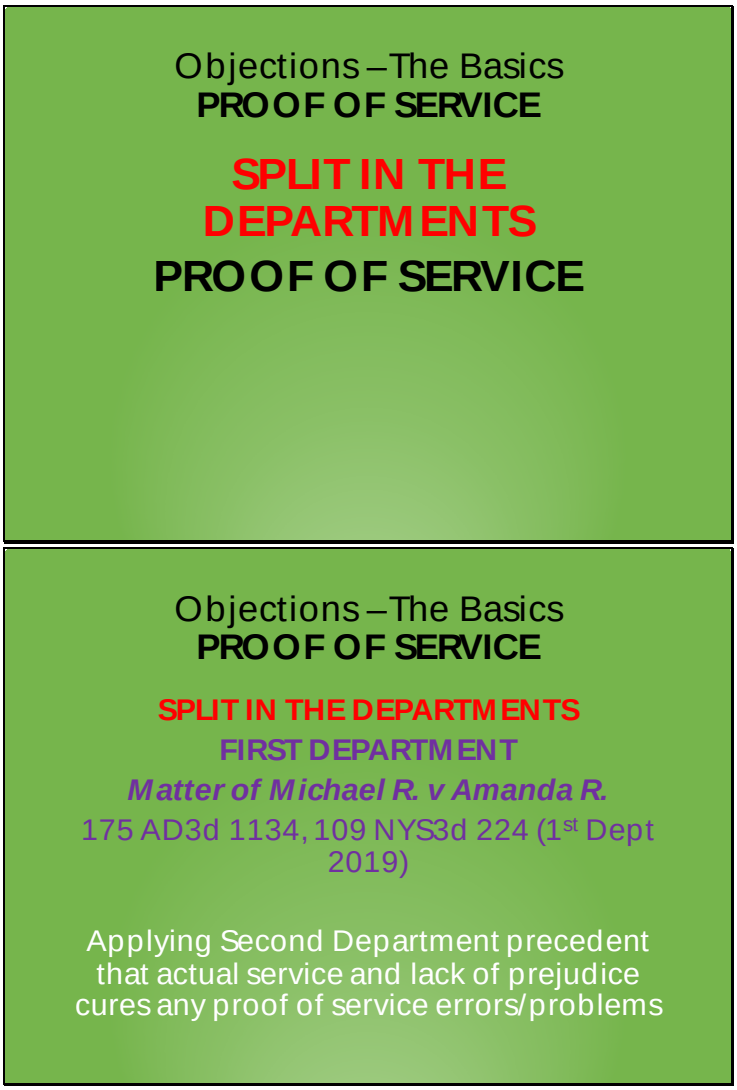


Family Court Act § 439 (e) requires that proof of service accompany the filing of objections and rebuttal. Failure to file a proper proof of service is a fatal defect that precludes consideration of the merits of the objections. Failure to file a proof of service with objections is a fatal defect in the objection process which precludes review of the objections (***Matter of Carroll v Brodsky***, 168 AD3d 727, 89 NYS3d 649 [2d Dept 2019]). The proof of service must comply with CPLR 306 (***Matter of Ishmael A.A.-S. v Sacha C.***, 169 AD3d 662, 91 NYS3d 731 [2d Dept 2019]). A proper proof of service is a condition precedent to the family court judge considering the objections, and the family court may raise the party's failure to satisfy the condition precedent even when or particularly when no rebuttal is filed (compare ***Matter of Sheridan v Koelmel***, 190 AD3d 859, 136 NYS3d 760 [2d Dept 2021] with ***Matter of Perez v Villamil***, 19 AD3d 501, 798 NYS2d 481 (2d Dept 2005)).

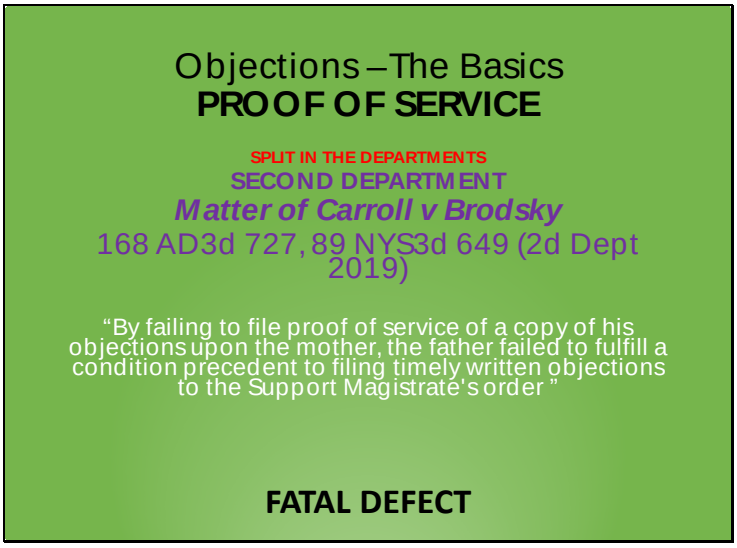
Failure to file a proof of service with correct information causes "the Family Court [to lack] jurisdiction to consider the merits of the objections" (***Matter of Ishmael A.A.-S. v Sacha C.***, 169 AD3d 662, 91 NYS3d 731 [2d Dept 2019]; ***Matter of Girgenti v Gress***, 85 AD3d 1166, 1166, 925 NYS2d 886, 886 [2d Dept 2011]). The proof of service must identify the document as the objections (***Matter of Michael H. v Kristen L.***, 179 AD3d 1065, 118 NYS3d 637 [2d Dept 2020]).

Failure to file a proof of service constitutes a waiver of the "right to appellate review of the merits of [the] objections" (***Matter of DiFede v DiFede***, 99 AD3d 1003, 1003, 952 NYS2d 455, 456 [2d Dept 2012]; ***Matter of Rinaldi v Rinaldi***, 239 AD2d 506, 657 NYS2d 443 [2d Dept 1997]). However, apparently a family court judge may allow an extension to a party who filed without a proper proof of service, and the extension may be for the purpose of filing a proper proof of service (***Matter of Michael H. v Kristen L.***, 179 AD3d 1065, 118 NYS3d 637 [2d Dept 2020])

The family court may deny objections both as untimely and as unaccompanied by a proper proof of service (***Matter of Mayeri v Mayeri***, 279 AD2d 473, 719 NYS2d 582 [2001]).

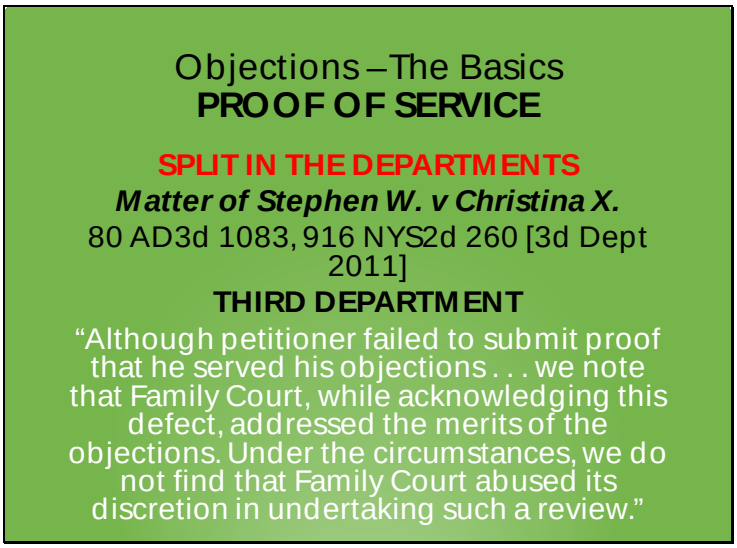


In ***Matter of Michael R. v Amanda R.*** (175 AD3d 1134, 109 NYS3d 224 [1st Dept 2019]) the First Department acknowledged that the affidavit of service was defective. Thus, statutory compliance did not exist. However, the adverse party filed rebuttal and was not prejudiced by the absence of a proof of service. Thus, the First Department held that the family court should have considered the objections on the merits. The First Department relied on Second Department precedents: ***Matter of Worner v Gavin*** (112 AD3d 956, 978 NYS2d 88 [2d Dept 2013]); ***Matter of Nash v Yablon-Nash*** (106 AD3d 740, 963 NYS2d 727 [2d Dept 2013] [Mother admitted receiving the objections and suffered no prejudice]); ***Matter of Perez v Villamil*** (19 AD3d 501, 798 NYS2d 481 [2d Dept 2005]).



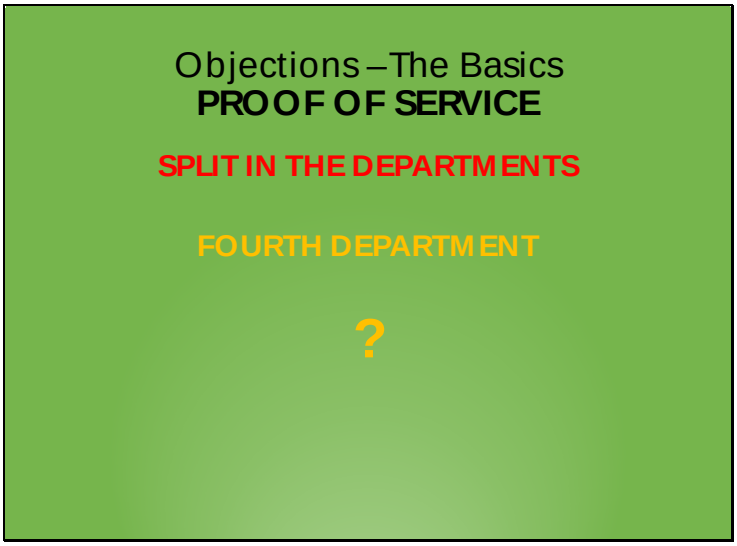
The Second Department is clear—no proof of service is a fatal defect to considering the objections on the merits.

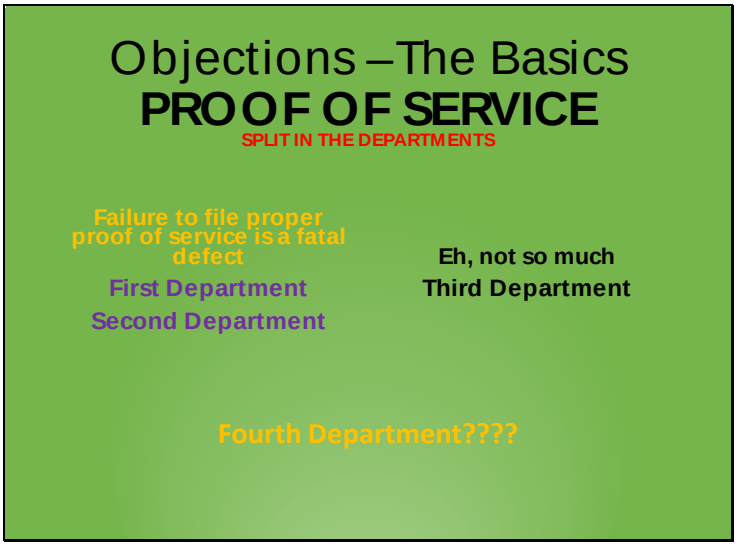
Where the proof of service is absent or defective, however, the Court must reach the merits where either rebuttal was filed or no prejudice exists to the other party (***Matter of Worner v Gavin,*** 112 AD3d 956, 978 NYS2d 88 [2d Dept 2013]; ***Matter of Nash v Yablon-Nash***, 106 AD3d 740, 963 NYS2d 727 [2d Dept 2013] [Mother admitted receiving the objections and suffered no prejudice]; ***Matter of Perez v Villamil***, 19 AD3d 501, 502, 798 NYS2d 481, 481 [2d Dept 2005] [because of lack of prejudice "the Family Court did not lack jurisdiction to consider the merits of the . . . objections").



