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Features

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IN EACH ISSUE

Publication of Articles

The *Family Law Review* welcomes the submission of articles of topical interest to members of the matrimonial bench and bar. Authors interested in submitting an article should send it in electronic document format, preferably WordPerfect or Microsoft Word (pdfs are NOT acceptable), along with a hard copy, to Lee Rosenberg, Editor-in-Chief, at lrosenber@scrllp.com

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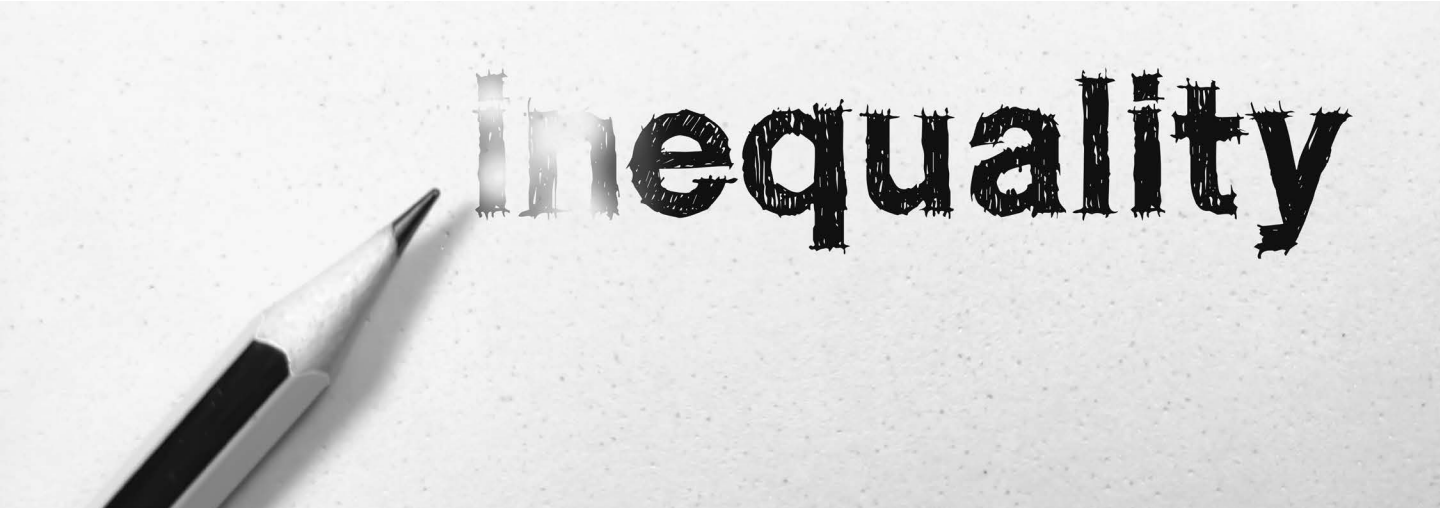
The Evisceration of Fundamental Rights by the United States Supreme Court Is Just Beginning

By Lee Rosenberg, Editor-in-Chief



This commentary was initially slated to address the fallacy of the "speedy trial." That, however, is for another day given the most recent decision of the United States Supreme Court, in *Dobbs v. Jackson Women's Health Organization*,[1] which overturned *Roe v. Wade*.[2] The New York State Bar Association, along with many other similar organizations, has decried the decision in *Dobbs*.[3]

Reproductive rights have been constitutionally protected since the 7-2 decision by the Supreme Court in *Griswold v. Connecticut*[4] in 1965, followed by *Eisenstadt v. Baird* in 1972,[5] and then by the 1973 landmark abortion rights decision in *Roe v. Wade*.[6] Although the decision in *Dobbs*—which also ignored the affirmation of *Roe* as binding precedent in *Planned Parenthood of Southeastern Pa. v. Casey*[7]—in overturning *Roe* and *Casey* asserts flawed reasoning in those long-standing precedents, there was a 50-year history that had protected women's rights of reproductive self-determination on the issue of choice which has now been federally obliterated. Further, the court did so, knowing full well that those rights, on a state-by-state basis—now further undercut by the court's chipping away at separation of church and state in *Kennedy v. Bremerton School District,*[8]—are clearly being eviscerated.

While this commentary will not address detailed Constitutional arguments, per se, using originalist analysis of the Constitution (that the document does not recognize privacy as a fundamental right), in this context is misplaced. The *Dobbs* court does not seek to address the sought recognition of a new, non-originally stated right. To the contrary, it strips away a half-century established fundamental right. It also ignores that guardianship of one's body, although not absolute, is protected, for example, against cruel and unusual punishment or unreasonable search and seizure, etc. Those rights, while specifically recognized in the Constitution—necessarily protect *privacy*. Moreover, that fundamental privacy right, in general, protects men along with women without distinction or separate classification. Since only women can biologically give birth, reproductively, men now remain a singularly protected class, biologically—while women, given *Dobbs*, are not.[9]

That some believe life begins at birth—which clearly underpins the barrage of legislation that brought this issue to the Supreme Court—is a *religious* issue, one which is rooted in biblical teachings—but not by all bibles, not by all religions, not by those who don't believe in religion, and not by accepted science. That is not a judgment against those who fall into any of those categories and have different beliefs, but as a matter of factual accuracy that there is not one universal belief. The long-standing 50-year federal right of reproductive self-determination is a *family law issue* and a *human rights issue*. Some are seeking even to criminalize the right to go to a different state to secure the ability to exercise their freedom to choose, and to implicate civil and criminal penalties if a woman and her medical provider need to address, for example, ectopic or miscarried pregnancy. These are usurpations of fundamental human rights which singularly affect *women* as a different class of human being than men. It poses an inherent danger that men are not subject to. It creates a second, and unequal, class category which is discriminatory.

The concurring opinion in *Dobbs* by Justice Clarence Thomas is honest in its insidiousness—forecasting the upcoming attack on marriage equality (while preserving his own personal marital position previously proscribed by *Loving v. Virginia)*[10]—requires further cause to beware on this addi-

tional family law and human rights front. It is a reminder that our freedoms should not be taken for granted, as those were thought to be franchised, can be disenfranchised as power shifts and is grabbed for by those who want it above all else—as long as it does not adversely affect them and theirs.

The scales of justice are sometimes tipped in one direction or another as equilibrium is sought. It now, however, has six thumbs—many of which are attached to persons who apparently misled to secure their appointments—weighing heavily upon it and which disenfranchises the rights of many.

As we have seen, and continue to see, our freedoms are fragile and too many are willing to subvert them to suit their purposes. This is just the beginning. Marriage equality, as established first by *Obergefell v. Hodges*,[11] is also no longer secure. When facts are no longer facts; when rights are no longer rights; when lines, long demarcated are bent, blurred, skewed and erased for the sake of political expediency and prejudice, we are all in peril.

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Endnotes

1. No. 19-1392, 597 U.S. ___ (2022), argued December 1, 2021 - Decided on June 24, 2022.
2. 410 US 113 (1973).
3. *See* DeSantis S., *New York State Bar Association Rebukes U.S. Supreme Court on Abortion Ruling*, NYSBA, June 24, 2022.See also, *Statement of ABA President Reginald Turner Re: Reproductive Choice and the Dobbs Decision*, ABA June 24, 2022.
4. 381 US 479 (1965).
5. 505 U.S. 833 (1972). Also decided by the Court on a 7-2 basis.
6. Endnote 2.
7. 505 U.S. 833 (1992), herein referred to as "*Casey.*"
8. No. 21-418, 597 U.S. ____ (2022), argued April 25, 2022 – Decided June 27, 2022.
9. The author is not herein addressing other arguments as to biology and gender which are not germane to the subject of this editorial.
10. 388 U.S. 1 (1967).
11. 576 U.S. 644 (2015).

Ukraine: Stay and Remain

By Mark E. Sullivan

The Pentagon has deployed thousands of servicemembers in response to the Russian invasion of Ukraine. Naval frigates, surveillance aircraft, artillery units and brigade combat teams are part of the first-ever NATO Response Force. As of the writing of this article, President Biden announced the stationing in Romania of a Brigade Combat Team from V Corps in Heidelberg, and a permanent US/NATO base in Poland.

Undoubtedly some of the servicemembers (SMs) will be involved in civil cases, administrative legal proceedings, and family law litigation. It is essential to know how to ask the court to freeze the case during a deployment (or any period in which the SM is unavailable due to assigned duties), so the status quo will remain while the SM is not available.

Stay of Proceedings

The "stay" is how litigation may be suspended. The Servicemembers Civil Relief Act (SCRA)[1] tells how to request and obtain a stay of proceedings. The court may order an automatic, mandatory stay if the four essential elements are shown. The statute requires a letter or other communication:

1. with facts showing how military duties materially affect the SM's ability to appear, and
2. stating a date when he will be available.

The SCRA also requires a letter or other communication from the SM's commanding officer stating that:

3. the SM's current military duty prevents his appearance, and
4. military leave is not presently authorized for the SM.[2]

The court may issue the stay on its own motion, and the court shall issue the stay upon application of the SM if the above four elements are shown.

No specific document is prescribed for requesting a stay. A motion or application will certainly suffice, but the request could also be in the form of a letter to the court or an affidavit.

Preparing a stay request is not "rocket science." But, there are two issues worth keeping in mind:

A. Follow the statute. In a Kansas case, the SM was denied a stay of proceedings because he failed to provide a statement as to how his current military duties materially affected his ability to appear and when he would be available to appear. In addition, he didn't provide a statement from his commanding officer stating that his current military duty prevented his appearance and military leave was not authorized.[3]

B. Provide persuasive details. Don't just recite the bare elements of the statute. Be sure to fill in specifics as to duties and inability to appear or participate in the proceedings. This is also true for the commander's communication.

The court can grant an initial 90-day stay, and it may allow an additional stay as well.[4]

Defending Against the Request for a Stay

Can a stay request be denied? Does the court have the power to refuse the application of a SM for a stay of proceedings while he or she is deployed and unavailable for participation in

the litigation? The answer is yes. There are two primary routes to blocking a stay request.

The first of these is to show that the application does not fit the requirements of the statute. If the stay request has omitted one or more elements of 50 U.S.C. § 3931 (b)(2), the court may deny the request. In an Alaska case, the court denied a request for a stay because evidence was lacking about military duties precluding the SM from participation in the case, and there was no communication from his commanding officer.[5]

The second issue involves misconduct by the SM. SMs who fail to comply with the rules and orders of the court may find that their stay requests are denied. In a North Carolina case, a soldier received several continuances because of military duty during the Persian Gulf War. He had an attorney, failed to comply with court discovery orders, and continued to request additional stays or continuances. The court denied his stay requests.[6]

Withholding important information from the other party or the court can also lead to denial of the stay request. When a party applying for a stay has acted inequitably, most courts will refuse to consider the stay request based on the doctrine of "the sword and the shield"—ruling that the SCRA is intended to be used as a shield to protect the rights of the servicemember, not as a sword to defeat the rights of others. "Fair play" is the key to successful use of the SCRA in slowing down civil proceedings.

More information on the stay request and its essential elements may be found in "A Judge's Guide to the Servicemembers Civil Relief Act," at: www.nclamp.gov > Publications > additional Resources.

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Endnotes

1. Chapter 50 of Title 50, U.S. Code.
2. 50 U.S. C. § 3931(b)(2).
3. *In re Marriage of Bradley*, 137 P.3d 1030 (Kan. 2006).
4. 50 U.S.C. § 3931(b)(1) and (d).
5. *Childs v. Childs*, 310 P.3d 955 (Alaska 2013).
6. *Judkins v. Judkins*, 113 N.C. App. 734 (1994).

The Evolution of the Status of Religious Observance and Best Interest in Custody Matters

By Martin E. Friedlander

The leading standard governing child custody matters is the best interest of the child. This standard is referred to and cited in the seminal case of *Friederwitzer v. Friederwitzer*.[1] *Friederwitzer* has been cited in many legal memoranda and cases concerning this standard. The best interest standard is used by the courts in deciding custody matters, and the standard followed by forensic evaluators in their evaluations to determine custody of the children.

To briefly summarize, the *Friederwitzer* case centered on a change of custody based on the mother's religious decisions and how those choices affected the children. The parties were to raise their children under the tenants of Orthodox Judaism. Thereafter, the mother had an unrelated male sleep over in the apartment while the children were there, and this person turned on the television during the Sabbath. This was asserted to be a violation of the Judgment of Divorce, and, coupled with the mother leaving the children at night alone while the children voiced their objections to her, the court found that these changes in routine and lifestyle (religious observance) were confusing and detrimental to the children.[2] Thus, in light of what was in the best interest of the children, the court found it proper to transfer physical custody of the children to the father. Since the fact pattern articulated in 1982's *Friederwitzer,* there has been a tremendous shift in the application of the best interest and custody modification standard as it relates to the religious observance of the parents and the religious upbringing of the children per agreement and court order.[3] As a result of this change in viewpoint, I would surmise that if *Friederwitzer* was before the court today, the outcome would differ significantly.

In matrimonial and custody matters, conflicting religious observance between parents has always been an issue. In many cases, religion is a prevalent factor when determining custody, especially in homogenous communities. Courts in various counties throughout New York State have been inundated with various cases revolving around differing religious observance between parents, included but not limited to Orthodox Judaism, Islam, and Christianity.[4]

In some cases, religiously observant parties enter a marriage, have children, and raise those children according to their religious principles. However, later one party may develop conflicting beliefs and no longer desire to continue in the religious lifestyle prior observed and imparted upon the children. This conflict may then affect the children who have been accustomed to being raised under one set of religious standards throughout their lives.

The purpose of this article is to address the issue of whether the parent who remains observant (and wants the children to continue the same) has a right to obtain an award protecting the religious observance of the child or enter into an enforceable contract with the other parent—defining in what religion the child should be raised and what practices should be followed while in the care of the other parent. The short answer in many of the cases is that under recent case law, it is not possible to protect the status quo and continued religious observance of the children if it will restrict the other parent's rights and religious freedom.

The Constitutional Right to Religious Freedom

Under the United States Constitution, the First Amendment grants and protects an express fundamental right for individuals to believe and freely practice their own religions and beliefs.[5] It is apparent from recent decisions rendered by the Appellate Division, Second Department, in matrimonial cases that the very same rationale used in *Friederwitzer*—that religion may be a factor in a best interest analysis and religious upbringing provisions will be legally enforced—no longer exists in the court today.

There have always been certain legal tenets that are clear—the doctrine of *stare decisis* and legal precedent. *Stare decisis* does not mean that the rules of law cannot change, but only

that the changes in the law are clearly made in reliance upon well settled law. In other words, if there is a logical connection between both interpretations of law, there is room for liberal interpretation. The *Friederwitzer* decision is precedent, and courts are therefore required to apply it in a manner consistent with its meaning, its context, and its application. Moreover, that precedent established the right of parents to have the courts consider the stability provided by a consistent religious upbringing when evaluating what is in the child's best interests. However, the recent movement of the courts have taken away any right to restrict the other parent's behavior and actions vis-a-vis religious observance when with the child. The recent cases of *Weisberger v. Weisberger, Cohen v. Cohen and Weichman v. Weichman,*[6] do not follow the pattern established in *Friederwitzer.*

As mentioned earlier, religious disparities between parents are common in custody matters and are subject to the best interest standard because these issues are directly relevant to the stability and well-being of the child. Per contra, the First Amendment requires that courts remain neutral in regard to religion. Hence, the appropriate application of the law today should require a balancing test. In fact, such balancing was implemented in pre-*Friederwitzer* cases where religious observance was a factor, but has evidently changed in more recent cases as described more thoroughly below.

Balancing Tests, Agreements, and Court Intervention

In 1980, in *Perlstein v. Perlstein*,[7] the court held that in cases where the parents have joint custody, the court should consider only the well-being of the child, but in cases where the parties have a custody agreement, the agreement should be balanced together with the best interests of the child. The court noted that if the parties have an agreement regarding the religious upbringing of a child and one party breaches that agreement, the breaching party must show that the agreed-upon religious guidelines are detrimental to the child's well-being.[8] Subsequently, in 1982's *Gruber v. Gruber*,[9] the court found that because the children had attended private *yeshivot*[10] (Jewish school) all their lives, it was in their best interests to continue their education in a similar environment, despite their mother's wish to place them in public school.

Shortly after *Gruber*, in 1982, *Spring v. Glawon* was decided.[11] There, the court explained that in cases where an agreement exists containing reasonable restraints on the religious upbringing of the children, those restraints will be enforced unless the restrains are in conflict with the best interest and well-being of the children.[12] Further, the court stated that as a policy matter, judicial intervention in cases that involve the religious upbringing of children should be a last resort.[13] The court in *Spring* stated that "the determination of that matter is best left to the child, if of sufficient age and intelligence, the agreement of the parents, or, where there is no agreement, to the custodial parent."[14] If, however, the court finds judicial intervention necessary, the court may only do so upon a finding that the "moral, mental and physical conditions are so bad as seriously to affect the health or morals of children."[15] Consequently, during this period of time, New York courts were reluctant to interfere with mutually agreed upon parental religious decisions.

By 1984, this public policy argument against judicial intervention lost its rigor and courts in the Second Department began expanding the circumstances where a court may intervene. In *Aldous v. Aldous*,[16] the court held that religion may be considered in a custody matter in three circumstances:

1. When a child has developed specific ties to a specific religion and those ties can be better served by one parent; or
2. When a religious belief violates a state statute; or
3. When a religious belief poses a threat to a child's well-being.

Of these three circumstances, the first is the primary focus of this article.

In the case of *De Luca v. De Luca*,[17] the children were raised as Catholics, but the mother later began studying to become a Jehovah's Witness. The court stated that it could not interfere with the custody decision regarding the child's upbringing unless there was a threat of harm to the child.[18] Furthermore, the father could expose the children to other religious beliefs when he had them in his care.[19] During the same year, in *Arain v. Arain*,[20] the court stated that

> While courts will enforce a contractual agreement between spouses concerning the religious upbringing of a child . . . in this case, the Family Court properly dismissed the appellant's cross petition seeking a change of physical custody due to the absence of any evidence that the petitioner violated the provision of a stipulation which obligated her to "raise the child pursuant to the Muslim faith."

By the early 2000s, Justice Jeffrey S. Sunshine of the Kings County Supreme Court further expanded the circumstances in which a court may intervene. In *Ervin R. v. Phina R.*,[21] the court held that religion may be considered to the extent that it is described in an agreement and only to the degree necessary for the children in light of their religious upbringing. Additionally, the court explained that the noncustodial parent has an obligation to respect the custodial parent's religious decisions for the children and to encourage the children to adhere to the religious traditions they were raised with.[22] However,

courts have refused to enforce such agreements upon a finding that the terms of the agreements are not in the best interest of the children.[23]

Children need structure and stability and without structure and stability, the child is vulnerable to harm because they are placed in an environment deemed "normal," when in reality the environment is both unstable and confusing. For example, a child attending a Catholic school who is exposed to adults eating meat on Fridays during Lent or a student in the Orthodox Yeshiva being exposed to cheeseburgers, or concerts on a Saturday, are put in a situation counter to their community and lifestyle. In other words, eating a cheeseburger alone is not in itself unstable or confusing. The problem arises, however, when a child is taught that it is wrong by one parent and/or school and then sees the other parent doing it or is put in an environment where the "wrong" behavior, contrary to the religious doctrines, is regularly practiced. This creates the instability and confusion.

Ultimately, the question still remains—what rights does a custodial parent have in directing a child's religious upbringing and/or maintaining the status quo? If a parent can determine the religious boundaries of his or her child's upbringing, do they have further rights to insure the respective child's religious upbringing or not? Is the religious freedom of the child to practice the determined religion without being subjected to other religions and observances during their formative years protected by law? Does the child have the right not to be exposed to events, actions, and observances that contradict the religious practices they are taught in an effort to maintain stability and uphold the best interest of the child? In a case of sole custody, does the custodial parent have any safeguards to ensure the maintenance of religious standards when the children have parenting time with the other parent?

