## **NYSBA FAMILY LAW SECTION UPDATE, April 2024**

## **Matrimonial Update**

## **By Bruce J. Wagner**

## **Support Magistrate, Schenectady & Montgomery County Family Courts**

## **Agreements - Pension – NYS – Post-Retirement Survivor Benefits – No RSSL 803-a Order Issued**

## In Matter of Lawrence v. NYS & Local Retirement System, 2024 Westlaw 968175 (3d Dept. Mar. 7, 2024), the former wife (wife) commenced a CPLR article 78 proceeding to review a determination of the Executive Deputy Comptroller, which denied her application for continued pension benefits pursuant to 1998 DRO issued following a December 1997 Judgment of Divorce, which incorporated an August 1997 stipulation between the wife and her former husband (decedent). The stipulation required decedent to remit 35% of his monthly pension benefits to the wife and “select a payout option providing survivor’s benefits, naming [the wife] as the beneficiary.” The 1998 DRO directed decedent to: designate the wife as the alternate payee; pay her 35% of his “maximum monthly retirement allowance”; and designate the wife as a beneficiary for survivor benefits so that “in the event [decedent] dies prior to retirement, [the wife] shall receive her pro-rata share of any survivor benefits.” The 1998 DRO did not specify which retirement option decedent was required to select. Decedent filed his retirement application in July 2007, in which he selected the “Joint Allowance – Full,” RSSL 90(a), and designated his then-current spouse (wife #2) as his beneficiary. Decedent retired on August 22, 2007. On June 2, 2008, the Retirement System informed decedent that his beneficiary designation could not be changed and the DRO required distribution to the wife as alternate payee. On the same date, the Retirement System informed the wife that she would receive 35% of decedent’s benefits pursuant to the DRO. In November 2014, wife #2 died and on December 25, 2017, decedent died and benefits to the wife ceased. The wife objected, and the Retirement System denied her request for continued benefits in a final agency determination. A hearing officer denied the wife’s request, finding that “decedent’s option beneficiary selection had become irrevocable on October 1, 2007.” The hearing officer further found that: although RSSL 803-a permits the Comptroller to change a retirement option election if made in violation of a settlement agreement or DRO, no court order directing such change was ever issued; and even had such an order been made, “the language of the pre-existing settlement agreement and DRO was insufficient to permit a change of [decedent’s] election.” The Third Department affirmed, concluding that the wife “failed to obtain a subsequent court order directing decedent to comply with her interpretation of the operative terms of the agreement and/or DRO.”

## **Agreements - Waivers – Equitable Distribution, Maintenance, Counsel Fees – Summary Judgment Denied**

## In Almountaser v. Abdo, 2024 Westlaw 1081055 (2d Dept. Mar. 13, 2024), the husband appealed from a June 2021 Supreme Court order which, in the wife’s January 2020 divorce action, denied his March 2021 motion for summary judgment seeking dismissal of the wife’s claims for equitable distribution, maintenance and counsel fees, based upon his contention that the wife waived the same in the parties’ Mahr agreement in accordance with Islamic law at the time of the parties’ marriage in Yemen in July 2005. The Second Department affirmed, holding that the husband “failed to eliminate triable issues of fact as to which English translation of the marriage license controls and as to whether the Mahr agreement was unconscionable,” while noting that “neither translation of the Mahr agreement contains an explicit waiver of equitable distribution, maintenance, or counsel fees.”

## **Child Support - Modification – Dismissed – No Substantial Change, No 15%; Cannot Reduce Pre-Petition Arrears**

## In Matter of Camarda v. Charlot, 224 AD3d 897(2d Dept. Feb. 28, 2024), the father appealed from an April 2023 Family Court order, denying his objections to a March 2023 Support Magistrate order which, after a hearing, dismissed his petition seeking downward modification of child support. The Second Department affirmed, finding that that the father “failed to demonstrate \*\*\* a substantial change in circumstances or that there had been an involuntary reduction in his [gross] income by 15% or more since his child support obligation was last modified.” The Appellate Division concluded: “Family Court has no discretion to reduce or cancel arrears which accrue prior to an application for a downward modification of a child support obligation.”

