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Developing COVD-19 Support Issues

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Acting Supreme Court Justice

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Moderator & Coordinator:
Hon. John J. Leo J.S.C., Supreme Court, Suffolk County

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Hon. Cheryl A. Joseph

Judge Joseph was appointed by Governor Andrew Cuomo to the NYS Court of Claims on May 5, 2015. She currently presides over matrimonial cases in the Supreme Court, Suffolk County. Her professional experience includes the positions of Adjunct Professor of Law at Touro Law Center in Central Islip, New York, Support Magistrate in Family Court (NYC and Suffolk County), Supervising Court Attorney in Queens Family Court, Domestic Violence Court Coordinator for the Center for Court Innovation, and Assistant District Attorney in Manhattan.

Judge Joseph is a frequent lecturer and presenter on family and matrimonial law for various organizations including the New York State Judicial Institute, the New York State Bar Association and the Suffolk County Bar Association. She has been appointed to the New York State Unified Court System's Matrimonial Practice Advisory and Rules Committee and the Matrimonial Curriculum Committee for the New York State Judicial Institute.

Judge Joseph received her Bachelor of Arts degree *magna cum laude*, Phi Beta Kappa with a double major in Political Science and Philosophy from New York University's College of Arts and Science in 1993. She received her Juris Doctor degree from New York University School of Law in 1996 wherein she also received the Myron L. Greene Award for Oral Advocacy.

Judge Joseph was born in Brooklyn to Edward and Ruby Joseph who both emmigrated to the United States from the West Indies. She was raised in Elmont, New York which is located in Nassau County. She attended Holy Trinity High School in Hicksville, New York. She currently resides in Suffolk County with her two sons, Bryce age 16 and Ethan age 13.

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Ms. Baiamonte is a partner of the Garden City-based firm of Gassman Baiamonte Gruner, P.C. She has been engaged exclusively in the practice of matrimonial and family law since she was admitted to the Bar in January, 1994.

Ms. Baiamonte is an active member of the Nassau County Bar Association. She has served on the Board of Directors, as well as Chair of both its Judiciary Committee and the Matrimonial Law Committee. She has served as an Officer of the NCBA since June 2018, and is currently the Bar Association's Vice President.

Ms. Baiamonte is also an active member of the New York State Bar Association, where she currently serves as Chair of the Family Law Section. She is also a long-time Co-Chair of the Continuing Legal Education Committee.

She is a frequent lecturer on issues pertaining to matrimonial and family law, and appellate practice, to various State and local Bar groups and organizations and law schools.

Hon. John J. Leo, J.S.C.

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Hon. John J. Leo is the current Secretary to the SCBA Board and Co-Chair of the Suffolk Academy of Law Curriculum Committee and Associate Dean.

Justice Leo was admitted to practice in New York and before the Supreme Court of the United States, the United States District Court of the Southern and Eastern Districts.

In 2013 he was elected Justice of the Supreme Court of the State of New York, County of Suffolk in Central Islip, NY.

Justice Leo served as town attorney for the Town of Huntington from January 2002 to December 2012 while maintaining his private practice, Law Offices of John J. Leo, Esq., in Huntington from March 1992 to 2012.

SUPPORT MODIFICATION IN THE COVID-ERA

A REVIEW OF THE STANDARDS FOR MODIFICATION OF MAINTENANCE AND CHILD SUPPORT, AND IMPUTATION OF INCOME

Presented by
Hon. Cheryl A. Joseph
Supreme Court, Suffolk County

and

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STANDARDS FOR SUPPORT MODIFICATION

MAINTENANCE MODIFICATION – "MERGER" v. "NON-MERGER"

Rainbow v. Swisher, 72 N.Y.2d 106, 527 N.E.2d 258, 531 N.Y.S.2d 775 (Ct. App. 1988). If an agreement is merged into a judgment of divorce, the agreement ceases to exist as a separately enforceable contract.

Campello v. Alexander, 155 A.D.3d 1381, 65 N.Y.S.3d 348 (3d Dept., 2017). When an agreement is incorporated into, but not merged into the final judgment, then both the agreement and the judgment continue to exist as two separately enforceable instruments.

Whether agreements merge or not merge into the final judgment will impact the standard to be applied on applications for modification of spousal maintenance.

A. Standard for Merged Agreements:

Where the initial obligation is established pursuant to Court Order or an agreement which has **merged** into the Judgment of Divorce:

> **DRL §236B(9)(b)(1):** "Upon application by either party, the court may annul or modify any prior order or judgment made after trial as to maintenance, upon a showing of the payee's ***inability to be self-supporting*** ***or*** upon a showing of a ***substantial change in circumstance***, including financial hardship or upon actual full or partial retirement of the payor if the retirement results in a substantial change in financial circumstances. . . . "

Therefore, need to show:

(1) Inability to be self-supporting; or
(2) Substantial change in circumstances, which includes:
    a. Financial hardship; or
    b. Actual full or partial retirement of the *payor*, if the retirement results in a substantial change in financial circumstances

B. Standard for Non-Merged Agreements:

Where the initial obligation is established pursuant to a non-merged or surviving **agreement**:

> **DRL §236B(9)(b)(1):** ". . . Where, after the effective date of this part, an agreement remains in force, no modification of an order or judgment incorporating the terms of said agreement shall be made as to maintenance without a showing of **extreme hardship** on either party, in which event the judgment or order as modified shall supersede the terms of the prior agreement and judgment for such period of time and under such circumstances as the court determines."

NOTE: Parties can stipulate in their agreement to apply a less stringent standard, e.g., "substantial change in circumstances", etc., for modification of maintenance applications.

DRL §236B(9)(b)(1) continues: "...The court shall not reduce or annul any arrears of maintenance which have been reduced to final judgment pursuant to section two hundred forty-four of this article. No other arrears of maintenance which have accrued prior to the making of such application shall be subject to modification or annulment unless the defaulting party shows good cause for failure to make application for relief from the judgment or order directing such payment prior to the accrual of such arrears and the facts and circumstances constituting good cause are set forth in a written memorandum of decision. Such modification may increase maintenance *nunc pro tunc* as of the date of application based on newly discovered evidence. Any retroactive amount of maintenance due shall, except as provided for herein, be paid in one sum or periodic sums, as the court directs, taking into account any temporary or partial payments which have been made. The provisions of this subdivision shall not apply to a separation agreement made prior to the effective date of this part."

C. Maintenance Arrears:

(1) Court shall not reduce or annul arrears which have been reduced to final judgment.

(2) No other maintenance arrears which accrued prior to modification application shall be modified or vacated unless the defaulting party shows good cause for failure to make an application prior to the accumulation of such arrears.

D. Newly Discovered Evidence:

An application to modify maintenance may increase it *nunc pro tunc* as of the date of the application based on newly discovered evidence. *(See also, FCA §451)*

MAINTENANCE MODIFICATION – CASE STUDIES

Kammerer v. Kammerer, 174 A.D.3d 874, 103 N.Y.S.3d 292 (Mem) (2d Dept. 7/31/19).
The lower court did not abuse its discretion denying the ex-husband's application to reduce his maintenance obligation without a hearing. Contrary to the ex-husband's contentions, he did not submit sufficient evidence that there was a substantial change in circumstances warranting a hearing or a downward modification.

O 'Neil v. O 'Neil, 108 N.Y.S.3d 255, 174 A.D.3d 1526 (4th Dept. 7/31/19).
The Plaintiff's cross-motion for a downward modification of maintenance was properly denied without a hearing. Plaintiff failed to disclose the total value of his then-current assets and thus failed to make the requisite showing of extreme financial hardship.

Kelly v. Leaird Kelly, 170 A.D.3d 1554, 96 N.Y.S.3d 407 (4th Dept. 3/15/2019).
Per the parties' stipulation, Plaintiff's maintenance obligation would terminate if Defendant remarried or if there was "a judicial finding of cohabitation pursuant to DRL §248." While no single factor—such as residing at the same address, functioning as a single economic unit, or involvement in a romantic or sexual relationship—is determinative, a common element of cohabitation is that people are living together in a relationship or manner resembling or suggestive of marriage. Here, the Defendant and man with whom she lives testified that they have a friendship or landlord-tenant relationship. However, they connected on a dating website, had a sexual relationship (which may or may not have ended), took multiple vacations together (sometimes sharing a room), and Defendant wears a diamond ring on her left hand that the man purchased. Defendant pays varying amounts of "rent" to the man, depending on her financial situation, and the man pays Defendant for work she purportedly performs for him, but Defendant does not declare the payments from the man as income nor does the man declare his payments to the Defendant as an expense. Therefore, the Supreme Court erred in denying Plaintiff's motion to terminate maintenance, as he established that the Defendant was engaged in cohabitation.

Rudy v. Rudy, 167 A.D.3d 751, 91 N.Y.S.3d 267 (2d Dept. 12/12/2018).
In order to obtain modification, either downward or upward, of the maintenance aspect of a stipulation of settlement that has been incorporated but not merged into a divorce judgment, a party must show extreme hardship resulting from the continued enforcement of the existing maintenance obligation. The Family Court should have granted Petitioner's objections to the Support Magistrate's order dismissing his petition for a downward modification of his maintenance obligation. Here, the Support Magistrate misconstrued Petitioner's bi-weekly income as his weekly income and further did not afford Petitioner an opportunity to submit evidence showing he made diligent efforts to find employment commensurate with his qualifications.

Burns v. Burns, 163 A.D.3d 210, 81 N.Y.S.3d 846 (4th Dept. 7/25/18).
Supreme Court properly held that Husband's maintenance obligation terminated upon ex-Wife's remarriage. According to the DRL and its common-law antecedents, the concept of spousal maintenance is limited to payments made to an unmarried ex-spouse. If divorcing spouses wish to vary this definition, they must do so clearly and unambiguously.

Isichenko v. Isichenko, 161 A.D.3d 833, 75 N.Y.S.3d 530 (2d Dept. 5/9/18).
Error to deny husband's application for a downward modification of his maintenance obligation without a hearing where the husband averred that his annual income had been substantially reduced from $750,000 that was imputed to him for the purpose of the spousal maintenance award in the judgment of divorce. Additionally, the husband's statements that he was only able to obtain employment at his salary significantly lower than the salary he was earning shortly before the parties' divorce were supported by the sworn submissions of job recruiters, colleagues, and a vocational expert. The husband established a genuine issue of fact as to whether the reduction in his income was based upon a decline in his opportunities for employment, thereby presenting a substantial change in circumstances meriting a downward modification.

Abdelrahman v. El Mahdi, 160 A.D.3d 1253, 74 N.Y.S.3d 672 (3d Dept. 4/19/18).
The lower court incorrectly granted the Father's motion to temporarily suspend his maintenance obligation pursuant to the parties' separation agreement as he was unable to seek a modification of the terms of an order or judgment of divorce because no order governing maintenance or judgment of divorce governing maintenance had been entered.

Rabinovich v. Shevchenko, 159 A.D.3d 754, 71 N.Y.S.3d 617 (2d Dept. 3/7/18).
Supreme Court properly denied Husband's motion for a downward modification of his maintenance obligation because he failed to demonstrate a substantial change in his financial circumstances from the time the Judgment of Divorce was entered or the time he last moved, unsuccessfully, to modify his maintenance obligation.

Brady v. White, 158 A.D.3d 748, 72 N.Y.S.3d 114 (2d Dept. 2/21/18).
Support Magistrate properly dismissed Father's petition for a downward modification of his maintenance obligation based on extreme hardship. Father failed to disclose his financial circumstances or to present credible evidence that his symptoms or physical condition prevented him from working. He also failed to show that he had diligently sought re-employment commensurate with his qualifications and experience.

Stassa v. Stassa, 155 A.D.3d 662, 63 N.Y.S.3d 463 (2d Dept. 11/1/17).
On prior appeal of Supreme Court's dismissal of Wife's petition for retroactive COLA increases, matter was remitted for a determination of the COLA increases due to Wife from the commencement of the action to the present, with prejudgment interest calculated thereon. Upon remittur, Supreme Court incorrectly failed to adhere to the terms of remittur by awarding Wife COLA increases based on the erroneous assumption that Wife was entitled to compounded increases beginning in an earlier time period.

Mtr. of Richard K. v. Deborah K., 154 A.D.3d 489, 61 N.Y.S.3d 483 (1st Dept., 10/12/17)
Petitioner failed to demonstrate the extreme hardship necessary to obtain modification of the maintenance obligations contained in the parties' stipulation of settlement, which was incorporated but not merged into the parties' divorce judgment. A husband's volitional actions which result in his unemployment, including incarceration preventing any employment, do not constitute such extreme hardship.

Schwartz v. Schwartz, 153 A.D.3d 953, 60 N.Y.S.3d 426 (2d Dept. 8/30/17)
The inheritance of significant funds can constitute a substantial change of circumstances supporting a request to modify a party's maintenance obligation.

Perez v. Perez-Brache, 148 A.D.3d 1647, 50 N.Y.S.3d 720 (4th Dept. 3/24/17).

The parties' settlement agreement provided that maintenance would be terminated if plaintiff cohabitated with another man. The Supreme Court improperly held that defendant was required to establish that plaintiff held herself out as another man's wife since the agreement only mentioned cohabitation. Nevertheless, the Fourth Department held that defendant failed to establish by a preponderance of the evidence that plaintiff was habitually living with her fiancé. Plaintiff's fiancé occasionally stayed overnight at plaintiff's residence but he maintained his own separate residence, where he received mail and kept his personal belongings. Furthermore, he did not own any real property with plaintiff and did not financially contribute to the payment of any of plaintiff's expenses.

Masri v. Masri, 55 Misc.3d 487, 50 N.Y.S.3d 801 (Supreme Court, Orange Co., 1/13/17, Bartlett)
Increasing amount of husband's post-divorce spousal maintenance obligation due to his refusal to give wife a religious divorce, absent evidence that he withheld the religious divorce to extract concessions in the matrimonial action or other wrongful purposes, would interfere with husband's free exercise of religion and violate the First and Fourteenth Amendments, and, thus, statutory provision requiring court to consider effect of barrier to remarriage in making maintenance determination did not apply in determining husband's maintenance obligation. Religious and social consequences of which wife complained flowed not from any impropriety in husband's withholding of religious divorce, but from religious beliefs to which wife and husband subscribed, and to apply coercive financial pressure because of perceived unfairness of religious divorce doctrines to induce husband to perform religious act would plainly interfere with the free exercise of his religion.

Sonkin v. Sonkin, 137 A.D.3d 635, 28 N.Y.S.3d 361 (1st Dept. 3/24/16).
The Appellate Division unanimously affirmed an Order of the Supreme Court, which denied defendant husband's motion for a downward modification of his maintenance obligations. The appellate court found that the lower court properly determined that defendant failed to demonstrate the extreme hardship necessary to obtain modification of the maintenance obligations contained in the parties' stipulation of settlement.

N.D. v. A.D., NYLJ 1202745219030 (Sup. Ct. Suffolk Co., 12/10/15, Tarantino).
Plaintiff (former husband) sought a downward modification of his child and spousal support obligations, arguing a severe decrease in his income. The Wife's maintenance obligation had been determined by her needs at the time of the parties' divorce in 2008, including the carrying costs on the marital residence, which was sold in January 2015. The Court held that justice could not require the husband to continue paying spousal support for factors which had been considered in determining the support award but which no longer existed. The Wife did not testify during the hearing and the Court held that, as such, it was deprived of any basis on which maintenance should be continued. The Court noted that, even if maintenance were to be continued, the Court was denied any facts upon it could determine an appropriate amount.

Susan S. v. George S, NYLJ 1202744630614 (Sup. Ct. Westchester Co., 11/20/15, Malone).
The Appellate Division previously determined that the Wife waived her right to COLA increases from May 1984 to May 2007 but the decision was remitted to the trial Court to determine COLA increases owed to the Wife by the Husband from the date of commencement of the action to the present, with prejudgment interest from May 2008. The Court noted the remittal presented an issue of whether the Court could calculate the COLA increases due to the Wife without a hearing, which the Husband argued was required. While the Husband correctly argued that the trial court, on remittitur, must obey the Appellate Division's mandate, he was incorrect that a hearing must be held. The Court held that the Appellate Division's order did not state or imply a hearing was necessary, but only directed a determination of the COLA increases due wife, which the parties had previously agreed in their stipulation would be calculated pursuant to a specific formula. Therefore, the determination of the COLA increase did not require a hearing but was determined by implementation of the parties' chosen formula.

CHILD SUPPORT MODIFICATION

Statutory Standard for Modification

> **DRL §236B(9)(b)(2)(i)** The court may modify an order of child support, including an order incorporating without merging an agreement or stipulation of the parties, upon a showing of a **substantial change in circumstances**. Incarceration shall not be a bar to finding a substantial change in circumstances provided such incarceration is not the result of nonpayment of a child support order, or an offense against the custodial parent or child who is the subject of the order or judgment.
> (ii) In addition, unless the parties have specifically opted out of the following provisions in a validly executed agreement or stipulation entered into between the parties, the court may modify an order of child support where:
> (A) **three years** have passed since the order was entered, last modified or adjusted; or
> (B) there has been a **change in either party's gross income by fifteen percent or more** since the order was entered, last modified, or adjusted. A reduction in income shall not be considered as a ground for modification unless it was involuntary and the party has made diligent attempts to secure employment commensurate with his or her education, ability, and experience.

(1) Substantial change in circumstances; or
(2) Passage of 3 years; or
(3) Change in either party's gross income by 15% or more

However, the statute provides that parties can expressly "opt-out" of (2) and (3) with a validly executed agreement.

Child Support Arrears

Pursuant to DRL §236B(9)(b)(2)(iii), "No modification or annulment shall reduce or annul any arrears of child support which have accrued prior to the date of application to annul or modify any prior order or judgment as to child support."

Newly Discovered Evidence

DRL §236B(9)(b)(2)(iii) goes on to state, "Such modification may increase child support *nunc pro tunc* as of the date of application based on newly discovered evidence."

CHILD SUPPORT MODIFICATION – CASE STUDIES

Camarda v. Charlot, 182 A.D.3d 532, 122 N.Y.S.3d 647 (2nd Dept., 4/2/20).
The lower court properly dismissed the father's petition for a downward modification of his child support obligation without a hearing. The father failed to make a prima facie showing that a substantial change in circumstances had occurred subsequent to his prior petition requesting the same relief. It is well settled that no hearing shall be required unless an application is supported by an affidavit and other evidentiary material sufficient to establish a prima facie case for the relief requested.

Oelsner v. Heppler, 181 A.D.3d 916, 122 N.Y.S.3d 330 (2nd Dept., 3/25/20).
Appellate court agreed with the Family Court's determination that the father did not meet his burden of establishing a substantial change in circumstances warranting a downward modification of his child support obligation based on his claim that he no longer can afford the agreed-upon monthly amount. The evidence presented, including the father's bank account statements, did not support the father's claim.

Nicol v. Nicol, 179 A.D.3d 1472, 118 N.Y.S.3d 833 (4th Dept., 1/31/20).
The lower court erred in summarily denying the father's motion for a downward modification of child support inasmuch as he made a prima facie showing of a substantial change in circumstances. The father submitted evidence establishing that his 50% share of the health insurance premiums had increased from $50.15 per week to $113.00 per week, which amounted to nearly 18% of his gross income. The court found that the father was entitled to a hearing on his application, and remitted the matter to the supreme court.

Dutcher v. Ronelli-Dutcher, 179 A.D.3d 1332, 118 N.Y.S.3d 261 (3rd Dept., 1/16/20).
Lower court's reduction of the husband's child support payments was reversed and the matter remitted for a determination of any arrears due the wife. A review of the record reveals that the husband failed to allege any change in circumstances to warrant a reduction. Moreover, there was no testimony at the hearing about change in circumstances, nor did the lower court cite any change in circumstances in its order reducing support.

Hayward v. Rodriguez, 179 A.D.3d 795, 118 N.Y.S.3d 55 (2d Dept. 1/15/20).
The Family Court's determination that the father demonstrated a substantial change in circumstances based on the child's enrollment in kindergarten and a significant decrease in childcare expenses is supported by the record. Further, the mother's testimony demonstrated that the father's pro rata share of the child's health insurance premiums and childcare expenses actually incurred was substantially less than his obligation to pay the lump sum of $200 per week for these expenses, as provided in the original order. The appellate court determined that the father should only be required to pay his pro rata share of the child's health insurance premiums and reasonable childcare expenses actually incurred by the mother.

