CASELAW UPDATE

APRIL 2019

Support Magistrate

Harold Bahr

(Bronx County)

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Acknowledgment of Paternity

Matter of Andrew E. v Angela N.S., 165 AD3d 658, 85 NYS3d 115 (2d Dept 2018)

In 1998, the parties signed an acknowledgment of paternity. Seventeen years later, the father filed a petition to vacate the AOP, alleging that he did not think he ever executed an AOP. In court, the parties consented to a DNA test. The court conducted a hearing on the issue of whether the AOP should be vacated on the ground of fraud. The court denied the petition. The Appellate Division affirmed.

The parties' consent to a DNA test did not obviate the need for a hearing on the issue of whether the AOP should be vacated on the ground of fraud, duress, or material mistake of fact.

Matter of Michael S. v Sultana R., 163 AD3d 464, 82 NYS3d 464 (1st Dept 2018)

A very complicated procedural history that I will spare you. The bare facts are Michael S and Sultana R have sexual relations between July 2007 and August 2008, during which Sultana R became pregnant with G. While Sultana R was pregnant, she and Michael S split up. In July 2008, Sultana R renewed her intimate relationship with JAC, who happened to be the father of her two older children. On October 10, 2008, G was born. The next day, JAC and Sultana R signed the AOP, naming JAC as G's father. Meanwhile, Michael S. was sentenced to jail but got permission to postpone his surrender date so he could be present for his child's birth. He went to New York on October 9, 2008 and on October 10, spoke with Sultana R's mother, who told him that his daughter had been born that day in the Bronx, but did not specify the name or location of the hospital where the birth took place.

While Michael S was still in prison in July 2010, he filed a paternity petition. During the case, Sultana R admitted that Michael S was G's biological father. After multiple adjournments, a Family Court judge determined that equitable estoppel did not prevent Michael S from asserting his paternity. Sultana R never produced G for DNA testing and never appeared for the paternity hearing. After inquest, the support magistrate vacated the AOP because the mother committed fraud, when she signed it, knowing that Michael S was the biological father. On Sultana R's default, the support magistrate entered an order of filiation, declaring Michael S to be G's father.

Michael S., although not a signatory to the AOP, had standing to "attack it" (collaterally?) because he filed a paternity petition (Family Court Act § 522. And the support magistrate had a proper evidentiary basis to determine that Michael S. was the father, based upon the certified transcript, where Sultana R. admitted that he was the biological father.

Matter of Tanika H. v Travaris E.M., 163 AD3d 817, 81 NYS3d 173 (2d Dept 2018), lv denied 32 NY3d 915 (2019)

The parties had a child out of wedlock. Two days after the child's birth, the father signed the AOP, even though the mother told him during the pregnancy that she had sexual intercourse with another man during the child's conception. When the child was

about 8 months old, the father had a DNA test that allegedly excluded him as the child's father. Nonetheless, he continued to provide financial support for the child. Fourteen years later, the mother filed a child support petition. Almost a year and a half later, the father filed a petition to vacate the acknowledgment of paternity and attached a copy of the DNA report.

A party seeking to challenge an acknowledgment of paternity more than 60 days after its execution must prove that it was signed by reason of fraud, duress, or material mistake of fact (Family Court Act § 516-a [b] [iv]). Here, the record supported Family Court's denial of the petition.

Adoption Subsidy

Matter of Barbara T. v Acquinetta M., 164 AD3d 1, 82 NYS3d 416 (1st Dept 2018)

An adoption subsidy is not income to the adoptive parent, but rather a resource of the child. Adoptive parents, just like biological parents, remain legally responsible for the support of their children until the child turns 21. Here, the court erred in setting a support obligation at only $25 monthly, and not considering the first three deviation factors under Family Court Act § 413 (1) (f) to make the support obligation at least the amount of the adoption subsidy.

Arrears

Matter of Onondaga County Dept. of Social Servs. v Marcus N.D., 2019 WL 1218270 (4th Dept 2019)

In 1999, Family Court entered an order of filiation on the father's default (and probably an order of child support). In 2016, the father moved by an order to show cause to vacate the default order of filiation and cancel child support arrears, after a Mississippi court adjudicated another man a father of the same child, based upon a DNA test. Family Court granted his motion to vacate the order of filiation but denied his motion to vacate the arrears. The Appellate Division affirmed.

Family Court Act § 451 (1) clearly states that the court "shall not reduce or annul child support arrears accrued prior to the making of an application pursuant to this section . . . ." Also, the law tolerates no excuses with respect to waiving child support arrears (*Matter of Dox v. Tynon*, 90 N.Y.2d 166, 173–174 [1997]; [other citations omitted]). The court correctly determined that it could vacate the order of filiation and could not vacate the accrued arrears.

Matter of Tarasco v Tarasco, 165 AD3d 952, 86 NYS3d 615 (2d Dept 2018)

The mother filed for divorce on March 7, 2011. The divorce judgment was entered May 11, 2015, and it required the father to pay the mother $245.19 weekly in child support. On April 15, 2016, the mother petitioned to enforce the judgment in Family Court. The issue was how far back could the support magistrate award arrears.

The Appellate Division concluded the support obligation was retroactive to March 7, 2011, when the mother started the divorce action (see Domestic Relations Law § 236[B][7][a]; *954 Burns v. Burns, 84 N.Y.2d 369, 377 [1994]).

Attorney Fees

Matter of Tarpey v Tarpey, 163 AD3d 687, 81 NYS3d 426 (2d Dept 2018)

To recover attorney's fees, an attorney must comply substantially with court rules 22 NYCRR 1400.2 and 1400.3, which, among other things, require an attorney to give the client a "written, itemized bill[] at least every 60 days." The party asking for the fees must make a prima facie showing of substantial compliance with both court rules. Here, the mother failed to submit appropriate evidence, so the support magistrate improperly awarded her attorney's fees.

Section 1400.2. Statement of client's rights and responsibilities

An attorney shall provide a prospective client with a statement of client's rights and responsibilities in a form prescribed by the Appellate Divisions, at the initial conference and prior to the signing of a written retainer agreement. If the attorney is not being paid a fee from the client for the work to be performed on the particular case, the attorney may delete from the statement those provisions dealing with fees. The attorney shall obtain a signed acknowledgment of receipt from the client.

Section 1400.3. Written retainer agreement

An attorney who undertakes to represent a party and enters into an arrangement for, charges or collects any fee from a client shall execute a written agreement with the client setting forth in plain language the terms of compensation and the nature of services to be rendered. The agreement, and any amendment thereto, shall be signed by both client and attorney, and, in actions in Supreme Court, a copy of the signed agreement shall be filed with the court with the statement of net worth. Where substitution of counsel occurs after the filing of the net worth statement, a signed copy of the attorney's retainer agreement shall be filed with the court within 10 days of its execution. A copy of a signed amendment shall be filed within 15 days of signing. A duplicate copy of the filed agreement and any amendment shall be provided to the client.

