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# Appendix A: Matrimonial Commission of the State of New York, Report to the Chief Judge of the State of New York

Sondra Miller

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**Hon. Sondra Miller, Chairperson**

## PREFACE

The Commission submits this Report to Chief Judge Judith S. Kaye with additional recommendations for improving the administration of divorce litigation and all the attendant matters to the end of reducing undue trauma, cost and delay to the parties and, most importantly, the children. The Commission recommends sweeping changes in several areas including, the selection and education of judges, the appointment and regulation of neutral experts and law guardians, access to justice, and the administration of the legal process, among others. Finally, the Commission urges the OCA to act quickly and deliberately on the recommendations made in this Report, to pursue scholarship and research on the many complex issues identified, and to strive to increase public awareness and education regarding the rights and responsibilities of parties engaged in divorce and custody matters and the impact such has on this litigation's unintended victims – the children.

With respect to our recommendations, the Commission recognizes that some require legislation, some can be acted upon administratively, and some may be done either way. Although legislation would be the preferable process in some instances, in the absence of such action, the Commission is confident that the goals of many of these recommendations may be achieved by the Judiciary itself.

The members of the Commission and its staff express to Chief Judge Kaye their gratitude for the opportunity to serve. We applaud the leadership she has demonstrated on family matters during her entire tenure. I express my heartfelt gratitude to

my colleagues on the Commission, who have so generously contributed their expertise and have served with dedication, consistency and good humor. In the course of many meetings over the past 20-months, we regularly had full attendance by all 32 members and although there were some disagreements, the tenor of the meetings was never disagreeable. Mutual respect, understanding, a willingness to listen pervaded. No chairperson could have hoped for a finer Commission.

We also wish to recognize the impressive work of the Hon. Jacqueline W. Silbermann, Statewide Administrative Judge for Matrimonial Matters and her staff. Created a little over ten years ago, Judge Silbermann's office was charged with the herculean task of implementing the sweeping rules changes adopted in 1993 as a result of the recommendations of our predecessor Committee and to further monitor and improve the process of matrimonial litigation Statewide. I have had the privilege and pleasure of working with Judge Silbermann in this effort during this time and have found her knowledge, passion, and fortitude to effect change in an area of litigation reknowned for the emotional weight it brings to bear on all those involved, deserving of the highest praise.

A special debt of gratitude is owed to the Hon. Joseph Lauria and his staff and the judiciary and staffs of the First, Third, Eighth and Ninth Judicial Districts, the availability of their facilities, personnel, resources and institutional insight proved invaluable.

Additionally, numerous staff have offered their expertise, insight, support and assistance through out the process of compiling statistical information and research, in managing the extraordinary number of submissions received from the public, judiciary and the Bar and in completing the arduous task of convening 32 Commission members for various public hearings and sub-committee and full Commission meetings, including: Raquel Aracena, Sandres Cancer, Cheryl Ferguson, Frances Malave, Marlene Nadel, Esq., and Amy Sheridan. Several very capable law students also contributed to the Commission's work, Jacqueline Beaudet, Sean McKinley, and Sandra Fusco.

Counsel to the Commission, Wendy E. Deer, Esq., was the talent, energy and glue that molded this Report. She literally nourished, guided, cajoled and demanded the respective contributions of all Commission members. This Report would not have been accomplished without her exceptional assistance.

We especially would like to thank Phillip Ferrara and his staff for their assistance on the development, distribution, compilation and interpretation of the three surveys conducted by the Commission in its efforts to seek clarification of the issues before it. Phillip's professionalism, insight, availability and command of the data facilitated the Commission's discussion of many difficult topics and helped forge consensus that we believe will lead to concrete change.

I wish to single out for special recognition those members of the Commission who co-chaired our three subcommittees and in many ways served as my personal conscience and sounding board: Susan Bender, Hon. Tandra Dawson, Hon. Betty Weinberg Ellerin, Patrick O'Reilly, Hon. Jeffrey Sunshine, and Daniel Weitz. These subcommittees, which met nearly monthly, are responsible for the progress made by the Commission in a relatively short time. I thank the members of these subcommittees, all busy professionals, for their dedication to the task at hand.

I am very grateful to our brothers and sisters in the judiciary of several other jurisdictions, their very competent and accommodating staffs as well as members of the practicing bars. The Commission learned much from the way matrimonial matters are adeptly handled in New Jersey, Connecticut, New Hampshire and elsewhere. My personal thanks to the following individuals for the time and energy expended speaking to our Commission and sharing written information and resources, Hon. Thomas J. Zampino, Hon. Julia DiCocco Dewey, Johanna Antonacci, Harry Cassidy, Debra Kulak, John Trombadore and George Manning.

The work of this Commission could not have been accomplished as efficiently and quickly as it has without the assistance and support of the following institutions, the NYS Judicial Institute,

the New York City Bar Association, the New York County Lawyers Association, the New York State Bar Association, the American Academy of Matrimonial Lawyers, Cardozo School of Law, Pace University School of Law, and the Office of Court Administration. Additional thanks is owed to Professor Andrew I. Schepard, Esq., Director, Hofstra Law School Center on Children, Families and the Law for his support and availability to myself and the Commission throughout its work.

The Commission also owes its thanks and appreciation to the many individuals and organizations that took the time to testify before the commission, submit written commentary, and meet with Commissioners. We especially recognize the men and women who have participated in the court processes as litigants and those bar associations who invited members of the Commission to their meetings. The breadth and depth of experiences from the lay public and the practicing bar shed enormous light on the difficult and personal nature of the problems facing this Commission. We deeply appreciate the trust and respect extended to us during this process and hope that the results of the work will prove worthy of their confidence.

In conclusion, I share some personal observations. Notwithstanding my 22years of judicial experience, on the Family, Supreme and Appellate courts of this state and my familiarity with the complex issues involved in this Report, and the general dissatisfaction on the part of the public, bench and bar with the law and the court system regarding these issues, I was profoundly impressed with the degree of anguish, frustration and suffering expressed by many in the course of the Commission's public hearings and through hundreds of written submissions. I believe I also speak for the Commission members who shared these experiences and reacted similarly in expressing our sincere concern and hope that the work of this Commission will serve to ameliorate the costs – emotional and financial – that inevitably accompany divorce. Most importantly, that its work shall serve to insulate the children, to the extent possible, from the potentially devastating harmful effects of such disruption on their lives.

Hon. Sondra Miller Associate Justice, Appellate Division – Second Department

## EXECUTIVE SUMMARY

Chief Judge Judith S. Kaye established the Matrimonial Commission in January 2004 to examine every facet of the divorce and custody determination process and recommend reforms to reduce trauma, delay and cost to parents and children so personally impacted by the system. Chaired by Associate Justice Sondra Miller of the Appellate Division, Second Department, the Commission's 32 member panel was appointed early in June 2004. The members were selected for their professional, geographic and social diversity. They represent a broad spectrum of disciplines, experience, expertise and interests.

This Commission concludes its 20-months of work with the delivery of this Report to Chief Judge Kaye with the thanks of its members for the opportunity to serve and with the hope that the recommendations proposed will be carefully considered and implemented. The Report includes recommendations for both the near and long term. It includes proposed legislative and rule changes, proposed uniform forms and processes as well as frank discussions of cultural changes that should be made among the bench, bar and litigants which would make great strides toward reducing the acrimony inherent in matrimonial litigation and in improving the processing of these difficult cases for families often overwhelmed by personal, financial and legal turmoil.

This report reflects the views of a substantial consensus of the Commission, but not every member agreed with every recommendation and some members disagreed with more than one recommendation. The order in which topics are raised and addressed in this Report does not reflect their importance or weight in the Commission's consideration and review of the issues and no conclusions should be drawn in that regard.

A threshold recommendation of the Commission, one that highlights the very culture change envisioned by the members, is to its recommendation that all relevant statutes, court rules, regulations and the like be amended to change the terms "visitation" and "law guardian" to "parenting time" and "attorney for the

child", respectively. The Commission believes these changes are critical to changing the perceptions held about the time parents spend with their children and the role of attorneys who represent the children in these cases.

*Court System Administration*

The Commission undertook to carefully examine the entirety of the divorce process, making several recommendations in all areas. With respect to the efficient and effective administration of the courts, the Commission makes the following recommendations, among others:

- Elevate the position of Statewide Administrative Judge for Matrimonial Matters to Deputy Chief Administrative Judge for Matrimonial Matters (DCAJ-MM).
- Specific attention be paid to the recruitment and assignment of judges to hear matrimonial cases and related proceedings and to the length of those assignments
- When judges are rotated out of the matrimonial part, it is recommended that they take with them certain matters, carefully defined by this Report, in order to maintain continuity for the parties and the system.
- To further increase the efficiency of the courts handling these matters, the Commission recommends the establishment, where practicable, of dedicated matrimonial parts and the designation of "supervising matrimonial judges".
- Further recommendations which would facilitate the timely and efficient processing of these matters include the addition of court personnel, special referees, designation of judicial reading periods, and increased and improved facilities. These recommendations are made with respect to both the Supreme Court, matrimonial parts and the Family Courts.

*Selection and Training of Judges*

While all matters before the courts of this state are important, there are few others in which the outcome will have an immediate and likely generational effect on human beings as those addressed by this Report. The just disposition of these cases depends on the knowledge, character, temperament, profes-

sional aptitude and experience of the judge before whom the matter is presented. Therefore, the Commission makes the following recommendations with respect to the selection and training of judges.

- As previously noted, the assignment of judges to hear matrimonial cases should take into consideration several relevant factors, including the judge's legal background, other professional experience, temperament, character, and desire to serve.
- Judges newly assigned to hear matrimonial cases have special education needs The Commission recommends, in detail, an expanded and highly specialized education and training module it feels will appropriately prepare judges to fairly and efficiently handle these matters while reducing cost, delay and trauma to all those involved.

*Improving the Process*

Although substantial strides have been made in improving the processing of contested matrimonials, the delay and attendant cost continues to frustrate the public, bar and judiciary alike. The Commission undertook to address several concerns in this area and makes the following recommendations, among others:

- Without endorsing any particular legislation, a majority of the Commission recommends that the state legislature enact an amendment to the Domestic Relations Law providing for no fault divorce.
- Following extended consideration and debate, the Commission concludes that no presumptions regarding the awarding of custody whatsoever should be created by legislation, case law or otherwise.
- The Commission concludes that a system of early screening of cases and the appropriate provision of services based thereon is critical to reducing cost, trauma and delay in this process. It recommends that a system of early screening be developed and discusses at length the components of such a system.
- An important factor in reducing the time a matter remains in the system is that preliminary conferences (PCs) are held at an early stage of the proceedings. To that end, the Commission makes several recommenda-

tions regarding the conduct of the PC and has annexed a proposed Preliminary Conference Order which would serve as a model for all those involved.

- The Commission further strives to reduce delay by proposing a three-tiered time line for the processing of contested divorce matters. This proposed classification of cases according to conflict level, with strict time lines for each category, will facilitate each party's ability to move on with his or her life while allowing the appropriate time and attention for those matters that require them.
- The Commission recognizes that as a result of New York's unique system, custody, parenting time and ancillary issues may be determined in both Supreme and Family Courts. The Commission makes several recommendations intended to resolve some of these overlapping issues as well as to better inform decisions made in one court or the other with respect to a particular family, party or circumstance.

*Alternative Dispute Resolution (ADR)*

Substantial testimony, submissions and other information gathered by the commission indicate that use of alternative dispute resolution processes should be utilized in matrimonial matters, particularly those involving children. The Commission concludes that, when used appropriately, ADR, particularly mediation, is an effective means of reducing the delay, expense and trauma to children often experienced during divorce. Several areas considered by the Commission include: the availability of ADR methods statewide; the skills experience, and training of ADR neutrals; the nature of referrals to ADR; confidentiality and protocols regarding situations which may render some forms of ADR inappropriate.

The Commission defines much of the language of ADR and explains the processes in some detail in an effort to facilitate understanding of its recommendations relevant to this area and to put those recommendations in proper context. Among other detailed suggestions for incorporating appropriate ADR processes into a divorce action or related proceeding, the Commission recommends:

- that the decision to refer a case to mediation, an early settlement panel, a parent coordinator or a combination of these should be by stipulation of both parties or at the judge's discretion;
- that the proposed court Rule (attached as Appendix F) be promulgated to give Judges express authority on a case-be-case basis to order parties to mediation for parenting issues, early settlement panels for financial issues or parenting coordinators for cases involving high-conflict repetitive-litigant parents;
- limits on referrals to ADR must exist where domestic violence or a severe power imbalance is present in a case;
- where parties are actively engaged in ADR processes, the time lines defined for each case category should be tolled, at the court's discretion, in an effort to encourage the parties efforts;
- judges, quasi-judicial officials and court personnel should be fully and extensively educated about ADR programs, specifically emphasizing those methods recommended in this Report;
- statewide guidelines for the qualifications and training of mediators, early settlement panelists and parent coordinators should be promulgated to ensure the highest standards of practice; a statute or court rule must be promulgated which provides for confidentiality in ADR, consistent with existing case law; and
- that attorneys discuss ADR options with their clients, and that section 1400.2 of the NY Ct. Rules – the Statement of Client's Rights – be amended accordingly.

*Statewide Parent Education and Awareness Program*

The Commission recognizes the successes of the State Parent Education Advisory Board to improve the quality of court outcomes involving children, raise judicial awareness of the benefits of parent education, clarify judicial authority to refer parents, and institutionalize parent education around the State. After consideration of the substantial testimony and material received on the benefits of parent education programs and the changes needed to the existing system to encourage attend-

ance at these programs, the Commission recommends the following:

- that judicial officers should be empowered to order parties, where appropriate, to attend a parent education program. This decision must wholly within the discretion of the judge and will not have any affect on the progress of the litigation;
- that, in response to concerns that parent education providers lack the resources to continue these efforts, the OCA develop a program similar to those already in existence in certain judicial districts wherein a court employee function as the "administrator" for the local programs, relieving much of the administrative burden on the local providers; and
- that the OCA promulgate rules of the Chief Administrator defining all aspects of the Parent Education Program, its administration and processes.

*Additional Process Related Topics*

Several other issues related to the processing of cases and the administration of the system were raised during the course of the Commission's information gathering, the public hearings and its meetings.

In reviewing information submitted regarding the use of recording devices for the recording of proceedings – as opposed to the use of a court reporter – and the resultant quality of the tapes and transcripts created therefrom, the Commission recommends that the OCA take the necessary steps to improve the quality of the equipment used in the affected courts and parts, provide that court personnel be assigned to operate the equipment and that fee schedules and time tables applicable to this circumstance be established.

The Commission learned that myriad issues exist with respect to automatic orders, discretionary stays on appeal and orders to show cause. As the use and processing of these practices can serve to reduce or increase the cost, time and trauma involved – depending on how they are employed by the courts and parties –

the Commission reviews each and makes several recommendations:

- The Commission believes that adoption statewide of an automatic order would make great strides toward addressing the delay, cost and litigious nature of many contested matrimonials and recommends that a thoughtful proposed order and accompanying instructions be devised and distributed.
- With respect to discretionary stays on appeal, the Commission recommends that court ordered payments of maintenance, child support, and attorney's fees be excepted from the automatic stay provisions of the CPLR and that the question of any such stay be required to be made upon motion to the court.
- In an effort to streamline the practice surrounding orders to show cause and requests for temporary Restraining Orders, the Commission recommends that signed orders be faxed to or available for pick up as soon as practicable after being signed and delineates firm time frames for hearing such requests.
- The Commission also recommends that these processes be uniformly and consistently followed in all counties.

*Role and Appointment of Attorney for The Child.*

The Commission heard extensively and from interested groups and individuals across the board regarding the role and appointment of attorneys for the child (formerly titled, "law guardians"). Its consideration of the issues raised with respect to the role, selection, appointment, qualifications, conduct and compensation of these attorneys was careful and the discussion was thoughtful and informed. As a result, the Commission makes several sweeping recommendations in this area, including, among others:

- that it is the Commission's opinion that an attorney for the child is not a fiduciary and that the OCA consider revising its rules and regulations accordingly, but the Commission recommends that the OCA continue those provisions of the Rules which provide for their monitoring and reporting;

- the adoption by administrative rule of the Statewide Law Guardian Advisory Committee's working definition of the role of the attorney for the child;
- that, after an extensive review of the law and arguments on both sides, the decision to appoint an attorney for the child in a custody case must remain within the discretion of the court and such appointments must be fair, unbiased and communicated in a manner that reflects the impartiality;
- that the excellent education programs already in place for attorneys for the children be continued and expanded and that efforts to educate the public generally about the duties and obligations of these attorneys be undertaken. The Commission recommends a proposed Order of Appointment as a first step in helping educate parties and attorneys in this regard;
- that there be uniform statewide protocols for the representation of children;
- that judicial education and training be expanded to address the specific areas raised as concerns with respect to the appointment, duties and obligations of the attorney for the child;
- that the OCA seek to amend the relevant statutes to expressly empower courts with the discretion to direct parents with sufficient means to pay the fee of the attorney for the child and that wherever such an appointment is made, an Order be entered specifying the details of payment of fees.

*The Role and Appointment of Experts*

Issues similar to those surrounding the role and appointment of attorneys for the child were also raised before the Commission with respect to forensic and financial experts. Indeed, public scrutiny of the processes often raised these concerns above all others, namely, the court's use and reliance on forensic reports in determining awards of custody. In considering the vast amount of statistical, scholarly and anecdotal evidence presented to the Commission, it concluded that substantial strides could be made to improve the way the system appoints

and uses experts, resulting in a reduction of cost, delay, and trauma to the parties.

Among the numerous and extensive recommendations included in its Report, the Commission proposes:

- that uniform criteria for the appointment of forensic experts be applied by the courts in custody cases and suggests several guidelines;
- that, although a detailed proposal for education and training of forensic experts is a long-term goal, several short-term solutions should be implemented to determine the best qualifications for experts presently being appointed by the courts;
- that statewide standards for minimum qualifications of evaluators, training and periodic review by established;
- based on survey data collected and testimony heard, that a uniform appointment order be used for the appointment of experts and details the process to be followed by the court for selection and appointment of such experts;
- a detailed framework for the conduct of an evaluation, the content of the resulting report and the use of such report by the court and the parties;
- that the decision to request an opinion or a recommendation from the expert with respect to custody must remain in the discretion of the judge, but that the order of appointment should expressly state the judge's request and define the scope of the expert's investigation;
- several detailed recommendations with respect to the payment of experts. Notably, the provision of information regarding fees to the parties and the court through the use of uniform reporting guidelines.

*Access and Equity in Matrimonial Litigation*

Access to the courts and a level playing field for the parties are themes which permeated the entirety of the Commission's work and its resultant Report. However, there are a few areas where these issues are specifically and narrowly raised and addressed, including, the Commission's discussion of the Right to Counsel, the challenges of serving a diverse population, and the treatment of marital assets.

In an effort to elevate all parties to the same level and reduce the cost, delay and trauma to the parties and the inefficiency created in the system resulting from these problems, the Commission make several recommendations.

- With respect to the provision of counsel, the Commission recommends:
  - the provision of assigned counsel in Supreme Court where a Family Court matter has been transferred and litigants are eligible for assignment or such has already been assigned;
  - an expansion of the assigned counsel programs and increased funding to groups providing civil legal services;
  - that the OCA undertake the establishment of a panel of available attorneys who would be certified as qualified and available for assignment as counsel in such matters.
- with respect to improved service to a diverse population, the Commission recommends:
  - that the OCA aggressively pursue a program of training and education regarding diversity issues;
  - that an inter-disciplinary Diversity Task Force be convened to research and make recommendations regarding the development of professional skills, evaluation of existing rules and regulations to eliminate subtle, inherent biases and to account for the "realities" of practice in the state's courts, the impact of divorce mills on the divorce process and the issues involved in the provision of interpreter services in the courts;
  - the legal community generally move strongly against divorce mills by, among other things, coordinating with local bar associations to provide free legal services to self-represented litigants;
  - the quality and availability of interpreter services be improved and expanded, statewide; and
  - several statutory and legislative measures be enacted to promote the equitable treatment of same-sex couples in proceedings involving the awards of custody, parenting time, child support and related issues before this Commission.