Cases acknowledge the Third Department rule permitting discretion to consider the merits despite a late proof of service, but find no abuse of discretion "for a court to demand that a party adhere to the statutory requirement" (***Matter of Fifield v Whiting*** (118 AD3d 1072, 1073, 987 NYS2d

479, 481 [3d Dept 2014]). In ***Matter of Treistman v Cayley*** (155 AD3d 1343, 65 NYS3d 332 [3d Dept 2017]) the proof of service was not notarized, so the Third Department affirmed a family court's denial of the objections on that ground despite the family court having discretion to overlook the self-represented litigant's failure to have the proof of service notarized.





This split in the Departments aligns with the split in the Departments on the 35 day rule. The Second Department case, ***Matter of Carroll v Brodsky*** (168 AD3d 727, 89 NYS3d 549 [2d Dept 2019]) ties the failure to file the proof of service to the timely filing of objections.

Objections – The Basics
PROOF OF SERVICE

METHOD OF SERVICE
ON AN ATTORNEY
Family Court Act § 165
CPLR 2103 [B]
1. Personal delivery
2. First class mail
3. Leave at office
4. Leave at residence **
5. Fax **
6. Overnight delivery
7. Electronic means **

Objections – The Basics
PROOF OF SERVICE

METHOD OF SERVICE
ON A SELF-REPRESENTED LITIGANT
Family Court Act § 165
CPLR 2103 [C]
1. Personal delivery
2. First class mail
~~3. Leave at office~~
4. Leave at residence **
5. Fax **
6. Overnight delivery
~~7. Electronic means **~~

Objections – The Basics
PROOF OF SERVICE

PRACTICE TIP

INCLUDE A PROOF OF SERVICE WITH PROPER INFOMRATION ON IT

OBJECTIONS TO CHILD SUPPORT ORDERS

THE BASICS

AFFIRMATIONS

Objections – The Basics AFFIRMATIONS

"The statement of an attorney admitted to practice in the courts of the state . . . may be served or filed in the action in lieu of and with the same force and effect as an affidavit."

CPLR 2106 (a)

Objections – The Basics AFFIRMATIONS

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"Affidavits shall be for a statement of the relevant facts, and briefs shall be for a statement of the relevant law." – 22 NYCRR 205.11 (b).

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Objections are tantamount to appellate review. ***Matter of Musarra v Musarra*** (28 AD3d 668, 814 NYS2d 657 [2d Dept 2006]).

Objections – The Basics AFFIRMATIONS

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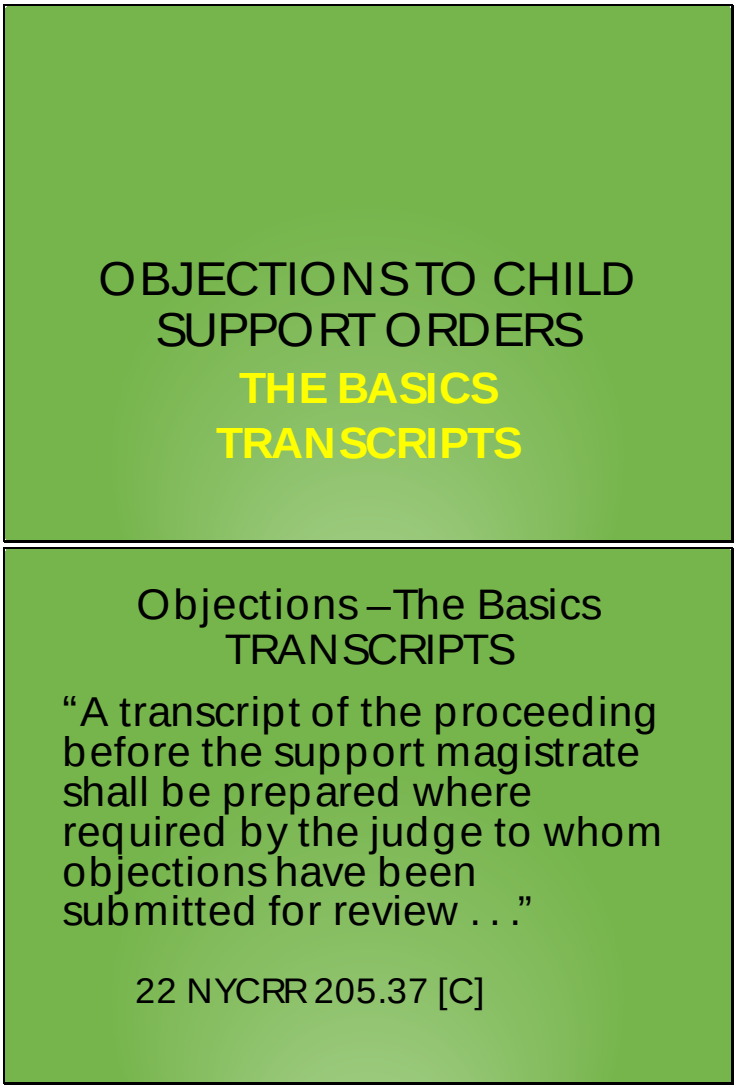
WRITE A BRIEF



Because the deadline to file is jurisdictional (in at least three departments) the notion that a party may reserve the right to amend the Objections upon receipt of a transcript is incorrect if that amendment will occur after the deadline to file. Support for this proposition comes from 22 NYCRR 205.37 (c) which makes a transcript mandatory only if the judge reviewing the objections requires one.

Objections – The Basics
TRANSCRIPTS

PRACTICE TIP

WAIT TO BE TOLD TO ORDER THE TRANSCRIPT UNLESS . . .

OBJECTIONS TO CHILD SUPPORT ORDERS

THE BASICS

RHETORIC

Objections – The Basics
RHETORIC

"The magistrate, in an obvious attempt to avoid reversal and hide [the magistrate's] bias"

"Never in my ## years of practice have I witnessed such a disgraceful effort to punish a parent who fell on hard times"

Objections – The Basics
RHETORIC

"The Father just ignores the child and acts like a deadbeat."

"trying to starve us into submission"

Objections – The Basics
RHETORIC

PRACTICE TIP

FOCUS ON THE LAW

FOCUS ON THE FACTS, not your ability to insult and demean

Objections – The Basics
RHETORIC

PRACTICE TIP

The Order erred……

The income calculation is incorrect …….

The Support Magistrate correctly ……..

The New York State Standards of Civility for the legal profession set forth principles of behavior to which the bar, the bench and court employees should aspire. (The term "court" as used herein also may refer to any other tribunal, as appropriate.) They are not intended as rules to be enforced by sanction or disciplinary action, nor are they intended to supplement or modify the Rules Governing Judicial Conduct, the Rules of Professional Conduct or any other applicable rule or requirement governing conduct. Instead they are a set of guidelines intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession's rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course.

> Lawyers can disagree without being disagreeable. Effective representation does not require antagonistic or acrimonious behavior. Whether orally or in writing, lawyers should avoid vulgar language, disparaging personal remarks or acrimony toward other counsel or witnesses.

(Standards of Civility [22 NYCRR 1200.0 Appx A] § 1 [I] [2]). "Lawyers should speak and write civilly and respectfully in all communications with the court and court personnel (Id. at § 1 [X] [1] [A]).

Although the standards of civility are not binding authority, the Rules of Professional Conduct are. "In appearing as a lawyer before a tribunal, a lawyer shall not . . . engage in undignified or discourteous conduct" (Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.3 [f] [2]). Moreover, "[a] lawyer shall not . . . knowingly engage in . . . conduct contrary to these rules" (Id. at rule 3.4 [a] [6]).

The presentation of the argument in objections and rebuttal should be clear, not clouded by undue rhetoric. Pin the objection or rebuttal to the right step in the process. ***Matter of Cassano v Cassano*** (85 NY2d 649, 628 NYS2d 10 [1995]) directs courts to follow the statutory three-step process (Family Court Act § 413 [1] [c] [1] – [3]). While those three steps govern the calculation of the presumptively correct amount of child support, this chart might better indicate where to direct a court's attention when writing objections and rebuttal.

1. [IF MODIFICATION] Modification jurisdiction (Family Court Act § 451 [3][2]).

2. Duty to support (Family Court Act § 413 [1] [a] [parents have a duty to support all their children until the child(ren) turn 21]).
    a. Adopted Children – special rule (Family Court Act § 413 [2])

[2] A fuller discussion appears beginning on page 37.

b. Adjusted Emancipation Date – (Constructive emancipation[3], emancipation by financial independence[4], emancipation by contract[5])

3. Determine the combined parental income (Family Court Act § 413 [1] [c] [1]; *see,* Family Court Act § 413 [1] [b] [5]).
    a. Inability to determine income – Needs-based order (Family Court Act § 413 [1] [k]; *see*, ***Matter of Ennis v Pina***, 78 AD3d 830, 830-831, 910 NYS2d 366, 366 [2d Dept 2010][6]).
    b. Compulsory financial disclosure (Family Court Act § 424-a; Family Court Act § 413 [1] [j] [additional documentation may be required])

4. Prorate up to the statutory cap (Family Court Act § 413 [1] [c] [2])

5. Allocate child support for income over the cap (Family Court Act § 413 [1] [c] [3])

6. Allocation of one-time income (Family Court Act § 413 [1] [e])

7. Unjust/Inappropriate analysis (Family Court Act § § 413 [1] [g] and [f]; *see,* Family Court Act § 413 [1] [a]).

8. Child care expenses (Family Court Act § § 413 [1] [c] [4] and [6]).

9. Health insurance expenses (Family Court Act § § 413 [1] [c] [5], 416).

10. Educational expenses (Family Court Act § 413 [1] [c] [7]).

11. Extracurricular expenses (NOT part of child support add ons)[7]

12. Poor person relief (Family Court Act § 413 [1] [d]).

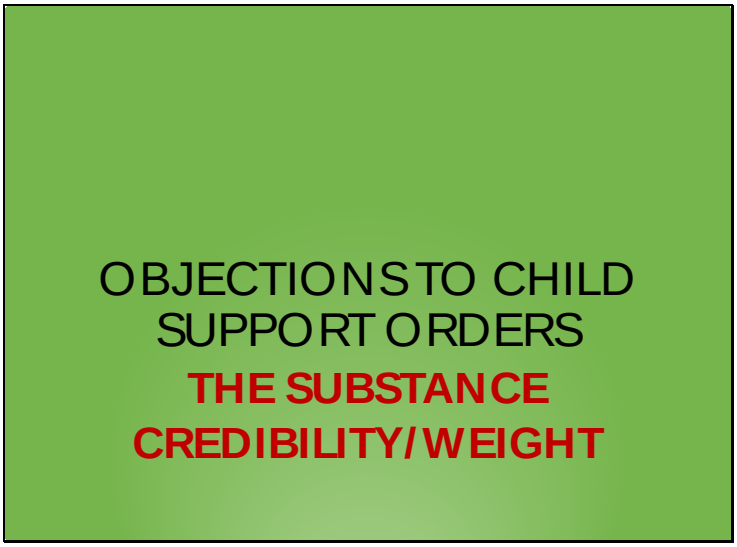
[3] A sample of what a constructive emancipation decision might say is set forth beginning on page 55.