Muenichsdorfer v. Biagiotti, 179 A.D.3d 805, 118 N.Y.S.3d 226 (2d Dept., 1/15/20).
The family court properly dismissed the father's petition for a downward modification of child support. The parties executed the agreement prior to the 2010 amendments and, thus, the father had the burden of establishing an unreasonable and unanticipated change in circumstances since the time they entered the agreement and he failed to satisfy this burden.

Shannon E.K. v. Amir S., 178 A.D.3d 497, 116 N.Y.S.3d 12 (1st Dept., 12/12/19).
While a loss of income may be sufficient to modify an order of support in some circumstances, the determination to reduce support "must be based on the petitioner's capacity to generate income, not his current economic status". Here, the court specifically found that the father failed to show that he lost his employment through no fault of his own and further failed to demonstrate diligent efforts to obtain employment commensurate with his qualifications and experience.

Anthony V.L. v. Bernadette R., 178 A.D.3d 479, 116 N.Y.S.3d 193 (1st Dept., 12/10/19)
The father alleged that the mother engaged in fraud by inflating the child's rent, health care premiums, and child-care costs. He sought vacatur based upon "new evidence" in the form of subpoenaed documents, including the mother's lease from 2008, her employment records, and her tax returns. However, he did not show that this "new evidence" could not have been found earlier with due diligence. Additionally, he failed to move to vacate the order within a reasonable time, having waited approximately four years before seeking relief. Nevertheless, the appellate court found that the Support Magistrate should have considered a downward modification of the father's *prospective* child support obligations. The father demonstrated at the hearing that there had been a substantial change in circumstances based upon the mother's actual housing costs. The matter was remanded for additional findings of fact to determine the mother's actual housing costs, and whether the father is entitled to overpayment credit to be applied to future add-on expenses.

E.D. v. T.D., 178 A.D.3d 474, 111 N.Y.S.3d 543 (Mem) (1st Dept., 12/10/19).
Family Court properly denied the mother's petition for downward modification of child support. The mother failed to produce evidence substantiating her testimony about the extent to which the parties' son's medical care impacted upon her ability to seek employment.

Fanelli v. Orticelli, 178 A.D.3d 700, 115 N.Y.S.3d 444 (2d Dept., 12/4/19).
Record supported the Support Magistrate's determination that an upward modification in child support was warranted: father's testimony that he desired the children to engage in additional activities; the children's participation in those activities; the cost of the children's orthodontic care; the mother's increased expenses to repay a personal loan that she had taken to afford the children's bills due to her income shortfall; the mother's added living expenses due to the father's failure to exercise parental access with the children since December 2015; the mother's monthly income was insufficient to pay for the children's monthly household expenses; the father's expenses, including those that were tax deductible; the father's reimbursement, through his employer, for airfare, hotel, mileage, and meal expenses; and the mother's gross income of $60,519.18 "being substantially less" than the father's gross income of $192,191.04.

Christopher C. v. Kimberly C., 177 A.D.3d 1129, 115 N.Y.S.3d 121 (3rd Dept., 11/21/19).
Father's family court petition seeking a downward modification of his child support obligation was properly dismissed by the Support Magistrate due to his failure to present evidence why he would be incapable of earning a salary on par with his historical earnings and his failure to demonstrate that a substantial change in circumstances had occurred.

Vetrano v. Vetrano, 177 A.D.3d 890, 115 N.Y.S.3d 104 (2nd Dept., 11/20/19).
The Support Magistrate properly determined that the Father – who claimed to have been wrongfully terminated from his employment -- failed to establish that the reduction in his income was involuntary and that he made diligent attempts to secure employment commensurate with his education, ability, and expertise. However, the Support Magistrate erred in failing to consider the father's loss of assets as well as the significant increase of the mother's income since entry of judgment which warranted a new determination of the parties' child support obligation

Roberts v. Roberts, 176 A.D.3d 1226, 113 N.Y.S.3d 244 (2nd Dept., 10/30/19).
The family court properly dismissed the father's petition for downward modification of child support, finding that the father failed to provide any evidence of his income or financial status at the time of the divorce or at the time of his prior unsuccessful petition for a downward modification. Furthermore, while loss of employment may constitute a substantial change in circumstances where the termination occurred through no fault of the party seeking modification, and he or she diligently sought re-employment commensurate with his or her earning capacity, here, the father failed to establish that his loss of employment occurred through no fault of his own. The father did not submit any evidence demonstrating that the asserted reduction in his income was the result of anything other than self-created hardship.

Reese v. Reese, 176 A.D.3d 949, 112 N.Y.S.3d 138 (2nd Dept., 10/16/19).
The appellate division held that the dismissal of the father's petition for a downward modification of his child support obligation was justified. The family court properly considered the father's asset, which had always been a primary source of support and his claim of an inability to pay child support lacked credibility.

Jurgita C. v. Manuel O., 176 A.D.3d 402, 111 N.Y.S.3d 20 (1st Dept., 10/1/19).
Dismissal of father's downward modification of child support and granting of mother's petition for upward modification of child support relating to childcare expenses unanimously affirmed. The mother established a substantial change in circumstances in that the child was no longer cared for by a relative and was now enrolled in day care and needed babysitting as well. Although the father claimed to have been unemployed, it was due to his own fault and he failed to show that he made diligent efforts to secure employment commensurate with his education, skills and experience. Instead, he spent his time promoting himself as a motivational speaker and spent four months abroad during the relevant period.

R.E.S. v. R.J.K., 65 Misc.3d 1207(A), 118 N.Y.S.3d 380 (Table) (Fam. Ct., Nassau Co., 9/19/19)
The Court dismissed the father's objections to a modified support order, finding that the Support Magistrate properly imputed $155,000 in annual income to the father, and that the father failed to establish that his loss of employment was through no fault of his own. The Court also found that the father failed to establish that he made diligent efforts to secure re-employment commensurate with his earning capacity.

Kanya J. v. Christopher K., 175 A.D.3d 760, 108 N.Y.S.3d 474 (3d Dept. 08/01/19).
Although the Family Court properly found the mother in contempt for her willful violation of the March 2017 Order based on the numerous times the mother failed to bring the child to the father's residence for parenting time or otherwise interfered with the father's time, the Family Court erred in suspending the father's child support obligation from June 21, 2017 to February 8, 2018 and ordering the money collected during that period to be credited back to the father. Although a court may suspend child support payments for a period where the custodial parent has wrongfully interfered with or withheld visitation, such suspension must be prospective. There is a strong public policy against restitution or recoupment of support payments.

Brandon v. Lopez, 102 N.Y.S.3d 485(Mem), 174 A.D.3d 706 (2d Dept. 7/17/19).
The Family Court could not enforce the notarized agreement to which the parties referred as it was not incorporated into the Judgment of Divorce.

White v. Holder, 101 N.Y.S.3d 875(Mem), 174 A.D.3d 635 (2d Dept. 7/10/19).
Family Court properly granted the father's petition for a downward modification of child support. Contrary to the mother's contention, the evidence revealed that the father was permanently disabled and unable to work.

Yerdon v. Yerdon, 174 A.D.3d 1216, 107 N.Y.S.3d 164 (3d Dept. 07/18/19).
Supreme Court properly held that mother failed to satisfy a condition precedent of divorce judgment that required her to return anything received under the settlement agreement (i.e. the father's 50% interest in the former marital residence) in order to seek a modification of the child support. The provisions in the settlement agreement were unambiguous and provided that mother would waive her right to child support from the father in return for which father had agreed to convey his half interest in the marital residence to the mother.

Abizadeh v. Abizadeh, 173 A.D.3d 1168, 101 N.Y.S.3d 624 (Mem) (2d Dept, .6/26/19).
The Family Court properly determined that the father failed to establish his alleged reduction in his income constituted a substantial change in circumstances to warrant a downward modification of his child support obligation.

Gharachorloo v. Regeer, 100 N.Y.S.3d 889, 173 A.D.3d 1025 (2d Dept. 6/19/19).
The lower court properly denied the father's petition for a downward modification of his child support obligation based upon his failure to establish that the termination occurred through no fault of his own and that he diligently sought re-employment commensurate with his or her earning capacity.

Hart v. Rosenthal, 173 A.D.3d 695, 103 N.Y.S.3d 107 (2d Dept. 6/5/19).
The Father was not entitled to recovery of child support payments where he alleged that the mother had spent the payment on herself instead of the parties' child. There is a strong public policy against recoupment of support payments and the father failed to establish he fell into an exception of the policy.

Montgomery v. List, 104 N.Y.S.3d 800, 173 A.D.3d 1657 (4th Dept. 6/7/19).
The lower court properly imputed annual income of $64,819 to the father for the purposes of determining his child support obligation in the mother's petition for an upward modification. The father had moved to another state and accepted a lower-paying position because his new wife had accepted a higher paying position in that state and that father's salary before he moved was $64,819.

Evans v. White, 173 A.D.3d 864, 100 N.Y.S.3d 547 (Mem) (2d Dept. 6/12/19).
The Family Court did not err in failing to grant the father's petition for a downward modification of child support. The father failed to establish that his income changed by 15% or that there was a substantial change in circumstances.

Regan v. Regan, 100 N.Y.S.3d 545 (Mem), 173 A.D.3d 874 (2d Dept. 6/12/19).
The Family Court properly granted the mother's petition for an upward modification of child support. The parties did not opt out of the statutory provisions in their Stipulation of Settlement allowing a party to modify child support if a party's income increased by 15%. Furthermore, three (3) years had passed since the parties' JOD was entered.

Lew v. Sobel, 172 A.D.3d 1208, 102 N.Y.S.3d 610, (2d Dept. 5/22/2019).
The Supreme Court properly denied Father's motion to terminate his child support obligation entirely since one of the children was under 21 and it is fundamental public policy that parents are responsible for their children's support until age 21. However, the court should have granted that branch of the Father's motion that sought downward modification of child support based on the emancipation of the parties' eldest child.

Schaff v. Schaff, 172 A.D.3d 1421, 102 N.Y.S.3d 630 (2d Dept. 5/29/2019).
The Supreme Court properly determined that the Father's child support obligation should be reduced pursuant to enforceable modifications to the parties' separation agreement.

J.M. v. T.A., NYLJ, May 14, 2019, Vol. 261, No. 92, Pg. 21 (Fam. Ct. Onondaga, M. Hanuszczk)
JM filed for modification of a child support order alleging substantial change in circumstance after the minor child, AM, enlisted in the Air Force ROTC. JM claimed that AM was self-supporting, receiving income via military and civilian employment, and emancipated as she took an oath of enlistment upon entering the ROTC. The Court held that ROTC membership did not equate to military service and the facts did not support a substantial change in circumstances/emancipation; AM was a full time undergrad student who resided with the other parent during school breaks and the income from ROTC was merely a stipend and a part-time job did not support a finding of economic independence or that AM was self-supporting.

Firenze v. Estevez, 171 A.D.3d 1174, 96 N.Y.S.3d 911 (Mem) (2d Dept. 4/24/2019).
The Family Court properly dismissed Mother's petition seeking to modify the prior order requiring the Father to pay 50% of childcare expenses and instead direct the Father to pay the sum of $500 per month. The Support Magistrate was not required to direct the Father to pay a sum certain for childcare expenses. Further, the Mother failed to demonstrate consistent childcare expenses, warranting a directive that the Father pay that sum.

Heintzman v. Heintzman, 171 A.D.3d 1061, 98 N.Y.S.3d 602 (2d Dept. 4/17/2019).
The record supports the determination that the Father failed to establish a substantial change in circumstances warranting a downward modification of his child support obligation but the Support Magistrate should have considered that branch of the Father's petition which was for a downward modification of his child support obligation based on a reduction of his income by more than 15%.

Mitarotonda v. Mitarotonda, 171 A.D.3d 1040, 96 N.Y.S.3d 868 (Mem) (2d Dept. 4/17/2019).
The Supreme Court properly denied, without a hearing, the Defendant's motion to terminate his child support obligation on the ground of constructive emancipation or interference with parental access. The Defendant failed to meet his prima facie burden of demonstrating that the sons refused all contact with him or that Plaintiff deliberately frustrated or actively interfered with his relationship with his sons.

J.A.H. v. E.G.M., 171 A.D.3d 710, 97 N.Y.S.3d 677 (2d Dept. 4/3/2019).
The Family Court should have denied those branches of Defendant's motion which were to reduce his pro rata share of the child support add-ons and college expenses and to eliminate the annual cost of living increase for his child support obligation. The parties' separation agreement was executed prior to the 2010 amendments to FCA Section 451, therefore in order to be entitled to modification, the Defendant had the burden to show an unreasonable and unanticipated change in circumstances and failed to meet that burden. Additionally, the Family Court should have denied those branches of Defendant's motion which was to entitle him to a credit against his child support obligation for his payment of the children's college room and board. It is clear from the parties' agreement that they did not intend that the Defendant receive a credit against his child support obligation for such payments.

Petros B. v. Ragat B., 171 A.D.3d 583, 99 N.Y.S.3d 16 (1st Dept. 4/23/19).
The Support Magistrate's incorrect assertion as to the father's original child support obligation when dismissing his petition to modify his child support was a notational error and could be corrected pursuant to statute permitting court to cure defects in orders or judgments.

Brooks v. Brooks, 171 A.D.3d 1462, 99 N.Y.S.3d 526 (4th Dept. 4/26/2019).
Family Court improperly applied New Jersey law in modifying the Father's child support obligation even though it was initially established pursuant to a NJ divorce and a separation agreement that stated that "notwithstanding the future residence or domicile of either party, this Agreement shall be interpreted, governed, adjudicated and enforced in New Jersey in accordance with the laws of the State of New Jersey." New York had jurisdiction under UIFSA to resolve the Mother's child support petition because both parties and the child now resided in NY. Further, NY law must be applied to determine the Father's child support obligation, as UIFSA states that "a tribunal of this state exercising jurisdiction . . . shall apply . . . the procedural and substantive law of this state." The Support Magistrate erred in determining that the choice of law provision in the separation agreement controlled over the statute because the provision was contrary to NY's longstanding public policy interest in calculating child support pursuant to the CSSA, including the duration of child support to age 21, compared to age 19 under NJ law.

Fanelli v. Orticelli, 170 A.D.3d 831, 96 N.Y.S.3d 136 (2d Dept. 3/13/2019).
The Support Magistrate failed to adequately articulate her reasoning and application of the relevant factors in this case to include income above the statutory cap in determining the Father's child support obligation.

DiLascio v. DiLascio, 170 A.D.3d 804, 95 N.Y.S.3d 588 (2d Dept. 3/13/2019).
The Supreme Court should have awarded maintenance and child support retroactive to the date the applications for maintenance and child support were first made, with credits to the Defendant for payments pursuant to the *pendente lite* award, carrying charges, vehicle leases and extracurricular expenses for the children.

Bishop v. Bishop, 170 A.D.3d 642, 95 N.Y.S.3d 317 (2d Dept. 3/6/2019).
The Supreme Court should have denied that branch of Plaintiff's motion which was pursuant to CPLR §3211(a)(7) to dismiss the Mother's Family Court petition for upward modification of child support and should have held a hearing on the Family Court petition.

Onondaga County Dept. of Social Svcs. V. Marcus N.D., 170 A.D.3d 1561, 94 N.Y.S.3d 527 (Mem) (4th Dept. 3/15/2019).
Respondent was adjudicated the Father of the Child by an order of filiation entered on his default. Seven (7) years later, he moved to vacate the Order and cancel his child support arears because another man had been adjudicated the father of the same Child in a Mississippi court after a DNA test. The Family Court properly granted Respondent's motion to vacate the order of filiation and denied his motion to vacate the arrears. Per FCA §451(1), child support arrears shall not be vacated, to ensure that respondents are not financially rewarded for failing either to pay the Order or seek its modification.

Charkhian v. Arabi, NYLJ, 2/15/19, Vol. 261, No. 31, Pg. 21 (Fam. Ct., Suffolk Co., Hensley)
Petitioner objected dismissal of his petition for downward modification of child support claiming the Support Magistrate erred in finding no substantial change in circumstances occurred since he was laid off and unemployed for a year. The Court found that the record contained sound and substantial evidence that the petitioner failed to meet his burden of proving the elements of his claim for downward modification: a) that he involuntarily lost his employment; and b) that he thereafter made diligent efforts to obtain commensurate employment.

Benedict v. Benedict, 169 A.D.3d 1522, 93 N.Y.S.3d 503 (4th Dept., 2/8/19)
Error to apply the CSSA to the combined parental income in excess of the statutory cap without express findings or record evidence of the child's actual needs, as to do so would constitute an abdication of judicial responsibility and render meaningless the statutory provision setting a cap on strict application of the formula. In this case, even if the court had made such a finding, there is no evidence in the record to support it and thus the father's basic child support obligation on the basis of the combined parental income extends up to the cap amount only.

McMann v. McMann, 168 A.D.3d 923, 92 N.Y.S.3d 358 (2d Dept. 1/23/2019).
The Supreme Court erred in precluding the Father from fully testifying in support of his allegations that there had been a decrease in his income since the execution of the parties' Stipulation of settlement.

Spano v. Spano, 168 A.D.3d 857, 92 N.Y.S.3d 300 (2d Dept. 1/16/2019).
The Support Magistrate providently exercised her discretion in imputing income to the Mother based upon her actual income in 2016 as reflected in income tax statements. Further, the determination to calculate child support obligations based on the parties' total combined income is adequately supported by the record and was not an improvident exercise of discretion. The Family Court erred in denying the Father's objections to so much of the order as directed the Father to pay 100% of the child support add-on expenses. He should have been directed to pay only 90% of those expenses. Moreover, it appears that the Support Magistrate miscalculated the Father's child support arrears by miscalculating credits due him.

Tobing v. May, 168 A.D.3d 861, 92 N.Y.S.3d 299 (2d Dept. 1/16/2019).
The Family Court should have denied the Father's objections to the Support Magistrate's non-final order. Objections from non-final orders made by a Support Magistrate are typically not reviewed unless they could lead to irreparable harm and here the Father's claims did not rise to the level of irreparable harm.

Zhuo Hong Zheng v. Hsin Cheng, 168 A.D.3d 862, 92 N.Y.S.3d 183 (2d Dept. 1/16/2019).
Zhuo Hong Zheng v. Hsin Cheng, 168 A.D.3d 864, 92 N.Y.S.3d 297 (2d Dept. 1/16/2019).
The Family Court properly denied the Father's objections to a 2013 order of support as untimely. Further, the Family Court properly denied the Father's motion to vacate the order of support and the denial of the Father's second motion for a downward modification of his child support obligation.

Muldowney-Walsh v. Desroches, 167 A.D.3d 1022, 91 N.Y.S.3d 167 (2d Dept. 12/26/18).
The Supreme Court providently exercised its discretion in partially reducing the Defendant's child support obligation. Utilizing imputed income is supported by the record and the Defendant's pro rata share as calculated by the Court was not unjust or inappropriate. However, the Second Department disagreed with the Supreme Court's determination directing the Defendant to reimburse the Plaintiff for 39% of the difference between the cost of individual and family health insurance coverage.

Gavin v. Worner, 167 A.D.3d 1008, 88 N.Y.S.3d 911 (Mem) (2d Dept. 12/26/2018).
The Family Court properly denied the Mother's objections to an order of the Support Magistrate determining that the Mother's petition for a downward modification of her child support obligation was barred by the doctrine of res judicata.

Levin v. Blum, 167 A.D.3d 609, 89 N.Y.S.3d 239 (2d Dept. 12/5/2018).
Levin v. Blum, 167 A.D.3d 611, 86 N.Y.S.3d 899 (Mem) (2d Dept. 12/5/2018).
The Family Court properly denied both parties' objections to a determination of the Support Magistrate, upon the Father's petition to modify his child support obligation, to impute income to the Mother and apply the CSSA to parental income above the statutory cap. The Support Magistrate properly imputed income to the Mother based upon, inter alia, her educational background, monthly expenses, and the resources available to her. Further, the Support Magistrate properly articulated her reasons for applying the statutory percentages to parental income over the statutory cap and the determination was not an improvident exercise of discretion.

Calta v. Hoagland, 167 A.D.3d 598, 89 N.Y.S.3d 247 (2d Dept. 12/5/2018).
The Family Court properly denied the Father's objections to the Support Magistrate's order granting the Mother's petition for an upward modification of the Father's child support obligation. In their agreement, the parties did not opt out of the provisions of FCA Section 451 so the Family Court had the authority to modify the Father's child support obligation even absent a substantial change in circumstances in this case. Further, the Support Magistrate adequately articulated the basis for his decision to apply the statutory percentages to parental income in excess of the statutory cap.