Matter of Pacheco v Pacheco, 163 AD3d 576, 80 NYS3d 455 (2d Dept 2018)

A support magistrate may award to the attorney representing a custodial parent counsel fees on any modification or enforcement petition (Family Court Act § 438 [a]). Other than a willfulness finding, counsel fees are discretionary. The court must base its decision primarily upon both parties' ability to pay, the nature and extent of the services required to deal with the support dispute, and the reasonableness of their performance under the circumstances.

Cassano (Income Above the Cap)

Fiom v Fiom, 2019 NY Slip Op 01643, 2019 WL 1064152 (1st Dept 2019)

Among many issues in the case, the special referee considered the paragraph "f" factors in deciding whether to award child support above the $141,000 cap (at the time). The referee determined that the father's income greatly exceeded the mother's, and that the child enjoyed a "luxurious standard of living" during the marriage. But because the father agreed to pay the child's educational expenses, coaching, tutoring, and summer camp expenses, the referee awarded support only up to the cap, which came to $1,238.50 monthly. On this issue, the Appellate Division reversed, concluding that the referee disregarded "paragraph f" factors (disparate earnings and lifestyle the child would have enjoyed). The Appellate Division, without explanation, concluded that an income cap of $300,000 would be appropriate, which would result in a basic obligation of $4,250. That amount "would satisfy the child's 'actual needs' and afford him an 'appropriate lifestyle' (see Matter of Culhane v Holt, 28 AD3d 251, 252, 813 NYS2d 400 [1st Dept 2006])."

(In Culhane, the First Department said the support magistrate erred in failing to consider the child's actual needs, when determining how much of the combined adjusted gross income above the cap to use. Quoting another case, the court said, "[I]n high income cases, the appropriate determination under [FCA § 413 (1) (f)] for an award of child support on parental income in excess of $80,000 should be based on the child's actual needs and the amount that is required for the child to live an appropriate lifestyle, rather than the wealth of one or both parties." While the quote on its face may seem to contradict the paragraph f factor (wouldn't the child enjoy a higher standard of living if his or her parent was wealthier?), the apparent contradiction ignores the real possibility that some parents may not be willing to spend their money on their children. But we also don't want to reduce a child's standard of living just because the custodial parent may earn substantially less money than the noncustodial parent. Practically, what are we to do? My suggestion (to protect yourself on appeal) is to have two sets of calculations. One is the child's actual needs, as the Appellate Divisions require. The other would be a lifestyle calculation. That calculation can be based upon the lifestyle the family in front of you had, before the household separated. And/or it can be based upon the lifestyle that the noncustodial parent's present children enjoy. For example, if the noncustodial parent now earns much more money than when he was living with the custodial parent and subject child, and he treats his present family to expensive family vacations, then wouldn't the subject child have enjoyed that same lifestyle had the household remained intact?)

Matter of Calta v Hoagland, 167 AD3d 598, 89 NYS3d 247 (2d Dept 2018)

Where, as here, the combined parental income exceeds the statutory cap, the court, in fixing the basic child support obligation on income in excess of the cap, has the discretion to apply the factors set forth in Family Court Act § 413(1)(f), or to apply the statutory percentages, or to apply both. The Support Magistrate adequately articulated the basis for his decision to apply the statutory percentages to parental income in

excess of the statutory cap which reflected, among other things, a careful consideration of the parties' circumstances and the child's actual needs, as well as a review of the statutory factors in light of the evidence presented at the hearing.

College Expenses

Morille-Hinds v Hinds, 169 AD3d 896, 2019 WL 693232 (2d Dept 2019)

Supreme Court correctly declined to award college expenses. The mother did not submit any documentary evidence of the cost of the college the child had been accepted to and was planning to attend. Although she testified the cost was about $30,000 and that there was an account for that amount set aside for the child's college education, the mother did not provide a recent account statement. The court's failure to direct the defendant to pay a share of the child's education was not an improvident exercise of discretion.

Matter of Manfrede v Harris, 162 AD3d 1035, 80 NYS3d 138 (2d Dept 2018)

Family Court may exercise its discretion and order a parent to pay college expenses, as long as the court considers the circumstances of the case, the circumstances of the parties, the best interests of the child, and the requirements of justice. Here, the court properly ordered the father to pay 61% of the child's out-of-pocket private college expenses, which the support magistrate calculated to be his pro rata share. Also, the support magistrate properly did not impose a SUNY cap because the father promised to help the child with the cost of attending private college, and the child relied upon that promise in choosing to attend the private college.

Weidman v Weidman, 162 AD3d 720, 78 NYS3d 371 (2d Dept 2018)

The court should have denied, as premature, the mother's request to allocate between the parties responsibility for the future college expenses of the parties' then 13 year old child.

Contract Interpretation

Keller-Goldman v Goldman, 31 NY3d 1123, 81 NYS3d 342 (2018)

In 2017, the First Department exercised its discretion looked beyond the plain terms of the parties' stipulation of settlement that was incorporated, but not merged, into their divorce judgment. The term at issue gave the father a dollar-for-dollar credit against his child support obligation for what he paid for a child's room and board at college. The mother moved by order to show cause for the pending judgment to include language making clear that any room-and-board credit due the father would be capped in accordance with the graduated emancipation reduction provided for in the immediate preceding paragraph of the agreement. The First Department, despite the provision's plain language, capped the father's credit. Citing the public policy that parties cannot contract away their duty to support a child: "The credit sought by the father takes away that portion of child support intended for the welfare of the other two children. Taken to its logical end, the agreement threatens to completely deprive the other children of

any support whatsoever, if monthly room and board costs for one child were to exceed [the child support obligation]."

The Court of Appeals, in a 5-2 decision, affirmed the First Department's ruling, concluding that the Appellate Division did not abuse its discretion, when it ensured adequate support to each unemancipated child, as the parties clearly intended by their overall agreement.

Burns v Burns, 163 AD3d 210, 81 NYS3d 846 (4th Dept 2018)

The parties divorced, and the surviving and incorporated stipulation of settlement in their divorce judgment required the ex-husband to pay the ex-wife maintenance. The ex-wife remarried, and the ex-husband wrote her, saying he wasn't paying any more maintenance because of her remarriage. The ex-wife moved in Supreme Court to hold her ex-husband in contempt for ending the maintenance payments. The divorce settlement was silent on the effect of the ex-wife's remarriage upon the ex-husband's maintenance obligation.

Unless a contract says otherwise, the law in force at the time of the agreement becomes as much a part of the agreement as though it were expressed in the contract. The law presumes that the parties contemplated the existing law when the contract was made, and the courts will construe the contract in light of such law (Dolman v United States Trust Co. of N.Y., 2 NY2d 110, 116 [1956]). That is known as the Dolman rule.