## **Child Support - Modification – Health Insurance – Denied – Neither Party Requested**

## In Matter of DiSapio v. DiSapio, 2024 Westlaw 1290299 (2d Dept. Mar. 27, 2024), the father appealed from a March 2022 Family Court order denying his objections to a January 2022 Support Magistrate order which, following a hearing upon his November 2021 petition to modify a December 2014 order, among other things, directed him to enroll the parties’ children in a health insurance plan. The Second Department modified, on the law and in the exercise of discretion, by vacating the aforesaid health insurance provision, holding that “it is undisputed that the children had been covered \*\*\* by the mother, and neither party sought modification of their respective obligations to provide health insurance.”

## **Child Support - Suspension – Granted – Alienation**

## In Matter of Franklin v. Quinones, 2024 Westlaw 1184205 (2d Dept. Mar. 20, 2024), the father appealed from, among other things, an August 2022 Family Court order, which denied his cross-motion to suspend his child support obligation for the parties’ child born in 2012. The Second Department reversed, on the law, and granted the father’s cross-motion, holding that “the evidence adduced at the hearing justified a suspension of the father’s child support obligation.” Specifically, “Family Court determined that the mother did not establish that the father sexually abused the child and also determined that the mother alienated the child from the father.” The Appellate Division noted further that: “there was evidence that the mother viewed the visits between the father and the child as harmful to the child, and that the mother never said anything encouraging to the child about the visits or the father-child relationship”; the mother “encouraged the estrangement of the father and [the child], and deliberately frustrated visitation \*\*\* and made no effort to assist the [child] in restoring [the] relationship with the father.”

## **Child Support -** **UIFSA – Continuing Exclusive Jurisdiction Dismissal – Reversed**

## In Matter of Sherman v. Killian, 2024 Westlaw 1184382 (2d Dept. Mar. 20, 2024), the father appealed from an October 2022 Family Court order, which granted the mother’s motion to dismiss his May 2021 petition to modify an October 2018 order directing him to pay child support, upon the grounds that NY does not have continuing exclusive jurisdiction and inconvenient forum (DRL 76-f). The parties’ May 2021 written agreement permitted the mother to move with the child to Florida and stated that “the parties agreed to cooperate with the filing of a petition to terminate the father’s obligation to pay \*\*\* basic child support.” By June 2021, the mother and child had moved to Florida while the father remained in NY. The Second Department reversed, on the law, denied the mother’s motion, reinstated the father’s modification petition, and remitted to Family Court for a hearing thereupon. The Appellate Division held that DRL 75 and 76 “do not apply to child support proceedings” and that FCA 580-205(a) “governs when a state has continuing, exclusive jurisdiction to modify it child support order.”

## **Counsel Fees - After Trial – Remitted Due to Imputed Income Error; Equitable Distribution - Marital Property Determinations Reversed – IRAs, Real Property; Separate Property Valuation Reversed – Medical Practice; Valuation – Marital Residence – After Date of Commencement**

## In Aggarwal v. Aggarwal, 2024 Westlaw 1129993 (4th Dept. Mar. 15, 2024), the husband appealed from a July 2022 Supreme Court judgment which, among other things, distributed marital property. The Fourth Department modified, on the law, and remitted, holding that Supreme Court erred by: (1) determining that the premarital value of the husband’s medical practice is 5% of the total value without articulating its reason for doing so; (2) determining that certain real property in Vermont is marital, given that the husband established that the same was purchased using the proceeds from the sale of his separate property; (3) determining that the value of his premarital contributions to his IRA was marital property; and (4) imputing $250,000 in income to the husband, which led to a remittal of the counsel fee award to the wife for recalculation, while noting such an award was proper in light of the wife’s status as the non-monied spouse. The Court concluded by rejecting the husband’s argument that Supreme Court erred in determining the value of the marital residence according to a September 2018 appraisal, 6 months following the commencement of the action, rather than as of the June 2020 sale thereof, holding that Supreme Court “properly considered [the husband’s] failure to pay the mortgage \*\*\* and his rejection of substantial purchase offers when it determined the appropriate valuation date.”

