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Statement

The Commission's Process and Recommendations

The Honorable Sondra Miller

Chief Judge Judith Kaye - a long time champion of court reform, adopted the families and children of this state early in her judicial career and made them a top priority. Although substantial improvement had been made since the implementation of the Milonas Commission in 1993 - the matrimonial and child custody area of the law still required more attention. To that end, Chief Judge Kaye established the multi disciplinary Miller Commission in January 2004 and provided me with the opportunity and privilege of Chairing the Commission. The composition of the Commission members included judges, attorneys, a law professor, a CPA, a mental health professional, advocates of victims of domestic violence and an ADR professional.

The Commission was charged with taking a global view of the practices of the divorce and custody dispute processes in New York State and recommending reforms to correct existing problems. It held a series of public hearings at various locations throughout New York State - which included Albany, Buffalo, New York City and White Plains. The Commission reviewed written submissions and other written information. Additionally, it met with bar associations and other interested agencies.

What became evident during the course of the Commission's work was an overall dissatisfaction by the public, the bench and the bar with the litigation processes in supreme and family courts dealing with matrimonial and family law related matters. The Commission recognized the need to change the

very culture of the system and to make explicit recommendations to reduce trauma, cost and delay.

After more than 20 months of conducting public hearings; reviewing the transcripts from those hearings, reports, surveys and letters; and much discussing and deliberating, the Commission provided recommendations included in the 70 pages of the Commission's report and more than 100 pages of the appendices.¹

The Recommendations included:

- The need to **change the culture** from divisiveness and bitterness to more understanding and cooperation. And toward that end - certain changes in language were important.
- **Language** - substitute **parenting time** for visitation - a term which has accumulated negative connotations failing to recognize that a non-custodial parent remains nonetheless a parent.
- Substitute **attorney for the child** for law guardian to correct misconceptions of their proper role as attorneys, not fiduciaries bearing established responsibilities, and ethical constraints as attorneys.
- **Administration of our Courts** - The Commission recommended:
 1. **Enhanced authority** and title for the statewide deputy chief administrative judge for matrimonial matters - which has been accomplished.
 2. **Additional resources** - due to exceptionally heavy calendars, i.e. additional law clerks, referees, social workers, etc.
 3. **Appropriate facilities** - case conferences for divorce and family disputes should not be held in lavatories and hallways.
 4. **Three-year terms** for supreme court judges where practicable, and the judges should take with them unfinished matters where appropriate for an 18-month period.

1. The report and appendices, as well as testimony, can be viewed at <http://www.courts.state.ny.us/ip/matrimonial-commission/index.shtml#report>. The text of the report is reprinted here as Appendix A.

5. **Early intervention and provision of services** should be further integrated into the court system statewide.
6. **Judges should be carefully selected** to serve on these courts since no courts require more extraordinary breadth of knowledge or temperament.
- **Improving the Process: Reducing delay and cost** - The report includes many recommendations to this end, some requiring legislation, others requiring court rule changes and administrative modification. Among them:
 1. **No fault divorce** - The Commission recommended legislation providing for no fault divorce where no judgment for divorce should be entered until all issues regarding maintenance, child support, equitable distribution and custody have been decided and incorporated into the decree. There is no doubt that fault trials exacerbate the time, expense, trauma and bitterness in divorce proceedings, and are often used merely as a tactic for delay.
 2. **Early intervention and provision of services** – See Appendix F.²
 3. **The use of a Model Preliminary Conference Order** – See Appendix D.³ The commission strongly urged that the courts and the bar utilize the order included in Appendix D of the Report, which the Commission believes will serve to expedite the process and eliminate unnecessary motion practice.
 4. **Model orders** - The Commission Report and Appendices contain several model orders and recommendations for rule changes including among them:
 - A. **Automatic orders** preventing the parties when filing their RJI's from transferring assets except in the ordinary course of business and for daily living expenses.
 - B. **Discretionary stays on appeal** - The Commission recommended the legislative modification of CPLR 5519 providing that automatic stays on ap-

2. *Id.*

3. *Id.*

peal EXCLUDE orders for child support, maintenance and counsel fees.

C. **Model orders pertaining to ATTORNEYS FOR THE CHILD, FORENSIC EXPERTS AND FINANCIAL EXPERTS** - See Appendices G, H, J and K.⁴ Such model orders if required, uniformly by court rule, should define the role, the payment and the responsibility of such experts, eliminating a substantial degree of confusion, inconsistency and litigation resulting from current ambiguities.

D. **Resolution orders** - Provide that where a party willfully fails to comply with court ordered discovery, the matter should be deemed determined in favor of the party demanding the discovery.

- **Parity Among the Courts** - The Commission recognized that due to our unique SPLIT SYSTEM, custody, parenting time and ancillary issues may be determined in both supreme and family courts, causing duplication and confusion and adding cost, delay and trauma to such proceedings. While the question of re-structuring the courts was not before the Commission, it made certain recommendations to alleviate the problems. Among them, the adoption of a rule allowing for the transfer to the supreme court of a family court matter where a divorce action is pending in the supreme court – when practicable. Where counsel was assigned in the family court, the Commission recommended that the assignment be continued in the supreme court. The legislature has already effectuated that recommendation.

Further, that a rule be adopted that any post-judgment application to modify a supreme court decree be brought in the supreme court if such action is brought within an **18-month period** after a divorce judgment has been entered.