[4] A short statement that distinguishes constructive emancipation from financial independence emancipation is set forth on page 58.

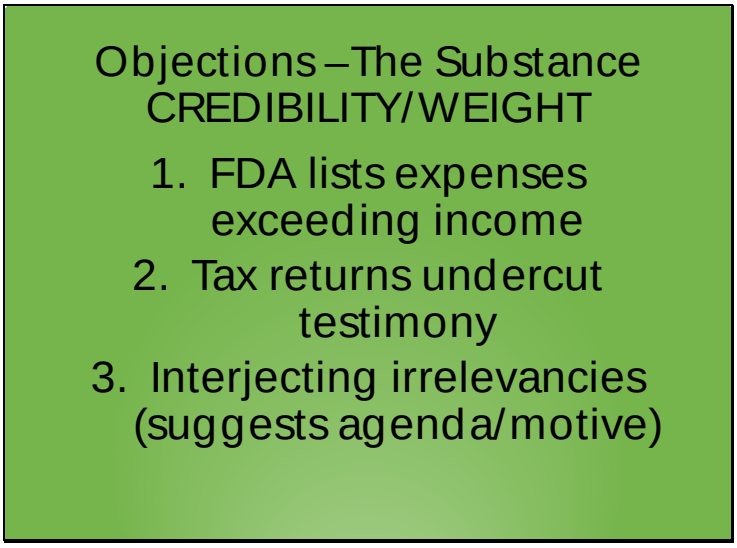
[5] Some language about a contractually adjusted emancipation date (here, involving full-time college study) begins on page 58.

[6] Little appellate guidance exists for how to calculate a needs-based order. Some sample language about needs-based orders begins on page 60.

[7] *See*, cases cited on page 61.



It is almost impossible to win objections on credibility. Courts are required to defer to the credibility assessment of the Support Magistrate. "Great deference should be given to the determination of the Support Magistrate, who is in the best position to assess the credibility of witnesses" (***Matter of Ennis v Pina***, 78 AD3d 830, 830-831, 910 NYS2d 366, 366 [2d Dept 2010]). The Fourth Department goes further, holding that "[g]reat deference should be given to the determination of the Support Magistrate" (***Matter of Yamonaco v Fey***, 91 AD3d 1322, 1323, 937 NYS2d 787, 789 [4th Dept 2012]).



Objections – The Substance
CREDIBILITY/WEIGHT

4. Testimony contradicts FDA
5. Evasive answers about numbers ESPECIALLY ON DIRECT TESTIMONY
6. Absence of documentary evidence to support oral testimony

Objections – The Substance
CREDIBILITY/WEIGHT

7. No competent medical evidence
8. Reliance on disability determination

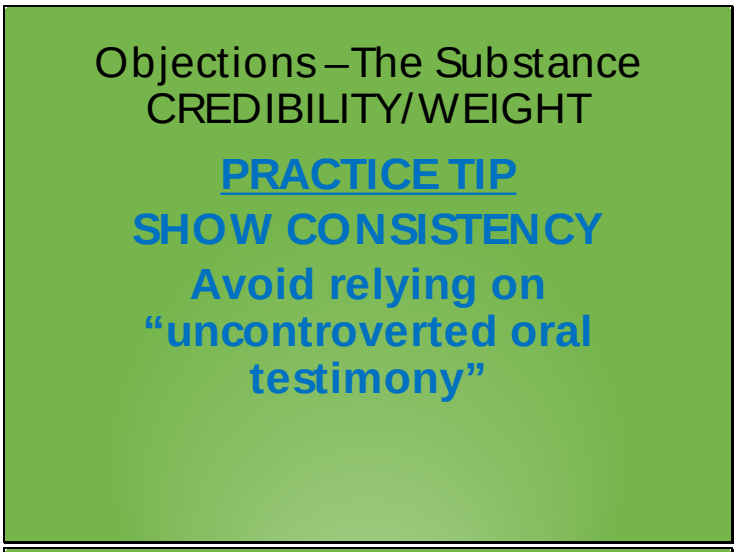
Objections – The Substance
CREDIBILITY/WEIGHT

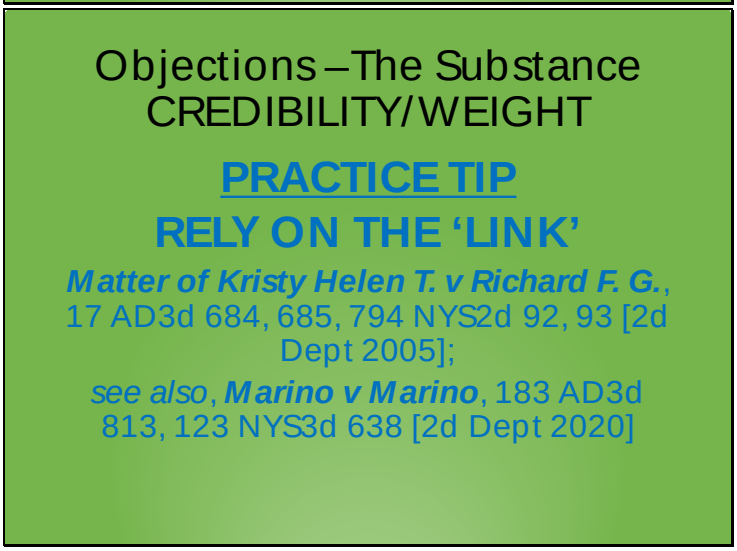
Incredible parties are subject to income imputation

***Matter of Decillis v Decillis*,**
152 AD3d 512, 58 NYS3d 126 (2d Dept 2017)

"A court is not bound by a party's account of his or her own finances, and where a party's account is not believable, the court is justified in finding a true or potential income higher than that claimed" (***Matter of Thomas v DeFalco***, 270 AD2d 277, 278, 703 NYS2d 530, 531 [2d Dept 2000]).

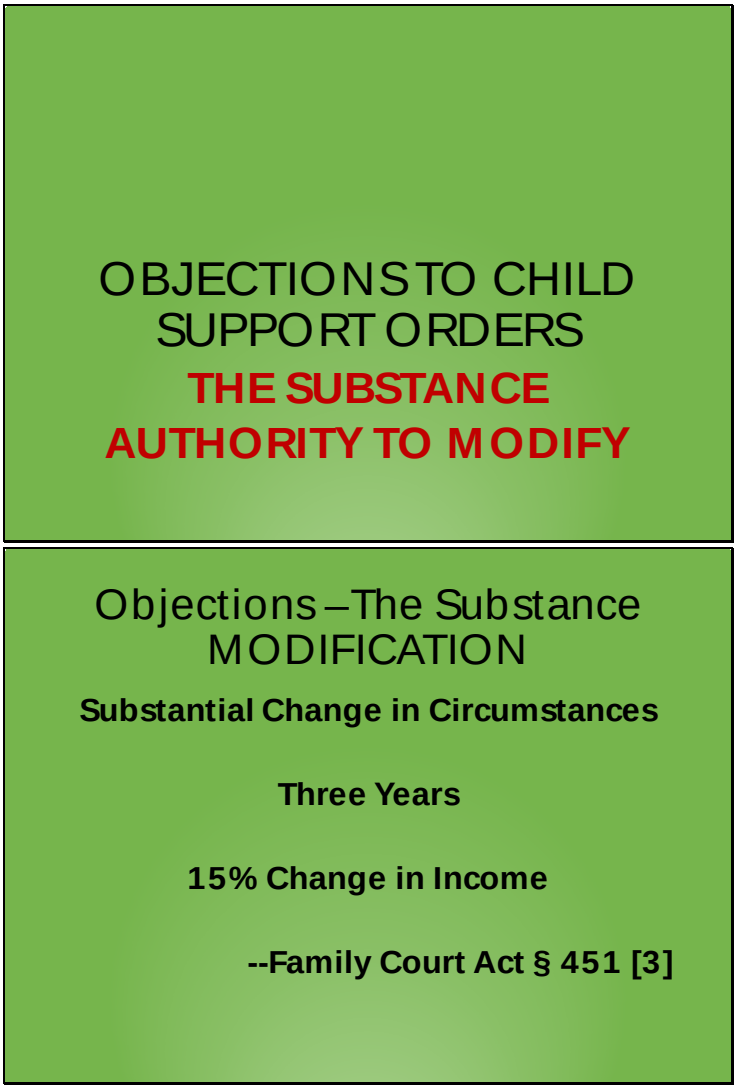
When a parent's oral testimony contradicts the parent's financial disclosure affidavit, the court may draw an adverse credibility finding, such as when a parent's education cost testimony is $60,000.00 per year, but the FDA claims only $12,000.00 per year or when the parent testifies to paying a mortgage but the FDA claims the parent pays rent at a lesser rate (***Matter of Hall v Pancho***, 149 AD3d 735, 51 NYS3d 149 (2d Dept 2017).





The amount a support magistrate imputes (as opposed to a support magistrate deciding to impute) must have a basis in the record. "[I]n exercising the discretion to impute income to a party, a Support Magistrate is required to provide

> a clear record of the source from which the income is imputed and the reasons for such imputation" (***Matter of Kristy Helen T. v Richard F. G.***, 17 AD3d 684, 685, 794 NYS2d 92, 93 [2d Dept 2005]). That discretion is considerable, but not unfettered by any means (***Matter of Ambrose v Felice***, 45 AD3d 581, 845 NYS2d 411 [2d Dept 2007]). To make the "clear record," the court must "specify the sources of income imputed, the actual dollar amount assigned to each category and the resultant calculations" (***Matter of Genender v Genender***, 40 AD3d 994, 995, 836 NYS2d 291, 292 [2d Dept 2007]).



Family Court Act section 451 (3) (a) and (b) establish subject matter jurisdiction for non-COLA adjustment cases. The heading of Family Court Act § 451 is "Continuing Jurisdiction." The language of Family Court Act § 451 (3) is grammatically identical to Public Health Law section 2801-c. The subject of the operative sentence is "the court" (Family Court Act § 451 [3]) and "[t]he supreme court" (Public Health Law § 2801-c). These are grammatically and functionally identical. The verb phrase is grammatically and functionally identical in both statutes; the verb phrase is

"may" followed by an action courts commonly take—modify an order (Family Court Act § 451 [3]) or enjoin violations (Public Health Law § 2801-c). "It is a recognized principle that where a statute has been interpreted by the courts, the continued use of the same language by the Legislature subsequent to the judicial interpretation is indicative that the legislative intent has been correctly ascertained" (***Matter of Knight-Ridder Broadcasting v Greenberg,*** 70 NY2d 151, 157, 518 NYS2d 595, 598 [1987]).