Here, DRL § 236, which defines maintenance, also provides that any award "shall terminate upon the death of either party or upon the payee's valid or invalid marriage."

Matter of Shkaf v Shkaf, 162 AD3d 1152, 78 NYS3d 462 (3d Dept 2018)

The meaning of a separation agreement, like a contract, should be determined from the plain language within the four corners of the document. The court, however, may also draw reasonable inferences from the literal language. Here, the agreement required the mother to submit a "receipt" to the father within 15 days after incurring an uncovered health care expense and, in turn, required the father to reimburse her "within [15] days of receipt of proof of payment." The mother testified that she gave the father receipts for the orthodontic installment payments. As she did not receive a receipt for the down payment, she instead provided the father with the full documentation that she did possess. In response, the father never demanded a formal receipt or claimed that the documentation was inadequate; instead, he advised that he would not pay until she gave him more contact with the child. Also, he did not reimburse her for any part of the installment payments for which she did provide receipts.

As for the down payment, nothing in the parties' agreement—which required the father to pay his share of "[a]ll" of the child's reasonable and necessary uncovered health care expenses—suggests that the parties intended to limit this obligation to only those expenditures that could be documented with formal receipts. On the contrary, the

contract's plain language obliges the father to reimburse the mother within 15 days after receiving "proof of payment by the [mother]." "[G]iving a practical interpretation to the language employed, so that the reasonable expectations of the parties may be realized" (Guntert v. Daniels, 240 A.D.2d 789, 790, 658 N.Y.S.2d 521 [1997]), we find that the word receipt, when read in context, "reasonably implie[s]" any form of documentary proof that the payment was made (Matter of Dillon v. Dillon, 155 A.D.3d at 1272–1273, 64 N.Y.S.3d 755 [internal quotation marks and citation omitted]). Having received such proof, the father's failure to reimburse the mother within the required 15–day period was a willful violation.

Cost of Living Adjustment

Matter of Murray v Murray, 164 AD3d 1451, 84 NYS3d 524 (2d Dept 2018)

The parties' 2002 divorce judgment incorporated a surviving stipulation of settlement. They deviated from the calculations under the CSSA, requiring the father to pay a certain child support obligation from August 1, 2001 through January 31, 2006. The parties also executed a rider to the stipulation, in which they agreed that beginning February 1, 2006, until both children were emancipated, the father would pay child support to the mother based upon DRL § 240 and by using the parties' total combined income for 2005. In 2009, the parties consented in Family Court to a support order of $740.56 weekly for both children, payable through the SCU.

In March 2017, the SCU notified the parties of a COLA, increasing the father's support obligation for the parties' one remaining, unemancipated child to $822 weekly. The mother filed an objection. The support magistrate vacated the COLA and entered an order of $360 weekly. Although the combined parental income was $371,697, the support magistrate concluded that the mother failed to prove a basis upon which to apply the statutory child support percentage to any income above the statutory cap of $143,000. Family Court denied the mother's objection. The Appellate Division affirmed.

Parties to an agreement that deviates from the guidelines set forth in the CSSA "may demonstrate why, in light of the agreement, it would be unjust or inappropriate to apply the guideline amounts" (Matter of Tompkins County SCU v Chamberlin, 99 NY2d 328, 336 [2003]). The mother failed to demonstrate why, in light of provisions of the stipulation and the rider, it was unjust or inappropriate for the support magistrate to decline to apply the child support percentage to the parties' combined income over the statutory cap.

Deviation Factors

Matter of Jerrett v Jerrett, 162 AD3d 1715, 80 NYS3d 768 (4th Dept 2018)

Courts may not reduce a child support obligation, based upon the amount of time the noncustodial parent spends with the children (Bast v Rossoff, 91 NY2d 723, 732 [1998]). That is the proportional offset method. Here, the support magistrate erred in deviating downward from the calculation, determining the child was spending "a sufficient amount of time" with the father. That was just another way to apply the prohibited

proportional offset method. Also, extraordinary visitation expenses do not include the ordinary expenses of providing suitable housing, clothing, and food for a child during custodial periods. Thus, a downward deviation is unwarranted (Family Court Act § 413 [1] [f] [9] [i]).

Emancipation

Matter of Root v Root, 161 AD3d 1171, 78 NYS3d 219 (2d Dept 2018)

The father filed a downward modification petition, asking to offset his child support obligation because one of the parties' children had moved in with him. The mother opposed his petition, claiming that the child was constructively emancipated and had given up his right to be supported. The support magistrate denied the father's petition, and Family Court denied the father's objection. The Appellate Division reversed.

The party claiming that a child is emancipated has the burden of proof at the hearing. A child (1) of employable age and (2) in full possession of his or her faculties may be deemed constructively emancipated if, (3) without cause and voluntarily (4) withdraws from supervision and control, (5) against the will of the parents and (6) for the purpose of avoiding parental control. Here, the mother failed to prove that the son was self-supporting, or that he moved out of her home to be free from parental control.

Matter of Jones v Jones, 160 AD3d 1428, 75 NYS3d 400 (4th Dept 2018)

Father proved child was constructively emancipated. Although she was 17 when the proceeding started, she was 18 (and of employable age), when the hearing finished. A child "of employable age, who actively abandons the noncustodial parent by refusing all contact and visitation, without cause, may be deemed to have forfeited his or her right to support" (*Matter of Saunders v Aiello*, 59 AD3d 1090, 1091, 875 NYS2d 656 [4th Dept 2009] [internal quotation marks omitted]; *see Matter of Roe v Doe*, 29 NY2d 188, 193, 324 NYS2d 71 [1971]). Further, the father proved he made consistent efforts to establish a relationship with the daughter by participating in counseling, inviting her to family functions, and giving her cards and gifts. But the daughter rebuffed those efforts. The conflicting evidence concerning an incident when the daughter was 8 or 9, and the daughter's vague complaints about the father's personality fail to prove that the father caused the breakdown in the relationship.

Equitable Estoppel

Matter of Shaundell M. v Trevor C., 167 AD3d 615, 89 NYS3d 330 (2d Dept 2018)

Equitable estoppel prevented the putative father from asking for a DNA test. father. The mother testified to an exclusive sexual relationship with the appellant during the relevant period. The child was interviewed by the court in camera, wherein testimony was elicited that the child wants a relationship with the appellant, whom the child considered to be her father and whom she called "dad." The child referred to the appellant's older children as her sister and brother and indicated that she had a personal relationship with them.

Matter of George C.S. v Kerry-Ann B., 165 AD3d 951, 86 NYS3d 210 (2d Dept 2018)

The attorney for the child argued there was an issue of equitable estoppel. The Judicial Hearing Officer ordered a DNA test, without holding a hearing on the issue of equitable estoppel. The Appellate Division reversed and remitted for an equitable estoppel hearing.

