Key 2009 New York Family Court Act Decisions

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OPENING STATEMENT:
Whether you are a newly admitted attorney or a seasoned lawyer, this segment will provide meaningful insight into some of the hot topic areas in Family Law. We all know that the law changes every day. This chapter, however, is designed to highlight some of the recent case law from various areas in family law including, child support, child custody, and paternity.

Key Child Support Decisions in New York Family Law

Among the most important decisions handed down by the New York Courts relating to family law issues in 2009 concern child support issues, including the following:

FCA Article 4: Downward Modification Requests

Martinez v.Torres, 59 A.D.3d 449, 871 N.Y.S.2d 916, (N.Y. A.D. 2009.)
In a child support proceeding pursuant to Family Court Act Article 4, the father appealed from an order of the Family Court, Kings County, which, after a hearing, denied his petition for a downward modification of his support obligation to $0 per month and to reduce the amount of the arrears that accrued prior to the filing of the petition. The Appellate Division affirmed the Family Court's order holding that contrary to the father's contention, Family Court Act § 413(1)(a) (2009) does not mandate the issuance of minimum orders of child support against indigent non-custodial parents, and as such it does not violate 42 USC § 667(b)(2) (2010) (See *Matter of Jennifer R. v. Michael C.,* 49 A.D.3d 443, 854 N.Y.S.2d 378 (N.Y.A.D 2008); *Aregano v. Aregano,* 289 A.D.2d 1081, 735 N.Y.S.2d 325).(N.Y.A.D. 2001)

Ripa v. Ripa, 61 A.D.3d 766, 877 N.Y.S.2d 383, (N.Y.A.D. 2009)
In a child support proceeding pursuant to Family Court Act Article 4, the father appealed an order of the Family Court that denied his petition to modify the child support provision of a judgment of divorce entered April

10, 2003. The Appellate Division determined that the Family Court properly denied the father's objections to the Support Magistrate's order denying his petition to modify the child support provision contained in a stipulation of settlement that was incorporated but not merged into the parties' judgment of divorce (*See* Domestic Relations Law § 236[B][9][b]; *Beard v. Beard,* 300 A.D.2d 268, 751 N.Y.S.2d 304 (N.Y.A.D. 2002); *Brevetti v. Brevetti,* 182 A.D.2d 606, 581 N.Y.S.2d 859) (N.Y.A.D. 1992)

The child support provisions contained in a settlement agreement should not be disturbed unless there is a substantial, unanticipated, and unreasonable change in circumstances since the entry of the divorce judgment (*See Matter of Boden v. Boden,* 42 N.Y.2d 210, 212-213, 397 N.Y.S.2d 701, 366 N.E.2d 791 (N.Y. 1997); *Schlakman v. Schlakman,* 38 A.D.3d 640, 641, 833 N.Y.S.2d 121; *Beard v. Beard,* 300 A.D.2d 268, 751 N.Y.S.2d 304 (N.Y. 2007). The court agreed that the burden was on the father to show that he used his best efforts to obtain employment commensurate with his qualifications and experience after losing his job (*See Matter of Navarro v. Navarro,* 19 A.D.3d 499, 500, 797 N.Y.S.2d 520 (N.Y. 2005); *Matter of Clarke v. Clarke,* 8 A.D.3d 272, 777 N.Y.S.2d 687 (N.Y. 2004); *Beard v. Beard,* 300 A.D.2d 268, 751 N.Y.S.2d 304 (N.Y.A.D. 2002); *Matter of Yepes v. Fichera,* 230 A.D.2d 803, 646 N.Y.S.2d 533 (N.Y.A.D. 1996)). In addition, the Appellate Division held that the record supported the Support Magistrate's finding that the father failed to establish a change in circumstances that would warrant a downward modification of his child support obligation (*See Matter of Muselevichus v. Muselevichus,* 40 A.D.3d 997, 836 N.Y.S.2d 661 (N.Y. 2007); *Matter of Meyer v. Meyer,* 205 A.D.2d 784, 614 N.Y.S.2d 42 (N.Y.A.D. 1994)). In determining whether such a change of circumstances has been shown, a court need not rely on the party's account of his or her finances, but may also impute income based upon the party's past income or demonstrated earning potential (*See Matter of Graves v. Smith,* 284 A.D.2d 332, 725 N.Y.S.2d 367 (N.Y.A.D. 2001); *Zabezhanskaya v. Dinhofer,* 274 A.D.2d 476, 710 N.Y.S.2d 639 (N.Y.A.D. 2000); *Matter of Diamond v. Diamond,* 254 A.D.2d 288, 678 N.Y.S.2d 127 (N.Y.A.D. 1998)).

Here, the Support Magistrate found, in effect, that the father's tax returns and other financial documentation provided an incomplete account of his finances. In addition, at the hearing there was a, "failure of proof as to exact circumstances under which the father lost his former employment, whether

it was due to his fault, and whether he used his best efforts to obtain new employment commensurate with his qualifications and experience" (*Matter of Clarke v. Clarke,* 8 A.D.3d 272, 272-273, 777 N.Y.S.2d 687 (N.Y. 2004); *see Matter of Navarro v. Navarro,* 19 A.D.3d 499, 500, 797 N.Y.S.2d 520 (N.Y. 2005); *Beard v. Beard,* 300 A.D.2d 268, 751 N.Y.S.2d 304 (N.Y.A.D. 2002)).

Accordingly, the Appellate Division determined that the Family Court properly denied the father's petition to modify the child support provision. The court further held that the father's remaining contention, that the court erred in failing to reduce the amount of child support arrears, was not properly before the Appellate Court, since the father did not appeal from the order denying his objections to the order fixing the amount of the arrears.

FCA Article 4: Imputing Income

Sena v. Sena, 61 A.D.3d 980, 878 N.Y.S.2d 759, (N.Y.A.D. 2009)
In a child support proceeding pursuant to Family Court Act Article 4, the father appealed an order of the Family Court directing him to pay the sum of $125 per week in child support and $72 per week for child care, and the appeals were held in abeyance pending the determinations. Upon review of the order and findings of fact of the Support Magistrate, the Appellate Division found it evident that he imputed income to the father in calculating the father's basic support obligation pursuant to the Child Support Standards Act. The court held that while a Support Magistrate is permitted to impute income in calculating a support obligation where he or she finds that the party's account of his or her finances is not credible or is suspect (S*ee Matter of Genender v. Genender,* 40 A.D.3d 994, 995, 836 N.Y.S.2d 291 (N.Y. 2007); *Matter of Westenberger v. Westenberger,* 23 A.D.3d 571, 806 N.Y.S.2d 665 (N.Y. 2005); *Peri v. Peri,* 2 A.D.3d 425, 427, 767 N.Y.S.2d 846 (N.Y. 2003); *Lilikakis v. Lilikakis,* 308 A.D.2d 435, 436, 764 N.Y.S.2d 206 (N.Y.A.D. 2003); *Rohrs v. Rohrs,* 297 A.D.2d 317, 318, 746 N.Y.S.2d 305 (N.Y.A.D. 2002)), "in exercising the discretion to impute income to a party, a Support Magistrate is required to provide a clear record of the source from which the income is

imputed and the reasons for such imputation," and the resultant calculations (*Matter of Kristy Helen T. v. Richard F.G.,* 17 A.D.3d 684, 685, 794 N.Y.S.2d 92 (N.Y. 2005); *see* Family Ct. Act § 413 [1][c]; *Matter of Genender v. Genender,* 40 A.D.3d at 995, 836 N.Y.S.2d 291; *Matter of Wienands v. Hedlund,* 305 A.D.2d 692, 693, 762 N.Y.S.2d 90 (N.Y.A.D. 2003); *Matter of Sweedan v. Baglio,* 269 A.D.2d 724, 725-726, 703 N.Y.S.2d 562 (N.Y.A.D. 2000)).

The Appellate Court determined that the Support Magistrate failed to specify the sources of income imputed, the actual dollar amount assigned to each category, and the resultant calculations. The record thus was not sufficiently developed to permit appellate review. Accordingly, the Appellate Division reversed the order and remitted the matter to Family Court to report on the specific sources of income imputed, the actual dollar amount assigned to each category, and the resultant calculations pursuant to Family Court Act § 413(1)(c). The appeals were held in abeyance pending receipt by the Appellate Division of the report.

Azrak v. Azrak, 60 A.D.3d 937, 876 N.Y.S.2d 439, (N.Y.A.D. 2 Dept.)

In a child support proceeding pursuant to Family Court Act Article 4, the father appealed an order of the Family Court that denied his objections to an order directing him to pay child support in the semi-monthly sum of $3,889. In determining a parent's support obligation under the Child Support Standards Act (Family Ct. Act § 413; Domestic Relations Law § 240), the court is required to begin its calculation with the parent's gross income "as should have been or should be reported in the most recent federal income tax return" (Family Ct. Act § 413[1][b][5][i]). The court is also permitted to consider current income figures for the tax year not yet completed (*See Matter of Moran v. Grillo,* 44 A.D.3d 859, 860, 843 N.Y.S.2d 674 (N.Y. 2007); *Matter of Culhane v. Holt,* 28 A.D.3d 251, 813 N.Y.S.2d 400 (N.Y. 2006); *Matter of Kellogg v. Kellogg,* 300 A.D.2d 996, 752 N.Y.S.2d 462) (N.Y.A.D. 2002). However, "[a] parent's child support obligation is determined by his or her ability to support the child, and not necessarily by the parent's current economic situation" (*Matter of Maharaj-Ellis v. Laroche,* 54 A.D.3d 677, 863 N.Y.S.2d 258 (N.Y. 2008); *see Fruchter v. Fruchter,* 29 A.D.3d 942, 943, 816 N.Y.S.2d 525 (N.Y. 2006)). Thus, the Family Court

may impute income to a parent based, inter alia, upon his or her employment history and demonstrated earning capacity (S*ee Matter of Maharaj-Ellis v. Laroche,* 54 A.D.3d 677, 863 N.Y.S.2d 258 (N.Y. 2008); *Matter of Solis v. Marmolejos,* 50 A.D.3d 691, 692, 855 N.Y.S.2d 584 (N.Y. 2008); *Bittner v. Bittner,* 296 A.D.2d 516, 517, 745 N.Y.S.2d 559 (N.Y. 2002)).

Contrary to the father's contention, the Appellate Division determined that the Family Court providently exercised its discretion in calculating his child support obligation upon an imputed income of $327,970 per year. It was undisputed that the father's gross income in the tax year preceding the hearing was $321,970, and that his past earnings over a *ten*-year period averaged $328,831 per year. Although the father testified that his earnings had decreased because he had been discharged from the company he worked for in 2005 and part of 2006, the Family Court's decision to base his support obligation on an imputed income higher than his 2007 salary was supported by evidence of his past employment history and demonstrated earning capacity (See *Matter of Maharaj-Ellis v. Laroche,* 54 A.D.3d 677, 863 N.Y.S.2d 258 (N.Y. 2008); *Matter of Solis v. Marmolejos,* 50 A.D.3d 691, 692, 855 N.Y.S.2d 584 (N.Y.A.D. 2008); *Fruchter v. Fruchter,* 29 A.D.3d 942, 943, 816 N.Y.S.2d 525 (N.Y. 2006); *Bittner v. Bittner,* 296 A.D.2d 516, 517, 745 N.Y.S.2d 559 (N.Y. 2002)).

Family Court is imputing income and not granting motions for downward modification just because a parent lost a job. They are taking into account potential, assets, and other income.

Calculating Income: Tax Refunds Questioned as Income for Child Support

Shelby T. v. Michael L., 23 Misc.3d 633, 875 N.Y.S.2d 745, (N.Y.Fam.Ct. 2009)
The petitioner filed a petition with the Family Court seeking an order of support. Upon a hearing, the Support Magistrate issued an Order of Support and Findings of Fact, finding that the respondent's presumptively correct child support obligation was $547 semi-monthly. The Support Magistrate further found the presumptive award unjust and/or inappropriate and deviated downward to an obligation of $500 semi-monthly. The respondent appealed arguing, inter alia, that the Support Magistrate erred when he

included the parties' respective federal and state tax refunds in the parties' incomes for purposes of calculating support. The Appellate Court concurred holding that including tax refunds in income for child support purposes results in the double counting of that refund for purposes of calculating an individual's child support obligation. Child support is not established based upon an individual's net income after taxes. The Child Support Standards Act provides for few deductions from gross income before arriving at adjusted gross income for child support purposes. See, FCA § 413(1)(b)(5)(vii) (2010). With a few additional deductions, applicable in only some cases, the basic deductions are Social Security and Medicare taxes (FICA). See, FCA § 413(1)(b)(5)(vii)(H) (2010). Additional federal and state taxes are not deducted for purposes of calculating income for child support purposes. An exception does exist for some city taxes, not relevant here. The court demonstrated in a hypothetical: if in 2008, an individual earned $50,000 and has no other specified deductions, that individual's income for child support purposes would be $46,175 ($50,000 minus FICA [7.65 percent]). Assume that same individual received a $5,000 federal tax refund in 2009 based upon his income tax return for the 2008 year. Assume also that the individual again earns $50,000 in 2009. If that individual's tax refund was included, their income for child support purposes in 2009 would be $51,175 ($50,000 - FICA + $5,000). Under this hypothetical, the $5,000 earned once in 2008 would count as income for child support purposes in both 2008 and 2009, and this result would be unjust. Accordingly, the Appellate Court disagreed with the Support Magistrate's decision to include the tax refund as income when establishing the parties' respective incomes for child support purposes. *But see Plog v. Plog,* 258 A.D.2d 713, 684 N.Y.S.2d 694 [3d Dept. 1999] (it appears tax refunds were included in the payer's income, but it does not appear that the inclusion was one of the issues on appeal, and there was no discussion as to the basis for inclusion of the tax refund). Upon establishing the parties' respective incomes for child support purposes, the Support Magistrate made findings both with regard to deviating from the presumptively correct award and consideration of income over $80,000. As those findings were made after including the tax refunds as part of the parties' income, those findings must be reconsidered utilizing the parties' income absent the refunds. Thus, the Appellate Court granted the respondent's objections, vacated the Support Magistrate's order**,** and held that the court would issue an amended Findings of Fact and

Order of Support. The refund(s) totaled $6,044 for respondent and $9,909 for petitioner.