Public Health Law section 2801-c relates to subject matter jurisdiction (***Fritz v Huntington Hospital*** (39 NY2d 339, 384 NYS2d 92 [1976]), so the identically constructed Family Court Act section 451 (3) likewise relates to subject matter jurisdiction.

A statute may affirmatively grant standing (***Matter of Rueda v Charmaine D.***, 17 NY2d 522, 934 NYS2d 72 [2011]). In ***Charmaine D.***, the Court of Appeals reviewed Mental Hygiene Law § 9.27 (b) that defines who has a judicially cognizable interest to seek the "involuntary care and treatment" of another person. The statute affirmatively granted standing to several categories of persons. The Objections interpret Family Court Act § 451 (3) to mean nothing more than a person who shows any of the 451 (3) bases may bring a modification of a support order proceeding. The Objections' position is that 451 (3) empowers parties.

Standing, a concept related to the particular circumstances of a party's injury in fact, must be raised by motion (*e.g.*, ***Matter of Brooke S.B. v Elizabeth A.C.C.***, 28 NY3d 1, 39 NYS3d 89 [2016]) whereas, in contrast, a court's lack of jurisdiction/power and authority to act may be raised without a motion (***Matter of Fry v Village of Tarrytown***, 89 NY2d 714, 658 NYS2d 205 [1977).

Unlike ***Charmaine D.*** which involved a statute explicitly granting standing to parties, ***Fritz v Huntington Hospital*** (39 NY2d 339, 384 NYS2d 92 [1976]) involved a statute that grants power and authority to a court to act and has no bearing on standing; in ***Fritz***, the Court of Appeals indicated that when a statute establishes the power and authority of a court to hear a category of cases, the standard standing rule—injury in fact—applies.

The statute in ***Fritz*** is Public Health Law section 2801-c, which provides, "The supreme court may enjoin violation or threatened violations of any provisions of" Public Health Law article 28. The ***Fritz*** court confronted the question of whether 2801-c in conjunction with Public Health Law section 2801-b denied standing to a physician seeking review of the hospital denial of privileges to that physician. The Court of Appeals held "where the Legislature has enacted a statute which envisages the enforcement of rights thereunder but does not explicitly set forth who shall have standing to maintain enforcement [of rights] proceedings … a party suffering injury in fact and arguably falling within the zone of interest to be protected by the statute has standing to sue" (***Fritz***, 39 NY2d at 346, 384 NYS2d at 97).

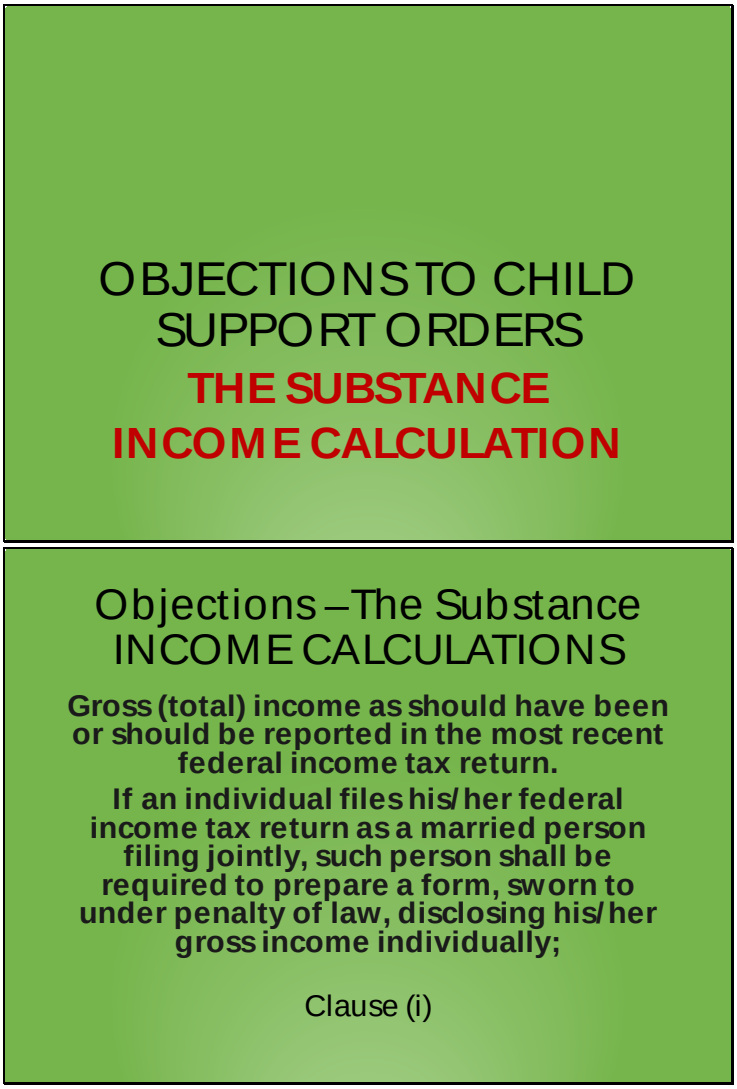
The question then, is whether Family Court Act § 451 (3) is a party-empowering statute as in ***Charmaine D.*** or a court-empowering jurisdictional statute as in ***Fritz***. For two reasons, this Court holds that Family Court Act § 451 (3) is a court- empowering statute.

First, the heading of Family Court Act § 451 is “Continuing Jurisdiction,” and does not use the word “standing.”

Second, the language of Family Court Act § 451 (3) is grammatically identical to Public Health Law section 2801-c. The subject of the operative sentence is “the court” (Family Court Act § 451 [3]) and “[t]he supreme court” (Public Health Law § 2801-c). These are grammatically and functionally identical. The verb phrase is grammatically and functionally identical in both statutes; the verb phrase is “may” followed by an action courts commonly take—modify an order ((Family Court Act § 451 [3]) or enjoin violations (Public Health Law § 2801-c).

Therefore, because Family Court Act § 451 (3) is jurisdictional, and not-standing related, Petitioner bore the burden of proving each element of a basis set forth in Family Court Act § 451 (3) for the court to act. That proof is a condition precedent to the Support Magistrate undertaking a recalculation of child support. Once that basis is established, the court does not have discretion not to undertake the process of recalculating child support; any discretion arises only after the calculation is determined to be unjust or inappropriate (Family Court Act § § 413 [1] [g] and [f]).

Contractual efforts to eliminate the three year rule and the 15% rule are expressly recognized by Family Court Act section 451. However, a contract cannot limit the reach of Family Court Act § 451 (3) (a). "Despite the fact that a separation agreement is entitled to the solemnity and obligation of a contract, when children's rights are involved the contract yields to the welfare of the children. The duty of a parent to support his or her child shall not be eliminated or diminished by the terms of a separation agreement, nor can it be abrogated by contract” (***Matter of Thomas B. v Lydia D.***, 69 AD3d 24, 30 [1st Dept 2009]).

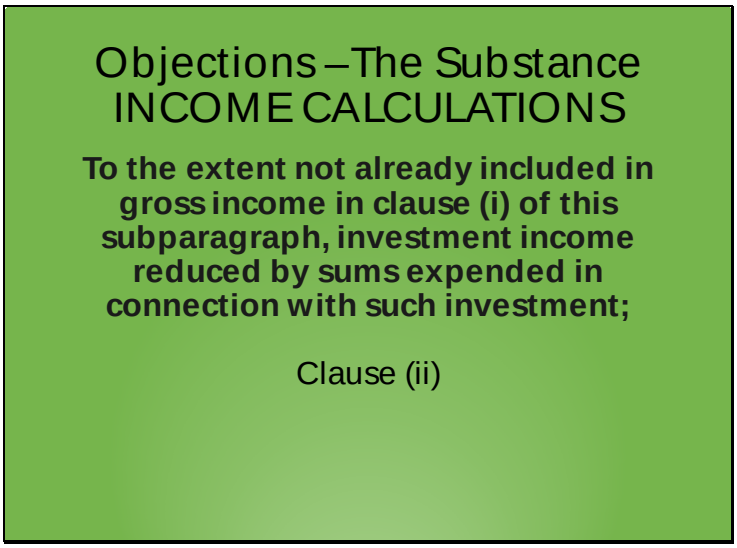


Family Court Act section 413 (1) (b) (5) has seven clauses that define how to calculate income. Your objections should identify that the objection is to income calculation and describe what clause is involved. Then, explain where the error exists.

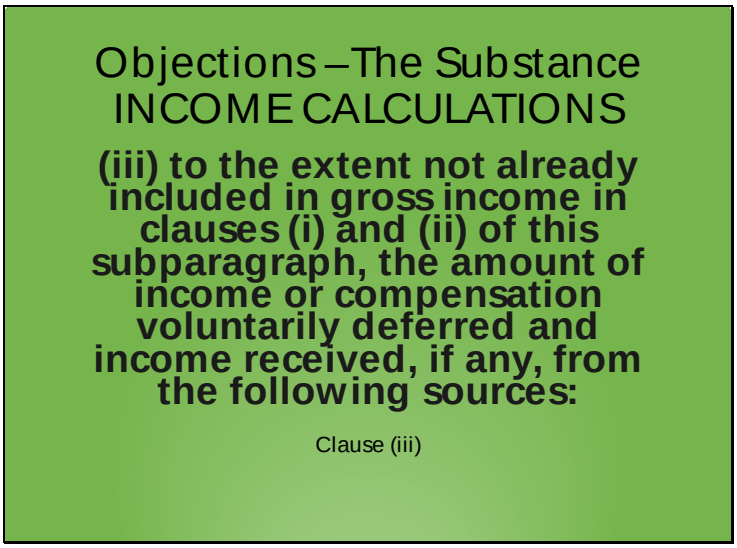
Despite the plain words of the statute, the court may rely on more current information, including the paystubs that a party must file by authority of Family Court Act section 424-a and 413 (1) (j) (***Matter of Feliciano v Elghouayel,*** 164 AD3d 1238, 83 NYS3d 587 [2d Dept 2018]). Where May to December income for year one was available through a tax return and earnings statements for a part of year two were available, the court should have used the year two earnings statements "to estimate the [parent's] income for a full year" (***Nosratabdi v Aroni***, -- AD3d --, -- NYS3d --, 2021 NY Slip Op 5862 at *2 [2d Dept October 27, 2021]). The language here is not of imputation, but is of calculation.