- with respect to the treatment of marital assets, the Commission recommends:
  - a court rule requiring that the court shall grant interim counsel fees to non-monies spouses in matrimonial matters, except for good cause, but with the proviso that if the judge finds good cause, a written decision be required to explain the rationale behind such a determination;
  - that the court may, in an appropriate circumstance, direct that marital funds be used to pay the interim fees of attorneys and experts for either party or both parties, and that the appropriate allocation of the payment of those fees between the parties be reserved for trial;
  - adoption of an administrative rule to allow attorneys to make a special or limited appearance for the purpose of making an application for counsel fees at the time of the commencement of an action;
  - where a party's refusal to pay court-awarded attorney's fees is found to be "willful or deliberate", the court should be given authority to enforce such orders via the contempt powers of the court;
  - that legislation be adopted to eliminate a party's "enhanced earning capacity" as a marital asset;

The Commission also carefully considered the issues of maintenance guidelines and the award of child support in joint custody situations carefully throughout its work. Although it could not reach a consensus on either issue, it considers both of critical importance, requiring additional attention, study and research. The Commission recommends that the OCA undertake such efforts in the immediate future with the goal or establishing appropriate solutions that will reduce the undue cost of continuously litigating such matters and which will engender public confidence in the system.

*Role of the Bar*

The Commission heard extensively about the role of the bar in matrimonial litigation in New York. It was recognized that the work of the 1995 Committee to Examine Lawyer Conduct in Matrimonial Actions had successfully addressed many of the

concerns previously raised. At the same time, the bar particularly expressed the need for greater civility and professionalism, which needs were echoed by the litigants. In addition, the litigants sought less delay in the process and more responsiveness to their needs.

In response to these concerns, the Commission called for more legal representation for all litigants, proposed sweeping recommendations with respect to the conduct or the preliminary conference (detailed in the Report), counsel's role and responsibilities with respect to the use of ADR processes, parent education programs, as attorneys for the child, with respect to the use of experts, among others. Additionally, the Commission recommends:

- that the organized bar continue to encourage greater participation by its members in pro bono efforts to assist low- and moderate-income litigants, and
- that mandatory continuing legal education (CLE) in the specific area of matrimonial law and practice should be required of all attorneys practicing in this area.

In sum, the Commission is confident that, when implemented, its recommendations will result in a major change in the culture of the matrimonial and Family Courts. The status of those courts and the judges who serve them will be enhanced, as warranted by their long range social impact and the complexity and sensitivity of their work. The statewide integration of mediation and other ADR processes will enable parties to resolve their disputes in a less contentious and more humane environment. By providing legal services for the low- and moderate-income litigants, not only will justice be served but the courts will be relieved of a substantial burden of matters that consume excessive time. It is hoped that these, among the Commission's many other recommendations, will reduce the cost, delay and, most importantly, the trauma to the parties and their children embroiled in matrimonial and attendant proceedings.

In her State of the Judiciary messages in both 2004 and 2005, Chief Judge Kaye placed family issues in the forefront of her initiatives, noting that "with families, [ ] the challenge of societal change and the long-term impact on people's lives are per-

haps the greatest." The Commission is confident that, as she has done in the past, our Chief Judge will do all in her power to effectuate the reforms she endorses and that the court system, under her leadership will eventually provide not merely adequate but optimal services to its families and children.

## INTRODUCTION

### *THE COMMISSION PROCESS*

Chief Judge Judith S. Kaye established the Matrimonial Commission in January 2004 to examine every facet of the divorce and custody determination process and recommend reforms to reduce trauma, delay and cost to parents and children so personally impacted by the system. Chaired by Associate Justice Sondra Miller of the Appellate Division, Second Department, the Commission's 32 member panel was appointed early in June 2004. The members were selected for their professional, geographic and social diversity. They represent a broad spectrum of disciplines, experience, expertise and interests. The Commission met for the first time on June 15, 2004.

The appointment of the Commission represents the court system's latest effort to reform matrimonial litigation in New York State, building on the work of the Committee to Examine Lawyer Conduct in Matrimonial Actions, chaired by the Hon. E. Leo Milonas, and resulting in the adoption of sweeping rules changes in 1993, and the invaluable work and dedication of the Hon. Jacqueline W. Silbermann, Administrative Judge, New York County Supreme Court, Civil Term and Statewide Administrative Judge for Matrimonial Matters.[1] The global mandate of this Commission allowed it to look closely at all aspects of the divorce process in New York State and to seek innovative, holistic resolutions that would ultimately reduce the trauma, expense and delay suffered by parties and their children.

Due to the breadth of this mandate, three subcommittees were formed to address issues concerning the Roles and Functions of the Judiciary and Court Administration, the Bar, and the Im-

1. Justice Silbermann also sits in a Supreme Court, Matrimonial Part, hearing matrimonial cases. She has been a sitting judge since 1987, first as an Acting Supreme Court Justice and then as a Supreme Court Justice beginning in 1991.

pact of Experts and other Non-Legal Issues on the Process. Subcommittees met frequently throughout the 20-month period of the Commission's work and were responsible for gathering information, formulating recommendations and drafting reports for consideration by the full Commission. Additionally, several smaller working groups met independently of the subcommittees to develop recommendations on particular issues that necessarily overlapped all three main subcommittees. Full Commission meetings, 11 of which were held around the State throughout 2004 and 2005, were dedicated to hearing from speakers on issues under consideration, deliberating on the subcommittee's reports and developing recommendations.

The Commission researched the numerous issues relevant to divorce litigation through various means. Commissioners reviewed reports, commentaries, decisional and statutory law, administrative protocols from pilot projects within New York State as well as in other jurisdictions. Several organizations proffered research and commentary on narrow issues and the Commission conducted primary research as well to inform its work. Particularly enlightening were the thoughtful and insightful submissions, both through public testimony and in writing, by former and pending litigants and their counsel.

During the eight month period beginning October 2004 and ending May 2005, the Commission conducted public hearings in Albany, Buffalo, New York City and White Plains. Notice was widely given statewide, as is evidenced by the nearly 300 requests to testify received by the Commission. Over 35 hours of testimony were heard from approximately one hundred forty-nine (149) witnesses. The public hearing notices are attached as Appendix A. Further information regarding litigants' specific concerns were shared by a group of individuals representing former and current litigants with members of the Commission in a May 2005 meeting. Many individuals and organizations also submitted written testimony and documentation throughout the process, including individuals with pending matters.[2] Full transcripts of the public hearings and additional

2. In an effort to protect the integrity of pending proceedings and avoid any unnecessary conflicts of interest, individuals with matters pending before the

information can be viewed on the Commission's website, www.nycourts.gov/ip/ matrimonial-commission.

The Commission developed three survey instruments to inform its work. With the help of Philip Ferrara, a research psychologist with the Office of Court Administration, the Commission conducted a series of anonymous surveys of members of the bar and the judiciary, and of attorneys who have undertaken assignments as law guardians in New York State. Following is a synopsis of the survey tools and process.

- *Attorney Survey on the Use of Experts in Matrimonial and Family Court Proceedings*. Distributed at several bar association meetings and mailed to a representative sample of attorneys who are members of the Family Law Section of the New York State Bar Association, this questionnaire solicited information directly from practicing family and matrimonial law attorneys regarding their recent experience with court-appointed financial and forensic experts and law guardians. Approximately 1050 surveys were distributed.
- *Law Guardians in Matrimonial and Family Court Proceedings*. A random sample of attorneys listed as law guardians with each of the four judicial departments as well as a sample of institutional providers received a questionnaire inquiring about caseloads and assignments, compensation, training, type of work performed on cases, and the ways their services are utilized by the court. A total of 800 surveys were distributed.
- *Judicial Survey on the Use of Experts in Matrimonial and Family Court Proceedings*. All New York court system Matrimonial and Family Court judges, court attorneys, judicial hearing officers (JHO's) and support magistrates were sent questionnaires soliciting their views and information about their recent experiences with financial experts, court-appointed forensic experts

courts of the State of New York or with matters eligible for appeal at the time of the public hearings were asked to submit their comments, observations and recommendations in writing to the Commission. Any identifying details contained in such written submissions were redacted by Commission staff before making them available to Commission members, however the substance of the submission remained unaltered.

and forensic evaluations. A total of 350 surveys were distributed.

Copies of the three surveys and the responses may be viewed at the Commission's website.

Employing the survey tool as an instrument to facilitate discussion, Commission members conducted a series of seven (7) focus groups during the late winter and spring of 2005. The focus groups took place across the State and were designed to elicit information from members of the practicing matrimonial bar on the issues presented by the survey instruments. In all, approximately 80 attorneys participated in the focus groups which provided a wealth of information.

Recognizing the many diverse practice issues presented and the regional differences which further complicate the process of developing solutions, members of the Commission met with over 500 members of the practicing bar through a series of 19 meetings with local and specialty bar associations or relevant practice sessions of State and local bar associations throughout the Commission's life to identify issues of concern to those groups as well to seek their input and feedback on issues and recommendations being considered by the Commission. Commission members also met with members of the bench sitting in Supreme Court, Matrimonial Parts and Family Court three times to engage in a similar dialogue and exchange of ideas.

As previously noted, the Commission maintains a website and email address to make its work publicly available and to ease communication and submission of materials by interested groups and individuals. Located at www.nycourts.gov/ip/ matrimonial-commission, the site includes information on the public hearing process, the surveys conducted and general administration information, including the text of this Report.

This Report includes our recommendations for both the near and long term. It includes proposed legislative and rule changes, proposed uniform forms and processes as well as frank discussions of cultural changes that should be made among the bench, bar and litigants which would make great strides toward

reducing the acrimony inherent in matrimonial litigation and in improving the processing of these difficult cases for families often overwhelmed by personal, financial and legal turmoil.

This report reflects the views of a substantial consensus of the Commission, but not every member agreed with every recommendation and some members disagreed with more than one recommendation. The order in which topics are raised and addressed in this Report does not reflect their importance or weight in the Commission's consideration and review of the issues and no conclusions should be drawn in that regard.

## NEW YORK SUPREME AND FAMILY COURTS: A BRIEF OVERVIEW

In examining every facet of the divorce process in New York, it is necessary to review briefly the number of cases related to divorce and attendant proceedings heard in New York State courts, the structure of the court system as relevant and the anatomy of a simple matrimonial action. Some cases may involve both Supreme Court and Family Court. The role of these two courts is often not obvious, and while jurisdiction overlaps on several domestic issues, there are significant differences between the two. See data attached as Appendix B.

*Caseload Data.* Although divorce is granted only in Supreme Court, other issues, specifically child support and family offense, are resolved in both Supreme and Family Courts. Consequently, 75% of the total statewide filings in the Supreme and County level courts, excluding Surrogate Court, relate to matrimonial actions, underscoring the tremendous potential impact the proposals and recommendations made in this Report may have on a multitude of people, most particularly, children.[3]

3. These statewide filings statistics do no include the finding that during 2004 there were 47,573 uncontested matrimonial matters handled by New York courts. These uncontested matrimonials certainly constitute a significant portion of the caseload of any assigned matrimonial judge. Furthermore, uncontested matrimonials do not necessarily mean appearance of parties and/or counsel are not required. In many instances, inquests or supplemental affidavits and/or pleadings require further appearances.

*Jurisdiction.* The Supreme Court is New York's trial court of broadest general and original jurisdiction with exclusive jurisdiction over matrimonial cases as provided by the State Constitution.[4] Statewide, it hears both civil cases and criminal cases; however, outside New York City, it hears primarily civil cases. Justices of the Supreme Court are elected to office and their efforts may be supplemented by use of acting justices of the Supreme Court. There are approximately 163 judges hearing matrimonial matters statewide.

Family Court sits in each of the 57 counties outside of New York City and as a single body in New York City. Family Court presides over a broad spectrum of matters, including, among others: child custody and dependent support proceedings, paternity proceedings, juvenile delinquency, family offense and child protective proceedings. Outside New York City, its judges are elected to office countywide;[5] in the City, its judges are appointed to office by the Mayor. There are 47 Family Court judges within the City of New York and approximately 153 judges sitting in Family Court outside the City of New York.

*Procedure.* Procedure in Supreme Court is governed by the Civil Practice Law and Rules (CPLR). Actions in Supreme Court are commenced by the filing of a summons. In matrimonial actions,

4. Article VI, §7 of the New York State Constitution establishes the Supreme Court as a court of "general original jurisdiction in law and equity" (N.Y. Const., Art. VI, §7[a]). Under this grant of authority, the Supreme Court "is competent to entertain all causes of action unless its jurisdiction has been specifically proscribed" *Thrasher v. United States Liab. Ins. Co.*, 19 N.Y.2d 159, 166, 225 NE2d 503, 506, 278 N.Y.S.2d 793, 798 (1967), and to that extent its powers are "unlimited and unqualified." *Kagen v. Kagen*, 21 N.Y.2d 532, 236 N.E.2d 475, 289 N.Y.S.2d 195 (1968); *Sohn v. Calderon*, 78 N.Y.2d 755, 587 N.E.2d 807, 579 N.Y.S.2d 940 (1991). *See also Fry v. Village of Tarrytown*, 89 N.Y.2d 714, 680 N.E.2d 578, 658 N.Y.S.2d 205 (1997); *In Re Doe*, 184 Misc. 2d 519, 709 N.Y.S.2d 372 (Sup. Ct. Queens Co. 2000). "Every court retains a continuing jurisdiction generally to reconsider any prior intermediate determination it has made" during the pendency of an action. *Liss v. Trans Auto Sys.*, 68 N.Y.2d 15, 496 N.E.2d 851, 505 N.Y.S.2d 831 (1986); *Matter of Budihas v. Board of Educ. of City of N.Y.*, 285 A.D.2d 549, 728 N.Y.S.2d 493 (2d Dept. 2001); *Daniels v. Howell*, 2004 N.Y. slip op 06191, 9 A.D.3d 917, 779 N.Y.S.2d 395 (4th Dept. July 26, 2004).

5. By act of the Legislature, many County Court judges are elected to serve both in the County Court and Family Court, or in County Court and Surrogate's Court or in all three courts. These judges are often referred to as "multi-hat" judges.

procedure is promulgated by Uniform Rules for Trial Courts, Section 202.16(a)-(k). A Request for Judicial Intervention (RJI) must be filed within 45 days of the service of process, if a Notice of No Necessity is not filed by both parties.

The court must hold a Preliminary Conference (PC) within 45 days of the filing of the RJI. The parties and their attorneys, if they have been retained, must attend this conference and it is important to note that the parties hear directly from the court at this time. The court will address and review all aspects of the case in order to determine what issues can be resolved immediately, which issues are contested and what services should be provided or to which the parties should be referred. For example, the court may advise parties about appropriate Alternative Dispute Resolution ("ADR") programs,[6] set a discovery schedule, refer parties to attend a parent education program, and appoint neutral experts and law guardians.[7] With respect to the appointment of forensic and financial experts, the court may expressly state the issues to be evaluated by the expert, the format and content of the expert's resulting report and a schedule for submission of the report to the court. The court may also determine at this time the parameters for payment of the experts and the law guardian for their service. This may be by the parties directly, through public funds, or some combination of these. The Commission recognizes that the appointment and payment process varies widely from court to court and across judicial districts and departments.[8] To the extent possible, the

6. *See infra*, pp 27 - 34 (ADR section of this Report).

7. The Commission acknowledges that the appointment of other experts or fiduciaries, such as a Guardian Ad Litem, or the referral to other services may be made during this conference as well. However, for the purposes of this Report, the Commission limits its discussion to the appointment of those individuals directly involved in the disposition of the matrimonial action or related proceeding.

8. The First and Second Departments permit the discretionary practice of directing parents with sufficient means to pay the law guardian's fee ("parental payment") in both the Supreme Court and Family Court, *see Trinh Quoc Tran v Tau Minh Tran*, 277 A.D.2d 49, 716 N.Y.S.2d 5 (1st Dept. 2000), *lv. dismissed*, 96 N.Y.2d 853, 754 N.E.2d 772, 729 N.Y.S.2d 669 (2001), *Plovnick v Klinger*, 10 A.D.3d 84, 781 N.Y.S. 2d 360 (2d Dept. 2004). The Fourth Department permits parental payment of law guardians in Supreme Court, but does not permit parental payment in Family Court, *see Lynda A.H. v Diane T.O.*, 243 A.D.2d 24, 673 N.Y.S.2d 989 (4th Dept. 1998), *lv. denied*, 92 N.Y.2d 811, 703 N.E.2d 269, 680 N.Y.S.2d 457 (1998). The Third Department, has held that law guardians shall be

Commission strives to respect these local practices in crafting its recommendations.

In large measure, the First and Second Judicial Department rules limit discovery in matrimonial actions to financial matters. However, in the Third and Fourth Departments, parties may also have discovery on grounds for divorce and custody issues. At the PC the court will order certain documents and information to be produced by each party to the other and set time frames within which this exchange must occur. During the discovery phase, it is often necessary to retain experts to evaluate certain marital assets for the purpose of equitable distribution. These assets can include the marital residence, businesses, pensions, licenses and educational degrees. The length of the discovery process varies depending on the complexity of the parties' assets. Typically the discovery phase lasts six (6) months; again, this may vary widely from case to case and court to court.

During the action, it is common for one or both parties to file an application for temporary (*pendente lite*) relief. This motion often seeks temporary maintenance or child support, temporary custody, exclusive occupancy of the marital residence, etc.

A compliance conference will be held by the court within six months to determine whether any financial disclosure remains to be done and whether the case can be settled. If the case can not be settled and is deemed to be ready for trial, a Note of Issue is filed by one of the parties. In addition to the Note of Issue, a Statement of Proposed Disposition is required, to provide the court with a "snapshot" of what each party proposes.

While a small minority of matrimonial cases can only be disposed of by trial, most cases are resolved by agreement or stipu-

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paid by the State and does not recognize parental payment as an option in any Supreme Court or Family Court proceedings. The Third Department has also held that there is no statutory or regulatory authority for payment of an appointed law guardian by a parent, and that the lack of parameters for a direct-pay system raises issues about the independence of the law guardian and concerns about fundamental fairness to all children. *Redder v Redder*, 17 A.D.3d 10, 792 N.Y.S.2d 201 (3d Dept. 2005); *See also Lips v Lips*, 284 A.D.2d 716, 725 N.Y.S.2d 763 (3d Dept. 2001).

lation. Written agreements are entered into voluntarily by the parties and are almost always incorporated by reference into the Judgment of Divorce. The Judgment of Divorce, signed by the court, is then entered with the County Clerk.

Procedure in Family Court varies from Supreme Court, often in important ways. Family Court is created and defined by the Family Court Act and has jurisdiction to hear a variety of case types. Generally, each case type is addressed by an article of the Act. In both Supreme and Family Courts, many parties proceed without counsel – the 'self-represented' – and systems have been implemented to assist them. Standardized forms for both courts have been developed by the court system and are available at the Office of the Self-Represented,[9] from the court system's website and at the courthouses. In Family Court, submission of a completed form to the Clerk – who will then prepare the necessary papers – is sufficient to start the proceeding. A judge is then automatically assigned and the matter is placed on the calendar.

Other noteworthy differences between the two courts include:

- In certain proceedings in Family Court, excluding custody, two hearings may be held, a fact finding hearing and a dispositional hearing.
- Unlike in Supreme Court where the right to assigned counsel is limited,[10] a Family Court judge has the authority to assign an attorney to indigent litigants for many (but not all) family court proceedings.

9. The Office of the Self Represented was created to assist individuals who have no attorney and seek information about legal processes in the court. Generally, the Office is not a point of intake of legal papers. The staff of the Office attempts to answer questions about court operations and procedures and make certain forms available so that inquiring persons can take legal action on their own if so inclined. The staff will not itself complete these forms, nor is it permitted to offer legal advice. The Office may make a quick examination of papers for formal sufficiency. Offices exist in several counties and further information can be found at www.nycourthelp.gov or at a local public library.

10. In Supreme Court indigent litigants are provided with counsel in orders of protection and contempt proceedings. Some courts have provided counsel in custody proceedings but there is a split in authorities as to whether or not such appointments are allowable. The Commission has received reports that some counties refuse to pay for court-assigned counsel in custody and visitation proceedings.

- The Family Court assigns all support cases to support magistrates to hear, determine and grant relief on these issues. Magistrates' final orders may be objected to within 30 days by either party to the Family Court judge.

Note that the authority to grant a divorce, and all ancillary relief other than support, custody and visitation was not granted to the Family Court by the Legislature. Given that Supreme Court retains exclusive jurisdiction over divorce, a single family may find that it has matters pending in more than one court. Within the City of New York, where such a situation exists, the administrative policy of the court system is to encourage the consolidation of the Family Court case into the Supreme Court case, to the extent legally and administratively possible.[11] Further, in some counties, matrimonial, child custody and domestic violence cases[12] are heard by one Supreme Court justice in an Integrated Domestic Violence (IDV) Court.

## THE PATHWAY TO CHANGE: A BRIEF HISTORICAL RETROSPECTIVE

In July 1992 the Administrative Board of the Courts convened the Committee to Examine Lawyer Conduct in Matrimonial Actions, chaired by the Hon. E. Leo Milonas of the First Department (the "Milonas Committee").[13] Empowered during a period when public trust and confidence in the legal system was con-

11. Within the City of New York the Administrative Judge of Family Court and the Statewide Administrative Judge for Matrimonial Matters have as a matter of policy encouraged Supreme Court justices to consolidate Family Court petitions into contested matrimonial proceedings, where appropriate.