FCA Articles 4 and 5B: Factors-Standard of Living

Tsarova v. Tsarova, 59 A.D.3d 632, 875 N.Y.S.2d 84, (N.Y.A.D. 2009)
In a child support proceeding pursuant to Family Court Act Articles 4 and 5B, the father appeals from an order of the Family Court, Richmond, in effect, finding paternity and directing him to pay child support in the amount of $1,650 per month, and $23,100 in child support arrears. The Appellate Division affirmed the order finding that "the record supports the Support Magistrate's assessment of the appellant's credibility. Great deference should be given to the determination of the Support Magistrate, who is in the best position to assess the credibility of the witnesses" (*Matter of Musarra v. Musarra,* 28 A.D.3d 668, 669, 814 N.Y.S.2d 657 (N.Y. 2006); see *Matter of Fragola v. Alfaro,* 45 A.D.3d 684, 685, 845 N.Y.S.2d 437 (N.Y. 2007); *Matter of Accettulli v. Accettulli,* 38 A.D.3d 766, 767, 834 N.Y.S.2d 533 (N.Y.A.D. 2007); *Matter of Luther v. Luther,* 35 A.D.3d 473, 473, 825 N.Y.S.2d 718 (N.Y.A.D. 2006)). Where, as here, there is insufficient evidence to determine gross income, the Child Support Standards Act provides that "the court shall order child support based upon the needs or standard of living of the child, whichever is greater" (Family Ct. Act § 413[1][k]; *see Orlando v. Orlando,* 222 A.D.2d 906, 908, 635 N.Y.S.2d 752 (N.Y.A.D. 1995)). Therefore, the Family Court properly denied the father's objections to the Support Magistrate's determination based upon the needs of the child (*See* Family Ct. Act § 413[1] [k]; *Matter of Denham v. Kaplan,* 16 A.D.3d 685, 793 N.Y.S.2d 58 (N.Y.A.D. 2005); *Matter of Kondratyeva v. Yapi,* 13 A.D.3d 376, 788 N.Y.S.2d 394 (N.Y. 2004); *Matter of Grossman v. Grossman,* 248 A.D.2d 536, 670 N.Y.S.2d 206 (N.Y.A.D. 1998)).

The amount of income on paper is not, in and of itself, basis to establish child support—the court will look at the needs of the child and the standard of living.

Downward Modification Request Based upon Emancipation of one Child: Duration of Child Support

Wrighton v. Wrighton, 61 A.D.3d 988, 878 N.Y.S.2d 757 (N.Y.A.D. 2009.)

On October 18, 2005, approximately fifteen months after the older of the two subject children turned twenty-one, the father filed a petition for a downward modification of child support. The father's petition was dismissed after he failed to serve it on the mother. Thereafter, the father continued paying support for the older child. On May 23, 2007, the father filed a petition to terminate the order of support based on both children having attained the age of twenty-one and requested, among other things, that any overpayment be applied to arrears. The Support Magistrate granted his petition to terminate the order of support, but did so without prejudice to the payment of arrears. The Family Court denied the father's objection to that part of the Support Magistrate's order. The father appealed, and the Appellate Division held that when child support has been ordered for more than one child, the emancipation of the oldest child does not automatically reduce the amount of support owed under an order of support for multiple children (See *Urban v. Urban,* 90 A.D.2d 793, 794, 455 N.Y.S.2d 403 (N.Y.A.D. 1982)). In addition, a credit should not be allowed for any alleged overpayments made on behalf of such emancipated child, absent or prior to a parent's legal action for a downward modification of support (See *generally Johnston v. Johnston,* 115 A.D.2d 520, 522, 496 N.Y.S.2d 50 (N.Y.A.D. 1985); *Gilda G. v. Joseph G.,* 80 Misc.2d 772, 775, 364 N.Y.S.2d 304 (N.Y. Supp. 1974)).

The father's October 18, 2005, petition to modify the order of support, based on the older child attaining the age of twenty-one, was dismissed after he failed to serve the mother with the petition. Thus, he failed to meet his, "burden of proving that the amount of unallocated child support [was] excessive based on the needs of the remaining child [ ]" (*Rosenthal v. Buck,* 281 A.D.2d 909, 909, 723 N.Y.S.2d 773 (N.Y.A.D.

2001); *see Matter of Stromnes v. Stromnes,* 201 A.D.2d 981, 982, 607 N.Y.S.2d 839 (N.Y.A.D. 1994)), and was therefore not entitled to a credit toward arrears for the alleged overpayments made on behalf of the oldest child after her emancipation (See generally *Johnston v. Johnston,* 115 A.D.2d at 522, 496 N.Y.S.2d 50; *Gilda G. v. Joseph G.,* 80 Misc.2d at 775, 364 N.Y.S.2d 304).

Musteric v. Lynch, 58 A.D.3d 634, 869 N.Y.S.2d 916, (N.Y.A.D. 2009)
The father filed a petition requesting downward modification of his child support obligation due to the emancipation of the parties' eldest child. The Support Magistrate granted the relief sought in the petition, but during the hearing on the petition, denied the father's oral application to change the medical insurance provider for the parties' youngest child from the mother's provider to his provider. Since the father failed to include the requested relief in his petition, the Support Magistrate properly denied his oral application.

Downward Modification (Termination) Request Based upon Visitation Interference

Boccalino v. Boccalino, 59 A.D.3d 901, 875 N.Y.S.2d 598, (N.Y.A.D. 2009)
Pursuant to a stipulation of settlement, the petitioner father and respondent mother agreed to share joint legal custody of their daughter, with the mother having primary physical custody in Florida and the father receiving extensive visitation in Florida, as well as limited visitation in New York. The agreement also provided that the father pay child support in the amount of $817 per month. In September 2006, upon the father's objection to a cost of living adjustment to the support order, his child support obligation was reduced to $772 a month. Thereafter, he commenced a proceeding seeking to terminate his support obligation on the grounds that the child abandoned him and the mother unjustifiably denied him access to and contact with the child. Following a hearing, Family Court dismissed the petition, and the Appellate Division affirmed,

stating, "[g]enerally, a parent has a statutory obligation to support his or her child until the child reaches the age of 21" (See Family Ct. Act § 413[1] [a] (2010)). However, child support payments may be suspended "where the non-custodial parent establishes that his or her right of reasonable access to the child has been unjustifiably frustrated by the custodial parent" (*Matter of Crouse v. Crouse,* 53 A.D.3d 750, 751, 862 N.Y.S.2d 615 (N.Y. 2008); *see Labanowski v. Labanowski,* 49 A.D.3d 1051, 1054, 857 N.Y.S.2d 737 (N.Y.2008); *Matter of Smith v. Bombard,* 294 A.D.2d 673, 675, 741 N.Y.S.2d 336 (N.Y. 2002), *lv. denied* 98 N.Y.2d 609, 746 N.Y.S.2d 693, 774 N.E.2d 758 (N.Y. 2002).

The father in this case failed to sustain his burden of demonstrating that the mother interfered with his efforts to maintain contact with his daughter or promoted the alienation of the father from the child. The evidence at the hearing established that there was very little contact between the father and his daughter from 2000 until 2006. The mother had testified that she encouraged the child to respond to the father's letters and return his telephone calls, but was unsure if the child ever did so respond to the father. Despite the father's assertions to the contrary, the mother denied encouraging the child to refer to him as "Paul" rather than "Dad," and the father's allegation that the mother attempted to change the child's last name on school and medical records was contrary to the evidence. The credible evidence did establish that the mother traveled to New York in 2005 without providing the father an opportunity for visitation. While the mother could have done more to ensure meaningful contact between the child and the father, the record as a whole did not support the conclusion that she, "intentionally orchestrated and encouraged the estrangement of [the father] from the child [ ] or that she actively interfered with or deliberately frustrated his visitation rights" (*Matter of Crouse v. Crouse,* 53 A.D.3d at 752, 862 N.Y.S.2d 615 [internal quotation marks and citations omitted]; *see Foster v. Daigle,* 25 A.D.3d 1002, 1004, 809

N.Y.S.2d 228 (N.Y. 2006), *lv. dismissed* 6 N.Y.3d 890, 817 N.Y.S.2d 624, 850 N.E.2d 671 (N.Y. 2006).

The record did not support a finding that the child abandoned the father. Where it is well settled that a child of employable age, who actively abandoned the non-custodial parent by refusing all contact and visitation, without cause, may be deemed to have forfeited his or her right to support (*Labanowski v. Labanowski,* 49 A.D.3d at 1053, 857 N.Y.S.2d 737, quoting *Matter of Chamberlin v. Chamberlin,* 240 A.D.2d 908, 909, 658 N.Y.S.2d 751 (N.Y. 1997). However, "where it is the parent who causes a breakdown in communication with his [or her] child, or has made no serious effort to contact the child and exercise his [or her] visitation rights, the child will not be deemed to have abandoned the parent" (*Matter of Alice C. v. Bernard G.C.,* 193 A.D.2d 97, 109, 602 N.Y.S.2d 623 (N.Y. 1993); *see Matter of Ogborn v. Hilts,* 269 A.D.2d 679, 680, 701 N.Y.S.2d 759 (N.Y. 2000). By his own admission, at no point following the parties' divorce did the father exercise his right to visitation as provided for in the stipulation of settlement by either visiting his daughter in Florida or offering to transport her to New York (*compare Matter of Chamberlin v. Chamberlin,* 240 A.D.2d at 910, 658 N.Y.S.2d 751). Nor could the father's sporadic telephone calls and the handful of letters he wrote to the child between 2000 and 2007 be construed as serious attempts to establish contact with his daughter (*See Radin v. Radin,* 209 A.D.2d 396, 396, 618 N.Y.S.2d 105 (N.Y. 1994); *Matter of Wikoff v. Whitney,* 179 A.D.2d 924, 926, 578 N.Y.S.2d 698 (N.Y. 1992). Moreover, the father failed to initiate a court proceeding to enforce his visitation rights (*See Matter of Juneau v. Morzillo,* 56 A.D.3d 1082, 1086, 869 N.Y.S.2d 633 (N.Y. 2008); *Matter of Crouse v. Crouse,* 53 A.D.3d at 752, 862 N.Y.S.2d 615). Thus, the Appellate Division would not disturb the Family Court's conclusion that the father's own conduct caused or contributed to the breakdown in communication and visitation with his daughter.

The behavior of a child and/or the custodial parent's toward the non-custodial parent, as well as the child's ability to participate in his or her own self-support, may affect a non-custodial parent's obligation to support the child.
Constructive Emancipation

Saunders v. Aiello, 59 A.D.3d 1090, 875 N.Y.S.2d 656, (N.Y.A.D. 2009)
A Law Guardian appealed from an order suspending the child support obligation of the petitioner father, who alleged in his petition that his two children, ages fourteen and seventeen, had abandoned him. In granting the petition seeking that relief, the Family Court determined that the children had refused to visit their father or to have any substantial contact with him, and the court further determined that the respondent mother was indifferent with respect to the visitation of the children with their father. The Appellate Division held that a, "child of employable age, who actively abandons the noncustodial parent by refusing all contact and visitation, without cause, may be deemed to have forfeited his or her right to support" (*Matter of Chestara v. Chestara,* 47 A.D.3d 1046, 1047, 849 N.Y.S.2d 353 (N.Y.A.D. 2008)). In this respective matter, the Appellate Division held that only one of the two children was of employable age (*See Matter of Gottesman v. Schiff,* 239 A.D.2d 500, 658 N.Y.S.2d 44 (N.Y.A.D. 1997); *Matter of Ryan v. Schmidt,* 221 A.D.2d 449, 450, 633 N.Y.S.2d 558 (N.Y.A.D. 1995)), and thus the Family Court erred as a matter of law in determining that the actions of the fourteen-year-old child constituted abandonment of her father, since the child was not of employable age (*see Gottesman,* 239 A.D.2d 500, 658 N.Y.S.2d 44). With respect to the seventeen-year-old child, the evidence failed to support the court's determination that she abandoned her father.

The children, who reside in Florida, last visited their father in the summer of 2005. The father and the children had an argument on the final night of the visit, and the children stayed with a family friend, who transported them to the airport the next day. The father testified at the hearing on the petition that he left one or two messages for the children on the answering machine at their home and that he called or sent text messages to them on their individual cellular telephones. The father further testified that the children failed to return his calls or to respond to his text messages. The Appellate Division concluded

that the failure of the older child to contact her father, "merely indicates that there was a reluctance on [her] part to contact him ... A child's reluctance to see a parent is not abandonment, relieving the parent of any support obligation ..., and a few telephone calls cannot be construed as a serious attempt to maintain a relationship with a child" (*Radin v. Radin,* 209 A.D.2d 396, 618 N.Y.S.2d 105 (N.Y.A.D. 1994); *cf. Matter of Chamberlin v. Chamberlin,* 240 A.D.2d 908, 909-910, 658 N.Y.S.2d 751 (N.Y.A.D. 1997); *see generally Matter of Kinney v. Simonds,* , 883-884, 714 N.Y.S.2d 151(N.Y.A.D. 2000)). In addition, the Family Court erred in determining that the failure of the mother to encourage visitation warranted the suspension of the father's child support obligation. **"**Where the custodial parent's actions do not rise to the level of 'deliberate frustration' of the non-custodial parent's visitation rights, suspension or termination of support payments is not warranted" (*Hiross v. Hiross,* 224 A.D.2d 662, 663, 639 N.Y.S.2d 70 (N.Y.A.D. 1996)).

Health Care Expenses

Delsoin v. Cosby, 61 A.D.3d 752, 878 N.Y.S.2d 85, (N.Y.A.D. 2009.)

The Appellate Division reversed an Order of the Family Court, Queens County, that denied a petition for reimbursement of the child's uncovered medical expenses. The Appellate Division found that the Support Magistrate should not have rejected father's reimbursement request without affording the father an opportunity to testify or present documentary evidence regarding his claim that he took the child to out-of-network physicians because the mother had not provided him with an insurance card. Under these circumstances, the Appellate Division deemed it appropriate to remit the matter to the Family Court, Queens County, for a new hearing and, thereafter, a new determination.

Educational Expenses (College): Apportionment of College Expenses

Niewladomski v. Jacoby, 61 A.D.3d 871, 878 N.Y.S.2d 388, (N.Y.A.D. 2009)

The Appellate Court held that the Family Court erred in requiring the father to pay 79 percent of the college tuition expenses of the parties' daughter, while directing the mother to pay only 21 percent of those expenses. The order was modified when the court took into consideration all of the relevant factors, including the mother's substantial assets, and thereafter directed the parties to equally share the responsibility of the daughter's college expenses. The mother's substantial assets influenced the court's decision to increase her support obligation. The Appellate Division modified the Family Court's decision to the extent of reducing the amount of the money judgment directed from the sum of $3,750.51 to the sum of $2,373.74, and reapportioning the parties' respective responsibility for their daughter's college tuition expenses from 79 percent to the father and 21 percent to the mother, to 50 percent to the father and 50 percent to the mother. "In determining whether to award educational expenses, the court must consider the circumstances of the case, the circumstances of the respective parties, the best interests of the [child], and the requirements of justice" (*Manno v. Manno,* 196 A.D.2d 488, 491, 600 N.Y.S.2d 968 (N.Y.A.D. 1994); *see Matter of Paccione v. Paccione,* 57 A.D.3d 900, 903-904, 870 N.Y.S.2d 430 (N.Y. 2008)). Under the circumstances of this case, the Family Court improvidently exercised its discretion in requiring the father to pay 79 percent of the college tuition expenses of the parties' daughter, while requiring the mother to pay only 21 percent of those expenses. Upon consideration of all of the relevant factors, including the mother's substantial assets (See *Reiss v. Reiss,* 56 A.D.3d 1293, 1294, 870 N.Y.S.2d 177 (N.Y.A.D. 2008)), an apportionment of 50 percent of those expenses to each party is appropriate.

Iadanza v. Boeger, 58 A.D.3d 733, 872 N.Y.S.2d 473, (N.Y.A.D. 2009)
The Appellate Division held that it was proper for the lower to court to direct the mother to pay 20 percent of the child's college expenses; however, the mother's child support obligation should have been reduced by any amounts she contributed, or would contribute in the future, toward the son's room and board during the periods in which the son lived away from home while attending college (*See Matter of Levy v. Levy,* 52 A.D.3d 717, 860 N.Y.S.2d 617 (N.Y. 2008); *Navin v. Navin,* 22 A.D.3d 474, 803 N.Y.S.2d 641 (N.Y. 2005); *Wortman v. Wortman,* 11 A.D.3d 604, 783 N.Y.S.2d 631 (N.Y. 2004); *Rohrs v. Rohrs,* 297 A.D.2d 317, 318, 746 N.Y.S.2d 305 (N.Y.A.D. 2002)).