Parties, and therein, by implication, children, are directed to abide by parenting time awards or custodial agreements that are entered into. However, courts in recent cases have barred, on constitutional grounds, the parties' voluntary, contractual ability to restrict the noncustodial parent's conduct when with the child in this regard. This has been effectuated under the "establishment clause" of the U.S. Constitution.

Fact Specificity

It is especially important to note, however, that each case may yield a different set of facts. Therefore, each fact pattern should be analyzed on a case-by-case basis. For example, in *Friederwitzer*, the parties were raising their children as they were raised prior to the divorce, with the same religious observance level pursuant to their agreement.[24] Later, the mother began living a more non-Orthodox lifestyle. At issue for the court was whether the mother's non-Orthodox lifestyle caused the children harm and confusion.[25] As a result, the court concluded that religion may be used as a stability factor in deciding custody.[26]

In many of these cases, the subject children are often in their formative years. As a result of the impressionable state of these children, one would be hard-pressed to say that this conduct does not cause stress and confusion to a child. Moreover, these impacts may have lasting effects. Sadly, matrimonial courts struggle with this fragile issue all too often and do not protect against religious instability that is therein imposed on the children.

Often the court will also require the assistance of professionals, such as forensic evaluators. These professionals are required to use religion as a factor in their forensic psychological evaluations as dictated under psychological protocols. In forensic reports specifically, religion *must* be addressed where the forensic evaluation is meant to assist the court in a custody determination.[27] The same applies with advocacy of the attorney for the child.

As noted earlier, in situations where both parents are of a similar religious background, upbringing, and "intention" to remain religious (before and during the marriage), and one party later decides to live a non-religious lifestyle, the children may experience great confusion. The subject children have been raised in a specific and consistent manner (i.e., attend religious schools and religious services on a regular and consistent basis) during the marriage but then this lifestyle is dismantled. Consistency and stability are critical to a child's development; hence, any turbulence to a child's development—religious or not—must be analyzed by the court as a factor in determining the best interest of the child.

In the past, in some cases issues relating to religious upbringing have been resolved by agreement. In such instances, the parties create an agreement that specifies what religious conduct the parents will adhere to and maintain in front of the children and define parameters for the religious observance of the children.

Recent Cases

Recently, the case law has been developing with cases such as *Weisberger v. Weisberger*,[28] wherein courts have held that irrespective of signed agreements with the assistance of counsel incorporated into a judgment of divorce, if a parent's personal conduct is affected and the ability to freely observe religious practices is impacted, those agreements will no longer be upheld. This has completely altered the prior history and courts' involvement in religious upbringing of the children.

Subsequently, in *Cohen*,[29] the court found that agreements between parties dictating certain religious practice will only be applied with regard to the child's actual observance. The court in *Cohen* held that where an agreement states that one parent must in some way adhere to the rules of a religion they do not

wish to follow, that agreement cannot be enforced against the parent.[30]

The seminal case of *Park Slope Jewish Ctr. v. Stern*[31] provided that courts cannot determine the definition of religion. But, what if religion is defined by the parties in an agreement?

The queries remain:

Does a party who maintains his or her religious observance and wants the same for the child (or when the child himself or herself affiliates with that religion and does not want exposure to non-observance) have the ability to dictate religious conduct while the children are with the non-observing parent? Is *Friederwitzer* and corollary cases still good law?

Most recently, the Appellate Division in *Weichman v. Weichman*[32] decided the case after 10 days of testimony from the court appointed forensic evaluator and over 60 days of trial. The forensic evaluator testified that the mother's alternative lifestyle caused the 13-year-old boy severe distress and extreme hardship. The trial court ordered that "the non-custodial parent shall not take the child to a place or expose the child to an activity that violates the rules, practices, traditions, and culture of the child and Orthodox Jewish Chassidic faith." This was held to not be in compliance with the line of cases following the ruling of *Weisberger*. Notwithstanding the clear distress found to have been inflicted upon the child, counter to his best interest, the Appellate Division disagreed. In effect, the determination on appeal then ran completely afoul of the best interest standards in the name of preserving a parent's religious freedom.

Conclusion

The current cases do not allow restrictions to be placed on the parents' conduct *vis-a-vis* religious observance whether by agreement of the parties or order of the court. *Friederwitzer* has not been overturned by the Court of Appeals, but in the context of religious observation, is clearly no longer being followed.

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Carlon Campbell, a third-year law student at Brooklyn Law School, and **Daniella Presser**, a graduate at Pace Law School, assisted in the preparation of this article.

Endnotes

1. 55 N.Y.2d 89 (1982).
2. *Id*. at 92.
3. *Id*. at 96.
4. *See Arain v. Arain*, 209 A.D.2d 406 (N.Y. App. Div. 1994) (custody dispute over alleged violation of settlement stipulation dictating that the children be raised in the Muslim faith); *see also Perlstein v. Perlstein*, 76 A.D.2d 49 (1st Dep't 1980) (custody dispute where the parties agreed to educate the child as an Orthodox Jew arose after one party became less observant).
5. U.S. Const. amend. I; *see also* N.Y. Const. art. I, § 3 (guarantees "the free exercise and enjoyment of religious profession and worship").
6. 154 A.D.3d 41 (2d Dep't 2017); 177 A.D.3d 848 (2d Dep't 2019); 199 A.D.3d 865 (2d Dep't 2021).
7. 76 A.D.2d 49 (1st Dep't 1980).
8. *Id*.
9. 87 A.D.2d 246 (1st Dep't 1982).
10. Religious Jewish school.
11. 89 A.D.2d 980 (2d Dep't 1982).
12. *Id*.
13. *Id.* at 981 (quoting *Paolella v. Phillips,* 27 Misc 2d. 763).
14. *Id*. At 981.
15. *Id* (quoting *People ex rel. Sisson v. Sisson*, 271 NY 285, 287–88).
16. 99 A.D.2d 197, 199 (3rd Dep't 1984).
17. 202 A.D.2d 580 (2d Dep't 1994).
18. *Id*. at 581.
19. *Id*.
20. 209 A.D.2d at 407.
21. 186 Misc. 2d 384 (N.Y. Fam. Ct. Kings Co. 2000).
22. *Id*. at 393.
23. *Karetny v. Karetny*, 283 A.D.2d 250 (1st Dep't 2001).
24. 55 N.Y.2d at 92.
25. *Id*.
26. *Id*. at 94.
27. *See* AFCC Protocols.
28. 154 A.D.3d 41 (2d Dep't 2017).
29. 177 A.D.3d 848 at 852–53.
30. *Id*.
31. 128 A.D.2d 847, 848 (2d Dep't 1987) (the court could not decide the dispute between the parties "because the matter cannot be decided without resolving the underlying controversies over religious doctrine").
32. 199 A.D.3d 865 (2d Dep't 2021).

New Rules Governing Matrimonial Actions

By Joel R. Brandes

22 N.Y.C.R.R. §§ 202.16, 202.16-a, 202.16-b, and 202.18, of the Uniform Rules for the Supreme Court and the County Court ("Uniform Rules") are the "matrimonial rules." Effective July 1, 2022, the matrimonial rules were revised to specifically incorporate 22 N.Y.C.R.R. Part 202 which contains many of the Commercial Division rules.[1]

In this article, we discuss the revisions to 22 N.Y.C.R.R. § 202.16 and § 202.16-b and some of the Part 202 Uniform Rules that are incorporated into those rules and affect how we practice matrimonial law from now on.

The Uniform Rules that have been incorporated into the matrimonial rules encourage appearances for the argument of motions and conferences by electronic means. 22 N.Y.C.R.R. § 202.8-f provides that oral arguments may be conducted by the court by electronic means and requires each court or court part to adopt a procedure governing requests for oral argument of motions. In the absence of such a procedure by a particular court or part, any party may request oral argument of a motion by a letter accompanying the motion papers. Notice of the date selected by the court must be given, if practicable, at least 14 days before the scheduled oral argument. 22 N.Y.C.R.R. § 202.10(a) provides that any party may request to appear at a conference by electronic means. Where feasible and appropriate, the court is encouraged to grant such requests.

Revisions to 22 N.Y.C.R.R. § 202.16

(a) Applicability

22 N.Y.C.R.R. § 202.16 has been retitled to add the words: "Application of Part 202 and 22 N.Y.C.R.R. § 202.16. Former 22 N.Y.C.R.R. § 202.16(a)(1) has been renumbered 22 N.Y.C.R.R. § 202.16(a)(2). 22 N.Y.C.R.R. § 202.16(a)(1) now provides that Part 202 shall apply to civil actions and proceedings in the Supreme Court, including, but not limited to, matrimonial actions and proceedings, except as otherwise provided in § 202.16 and in §§ 202.16-a, 202.16-b, and 202.18, which sections shall control in the event of a conflict.

(b) Form of statements of net worth

22 N.Y.C.R.R. § 202.16(b) has been amended to require that statements of net worth must be in substantial compliance with the form contained in Appendix A. 22 N.Y.C.R.R. § 202.16(b) now provides: Form of Statements of Net Worth. Sworn statements of net worth, except as provided in subdivision (k) of this section, exchangedand filed with the court pursuant to § 236 of the Domestic Relations Law, shall be in substantial compliance with the Statement of Net Worth form contained in appendix A of this Part.[2]

(e) Certification

22 N.Y.C.R.R. § 202.16(e) dealing with certification has been amended to change the title of the section to "Certification of Paper and Obligations of Counsel Appearing Before the Court."

22 N.Y.C.R.R. § 202.16(e)(2) has been added. It requires attorneys who appear before the court to be fully familiar with the case and authorized to discuss and settle all issues. A failure to comply with this rule may be treated asa default for purposes of 22 N.Y.C.R.R. § 202.27 and/or may be treated as a failure to appear for purposes of 130.21.[3] In matrimonial actions and proceedings, consistent with applicable case law on defaults in matrimonial actions, failure to comply with this rule may, either in lieu of or in addition to any other direction, be considered in the determination of any award of attorney fees or expenses.[4]

(f) Preliminary Conference

22 N.Y.C.R.R. § 202.16(f) was amended to add subdivision (1-a). It requires counsel to consult with each other before the preliminary conference and discuss in good faith the matters in 22 N.Y.C.R.R. § 202.16(f)(2) and 22 N.Y.C.R.R. § 202.11.[5] Any agreements reached must be submitted to the court in writing which the court shall "so order" if approved and in proper form. This provision applies only where both parties are represented by counsel.[6]

22 N.Y.C.R.R. § 202.16(f) was amended to add subdivision (1-b)(1) which requires that both parties personally must be present in court at the time of the conference, and the judge personally must address the parties at some time during the conference.[7]

22 N.Y.C.R.R. § 202.16(f)(1-b)(2) provides that the matters to be considered at the conference may include, among other things, compliance with the requirement of compulsory financial disclosure, including the exchange and filing of a supplemental statement of net worth indicating material changes in any previously exchanged and filed statement of net worth, and, including the number and length of depositions, the number of interrogatories, and agreement of the parties to comply with Guidelines on Electronically Stored Information.[8]

Interrogatories and Depositions

Inserted in this section is the provision that unless otherwise stipulated by the parties or ordered by the court, interrogatories shall be no more than 25 in number including subparts, and depositions shall be no more than seven hours long.[9]

The Provisions of N.Y.C.R.R. § 202.20-b(a)(l) limiting the number of depositions taken by plaintiffs, or by defendants, or third-party defendants, do not apply to matrimonial actions.[10]

Compliance Conference

22 N.Y.C.R.R. § 202.16(f)(1-b) has been amended to add 22 N.Y.C.R.R. § 202.16(f)(4) which provides that unless the court excuses their presence, the parties personally must be present in court at thetime of the compliance conference. If the parties are present in court, the judge personally must address them at some time during the conference.[11] If the parties are present in court, the judge personally must address them at some point during the conference.[12]

Where both parties are represented by counsel, counsel must consult with each other before the compliance conferencein a good faith effort to resolve any outstanding issues. Notwithstanding N.Y.C.R.R. § 202.11,[13] no prior consultation is required where either or both of the parties are self-represented.[14]

Counsel must, before or at the compliance conference, submit to the court a writing with respect to any resolutions reached, which the court must "so order" if approved and in proper form.[15]

Document Preclusion

22 N.Y.C.R.R. § 202.16(f)(1-b) has been amended to add subdivision (5). It provides that absent good cause, in accordance with 22 N.Y.C.R.R. § 202.20-c(f),[16] a party may not use at trial or otherwise any document that was not produced in response to a request for the document or category of document where the request was not objected to or where an objection to the request was overruled by the court.[17]

The court may exercise its discretion to impose other or additional penalties for non-disclosure authorized by law which may be more appropriate in a matrimonial action, other than preclusion or where there is a continuing obligation to update documents.[18]

22 N.Y.C.R.R. § 202.16(f)(1-b) has been amended to add 22 N.Y.C.R.R. § 202.16(f)(1-b)(6). It requires the court to alert the parties to the requirements of 22 N.Y.C.R.R. § 202.20-c regarding requests for documents; § 202.20-e regarding adherence to discovery schedule,[19] and § 202.20-f regarding discovery disputes.[20] The court must also address the issues of potential for default, preclusion, denial of discovery, drawing inferences, or deeming issues to be true, as well as sanctions and/or counsel fees in the event of default or preclusion or such other remedies are not appropriate in a matrimonial action.

Commentary—Interrogatories and Document Preclusion

Both 22 N.Y.C.R.R. § 202.16(f)(1-b) as amended effective July 1, 2022, as well as 22 N.Y.C.R.R. § 202.20 which has been incorporated into the matrimonial rules effective July 1, 2022, limit the use of Interrogatories in matrimonial actions to 25 in number, including subparts, unless the parties agree or the court orders otherwise. Due to the usual animosity of the parties in contested matrimonial actions, we doubt that a monied spouse would agree to let his spouse serve more than 25 interrogatories. This rule places the burden on the proponent of the interrogatories to make a motion or an application at the preliminary conference to serve more than 25 interrogatories.

Interrogatories may relate to any matters embraced in the disclosure requirement of CPLR 3101. The answers may be used to the same extent as the depositions of a party. Interrogatories may require copies of documents or photographs as are relevant to the answers required unless an opportunity for this examination and copying be afforded.[21] Interrogatories may be used to impeach or contradict the testimony of a party—provided that the interrogatories are answered in proper form.[22] In *Kaye v Kaye*[23] the Appellate Division held that the use of interrogatories as an initial disclosure device in complex equitable distribution cases will expedite the discovery process.[24] The general rule is that a party is "free to choose both the pretrial disclosure devices it wishes to use and the order in which to use them." It noted that Special Term's direction that the parties proceed to depositions upon oral examination, rather than interrogatories, would not expedite disclosure but may instead operate to prejudice the plaintiff by preventing the use of another, more appropriate, intermediate device.

Interrogatories are frequently used as the first disclosure device in matrimonial actions because they are far less costly than counsel spending hours at a deposition. They take less time than a deposition because the answers are due within 30 days of their service, and they may be used to ascertain the existence of identification documents that may be requested to be returned with the answers to the interrogatories.

In *Lobatto v. Lobatto*,[25] although the wife's interrogatories were detailed and extensive, the court noted that where, as here, the case is lengthy and complex and made even more difficult by the husband's reluctance to furnish the necessary information on the ground that the wife had no entitlement to his assets, claiming it was separate property, the interrogatories are appropriate. In *Snow v. Snow*[26] the defendant was ordered

to answer the following interrogatories: whether he currently owns or is covered by any insurance policies, whether he has any interest in any corporations, partnerships, or other financial or business entities, whether he has received or will receive any benefits from employment-related agreements (*e.g.*, pension plans, etc.), whether he has received or will receive any disbursements from an interest in trusts, and whether he owns any heretofore undisclosed personal property.

In *Briger v. Briger*,[27] the Appellate Division held that a wife's interrogatory pertaining to gifts from third parties valued over $500 was not unreasonable and should not have been stricken; that the wife was entitled to know in which separate property the husband would claim an interest; and that the interrogatories calling for data supporting information disclosed in the parties' net worth statements were proper. The husband was a lawyer with substantial tax shelter investments. Although there were 65 questions with 353 subparts, the court did not find them oppressive to the point of vacatur. It held that a spouse with a minority interest in a business enterprise may be required to provide information within his "possession, custody and control."

There is no obligation on the part of the recipient of the interrogatories to make a motion to strike any interrogatory. The burden to compel compliance is on the party serving the interrogatories. Where a person fails to respond to or comply with an interrogatory or document demand, the remedy for the party seeking disclosure is to move to compel compliance or a response.[28]

The new 25-question limit effectively precludes the parties from using interrogatories in matrimonial actions to expedite the discovery process. Moreover, it conflicts with CPLR 3130, which contains no limit on the number of interrogatories a party may serve. The limit prevents a party from serving comprehensive questions related to all of the elements of maintenance, child support, property distribution, and counsel fee awards and defenses, as well concerning the 16 maintenance factors, the 10 child support factors, the 20 equitable distribution factors, and the counsel fee factors.

Under the State Constitution, the authority to regulate practice and procedure in the courts is delegated primarily to the Legislature.[29] There are some matters which are not subject to legislative control because they deal with the inherent nature of the judicial function.[30] Generally, however, the Legislature has the power to prescribe rules of practice governing court proceedings, and any rules the courts adopt must be consistent with existing legislation and may be subsequently abrogated by statute.[31] In addition, court rules must be adopted in accordance with procedures prescribed by the Constitution and statute.[32]

N.Y. Constitution, Article VI, § 30, which is the source of the Appellate Division's broad judicial rule-making authority does not afford *carte blanche* to courts in promulgating regulations. A court may not significantly affect the legal relationship between litigating parties through the exercise of its rule-making authority No court rule can enlarge or abridge rights conferred by statute and this bars the imposition of additional procedural hurdles that impair statutory remedies.[33] This rule appears to abridge rights conferred by statute.

After an action is commenced, any party may serve on any other party[34] a notice or on any other person a subpoena duces tecum (i) to produce and permit the party seeking discovery, or someone acting on his or her behalf, to inspect, copy, test or photograph any designated documents or any things which are in the possession, custody or control of the party or person served; or (ii) to permit entry upon designated land or other property in the possession, custody or control of the party or person served for the purpose of inspecting, measuring, surveying, sampling, testing, photographing or recording by motion pictures or otherwise the property or any specifically designated object or operation on it.[35]

CPLR 3120 (2) which was added in 1994 provides that the notice . . . shall . . . set forth the items to be inspected, copied, tested, or photographed by individual item or by category, and shall describe each item and category with reasonable particularity. When "an inspection, copying, testing or photographing" of an item or items is sought, CPLR 3120(2) requires that the seeking party set them forth by individual item or by category, and describe each item and category with reasonable particularity.