12. Though the IDV courts operate in many counties, they have separate rules regarding the types of matters they handle. These rules are governed by the need in each county. All counties require IDV to handle cases involving a criminal domestic violence complaint and a family court Order of Protection or custody matter. But, some counties are also handling matrimonial matters in IDV, while others have begun to handle child protective proceedings. These types of matters are dependent on the District Administrative Judge, in conjunction with the IDV Judge.

13. The Committee included six lawyers and an Appellate Division Justice from each Judicial Department. Among the members were then Associate Court of Appeals judge Judith S. Kaye, until her appointment as Chief Judge in March 1993, as well as the Hon. Sondra Miller, Associate Justice, Appellate Division, Second Department and Patrick O'Reilly, Esq., both members of this Matrimonial Commission.

sidered lagging and on the heels of a controversial study issued by then Commissioner of the New York City Department of Consumer Affairs, Mark Green, the court system affirmatively acted to address aspects of the process that seemed to prolong and frustrate rather than resolve the parties' conflicts in these highly emotional and trauma-laden cases.[14] The Committee's mandate was to look at attorney conduct in matrimonial actions and make recommendations to ensure that the courts provided a fair and effective forum for these difficult issues.

In November, 1993, the Administrative Board of the Courts promulgated rules based in large part on the recommendations of the Milonas Committee. These rules were intended to be responsive to the concerns and criticisms raised by litigants, lawyers and judges alike that matrimonial actions took too long and cost too much, with the toll on the children being especially high. Promulgation and implementation of the 1993 rules were intended to change the nature of matrimonial practice in New York.

Over the intervening 12 years, the court system, under the strong and impassioned leadership of its Chief Judge, has continued to keep a close eye on the vexing cases, establishing the Statewide post of Administrative Judge for Matrimonial Matters, appointing the Hon. Jacqueline Silbermann who continues to serve in that post. Working with judges around the State, the court system has implemented dedicated matrimonial parts and innovative programs to emphasize early and active case management. Additional invaluable assistance in this effort comes from the Committee on Matrimonial Practice as well.[15] Alternative Dispute Resolution programs in varying degrees and permutations also have been developed, responding to the specific

14. Issued in March 1992, Green's report, entitled "Women in Divorce: Lawyers, Ethics, Fees and Fairness" was especially concerned with how divorce attorneys treated their clients, especially with respect to women, and especially with respect to fee arrangements.

15. The Committee on Matrimonial Practice, chaired by Justice Silbermann, was formed as a working group to assist with the implementation of the recommendations made by the Milonas Commission. It remains as a de facto standing committee assisting by proposing rule changes and uniform forms, monitoring compliance with the rules and serving as the catalyst and organizer of the training for matrimonial judges and law assistants, among other things.

and unique needs of local judges, the practicing bar and litigants. Building on the important recommendations made by Justice Evelyn Frazee and the Parent Education Advisory Board, parent education providers statewide are being certified and judges are making more and more referrals to these effective programs for divorcing parents. Important strides have been made in the provision of education and training for new judges and in specific topic areas, such as those addressed by the Unified Court System's Family Violence Task Force.

The accomplishments made in this area and the issues which remain a source of trauma, cost and delay are more fully discussed in the retrospective issued by Justice Silbermann, "The Matrimonial Rules – Ten Years Later". That report provides a comprehensive review of the particular rule changes made in 1993, their effectiveness to date and the areas which continue to challenge the courts. To that end, Justice Silbermann recognized the need for the system to "take a more comprehensive look at every facet of the divorce process in New York, to tackle the difficult issues that remain."[16] Ultimately, Chief Judge Kaye appointed this Commission with a mandate similar to that stated in the retrospective, "[t]his new effort would build on what the Milonas Committee learned, the changes made and the progress achieved – and go beyond. A fresh examination, by this newly constituted commission * * * with a broad mandate, should produce an all-encompassing, concrete agenda for the future of matrimonial litigation."

## REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK

### *THE JUDICIARY AND ADMINISTRATIVE PROCESS*

This Commission states unequivocally and with unanimity that this Report is offered with deep appreciation and respect for the exemplary public servants who serve as judges in New York State, and with special note taken of the tireless and often thankless job done by those hearing matrimonial and related

16. "The Matrimonial Rules – Ten years Later." Office of the Statewide Administrative Judge for Matrimonial Matters, Hon. Jacqueline W. Silbermann, January 2004, p 32.

matters in courts around the state. The Commission members recognize that the overwhelming majority of judges are well-qualified, hardworking professionals who care deeply about the trauma and cost incurred by parties involved in divorce litigation. The public outcry recently heard with respect to some aspects of this process may be in some measure a product of perception, and perception can be driven by a few unfortunate and unrepresentative examples. The Commission resists the temptation to paint all judges – or neutral experts or law guardians, for that matter – with a broad brush, and pays continued respect and admiration to the vast majority to whom it is due. Nevertheless, the system is far from perfect. The Commission recognizes the system's inadequacies and that it is incumbent upon each member to take a critical look at every aspect of the process in an effort to reduce the trauma, cost and delay to the parties, the court system and, most importantly, the children.

*Language.* The Commission also notes at the outset that certain terms of art and language used in matrimonial cases and related actions are heavily laden with negative connotations or are, in the estimation of many, imprecise in describing the role or process they seek to define. The Commission strives to refine the language of matrimonial practice in an effort to facilitate understanding by all those involved – bench, bar and litigants – in two specific respects. First, it recommends that all relevant statutes, court rules, regulations and the like be amended to change the term used to refer to the time non-custodial parents spend with their children from "visitation" to "parenting time". This is a simple but critical change in how time spent together as a family is viewed. The Commission heard extensively on this simple but important issue throughout its work with one speaker succinctly identifying the detrimental impact of this language by stating, "custody and visitation: Where else do we see these terms, other than in prison? What parent wants to be a visitor with [their] child, and what child wants their parents to be a mere visitor in their life?"[17]

Second, from the testimony at the hearings and the written submissions received, it is clear that there exists a misconception

17. Public Hearing, May 9, 2005, New York City.

that a law guardian plays a neutral role in these adversarial proceedings. Accordingly, the Commission proposes that a change from the title "law guardian" to "attorney for the child(ren)" also is a necessary language change which more accurately reflects the attorney's role; advocacy on behalf of the child. The attorney for the child is not a mental health professional, a mediator, a fiduciary or, most importantly, an arm of the court.

To highlight the Commission's position that these language changes are critical to changing the perceptions held about the time parents spend with their children and the role of attorneys who represent the children in these cases, the Commission will use the terms "parenting time" and attorney for the child, throughout the balance of this Report.[18]

*Court System Administration*

Effective and knowledgeable administrative oversight is the key to insuring that matrimonial cases are accorded the appropriate attention, resources and respect warranted by matters that so significantly impact on the past and future lives of the parties involved, as well as their children. Consistent with this goal, the Commission first recommends that the statewide Administrative Judge for Matrimonial Matters be afforded the same kind of meaningful administrative status possessed by other statewide administrative judges, including appropriate jurisdictional title and authority as a statewide Deputy Chief Administrative Judge for Matrimonial Matters (the "DCAJ – MM"). That fact, alone, would speak volumes in terms of demonstrating the court system's recognition of the importance of matrimonial litigation and its commitment to insuring that matrimonial cases, at the very least, be accorded the same prestige and respect as other types of cases, which has historically not been true. In addition, just as in the case of the commercial division, some special public acknowledgment by the court system's highest administrative leadership of the exceptionally important

18. The Commission will use the new terms with the exception of direct quotes, names of existing committees or panels which address these narrow issues or other circumstances where use of the recommended terms would be confusing or inaccurate.

and difficult role played by matrimonial judges in our system of justice, would do much to enhance the desirability and status of such assignments.

At the outset, it must be realistically acknowledged that in many localities assignments to matrimonial parts are almost automatically made to the newest judges irrespective of their knowledge or familiarity with such cases or are frequently perceived as "punishment assignments." Unfortunately, not all district administrative judges accord matrimonial cases the priority they require and that attitude is reflected in the judicial assignments. To insure that appropriate assignments are made and to avoid administrative entanglements, it is necessary that clear lines of authority be drawn. To that end, the statewide DCAJ – MM should seek out and solicit judges, who by background and temperament, are particularly well-suited to sit in matrimonial parts and shall make recommendations to the respective district administrative judges for such assignments. In the event the district administrative judge is not in agreement with such recommendation , the final decision shall be made by the state's Chief Administrative Judge. The timetable for such decisions shall be set sufficiently in advance of the actual assignment dates to enable appropriate preparation and training of those so assigned to take place.

As has been recognized both in prior reports and by this Commission, the particularly sensitive nature of matrimonial cases requires the assignment of judges with appropriate training and sensitivity and the establishment in each county, or other relevant geographical area, of dedicated matrimonial parts. These parts shall have the various ancillary support services elsewhere described in this Report.[19] While the establishment of such parts can more easily be accomplished in more populous

19. Retaining the overwhelming majority of justices who are doing extraordinary work in matrimonial parts and finding willing and suitable justices to assign to the matrimonial parts will continue to be a challenge. Accordingly, district administrative judges and the DCAJ-MM should be given the resources and authority to provide enhancements to assist in the effective recruitment and retention of appropriate judges. Such enhancements may include, but not be limited to, those facilities, equipment and personnel support systems recommended throughout this Report.

areas with multiple judges, the Commission recommends that a similar system be adopted in less populous areas, within the discretion of the district administrative judge and in consultation with the DCAJ-MM.

The DCAJ – MM will be responsible for the education and training for judges assigned to such parts and continuing review and oversight with authority to recommend that judges be transferred out of such parts, as appropriate, and again where there is lack of agreement by the district administrative judge, the Chief Administrative Judge shall be the ultimate arbiter.

Because of the dynamics and frequently prolonged nature of matrimonial litigation, it is important that judges, whenever possible, be assigned to such parts for extended periods rather than abbreviated terms that lead to interruption in orderly case management and generate unnecessary duplications. It is suggested that such assignments be made for at least a three (3) year period, on average. Recognizing the tension and stresses upon some judges presiding over matrimonial cases gives rise to understanding that this period may be too extended for some. In many cases the judge is not only able to continue such assignment beyond three (3) years, but is desirous of doing so. Here too, the DCAJ – MM shall have the authority to exercise flexibility and judgment in consultation with the local administrative judge with respect to the length of the assignment. It must be emphasized, however, that such assignments shall not be made on an automatic constantly rotating basis as has too often been the case in the past. Moreover, when judges are transferred out of the matrimonial parts, they shall take with them all uncompleted matrimonial cases where a trial is imminent and, to the extent practicable after consultation with the DCAJ – MM and district administrative judge, any other matters where the court's involvement makes retention necessary.

Further, post-judgment motions on contested matters shall remain with the presiding judge for a period of 18-months following the judge's signing of a Judgment of Divorce.

In some jurisdictions there are multiple matrimonial parts with extremely heavy caseloads. It would be helpful in such areas to

allow the DCAJ – MM to designate a "supervising matrimonial judge," who is particularly experienced and knowledgeable and can exercise hands-on daily oversight of the parts in that particular jurisdiction and who will be readily available to provide support and advice, as needed, to the judge in those parts. Additionally, these supervising judges should enjoy parity with the supervising judges that already exist in other courts and be vested with the same administrative authority, responsibilities and resources.

One of the most frequent observations of judges assigned to matrimonial parts is that matrimonial cases, by their very nature, require close monitoring and follow-up by the court and the determination of matters is often document and writing-intensive. These concerns reflect the substantial need of these parts for additional assistance, most critically the addition of competent judges in certain areas. Additional individual law clerks, pool court attorneys, and special referees, who are particularly knowledgeable in the field also would meet this need. The Chief Administrative Judge should, where practicable, designate additional special referees to whom hearings can be referred on limited financial issues by trial judges in their discretion. It is further recommended that mandatory reading periods to allow judges to concentrate on responsibilities beyond those they bear while in the courtroom be blocked out on the calendars of the matrimonial parts to allow judges time to appropriately address the difficult legal and factual questions presented in many of these cases. The specific dates and number of days would be determined by the supervising matrimonial judge – where one exists – in consultation with the district administrative judge and the judges assigned to the matrimonial parts.

As has been universally recognized, adequate courtroom space and appropriate physical facilities are essential to the efficient operation of the court and to engendering respect for the judicial process. In the case of matrimonial parts, which are regularly overcrowded with litigants, as well as counsel, and which are fraught with emotional overtones, this is an even more critical need. Yet matrimonial parts frequently are assigned the least desirable courtroom space and insufficient resources to

cope with the volume and seriousness of the caseloads involved. This too requires firm and immediate administrative attention.

The Commission recognizes that the administration, resource and facilities issues addressed above are not limited to matrimonial parts, but present challenges for judges hearing custody / parenting time and related actions in the Family Courts across the state. The judges sitting in Family Courts and multi-hat judges hearing Family Court matters toil tirelessly as well, often with limited resources and inadequate facilities. This is especially challenging in a court where the disputes between the parties may include criminal allegations. To this end, the Commission recommends that Family Court judges hearing custody cases be afforded additional court resources similar to those recommended for the Supreme Court, matrimonial parts. Specifically, each Family Court judge, to the extent practicable, should be assigned a court attorney-referee and a court attorney.[20] Family Court judges should also enjoy the benefit of scheduled reading periods.

Further, the Commission has heard testimony and received submissions bemoaning the fact that conferences between court attorneys, parties – those appearing pro se or with counsel – are often held in the general waiting areas, within earshot of other parties and counsel, court personnel and the general public. These "conferences" are often conducted without the benefit of privacy or the security of a closed room, let alone a conference table, chairs or computer to facilitate the review of documents, proposed agreements or to memorialize any of the discussion. The Commission recommends that a comprehensive review of the status of the facilities available to the Supreme Court, matrimonial parts and Family Courts be conducted by the OCA and that a plan be devised by the OCA, the counties and the district administrative judges to address the immediate issues raised with respect to conferencing cases and the long-term goal of im-

20. Recognizing the personnel costs and facilities required to accomplish such an ideal, the Commission accepts that a court attorney – referee may be assigned to more than one judge or quasi-judicial official. However, the Commission would strongly encourage the court administrators to limit such assignments to two judicial officials per court attorney – referee.

proving the environment in which families attempt to navigate this process.

*The Judiciary: Selection and Training of Judges.*

The issues presented in matrimonial and related matters are numerous and diverse, requiring the Judge to be knowledgeable about statutory and case law relevant to matrimonial proceedings, as well as areas of tax, bankruptcy law, the appraisal of commercial assets, realty, enhanced earnings and professional license valuations, among other things. There are few other actions in which the outcome will have an immediate and likely generational effect on human beings. Therefore, the timely, accurate and just disposition of these cases depends, to a great degree, on the knowledge, character, temperament, professional aptitude and experience of the judge before whom the matter is presented. The public's confidence in and respect for the courts hinges on the proper selection and retention of judges for these parts. The efforts of the court system to address the public's confidence and negative perception in this regard is admirable and should continue.

With respect to Supreme Court, the assignment of matrimonial cases to those judges with a desire to deal with the important issues they present fosters faith in the judiciary. It is only logical that, when possible, matrimonial assignments should be sought after by the judge, not imposed upon a junior judge solely by reason of his or her lack of seniority. Administrative judges, who are aware of the background and preferences of the judge in their districts should, to the extent possible, provide such information to the DCAJ – MM, better informing the assignment decisions made.

While it is largely agreed that it is desirable to assign judges to matrimonial parts who are knowledgeable and experienced in the area of law, the realities of judicial administration do not always make this possible. Further, there is an equally valid argument that senior judges with experience in other parts or individuals with non-matrimonial backgrounds who are new to the bench can bring new insight and perspective to substantive legal questions as well as the administrative process. However, regardless of the frame of reference from which a newly as-

signed matrimonial judge begins, it is essential that he or she receive a strong, basic education in matrimonial law and practice and how these areas are relevant to the administration of a courtroom and case management.

While the Commission recognizes that all judges already receive invaluable, extensive, on-going continuing education through the Office of Court Administration, the Office of the Statewide Administrative Judge for Matrimonial Matters (the Office of the DCAJ – MM, for purposes of this Report) and the Office of the Administrative Judge, New York City Family Court, there are additional special needs that must be addressed. Judges newly assigned to dedicated matrimonial parts or otherwise being assigned matrimonial cases for the first time have special education needs, which must be met with an expanded and highly specialized education and training module. The Commission recommends that prior to assuming the bench in a matrimonial part – or being assigned matrimonial cases – judges and their legal staff attend a mandatory primary education program addressing all of the legal and practical issues the judge will likely face by virtue of the assignment.

Given these important legal and social considerations, the Commission recommends the following with regard to the selection, education and training of matrimonial judges:

- the assignment of judges to parts in which matrimonial cases will be adjudicated should be made after due consideration of the judge's temperament, professional aptitude and willingness to serve.
- Newly assigned judges should spend the first term of the calendar year in a combination of classroom education and courtroom training.
- In order to allow for the previously discussed period of training for newly assigned judges and to provide for an orderly transition, new matrimonial assignments should not become effective until the second term of the calendar year.
- This expanded education program for newly assigned judges should include three components:

1. Orientation and Observation. Two (2) week orientation and observation period for judges in a dedicated matrimonial part and with an experienced matrimonial judge in the district in which the new judge will be assigned. To the extent possible, time should also be scheduled for the new judge to familiarize himself or herself with the assistance of the judge whose calendar is being transferred. As a result, when the new judge attends the substantive education portion of this program, he or she will have enjoyed the benefit of witnessing matrimonial proceedings in progress and be generally familiar with the issues presented by the caseloads and unique to the districts.
2. Substantive and Procedural Law Course. In the third week of the first term, after the newly assigned judge completes the shadowing component, he or she and his or her law clerk will attend a four-day program of classroom education in matrimonial law and practice. This component should employ a variety of teaching methods, including lectures, panel presentations, role playing and break-out or round table exercises. Generally, the course content must address substantive and procedural law applicable to matrimonial proceedings and the practical difficulties presented when presiding over such matters. At a minimum, the topics included as Appendix C should be addressed.
3. Integration and Continued Support. The newly assigned judge should spend the last week – week four – of the first term in his or her respective district for a final week of transition. During this period they should begin to hear motions, try cases and continue to observe and shadow senior matrimonial judges as the supervising judge and/or administrative judge feels is appropriate given the individual judge's and court's needs. To the extent possible, a new judge should begin at least one trial during this period in order to develop a level of comfort with the trial process prior to assuming responsibility for the entire calendar. An important aspect of this integration to the new assignment is to pair each new judge with a more

> senior judge . The senior judge should be available to assist the new judge during the entire training period and for a period of at least one year following the assignment.

Insofar as the court system is responsible for the education and training of all judges, the Commission recommends that Family Court judges be provided comparable opportunities and support as to those recommended for Supreme Court justices.

*Improving the Process.*

One of the most common complaints heard throughout the Commission's work – and for many years by the Office of Court Administration – was that divorce took too long and costs too much. The emotional toll on litigants, especially their children, was far too high. Today, with the strong, early case management prescribed by the rules, a contested matrimonial is resolved, on average, in less than half the time it took ten years ago — down from 796 days to 319 days. That average brings some finality for family members within a year of the start of a case. Over ten (10) years ago as much as a quarter (25%) of the pending contested caseload was more than two (2) years old. That figure is now down to four percent (4%). While the time from filing to resolution has been reduced by more than half, still divorce takes too long. This section addresses several "nuts and bolts" issues involved in the processing of these cases and the Commission's recommendations in those areas.

*No-Fault Divorce*. The Commission finds that New York's fault-based divorce system[21] has a direct impact on the manner in which, and the speed with which, matrimonial matters proceed.

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21. Dom. Rel. Law § 170 presently provides that an action for divorce may be maintained on any of the following grounds:

1) Cruel and inhuman treatment so that the conduct of the defendant so endangers the physical or mental well-being of the plaintiff so as to render it unsafe or improper for the plaintiff to cohabit with the defendant,

2) The abandonment of the plaintiff by the defendant for a period of one or more years,

3) The confinement of the defendant in prison for a period of 3 or more consecutive years after their marriage,

4) The commission of an act of adultery,

Substantial evidence, derived from the public hearings held by the Commission and the professional experience of the Commission members, leads us to conclude that fault allegations and fault trials add significantly to the cost, delay and trauma of matrimonial litigation and are, in many cases, used by litigants to achieve a tactical advantage in matrimonial litigation. The Commission urges the New York State legislature to enact an amendment to the Domestic Relations Law providing for no fault divorce.[22] Although the Commission does not endorse any particular no fault divorce proposal, it recommends that any such legislative change provide that no final Judgment of Divorce be entered until all economic issues, including equitable distribution, maintenance and child support, as well as custody are determined and those determinations are incorporated into the judgment, unless the parties consent in writing and good cause is shown. By enacting a no-fault statute, New York law would be consistent with that of virtually every other state in allowing a marriage to be dissolved without a lengthy wait or requiring one party to cast blame upon the other.[23]

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5) The parties have lived apart pursuant to a decree or Judgment of Separation for one or more years after the granting of such decree or judgment and satisfactory proof has been submitted by the plaintiff that plaintiff has substantially performed all terms and conditions of such decree or judgment.