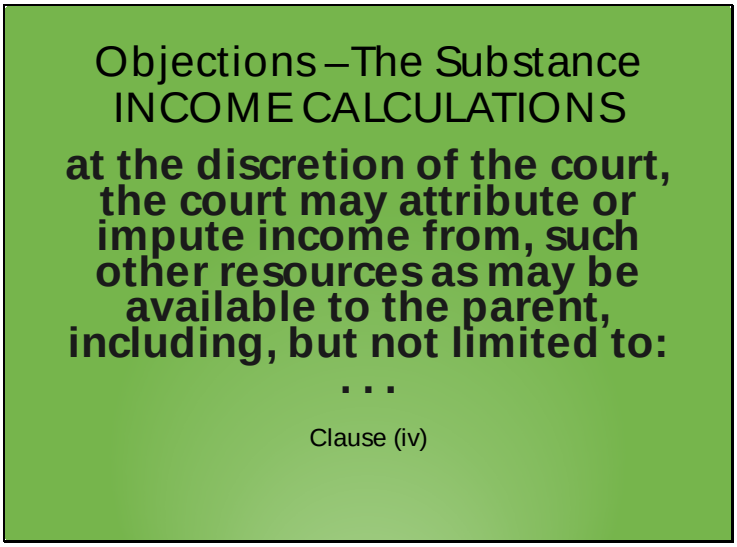
Objections that argue about the variability of income because of overtime or commission must overcome the rules set forth in (***Koutsouras v Mitsos-Koutsouras***, 2021 NY Slip Op 05328 [2d Dept 2021]; ***Wallach v Wallach***, 37 AD3d 707, 831 NYS2d 210 [2d Dept 2007]).

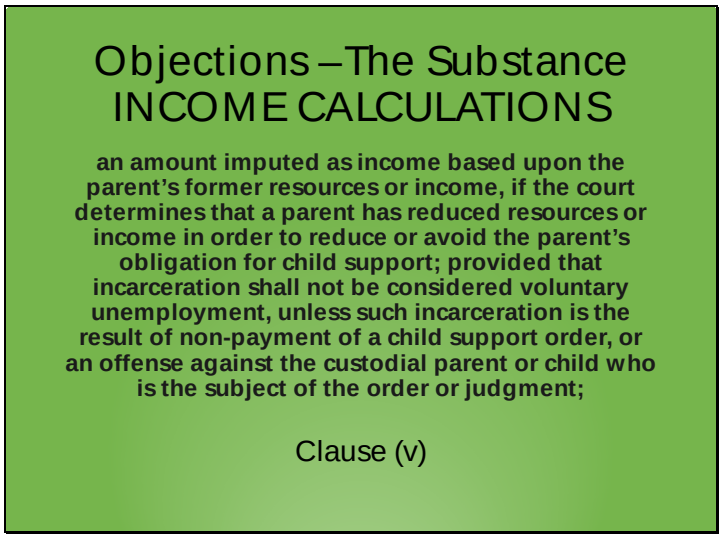
Income calculation, like any other finding of fact, must be upheld if it has a basis in the record (***Matter of Amanda YY v Faisal ZZ***, -- AD3d --, - NYS3d --, 2021 NY Slip Op 06851 [3d Dept 2021]).



This covers, among other things, tax-exempt income. In addition, be on the lookout for depreciation and other non-cash expenses that reduce investment income (especially in real estate rental activities) to or below zero. If these issues are preserved before the Support Magistrate, they may be raised on objections.







A voluntary reduction to pursue something not income generating in the long or short term and otherwise not explained requires, under Family Court Act § 413 [1] [b] [5] [v] income imputation (***Matter of Zwick v Kulhan***, 226 AD2d 734, 641 NYS2d 861 [2d Dept 1996]). However, a voluntary reduction is not always cause to impute. Payor-parent quit a NY job to relocate with payor-parent's new spouse who had accepted a job with overall income that exceeded the amount by which the payor-parent's overall income dropped. The Family Court held that it was mot permitted to reduce the payor-parent's child support obligation because the income loss was voluntary. This is an abuse of discretion because "[t]he general rule that a parent who voluntarily quits a job will not be deemed without fault in losing such employment . . . should not be inflexibly applied where a parent quits a job for a sufficiently compelling reason" (***Matter of Montgomery v List***, 173 AD3d 1657, 1658, 104 NYS3d 800, 802 [4th Dept 2019] [internal quotations and citations omitted]). However, in this case, the Family Court should have exercised its discretion to impute income based on the payor-parent's demonstrated earning potential and/or to impute a portion of the new spouse's income to the payor-parent.

Objections – The Substance
INCOME CALCULATIONS

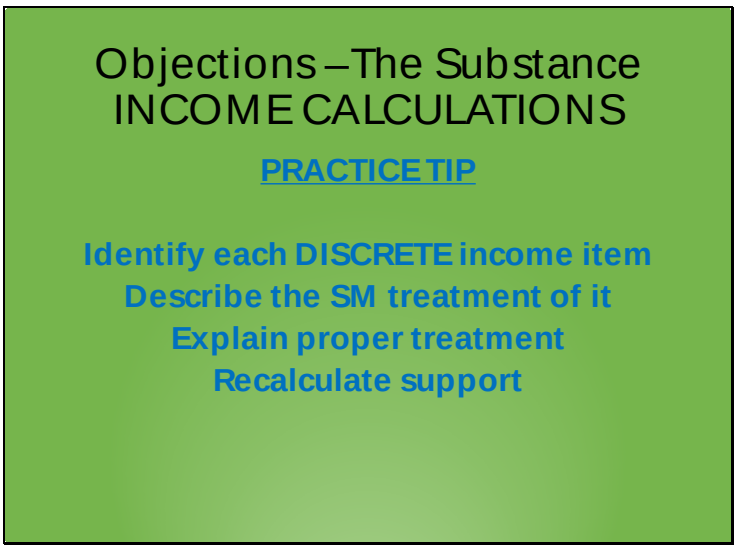
to the extent not already included in gross income in clauses (i) and (ii) of this subparagraph, the following self-employment deductions attributable to self-employment carried on by the taxpayer:

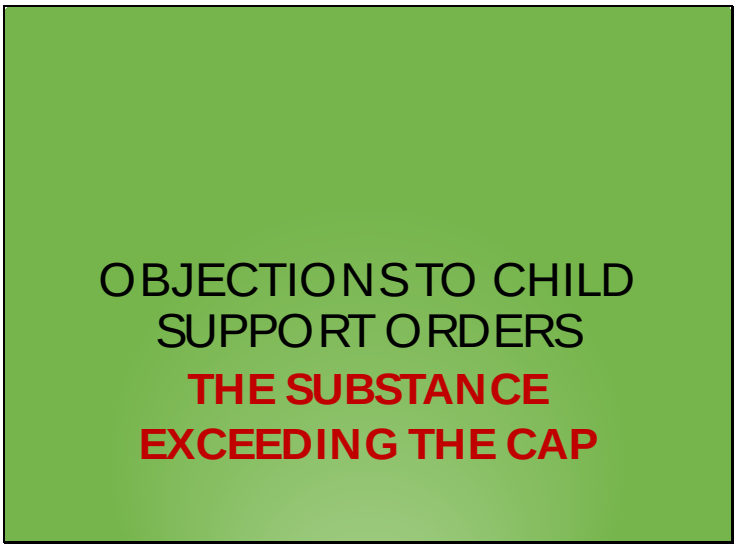
Clause (vi)

Objections – The Substance
INCOME CALCULATIONS

Income reductions

Clause (vii)

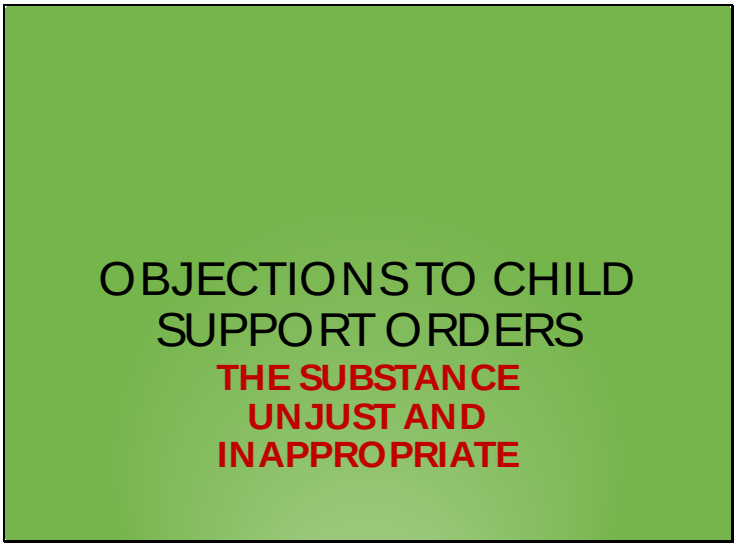


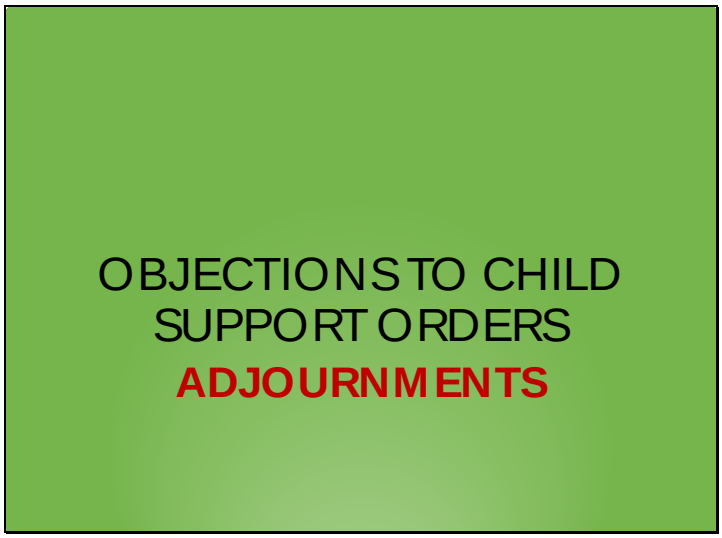


In ***Matter of Ward v Hall*** (188 AD3d 1222, 132 NYS3d 879 [2d Dept 2020] the Appellate Division noted the "thorough analysis of the parties' financial situation, including the father's considerable income, the income disparity between the parties, the father's child support obligations for other children not subject to this proceeding and the living conditions and needs of the parties' child." This degree of analysis, particularly when child support is being paid in respect of other children, strongly supports a party's position.

In ***Matter of Hipp v Ryan*** (188 AD3d 1206, 132 AD3d 802 [2d Dept 2020]) the Second Department cited ***Matter of Peddycoart v MacKay*** (145 AD3d 1081, 45 NYS3d 135 [2d Dept 2016]) which held that awards above the cap must reflect "careful consideration."

To show the careful consideration, cite to specific pieces of evidence and relate those pieces of evidence to specific paragraph [f] factors.





Adjournments are within the court's sound discretion (***Matter of Konig v Fabrizio***, 176 AD3d 1066, -- NYS3d – [2d Dept 2019]; ***Matter of Dench-Layton v Dench-Layton***, 151 AD3d 1199, 56 NYS3d 598 [3d Dept 2017]). Thus, a basis in the record support the granting or denial of an adjournment.

However, the fourteen day rule should be applied (22 NYCRR 205.43) to enforcement and violation petitions. The parties (and, for that matter, the family court) does not have authority to disregard and contravene that rule of the Chief Administrator. Moreover, relief through objections for an unduly long adjournment may be available (*see*, ***Matter of Carmen R. v Luis I.***, 160 AD3d 460, 463, 74 NYS3d 37, 40 [1st Dept 2018]).