If a party or person objects to the disclosure, inspection or examination, he must serve a response within 20 days of service of the notice, stating with reasonable particularity the reasons for each objection. If an objection is made to part of an item or category, the part must be specified.[36]

The First Department has held that the failure to object to the document demand within the 20 days as set forth in CPLR 3122(a) generally limits review to the question of privilege under CPLR 3101.[37] A person served with a disclosure notice who serves a timely objection but which fails to specify any particular grounds. waives objections based on any ground other than privilege or palpable impropriety.[38]

The Second Department has held that a defendant's failure to make a timely challenge to a plaintiff's document demand under CPLR 3122(a)(1) forecloses inquiry into the propriety of the information sought except with regard to material that is privileged under CPLR 3101 or requests that are palpably improper.[39]

In the absence of a timely motion for a protective order vacating a notice of discovery and inspection, the items of the notice will not be scrutinized by the court unless the notice is "palpably improper." The older cases held that the hallmark

of CPLR 3120 is "specific designation" in the notice and held that attempts to designate documents by use of the alternate phrases "all," "all other" or "any and all" rendered a request or notice for production under CPLR 3120 "palpably improper," even when the moving party failed to make a timely objection.[40] However, a demand may still be vacated in its entirety if it is found "unduly burdensome." In *Bennett v. State Farm Fire & Cas. Co.*,[41] the Appellate Divison held that a motion to compel responses to demands and interrogatories is properly denied where the demands and interrogatories seek information that is irrelevant, overly broad, or burdensome. Where discovery demands are overbroad, 'the appropriate remedy is to vacate the entire demand rather than to prune it.[42]

A party seeking disclosure under CPLR 3120 may move for an order under CPLR 3124 compelling disclosure with respect to any objection to, or other failure to respond to or permit inspection as requested by the notice or any part of it.[43] Disclosure enforcement may also be obtained under CPLR 3126. The court may make such orders with regard to the failure or refusal to disclose as are just, including, among other things that the issues to which the information is relevant be deemed resolved in accordance with the claims of the party who obtains the order. It may prohibit the disobedient party from supporting or opposing certain claims or defenses and from producing in evidence designated things or items of testimony. It may also strike all or parts of the pleadings, stay further proceedings until the order is obeyed, dismiss all or part of the action, and grant judgment by default against the disobedient party.[44]

22 N.Y.C.R.R. § 202.16(f)(1-b)(5) provides that absent good cause, in accordance with 22 N.Y.C.R.R. § 202.20-c(f),[45] a party may not use at trial or otherwise any document which was not produced in response to a request for the document or category of document, where the request was not objected to or where an objection to the request was overruled by the court.[46]

22 N.Y.C.R.R. § 202.16(f)(1-b)(5) creates a self-executing remedy not authorized by CPLR 3124 or CPLR 3126. It appears to constitute a denial of due process because preclusion is automatic. The rule does not require that a motion be made by the proponent of the document discovery before the document may not be used. In contrast, under the CPLR a party seeking document production under CPLR 3120 may move for an order under CPLR 3124 with respect to any objection to, or other failure to respond to as requested by the notice.[47] The party seeking disclosure may also obtain a preclusion order under CPLR 3126.

This rule changes the statutory burden to obtain relief by a disclosure enforcement motion. It automatically precludes the party who has failed to produce the document or category of documents (and failed to object, or who objected and was overruled) from using the document(s) at trial or for any other purpose. The rule places the burden on the party who has failed to produce the document or category of documents he has not objected to or provided to make a motion to obtain permission to use the document(s). This rule places the burden on the party who wants to use the document(s) to make a showing of good cause for his or her failure to object to the demand for it.[48]

It appears that this rule violates New York Constitution, article VI, § 30. This rule appears to abridge rights conferred by statute.[49]

Article I

(g) Expert witnesses

22 N.Y.C.R.R. § 202.16(g), formerly titled Expert Witnesses, is now titled "Expert Witnesses and Other Trial Matters" and has been amended to add 22 N.Y.C.R.R. §§ 202.16 (g)(3),(4),(5), and (6).

22 N.Y.C.R.R. § 202.16(g)(3) was added to provide that pursuant to N.Y.C.R.R. § 202.26,[50] in cases in which both parties are represented by counsel andeach party has called or intends to call, an expert witness on issues of finances, (such as equitable distribution. maintenance, child support), the court may direct that, before, or during the trial, counsel consult in good faith to identify those aspects of their respective experts' testimony thatare not in dispute. The court may also direct that any agreements reached must be reduced to a written stipulation.[51]

This consultation is not required where one or both parties are self-represented or where the expert testimony relates to matters of child custody or parental access, domestic violence, domestic abuse, or child neglect or abuse.[52]

22 N.Y.C.R.R. § 202.16(g)(4) was added to indicate that 22 N.Y.C.R.R. § 202.20-a regarding privilege logs do not apply to matrimonial actions and proceedings unless the court orders otherwise. 22 N.Y.C.R.R. § 202.16(g)(5) was added to state that the parties "should" adhere to the Electronically Stored Information (ESI) Guidelines set forth in an Appendix to the Uniform Civil Rules.[53]

Witness Lists

22 N.Y.C.R.R. § 202.16(g)(6) has been added to require that at the commencement of the trial or at such time as the court may direct, the parties must identify in writing for the court the witnesses he or she intends to call, the order in which they will testify and the estimated length of their testimony. It also requires the parties to provide a copy of their witness list to opposing counsel.[54]

Counsel must separately identify "for the court only" a list of the witnesses who may be called solely for rebuttal or with regard to credibility.[55]

For good cause shown and in the absence of substantial prejudice, the court may permit a party to call a witness to testify who was not identified on the witness list submitted by that party.[56]

The estimates of the length of testimony and the order of witnesses provided by counsel are advisory only. The court may permit witnesses to be called in a different order and may permit further testimony from a witness notwithstanding that the time estimate for such witness has been exceeded.[57]

(m) Premarking Exhibits, Memoranda, Exhibit Books

22 N.Y.C.R.R. § 202.34**,** Pre-Marking of Exhibits, provides that counsel for the parties are required to consult before trial and in good faith attempt to agree upon the exhibits that will be offered into evidence without objection.[58]

Before the commencement of the trial, each side must then mark its exhibits into evidence, subject to court approval, as to those to which no objection has been made. All exhibits not consented to must be marked for identification only.[59]

Exhibits not previously demanded which are to be used solely for credibility or rebuttal need not be pre-marked. If the trial exhibits are voluminous, counsel must consult the clerk of the part for guidance. The court will rule upon the objections to the contested exhibits at the earliest possible time.[60]

22 N.Y.C.R.R. § 202.16(m) has been added to provide that for good cause the court may relieve the parties and counsel from pre-marking exhibits, memoranda, and exhibit books.[61]

Article II

(n) Direct Testimony of Party's Witness by Affidavit

22 N.Y.C.R.R. § 202.16(n) which allows direct testimony of Party's Witness by Affidavit, has been added to provide that upon request of a party, the court may permit direct testimony of that party's own witness to be submitted in affidavit form.[62]

It appears from the last sentence of this rule, which refers to the testimony of a party or a party's own witness, that the rule applies to both a party and his or her witnesses.

The opposing party has the right to object to statements in the direct testimony affidavit, and the court must rule on the objections, just as if the statements had been made orally in open court. Where an objection to a portion of a direct testimony affidavit is sustained, the court may direct that it be stricken.[63]

The submission of direct testimony in affidavit form must not affect any right to conduct cross-examination or re-direct examination of the witness. Except as provided in N.Y.C.R.R. § 202.18,[64] a party or a party's own witness may not testify on direct examination by affidavit in an action for custody, visitation, contempt, order of protection, or exclusive occupancy.[65]

22 N.Y.C.R.R. § 202.16(n) is in addition to and supersedes[66] 22 N.Y.C.R.R. § 202.20-i[67] which provides that the court *may require* that direct testimony of a party's own witness in a non-jury trial or evidentiary hearing be submitted in affidavit form.

22 N.Y.C.R.R. § 202.16(n) does not set forth the procedure to be followed by a party to obtain the consent of the court to permit direct testimony of that party's own witness to be submitted. It would appear that due process requires that an application to permit the direct testimony of a party's own witness must be made by motion upon notice in accordance with CPLR 2214 or 2215. Nor does 22 N.Y.C.R.R. § 202.16(n) establish a procedure for the admission of the affidavit and the method by which the opposing party may object to statements in the direct testimony affidavit, or for the court to rule on the objections, just as if the statements had been made orally in open court.

In *Campaign for Fiscal Equity v. State*, 182 Misc.2d 676, 699 N.Y.S.2d 663, (Sup.Ct., 1999) the only reported New York case on the subject, the Supreme Court, New York County allowed direct testimony by affidavit, where plaintiffs estimated that they would call as many as 140 non-expert witnesses. It found that it had the power to do so under CPLR 4011, which empowers the court to "regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matters at issue in a setting of proper decorum." In that case, where there was no hearsay objection, the court held that:

> Under the procedures specified below, a fact witness shall swear to the truth of his affidavit in open court before undergoing cross-examination. Defendants will continue to be able to test a witness's direct testimony via cross-examination in open court. To the extent that defendants believe that a witness's testimony may be impugned because it was "crafted" by plaintiffs' lawyers, they will have the opportunity to bring this out on cross-examination. The court will be able to assess witnesses' credibility on cross-examination.
>
> . . .
>
> The parties shall have the right to submit the direct testimony of non-expert witnesses via affidavit, affidavit supplemented by live testimony, or solely by live testimony. If a witness's direct testimony shall be presented in whole

> or in part by affidavit, the affidavit shall be presented to the opposing party and to the court at least three business days prior to the appearance of the witness. The party offering the affidavit shall specify if the affidavit comprises the whole or a part of the witness's direct testimony. The affidavits shall consist of numbered paragraphs to assist the opposing party to make objections (if necessary) to portions of the affidavit. The facts stated shall be in narrative, as opposed to question and answer, form…When the witness appears at trial he or she shall take the stand and under oath adopt the affidavit as true and correct. The party offering the affidavit then shall offer the statement as an exhibit, subject to appropriate objections by the opposing party on which the court will then rule. Thereafter cross-examination and any redirect shall proceed in the ordinary course.

Commentary—Rule Against Hearsay

This rule creates a new, and questionable exception to the rule against hearsay. It allows the prima facie economic case of a party to a contested matrimonial action to be meticulously crafted by his or her attorney.

Hearsay has been defined as evidence of a statement which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated.[68] Hearsay includes not only an oral statement or written expression but also the non-verbal conduct of a person which is intended by him as a substitute for words in expressing the matter stated.[69]

The Court of Appeals has explained the rule against hearsay as follows: Out-of-court statements offered for the truth of the matters they assert are hearsay and "may be received in evidence only if they fall within one of the recognized exceptions to the hearsay rule, and then only if the proponent demonstrates that the evidence is reliable."[70] In determining reliability, a court must decide "whether the declaration was spoken under circumstances which render [ ] it highly probable that it is truthful."[71]

The rule against hearsay prohibits evidence of an out-of-court statement that is offered for its truth where there is an objection to the introduction of the evidence unless there is an exception to the rule. If there is no exception the evidence must be excluded.[72] 22 N.Y.C.R.R. § 202.16(n) is neither a recognized exception to the hearsay rule nor does it establish or contain a method for the court to determine that the evidence is reliable before permitting it to be submitted as direct evidence of a prima facie case.

The credibility of the witnesses is an inquiry within the province of the trial court.[73] Since the trial court has the opportunity to view the demeanor of the witnesses at the trial, it is in the best position to gauge their credibility, and its resolution of credibility issues is entitled to great deference on appeal.[74] Where the determination as to equitable distribution has been made after a nonjury trial, the trial court's assessment of the credibility of witnesses is afforded great weight on appeal.[75] A trial court's decision regarding the credibility of the witnesses is a determination that will only be disturbed on appeal when clearly unsupported by the record.[76]

Under this rule, there is no live direct verbal testimony by a witness to cross-examine. Neither the court nor opposing counsel have an opportunity to observe the demeanor of the witness whose testimony is offered by affidavit in order to make a credibility determination with regard to the evidence in support of her prima facie economic case. This rule allows the testimony of a party to be prepared by his or her attorney, who can draft it to avoid the usual grounds for objection to its introduction. It eliminates from the credibility equation the ability of the court to observe the demeanor and tone of the witness when presenting her prima facie case. It prevents counsel for the defendant from observing the weakness and hesitation in the direct testimony of the plaintiff which would ordinarily enable him to prepare an effective cross-examination. We believe that it denies the parties a fair trial by authorizing the use of hearsay evidence to establish a prima facie case.

(O) Omission or Redaction of Confidential Personal Information From Matrimonial Decisions.

Former 22 N.Y.C.R.R. § 202.16(m), Omission or Redaction of Confidential Personal Information from Matrimonial Decisions, has been renumbered subdivision (O). Omission or Redaction of Confidential Personal Information from Matrimonial Decisions.[77]

Article III

Revisions to 22 N.Y.C.R.R. § 202.16-b. Submission of Written Applications in Contested Matrimonial Actions

22 N.Y.C.R.R. § 202.16-b of the Uniform Rules governing matrimonial actions, was amended effective July 1, 2022. Former 22 N.Y.C.R.R. §§ 202.16-b(2)(i)(ii)(iii),(iv),(v),(vi) and (3) were amended.[78]

22 N.Y.C.R.R. § 202.16-b(2)(i) was amended to provide that applications that are deemed an emergency must comply with 22 N.Y.C.R.R. § 202.8(e) and provide for notice, where applicable, in accordance with the same.[79]

22 N.Y.C.R.R. § 202.16-b(2)(ii) was amended to add that "the utilization of the requirement to move by order to

show cause or notice of motion shall be governed by local part rule."[80]

Former 22 N.Y.C.R.R. § 202.16-b(3) was renumbered 22 N.Y.C.R.R. § 202.16-b(2)(vii). Former 22 N.Y.C.R.R. § 202.16-b(2)(iv) was renumbered 22 N.Y.C.R.R. 202.16-b(2)(iii). Former 22 N.Y.C.R.R. § 202.16-b(2)(iii), Former 22 N.Y.C.R.R. § 202.16-b(2)(iv), Former 22 N.Y.C.R.R. § 202.16-b(2)(vi) and Former 22 N.Y.C.R.R. § 202.16-b(3) were deleted.[81]

22 N.Y.C.R.R. § 202.16-b(2)(iii) was added to provide parties must "comply with the word limitations in 22 N.Y.C.R.R. § 202.8(b)(a)-(f) as amended."[82]

22 N.Y.C.R.R. § 202.16-b(2)(iv) was added to provide parties must comply with the requirements of 22 N.Y.C.R.R. § 202.5(a) as amended.[83]

22 N.Y.C.R.R. § 202.16-b(2)(v) was added to provide that notwithstanding 22 N.Y.C.R.R. § 202.5-a, papers and correspondence may be transmitted to the court by fax by a self-represented party without prior court approval unless prohibited by a local part rule or judicial order.[84] 22 N.Y.C.R.R. § 202.16-b(2)(vi) was added to provide that self-represented litigants may submit handwritten applications provided that the handwriting is legible and otherwise in conformity with all applicable rules.[85]

22 N.Y.C.R.R. § 202.16-b(2)(v) was renumbered 22 N.Y.C.R.R. § 202.16-b(2)(vii). It provides that except for affidavits of net worth (pursuant to 22 N.Y.C.R.R. § 202.16 (b)), retainer agreements (pursuant to Rule 1400.3 of the Joint Rules of the Appellate Division), maintenance guidelines worksheets and/or child support worksheets, or counsel fee billing statements or affirmations or affidavits related to counsel fees (pursuant to Domestic Relations Law § 237 and 22 N.Y.C.R.R. § 202.16(k)), all of which may include attachments, all exhibits annexed to any motion, cross motion, order to show cause, opposition or reply may not be greater than three (3) inches thick without prior permission of the court. All such exhibits must contain exhibit tabs.[86]

22 N.Y.C.R.R. § 202.16-b(2)(vii) does not apply to documents that are electronically filed.

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Appendix A

Article I

Section 202.16. Application of Part 202 and Section 202.16. Matrimonial Actions; Calendar Control of Financial Disclosure in Actions and Proceedings Involving Alimony, Maintenance, Child Support and Equitable Distribution; Motions for Alimony, Counsel Fees Pendente Lite, and Child Support; Special Rules

(a) Applicability of Part 202 and Section 202.16.

(1) Part 202 shall be applicable to civil actions and proceedings in the Supreme Court, including, but not limited to, matrimonial actions and proceedings, except as otherwise provided in this section 202.16 and in sections 202.16-a, 202.16-b, and 202.18, which sections shall control in the event of conflict.

(2) This section shall be applicable to all contested actions and proceedings in the Supreme Court in which statements of net worth are required by section 236 of the Domestic Relations Law to be filed and in which a judicial determination may be made with respect to alimony, counsel fees, pendente lite, maintenance, custody and visitation, child support, or the equitable distribution of property, including those referred to Family Court by the Supreme Court pursuant to section 464 of the Family Court Act.

(b) Form of Statements of Net Worth.

Sworn statements of net worth, except as provided in subdivision (k) of this section, exchanged and filed with the court pursuant to section 236 of the Domestic Relations Law, shall be in substantial compliance with the Statement of Net Worth form contained in appendix A of this Part.

(c) Retainer Agreements.

(1) A signed copy of the attorney's retainer agreement with the client shall accompany the statement of net worth filed with the court, and the court shall examine the agreement to assure that it conforms to Appellate Division attorney conduct and disciplinary rules. Where substitution of counsel occurs after the filing with the court of the net worth statement, a signed copy of the attorney's retainer agreement shall be filed with the court within 10 days of its execution.

(2) An attorney seeking to obtain an interest in any property of his or her client to secure payment of the attorney's fee shall make application to the court for approval of said interest on notice to the client and to his or her adversary. The application may be granted only after the court

reviews the finances of the parties and an application for attorney's fees.

(d) Request for Judicial Intervention.

(e) Certification.

(1) Every paper served on another party or filed or submitted to the court in a matrimonial action shall be signed as provided in section 130-1.1a of this Title.

(2) Counsel who appear before the court must be familiar with the case with regard to which they appear and be fully prepared and authorized to discuss and resolve the issues which are scheduled to be the subject of the appearance. Failure to comply with this rule may be treated as a default for purposes of Rule 202.27 and/or may be treated as a failure to appear for purposes of Rule 130.21, provided that, in matrimonial actions and proceedings, consistent with applicable case law on defaults in matrimonial actions, failure to comply with this rule may, either in lieu of or in addition to any other direction, be considered in the determination of any award of attorney fees or expenses.

(f) Preliminary Conference.

(1) In all actions or proceedings to which this section of the rules is applicable, a preliminary conference shall be ordered by the court to be held within 45 days after the action has been assigned. Such order shall set the time and date for the conference and shall specify the papers that shall be exchanged between the parties. These papers must be exchanged no later than 10 days prior to the preliminary conference, unless the court directs otherwise. These papers shall include:

(i) statements of net worth, which also shall be filed with the court no later than 10 days prior to the preliminary conference;

(ii) all paycheck stubs for the current calendar year and the last paycheck stub for the immediately preceding calendar year;

(iii) all filed State and Federal income tax returns for the previous three years, including both personal returns and returns filed on behalf of any partnership or closely held corporation of which the party is a partner or shareholder;

(iv) all W-2 wage and tax statements, 1099 forms, and K-1 forms for any year in the past three years in which the party did not file State and Federal income tax returns;

(v) all statements of accounts received during the past three years from each financial institution in which the party has maintained any account in which cash or securities are held;

(vi) the statements immediately preceding and following the date of commencement of the matrimonial action pertaining to:

(a) any policy of life insurance having a cash or dividend surrender value; and

(b) any deferred compensation plan of any type or nature in which the party has an interest including, but not limited to, Individual Retirement Accounts, pensions, profit- sharing plans, Keogh plans, 401(k) plans and other retirement plans.

(1-a) Where both parties are represented by counsel, counsel shall consult with each other prior to the preliminary conference to discuss the matters set forth in paragraph (2) below and in N.Y.C.R.R. § 202.11 in a good faith effort to reach agreement on such matters. Notwithstanding N.Y.C.R.R. § 202.11, no prior consultation is required where either or both of the parties is self-represented. Counsel shall, prior to or at the conference, submit to the court a writing with respect to any resolutions reached, which the court shall "so order" if approved and in proper form.