Evidence

Matter of Anthony S. v Monique T.B., 167 AD3d 408, 89 NYS3d 151 (1st Dept 2018)

A court is not required to draw a negative inference against a witness who fails to testify, when that witness is not a party to the proceeding and no evidence is presented that the witness is under a party's control.

Matter of Joel S. v Heidi S. L.-S., 166 AD3d 784, 85 NYS3d 773 (2d Dept 2018)

Under Family Court Act § 532, DNA test results which indicate at least a 95% probability of paternity were not only admissible, but also create a rebuttable presumption of paternity.

Matter of Linda D. v Theo C., 166 AD3d 461, 89 NYS3d 23 (1st Dept 2018)

Trial court mistakenly relied on letters from the father's health care providers that had not been properly admitted into evidence because they were hearsay. The Appellate Division cited to Matter of Bronstein-Becher v Becher, 25 AD3d 796, 86 NYS2d 140 [2d Dept 2006]), which distinguishes hospital business records from a letter from a doctor: "[A] physician's office records, supported by the statutory foundations set forth in CPLR 4518(a), are admissible in evidence as business records" (citation omitted). However, medical reports, as opposed to day-to-day business entries of a treating physician, are not admissible as business records where they contain the doctor's opinion or expert proof (citations omitted). Here, Dr. Stephens' two "narrative reports" were simply letters summarizing his diagnosis, treatment, and opinion concerning the father's ability to return to work. No proper foundation was provided demonstrating that they were in fact business records (see CPLR 4518[a]). Their certification did not cure this defect as only hospital records, and not physician office records, are admissible by certification (citations omitted).

Matter of Alexandria F. (George R.), 165 AD3d 1108, 87 NYS3d 280 (2d Dept 2018)

The Department of Social Services filed Article 10 petitions, alleging that the children were abused and neglected. Among the *sworn* allegations by the DSS were that George R. was the father of two of those children. These allegations constituted formal judicial admissions that are conclusive of the facts admitted in these proceedings.

Gorman v Gorman, 165 AD3d 1067, 86 NYS3d 554 (2d Dept 2018)

Supreme Court should not have imputed income based on statistical information from the New York State Department of Labor that was not admitted into evidence at trial.

Income Calculation

Matter of Bashir v Brunner, 169 AD3d 1382, 93 NYS3d 481 (4th Dept 2019)

The proper amount of support is not based upon a parent's current finances but upon the parent's ability to provide financial support. A support magistrate, then, possesses considerable discretion to impute income, so long as there is evidence to support the imputation. Here, the mother claimed she had to quit her job because she could no longer pay the child care costs due to the father's temporary failure to pay child support. The support magistrate did not credit her testimony and imputed her former income.

Morille-Hinds v Hinds, 169 AD3d 896, 2019 WL 693232 (2d Dept 2019)

After retrial, Supreme Court appropriately did not impute income to the father beyond the amount shown on his income tax returns, when calculating child support. The father's highest reported annual income during the marriage was $18,570, and Supreme Court found no evidence to suggest that the father's income earning potential was greater. "The trial court is afforded considerable discretion in determining whether to impute income to a parent" "[A] determination to impute income will be rejected where the amount imputed was not supported by the record, or the imputation was an improvident exercise of discretion."

Brendle v Roberts-Brendle, 169 AD3d 752, 2019 NY Slip Op 01049 (2d Dept 2019)

A court is not bound by a party's account of his or her finances but may impute income to that party based upon the party's past income or demonstrated future potential earnings. The court properly exercised its discretion when it imputed $150,000 annually to the father based upon his past earnings and demonstrated earning capacity.

Matter of Feliciano v Elghouayel, 164 AD3d 1238, 83 NYS3d 587 (2d Dept 2018)

When calculating the father's income, the support magistrate not only used the father's last-filed income tax return (2015) but also the tutoring income he earned in the first half of 2016.

The support magistrate is required to begin the support calculation with the parent's gross income "as should have been or should be reported in the most recent federal income tax return" (Family Court Act § 413[1][b][5][i]). But the level of child support is determined by the parents' ability to provide for their children. In assessing that ability, the support magistrate is afforded considerable discretion in determining whether to impute income to a parent based upon the parent's past income or demonstrated future potential earnings, rather than relying on the parent's account of his or her finances. The court may also consider current income for the current tax year.

Desouza v Desouza, 163 AD3d 1185, 81 NYS3d 1185 (3d Dept 2018)

Where, as here, a net loss is sustained on rental property for a given year, such rental income is properly excluded from the calculation of the parties' total gross income for child support purposes (Family Court Act § 413 [1] [b] [5] [ii]).

Matter of Poulos v Chachere, 163 AD3d 679, 81 NYS3d 428 (2d Dept 2018)

Father is the custodial parent. The mother was ordered to pay about $386 weekly in child support, based upon an imputed income of $80,000, which was her salary prior to her termination from her employment. The support magistrate at the initial support hearing concluded that the mother failed to diligently seek commensurate employment. Seven years later, the mother filed a downward modification petition. She earned only $22,000 annually. For the seven intervening years, she had been unemployed but diligently sought commensurate reemployment. Despite being employed now on a full-time basis, she continued to look for higher-paying employment. And, at the hearing, she proved that her termination from her employment was not her fault.

A party seeking a downward modification based upon a loss of employment must prove that the employment was terminated through no fault of his or her own, and that he or she made diligent attempts to find employment commensurate with his or her education, ability, and experience. Here, the support magistrate concluded that the mother met her burden, and the Appellate Division affirmed.

O'Brien v O'Brien, 163 AD3d 694, 81 NYS3d 417 (2d Dept 2018)

Supreme Court's imputation of $60,000 annually to the mother had no factual basis. The court may impute income based upon employment history, future earning capacity, education, or money received from friends and relatives. Here, the mother had a high school diploma, and at various times during the marriage, had worked at a delicatessen, medical assistant, and dental assistant. Her mother testified that she had given her between $1,800 and $2,000 monthly. The Appellate Division concluded that Supreme Court should have imputed only $30,000, reducing the mother's child support obligation.

Matter of Nieves v Iacono, 162 AD3d 669, 77 NYS3d 493 (2d Dept 2018)

Veterans disability benefits are income for child support purposes (Family Court Act § 413 [1] [b] [5] [iii] [E]).

Lashlee v Lashlee, 161 AD3d 843, 73 NYS3d 441 (2d Dept 2018)

When calculating child support, a court does not have to rely on a party's own account of his or her finances. Instead, the court may exercise its considerable discretion by imputing income to a party based upon his or her employment history, future earning capacity, and educational background. Here, the court properly imputed $50,000 annually to the father based upon past earnings, education, and future earning capacity.

Liability for Child Support

Matter of Lozaldo v Cristando, 164 AD3d 1241, 83 NYS3d 211 (2d Dept 2018)

The children's mother passes away. The maternal aunt and uncle were awarded residential custody and shared legal custody with the father. The maternal aunt and uncle filed a petition against the father in Family Court for child support. The support magistrate entered an order that required the father, among other things, to pay 100% of unreimbursed medical and educational expenses.