Bias must be preserved (***Matter of Hayward v Rodriguez***, 179 AD3d 795, 118 NYS3d 55 [2d Dept 2020]). In ***Matter of Berg v Berg***, (166 AD3d 763, 88 NYS3d 248 [2d Dept 2018]), the Second Department reached the issue of bias in the interest of justice because during a confirmation and incarceration hearing the judge called the respondent lazy, arrogant, selfish, self-interested, and self-seeking. The judge told the respondent that respondent would fold like a cheap suit in a foxhole. The judge compared respondent conduct to the judge's own experience. Then, the sentence to four times what the magistrate recommended made the bias all the more apparent.

Matter of K.T. v M.T.
2021 NY Slip Op 51118(U)
Decided on November 24, 2021
Family Court, Suffolk County
Hensley, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on November 24, 2021

Family Court, Suffolk County

Docket: REDCATED

Dorothy Courten, Esq. for Petitioner; Jeffrey Schechter, Esq. for Respondent.

Paul M. Hensley, J.

On November 5, 2021, Petitioner timely filed objections (Objections) to the October 8, 2021 Order on Motion (K. L. Coward, S.M.) (Order). The Objections were accompanied by a proper proof of service. No one filed rebuttal. The matter is now before this Court for decision on the Objections.

In reaching this Decision, this Court reviewed and relied on the motion brought by order to show cause, the cross-motion which includes a request for attorneys fees because the motion is frivolous and which constitutes the opposition to the motion, the opposition to the cross-motion which is also captioned as a reply, and the Order.

Petitioner served two judicial subpoenas duces tecum, one on Gold Medal Gymnastics (Gold Medal Subpoena) and one on Teachers Federal Credit Union (TFCU Subpoena). The Gold Medal Subpoena bears a caption of a supreme court action. The TFCU Subpoena bears a caption of this family court special proceeding. Petitioner sent the subpoenas to Respondent, who stood [*2]mute upon receipt. Petitioner received responsive documents to the TFCU Subpoena and sent copies thereof to Respondent approximately three days later. Respondent stood mute for another three weeks before filing the motion brought by order to show cause.

The motion sought relief because the Petitioner issued a judicial subpoena duces tecum seeking disclosure (*see*, CPLR art 31) in a special proceeding without leave of court as required by the black letter language of CPLR 408 which is incorporated into the Family Court Act (Family Court Act § 165). Insofar as relevant here, the Order directed Petitioner to pay attorneys fees of $2,000.00 to Respondent in respect of the motion practice related to the subpoenas. Although

paragraph 'f' of the order to show cause sets forth a request for sanctions (22 NYCRR 130-1.1) in the amount of the attorneys fees Respondent incurred, the Order cites only to the discretionary authority of the family court to award attorneys fees (Family Court Act § 438 [a]). Thus, the attorneys fees award of $2,000.00 was discretionary, and the Support Magistrate did not find the Petitioner's conduct frivolous.

The Petitioner objects, as limited by the Objections, to the award of attorney fees.

"The Court (Support Magistrate) notes a trial on the underlying action commenced on June 8 and continued on July 29" (Order on Motion at 1). Those dates appear to be in 2021. Petitioner filed the petition on July 9, 2020, one day shy of eleven months before the trial began. These parties' child support disagreement remains unresolved, and the next scheduled trial date is December 20, 2021 (Guide to NY Evid rule 2.01, Judicial Notice).

I. Implicit Conversion of the Motion for Sanctions to a Motion Addressed to the Court's Discretion for Attorney Fees

The general language in the order to show cause is sufficient notice to the Petitioner that the Court or the Respondent might seek to convert the sanctions application to a discretionary attorneys fees application (***Matter of Perso v Perso***, NYLJ, Feb. 8, 2019 at 42 [Family Ct Suffolk County 2019] [Hensley, AJFC]). The implicit conversion demonstrates that the Support Magistrate found the Petitioner's lawyer's conduct non-frivolous. This Court honors that finding by not finding Respondent's lawyer's conduct as set forth below frivolous even though both attorneys appear to have acted in direct contravention of controlling legal authority in this case which has already dragged out for over 17 months.

II. Final Order

An aggrieved party may file objections to a final order of a support magistrate (Family Court Act § 439 [e]). "The concept of finality is a complex one that cannot be exhaustively defined in a single phrase, sentence or writing *(see generally,* Cohen and Karger, Powers of the New York Court of Appeals § 9, at 39; Scheinkman, *The Civil Jurisdiction of the New York Court of Appeals: The Rule and Role of Finality*, 54 St John's L Rev 443). Nonetheless, a fair working definition of the concept can be stated as follows: a "final" order or judgment is one that disposes of all of the causes of action between the parties in the action or proceeding and leaves nothing for further judicial action apart from mere ministerial matters *(see generally*, Cohen and Karger, *op. cit.*, §§ 10, 11) (***Burke v Crosson***, 85 NY2d 10, 15, 623 NYS2d 524, 527 [1995]).

Merely because an order resolves a motion, the order is not necessarily a final order (***Matter of Tobing v May***, 168 AD3d 861, 92 NYS3d 299 [2d Dept 2019] [denial of a motion to [*3]dismiss is not a final order]). Moreover, one or more of the parties might differently evaluate the appellate process regarding a motion of which objections are a part (*e.g.*, ***Matter of Musarra v Musarra***, 28 AD3d 668, 814 NYS2d 657 [2d Dept 2006]) after the merits of the proceeding are resolved. Although the portion of the Order to which Objections were filed has less to do with the substantive outcome of the special proceeding than does the Order's impact on Petitioner's ability to secure information about Respondent's financial condition, the question of what constitutes a final order should be taken not on a segmented or compartmentalized view but on an overall view of the order

at issue. In other words, a party's structuring of objections should not drive the analysis of whether an order is final or interlocutory.

Here, because the Petitioner could have objected to more of the order (this Court expressing no opinion on the likely outcome of those as-of-now hypothetical objections) and because those other aspects of the order would have been brought up by objections to a final order of support or dismissal (*cf.* CPLR 5501), the Order is an interlocutory order.

III. Irreparable Harm

Anything not a "final order" is an interlocutory order (***Matter of Fischer v Fritzch***, 35 AD3d 1146, 827 NYS2d 732 [3d Dept 2006]) and, therefore, not subject to the objection process unless the aggrieved party demonstrates irreparable harm (***Matter of Tobing v May***, 168 AD3d 861, 92 NYS3d 299 [2d Dept 2019]). Where the harm is financial and the burden of continuing the special proceeding with the attendant expenses related to litigation, the harm is not irreparable (***Id.***). However, if the family court acts without power and authority irreparable harm arises (***Matter of McGrath v McGrath***, 166 Misc 2d 512, 633 NYS2d 694 [Erie County Family Ct 1995] *cited by* ***Matter of Tobing v May***, 168 AD3d 861, 92 NYS3d 299 [2d Dept 2019]).

A. Power and Authority of the Court

A party seeking an award of attorneys fees must prove compliance with 22 NYCRR 1400.2 and 22 NYCRR 1400.3 (Matrimonial Rules) in the party's moving papers (***Gottleib v Gottleib***, 101 AD3d 678 , 957 NYS2d 132 [2d Dept 2012]). ***Matter of Tarpey v Tarpey***(163 AD3d 687, 81 NYS3d 426 [2d Dept 2018]) reversed the denial of objections to an award of attorneys fees. In ***Tarpey***, like in ***Gottleib***, the movant's motion papers did not show substantial compliance with the long-ago enacted regulations, and the Second Department vacated the attorneys fee award.

The absence of essential (required) allegations of facts makes the application for attorneys fees in a matrimonial matter subject to dismissal for failure to state a cause of action (CPLR 3211 [a] [7]; ***Swergold v Weinrib***, 193 AD3d 1094, 147 NYS3d 112 [2d Dept 2011]). That means that the pleadings, on their face, failed to invoke the subject matter jurisdiction of the court. In ***Swergold***, the attorney's motion papers did not establish compliance with the Matrimonial Rules.

Here, the movant's papers are bereft of evidence that the movant's attorney substantially complied with the black letter language of 22 NYCRR 1400.2 which relates to one issue—providing a client with a verbatim copy of the statement of client's rights and responsibilities and obtaining a signed "acknowledgment of receipt from the client" (22 NYCRR 1400.2). Respondent's attorney included in the papers in support of the motion brought by order to show [*4]cause an affirmation from that attorney that contains a mixture of allegations of fact and positions and arguments of law (*but see*, 22 NYCRR 205.11 [b]). "Annexed [to the affirmation of Respondent's attorney] as **Exhibit "D"** is a copy of Respondent's retainer agreement with this firm for this matter" (Affirmation of Respondent's attorney dated September 17, 2021 [emphasis in original] [hereafter, Atty Aff]).

The last paragraph of the retainer agreement sets forth:

> Kindly acknowledge that you have been provided with and have read the Statement of Client's Rights and Responsibilities, a copy of which is attached to this Retainer Agreement. Indicate your understanding and acceptance of the above by signing the letter below where indicated. We look forward to being of service to you in connection with this matter.

(Atty Aff, Exhibit D at 5). The client's signature is absent from the retainer agreement. Moreover, even if the client signed the retainer agreement which, for purposes of this motion, the attorney admits that the Respondent did not, the attorney promised to attach the specific statement of client's rights and responsibilities that someone (and not necessarily the attorney, based on the passive voice construction of the first quoted sentence) previously provided to the client. The attachment is absent from the retainer agreement. Exhibit D is five pages and has no attachments to the retainer agreement.

22 NYCRR 1400.3 requires that a retainer agreement in a special proceeding like this "shall be signed by both client and attorney." The attorney admits, for purposes of this motion, that the Respondent did not sign the retainer agreement.

The Respondent executed an affidavit in support of the motion brought by order to show cause. Respondent adopted the contents of the attorney's affirmation (Affidavit of Respondent sworn to on September 17, 2021, ¶ 2). Therefore, the Respondent also admits that the Respondent did not sign the retainer agreement and did not execute a written acknowledgment of when the attorney furnished, if at all, the statement of client's rights and responsibilities.

The billing statement (Atty Aff Exhibit E) does not show that the attorney carefully reviewed the Respondent's affidavit with the Respondent, or even discussed the subpoenas, affidavit, or motion practice with the client. The only client contact between Respondent and Respondent's attorney, according to the billing statement, was a telephone call on September 17, 2021 for one quarter of an hour for which the attorney did not charge Respondent (Atty Aff Exhibit E; *see also*, Atty Aff ¶ 13).

Equally absent from the motion papers is anything to indicate that the Respondent's attorney sent the affirmation to Respondent or otherwise discussed the affirmation.

This Court does not find that the no charge telephone call on September 17, 2021 for one quarter of an hour constituted a thorough review of the multi-page, multi-exhibit attorney affirmation and the client affidavit, particularly because Respondent's attorney would have had to explain that the documents attached to the affirmation, especially Exhibit D, preclude Respondent's attorney from being paid for the motion (*see,* Rules of Professional Conduct [22 NYCRR 1200.0] rules 1.5 [a], 1.5 [d] [5] [ii]; Judiciary Law § 474).