(1-b) Both parties personally must be present in court at the time of the conference, and the judge personally shall address the parties at some time during the conference.

(2) The matters to be considered at the conference may include, among other things:

(i) applications for pendente lite relief, including interim counsel fees;

(ii) compliance with the requirement of compulsory financial disclosure, including the exchange and filing of a supplemental statement of net worth indicating material changes in any previously exchanged and filed statement of net worth, and, including the number and length of depositions, the number of interrogatories, and agreement of the parties to comply with Guidelines on Electronically Stored Information. Unless otherwise stipulated by the parties or ordered by the court, interrogatories shall be no more than 25 in number including subparts; and depositions shall be no more than 7 hours long. The Provisions of N.Y.C.R.R. § 202.20-b(a)(1) limiting the number of depositions taken by plaintiffs, or by defendants, or by third-party defendants, shall not apply to matrimonial actions.

(iii) simplification and limitation of the issues;

(iv) the establishment of a timetable for the completion of all disclosure proceedings, provided that all such procedures must be completed and the note of issue filed within six months from the commencement of the conference, unless otherwise shortened or extended by the court depending upon the circumstances of the case;

(v) the completion of a preliminary conference order substantially in the form contained in Appendix "G" to these rules, with attachments; and

(vi) any other matters which the court shall deem appropriate.

(3) At the close of the conference, the court shall direct the parties to stipulate, in writing or on the record, as to all resolved issues, which the court then shall "so order," and as to all issues with respect to fault, custody and finance that remain unresolved. Any issues with respect to fault, custody and finance that are not specifically described in writing or on the record at that time may not be raised in the action unless good cause is shown. The court shall fix a schedule for discovery as to all unresolved issues and, in a noncomplex case, shall schedule a date for trial not later than six months from the date of the conference. The court may appoint an attorney for the infant children, or may direct the parties to file with the court, within 30 days of the conference, a list of suitable attorneys for children for selection by the court. The court also may direct that a list of expert witnesses be filed with the court within 30 days of the conference from which the court may select a neutral expert to assist the court. The court shall schedule a compliance conference unless the court dispenses with the conference based upon a stipulation of compliance filed by the parties.

(4) Unless the court excuses their presence, the parties personally must be present in court at the time of the compliance conference. If the parties are present in court, the judge personally shall address them at some time during the conference. If the parties are present in court, the judge personally shall address them at some point during the conference. Where both parties are represented by counsel, counsel shall consult with each other prior to the compliance conference in a good faith effort to resolve any outstanding issues. Notwithstanding N.Y.C.R.R. § 202.11, no prior consultation is required where either or both of the parties is self-represented. Counsel shall, prior to or at the compliance conference, submit to the court a writing with respect to any resolutions reached, which the court shall "so order" if approved and in proper form.

(5) In accordance with Section 202.20-c(f), absent good cause, a party may not use at trial or otherwise any document which was not produced in response to a request for such document or category of document, which request was not objected to, or, if objected to, such objection was overruled by the court, provided, however, the court may exercise its discretion to impose such other, further, or additional penalty for non-disclosure as may be authorized by law and which may be more appropriate in a matrimonial action than preclusion or where there is a continuing obligation to update (e.g., updated tax returns, W-2 statements, etc.).

(6) The Court shall alert the parties to the requirements of 22 N.Y.C.R.R. § 202.20-c regarding requests for documents; § 202.20-e regarding adherence to discovery schedule, and § 202.20-f regarding discovery disputes, and shall address the issues of potential for default, preclusion, denial of discovery, drawing inferences, or deeming issues to be true, as well as sanctions and/or counsel fees in the event default or preclusion or such other remedies are not appropriate in a matrimonial action.

(g) Expert Witnesses and Other Trial Matters.

(1) Responses to demands for expert information pursuant to CPLR section 3101(d) shall be served within 20 days following service of such demands.

(2) Each expert witness whom a party expects to call at the trial shall file with the court a written report, which shall be exchanged and filed with the court no later than 60 days before the date set for trial, and reply reports, if any, shall be exchanged and filed no later than 30 days before such date. Failure to file with the court a report in conformance with these requirements may, in the court's discretion, preclude the use of the expert. Except for good cause shown, the reports exchanged between the parties shall be the only reports admissible at trial. Late retention of experts and consequent late submission of reports shall be permitted only upon a showing of good cause as authorized by CPLR 3101(d)(1)(i). In the discretion of the court, written reports may be used to substitute for direct testimony at the trial, but the reports shall be submitted by the expert under oath, and the expert shall be present and available for cross- examination. In the discretion of the court, in a proper case, parties may be bound by the expert's report in their direct case.

(3) Pursuant to N.Y.C.R.R. § 202.26, in cases in which both parties are represented by counsel and each party has called, or intends to call, an expert witness on issues of finances (e.g., equitable distribution, maintenance, child support), the court may direct that, prior to, or during trial, counsel consult in good faith to identify those aspects of their respective experts' testimony that are not in dispute. The court may further direct that any agreements reached in this regard shall be reduced to a written stipulation. Such consultation shall not be required where

one or both parties is self-represented or where the expert testimony relates to matters of child custody or parental access, domestic violence, domestic abuse, or child neglect or abuse.

(4) The provisions of section 202.20-a regarding privilege logs shall not apply to matrimonial actions and proceedings unless the court orders otherwise.

(5) Parties and non-parties should adhere to the Electronically Store Information (ESI) Guidelines set forth in an Appendix to the Uniform Civil Rules

(6) At the commencement of the trial or at such time as the court may direct, each party shall identify in writing for the court the witnesses it intends to call, the order in which they shall testify and the estimated length of their testimony, and shall provide a copy of such witness list to opposing counsel. Counsel shall separately identify for the court only a list of the witnesses who may becalled solely for rebuttal or with regard to credibility. The court may permit for good cause shown and in the absence of substantial prejudice, a party to call a witness to testify who was not identified on the witness list submitted by that party. The estimates of the length of testimony and the order of witnesses provided by counsel are advisory only and the court may permit witnesses to be called in a different order and may permit further testimony from a witness notwithstanding that the time estimate for such witness has been exceeded.

(h) Statement of Proposed Disposition.

(1) Each party shall exchange a statement setting forth the following:

(i) the assets claimed to be marital property;

(ii) the assets claimed to be separate property;

(iii) an allocation of debts or liabilities to specific marital or separate assets, where appropriate;

(iv) the amount requested for maintenance, indicating and elaborating upon the statutory factors forming the basis for the maintenance request;

(v) the proposal for equitable distribution, where appropriate, indicating and elaborating upon the statutory factors forming the basis for the proposed distribution;

(vi) the proposal for a distributive award, if requested, including a showing of the need for a distributive award;

(vii) the proposed plan for child support, indicating and elaborating upon the statutory factors upon which the proposal is based; and

(viii) the proposed plan for custody and visitation of any children involved in the proceeding, setting forth the reasons therefor.

(2) A copy of any written agreement entered into by the parties relating to financial arrangements or custody or visitation shall be annexed to the statement referred to in paragraph (1) of this subdivision.

(3) The statement referred to in paragraph (1) of this subdivision, with proof of service upon the other party, shall, with the note of issue, be filed with the court. The other party, if he or she has not already done so, shall file with the court a statement complying with paragraph (1) of this subdivision within 20 days of such service.

(i) Filing of Note of Issue.

No action or proceeding to which this section is applicable shall be deemed ready for trial unless there is compliance with this section by the party filing the note of issue and certificate of readiness.

(j) Referral to Family Court.

In all actions or proceedings to which this section is applicable referred to the Family Court by the Supreme Court pursuant to section 464 of the Family Court Act, all statements, including supplemental statements, exchanged and filed by the parties pursuant to this section shall be transmitted to the Family Court with the order of referral.

(k) Motions for Alimony, Maintenance, Counsel Fees Pendente Lite and Child support (other than under section 237(c) or 238 of the Domestic Relations Law).

Unless, on application made to the court, the requirements of this subdivision be waived for good cause shown, or unless otherwise expressly provided by any provision of the CPLR or other statute, the following requirements shall govern motions for alimony, maintenance, counsel fees (other than a motion made pursuant to section 237(c) or 238 of the Domestic Relations Law for counsel fees for services rendered by an attorney to secure the enforcement of a previously granted order or decree) or child support or any modification of an award thereof:

(1) Such motion shall be made before or at the preliminary conference, if practicable.

(2) No motion shall be heard unless the moving papers include a statement of net worth in the official form prescribed by subdivision (b) of this section.

(3) No motion for counsel fees and expenses shall be heard unless the moving papers also include the affidavit of the movant's attorney stating the moneys, if any, received on account of such attorney's fee from the movant or any other person on behalf of the movant, the hourly

amount charged by the attorney, the amounts paid, or to be paid, to counsel and any experts, and any additional costs, disbursements or expenses, and the moneys such attorney has been promised by, or the agreement made with, the movant or other persons on behalf of the movant, concerning or in payment of the fee. Fees and expenses of experts shall include appraisal, accounting, actuarial, investigative and other fees and expenses (including costs for processing of NYSCEF documents because of the inability of a self-represented party that desires to e-file to have computer access or afford internet accessibility) to enable a spouse to carry on or defend a matrimonial action or proceeding in the Supreme Court.

(4) The party opposing any motion shall be deemed to have admitted, for the purpose of the motion but not otherwise, such facts set forth in the moving party's statement of net worth as are not controverted in:

(i) a statement of net worth, in the official form prescribed by this section, completed and sworn to by the opposing party, and made a part of the answering papers; or

(ii) other sworn statements or affidavits with respect to any fact which is not feasible to controvert in the opposing party's statement of net worth.

(5) The failure to comply with the provisions of this subdivision shall be good cause, in the discretion of the judge presiding, either:

(i) to draw an inference favorable to the adverse party with respect to any disputed fact or issue affected by such failure; or

(ii) to deny the motion without prejudice to renewal upon compliance with the provisions of this section.

(6) The notice of motion submitted with any motion for or related to interim maintenance or child support shall contain a notation indicating the nature of the motion. Any such motion shall be determined within 30 days after the motion is submitted for decision.

(7) Upon any application for an award of counsel fees or fees and expenses of experts made prior to the conclusion of the trial of the action, the court shall set forth in specific detail, in writing or on the record, the factors it considered and the reasons for its decision.

(l) Hearings or trials pertaining to temporary or permanent custody or visitation shall proceed from day to day conclusion. With respect to other issues before the court, to the extent feasible, trial should proceed from day to day to conclusion.

(m) The court may, for good cause, relieve the parties and counsel from the requirements of 22 N.Y.C.R.R. § 202.34 regarding pre-marking of exhibits and 22 N.Y.C.R.R. § 202.20-h. regarding pre-trial memoranda and Exhibit Books.

(n) Upon request of a party, the court may permit direct testimony of that party's own witness in a non-jury trial or evidentiary hearing shall be submitted in affidavit form, provided, however, that the opposing party shall have the right to object to statements in the direct testimony affidavit, and the court shall rule on such objections, just as if the statements had been made orally in open court. Where an objection to a portion of a direct testimony affidavit is sustained, the court may direct that such portion be stricken. The submission of direct testimony in affidavit form shall not affect any right to conduct cross-examination or re-direct examination of the witness. Notwithstanding the foregoing, in an action for custody, visitation, contempt, order of protection or exclusive occupancy, however, except as provided in N.Y.C.R.R. § 202.18, a party or a party's own witness may not testify on direct examination by affidavit.

(o) Omission or Redaction of Confidential Personal Information from Matrimonial Decisions.

(1) Except as otherwise provided by rule or law or court order, and whether or not a sealing order is or has been sought, prior to submitting any decision, order, judgment, or combined decision and order or judgment in a matrimonial action for publication, the court shall redact the following confidential personal information:

(i) the taxpayer identification number of an individual or an entity, including a social security number, an employer identification number, and an individual taxpayer identification number, except the last four digits thereof;

(ii) the actual home address of the parties to the matrimonial action and their children;

(iii) the full name of an individual known to be a minor under the age of eighteen (18) years of age, except the minor's initials or the first name of the minor with the first initial of the minor's last name; provided that nothing herein shall prevent the court from granting a request to use only the minor's initials or only the word "Anonymous";

(iv) the date of an individual's birth (including the date of birth of minor children), except the year of birth;

(v) the full name of either party where there are allegations of domestic violence, neglect, abuse, juvenile delinquency or mental health issues, except the party's initials or the first name of the party with the first initial of the party's last name; provided that nothing herein shall prevent the court from granting a re-

quest to use only the party's initials or only the word "Anonymous"; and

(vi) a financial account number, including a credit and/or debit card number, a bank account number, an investment account number, and/or an insurance account number (including a health insurance account number), except the last four digits or letters thereof.

(2) Nothing herein shall require parties to omit or redact personal confidential information as described herein or 22 N.Y.C.R.R. § 202.5(e) in papers submitted to the court for filing.

(3) Nothing herein shall prevent the court from omitting or redacting more personal confidential information than is required by this rule, either upon the request of a party or sua sponte.

Amended 202.16 on June 13, 2022, effective July 1, 2022

Appendix B

Article I

Section 202.16-b. Submission of Written Applications in Contested Matrimonial Actions.

(l) Applicability. This section shall be applicable to all contested matrimonial actions and proceedings in Supreme Court authorized by subdivision (2) of Part B of section 236 of the Domestic Relations Law.

(2) Unless otherwise expressly provided by any provision of the CPLR or other statute, and in addition to the requirements of 22 N.Y.C.R.R. § 202.16(k) where applicable, the following rules and limitations are required for the submission of papers in all applications (including post judgment applications) for alimony, maintenance, counsel fees, child support, exclusive occupancy, custody and visitation unless said requirements are waived by the judge for good cause shown:

(i) Applications that are deemed an emergency must comply with 22 N.Y.C.R.R. § 202.8(e) and provide for notice, where applicable, in accordance with same. These emergency applications shall receive a preference by the clerk for processing and the court for signature. Designating an application as an emergency without good cause may be punishable by the issuance of sanctions pursuant to Part 130 of the Rules of the Chief Administrative Judge. Any application designated as an emergency without good cause shall be processed and considered in the ordinary course of local court procedures.

(ii) Where practicable, all orders to show cause, motions or cross-motions for relief should be made in one order to show cause or motion or cross-motion. The utilization of the requirement to move by order to show cause or notice of motion shall be governed by local part rule.

(iii) Length of Papers: Parties shall comply with the word limitations in subsections (a)-(f) of 22 N.Y.C.R.R. § 202.8(b) as amended.

(iv) Form of Papers: Parties shall comply with the requirements of 22 N.Y.C.R.R. § 202.5(a) as amended.

(v) Notwithstanding 22 N.Y.C.R.R. § 202.5-a, papers and correspondence may be transmitted to the court by fax by a self-represented party without prior court approval unless prohibited by a local part rule or judicial order.

(vi) Self-represented litigants may submit handwritten applications provided that the handwriting is legible and otherwise in conformity with all applicable rules

(vii) Except for affidavits of net worth (pursuant to 22 N.Y.C.R.R. § 202.16(b)), retainer agreements (pursuant to Rule 1400.3 of the Joint Rules of the Appellate Division), maintenance guidelines worksheets and/or child support worksheets, or counsel fee billing statements or affirmations or affidavits related to counsel fees (pursuant to Domestic Relations Law § 237 and 22 N.Y.C.R.R. § 202.16(k)), all of which may include attachments thereto, all exhibits annexed to any motion, cross motion, order to show cause, opposition or reply may not be greater than three (3) inches thick without prior permission of the court. All such exhibits must contain exhibit tabs.

Amended 202.16-b on June 13, 2022, effective July 1, 2022

Endnotes

1. *See* AO142/22, amended on June 13, 2022, effective on July 1, 2022; *see also* AO270/2020, Added on Dec. 29. 2020, effective Feb. 1, 2021. The Uniform Rules which are incorporated into the matrimonial rules include the following rules which were added to 22 N.Y.C.R.R. Part 202 effective Feb. 1, 2021: 22 N.Y.C.R.R. § 202.8-a; 22 N.Y.C.R.R. § 202.8-b; 22 N.Y.C.R.R. § 202.8-c; 22 N.Y.C.R.R. § 202.8-d; 22 N.Y.C.R.R. § 202.8-e; 22 N.Y.C.R.R. § 202.8-f and 22 N.Y.C.R.R. § 202.8-g; 22 N.Y.C.R.R. § 202.10; 22 N.Y.C.R.R. § 202.11; 22 N.Y.C.R.R. § 202.20; 22 N.Y.C.R.R. § 202.20-a; 22 N.Y.C.R.R. § 202.20-b; 22 N.Y.C.R.R. § 202.20-c; 22 N.Y.C.R.R. § 202.20-d; 22 N.Y.C.R.R. § 202.20-e; 22 N.Y.C.R.R. § 202.20-f; 22 N.Y.C.R.R. § 202.20-g; 22 N.Y.C.R.R. § 202.20-h; 22 N.Y.C.R.R. § 202.20-I; 22 N.Y.C.R.R. § 202.20-j; 22 N.Y.C.R.R. § 202.23; 22 N.Y.C.R.R. § 202.29; 22 N.Y.C.R.R. § 202.34; and 22 N.Y.C.R.R. § 202.37

   In addition, the Uniform Rules, which are incorporated into the matrimonial rules, include the following rules which were amended: 22 N.Y.C.R.R. § 202.1, Added (f) & (g) on Dec. 29. 2020, effective Feb. 1, 2021; 22 N.Y.C.R.R. § 202.5, Amended (a)(1) & added (a)(2) on Dec. 29. 2020, effective Feb. 1, 2021; 22 N.Y.C.R.R. § 202.5-a, Amended (a) & (b) on Dec. 29. 2020, effective Feb. 1, 2021; 22 N.Y.C.R.R. § 202.6, Amended (b) on Jan. 7, 2022, effective Feb. 1, 2022; 22 N.Y.C.R.R. § 202.26 , Amended on Dec. 29. 2020, effective Feb. 1, 2021; and 22 N.Y.C.R.R. § 202.28, Amended (a) & (b) on Dec. 29. 2020, effective Feb. 1, 2021.