Winter v. Winter, 167 A.D.3d 821, 87 N.Y.S.3d 495 (Mem) (2d Dept. 12/12/2018).
Winter v. Winter, 167 A.D.3d 822, 87 N.Y.S.3d 492 (Mem) (2d Dept. 12/12/2018).
The Supreme Court properly denied the Father's petition to modify his child support obligation finding his allegations were insufficient to show, prima facie, a substantial change in circumstances to justify a modification.

Williams v. Jenkins, 167 A.D.3d 758, 90 N.Y.S.3d 81 (2d Dept. 12/12/2018).
The Supreme Court, following the Father's in-court outburst, granted the Mother's petition for sole custody and suspended the Father's parental access without a hearing. The Appellate Division found that there were unresolved factual issues necessitating a hearing and, under the circumstances of the case, same should be held before a difference Justice.

Murphy v. Murphy, 166 A.D.3d 987, 88 N.Y.S.3d 468 (2d Dept. 11/28/18).
The Father failed to demonstrate a substantial change of circumstances warranting downward modification of his child support obligation as to the parties' daughter. However, the Supreme Court erred in calculating the obligation upon the emancipation of the parties' son. There was insufficient evidence to support the level of income imputed to the Father and the court failed to set forth its reasons for applying a designated statutory percentage to combined parental income in excess of the statutory cap.

Johnson v. Gordon, 166 A.D.3d 975, 86 N.Y.S.3d 732 (Mem) (2d Dept. 11/28/18).
The Family Court properly denied that branch of the Father's petition which was to adjust his child support arrears where the branch of the petition to suspend his child support obligation was granted based upon the Mother's violation of a prior visitation order. Deliberate interference does not constitute a ground to cancel child support arrears.

Adinolfi v. Callanan, 166 A.D.3d 966, 86 N.Y.S.3d 746 (Mem) (2d Dept. 11/28/18).
Family Court properly dismissed Father's petition to reduce or vacate child support arrears that accrued prior to Father's application to terminate his child support obligation.

Patscot v. Fisco, 166 A.D.3d 981, 86 N.Y.S.3d 735 (Mem) (2d Dept. 11/28/18).
Family Court properly denied the Father's petition for downward modification of child support where the Father failed to show that he was unable to perform work in any capacity and income could be imputed to the Father.

Berg v. Berg, 166 A.D.3d 763, 88 N.Y.S.3d 248 (2d Dept. 11/14/18).
Family Court properly denied Father's petition for downward modification of his support obligation pursuant to the parties' judgment of divorce. The Father failed to establish that the termination of his employment did not occur through his own fault or that he diligently sought new employment commensurate with his qualifications or experience.

Goldstein v. Goldstein, 166 A.D.3d 729, 88 N.Y.S.3d 556, (2d Dept. 11/14/18).
Where parties' stipulation provided for father to pay child support terminable upon the emancipation of the last child, and defined emancipation as "permanent residence of a child away from the mother for a period of more than 3 consecutive months", defendant was entitled to terminate payments when the last child moved into his home. Thus, Defendant was properly relieved of his obligation to pay child support to the Plaintiff as of the date of the emancipation forward. The Supreme Court properly denied that branch of Defendant's motion which was to recoup basic child support paid to the Plaintiff during the pendency of the motion prior to the interim order suspending his child support obligation. There is a strong public policy in this state against restitution or recoupment of the overpayment of child support and there is no basis to conclude that any exception to that policy should be made in this case.

Barker v. Rohack, 166 A.D.3d 761, 88 N.Y.S.3d 242 (2d Dept. 11/14/18).
The Family Court miscalculated the amount of child support arrears owed by the Father upon an upward modification of child support and therefore should have granted the Father's objection to the order which would reduce the amount of child support arrears owed by him.

Cali v. Cali, 166 A.D.3d 610, 87 N.Y.S.3d 225 (2d Dept. 11/7/18).
The Family Court improperly dismissed the Mother's petition for an upward modification of child support finding that she failed to submit the requisite financial documentation to establish a prima facie case. The Second Department remitted the matter to Family Court to afford the Mother an opportunity to provide the relevant financial documents and for a new determination of the Father's child support obligation.

Linda D. v. Theo C., 166 A.D.3d 461, 89 N.Y.S.3d 23 (1st Dept. 11/15/18).
The Family Court mistakenly relied on letters from the father's health care providers that had not been properly admitted into evidence. Thus, the father provided no competent evidence that his medical condition rendered him unable to provide support for the subject children and was not entitled to a downward modification. The father's receipt of Social Security disability benefits did not preclude a finding that he was capable of working.

Parmenter v. Nash, 166 A.D.3d 1475, 87 N.Y.S.3d 759 (4th Dept. 11/9/18).
Father's petition for a downward modification of his child support obligation should have been granted. After Mother relocated with the parties' child from Virginia to New York, Father followed approximately six (6) months later. Although the Father made good faith efforts to obtain more lucrative employment in NY, his income was reduced. The Family Court found this did not rise to the level of a change in circumstances because the Father voluntarily left the higher paying position in VA. However, the Appellate Division held that the general rule should not be inflexibly applied where a parent quits a job for a sufficiently compelling reason, such as the need to live closer to a child. A parent who chooses to leave his job rather than live hundreds of miles away is not voluntarily unemployed or underemployed—he is a loving parent attempting to do the right thing.

K.S. v. R.W., 61 Misc.3d 1221(A), 2018 WL 6166300 (Table), (Fam. Co. Onondaga Co., J. Hanuszczak, 11/19/18).
Petitioner-Mother moved for a downward modification of her child support obligation entered by the Support Magistrate on the grounds that her only source of income is Social Security Disability benefits, her income reduced since the entry of the prior child support order, and "her total household income is below the poverty level." Family Court held that the petition properly set forth a genuine issue of fact as to whether a downward modification is appropriate and the Petitioner-Mother is thus entitled to a hearing. Petitioner-Mother shall have the opportunity to proffer documentary and testimonial evidence in support of her allegations pertaining to her alleged financial status at the hearing.

Evans v. Oliveira, 165 A.D.3d 543, 88 N.Y.S.3d 28 (1st Dept. 10/23/18).
The lower court correctly denied the mother's request for an upward modification of child support. The mother's failure to find employment commensurate with her training and expertise did not constitute a change in circumstances as the record revealed that she was either unemployed or underemployed at the time the agreement was entered into. Further, the decrease in the mother's income attributable to the cessation of maintenance was not an unanticipated change, as it was a negotiated consequence of the settlement agreement

Petraglia v. Petraglia, 165 A.D.3d 993, 86 N.Y.S.3d 113 (2d Dept. 10/17/18).
Supreme Court providently exercised its discretion in denying Father's motion for child support where the parties had joint custody and stipulated that neither would be entitled to child support. The Court found the Father failed to adduce sufficient credible evidence that his income decreased through no fault of his own and he made diligent efforts to secure employment commensurate with his education, ability, or experience.

Petraglia v. Petraglia, 165 A.D.3d 946, 83 N.Y.S.3d 917 (Mem) (2d Dept. 10/17/18).
Family Court properly dismissed Father's petition for modification of child support on the grounds of res judicata and collateral estoppel as the Father's request for child support had been decided by the Supreme Court.

Mervil v. Exhume 165 A.D.3d 675, 82 N.Y.S.3d 730 (Mem) (2d Dept. 10/3/18).
Family Court properly denied the Father's objections to an order dismissing his petition for a downward modification of child support finding same was barred by the doctrine of res judicata having failed to show a substantial change in circumstances. Father was precluded from re-litigating the issue.

Murray v. Murray, 164 A.D.3d 1451, 84 N.Y.S.3d 524 (2d Dept. 9/26/18).
Family Court providently exercised its discretion in reducing Father's child support obligation to the statutory cap following a hearing on the Mother's objections to a modest COLA increase in child support paid above the guideline amount wherein the Mother failed to demonstrate why in light of the provisions of the stipulation and rider it was unjust or inappropriate for the Support Magistrate to decline to apply the child support percentage to combined income over the statutory cap.

Fasano v. Fasano, 164 A.D.3d 1421, 83 N.Y.S.3d 224 (2d Dept. 9/26/18).
The Supreme Court should have granted that branch of Plaintiff's motion for an upward modification of the Defendant's child support obligation where a stipulation providing an amount of child support that significantly deviated downward from the CSSA was signed years before the Judgment of Divorce was granted and the Plaintiff moved for an upward modification of child support and add ons to be included. Here, the reason for the downward deviation in the agreement was to allow Defendant to retain the marital residence but in the intervening years Defendant sold the residence and moved to another school district which the Second Dept. found constituted a substantial change in circumstances and remitted the matter for a new determination.

Fanizzi v. Delforte Fanizzi, 164 A.D.3d 1653, 84 N.Y.S.3d 650 (4th Dept. 9/28/18).
Family Court properly denied Mother's objections to Support Magistrate's order directing a downward modification of Father's child support obligation. Father established a substantial change in circumstances after he was terminated from his job through no fault of his own and diligently sought reemployment. Family Court did not err in imputing only $64,000 to Father, given his level of education and the results of his extensive job search. Support Magistrate properly deviated from the presumptive support obligation under the CSSA and issued written findings of fact setting forth the relevant statutory factors and reasons why it would be "unjust or inappropriate" to require the Father to pay his presumptive child support obligation.

Pathak v. Shukla, 164 A.D.3d 687, 81 N.Y.S.3d 549 (2d Dept. 8/15/18).
Pathak v. Shukla, 164 A.D.3d 690, 84 N.Y.S.3d 490 (2d Dept. 8/15/18).
The Supreme Court properly denied the Father's motion for a downward modification of his child support obligation because he failed to meet his burden of demonstrating his employment was terminated through no fault of his own and he also failed to produce adequate evidence of his job search and to sufficiently prove his other efforts to procure equivalent full-time employment.

Barbara T. v. Acquinetta M, 164 A.D.3d 1, 82 N.Y.S.3d 416 (1st Dept. 8/9/18).
When the Respondent became the adoptive parent of the subject child she began to receive an adoption subsidy. Thereafter, the Petitioner was granted guardianship of the child and the Respondent stopped receiving the subsidy. The Petitioner then filed for child support from the Respondent. The Family Court held that the Respondent remained legally responsible for the child's support until he reached the age of 21 regardless of the award of guardianship to the Petitioner. However, the adoption subsidy was not a factor in determining the amount of child support because the Respondent was no longer receiving the subsidy. The Appellate Division held that the lower court erred and that child support should have been set at no less than the amount of the adoption subsidy for so long as the Respondent was eligible to receive the subsidy on the child's behalf.

Tarpey v. Tarpey, 163 A.D.3d 687, 81 N.Y.S.3d 426 (2d Dept. 7/11/18).
The Family Court erred in granting the Mother's upward modification of child support because although the change in residential custody to the Mother amounted to a substantial, unanticipated and unreasonable change in circumstances (the standard at the time the parties executed their agreement) she failed to show concomitant need. While the mother showed that there had been some increase in the children's expenses, she failed to demonstrate that she was unable to meet the children's needs with the resources available to her along with the current child support she was receiving.

Poulos v. Chachere, 163 A.D.3d 679, 81 N.Y.S.3d 428 (2d Dept. 7/11/18).
Family Court properly granted the Mother a downward modification of child support where the initial determination was based upon imputed income and the Mother subsequently showed a significant change of circumstances in that her income was decreased despite her diligent efforts to obtain employment commensurate with her experience and prior salary. The Family Court's decision to impute additional income of only $30,485.72 was supported by the record.

Moradi v. Noorani, 163 A.D.3d 570, 76 N.Y.S.3d 830 (Mem) (2d Dept. 7/5/18).
The change in residence of one of the parties' two children, from the Mother's home to the Father's home, was a substantial change in circumstances warranting downward modification of the Father's child support obligation.

Conway v. Gartmond, 162 A.D.3d 1013, 79 N.Y.S.3d 674 (2d Dept. 6/27/18).
In the instant appeal, the Court affirmed an order of the Family Court (Westchester County) setting the Mother's monthly child support obligation and determining the child support arrears. In 2013, the court modified a 2006 custody order to increase the Father's parenting time. In 2016, the Second Department determined that the parties had equal parenting time and the Mother would be deemed the non-custodial parent for child support purposes since the Mother earned substantially more than the Father.

Youngs v. Youngs, 162 A.D.3d 1185, 78 N.Y.S.3d 458 (3d Dept. 6/7/18).
Two weeks after the parties' judgment of divorce was entered, wherein the parties were granted joint custody of the children with the father being the primary physical custodial parent and both parties waiving child support, the father petitioned the court for a modification seeking child support from the mother. The Family Court properly dismissed the father's petition as he failed to prove a change in circumstances. Further, there was nothing in the record demonstrating that the children's needs were not being met.

Gratton v. Gratton, 162 A.D.3d 1502, 78 N.Y.S.3d 540 (4th Dept. 6/8/18).
The Family Court correctly denied Father's objection to the Support Magistrate's order that dismissed his petition for downward modification of child support. The Father failed to establish that there had been a change of 15% because the change did not occur prior to the time the judgment was entered and he failed to establish that the change was involuntary.

Isichenko v. Isichenko, 161 A.D.3d 833, 75 N.Y.S.3d 530 (2d Dept. 5/9/18).
Error to deny husband's application for a downward modification of his child support obligation without a hearing where the husband averred that his annual income had been substantially reduced from $750,000 that was imputed to him. Additionally, the husband's statements that he was only able to obtain employment at his salary significantly lower than the salary he was earning shortly before the parties' divorce were supported by the sworn submissions of job recruiters, colleagues, and a vocational expert. The husband established a genuine issue of fact as to whether the reduction in his income was based upon a decline in his opportunities for employment, thereby presenting a substantial change in circumstances meriting a downward modification.

Foster-Fisher v. Foster-Fisher, 160 A.D.3d 951, 72 N.Y.S.3d 485 (Mem) (2d Dept. 4/25/18).
Family Court properly granted Father's petition for a downward modification of his child support obligation and granted Mother's petition for arrears. Father demonstrated a substantial change of circumstances based on the fact that the Mother was no longer incurring childcare expenses for the children.

Valverde v. Owens, 60 A.D.3d 753, 71 N.Y.S.3d 374 (Mem) (2d Dept. 4/11/18).
Family Court properly dismissed Father's petition for a downward modification of support. Father failed to demonstrate that a substantial change in circumstances had occurred or that he made diligent attempts to secure employment commensurate with his education, ability and experience.

Abdelrahman v. El Mahdi, 160 A.D.3d 1253, 74 N.Y.S.3d 672 (3d Dept. 4/19/18).
The lower court incorrectly granted the Father's motion to temporarily suspend his child support obligation pursuant to the parties' separation agreement. Father was unable to seek a modification of the terms of an order or judgment of divorce because no order governing child support or judgment of divorce governing child support had been entered.

Gordon-Medley v. Medley, 160 A.D.3d 1146, 74 N.Y.S.3d 412 (3d Dept. 4/12/18).
Wife commenced an action for divorce in 2011. The parties had one unemancipated child together, who was the subject of a 2003 child support order. The Appellate Division held that the Supreme Court did not err by modifying the 2003 child support order based upon the passage of time pursuant to DRL §236. The prior child support order was not incorporated into a later agreement, thus, the statutory language stating that "a court may modify an order of child support where . . . three years have passed since the order was entered, last modified or adjusted" was applicable.

Abizadeh v. Abizadeh, 159 A.D.3d 857, 70 N.Y.S.3d 54 (Mem) (2d Dept. 3/21/18).
Abizadeh v. Abizadeh, 159 A.D.3d 858, 72 N.Y.S.3d 563 (2d Dept. 3/21/18).
Supreme Court properly denied Father's motion for a downward modification of his child support obligation because he failed to establish a substantial change in circumstances. Father's submissions, which relied on overpayments he had already made and underpayments by the mother, did not set forth a proper basis upon which to order a prospective reduction in the Father's child support obligation.

Michael K. v. Pamela D.W., 159 A.D.3d 594, 70 N.Y.S.3d 386 (Mem) (1st Dept. 3/27/18).
The Family Court providently denied the Father's petition for a downward modification of his child support obligation. Specifically, the Magistrate found that the income reported on the father's tax returns did not present a complete picture of his finances and the Father failed to demonstrate that he diligently sought to obtain employment commensurate with his earning capacity.

Diaz v. Smatkitboriharn, 158 A.D.3d 760, 71 N.Y.S.3d 150 (2d Dept. 2/21/18).
Family Court properly granted Mother's application for an increase in Father's child support obligation where she presented uncontroverted testimony and other evidence as to specific expenses related to the care of the children, including specific increased expenses related to the children's extracurricular activities. In addition, she submitted her tax return and other financial evidence to demonstrate she was unable to meet the financial needs of the children even with the Father's current child support contribution.

Brady v. White, 158 A.D.3d 748, 72 N.Y.S.3d 114 (2d Dept. 2/21/18).
Support Magistrate properly dismissed Father's petition for a downward modification of his child support obligation because he failed to disclose his financial circumstances or to present credible evidence that his symptoms or physical condition prevented him from working. He also failed to show that he had diligently sought re-employment commensurate with his qualifications and experience. However, the Support Magistrate erred in dismissing those branches seeking a modification based on the provisions of the Stipulation which provided for reductions in support based on a child's emancipation.

DeGennaro v. DeGennaro, 158 A.D.3d 682, 68 N.Y.S.3d 747 (Mem) (2d Dept. 2/14/18).
Family Court properly dismissed Father's petition for a downward modification of his child support obligation, which was to be pre-paid from retirement funds. The Court lacked the authority to vacate or modify the provision of the Stipulation in which the Father agreed to transfer funds from his retirement accounts to Mother. Moreover, the Father's allegations of parental alienation on the part of the Mother were conclusory and unsupported.

Calenda v. Calenda, 158 A.D.3d 625, 70 N.Y.S.3d 552 (2d Dept. 2/7/18).
Family Court properly determined that there had been a substantial change of circumstances warranting an upward modification of the Father's child support obligation. In determining whether there has been a change in circumstances, the court must consider several factors, including the increased needs of the children, the increased cost of living insofar as it results in greater expenses for the children, a loss of income or assets by a parent or a substantial improvement in the financial condition of a parent, and the current and prior lifestyles of the children.

Heintzman v. Heintzman, 157 A.D.3d 682, 68 N.Y.S.3d 508 (2d Dept. 1/10/18).
Support Modification was remanded to the Family Court for a new determination of the parties' respective incomes for the years 2012-2014 and their proportionate shares of college education expenses, a new determination regarding the average costs of tuition and room and board at SUNY Albany and SUNY Binghamton, and a recalculation of the Father's child support obligation and arrears. Income was erroneously imputed to Mother due to her exercise of stock options and Father's income was not adjusted for FICA. Family Court also failed to properly apply credits to Father's obligation for his payment of college expenses and to recalculate his obligation upon the emancipation of one child.

Gillison v. Penepent, 156 A.D.3d 697, 66 N.Y.S.3d 293 (2d Dept. 12/13/17).
Family Court incorrectly granted Father's application for a downward modification of support. Although Father alleged a loss of employment, the proper amount of support is determined not by the parent's current economic situation but by the parent's assets and earning capacity. Here, Father failed to demonstrate that his loss of employment was through no fault of his own, because he was terminated due to his incarceration for failing to meet his child support obligation. Father also failed to sufficiently prove that he made efforts to procure equivalent full-time employment after his former employer would not re-hire him.

Muller v. Muller, 156 A.D.3d 644, 64 N.Y.S.3d 561 (Mem) (2d Dept. 12/6/17).
Family Court properly denied Father's petition for a downward modification of his child support obligation. Although Father alleged he was permanently disabled and unable to work in any capacity, he failed to present any competent medical evidence.

Lindsay v. Lindsay-Lewis, 156 A.D.3d 642, 64 N.Y.S.3d 564 (Mem) (2d Dept. 12/6/17).
Family Court properly dismissed Father's petition for a downward modification of his child support obligation. While a loss of employment may constitute a substantial change in circumstances, the evidence relating to Father's unemployment showed that he voluntarily left his job to follow his girlfriend to Florida.

Xu v. Sullivan, 155 A.D.3d 1031, 65 N.Y.S.3d 204 (2d Dept. 11/29/17).
Family Court properly denied Father's petition for a downward modification of his child support obligation. While the Father demonstrated that he was unemployed or underemployed, he did not demonstrate that this constituted a change in circumstances. On the contrary, when the Father's support obligation was set, the Supreme Court imputed an income to him.