## **Custody - Father – Mother’s Move During Proceeding, Overcrowded Living Conditions; Expert Report Admitted**

## In Matter of Frias v. Arroyo, 2024 Westlaw 1081262 (2d Dept. Mar. 13, 2024), the mother appealed from a March 2023 Family Court order which, after a hearing upon the parties’ March 2022 custody petitions, awarded physical custody of the parties’ child born in January 2017 to the father, with time to the mother. The Second Department affirmed, noting that after the proceedings commenced, the mother moved, with the child and 2 older children from a prior relationship, from Orange County to live with the mother’s aunt and other family members in NYC. The Appellate Division held that: Family Court “did not err in finding that the testimony and report of the forensic evaluator were admissible”; “the mother chose to relocate the child from Orange County to New York City, approximately one hour away from the child’s longtime residence in Orange County, the father, and the father’s extended family, despite the fact that the mother still worked in Orange County”; and “the mother and the child resided in the overcrowded apartment of the mother’s aunt and that the mother’s prospects for securing her own housing were uncertain.”

## **Custody - Modification – Error to Emphasize Agreed Prior Relocation**

## In Kaleta v. Kaleta, 2024 Westlaw 1225359 (4th Dept. Mar. 22, 2024), the mother appealed from a September 2022 Supreme Court order, which, following a hearing upon the parties’ motions to modify their judgment of divorce and incorporated agreement to award the movant primary custody, granted the father primary physical custody of the parties’ child. The parties separated when the child was 1 year old, 4 years prior to the parties’ post-judgment motions, at which time the mother moved from the parties’ Buffalo residence to Syracuse. The agreement conferred primary custody to neither parent. The shared custody arrangement was stated to continue until the child started elementary school, with no showing of changed circumstances being required in the event of disagreement. The Fourth Department reversed, on the law and the facts, granted the mother’s motion for primary custody and remitted for determination of visitation to the father. The Appellate Division found that “the evidence presented at the hearing established that the mother’s weekday and daytime work schedule more closely aligns with the child’s school schedule,” while “the father testified that his work schedule includes at least two weeknight commitments and frequent out-of-town travel on weekends during the majority of the school year.” The Court held that “the record does not support the court’s conclusion that the mother intentionally disregarded the child’s best interests and interfered with the child’s ability to bond with the father by moving away from the Buffalo area.” Rather, the Fourth Department found that “the record establishes that, four years prior to the instant proceeding, the mother relocated with the father’s full knowledge out of practical necessity,” and that Supreme Court “gave undue weight to the mother’s residence in the Syracuse area.”

## **Custody - Visitation – Modified – Too Many In-Person Transfers**

## In Matter of Wright v. Metz, 2024 Westlaw 1081288 (2d Dept. Mar. 13, 2024), the mother appealed from a January 2023 Family Court order which, after a hearing upon the parties’ modification petitions pertaining to the parties’ child born in 2013, awarded the father Sundays from 3-7pm, Tuesdays 3pm to Thursdays 7pm, and alternating weekends Fridays 3 pm – Sundays 3 pm. The Second Department modified, on the facts and in the exercise of discretion, by deleting the aforesaid schedule and awarding the father Wednesday end of school through Thursday end of school, and on alternating weekends from Friday end of school through Sunday 7 p.m., holding that Family Court’s modification “increased the number of in-person transfers and, thus, the opportunity for conflict between the parties in the child’s presence; only allowed time for the child to engage in after-school activities with the mother on Mondays and alternate Fridays; and resulted in a fragmented schedule, all contrary to the best interests of the child.”