   The Administrative Order also adopted a revised Preliminary Conference Stipulation/Order-Contested Matrimonial Form (PC Order) for use in matrimonial matters effective July 1, 2022.
2. 22 N.Y.C.R.R. § 202.16(b), effective July 1, 2022.
3. 22 N.Y.C.R.R. § 202.16(e), effective July 1, 2022. This appears to be a typographical error. There is no rule 130.21. It probably should be rule 130-2.1 (Section 130-2.1. Costs; sanctions)
4. This appears to duplicate 22 N.Y.C.R.R. § 202.1(f). It provides: (f) Counsel who appear before the court must be familiar with the case with regard to which they appear and be fully prepared and authorized to discuss and resolve the issues which are scheduled to be the subject of the appearance. Failure to comply with this rule may be treated as a default for purposes of Rule 202.27 and/or may be treated as a failure to appear for purposes of Rule 130.2.1.
5. 22 N.Y.C.R.R. § 202.11 requires counsel for all parties to consult prior to a preliminary or compliance conference about (i) resolution of the case, in whole or in part; (ii) discovery, including discovery of electronically stored information, and any other issues to be discussed at the conference, (iii) the use of alternate dispute resolution to resolve all or some issues in the litigation; and (iv) any voluntary and informal exchange of information that the parties agree would help aid early settlement of the case. Counsel must make a good faith effort to reach agreement on these matters in advance of the conference.
6. 22 N.Y.C.R.R. § 202.16(f), effective July 1, 2022.
7. 22 N.Y.C.R.R. § 202.16(f)(1-b)(1), effective July 1, 2022.
8. 22 N.Y.C.R.R. § 202.16(f)(1-b)(2), effective July 1, 2022.
9. 22 N.Y.C.R.R. § 202.16(f)(1-b)(2)(ii).
10. 22 N.Y.C.R.R. § 202.16(f)(1-b)(2)(ii).
11. This repeated sentence is a typographical error.
12. 22 N.Y.C.R.R. § 202.16(f)(4), effective July 1, 2022.
13. This provision appears to duplicate portions of 22 N.Y.C.R.R. § 202.11 (*see* n. 5, *supra*).
14. 22 N.Y.C.R.R. § 202.16(f)(4), effective July 1, 2022.
15. *Id.*
16. 22 N.Y.C.R.R. § 202.20-c(f) provides: Absent good cause, a party may not use at trial or otherwise any document which was not produced in response to a request for such document or category of document, which request was not objected to or, if objected to, such objection was overruled by the court.
17. 22 N.Y.C.R.R. § 202.16(f)(1-b), effective July 1, 2022.
18. *Id.*
19. 22 N.Y.C.R.R. § 202.20-e, Adherence to Discovery Schedule, provides that parties must strictly comply with discovery obligations by the dates set forth in all case scheduling orders. If a party seeks documents from an adverse party as a condition precedent to a deposition of the party and the documents are not produced by the date fixed, the party seeking disclosure may ask the court to preclude the non-producing party from introducing the demanded documents at trial.
20. 22 N.Y.C.R.R. § 202.20-f, Disclosure Disputes, provides that to the maximum extent possible, discovery disputes should be resolved through informal procedures, such as conferences, as opposed to motion practice. Absent exigent circumstances, prior to contacting the court regarding a disclosure dispute, counsel must first consult with one another in a good faith effort to resolve all disputes about disclosure. The consultation must take place by an in-person or telephonic conference. In the event that a discovery dispute cannot be resolved other than through motion practice, each discovery motion must be supported by an affidavit or affirmation from counsel attesting to counsel having conducted an in-person or telephonic conference, setting forth the date and time of the conference, persons participating, and the length of time of the conference. The unreasonable failure or refusal of counsel to participate in a conference requested by another party may relieve the requesting party of the obligation to comply with 22 N.Y.C.R.R. § 202.20-f(b) and may be addressed by the imposition of sanctions pursuant to Part 130. If the moving party was unable to conduct a conference due to the unreasonable failure or refusal of an adverse party to participate, then the moving party must, in an affidavit or affirmation, detail the efforts made by the moving party to obtain a conference and set forth the responses received. The failure of counsel to comply with 22 N.Y.C.R.R. § 202.20-f may result in the denial of a discovery motion, without prejudice to renewal once the provisions of 22 N.Y.C.R.R. § 202.20-f have been complied with, or may result in the motion being held in abeyance until the informal resolution procedures of the court are conducted.
21. CPLR 3131.
22. CPLR 3117.
23. *Kaye v. Kaye*, 102 A.D.2d 682, 692, 478 N.Y.S.2d 324 (2d Dep't 1984).
24. Citing (*see Myers v. Myers*, 108 Misc 2d 553; Scheinkman, 1981 Practice Commentary, McKinney's Cons Laws of NY, Book 14, Domestic Relations Law, C236B:6; Brandes, Disclosure Requirements Under Equitable Distribution, NYLJ, June 21, 1983, p 1, col 2).
25. 109 A.D.2d 697, 487 N.Y.S.2d 326 (1st Dep't 1985).
26. 209 A.D.2d 399, 618 N.Y.S.2d 442 (2d Dep't 1994).
27. 110 A.D.2d 526, 487 N.Y.S.2d 756 (1st Dep't 1985).
28. CPLR 3124.
29. N.Y. Const., art. VI, § 30.
30. *See, e.g.*, *Riglander v. Star Co.*, 98 App.Div. 101, 90 N.Y.S. 772, affd. 181 N.Y. 531, 73 N.E. 1131.
31. *Cohn v. Borchard Affiliations*, 25 N.Y.2d 237, 303 N.Y.S.2d 633 (1969).

32. *A.G. Ship Maintenance Corp. v. Lezak*, 69 N.Y.2d 1, 511 N.Y.S.2d 216 (1986).

33. *People v. Ramos*, 85 N.Y.2d 678, 651 N.E.2d 895, 628 N.Y.S.2d 27 (1995); *see also, Gormerly v. McGlynn*, 84 N.Y. 284, 1881 WL 12807 (1881); *Moot v. Moot*, 214 N.Y. 204, 108 N.E. 424 (1915).

34. CPLR 3120(a).

35. CPLR 3120(1).

36. CPLR 3122(a)(1).

37. *Anonymous v. High School for Envtl. Studies*, 32 A.D.3d 353, 358–59, 820 N.Y.S.2d 573 (1st Dep't 2006).

38. *Khatskevich v. Victor*, 184 A.D.3d 504, 124 N.Y.S.3d 178 (1st Dep't 2020).

39. *Recine v. City of New York*, 156 A.D.3d 836, 65 N.Y.S.3d 788 (2d Dep't 2017).

40. *See Ehrlich v. Ehrlich*, 74 A.D.2d 519, 425 N.Y.S.2d 11 (1st Dep't 1980).

41. 189 A.D.3d 749, 137 N.Y.S.3d 120, (2d Dep't 2020).

42. *Stepping Stones Associates, L.P. v. Scialdone*, 148 A.D.3d 855, 50 N.Y.S.3d 76 (2d Dep't 2017).

43. CPLR 3122(a)(1).

44. CPLR 3126. For example, in *Douek v. Douek*, 148 A.D.2d 166, 48 N.Y.S.3d 614 (2d Dep't 2017) the Appellate Divison held that the Supreme Court did not improvidently exercise its discretion in granting that the plaintiff's motion pursuant to CPLR 3126 to preclude the defendant from offering financial evidence at trial due to her willful violation of discovery orders and her failure to comply with the plaintiff's discovery requests. In *Casey v. Casey*, 39 A.D.3d 579, 835 N.Y.S.2d 277 (2d Dep't 2007) the Appellate Division held that Supreme Court providently struck the defendant's answer for failure to comply with court ordered discovery and precluded the defendant from presenting evidence or testimony at trial relating to financial issues. It found that the defendant engaged in a pattern of conduct over a period of time which evidenced an intent to willfully and contumaciously obstruct and delay the progress of disclosure.

45. 22 N.Y.C.R.R. § 202.20-c(f) provides: Absent good cause, a party may not use at trial or otherwise any document which was not produced in response to a request for such document or category of document, which request was not objected to or, if objected to, such objection was overruled by the court.

46. 22 N.Y.C.R.R. § 202.16(f)(1-b), effective July 1, 2022.

47. CPLR 3122(a)(1).

48. 22 N.Y.C.R.R. § 202.16(f)(1-b), effective July 1, 2022.

49. *People v. Ramos*, 85 N.Y.2d 678, 651 N.E.2d 895, 628 N.Y.S.2d 27 (1995); *see also, Gormerly v. McGlynn*, 84 N.Y. 284, 1881 WL 12807 (1881); *Moot v. Moot*, 214 N.Y. 204, 108 N.E. 424 (1915).

50. 22 N.Y.C.R.R. § 202.26, titled Settlement and Pretrial Conference, provides that at the time of certification of the matter as ready for trial or at any time after the discovery cutoff date, the court may schedule a settlement conference which must be attended by counsel and the parties. They are expected to be fully prepared to discuss the settlement of the matter. Prior to trial, counsel must confer in a good faith effort to identify matters not in contention, resolve disputed questions without need for court intervention and further discuss settlement of the case. Where a pre-trial conference is scheduled, or otherwise prior to the commencement of opening statements, counsel must be prepared to discuss all matters as to which there is disagreement between the parties and settlement of the matter. The court may require the parties to prepare a written stipulation of undisputed facts. The court may direct that prior, or during, trial, counsel for the parties consult in good faith to identify those aspects of their respective experts' anticipated testimony that are not in dispute. The court may direct that any agreements reached be reduced to a written stipulation.

51. 22 N.Y.C.R.R. § 202.16(g)(3), effective July 1, 2022.

52. *Id.*

53. *See* https://www.nycourts.gov/LegacyPDFS/RULES/trialcourts/Ex%20A%20-%20Appendix%20A.pdf (last accessed June 16, 2022).

54. 22 N.Y.C.R.R. § 202.16(g)(6), effective July 1, 2022.

55. *Id.*

56. *Id.*

57. *Id.*

58. 22 N.Y.C.R.R. § 202.34 as amended effective July 1, 2022.

59. *Id.*

60. *Id.*

61. 22 N.Y.C.R.R. § 202.16(m), effective July 1, 2022.

62. 22 N.Y.C.R.R. § 202.16(n), effective July 1, 2022.

63. *Id.*

64. Section 202.18 Testimony of court-appointed expert witness in matrimonial action or proceeding**.**

> In any action or proceeding tried without a jury to which section 237 of the Domestic Relations Law applies, the court may appoint a psychiatrist, psychologist, social worker or other appropriate expert to give testimony with respect to custody or visitation, and may appoint an accountant, appraiser, actuary or other appropriate expert to give testimony with respect to equitable distribution or a distributive award. In the First and Second Judicial Departments, appointments shall be made as appropriate from a panel of mental health professionals pursuant to 22 N.Y.C.R.R. Parts 623 and 680. The cost of such expert witness shall be paid by a party or parties as the court shall direct.

65. 22 N.Y.C.R.R. § 202.16(n), effective July 1, 2022.

66. *See* 22 N.Y.C.R.R. § 202.16(a).

67. 22 N.Y.C.R.R. § 202.20-i effective Feb. 1, 2021.

68. *People v. Romero*, 78 N.Y.2d 355, 575 N.Y.S.2d 802 (1991); *People v. Edwards*, 47 N.Y.2d 493, 419 N.Y.S.2d 45 (1979); *People v. Caviness*, 38 N.Y.2d 227, 379 N.Y.S.2d 695 (1975); § 7:11. Hearsay, Bench Book for Trial Judges-New York § 7:11.

69. *People v. Caviness*, 38 N.Y.2d 227, 379 N.Y.S.2d 695, 342 N.E.2d 496 (1975); *see also* Prince, Richardson on Evidence, 11th Edition (Farrell), § 8–101.

70. Citing (*People v. Brensic*, 70 N.Y.2d 9, 14, *citing People v. Nieves*, 67 N.Y.2d 125*,* 131*; see also, People v. Brown*, 80 N.Y.2d 729, 734–35 [present sense impressions]; *People v. Brown*, 70 N.Y.2d 513, 518–19 [excited utterances]).

71. *Nucci ex rel. Nucci v. Proper*, 95 N.Y.2d 597, 602, 721 N.Y.S.2d 593, 595, 744 N.E.2d 128, 130 (2001) citing, among other things, Prince, Richardson on Evidence § 8–107, at 504–05 [Farrell 11th ed. 1995]).

72. *Sadowsky v. Chat Noir, Inc.*, 64 A.D.2d 697, 407 N.Y.S.2d 562 (2d Dep't 1978); Prince, Richardson on Evidence, 11th Edition (Farrell), § 8–103.

73. *Viles v. Viles*, 14 N.Y.2d 365, 251 N.Y.S.2d 672 (1964).

74. *Schwartz v. Schwartz*, 186 A.D.3d 1742, 132 N.Y.S.3d 34 (2d Dep't 2020); *Kerley v. Kerley*, 131 A.D.3d 1124, 17 N.Y.S.3d 150 (2d Dep't 2015).

75. *Linenschmidt v. Linenschmidt*, 163 A.D.3d 949, 82 N.Y.S.3d 474 (2d Dep't 2018).

76. *Hass & Gottlieb v. Sook Hi Lee*, 55 A.D.3d 433, 866 N.Y.S.2d 72 (1st Dep't 2008).

77. 22 N.Y.C.R.R. § 202.16(O), effective July 1, 2022.

78. Administrative Order AO/141/22.

79. 22 N.Y.C.R.R. § 202.16-b(2)(i) effective July 1, 2022.

80. 22 N.Y.C.R.R. § 202.16-b(2)(ii) effective July 1, 2022.

81. The deleted provisions provided as follows:

> [(iii) All orders to show cause and motions or cross motions shall be submitted on one-sided copy except as otherwise provided in 22 N.Y.C.R.R. § 202.S(a), or electronically where authorized, with one-inch margins on eight and one half by eleven (8.5 x 11) inch paper with all additional exhibits tabbed. They shall be in Times New Roman font 12 and double spaced. They must be of sufficient quality ink to allow for the reading and proper scanning of the documents. Self represented litigants may submit handwritten applications provided that the handwriting is legible and otherwise in conformity with these rules.]
>
> [(iv) The supporting affidavit or affidavit in opposition or attorney affirmation in support or opposition or memorandum of law shall not exceed twenty (20) pages. Any expert affidavit required shall not exceed eight (8) additional pages. Any attorney affirmation in support or opposition or memorandum of law shall contain only discussion and argument on issues of law except for facts known only to the attorney. Any reply affidavits or affirmations to the extent permitted shall not exceed ten (10) pages. Sur-reply affidavits can only be submitted with prior court permission.]
>
> [(vi) If the application or responsive papers exceed the page or size limitation provided in this section, counsel or the self-represented litigant must certify in good faith the need to exceed such limitation, and the court may reject or require revision of the application if the court deems the reasons insufficient.]
>
> [(3) Nothing contained herein shall prevent a judge or justice of the court or of a judicial district within which the court sits from establishing local part rules to the contrary or in addition to these rules.]

82. 22 N.Y.C.R.R. § 202.16-b(2)(iii) effective July 1, 2022.

> Section 202.8-b Length of Papers**.**
>
> (a) Where prepared by use of a computer, unless otherwise permitted by the court: (i) affidavits, affirmations, briefs and memoranda of law in chief shall be limited to 7.000 words each: (ii) reply affidavits, affirmations, and memoranda shall be no more than 4,200 words and shall not contain any arguments that do not respond or relate to those made in the memoranda in chief.
>
> (b) For purposes of paragraph (a) above, the word count shall exclude the caption, table of contents, table of authorities, and signature block.
>
> (c) Every brief, memorandum, affirmation, and affidavit which was prepared by use of a computer shall include on a page attached to the end of the applicable document, a certification by the counsel who has filed the document setting forth the number of words in the document and certifying that the document complies with the word count limit. The counsel certifying compliance may rely on the word count of the word-processing system used to prepare the document.
>
> (d) Where typewritten or handwritten, affidavits, affirmations, briefs and memoranda of law in chief shall be limited to 20 pages each; and reply affidavits, affirmations, and memoranda shall be limited to 10 pages each and shall not contain any arguments that do not respond or relate to those made in the memoranda in chief.
>
> (e) Where a party opposing a motion makes a cross-motion, the affidavits, affirmations, briefs, or memoranda submitted by that party shall be limited to 7,000 words each when prepared by use of a computer or to 20 pages each when typewritten or handwritten. Where a cross-motion is made, reply affidavits, affirmations, briefs or memoranda of the party who made the principal motion shall be limited to 4,200 words when prepared by use of a computer or to 10 pages when typewritten or handwritten.
>
> (f) The court may, upon oral or letter application on notice to all parties permit the submission of affidavits, affirmations, briefs or memoranda which exceed the limitations set forth above. In the event that the court grants permission for an oversize submission, the certification required by paragraph (c) above shall set forth the number of words in the document and certify compliance with the limit, if any set forth by the court.

83. 22 N.Y.C.R.R. § 202.16-b(2)(iv) effective July 1, 2022.

> Section 202.5 Papers filed in court. (a)(1) The party filing the first paper in an action, upon payment of the proper fee, shall obtain from the county clerk an index number, which shall be affixed to the paper. The party causing the first paper to be filed shall communicate in writing the county clerk's index number forthwith to all other parties to the action. Thereafter such number shall appear on the outside cover and first page to the right of the caption of every paper tendered for filing in the action. Each such cover and first page also shall contain an indication of the county of venue and a brief description of the nature of the paper and, where the case has been assigned to an individual judge, shall contain the name of the assigned judge to the right of the caption. In addition to complying with the provisions of CPLR 2101, every paper filed in court shall have annexed thereto appropriate proof of service on all parties where required, and if typewritten, shall have at least double space between each line, except for quotations and the names and addresses of attorneys appearing in the action, and shall have at least one-inch margins. In addition, every paper filed in court, other than an exhibit or printed form, shall contain writing on one side only, except that papers that are fastened on the side may contain writing on both sides, and shall contain print no smaller than 12-point, or 8 ½ x 11 inch paper, bearing margins no smaller than one inch. The print size of footnotes shall be no smaller than 10 point. Papers that are stapled or bound securely shall not be rejected for filing simply because they are not bound with a backer of any kind.
>
> (2) Unless otherwise directed by the court, each electronically-submitted memorandum of law, affidavit and affirmation, exceeding 4500 words, which was prepared with the use of a computer software program, shall include bookmarks providing a listing of the document's contents and facilitating easy navigation by the reader within the document.

84. 22 N.Y.C.R.R. § 202.16-b(2)(v) effective July 1, 2022.

85. 22 N.Y.C.R.R. § 202.16-b(2)(vi) effective July 1, 2022.

86. 22 N.Y.C.R.R. § 202.16-b(3) effective July 1, 2022.

New Preliminary Conference Stipulation/Order—Contested Matrimonial

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF
----------X

Plaintiff,

Index No.:_____

- against -

Part No.:_____

Defendant.
----------X

PRELIMINARY CONFERENCE STIPULATION/ORDER
CONTESTED MATRIMONIAL

PRESIDING: Hon. _____
Justice of the Supreme Court

The parties and counsel have appeared before this Court on _____ at a preliminary conference on this matter held pursuant to 22 NYCRR §202.16.

A. BACKGROUND INFORMATION:

1. Summons: Date filed: _____ Date served: _____

2. Date of Marriage: _____

3. Name(s) and date(s) of birth of child(ren):

Name:_____ DOB:_____
Name:_____ DOB:_____
Name:_____ DOB:_____
Name:_____ DOB:_____

4. Attorneys for Plaintiff: Attorneys for Defendant:

_____ _____

_____ _____

_____ _____

Phone: _____ Phone: _____

Fax: _____ Fax: _____

Email: _____ Email: _____

5. The Court has received a copy of: Plaintiff Defendant

(Date Filed ***OR*** To Be Filed)

(a) A sworn statement of net worth as of date of commencement of the action. _____ _____

(b) A signed copy of each party's attorney's retainer agreement. _____ _____

6. An Order of Protection has been issued against:

Plaintiff: ____ YES ____ NO **Defendant:** ____ YES ____ NO

Issue Date: _____ Issue Date:_____

Issuing Court: _____ Issuing Court: _____

Currently in Effect?
___YES ___NO

Currently in Effect?
___YES ___NO

7. Plaintiff/Defendant requests a translator in the _____language.

8. (a) Please identify and state the nature of any Premarital, Marital, Separation or other Agreements and/or Orders which affect the rights of either of the parties in this action.

_____

_____

_____

(b) Plaintiff/Defendant shall challenge the Agreement dated _____ by _____. If no challenge is asserted by that date, it is waived unless good cause is shown.

B. GROUNDS FOR DIVORCE:

1. The Complaint (was) (or will be) served on:_____/_____/_____

2. A Responsive Pleading (was) (or will be) served on:_____/_____/_____

3. Reply to Counterclaim, if any, (was) (or will be) served on:_____/_____/_____

4. The issue of grounds is ☐ **resolved** ☐ **unresolved.**

   If the issue of grounds is **resolved**, the parties agree that Plaintiff/Defendant will proceed on an uncontested basis to obtain a divorce on the grounds of DRL § 170(7) and the parties waive the right to serve a Notice to Discontinue pursuant to CPLR 3217(a) unless on consent of the parties.