Modification of Child Support Obligation—Standard of Proof: Substantial Change in Circumstances

Vincent Z. v. Dominique K., 62 A.D.3d 402, 879 N.Y.S.2d 70, (N.Y.A.D. 2009)
The Appellate Division stated that the parties may agree to dispense with the, "unanticipated or unreasonable change in circumstances" standard for modifying a support obligation (See *Colyer v. Colyer,* 309 A.D.2d 9, 15-16, 763 N.Y.S.2d 249 (N.Y. 2003). The record of the open court proceedings regarding the proposed stipulation of settlement indicated that the parties and the support magistrate intended to give the court broad power to modify the parties' child support obligations once the respondent obtained full-time employment as a physician. The petitioner father failed to establish that the stipulation was unfair when entered into, or that respondent's increased earnings were unanticipated and unreasonable (*see generally Corniello v. Gavalas,* 264 A.D.2d 418, 693 N.Y.S.2d 238 (N.Y. 1999). Although the issue was not raised before the Family Court, the Appellate Division held that the respondent's fivefold increase in earnings constituted a substantial change in circumstances warranting a downward modification of the petitioner's child support obligations (*See generally Matter of Freedman v. Horike,* 29 A.D.3d 1093, 1094, 815 N.Y.S.2d 313 (N.Y. 2006). The

Appellate Division, however, did not grant the petitioner's request for a credit against future child support payments for overpayments he had made by virtue of complying with the Family Court's order (*See Matter of Maksimyadis v. Maksimyadis,* 275 A.D.2d 459, 461, 713 N.Y.S.2d 79 (N.Y. 2000).

Modification of Child Support Order after Hearing—Standard of Proof: Substantial Change in Circumstances

Figueroa v. Herring, 61 A.D.3d 976, 879 N.Y.S.2d 150 (N.Y.A.D. 2009) The father sought a downward modification of an initial order of support, in which the Support Magistrate found, after a hearing, that his account of his limited income and undocumented medical problems was incredible, and imputed annual income to him in the sum of $42,259.36. The Appellate Division affirmed, stating that "no hearing is required on an application to set aside or vacate an order of support, no hearing is required unless the application is supported by affidavit and other evidentiary material sufficient to establish a prima facie case for the relief requested" (Family Ct. Act § 451; see *Matter of Suffolk County Dept. of Social Servs. v. Spinale,* 57 A.D.3d 681, 683, 870 N.Y.S.2d 70 (N.Y.A.D. 2008); *D'Alesio v. D'Alesio,* 300 A.D.2d 340, 341, 751 N.Y.S.2d 774 (N.Y.A.D. 2002)). "The party seeking modification of a support order has the burden of establishing the existence of a substantial change in circumstances warranting the modification" (*Matter of Nieves-Ford v. Gordon,* 47 A.D.3d 936, 936, 850 N.Y.S.2d 588 (N.Y. 2008); *see Matter of Marrale v. Marrale,* 44 A.D.3d 773, 775, 843 N.Y.S.2d 407 (N.Y. 2007); *Carr v. Carr,* 187 A.D.2d 407, 408, 589 N.Y.S.2d 822 (N.Y.A.D. 1992)). The Appellate Division further held that the father was precluded from re-litigating the issue in the subsequent proceeding on his petition for downward modification, having failed to show a substantial change in circumstances since the prior support proceeding (*See Matter of Solis v. Marmolejos,* 50 A.D.3d 691, 692, 855 N.Y.S.2d 584 (N.Y.A.D. 2008); *Matter of Lacome v. Marius,* 4 A.D.3d 430, 430, 771 N.Y.S.2d 353 (N.Y.A.D. 2004); *Matter of*

Kleiger-Brown v. Brown, 306 A.D.2d 482, 483, 761 N.Y.S.2d 516 (N.Y.A.D. 2003)).

Modification of Child Support Order—Standard of Proof: Emancipation—More than One Child

Fantel v. Stamatatos, 59 A.D.3d 717, 875 N.Y.S.2d 497, (N.Y.A.D. 2009)

In a child support proceeding pursuant to Family Court Act Article 4, the mother appealed from an order of the Family Court, Suffolk County, that granted the father's petition to modify the child support provision of a judgment of divorce, to require her to pay child support. The Appellate Division ordered the notice of appeal premature and reversed the order, on the law, with costs, denying the father's petition. "When a party seeks to modify the child support provision of a prior order or judgment, he or she must demonstrate a 'substantial change in circumstance'" (*Matter of Heyward v. Goldman,* 23 A.D.3d 468, 469, 805 N.Y.S.2d 628 (N.Y.A.D. 2005), quoting Domestic Relations Law § 236[B][9][b]; see *Matter of Talty v. Talty*, 42 A.D.3d 546, 547, 840 N.Y.S.2d 114 (N.Y. 2007); *Matter of Brescia v. Fitts*, 56 N.Y.2d 132, 140-141, 451 N.Y.S.2d 68, 436 N.E.2d 518 (N.Y. 1982); *Matter of Love v. Love,* 303 A.D.2d 756, 757 N.Y.S.2d 579 (N.Y.A.D. 2003); *Rosen v. Rosen*, 193 A.D.2d 661, 662, 598 N.Y.S.2d 13 (N.Y.A.D. 1993)). In determining whether there has been a change in circumstances warranting a modification of child support, 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" (*Shedd v. Shedd*, 277 A.D.2d 917, 918, 715 N.Y.S.2d 132 (N.Y.A.D. 2000); *see Matter of Heyward v. Goldman*, 23 A.D.3d 468, 805 N.Y.S.2d 628 (N.Y.A.D. 2005)). "It is the burden of the moving party to establish the change in circumstance warranting the modification" (*Rosen v. Rosen*, 193 A.D.2d at 662, 598 N.Y.S.2d 13).

In this case, the father sought to modify the child support provision of the judgment of divorce to require the mother to pay child support, primarily based upon the fact that the parties' daughter, of whom the mother had custody, was emancipated, and the parties' son, of whom the father had custody, was a high school senior taking college courses for which he had to pay. However, the father failed to present compelling proof that his son's needs had increased because of special circumstances. The father provided only generalized testimony that his son's educational needs had increased. Moreover, the Appellate Division held that the father failed to present evidence that his financial circumstances had changed due to a loss of employment or assets not of his own making or that the mother's financial circumstances had substantially improved. The fact that the parties' daughter was now emancipated was insufficient to establish that the mother's financial means had increased. Under the circumstances, a modification of the child support provision of the judgment of divorce was not warranted (*see Matter of Love v. Love*, 303 A.D.2d 756, 757 N.Y.S.2d 579 (N.Y.A.D. 2003)).

Modification of Child Support Order after Hearing—Standard of Proof: Substantial Change of Circumstances

Vanburen v. Burnett, 8 A.D.3d 900, 870 N.Y.S.2d 605 (N.Y.A.D. 2009)

Family Court directed the father to pay child support in the amount of $60 per week; the mother was awarded primary physical custody of the child, and the father was given weekly visitation. The father filed a petition to modify the child support order, and after a hearing, the Support Magistrate dismissed the petition, finding that the father had failed to show a change of circumstances that warranted a modification of his child support obligation. The Appellate Division affirmed and held that to prevail, the father was required to establish a substantial change in circumstances since the entry of the child support order that warranted a modification of his obligation to pay child support (*See Matter of Bianchi v. Breakell,* 48 A.D.3d 1000, 1002, 852 N.Y.S.2d 454 (N.Y. 2008); *Matter of Carr v. Carr,* 19 A.D.3d 839, 842, 797 N.Y.S.2d 594 (N.Y. 2005); *Redder v. Redder,* 17 A.D.3d 10, 12-

13, 792 N.Y.S.2d 201 (N.Y. 2005). In that regard, the father alleged that he had a medical condition that limited his ability to work and, in turn, had caused a significant reduction in his annual income. However, the father was not on disability, and the condition in question was not new, but had existed for many years, including a time that the father was able to earn sufficient income to meet his child support obligation. In addition, the father had acknowledged that he was terminated from his position as a manager of a convenience store, not because he was unable to work, but because he, "had a falling out with [his] manager."

Based on this testimony, the Appellate Division agreed with the Family Court that the father failed to prove that his medical condition rendered him unable to work (*See Matter of Gray v. Gray,* 52 A.D.3d 1287, 1288, 859 N.Y.S.2d 785 (N.Y. 2008), *lv. denied* 11 N.Y.3d 706, 868 N.Y.S.2d 598, 897 N.E.2d 1082 (N.Y. 2008); *Matter of Greene v. Holmes,* 31 A.D.3d 760, 762, 820 N.Y.S.2d 597 (N.Y. 2006); *Matter of Meyer v. Meyer,* 305 A.D.2d 756, 757, 760 N.Y.S.2d 567 (N.Y. 2003) and, as such, did not constitute a substantial change in circumstances that would warrant a modification of the child support order. The father also claimed that because the child was in his custody for a significant period of time each week, the existing child support order should be modified to require that each parent be obligated to support the child only when she is in each parent's respective care. While the custody order called for the child to be in the father's care for a significant amount of time each week, the mother had been designated the custodial parent for the purposes of determining child support and cared for the child, "for a majority of the time" (*Bast v. Rossoff,* 91 N.Y.2d 723, 728, 675 N.Y.S.2d 19, 697 N.E.2d 1009 (N.Y. 1998); *see Rossiter v. Rossiter,* 56 A.D.3d 1011, 1012, 869 N.Y.S.2d 624 (N.Y. 2008).

In addition, the father previously made a similar application to modify child support, and the Support Magistrate, in refusing to modify the terms of child support, noted that when the child support order was issued, the court considered, "the fact that [the child] spends a substantial period of time each week with [the father]." Thus, the Appellate Division concluded that the fact that the father took care of the child for a significant period of time each week was not a new circumstance, and the father had failed to present evidence of an intervening circumstance that would warrant a modification of the terms of the child support order (*See Matter of Minter-Litchmore v.*

Litchmore, 24 A.D.3d 932, 933, 805 N.Y.S.2d 445 (N.Y. 2005)). The petitioner had also failed to demonstrate that he had incurred any extraordinary expenses while caring for the child that served to substantially reduce those that are routinely paid by the mother (*See* Family Ct. Act § 413[1][f][9]; *Matter of Gillette v. Gillette,* 8 A.D.3d 1102, 1103, 778 N.Y.S.2d 362 [2004]; *Matter of Fernandez v. Fernandez,* 256 A.D.2d 901, 902, 681 N.Y.S.2d 693 (N.Y. 1998). The father also argued that Family Court failed to consider the mother's current financial situation. The Appellate Division concluded that while evidence was received that the mother had recently earned a cosmetology degree, the record was devoid of any proof that she was earning an income or any proof of her potential earning capacity that should have been considered in determining each party's child support obligation (*Compare Kayemba v. Kayemba,* 46 A.D.3d 994, 995-996, 846 N.Y.S.2d 801 (N.Y. 2007); *Matter of Freedman v. Horike,* 29 A.D.3d 1093, 1094, 815 N.Y.S.2d 313 (N.Y. 2006). The father's petition did not allege that the mother had become gainfully employed, but only that she was, "healthy and fully capable of working to support the child" and therefore was not sufficient in proving the mother's potential earning capacity or income.

Downward Modification of Child Support—Standard of Proof: Substantial Change of Circumstances—Documentation Financial Disclosure Insufficient

Virginia S. v. Thomas S. 58 A.D.3d 441, 870 N.Y.S.2d 322, (N.Y.A.D. 2009)
In a prior order in 2005 (22 A.D.3d 415, 803 N.Y.S.2d 54), the Appellate Division rejected an unattested financial disclosure affidavit and a single pay stub as warranting a reduction in child support. At a new hearing on remand, the respondent again failed to provide documentation of his income and assets sufficient to justify a modification of his scheduled payments. The respondent's testimony supported his claim of a substantial change of circumstances, but he failed to provide any documentation to substantiate it. His evidence consisted of an unsigned and unattested financial affidavit, and unsigned tax returns from 2004 and 2005. He produced no other tax returns, nor any verification that he was receiving public assistance or any evidence of good-faith efforts to obtain employment commensurate with his experience and qualifications (*See Beard v. Beard,* 300 A.D.2d 268, 751 N.Y.S.2d 304 (N.Y. 2002).

In a related enforcement proceeding in 2007, the petitioner alleged, and it was undisputed, that the respondent had failed to make any support payments since 2005. The only question that remained was whether this violation was willful. Failure to pay support as ordered constitutes prima facie evidence of a willful violation (Family Ct. Act § 454[3][a]). The burden then shifts to the supporting party, who must offer some competent, credible evidence of his inability to make the required payments (*Matter of Powers v. Powers,* 86 N.Y.2d 63, 69, 629 N.Y.S.2d 984, 653 N.E.2d 1154 (N.Y. 1995). Only when such evidence is presented does the burden shift back to the recipient to contradict that proof. At the violation hearing, the respondent offered only his own testimony regarding his income and assets, his health status, and his inability to find work. However, he again failed to substantiate his claims with documentation, such as signed tax returns, a completed and attested financial affidavit, or the testimony of his doctors regarding his alleged disabilities. Nor did he provide any documentation about his efforts to obtain employment, such as a résumé, job applications, or a job search diary. The respondent even admitted that although he had applied for Social Security disability, his application was rejected because he was not deemed disabled. He has a potentially high earning capacity as a stockbroker and holder of a commercial driver's license. The Appellate Division held the respondent had failed to overcome the prima facie evidence that his violation was willful so that the petitioner was not required to come forward with evidence to contradict the respondent's assertions.

Modification of Child Support Order—Willful Violation of Order—Standard Proof: Substantial Change in Circumstances—Transportation Expense Required for Visitation

Ferraro v. Lang, 60 A.D.3d 1116, 875 N.Y.S.2d 600, (N.Y.A.D. 2009)

This case concerned an appeal from an order of the Family Court of Broome County that dismissed the respondent's application for modification of a child support order. The parties were the unmarried parents of a child born in 2005. Family Court set forth the respondent's support obligations in August 2006. Subsequently, joint custody was ordered, with the petitioner as the primary custodial parent and the respondent, who resided in Louisiana, granted visitation at a minimum of

six times per year to take place in either New York or Louisiana. The respondent was also held responsible for the transportation expenses related to visitation. The petitioner commenced a violation proceeding alleging that the respondent had failed to pay his full support obligation. The respondent opposed and petitioned for modification of the support order. The Appellate Division affirmed the Family Court's dismissal of the modification petition and held the respondent in willful violation of the support order. The moving party had the burden of demonstrating a sufficient change in circumstances warranting modification (*See Matter of Reach v. Reach,* 307 A.D.2d 512, 513, 761 N.Y.S.2d 417 (N.Y. 2003); *Matter of Cohen v. Hartmann,* 285 A.D.2d 675, 675, 726 N.Y.S.2d 806 (N.Y. 2001). The respondent contended that the transportation expenses required for visitation included in the custody order constituted such a change in circumstances. While extraordinary expenses related to visitation may serve as a basis for the reduction of a support award (*See* Family Court Act § 413[1][f][9]; *Matter of Susan M. v. Louis N.,* 206 A.D.2d 612, 614-615, 614 N.Y.S.2d 584 (N.Y. 1994), the record reflected that after entering the support and custody orders, the respondent had paid the expenses for only one visitation. During this same time period, however, his income had increased significantly. Thus, the court held that the respondent had not demonstrated extraordinary expenses related to visitation.

