**Case Update - Additional Cases**
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**College Expenses - SUNY Cap**
**College Expenses - Credit to Basic Payment**

Wheeler v. Wheeler, 174 AD3d 1507 (4th Dept., 2019)

The parties' separation agreement provided that they would share the expenses of college "based upon their facts and circumstances" but neither parent would be "obligated to contribute to expenses exceeding the cost of SUNY Geneseo." The child attended a private college whose costs exceeded Geneseo's but the amount of financial aid that she received reduced the net cost to a level below Geneseo's. The Support Magistrate directed the father to pay his pro-rata share of the net cost. On objection, the Family Court Judge agreed with the father that a portion of the financial aid that the child received should be deducted from the SUNY Geneseo Cap before determining the parents' share. Although the amount of financial aid actually exceeded the total cost of a SUNY education, the Father had proposed that the Geneseo cost be reduced by the same percentage that the cost of the private university was reduced by financial aid.

The Appellate Division reversed and reinstated the Support Magistrate's order, stating that the separation agreement had no such calculation and that courts could not add terms which "distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing."

The Court also rejected the father's contention that he is entitled to a credit toward his basic child support obligation. The Court stated that a credit "is not mandatory but depends upon the facts and circumstances in the particular case, taking into account the needs of the custodial parent to maintain a household and provide certain necessaries." In this case, the court stated that the father was not entitled inasmuch as the mother still had to maintain a household for the child during school breaks.

Compare:

> Keller-Goldman v. Keller, 149 AD3d 422 (1st Dept. 2017), aff'd 31 NY3d 1123 (2018)
> Trent v. Alburg, 155 A.D.3d 881 (2nd Dept., 2017)
> Rohrs v. Rohrs 297 AD2d 317 (2nd Dept., 2002)
> Covington v. Boyle, 127 A.D.3d 1393 (3rd Dept., 2015)

**Confirmation Hearings**

Garuccio v. Curcio, 174 AD3d 804 (2nd Dept., 2019)

After a fact-finding hearing, the Support Magistrate found that the father was in willful violation and referred the case to the Family Court Judge for confirmation with a recommendation of incarceration. The father failed to appear at the confirmation hearing and the Family Court Judge, without taking further testimony, confirmed the recommendation. The father appealed, claiming that 1) a second hearing was required prior to confirming the recommendation and 2) that the Family Court must wait until the time to file objections has passed before confirming the recommendation.

The Appellate Division held that the father was given a full and fair opportunity to defend himself at the hearing before the Support Magistrate and thus a second hearing was not required. As to the time of the confirmation hearing, the court pointed out that an order recommending incarceration was not a final order and therefore not subject to the objection process.

**Emancipation - Support Beyond the Child's 21st Birthday**

Brandon v. Lopez, 174 AD3d 706 (2nd Dept., 2019)
The mother sought to extend support past the child's 21st birthday. She produced a notarized agreement wherein both parents agreed to support the child until the child graduated from college. The mother did not produce the judgment of divorce and there was no evidence that the agreement had ever been incorporated into an order. The Support Magistrate dismissed. The Appellate Division agreed. Family Court has no jurisdiction to enforce an agreement that was not incorporated into an order.

Compare:

> Spelman v. Spelman, 81 A.D.3d 837 (2nd Dept., 2011)
> The Family Court had subject matter jurisdiction to enforce the provisions of the parties' judgment of divorce, which incorporated their stipulation of settlement, obligating the father to share the expenses of the daughter's college education incurred after her 21st birthday.

**Interlocutory objections**

Tobing v. May, 168 AD3d 861 (2nd Dept., 2019)

The parties executed a so-ordered stipulation in 2015 in which they agreed that prior to filing a petition in Family Court, the parties must submit to mediation, and if the mother feels after a

good faith effort that the mediation does not resolve the issues, she may seek the approval of Family Court to file a petition. In 2016, the mother filed an enforcement and modification petition. The father filed a motion to dismiss, which was denied by the Support Magistrate, who found that the mother "had met her threshold requirements." The father filed an objection which was sustained by the Family Court.

The Appellate Division reversed. Objections from non-final orders of a Support Magistrate must be denied unless the Support Magistrate's order will lead to irreparable harm. In this case, the father's claim that a continuing proceeding will result in lost time and work and counsel fees does not rise to that level.

**Modification - 3-year/15% Increase**

Yerdon v. Yerdon, 174 A.D.3d 1216 (3rd Dept. 2019)

The parties entered into a settlement agreement which was incorporated but not merged into a judgment of divorce. The mother agreed to waive support from the father for their 13-year-old child in exchange for the father's agreement to convey his interest in the marital residence to the mother. The agreement also provide that if either party wishes to modify the agreement, that party must first return anything received under the agreement. Sixteen months after the divorce, the mother filed a petition in Family Court seeking to modify the support obligation. The father then moved in Supreme Court for an order directing the mother to pay him for his share of the marital home. Supreme Court removed the support petition from Family Court and dismissed it, finding that the mother had not satisfied the condition precedent to seeking a modification.