Daughtry v. Jacobs, 155 A.D.3d 947, 65 N.Y.S.3d 242 (2d Dept. 11/22/17).
Family Court properly granted Mother's petition for an upward modification of the Father's child support obligation. The Mother demonstrated a substantial change in the parties' financial circumstances between the time the 2005 order was issued and the time her petition was filed in 2013 as well as an increase in the child's expenses over that period.

Frederick-Kane v. Potter, 155 A.D.3d 1327, 65 N.Y.S.3d 329 (3d Dept. 11/22/17).
The Family Court erred when it found the support provisions of the parties' judgment of divorce to be invalid and unenforceable and then remitted the matter to the Support Magistrate for a de novo determination of child support. The CSSA does not require that the JOD explicitly set forth the CSSA recitals but rather only requires the inclusion of such recitals in the agreement or stipulation.

Krege v. Hoffman, 155 A.D.3d 1398, 63 N.Y.S.3d 913 (Mem) (3d Dept. 11/22/17).
After a hearing, the Family Court granted the mother's application for an upward modification of the father's child support obligation. The father objected, and the Family Court sustained the Father's objections and dismissed the petition. On appeal, the Appellate Division held that mother failed to meet her burden by only providing general claims regarding an increase of the cost of goods and providing for the child which was insufficient to constitute an unanticipated or unreasonable change in circumstances.

Buchanan v. Kocke, 155 A.D.3d 1602, 63 N.Y.S.3d 773 (4th Dept. 11/9/17).
Family Court erred in granting Father a downward modification of his child support obligation inasmuch as Father did not raise any issue regarding his support obligation in his petition seeking primary placement of the children with him, which was denied.

Hardman v. Coleman, 154 A.D.3d 1146, 62 N.Y.S.3d 615 (3d Dept., 10/19/17)
All child support stipulations seeking to deviate from the CSSA must include a provision stating that the parties have been advised of the provisions of the CSSA and that the basic child support obligation provided for therein would presumptively result in the correct amount of child support to be awarded, and such provision may not be waived by either party or counsel. The failure to include such recitals in a stipulation agreeing to deviate from the CSSA guidelines will render it "invalid and unenforceable".

Lawlor v. McAuliffe, 152 A.D.3d 427, 58 N.Y.S.3d 363 (1st Dept., 7/11/17).
Denial was warranted of mother's application for a downward modification of child support, where mother failed to submit net worth statement or provide any evidence that amount of ordered support was inappropriate in light of her earning ability, even considering that she was temporarily disabled from working.

Fiore, now known as Brochhagen v. Fiore, 150 A.D.3d 1205, 56 N.Y.S.3d 194 (2d. Dept. 5/31/17).
Supreme Court properly denied ex-wife's request for upward modification of ex-husband's basic child support obligation. Ex-wife did not establish a substantial, unanticipated and unreasonable change in circumstances resulting in a concomitant need or that that the patties' Stipulation and supplemental Stipulation were unfair or inequitable when entered into.

Sanders v. Sanders, 150 A.D.3d 781, 54 N.Y.S.3d 68 (2d. Dept. 5/3/17).
The Supreme Court properly denied, without a hearing, the father's motion for a downward modification of child support. Since the stipulation of settlement was executed prior to the effective date of the 2010 amendments to Family Court Act §451, the father had to show there was a substantial and unanticipated change of circumstances since he agreed to the supp0li amount, and he did not make that showing. The stipulation of settlement provided that emancipation occurred upon the happening of certain events, one being where the child establishes a "[p]ermanent residence away from the residence of the Wife for a period in excess of 50 consecutive days." The father failed to show that the child established another residence for a period in excess of 50 consecutive days. Therefore, the father did not show that the child was emancipated, nor did he establish that he was entitled to a hearing on the issue.

Garduno v. Valdez, 149 A.D.3d 551, 52 N.Y.S.3d 345 (1st Dept. 4/18/17).
Modified support order was consistent with the application of the statutory formula and the Support Magistrate did not improvidently exercise her discretion in applying it. Likewise, Support Magistrate's application of the CSSA to the income over the cap was not an abuse of discretion. The Family Court should not have granted Husband's objections to the order and remanded it for recalculation by the Support Magistrate.

Jaffe v. Friedman, 149 A.D.3d 923, 50 N.Y.S.3d 293 (Mem) (2d. Dept. 4/19/17).
The Supreme Court properly denied defendant's motion to modify his child support obligations when defendant failed to meet his burden of establishing a substantial change in circumstances warranting the modification.

Matter of Conde v. Gouin, 149 A.D.3d 834, 51 N.Y.S.3d 611 (2d. Dept. 4/12/17).
The father filed a petition seeking a downward modification of his child support obligations, claiming his income declined by more than 15% since the last order of support. The Support Magistrate found that the father was not entitled to downward modification of his child support obligation. The Family Court denied the father's objections to the Support Magistrate. The Second Department held that the Family Court properly denied the father's objections because he did not testify credibly regarding the circumstances surrounding him leaving his former job and he failed to present sufficient evidence that he diligently sought re-employment commensurate with his earning capacity.

Matter of Harrison v. Harrison, 148 A.D.3d 1630, 50 N.Y.S.3d 715 (4th Dept. 3/24/17).
The mother sought modification of her child support obligation based on the father's increase of income by more than 15%. The Family Court and Support Magistrate dismissed the mother's petition and denied her objections because, besides the 15% increase in income, she did not show a substantial change of circumstances. The Fourth Department found that the petition was denied upon application of the incorrect standard. All that is required for a modification of child support is a change in the party's income by fifteen percent or more since the order was entered, last modified or adjusted.

Matter of McGovern v. McGovern, 148 A.D.3d 900, 50 N.Y.S.3d 408 (2d.Dept. 3/15/17).
The Second Department held that the Family Court improvidently exercised its discretion in denying the mother's objections to the Support Magistrate's determination that the father was entitled to a credit against his child support obligation based on prior overpayments of child support. There was no basis for concluding that any exception to the strong public policy against recoupment of support overpayments existed. The overpayments could not be applied to the father's child support obligation but could be used to offset his share of the add-on expenses, such as educational expenses.

Matter of Taylor v. Taylor, 148 A.D.3d 1161, 50 N.Y.S.3d 455 (2d. Dept. 3/29/17).
The father claimed he was entitled to a credit against his outstanding child support obligation because he gave the mother $6,000 in proceed she received from the sale of the former marital home. The Second Department held this argument was without merit and that this sum also was not an advance payment of child support.

Matter of Addimando v. Huerta, 147 A.D.3d 750, 46 N.Y.S.3d 168 (2d Dept. 2/1/17).
Father failed to demonstrate a substantial change in circumstances warranting downward modification of his child support obligation because he failed to establish he made a good faith effort to find employment commensurate with his qualifications and experience. The father made the choice to open a solo law practice, which he would not profit from for several years and he did not submit evidence showing he pursued other lucrative opportunities before opening his own practice. Furthermore, he failed to show that his physical disability, which he had since he was a child, interfered with his working ability. The father also argued his child support obligation should be downwardly modified on the ground of constructive emancipation or parental alienation. However , the Second Department struck down the constructive emancipation argument because evidence failed to show the father made sufficient attempts to maintain a relationship with his children or that the children actively abandoned their relationship with him .The court also struck down the parental alienation argument because the father failed to demonstrate that the mother deliberately frustrated or actively interfered with his relationship with the children.

Matter of Spaights v. Muller, 147 A.D.3d 768, 46 N.Y.S.3d 207 (2d Dept. 2/1/17).
Family Court properly denied the father's objections to the Support Magistrate's order which denied his petition for an upward modification of the mother's child support obligation because the father failed to show that either party's financial situation changed between the issuance of the prior order and the time he filed his petition for modification.

Matter of Brink v. Brink, 147 A.D.3d 1443, 47 N.Y.S.3d 553 (4th Dept. 2/3/17).
Family Court order denying petitioner's objections to the Support Magistrate's denial of his petition is unanimously reversed because the Family Court erred in concluding petitioner failed to establish a sufficient change in circumstances to warrant a modification. The petitioner proved his income was significantly reduced by 18%, which constitutes a sufficient change in circumstances to warrant recalculation of his child support obligation.

Matter of Lorenzo v. Lorenzo, 146 A.D.3d 959, 48 N.Y.S.3d 677 (2d Dept. 1/25/17)
The Family Court properly denied father's objections to Support Magistrate's determination that he was not entitled to downward modification of his child support obligation because the father failed to establish his loss of employment was involuntary and through no fault of his own. The Court used the "substantial and unanticipated change in circumstances" standard since the parties' stipulation of settlement was executed prior to the effective date of the 2010 amendments to Family Court Act §451.

Rosenberg v. Rosenberg, 145 A.D.3d 1015, 42 N.Y.S.3d 855 (Mem) (2d Dept. 12/28/16).
Father failed to establish a change in his financial situation between the time of the original support award and his application for a downward modification and, therefore, his petition was properly dismissed.

Holeck v. Bevel, 145 A.D.3d 1600, 43 N.Y.S.3d 816 (4th Dept. 12/23/16).
Family court properly directed the father to apply to have the Social Security Administration send those disability benefits he received for the support of the children to the mother, who was the custodial parent. The reduction in the father's income as a result of the assigned benefits did not constitute a change in circumstances warranting a reduction in his child support obligation.

Zaveckas v. Senat, 145 A.D.3d 908, 42 N.Y.S.3d 838 (Mem) (2d Dept. 12/21/16).
Where father failed to submit competent medical evidence of his alleged disability, his downward modification was properly dismissed for failure to establish a change in circumstances.

Detwiler v. Detwiler, 145 A.D.3d 778, 42 N.Y.S.3d 354 (2d Dept. 12/14/16).
Mother's unilateral relocation with the children to Missouri, without consulting the father, just 4 days after the father filed a petition to modify custody, raised a strong probability that she was unfit to continue to act as the custodial parent. The family court properly granted the father's petition and denied the mother's subsequent petition for permission to relocate.

Thompson v. Sussman, 144 A.D.3d 928, 40 N.Y.S.3d 571 (2d Dept. 11/16/16).
Parties entered into stipulation setting father's child support obligation prior to the 2010 amendments to the statute regarding bases for modification. Thus, it was error for the family court to hold the mother's modification petition to the standard set forth by the 2010 version of the statute, even though the Support Collection Unit had issued a COLA increase order after the statute's effective date. The adjustment order did not render the child support order subject to the new law.

Tomassi v. Suffolk Co. DSS, 144 A.D.3d 930, 41 N.Y.S.3d 540 (2d Dept. 11/16/16)
Where father failed to submit a financial disclosure affidavit and his testimony failed to establish a substantial change in circumstances, the family court properly denied his petition seeking modification of his child support obligation.

Conway v. Gartmond, 144 A.D.3d 795, 41 N.Y.S.3d 90 (2d Dept. 11/9/16).
Initially, the mother had primary physical custody and the father paid child support. However, after certain modifications to the parenting time schedule, the parties shared 50/50 time with the subject child. Because the mother earned approximately $250,000 per year and the father earned approximately $160,000 per year, the family court should have granted the father's petitions to terminate the father's child support obligation and should have issued an order of child support in favor of the father. Because the mother earned a higher income, she was the "non-custodial parent" for child support purposes.

R.S. v. A.P., 53 Misc.3d 1215(A)48 N.Y.S.3d 267 (Table) (Fam. Ct., Ontario Co., Aronson 11/15/16).

The Father brought a modification petition to reduce his child support obligation. After a hearing, his support was slightly reduced. Then, the father filed objections claiming that the parties' support obligations should be assessed according to their financial situations and household incomes, rather than on the self-imposed hardship standard. The Court agreed and stated that the Father's prior modification petition was determined on the ground that his income reduction was self-imposed. However, the Court found that it was clear the father's income in 2013 was an exception to his typical earning capacity, rather than a representation thereof. Thus, it was an improvident exercise of discretion for the support magistrate to impute income to the father based on what was a temporary work assignment paying higher rates. As a result, the Court held that in a child support modification proceeding, income should not be imputed to a parent of lesser means where one exceptionally good year of earnings is not representative of the parent's long-term earning capacity and where there is no evidence that the parent took lesser paying jobs to avoid their support obligations.

O'Connor-Gang v. Munoz, 143 A.D.3d 825, 39 N.Y.S.3d 67 (2d Dept. 10/12/16).
In light of: (1) the significant increase in the father's income, post-judgment; (2) the increased costs relating to the subject child who had special needs; and (3) the father's failure to make substantial noneconomic contributions contemplated by the parties' stipulation of settlement, the family court properly granted the mother's petition to increase the father's child support obligation from $800 per month to $3,000 per month and to increase his *pro rata* share of the child's add-on expenses from 50% to 79%.

Kolodny v. Perlman, 143 A.D.3d 818, 38 N.Y.S.3d 613 (2d Dept. 10/12/16).
Family court properly denied the father's petition for a downward modification of his child support obligation but should not have denied it "with prejudice" to future applications.

Smith v. McCarthy, 143 A.D.3d 726, 38 N.Y.S.3d 588 (2d Dept. 10/5/16).
Family court should not have denied the father's downward modification petition based on a finding that he left his job voluntarily. The father had been laid off from his job near his home in Pennsylvania and, thereafter, found a new position in Delaware. However, the father's current wife refused to relocate to Delaware and had also commenced an action for divorce against him. If he kept the job in Delaware, the father would have been unable to spend time with the children of his current marriage. The Court further noted that, after "voluntarily" leaving his employment in Delaware, the father was ultimately awarded custody of those children. The Court held that, under the circumstances, the father's decision to leave his out-of-state position should not have precluded his petition for a downward modification of support. The record showed that the father made diligent efforts to obtain employment but that there were no jobs available in his field within a 100 mile radius of his residence.

Wiener v. Salamy, 142 A.D.3d 1179, 37 N.Y.S.3d 909 (Mem) (2d Dept. 9/28/16).
Father's petition was properly dismissed where he failed to show a change in circumstances since the time of his last unsuccessful petition for a downward modification.

Frates v. Frates, 142 A.D.3d 582, 36 N.Y.S.3d 505 (2d Dept. 8/17/16).
Where father was clearly entitled to a downward modification of his child support obligation (based on the parties' eldest child beginning to live with him) and the extensive financial information received by the trial court at the hearing, the trial court did not err in denying the mother's motion to dismiss the father's application based on his failure to attach a statement of net worth.

Holmes v. Holmes, 140 A.D.3d 1066, 32 N.Y.S.3d 658 (2d Dept. 6/22/16).
Family Court improperly denied father's petition for a downward modification. The record showed that the father demonstrated that he was laid off from his employment due to no fault of his own and that he had made diligent, good faith efforts to obtain new employment commensurate with his experience and qualifications.

Ealy v. Levy-Hill, 140 A.D.3d 1164, 33 N.Y.S.3d 754 (Mem) (2d Dept. 6/29/16).
Father's petition for a downward modification of child support should not have been granted. At the hearing, the father failed to demonstrate that his loss of employment was due to no fault of his own and that he made diligent efforts to obtain commensurate employment. The Court noted that the father failed to submit evidence such as resumes sent to potential employers or proof that he had been on any job interviews in search of employment.

Nenninger v. Kelly, 140 A.D.3d 961, 34 N.Y.S.3d 131 (2d Dept. 6/15/16).
Parties' stipulation of settlement provided for the amount of child support, the amount of maintenance, and a specific termination date for the wife's maintenance. Accordingly, wife's application for an upward modification of child support upon the termination of her maintenance was not based on an unanticipated change in circumstances and was properly dismissed by the family court.

M.M. v. D.P., 5/9/16 NYLJ 1202759240929 (Fam. Ct., Kings Co., Clarke).
The Respondent-Father filed an objection to the Order of the Support Magistrate which dismissed the petition filed by Respondent to Modify an Order of Support. The Court determined that a comprehensive review of the entire file was required to address underlying issues created during the original paternity petition filed by the Petitioner-Mother in 2003, which was granted based upon the Father's default. The Court found the original paternity petition was defective because it was disputed whether the Father was institutionalized or living at the address where service was attempted. The Court also found that income was improperly assessed and poor person's relief should have been calculated based upon the Father's income. Thus, the Court granted the Father's objection and ordered that (i) the Order of Filiation was vacated and remanded for a de novo determination and (ii) a 2009 Order of Support was vacated.

Amanda T. v. Erick Z., 140 A.D.3d 529, 34 N.Y.S.3d 25 (1st Dept. 6/16/16)
Family court properly denied father's petition for a downward modification of support order. Father failed to submit evidence sufficient to demonstrate a substantial change in circumstances warranting a downward modification since he did not submit a financial disclosure affidavit, job search diary, or any evidence of his income. Furthermore, the respondent failed to comply with the Support Magistrate's directive to attend the Support Through Employment Program (STEP).

Nicotra v. Nicotra, 139 A.D.3d 1070, 30 N.Y.S.3d 850 (Mem) (2d Dept. 5/25/16).
Family court properly found that the petitioner father failed to meet his burden in support modification proceeding by failing to offer medical evidence in support of his claims that an alleged illness prevented him from working.

Goehringer v. Vozza-Nicolosi, 139 A.D.3d 949, 30 N.Y.S.3d 566 (Mem) (2d Dept. 5/18/16).
Family court properly denied mother's objections to order granting father's petition for a downward modification of child support. The father established both that his loss of employment constituted a substantial change in circumstances and that he made a good-faith effort to obtain new employment commensurate with his qualifications and experience. The Court noted that, although direct support payments may not be recovered by reducing future payments, public policy does not prohibit offsetting add-on expenses against an overpayment.

Morgan v. Spence, 139 A.D.3d 859, 31 N.Y.S.3d 556 (2d Dept. 5/11/16).
Family court erred in denying father's petition for downward modification of child support based on his having been laid off from his employment and his unsuccessful efforts to obtain comparable employment. The matter was remitted for a hearing and determination of the amount of the reduced support obligation.

Thomas v. Fosmire, 138 A.D.3d 1007, 30 N.Y.S.3d 268 (2d Dept. 4/20/16).
Despite increase in noncustodial mother's income by more than 15%, the trial court properly denied the father's petition for an upward modification in child support based on the 2010 statutory amendment. The record showed that the mother's income had increased but that her expenses had also increased to the extent that they exceeded her income according to her financial disclosure affidavit. In addition, the father did not establish an inability to meet the needs of the children.

Kameneva v. Hughes, 138 A.D.3d 854, 28 N.Y.S.3d 343 (Mem) (2d Dept. 4/13/16).
Family court properly imputed income to the mother in connection with her request for a downward modification of her child support obligation and the reduction of her support obligation from $825 per month to $734 per month was appropriate.

Sonkin v. Sonkin, 137 A.D.3d 635, 28 N.Y.S.3d 361 (1st Dept. 3/24/16).
The Appellate Division unanimously affirmed an Order of the Supreme Court, which denied defendant husband's motion for a downward modification of his child support obligations. The appellate court found that the lower court properly determined that defendant failed to demonstrate a substantial, unanticipated and unreasonable change in his circumstances to warrant a reduction in the child support obligations contained in the parties' stipulation.

Dailey v. Govan, 136 A.D.3d 1029, 26 N.Y.S.3d 173 (2d Dept. 2/24/16).
Petitioner mother, seeking an upward modification of child support, did not submit all of the required financial documentation, including tax returns, and did not remedy that failure through other submissions and testimony. Accordingly, it was error for the family court to grant her petition. Instead, the Support Magistrate should have adjourned the proceeding until the mother provided sufficient documentation.

Taylor v. Benedict, 136 A.D.3d 1295, 24 N.Y.S.3d 546 (Mem) (4th Dept. 2/5/16).
Family court properly imputed income to the father and properly granted the mother's petition for an upward modification of child support based on that income. The father testified at the hearing that he was currently unemployed but that he had worked "off and on" for over 5 years, earning $10 an hour and that he did not have any disabilities to prevent him from working. Accordingly, imputed income of $20,800 per year was appropriately attributed to him.

Neufeld v. Neufeld, 135 A.D.3d 570, 22 N.Y.S.3d 854 (Mem) (1st Dept. 1/19/16).
The Appellate Division unanimously affirmed an Order of the Supreme Court, which denied defendant's motion for a downward modification of maintenance, given the defendant's failure to submit either a paycheck or his most recently filed tax return in support of his motion for a downward modification of maintenance, the denial of which was without prejudice and subject to renewal upon the submission of the requisite documentation.

Strykiewicz v Strykiewicz, 135 A.D.3d 1030, 22 N.Y.S.3d 685 (3d Dept. 1/7/16).
Although ordinarily when a party fails to provide a statement of net worth in a support proceeding, the court should decline to hear the motion, in light of defendant's pro se status and his clear entitlement to a downward modification of his support obligation, the appellate court remitted the matter for a hearing on the issue of the amount to enable the court to consider the parties' relative financial circumstances.