6) The husband and wife have lived separate and apart pursuant to a written agreement of separation, subscribed by the parties thereto and acknowledged or proved in the form required to entitle a deed to be recorded, for a period of one or more years after the execution of such agreement and satisfactory proof has been submitted by the plaintiff that he or she has substantially performed all the terms and conditions of such agreement. * * *

22. The Commission recognizes the impact of fault-based divorce on the length and acrimony of divorce proceedings, however, a minority of members consider the issue of no-fault divorce to be one of public policy that exceeds the scope of this Commission's mandate and concur in this recommendation only to the extent of urging the Legislature, as it considers the various proposals with respect to no-fault divorce, to be mindful of the deleterious impact of fault-based divorce on matrimonial litigation and to include in any legislative change that may result the requirements defined by the majority position. An additional minority of members do not support the Commission's majority position with respect to this issue in any regard, concluding that adoption of a no-fault divorce statute would not be beneficial to many litigants, especially victims of domestic violence, and non-monied spouses who, generally, enjoy certain protections by the existence of the grounds requirement.

23. A recent survey of divorce statutes for the fifty states, Puerto Rico, the US Virgin Island and the District of Columbia indicates that 35 jurisdictions recognize some form of Irreconcilable Differences or Irretrievable Breakdown of the mar-

*Presumptions.* The Commission heard extensively about the current law governing custody decisions, including whether any presumptions regarding the awarding of custody should exist. Under the precedent set forth in the Court of Appeals decision in *Braiman v Braiman*[24] and its progeny, New York courts have determined that where the parties have engaged in a bitterly antagonistic custody proceeding, joint custody is inappropriate, thus creating a de facto presumption in favor of the granting of custody to one parent. Following extended consideration and debate, the Commission concluded that no presumptions whatsoever should be created via legislation, case law or otherwise. This conclusion was reached in the hope and expectation that well-trained, competent judges would evaluate each individual case and each individual child's needs without prejudice. Further, the conclusion was reached that a presumption of either joint or sole custody would be inconsistent with the optimal functioning of the judge.

*Early Screening and Provision of Services.* The Commission notes the critical importance of early and proper identification of cases and issues which will demand greater attention and resources. Based on the testimony received from litigants and its review of processes in place in its sister jurisdictions, the Commission concludes that early screening and the appropriate provision of services is critical and must be tailored to low, moderate and high conflict cases in both Supreme and Family Courts, as those categories are defined below. Although well-intentioned, current services – mediation, parent education and mental health evaluations – are typically provided or offered to parties by the court in piecemeal fashion with little screening or in-depth assessment of the "fit" of the particular service to the parties' needs. For example, in mediation, cases are either screened as appropriate and sent to mediation or screened as inappropriate and referred back to the court with little follow up. Through early screening and identification of a wide array

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riage as a basis of ending the marital relationship, 6 jurisdictions recognize Incompatibility as a basis of ending marriages and 11 jurisdictions permit living separate and apart without legal proceedings or the finding of fault as a basis for divorce. Only New York requires the finding of fault or the living apart pursuant to a legal document as the basis for a divorce.

24. 44 N.Y.2d 584, 378 N.E.2d 1019, 407 N.Y.S.2d 449 (1978).

of dispute resolution options and direct linkages to services, courts could provide a more holistic response to the needs of families than is presently available.

Starting from the premise that not all cases are alike and that the type of court intervention will vary from case to case, the Commission makes some general observations about the early screening process. The primary goal of early screening and triage is to assist the judge as early in the process as possible in assessing family dynamics and levels of conflict between the parents, ultimately allowing the judge to tailor a service plan to the specific needs of the family. The Commission envisions that such screening would occur at the first court appearance, most likely at the PC. Once assessed for its level of complexity and management needs,[25] the cases are placed on the appropriate track. Firm deadlines and time frames are established according to this classification.

The goals of identifying high conflict / problem cases early, matching families and parties with services and encouraging responsible self-determination by the parties as early as possible are largely attained by this screening. Screening would be conducted by court personnel and/or the judge with the judge retaining all authority and discretion with respect to final determinations of what track the case should follow, which services should be offered or ordered; generally, how the case will proceed. The cases may be screened by the use of questionnaires, previous case records, interviews with parties, collaterals and counsel, where retained, and by any other legal method the judge feels appropriate. A uniform screening tool which incorporates all of the current science, research and law may be developed to assist the court in completing this function. This approach has proved useful in other jurisdictions in helping the court consistently address and identify pertinent issues as well as in the matching of parties and families with available services. The judge will meet with the parties after the screening is conducted, all relevant information and documents are reviewed and an assessment of the case is made.

25. *See*, "Time-line for and Processing of Contested Divorces." *infra*, pp. 23-25 (three levels of conflict and attendant time frames are defined by the Commission).

A key recommendation included in the New York State Comprehensive Civil Justice Program released in 2005 was the development of a model child-centered custody initiative that would promote an expeditious and efficacious resolution of custody disputes and avoid negative impacts on children. This pilot, called Children Come First, is currently being developed and implemented in Nassau County Supreme Court. The core elements of this pilot are similar to those discussed above and take the best of similar programs and standards of practice in the expedited matrimonial part in the Eighth District as well as from New Jersey, Connecticut and other jurisdictions, folding them into the existing court processes. It is planned to be a judge-centered approach whereby early screening and the provision of appropriate need-based services will be identified as early as possible in the litigation. Examples of appropriate services – or tools that would be added to the judge's toolbox – include parent education programs, mediation, case conferencing, issue-focused and comprehensive evaluations and the use of parenting plans.

The "parenting plan" tool is an especially illustrative example of the strength of this approach. Where a judge and court personnel can quickly identify a family dynamic where a custody dispute exists and that may benefit from the use of a parenting plan, the court can assist parents in formulating an appropriate parenting schedule through the exercise of completing such a plan, not only resolving the issue early on and outside of the adversarial process, but also empowering parents to resolve differences independently of the court. This is important since data suggests that where no parenting plan exists, many parents return to court for assistance in resolving the very issues that could have been addressed in the parenting plan.

The positions of Parent Coordinator and social worker may also be utilized in this process to assist parents in resolving disputes and complying with court orders. Specifically, in certain parts of the state, the court system has successfully employed social workers (MSWs) to assist matrimonial judges in resolving custody and parenting time disputes, providing assessments and referrals. The Commission recommends that social workers be employed in each of the State's larger counties and one in each

of the five boroughs of New York City. In other parts of the state, social workers could be utilized on a regional basis. The social workers should be under the supervision and jurisdiction, including their education and training, of the DCAJ-MM.

In sum, with respect to this early screening model, the Commission recognizes that the development of a screening process such as that discussed above requires additional research and study. Creating a reliable screening process to assist the court in assessing the complexity of the case and developing appropriate service plans is a major challenge, involving concerns as to how information will be developed and shared. Court personnel and judges must be well trained and there must be appropriate oversight. Therefore, the Commission recommends that the OCA pursue this program by first, continuing the work started in Nassau County as the Children Come First pilot and second, developing best practices and standards in this area to be exported to other courts for implementation as soon as practicable. Additionally, the OCA should begin a dialogue with the matrimonial Bar and mental health professionals to incorporate their expertise and knowledge on these issues.

*Preliminary Conference* (PC). An important factor in reducing the time matters remain in the system is that, overwhelmingly, PCs are held, as required by the matrimonial rules, at an early stage of the proceedings. Seeking to further improve the utility of the PC and aggressively manage the cases from all perspectives, the Commission proposes a modification of Uniform Rules for Trial Courts, Section 202.16 by the adoption and employment by all courts in the State of the revised standard Preliminary Conference Order (PC order) form attached as Appendix D. While individual discretion regarding resolution of or prescribed action on issues included on the form remains with the Judge before whom the matter is pending and in the parties and counsel involved, the form includes numerous issues which should at least be raised for consideration during this important early meeting.

To assure adequate preparation by the parties, the proposed order should be reviewed and discussed prior to the PC. Among other specific information included in the new proposed form,

the Commission recommends that a sworn statement of net worth as of the date of the commencement of the action,[26] a signed copy of each attorney's retainer agreement, where applicable, and certification by all attorneys that they have no knowledge of any false statements of fact (including the net worth statement) in the statements and allegations submitted be exchanged at the conference. Additional documents are to be exchanged within 45 days of the PC, including, but not limited to: complete tax returns and related data; credit card statements for all credit cards used by a party; joint and individual checking account statements, checks and registers; brokerage account statements; savings account records; and retirement account or plan statements.

At the PC, the parties and their attorneys should be prepared to address the issues raised in the proposed PC order. If the parties are unable to complete the form without the assistance of the court, it is contemplated that this will be done with the court's participation on the record. In addition, the order provides web sites where a party can obtain additional information about the legal process.

As part of the proposed PC order, the parties must represent what orders and agreements are outstanding, whether they anticipate that their matter will be low, moderate or high conflict, whether they want to consider alternative dispute resolution options and what issues, including grounds for divorce, are in dispute. The court is to be advised of any special needs of a party whether this relates to safety, translation or technology needs and the parties are advised of certain services available to them, e.g. parent education programs.

To assure that cases are prosecuted in a timely manner without the delay arising from belated identification of issues, the proposed PC order would require the parties to identify issues in dispute. In addition, the parties must provide a plan for how issues are to be resolved - through alternative dispute resolu-

26. The Commission recommends specific and practical revisions to the standard Net Worth Statement form currently in use, for example, the inclusion of children's social security numbers. No major overhaul of the form is envisioned. The Commission's proposed form together with a Guide is annexed as Appendix E.

tion or the litigation process. They will be asked to decide on what is necessary to have the issues ready for trial. Therefore, issues as to attorneys for the child, forensic evaluations, confidentiality agreements, document production, and the need for financial experts are to be addressed at this conference and in this order. The goal is to make the PC a first and important step towards managing the case with the parties' active participation in the process.

*Time-line for and Processing of Contested Divorces.* Irrespective of the great strides made, the progression of a matrimonial matter or related proceeding continues to present problems for courts and parties alike. The Commission received testimony on both ends of the spectrum. Many contended their matters dragged on far too long; the blame resting with the courts, counsel, experts, their former partner or spouse or any combination of these. Others felt that the system moved too quickly, with little attention given to the arguably unique issues presented by their case or with little sensitivity to conflicts presented by appearance schedules with their personal calendars already complicated by the complexities of shared-parenting.

In an effort to appropriately streamline cases to facilitate each party's ability to move on with his or her life while allowing the appropriate time and attention for those matters that require them, the Commission proposes the following three-tiered time line for the processing of contested divorce matters. These definitions were meant to be guidelines for judges and courts, who will continue to retain full discretion to manage their cases as appropriate.[27]

*Low Conflict – Four (4) Months* Factors to consider in determining whether a matter would be considered "Low Conflict":

- Grounds not in dispute.
- Custody and/or parenting time not in dispute.
- No allegations of domestic violence.
- W-2 wage earners with tax returns filed in the three (3) years prior to the filing of the action or date of the PC.

27. This categorization scheme was crafted by the Commission from its collective professional experience and research.

- No real property or only residential real estate subject to equitable distribution.

*Moderate Conflict – Eight (8) Months* Factors to consider in determining whether a matter would be considered "Moderate Conflict":

- Likely that grounds are in dispute.
- Custody unresolved, but forensic involvement unlikely.
- Allegations of domestic violence.
- W-2 wage earners without updated or recently filed tax returns.
- Party(ies) self-employed with less than two (2) employees.
- Commercial as well as residential real estate subject to equitable distribution.

*High Conflict – 12 Months* Factors to consider in determining whether a matter would be considered "High Conflict":

- All factors listed for consideration in a "Moderate Conflict" matter.
- Custody unresolved, forensic involvement likely.
- Allegations of domestic violence.
- Business or professional practice evaluation to be completed.
- License(s) must be valued.
- Enhanced earnings valuations to be conducted.
- Discovery of assets requiring non-party depositions.
- Allegations of substantial cash income to one or both parties.
- Substantial separate property claimed by one or both parties.
- Related litigation involving validity of an agreement.
- Litigants regularly returning to court on same or related matter(s).

In an effort to encourage parties to diligently mediate custody disputes and to increase the likelihood of success in mediation and other forms of ADR, the Commission proposes that, while the parties are actively participating in court-sponsored alternative dispute resolution processes and with the consent of the

court, standards and goals time mandated by the OCA be tolled by an initial period of no more than 30-45 days. This releases the parties and their counsel from their obligation to actively engage in an adversarial process while simultaneously pursuing a collaborative resolution of the matter through mediation and other forms of ADR. In actions in which the court is satisfied that the parties are diligently and actively pursuing such a court-sponsored alternative dispute resolution process, the court may, at its discretion and for reasons stated either on the record or in a written order, extend the tolling of standards and goals for an additional period not to exceed 30-45 days. In no event, may the tolling period exceed a total of 90 days. Further, courts which affirmatively encourage and embrace ADR programs will not appear to be failing to meet standards and goals, a common measure of a court's/judge's performance.

It is further recommended that where a trial becomes necessary on issues of custody or relocation, such trials be scheduled early and given preference by the court, where practicable.

*Parity Among the Courts.* The Commission recognizes that as a result of New York's unique split court system, custody, parenting time and ancillary issues may be determined in both Supreme and Family Courts. The overlapping jurisdiction of these courts often causes duplication and confusion, adding cost, delay and trauma to such proceedings. While the question of restructuring the courts is not before this Commission, in an effort to help resolve some of these issues as well as to better inform decisions made in one court or the other with respect to a particular family, party or circumstance, the Commission recommends that certain matters be transferred between the courts. Specifically, where there are matters presently pending in both Supreme Court and Family Court, a rule should be adopted allowing for the transfer to the Supreme Court of the Family Court case where a contested divorce action is pending. This transfer should occur when practicable and upon notification of the Supreme Court by the Family Court, with the following caveat: in circumstances where a Family Court action has had an actual trial date selected or testimony has begun at trial, the matter should not be readily transferred to be heard simultaneously with the Supreme Court action. Such transfer

may create the duplication in effort, expense and resources the recommended process is intended to eliminate.

Consistent with this recommendation would be the requirement that if a Family Court matter has had counsel assigned pursuant to 35-A of the Judiciary Law or 18b of the County Law or if the litigants are eligible for assignment, that counsel be assigned to the continued Family Court case notwithstanding the fact that the case was transferred. This is necessary to protect parties from being denied access to counsel based solely upon the transfer of their matter to Supreme Court, thereby becoming subject to a different standard. Similarly, recognizing the impact of court orders excluding parents from a home or directing a parent to stay away from a child or children, a court rule requiring that cases with such "exclusion orders" be made returnable to the court within three (3) to five (5) court days should be adopted. This rule should be equally applicable in both the Supreme and Family Courts.

The Commission further recommends that a rule be adopted providing that any post-judgment application to modify a Supreme Court order/judgment (exclusive of enforcement) be brought in the Supreme Court, and not the Family Court, if such action is brought during an 18-month period after the judgment has been entered. The Family Court should have the authority to recommend that the matter be directly transferred to the Supreme Court. In keeping with the Commission's goal of improving the efficiency of the process in this regard, it further recommends that a separate computer tracking system for post-judgment matrimonial proceedings be developed and made accessible to all Supreme Court, matrimonial part and Family Court judges.

Although the Commission makes several recommendations with respect to increasing the exchange of information between Supreme Court and Family Court – including encouraging open dialogue between judges sitting in each court, the requirement that all Family Court jackets and contents of files be forwarded with the application to Supreme Court, and that a shared

database of information on matters and parties be created[28]– the Commission expects counsel and parties to fulfill their obligations to communicate effectively by making full disclosure to the courts. To that end, it should be required that each Supreme Court and Family Court request for an order of protection or custody and parenting time contain a declaration signed by a party that the signor understands that his or her failure to disclose that an order or pending matter in either Supreme Court or Family Court exists or that there was a contested divorce within18-months prior to the date of the application or petition, is considered a fraud upon the court and will be dealt with accordingly and subject to the penalties of perjury and sanctions.

Consistent with this recommended requirement, the Commission urges a change in the rules and substantive law pertaining to the enforcement of court orders. The Commission heard substantial testimony from litigants, attorneys and the judiciary that non-compliance with court orders largely contributed to the increased delay and cost of divorce. Moreover, the litigation process can be delayed or stymied by one party's refusal to cooperate in the process. To ameliorate the deleterious effects of one's failure to comply with court orders or cooperate in the discovery or evaluation process, the Commission makes two recommendations. First, it recommends that Domestic Relations Law § 245 be amended to provide Supreme Court judges with the same authority to enforce orders by contempt now enjoyed by Family Court judges.[29] Second, it recommends the adoption of a right to seek at a compliance conference, or sooner, on notice, an order deeming an issue resolved in favor of a party seeking discovery by deeming the issue true if there is a failure to provide discovery.[30]

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28. The Commission spoke at length with Chester Mount, Director of Research and Technology, regarding technology improvements needed to facilitate the efficient processing of matrimonial cases. Among other recommendations for further study and consideration, the Commission discussed the possibility of sharing information between the Supreme Court and Family Court by the implementation of a shared database. This solution is already being pursued to the extent possible by the OCA and the Commission enthusiastically endorses this effort.

29. *Compare* Fam. Ct. Act 454.

30. *See Miceli v. Miceli*, 233 A.D.2d 372, 650 N.Y.S.,2d 241 (2d Dept. 1996)(The appellate court opined that the remedy of preclusion here would be un-

These recommendations are not meant in any way to erode the Family Court's concurrent jurisdiction over a contested Supreme Court matter, but rather to eliminate duplication of effort and increase efficiency. Therefore, the Commission recommends that it be a general policy that the Family Court exercise its concurrent jurisdiction over a contested Supreme Court matter only if the Supreme Court is not in session or the Supreme Court justice is not available to handle the specific matter. Any petition for an order of protection, custody or parenting time shall be transferred without delay to the assigned Supreme Court judge. If the Family Court judge exercises such jurisdiction, any temporary orders shall be issued and referred to the Supreme Court on the next date that the Supreme Court is sitting, and the Family Court judge shall have the authority to make said petitions returnable in the Supreme Court on the adjourned date or the next motion date of the judge.

Finally, with respect to the specific goal of improving the process, the Commission takes note of the inconsistent manner in which forms, orders and judgments are processed across the state. Throughout this Report, the Commission recognizes recent strides toward the creation of practical and user-friendly forms and notes where such model uniform forms exist, or recommends forms to be considered for adoption by the court system and bar. However, it is imperative that these proper forms not only be available but that they be processed uniformly.[31] The Commission heard from numerous speakers about the inconsistencies in this regard and recommends that steps be taken to ensure the court and County Clerks across the state be provided the uniform forms, they be instructed on the documents, the information requested and the time frames for com-

satisfactory as it "could permit a party to secrete the very property the other party is seeking to discover." *Id.* at 373. Therefore, the court held that a more appropriate remedy would be to "deem true the [ ] allegations regarding the property about which discovery [was] withheld." *Id.*)

31. The Commission notes that under the Uniform Rules of the Court, 202.21(i)(2), there shall be a Unified Court System Uncontested Divorce Packet which shall be accepted by the court for obtaining an uncontested divorce, and no other forms shall be necessary. It also states that the court, in its discretion, may accept other forms that comply with the requirements of law.

pleting and filing each form. Further, the district administrative judges, with the assistance and support of the DCAJ-MM, will strive to ensure that uniform forms adopted for use be accepted by the clerks, without additional requirements or variations from county to county as is the current situation.

*Alternative Dispute Resolution (ADR).*

Substantial testimony, submissions and other information gathered by the Commission indicate that use of alternative dispute resolution processes should be expanded in matrimonial matters, particularly those involving children. When used appropriately, ADR, particularly mediation, is widely recognized as an effective means of reducing the delay, expense and trauma to children often experienced during divorce.[32] Areas of specific concern regarding the utilization of ADR methods in matrimonial proceedings include: the availability of ADR methods statewide; the skills, experience, and training of ADR neutrals; the nature of referrals to ADR; confidentiality and protocols regarding domestic violence or a severe power imbalance which would render some forms of ADR (e.g., mediation) inappropriate.