Family Court Act § 413 (1) (a) says "the *parents* of a child under age of [21] years are chargeable with the support of such child . . . ." The statute does not require a third party who is not a parent to financially support a child. Also, the aunt and uncle had no intention of adopting the children. Just because they had residential custody did not relieve the father of his burden under section 413. Because the evidence showed that he had the means to provide support for the children, the support magistrate properly found him to be responsible for 100% of their unreimbursed medical and educational expenses.

Life Insurance

Wasserman v Wasserman, 163 AD3d 897, 82 NYS3d 46 (2d Dept 2018)

The parties' divorce judgment required the father to continue a life insurance policy with a face value of $500,000 for the children's benefit, until the father was no longer obligated to pay child support. About two years later, the insurance company cancelled the policy because the father stopped paying the premiums. Two years later, the youngest child emancipated. The mother moved for a money judgment against the father for the policy's face value plus the total lost value of the policy due to the father's failure to pay the premiums.

The Appellate Division said that the mother was not entitled to a money judgment for the policy's face value because the father had not deceased prior to the youngest child's emancipation. But she was entitled to a money judgment for what cash surrender value the insurance policy would have been, when the youngest child had emancipated, had the father paid all the premiums, less the cash surrender value of the life insurance policy had, when the divorce judgment was entered.

Modification

Matter of Parmenter v Nash, 166 AD3d 1475, 87 NYS3d 759 (4th Dept)

Losing a job may justify a reduction in a child support obligation, so long as the job loss was not the obligor's fault and the obligor diligently sought reemployment. Normally, quitting a job is being at fault for the termination. But a parent can quit a job for a compelling reason, such as to move closer to the subject child.

Here, the father proved a substantial change of circumstances to warrant a recalculation of the support obligation. The mother had moved the child hundreds of miles away from the father, causing difficulties in long-distance parenting. To repair his relationship with his son, the father quit his job in Virginia and move to Onondaga County to be near his son.

Matter of Linda D. v Theo C., 166 AD3d 461, 89 NYS3d 23 (1st Dept 2018)

Receipt of Social Security disability benefits did not preclude a finding that the father was capable of work. Absent competent medical evidence that his reduction in income was not volitional, the receipt of public assistance also did not constitute a substantial change in circumstances to warrant modification of the child support order. Notably, at

the time of the divorce judgment, the court imputed income to the father, after finding that he stopped looking for freelance work at the same time the divorce action started.

Evans v Oliveira, 165 AD3d 543, 88 NYS3d 543 (1st Dept 2018)

The mother sought an upward modification of the child support agreement in the parties' May 2010 stipulation of settlement, which was incorporated but not merged into their divorce judgment. Her failure to find employment commensurate with her training and expertise does not constitute an unanticipated change in circumstances, as the record reveals that she was either unemployed or underemployed at the time the agreement was made. The decrease in the mother's income attributable to the cessation of spousal maintenance was not an unanticipated change, but instead a negotiated consequence of the settlement agreement. The alleged increase in the father's income does not constitute an unanticipated change in circumstances warranting an increase in support, as the mother has not identified any needs of the child that are not being met.

Matter of Fanizzi v Delforte-Fanizzi, 164 AD3d 1653, 84 NYS3d 650 (4th Dept 2018)

Loss of employment may be a substantial change in circumstances, provided the petitioner proves that the termination from employment was through no fault of his or her own and he or she has diligently sought commensurate reemployment. Here, the father testified at the hearing that he was terminated from his position as general manager of a printing services company, which had an annual salary of $115,000, because upper management disagreed with his decision to purchase a digital printing press. He also testified that the company was in financial peril and, since his termination, the company closed one of its facilities and had barely enough work to continue operating its remaining facility. Furthermore, the father testified that he applied to more than 300 jobs in New York, Pennsylvania, New Hampshire and Utah, and contacted various employment agencies; but, without a four-year college degree, he was unable to obtain employment at his prior level of compensation. After a 19–month job search, the father ultimately accepted a position that paid less than one fourth of his prior salary. The record thus establishes that he was terminated through no fault of his own and that he diligently sought reemployment.

Fassano v Fassano, 164 AD3d 1421, 83 NYS3d 224 (2d Dept 2018)

In October 2012, the parties entered into a stipulation of settlement regarding a prior divorce action. Although the father's support obligation would be about $2,600 monthly on the entire, combined adjusted gross income, the parties agreed that the father would pay only $1,500 monthly in child support, and that there would be no add-on expenses. The stipulation contained an explanation that the deviation from the CSSA calculation was necessary "to allow the [defendant] to retain the marital residence as a place for the children to be with him when they are together," and one other reason. In 2014, the mother moved for an upward modification of the support obligation and asked for the add-on for unreimbursed health care expenses. At the hearing, she submitted evidence that the father recently sold the marital residence and was moving to another residence in a different school district. Supreme Court denied the motion.

The Appellate Division reversed. The father's selling and moving away from the marital residence constituted a substantial change in circumstances because it was a basis for deviating from the CSSA calculation.

Matter of Orlowski v Gialanella, 163 AD3d 1368, 81 NYS3d 670 (3d Dept 2018)

The parties had three children. Their January 2000 divorce required the father to pay $100 weekly in child support. In 2008, he agreed to pay an additional $45 monthly. In July 2015, the mother petitioned for an upward modification of the May 2012, modified support order (unknown order). She asked that the father help pay the college loans of the two older children, the ongoing college expenses of the youngest child, and 50% of the youngest child's braces. The support magistrate dismissed the petition, and the Appellate Division affirmed.

The parties' divorce judgment never required the father to pay college expenses after they turned 21. When the mother filed this petition, the two older children were 24 and 27 years old. Key factors to consider in determining whether a parent should be required to contribute to a child's education include the child's academic ability, the parents' educational background, and the parents' ability to pay. Based upon credibility determinations, the support magistrate concluded that the father's income had not increased by 15%, and that he did not have additional sources of income with which to pay more support. Finally, the support magistrate determined that the youngest child did not actually get braces before turning 21 years old.

Matter of Tarpey v Tarpey, 163 AD3d 687, 81 NYS3d 426 (2d Dept 2018)

The parents had three children. They divorced on March 10, 2010. The divorce judgment incorporated a surviving stipulation of settlement that included child support and custody terms. Pursuant to the stipulation, the parties were to share residential custody of the children. In 2016, the mother filed an upward modification petition in Family Court, alleging that she then had full residential custody of the children.

To modify a surviving and incorporated stipulation of settlement that was executed before the 2010 amendments to Family Court Act § 451, a party must prove that there was a substantial, unanticipated, and unreasonable change in circumstances resulting in a concomitant need for the modification. While the change in residential custody satisfied the substantial, unanticipated, and unreasonable change in circumstances prong, the mother failed to prove that she was unable to meet the children's needs with the resources available to her along with the current child support obligation. Despite incurring debt while obtaining full residential custody, she failed to prove that the debt was a result to an increase in the children's expenses. Thus, Family Court should have dismissed her petition.