Fermon v. Fermon, 135 A.D.3d 1045, 24 N.Y.S.3d 226 (3d Dept. 1/7/16).
The terms of the stipulation regarding basic child support were unfair when they were entered into, as they were premised upon his fraudulent misrepresentation that the husband's annual income was lower than what it actually was. Accordingly, the trial court properly modified the award of child support.

Fantau v. Fantau, 134 A.D.3d 1109, 21 N.Y.S.3d 725 (2d Dept. 12/30/15).
Father's petition for a downward modification of child support was properly dismissed, as the father failed to establish that he used his best efforts to obtain employment on par with his qualifications and experience or that his current income was commensurate with his earning capacity. The Court noted that the father failed to submit evidence such as resumes sent to potential employers or proof that he had been on any interviews in search of employment commensurate with his education, ability, and experience.

Ippoliti v. Ippoliti, 134 A.D.3d 844, 21 N.Y.S.3d 323 (2d Dept. 12/9/15).
Father failed to show that the termination of his employment did not involve his own fault and, therefore, failed to establish a substantial change in circumstances warranting a downward modification of child support. Notwithstanding the foregoing, the father also failed to show that he diligently sought employment commensurate with his qualifications and experience. Accordingly, the father's petition was properly denied.

In re Cato, 134 A.D.3d 821, 22 N.Y.S.3d 459 (2d Dept. 12/9/15).
Family court properly denied the father's request for a downward modification of child support. The father claimed that he had been forced to retire from his job because of his deteriorating eyesight, which prevented him from driving safely. However, the father offered no medical evidence in support of his claimed condition and he further failed to demonstrate that he was incapable of working or that he had made a good faith effort to obtain other employment commensurate with his abilities or qualifications. Because the father's support arrears were greater than the amount of support due for a period of 4 months, the family court properly upheld the denial of the father's challenge to the suspension of his driver's license.

Schulman v. Miller, 134 A.D.3d 616, 22 N.Y.S.3d 44 (1st Dept. 12/29/15).
The Appellate Division affirmed the Orders of the Supreme Court, which: (i) denied plaintiff's motions for a declaration that the parties' older child was emancipated upon ceasing to be a full-time student at age 21, or, alternatively, that she would be emancipated on her 22nd birthday, and a re-computation of his support obligations accordingly, and to compel financial disclosure by defendant, and (ii) granted defendant's motion to direct plaintiff to resume payment of all basic child support and add-on expenses pursuant to the parties' stipulation of settlement. The appellate court noted that the parties' stipulation of settlement did not provide for and the parties did not intend to include a provision concerning the reduction or recalculation of plaintiff's child support obligation upon the emancipation of the older child. The Court held that it should not rewrite the parties' agreement so that plaintiff could obtain a downward modification of the unallocated support obligation.

Rubin v. Rubin, 134 A.D.3d 572, 23 N.Y.S.3d 25 (1st Dept. 12/22/15).
The Appellate Division unanimously affirmed the Order of the Supreme Court, which granted plaintiff father's motion to terminate his monthly child support obligation of $4,250 based upon his showing of a substantial change in circumstances as a result of a change in the child's residence from defendant mother to him. The appellate court concluded that, notwithstanding the defendant mother's contention, the court was not required to conduct a hearing, as no triable issues of fact were raised. The court further noted that the mother's allegations of the father's undue influence on the child and other allegations pertaining to the child's execution of her affidavit were conclusory and insufficient to warrant a hearing. The court concluded that the child's affidavit, based upon her personal knowledge of her intent not to return to the mother's home, did not constitute inadmissible hearsay.

Bores v. Bores, 134 A.D.3d 527, 23 N.Y.S.3d 11 (1st Dept. 12/15/15).
The Appellate Division unanimously affirmed the Order of the Supreme Court, which denied plaintiff wife's cross motion for a downward modification of her child support obligation. The appellate court found that plaintiff failed to show a substantial change in circumstances to warrant a downward modification. The record demonstrated that plaintiff's monthly income had actually increased from the time of the initial child support determination, and plaintiff failed to show that her overall expenses had significantly changed from that time. Further, the appellate court declined to entertain plaintiff's challenges to the Referee's initial child support recommendation, given that she failed to appeal from the order confirming the Referee's report, or from the judgment of divorce, which incorporated said order.

Christopher H. v. Marisa S.-H., 134 A.D.3d 469, 21 N.Y.S.3d 220 (1st Dept. 12/8/15).
The Family Court correctly confirmed the Support Magistrate's conclusion that although petitioner lost his employment, it did not constitute a sufficient change in circumstances to warrant a downward modification because he failed to make diligent efforts to secure new employment. The appellate court further found that the Family Court's determination was supported by the evidentiary record and credibility determinations, which were not disturbed on appeal.

Georgette D.W. v. Gary N.R., 134 A.D.3d 406, 21 N.Y.S.3d 41 (1st Dept. 12/1/15).
Although the respondent's objections were untimely, and the appellate court found that he failed to proffer a reasonable excuse for the delay, the appellate court exercised its discretion in entertaining the appeal since it concerned the Family Court's subject matter jurisdiction. The Appellate Division concluded that the Support Magistrate's sua sponte determination that the parties' stipulation's noncompliance with the requirements of the CSSA provided a basis for a de novo hearing on child support was tantamount to invalidating the stipulation, which is beyond the power of Family Court. The appellate court concluded further that respondent's motion to dismiss the petition for failure to plead facts warranting modification of child support was correctly denied since the petition and supporting affidavit allege that respondent did not meet his support obligations, that the child's expenses had increased, and that there had been a significant increase in respondent's financial resources in the eight years since the parties entered into the stipulation.

Mitchell v. Mitchell, 134 A.D.3d 1213, 21 N.Y.S.3d 438 (3d Dept. 12/3/15).
The Appellate Division affirmed an order of the Family Court, which granted respondent's objections to an order of a Support Magistrate. The father commenced a proceeding seeking a modification of child support on the basis that, as he alleged, his parenting time had increased and he had become the child's primary physical custodian and, thus, he argued that the mother should be directed to pay child support to him pursuant to the CSSA or that his child support obligation should be reduced based on the expenses resulting from the increased parenting time. Following a hearing, a Support Magistrate partially granted the petition and reduced the father's support obligation as calculated under the CSSA. Thereafter, the Family Court granted the mother's objections to the Support Magistrate's order, finding that the record did not support a deviation from the CSSA. As an initial matter, the appellate court rejected the father's argument that the Family Court should have determined that he was the child's custodial parent. The appellate court concluded that based upon the record, the Family Court did not err in determining that the parties shared "close to equally shared physical custody of the child." The appellate court determined that the Family Court properly granted the mother's objections to the Support Magistrate's determination to deviate from the presumptive amount of child support because the Support Magistrate did not identify the factors she relied upon in making such determination. Further, the appellate court noted that its independent review of the record did not reveal sufficient evidence to support a finding that the father's support obligation was unjust or inappropriate based on the application of the statutory factors.

Mancuso v. Mancuso, 134 A.D.3d 1421, 21 N.Y.S.3d 790 (4th Dept. 12/23/15).
Trial court erred in concluding that it was required to recalculate child support upon the termination of the plaintiff's maintenance, as that was not provided in the judgment of divorce. The trial court further erred in essentially correcting the prior error in connection with the plaintiff's request for an upward modification of child support. The plaintiff failed to show any basis for an upward modification of child support and, therefore, her request should have been denied.

N.D. v. A.D., 30442/2010, NYLJ 1202745219030 (Sup. Ct. Suffolk Co., 12/10/15, J. Tarantino).
The Court held that the former husband's child support obligation should be modified, as the older of the parties' 2 children had been emancipated since the support order was issued. Therefore, the Court held that child support would be recalculated using 17% of Plaintiff's current income.

Milton v. Tormey-Milton, 133 A.D.3d 857, 21 N.Y.S.3d 155 (2d Dept. 11/25/15).
Family Court should not have granted the mother's motion to dismiss the father's petition for a downward modification of child support, as the father's allegations were sufficient to state a cause of action for modification. The father alleged that: (1) his children were going away to college and that their tuition, room, and board would be paid for out of an UTMA account funded by him; (2) the child support amount agreed to by the parties in their stipulation of settlement was based on the expectation that the father would obtain a more lucrative employment, which did not happen; and (3) he was able to meet his support obligations only by depleting assets. The matter was remitted for a hearing and determination of the father's petition.

Straker v. Maynard-Straker, 133 A.D.3d 865, 21 N.Y.S.3d 288 (2d Dept. 11/25/15).
Family court erred in granting father's petition for downward modification of child support based on his claimed inability to work. The father submitted no medical proof to support his claim that he suffered from an eye problem that prevented him from working in his field of installing drywall. Moreover, the father did not make any showing that he made efforts to obtain employment in a different field.

Goodman v. Pettit, 133 A.D.3d 630, 20 N.Y.S.3d 112 (2d Dept. 11/12/15).
The parties' agreement provided that the father would pay $2,900 per month in child support "until the children are emancipated." Thus, even if the father's being awarded custody of 1 of the 3 subject children constituted an emancipation event, same would not serve as a basis for reducing the father's support obligation for the remaining 2 children. The father had the burden of showing that the amount of unallocated support was excessive based on the needs of the children, which he failed to do. Accordingly, his motion should have been denied and the mother's cross-motion for arrears should have been granted.

Geller v. Geller, 133 A.D.3d 599, 20 N.Y.S.3d 379 (2d Dept. 11/4/15).
Upon emancipation of the parties' eldest children, the father sought a downward modification of his child support obligation pertaining to the parties' younger children. In performing the CSSA calculations, the family court properly determined that the presumptive award ($447 per week) was inappropriate in light of the financial support that the father was receiving from his girlfriend, with whom he resided and who paid for all of the household expenses, without contribution by the father. Accordingly, the family court's upward deviation to an award of $650 per week was appropriate.

Gelfarb v. Gelfarb, 133 A.D.3d 598, 18 N.Y.S.3d 548 (Mem) (2d Dept. 11/4/15).
Father established a change in circumstances sufficient to modify the prior order of custody, which awarded custody of the subject child to the mother. Both parties testified at the hearing that the child had been residing at the father's apartment 3 nights per week and every other weekend in order to attend a school nearby. Accordingly, it was proper to award the father sole custody of the subject child.

Matter of Jeffers v. Jeffers, 133 A.D.3d 1139, 20 N.Y.S.3d 691 (3d Dept. 11/25/15).
The Appellate Division affirmed the Family Court's Order, which denied the petitioner's objections to an order of the Support Magistrate. In September 2012, the father petitioned to terminate the order of support, alleging that his support obligation was based on a higher income than he had earned for the past several years. Thereafter, the father filed an amended petition seeking to terminate or recalculate his child support obligation, and the mother moved to dismiss for failure to allege a substantial change in circumstances, which motion was denied. Following a hearing, the Support Magistrate dismissed the modification petition, with prejudice, based upon the father's failure to meet his burden of proof. The father filed objections, which the Family Court denied. The Appellate Court noted that the Support Magistrate properly determined that the father had not met his burden inasmuch as he failed to submit credible evidence of his income for 2012 and 2013 and, therefore, properly denied the father's objections.

Grace v. Grace, 132 A.D.3d 1218, 18 N.Y.S.3d 770 (3d Dept. 10/29/15).
The Appellate Division affirmed an Order of the Supreme Court, which, *inter alia*, denied defendant's cross motion to modify a prior order of child support. Plaintiff husband and defendant wife were the divorced parents of five children. Pursuant to an oral stipulation of settlement that was incorporated but not merged into the parties' judgment of divorce, the husband agreed to pay the wife child support in the annual amount of $16,500, which represented a downward deviation from the CSSA, in addition to maintenance in the annual amount of $28,000 for five years. The husband moved to terminate his maintenance obligation on the basis of the wife's alleged cohabitation with her paramour. The wife opposed the motion and cross-moved for an upward modification of child support based upon an increase in the husband's income. The Supreme Court denied the wife's cross motion, partially granted the husband's motion and terminated his obligation to pay maintenance, from which the wife appealed. The wife's sole contention was that the lower court erred in denying, without a hearing, her request for an upward modification of the husband's child support obligation. The Appellate Court found that the husband's income did not alone constitute a sufficient basis upon which to grant an upward modification of child support. Although the parties did agree that termination of the husband's maintenance obligation would constitute a sufficient change in circumstances for the purpose of recalculating child support, the wife failed to submit a sworn statement of net worth, or any other financial documentation in support of her cross motion. Accordingly, the Appellate Division concluded that the Supreme Court properly denied the wife's application without prejudice to renewal.

Kandus v. Forlenza, 132 A.D.3d 815, 18 N.Y.S.3d 147 (2d Dept. 10/21/15).
Mother failed to establish her right to an upward modification of the prior child support order based on the father's having relocated to the Czech Republic to fulfill the responsibilities of his employment. The mother failed to offer proof that his relocation impacted her expenses or the children's needs.

Lueker v. Lueker, 132 A.D.3d 739, 17 N.Y.S.3d 778 (2d Dept. 10/14/15).
Father established that his financial condition had worsened since the prior child support order was issued. However, the evidence showed that he was still possessed of sufficient means and earning potential to meet the obligation. Accordingly, his application for a downward modification of child support was properly denied. However, the trial court should have granted the father's application to vacate that portion of the order which required the parties to pay their *pro rata* shares for the children's private school tuition and should have denied the mother's motion to direct the father to post a bond to guarantee the payment of his share of those costs. The evidence showed that the mother had since relocated specifically to take advantage of the public school system where her new residence was located and both children had been enrolled in public school. There was no evidence offered that the needs of either child would be better served by enrollment in private school.

James B. v. Regina D.S., 132 A.D.3d 505, 17 N.Y.S.3d 642 (Mem) (1st Dept. 10/15/15).
The Appellate Division unanimously affirmed the Family Court's Order, which denied petitioner's objection to an order dismissing his petition for downward modification of an order of child support because petitioner failed to meet his burden of establishing the existence of a substantial change of circumstances sufficient to warrant a downward modification of child support. More specifically, petitioner failed to show that he lost his job through no fault of his own.

Lagani v. Wenzhu Li, 131 A.D.3d 1246, 16 N.Y.S.3d 863 (2d Dept. Sept. 30, 2015).
Family Court properly granted respondent mother's motion to dismiss the father's petition for a downward modification of his child support obligation based on a more than 15% increase in the mother's income due to the mother's recent employment. However, the mother's motion papers showed unrefuted documentary evidence that she had been let go from that employment and was actually unemployed. Because there were no material facts in dispute, it was appropriate to dismiss the petition without a hearing. The Court noted that the parties' "opting out" of the application of the CSSA formula to reach their agreed-upon support award did not constitute an "opting out" of the separate bases for a modification petition under FCA § 451(3)(b)(ii).

Rodney W. v. Natasha L., 48 Misc.3d 1228(A), 26 N.Y.S.3d 216 (Table) (Fam. Kings, J. Silvera, 9/8/15).
Father petitioned for a downward modification of his child support obligation. After a hearing, the Support Magistrate dismissed the petition without prejudice. Subsequently, the Father filed an objection claiming that the Support Magistrate erred by increasing his portion of the child care expenses, failing to consider his travel expenses related to exercising visitation with the child, failing to consider his medical debt, failing to consider his tax debt, failing to consider that he fell below the self-support reserve, and ordering that he be responsible for the child's medical insurance. After hearing the objections, the Court held that regarding the childcare expenses and health insurance, the Support Magistrate did not increase the Father's contribution, rather, he continued an order that had been in place for approximately six (6) years. The testimony revealed that the Father stated he never paid for airplane tickets to visit the child, so there were no travel expenses to consider. Further, even if travel expenses existed, there was no proof of those expenses presented. Additionally, the Father testified that he settled his tax debt and would commence paying $400 per month and his payments toward his medical debt were nominal. Lastly, through the Father's own evidence and testimony, the record showed that he earned over $89,000 in 2014 and was therefore well above the self-support reserve.

Casler v. Casler, 131 A.D.3d 664, 15 N.Y.S.3d 461 (2d Dept. August 26, 2015).
Trial court properly denied the mother's motion for an upward modification of child support. The mother failed to show that a decrease in the father's visitation with the child constituted a substantial and unanticipated change in circumstances that created the need for modification of his child support obligation.

IMPUTATION OF INCOME

Statutory Discretion Inherent in Child Support Standards Act

The CSSA vests within the court the discretion to "attribute or impute income from, such other resources as may be available to the parent". This clause specifies four potential sources of imputed income, but it also makes clear that the court is not limited to these when exercising its discretion in this area. The four enumerated sources are:

(1) non-income producing assets;

(2) meals, lodging, memberships, automobiles or other perquisites that are provided as part of compensation for employment to the extent that such perquisites constitute expenditures for personal use, or which expenditures directly or indirecly[1] confer personal economic benefits;

(3) fringe benefits provided as part of compensation for employment; and

(4) money, goods, or services provided by relatives and friends.

General Principles: Imputed Income Based on Earning Capacity and Prior Experience

A court need not rely upon a party's own account of his/her finances for purposes of maintenance, but rather may impute income based upon the party's employment history, future earnings capacity, and educational background. ***Kessler v. Kessler, 118 A.D.3d 946 (2nd Dept., 2014).***

In ***Carney v. Carney, 54 Misc.3d 947 (Sup. Ct., Monroe Co., 2016) (Dollinger, J.)***, the court found that imputation of based on what an individual can do now; not what they did "decades ago".

In ***Gorelik v. Gorelik, 71 A.D.3d 730 (2nd Dept., 2010)***, the appellate court found that the Court need not rely upon a party's own account of finances, but may impute income to a party based upon his or her past income or demonstrated earning potential. Child support is to be determined by a parents' ability to provide for children rather than their current economic situation. Here, the Supreme Court properly imputed $105,000 in annual income to the plaintiff husband based upon his own testimony and evidence adduced at the hearing. Also, the Court properly declined to give collateral estoppel effect to the finding made in Bankruptcy Court order as to his financial circumstances absent identity of issues actually litigated and decided between those proceedings and action herein.

In ***Pfister v. Pfister, 146 A.D.3d 1135 (3rd Dept., 2017)***, the husband appealed from a June 2015 Supreme Court judgment which directed him to pay child support of $340 per week for 2 children and maintenance of $200 per week for 3 years. On appeal, the Third Department affirmed, noting that the Supreme Court properly imputed income of $44,447 per year to the wife and $85,000 per year to the husband, based upon the husband's ownership of a property maintenance business in which he claimed earnings of $63,000 in 2010 and $43,000 in 2013, which earnings he stated declined post-commencement. The wife has two Master's degrees, is a certified school counselor, and earned $18,000 in 2010 from part-time work; she disclosed 2013 income of $16,000, but the evidence established that she also worked a second part-time job, earning approximately $2,125 per month. Both parties had received Chapter 7 Bankruptcy discharges. Supreme Court found that the husband earned more than $120,000 per year until 2009, when he began to change the way he kept his financial records, and that he historically paid for the family's expenses through the business accounts. Further, the Court astutely observed that the husband's income similarly decreased during the prior action for a divorce and that the business's profits were "extremely disproportionate to [the husband's] net income." As for the wife, the Supreme Court emphasized her advanced degrees and rejected her argument that she should not be required to work full time. The Appellate Division found no abuse of discretion in Supreme Court's determination to impute income to the wife according to her actual earnings derived from the two part-time jobs, consistent with the findings of the Bankruptcy Court.

In ***Matter of Taylor v. Benedict, 136 A.D.3d 1295 (4th Dept., 2016)***, the father appealed from a July 2014 Family Court order, denying his objections to a Support Magistrate order, which granted the mother's petition for upward modification of child support. On appeal, the Fourth Department affirmed, noting that the father "testified that he was currently unemployed, but that he had worked for a company 'off and on' for over five years, making $10 per hour, and that he did not have any medical disabilities preventing him from working." The Appellate Division held that Family Court properly determined that the Support Magistrate correctly imputed income to the father of $20,800 per year.

In ***Horn v. Horn, 145 A.D.3d 666 (2nd Dept., 2016)***, contrary to the defendant's contention, the Supreme Court providently exercised its discretion in imputing income to the father in the sum of $90,000 per year. A trial court is not bound by a party's own account of his or her finances, but may impute income based upon the party's past income and demonstrated future potential earnings. Here, the court properly imputed income to the defendant based upon his skills, education, employment history, and financial resources.