5. Other:_____

C. CUSTODY:

1. The issue of parenting time is ☐ **resolved** ☐ **unresolved**.

2. The issues relating to decision-making are ☐ **resolved** ☐ **unresolved.**

   (a) If the issues of custody, including parenting time and decision-making, are resolved: The parties are to submit an agreement/stipulation no later than _____.

(b) If the parties do not notify the Court that all issues related to custody are resolved, a conference shall be held on _____ at which time the Court shall determine the need for an Attorney for the Child/Guardian ad Litem and/or a forensic evaluation and set a schedule for resolving all issues relating to custody.

3. ☐ **ATTORNEY FOR CHILD(REN) or GUARDIAN AD LITEM**: Subject to judicial approval, the parties request that the Court appoint an Attorney for the parties' minor child(ren) ("AFC"). The cost of the AFC's services shall be paid as follows: _____ .

☐ **FORENSIC:** Subject to judicial approval, the parties request that the Court appoint a neutral forensic expert to conduct a custody/parental access evaluation of the parties and their child(ren). Subject to Judicial approval, the cost of the forensic evaluation shall be paid as follows:_____.

Any appointment of an Attorney for the Child/Guardian ad Litem or forensic evaluator shall be by separate order which shall designate the individual appointed, the manner of payment, source of funds for payment, and each party's responsibility for such payment.

D. FINANCIAL:

(1) Maintenance is ☐ **resolved** ☐ **unresolved**

(2) Child Support ☐ **resolved** ☐ **unresolved**

(3) Equitable Distribution is ☐ **resolved** ☐ **unresolved**

(4) Counsel Fees are ☐ **resolved** ☐ **unresolved**

List all other causes of action and ancillary relief issues that are **unresolved**.

_____

_____

_____

Any issues not specifically listed in this Order as unresolved may not be raised in this action unless good cause is shown.

E. OTHER:

List all other causes of action and ancillary relief issues that are **unresolved**.

_____

_____

_____

_____

F. *PENDENTE LITE* RELIEF:

See annexed Order _____

See annexed Stipulation _____

G. DISCOVERY:

1. **Preservation of Evidence:**

(a) **Financial Records:** Each party shall maintain all financial records in his or her possession or under his or her control through the date of the entry of a judgment of divorce.

(b) **Electronic Evidence:** For the relevant periods relating to the issues in this litigation, each party shall maintain and preserve all electronic files, other data generated by and/or stored on the party's computer system(s) and storage media (i.e. hard drives, floppy disks, backup tapes), or other electronic data. Such items include, but are not limited to, e-mail and other electronic communications, word processing documents, spreadsheets, data bases, calendars, telephone logs, contact manager information, internet usage files, offline storage or information stored on removable media, information contained on laptops or other portable devices, and network access information.

2. **Document Production:**

(a) No later than ____ days after the date of this Order, the parties shall exchange the following records for the following periods:

Time Period

_____ Federal, state and local tax returns, including all schedules, K-1s, 1099s, W-2s and similar data.
_____ Credit card statements for all credit cards used by a party.
_____ Checking account statements, cancelled checks and check registers for joint and individual accounts.
_____ Brokerage account statements for joint and individual accounts.
_____ Savings account statements for joint and individual accounts.
_____ Other: (specify)_____

Absent any specified time period, the records listed above are to be produced for the **three years** prior to the commencement of this action through the present. If a party does not have complete records for the time period, the party shall provide a written authorization to obtain such records directly from the source within five days of presentation.

(b) Service of Notice For Discovery and Inspection:

Plaintiff: ____/____/____ Defendant: ____/____/____

(c) Responses to Notice for Discovery and Inspection:

Plaintiff:____/____/____ Defendant:____/____/____

(d) Service of Interrogatories:

Plaintiff:____/____/____ Defendant:____/____/____

(e) Response to Interrogatories:

Plaintiff:____/____/____ Defendant:____/____/____

(f) Interrogatories:

Interrogatories are limited to 25 including subparts unless the parties stipulate, or the court orders otherwise. In this proceeding ☐ The parties stipulate OR ☐ the court orders ___ Interrogatories including subparts.

(g) Depositions:

Plaintiff to be deposed on or before _____.

Defendant to be deposed on or before _____.

Nonparties who may be deposed are _____

Nonparty depositions shall be completed by _____.

All depositions shall be limited to 7 hours in length, except as follows:_____ _____

(h) Electronically Stored Information

Parties and non-parties should adhere to the Guidelines on Electronically Stored Information contained in Appendix A to the Uniform Civil Rules for Supreme and County Courts in accordance with 22 NYSCRR 202.20(j)..

(i) Privilege Logs:

The Court ☐ orders **OR** ☐ declines to order that the provisions of 22 N.Y.C.R.R. §202.20-a relating to privilege logs be applicable to this case.

Failure to comply with the provisions of this section may result in sanctions, including the award of legal fees, and other penalties.

H. VALUATION/FINANCIAL EXPERTS

1. **Neutral Experts –** The parties request that the Court appoint a neutral expert to value the following:

The cost of the valuations shall be paid (subject to reallocation): _____% Plaintiff and _____% Defendant

(a) Deferred compensation/Retirement assets _____
(b) Business interest _____
(c) Professional practice _____

(d) Real property _____
(e) Stock options, stock plans or other benefit plan _____
(f) Intellectual property _____
(g) Other (identify): _____

_____

The parties agree that the appointment of the neutral expert as specified above, shall be pursuant to a separate order which shall designate the neutral expert, what is to be valued, the manner of payment, the source of funds for payment, and each party's responsibility for such payment if not agreed above.

If the Court does not appoint the neutral expert(s) requested above simultaneously with the signing of this Order, then the parties may suggest names for the Court to consider appointing. Said names shall be submitted by letter no later than _____.

The parties shall notify the Court no later than _____as to whether any other neutral experts are required.

2. **Experts to be Retained by a Party:**

Each party shall select his/her own expert to value _____. The expert shall be identified to the other party by letter with their qualifications and retained no later than _____. If a party requires fees to retain an expert and the parties cannot agree upon the source of the funds, an application for fees shall be made. Any expert retained by a party must represent to the party hiring such expert that he or she is available to proceed promptly with the valuation.

Expert reports are to be exchanged by _____. Absent any date specified, they are to be exchanged 60 days prior to trial or 30 days after receipt of the report of the neutral expert, whichever is later. Reply reports are to be exchanged 30 days after service of an expert report.

3. **Additional Experts:**

If, as of the date of this order, a net worth statement has not been served or a party cannot identify all assets for valuation or cannot identify all issues for an expert, then, upon the parties' becoming aware of such assets or issues, that party promptly shall notify the other party as to any assets for valuation or any issue for which an expert is needed. If the parties cannot agree upon a neutral expert or the retention of individual experts, either party may notify the Court for appropriate action. Timely application shall be made to the Court if assistance is necessary to implement valuation or the retention of an expert.

I. HEALTH INSURANCE COVERAGE NOTICE:

Each party fully understands that upon the entry of a divorce judgment, he/she may no longer be allowed to receive health coverage under his/her former spouse's health insurance plan. Each party understands that he/she may be entitled to purchase health insurance on his/her own through a COBRA option, if available, otherwise he/she may be required to secure his/her own health insurance coverage.

J. AUTOMATIC STATUTORY RESTRAINTS (D.R.L. §236[B][2])

Each party acknowledges that he/she has received a copy of the Automatic Statutory Restraints/Automatic Orders (D.R.L. §236[B][2]). Each party acknowledges that he/she understands that he/she is bound by those Restraints/Orders during the pendency of this action, unless terminated, modified, or amended by order of the Court upon motion of either party or upon written agreement between the parties duly executed and acknowledged.

K. PARENT EDUCATION:

The Court: ☐ has provided information as to parent education.
☐ has taken no action with respect to parent education.
☐ hereby orders the parties to attend parent education.

L. ALTERNATE DISPUTE RESOLUTION/PRESUMPTIVE MEDIATION:

The parties ☐ *are* OR ☐ *are not* aware of the existence of presumptive mediation, collaborative processes and other alternative dispute resolution methods.

M. NOTICE OF GUIDELINE MAINTENANCE

Each party acknowledges receipt of the following notice from the Court:

If your divorce was commenced on or after January 25, 2016, this Notice is required to be given to you by the Supreme Court of the county where your divorce was filed to comply with the Maintenance Guidelines Law ([S. 5678/A. 7645], Chapter 269, Laws of 2015) because you may not have counsel in this action to advise you**. It does not mean that your spouse is seeking or offering an award of "Maintenance" in this action. Maintenance" means the amount to be paid to the other spouse for his or her support, either during the pendency of the divorce action as temporary maintenance or after the divorce is final as post-divorce maintenance.**

You are hereby given notice that under the Maintenance Guidelines Law (Chapter 269, Laws of 2015), there is an obligation to award the guideline amount of maintenance on income up to $203,000 (eff. 3/1/22) to be paid by the party with the higher income (the maintenance payor) to the party with the lower income (the maintenance payee) according to a formula, unless the parties agree otherwise or waive this right. Depending on the incomes of the parties, the obligation might fall on either the Plaintiff or Defendant in the action.

There are two formulas to determine the amount of the obligation. If you and your spouse have no children, the higher formula will apply. If there are children of the marriage, the lower formula will apply, but only if the maintenance payor is paying child support to the other spouse who has the children as the custodial parent. Otherwise the higher formula will apply.

Lower Formula

(a) Multiply Maintenance Payor's Income by 20%.

(b) Multiply Maintenance Payee's Income by 25%.

(c) Subtract Line b from Line a: = **Result 1**

(d) Subtract Maintenance Payee's Income from 40 % of Combined Income* = **Result 2**.

(e) Enter the lower of **Result 2** or **Result 1,** but if less than or equal to zero, enter zero.

THIS IS THE CALCULATED GUIDELINE AMOUNT OF MAINTENANCE WITH THE LOWER FORMULA

Higher Formula

(a) Multiply Maintenance Payor's Income by 30%

(b) Multiply Maintenance Payee's Income by 20%

(c) Subtract Line b from Line a= **Result 1**

(d) Subtract Maintenance Payee's Income from 40 % of Combined Income*= **Result 2**

(e) Enter the lower of **Result 2** or **Result 1,** but if less than or equal to zero, enter zero.

THIS IS THE CALCULATED GUIDELINE AMOUNT OF MAINTENANCE WITH THE HIGHER FORMULA

***Combined Income equals Maintenance Payor's Income up to $203,000 (eff. 3/1/22) plus Maintenance Payee's Income**

The Court is not bound by the Guideline Amount of Maintenance and may deviate therefrom in the Court's discretion as set forth in the statute.

The Court will determine, in its discretion, how long maintenance will be paid in accordance with the statute.

N. CONFERENCING AND PRE-TRIAL REQUIREMENTS

1. ☐ Both parties are represented by Counsel, and the parties affirm that their Counsel met prior to the submission of this Preliminary Conference Stipulation/Order in a good faith effort to reach agreement without Court intervention, and this Preliminary Conference Stipulation/Order reflects the agreements, if any, so reached. **OR** ☐ This provision is not applicable because one or both parties is unrepresented.

2. ☐ Both parties are represented by Counsel, and Counsel shall meet prior to the compliance conference scheduled below in a good faith effort to resolve any outstanding issues without Court intervention. **OR** ☐ This provision is not applicable because one or both parties is unrepresented; and the conference will occur with the Court.

3. ☐ Both parties are represented by Counsel, and each party intends to call an expert witness on any issues of finances described in Paragraph D of this Preliminary Conference Stipulation/Order, and Counsel shall meet to identify those aspects of their respective testimony not in dispute .**OR** ☐ This provision is not applicable because one or both parties is unrepresented.or because the expert testimony relates to matters of child custody or parental access, domestic violence, domestic abuse, or child neglect or abuse; and the conference will occur with the Court.

4. The Court directs that the parties and their respective Counsel are to appear at a compliance conference to be held on _____/_____/_____ at _____ am/pm. All discovery as set forth herein above is expected to be completed prior to the compliance conference. At the conference, counsel shall also be prepared to discuss settlement.

5. The Court has determined that **:**
   (i) the requirements of NYCRR section 202.34 regarding pre-marking of exhibits ☐ shall not apply **OR** ☐ shall apply;
   (ii) Exhibit Books ☐ shall not be required **OR** ☐ shall be required
   (iii) Pre-Trial Memoranda ☐ shall not be required **OR** ☐ shall be required

6. A Note of Issue shall be filed on or before _____. Failure to file a Note of Issue as directed herein may result in dismissal pursuant to CPLR 3216.

THE TRIAL IN THIS MATTER SHALL BE HELD ON:
_____ in part/room _____ at _____.

All of the above is hereby stipulated to by the parties:

_____	_____
Plaintiff (Signature)	Defendant (Signature)
_____	_____
Plaintiff (Print Name)	Defendant (Print Name)
_____	_____
Plaintiff's Attorney (Signature)	Defendant's Attorney (Signature)
_____	_____
Plaintiff's Attorney (Print Name)	Defendant's Attorney (Print Name)

Dated: _____, 20___

SO ORDERED:

_____
Justice of the Supreme Court

☐ **There is no addendum to this Preliminary Conference Order.**

☐ **There is an addendum of _____ pages which is attached to this Preliminary Conference Order.**

☐ **Where the parties wish to execute this document in counterparts, there is a Counterparts Addendum to this Preliminary Conference Order.**

COUNTERPARTS ADDENDUM IF SIGNED SEPARATELY

_____
Plaintiff (Signature)

_____
Plaintiff (Print Name)

_____
Plaintiff's Attorney (Signature)

_____
Plaintiff's Attorney (Print Name)

Dated: _____, 20___

COUNTERPARTS ADDENDUM IF SIGNED SEPARATELY

_____
Defendant (Signature)

_____
Defendant (Print Name)

_____
Defendant's Attorney (Signature)

_____
Defendant's Attorney (Print Name)

Dated: _____, 20___

COUNTERPARTS ADDENDUM IF SIGNED SEPARATELY

Dated: _____, 20___

SO ORDERED:

_____

Golan v. Saada Case

U.S. Supreme Court vacated the determination of the U.S. Court of Appeals for the Second Circuit. It found that the Hague Convention empowers our courts with judicial discretion to consider ameliorative measures that might facilitate the return of a child to its habitual residence while still protecting the child's safety. However, consideration of all ameliorative measures vis a vis the existence of a grave risk to the child, does not comport with the text and express requirements of The Hague Convention. The matter was remanded to the U.S. District Court for the Eastern District of New York to follow the proper legal standard set forth in *Monasky v. Taglieri*.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GOLAN *v.* SAADA

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 20–1034. Argued March 22, 2022—Decided June 15, 2022

The Hague Convention on the Civil Aspects of International Child Abduction requires the judicial or administrative authority of a Contracting State to order a child returned to the child's country of habitual residence if the authority finds that the child has been wrongfully removed to or retained in the Contracting State. The authority "is not bound to order the return of the child," however, if the authority finds that return would expose the child to a "grave risk" of "physical or psychological harm or otherwise place the child in an intolerable situation." The International Child Abduction Remedies Act (ICARA) implements the Convention in the United States, granting federal and state courts jurisdiction over Convention actions and directing those courts to decide cases in accordance with the Convention.

Petitioner Narkis Golan, a United States citizen, married respondent Isacco Saada, an Italian citizen, in Italy, where they had a son, B. A. S., in 2016. In 2018, Golan flew with B. A. S. to the United States to attend a wedding and, instead of returning to Italy, moved into a domestic violence shelter with B. A. S. Saada thereafter timely filed a petition with the U. S. District Court for the Eastern District of New York, seeking an order returning B. A. S. to Italy pursuant to the Hague Convention. The District Court concluded that B. A. S. would face a grave risk of harm if returned to Italy, given evidence that Saada had abused Golan and that being exposed to this abuse harmfully affected B. A. S. The court, however, ordered B. A. S.' return to Italy, applying Second Circuit precedent obligating it to "examine the full range of options that might make possible the safe return of a child" and concluding that ameliorative measures could reduce the risk to B. A. S. sufficiently to require his return. The Second Circuit vacated the return order, finding the District Court's ameliorative measures

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insufficient. Because the record did not support concluding that no sufficient ameliorative measures existed, the Second Circuit remanded for the District Court to consider whether such measures, in fact, existed. After an examination over nine months, the District Court identified new ameliorative measures and again ordered B. A. S.' return. The Second Circuit affirmed.

Held: A court is not categorically required to examine all possible ameliorative measures before denying a Hague Convention petition for return of a child to a foreign country once the court has found that return would expose the child to a grave risk of harm. Pp. 8–16.

(a) "The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Abbott* v. *Abbott*, 560 U. S. 1, 10 (internal quotation marks omitted). When "a child has been wrongfully removed or retained" from his country of habitual residence, Article 12 of the Hague Convention generally requires the deciding authority (here, a district court) to "order the return of the child." T. I. A. S. No. 11670, S. Treaty Doc. No. 99–11, p. 9. But Article 13(b) of the Convention leaves a court with the discretion to grant or deny return, providing that a court "is not bound to order the return of the child" if it finds that the party opposing return has established that return would expose the child to a "grave risk" of physical or psychological harm. *Id.,* at 10. Nothing in the Convention's text either forbids or requires consideration of ameliorative measures in exercising this discretion. Pp. 8–11.

(1) Saada's primary argument is that determining whether a grave risk of harm exists necessarily requires considering whether any ameliorative measures are available. The two questions, however, are separate. A court may find it appropriate to consider both questions at once, but this does not mean that the Convention imposes a categorical requirement on a court to consider any or all ameliorative measures before denying return based on a grave-risk determination. Pp. 9–10.

(2) The discretion to courts under the Convention and ICARA includes the discretion to determine whether to consider ameliorative measures that could ensure the child's safe return. The Second Circuit's contrary rule—which imposes an atextual, categorical requirement that courts consider all possible ameliorative measures in exercising discretion under the Convention, regardless of whether such consideration is consistent with the Convention's objectives—"in practice, rewrite[s] the treaty," *Lozano* v. *Montoya Alvarez*, 572 U. S. 1, 17. Pp. 10–11.

(b) A district court's consideration of ameliorative measures must be guided by the legal principles and other requirements set forth in the

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Convention and ICARA. The Second Circuit's rule improperly elevated return above the Convention's other objectives. The Convention does not pursue return exclusively or at all costs. Courts must remain conscious of all the Convention's objectives and requirements, which constrain courts' discretion to consider ameliorative measures. First, the Convention explicitly recognizes that any consideration of ameliorative measures must prioritize the child's physical and psychological safety. Second, consideration of ameliorative measures should abide by the Convention's requirement that courts addressing return petitions do not usurp the role of the court that will adjudicate the underlying custody dispute. Third, any consideration of ameliorative measures must accord with the Convention's requirement that courts "act expeditiously in proceedings for the return of children." A court therefore reasonably may decline to consider ameliorative measures that have not been raised by the parties, are unworkable, draw the court into determinations properly resolved in custodial proceedings, or risk overly prolonging return proceedings. Pp. 11–15.

(c) In this case, the District Court made a finding of grave risk, but never had the opportunity to inquire whether to order or deny return under the correct legal standard. Accordingly, it is appropriate to allow the District Court to apply the proper legal standard in the first instance, see *Monasky* v. *Taglieri*, 589 U. S. ___, ___. The District Court should determine whether the measures considered are adequate to order return in light of the District Court's factual findings concerning the risk to B. A. S., bearing in mind that the Convention sets as a primary goal the safety of the child. Pp. 15–16.

833 Fed. Appx. 829, vacated and remanded.

SOTOMAYOR, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 20–1034

NARKIS ALIZA GOLAN, PETITIONER *v.*
ISACCO JACKY SAADA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June 15, 2022]

JUSTICE SOTOMAYOR delivered the opinion of the Court.