Matter of Moradi v Noorani, 163 AD3d 570, 76 NYS3d 830 (2d Dept 2018)

When one of the parties' two children changes residences from one parent to the other, that can be a substantial change of circumstances that warrants a downward modification of a child support order.

Matter of Gratton v Gratton, 162 AD3d 1502, 78 NYS3d 540 (4th Dept 2018)

The father sought to modify downward his child support obligation set forth in the parties' April 2016 surviving stipulation of settlement that was incorporated into a divorce judgment entered August 2016. He was laid off from his job as a nuclear power plant contractor in May 2016, had no intention of returning to his occupation, made minimal efforts to look for commensurate employment, and intended to work on the family farm, although it was not profitable. The father claimed he was entitled to a recalculation of the order because his income had diminished by over 15%.

The Appellate Division affirmed the support magistrate's dismissal with prejudice of the downward modification petition. As for the reduction in income by more than 15%, he was laid off in May 2016, which was before the entry of the divorce judgment in August 2016. As an alternative holding, the Appellate Division concluded that the father failed to prove that his reduction in income was involuntary. He chose to work on the family farm for no profit, had no intention of going back to his old job, and he made little efforts to seek commensurate reemployment.

The Appellate Division also concluded that the father failed to establish a substantial change of circumstances that happened *after* the divorce judgment was entered, as noted above. Moreover, the father's work was intermittent, and the father testified that he would be laid off every spring or fall, when the nuclear plan was refueled. He should have anticipated the layoff.

Matter of Michael K. v Pamela D. W., 159 AD3d 594, 70 NYS3d 386 (1st Dept 2018)

Father failed to prove a substantial change of circumstances that warranted a downward modification of his child support obligation, when the support magistrate concluded that the income reported on his income tax returns was an incomplete financial picture (*see Matter of Michelle F.F. v Edward J.F.,* 50 AD3d 348, 349, 855 NYS2d 446 [1st Dept 2008], *lv denied* 11 NY3d 708 [2008]; *Peri v Peri*, 2 AD3d 425 [2d Dept 2003]). Also, the father did not prove that he diligently sought commensurate re-employment (citation omitted).

Matter of Merritt v Merritt, 160 AD3d 870, 74 NYS3d 605 (2d Dept 2018)

Parties divorced in 2010. The divorce judgment incorporated a surviving stipulation of settlement that required the father to pay $3,272 monthly in child support, and $2,000 monthly in maintenance for 60 months. The judgment also said that child support would be recalculated each year based upon the father's W-2 from the prior year, and that it would be recalculated after the maintenance obligation ended. Four years later, the court, on the parties' consent, granted the mother's upward modification petition, and ordered the father to pay $4,593 monthly in child support. The parties agreed to cap the child support at $200,000 of the father's base salary, with additional amounts to be paid to the mother based on the father's bonus, if any, up to $155,000.

In April 2015, the father was laid off, and in December 2015, he filed a downward modification petition. In April 2016, the mother filed a violation petition, alleging the father underpaid the ordered amount in April 2016. The support magistrate denied the

father's petition and granted the mother's petition. Family Court denied the father's objection. The Appellate Division reversed.

On his downward modification petition, he proved that he lost his employment through no fault of his own, and that he diligently sought commensurate re-employment. The father proved that he was laid off from his job, and that he received unemployment benefits. He also submitted evidence of his unsuccessful job search. He established a substantial change of circumstances warranting a modification

Matter of Foster-Fisher v Foster-Fisher, 160 AD3d 951, 72 NYS3d 485 (2d Dept 2018)

To be entitled to a downward modification of a child support obligation, a petitioner must prove that there has been a substantial change in circumstances. Here, the court properly granted the father's downward modification, when he proved the mother was no longer incurring child care expenses for the children (*see Matter of Scarduzio v Ryan*, 86 AD3d 573, 926 NYS2d 909 [2d Dept 2011]).

[Note: *Scarduzio*, has the more generalized proposition: "A change in the expenses for the child may constitute such a change in circumstances" (citations omitted). The case then goes on to discuss child care expenses.]

Personal Jurisdiction

Matter of Smith v Murphy, 161 AD3d 1174, 74 NYS3d 503 (2d Dept 2018), lv dismissed 32 NY3d 933 (2018)

In 2004, Family Court entered a child support order on the father's default. Nine years later, the father petitioned to modify the support order. Two years later, the father moved to vacate the child support order for lack of personal jurisdiction (CPLR 5015 [a] [4]), alleging that he was not served. Family Court held a hearing and concluded that the mother failed to prove that the father was served properly. But the court did not vacate the support order, reasoning that the father waived the defense of lack of personal jurisdiction, when he sought a modification of that order. The Appellate Division affirmed.

By seeking to modify the order without contesting service on the default order, the father acknowledged the validity of the order, consented to the court's jurisdiction over him, and waived any jurisdictional objection (see CPLR 3211 [e] ["A motion based upon a ground specified in paragraph two, seven [lack of personal jurisdiction] or ten of subdivision (a) may be made at any subsequent time or in a later pleading, if one is permitted; an objection that the summons and complaint, summons with notice, or notice of petition and petition was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship."]).

Recoupment

Fortang v Fortang, 2019 WL 1272555 (2d Dept 2019)

The parties' divorce judgment and incorporated, surviving stipulation of settlement required the father to pay $2,600 monthly to support the parties' two children. The stipulation provided that the father's obligation would decrease when the older child emancipated and would terminate when the youngest child emancipated. In 2013, the older child emancipated, but the father still paid the $2,600 monthly because of an income execution. In 2015, the youngest child emancipated, but the father continued to pay child support for several more months because of the income execution. In 2016, the father filed a motion in Supreme Court to be reimbursed for the child support overpayments. Supreme Court granted the father's motion and awarded him a money judgment for $30,422 against the mother. The Appellate Division reversed.

"There is strong public policy in this state, which the [Child Support Standards Act] did not alter, against restitution or recoupment of the overpayment of child support" (Matter of McGovern v. McGovern, 148 AD3d 900, 902 [internal quotation marks omitted]; see Johnson v. Chapin, 12 NY3d 461, 466). The rationale behind this policy is that child support payments are deemed to have been used to support the children, so "no funds exist from which one may recoup moneys so expended" (Matter of McGovern v. McGovern, 148 AD3d at 902 [internal quotation marks omitted]). "[R]ecoupment of child support payments is only appropriate under 'limited circumstances' " (id., quoting People ex rel. Breitstein v. Aaronson, 3 AD3d 588, 589)." The father failed to prove any of the limited circumstances. Also, he could have, but did not, petition for a modification of his support obligation in accordance with the terms of the parties' stipulation.