## **Divorce - Foreign Marriage (D.R. Congo) Recognized**

## In Mihigo v. Mihigo, 2024 Westlaw 1129199 (4th Dept. Mar. 15, 2024), the husband appealed from a December 2022 Supreme Court judgment which granted the wife a divorce, contending that the wife failed to prove that the parties were married in Africa in 1994. The Fourth Department affirmed, noting that NY law “recognizes as valid a marriage considered valid in the place where celebrated.” The parties testified that they “met in 1987 or 1988 in what is now known as the Democratic Republic of the Congo and began living together as husband and wife and had children together shortly thereafter,” and obtained a document in August 1994, prior to traveling to a refugee camp to seek asylum, which showed that they were married. The Appellate Division concluded: “The parties’ testimony showed that they were considered married in their culture in Africa.”

## **Divorce - No-Fault – Cannot Litigate Sworn Statement of Irretrievable Breakdown; Equitable Distribution - Proportions – Marital Residence and Rental (15%), Pension (0%); Wasteful Dissipation – Found; Maintenance - Pre-Guidelines – Denied – No SNW - Preclusion**

## In D’Ambra v. D’Ambra, 2024 Westlaw 1081237 (2d Dept. Mar. 13, 2024), the parties were married in January 2007 and had no children together, although the wife’s adult son from a prior relationship began residing with them in 2011. During the marriage, the husband paid all marital expenses and the wife did not earn an income. The wife appealed from a March 2020 Supreme Court judgment which, upon an October 2019 decision following trial of the husband’s May 2014 action for divorce, denied maintenance, failed to award her a distributive share of the husband’s pension, awarded her 15% shares of the marital residence and a rental property, and awarded the husband a credit of $150,000 due to “a fraud perpetrated upon him by the [wife] relating to a transfer of funds to one of her family members in China.” The Second Department affirmed, holding that “the opposing spouse in a no fault divorce action pursuant to Domestic Relations Law §170(7) is not entitled to litigate the other spouse’s sworn statement that the relationship has broken down irretrievably for a period of at least six months.” The Appellate Division determined that “Supreme Court providently exercised its discretion in declining to award her maintenance, considering, inter alia, her failure to file a revised statement of net worth and the court’s resulting inability to sufficiently evaluate her finances.” The Court found that the wife “failed to establish a basis to disturb Supreme Court’s equitable distribution determination” and that Supreme Court “providently exercised its discretion with regard to the equitable distribution of the marital residence \*\*\* and the rental property \*\*\*.” The Second Department concluded that the finding of “purported fraud \*\*\* concluding, in effect, that she had wastefully dissipated marital assets \*\*\* was also a provident exercise of discretion, hinging on the court’s credibility assessments of the parties (citations omitted).”

## **Enforcement - Child Support – SCU Records State $0 Arrears – Dismissed**

## In Matter of Abizadeh v. Petrushka, 224 AD3d 896 (2d Dept. Feb. 28, 2024), the father appealed from a June 2023 Family Court order, denying his objections to a May 2023 Support Magistrate order, which dismissed his violation petition against the mother. The Second Department affirmed, noting that FCA 441 provides: “If the allegations of a petition under this article are not established by competent proof, the court shall dismiss the petition.” Regarding the 2 orders upon which the mother was the obligor, the Appellate Division found that the SCU records for one order showed no outstanding balance, and the mother was making the $400 monthly payments toward college expenses required by the other order.

## **Equitable Distribution - Valuation – Summary Judgment Denied**

## In Desantis v. Desantis, 2024 Westlaw 1290252 (2d Dept. Mar. 27, 2024), the husband appealed from an April 2022 Supreme Court order which, in the wife’s October 2016 divorce action, among other things, granted her motion made just prior to trial to set the minimum value of an LLC at $2,450,000 and to preclude evidence of any lower value. An August 2021 order granted the wife’s cross-motion to value the LLC as of the date of commencement of the action, and no appeal was taken therefrom. The Second Department reversed, on the law, denying the wife’s motion, holding that the motion, “while styled as a motion in limine, was the functional equivalent of an untimely motion for partial summary judgment” and “is an inappropriate substitute for a motion for summary judgment.” The Court concluded: “in the absence of any showing of good cause for the late filing of such a motion, [the same] should not have been considered.”