Modification of Child Support Order—Money Judgment for Arrears—Law of the Case Collateral Estoppel

Yarinsky v. Yarkinsky, 59 A.D.3d 828, 875 N.Y.S.2d 592, (N.Y.A.D. 2009)
An appeal from an order of the Family Court of Saratoga County dismissed the petitioner's application to modify a prior order of child support. The parties were married in 1985 and had seven children. When they separated in 1999, the petitioner mother successfully applied in Family Court for temporary custody, child support, and spousal support. The mother's action for divorce was dismissed in 2003 by the Supreme Court, Saratoga County, where all support matters had been consolidated. Protracted litigation and appeals followed. Previously, the Appellate Division increased the child support obligation of the respondent father from $4,491 per month to $6,016 per month and decreased his monthly spousal support obligation from $1,500 to $1,200. After protracted proceedings and hearings, the parties ultimately agreed on the amount of arrears, $101,815 (as of

November 15, 2007). By amended petition, the mother requested a money judgment with interest for the full arrearage amount and/or an increase in the amount of monthly arrears payments from $500 per month to "at least $1,000 monthly" in view of the large amount of arrears due. Family Court denied the relief requested. The mother appealed, contending that Family Court should have granted her request for a money judgment with interest for the full amount of the arrears.

The Appellate Division held that the arrearage sum was a result of an order, which recalculated the sum of child support and spousal support and directed the adjustment of the calculations retroactive to the original filing date of 1999, and not that the father failed to comply with a lawful order, since the obligations that it calculates as unpaid support were generated ex post facto. The Appellate Division did, however, agree with the mother's claim that payment of the monthly sum of $500 toward arrears was inadequate given that the total adjusted amount was in excess of $100,000 as of November 2007. The court declined the father's request to invoke the discretionary doctrines of law of the case or collateral estoppel so as to preclude the mother's request to increase the monthly payment amount after the substantial total amount of arrears were first calculated and agreed to in late 2007. The Appellate Division further stated that even if it were to assume, as did Family Court, that a substantial change in circumstances analysis was warranted when addressing an application to increase installment payments on arrears (as distinguished from a modification to the amount of monthly support), they determined that the mother made the requisite showing here. The considerable amount of the child support arrears and the unduly protracted length of time it would take to pay the sum in full at the $500 per month set rate, without interest, constitute an unanticipated change in circumstances sufficient to warrant reevaluation of the rate previously established.

The child's justifiable reliance on the representation of paternity will be considered in paternity proceedings and, if it is in the child's best interests, will justify the court's decision to preserve the established father-son relationship through the doctrine of equitable estoppel and deny genetic marker testing. This case may result in obligating a man who is not the biological father to support a child that he has held out to be his own since birth.

Child Support Petition—Genetic Marker Testing—Vacate Acknowledgment of Paternity—Equitable Estoppel—Justifiable Reliance Challenge to Paternity

Savel v. Shields, 58 A.D.3d 1083, 872 N.Y.S.2d 597, (N.Y.A.D. 2009)

The unmarried parties were cohabiting at the time that respondent became pregnant with a child who was born in June 2004. The petitioner's name was listed on the birth certificate, and three days after the child's birth, he signed an acknowledgment of paternity. When the child was approximately eight to nine months old, the respondent allegedly told him she had been in a sexual relationship with another man during the time the child was conceived. Although the parties separated in February 2005, the petitioner concedes that, thereafter, he had regular contact with the child "about once every one to two weeks." The respondent brought a proceeding seeking child support, and the petitioner filed a petition in Family Court seeking a genetic marker test and an order vacating the acknowledgment of paternity. Family Court dismissed the petition based on the Law Guardian's invocation of equitable estoppel on the child's behalf. The Appellate Division affirmed the holding that in a paternity proceeding, it is the *child's* justifiable reliance on a representation of paternity that is considered and, in determining whether equitable estoppel should be applied to a particular case, the court's conclusion must be based on the child's best interests (*See Matter of Sarah S. v. James T.,* 299 A.D.2d 785, 785, 751 N.Y.S.2d 61 (N.Y. 2002); *Matter of Hammack v. Hammack,* 291 A.D.2d 718, 719-720, 737 N.Y.S.2d 702 (N.Y. 2002); *see also Matter of Shondel J. v. Mark D.,* 7 N.Y.3d 320, 327, 820 N.Y.S.2d 199, 853 N.E.2d 610 (N.Y. 2006). The child, approximately three years old at the time the petitioner commenced this proceeding, was bonded to the petitioner, who was the only father the child had ever known. Additionally, although the petitioner claimed that he had reason to question paternity when the child was less than a year old, he nevertheless continued fostering a relationship with the child and did not seek to vacate the acknowledgment of paternity until the respondent sought a child support order (*see Matter of Hammack v. Hammack,* 291 A.D.2d at 720, 737 N.Y.S.2d 702). Therefore, the Appellate Division concluded that it was in the child's best interests to preserve the established father-child relationship by applying the doctrine of equitable estoppel and denying the petitioner's request for genetic marker testing.

FCA Article 4: Willful Violation of Child Support Order—Imprisonment

Greene-Tyus v. Tyus, 61 A.D.3d 758, 878 N.Y.S.2d 79, (N.Y.A.D. 2009)

In an Article 4 proceeding, the father appealed from an order of the Family Court that found that he willfully violated a prior order of support and committed him to the New York City Department of Corrections for a term of ninety-day imprisonment for nonpayment of child support unless he paid the sum of $30,000 for child support. The Appellate Division confirmed the order of commitment and found that the father willfully violated the order of support. The mother demonstrated that the father failed to pay child support as ordered, and this constituted prima facie evidence of the father's willful violation of the order of support. The father failed to rebut this prima facie evidence of willfulness by offering competent, credible evidence of his inability to pay (*see Matter of Fraser v. Green,* 57 A.D.3d 896, 868 N.Y.S.2d 920 (N.Y.A.D. 2008); *Heinz v. Faljean,* 57 A.D.3d 665, 868 N.Y.S.2d 547 (N.Y. 2008); *Matter of Powers v. Horner,* 12 A.D.3d 609, 785 N.Y.S.2d 117 (N.Y. 2004)).

Sutton-Murley v. O'Connor, 61 A.D.3d 1054, 877 N.Y.S.2d 480 (N.Y.A.D. 2009)

Family Court granted the petitioner's application to hold the respondent in willful violation of a prior order of support, which required payment of $70 per week. Following a hearing, during which the respondent claimed that he suffered from a psychiatric disability, a Support Magistrate found that the respondent had willfully violated the order, but recommended that no action be taken by Family Court if the respondent produced evidence that he suffered from such a disability. After a hearing, Family Court determined that the respondent failed to produce competent medical evidence that his mental condition rendered him unable to maintain employment, confirmed the finding of willful violation, and committed the respondent to a conditional term of ninety days in jail. The only issue before the Appellate Division was whether the respondent met his burden, "to offer some competent, credible evidence of his inability to make the required payments" sufficient to rebut that showing (*Matter of Powers v. Powers,* 86 N.Y.2d 63, 69-70, 629 N.Y.S.2d 984, 653 N.E.2d 1154 (N.Y. 1995); *see*

Matter of Mitchell v. Rockhill, 45 A.D.3d 1140, 1141, 846 N.Y.S.2d 439 (N.Y. 2007).

At the confirmation hearing, the respondent claimed that his mental condition interfered with his ability to work and currently rendered him unable to work. In support of this claim, he submitted medical records concerning psychiatric treatment that he received from March to August 2005 and again from December 2007 to January 2008. While these medical records reveal that the respondent suffers from depression and an unspecified mood disorder, they also indicate that he was either employed or looking for work during that time and do not suggest that the respondent could not, or should not, work. Simply stated, there was no competent medical proof that his mental condition prevented him from maintaining employment (*see Matter of Greene v. Holmes,* 31 A.D.3d 760, 762, 820 N.Y.S.2d 597 (N.Y. 2006); *Matter of Snyder v. Snyder,* 277 A.D.2d 734, 734, 716 N.Y.S.2d 154 (N.Y. 2000); *Matter of Nickerson v. Bellinger,* 258 A.D.2d 688, 688-689, 685 N.Y.S.2d 320 (N.Y. 1999). Furthermore, despite the respondent's claim that his mental illness prevented him from pursuing employment, evidence was presented that he routinely engaged in recreational activities with friends (*see Matter of Nickerson v. Bellinger,* 258 A.D.2d at 689, 685 N.Y.S.2d 320; *Matter of Gerzack v. Gerzack,* 87 A.D.2d 612, 612, 448 N.Y.S.2d 34 (N.Y.A.D. 1982). According deference to the Family Court's credibility assessments (*see Matter of Straight v. Skinner,* 33 A.D.3d 1175, 1176, 823 N.Y.S.2d 277 (N.Y. 2006); *Matter of Crystal v. Corwin,* 274 A.D.2d 683, 685, 710 N.Y.S.2d 207 (N.Y. 2000), the Appellate Division found no basis to disturb the lower court's finding that the respondent failed to produce credible and competent proof of his inability to make the required payments.

Corry v. Corry, 59 A.D.3d 618, 875 N.Y.S.2d 87, (N.Y.A.D. 2009).
Family Court determined that the father willfully violated a prior order of support and directed the entry of a money judgment in favor of the mother in the sum of $14,646. The mother's proof that the father failed to pay child support as ordered constituted prima facie evidence of the father's willful violation of the support order (*see* Family Ct. Act § 454[3][a]; *Matter of Powers v. Powers,* 86 N.Y.2d 63, 629 N.Y.S.2d 984, 653 N.E.2d 1154 (N.Y. 1995); *Matter of Greene v. Holmes,* 31 A.D.3d 760, 820 N.Y.S.2d 597 (N.Y.A.D. 2006)). The father failed to rebut this prima facie evidence of willfulness by

offering competent, credible evidence of his inability to pay (*see Matter of Powers v. Powers,* 86 N.Y.2d at 69-70, 629 N.Y.S.2d 984, 653 N.E.2d 1154; *Matter of Rawlins v. Williams,* 27 A.D.3d 757, 815 N.Y.S.2d 606 (N.Y.A.D. 2006)). Accordingly, the Appellate Division held that the Family Court properly determined that he willfully violated the prior order of support.

Thompson v. Thompson, 59 A.D.3d 1104, 873 N.Y.S.2d 786, (N.Y.A.D. 2009)
The petitioner commenced a proceeding alleging that the respondent had violated an order requiring him to pay child support in the amount of $28 per month. In addition, the order suspended a six-month jail sentence imposed based on the respondent's prior willful failure to pay support. The respondent appealed the order revoking the suspension of the jail sentence and remanding him to the Ontario County jail. The Appellate Division held that although the Family Court had the discretion to revoke the suspension of the jail sentence, the court erred in doing so without first affording the respondent, "an 'opportunity to be heard and to present witnesses' ... on the issue whether good cause existed to revoke the suspension of the sentence" (*Ontario County Dept. of Social Servs. v. Hinckley,* 226 A.D.2d 1126, 642 N.Y.S.2d 830 (N.Y.A.D. 1996), quoting Family Ct. Act § 433[a]; *see Matter of Wolski v. Carlson,* 309 A.D.2d 759, 765 N.Y.S.2d 277 (N.Y.A.D. 2003)). No specific form of a hearing is required, but at a minimum the hearing must, "'consist of an adducement of proof coupled with an opportunity to rebut it'" (*Ontario County Dept. of Social Servs.,* 226 A.D.2d 1126, 642 N.Y.S.2d 830 (N.Y.A.D. 1996)). "[I]t is well settled that neither a colloquy between a respondent and Family Court nor between a respondent's counsel and the court is sufficient to constitute the required hearing" (*Matter of Commissioner of Chenango County Dept. of Social Servs. v. Bondanza,* 288 A.D.2d 773, 773-774, 733 N.Y.S.2d 299 (N.Y.A.D. 2001); *see Matter of Delaware County Dept. of Social Servs. v. Manon,* 119 A.D.2d 940, 501 N.Y.S.2d 210 (N.Y.A.D. 1986)). Contrary to the contention of the respondent Ontario County, the respondent did not waive his right to a hearing pursuant to Family Court Act § 433. Waiver of the right to be heard in a meaningful manner must be, "'unequivocal, voluntary and intelligent'" (*Matter of Jung,* 11 N.Y.3d 365, 870 N.Y.S.2d 819, 899 N.E.2d 925 (N.Y. 1998)), and the request for an adjournment by the respondent's attorney could not be considered a waiver of the respondent's right to a hearing. Therefore, the Appellate Division reversed the order and remitted the

matter to Family Court for a hearing on the petition in compliance with Family Court Act § 433 before a different judge.

Stipulation of Settlement

Enforceability

Hanlon v. Hanlon, 62 A.D.3d 702, 880 N.Y.S.2d 92, (N.Y.A.D. 2009)
At a hearing for child support, the parties stipulated that the father would comply with certain child support obligations, including an obligation to, "pay or cause to be paid as and for child support, before January 31st of each year, 25 percent of his adjusted gross income (as defined by the Family Court Act) above his base salary (which may be in the form of a bonus, commission or other form of deferred compensation)." At the time that the order of support was entered, the father earned a "base salary" of approximately $100,000 per annum, with a bonus of approximately $100,000 paid in January of each year. In the years following the entry of the order of support, the father's base salary increased substantially. When the father failed to provide the mother with certain tax documents reflecting his annual income, she petitioned for an order of enforcement of the order of support. A Support Magistrate determined that, pursuant to the order of support, the father was obligated to pay 25 percent of any earnings in excess of $100,000 and, after subtracting the amount which the mother conceded had been paid, fixed the amount in arrears in the sum of $217,368.89. The father appealed. "[A]n open-court stipulation is an independent contract between the parties and will be enforced according to its terms unless there is proof of fraud, duress, overreaching, or unconscionability" (*Jablonski v. Jablonski,* 275 A.D.2d 692, 693, 713 N.Y.S.2d 184 (N.Y.A.D. 2000) *see Christian v. Christian,* 42 N.Y.2d 63, 73, 396 N.Y.S.2d 817, 365 N.E.2d 849 (N.Y. 1977); *Bruckstein v. Bruckstein,* 271 A.D.2d 389, 390, 705 N.Y.S.2d 391 (N.Y.A.D. 2000)). "Where the stipulation's terms are unambiguous, the parties' intent must be gleaned from the plain meaning of the words used by the parties" (*Linsalato v. Giuttari,* 59 A.D.3d 682, 683, 874 N.Y.S.2d 212 (N.Y. 2009); *see Laba v. Carey,* 29 N.Y.2d 302, 308, 327 N.Y.S.2d 613, 277 N.E.2d 641 (N.Y. 1971); *Matter of Scalabrini v. Scalabrini,* 242 A.D.2d 725, 726, 662 N.Y.S.2d 581 (N.Y.A.D. 1997); *Matter of Tillim v. Fuks,* 221 A.D.2d 642, 643, 634 N.Y.S.2d 508 (N.Y.A.D. 1995)).