Despite the absence of conversation, Respondent adopted the attorney's affirmation and is bound by it.

This Court acknowledges the irony of Respondent bringing a motion criticizing [*5]Petitioner's counsel for serving a subpoena for discovery (as opposed to for trial) without permission of the Court, an action that the law obviously prohibits (CPLR 408) when

Respondent has proceeded equally outside the obvious dictates of the controlling law (22 NYCRR 1400.2 and 1400.3).

The fee receipt set forth on the billing statement is dated September 15, 2021, but the billing statement was issued on September 17, 2021. The motion papers offer no explanation of how the Respondent paid the precise amount — to the penny — of the attorney fee related to the subpoenas two days ahead of when the attorney completed the work and then issued the billing statement. In other words, after Respondent paid the full amount, the law firm conducted other work. The motion papers lack an explanation of this degree of precision forecasting.

In contrast to ***Perso***, here this Court does not remand the issues to the Support Magistrate. Here, unlike ***Perso***, this special proceeding has dragged on for over 17 months with no end in sight, and the parties undoubtedly want resolution not further litigation when the necessary facts to resolve the Objections are fully available to this Court. Also, here, unlike ***Perso***, the Order is not a final order. Part of the final order requirement is to avoid sidetracking litigation, so this Court making its own order and findings prevents (further) sidetracking of the litigation. Thus, this Court makes the findings of fact set forth in this Decision (Family Court Act § 439 [e] [ii]) and concludes that the moving papers Respondent filed do not, prima facie, prove substantial compliance — and, in fact, demonstrate non-compliance — with either of 22 NYCRR 1400.2 or 22 NYCRR 1400.3. Therefore, the family court is without jurisdiction to award attorney fees on Respondent's motion. Because the Order arose without the proper, prima facie, invocation of the court's jurisdiction, irreparable harm exists.

B. Public Harm — Matrimonial Rules

The Matrimonial Rules, amended from time to time after their 1993 adoption, are designed "to address abuses in the practice of matrimonial law and to protect the public" (***Julien v Machson***, 245 AD2d 122, 122, 666 NYS 147, 148 [1st Dept 1997] *quoted in* ***Gahagan v Gahagan***, 51 AD3d 863, 859 NYS2d 218 [2d Dept 2008]; *see also*, ***Greco v Greco***, 161 AD3d 950, 77 NYS3d 160 [2d Dept 2018]). Given these purposes of the Matrimonial Rules, this Court holds that the irreparable harm exception to the final order requirement applies when a court confronts the sorts of abuses and harms that triggered the enactment of the Matrimonial Rules over one-quarter century ago.

The judiciary must act swiftly to correct actions that contravene the public interest. Given the binding appellate precedent about the Matrimonial Rules purposes of protecting the public, the irreparable harm doctrine must apply to protect the public interest, rather than waiting to invoke the long-established public protecting rules.

C. Public Harm — Rules of Professional Conduct

Similarly, the Rules of Professional Conduct are designed to protect against "abuse of the adversary system and resulting harm to the public at large" (***Greene v Greene***, 47 NY2d 447, 451, 418 NYS2d 379, 381 [1979]). When faced with questions the implicate the public interest, the Court of Appeals terms a court's conduct "egregious" if the court allows contravention of rules designed for protection of the public to persist (***Id.*** at 452, 418 [*6]NYS2d at 382). The Court of Appeals requires lower courts to prevent and eliminate threats to "the overriding public interest in the integrity of our adversary system" (***Id.***at 453 , 418 NYS2d at 383).

Although ***Greene***is a conflict of interest case, where the result may be removal of a party's chosen lawyer, no principled reason exists to distinguish ***Greene*** from this case where the lawyer'sfinancial interests (collecting a fee) are adverse to that of the lawyer's client who, based on this motion record, appears to have no duty to pay the fee, but might otherwise not know that, particularly where, as here, lawyer and client spent no more than fifteen minutes discussing the various documents and the entire motion.

Given the Court of Appeals precedent, the irreparable harm doctrine must apply to protect the public interest and to preserve the judiciary's integrity.

D. Harm to Reputation

Because the Order, in effect, did not find the Petitioner's attorney's conduct frivolous, and because this Court even handedly treated Respondent's attorney's conduct that was equally disallowed by controlling law, neither lawyer has a reputation interest at stake. Therefore, this Court makes no decision and expresses no opinion about whether the irreparable harm doctrine applies if a non-final order of a support magistrate carries a stigma or penalty based on attorney conduct.

IV. The Merits

Based on the analysis set forth above, on this motion, Respondent is ineligible to recoverattorney fees. Thus, on the merits, the Objections are GRANTED.

As a result of the determination of ineligibility, this Court does not need to reach the obvious questions of (A) why Respondent's attorney did not call or write to Petitioner's attorney to object to the TFCU Subpoena shortly after Petitioner's attorney sent it to Respondent's attorney, (B) why Respondent's attorney did not move to quash the TFCU Subpoena when Respondent's attorney possessed every fact needed to succeed on such a motion, (C) why laches should not apply given that a colorable claim exists that Respondent's attorney did not seek immediately to correct obviously improper procedure and, instead, waited until Respondent's might seek a more punitive remedy, and/or (D) why Respondent's attorney apparently does not concede that Petitioner's attorney could have issued a trial subpoena without leave of court either to the credit union or to the Respondent.

As a result of the determination of ineligibility, this Court does not need to reach the obvious questions of (A) why Petitioner's attorney was midstream in trial before seeking disclosure, (B) why Petitioner's attorney did not seek the required court permission to conduct disclosure—especially during trial, (C) whether Petitioner's attorney's effort to have the documents produced at Petitioner's attorney's office is proper—even in conjunction with a return being made to the Clerk's office, and/or (D) why Petitioner's attorney did not issue trial subpoenas.

These issues about the reasonableness of the fees and behaviors of each of the attorneys relate the amount of the possible discretionary fee award because the conduct of the parties and positions each adopts are relevant to discretionary fee awards under Family Court Act section [*7]438 (***Matter of Westergaard v Westergaard***, 106 AD3d 926, 927, 964 NYS2d 179, 179-180 [2d Dept 2013]). Because the Respondent is ineligible to collect fees on this motion based on the motion record that Respondent developed, this Court abstains from any further comment on what might constitute reasonable fees in a 17-month old child support case that appears not to be set for hearing

on a day-to-day basis (*cf.* ***Liu v Ruiz***, — AD3d —, — NYS3d —-, 2021 NY Slip Op 06089 [1st Dept 2021]).

Another point that this court need not reach but notes in case the issue arises later (***People v Abdul***, 76 AD3d 563, 906 NYS2d 594 [2d Dept 2010] [Appellate Division addresses a significant issue to facilitate orderly litigation between the same parties) in this already protracted litigation is whether an attorney has the authority to issue a subpoena in the name of the court. So much of the form of subpoena where the name of the, in this case, Support Magistrate appears and the attorney affixes the attorney's signature is proper (Family Court Act § 165; CPLR 2302 [a]).

V. Conclusion

Based on the foregoing, the Objections are GRANTED, and so much of the Order that awarded attorney fees is vacated, and any amount so paid must be refunded immediately.

CONSTRUCTIVE EMANCIPATION

The leading constructive emancipation case, ***Matter of Roe v Doe*** (29 NY2d 188, 193, 324 NYS2d 71, 74-75 [1971]) holds, "that where by no fault of the parent's part, a child voluntarily abandons the parent's home for the purpose of . . . avoiding parental discipline and restraint, the child forfeits the claim to support. To hold otherwise would be to allow . . . a minor of employable age to deliberately flout the legitimate mandates of [the minor's] father while requiring that the latter support [the child] in [the child's] decision to place [the child] beyond [the parent's] effective control." Constructive emancipation cases involve not an abandoned child, but, instead, an abandoned parent (***Matter of Parker v Stage***, 43 NY2d 128, 400 NYS2d 794 [1977]).

Despite the now anachronistic linguist flourishes in ***Roe***, the holding endures and, that case's facts strikingly parallel this special proceeding on each of the four abandoning behaviors ***Roe*** cited. In ***Roe***, the child moved out of the college dormitory and into an off-campus apartment against the parent's wishes. Here, the child abandoned college housing for a non-college approved fraternity against the parent's wishes.

In ***Roe***, the child "has experimented with drugs (LSD and marijuana), apparently without addiction" (***Roe***, 29 NY2d at 192, 324 NYS2d at 73). Here, the younger child is using drugs, including alcohol (despite being underage) and nicotine or other drugs being delivered through the child's vaping.

In ***Roe***, the child did not return home upon the parent's demand when the parent learned that the child had lied about the child's housing. Here, the child left home to return to the fraternity house despite the parent's objection.

In ***Roe***, "[a]cademically, the [child] fared poorly, and was placed on academic probation" (***Roe***, 29 NY2d at 191, 324 NYS2d at 73). Here, the child flunked out of college, doing even worse than the child in ***Roe***. These parties' younger child vacationed just two weeks before final exams; the vacation was to an international destination designed to permit the child to escape the legal drinking age in the several states of the United States and to consume alcohol legally in the destination. The younger child's ultimate fate at college (that the Support Magistrate gently terms "dismissal") hardly triggers surprise given the younger child's attitude toward the responsibilities of a student and toward the responsibilities of a child whose parents finance that child's education as demonstrated by the array of behaviors that the younger child undertook, most of which behaviors contravened the guidance of the parents. .

The ***Roe*** court concluded that although "the obligation [to support a child] cannot be avoided merely because a young enough child is at odds with [the] parents or has disobeyed their instructions: delinquent behavior of itself, even if unexplained or persistent, does not generally carry with it the termination of the duty of a parent to support" (***Roe***, 29 NY2d at 193, 324 NYS2d at 74), the constellation of behaviors sufficiently exceeded the acceptable limits of a child's behavior.

Here, in addition to the already-cataloged similarities to the four ***Roe*** behaviors, this child, when not away in the college community, refused to live in Father's home despite the parent's stipulation of settlement so providing. This child, when living with the Father, refused to comply with the house rules of completing chores and not vaping. This child made no effort of any meaningful degree to respond to Father's numerous overtures which align with Father's forgiving mindset that Father demonstrated by assisting the child in transitioning from the unsuccessful college experience in a distant community to an academically successful experience much closer to each of the parent's homes. Essentially, the parties' younger child would occasionally run into the Father at some family events and may have responded here and there to Father's outreach.

No bright line rule of the number of communications establishes non-withdrawal, so the overall analysis of constructive emancipation is based on the totality of the circumstances. Here, the Support Magistrate's thorough findings of fact establish that the parties' younger child has withdrawn from the relationship with the Father.