In ***Matter of Watson v. Maragh, 147 A.D.3d 769 (2nd Dept., 2017)***, the father is appealing a Family Court order denying his objections to an order directing him to pay child support to the mother. The Second Department affirmed the order, finding that the Support Magistrate correctly determined that the mother was the custodial parent for child support purposes and properly exercised discretion in imputing income to the mother based on her past employment.

In ***Fruchter v. Fruchter, 29 A.D.3d 942 (2nd Dept., 2006)***, the appellate court found the plaintiff's contention that the Supreme Court improperly imputed income to him in determining his pendente lite child support obligations is without merit. "A court may determine a child support obligation on the basis of a party's earning potential, rather than the party's current economic situation". Here, the Supreme Court properly imputed an annual income of $160,000 to the plaintiff given his past employment history and his present ownership of a successful, growing business.

In ***Spreitzer v. Spreitzer, 40 A.D.3d 840 (2nd Dept., 2007)***, the appellate court found that the defendant's contention that the trial court erroneously imputed income to her for the purpose of calculating her child support obligation is without merit. In determining a party's child support obligation, "a court need not rely upon the party's account of his or her finances, but may impute income based upon the party's past income or demonstrated earning potential". Here, the court properly imputed an annual income to the defendant since the evidence at trial demonstrated that she was capable of earning $78,000 a year based on her degree, her nurse practitioner license, the facts adduced at trial, and the testimony of the expert who valued her degree and license. Given its opportunity to assess witness credibility, the court did not err in imputing that amount to the defendant. The record supports the determination of the court that the defendant's earning potential exceeds her actual income reported on her 2004 income tax returns.

When imputing income, a court may in the exercise of its discretion, consider "[w]hat he or she is capable of earning, based upon prevailing market conditions and prevailing salaries paid to individuals with the party's credentials in his or her chosen field." ***Dougherty v. Dougherty***, 131 A.D.3d 916 (2nd Dept., 2015)

Courts are not bound by husband's account of his finances and will look at past income and earning potential as a mortgage consultant. ***Diaz v. Diaz***, 129 A.D.3d 658 (2nd Dept., 2015)

The trial court properly imputed income to wife based on the testimony and report of the husband's vocational expert. Although the Ivy–League educated wife left full-time work as a lawyer in 1999 to raise the parties' children, she nevertheless maintained her law license, continued to engage in professional activities, and did consulting work. Prior to commencement of the action, she was accepted to the Scheinman Institute on Conflict Resolution at Cornell University for an arbitration program and was appointed as an arbitrator for the United Federation of Teachers and New York City Department of Education § 3020–a Hearing Panel, where she rendered a 90–page decision upheld by the Supreme Court. ***R.S. v. B.L., 151 A.D.3d 609, 57 N.Y.S.3d 146 (1st Dept. 2017)***

Matter of Watson v. Maragh, 147 A.D.3d 769, 46 N.Y.S.3d 192 (2d Dept. 2/1/17).
The father is appealing a Family Court order denying his objections to an order directing him to pay child support to the mother. The appellate court affirmed, finding that the Support Magistrate correctly determined that the mother was the custodial parent for child support purposes and properly exercised discretion in imputing income to the mother based on her past employment history.

Lack of Good Faith Effort to Find Employment Commensurate with Education/Experience

In ***Matter of Muok v. Muok, 138 A.D.3d 1458 (4th Dept., 2016)***, the father appealed from a March 2015 Family Court order, which denied his objections to a Support Magistrate Order. On appeal, the Fourth Department modified, on the facts and law, by granting the father's objections to the extent of imputing income to the mother of $20,000, in addition to her Social Security income, and remitted to Family Court. The parties have three children, one living with the father and two living with the mother. The Appellate Division agreed that Family Court "erred in determining that the Support Magistrate did not abuse her discretion in imputing annual income to the mother of $20,000, which included $13,164 that she received in Social Security income." The Court noted: "the mother was 65 years old and had not worked since 2007, when she closed a Montessori school that she opened. The record further establishes that the mother has a bachelor's degree and an MBA, and that she graduated from law school but did not pass the bar exam and was therefore not admitted to the practice of law. The mother testified that, prior to the hearing, she sought only jobs as an attorney, for which she is not qualified. Thus, the mother has not sought employment for which she is qualified since 2007 ***." The Fourth Department concluded: "The record is sufficient for us to determine that, based upon her education and experience, the mother has the ability to earn income in the amount of $20,000 per year, exclusive of the Social Security income."

In ***Matter of Napoli v. Koller, 140 A.D.3d 1070 (2nd Dept., 2016)***, the father appealed from a May 2015 Family Court order denying his objections to a February 2015 Support Magistrate Order, which after a hearing, imputed $46,609 in CSSA income to him. On appeal, the Second Department affirmed, holding that the Support Magistrate "properly imputed income to the father based upon his prior income, his training, his choice to pursue only part-time employment, and his current living arrangement, in which he did not pay rent."

R.E.S. v. R.J.K., 65 Misc.3d 1207(A)118 N.Y.S.3d 380 (Table) (Fam. Ct., Nassau Co., 9/19/19)
The Court dismissed the father's objections to a modified support order, finding that the Support Magistrate properly imputed $155,000 in annual income to the father, and that the father failed to establish that his loss of employment was through no fault of his own. The Court also found that the father failed to establish that he made diligent efforts to secure re-employment commensurate with his earning capacity.

Imputed Income Must Have Some Basis in Law and Fact

As it was in ***D'Amico v. D'Amico, 66 A.D.3d 951 (2nd Dept., 2009)***, while a court may determine the child support obligation based upon a party's earning potential, rather than his/her claimed economic situation, the calculation must have some basis in law and fact. In this case, the matter was remitted for a recalculation of plaintiff's child support obligation as there was no evidence in the record that plaintiff could actually earn an imputed income amount of $2,000 per month.

Similarly, in ***Mongelli v. Mongelli, 68 A.D.3d 1070 (2nd Dept., 2009)***, the appellate court held that while a court need not rely on a party's own reported income and may impute income based on a party's past income or demonstrated earning potential, its determination must be based in law and fact. Here, the Court failed to properly consider that plaintiff's opportunities to earn overtime compensation at his job lessened in recent years and that home improvement jobs he performed on the side were for family and friends, with no showing of profit earned therefrom. The plaintiff's child support obligation was modified by the Appellate Division, who applied the statutory percentage of 25% for 2 children to the parties' combined parental income of $97,201.57, resulting in the plaintiff's child support obligation for his pro rata 67% share of the combined income to be $1,356.77 monthly.

In ***McAuliffe v. McAuliffe, 70 A.D.3d 1129 (3rd Dept., 2010)***, the plaintiff husband married the defendant wife in 1976. During the marriage, the husband earned an engineering degree and has been employed since early in the marriage, and the wife earned an undergraduate degree and worked in administrative and sales positions until taking care of her children in 1992, when she began working part time as a self-employed consultant and trainer. While the husband had a 20-year history of substantial earnings in computer sales and services to support Supreme Court's conclusion to impute $120,000 annual income to him, the record did not support the Supreme Court's conclusion that $50,000 annual income should be imputed to the wife. The wife was not employed outside the home at the time of trial. Supreme Court properly rejected her claim that she was completely incapable of gainful employment as the record revealed that the wife began working in sales and account management positions in 1981, earning $18,831, which increased to $51,300 in 1990 and reached a high point of $91,939 in 1991; but she thereafter left employment to care for her children. Wife's social security and tax records showed that she had no earnings other than $2,344 in 1995 and approximately $28,000 in 2004. Supreme Court relied upon expert opinion that the wife could earn $60,000 annually; however, this amount was not determined by the evaluator himself, but rather from a report prepared by Sheldon Grand of Forensic Rehabilitation Services and Grand did not testify. Expert opinion, to be properly admitted as evidence, must be generally based upon facts found in the record or facts personally known to the witness, derived from a professionally reliable source or from a witness subject to cross-examination. No determination can be made regarding whether Grand's opinion meets the requirements, and thus precludes reliance on his assessment of wife's salary potential. While the wife is capable of gainful employment and achieved significant earnings prior to 1993, her lack of meaningful earnings thereafter makes it speculative to impute more than minimal wage income to her given her age and health. The matter is remitted for recalculation, including the husband's resulting child support determination.

In ***Rohme v. Burns, 79 A.D.3d 756 (2nd Dept., 2010)***, the appellate court recognized that where a party's account is not credible, the court may impute an income higher than claimed. However, "in exercising the discretion to impute income to a party, a Support Magistrate is required to provide a clear record of the source from which the income is imputed and the reasons for such imputation" (*Matter of Kristy Helen T. v. Richard F.G., Jr.,* 17 A.D.3d 684, 685, 794 N.Y.S.2d 92). Where the Support Magistrate fails to specify the sources of income imputed and the actual dollar amount assigned to each category, the record is not sufficiently developed to allow appellate review (*id.* at 685, 794 N.Y.S.2d 92; *see Matter of Sena v. Sena,* 61 A.D.3d 980, 981, 878 N.Y.S.2d 759; *Matter of Genender v. Genender,* 40 A.D.3d 994, 995, 836 N.Y.S.2d 291)."

While a court may determine a child support obligation on the basis of a party's earning potential, rather than the party's current economic situation, the calculation of the party's earning potential must have some basis in law and fact. Here, the father did not establish what the mother's earning potential was as a teacher and there is no such evidence in the record. Accordingly, the Support Magistrate providently exercised her discretion in imputing income to the mother in the sum of $21,896 based upon her actual income in 2016, as reflected in income tax statements. ***Spano v. Spano, 168 A.D.3d 857, 92 N.Y.S.3d 300 (2d Dept. 2019)***

A determination to impute income will be rejected where the amount imputed was not supported by the record, or the imputation was an improvident exercise of discretion. ***Morille-Hinds v. Hinds, 169 A.D.3d 896, 94 N.Y.S.3d 336 (2d Dept. 2019)***

Error for court to impute annual income to plaintiff of $216,000. While where was some evidence that plaintiff's income was higher than income reflected on his tax returns, there was insufficient evidence of plaintiff's post commencement earnings and future earning capacity to support amount of income imputed by court. ***Murphy v. Murphy, 166 A.D.3d 987, 88 N.Y.S.3d 468 (2d Dept. 2018)***

The Support Magistrate's decision to impute $60,000 in income to the father and only $30,000 in income to the mother, which was based primarily on credibility determinations, is supported by the record, and should not be disturbed. ***Grace v. Amabile, 181 A.D.3d 602, 117 N.Y.S.3d 616 (Mem) (2nd Dept., 3/4/20)***

Unemployment/Underemployment

In ***Abruzzo v. Jackson, 137 A.D.3d 1017 (2nd Dept., 2016)***, the father appealed from an April 2015 Family Court order which denied his objections to a February 2015 Support Magistrate order which, after a hearing, imputed income to him of $62,400 per year (based upon a prior hourly wage of $30, over an assumed 40-hour work week) and directed him to pay $173 per week in child support. On appeal, the Second Department affirmed. The father contended that he was currently unemployed, had "never earned $30 per hour on a 40 hour work week basis", and that his current annual income was only $18,060. Family Court determined that the father had been intentionally underemployed and declined to rely on his income as reported on his most recent tax returns. The family court properly imputed income to the father based on a calculation of the father's hourly wage in a 40-hour work week, despite the father's claims that he was never employed at that rate and number of hours per week.

In ***Bustamante v. Donawa, 119 A.D.3d 559 (2nd Dept., 2014)***, the appellate court affirmed an imputation of income to the father based on his earning capacity after he left his employment. "While a parent is entitled to attempt to improve his vocation, his children should not be expected to subsidize his decision."

Supreme Court did not abuse its discretion in imputing $125,000 of annual income to father for purposes of calculating child support, after finding that he possessed master's degree in civil and environmental engineering and that his past employment history demonstrated that he could earn well in excess of imputed amount; trial court highlighted father's questionable decision to work for his wife's company at a significantly lower salary than he was capable of earning, as well as the fact that he resided in very expensive housing having views of the Pacific Ocean. ***Decker v. Decker, 148 A.D.3d 1272, 48 N.Y.S.3d 827 (3d Dept. 2017)***

Support Magistrate properly imputed income to the mother based upon her prior income, her choice to only engage in part-time employment, and her current living arrangement, in which she did not pay rent or related housing expense. ***Decillis v. Decillis, 152 A.D.3d 512, 58 N.Y.S.3d 126 (2d Dept. 2017)***

Susko v. Susko, 181 A.D.3d 1016, 118 N.Y.S.3d 810 (3rd Dept., 3/5/20).

Although the Support Magistrate gave some credit to the mother's assertion that the father had failed to report his true business income on his tax returns, it nevertheless declined to impute business income to the father, stating that the mother had signed joint tax returns during the marriage that were "similar to [the father's] 2017 return." The appellate court held that this determination had no support in the record. No joint tax returns were admitted into evidence, and there was no testimony as to the amounts of business income reported in the joint returns. In any event, "the [mother] did not waive her right to challenge the [father's] claims regarding his annual income simply because she had previously signed joint tax returns" that reported a lower income. In the interest of judicial economy, the appellate court exercised its authority to review the record and make independent findings on this issue. The appellate court found that the father's failure to reveal his business income by turning over the records that the mother requested is highly significant. As a direct result, the only evidence on this issue is the father's tax returns for 2015, 2016 and 2017, his testimony that the business earned $350 monthly, and his statement in the December 2016 mortgage application that it earned $4,000 monthly. While the father claimed that the mortgage document was in error, he initialed each page of the application and signed it under a statement averring that the information it contained was correct. Moreover, he did not produce any evidence that he had done anything to correct the alleged error. Under these circumstances, and assuming that the amount of business income shown in the mortgage application may have been overstated, the appellate court found that the record supports the imputation of $30,000 annually to the father as business income.

Turning to the issue of the decrease in the father's earnings from his full-time employment, his terse explanation that overtime suddenly became unavailable, unsupported by documentation from his employer or evidence that the father made efforts to replace the lost earnings, was found to be inadequate. The father acknowledged that he consistently earned overtime before 2017 and likewise in more than half of the 31 weeks in 2017 before the mother filed her enforcement petition. The mother demonstrated that if the father had continued to earn overtime at the same rate throughout 2017, his income would have been approximately $89,000—an amount relatively consistent with his earnings of approximately $92,000 and $94,000 in the two previous years. Based on the father's demonstrated earning capacity and employment history, the appellate court found it appropriate to impute a total income of $90,000 annually to him from his full-time employment.

Accordingly, the father's total imputed income is $120,000.

Job Loss

In *Fein v. Fein, 113 A.D.3d 647 (2nd Dept., 2014)*, the wife appealed from a December 2012 Supreme Court judgment which, upon a decision of the Court after trial, directed the husband to pay child support in the sum of only $450 per week and maintenance in the sum of only $346.15 per week for three years. On appeal, the Second Department affirmed. The parties were married in 1993 and have three children born in 1994, 1996 and 1998, respectively. The husband was a trader in the financial industry before losing his job in late 2009 and the wife stayed home with the children. The divorce action was commenced in March 2009 and came to trial in June 2011. The Appellate Division rejected the wife's contentions that the Supreme Court abused its discretion by imputing an annual income of only $125,000 to the husband for child support purposes. The Second Department recognized that Supreme Court considered the husband's current employment situation, his future earning capacity and the evidence presented relating to additional streams of income. The Appellate Division also found the Supreme Court properly imputed an annual income of $65,000 to the wife. The Second Department also rejected the wife's contention that Supreme Court abused its discretion by applying the $130,000 statutory cap to child support, and held that the same was supported by the record. With regard to maintenance, the award was affirmed, given Supreme Court's consideration of Defendant's college education and the fact that she was capable of seeking employment.

Kathleen M.H. v. John J.C., 182 A.D.3d 411, 123 N.Y.S.3d 9 (1st Dept., 4/4/20).
The husband failed to meet his burden of presenting credible evidence that he was unable to make the maintenance payments as directed. The husband's receipt of benefits from Social Security and SNAP did not preclude the Support Magistrate from finding that he was capable of working. There is no basis to reject the Support Magistrate's finding that the husband was incredible in claiming that he lacked income and was unable to work.

Account of Finances Lack of Credibility; Lack of Candor

A court may impute income for purposes of determining maintenance where a party's account of his/her finances is not believable. ***Lamparillo v. Lamparillo, 116 A.D.3d 924 (2nd Dept., 2014)*** In this case, the Supreme Court had the discretion to impute income to the defendant based on information he provided in his bankruptcy petition.

In ***Sena v. Sena, 65 A.D.3d 1244 (2nd Dept., 2009)***, the appellate court found that a Support Magistrate may impute income to a party in calculating the child support obligation where a party's account of his finances is not credible. The Family Court was found to have providently exercised its discretion in imputing income to the father for purposes of determining his basic child support obligation and his *pro rata* share of child care expenses where the father testified that he earned $350 per week, but did not submit any pay stubs, and further testified that he was paid in cash. The father also claimed various business expenses from gross business income, including "commission" to an assistant. Here, the father's 2006 federal income tax return indicated that he was an independent contractor who had paid more than $28,000 in business expenses for a 10-month period, which was inconsistent with his contention that he earned $350 per week. Family Court did not err in basing child support award on father's gross business income as reported on 2006 federal income tax return.

In ***Abizadeh v. Abizadeh, 137 A.D.3d 824 (2nd Dept., 2016)***, the trial court's determination of child support was supported by the record. The trial court properly imputed income to both parties based on its "well supported" findings that the parties were not credible and that the documentary evidence submitted at trial was unconvincing as well as evidence regarding the parties' receipt of income from other sources, including family members.

As it was reiterated in ***Kasabian v. Chichester, 72 A.D.3d 1141 (3rd Dept., 2010)***, a parent's obligation to provide child support is determined by his or her ability to provide support, and not their current financial situation. A court is not bound by a party's own account of income, but may impute income based upon his or her past employment experience and future earning capacity. The respondent herein only provided documentation for 2007, indicating that he had no personal income, and testified that he has had no income since 1999 and that he only filed 2007 tax returns in order to receive economic stimulus check. The testimony at the hearing concerned respondent's association with various businesses involving buying and selling cars, wherein respondent disclaimed any income or financial benefit from companies currently "owned" by his children, petitioner or his fiancée, but which he previously owned. Support Magistrate determined that respondent had earning capacity with having a commercial driver's license and imputed annual income to him of $38,690, which was the average amount earned by general freight trucker established by statistics from U.S. Department of Labor. Support Magistrate's determination was not an abuse of discretion.

In *Gafycz v. Gafycz, 148 A.D.3d 679 (2nd Dept., 2017)*, contrary to the defendant's contention, the Supreme Court did not err in imputing income to the father in the sum of $85,000 in calculating the amount of child support arrears owed to the plaintiff. "In determining a party's child support obligation, a court need not rely on a party's own account of his or her finances. Rather, the court may impute income to a party based on the party's past income, demonstrated earning potential, or based upon money, goods, or services provided by relatives and friends (*see* Family Court Act §413[1][b][5][iv][D]; Matter of Genender v. Genender, 51 AD3d 669)." Here, the Supreme Court found that the defendant was deliberately evasive about his finances, his income was not, as he claimed, limited to workers' compensation benefits resulting from an on-the-job injury, and he had been secreting assets. The appellate court found that the lower court's credibility determination is entitled to deference. The record supports the court's determination to impute income to the defendant in the sum of $85,000, and it declined to disturb its determination on the issue of child support arrears.

Daniel M.G. v. Annette P., 181 A.D.3d 461, 120 N.Y.S.3d 316 (1st Det., 3/10/20).
Family Court deemed the mother's statements about her earnings as a Doula and record keeping not credible, and imputed income to her of $126,000/year accordingly. The imputed amount was well in excess of even the greatest total annual deposit into her bank accounts for the relevant period, and the court imputed such income precisely because it found her testimony unreliably vague, and as due to her failure to furnish tax returns or other reliable documentation of her income.

In *Westenberger v. Westenberger, 23 A.D.3d 571 (2nd Dept., 2005)*, the appellate court found that the Family Court was entitled to impute income to the father in calculating his child support obligation for 2 children, where his reported income on his income tax returns was suspect.