Alternative dispute resolution represents a variety of dispute resolution processes through which people may resolve or manage disputes. The traditional view of ADR is that the processes range from face-to-face negotiations to formal, binding arbitrations. Today, however, ADR practitioners recognize that litigation need not be the standard against which all other processes are deemed "alternative." Instead, the process of litigation occupies a place among a spectrum of "appropriate dispute resolution." Furthermore, several hybrid processes or services, particularly those related to divorce, have evolved in recent years including collaborative law and parenting coordination which many consider to be forms of ADR as well.

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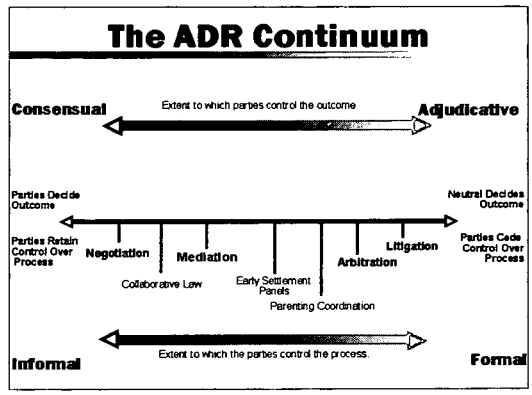
32. *See* Joan B. Kelly, *Family Mediation Research: Is There Empirical Support for the Field?* 22 no. 1-2 Conflict Resolution Quarterly 3, 8 (Fall-Winter 2004). *See also* Andrew I. Schepard, *Children, Courts, and Custody: Interdisciplinary Models for Divorcing Families* (Cambridge Univ. Press 2004) 62 (cites research in support of this assertion).

Appropriate dispute resolution processes differ along a continuum in the degree to which parties relinquish control of the process and outcome to a neutral third party. Thus, if one wished to rank ADR processes by the extent to which the parties yield control over the process and outcome, such a ranking might resemble the following:




For the purposes of this discussion, it is important to expressly define certain terms.

*Mediation.* Mediation is a confidential, informal procedure in which a neutral third person helps parents to communicate and make decisions with each other regarding their relationship and their child(ren). With the assistance of a mediator, parties identify issues, clarify perceptions and explore options for a mutually acceptable outcome. Mediators may "reality test" the parties' positions and encourage them to discuss proposed solutions with counsel to promote informed decision making. However, mediators do not give opinions regarding the merits of either party's case or attempt to assess the likely court outcome. This general practice of not offering opinions or assessing the merits on the part of the mediator, though debated in certain contexts, is critical when it comes to mediation of parenting issues. Through mediation, parents build confidence in making decisions on their own in the best interests of their children without the need to return to a third party (i.e., the court) for assistance every time a dispute arises. Furthermore, given the confusion that exists regarding the role of counsel in mediation, it is worth noting that although the foundation for mediation is di-

rect negotiation between the parties, it does not by definition mean "negotiation without lawyers". Whether or not a party is represented by counsel in mediation is up to the party and his or her counsel.

*Early Neutral Evaluation or an Early Settlement Panel.* Early Neutral Evaluation or an Early Settlement Panel is a confidential, non-binding process in which a neutral third party or panel with special knowledge in the subject matter relating to the dispute listens to abbreviated case presentations and provides an evaluation of likely court outcomes or assessment of strengths and weaknesses of the parties' cases in an effort to help parties reach a settlement. Early Settlement Panels may also offer case planning guidance and settlement assistance at the parties' request. As discussed later, two neighboring jurisdictions use a version of this ADR tool with great success.

*Parenting Coordinator.* A Parenting Coordinator is a combination educator, mediator and sometimes-therapist who helps parents develop conflict management skills and decides disputes if they cannot. Parent Coordinators typically supervise and manage chronic, recurring disputes such as parenting time conflicts on behalf of and under the direction of the court and help parents to adhere to court orders.

*Collaborative Law.* In Collaborative Law, parties to divorce and their attorneys agree to make a good faith attempt to reach a mutually acceptable settlement without going to court. At the beginning of the process, husband, wife, and both attorneys sign a Participation Agreement. The agreement requires both parties to: (1) exchange complete financial information so that each spouse can make well-informed decisions; (2) maintain confidentiality during the process, so that each spouse can feel free to express his or her needs and concerns; (3) reach written agreement on all issues and concerns outside of contested court proceedings and; (4) authorize the attorneys to use the written agreement to obtain a final court decree. The agreement also states that the attorneys involved agree not to represent either of the parties should the case proceed to litigation.

Commission members spent a significant amount of time exploring the potential of ADR. They heard from numerous speakers who specifically emphasized the benefits of ADR including, high settlement rates, party satisfaction with both the process and outcome and higher rates of compliance with agreements than with court orders.

Mediation is particularly appropriate for the resolution of child custody and parenting time disputes because it offers parents a safe, structured forum in which to discuss directly with one another issues effecting the parents' relationship with their children. In mediation, the parties not only discuss with each other (and counsel) the legal issues in dispute, they also discuss the kind of relationship they expect to have with each other moving forward and what their aspirations are for their children.

Members of the Commission also visited other jurisdictions which use a variety of ADR processes. The Commission was afforded an opportunity to speak with members of several stakeholder groups including the court system, the bar and the litigants, all of whom indicated, after acknowledging some initial skepticism about the programs, that ADR has been a great success. In the States of New Jersey and Connecticut, early settlement panels and the special masters programs, respectively, have overwhelming success rates at helping cases reach settlement agreements, with attendant high compliance rates, while also providing the litigants an opportunity to be heard.

In addition to hearing extensive testimony from professional neutrals engaged in ADR practices, former litigants who had experience with the processes, and representatives from several other jurisdictions, the Unified Court System's Office of ADR programs conducted research on these issues at the request of the Commission. This research revealed that forty four states have some form of statute or court rule encouraging the use of ADR and mediation where custody and parenting time is at issue in a litigation. These "mandatory" rules range from automatic referrals to judicial case-by-case discretion. Fourteen states mandate automatic referral of custody / parenting time issues to mediation, twelve of which have exceptions for good cause shown – typically where domestic violence is an issue.

Thirty states have a statute or court rule that authorizes the court to send parties with custody / parenting time issues to mediation or other appropriate form of dispute resolution. New York currently has no statute or court rule dealing with referrals to ADR in family matters (although the recently enacted permanency law authorizes the use of mediation in child welfare cases).

A rule which gives the court discretion to order parties to mediation for parenting issues would represent a significant culture change for the court as well as the Bar. The Hon. Janice Rosa, Supreme Court, Eighth Judicial District, explained best why such a change is both necessary and possible. Testifying before the Commission during its Buffalo public hearing, she stated that she went from distrustful to impassioned about the effects of mediation on family disputes. Justice Rosa opined that "Mediation and other ADR forms are techniques whose time has arrived. It reduces trauma, reduces expenses, reduces delays. Mediation not only changes the litigants, it alters the players, the attorneys, and the way they do business, and to the better." She further stated that litigation, by its nature and intent, does not allow for a free flow of ideas and that matrimonial cases, particularly issues involving parental decision making, cry out for a more respectful approach than the way presently offered – by shoe-horning those kinds of cases into our strictly adversarial process.

The Commission takes special note that Erie County Supreme Court, under the leadership of local district Administrative Judge Sharon Townsend and Justice Rosa, has already begun utilizing mediation for parenting disputes with great success. New York County Supreme Court, under the leadership of Administrative Judge Jacqueline Silbermann, also successfully utilizes mediation for parenting disputes. Mediation has been used in the Family Court throughout the State since the mid 1980's to help resolve parenting disputes with great success.

Significant independent research conducted over the last decade supports the benefits of mediation particularly for purposes

of resolving parenting issues.[33] Parties in mediation indicate greater satisfaction with the process over litigation or adversarial settlement. Satisfaction with the process often increases satisfaction with the outcome and this in turn leads to increased compliance. Research also indicates that the range of agreements resulting from mediation is comparable to those in the general divorcing population.[34] However, there are major differences in the practical nature and quality of parent-child relationships post-divorce mediation than from those post-litigation, particularly regarding the involvement of the non-custodial parent.[35]

Despite the success and increasing comfort of the courts and matrimonial bar in New York with mediation in custody disputes, significant concerns remain over the application of mediation to the financial aspects of divorce. Some states have addressed these concerns by utilizing other forms of ADR for the resolution of financial issues. As discussed earlier, Early Settlement Panels have been used extensively in New Jersey for this purpose with great success.

Given this background and research, the Commission recommends that the decision to refer a case to mediation, an early settlement panel, a parent coordinator or a combination of these should be by stipulation of both parties or at the judge's discretion. It further recommends the proposed court Rule attached as Appendix F be promulgated by the OCA to give Judges express authority on a case-by-case basis to order parties to mediation for parenting issues, early settlement panels for financial issues or parenting coordinators for cases involving high-conflict repetitive-litigant parents. Although the court's discretion to order parties to ADR should be limited as discussed, subject to approval by the court, the parties should be free to submit any unresolved issues to whichever form of ADR they prefer.

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33. *See generally* Joan B. Kelly and Robert E. Emery, *Children's Adjustment Following Divorce: Risk and Resilience Perspectives*, 52 FAM. REL. (2003). *See also* Kelly, *Family Mediation Research: Is There Empirical Support for the Field?*, *supra* n. 32; Robert E. Emery, *The Truth About Children and Divorce* (Penguin Group 2004).

34. *Id.*

35. *Id.*

Furthermore, the Commission anticipates that while mediation may be best utilized as early as possible, early settlement panels may be most appropriate after completion of discovery.

Victims of domestic violence or cases involving a severe power imbalance or in which there is evidence of child abuse should never be ordered to participate in mediation. Courts should implement protocols for screening cases referred or submitted to ADR to ensure the appropriateness of such referrals.

Referrals and the subsequent process of appointment must be perceived as fair, unbiased and reflect an impartial rotation. In an effort to ensure that judges exercise their discretion appropriately and to the greatest benefit of the parties and the system, it is recommended that judges and quasi-judicial officials as well as court attorneys and law secretaries be thoroughly educated about ADR programs generally and the areas of mediation, early settlement panels and parent coordinators specifically.

It is incumbent upon the court system to ensure that the ADR programs being utilized meet certain high standards. To this end, statewide guidelines for the qualifications and training of mediators, early settlement panelists and parent coordinators in matrimonial matters should be promulgated by the OCA. Standards of Conduct or Ethical Guidelines for ADR neutrals including mediators, early settlement panelists and parenting coordinators should also be promulgated. To the extent that models for these standards and guidelines exist in the form of those promulgated by the UCS Office of ADR Programs for community mediators handling family matters and the qualifications and training of mediators in the New York County Supreme Court Matrimonial Mediation Pilot Program, the Commission recommends that the OCA may look to these as guides. With respect to the guidelines for neutrals serving on Early Settlement Panels, these must be developed in collaboration with the bench and bar. The rules for similar panels in other jurisdictions, e.g., Connecticut and New Jersey, may be illustrative.

The success of such alternative dispute resolution programs relies heavily upon the assurance of confidentiality in ADR. Currently, there is no statute or court rule in New York that specifically provides confidentiality in ADR proceedings other than for those cases handled through New York's Community Dispute Resolution Centers.[36] Confidentiality, with limited exceptions (e.g., child abuse) is a hallmark of mediation and ADR in general. Confidentiality promotes the candor required to establish the type of cooperative atmosphere for communication and negotiation that sets mediation and ADR apart from the traditional adversarial means of dispute resolution. Therefore, the Commission recommends that a statute or court rule be promulgated which provides for confidentiality in ADR, consistent with existing case law as to admissions of fact.

The success of ADR programs also relies heavily upon the support of the practicing bar. The Commission strongly recommends that the bar take a leading role in educating its membership and their clients about the utility of ADR. To assist the organized bar in this effort, the Commission recommends that attorneys discuss ADR options with their clients and that section 1400.2 of the NY Ct. Rules – the Statement of Client's Rights – be amended as follows:

> * * * You are entitled to make the ultimate decision on the objectives to be pursued in your case, and to make the final decision regarding the settlement of your case.
>
> *You are entitled to ask your attorney, if retained, to discuss with you the advantages and disadvantages, of the alternative dispute resolution processes that might be appropriate in pursuing your objectives.*

The Office of Court Administration should publish brochures and other informational packets to assist the bar in complying with the above recommendation.

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36. *See* Jud. Law Article 21A § 849(b)(6).

*Statewide Parent Education and Awareness Program.*

In 2001, the Statewide Parent Education and Awareness Program was established to improve the quality of court outcomes involving children, raise judicial awareness of the benefits of parent education, clarify judicial authority to refer parents, and institutionalize parent education around the State.

In October 2003, the Parent Education Advisory Board (the "Board") released its Report and recommendations. The structure and content of parent education proposed was child-centered and concerned primarily with promoting children's healthy adjustment and development by educating parents about what they can do to reduce the stress of the family transition and to protect their children from the negative effects of ongoing parental conflict. The goal was to provide parents with information, practical strategies, and tools that they could use to mitigate the deleterious effects of divorce and separation on children.

Experience has shown that parent education programs can make a meaningful contribution to the well-being of children and promote healthy family functioning in the aftermath of a divorce or separation.[37] The Report served as the first step toward fashioning safe, accessible and highly effective parent education programs in New York State. To date, many of the recommendations have been implemented, including the creation of two positions within the OCA to implement and administer the Program and the first certifications of providers and programs should be complete by Spring 2006.

However, these guidelines, standards, and requirements were meant merely as a beginning and the Board expressly recognized that they may be modified in the future, as experience, research literature, evaluations, and feedback provide additional information. The Commission received substantial testi-

37. See generally Adler-Baeder, F. Parenting Education Programs for Separating/Divorcing Parents – Recent Research and Evaluative Studies: An Annotated Bibliography, Cornell Cooperative Extension, N.Y. (2000); Hetherington, E.M., & Stanley-Hagan, M.M. The Adjustment of Children with Divorced Parents: A Risk and Resiliency Perspective. Journal of Child Psychology and Psychiatry 40, 129-140 (1999).

mony and submissions from litigants, the bench and experts in the area of parent education, all overwhelmingly in favor of the existing system and encouraging further institutionalization by the court system. Two concerns raised repeatedly were: 1) the limitation on judicial authority to order parents to attend such programs and 2) the dearth of resources available to fund and support these programs.

Presently, judges are empowered to inform and encourage individuals to attend and to make express referrals, but may not order parties to do so. Given the success of such programs based on independent evaluations and the failure of many individuals to appreciate the program's benefits until they have actually attended, it is the Commission's recommendation that judicial officers be empowered to order parties, where appropriate, to attend a parent education program. The decision to order attendance must be wholly within the judge's discretion with the limitation that attendance – or failure to do so – will not have any affect on the progress of the litigation. The Commission urges the OCA, with the assistance of Justice Frazee and the staff of the Parent Education Program to develop the proposed legislation, rule changes and informational material for the bench, bar and litigants necessary to immediately effectuate this recommendation.

Additionally, the Commission learned that the overwhelming majority of the entities providing parent education providers rely almost exclusively on grants, private donations, and fees. Without a reliable funding stream, many programs struggle to provide consistent services; some even discontinue the provision of parent education all together. The Commission acknowledges the provision of in-kind services and support by the OCA and the competition for the court system's limited resources. Nonetheless, it recommends that the OCA investigate additional in-kind support which can be offered to continue and expand the number and quality of parent education programs statewide. Specifically, the Commission recommends that the OCA develop a pilot program similar to those which exist in the Seventh and Eighth Judicial Districts wherein a court employee functions as the "administrator" for the local programs, relieving the provid-

ers of much of the administrative responsibilities recommended by the Board in its 2003 Report.

Lastly, with respect to the parent education program, consistent with these recommendations and in recognition of the need for a consistent and uniform approach to the long-term administration of this program, the Commission recommends that the OCA promulgate Rules of the Chief Administrator which would replace the original Administrative Order of the Chief Administrative Judge creating this program and defining all aspects of the Parent Education Program, its administration and processes.

*Additional Process-Related Issues.*

Several other issues related to the processing of cases and the administration of the system were raised during the course of the Commission's information gathering, the public hearings and its meetings and are addressed here as they do not necessarily correlate to any one narrow issue area.

*Recording of Proceedings*. An issue of general import to those involved in these matters and who appear in our courts is that of the quality of recording equipment used to create the record of proceedings. The Commission heard from several individuals – both inside and outside the system – that the recording equipment used in some courts to record custody and parenting time proceedings was sub-standard. The Commission has also learned that the Council on Children of the Bar of the City of New York is currently looking into this issue and expects to make some recommendations for improvement by the middle of 2006. The OCA Department of Technology is keenly aware of the purported problems as well.

Specifically, it has been reported that in some jurisdictions the quality of the tape recordings made on cassette recording machines sometimes results in inaudible tapes, breaks in or missing portions of testimony resulting in incomplete transcripts. This may be attributable to a number of factors, including the way the machines are operated, the age and quality of the equipment and the quality of the tapes used. Additionally, the equipment is often operated by the judges themselves, creating

situations where the judge may have to stop proceedings to attend to the equipment and making "read backs" and or clarifications of testimony difficult. Even where recordings are sufficient and transcribed, the delays in receiving those transcripts and the costs incurred are significant. The Commission does not seek to determine which of these factors is causing the ultimate problem: insufficient official records and transcripts of proceedings, resulting in reconstruction hearings and other efforts used to create "usable" transcripts. This is not only inefficient and costly, but may create legal issues which go to the heart of the proceedings themselves.

The Commission recommends that the OCA take the necessary steps to improve the quality of the machines utilized in the affected courts and parts and provide that court personnel be assigned to operate and monitor the equipment to ensure it is functioning properly. With respect to the costs associated with obtaining transcripts of recorded proceedings, the Commission recommends that fee schedules be established by the OCA applicable to this circumstance and that contracts be entered into with transcription services by the OCA or the local courts only if the service can guarantee transcriptions be ready within ten (10) days of payment.

*Automatic Orders*. The Commission learned from many who appeared before it that numerous issues can be either completely resolved or significantly addressed during the earliest stages of an action. All too often, parties seek relief by way of order to show cause for the task of maintaining the status quo once a divorce action has been commenced. The Commission believes that the adoption statewide of an automatic order would make great strides toward reducing the delay, cost and litigious nature of many contested divorce matters.

Although the Commission suggests that further time and consideration be given to devising a thoughtful proposed order and accompanying instructions, it recommends, generally, that upon the filing of a Request for Judicial Intervention (RJI), an automatic order should issue preventing parties from transferring assets except in the ordinary course of business or for daily living expenses. The order would require parties to maintain all

health, life and property insurance. Absent a court order to the contrary, all custodial arrangements would remain in full force. Any automatic order adopted should include a provision that any application (either ex parte or on notice) to vacate an automatic order must be heard within 24 hours.

*Discretionary Stays on Appeal.* Under the present law,[38] a moneyed spouse may frustrate and avoid the timely payment of court-ordered maintenance, child support or attorney's fees, by filing a Notice of Appeal and posting a bond or undertaking which entitles the appellant to an automatic stay, without court order, on appeal. The Commission recommends that court ordered payments of maintenance, child support and attorney's fees be excepted from the automatic stay provisions of CPLR 5519 (a)(2) and (3), and that the question of any such stay be required to be made upon motion and determined within the discretion of the court.

*Orders to Show Cause.* The Commission heard from numerous practicing attorneys that the process of deciding and signing Orders to Show Cause in some counties results in unnecessary delay and cost to the parties. The Commission notes that each county has established its own procedures for handling Orders to Show Cause submitted with "emergency" affirmations. This discussion does not address emergency orders, but all others. Apparently, in some counties, the Orders are processed promptly even though not submitted as "emergencies", so that one can submit an order and conform it before leaving the courthouse. In other counties, once the order is left with the matrimonial clerk, and subsequently signed, the attorney or self-represented litigant must make a second trip to the courthouse to obtain a copy of the order suitable for service. This waste of time results in expense and delay to the parties and inefficiencies in the process as a whole.

In an effort to streamline this aspect of the process, the Commission recommends that, as soon as practicable, after an Order to Show Cause is signed in a matrimonial matter, it be faxed to the attorney or self-represented litigant who submitted the or-

38. CPLR 5519 (a)(2) and (3) plug in statutory language.

der, provided that person has given the court a fax number for such purpose. The court would be relieved of this obligation if the attorney or self-represented litigant submitting the order is given a copy of the conformed order before he or she leaves the courthouse. The court should develop a system for recording when and how a conformed copy of the signed order was delivered to the attorney or self-represented litigant, e.g., a note in the file of the date that the that the copy was picked up or a copy of the facsimile confirmation. Further, many Orders to Show Cause request a Temporary Order of Protection. This request must be decided by the court on the day it is brought before it and the court should set a return date within 48-hours to ensure all parties are heard in a timely manner. Finally, the Commission recommends these processes be uniformly and consistently followed in all counties.