Retroactive Date

Murray v Murray, 162 AD3d 1494, 78 NYS3d 827 (4th Dept 2018)

Supreme Court erred when it made the child support retroactive to the filing date of the divorce because the parties' daughter did not live with the mother at that time. Instead, the retroactive date should have been later, when the daughter began living with her.

Right to Counsel

Matter of Worsdale v Holowchak, 2019 NY Slip Op 02104, 2019 WL 1272368 (2d Dept 2019)

The parties' 2012 divorce judgment required the father to pay $600 weekly in child support. The mother later filed a violation petition against the father, and a support magistrate found willfulness, ordering the father to pay $1,000 weekly ($600 basic, $400 arrears). Two months later, the mother filed another violation petition, claiming the father failed to obey the order entered two months prior. When the father first appeared, he asked for an adjournment to hire an attorney. On the adjournment date, he appeared by himself. He told the support magistrate that, after the last court date, he had lost his job and could not afford an attorney. Without asking about his financial

circumstances, including his expenses, to determine whether he was eligible for assigned counsel, the support magistrate held the willfulness hearing, found willfulness, and recommended incarceration. The father represented himself at the hearing. At the confirmation hearing, the judge also did not ask about his financial circumstances to determine whether he was eligible for assigned counsel. Halfway through the confirmation hearing, the judge assigned the father an attorney but denied the attorney's request for an adjournment. The judge confirmed the willfulness finding and committed him to 90 days' jail, unless he purged his contempt by paying $75,000 to SCU. The Appellate Division reversed.

The Appellate Division said the support magistrate should have inquired into the father's current financial circumstances, including his expenses, to determine whether he had become eligible for assigned counsel. After the matter was referred for confirmation, the Judge should have made the same inquiry. The fact that the Judge assigned an attorney midway through the last court appearance did not cure the error, especially since the court had already determined that he had willfully violated the support order and would incarcerate him.

[Practice note: In the City, we do not have to do the inquiry of the finances on the record as we have the assigned counsel eligibility form.]

DiBella v DiBella, 161 AD3d 1239, 75 NYS3d 371 (3d Dept 2018)

The parents married in 2005 and had 2 children. In 2010 and 2011, the parties consented to orders of joint legal custody, shared physical custody, and a parenting schedule. In 2013, the mother filed a divorce action. Months later, the mother and the father filed family offense and violation petitions against each other in Family Court. In 2014, Family Court transferred those petitions to Supreme Court.

When Supreme Court exercises jurisdiction over a matter which started in Family Court, then Supreme Court has to abide by Family Court Act § 262 (Judiciary Law § 35 [8]). In custody cases, a parent of any child seeking custody must be advised that he or she has the right to an adjournment to confer with counsel, the right to be represented by counsel of his or her choosing, and the right to be assigned counsel, when he or she is financially unable to obtain counsel.

The mother was represented by an attorney for the first four days of trial: May, June, and July 2014. In October 2014, the mother appeared by herself, said she was discharging her attorney and needed 2 to 3 months to hire another attorney. The mother said the normal retainer was $3,000. Supreme Court said to hire the attorney sooner rather than later so that the new attorney would have time to prepare for the continued trial. Supreme Court adjourned to May 27, 2015 and June 3, 2015. On May 27, 2015, the mother appeared, said she retained new counsel, but he was unable to appear. She asked to "hold off" the trial until the June 3 date. Supreme Court denied the mother's adjournment request, indicating the mother's attorney had not filed a notice of appearance and that the court could not rely only on her statement that she

was represented by an attorney. Supreme Court proceeded with the trial and made the mother proceed pro se.

Supreme Court failed to advise the mother of her right to counsel under Family Court Act § 262 (a). Despite the lengthy adjournment and the mother having previously been represented by counsel, Supreme Court had to advise the mother of her right to assigned counsel in October 2014, especially since the mother said she would need several months to come up with the $3,000 retainer. Reversal is automatic and not subject to harmless error analysis.

Stipulations

Abdelrahman v El Mahdi, 160 AD3d 1253, 74 NYS3d 672 (3d Dept 2018)

Wife started a divorce action in 2014. The parties made a written stipulation in 2015 that required the father, among other terms, to pay maintenance and child support to the wife. Later, the parties executed an addendum that corrected an error in the child support calculation, resulting in an increase of about $30 weekly. Four months later in 2016, filed a motion seeking a reduction and temporary suspension of his child support and maintenance obligations because he had been terminated from his employment in 2016. After a hearing, Supreme Court concluded that the husband did not cause his loss of employment, and that the husband diligently sought re-employment. The court, thus, granted the husband's motion, suspending the child support and maintenance obligations for 90 days, or until he secured employment, whichever first occurred. The wife appealed, and the Appellate Division reversed.

The Appellate Division concluded that the husband improperly sought modification of the parties' stipulation, and that he was unable to modify the terms of an order or divorce judgment because none had been entered. The written stipulation was the only source of the husband's child support and maintenance obligations. Thus, there was no valid basis for Supreme Court to suspend the husband's contractual obligation to pay child support or maintenance.

Vacate Default

Matter of Makaveyev v Paliy, 160 AD3d 862, 74 NYS3d 336 (2d Dept 2018)

Mother filed an upward modification petition to help pay for the child's college expenses. The father failed to appear in court. On default, the support magistrate increased the support order to $1,333. Eight days later, the father moved to vacate the default order. The support magistrate denied the motion. And Family Court denied the father's objection. Six months later, the father filed a second motion to vacate the default order. This time, he attached an affidavit from his oral surgeon attesting that the father had undergone surgery the day before the hearing and was provided with instructions to refrain from normal activities for 24 hours thereafter. The support magistrate denied the second motion, concluding that the father failed to provide a reasonable excuse for failing to appear at the hearing. Family Court denied the father's objection. The Appellate Division reversed.

While the decision to relieve a party of an order entered on default is left to the discretion of the court, default orders in child support are disfavored. The Appellate Division disagreed with Family Court, believing the father provided a reasonable excuse for failing to appear at the hearing. Not only did the father submit evidence that he had undergone a surgical procedure the day before the hearing, "the relative shortness of the delay, the absence of prejudice to the mother, and the public policy in favor of resolving cases on the merits, we find that the court improvidently exercised its discretion in denying the father's objections" (citation omitted). The Court also concluded that the father proffered a meritorious defense to the default order, but the Court did not say what the defense was.

Visitation

Matter of Johnson v Gordon, 166 AD3d 975, 86 NYS3d 732 (2d Dept 2018)

In March 2017, the father filed a petition to suspend his child support obligation and adjust his child support arrears based upon the mother's violation of a prior visitation order. In an order dated June 5, 2017, the support magistrate granted that branch of the father's petition which was to suspend his child support obligation, but, in effect, denied that branch of his petition which was to adjust his child support arrears.