## **Equitable Distribution - Wasteful Dissipation – Not Found**

## In Jonas v. Jonas, 2024 Westlaw 1129996 (4th Dept. Mar. 15, 2024), the wife appealed from an October 2021 judgment which, following a trial, dissolved the marriage and distributed marital property, contending that Supreme Court ignored the husband’s dissipation of marital assets. The Fourth Department affirmed, holding that the trial evidence “established that the parties mutually liquidated marital assets, and accumulated significant debt, in an unsuccessful attempt to save their family business.” The Appellate Division concluded by citing Mahoney-Buntzman v. Buntzman, 12 NY3d 415, 421 (2009) [“Courts should not second-guess the economic decisions made during the course of the marriage, but rather should equitably distribute the assets and obligations remaining once the relationship is at an end”].

## **Family Offense - Extreme Risk Orders of Protection – Firearm Prohibitions Constitutional**

## In Matter of R.M. v. C.M., 2024 Westlaw 1184370 (2d Dept. Mar. 20, 2024), the NYS Attorney General appealed, as the intervenor in a proceeding seeking an extreme risk order of protection pursuant to CPLR Article 63-A, from an April 2023 Supreme Court order and judgment, which granted the respondent’s motion seeking a declaration that the statute is unconstitutional, and dismissed the petition. The Second Department unanimously reversed, on the law, denied the respondent’s motion, reinstated the petition, and remitted for further proceedings thereupon and the entry of a judgment declaring that CPLR Article 63-A is constitutional.

## **Family Offense - Harassment 1st and 2d – Not Found – No Course of Conduct; Cannot Consider Facts Not Alleged in Petition**

## In Matter of Tikiya S. v. Kyle R.G., 224 AD3d 618 (1st Dept. Feb. 27, 2024), petitioner appealed from a November 2022 Family Court order which, after a hearing, found that she failed to establish that respondent committed harassment 1st and 2d and dismissed her petition. The First Department affirmed, holding that a 2018 knife incident and a strangulation incident, were each single incidents, which do not satisfy the “course of conduct” or “repeated commission” elements of harassment 1st, while noting that “Family Court properly declined to consider testimony about the strangulation incident, which was not alleged in the \*\*\* petition.” As to harassment 2d, the Appellate Division concluded that “petitioner failed to demonstrate that respondent brandished a knife ‘with intent to harass, annoy or alarm’ her,” as required by PL 240.26.

## **Family Offense – Harassment 2d – Found; 1-Year Order**

## In Matter of Carly W. v. Mark V., 2024 Westlaw 968371 (3d Dept. Mar. 7, 2024), respondent appealed from a January 2023 Family Court order which, following a hearing, found that he committed harassment 2d against petitioner and issued a 1-year order of protection. The parties were in an intimate relationship that ended in March 2022, but they continued to live in the same apartment until May 2022. Petitioner filed family offense petitions in April and July 2022. The April 2022 petition alleged an incident in which respondent tried to forcibly get petitioner out of bed by pulling the bedsheets toward him, resulting in a stay away temporary order of protection, and the July 2022 petition alleged that respondent continued to harass her by returning to the apartment and repeatedly attempting to contact her by telephone calls, text messages and social media, in violation of the temporary order of protection. The Third Department affirmed: holding that petitioner proved respondent’s commission of harassment 2d, with testimony consistent with the allegations of her petitions; and according deference to Family Court’s credibility determinations, found that “the credible proof readily permitted the inference that respondent acted with the requisite intent when he grabbed the bedsheets in an attempt to make physical contact with [petitioner] and, moreover, engaged in a course of conduct toward her that had no legitimate purpose and had the effect of alarming and seriously annoying her.”