## ROLE AND APPOINTMENT OF ATTORNEY FOR THE CHILD

Contested custody proceedings are often complex, lengthy and stressful. By the very nature of these proceedings, children are usually entangled as the focus of two caring, but warring, parents. In these emotionally charged, intensely adversarial, and traumatic disputes, the attorney for the child, as the children's independent advocate, generally must take a position based upon the children's wishes and convey that position to the court.

Questions have been raised about the proper role of attorneys for the child in custody proceedings, when they should be appointed, their qualifications, and protocols for representation. Other issues of concern are how attorneys for the child should be compensated, and mechanisms for monitoring their performance.

*Role of the Attorney for the Child.* The Commission is cognizant of the unique responsibilities of representing a child. After an extensive review and much deliberation, the Commission has concluded that, the attorney for the child is not a fiduciary and

should not be so regarded.[39] The Commission believes that this issue requires further research, discussion, and consideration and recommends that the OCA consider revising its rules and policies to reflect more accurately the Commission's conclusion the attorney for the child is not a fiduciary. However, the Commission believes that limits on the conduct and practice of these attorneys is both necessary and important, and strongly recommends that the OCA continue those provisions of the Rules which provide for their monitoring and reporting.

The Commission is also aware that unless the court, the parties, their attorneys and the attorney for the child all recognize and appreciate the unique role of – and limitations on – the attorney for the child, attorneys for children will never be as effective as their responsibilities demand. Therefore, the Commission is recommending the adoption by administrative rule of the Statewide Law Guardian Advisory Committee's working definition of the role of the attorney for the child, which states:

> The law guardian is the attorney for the child. In juvenile delinquency proceedings, it is the responsibility of the law guardian to vigorously represent the child. In other types of proceedings, it is the responsibility of the law guardian to diligently advocate the child's position in the litigation. In ascertaining that position, the law guardian must consult with and advise the child to the extent possible and in a manner consistent with the child's capacities. If the child is capable of a knowing, voluntary and considered judgment, the law guardian should be directed by the wishes of the child, even if the law guardian believes that what the child wants is not in the child's best interest. However, when the law guardian is convinced either that the child lacks the capacity for making a knowing, voluntary, and considered judgment or that following the child's wishes is likely to result in a risk of physical or emotional harm to the child, the law guardian would be justified in taking a position that is contrary to the child's wishes. In these circumstances, the law guardian should report the child's

39. The regulatory process for monitoring and reporting the fees of the privately-paid attorney for the child is set forth in Part 36 of the Rules of the Chief Judge.

> articulated wishes to the court if the child wants the law guardian to do so, notwithstanding the law guardian's position.[40]

The Commission notes that assessing the child's ability to make a knowledgeable, voluntary and considered judgment must be one of the first tasks undertaken by the attorney for the child. It is our determination that such an assessment must consider the child's age, level of maturity, developmental ability, emotional status, and ability to articulate his or her desires. An additional factor to be considered during the assessment is inappropriate parental behavior.

The Commission reiterates that at all times during the proceeding, the attorney for the child is subject to the same rules of good lawyering and professional responsibility applicable to any attorney in a civil proceeding or action, and must represent the client within those bounds.

*The Appointment of the Attorney for the Child.* The authority for the appointment of the attorney for the child is statutory, based on the policy considerations contained in Family Court Act, Article 2. That statute declares that an attorney for a child is a necessary advocate for a minor who often requires the assistance of counsel to protect his or her interests, and in expressing his or her wishes to the court. In the context of a disputed custody matter, "[t]he possibility that parental rights will prevail over the children's rights is clearly a danger. . . which may only be avoided by the appointment of a law guardian."[41] Appointments are subject to Family Court Act, Article 2, specific rules of the respective Appellate Divisions and the Rules of the Chief Judge.[42]

The appointment of an attorney for the child, and his or her active participation in the proceedings, ensures independent representation for the children.[43] Pursuant to Family Court Act

40. Appellate Division, Second, Third and Fourth Departments, *Law Guardian Program Administrative Handbook* (2005).

41. *Borkowski v Borkowski*, 90 Misc.2d 957, 396 N.Y.S.2d 962 (Sup. Ct. Steuben Co. 1977).

42. *See* 22 NYCRR §§ 611, 679, 835 and 1032; 22 NYCRR Part 36, Appointments by the Court; Fam. Ct. Act article 2.

43. Barbara Dildine, "Law Guardian Practice in Custody/Visitation Proceedings," The Children's Law Center, May 25, 2004.

§ 249, the appointment of an attorney for the child in a custody dispute is within the sound discretion of the court. Nonetheless, there is a preference for the appointment of an attorney for the child in such disputes. Indeed, the failure to make such an appointment in certain custody proceedings has been deemed to be an improvident exercise of a court's discretion.[44]

The Commission recognizes that, in the first instance, the judge must examine the unique circumstances of the case and the nature of the allegations raised by the parties in determining whether to appoint an attorney for the child. Established factors which may be taken into consideration by the court include whether or not the parties are represented by counsel, the degree of acrimony between the parties, the presence of issues or allegations of domestic violence and/or substance abuse, requests for relocation, allegations of child abuse or neglect, a parent's unfitness, and the age and maturity of the child. A school of thought exists that appointments should be defined statutorily, removing much of the judge's discretion in such matters. The Commission recommends that the decision to appoint an attorney for the child in a custody case must remain within the court's discretion. Further, the Commission unequivocally states that it is essential that such appointments be fair and unbiased. Further, they should be made and communicated to the litigants and the public in such a manner that they reflect impartiality.

Next, the Commission reminds all those involved in the process that the appointment of the attorney for the child is subject to specific legal guidelines, as defined by, statutes, case law, and court rules. The Commission commends the work of the OCA, the Appellate Divisions and others in educating and training judges, court personnel and those seeking appointments as attorneys for children. This education must be continued and expanded, specifically emphasizing a better understanding of the role of the attorney who represents the child.

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44. *See Vecchiarelli v Vecchiarelli*, 238 A.D.2d 411,413, 656 N.Y.S.2d 337, 338-339 (2d Dept. 1997), *citing Koppenhoefer v Koppenhoefer*, 159 AD2d 113, 558 N.Y.S.2d 596 (2d Dept. 1990); *see also, McWhirter v Mc Whirter*, 129 A.D.2d 1007, 514 N.Y.S.2d 301 (4th Dept. 1987).

As a result of a careful review of the testimony offered at the hearings, responses to the surveys prepared by the Commission and written submissions received, it became obvious that parties often lack a full understanding of the duties and obligations of the attorney for the child. Additionally, parties require clarification of the payment structure and process for these attorneys.

In an effort to address these misunderstandings and misconceptions and better guide the attorneys and parties to an action where an attorney for the child is appointed, the Commission recommends that the attached proposed order of appointment be used. As in the proposed form, the order must include language regarding the method of compensation, defining the responsibilities of the attorney for the child, including the scheduling of interviews, and the obligations of the parties and their attorneys regarding cooperation in providing documents and executing releases. Proposed orders are attached as Appendices G and H.

*Protocols for Representation.* Appointments must comply with the Appellate Divisions' rules regarding eligibility requirements as set forth in New York Rules of Court.[45] These rules address a minimum level of experience necessary to be appointed to the Attorney for the Child Panels and also provide for co-counsel or mentoring programs as well as continuing legal education requirements.

The Commission recognizes a need to have uniform protocols for representation of children in every aspect of custody litigation from the preliminary stages through the post-trial proceedings. The Commission also recognizes that some variations exist in the local practice of law. Nevertheless, the Commission recommends that there be uniform statewide protocols for the representation of children. In pursuing this goal, the Commission thoroughly reviewed and considered the Law Guardian Representation Standards promulgated by the New York State Bar Association's Committee on Children and the Law. These stan-

45. 22 NYCRR §§ 611, 679, 835 and 1032. Institutional providers of law guardian services (*e.g.*, Legal Aid Societies) are subject to the terms and conditions of the individual contracts under which they operate.

dards, organized into sections by the preliminary, trial and post-trial stages of custody litigation, were first adopted and published in 1992. A second edition was published in 1999. The current revision (awaiting adoption by the New York State Bar Association Executive Committee[46]) most accurately reflects the principle that these attorneys must be viewed as the attorneys for the children and are subject to the same rules of professional responsibility applicable to all attorneys. Included are restrictions and obligations concerning ex-parte communications, client confidentiality and conflicts of interests. After careful consideration, the Commission recommends the adoption of the New York State Bar Association's Law Guardian Representation Standards by administrative rule. These standards should be viewed as a supplement to the Code of Professional Responsibility.[47]

*Mechanisms for Monitoring Performance.* The Rules of the Appellate Divisions provide for periodic evaluations, annual recertifications, continuing legal education, investigation of complaints made against attorneys for the child and, where appropriate, their removal from the list of certified attorneys.[48] The Commission recognizes the effort expended by each of the Appellate Divisions in the administration of their programs. Nevertheless, it is the Commission's recommendation that the Appellate Divisions examine their existing rules, particularly with regard to eligibility requirements and evaluations. Upon a review of testimony at the hearings, responses to the surveys prepared and distributed by the Commission and written submissions received, the Commission found several recurring issues of concern regarding the performance of the appointed attorneys for the child, including the following: investigation, case organization and gender bias. The Commission recommends that the areas of training of attorneys for the child should be expanded to include:

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46. *See* New York State Bar Association Committee on Children and the Law, *Law Guardian Representation Standards, Vol. II: Custody Cases* (3d ed., 2005)(adoption by the New York State Bar Association Executive Committee pending).

47. *See* Code of Prof. Resp., McKinney's Consol. Laws, Book 29 Appendix.

48. *See* 22 NYCRR §§ 611, 679, 835 and 1032.

- various facets of custody litigation including, domestic violence, the use of protective orders, obtaining evidence and witnesses;
- case preparation, organization, investigation and trial skills;
- understanding the client's environment and recognizing support systems;
- child developmental concerns as they affect lawyer/client relationship and child/parent relationship;
- reading and examining forensic reports and techniques in cross-examining forensic experts and critiquing reports and recommendations;
- addressing one's own biases.

A recurring problem cited in the responses to the Commission's surveys relates to the court's expectations regarding the role of the attorney for the child. The court should not ask an attorney for the child for a recommendation or personal opinion. As stated earlier, the attorney for the child is not an arm of the court or a fiduciary and, as the attorney for the child, he or she must advocate on that child's behalf as is required of any other attorney in a civil proceeding or action. The attorney for the child is expected, however, to take a position in the litigation – in accordance with the considerations outlined earlier – and to use every appropriate means to advance that position.[49] Consistent with the earlier recommendations by this Commission regarding judicial training, it is essential that judges receive training in child development issues. Additionally, the following areas of judicial training should be expanded so that judges:

- shall not make improper requests for recommendations by the attorney for the child;
- shall not unduly rely on or delegate any judicial responsibilities to any attorney involved in the litigation, including the attorney for the child;
- shall not engage in *ex parte* communications;
- shall not request that the attorney for the child select the forensic expert;

49. *See Matter of Graham v Graham*, 2005 WL 3489247 (N.Y.A.D. 3rd Dept), 2005 N.Y. Slip Op. 09781, at 3 (December 22, 2005).

- shall not request reports prepared by the attorney for the child.

Judges should be encouraged to appoint multiple attorneys when conflicts exist in representing more than one child in the family.

*Compensation of the Attorney for the Child in Custody Cases.* The Commission found that the discretionary practice of directing parents with sufficient means to pay an attorney's fee is not consistent throughout the four judicial departments of the State.[50] The Commission also notes that in matrimonial actions, Supreme Courts can provide for the payment of attorneys for the child with State funds pursuant to Family Court Act §245 and Judiciary Law § 35(3).[51]

To assure consistent and meaningful assistance of counsel to children and statewide uniformity in the availability of such counsel, the Commission recommends that the OCA seek to amend the Domestic Relations Law, the Family Court Act and the Judiciary Law, to expressly empower courts with the discretion to direct parents with sufficient means to pay the fee of the attorney for the child. It is hoped that this initiative would not only place the responsibility for the cost of these services upon those who can afford them, but also would reduce the case load and cost of publicly funded programs and assignments. The attorney for the child should advise the court if fees are not paid in a timely manner so that the court may act to facilitate payment.

The Commission further recommends that it be required whenever such an appointment is made that an Order be entered specifying the allocation of fees, the source of payment, the attorney's hourly rate, the frequency and reporting process of billing, the means for enforcement of payment, and any other

50. *See supra* n. 8.

51. A small minority of the Commission believes that each of the four Appellate Divisions should be permitted to continue to chart its own course – both administratively and with respect to its view of the law – on the issue of privately paid attorneys for the child.

relevant factors that will eliminate conflict in connection with the appointment of an attorney for the child.

## THE ROLE AND APPOINTMENT OF EXPERTS

*Forensic Experts.*

The use of forensic experts in custody cases is a matter that clearly pervaded the information gathered by the Commission in all respects. The concerns raised include the validity of forensic reports, the quality of those reports, the qualifications of the forensics, the use of the reports by courts and their admissibility as evidence. Proposed reforms from many different sources have ranged from eliminating the use of forensics altogether to instituting changes that will insure the quality and proper use of the reports; namely, that they be given appropriate weight and consideration by the judiciary. It is a serious issue requiring significant attention, while taking care not to eliminate or overly constrict what is often a very valuable, and at times indispensable resource for the litigants and courts in custody matters.

The areas of concern appear to fall into the following general categories:

- The use (or overuse) of forensic experts, i.e., when is it appropriate for the court to order forensics in a custody case.
- The qualifications of the forensic experts, including their training and sensitivity to discrete issues such as diversity, alcoholism, use of illegal drugs, abuse of prescription drugs, domestic violence, and others that may affect the evaluation.
- The quality of the reports produced and the criteria for an appropriate valuation.
- Whether reports should contain recommendations on the ultimate issue presented to the court in a custody case, i.e., which parent should be awarded primary physical custody.
- The use of the reports by the courts. That is, to what extent should the court rely on the forensic's report. Here, the issue is raised as to the "scientific" validity of certain

testing and conclusions rendered in forensic reports as they pertain to parenting and, thus, whether the report is admissible in evidence under the prevailing standards for the admissibility of expert testimony.[52]

- Procedural aspects as to how a forensic's report is handled by the courts. In particular, the access to the reports given to parties and counsel, the review of these reports by courts prior to trial and discovery of the underlying bases for the reports by counsel prior to trial. A corollary issue raised here is the availability of discovery in general in custody cases and the lack of uniformity on this issue among the departments.
- The cost of forensic experts and allocation of that cost.

It is abundantly evident that examinations by forensic experts have played an important, and indeed vital, role in custody cases. The elimination of these evaluations altogether does not appear to be advocated by any interested group. The initial question then posed is, "When should a court order a forensic examination?" The concern raised by litigants, the bar, and judges alike is that often there is an automatic appointment of a forensic expert as soon as the court is informed that there is a custody issue in the case. In addition, when these appointments are made there is insufficient direction to keep the evaluation within the confines of the needs of the particular case. The result is often unnecessary or excess cost and delay.

It would be nearly impossible and probably counterproductive to attempt to set forth every instance in which a forensic should or should not be appointed. However, the Commission recommends that uniform criteria be applied by the courts in custody cases. Also, if both parties are not in agreement on the need for a forensic examination, the court should articulate on the record its reasons for appointing a forensic expert in the face of this disagreement and the specific issues to be addressed.

The Commission proposes the following guidelines for the appointment of a forensic expert be adopted statewide:

52. *See generally Frye v United States*, 54 App. D.C. 46, 293 F. 1013 (App. D.C. 1923).

- Bona fide issue of custody. The court should look at the practice of the parties to date and the practicality of the proposed parenting plan of each spouse seeking custody. That is, whether one party is threatening a custody battle as a bargaining chip or to pressure or harass the other party.
- Consideration of an allegation of mental illness on the part of either or both parents calling for a diagnosis from a qualified mental health professional.
- Defining the issues presented as access to the children, decision-making or both.
- Consideration of any special needs of the children that present particularly difficult parenting issues with which the court would benefit from the participation of a forensic expert.
- Consideration of any allegations of a pattern of parental alienation or interference that are of such a nature that inquiry by an expert would aid the court in its determination of the merits of those issues.
- Consideration of allegations of child abuse or domestic violence requiring a forensic expert with training in these areas.

*Qualifications*. Once the court determines that a forensic evaluation would benefit the parties and inform the ultimate determination of the custody issue, it is imperative that the qualifications and training of the forensic expert being appointed match the needs and dynamics of the case. The qualifications of the forensic expert are, of course, connected intimately with their education, training and professional experience. The Commission considered extensive testimony, data, scholarly research and anecdotal reports regarding this issue and enjoyed a spirited and thoughtful discussion of the matter. Ultimately, the Commission concluded that detailed proposals for education and training are long-term issues to be dealt with independently and through a multi- and inter-disciplinary approach. Therefore, the observations and recommendations contained in this Report are limited to the short-term goal of determining the best qualifications for experts presently being appointed by the courts. To that end, the Commission reviewed

the relevant statutory provisions in California, attached as Appendix I, and recommends that the OCA adopt and implement similar requirements through appropriate means.

In general, such an expert may come from one of four different educational backgrounds: (1) psychiatrist, (2) psychologist, (3) psychiatric social worker, and (4) psychiatric clinical nurse specialist. Unless specific questions arise which mandate the appointment of a specialist from one or another of these fields, the specific degree a person has is far less important than his or her training and knowledge in areas important to child custody contests and the case-specific concerns, e.g., those previously enumerated.[53] Further, child custody contests often involve discrete problems and issues, such as alcoholism, abuse of prescription drugs, use of illegal drugs, domestic violence, and others, which may require knowledge beyond the expertise of the usual mental health practitioner, and for which the expert should be able to demonstrate special knowledge, training and experience.

The Commission recommends the establishment of statewide standards for minimum qualifications of evaluators, training and periodic review. Qualifications should be maintained by mandatory continuing education and training provided by recognized organizations and institutions. Experts should also work under the supervision of "senior" experts for a specified period of time and be subject to a formalized peer review process.

*The Selection Process.* Data collected by the Commission through the survey process and further enhanced by anecdotal

53. To the extent that certain credentials may be misleading, the Commission strongly urges the court and bar to carefully review the potential expert's resume, curriculum vitae and application and be informed about the nature of the accreditations included therein. The Commission notes an article appearing in US News and World Reports, Apr. 25, 2005, at p. 52. which drew attention to the "American College of Forensic Examiners International." "Certification" by this organization and others has nothing to do with endorsement by these professions. In addition, the article states that the founder had been charged with plagiarism and fired from the university in which he taught before he began the organization. In the event that an evaluator gets to the point of testifying in court, it is the responsibility of the attorney to conduct a *voir dire* to clarify the question of validity of such credentials during the qualifying process.

evidence received, revealed that attorney satisfaction with the process increases when the parties mutually agree upon the expert. Apparently, attorney satisfaction with the process decreases significantly when the court appoints the expert and attorneys are unaware of the basis for the appointment. Satisfaction also decreases when the expert is merely chosen from an approved list of experts on file with the court without consideration for the subtleties of the case. A survey of judges resulted in similar results. However, with respect to lists, judges responded that they tended to use the list of forensic experts compiled by the Appellate Division departments and found them helpful.

The Commission recommends that counsel and litigants come to the PC prepared with the names and curriculum vitae of proposed experts that they would want the court to consider as neutral experts. If the parties cannot agree then the judge should choose an expert from the names submitted. If the judge does not select an expert from the names submitted and chooses another, the reasons for not agreeing with counsel's submission should be stated on the record.

A uniform appointment order should be used in these situations. A model order is attached as Appendix J. Generally, the order provides for (I) a designation by the court of the issues to be addressed by the expert, (ii) upon request of the evaluator (and subject to any court orders limiting disclosure)a direction that the parties shall provide the expert with appropriate releases so that the expert may consult with healthcare professionals, therapists and school personnel and procure relevant records and reports, (iii)that neither counsel for the parties nor counsel for the child(ren) shall have contact with the expert except for scheduling issues, (iv) that if an expert determines that exigent circumstances exist requiring court intervention, the expert will notify counsel for the parties and the child(ren), (v) that the report shall be submitted to the court and shown to the parties (without providing copies to the parties absent court order), (vi) that in response to a discovery request, the expert shall make his or her underlying data and notes available to counsel, subject to any limiting order by the court, and (vii) shall indicate whether the court wants the expert to make rec-

ommendations on the issue of custody or other specific issues to be addressed by the expert. The order also addresses the hourly fee and maximum fee to be charged by the expert for the evaluation and the initial division of responsibility for payment of those fees between the parties. An expert is given the right to petition the court to exceed the maximum fee.