While "[i]nterference with visitation rights can be a basis for prospectively suspending child support payments," "deliberate interference by a parent with court-ordered visitation does not constitute a ground to cancel child support arrears" (citation omitted).

Practice Note: Family Court Act § 439 (a) prohibits support magistrates from hearing, determining, and granting any relief with respect to issues of visitation including visitation as a defense.

Willfulness

Matter of Mandile v Deshotel, 166 AD3d 1511, 87 NYS3d 766 (4th Dept 2018)

The mother failed to come forward with competent and credible evidence of her inability to make the required child support payments. Although she presented some evidence of medical conditions that allegedly disabled her from work, her medical records indicate that the diagnoses related to those conditions were based upon her subjective complaints, not on any objective testing. Also, the support magistrate noted that the mother did not seek treatment for her alleged conditions until shortly after the father filed his first violation petition and that she had testified several years earlier that she did not intend to work because her paramour could financially support her.

The court did not err in refusing to cap her arrears at $500. Normally, when the noncustodial parent's sole source of income is public assistance, "unpaid child support arrears in excess of [$500] shall not accrue" (Family Court Act § 413 [1] [g]). Although the mother received public assistance and was unemployed, circumstantial evidence suggested that she received support from her live-in paramour.

Matter of Garrett v Jones, 166 AD3d 1089, 87 NYS3d 688 (3d Dept 2018)

A court may revoke a suspended commitment for good cause shown. Here, the father paid only $250 toward the $950 in child support due between the order suspending his commitment and the revocation of the suspension. Also, he had no proof of imminent, new employment, just his self-serving testimony. He also failed to document the details of his job search. Finally, he had accrued substantial arrears. "In view of the father's consistent failure to take advantage of the opportunities offered to him by Family Court to comply with his child support obligations, we are satisfied that there was good cause for the revocation of the suspension of his sentence."

Matter of Sayyeau v Nourse, 165 AD3d 1417, 86 NYS3d 259 (3d Dept 2018)

The father failed to come forward with competent and credible evidence of his inability to comply with the support order. The father testified that his income is limited to monthly Social Security disability benefits, and he claimed that he is unable to make the required payments due to his poor health. Although the Support Magistrate credited the father's testimony regarding his medical history and related health issues, he submitted no competent medical evidence that his physical ailments prevented him from maintaining employment. The fact that the father is receiving Social Security benefits does not preclude a finding that he is able to work. Also, the father admitted that he used his available funds to pay expenses other than his child support obligation. And there was no evidence that he made even minimal efforts to comply with the support order. So the support magistrate's willfulness finding was proper.

Matter of Martin v Claesgens, 165 AD3d 1382, 86 NYS3d 276 (3d Dept 2018)

The father failed to come forward with credible evidence of his inability to comply with the support order. The father testified that, while he previously earned a healthy income, financial reversals in 2013 caused him to "los[e] everything" and left him and two of his other children living with his father in Florida. His efforts to recover from those alleged reversals, however, amounted to self-employment as a consultant, a fitness and wellness coach and a producer of live-streamed content, resulting in variable income that did not cover his expenses. The father testified that these endeavors consumed 60 to 70 hours every week, and yet he earned only $1,200 a month at the time of the hearing. He further claimed that he was looking for a stable job but could not find one, an assertion that was unsubstantiated and deserved to be treated with skepticism given his acknowledged experience in the automotive sales industry and his ongoing consulting relationships with automotive dealerships near his residence. The Support Magistrate found that the father's testimony was "simply not credible" and, according deference to a credibility assessment that Family Court did not disturb, we agree that the father's proof was "clearly inadequate to meet his burden" of showing an inability to pay that would defeat the prima facie case of willful violation.

Matter of Shkaf v Shkaf, 162 AD3d 1152, 78 NYS3d 462 (3d Dept 2018)

The mother testified that the father chronically paid the weekly support obligation late, sometimes even 9 weeks late. He did not start paying regularly until she commenced the present enforcement proceeding, and the court modified the order, making the

payments payable through the SCU. The father also delayed paying orthodontic payments. Family Court determined that the father's default was non-willful. Contrary to the court's determination, the fact that the father had paid his obligations by the time of the hearing—at least in part, because he was ordered to do so—does not negate the evidence that he repeatedly delayed in fulfilling some of his responsibilities and completely avoided others, forcing the mother to make repeated efforts to obtain his compliance and, finally, to commence this proceeding.

Matter of Fletcher v Saul, 162 AD3d 1018, 80 NYS3d 352 (2d Dept 2018), lv denied 32 NY3d 1036 (2018)

The father failed to come forward with competent, credible evidence of his inability to comply with the support order. He admitted to earning income during the years that he did not pay child support.

Matter of Merritt v Merritt, 160 AD3d 870, 74 NYS3d 605 (2d Dept 2018)

Parties divorced in 2010. The divorce judgment incorporated a surviving stipulation of settlement that required the father to pay $3,272 monthly in child support, and $2,000 monthly in maintenance for 60 months. The judgment also said that child support would be recalculated each year based upon the father's W-2 from the prior year, and that it would be recalculated after the maintenance obligation ended. Four years later, the court, on the parties' consent, granted the mother's upward modification petition, and ordered the father to pay $4,593 monthly in child support. The parties agreed to cap the child support at $200,000 of the father's base salary, with additional amounts to be paid to the mother based on the father's bonus, if any, up to $155,000.

In April 2015, the father was laid off, and in December 2015, he filed a downward modification petition. In April 2016, the mother filed a violation petition, alleging the father underpaid the ordered amount in April 2016. The support magistrate denied the father's petition and granted the mother's petition. Family Court denied the father's objection. The Appellate Division reversed.

On the mother's violation petition, it was undisputed that the mother presented prima facie evidence of a willful violation – failure to pay the total amount of child support. But the father met his burden of presenting competent, credible evidence of his inability to comply with the support order. Here, the father proved that he was laid off from his job (presumably through no fault of his own), and that he received unemployment benefits. He also submitted evidence of his unsuccessful job search (presumably diligent search for commensurate employment). While he did consulting work, his earnings in 2016 were drastically lower than in 2015. the father paid the full amount of child support owed through March 2016 from his savings and from the bonus he received in April 2015 for work performed in 2014, as well as from the money he received after he cashed in his profit-sharing plan. Thereafter, beginning in April 2016, the father paid child support in a reduced amount, which was approximately 29% of the income he earned from his consulting work. There was no evidence that the father had any other assets with which to further meet his obligations.

Espinal-Melendez v Vasquez, 160 AD3d 852, 74 NYS3d 82 (2d Dept 2018)

Failure to pay required, court-ordered support is prima facie proof of willful non-payment. The respondent must come forward with credible, competent evidence of an inability to comply with the support order. Here, the support magistrate did not credit the father's claimed lack of income and inability to work. Thus, Family Court properly confirmed the willfulness finding.