The Appellate Division rejected the mother's argument that the parties did not opt out of the statutory grounds for modification (substantial change in circumstances/15% change in income/passage of 3 years), holding that the agreement did not vitiate those grounds. The statutory grounds are still available so long as the condition precedent is satisfied.

**Recoupment of overpayments/Cancellation of Arrears**

Onondaga County Dept. of Social Servs. v Marcus N.D. 170 A.D.3d 1561 (4th Dept., 2019)

An order of filiation was entered on default in 1999 declaring Marcus N.D. to be the father of the child. Support was also ordered at the time. In 2016, based upon an order from Mississippi which, after DNA testing, adjudicating another man to be the child's father, Marcus moved to vacate the order of filiation and all support arrears. The Court granted the vacature of the order of support but declined to vacate the arrears. The Appellate Division affirmed. Citing Dox v. Tynan, 90 AD2d 166 (1997), the Court stated that under no circumstances can courts vacate arrears that accrued prior to the petition.

Rapp v. Horbett, 174 AD3d 1315 (4th Dept. 2019)

The father filed a support petition on April 2, 2015. At the time of the filing until January 1, 2016, the parties shared custody equally. Thereafter, the father was the primary custodian. After imputing income to the mother, the Support Magistrate ordered the mother to pay $125 per week effective April 2, 2015, despite the fact that the father was the higher wage earner. The Family Court denied the mother's objections.

On appeal, the Appellate Division upheld the Support Magistrate's imputation of income and the $125 weekly award, but found that since the father was the higher wage earner, no support should have been ordered for the period from April 2, 2015 to January 1, 2016. As a result, the mother was entitled to a credit for any arrears erroneously ordered from during that period. Although there is a strong public policy against recoupment of support or reduction of arrears, under the limited circumstances of this case, a credit is appropriate. The mother had significantly less income than the father and the credit will not impair father's ability to take care of the child. In fact it will allow the mother to have a more stable household during her parenting time.

**Right to Counsel - Imputation of Income**

Carney v. Carney, 160 A.D.3d 218 (4th Dept. 2018)

The mother filed a motion in Supreme Court seeking to hold the father in contempt for failure to comply with custody and visitation orders. The father sought assignment of counsel. The court determined that a hearing should be held on the father's income and earning potential before assigning counsel for the contempt proceeding. The public defender's office was assigned for the limited purpose of assisting the father at the hearing. After the hearing, the court imputed $50,000 to the father and denied his application. The Supreme Court reasoned that if a court can impute income to parties in a support proceeding to compel them to pay more support, then the taxpayers have the same right to compel parties to maximize their incomes before free legal services are provided. The Appellate Division reversed.

The Appellate Division stated that since the Supreme Court was exercising jurisdiction over a matter that the Family Court would also have jurisdiction over, the provisions of FCA § 262 concerning the appointment of counsel applied. Because the statute is written in the present tense – ". . . **is** financially eligible" to obtain counsel – it requires an examination of applicants' current circumstances as opposed to their prospective abilities. While the Family Court Act specifically provides for the imputation of income in support proceedings, there is no such provision in § 262. A respondent facing incarceration cannot "fulfill the immediate need for representation by paying a private attorney with hypothetical, imputed income."

**Spousal Support - Deviaion**

Bibbes-Turner v. Bibbes, 174 AD3d 1506 (4th Dept. 2019)

Although the husband would be required to pay spousal support pursuant to the guidelines, the Appellate Division held that the Support Magistrate was justified in dismissing the wife's petition based on the fact that the parties married wile the husband was incarcerated and the parties had lived separately for 13 years prior to the proceeding. They only had sporadic contact after the husband's release.

**Tax Exemptions - Family Court Authority**

Bashir v. Brunner, 169 AD3d 1382 (4th Dept., 2019)

After a hearing, the Support Magistrate granted the father a downward modification. The mother filed objections, which were denied by the Family Court. The Appellate Division affirmed the Court's findings that the mother lived rent-free and imputed income to her based upon past-employment. However, it reversed that part which reduced the father's obligation by one-half of the parties' tax refund. The Court found that this was amounted to a determination that the father was entitled to part of the tax exemption. The 4th Dept has previously held that the Family Court does not have subject matter jurisdiction to make such determinations. John M.S. v. Bonni L.R., 49 AD3d 1235 (4th Dept., 2008)

Note: The Family Court has some authority to take the "tax consequences to the parties" into account under the (f) factors, but apparently this was a step too far in that it appeared to be a shifting of the exemption.