Under the Hague Convention on the Civil Aspects of International Child Abduction, Mar. 26, 1986, T. I. A. S. No. 11670, S. Treaty Doc. No. 99–11 (Treaty Doc.), if a court finds that a child was wrongfully removed from the child's country of habitual residence, the court ordinarily must order the child's return. There are, however, exceptions to that rule. As relevant here, a court is not bound to order a child's return if it finds that return would put the child at a grave risk of physical or psychological harm. In such a circumstance, a court has discretion to determine whether to deny return.

In exercising this discretion, courts often consider whether any "ameliorative measures," undertaken either "by the parents" or "by the authorities of the state having jurisdiction over the question of custody," could "reduce whatever risk might otherwise be associated with a child's repatriation." *Blondin* v. *Dubois*, 189 F. 3d 240, 248 (CA2 1999) (*Blondin I*). The Second Circuit has made such consideration a requirement, mandating that district courts independently "examine the full range of options that might

make possible the safe return of a child" before denying return due to grave risk, even if the party petitioning for the child's return has not identified or argued for imposition of ameliorative measures. *Blondin* v. *Dubois*, 238 F. 3d 153, 163, n. 11 (CA2 2001) (*Blondin II*).

The Second Circuit's categorical requirement to consider all ameliorative measures is inconsistent with the text and other express requirements of the Hague Convention.

I

A

The Hague Convention "was adopted in 1980 in response to the problem of international child abductions during domestic disputes." *Abbott* v. *Abbott*, 560 U. S. 1, 8 (2010). One hundred and one countries, including the United States and Italy, are signatories. Hague Conference on Private Int'l Law, Convention of 25 Oct. 1980 on the Civil Aspects of Int'l Child Abduction, Status Table, https://www.hcch.net/en/instruments/conventions/status-table/?cid=24.

The Convention's "core premise" is that "'the interests of children . . . in matters relating to their custody' are best served when custody decisions are made in the child's country of 'habitual residence.'" *Monasky* v. *Taglieri*, 589 U. S. ___, ___ (2020) (slip op., at 2) (quoting Convention Preamble, Treaty Doc., at 7). Accordingly, the Convention generally requires the "prompt return" of a child to the child's country of habitual residence when the child has been wrongfully removed to or retained in another country. Art. 1(a), Treaty Doc., at 7; see also Art. 12, *id.,* at 9.[1] This requirement "ensure[s] that rights of custody and of access

[1] The Convention defines a "wrongful" removal or retention as one that breaches existing custody rights "under the law of the State in which the child was habitually resident immediately before the removal or retention" if those rights "were actually exercised" or "would have been so exercised but for the removal or retention." Art. 3, Treaty Doc., at 7.

under the law of one Contracting State are effectively respected in the other Contracting States." Art. 1(b), *id.,* at 7.

Return of the child is, however, a general rule, and there are exceptions. As relevant here, the Convention provides that return is not required if "[t]here is a grave risk that . . . return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Art. 13(b), *id.,* at 10.[2] Because return is merely "a 'provisional' remedy that fixes the forum for custody proceedings," *Monasky*, 589 U. S., at ___ (slip op., at 3), the Convention requires that the determination as to whether to order return should be made "us[ing] the most expeditious procedures available," Art. 2, Treaty Doc., at 7; see also Art. 11, *id.,* at 9 (providing that the party petitioning for return has "the right to request a statement of the reasons for the delay" if the court "has not reached a decision within six weeks from the date of commencement of the proceedings").

Congress implemented the Convention in the International Child Abduction Remedies Act (ICARA), 102 Stat. 437, as amended, 22 U. S. C. §9001 *et seq*. ICARA permits a parent (or other individual or institution) seeking relief under the Convention to file a petition for return of a child in state or federal court, §§9003(a)–(b), and directs courts to "decide the[se] case[s] in accordance with the Convention," §9003(d). Consistent with the Convention, ICARA "empower[s] courts in the United States to determine only

[2]The Convention also enumerates several other exceptions to the return requirement. Return is not required if the parent, institution, or body having care of the child seeking return was not exercising custody rights at the time of removal or had consented to removal, if the child objects to return and "has attained an age and degree of maturity at which it is appropriate to take account of its views," or if return would conflict with fundamental principles of freedom and human rights in the country from which return is requested. Arts. 13, 20, Treaty Doc., at 10, 11.

rights under the Convention and not the merits of any underlying child custody claims." §9001(b)(4); see Art. 19, Treaty Doc., at 11 ("A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue").

Under ICARA, the party petitioning for the child's return bears the burden of establishing by a preponderance of the evidence that the child was wrongfully removed or retained. §9003(e)(1). If the court finds the child was wrongfully removed or retained, the respondent opposing return of the child has the burden of establishing that an exception to the return requirement applies. §9003(e)(2). A respondent arguing that return would expose the child to a grave risk of harm must establish that this exception applies by "clear and convincing evidence." §9003(e)(2)(A). Absent a finding that an exception applies, a child determined to be wrongfully removed or retained must be "promptly returned" to the child's country of habitual residence. §9001(a)(4).

B

Petitioner Narkis Golan is a citizen of the United States. She met respondent Isacco Saada, an Italian citizen, while attending a wedding in Milan, Italy, in 2014. Golan soon moved to Milan, and the two wed in August 2015. Their son, B. A. S., was born the next summer in Milan, where the family lived for the first two years of B. A. S.' life.

The following facts, as found by the District Court, are not in dispute. Saada and Golan's relationship was characterized by violence from the beginning. The two fought on an almost daily basis and, during their arguments, Saada would sometimes push, slap, and grab Golan and pull her hair. Saada also yelled and swore at Golan and frequently insulted her and called her names, often in front of other people. Saada once told Golan's family that he would kill her. Much of Saada's abuse of Golan occurred in front of his son.

In July 2018, Golan flew with B. A. S. to the United States to attend her brother's wedding. Rather than return as scheduled in August, however, Golan moved into a domestic violence shelter with B. A. S. In September, Saada filed in Italy a criminal complaint for kidnapping and initiated a civil proceeding seeking sole custody of B. A. S.

Saada also filed a petition under the Convention and ICARA in the U. S. District Court for the Eastern District of New York, seeking an order for B. A. S.' return to Italy. The District Court granted Saada's petition after a 9-day bench trial. As a threshold matter, the court determined that Italy was B. A. S.' habitual residence and that Golan had wrongfully retained B. A. S. in the United States in violation of Saada's rights of custody. The court concluded, however, that returning B. A. S. to Italy would expose him to a grave risk of harm. The court observed that there was "no dispute" that Saada was "violent—physically, psychologically, emotionally, and verbally—to" Golan and that "B. A. S. was present for much of it." App. to Pet. for Cert. 79a. The court described some of the incidents B. A. S. had witnessed as "chilling." *Ibid.* While B. A. S. was not "the target of violence," undisputed expert testimony established that "domestic violence disrupts a child's cognitive and social-emotional development, and affects the structure and organization of the child's brain." *Id.,* at 79a–80a, and n. 37.[3] Records indicated that Italian social services, who had been involved with the couple while they lived in Italy, had also concluded that "'the family situation entails a developmental danger' for B. A. S.*"* *Id.,* at 80a. The court found that Saada had demonstrated no "capacity to change his behavior," explaining that Saada "minimized or tried to excuse his violent conduct" during his testimony and that Saada's "own expert said . . . that [Saada] could not control his anger or take responsibility for his behavior." *Ibid.*

The court nonetheless ordered B. A. S.' return to Italy based on Second Circuit precedent obligating it to "'examine the full range of options that might make possible the safe return of a child to the home country'" before it could "'deny repatriation on the ground that a grave risk of harm exists.'" *Id.,* at 81a (quoting *Blondin II*, 238 F. 3d, at 163, n. 11). The Second Circuit based this rule on its view that the Convention requires return "if at all possible." *Blondin I*, 189 F. 3d, at 248. To comply with these precedents, the District Court had required the parties to propose "'ameliorative measures'" that could enable B. A. S.' safe return. App. to Pet. for Cert. 81a.[4] Saada had proposed that he would provide Golan with $30,000 for expenses pending a decision in Italian courts as to financial support, stay away from Golan until the custody dispute was resolved, pursue dismissal of the criminal charges he had filed against Golan, begin cognitive behavioral therapy, and waive any right to legal fees or expenses under the Convention. The court concluded that these measures, combined with the fact that Saada and Golan would be living separately, would "reduce the occasions for violence," thereby ameliorating the grave risk to B. A. S. sufficiently to require his return. *Id.*, at 81a–82a.

On Golan's appeal of this return order, the Second Circuit

[3] The court noted that "[t]here were isolated incidents of possible abuse" of B. A. S. based on Golan's testimony that Saada had inadvertently hit and pushed B. A. S. while targeting her and Golan's brother's testimony that Saada had spanked B. A. S. aggressively, accusations that Saada disputed. App. to Pet. for Cert. 79a, n. 37; see *id.,* at 54a–55a, 61a.

[4] Courts of Appeals use the terms "undertakings" and "ameliorative measures" interchangeably. See, *e.g., Blondin I*, 189 F. 3d 240, 248 (CA2 1999) (referring to "ameliorative measures"); *Simcox* v. *Simcox*, 511 F. 3d 594, 604–606 (CA6 2007) (referring to "undertakings"). Although Saada asserts that the latter is broader than the former, he does not argue that the difference is determinative in this case. Accordingly, we use "ameliorative measures," the term employed by the Second Circuit in this case.

vacated the order, finding the District Court's measures insufficient to mitigate the risk of harm to B. A. S. Emphasizing that the District Court's factual findings provided "ample reason to doubt that Mr. Saada will comply with these conditions," the Second Circuit concluded that "the District Court erred in granting the petition subject to (largely) unenforceable undertakings" without "sufficient guarantees of performance." 930 F. 3d 533, 540, 542–543 (2019). Because the record did "not support the conclusion that there exist *no* protective measures sufficient to ameliorate the grave risk of harm B. A. S. faces if repatriated," the court remanded for the District Court to "consider whether there exist alternative ameliorative measures that are either enforceable by the District Court or supported by other sufficient guarantees of performance." *Id.,* at 543 (emphasis added).

To comply with the Second Circuit's directive, over the course of nine months, the District Court conducted "an extensive examination of the measures available to ensure B. A. S.'s safe return to Italy." App. to Pet. for Cert. 12a. The District Court directed the parties to appear for status conferences and to submit status reports and supplemental briefs, and the court corresponded with the U. S. Department of State and the Italian Ministry of Justice. At the court's instruction, the parties petitioned the Italian courts for a protective order, and the Italian court overseeing the underlying custody dispute issued a protective order barring Saada from approaching Golan for one year. In addition, the Italian court ordered that an Italian social services agency oversee Saada's parenting classes and therapy and that visits between Saada and B. A. S. be supervised.[5]

The District Court concluded that these measures were sufficient to ameliorate the harm to B. A. S. and again

[5] Separately, the Italian criminal court dismissed the kidnapping charges against Golan.

granted Saada's petition for B. A. S.' return. It rejected Golan's argument that Saada could not be trusted to comply with a court order, expressing confidence in the Italian courts' abilities to enforce the protective order. The District Court additionally ordered Saada to pay Golan $150,000 to facilitate B. A. S.' return to Italy and to cover Golan's and B. A. S.' living costs while they resettled. The Second Circuit affirmed, concluding that the District Court did not clearly err in determining that Saada likely would comply with the Italian protective order, given his compliance with other court orders and the threat of enforcement by Italian authorities of its order. 833 Fed. Appx. 829 (2020).

This Court granted certiorari to decide whether the Second Circuit properly required the District Court, after making a grave-risk finding, to examine a full range of possible ameliorative measures before reaching a decision as to whether to deny return, and to resolve a division in the lower courts regarding whether ameliorative measures must be considered after a grave-risk finding.[6] 595 U. S. ___ (2021).

II
A

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Abbott*, 560 U. S., at 10 (internal quotation marks omitted). As described above, when "a child has been wrongfully removed or retained" from his country of habitual residence, Article 12 of the Hague Convention generally requires the deciding authority (here, a district court) to "order the return of the child." Treaty Doc.,

[6] Compare *In re Adan*, 437 F. 3d 381, 395 (CA3 2006) (requiring consideration of ameliorative measures); *Gaudin* v. *Remis*, 415 F. 3d 1028, 1035 (CA9 2005) (same); *Blondin II*, 238 F. 3d 153, 163, n. 11 (CA2 2001) (same), with *Acosta* v. *Acosta*, 725 F. 3d 868, 877 (CA8 2013) (consideration not required in all circumstances); *Baran* v. *Beaty*, 526 F. 3d 1340, 1346–1352 (CA11 2008) (same); *Danaipour* v. *McLarey*, 386 F. 3d 289, 303 (CA1 2004) (same).

at 9. Under Article 13(b) of the Convention, however, a court "is not bound to order the return of the child" if the court finds that the party opposing return has established that return would expose the child to a "grave risk" of physical or psychological harm. *Id.,* at 10. By providing that a court "is not bound" to order return upon making a grave-risk finding, Article 13(b) lifts the Convention's return requirement, leaving a court with the discretion to grant or deny return.

Nothing in the Convention's text either forbids or requires consideration of ameliorative measures in exercising this discretion. The Convention itself nowhere mentions ameliorative measures. Nor does ICARA, which, as relevant, instructs courts to "decide the case in accordance with the Convention" and accordingly leaves undisturbed the discretion recognized in the Convention. 22 U. S. C. §9003(d). The longstanding interpretation of the Department of State offers further support for the view that the Convention vests a court with discretion to determine whether to order return if an exception to the return mandate applies. See 51 Fed. Reg. 10510 (1986) (explaining that "a court in its discretion need not order a child returned" upon a finding of grave risk); see also *Abbott*, 560 U. S., at 15 (explaining that the Executive Branch's interpretation of the Convention "is entitled to great weight" (internal quotation marks omitted)).

Unable to point to any explicit textual mandate that courts consider ameliorative measures, Saada's primary argument is that this requirement is implicit in the Convention's command that the court make a determination as to whether a grave risk of harm exists. Essentially, Saada argues that determining whether a grave risk of harm exists necessarily requires considering whether any ameliorative measures are available.

The question whether there is a grave risk, however, is separate from the question whether there are ameliorative

measures that could mitigate that risk. That said, the question whether ameliorative measures would be appropriate or effective will often overlap considerably with the inquiry into whether a grave risk exists. See *Simcox* v. *Simcox*, 511 F. 3d 594, 607–608 (CA6 2007) (explaining that the appropriateness and utility of ameliorative measures correlate with the gravity of the risk to the child). In many instances, a court may find it appropriate to consider both questions at once. For example, a finding of grave risk as to a part of a country where an epidemic rages may naturally lead a court simultaneously to consider whether return to another part of the country is feasible. The fact that a court may consider ameliorative measures concurrent with the grave-risk determination, however, does not mean that the Convention imposes a categorical requirement on a court to consider any or all ameliorative measures before denying return once it finds that a grave risk exists.[7]

Under the Convention and ICARA, district courts' discretion to determine whether to return a child where doing so would pose a grave risk to the child includes the discretion

[7] Saada argues that the approach of other signatory countries, including the United Kingdom, supports the position that consideration of ameliorative measures is required. See, *e.g., In re E*, [2011] UKSC 27 ¶52 (stating that the focus of the return inquiry should be on the sufficiency of protective measures where there are disputed allegations of domestic violence). The Hague Conference on Private International Law's Guide to Good Practice, which the Hague Conference issued to encourage consistent application of the grave-risk exception internationally, also offers some support for this position, explaining that courts generally should consider "the circumstances as a whole, including whether adequate measures of protection are available." 1980 Child Abduction Convention: Guide to Good Practice, Pt. VI, Art. 13(1)(b), p. 31, ¶41 (2020). The Convention itself, however, leaves contracting states free to require or not require consideration of ameliorative measures, and consistent with most signatory countries outside the European Union, see, *e.g., Arthur & Secretary, Dept. of Family & Community Servs. and Anor*, [2017] FamCAFC 111 ¶69 (Austl.), Congress has not chosen to require such consideration.

whether to consider ameliorative measures that could ensure the child's safe return. The Second Circuit's rule, "in practice, rewrite[s] the treaty," *Lozano* v. *Montoya Alvarez*, 572 U. S. 1, 17 (2014), by imposing an atextual, categorical requirement that courts consider all possible ameliorative measures in exercising this discretion, regardless of whether such consideration is consistent with the Convention's objectives (and, seemingly, regardless of whether the parties offered them for the court's consideration in the first place). See *Blondin I*, 189 F. 3d, at 249 (requiring district court not to "limit itself to the single alternative placement initially suggested by [the appellant]" but instead affirmatively to "develop a thorough record to facilitate its decision," including by "mak[ing] any appropriate or necessary inquiries" of the government of the country of habitual residence and invoking the aid of the Department of State).

B

While consideration of ameliorative measures is within a district court's discretion, "[d]iscretion is not whim." *Martin* v. *Franklin Capital Corp.*, 546 U. S. 132, 139 (2005). A "motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Ibid.* (internal quotation marks and alteration omitted). As a threshold matter, a district court exercising its discretion is still responsible for addressing and responding to nonfrivolous arguments timely raised by the parties before it. While a district court has no obligation under the Convention to consider ameliorative measures that have not been raised by the parties, it ordinarily should address ameliorative measures raised by the parties or obviously suggested by the circumstances of the case, such as in the example of the localized epidemic. See *supra,* at 10.

In addition, the court's consideration of ameliorative measures must be guided by the legal principles and other

requirements set forth in the Convention and ICARA. The Second Circuit's rule, by instructing district courts to order return "if at all possible," improperly elevated return above the Convention's other objectives. *Blondin I*, 189 F. 3d, at 248. The Convention does not pursue return exclusively or at all costs. Rather, the Convention "is designed to protect the interests of children and their parents," *Lozano*, 572 U. S., at 19 (ALITO, J., concurring), and children's interests may point against return in some circumstances. Courts must remain conscious of this purpose, as well as the Convention's other objectives and requirements, which constrain courts' discretion to consider ameliorative measures in at least three ways.

First, any consideration of ameliorative measures must prioritize the child's physical and psychological safety. The Convention explicitly recognizes that the child's interest in avoiding physical or psychological harm, in addition to other interests, "may overcome the return remedy." *Id.,* at 16 (majority opinion) (cataloging interests).[8] A court may therefore decline to consider imposing ameliorative measures where it is clear that they would not work because the risk is so grave. Sexual abuse of a child is one

[8]The explanatory report for the Convention, which is "recognized by the [Hague] Conference as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention," supports this understanding. 51 Fed. Reg. 10503. The explanatory report describes that the general "interest of the child in not being removed from its habitual residence," the foundation for the general return principle, "gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation." 1980 Conférence de La Haye de droit international privé, Enlèvement d'enfants, E. Pérez-Vera, Explanatory Report, in 3 Actes et documents de la Quatorzième session, p. 433, ¶29 (1982). This Court has repeatedly referenced the report in Hague Convention cases, without "decid[ing] whether this Report should be given greater weight than a scholarly commentary." *Abbott* v. *Abbott*, 560 U. S. 1, 19 (2010); see, *e.g., Monasky* v. *Taglieri*, 589 U. S. ___, ___, n. 2 (2020) (slip op., at 8, n. 2).

example of an intolerable situation. See 51 Fed. Reg. 10510. Other physical or psychological abuse, serious neglect, and domestic violence in the home may also constitute an obvious grave risk to the child's safety that could not readily be ameliorated. A court may also decline to consider imposing ameliorative measures where it reasonably expects that they will not be followed. See, *e.g., Walsh* v. *Walsh*, 221 F. 3d 204, 221 (CA1 2000) (providing example of parent with history of violating court orders).