- **Access and equity**

The Commission recognized the importance of equity and access to all parties involved in divorce and family litigation.

4. *Id.*

The Right to Counsel - the Commission recognized that the right to legal representation in contested matrimonial proceedings is essential to the fair and expeditious resolution of these cases. And to that end, the Commission recommended the expansion of assigned counsel and increased funding for legal services to provided representation to the low- and moderate-income litigants as being essential to the administration of justice.

Additionally, the Commission recommended that counsel have the obligation to advise their clients of alternatives to litigation, that they discuss ADR options with their clients and that section 1400.2 of the N.Y. Court Rules, the Statement of Client's Rights, be amended accordingly.

Also essential to the administration of justice, as noted by the Commission, is the recognition of the needs of a diverse population, increased sensitivity and understanding of various cultures.

• **Substantive law issues**

The Commission recommended that the legislature eliminate from New York divorce law the burdens of evaluating enhanced earning capacity as an asset, and abandon the doctrine established by *O'Brien v. O'Brien*.⁵ Such legislation would also require that the trial court consider a spouse's contribution to the development of the other's enhanced earning capacity in arriving at equitable distribution of the remaining marital property, and in appropriate cases, order maintenance that does not cease upon remarriage.

SIGNIFICANT CHANGES IN NEW YORK STATE

1. By court rule, judges are now authorized to mandate parties to attend parent education programs.
2. While mediation programs and services have been in place in the New York State Family Courts for the past 20 years, during the past two years, mediation has been introduced and has grown substantially throughout the state - so much so that mediation services are being offered and provided to families in custody and parenting

5. 66 N.Y.2d 576 (Ct. App. 1985).

disputes in Supreme Courts (N.Y. County, Suffolk County, Kings County and Erie County). Excellent training programs are being conducted by the New York State ADR Office so that mediators can be trained and utilized throughout the state.

3. Pilot projects are ongoing in various parts of the state - Nassau, Suffolk and the 8th judicial district in which various of the most significant reforms advocated in the report have been integrated.
4. Enhanced education and training for the judiciary, judicial hearing officers and the bar (specifically attorneys for the children) have been accomplished and are ongoing. Specialized training programs have been developed and offered to newly appointed judges, as well as for judges newly assigned to matrimonial or family court parts.
5. The administrative board will be studying the changes recommended by the Commission that can be effectuated by changes in the court rules.

Notwithstanding these significant gains, implementation of reform requires hard work and continued good faith and meaningful teamwork among the stakeholders. Following the publication of the report, Chief Judge Judith Kaye established the Office of Family Services, where I serve as Director, a proactive think tank to help develop best practices and work toward the changes envisioned by the Matrimonial Commission. Our first project was the organizing of a symposium. The Office of Court Administration, in conjunction with the Association of the Bar, Hofstra Law School and Pace Law School sponsored a day-long symposium, "Improving Justice for Children of Divorce and Separation," which was held on Friday, October 6, 2006, at the Association of the Bar. The purpose of the symposium was to gather interested professionals working within New York's matrimonial system to voice their suggestions and concerns and generate discussions about how implementation of these changes can be best accomplished. In addition to concerned professionals from all regions of New York, experts and professionals from other states were invited to speak and make suggestions based on their own experiences from their respective states, each of which has already implemented similar changes

with success. One hundred eighty-eight people were in attendance, including judges, lawyers, forensic and social science experts, professors, interested individuals, law school interns and law students.

The morning session presented a discussion of empirical data relating to the needs of children of divorce and separation with presentations from representatives of other states, including California, Connecticut and Florida, states that have already implemented similar programs to those recommended in the commission report. A large-group session then followed, focusing on overcoming resistance and obstacles that may pose barriers to implementing the recommended changes in matrimonial and custody cases; this session also included ideas and recommendations from professionals in other states. During the afternoon, the attendees split into small group sections to more candidly discuss individual concerns and suggestions. The symposium concluded with all participants coming back together in full to discuss what was heard throughout the small groups.

A synthesis of the resulting recommendations, serving as an addendum to the Commission's Report, was distributed to all attendees and will be further incorporated in our ongoing efforts to further the goals of the commission.

The "Post-Miller Commission Committee for Change"* has been formed since the conclusion of the Miller Commission Symposium. That Committee continues to work to assist in implementing the recommendations of the Commission. It is presently focused on efforts to effect the passage of no-fault legislation in New York, the only state still requiring fault for divorce where only one party wants out of a marriage.

Proposed rule changes, as recommended in the Commission Report, have been presented to the Administrative Board of the Courts of the State of New York and we have been assured they are being considered.

The increased use of mediation, parenting plans and parent education programs throughout the state, enlarged and im-

* Committee in formation: Hon. Sondra Miller, Anne-Marie Jolly, Esq., Prof. Andrew Schepard, Prof. Janet Johnson, Alton Abramowitz, Esq., Daniel Weitz, Esq., and Lucille Oppenheim, Esq.

proved training programs for judges and staff, and the elevated status of Hon. Jacqueline Silbermann to statewide Deputy Chief Administrative Judge for Matrimonial Matters are encouraging improvements. With the continued support and enthusiasm of our remarkable Chief Judge Judith Kaye, we are confident that the culture will change and the recommendations of the Commission, when substantially enacted, will improve justice for the children and families of New York.