Here, the plain language in the order of support, entered upon the parties' stipulation, required that the father pay 25 percent of any income earned above his base salary, not 25 percent of any earnings above a fixed amount of $100,000 (*see generally Grace v. Nappa,* 46 N.Y.2d 560, 565, 415 N.Y.S.2d 793, 389 N.E.2d 107 (N.Y. 1979); *Matter of Nelson v. Nelson,* 48 A.D.3d 688, 850 N.Y.S.2d 915 (N.Y.A.D. 2008); *Matter of Tillim v. Fuks,* 221 A.D.2d at 643, 634 N.Y.S.2d 508; *Bottitta v. Bottitta,* , 513, 598 N.Y.S.2d 304(N.Y.A.D. 1993); *Karl v. Karl,* 138 A.D.2d 354, 355, 525 N.Y.S.2d 646 (N.Y.A.D. 1988)). Therefore, the Support Magistrate's calculations of the father's child support obligations as including 25 percent of his income in excess of $100,000 were incorrect. Accordingly, the Appellate Division vacated the order that fixed his arrears for child support for the years 2002 through 2006 in the sum of $217,368.89 and remitted the matter to the Family Court for a calculation of the correct child support obligation for the years 2002 through 2006, and the entry of an appropriate order regarding arrears and the father's ongoing child support obligation.

Specific Clauses—Child Support Clauses—Add-ons—Educational Expenses

Cricenti v. Cricenti, 60 A.D.3d 1052, 877 N.Y.S.2d 349, (N.Y.A.D. 2009).
The petitioner's parents were divorced in 1994. They entered into a stipulation of settlement agreeing to share the expense of the petitioner's college education, in a specified pro-rata manner, as long as they both approved of the petitioner's choice of college. In September 2007, after the petitioner matriculated at the Fashion Institute of Technology, she commenced the instant proceeding seeking, inter alia, an order directing the respondent, her non-custodial mother, to pay her share of the petitioner's college expenses and to provide child support. After a hearing, the Family Court denied that branch of the petition by which the petitioner sought contribution by the mother toward the petitioner's college expenses. The Family Court observed that the stipulation of settlement established as a condition of contribution that there would be discussion about which school the petitioner would attend. The Family Court found that the petitioner failed to demonstrate that the mother had an opportunity to express any opinion regarding the choice of school. The Family Court remitted the matter to a Support Magistrate to issue findings of fact

pursuant to Family Court Act § 439(e) or for a hearing on the issue of the mother's child support obligations. The petitioner appealed.

The Appellate Division held that the terms of a separation agreement incorporated but not merged into a judgment of divorce operate as contractual obligations binding on the parties (See *Colucci v. Colucci,* 54 A.D.3d 710, 712, 864 N.Y.S.2d 67 (N.Y. 2008)). A matrimonial settlement is a contract subject to principles of contract interpretation, and a court should interpret the contract in accordance with its plain and ordinary meaning (*see id.; Herzfeld v. Herzfeld,* 50 A.D.3d 851, 857 N.Y.S.2d 170 (N.Y. 2008)). "Where such an agreement is clear and unambiguous on its face, the parties' intent must be construed from the four corners of the agreement and not from extrinsic evidence" (*id.* at 851-852, 857 N.Y.S.2d 170).

In this matter, the Appellate Division determined that the petitioner failed to demonstrate that the mother was aware of her choice of college. The mother could neither approve of the petitioner's choice of college nor unreasonably withhold such approval in the absence of any awareness of the petitioner's choice in that regard. In the absence of any evidence that the mother was aware of the petitioner's choice of college, the petitioner failed to establish that the mother violated her obligations under the terms of the agreement to pay her share of the related expenses upon approving the petitioner's choice of college or in unreasonably withholding her approval. Accordingly, the Appellate court determined that the Family Court properly denied that branch of the petition by which the petitioner sought educational expenses from the mother under the express terms of the stipulation of settlement. In light of its determination that the mother's income had not been adequately established, the Appellate Division further held that the Family Court providently exercised its discretion in remitting the matter to a Support Magistrate for findings of fact pursuant to Family Court Act § 439(e) or for a determination of the mother's child support obligations (*see* Family Ct. Act § 439; *Matter of Viehl v. Viehl,* 50 A.D.3d 814, 816, 860 N.Y.S.2d 536 (N.Y. 2008)).

Procedure—Accelerated Judgment

Default Judgment

*In re Isaiah H.*61 A.D.3d 1372, 877 N.Y.S.2d 786 (N.Y.A.D. 2009)
The Appellate court held that the Family Court erred in granting the petitioner's motion for a default order, finding that the respondent mother permanently neglected her son and in thereafter, following a dispositional hearing, terminated her parental rights with respect to him pursuant to Social Services Law § 384-b (2009). The mother's failure to appear at the fact-finding hearing on the issue of permanent neglect, "does not automatically constitute a default," in view of the fact that the attorney for the mother appeared on her behalf and requested an adjournment (*Matter of David A.A. v. Maryann A.,* 41 A.D.3d 1300, 1300, 837 N.Y.S.2d 479 (N.Y. 2007); *Matter of Shemeco D.,* 265 A.D.2d 860, 695 N.Y.S.2d 799 (N.Y.A.D. 1999)). "A party who is represented at a scheduled court appearance by an attorney has not failed to appear" (*Matter of Sales v. Gisendaner,* 272 A.D.2d 997, 997, 707 N.Y.S.2d 562 (N.Y.AD.2000). Therefore, the Appellate Court reversed the order, denied the petitioner's motion, and remitted the matter to Family Court for a hearing on the petition.

Vacatur of Default Judgments

In re Sarah A., 60 A.D.3d 1293, 874 N.Y.S.2d 653 (N.Y.A.D. 2009)
The respondent father appealed an order denying his motion "to Reopen a Finding by Default Terminating Parental Rights" with respect to his daughter based on findings that he abandoned and permanently neglected her. The Appellate Division agreed with the father that Family Court erred in denying his motion and concluded that the court violated the father's fundamental right to due process by failing to conduct either a fact-finding hearing or "inquest" before making its findings of abandonment and permanent neglect, regardless of the father's default status on the scheduled hearing date. The Appellate Court noted that "[a]ll proceedings to terminate parental rights . . . must include a fact finding hearing where the Judge of the Family Court must determine that the parent is guilty of some fault, either lack of visitation and contact in the case of abandonment, or lack of planning in the case of permanent neglect" (Carrieri, *Practice Commentaries*,

McKinney's Cons Laws of N.Y., Book 52A, Social Services Law § 384-b, at 258).

Here, although a fact-finding hearing was scheduled, no hearing was conducted when the father did not appear. Indeed, the petitioner offered no evidence at the scheduled fact-finding hearing to support its petition, and the record thus is devoid of any evidence that the father, "is guilty of some fault" to support any such determination by the court (*id.*), or that the petitioner engaged in the requisite diligent efforts to strengthen the relationship between the father and his daughter (*see Matter of Kyle K.,* 49 A.D.3d 1333, 1335, 854 N.Y.S.2d 270 (N.Y. 2008), *lv. denied* 10 N.Y.3d 715, 862 N.Y.S.2d 335, 892 N.E.2d 401 (N.Y. 2008); *see also* Social Services Law § 384-b [7][f] (2009)). The Appellate Court therefore reversed the order, granted the father's motion, vacated the default order of fact-finding and disposition, and remitted the matter to Family Court for a hearing on the petition. It was further determined with respect to the remaining contentions of the father, that the respondent father failed to demonstrate that he was prejudiced by his attorney's alleged ineffective assistance (*see Matter of James R.,* 238 A.D.2d 962, 963, 661 N.Y.S.2d 160 (N.Y.A.D. 1997)), and that there is nothing in the record to support his contention that the Law Guardian was ineffective.

In re Princess M., 58 A.D.3d 854, 873 N.Y.S.2d 121, (N.Y.A.D. 2009)

In a proceeding pursuant to Social Services Law § 384-b (2009) to terminate parental rights on the ground of permanent neglect, the mother appealed an order of the Family Court, which denied her motion, in effect, to vacate an order of fact-finding and disposition of the same court dated July 13, 2007, which, upon her default in appearing at the fact-finding and dispositional hearings, terminated her parental rights and transferred guardianship and custody of the child to the Commissioner of Social Services of the City of New York and Forestdale Inc. for the purpose of adoption. A parent seeking to vacate an order entered upon his or her default in a termination of parental rights proceeding must establish that there was a reasonable excuse for the default and a meritorious defense to the relief sought in the petition (*see* CPLR 5015[a][1]; *Matter of Anna Coral DeL.,* 50 A.D.3d 792, 856 N.Y.S.2d 180 (N.Y. 2008); *Matter of Unique M.C.,* 16 A.D.3d 1155, 790 N.Y.S.2d 904 (N.Y.A.D. 2005); *Matter of Vanessa F.,* 9 A.D.3d 464, 779 N.Y.S.2d 917 (N.Y. 2004)). The determination of whether to relieve a party

of a default is within the sound discretion of the Family Court (*see Matter of Anna Coral DeL.,* 50 A.D.3d at 792-793, 856 N.Y.S.2d 180). The Appellate Division determined that the mother failed to present a reasonable excuse for her default and failed to set forth a meritorious defense. Accordingly, the Family Court providently exercised its discretion in denying her motion to vacate the order of fact-finding and disposition entered upon her default.

In re Cassidy Sue R., 58 A.D.3d 744, 870 N.Y.S.2d 799, (N.Y.A.D. 2009)
In a proceeding pursuant to Social Services Law § 384-b (2009) to terminate parental rights on the ground of abandonment, the father appealed an order of the Family Court, which denied his motion to vacate an order of the same court dated January 2, 2008, after a fact-finding inquest held upon his default in appearing at the fact-finding hearing, determined that he had abandoned the subject child, terminated his parental rights, and transferred guardianship and custody of the subject child to Mercy First and the Commissioner of Administration for Children's Services for the purpose of adoption. The Appellate Division held that to vacate the order, the father was required to show that there was a reasonable excuse for his default and a meritorious defense (See *Matter of Francisco R.,* 19 A.D.3d at 502, 796 N.Y.S.2d 247). Accordingly, the Appellate Division affirmed the Family Court's determination that the father did not make the requisite showing (*id.*).

Pendente Lite Relief-Modification

Ayoub v. Ayoub, 63 A.D.3d 493, 881 N.Y.S.2d 66, (N.Y.A.D. 2009)
The defendant father appealed a pendente lite order (an order or agreement entered into before the court pending a final determination) of $20,000 per month to maintain an apartment for the plaintiff and their children; $7,000 per month in temporary child support, and $2,500 per month in temporary maintenance, as well as the cost of the children's private school tuition, child care and nursery school expenses, after-school and extracurricular activities, books, supplies, camp and travel expenses, the children's medical, therapy, dental, and pharmacological costs, and the family medical insurance premiums.

During the marriage, the family lived an extravagant lifestyle. A divorce action was commenced, and the wife moved by order to show cause for pendente lite relief, including custody of the children, monthly maintenance, and monthly child support. The wife submitted a statement of net worth in support of her pendente lite motion, and the husband cross-moved for temporary custody of the children. In opposing the wife's motion, the husband asserted that the expenses claimed by the wife in her statement of net worth were "grossly exaggerated."

The court directed the husband to pay $20,000 per month to maintain an apartment in the city pending resolution of the action, as well as $40,000 for the initial rent payment and a security deposit. The husband was further ordered to pay up to $40,000 to furnish the apartment unless the parties agreed that the wife could furnish the apartment with items from the parties' townhouse. In addition, the court directed the husband to pay the wife interim child support in the amount of $7,000 per month, maintenance in the amount of $2,500 per month, and an interim payment of attorneys' fees in the amount of $25,000. Finally, the court ordered the husband to pay the costs of the children's private school, child care, nursery school, after school and extracurricular activities, books, supplies, camps, travel and health care, and the family's health insurance premiums. In granting the award, the court stated:

> This temporary award is reasonable in light of the children's prior standard of living and the great discrepancy between the parents' financial positions. *See Nayar v. Nayar*, 225 A.D.2d 370, 638 N.Y.S.2d 647 (N.Y. 1996). In arriving at this calculation, the court has considered that rote application of the CSSA guidelines is not mandatory on a motion for temporary support. *Rizzo v. Rizzo*, 163 A.D.2d 15, 558 N.Y.S.2d 12 (N.Y. 1990).

A pendente lite award should be modified only "rarely" (*Wittich v. Wittich*, 210 A.D.2d 138, 140, 620 N.Y.S.2d 351 (N.Y 1994) and the general rule is that an aggrieved party's remedy for perceived inequities in a pendente lite award is a speedy trial (*see Sumner v. Sumner,* 289 A.D.2d 129, 733 N.Y.S.2d 869 (N.Y. 2001); *Gad v. Gad*, 283 A.D.2d 200, 724 N.Y.S.2d 305 (N.Y. 2001). However, this rule, as the husband notes, may be set aside if exigent

circumstances exist (*id.*). Although the husband asserted that such exigent circumstances exist, the Appellate Division held that he failed to substantiate his claims. He failed to establish his true income because he did not submit tax returns for 2007, nor did he offer any explanation for his failure.

The Appellate Court did not accept the plaintiff's argument that the court impermissibly provided for a double housing allowance by ordering him to make both interim child support payments and separate payments for rental of an apartment. He asserted that at the very least the court was required to specifically delineate the components of the child support payment. The Appellate Court determined that the husband misstated the law. In all of the cases cited by the husband in support of this point, the trial court had applied the Child Support Standards Act (Domestic Relations Law § 240[1-b]) (2009) in fashioning the pendente lite award (*Kaplan v. Kaplan*, 192 A.D.2d 343, 595 N.Y.S.2d 770 (N.Y. 1993); *James v. James,* 169 A.D.2d 441, 564 N.Y.S.2d 334 (N.Y. 1991); *Lenigan v. Lenigan*, 159 A.D.2d 108, 558 N.Y.S.2d 727 (N.Y. 1990), or was directed to do so by the Appellate Division (*Ryder v. Ryder*, 267 A.D.2d 447, 700 N.Y.S.2d 862 (N.Y. 1999). The Appellate Court determined that the court expressly and appropriately declined to apply the Child Support Standards Act. Thus, it was not required to deduct the amount awarded for carrying charges before determining the appropriate amount of child support (*see Otto v. Otto*, 13 A.D.3d 503, 787 N.Y.S.2d 375 (N.Y. 2004); *Fischman v. Fischman*, 209 A.D.2d 916, 917, 619 N.Y.S.2d 198 (N.Y. 1994)). In fashioning its award, the Appellate Court held that the lower court properly considered the family's standard of living (*Winter v. Winter*, 50 A.D.3d 431, 432, 857 N.Y.S.2d 69 9 (N.Y. 2008); *Lapkin v. Lapkin,* 208 A.D.2d 474, 617 N.Y.S.2d 327 (N.Y. 1994); *Rizzo v. Rizzo,* 163 A.D.2d 15, 16, 558 N.Y.S.2d 12 (N.Y. 1990)). The husband could not dispute that his children became accustomed to a lifestyle that is extremely expensive. The goal of child support is to continue the status quo pending the divorce and to satisfy the, "overwhelming need to maintain a sense of continuity in the children's lives" (*Cron v. Cron*, 8 A.D.3d 186, 187, 780 N.Y.S.2d 121 (N.Y. 2004), lv. dismissed 7 N.Y.3d 864, 824 N.Y.S.2d 608, 857 N.E.2d 1139 (N.Y. 2006), lv. denied 10 N.Y.3d 703, 854 N.Y.S.2d 104, 883 N.E.2d 1011 (N.Y. 2008)). In this case, the trial court's child support award was consistent with that purpose. The same was true for those items that the husband characterized

as "open-ended" and "ambiguous," such as school supplies, summer camp, and travel expenses (*see Rogers v. Rogers,* 52 A.D.3d 354, 860 N.Y.S.2d 70 (N.Y. 2008)). Therefore, the defendant was ordered to pay the actual monthly cost of the plaintiff's apartment in lieu of $20,000 per month to maintain an apartment, and otherwise affirmed, without costs.