In *G.K. v. L.K., 27 Misc.3d 1239(A) (Sup. Ct., Kings Co., 2010) (Sunshine, J.)*, the trial court found that during the marriage, the parties' sole source of income was the husband's employment in the construction industry. The husband filed tax returns as married filing separately for the years 2006 and 2007. At the time the trial testimony concluded, he had yet to file a tax return for the year 2008. In 2006, the husband's adjusted gross income, as reported on his tax return, was $20,000. His reported adjusted gross income on his 2007 tax return was $15,000. However, it is undisputed that the husband used funds from his business (W.C.S. Corporation) to pay for many, if not all, family and personal expenses during the marriage. Based upon dramatic inconsistencies in the husband's documentary evidence, his hearing testimony and the video tape of him working in his business while collecting unemployment benefits and after the business was allegedly defunct, the trial court determined that the husband lacked credibility. The trial court also determined that it was clearly evident that the husband's account of his finances was not believable and that he concealed his true income. Furthermore, it was clear from the bank records and admissions of the husband that the business paid an extensive amount of his personal expenses (citing the Second Department case of *Beroza v. Hendler* {71 AD3d 615}), further justifying the imputation of income. In consideration of the parties' lifestyle and evidence of the use of business funds by the husband, the trial court determined that the husband continued to maintain an interest in the business and therefore imputed to him an income in the amount of $58,610.00. The trial

court rejected the husband's contention that he no longer had any interest in WCS Corp. due to the fact that he used the business monies for personal expenses. It also rejected his claim that difficult financial crisis had resulted in there being no construction jobs for WCS Corp. The Court noted that the surveillance video entered into evidence unequivocally refuted the husband's position. Accordingly, the trial court found that the husband's income of $58,610.00 listed on his own first affidavit, which he refuted, was a reasonable estimate of the husband's income. Careful to stress that a decision to impute income is "not entered lightly", the trial court underscored that it had the ability to observe these parties and consider the totality of their testimony. In adjudging their credibility, the trial court reiterated the husband's perpetual purposeful intent to shield all financial assets from the wife's reach. It also noted that since the husband's employment income and his unemployment income earned at the same time would constitute an illegal act, the court cannot fix support based upon both sources.

Annual income in the amount of $100,000 should have been imputed to husband for purposes of determining maintenance amount, based on his lack of candor in his testimony as to his finances, his history of gambling winnings and related benefits, and his failure to submit a current net worth statement or disclose his living expenses. Evidence was sufficient to impute income of $26,000 per year to wife when calculating a maintenance award; while the trial court should not have imputed income to wife based on statistical information from the New York State Department of Labor that was not admitted in evidence at trial, there was evidence that she had earned $15 per hour as a legal secretary during the early part of the marriage, was in good health, and had an employment history sufficient to warrant conclusion she was capable of earning $26,000 annually. ***Gorman v. Gorman, 165 A.D.3d 1067, 86 N.Y.S.3d 554 (2d Dept. 2018)***

Income may be imputed to a party for purposes of spousal maintenance and child support where he or she does not report all of his or her income, where personal expenses are paid through a business account, and where a party's earning capacity is enhanced by his or her employment, experience, and education. ***Seale v. Seale, 149 A.D.3d 1164, 51 N.Y.S.3d 647 (3d Dept. 2017)***

The court imputed income to the defendant in the sum of $350,000, apparently attributing the additional income to substantial amounts of cash generated by his medical practice over the years. While at one time the defendant's income was substantially higher than $350,000, his federal income tax returns filed from 2001 through 2011 reflect a steady decline in his adjusted gross income. The court found that the defendant testified credibly that this decline occurred because in or around 1999 or 2000, his medical practice began to suffer financially due to the advent of managed care. ***Marin v. Marin, 148 A.D.3d 1132, 51 N.Y.S.3d 111 (2d Dept. 2017)***

Adverse Inference Based on Incomplete Disclosure

In ***Charpie v. Charpie, 271 A.D.2d 169 (1st Dept., 2000)***, the defendant asserted that his annual income was $183,000; however, the plaintiff provided substantial basis for her assertion that his income was actually far greater, particularly in view of their lifestyle during the marriage. The court noted that defendant's statement of net worth did not report the total value of his estate, marital and separate property, inasmuch as the numerous businesses he owned had not been valued. Moreover, those assets whose value he acknowledged, totaled approximately $300,000. Because the defendant's statement of net worth was incomplete, the court found it appropriate to apply an adverse inference on the issue of his finances. Under the circumstances, the court found good reason to acknowledge the possibility that defendant's wealth is substantial, far in excess of the funds to which the plaintiff had access.

In ***Glass v. Glass, 233 A.D.2d 274 (1st Dept., 1996)***, the trial court properly drew an adverse inference with regard to the husband's financial condition, and gave little weight to the husband's self-imposed tax liabilities. The husband was barred from complaining the support award exceeded his ability to pay, in light of the husband's failure to provide requested financial documentation, including his income tax return for a certain year or an estimate thereof and a complete net worth statement.

In ***Roach v. Roach, 193 A.D.2d 660 (2nd Dept., 1993)***, having failed to submit a statement of net worth or to otherwise more fully disclose information critical to the assessment of his net worth, the appellate court sustained a finding that the defendant may not now be heard to complain that the court erred in drawing an adverse inference against him with respect to his financial condition.

Expenses Exceed Income

In ***DeSouza-Brown v. Brown, 71 A.D.3d 946 (2nd Dept., 2010)***, the appellate court found that the Supreme Court properly imputed income to the defendant of $100,000 per annum. Among other things, the defendant's expenses listed in his Statement of Net Worth far exceeded his income as reported on his tax returns, and he lived in a two-bedroom apartment in a luxury apartment building for $2,340 per month. Additionally, the defendant had been employed for 12 years by a major bank when his job was eliminated and he failed to demonstrate that he diligently sought new employment commensurate with his qualifications and experience.

In ***Matter of Scheppy v. Kelly-Scheppy, 145 A.D.3d 903 (2nd Dept., 2016)***, the mother appealed from a December 2015 Family Court order which denied her objections to a September 2015 Support Magistrate order, rendered after a hearing and which directed her to pay $139 weekly in child support. The Second Department affirmed, holding that the Support Magistrate "properly imputed income to the mother based upon her prior and current income, and her savings account assets," and noting that her monthly expenses were more than 3 times greater than her stated monthly income and "she did not submit any evidence to show that these monthly expenses were not being paid in a timely manner".

In ***DeVries v. DeVries, 35 A.D.3d 794 (2nd Dept., 2006)***, the appellate court found that the plaintiff's contention that the trial court erroneously imputed income to him for the purposes of calculating his child support obligation is without merit. The court properly imputed income to the plaintiff since the evidence showed that he earned and spent well in excess of the income reported on his tax returns.

In ***Khaimova v. Moshevev, 57 A.D.3d 737 (2nd Dept., 2008)***, the defendant husband represented to the Supreme Court that his annual income was $12,000. Based upon his testimony and an examination of his tax returns and sworn expenses from his Statement of Net Worth, which indicated that he had monthly expenses as great as $6,000, the court concluded that his testimony regarding his yearly income was disingenuous. The court imputed an annual income to the defendant in the sum of $30,000, based upon his financial documentation and significant expenses in excess of his purported income.

Income/Expenses of Shareholder Disguised as Income/Expenses of a Corporation

In ***E.D. v. J.D., 42 Misc.3d 1204(A) (Sup. Ct., Westchester Co., 2013) (Duffy, J.)***, the issue was whether the income of a corporation, as to which the husband was the sole shareholder, should be imputed to him for purposes of calculating maintenance and child support. The parties were divorce in February 2005 and a February 2004 stipulation was incorporated but not merged into the judgment of divorce. The present application sought a recalculation of child support and maintenance and a money judgment for arrears owed from 2007 through 2012. The agreement obligated the husband to pay the wife, as maintenance and child support, 66% of his after-tax earned income up to $200,000. Earned income was defined as monies and/or stocks and/or options received for personal services, including, without limitation, compensation from salary, commissions, bonuses, partnership draw, distributions made to the partnership, corporation, limited liability, "S" corporation, non-profit corporation or business entity income, and further included income from an interest in any entity from which he receives or had received compensation for personal services. The only pre-tax funds that were excluded from the husband's earned income were retirement contributions in a percentage amount of 5% or less of his income from employment. The Supreme Court found: "the credible evidence showed that Defendant deliberately reduced his personal income by giving himself an artificially low salary and yet was able to maintain his pre-Corporation standard of living by characterizing his personal expenses such as rent, travel, and food, as business expenses, in Order to reduce his child support and maintenance obligation. Such acts by Defendant warrant the imputation of income to him." Supreme Court found that the husband was the sole shareholder, board member and officer of a corporate entity which he established in 2007, and that he makes all decisions relating to the corporation, including what purchases should be made and what he should pay himself as salary. Supreme Court noted that the "most glaring evidence of the Defendant's co-mingling the Corporation's assets with his own personal needs is his use of corporate money to pay his legal team in defense of this action." Supreme Court performed the calculations required by the agreement, imputed amounts of income to Defendant for the years in question and found that the former wife was entitled to additional maintenance and child support payments for the years 2008-2012 in the sum of $282,244.

In ***Beroza v. Hendler, 71 A.D.3d 615 (2nd Dept., 2010)***, the parties were divorced by 2008 judgment, with the husband being directed to pay $4,833.33 in monthly child support based on an imputed annual income of $259,100. The appellate court found that the Supreme Court properly imputed annual income to the husband based upon the undisputed evidence that his businesses paid virtually all of his personal expenses so that his actual earnings greatly exceeded the amount of income which he reported on his income tax returns. However, since the Supreme Court failed to set forth the parties' pro rata share of child support and adequately explain the application of the precisely articulated 3-step method of calculating child support pursuant to CSSA, the matter was remitted for a recalculation of child support. [*Parenthetical note: the firm of Gassman Baiamonte Betts, P.C. represented the wife at trial and on appeal. During the trial, the Husband, who was an equine veterinarian and surgeon and operated a polo club in West Hills, acknowledged that virtually all of his personal expenses were paid by his businesses, including: all auto lease payments, insurance, gas, vehicle service and maintenance regardless of personal*

use; all utilities for his personal residence located on the business property including electricity and telephone; the expenses of the children's nanny; all insurance premiums, including personal life and homeowners'; all credit card expenditures, including movie tickets, groceries, drug store items, gym membership, sports equipment, clothing and accessories, liquor, deli and marina charges; all personal meals and entertainment for himself and, for himself and his children during periods of visitation because, in his words, he is "on call 24-7"; costs for his son's treating doctors and evaluators; his monthly child support; and over $120,000 in professional legal fees and costs pertaining to the matrimonial litigation, including attorneys, forensic accountants, law guardian, real estate appraisers and mental health professionals.]

In ***Matter of McKenna v. McKenna, 137 A.D.3d 1464 (3rd Dept., 2015)***, the father appealed from a January 2014 Family Court order which granted child support to the mother. The parties have 2 children. After a hearing, the Support Magistrate imputed approximately $18,000 in income to the father, in addition to his 2011 reported income of $22,553. Family Court denied the father's objections to the Support Magistrate's imputation of income. The Appellate Division affirmed, noting that "the father is the sole owner of a small corporation and resides in a portion of the business property at no personal cost. He does not pay rent for such personal living space and all of the occupancy costs, as well as his personal expenses – including utilities, cable, Internet, cell phone, groceries and vehicle insurance – are paid out of his corporate account. Under such circumstances, Family Court acted well within its discretion in imputing $1,000 per month to the father for the benefit derived from the company-provided living expenses." The Third Department also held that Family Court properly imputed income based upon increased depreciation, given the testimony of the mother's accountant, who calculated straight line depreciation, and concluded that the father had claimed $4,761 in excess of straight line depreciation year 2011.

Children's Needs and Expenses

McVea v. McVea, 176 A.D.3d 822, 107 N.Y.S.3d 882 (Mem) (2d Dept., 10/9/19).
The record supports the Support Magistrate's finding that there was no credible testimony or documentary evidence upon which to rely in order to determine the father's income or earning capacity. The appellate court agreed with the Family Court's denial of the father's objections to the Support Magistrate's determination to base his support obligations on the needs of the child.

A court is not bound by father's testimony and can award support upon evidence of the children's needs and expenses. ***Toumazatos v. Toumazatos, 125 A.D.3d 870 (2nd Dept., 2015)***

Gifts From or Expenses Paid by Third Parties

O'Brien v. Rutland, 180 A.D.3d 1183, 120 N.Y.S.3d 454 (3rd Dept., 2/20/20).
Following a 2014 order granting the father sole legal custody of the child, the daughter began living exclusively with the mother and in 2016 the mother filed a support petition. Father's affirmative defenses of alienation and daughter's abandonment were rejected; the child was not self-supporting and she had not actively abandoned him by refusing all visitation and contact without cause. Yet, the Family Court should have sustained the father's objection to the Support Magistrate omitting rent, admittedly paid to the mother by her fiancé, from her income, in calculating the father's child support obligation.

A support magistrate may impute income to a party based on resources available to the party, including "money, goods, or services provided by relatives and friends" (Family Ct. Act § 413[1][b][5][iv][D]). Contrary to the father's contention, it was not error for the Support Magistrate to impute to the father the income of the father's current spouse in the support calculation. ***Fanelli v. Orticelli, 178 A.D.3d 700115 N.Y.S.3d 444 (2d Dept., 12/4/19).***

In the ***Matter of Geller v. Geller, 133 A.D.3d 599 (2nd Dept., 2015)***, the father appealed from an August 2014 Family Court order, which denied his objections to a May 2014 Support Magistrate Order, which, in turn, after a hearing, granted his 2012 petition for downward modification of child support from $930 to $650 per week, based upon emancipation of 2 of the parties' 4 children. On appeal, the Second Department affirmed. The parties were divorced in August 2011. The Support Magistrate imputed income to the father for various bills paid by the father's employer, and determined that his pro rata share of the basic child support obligation was $447 per week, but deemed this amount to be "unjust or inappropriate", in light of the financial support the father received from his girlfriend. The Support Magistrate deviated from the CSSA, and set the father's child support obligation at $650 per week. The Appellate Division noted that the father's employer paid certain of his expenses, including his car payment of $850 per month and held that the Support Magistrate properly imputed income to him. The Second Department further found that "the father testified that he resides with his girlfriend, and does not financially contribute to any of their household expenses. Accordingly, in light of the financial support the father receives from his girlfriend, the Support Magistrate providently exercised her discretion in deviating from the presumptively correct amount of child support and directing the father to pay $650 per week."

In ***Matter of Kiernan v. Martin, 108 A.D.3d 767 (2nd Dept., 2013)***, the mother appealed from a June 2012 Family Court Order which denied her objections to a March 2012 support magistrate order, which, in turn, directed her to pay the father the principal sum of $28,210 in arrears for college expenses and to pay 67% of the subject children's future college expenses. On appeal, the June 2012 Order was reversed, on the facts, and in the exercise of discretion, so much of the 2012 Order as directed her to pay the aforesaid principal sum of arrears and to pay 67% of the future college expenses. and remitted the matter to Family Court for a new determination as to college expenses, following a report from the support magistrate on the amount of money the father received from his family members for the subject children's college expenses. The Second Department held that while the record supports the determination that the mother should share in the college expenses of the children, it found that the support magistrate improvidently exercised her discretion by failing to impute additional income to the father for money he received from his family for the subject children's college expenses. The father's testimony established that the funds he received from his family for college expenses were not loans that he was obligated to repay.

When imputing income, a court can consider money received from friends and relatives. ***Badwal v. Badwal, 126 A.D.3d 736 (2nd Dept., 2015).***

When imputing income, a court can consider fringe benefits provided as part of compensation for employment such as expenses covered by the employer, for e.g., car payments. A court can also consider such benefits as financial support that a noncustodial parent receives from residing with a girlfriend if he does not contribute to their household expenses. ***Matter of Geller v. Geller, 133 A.D.3d 599 (2nd Dept., 2015).***

Funds provided by Husband's parents for construction of his new home were properly considered in assessing the child support obligation of the father. Although there was a promissory note, the father had not begun to repay the debt in accordance with its terms and failed to list the debt on either of his financial disclosure affidavits. The Court imputed income to the father in an amount equal to the unpaid monthly payments on the promissory note. ***Worfel v. Kime, 154 A.D.3d 1143, 64 N.Y.S.3d 130 (3d Dept. 2017)***

Family Court should have imputed an additional $70,000 per year to the father's income for the purpose of determining his child support obligation where since 2009, he contributed such sum per year toward household expenses from sums that he had inherited, and he had substantial assets. However, the father's voluntary contributions to the household expenses do not furnish a basis to depart from the CSSA calculations as they constitute, at most, an unenforceable promise to pay. ***Weissbach v. Weissbach, 169 A.D.3d 702, 95 N.Y.S.3d 85 (2d Dept. 2019)***

The court properly imputed income to defendant by including significant funds he received from his parents to pay his expenses. Defendant is self-employed, and refuses to maintain a general ledger or financial records for his business. Trial evidence supports the court's finding that defendant inflated his expenses on his tax returns to deflate his reported net income, and otherwise manipulated his income. Further, defendant, who is the sole executor of his father's estate, admitted to using estate funds directly to pay some of his personal expenses. In view of its inability to quantify these alternate sources of revenue available to defendant, the court acted within its discretion in imputing income to him based on the discernible measure of parental contributions. Further, the court properly articulated its rationale for including combined parental income above the statutory cap, i.e., to maintain the standard of living provided the child during his parents' marriage and taking into account his reasonable needs. ***Schorr v. Schorr, 154 A.D.3d 621, 63 N.Y.S.3d 368 (1st Dept. 2017)***

FCA §437-a and SSD

In ***Matter of Anthony S. v. Monique F.B., 148 A.D.3d 596 (1st Dept., 2017)***, the mother appealed from a February 2016 Family Court order which awarded her child support of $388 per month. On appeal, the First Department reversed, on the law and the facts, vacated the award and remanded for a new child support determination. The Appellate Division held that Family Court "improvidently exercised its discretion in not imputing to the father as income the $500 per month he was earning from his part-time employment in 2012 solely on the basis of Family Court Act §437-a, which bars the Family Court from requiring a recipient of social security disability benefits to engage in certain employment related activities." The First Department held that FCA§437-a "is not dispositive in this case where the father had been employed during the pendency of his social security disability benefits application and did not show that he was unable to continue to be employed in any capacity after he began receiving benefits."

Imputed Income – Reduced on Appeal

In ***Matter of D'Andrea v. Prevost, 128 A.D.3d 1166 (3d Dept., 2015)***, the father appealed from a March 2014 Family Court order which denied his objections to a Support Magistrate order. The parties were divorced and had 2 children. Pursuant to year 2011 orders, the parties shared custody and neither was directed to pay basic child support to the other. In May 2013, the mother petitioned to modify upon the ground that the parties were no longer sharing custody and that the children were residing with her. Following a hearing, the Support Magistrate imputed $54,000 of annual income to the father and established his child support obligation [not stated, but CSSA would be about $480 biweekly]. On appeal, the Third Department modified on the law, and reversed the imputed income finding. The Appellate Division rejected "the father's contention that Family Court was required to determine that he had deliberately reduced his income in order to reduce or avoid his child support obligation in order to impute income to him." The Court noted that the father testified that he had "the equivalent to a Bachelor's degree from Organizational Leadership and Communication in Criminal Justice" and earned about $54,000 in 2010 working as an assistant

dean of students at a secondary school; he then lost his job at the school and in 2011, he received about $50,000 as a part-time police officer and from unemployment insurance. The Third Department further found: "In 2012, the father's reported income ($56,556) reflected his salary from employment in the amount of $28,350, unemployment insurance benefits and the sum that he withdrew from his pension. At the hearing, the father explained that he was employed by a youth and family services agency earning $1,373 biweekly but that, one month earlier, his hours had been reduced from full time to 10 hours a week due to the termination of one of the agency's contracts. In addition, he testified that he worked approximately one shift each month for the police department." The Appellate Division concluded: "In our view, the record supports Family Court's determination to impute income to the father, but not the amount imputed. The Support Magistrate found that the father had the ability to earn $54,000 per year based on his wages at the school in 2010. *** At best, however, the evidence of the father's work history was limited; the record includes no evidence with regard to the type of work that the father is trained to do, nor does it provide any basis to conclude whether, based on the father's educational background, he or one similarly situated has the ability to obtain a job earning $54,000 per year. *** Based on the record evidence, we conclude that the father's child support obligation should be calculated based on the income he reported on his 2013 financial disclosure affidavit ($1,373 biweekly). Utilizing this amount, the father's child support obligation is reduced to $310 biweekly. In addition, the father's pro rata share for unreimbursed health-related expenses is reduced to 35%."