## **Family Offense - Harassment 2d – Found; Remoteness Argument Rejected; 3-year Order Satisfied by Temporary Order Duration**

## In Matter of Damineh M. v. Bedouin L.J., 2024 Westlaw 1200206 (1st Dept. Mar. 21, 2024), Respondent appealed from an April 2023 Family Court order, which upon the trial of a March 2020 family offense petition, found that he had committed harassment 2d and deemed the final order of protection satisfied by the temporary order in effect from March 2020 to April 2023. The First Department affirmed, holding that harassment 2d was satisfied by Petitioner’s testimony that Respondent “in May 2016 grabbed her by the neck and strangled her, causing bruising to her neck and wrist” and a photograph in the record “showing an injury to petitioner’s arm,” while noting that “Respondent’s intent to commit physical injury can be inferred from his actions and surrounding circumstances.” The Appellate Division rejected both Respondent’s remoteness argument, citing FCA 812(1), and his contention that the proceeding should be dismissed upon the ground that Family Court did not continue the order of protection to a future date, concluding that Family Court “had the authority to determine that respondent committed the [stated] family offense \*\*\* while also deciding that the order of protection was not required to be continued after the date of the court’s determination.”

## **Family Offense -** **Intimate Relationship – Not Found**

## In Matter of Watson v. Brown, 2024 Westlaw 950057 (2d Dept. Mar. 6, 2024), respondent appealed from a June 2023 Family Court order which, following a hearing, found that she committed harassment 1st or 2d and granted a 2-year order of protection in favor of petitioner’s 4 children. The Second Department reversed, on the law, vacated the order of protection and dismissed the proceeding, finding that respondent and the subject children “are not related by blood or marriage, but three of the subject children have the same biological father as [her] children.” The Appellate Division determined that: respondent and the subject children “have no direct relationship”; she “was only connected to the subject children through her children, who were the half-siblings of three of the subject children”; and respondent and the subject children “do not reside together and there was no evidence that they have any direct interaction with each other.” The Court concluded that there is no “intimate relationship” between respondent and the subject children as defined by FCA 812(1)(e).

## **Pendente Lite - Counsel Fees – Denied**

## In Ravichandran v. Renjen, 204 NYS3d 509 (1st Dept. Mar. 7, 2024), the husband appealed from a May 2023 Supreme Court order, which granted the wife’s motion for temporary counsel fees [amount not specified]. The First Department reversed, on the law, and denied the wife’s motion. The Appellate Division held that under the circumstances of the case: Supreme Court “improperly awarded counsel fees to the wife”; [a]ssuming the wife is the less monied spouse, the presumption of entitlement to counsel fees is rebuttable, and the disparity in the parties’ incomes, even as of the date of the wife’s motion, is not so great that the wife was unable to obtain and pay for adequate representation”; and “there was no finding by the court that the husband engaged in dilatory practices.”

## **Procedure - Audio Recording Malfunction – Reconstruction Hearing**

## In Matter of Kirkland v. Crawford, 2024 Westlaw 1129211 (4th Dept. Mar. 15, 2024), the mother appealed from a February 2022 Family Court order which, after a hearing, modified a prior order and awarded the father sole legal and primary physical custody of the subject child. The Fourth Department affirmed, rejecting the mother’s contention that “summary reversal is required where 47 minutes of testimony could not be transcribed due to an audio recording malfunction,” while noting that “by failing to object to the method used for reconstructing that testimony and failing to allege that the testimony was not properly reconstructed, the mother failed to preserve for our review ‘any claim of appellate prejudice’ as a result thereof.” The Appellate Division concluded that the record, “including the minutes of [the] reconstruction hearing …, is adequate for meaningful appellate review.”