Maintenance-Modification

Tomczyk v. Tomczyk, 61 A.D.3d 1029, 876 N.Y.S.2d 726, (N.Y.A.D. 2009)

This Family Court proceeding pursuant to Family Ct. Act Article 4 (2006), granted the respondent's motion to dismiss the modification petition. The parties' twenty-seven-year marriage ended pursuant to a June 16, 2003, judgment of divorce that required the respondent to pay spousal maintenance to the petitioner in the amount of $290 per week. The respondent petitioned for modification of the maintenance award in July 2006, citing a negative change in his financial circumstances resulting from the termination of his employment. Following a hearing in October 2006, at which the petitioner was not represented by counsel, a Support Magistrate found that the respondent's maintenance obligation should terminate. Upon the petitioner's written objections to the Support Magistrate's order, the Family Court upheld the Support Magistrate's determination, specifically rejecting supplemental objections filed by the petitioner's attorney (presumably newly retained) on the basis that they were untimely. The petitioner failed to appeal the Family Court's order. The petitioner's counsel contended that the petitioner attempted to file an appeal of this order, but that the appeal was rejected as untimely. Thereafter, in February 2007, the petitioner filed a petition for modification of spousal support based on deterioration in her financial circumstances since the termination of her maintenance payments. The Support Magistrate granted the respondent's motion to dismiss the petition without a hearing, after determining that the petitioner had alleged no new issues of fact that would entitle her to relief. The petitioner filed written objections, and

the Family Court again upheld the Support Magistrate's determination.

The petitioner appealed to the Appellate Division, where it was determined that the petitioner was entitled to a hearing, and it reversed the Family Court order. The petition contained allegations that, although the petitioner had assets of approximately $30,000 at the time of the prior order, such assets had since been dissipated, forcing her to live on $439.60 a month. Therefore, the Appellate Division held that the petitioner did not have to allege a "change in circumstance" to be entitled to a hearing on her petition for modification of a prior order terminating her spousal support, since she was seeking modification of maintenance on the basis of her "inability to be self-supporting." In the petitioner's affidavit in opposition to the respondent's motion to dismiss the petition, she alleged that her income was insufficient to meet her needs and that she was "living well below the poverty line." (*Wyser-Pratte v. Wyser-Pratte,* 66 N.Y.2d 715, 716-717, 496 N.Y.S.2d 991, 487 N.E.2d 901 (N.Y. 1985))] [citation omitted]; *see* Domestic Relations Law § 236[B][9][b]; *Mitchell v. Mitchell,* 56 A.D.3d 740, 740, 867 N.Y.S.2d 683 (N.Y. 2008)). It was further indicated on the record that such income was a Social Security disability allowance based on petitioner's mental illness.

Responding to Changes in Child Support Proceedings

The outcomes of the aforementioned cases indicate that courts are cognitive of the economic times but are not necessarily modifying the financial obligations of parties in family court child support proceedings without the requisite showings. Standards for modification are still enforced; judges are not necessarily allowing the parties to use the economy as an excuse for lack of payment.

At the same time, family law attorneys have responded to the current economic climate by offering alternate billing arrangements or lower-cost alternative dispute resolution options, such as mediation, where the parties can share the costs associated with their dispute and are given an incentive to negotiate the terms to an agreement rather than undergo the costly consequences of litigating.

Family lawyers must take steps to best integrate these new decisions and developments into their family law strategies; therefore, it is important to read the new statutes in this area and keep current on the most recent case law.

Strategies for the Most Challenging Child Support Cases

The most challenging child support family law cases are typically those in which income is not reported on tax returns and courts need to determine support or maintenance or financials. Unreported income forces courts, as well as the forthcoming party, to delegate time determining the motive and the authenticity of any documents set forth. Other challenging cases are those in which marital funds are spent on separate liabilities; cases involving allegations of dissipation of marital funds; and neglect and abuse cases, which involve determining what is in the child's best interest. Time expended in confirming the accuracy of a party's income and allegations results in the incurred expenses of experts, certified documentation, and of course, legal fees, as the parties' counsel oversee the retaining of those experts and obtaining of documents. In turn, the more time spent confirming the factors surrounding a child support matter, such as a party's income, the longer it will be before the court is able to determine the reasonableness of a support obligation, along with who will be obligated to pay the support, in the event that custody of the respective child or children is presented before the court as a concurrent issue. In attempts to overcome these challenges, counsel should encourage their clients to be as honest and as accurate as possible—income hidden from the court will nevertheless be spent on the opposing party's endeavor to reveal the truth to the court instead of having the income go to the children who need it the most.

Key Child Custody Cases in New York Family Law

The following are among the most significant recent child custody case decisions of the New York family law courts:

Winston v. Gates, 64 A.D.3d 815, 881 N.Y.S.2d 684,(N.Y.A.D. 2009)
Family Court granted the petitioner's application to modify a prior order of custody involving parents of a daughter who was born in 1996; they separated when the child was about two years old, and the child had primarily resided with the mother since that time. In 2002, the parties

consented to a modified order awarding them joint legal custody, with the mother having primary residential custody and the father an extensive visitation schedule. In 2007, the mother commenced a proceeding seeking modification of the 2002 order to allow her to move to Florida with the child. The father then commenced a proceeding requesting that the prior order be modified to place the child's primary residence with him. Family Court rendered an order continuing the child's primary residence with the mother, granting the mother's request for permission to relocate to Florida with the child, and awarding the father extensive parenting time. The father appealed, and the Appellate Division affirmed.

The Appellate Division looked at the relevant factors in reviewing the application for permission to relocate the child's primary residence, including, "each parent's reasons for seeking or opposing the move, the quality of the relationships between the child and the custodial and non-custodial parents, the impact of the move on the quantity and quality of the child's future contact with the non-custodial parent, the degree to which the custodial parent's and child's life may be enhanced economically, emotionally and educationally by the move, and the feasibility of preserving the relationship between the non-custodial parent and child through suitable visitation arrangements" (*Matter of Tropea v. Tropea,* 87 N.Y.2d 727, 740-741, 642 N.Y.S.2d 575, 665 N.E.2d 145 (N.Y. 1996)). The court determined that it is free to consider and give appropriate weight to all relevant factors and, "[i]n the end, it is for the court to determine, based on all of the proof, whether it has been established by a preponderance of the evidence that a proposed relocation would serve the child's best interests" (id. at 741).

Here, the basis of the mother's application was that she had been diagnosed with a degenerative disc disease and was unable to continue to work. As a result, she had been forced to reside with relatives and with a former boyfriend, none of whom were able to accommodate her and the child on a long-term basis, necessitating that they move frequently. The mother's parents had offered to allow her and the child to reside with them indefinitely at their home in Florida and to provide for their basic living expenses, including room and board. The father alleged, in support of his application, that the mother's inability to provide for the child and his own ability to provide a stable and secure environment for the child warranted a

change in the child's primary residential custody to him. The Appellate Division affirmed the denial of the father's petition for modification of primary residential custody, as it was in the child's best interest. The evidence established that both parents were active participants in raising the child and had a strong relationship with the child. However, the mother had been the child's primary caregiver for most of the child's life, and the child had a stronger bond with her. For example, the record reflected that the child generally turned to the mother for advice and when she wanted someone in whom to confide. As Family Court observed, the mother, unlike the father, was knowledgeable with regard to the child's medical diagnosis of attention deficit disorder and special educational needs and addressed concerns relating to those needs. The mother also arranged for the child's involvement in various extracurricular activities (although the father's participation in those activities was also substantial).

Significantly, the mother testified during the hearing that she was unable to financially support herself or the child due to her medical condition and that she and the child had exhausted all available local resources. The grandfather testified that the mother and child would be able to reside with him and his wife at no cost as long as necessary. The evidence established that the mother and the child would each have her own bedroom at the grandparents' residence—in contrast to the father's home, where the child was required to share a room with a stepsibling—and that the school the child would attend was located near their home. There was no evidence of any motive on the part of the mother, other than economic security and stability, let alone any improper motive, for her desire to relocate with the child. Both the mother and the grandfather indicated their willingness to provide the father with as much visitation with the child as practicable and to facilitate as much communication between the father and the child as the child desired. Notably, to that end, the Family Court's order provided for extensive visitation—six weeks during the summer, one week at Christmas, and one week during spring break—and required the mother to provide transportation for two of those visits, a cellular telephone that would allow the child and the father to make regular and frequent local telephone calls to one another, and e-mail communication.

On the other hand, the Family Court clearly considered the unquestionable fitness of the father, his close relationship with the child, the presence of

members of the child's extended family in the area of the father's residence, and the child's positive adjustment to her school and established social relationships. However, there was also evidence that the father's household consisted of his wife and, at times, as many as four other children, leaving limited time for him to spend alone with the subject child. In addition, while the father testified that he would be willing to pay any tuition necessary to maintain the child in her current school, he had not inquired as to the amount of such tuition, and his modest income raised questions regarding the feasibility of his doing so, thus increasing the likelihood that the child would be required to change schools even if he were awarded primary residential custody. Also, his residence was in a different school district.

The Appellate Division discerned no abuse of discretion in the Family Court's determination to place substantial weight on the child's expressed desire to relocate to Florida with the mother, particularly in view of the Law Guardian's recommendation that the child's wishes be given such weight and the opportunity afforded to the Family Court to observe the child and ascertain her level of maturity and ability to articulate her preferences (*see Matter of Burch v. Willard,* 57 A.D.3d 1272, 1273, 870 N.Y.S.2d 141 (N.Y. 2008)).

Harrington v. Harrington, 63 A.D.3d 1618, 881 N.Y.S.2d 737, (N.Y.A.D. 2009)

The respondent father appealed from an order that awarded the petitioner mother sole custody of the parties' two children and granted the mother permission for the children to relocate with her to Troy, New York. The Appellate Division affirmed the lower court's order and rejected the father's contention that the Family Court failed to consider the best interests of the children in determining that the mother is entitled to sole custody of the children. Here, the evidence demonstrated that the mother was gainfully employed in Troy and provided the children with a stable home environment, while the father had no gainful employment, and it was unlikely that he could provide a stable home environment.

Brian JJ. v. Heather KK., 61 A.D.3d 1285, 878 N.Y.S.2d 482, (N.Y.A.D. 3 Dept.)

The father and mother in this case are the unwed parents of one son, Caleb JJ., born in 2005. In January 2006, they stipulated to an order of the Family Court wherein the mother and her sister would share joint legal custody of Caleb, with the sister initially having primary physical custody, but with such custody being gradually transferred to the mother, who was prohibited from removing the child from Tompkins County without a prior court order. The stipulation and order also included provisions for the father and Caleb's grandparents to visit with the child and required the father to complete an alcohol abuse treatment program, after which he could petition Family Court for a modification of custody without any further showing of a change in circumstances. In May 2006, the mother regained physical custody of Caleb and, without getting court permission, moved with the child to Chemung County to avail herself of the financial and emotional support and assistance of her boyfriend and his family. After several custody proceedings involving the grandparents (where it was determined that the grandparents lacked standing) and the father, as in between the mother and the father, the court determined that it was in Caleb's best interests to continue to live with the mother in Chemung County and granted the mother sole custody. The court retroactively approved the mother's move to Chemung County and declined to impose any sanctions for her failure to obtain prior approval from the Tompkins County Family Court. A written order awarded the father visitation, and the father appealed.

The Appellate Division affirmed the Family Court order and held that the Family Court did not abuse its discretion in awarding sole custody to the mother. In reviewing the father's petitions, the Family Court followed a best interests analysis (s*ee Friederwitzer v. Friederwitzer,* 55 N.Y.2d 89, 94, 447 N.Y.S.2d 893, 432 N.E.2d 765 (N.Y. 1982); *Matter of Bessette v. Pelton,* 29 A.D.3d 1085, 1087, 814 N.Y.S.2d 397 (N.Y. 2006)) and properly considered, among other things, "the quality of the respective home environments" and each parent's "relative fitness and ability to provide for and guide the child's intellectual and emotional development" (*Matter of Russo v. Russo,* 257 A.D.2d 926, 927, 684 N.Y.S.2d 350 (N.Y. 1999)). The record reflected that the court focused primarily on the fact that the mother was providing an appropriate home for Caleb, had availed herself of a

variety of services offered by the Department of Social Services—including mental health counseling, alcohol treatment, and parenting classes—and had overcome her past problems (*see Matter of Morrow v. Morrow,* 2 A.D.3d 1225, 1227, 769 N.Y.S.2d 651 (N.Y. 2003)). Furthermore, Family Court properly considered the circumstances of that move, including the mother's valid reasons therefore and her prior notice to the father. Family Court also properly weighed, on the other hand, the father's unwillingness to communicate with the mother, to set aside his animosity toward her, and to foster her relationship with Caleb. In addition, there was a sound and substantial basis in the record for the lower court's determination that the father and the grandparents had relentlessly and unnecessarily subjected the mother to child abuse hotline reports and the child to photo sessions, medical office, and hospital emergency room visits, all in an attempt to document the mother's alleged abuse and/or neglect of the child. Ultimately, all of the child's injuries were determined to be normal for an active toddler, and the hotline reports were determined to be unfounded. Also notably, the father currently resides in a one-bedroom apartment, and the grandmother testified that she believes he would need her support were he to gain custody of Caleb (*see Matter of Robinson v. Cleveland,* 42 A.D.3d 708, 709, 839 N.Y.S.2d 611 (N.Y. 2007)).

Under these circumstances, and according due deference to the Family Court's credibility determinations (*see Friederwitzer v. Friederwitzer,* 55 N.Y.2d at 94, 447 N.Y.S.2d 893, 432 N.E.2d 765; *Matter of Diffin v. Towne,* 47 A.D.3d 988, 990, 849 N.Y.S.2d 687 (N.Y. 2008), *lv. denied* 10 N.Y.3d 710, 859 N.Y.S.2d 395, 889 N.E.2d 82 (N.Y. 2008)), the lower court was well within its discretion in concluding that joint custody would not be in the best interests of the child and awarding sole custody to the mother (s*ee Matter of Lopez v. Robinson,* 25 A.D.3d 1034, 1036-1037, 808 N.Y.S.2d 494 (N.Y. 2006); *Matter of Ruller v. Berry,* 19 A.D.3d 814, 816, 797 N.Y.S.2d 586 (N.Y. 2005), *lv. denied* 6 N.Y.3d 705, 811 N.Y.S.2d 338, 844 N.E.2d 793 (N.Y. 2006); *Reed v. Reed,* 93 A.D.2d 105, 111-112, 462 N.Y.S.2d 73 (N.Y. 1983), *appeal dismissed* 59 N.Y.2d 761 (N.Y. 1983)).