In ***Zwick v. Kulhan, 226 A.D.2d 734 (2nd Dept., 1996)***, the appellate court sustained the mother's objections only to the extent of reducing the amount of child support to $340.70 per month, the amount of child support arrears to $5,777.30, and the amount of child care arrears to $1,337.60, and by reducing the mother's pro rata share of child support, child care expenses and health care expenses to 32%. The Hearing Examiner properly imputed $26,000 as income to the mother based on her prior work history. The mother stopped working in July or August 1992 in order to pursue certain legal matters, including her appeal of a separate order granting custody of the parties' child to the father. Moreover, the $26,000 figure is supported by the record. "Child support is determined by the parents' ability to provide for their child rather than their current economic situation. [citations omitted] An imputed income amount is based, in part, upon a parent's past earnings, actual earning capacity, and educational background." The record reveals that the mother earned $13,000 in 1992 after working only part of the year. In addition, the mother has a Master's Degree in English, was previously employed as an elementary school teacher, and was a licensed real estate broker and insurance broker. However, the Hearing Examiner was found to have improperly exercised its discretion by also imputing as income to the mother $23,618 her family paid to cover the mother's expenses during 1993. By combining this figure with the $26,000 and thus imputing a total income to the mother of $49,618, the Hearing Examiner essentially doubled the mother's annual earnings to be considered in calculating child support. Moreover, there is no evidence in the record indicating that the mother ever earned that amount in the past.

Imputation of Income Declined

In *Matter of Justin v. Justin, 120 A.D.3d 1417 (2nd Dept., 2014)*, the mother appealed from an October 2013 Family Court order, which denied her objections to an August 2013 Support Magistrate order, which, after a hearing, granted the father's petition for a downward modification of his child support obligation. On appeal, the Second Department affirmed, finding that "the Support Magistrate properly concluded that the father satisfied his burden of demonstrating a substantial change in circumstances warranting a downward modification of his support obligation. Under the circumstances of this case, the Support Magistrate properly declined to impute income to the father based on his income while he was serving in the Army. On this record, the father's choice not to re-enlist was not undertaken to affect a reduction in his income "in order to reduce or avoid [his] obligations for child support' (Family Ct Act §413[1][b][5][v])."

In *Hurley v. Hurley, 71 A.D.3d 1470 (4th Dept., 2010)*, the Referee had discretion to impute income to the plaintiff father for purposes of calculating child support based upon his prior employment experience. The record shows that prior employment for the father ended when his employer terminated part of the business in which he was employed. The father did not significantly decrease his income by starting his own business, rather than accept similar employment from another employer. Here, the referee did not abuse his discretion in refusing to impute additional income to the father.

In *McLoughlin v. McLoughlin, 74 A.D.3d 911 (2nd Dept., 2010)*, the appellate court found that a Court need not only rely upon a party's own account of finances for child support purposes, but rather may impute income based upon a party's past income or demonstrated earning potential. However, while the Supreme Court imputed yearly income of $100,000 to the plaintiff based upon his prior earnings as a photographer and from the sale of real estate, it did not make findings of fact concerning the impact of his stroke, suffered during the pendency of the action, upon his ability to earn income in the future. Supreme Court also did not explain why it did not impute income to defendant in making a child support determination where the defendant reported that her health was good and listed her occupation as a part-time travel agent and homemaker on her statement of net worth. Defendant reported $2,536 income per year from employment as a part-time travel agent. Supreme Court imputed $30,000 income per year to defendant in determining the parties' *pendente lite* support obligations. Defendant represented in 2004 that she earned approximately $10,000 the previous year working part-time as a travel agent and as a receptionist for an exercise studio. Matter remitted.

New York Law Journal

An Update on Lawyers' Duty of Technological Competence: Part 1

By Anthony E. Davis and Steven M. Puiszis
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In this Professional Responsibility column, Anthony E. Davis and Steven M. Puiszis write: The duty of competence requires lawyers to be aware of the benefits and risks of emerging technologies that can be used to deliver legal services and how advances in existing technologies can impact the security of information in their possession. Because of the speed at which technology is advancing, the lawyer's duty of competence must evolve with the technologies.

In 2012 Rule 1.1 of the ABA's Model Rules—the duty of competence—was modified in Comment 8 to require that lawyers know and understand "the benefits and risks and associated with relevant technology." Consistent with that change, Comment 8 to New York Rules of Professional Conduct (RPC) 1.1 states: "To maintain the requisite knowledge and skill, a lawyer should ... (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information." As early as 2004, N.Y. State Bar Association Ethics Opinion 782 opined that a lawyer who uses technology to communicate with clients must use reasonable care with respect to such communication, and therefore must assess the risks attendant to the use of that technology.

In our Jan. 8, 2016 column "The Ethical Obligation to Be Technologically Competent," we explored the meaning of this duty in connection with using technology in a manner consistent with lawyers' duty to preserve clients' confidences and secrets in the light of the growing threats to data security. In this article we will consider the much broader implications of this duty in the era of Artificial Intelligence and other critical developments in the high tech world in which lawyers now operate (willingly or not).

There are six realms of technological competence reasonably necessary for today's lawyers: data security; the technology used to run a law firm and practice law; social media competence; technology used by clients to build products or offer services that lawyers have to defend; electronic discovery; and technology used to present information in court. In this first of two articles we will consider the first two realms. The remainder will be covered in the next article.

Data Security

The Jan. 8, 2016 article focused on this topic, and the threats identified there continue unabated, albeit with ever increasing sophistication, including phishing, social engineering attacks, data breaches and Internet scams. And as the threats have increased in intensity and severity, the duty to understand and protect clients and law firms themselves has expanded commensurately.

But the duty is broader than creating walls against invaders. It requires that in complying with their duties to preserve client confidences under RPC 1.6, lawyers take reasonable care to ensure that only authorized individuals have access to electronic files. What constitutes reasonable efforts is not susceptible to a hard and fast rule, but although not adopted in the Comments to New York's RPC's, Comment 18 to Model Rule 1.6 lists factors to consider in assessing what constitutes "reasonable efforts" to protect against the inadvertent or unauthorized disclosure of, or access to client information including:

- The sensitivity of the information.
- The likelihood of disclosure if additional safeguards are not taken.
- The cost of employing additional safeguards.
- The difficulty of implementing the safeguards.
- The extent to which the safeguards adversely affect a lawyer's ability to represent a client.
- Whether the client requires special security measures be taken or provides informed consent to forgo security measures that might be required under this rule.

Data security is thus a relative concept. What might be reasonable and appropriate safeguards for one firm may be completely inadequate for another. The nature of a law firm's practice area(s), its size, geographic locations, office footprint, clientele, and the technological sophistication of its lawyers and staff are all relevant factors. The increasing use by clients of outside counsel guidelines containing data security requirements makes Comment 18's final factor critical in any such analysis.

The use of the cloud implicates the lawyer's duty of competence under Rule 1.1, as well as 1.6 duties to preserve confidential information. Because use of the cloud means that client information will be stored on a third party's servers, it poses a different set of security risks, as third parties may be permitted to have some form of access to client information.

A lawyer's duty to safeguard information under its control cannot be transferred or delegated to a third party, nor is it lessened simply because the lawyer stores client information with a cloud provider. A lawyer must evaluate whether a cloud provider's terms of use, policies, practices and procedures are compatible with the lawyer's professional obligations.

N.Y. State Bar Association Ethics Opinion 842 (2010) suggested that exercising "reasonable care" in this context "may" require:

- Verifying the cloud storage provider has an enforceable obligation to preserve confidentiality and will notify the lawyer if served with process requiring the production of client information.
- Investigating the adequacy of the cloud provider's security, policies, recoverability methods, and other procedures.
- Employing available technology to guard against reasonably foreseeable attempts to infiltrate the data that is stored.
- Investigating the cloud provider's ability to purge any copies of the data, and to move the data to a different host for any reason.

The opinion also points out that a highly relevant inquiry is whether the cloud provider has ever suffered a security breach, and if so, how the breach (or breaches), occurred and what steps have been taken to prevent a reoccurrence.

Given the increasing importance of encryption to data security, lawyers should inquire if the cloud provider encrypts information both in transit and at rest.

Finally, law firms should consider rules and policies that prohibit the use of public clouds that have not been carefully evaluated and approved by the firm. This would include the use of mobile technology and applications that store sensitive or confidential client information in public clouds without the firm's prior express authorization.

Although the N. Y. State Bar Association Ethics Committee took the position in Formal Opinion 1019 that client consent is unnecessary when a law firm is able to make a determination that the security measures in place are reasonable in connection with technology used for remote access to client files, the risk exists that a client may later second guess that determination. Accordingly, even if not required to do so, lawyers should consider addressing the use of the cloud in their engagement letters, explaining how they use the cloud and its potential ramifications in terms that clients can understand.

More generally, law firms need to consider addressing the sensitivity of client information at the outset of any engagement. The client can be asked at the file opening stage if the engagement will involve any highly sensitive information or information warranting special security measures. Additionally, the file intake process can be set up to identify any categories of information that state or federal law treat as highly sensitive in nature or that the firm believes should be treated as highly sensitive. Examples could include personally identifying information, protected health information, non-public financial information, proprietary information, source code, patents, trademarks, trade dress, trade secrets, a merger and acquisition or a high stake business deal. A firm can then take any steps it deems necessary and appropriate to protect that information, including limiting who is permitted to access that information and how it may be transmitted.

Finally, record retention policies cannot be ignored. Given today's level of data breach risk, records and data should be kept no longer than necessary. Data protection also requires careful and proper disposal of client records.

Technology Used to Run a Law Firm and Practice Law

Computer research has made law libraries and hard copy of texts obsolete. Tools are now available that can identify relevant decisions that were not cited in a party's brief. Software programs can generate a wide variety of basic legal documents. This second realm includes communication technologies, technologies for transmitting information, running conflicts checks, or opening new engagements, as well as applications for document generation, electronic research, electronic calendaring, and docketing. Emerging technologies in this realm include blockchain, knowledge management and data analytics. Knowledge management and data analytics are forms of augmented or artificial intelligence (AI).

There is a growing recognition that different AI tools or applications can potentially lead to differing, inaccurate or even biased results depending on the choices made in developing the algorithm, or the data used to train the algorithm. An algorithm that is trained on a dataset that is incomplete or is the product of unacceptable

human choices and biases will likely produce biased results. Rather than eliminating human bias, the use of AI may reinforce it. These are issues that lawyers will need to consider in deciding which technologies to use, rather than simply relying on so-called blackbox technologies.

Ideally an algorithm or AI tool should be able to explain its output. The persons who created the algorithm and trained it, as well as their background, experience and expertise are questions that should be considered. Equally, the dataset or information used to train the algorithm is should be considered and should be available for review.

Lawyers subject to the EU's General Data Privacy Regulation (GDPR) should be aware that Article 15(h) of the GDPR, requires data controllers to provide "meaningful logic" about any automated decision-making tools that produce "legal effects" on EU data subjects. Because a lawyer qualifies as a data controller under the GDPR, he or she may need to obtain that information from the developer of an AI tool or application, depending on its purpose and how it is used by the lawyer.

In sum, if an attorney lacks a basic understanding of how to use an available technology, or the risks inherent in the technologies used to provide legal services, how can the attorney take "reasonable steps" to competently guard against those risks? The duty of competence also requires lawyers to be aware of the benefits and risks of emerging technologies that can be used to deliver legal services and how advances in existing technologies can impact the security of information in their possession. Because of the speed at which technology is advancing, the lawyer's duty of competence must evolve with the technologies.

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New York Law Journal

An Update on Lawyers' Duty of Technological Competence: Part 2

By Anthony E. Davis and Steven M. Puiszis
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Continuing a discussion they started in an earlier article, Professional Responsibility columnists Anthony Davis and Steven Puiszis discuss additional areas that require technological competence: social media; electronic discovery; technology used by clients to build products or offer services, and technology used to present information in court.

This is the second article in this column addressing the meaning and implications of Comment 8 to New York Rules of Professional Conduct 1.1, which states that "To maintain the requisite knowledge and skill, a lawyer should ... (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information."

In the first column published on March 1, 2019, we discussed the first two areas of technological competence reasonably necessary for today's lawyers: data security and the technology used to practice law. In this article we address four other areas that require technological competence: social media; electronic discovery; technology used by clients to build products or offer services; and technology used to present information in court.

Social Media Competence

Lawyers who are social media users need to understand how these activities have huge ethical and legal implications.

Social media posts or communications have no geographic borders, may be searched and found indefinitely and by anyone. The most basic difficulty lawyers face in this regard is that there are subtle yet potentially significant variations in various states' Rules of Professional Conduct as to what is, or is not permissible use of social media.

Ethics opinions have addressed an array of issues in connection with social media usage, including: preserving confidentiality; compliance with the advertising and solicitation rules; creating unintended attorney-client relationships; using social media to investigate parties, witnesses and jurors; and the permissible scope of a lawyer's advice concerning a client's social media information.

The duty of competence applies to lawyers' decisions to use social media. Lawyers who use a social media network in their practice need to review the terms and conditions, including privacy features—which change frequently—prior to using the network. See, e.g., ABA Comm. on Ethics & Profl. Responsibility, Formal Op. 466 (2014), and D.C. Bar Legal Ethics Comm., Ethics Op. 370 (2016).

The use of social media triggers several distinct risks to client information. First, confidential client information may be disclosed in violation of Rule 1.6. Accordingly, many law firms have developed social media policies that prohibit the disclosure of any information relating to a firm matter or to the legal services provided to current or former clients of the firm without express client consent. Additionally, lawyers who blog or who are active on social media need to run conflict checks before blogging or tweeting about an actual case because the lawyer's firm may represent one of the parties.

Even in the face of a negative on-line review by a current or, more often, former client, lawyers have an obligation to preserve client confidences. All of the ethics opinions that have addressed this situation have concluded that responding to a negative online review does not trigger the exception to Rule 1.6 that, in other circumstances, permits lawyers to reveal confidential information to establish a defense to a controversy between the lawyer and a client, or to respond to

allegations in any proceeding concerning the lawyer's representation of the client. See, e.g., Pa Bar Assoc., formal Op. 2014-300 (2014).

When lawyers use social media such as LinkedIn to develop business, the advertising and solicitation rules apply. Although a lawyer's social media profile that merely provides biographical information and the lawyer's current and past employment does not constitute attorney advertising, the ethics opinions differ as to whether statements including a detailed description of practice areas and types of work done in prior employment requires the user to include the words "Attorney Advertising" on the lawyer's...profile. Similarly, lawyers bragging about outcomes achieved for their clients may need to comply with the requirements of a disclaimer that "prior results do not guarantee a similar outcome."

Some social media sites permit third parties to add an endorsement or recommendation to a lawyer's profile. Attorneys have an obligation to monitor those to ensure they are not false or misleading, and to remove or correct any endorsement or recommendation that is misleading or inaccurate.

When lawyers answer questions posed on a lawyer's personal account or a law firm's social media site, they can safely provide a general answer to general legal issues or questions, but when they provide specific legal advice to a specific problem they run the risk of unintentionally creating an attorney-client relationship, or at least triggering a belief in the mind of the party asking the question that such a relationship exists.

Although lawyers may view the public profile, public portion, or the public posts of a party or a witness on any social media account, ethics opinions preclude sending a request to view the private portion of a social media account of a party, or any witness whom the lawyer knows is represented by counsel. Numerous ethics opinions also prohibit the use of deception when contacting a witness either directly by the lawyer or indirectly through an investigator, paralegal or third party to seek private social media information. See, e.g., N.Y. City Bar Assoc., Formal Op. 2010-2 (2010).

While lawyers may send a request to view the private portion of an unrepresented person's social media account (a "friend" request), the ethics opinions are split as to what information a lawyer must include in such a request to avoid it being deceptive. In New York, a lawyer who uses his or her real name and profile does not need to disclose the reason for making the request (N.Y. City Bar Assoc., Formal Op. 2010-2 (2010)), but other states' opinions advise lawyers to disclose they are a lawyer for a party (see, e.g., Mass. Bar Assoc., Advisory Op. 2014-5 (2014)), or their involvement in a disputed or litigated matter (see, e.g., N.H. Bar Assoc. Ethics Op. 2012-13/05), or the "lawyer's affiliation and purpose for the request." See, e.g., San Diego County Bar Assoc., Formal Op. 2011-2 (2011).

Because the rules governing a lawyer's conduct in connection with litigation will usually be the rules of the jurisdiction of the court where the litigation is taking place, New York lawyers should take note of the need to review the applicable ethics opinions on this issue in that jurisdiction rather than rely on the New York opinion.

Outside New York, the same rules generally apply to jurors; lawyers are permitted to view the public information posted on a juror or a prospective juror's social media account unless otherwise prohibited by law or a court order. But lawyers may not send a request to view the private areas of a juror's social media account or profile, since that would constitute an ex parte communication with a juror. See, e.g., ABA Formal Op. No. 466 (2014).

However, the New York City Bar Association has opined that the fact that some social media networks automatically alert a person that their profile has been viewed constitutes an impermissible contact with a juror. See N.Y. City Bar Assoc., Formal Op. 2012-2 (2012). So New York practitioners should determine which social media networks generate these types of messages before even viewing the public social media postings of jurors or prospective jurors.

Finally, while lawyers may advise clients about taking down social media information, it is critically important that lawyers also instruct clients, in writing, to preserve any and all information that is taken down, in case a question later arises as to the relevancy of the information to a contested matter. Nothing, however, prohibits a lawyer from advising a client to change the client's privacy or security settings on any social media account, or from making publically available information private, so long as it is properly preserved.

Electronic Discovery

It is axiomatic today that at the outset of any case, and in order to provide competent representation, a lawyer should assess what electronic discovery issues might arise during the litigation and his or her own e-discovery skill, and if those skills are lacking lawyers must either acquire sufficient learning or skill, or associate or consult with someone with the necessary expertise to assist. The by now accepted basic technological competence required to make appropriate decisions in connection with e-discovery includes the necessary know-how to:

- Initially assess e-discovery needs and issues, if any;
- Implement/cause to implement appropriate electronically stored information (ESI) preservation procedures;
- Analyze and understand a client's ESI systems and storage;
- Advise the client on available options for collection and preservation of ESI;

- Identify custodians of potentially relevant ESI;
- Engage in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan;
- Perform data searches;
- Collect responsive ESI in a manner that preserves the integrity of that ESI; and
- Produce responsive non-privileged ESI in a recognized and appropriate manner.

But today, in the new universe of artificial intelligence (AI), discussed in the previous article, lawyers need to be well versed, and able to advise clients in the selection of appropriate predictive coding software in order to improve the accuracy and speed of electronic discovery and minimize its cost.

Importantly, consultation or collaboration with an expert in any of these processes does not absolve an attorney of her duty to supervise the work of any attorney, expert, vendor or client assisting the attorney. That duty is non-delegable, and the attorney retains overall responsibility for the work of the expert, even if the expert is someone selected or employed by the client.

Competence in Dealing With Client-Developed Technology

In order to give competent legal advice, lawyers always need to understand the technology used by clients to design and manufacture the products they sell or use in the transactions the lawyers work on, or in the cases they litigate. Today, in addition to understanding how AI software works, common technologies developed or operated by clients can run the gamut from robotics and 3D printing to the use of drones, autonomous vehicles, nano technology or coding used in software components and anything in between.

Technology has impacted both the design and manufacture of products. Technology is changing so rapidly that the issues lawyers will be asked to understand and address, such as DNA identification or autonomous vehicles, will be radically different from those faced in the past. As was recognized in Cal. State Bar, Form Op. 2015-193, 3 (2015), "[l]egal rules and procedure, when placed alongside ever-changing technology, produce professional challenges that attorneys must meet to remain competent."

Competence in the Courtroom

Trial lawyers face a variety of challenges if they are to become technologically competent in the courtroom. First, they must be familiar with the new methods available to present information and rules governing the authentication and admissibility of new and emerging technological evidence. As one example, annotation monitors that allow witnesses to mark electronic exhibits, and evidence cameras that convert paper documents into electronic exhibits to display to a jury are making their way into courtrooms. Skills in using white boards and PowerPoint are not the cutting edge of competence in today's courtroom presentations.

Second, trial lawyers need to be aware of how technology offers new ways to develop evidence. Fitness trackers, "wearables" and social media are becoming fruitful sources of information that can corroborate or devastate injury claims. Google Glass has been used to create day-in-the-life videos of traumatically injured individuals. GPS tracking and electronic control modules ("black boxes") in motor vehicles can provide detailed and accurate information about location, velocity, speed, acceleration and deceleration rates critical to many disputes. Drones can be used to monitor and track movements of vehicles and persons or the progress of high-rise construction projects. Technological competence requires that lawyers understand not only what technology is available to help establish their case, but how to use it effectively.

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