Cali v. Cali, 166 AD3d 614 (2nd Dept 2018)

After a hearing, the Support Magistrate dismissed the mother's petition for an upward modification of the support obligation. The Support Magistrate found that the mother failed to submit updated pay stubs and a signed tax return. The Court did have an unsigned tax return and older pay stubs. The Support Magistrate also declined to modify the judgment of divorce regarding the claiming of the children. The mother filed objections which were denied.

The Appellate Division found that the mother was not informed prior to the Support Magistrate's decision that the tax return or pay stubs were insufficient. The evidence did show that the father's income had increased by more than 15%, so the mother was entitled to a modification. The case was remanded to Family Court to determine the father's obligation after receiving updated pay stubs and a signed tax return from the mother.

The Appellate Division affirmed the decision of the Family Court to deny the mother's request to reallocate the tax exemptions. In this case the tax exemptions were allocated in an agreement that was incorporated but not merged into the judgment of divorce. Because the agreement did not provide for modification, the Family Court had no authority to "imply a term which the parties themselves failed to insert."

Note: The Second Department has not determined that the Family Court is without jurisdiction to allocate exemptions. In fact, in the past, it has approved of orders doing just that. See, Jurgielewicz v. Jurgielewicz, 31 AD3d 639 (2nd Dept., 2006).

**UIFSA - Jurisdiction to modify**

Reynolds v. Evans, 159 AD3d 1562 (4th Dept., 2018)

Father and mother and child previously resided in New Jersey, where a support order was made in 2001 which directed the father to pay support to the mother. Thereafter, the mother and the child moved to Tennessee and the father moved to New York. in 2004, the New Jersey order was registered in New Jersey for enforcement against the father. In 2016, the father filed a modification petition in Ontario County seeking a downward modification. The Support Magistrate dismissed, reasoning that the requirements of §580-611(1)(a) were not met.

In order to modify an order from another state, UIFSA requires at §580-611(a) that:

1. Neither parent or child resides in the issuing state;
2. The issuing state no longer has CEJ;
3. The state issuing the new order must have jurisdiction over the respondent; and
4. The petitioner is a nonresident of this state.

This is the so-called "play-away" rule.

The Appellate Division, following the Third Department's ruling in Bowman v. Bowman, 82 AD3d 144 (3rd Dept., 2011), reversed. Like the Third Department, the Court found that UIFSA is in conflict with the Full faith and Credit for Child Support Orders Act (FFCCSOA), 28 USC § 1738B, which was enacted by Congress in 1994, which requires only:

1. Neither parent or child resides in the issuing state;
2. The issuing state no longer has CEJ; and
3. The state issuing the new order must have jurisdiction over the respondent.

In other words, no play away rule. FFCCSOA "is so comprehensive in scope that it is inferable that Congress intended to fully occupy the field of its subject matter." Inasmuch as FFCCSOA is a Federal law, it preempts UIFSA, which is a state statute. Therefore, New York State had

jurisdiction to modify the order. It should be noted that UIFSA has been enacted in all 50 states as part of a congressional mandate in order to continue to receive Federal funding.

**Voluntary reduction of income due to relocation**

Parmenter v. Nash, 166 AD3d 1475 (4th Dept., 2018)

The parties resided together in Virginia until 2015, when the mother relocated to NY. After six months, the father quit his job in Virginia and relocated to New York to be closer to the child. He took a new job, which was lower paying than the job he held in Virginia. The Support Magistrate dismissed the father's petition for a downward modification, reasoning that the reduction in income was voluntary. The Family Court denied the father's objection.

The Appellate Division reversed. While the general rule is that a voluntary reduction in income should not result in a reduction in support, this rule should not be applied inflexibly. A parent who chooses to leave employment under such circumstances is not voluntarily unemployed or underemployed. The Court remanded the case to the Family Court to determine the support based on the father's new income.

Montgomery v. List, 173 A.D.3d 1657 (4th Dept., 2019)

The mother filed a petition for an upward modification. Because the father's new wife accepted a position in North Carolina which paid her $30,000 more per year, the father voluntarily left his employment in New York to take a position in North Carolina which paid him $13,800 less per year. Although the Support Magistrate granted an upward modification, the new order was based on the father's North Carolina income. The Support Magistrate declined to impute income to the father. The Family Court granted the mother's objections and imputed the full amount of the father's New York income, $64,819 annually, to him, stating that a "voluntary reduction in income, however reasonable, does not permit a reduction" of the support obligation.

The Appellate Division affirmed. It noted that the Family Court was overbroad in stating that a voluntary reduction can never result in a reduction of support (see, e.g., Parmenter v. Nash, *supra*) and its failure to exercise discretion that it had was "in itself, an abuse of discretion." However, the Appellate Division, upon exercising its own discretion, found that the father had the ability to earn $64,819. Moreover, since the reason that the father left New York was to achieve a higher income household, even if that meant reducing his own income, part of his wife's salary may be imputed to him.