Second, consideration of ameliorative measures should abide by the Convention's requirement that courts addressing return petitions do not usurp the role of the court that will adjudicate the underlying custody dispute. The Convention and ICARA prohibit courts from resolving any underlying custody dispute in adjudicating a return petition. See Art. 16, Treaty Doc., at 10; 22 U. S. C. §9001(b)(4). Accordingly, a court ordering ameliorative measures in making a return determination should limit those measures in time and scope to conditions that would permit safe return, without purporting to decide subsequent custody matters or weighing in on permanent arrangements.[9]

Third, any consideration of ameliorative measures must accord with the Convention's requirement that courts "act expeditiously in proceedings for the return of children."

[9]The Department of State expressed this view in a 1995 letter to a United Kingdom official, emphasizing that any ameliorative measures ordered to facilitate return "should be limited in scope and further the Convention's goal of ensuring the prompt return of the child" and that measures that "address in great detail issues of custody, visitation, and maintenance" would be "questionable" given the Convention's reservation of custody issues for resolution in the country of the child's habitual residence. App. to Brief for United States as *Amicus Curiae* on Pet. for Cert. 2a (Letter from C. Brown, Assistant Legal Adviser for Consular Affairs, U. S. Dept. of State, to M. Nicholls, Lord Chancellor's Dept., Child Abduction Unit, United Kingdom (Aug. 10, 1995)).

Art. 11, Treaty Doc., at 9.[10] Timely resolution of return petitions is important in part because return is a "provisional" remedy to enable final custody determinations to proceed. *Monasky*, 589 U. S., at ___ (slip op., at 3) (internal quotation marks omitted). The Convention also prioritizes expeditious determinations as being in the best interests of the child because "[e]xpedition will help minimize the extent to which uncertainty adds to the challenges confronting both parents and child." *Chafin* v. *Chafin*, 568 U. S. 165, 180 (2013). A requirement to "examine the full range of options that might make possible the safe return of a child," *Blondin II*, 238 F. 3d, at 163, n. 11, is in tension with this focus on expeditious resolution. In this case, for example, it took the District Court nine months to comply with the Second Circuit's directive on remand. Remember, the Convention requires courts to resolve return petitions "us[ing] the most expeditious procedures available," Art. 2, Treaty Doc., at 7, and to provide parties that request it with an explanation if proceedings extend longer than six weeks, Art. 11, *id.,* at 9. Courts should structure return proceedings with these instructions in mind. Consideration of ameliorative measures should not cause undue delay in resolution of return petitions.

To summarize, although nothing in the Convention prohibits a district court from considering ameliorative measures, and such consideration often may be appropri-

[10]Conferring with other countries, when necessary to resolve a petition, need not take long. The Hague Conference on Private International Law, the intergovernmental organization that adopted the Hague Convention, has an extensive list of cases and references to practices of virtually all the signatory countries. Moreover, the Conference has established a network of judges in signatory countries who are available to engage in direct judicial communications about the application of the Convention. See Hague Conference on Private Int'l Law, The International Hague Network of Judges, https://www.hcch.net/en/instruments/conventions/specialised-sections/child-abduction/ihnj.

ate, a district court reasonably may decline to consider ameliorative measures that have not been raised by the parties, are unworkable, draw the court into determinations properly resolved in custodial proceedings, or risk overly prolonging return proceedings. The court may also find the grave risk so unequivocal, or the potential harm so severe, that ameliorative measures would be inappropriate. Ultimately, a district court must exercise its discretion to consider ameliorative measures in a manner consistent with its general obligation to address the parties' substantive arguments and its specific obligations under the Convention. A district court's compliance with these requirements is subject to review under an ordinary abuse-of-discretion standard.

III

The question now becomes how to resolve the instant case. Golan urges that this Court reverse, arguing that the ameliorative measures adopted by the District Court are inadequate for B. A. S.' protection and otherwise improper. The United States, as *amicus curiae*, suggests remanding to allow the District Court to exercise its discretion in the first instance under the correct legal standard. Brief for United States as *Amicus Curiae* 32.

Under the circumstances of this case, this Court concludes that remand is appropriate. The Convention requires courts to make a discretionary determination as to whether to order return after making a finding of grave risk. The District Court made a finding of grave risk, but never had the opportunity to engage in the discretionary inquiry as to whether to order or deny return under the correct legal standard. This Court cannot know whether the District Court would have exercised its discretion to order B. A. S.' return absent the Second Circuit's rule, which improperly weighted the scales in favor of return. Accordingly, it is appropriate to follow the ordinary course and allow the District Court to apply the proper legal standard in the first instance. Cf. *Monasky*, 589 U. S., at ___–___ (slip op., at 16–17) (declining to follow the "[o]rdinar[y]" course of ordering remand where the determination in question was nondiscretionary and there was no "reason to anticipate that the District Court's judgment would change on a remand").

Remand will as a matter of course add further delay to a proceeding that has already spanned years longer than it should have. The delay that has already occurred, however, cannot be undone. This Court trusts that the District Court will move as expeditiously as possible to reach a final decision without further unnecessary delay. The District Court has ample evidence before it from the prior proceedings and has made extensive factual findings concerning the risks at issue. Golan argues that the ameliorative measures ordered intrude too greatly on custodial determinations and that they are inadequate to protect B. A. S.' safety given the District Court's findings that Saada is unable to control or take responsibility for his behavior. The District Court should determine whether the measures in question are adequate to order return in light of its factual findings concerning the risk to B. A. S., bearing in mind that the Convention sets as a primary goal the safety of the child.

* * *

The judgment of the United States Court of Appeals for the Second Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Recent Legislation, Cases and Trends in Matrimonial Law

By Wendy B. Samuelson

RECENT LEGISLATION

Adult Survivors Act becomes law, opening legal options for sexual assault survivors

In 2019, Albany passed the Child Victims Act (CVA), which extended the criminal and civil statutes of limitations and opened a one-year "lookback window" to allow victims of childhood sexual abuse to sue their abusers and the co-conspiratorial institutions that facilitated their abuse, regardless of how long ago the crimes occurred.

In the three years since the CVA's passage, more than 10,000 victims have used that window to take the first steps towards justice, filing civil suits against their attackers.

On May 24, 2022, Governor Hochul followed up on the CVA's success, signing the Adult Survivors Act (ASA), which creates a lookback window for those who suffered sexual violence as adults. This window for the statute of limitations-immune lawsuits opens six months after the Act's passage (November 24, 2022) and closes one year later (November 24, 2023).

The ASA, which was sponsored by Assemblymember Linda Rosenthal and Senator Brad Hoylman and passed with overwhelming support in the State Assembly and Senate, was greeted with adulation and relief by a wide array of victims and advocates. Liz Roberts, head of Safe Horizons, a New York nonprofit that provides services for victims of abuse, called the act "monumental." In a statement, Roberts expressed gratitude to the Act's sponsors and credited the efforts of survivors who spent years "retelling their stories and reliving their trauma endlessly, pleading with legislators to make them a priority."

State's legislative session ends without determining the issue of salary increase to 18B attorneys

The number of attorneys participating in the Assigned Counsel Plan has been rapidly dwindling, as inflation has soared and the plan's pay scale remains stagnant. New York currently pays 18B attorneys $60 an hour for misdemeanor cases, and $75 an hour for Supreme, Family and Criminal Court cases. On June 2, 2022, the state's legislative session ended once again without passing a pay increase.

The minuscule rates, which haven't been increased in 18 years, have left thousands of children and indigent defendants without timely access to counsel, as a diminishing roll of 18B attorneys cannot afford to participate in the program. The frozen pay scale has also clogged the Family Court's calendar with custody and neglect cases that need to be adjourned until an attorney for the subject child can be found.

In 2021, the New York County Lawyers Association, which played a significant role in the creation and implementation of the Assigned Counsel Plan, sued the state, demanding that it increase the wages for 18B attorneys to $158 an hour, the rate for assigned counsel in New York's federal courts. The NYCLA case is currently being considered by the New York County Supreme Court.

The NYCLA's push for a pay increase has received support from a broad spectrum of legal organizations, including the New York City Family Court Judges Association. In January, the organization wrote an open letter to Governor Hochul advocating for the increase. "As judges, we observe daily the heartbreaking impact the inadequate supply of attorneys has on the children and families who come before us, and it is not an overstatement to assert that our system for providing counsel to indigent litigants in Family Court is in a crisis," the association wrote.

In contrast, the governor's office has offered a baffling jumble of contradicting positions, advocating for and aggressively opposing the proposed increase. In April, Hochul told reporters that she supported the pay increase and said that 18B attorneys "absolutely need this, the work they do is so critical." But, she said, the state should hold off on passing legislation to increase rate while the proposed increase is still winding its way through the courts. At the same time, Hochul's lawyers have continued to fight the NYCLA in court, arguing that the court should leave the issue of 18B attorney pay to the Legislature.

We will continue to cover this issue as it moves through the courts and Legislature and will provide an update for you in our next column.

CHILD SUPPORT

Father must pay his share of college costs, even after children turn 21

***Pape v. Pape*, 205 A.D.3d 920, 166 N.Y.S.3d 574 (2d Dep't 2022)**

The parties' divorce agreement required the father to pay 50% of his two children's college costs, for the first four years of college. It also provided that the father would receive a room and board credit against any child support paid.

In 2019, when the oldest child turned 21, the father stopped paying his share of the academic expenses, citing the child's age. In response, the mother filed a petition in Suffolk County Supreme Court to enforce the financial obligations in the settlement agreement. The father argued that his obligation to pay part of the college tuition had ended now that their child had reached the age of emancipation.

After the Suffolk County Supreme Court embraced the father's view, the mother appealed to the Second Department, which reversed the lower court's opinion and remitted the case for further hearings on the college expense arrears.

The appellate court held, "In the absence of a voluntary agreement, a parent may not be directed to contribute to the college education of a child who has attained the age of 21 years. (*See Sinnott v. Sinnott*, 194 A.D.3d 868, 149 N.Y.S.3d 441; *Calvello v. Calvello*, 20 A.D.3d 525, 527, 800 N.Y.S.2d 429; *Miller v. Miller*, 299 A.D.2d 463, 464, 750 N.Y.S.2d 112)." But here there was a voluntary agreement that specified the duration of the obligation (four years of college). The lower court "may not write into a contract conditions the parties did not insert [themselves], nor may it construe the language in such a way as would distort the contract's apparent meaning." (*See Fleming v. Fleming*, 137 A.D.3d 1206, 28 N.Y.S.3d 440.).

FAMILY OFFENSE

Father who claims he was assaulted by mother after stealing her counsel's computer is permitted a hearing

***Walter Q. v. Stephanie R.*, 201 A.D.3d 1142 (3d Dep't 2022)**

The wife filed petitions with the Tompkins County Supreme Court, alleging that her husband had committed a family offense and requesting that she be granted sole custody of their son. The court granted both of her petitions and issued a full stay-away order, barring the father from appearing at the

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mother's home. When the father decided to drop by anyway, in clear violation of the order, he was prosecuted and convicted for criminal contempt and sentenced to jail.

In June 2019, after his release, the parties' custody wrangling continued, and they returned to the courthouse for a deposition. For the proceeding, the mother's attorney brought a laptop that contained the parties' financial information. Moving fast and again disregarding the law, the father swiped the computer during a break in questioning and fled the scene. The police were called, and the mother, alerted to the theft on her way to the deposition, identified the father in the street, ambling away from the courthouse with the stolen computer in hand.

In response, she jumped out of her car, dialed 911, and chased after the father, who evaded capture by boarding a bus and fleeing the scene. Soon after, the father filed a family offense petition against the mother, claiming that after chasing him down, she grabbed him, hit him, and yelled obscenities at him, causing him to burst into tears, seek help from onlookers, and call the police.

The mother moved to dismiss the father's petition. The attorney for the child moved the court to dismiss the petition as well, asserting that the father failed to state a claim and, alternatively, seeking summary judgment. The court granted the motions, obviating the need for a hearing on the facts.

The father appealed, and the appellate court granted his appeal and reversed the lower court's ruling, remitting the matter to the court for a hearing on the facts.

The question before the court, the appellate court noted, was "whether [the father's] petition sufficiently alleges an enumerated family offense, which requires a court to afford the petition a liberal construction, accept the allegations contained therein as true and grant the petitioner the benefit of every favorable inference." (*See Christina Z. v. Bishme AA.*, 132 A.D.3d 1102; *Craig O. v. Barbara P.*, 118 A.D.3d 1068 [2014].) By alleging in his affidavit that the mother grabbed, hit, and verbally abused him, the father sufficiently described actions that, if true, would constitute a criminal offense and perhaps even the family offense of harassment in the second degree. (*See* Penal Law § 240.26[1],[2]; *Jodi S. v. Jason T.*, 85 A.D.3d 1239 [2011].)

Granting summary judgment, the appellate court ruled, was error because it is a "drastic procedural device which will be found appropriate only in those circumstances when it has been clearly ascertained that there is no triable issue of fact." The AFC argued that no triable issue existed because the mother's 911 call, admitted into evidence under the "excited utterance" hearsay exception, provided auditory proof that no physical attack occurred.

But the 911 recording presented only a partial view of the encounter, as the audio began after the chase and subsequent confrontation was in progress. For a full, fair consideration of the father's allegations, the court should have denied the mother's and AFC's motions and granted the father a fact-finding hearing.

CUSTODY/VISITATION

Father's inappropriate in-court interruptions of the judge don't obviate need for custody hearing

***Corcoran v. Liebowitz*, 204 A.D.3d 910 (2d Dep't 2022)**

The parties' divorce agreement provided for joint custody of their two children. Three years after the divorce, the mother petitioned the Westchester County Family Court for sole custody. The Family Court granted her motion without even allowing for a hearing.

The father appealed, and the appellate court granted his appeal in part, remitting the custody question back to the lower court.

As the appellate court explained, a parent seeking to modify a custody order, claiming a sufficient change in circumstances, isn't automatically owed a hearing. The Family Court's refusal to grant the father a hearing was in the form of punishment to the father for his disrespect of the court rather than for determining the children's best interests. "The Court abruptly awarded sole legal custody of both children to the mother in response" to the father's blurting out that the court was being "ridiculous." In the face of such open disrespect, the court informed the father, "[Your] interjections changed my mind. . . . I was going to give you the option . . . to remain a joint custodian, but . .. you didn't let me even finish my thought."

The appellate court remanded the matter for a hearing before the lower court, and under the circumstances, required a new judge be assigned for the hearing so that the defendant would not be prejudiced.

Court ends biological mother's visitations with adopted children

***Jennifer JJ. v. Jessica JJ.*, 203 A.D.3d 1444 (3d Dep't 2022)**

In 2017 an Otsego County couple adopted a boy and girl. Recognizing the value to adopted children of continued contact with their birth mother, the couple entered into a post-adoption visitation agreement with the children's biological mother, granting her two supervised visits each year, along with occasional photos of the children. The Family Court incorporated the agreement into its adoption order.

Two years later, the adoptive mother filed a petition to modify the post-adoption agreement, asserting that the ongoing visits were not in the children's best interests. In response,

the birth mother filed a cross-petition alleging that the adoptive mom refused to bring the son for their recent scheduled visit, in violation of the court's order.

Following a hearing, the Family Court ended the birth mother's visitation rights. The birth mother appealed. The Third Department affirmed the lower court's ruling.

Under DRL § 112–b(4), birth parents and adoptive parents may enter into post-adoption agreements for visitation that can be enforced by Family Court, but they can be modified if it's no longer in the children's best interests.

Here, the adoptive mother presented ample evidence that her son's visits with his biological mother were creating a radical disturbance in his behavior. A therapist who had been treating the boy testified that he had autism and, due to his medical condition, would become deeply agitated by alterations in his schedule. The adoptive mother testified that after being sent to visit his biological mother, the son would return home "completely out of control," destroying rooms in her house, hitting his friends, and hurting his sister—serious behavioral changes that didn't subside for several months. Additional testimony revealed that the daughter had also become increasingly disturbed by the visits with her birth mother. After a December 2017 visit, she had a series of nightmares and began banging her head.

The Family Court embraced the testimony of the adoptive mother and therapist as credible, and therefore the Family Court's determination that it is in the children's best interests to terminate post-adoption contact with the biological mother was supported by a sound and substantial basis in the record.

EQUITABLE DISTRIBUTION

Court properly granted wife 50% ownership of family's car wash business

***Keren v. Keren*, 201 A.D.3d 906 (2d Dep't 2022)**

During their 25-year marriage, the parties acquired a partial ownership of a car wash company, Manhattan Bridge Car Wash Inc. The company owned a lease to a car wash in Brooklyn, before selling that lease in 2007 and using the proceeds to buy a building in Manhattan. The company sold that building, and used those proceeds to buy a building in Huntington, which was leased by Walgreens.

When the parties commenced divorce proceedings, the battle began for possession of the car wash company and its assets. The husband argued for full ownership of the corporate assets because he claimed it was derived from a separate property gift from his brother, a contention the wife disputed. At trial, the husband presented testimony from his brother, who claimed that he had gifted his interest in the car wash company. But, the husband had no documents to support that claim. The court found the brother's testimony incredible. The lower court granted the wife 50% of the husband's interest in the company and 50% of his interest in the Huntington property, in the event that it was ever sold.

The husband appealed. The appellate court affirmed the lower court's decision. The appellate court reasoned that the trial court did not abuse its discretion, particularly where the parties "were involved" in the car wash business during their long-term, 25-year marriage. There were no specific facts cited by the court regarding each party's participation and roles in the car wash business.

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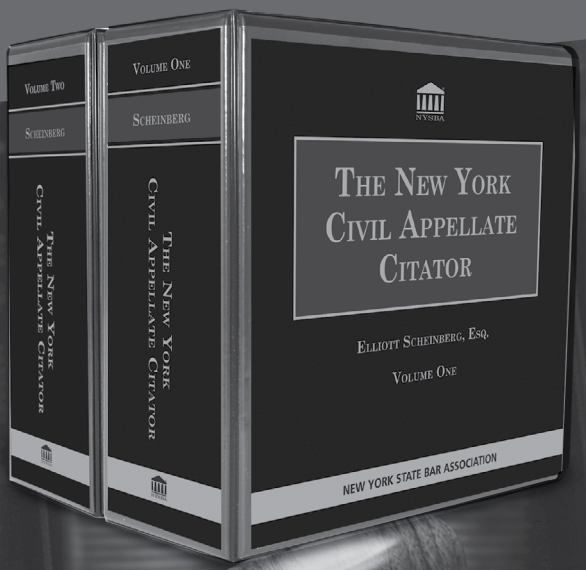

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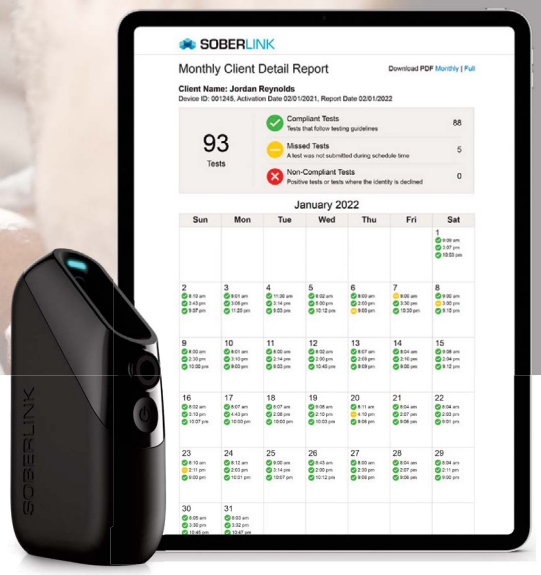

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