Said v. Said, 61 A.D.3d 879, 878 N.Y.S.2d 384, (N.Y.A.D. 2 Dept.)
The mother in this case appealed from an order of the Family Court that granted the father's petition, inter alia, to modify the custody provisions of a stipulation of settlement that was incorporated but not merged into a judgment of divorce dated December 8, 1998, awarding her sole custody of

the subject children, so as to award him sole custody of the subject children, and denied her petition, among other things, for permission to relocate with the subject children to Pennsylvania. The Appellate Division reversed the order and denied the father's petition while granting the mother's petition. The matter was remitted to the Family Court, and pending further order, the father was awarded visitation on alternate weekends from Friday at 6 p.m. until Sunday at 6 p.m. or other times as the parties may agree, with the mother transporting the children to Liberty State Park for pick-up and drop-off.

Where, as here, parents enter into an agreement concerning custody, that agreement will not be modified unless there is a sufficient change in circumstances since the time of the stipulation, and unless modification of the custody arrangement is in the best interests of the children (*see Matter of Manfredo v. Manfredo,* 53 A.D.3d 498, 499, 861 N.Y.S.2d 399 (N.Y. 2008); *Matter of Joseph F. v. Patricia F.,* 32 A.D.3d 938, 938-939, 821 N.Y.S.2d 625 (N.Y. 2006); *Matter of Rawlins v. Barth,* 21 A.D.3d 495, 799 N.Y.S.2d 738 (N.Y.A.D. 2005)). In assessing whether a change in circumstances warrants a modification of the custody arrangement, relevant considerations include whether the change in circumstances implicates the fitness of the custodial parent, or affects the nature and quality of the relationship between the children and the non-custodial parent (*see Matter of Joseph F. v. Patricia F.,* 32 A.D.3d at 939, 821 N.Y.S.2d 625). Custody determinations are ordinarily a matter of discretion for the hearing court, and the court's determination will not be set aside on appeal unless it lacks a sound and substantial basis in the record (*see Matter of Manfredo v. Manfredo,* 53 A.D.3d at 499-500, 861 N.Y.S.2d 399; *Matter of Joseph F. v. Patricia F.,* 32 A.D.3d at 939, 821 (N.Y.S.2d 625)).

The Appellate Court concluded that the Family Court's determination to transfer custody of the subject children from the mother to the father was not supported by a sound and substantial basis in the record. As the mother and the attorney for the children contended, in light of the ages and maturity of the children, their clearly expressed preferences to live with the mother, although not controlling, are entitled to great weight (*see Matter of Manfredo v. Manfredo,* 53 A.D.3d at 500, 861 N.Y.S.2d 399). In addition, the evidence at the hearing showed that the children have been in the custody of the mother for most of their lives, that she is a fit parent, and that the

children have thrived in her care (*see Eschbach v. Eschbach,* 56 N.Y.2d 167, 171, 451 N.Y.S.2d 658, 436 N.E.2d 1260 (N.Y. 1982)). Furthermore, although the Family Court expressed a concern that the mother and her fiancé had, and would continue to, "undermine[ ]" the father's relationship with the children, the evidence showed that the mother and her fiancé fostered the father's visitation with the children, who enjoyed a good relationship with the father. The court's determination to deny the mother permission to relocate with the children to Pennsylvania also lacked a sound and substantial basis in the record and, thus, could not be upheld.

Although each custodial parent's request for relocation must be decided on its own merits, the factors that should have been considered include, but are not limited to, each parent's reasons for seeking or opposing the move, the quality of the relationships between the children and each parent, the impact of the move on the quantity and quality of the children's future contact with the non-custodial parent, the degree to which the lives of the custodial parent and the children may be enhanced economically, emotionally, and educationally by the move, and the feasibility of preserving the relationship between the non-custodial parent and the children through suitable visitation arrangements (*see Matter of Tropea v. Tropea,* 87 N.Y.2d 727, 738-739, 642 N.Y.S.2d 575, 665 N.E.2d 145 (N.Y. 1996)). Upon weighing these factors, it was determined that the mother established that the children's best interests would be served by permitting the relocation, which will, among other things, still permit the children to have a meaningful relationship with the father (*see Matter of Cooke v. Alaimo,* 44 A.D.3d 655, 843 N.Y.S.2d 365 (N.Y. 2007); *Matter of Wisloh-Silverman v. Dono,* 39 A.D.3d 555, 556-557, 834 N.Y.S.2d 539 (N.Y.A.D. 2007); *Matter of Vega v. Pollack,* 21 A.D.3d 495, 497, 800 N.Y.S.2d 442 (N.Y.A.D. 2005)).

Arroyo v. Thompson, 63 A.D.3d 921, 880 N.Y.S.2d 540, (N.Y.A.D. 2 Dept.)
In two related child custody and visitation proceedings pursuant to Family Court Act Article 6 (2006), the mother appealed from an order of the Family Court that denied her permission to relocate to Ohio with the parties' child. The Appellate Division affirmed and determined that the record contained sound and substantial basis for the Family Court's denial of that branch of the mother's petition, as the evidence did not demonstrate that relocation to Ohio was in the best interests of the child (*see Matter of Tropea v. Tropea,* 87 N.Y.2d 727, 642 N.Y.S.2d 575, 665 N.E.2d 145 (N.Y.

1996)); *see also Matter of Said v. Said,* 61 A.D.3d 879, 878 N.Y.S.2d 384 (N.Y. 2009)).

The Use of Mediation in Child Custody Cases

Mediation is now used more frequently to settle child custody cases; however, the agreements that are reached are often brought to court to challenge validity. The benefits of mediation in these cases include lower costs, a friendlier atmosphere, and the fact that it is typically a faster procedure than litigation.

In child custody cases where mediation has had a successful outcome, there was not an exorbitant amount of money to argue over, and the parties were made to recognize that there are no sure things in court; also, litigation is expensive and frequently long and drawn-out. In the unsuccessful mediations, the parties were typically affluent, untrusting, and needed to have their own attorneys.

It is important for family lawyers who are considering mediation in a child custody case to listen to their clients, read over the agreements carefully, and then chart out the agreements and the contingent provisions.

Paternity Decisions in Family Court Law

Several notable paternity decisions have been handed down in New York family courts in recent times:

Marilene S. v. David H., 63 A.D. 949, 882 N.Y.S.2d 155 (N.Y.A.D. 2009)
The petitioner was married to Charles S. when the subject child was born, and she commenced a proceeding against the respondent, David H., to establish paternity. David H. challenged paternity on the ground of doctrine of equitable estoppel (a legal principle that bars a party from denying or alleging a certain fact owing to that party's previous conduct, allegation, or denial. The rationale behind estoppel is to prevent injustice owing to inconsistency or fraud). The matter should not have been determined by a Support Magistrate, but rather should have been transferred to Family Court. FCA §439[a] (2006). Also, a child born during marriage is presumed to be the biological product of the marriage. This presumption may be rebutted by

clear and convincing evidence excluding the father or otherwise to disprove legitimacy. *See Matter of Barbara S. v. Michael I.,* 24 AD3d 451, 452 (N.Y. 2005); *Matter of Findlay*, 253 N.Y. 17 (N.Y. 1930); *Matter of Walker v. Covington*, 287 A.D.2d 572 (N.Y.A.D. 2001); *Murtagh v. Murtagh,* 217 A.D.2d 538, 539 (N.Y.A.D. 1995); *David L. v. Cindy Pearl L.,* 208 A.D.2d 502, 503 (N.Y.A.D. 1994).

Aikens v. Nell, 63 A.D.3d 1662, 880 N.Y.S.2d 406 (N.Y.A.D. 2009)

The petitioner mother commenced a paternity proceeding against the respondent seeking an order of filiation (an official document that declares a man to be the father of a child) and child support for her then-12-year-old child. Family Court properly determined that the respondent may not invoke the doctrine of equitable estoppel, which is applicable in paternity proceedings to be invoked to further a child's best interests and generally not available to a party seeking to disavow allegation of parenthood for purposes of avoiding child support. *See Matter of Dowed v Munna*, 306 A.D.2d 278, 279 (N.Y.A.D. 2003); see *Matter of Ruby M.M. v Moses K.,* 18 A.D.3d 471, 472 (N.Y. 2005)

Lucero v. Gabriel, 60 A.D.3d 860, 874 N.Y.S.2d 386 (N.Y.A.D. 2009)

The appellant was properly served a summons and petition for child support under UIFSA (Uniform Interstate Family Support Act). This federal law statute was passed to expedite intrastate and interstate proceedings involving child support. *See* FCA§§ 427[c], 525[a]; CPLR 308[2] (2006). Family Court providently exercised discretion in granting the mother leave to amend the petition to allege that the appellant was the father once he denied paternity. *See Matter of Department of Social Servs. v Jay W.,* 105 A.D.2d 19 (N.Y.A.D. 1984); CPLR 3025[b]; FCA§ 18[a]. The mother established by clear and convincing evidence (*Case law does not explain what evidence was used to establish paternity)* that the appellant was the subject child's father. *See* FCA § 532[a]; *Matter of Commissioner of Social Servs., Suffolk County DDS v Wisloh,* 302 A.D.2d 383 (N.Y.A.D. 2003).

Tsarova v Tsarov, 59 A.D.3d 632, 875 N.Y.S.2d 84 (N.Y.A.D. 2009)

Family Court established paternity and directed the appellant father to pay $1,650 child support per month and $23,100 in child support arrears. The appellant withdrew his application contesting paternity of the subject child at a hearing before the Support Magistrate. There was no evidence in the

record to suggest the appellant was coerced by the Support Magistrate. Therefore, the issue of paternity was not properly before the Appellate Division. See *Matter of Michael F. v. Cerise S.,* 224 A.D.2d 692, 692 (N.Y.A.D. 1996). Where there is insufficient evidence to determine gross income, CSSA provides that child support may be based on the child's needs or standard of living. *See* FCA §413[1][k]; *see also Orlando v Orlando*, 222 A.D.2d 906, 908 (N.Y.A.D. 1995). The Family Court properly denied objections to the Support Magistrate's determination based upon the child's needs. *See* FCA §[1][k]; *Matter of Denham v Kaplan,* 16 A.D.3d 685 (N.Y.A.D. 2005); *Matter of Kondratyeva v Yapi*, 13 AD3d 376 (N.Y. 2004); *Matter of Grossman v Grossman,* 248 A.D.2d 536 (N.Y.A.D. 1998).

Alessandra S v. Robert EF, April 10, 2009, *NYLJ* p. 27, col. 3, Fam. Ct., Larabee *(2009)*

The petitioner mother alleged that she had the respondent's child born out of wedlock. FCA § 516 (2006) authorized the court to approve a compromise agreement, which allows a man to settle a paternity claim without an admission or finding that he is a child's father, after notice and opportunity to be heard are given to the local DSS. The parties, with the help of an attorney, entered an agreement on October 1, 2002, for support of the petitioner's unborn child. The petitioner agreed to never institute a paternity proceeding and to not seek judicial approval of the agreement pursuant to FCA §516 (2006) until after the child's birth. The respondent agreed to pay $4,000 per month until the child was born, and then pay $6,000 per month until the child's emancipation, with a provision for an annual adjustment. However, no application was made to the Family Court for approval of the agreement until an instant petition filed on August 27, 2008. The Support Magistrate properly dismissed the petition, as the agreement had never been approved by the court and did not make adequate provision for the subject child. The FCA § 516 (2006) agreement is not binding until Family Court has independently determined that adequate provision was made for the child. *See Clara C. v. William L.,* 96 N.Y.2d 244 (N.Y. 2001).

McCoy v. Briggs, 22 Misc.3d 1110(A), 880 N.Y.S.2d 225 (Table), (Fam. Ct., Essex Co., 2009)

The petitioner mother brought a paternity proceeding in March 2008 against the respondents, Briggs and MacIntyre, to determine paternity of a female child born August 2007. The mother informed the court that although Briggs signed an acknowledgment of paternity at the time of the child's birth in Vermont based on her representations to him that he was the father, she believed that MacIntyre was the child's natural father. Briggs submitted genetic marker testing excluding him as the father. MacIntyre did not appear. The court determined that material mistake of fact existed sufficient to warrant an order vacating *ab initio* (null and void from the very beginning) the acknowledgment of paternity. MacIntyre appeared with counsel on August 4, 2008, and moved to dismiss petitions based on the acknowledgement of paternity. MacIntyre was directed to submit to genetic marker testing, the results of which revealed a probability of paternity at 99.99 percent. Genetic marker testing results conclusively proved that Briggs is not the child's natural father, and the acknowledgment was signed under material mistake of fact. The acknowledgement of paternity was properly vacated pursuant to FCA §516-a (b)(ii) (2006).

See also, Savel v. Shields, supra at 58 A.D.3d 1083, 872 N.Y.S.2d 597 (N.Y.A.D. 2009)

Additional Key Issues in New York Court Decisions

Several additional New York Family Court cases have focused on some other key issues of note:

Domestic Partners and Adoption

In re Donna S., 23 Misc.3d 338, 871 N.Y.S.3d 883 (Fam. Ct., Monroe County, 2009*)*, a Rochester Family Court judge declared that a same-sex spouse need not be certified to adopt a parent's child; a simple consent would do. The Family Court judge ruled that there was no need for the same-sex spouse of a woman due to give birth in March to seek pre-certification to adopt her partner's child. Judge Joan S. Kohout concluded that because the couple's Canadian marriage is recognized under New York

law, the spouse could be treated exactly the same as the husband of a woman who became pregnant through donor insemination, in which case neither pre-certification nor an adoption proceeding would be necessary to establish a parental relationship with the child. Since all the paperwork was in order, and there was a positive home study report on file, Judge Kohout granted the petition for pre-certification, so the petitioner is eligible to adopt a child until the expiration of the petition in May 2010.

According to Judge Kohout's opinion, Donna R.S. and Lisa P. were married on July 4, 2007, in Niagara-on-the-Lake, Ontario, Canada. Lisa had become pregnant through donor insemination and was due to give birth in March. Donna initiated the process of being approved as an adoptive parent, with the intention of having a second-parent adoption when the child was born. As part of that process, she submitted to a home study by a social worker, who produced a positive report, and then she submitted her petition to the court to be "pre-certified" as an adoptive parent so the adoption procedure could be undertaken quickly after the child was born. The petition does not specify that Donna was seeking to adopt any particular child, but merely to be certified as qualified in general to be an adoptive parent, but the home study made clear to the court that her intention was to adopt her same-sex spouse's child. Judge Kohout considered the pre-certification process to be unnecessary. Pointing out that the Appellate Division's ruling last year in *Martinez v. County of Monroe*, 50 A.D.3d, 189 850 N.Y.S.3d 740 (N.Y. 2008) means that "the marriage of same sex couples legally married in other jurisdictions must be recognized by New York," and mentioning as well that Governor David Paterson had directed New York state agencies to, "apply statutes and regulations in a gender neutral manner to same sex parties validly married in another jurisdiction," Judge Kohout saw no reason to treat Donna any differently from the husband of a woman who has become pregnant through donor insemination. In such situations, no adoption proceeding is necessary. All that is required is for the parties to execute a consent form, indicating their agreement that the birth mother's spouse will be the legal parent of the child, and the spouse's parental status would be established.