*Conduct of Evaluation and the Report.* The quality of forensic reports in child custody contests cannot be overemphasized. The quality of the report is directly related to the evaluation process. The Commission has reviewed numerous proposed guidelines and best practices, finding that they each differ from the other to some degree. Scholarly pieces considered include, the "Guidelines for Child Custody Evaluations in Divorce Proceedings" of the American Psychological Association, "Child Custody Consultation: A Report of the Task Force of Clinical Assessment in Child Custody" of the American Psychiatric Association and "Practice Parameters for Child Custody Evaluation" of the American Academy of Child and Adolescent Psychiatry.[54]

Relying on these reports and experts in the field and seeking to redress complaints and concerns raised by the courts and litigants in this area, the Commission proposes the following essential elements for a forensic custody evaluation and report. The Commission emphasizes that the over-arching focus of the evaluation and report should be on the "emotional" best interests of the child, specifically recommending that the following be adhered to in the conduct of custody evaluations and the resulting report to the court:

Content of Report

- A statement that the report is being rendered pursuant to court order;
- A statement that all parties have been advised of the lack of privilege and confidentiality and that no physi-

54. "Guidelines for Child Custody Evaluations in Divorce Proceedings", American Psychology 49:7, 677-680 (Am. Psychol. Assn. July 1994); "Child Custody Consultation: A Report of the Task Force on Clinical Assessment in Child Custody", Am. Psychiatric Assn. (December 1988); "Practice Parameters for Child Custody Evaluation", J. Am. Acad. Child Adolesc. Psych. 36 (10 Suppl.) (1997).

cian-patient relationship exists in custody cases. This should include a statement of understanding by parties, collaterals interviewed by the expert and children of appropriate age.

- Names of parties and children at issue with dates interviewed / observed and the amount of time spent with each.
- All relevant records, documents and the like must be carefully reviewed by the expert and addressed accordingly.

Elements of Evaluation:

- At a minimum, each party should be seen twice before the children are seen, children should be seen alone and with each parent – age being taken into consideration – with parents being seen again following children's appointments. Interviews must be conducted with important collaterals, which may be identified by the court, parties, or the forensic expert based on interviews with the parents and children.
- Party's understanding of why each is being seen, in that person's own language. Use quotes where appropriate. Do this also for each child.
- Family history: include data on each child.
- Personal History: include education, occupation, and the like.
- Past Medical History.
- Past Psychiatric History.
- Marital History: include description of difficulties from start to final straw.
- Present Issue: include status of litigation.
- Mental Status examination include drug, alcohol, history where appropriate.
- Evaluation for Domestic Violence.
- Description of functioning of each party, each child.
- Discussion of possibilities of support of or interference with access of other.
- Interaction, children with each parent.

- Conclusions, opinions as to which parent best meets emotional needs of children.
- Recommendations regarding custody, access, if made. Must be supported by all above.

*Forensic Report v. Recommendation.* The Commission received a substantial amount of information regarding the ongoing debate over whether forensic experts should be required to make recommendations to the court regarding the ultimate determination of custody. Approximately 34% of judges surveyed stated that no recommendation should be included, while 37% responded that they believed such a recommendation should be made. Those in favor of a recommendation opined that the expert was the most knowledgeable and best suited to draw conclusions in this regard. Additionally, judges recognized that the court retained the ultimate discretion and could reject the recommendation if it did not find it appropriate. Those who felt that the recommendation should not be required stated that it may be deemed an abdication of judicial authority and that the recommendation may unduly sway the court.

Ultimately, a majority of the Commission concluded that the judge should have discretion to decide whether she/he wants an opinion or an opinion with a recommendation from the expert. To that end, the Commission recommends that the order appointing a forensic expert should state the judge's request (opinion and/or recommendation) and define the scope of the expert's investigation.

*The Use of Forensic Reports by the Courts.* The issue of whether forensic reports and evaluations are appropriate evidence in court has been hotly debated. It has been argued that the methods used by forensic evaluators and the relationship of those methods to the inferences and conclusions reached on parenting issues are insufficiently "scientific" to meet the admissibility standards set down by courts in New York[55] and in other jurisdictions.[56] That is, in order for expert testimony to be admitted

55. *Frye, supra* n. 54, as discussed in *People v. Wesley,* 83 N.Y.2d 417, 633 N.E.2d 451, 611 N.Y.S.2d 97 (1994).

56. *See generally Daubert v. Merrill Dow Pharmaceuticals, Inc.* 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993).

as evidence in a court of law, it must meet certain standards of reliability and acceptance in the scientific community in which the expert practices.[57] Pointing to insufficient statistical data to corroborate the conclusions on custody and parenting issues contained in forensic reports, it has been suggested that these reports should not be admitted into evidence in custody proceedings.

Others have disagreed with that legal analysis and have concluded that the standard for admissibility in New York Courts under the decision in *Frye v. United States*,[58] has been met by the acceptance of the validity and usefulness of these reports in the community of mental health professionals and in the legal community, as expressed in the Court of Appeals decision in *Kesseler v. Kesseler,* decided in 1962.[59] Thus, it is suggested, the issue is not whether forensic reports should be excluded on the whole, but rather whether they are issued by qualified professionals and are properly prepared. Whether the expert is qualified and the conclusions reached by the report are sufficiently supported are matters to be policed by the judge presiding over the custody case.

The Commission, after much discussion and consideration, concluded that forensic reports, properly prepared by qualified mental health professionals, are an important tool for the courts and litigants in reaching resolution in contested custody matters and should be admissible in evidence, including conclusions by the forensic on issues of custody. However, in order for the expert's report to be properly considered and weighed, the Commission recommends the following:

- The court should not be required to follow the forensic report and a custody decision is not *per se* flawed simply because it differs with the "expert's" conclusions.

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57. A full presentation of this view may be found in the series of articles published by Timothy M. Tippins in articles appearing in the New York Law Journal on September 4, 2003 and May 5, 2005.

58. See Frye, supra n. 54.

59. N.Y.2d 445, 180 N.E.2d 402, 225 N.Y.S.2d 1(1962). The view that forensic reports are admissible has been set forth in articles in the New York Law Journal by Robert Dobrish, Esq. and Raunak Kothari (April 13, 2005) and recently by Philip C. Segal. (July 12, 2005).

- The reports must meet the standards discussed above and the forensic experts must have the training necessary to properly evaluate the issues identified by the court in its appointment order.
- The forensic report should be open to all of the trial procedures which allow a litigant and his or her counsel to test the underlying basis for the report. In that regard, all underlying notes and test data, including raw test material, should be made available in discovery to counsel for the litigants, attorney for the child(ren), or a professional designated by counsel to review the material.[60] Upon presentation of the forensic's report to the court and counsel, either party, or attorney for the child(ren), should be permitted to serve a notice, pursuant to Article 31 of the CPLR, on the forensic expert to produce the underlying notes and test data. The forensic expert should comply with the notice subject to an application to the court by either party or attorney for the child(ren) to limit or otherwise condition the disclosure.
- With respect to general discovery on the issue of custody, some members of the Commission expressed the view that discovery should be limited in custody cases to depositions and document discovery of the parties unless the court permits additional discovery upon good cause shown. Others felt that the present rule in the First and Second Departments that prohibits any discovery in custody cases without court permission be continued due to the potential for delay and increased cost that may result from these additional proceedings. However, members of the Commission from the Third and Fourth Departments, where discovery in custody matters is permitted, expressed the importance of having such discovery, at least as to the parties, both for having the requisite information prior to trial and the value such discovery has in exposing unmeritorious claims prior to trial and promoting settlement. Given that there are reasonable and

60. Commission notes that this recommendation is specifically at odds with the decision in *Ochs v. Ochs,* 193 Misc.2d 502, 749 N.Y.S.2d 650 (Sup. Ct. West. Co. 2002); *see also Nicholson v. Nicholson*, 2003 N.Y. Slip Op. 51713U, 2 Misc.3d 1002A, 784 N.Y.S.2d 922 (Sup. Ct. Kings Co. 2003).

founded arguments on both sides of the issue, the Commission did not reach a consensus and, thus, will not take a position on this issue.

- Attorneys for the parties and the attorney for the child should not be permitted to have substantive communication with the neutral forensic expert, except as stipulated among attorneys and subject to the court's approval.
- A majority of the Commissioners voted in favor of permitting the court, in its discretion, to review a forensic's report when it is issued and prior to trial, including the underlying notes and test data, to aid the court in its rulings and in achieving settlements pre-trial. A minority of the Commission expressed the view that, to avoid the appearance of prejudgment or bias, and so parties may not feel they are compromised and lose the protections of the discovery and trial process, the forensic report should not be read by the court prior to trial.
- Access to reports should be made uniform. Copies of the reports should be given to counsel for the parties and the attorney for the child, with the express instruction that no additional copies be made or disseminated without court permission. Clients can review the report at the attorney's office. If a litigant is self-represented, a separate copy of the report should be maintained at the courthouse for use by that litigant to review and make confidential notes. The litigant would not be permitted to remove this copy from the courthouse.
- The neutral forensic expert should be a court witness with both parties, including the attorney for the child, having equal right to challenge the admissibility of the report and cross-examine the expert. If admitted into evidence, the report should be considered the expert's direct testimony.

Through the use of quality control, uniform procedures, maximizing openness and the ability to challenge unfavorable reports, and emphasizing that the judiciary has the final say on custody decisions, it is the Commission's opinion that the usefulness of forensic evaluations while maintaining the faith of

the litigants in the integrity and fairness of the decision making process can be preserved.

*Fees for Experts & Preliminary Triage.* Anecdotal and survey data compiled during the course of the Commission's work suggested that the costs incurred by parties related to the appointment of a forensic expert were considered excessive by those downstate. This was less of an issue to upstate attorneys and parties. Similarly, only a third of the judges surveyed felt that costs were excessive. A problem specifically identified in the surveys was how costs for these evaluations are assessed and paid. The Commission makes several recommendations with regard to the payment of forensic experts.

First it is the Commission's opinion that the parties are entitled to information regarding the expense to be incurred by the appointment of the forensic expert. To this end, the Commission recommends that uniform guidelines for informing parties – and the court – about costs and the assessment thereof be adopted. When the judge orders parties to use a forensic expert, the parties should be provided with the expert's hourly fee and an estimate as to how long the expert believes the work will take. Parties will then be able to fairly assess the cost of the evaluation and whether they should consider asking the court appoint a different expert.

Data also suggested that a cap on the fees of forensic experts would be appropriate. The Commission finds that this does not need to be statutorily defined. Rather it recommends that the order appointing the forensic expert should contain a cap on the expert's fees, based on the hourly rate and estimated time frame provided to the parties and with the proviso that the expert may apply to the court for additional fees in excess of the cap should it be necessary under the circumstances.

A triage person, such as the court clerk, can act as the liaison between the expert and the parties. This would remove the attorneys for the parties and the attorney for the child(ren) from communications about the case with the expert. This triage person can also provide the parties with information as to where to go next. We recommend the adoption of the Connecti-

cut model where a court employee, usually a social worker, is hired to handle these functions. The Commission also recommends that an order appointing a neutral forensic expert contain a direction that the expert must appear to testify at trial and cannot refuse to appear on the ground of nonpayment of fees. Otherwise – and it has been suggested to the Commission that is a strategy sometimes used – the party who was directed to pay the fee can prevent the introduction of critical evidence by refusing to pay. In order to protect the forensic expert, the court must enforce its orders requiring payment through the issuance of money judgments and sanctions in the court proceeding against the non-paying party. The order appointing the forensic expert may, if the court deems it appropriate, set forth a timetable for payment of the forensic expert's fees. The forensic expert should advise the court if fees are not paid in a timely manner so that the court may act to facilitate payment.

The Commission recognizes that the forensic expert must be an equal and willing partner in order for these measures to improve the system for use of forensic experts. Therefore, it recommends that the forensic expert should be required to execute a form indicating the forensic expert's acceptance of the terms of the appointment order. The forensic expert should also, as a result, have standing to seek enforcement of overdue fees under the order.

*Financial Experts.*

The Commission also examined the practices by which the courts appoint experts to value components of the marital estate and provide other expert financial services regarding tax, child and spousal support, and other pertinent financial issues. Our review revealed a lack of uniformity within and among the judicial departments as to the appointment of such experts and deficiencies in the orders issued by the courts appointing such experts.

While the courts' appointment of financial experts is appropriate in many cases, usually resulting in lower overall fees to the parties and a more expeditious completion of the appointed tasks, the Commission recognizes that it might not be the most efficient practice in certain high net worth, complex and high

conflict situations. The decision to appoint or not to appoint should be left to the discretion of the judge. Some of the deficiencies noted in the sampling of court orders reviewed included a lack of specificity as to the scope of the appointment, a lack of standards as to the production of documents needed by the expert, a lack of directive as to the responsibility for the payment of the expert fees, a lack of rules as to communications among the expert, the parties and the attorneys and a failure to address the issue of confidentiality.

To correct these deficiencies, the Commission has drafted a model court order appointing financial and valuation experts and recommend its uniform use by the courts. The order is attached as Appendix K. The adoption of this order will go a long way to expedite the process and avoid much of the confusion and time wasted in many cases dealing with the very issues that should have been addressed in the first instance in the court order itself.

Similar to the appointment of forensic experts, the Commission recommends that an order appointing a financial expert contain a direction that the expert must appear to testify at trial and cannot refuse to appear on the ground of nonpayment of fees. The order appointing the expert may, if the court deems it appropriate, set forth a timetable for payment of the expert's fees. Again, the expert should advise the court if fees are not paid in a timely manner so that the court may act to facilitate payment. The Commission also recommends that the financial expert should be required to execute a form indicating his or her acceptance of the terms of the appointment order. The expert should, as a result, have standing to seek enforcement of overdue fees under the order.

## ACCESS AND EQUITY IN MATRIMONIAL LITIGATION

*Right to Counsel.*

During the course of the Commission's meetings with matrimonial judges and others throughout the state, the problem that was universally highlighted as a substantial barrier to the efficient, effective and timely movement of contested matrimonial

cases is the number of individuals representing themselves in these cases– the self-represented litigants.

Unfortunately, there is no statutory authority for the appointment of counsel for those matrimonial litigants in the Supreme Court who cannot afford counsel. While some extremely limited relief in this regard has been provided by institutional civil legal services, the realities of the decreasing availability of funds for such purposes has prevented these providers from significantly decreasing the number of self-represented litigants appearing in such cases. Not only does this seriously impede the expeditious flow of cases, but of even greater significance is the apparent inequity of depriving these litigants realistic access to justice. This is particularly true in cases where the adversary is, in fact, represented by counsel.

While, as has been previously noted, Supreme Court and Family Court often enjoy overlapping jurisdiction with respect to family law matters, of special importance are matters involving the resolution of custody and parenting time. Section 262(a) of the Family Court Act provides that indigent parents involved in child custody matters have a constitutional right to counsel but there is no explicit statutory provision creating the same right to counsel when a child custody matter comes before the Supreme Court. The case law in this area is not extensive and no consistent philosophy has emerged. Indeed, it has been addressed inconsistently across the state. Two trial court decisions directly on point appear to be in conflict[61] while two Appellate Division authorities, one in the Second Department and one in the Fourth Department suggest that the appointment of counsel by Supreme Court would be appropriate.[62]

61. *See generally Borkowski v Borkowski*, 90 Misc.2d 957, 396 N.Y.S.2d 962 (Sup. Ct. Steuben Co. 1977) (opining that the enactment of Fam. Ct. Act 262[a] reversed the holding in *In re Smiley*, 36 N.Y.2d 433, 330 N.E.2d 53, 369 N.Y.S.2d 87 (1975), and held that because Supreme Court may exercise every power of Family Court, it had the inherent power to appoint counsel pursuant to section 262[a]) and *McGee v McGee*, 180 Misc.2d 575, 694 N.Y.S.2d 269 (Sup.Ct. Suffolk Co. 1999)(holding that Supreme Court could not appoint counsel and that plaintiff could have brought her custody claim in Family Court where the appointment of counsel was properly available).

62. *See generally,* N.Y. Comp. Codes R. & Regs. Tit. 22, § 678.11 (2002)(covering the Second Department, states that appointments by Supreme Court pursuant

Some Supreme Court judges assign counsel pursuant to the reasoning in *Borkowksi*, while others will not make such appointments, pointing to the *McGee* analysis. The Commission notes that there appears to be no justifiable rationale for depriving litigants in the Supreme Court of the right to counsel enjoyed by those appearing in Family Court.

As indicated in an earlier section of this Report, the Commission recommends that where custody cases from the Family Court are removed to the Supreme Court, counsel for the parties appointed in the Family Court proceedings shall continue to provide representation in the Supreme Court. It is clear, however, that continuing representation in transferred custody cases and the representation of limited numbers of matrimonial litigants by civil legal services groups are inadequate to address the need for representation of the majority of those individuals representing themselves in these matters.

The Commission believes that the right to legal representation in contested matrimonial proceedings is essential to the fair and expeditious resolution of these emotion-laden cases. To that end, it recommends both an expansion of the assigned counsel program and increased funding to groups providing civil legal services, so as to provide counsel to the low - and moderate-income litigants presently representing themselves before Supreme Court in divorce, custody, parenting time and related matters.[63] Additionally, the Commission recommends that the OCA undertake the establishment of a panel of available attorneys – funded by the court system – who would be certified by the system as qualified and available for assignment as counsel

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to section 262 of the Fam. Ct. Act shall be made from the law guardian panels) and *Petkovsek v Snyder*, 251 A.D.2d 1088, 674 N.Y.S.2d 210 (4th Dept. 1998) (court affirmed trial court's decision not to appoint counsel for a third time, never suggesting in its reasoning that the first two appointments by Supreme Court were inappropriate).

63. The establishment of state funding dedicated to civil legal services has been long debated, but remains unresolved. The Commission notes the existence of the NYS Bar Association's Special Committee on Funding for Civil Legal Services, convened to prepare a report and make recommendations regarding possible means to obtain dedicated funds for civil legal services. That Special Committee is focusing initially on promoting a statewide program for cy pres awards to legal services programs in class action settlements.

in such matters. The panel would be administered and function in a manner similar to the panels presently in place for the assignment of an attorney for the child.

*Serving A Diverse Population.*

Matrimonial and family issues are at once intensely personal and intensely cultural. The relevance of one aspect of culture is explicitly recognized in divorce law: the legal distinction between civil marriage and religious marriage. An awareness of the cultural context of others, and of the danger of inappropriately misapplying one's own culturally derived values, is important in all sensitive human interactions. Such awareness becomes absolutely critical in a court system which renders decisions profoundly affecting the future lives of those other people, decisions regarding such deeply emotional matters as romantic relationships, marriage and parenthood. A just court system will be cognizant of and sensitive to such differences.

Powerful factors, including globalization, demographics and migration, are exploding cultural diversity almost everywhere. It is not surprising that those involved with the New York matrimonial and Family Court system have increasingly reported strains and inefficiencies as the system struggles to understand and adjust to a range of unfamiliar phenomena, unfamiliar concepts and unfamiliar value systems. The following recommendations are made in the interest of continuing to strengthen the court system's capacity to meet such demands.

*Sensitivity and Understanding.* There are several general ways in which inadequate consideration for or adjustment to diverse populations can detract from the function of the matrimonial and family court system. Individual attitudes of members of the judiciary, court personnel, the bar – including counsel for the parties and attorneys for the child – forensic, financial and other experts, as well as others, sometimes negatively impact on the way individuals are treated during the divorce process or on the way seemingly objective standards and laws are applied. Generally, such biases are addressed through education and training to increase awareness and sensitivity. An organization the size of the court system calls for building an internal capacity for training and development. This is a deeper and more

long-term commitment than just having the existing staff trained or expanding the breadth and depth of the existing training. It requires that leaders within the court system be assigned the ongoing tasks of cultural competency building and prejudice reduction. These individuals must always work in cooperation with those who play an integral role in matrimonial proceedings but are not directly within the court system's control, namely members of the bar and the experts discussed elsewhere in this Report.

The Commission recommends that the OCA pursue this program of training and education aggressively and that an interdisciplinary Diversity Task Force – including members of the bar, judiciary, representatives of those expert groups regularly participating in matrimonial matters, representatives of the major diverse communities which exist in this State and other relevant individuals – be created to research and make recommendations regarding the numerous and complex issues involved.

*Professional Skills.* Some activities require more than just awareness and sensitivity. Ethnic and regional differences often mean language differences, so accurate translation of documents and accurate idiomatic interpretation become essential to the administration of justice. Psychotherapists, clinical psychologists and social workers are also examples of professionals who require special diversity skills, in that a reasonable familiarity with a particular subject's cultural context can be essential to the professional's effectiveness. Some tools for addressing such skill issues are (1) new or improved selection guidelines, (2) the creation of special training programs and (3) new or improved certification requirements. The techniques used to address sensitivity and understanding issues may be helpful, but they are inadequate by themselves.