The child lacks any cause to withdraw. First, despite the child's disobedience and consequent (and hardly unforeseeable) expulsion from college because of deficient academic performance, Father remained engaged with the child to try to place the child in a different college setting, closer to home. Second, even after a long period of the child's disobedience, the Father continued to give the child money—even though child had lied about the reasons that the child needed money. Third, Father's communications with the child kept the door open for the child to have a relationship with Father, but the child did not engage with the Father, for whatever reason—embarrassment at the immaturity that the child displayed; shame over the child's substance use; humiliation over having failed out of college; uncertainty about how to repair the fraying and ultimately frayed relationship; something else; or a combination of any of the foregoing.

The cause for the child's withdrawal from a parental relationship must precede, not follow, the relationship's collapse. The cause the child, and by extension Mother, asserts for the child's withdrawal is that the child feels conflicted and, perhaps, inauthentic, because having a relationship with Father is inconsistent with Father trying to emancipate the child. This position falls flat for three reasons. First, Father has maintained an open door for the child for a legally significant time before Father responded to Mother's petition with the constructive emancipation petition. The record does not allow a finding at this level about whether Father remains open to a relationship with the rejecting child although given Father's demonstrated forgiveness and given that Father did not initiate support litigation, it appears that Father is willing to engage with the parties' younger child. Second, the constructive emancipation petition reflects Father's fair position established in ***Roe*** that the law ought not to reward an out of control child who rejects parental guidance and rules while demanding parental subsidy for the child's rejecting, out of control behavior. Third, Mother, with whom the younger child lives, brought the petition that led to Father's petition seeking to declare the child constructively emancipated; thus, child's redefinition of the legal proceedings as Father seemingly lashing out at the child and thereby victimizing the child has no basis in the facts.

So much of the Objections' position that allege that the child withdrew because Father imposed unreasonable conditions on the child is equally unsupported by the facts. Asking that a child remain clean and sober, do basic household chores, work or attend school, and engage at

least minimally with the parent are not "unreasonable or capricious . . . [and] cannot be said to amount to a showing of misconduct, neglect or abuse" that excuses the child from minimal courtesy and respect (***Roe***, 29 NY2d at 75, 324 NYS2d at 75).

FINANCIAL INDEPENDENCE

"Children are emancipated if they become economically independent of their parents through employment, entry into military service, or marriage, and may also be deemed constructively emancipated if, without cause, they withdraw from parental control and supervision" (***Matter of Alice C. v Bernard G.C.***, 193 AD2d 97, 105, 602 NYS2d 623, 628 [2d Dept 1993]). "[A] child who is not financially self-sufficient may nevertheless be deemed emancipated if he or she abandons the parental home without sufficient cause and refuses to comply with reasonable parental demands" (***Id.*** at 106, 602 NYS2d at 629). The Objections stress that the younger child cannot be self-supporting given that child's 25-30 hours of work per week at a restaurant hardly yields a living wage. This argument addresses emancipation (financial independence), not constructive emancipation (withdrawal from the relationship).

CONTRACTUAL EMANCIPATION

No one disputes that (A) the older child took summer classes because certain required courses were not offered every semester, and (B) the summer classes filled degree requirements. As a result of having taken the summer classes, the older child is taking, by everyone's acknowledgment, less than a full course load in the older child's final college semester.

The outcome of this case turns on the interpretation of this language from two portions of the parties' stipulation:

> In the event that either of the children, upon graduating from high school, attends a fully accredited college or university on a full-time basis and matriculates in a course of study leading to an undergraduate degree, the parties shall contribute toward payment the reasonable educational expenses of such child . . .

(Stipulation of Settlement, Court Exhibit 1 at art XXXII, page 39). The parties do not dispute that educational expenses are a component of child support which, of course, ends at emancipation. The emancipation extension these parents agreed to is:

> In the event that either of the children, upon graduating from high school, attends a fully accredited college or university on a full-time basis and matriculates in a course of study leading to an undergraduate degree, the emancipation date for either of the children shall be their twenty-second birthday.

This Court abides by precedent holding:

> A stipulation of settlement entered into by parties to a divorce proceeding constitutes a contract between them subject to the

> principles of contract interpretation. Where the intention of the parties is clearly and unambiguously set forth, effect must be given to the intent as indicated by the language used. A court may not write into a contract conditions the parties did not insert, or, under the guise of construction, add or excise terms, and it may not construe language in such a way as to distort the apparent meaning.

(***Matter of Abramson v Hasson***, 184 AD3d 768, 770, 125 NYS3d 730, 733 [2d Dept 2020] [internal quotations and citations omitted]). When defining terms in a contract, unless the context otherwise indicates, "[t]he words and phrases used in an agreement must be given their plain meaning so as to define the rights of the parties" (***Matter of Tillim v Fuks***, 221 AD2d 642, 643, 634 NYS2d 508, 509 [2d Dept 1995]). "To determine whether a writing is unambiguous, language should not be read in isolation because the contract must be considered as a whole" (***Brad H. v City of New York***, 17 NY3d 180, 185, 928 NYS2d 221, 224 [2011]).

The parties agree that the child turned 22 on April 10, 2019, during what turned out to be the last semester of college for the older child. No argument is advanced regarding whether any sort of pro ration of the college expenses should occur because emancipation occurred during the semester, nor is either party seeking determination of whether the date of payment of the a portion of the expense (here, based on the Petitioner's Exhibit 16, May 2, 2019, after emancipation) influences the outcome.

Here, the obligation of the parents to pay for college expenses is subject to two specific conditions introduced by the conditional phrase, "[i]n the event that." Each condition is set forth in specific behavioral terms using straightforward verbs. The first condition is that the child "attend a fully accredited college or university on a full time basis," and the second condition is that the child "matriculates in a course of study leading to an undergraduate degree."

Reading the two conditions together, the parties' intent is that each parent pay something toward college expense, so long as the child at issue is pursuing an "undergraduate degree" within the ordinary amount of time required to earn that degree. Here, the older child "matriculate[d]" (enrolled) in a course of study leading to an undergraduate degree. The condition that a child "attend . . . on a full time basis" protects each of the parents against dilettante or dabbler behavior of a child who stretches undergraduate studies through half a decade or more. The older child's undergraduate college career spans four or fewer years, so that career reflects "attend[ing] . . . on a full time basis," and satisfies the contract's first condition—that attending college be full time, language that means that the degree will be secured in the time that a full time student would earn the undergraduate degree.

The Order misreads the full time basis language to modify the verb matriculates. The adverbial phrase "full time" precedes the conjunction "and" that links the two verb phrases (conditions) and, thereby connects both verb phrases to the sentence's subject, "either of the children." "An adverb should usually be placed as near as possible to the word it modifies" (Margaret Shertzer, *The Elements of Grammar*, [Collier Books 1986] at 40; *see,* W. Strunk & E.B. White, *The Elements of Style, 4th Ed.* [Allyn & Bacon 2000] at ch II ¶ 20 ["Keep related words together"]). Therefore, the parties could not possibly have used this verbal formulation if the child

was required to matriculate (enroll) in a full time course load. Instead, the parties might have written, "matriculates in a full time course of study leading to an undergraduate degree," converting the adverbial phrase "full time" that modifies "attends" to an adjective phrase that answers the question "what kind?" or "which one?" regarding the noun phrase "course of study.".

Therefore, the branch of the Objections related to the older child are granted. Under the parties' judgment of divorce, the parties must contribute to any pre-emancipation college expenses in respect of the older child. The amount, and other effects of Father's apparent default, may require further fact-finding, so the proceeding must be returned to the Support Magistrate for further proceedings to determine how much, if anything, Father owes.

NEEDS BASED ORDERS – One idea

Respondent did not comply with the compulsory financial disclosure obligations (Family Court Act § 424-a) after having been warned of the consequences of the failure to disclose. The record lacks evidence sufficient to determine Respondent's income, so a needs-based order should issue (Family Court Act § 413 [1] [k]; ***Matter of Ennis v Pina***, 78 AD3d 830, 910 NYS2d 310 [2d Dept 2010]). A needs-based order is all the more appropriate when the disobedient party is not credible (***Id.***) as the Support Magistrate found Respondent to be.

Mother's monthly expenses for a household of two persons are $6,134.66 per month according to the financial disclosure affidavit. The child's share of those expenses, then, is $3,067.33 because Mother's household contains only Mother and the child.

Certain expenses are directly attributable to the child and are not listed on the affidavit: $150 for drum lessons and $100 for therapy, which appear to be monthly figures. Thus, the total needs of the child are $3,317.33 per month.

Mother's annual gross income as set forth in the tax return that Petitioner compliantly included within the compulsory financial disclosure is $126,557.00 from which $7,861.57 and $1,838.63 should be subtracted for FICA and medicare taxes actually paid as set forth on the form W-2 Petitioner properly included with the compulsory financial disclosure (Family Court Act § 413 [1] [b] [5] [vii] [H]), making Mother's income for child support purposes $116,856.80.

With one child, the applicable child support percentage is 17% (Family Court Act § 413 [1] [b] [3] [i]). Thus, Mother's portion of the child support for this child is 17% of $116,856.80, or $19,865.66 per year. On a monthly basis, that is $1,655.47.

The shortfall in meeting the child's needs is $3,317.33 minus Mother's contribution, which is able to be calculated because of Mother's candor and respect, of $1,655.47. The gap in meeting the child's needs $1,661.86, so on a needs-based order, Father owes $1,661.86 per month in child support, which, when divided by 4.3 weeks per month is $386.48 per week.

NEEDS BASED ORDERS – Another Idea

(*see*, ***Matter of Villafana v Walker***, 157 AD3d 802, 66 NYS3d 893 [2d Dept 2018])

Respondent did not comply with the compulsory financial disclosure obligations (Family Court Act § 424-a) after having been warned of the consequences of the failure to disclose. The record lacks evidence sufficient to determine Respondent's income, so a needs-based order should issue (Family Court Act § 413 [1] [k]; ***Matter of Ennis v Pina***, 78 AD3d 830, 910 NYS2d 310 [2d Dept 2010]). A needs-based order is all the more appropriate when the disobedient party is not credible (***Id.***) as the Support Magistrate found Respondent to be.

Mother's monthly expenses for a household of two persons are $8,245.66 per month according to the financial disclosure affidavit. The child's share of those expenses, then, is $4,122.83 because Mother's household contains only Mother and the child.

Certain other expenses are directly attributable to the child and are not listed on the affidavit: $180.00 for therapy per month and $99.00 per month for clothing. Thus, the total needs of the child are $4,401.83 per month.

Upon an equal sharing of the child's needs, Father's share of the child's needs is $2,200.92.

EXTRACURRICULAR ACTIVITIES

The Child Support Standards Act (DRL 240 [1-b], Family Court Act 413) does not require the Court to allocate extracurricular activity expenses (***Klauer v. Abeliovich***, 149 AD3d 617, 53 NYS3d 37 [1st Dept 2017]). Unless the parents otherwise agree, or unless a court orders as a discretionary add on under DRL 240 (1-b) (f) or Family Court 413 (1) (f), extracurricular activities should be paid from basic child support (***Michael J.D. v. Carolina E.P.***, 138 AD3d 151, 25 NYS3d 196 [1st Dept 2016]).

That language is quoted from ***Matter of L.G. v G.G.***, NYLJ Aug. 9, 2019 at 36 [Suffolk County Fam Ct]).

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