## **Procedure - Denial of Request to Appear Virtually – Upheld**

## In Matter of Rodney v. Pimbino, 204 NYS3d 590 (2d Dept. Mar. 6, 2024), the mother appealed from a September 2022 Family Court order which, upon her failure to appear at a conference following denial of her application to appear virtually, and after inquest, directed the parties to take the child’s wishes into consideration for all scheduled parental access. The Second Department dismissed the appeal, except to the extent of reviewing the denial of the mother’s request to appear virtually, and affirmed, holding that “Family Court did not improvidently exercise its discretion in denying the mother’s application \*\*\* to appear virtually \*\*\*.”

## **Procedure - Interpreter – Waiver Upheld**

## In Matter of Paek v. Alicea, 2024 Westlaw 1290475(2d Dept. Mar. 27, 2024), petitioner appealed from a December 2022 Family Court order which, after a hearing, dismissed her family offense petition against her former boyfriend. Family Court initially provided petitioner with an interpreter, 22 NYCRR 217.1, but petitioner thereafter stated that she no longer wished to use an interpreter. The Court ensured that Petitioner understood her rights and wished to testify in English. Later in the hearing, Family Court denied the request of Petitioner’s attorney that she be provided with a second interpreter. The Second Department affirmed, holding that Family Court “providently exercised its discretion in denying the \*\*\* request to provide \*\*\* a second interpreter.”

## **LEGISLATIVE ITEM**

## **Child Support – Amendments to Conform to Federal Law**

## If passed, and enactment is expected by reason of federal mandate (see 45 CFR 302.56, effective January 19, 2017, published in 81 FR 93562 on December 20, 2016) A09505 and a Senate version contained in the budget bill, **would amend** FCA 413(1)(b)(5)(iv)(D) and DRL 240(1-b)(b)(5)(iv)(D) to state:

(D) money, goods, or services provided by relatives and friends;

In determining the amount of income that may be attributed or imputed, the court shall consider the specific circumstances of the parent, to the extent known, including such factors as the parent's assets, residence, employment and earning history, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, record of seeking work, the local job market, the availability of employers willing to hire the parent, prevailing earnings level in the local community, and other relevant background factors such as the age, number, needs, and care of the children covered by the child support order. Attribution or imputation of income shall be accompanied by specific written findings identifying the basis or bases for such determination utilizing factors required or permitted to be considered pursuant to this clause;

Further, FCA 413(1)(k) and DRL 240(1-b)(k) **would be amended** as follows:

(k) When a party has defaulted and/or the court is otherwise presented with insufficient evidence to determine gross income,[~~the court shall order child support based upon the needs or standard of living of the child, whichever is greater~~] the support obligation shall be based on available information about the specific circumstances of the parent, in accordance with clause (iv) of subparagraph five of paragraph (b) of this subdivision. Such order may be retroactively modified upward, without a showing of change in circumstances.

And FCA 413(1)(b)(5)(v) and DRL 240(1-b)(b)(5)(v) **would be amended** as follows:

(v) an amount imputed as income based upon the parent's former resources or income, if the court determines that a parent has reduced resources or income in order to reduce or avoid the parent's obligation for child support; provided that incarceration shall not be considered voluntary unemployment[**~~,~~**~~unless such incarceration is the result of non-payment of a child support order, or an offense against the custodial parent or child who is the subject of the order or judgment~~];

Finally, FCA 451(3)(a) and DRL 236(B)(9)(b)(i)**would be amended** as follows:

[(a) or (i)] The court may modify an order of child support, including an order incorporating without merging an agreement or stipulation of the parties, upon a showing of a substantial change in circumstances. Incarceration shall not be considered voluntary unemployment and shall not be a bar to finding a substantial change in circumstances [~~provided such incarceration is not the result of non-payment of a child support order, or an offense against the custodial parent or child who is the subject of the order or judgment~~].

The effective date of the foregoing amendments would be immediate, and the legislation provides that it “shall apply to any action or proceeding pending upon or commenced on or after such effective date.”