*Procedures and Regulations.* Inadequate awareness of diversity can lead to procedures and regulations that are unjust or impractical in some cases. Although drafted with the best of intentions and to address the bulk circumstances faced in "standard" cases, such rules often fail to account for the reality occurring in the courts on a daily basis. The Commission recom-

mends effective action to begin addressing this problem, including raising the awareness of those primarily responsible for drafting and adopting court rules and regulations, especially in those areas where the effect of diversity has not traditionally been recognized, and (2) including this issue in the mandate of the previously recommended Diversity Task Force.

*Divorce Mills.* Unauthorized Practice of Law, in the form of "divorce mills," is a major problem in many counties in New York State. One organization alone advertises twenty-six "stores" in ten New York counties. Mills claim not to practice law, but they provide an alternative to law offices. Low income litigants, especially immigrants, go to mills because they are unable to afford lawyers, and often because the mill staff speaks their language and appreciates nuances of their culture. Such litigants are especially vulnerable to incompetent or dishonest mill operators. Some mills appear to have no demonstrable standards and, either through express or implicit representations, encourage clients to believe that the staff actually includes licensed attorneys. Preparation of documents by the mills is often substandard, altogether overlooking rights of parties, issues of equitable distribution and child support and resulting in the papers being rejected by the court.

Commission members report through personal experience and conversations with several court clerks that clerks are spending more and more time trying to catch improper filings and correct inadequate submissions made by these mills. Many such cases result in inquests, with the parties representing themselves, and are simply dismissed. The situation is becoming an increasing demand on the system's resources and is costly, often with detrimental effects.

The legal system needs to move strongly against these mills. In addition to appropriate law enforcement measures being pursued,[64] the Commission opines that the increased availability of counsel to low- and moderate income litigants, as discussed in

64. *See e.g., Martini v We The People Forms & Serv. Ctr. USA, Inc.* (In re Barcelo) __ B.R. __, 2005 Bankr. LEXIS 2148 (Bankr. E.D.N.Y., 2005)(enjoins the entity known as "We the People" from engaging in the unlawful practice of law specifically with respect to bankruptcy proceedings) .

this Report, will help to limit their reliance on such services, eventually rendering them superfluous. The popularity and expansion of this cottage industry demonstrates, in the Commission's opinion, that a genuine public need for assistance in this area is unmet. In addition to the Commission's recommendations regarding the provision of counsel, the Commission further recommends that the OCA consider:

- coordinating with local bar associations to host one night a month where attorneys and court personnel would assist self-represented litigants to obtain and complete paperwork for divorce actions and / or attendant proceedings, with appropriate safeguards to protect advisors and litigants from inadvertently entering into legal relationships;
- further streamlining the process for obtaining an uncontested divorce, including, but not limited to, wider availability of the uniform packet and increasing the languages in which the material is available;
- including the issue of "mills" and their specific impact on immigrant, minority and low- and moderate-income communities in the work of the Diversity Task Force.

*Interpreters*. Numerous litigants and members of the bar presented testimony to the Commission outlining the deleterious effects that language barriers present in the matrimonial actions and related proceedings. These problems are especially severe among low-income and immigrant litigants who often lack an understanding of the legal system and are further hampered by their inability to fully understand the proceedings due to the fact that English, if spoken at all, is often a second or even third language. Many of these litigants rely on family members or others from their communities to assist them in court by informally translating court proceedings. The problem persists even where the parties have retained or been assigned counsel as counsel is often not fluent in the litigant's first language.

It was reported to the Commission that even where court interpreters are available to translate for the litigants, they sometimes are not available early enough in the process (e.g., at the

PC), do not speak the specific dialect or even language required for proper translation or, given the nature and size of some immigrant communities, have conflicts based on their familiarity with one or both of the parties or other cultural considerations. The Commission was briefed by a representative of the Office of Court Administration integrally involved in the area of interpreter services[65] that the court system is currently working to expand the number and type of language tests administered by the organization to increase the availability of interpreter services. However, these admirable efforts do not address all of the concerns raised in this regard.

The Commission appreciates that the use and screening of free-lance interpreter candidates for the large number of less frequently used languages present special problems for the UCS and for linguistic minorities seeking equal access to justice. Accordingly, the Commission recommends that, In these instances, the competency of free-lance interpreters must be verified by court administrators either prior to or at the outset of the proceeding through a review of the individual's credentials, including formal language education, interpreting experience in a legal setting or similar situations and additional

65. Philip Ferrara, a research psychologist with the OCA, advised the Commission that the Unified Court System (UCS) currently employs approximately 325 full-time staff court Interpreters statewide. About 250 UCS staff interpreters provide interpreter services in Spanish and the remainder are employed across another 20 different languages (e.g., Mandarin, Russian, Haitian-Creole, Korean, Arabic, Polish, French and Cantonese). In addition, the UCS hires on a per-diem contractual basis freelance interpreters to provide interpreter services to both supplement existing staff and to handle the nearly 175 separate languages requested by court litigants.

Full-time staff court Interpreters in Spanish are hired based upon a competitive civil service examination, consisting of both written test and oral assessment. Only about 10% of the several thousand candidates who apply to take the examination are eventually successful and have their name placed on the final ranked hiring eligible list. The court system also conducts the Language Assessment Testing Program for Court Interpreting to provide a mechanism for screening and qualifying service providers to offer court interpreting services on a voucher-paid free-lance basis in the state courts. The evaluation involves a written test and an oral assessment currently offered in 12 different languages. Candidates who successfully pass the screening tests and meet minimum qualifications are placed on the Registry of Per diem Court Interpreters that is used solely by UCS court administrators to support court specific operations. The UCS requires that all free-lance sign language interpreters be certified by the Registry of Interpreters for the Deaf, Inc. (RID).

linguistic assessment of both English proficiency and some type of linguistic competency measure in the foreign language must be completed for these less frequently requested languages. Furthermore, as has been the practice in several other state court systems, the New York Court System should adopt a mandatory ethics and courtroom procedure training program for all free-lance interpreters and offer regularized training programs on court processes and cultural diversity issues to both staff and free-lance interpreters alike. While these initial short-term recommendations will begin to address the numerous and complicated issues related to interpreter services, the Commission also recommends that this entire subject be included as an area of study for the Diversity Task Force discussed in this Report.

*Same-Sex Relationships.* Diversity issues are certainly not limited to cultural, religious, ethnic or other similar realms. The Commission heard from many individuals representing the interests of same-sex couples and the unique challenges faced by these individuals when attempting to proceed in the Supreme and Family Courts on custody, shared parenting time and related issues.[66] At the outset the Commission takes note of the substantial amount of testimony received during the public hearing process and submitted in writing by individuals involved in same-sex relationships who characterized their experience with the court system as unfavorable and tainted by a negative bias. This Commission passes no judgement on these conclusions but states strongly and unequivocally that such a bias – explicit or implicit – would be unacceptable in the courts of the State of New York. We recognize the efforts made on the part of the court system to educate judicial and non-judicial personnel on all issues of diversity and encourage continued and increased efforts in that regard. It is especially important in

66. Same-sex couples also experience greater challenges when faced with issues of domestic violence. Currently, domestic violence victims involved in same-sex relationships only recourse to ensure protection is the Criminal Court system. Family Court jurisdiction does not extend to allow for litigants involved in same-sex relationships to obtain Orders of Protection. Although not directly within its mandate, the Commission requests that consideration be given to a legislative amendment extending the jurisdiction of Family Court to address this issue.

areas where real and perceived gaps in the legal system's protection of certain relationships exist.

With respect to specific issues involving same-sex couples and the substantive legal issues within our mandate, we acknowledge that the law often provides little protection to non-biological children who have not yet been legally adopted by the other de facto parent. We recommend that some incremental, discrete protections crucial to safeguarding the best interests of the children of gay and lesbian parents be adopted, namely, standing to seek custody of and parenting time with the non-biological child(ren). The Commission would similarly endorse legislation that would provide that the person seeking such custody / parenting time would be responsible to pay child support in accordance with Domestic Relations Law § 240 and the Family Court Act.

Additionally, we recommend that the relationships of lesbian parents and their children should be secured by the extension to these couples of protections similar to those afforded married partners under Domestic Relations Law § 73 ("Legitimacy of children born by artificial insemination"). Section 73 provides a simple mechanism for establishing the legal parenthood of a man whose wife with his written consent conceives a child through donor insemination. This same procedure should be made available to lesbian couples so that the non-biological mother's parental rights can be secured even before the planned child of the relationship is born. To its credit, this state does permit second-parent adoptions in these circumstances; however, this process is time-consuming and extensive and offers no protections to the adopting parent during the course of the process. Extension of the provisions of section 73 would establish legal rights and responsibilities in both parents, notably to the benefit of the child as well as the non-biological mother.

Finally, insofar as the issues raised herein involve equal protection under the law, the dissolution of marriages, the distribution of the marital estate and determination of custody and shared parenting time, it is the opinion of a majority of this Commission, based on substantial evidence submitted to it, that these important issues could be substantially addressed by

the extension of civil marriage to same sex couples in New York State.[67] Therefore, the Commission supports, in principle, such a legislative amendment to the Domestic Relations Law. Furthermore, the Commission notes the inconsistency inherent in New York's failure to give full faith and credit to foreign State and comity to foreign country marriages, civil unions, domestic partnerships and other legally-conferred relationships of same-sex New York couples. We note the substantial case law authority which exists on the issue of the extension of full faith and credit by this state to marriages validly entered in other states and opine that such parity in same-sex unions would facilitate resolution of the issues raised and often contested in the dissolution of recognized legal marriages.

*Marital Assets.*

In a contested matrimonial action, the financial situation created when a married couple with multiple assets decides to divorce is complicated legally, financially and emotionally. There are often situations where one spouse controls the bulk of the funds and income as well as having years of knowledge about the financial assets of the couple, creating a severe power imbalance in the case. The Commission has heard a great deal of testimony regarding such situations and the impact it has on the availability of representation to one or both parties. It is likely to affect the payment of fees to retained counsel, the ability of one or both parties to retain experts for purposes of the litigation or to even, in the first instance, retain counsel.

*Counsel Fees*: The Commission heard testimony from litigants, attorneys and members of the judiciary concerning access to competent legal representation for all individuals, including those for whom assigned counsel would not be available. Often, this involves the inability of one spouse to retain counsel do to limited resources. The award of counsel fees, ability to limit attorney appearances and other measures in matrimonial actions will ameliorate some of these problems and the Commission makes the following recommendations in that regard.

67. Similarly to no-fault divorce, a minority of Commission members consider the issue of same-sex marriage to be one of public policy that exceeds the scope of this Commission's mandate.

First, the Commission considered whether court's should grant interim awards of attorney's fees. The Court of Appeals has discouraged the practice of deferring to trial courts the issue of *pendente lite* counsel fees.[68] In keeping with this declaration of public policy by the Court of Appeals, the Commission recommends a court rule requiring that the court shall grant interim fees to non-monied spouses in matrimonial matters, except for good cause, but with the proviso that if the judge in his or her discretion finds good cause, a written decision be required to explain the rationale behind such a determination.

The second concern raised involves the situation where counsel is retained by a party, but during the course of the litigation no longer receives payment of his or her fees. This occurs for a variety of reasons, sometimes as a statement about the attorney's performance but more often because the marital assets are tied up in litigation and the cost of supporting two separate households depletes the limited income available to one or both of the parties. It is the recommendation of the Commission that (as discussed concerning the payment of experts)[69], the court in a matrimonial case may, in an appropriate circumstance, direct that marital funds be used to pay the interim fees of attorneys and experts for either party or both parties, and that the appropriate allocation of the payment of those fees between the parties be reserved for trial. This provision would not preclude a court in its discretion from granting an award of interim attorneys and/or experts fees to either party to be paid by the other party from current income, but would be intended to provide the court with additional discretion so as to be able to fashion an appropriate award, to be paid from specific, identifiable sources. Once again, the ultimate allocation of attorneys and experts fees between the parties would be determined by the trial court.

Various individuals provided testimony and submissions suggesting that special appearances or appearance on initial applications by counsel would serve to reduce delay and stress to those parties who appear without counsel and must determine

68. *See generally Frankel v Frankel*, 2 N.Y.3d 601, 814 N.E.2d 37, 781 N.Y.S.2d 59 (2004).

69. *See supra* at pp.51.

how to navigate the divorce process. The Commission recommends adoption of an administrative rule to allow attorneys to make a special or limited appearance for the purpose of making an application for counsel fees at the time of the commencement of an action. The adoption of such a rule would ease the burden on litigants who would otherwise have to make applications pro se, and would encourage attorneys to make such applications, without the fear that in the event the application is denied, the attorney would then be deemed attorney of record and be compelled to continue the representation of a client without the prospect of being paid. Similarly, the Commission recommends that indigent, pro se parties should be permitted to make an initial application for an award of fees necessary to obtain counsel, without the formal requirement of an attorney's affidavit.

Finally, enforcement of fee awards, or failure to do so, was raised as a concern by members of the bench and bar. Where a party's refusal to pay court-awarded attorney's fees is found to be "willful or deliberate", the court should be given authority to enforce such orders via the contempt powers of the court without the necessity of first reducing such orders and attempting to collect the awards via money judgment, and to impose alternate remedies, such as the striking of the pleadings of the obstructionist party.

*Enhanced Earnings.* An issue tangentially related to the valuing of marital assets both for the payment of fees as discussed above and in making equitable distribution is the concept of enhanced earnings. The Commission received a great deal of comment and expressions of concern over the treatment by New York courts of a spouse's "enhanced earnings capacity" as an asset subject to equitable distribution in a divorce proceeding. Notably, New York is the only state in the nation which has recognized such an "asset".[70] Among the concerns expressed on this issue are the intangible nature of the "asset", the speculative nature of its "value" including the unfairness of creating a non-modifiable award based on a projection of earnings, the cost

70. *See generally O'Brien v O'Brien*, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985); *McSparron v McSparron*, 87 N.Y.2d 275, 662 N.E.2d 745; 639 N.Y.S.2d 265 (1995); *Grunfeld v Grunfeld*, 94 N.Y.2d 696, 731 N.E.2d 142, 709 N.Y.S.2d 486 (2000).

of the valuation process, the problems of double counting when coupled with maintenance and child support awards and the multitude of litigation spawned by this concept that has increased the cost and the length of matrimonial proceedings. The Commission also recognizes the need to address one spouse's contributions to another's career and increased earning capacity in any ultimate award on divorce.

Consistent with the Commission's mandate to reduce the cost and length of matrimonial proceedings and to increase the public's confidence in the fairness and rationality of the awards rendered by the courts, the Commission recommends that legislation be adopted that eliminates a party's "enhanced earning capacity" as a marital asset.[71] The legislation would also require that the trial court must consider a spouse's contributions to the development of a spouse's enhanced earning capacity in arriving at the equitable distribution of the remaining marital property and, in cases where it is appropriate, shall order maintenance that does not cease upon remarriage. We also recognize that the trial court already has the discretion to render an award of maintenance that is non-taxable to the spouse receiving the payments and nondeductible to the spouse making the payments. The proposed modifications to Domestic Relations Law § 236B, Subdivisions 5 and 6, are annexed as Appendix L to this Report.

*Maintenance Guidelines.* Significant frustration and dissatisfaction was voiced by the public and the bar respecting the award of maintenance and the perception that these awards vary unpredictably from court to court with little or no guidance, often resulting in feelings of injustice and unequal treatment by the system. A majority of Commission members did not support the adoption of maintenance guidelines, alternatively, a minority felt that a remedy for this unpredictability and perceived inequity would be the enactment of such guidelines. While a consensus could not be reached on the ultimate

71. A minority of the Commission supports the continued application of the treatment of one's license, degree and/or certification as a marital asset to be valued with the court giving due consideration to the efforts and contributions of the non-titled spouse to the acquisition of that asset, as is consistent with current case law.

resolution of the problem, the Commission was largely in agreement that the issue deserved greater attention, study and research and, therefore, urges that this matter be addressed in the immediate future.

*Child Support in a Joint Custody Arrangement.* The Commission heard testimony from a number of litigants who had equal or close to equal parenting time with their children. Those parents expressed the unfairness of having to pay child support at an amount calculated pursuant to the Child Support Standards Act (the "CSSA") without any adjustment for the expenses the payor spouse incurred in connection with his or her time with the children. Under prevailing authority in New York, even in the case where each parent has equal time with the children – the shared custody arrangement - the spouse with the greater income is deemed the "noncustodial spouse" for the purpose of paying child support under the CSSA.[72] The Commission recognizes that the result of applying the CSSA strictly on the basis of income in a shared custody situation (whether the payor spouse has joint access or nearly joint access) can result in a burdensome and unfair child support award in some instances and recommends that further research and consideration be given to the establishment of a formula for child support that allocates child support between parents in a manner that takes cognizance of the amount of time spent by each parent with the children and the expenses incurred by each parent for the children when the children are in their care.

## ROLE OF THE BAR

The Commission heard extensively about the role of the bar in matrimonial litigation in New York. It was recognized that the work of the 1995 Committee to Examine Lawyer Conduct in Matrimonial Actions had successfully addressed many of the concerns previously raised. At the same time, the bar particularly expressed the need for greater civility and professionalism, which needs were echoed by the litigants. In addition, the litigants sought less delay in the process and more responsiveness to their needs.

72. *Bast v. Rossoff*, 91 N.Y.2d 723, 697 N.E.2d 1009; 675 N.Y.S.2d 19 (1998).

In response, the Commission undertook a proposed major revision of the PC order which has been discussed in this Report. The overall goal of the new PC order is to accelerate the prosecution of matrimonial actions, eliminate areas of potential dispute that lead to delays, have the lawyers and litigants focus on the major issues in their case at an early stage and bring to the parties the option of alternative dispute resolution. Further, there are reminders in the proposed PC order of negative consequences for the failure to comply with the PC order and the discovery requirements set forth. Lawyers will be expected by the judiciary to meaningfully address the issues raised in the PC order and comply with the deadlines. This will be effective if the judiciary enforces the deadlines and gives these matters the attention contemplated earlier in this Report. It is perceived that lawyers and litigants will meet the deadlines imposed by the system if the judiciary has the means and time to compel prompt compliance. In this manner, the process will achieve greater efficiency and avoid the delays which escalate costs and litigant frustration, all of which contribute to the pain of divorce.

In addition, recognizing the important contribution that competent counsel can bring to the process, there was a resounding call for more legal representation of all parties as evidenced by the recommendation for greater use of assigned counsel. To this same end, the Commission makes the following recommendations:

- The organized bar associations, regionally organized and specialty, must continue to encourage greater participation by its members in pro bono efforts to assist low- and moderate-income litigants in these trauma and emotion-laden matters.
- Mandatory continuing legal education (CLE) in the specific area of matrimonial law and practice should be required of all attorneys practicing in this area.[73] The Commission urges the OCA and the New York State Continuing Legal Education Board to develop and imple-

73. It should be noted that the Commission envisions that these mandatory CLE credits will be part of the existing CLE requirement and not an additional requirement placed upon matrimonial attorneys.

ment a program whereby such attorneys could be identified.

- Once identified, these attorneys may be referred to existing programs specifically tailored to the unique aspects and ethical considerations of matrimonial practice. Where no such programs exist, the CLE Board should strive to develop and implement them.

## CONCLUSION

The Commission's recommendations have resulted from its consideration of substantial input from the public, members of the bar, the judiciary, experts representing all relevant disciplines and review of the judicial systems of other jurisdictions. Consensus was reached only after study, deliberation and debate by all 32 Commission members.

The Commission is confident that when implemented its recommendations will result in a major change in the culture of the matrimonial and Family Courts. The status of those courts and the judges who serve them will be enhanced, as warranted by their long range social impact and the complexity and sensitivity of their work. The statewide integration of mediation and other ADR processes will enable parties to resolve their disputes in a less contentious and more humane environment. By providing legal services for the low- and moderate-income litigants, not only will justice be served but the courts will be relieved of a substantial burden of matters that consume excessive time, as the self-represented struggle to comply unassisted with the rules and practices of the courts. The aforesaid are just a sample of the reforms that the Commission has recommended to reduce the time, costs, and trauma to the parties and their children embroiled in matrimonial and custody proceedings.

The Commission recognizes that the court system's work on these issues must be ongoing and urges the OCA to act quickly and deliberately on the recommendations made in this Report. It also recommends that the OCA pursue scholarship and research of complex issues involving, but not limited to, custody determinations, the award of support and maintenance, the

changing definition of family and the development of the law and proceedings in other jurisdictions.

In her State of the Judiciary messages in both 2004 and 2005, Chief Judge Kaye placed family issues in the forefront of her initiatives, noting that "with families, [ ] the challenge of societal change and the long-term impact on people's lives are perhaps the greatest." The Commission is confident that, as she has done in the past, our Chief Judge will do all in her power to effectuate the reforms she endorses and that the court system, under her leadership will eventually provide not merely adequate but optimal services to its families and children.