Along the way to this result, Kohout speculated on an alternative approach to the same end: "Since Ms. S. is the spouse of Ms. P., she will at the very

least be considered a step-parent to Ms. P.'s child after the child's birth. Step-parents are not required to be pre-certified as qualified adoptive parents for the purpose of adopting their spouse's child." However, step-parents would have to fulfill a one-year waiting period to adopt, or get approval to waive the waiting period from the court. Ultimately, Judge Kohout seemed to feel that the better approach would be that provided by the statute governing donor insemination, as described above, pointing out that "a child born to a married woman by artificial insemination is deemed the legal child of the husband if both spouses execute a consent to that effect. Given the holding in *Martinez*, it would seem that by the simple execution of a consent, Ms. S. could become the baby's legal parent without the necessity of an adoption."

Appreciation of Separate Property

Smith v. Winter 64 A.D. 3d 1218, 883 N.Y.S.2d 412 (N.Y. 2009)
The court was to determine whether the portion of the business owned by party-spouse that appreciated due to the employees who were hired by the owner-spouse count as active spousal effort, which would render the appreciation marital property, or whether it is considered passive, non-spousal effort so that the appreciation attributable to the employees is treated as separate property.

The Appellate Division Fourth Department stated that with respect to Permanban North America, a wholly owned subsidiary of the plaintiff husband's business, American Wire Tie Inc. (PNA), the court found that the value of PNA appreciated by $20 million during the course of the marriage but that the increase in value attributable to the plaintiff was minimal when compared to the increase attributable to those hired by the plaintiff to run the company. The court thus determined that only 10 percent of the appreciation in value of PNA was marital property subject to equitable distribution.

Recoupment Credits

Reiter v Reiter, 65 A.D. 3d 1209, 886 N.Y.S.2d 434 (N.Y. 2009))
The Appellate Division Second Department held that under the circumstances of that case, the Supreme Court improvidently exercised its discretion in failing to award the defendant a credit for the legal fees she expended in reaching a settlement to sell her ownership interest in certain companies, as the proceeds of the sale were marital property that the court divided equally between the parties. Since the defendant paid a total sum of $26,945 in legal fees in connection with the settlement, which occurred after the parties ceased living together and before the commencement of this action, she is entitled to a credit for half of that amount or $13,472.50.

Impact of Marital Misconduct on Equitable Distribution

Howard S. v. Lillian S., 62 A.D.3d, 876 N.Y.S.2d 351(N.Y. 2009)
In a matrimonial action, the issue raised was whether the defendant wife's alleged misrepresentation to plaintiff husband that he was the biological father of one of their children, when in fact the child was conceived during her adultery and fathered by her lover, constituted "egregious fault" sufficient to be considered in equitably distributing the marital property.

The parties met in 1993. The wife was then a single mother employed as a receptionist at the World Trade Center. The husband was a corporate attorney. They married in 1997 and had a son in 1998 and a daughter in 1999. The husband legally adopted the wife's then eight-year-old daughter in December 1999. The husband alleges that in early 2004, his wife became pregnant by an unidentified man with whom she was having an affair, and she thereafter gave birth to a son in December 2004. The husband, unaware of the affair, had no reason to suspect that the child was not his, and the wife made no effort to inform him of the possibility, allowing him to raise the child believing it to be his own. In February 2007, the wife began another affair with co-respondent Ryan M.. The wife thereafter spent large blocks of time away from her husband and the kids while embarking on numerous trips with M., including one in which they traveled to Argentina for eighteen days. During these trips, the husband was left to care for the children, on at least

one instance taking them on vacation himself, while the wife remained largely incommunicado, refusing to provide contact information to her husband. The husband also alleged that during one family vacation to California, the wife's paramour secretly followed the family to the West Coast, where the wife shunned dinner and day trips with her husband and children so that she could spend time with M. The husband claimed that in the face of his wife's repeated and extended absences, her increased spending habits, and frequent jokes from family and friends about the lack of family resemblance between himself and his youngest child, he brought his son for a DNA marker test, which indicated that there was 0 percent chance he was the biological father of the youngest child.

In imposing its decision, the Appellate Division adopted the analysis set forth in *Blickenstein v. Blickenstein,* 99 A.D.2d 287, 292 (N.Y. 1984):

> … it is well settled that Domestic Relations Law § 236 (B) (5) (d) (2006), which lists the specific factors that a court is to weigh in determining equitable distribution, provides that, in limited circumstances, marital fault may be considered pursuant to paragraph (d) (13) of the statute, the "catchall" provision that allows the court to take "any other factor" which may be "just and proper" into account. Marital fault can only be considered where the misconduct "is so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship—misconduct that "shocks the conscience" of the court [,] thereby compelling it to invoke its equitable power to do justice between the parties.

A majority of the Appellate Division found that the defendant's misconduct, though it clearly violated the marital relationship, was not sufficient to be considered for purposes of equitable distribution.

Custodial Parent's Relocation with Child

Exceptional Circumstances Not Required; Fostering Relationship with Other Parent; Physical and Decision-Making Custody

In re Damien P.C. v. Jennifer H.S., 57 A.D.3d 295, 869 N.Y.S.2d 59 (1st Dept 2008)

The Family Court, New York County, granted the mother full residential custody of the subject children; granted the father final decision-making authority as to the children's extracurricular activities, three out of four consecutive weekends, and either Thanksgiving or Christmas with the children each year; and placed a restriction against the mother relocating with the children more than thirty-five miles from the father's residence. Both parties appealed. The Supreme Court, Appellate Division, held that: (1) grant of residential custody to the mother was proper; (2) the Family Court properly exercised its discretion with regard to particular days and the schedule of the father's visitation, his role in planning extracurricular activities, and the split of holidays; and (3) the Family Court providently exercised its discretion in limiting the relocation of the mother with the children to thirty-five miles from the father's home.

The Appellate Division found that contrary to the father's contention, the Law Guardian's advocacy of positions favoring the mother did not indicate improper bias. Nor was there any basis for refuting the court's finding that the forensic expert's testimony was credible. Under the factors to be considered in determining custody, the parties were equally qualified, with one exception. Regarding who would better facilitate the relationship between the children and the non-custodial parent, the court agreed with the forensic expert's findings that the mother was the superior parent, based on evidence that she invited the father to the children's birthday parties and encouraged him to visit on numerous occasions while she had custody; whereas, he withheld information about schooling and refused her admittance to the

apartment when they were with him. The grant of residential custody to the mother was proper, supported by the record, and balanced with ample rights of access to the father at holidays and year-round.

On the other hand, however, the mother contended that the Family Court erred with regard to the particular days and schedule of the father's visitation, his role in planning extracurricular activities, and the split of holidays. In light of the father's intense involvement in the children's lives, as well as the parties' equal split of time with the children over the past five years, the Appellate Division found the Family Court's allocation to have been a proper exercise of discretion. In addition, with regard to the geographical limitation on the mother's relocation, the mother pointed to a Yorktown Heights house forty-one miles away in which she can stay with the children. The Appellate Division held that given the proximity of the respective parental residences to each other, the Family Court providently exercised its discretion in limiting the mother's relocation to a reasonable distance of thirty-five miles from the father's home.

Amendments and Changes in Family Court Act and Domestic Relations Laws

1. Family Court Act § 1055-b (2006): relative to complex issues of disposition orders where court has before it an Article 10 termination proceeding and an Article 6 custody proceeding:

(b) (i) Children placed under this section shall be placed until the court completes the initial permanency hearing scheduled pursuant to article ten-A of this act. Should the court determine pursuant to article ten-A of this act that placement shall be extended beyond completion of the scheduled permanency hearing, such extended placement and any such successive extensions of placement shall expire at the completion of the next scheduled permanency hearing, unless the court shall determine, pursuant to article ten-A of this act, to continue to extend such placement.

(ii) Upon placing a child under the age of one, who has been abandoned, with a local commissioner of social services, the court shall, where either of the parents do not appear after due notice, include in its order of disposition pursuant to section one thousand fifty-two of this part, a direction that such commissioner shall promptly commence a diligent search to locate the child's non-appearing parent or parents or other known relatives who are legally responsible for the child, and to commence a proceeding to commit the guardianship and custody of such child to an authorized agency pursuant to section three hundred eighty-four-b of the social services law, six months from the date that care and custody of the child was transferred to the commissioner, unless there has been communication and visitation between such child and such parent or parents or other known relatives or persons legally responsible for the child. In addition to such diligent search the local commissioner of social services shall provide written notice to the child's parent or parents or other known relatives or persons legally responsible as provided for in this paragraph. Such notice shall be served upon such parent or parents or other known relatives or persons legally responsible in the manner required for service of process pursuant to section six hundred seventeen of this act. Information regarding such diligent search, including, but not limited to, the name, last known address, social security number, employer's address and any other identifying information to the extent known regarding the non-appearing parent, shall be recorded in the uniform case record maintained pursuant to section four hundred nine of the social services law.

(iii) Notice as required by paragraph (ii) of this subdivision shall state:

(A) that the local commissioner of social services shall initiate a proceeding to commit the guardianship and custody of the subject child to an authorized agency and that such proceeding shall be commenced six months from the date the

child was placed in the care and custody of such commissioner with such date to be specified in the notice;

(B) that there has been no visitation and communication between the parent and the child since the child has been placed with the local commissioner of social services and that if no such visitation and communication with the child occurs within six months of the date the child was placed with such commissioner the child will be deemed an abandoned child as defined in section three hundred eighty-four-b of the social services law and a proceeding will be commenced to commit the guardianship and custody of the subject child to an authorized agency;

(C) that it is the legal responsibility of the local commissioner of social services to reunite and reconcile families whenever possible and to offer services and assistance for that purpose;

(D) the name, address and telephone number of the caseworker assigned to the subject child who can provide information, services and assistance with respect to reuniting the family;

(E) that it is the responsibility of the parent, relative or other person legally responsible for the child to visit and communicate with the child and that such visitation and communication may avoid the necessity of initiating a petition for the transfer of custody and guardianship of the child.

Such notice shall be printed in both Spanish and English and contain inconspicuous print and in plain language the information set forth in this paragraph.

2. Domestic Relations Law §236 B[2]: effective September 1, 2009, subdivision (b) was added which provides for automatic restraining orders that come into effect upon the commencement of a matrimonial action and bind both parties and which will in turn impact equitable distribution

practices. Domestic Relations Law [section] 236 B (2) has been amended to add a paragraph "b" to require that:

> b. With respect to matrimonial actions which commence on or after the effective date of this paragraph, the plaintiff shall cause to be served upon the defendant, simultaneous with the service of the summons, a copy of the automatic orders set forth in this paragraph. The automatic orders shall be binding upon the plaintiff in a matrimonial action immediately upon the filing of the summons, or summons and complaint, and upon the defendant immediately upon the service of the automatic orders with the summons. The automatic orders shall remain in full force and effect during the pendency of the action, unless terminated, modified or amended by further order of the court upon motion of either of the parties or upon written agreement between the parties duly executed and acknowledged. The automatic orders are as follows:
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> > (1) Neither party shall sell, transfer, encumber, conceal, assign, remove or in any way dispose of, without the consent of the other party in writing, or by order of the court, any property (including, but not limited to, real estate, personal property, cash accounts, stocks, mutual funds, bank accounts, cars and boats) individually or jointly held by the parties, except in the usual course of business, for customary and usual household expenses or for reasonable attorney's fees in connection with this action.
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> > (2) Neither party shall transfer, encumber, assign, remove, withdraw or in any way dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401K accounts, profit sharing plans, Keough [FN2] accounts, or any other pension or retirement account, and the parties shall further refrain from applying for or requesting the payment of retirement benefits or annuity payments of any kind, without the consent of the other party in writing, or upon further order of the court.

(3) Neither party shall incur unreasonable debts hereafter, including, but not limited to further borrowing against any credit line secured by the family residence, further encumbrancing any assets, or unreasonably using credit cards or cash advances against credit cards, except in the usual course of business or for customary or usual household expenses, or for reasonable attorney's fees in connection with this action.

(4) Neither party shall cause the other party or the children of the marriage to be removed from any existing medical, hospital and dental insurance coverage, and each party shall maintain the existing medical, hospital and dental insurance coverage in full force and effect.

(5) Neither party shall change the beneficiaries of any existing life insurance policies, and each party shall maintain the existing life insurance, automobile insurance, homeowners and renters insurance policies in full force and effect.

3. Domestic Relations Law § 240 (1-b) (2006*)* and its corresponding Family Court Act provisions, amended relative to the $80,000 so-called statutory "cap." Effective January 31, 2010 the $80,000 will become $130,000. While the $80,000 was never really a "cap" that was the way the proponents of the original legislation presented it to the legislature. As actually enacted, it was simply the level of combined parental income below which the CSSA support formula was presumed (a rebuttable presumption) to produce the correct Basic Child Support Obligation and the non-custodial parent's pro rata share thereof. The amendment accomplishes the elevation of the dollar amount by turning the issue over to the commissioner of social services who will be responsible for ensuring that the "cap" increases on a biannual basis to keep up with the increases in the cost of living. This is accomplished by the cross-reference over from the DRL and FCA provisions to SSL § 111-i(2). The relevant statutory provisions are set forth below:

a. DRL §240(1-b)(c)(2): [Eff. Jan. 31, 2020..] The court shall multiply the combined parental income up to the amount set forth in

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

b. SSL § 111-i(2): [Eff. Jan. 31, 2010] (a) The commissioner shall publish annually a child support standards chart. The child support standards chart shall include: (i) the revised poverty income guideline for a single person as reported by the federal department of health and human services; (ii) the revised self-support reserved as defined in section two hundred forty of the domestic relations law; (iii) the dollar amounts yielded through application of the child support percentage as defined in section two hundred forty of the domestic relations law and section four hundred thirteen of the family court act; and (iv) the combined parental income amount.

(b) The combined parental income amount to be reported in the child support standards chart and utilized in calculating orders of child support in accordance with subparagraph two of paragraph (c) of subdivision one of section four hundred thirteen of the family court act and subparagraph two of paragraph (c) of subdivision one-b of section two hundred forty of the domestic relations law shall be one hundred thirty thousand dollars; provided, however, beginning January thirty-first, two thousand twelve and every two years thereafter, the combined parental income amount shall increase by the product of the average annual percentage changes in the consumer price index for all urban consumers (CPIU) as published by the United States department of labor bureau of labor statistics for the two year period rounded to the nearest one thousand dollars.

(c) The commissioner shall publish the child support standards chart on an annual basis by April first of each year and in no event later than forty-five days following publication of the annual poverty income guideline for a single person as reported by the federal department of health and human services."

Additional Resources

See Appendix I for a Separation Agreement Index, Appendix J for a Sample Retainer Agreement for Matrimonial Cases, and Appendix K for a Sample Retainer Agreement for Mediation.

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Dedication: *To my husband and our children, whose support has made my contribution to this book possible. I dedicate this to my father, Zindel Henry Bistricer. A"H.*