# AAML NY CHAPTER BULLETIN

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## MATRIMONIAL UPDATE

By Bruce J. Wagner
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### AGREEMENTS - PRENUPTIAL – TEMPORARY MAINTENANCE DENIED

In Anonymous v. Anonymous, 2016 Westlaw 1098204 (1st Dept. Mar. 22, 2016), the wife appealed from a May 2015 Supreme Court order which, among other things, granted the husband temporary maintenance, despite certain language in the parties' prenuptial agreement. On appeal, the First Department modified, on the law, to deny the husband's motion for temporary maintenance. The Appellate Division held that Supreme Court "improperly granted the husband's application for temporary maintenance" and "should not have applied" former DRL §236B(5-a)(f) to the parties' prenuptial agreement, given that said agreement predated its effective date. The agreement stated that the parties agreed to "waive any and all claims for spousal support and/or maintenance *** both now and in the future." The First Department held that the words "any and all *** clearly signaled" the parties' intent "that the waiver would encompass both temporary and final awards of spousal support." The Court further held that "in the future *** can only mean any time after the agreement was executed, which necessarily includes when the husband's present motion was made." The Appellate Division rejected the husband's contention that the parties failed to expressly waive temporary maintenance, given that the agreement relinquished "any and all" maintenance claims "now and in the future." The First Department concluded: "Here, both

parties, represented by counsel, contracted to waive all claims of spousal support, both temporary and final, and they should be held to their bargain."

**ATTORNEY & CLIENT - MALPRACTICE – EMAILS AS PART OF BASIS TO DENY SUMMARY JUDGMENT**

In Tuppatsch v. LoPreto, 2016 Westlaw 1096600 (1st Dept. Mar. 22, 2016), the attorney appealed from an August 2014 Supreme Court order, which denied her motion to dismiss a cause of action for legal malpractice. On appeal, the First Department affirmed. The client alleged that the attorney was "negligent in, among other things, failing to advise her of her rights in an underlying divorce proceeding, and in pressuring her to settle the action before trial" and that "but for defendant's negligence, she would have recovered a larger equitable distribution." The attorney's motion to dismiss cited the settlement agreement, in which the client stated "that she was apprised of her rights and that she was not entering into the settlement agreement under duress." The client "submitted her affidavit and several emails between the parties, in which plaintiff complains about defendant's representation of her during settlement negotiations and defendant urges plaintiff to settle the matter and contemplates withdrawal as counsel." The Appellate Division concluded that Supreme Court "correctly sustained the first cause of action because plaintiff has properly pleaded a cause of action for legal malpractice" in that the client's "affidavit and attached emails are sufficient to support her allegations."

**CHILD SUPPORT – IMPUTED INCOME**

In Matter of McKenna v. McKenna, 2016 Westlaw 1136317 (3d Dept. Mar. 24, 2015), the father appealed from a January 2014 Family Court order, which granted child support to the mother. The parties have two children born in 1997 and 1998. After a hearing, the Support Magistrate imputed approximately $18,000 in income to the father, in addition to his 2011 reported income of $22,553. Family Court denied the father's objections to the Support Magistrate's imputation of income. The Appellate Division affirmed, noting that "the father is the sole owner of a small corporation and resides in a portion of the business property at no personal cost. He does not pay rent for such personal living space and all of the occupancy costs, as well as his personal expenses — including utilities, cable, Internet, cell phone, groceries and vehicle insurance — are paid out of his corporate account. Under such circumstances, Family Court acted well within its discretion in imputing $1,000 per month to the father for the benefit derived from the company-provided living expenses." The Third Department also held that Family Court properly imputed income based upon increased depreciation, given the testimony of the mother's accountant, who concluded that the father had claimed $4,761 in excess of straight line depreciation in year 2011.

**CHILD SUPPORT – IMPUTED INCOME**

In Matter of Abruzzo v. Jackson, 2016 Westlaw 1035171 (2d Dept. Mar. 16, 2016), the father appealed from an April 2015 Family Court order, which denied his objections to a February 2015 Support Magistrate order, which, after a hearing, imputed income of $62,400 per year to him (based upon a prior hourly wage of $30, over an assumed 40 hour week) and directed him to pay $173 per week in child support. On appeal, the Second Department affirmed. The father contended that he was currently unemployed, had "never earned $30 per hour on a 40 hour work week basis," and his current annual income was $18,060. The Appellate Division found support in the record for "the Support Magistrate's determination that the father had been intentionally underemployed (citations omitted) and that annual income of $62,400 should be imputed to him."

**CSSA–OVER $136,000; EQUITABLE DISTRIBUTION-PREJUDGMENT INTEREST -PROPORTIONS REDUCED-TAX IMPACTING; MAINTENANCE**

In Doscher v. Doscher, 2016 Westlaw 1035316 (2d Dept. Mar. 16, 2016), the husband appealed from a March 2014 Supreme Court judgment which, in the wife's May 2003 action for divorce, among other things: (1) awarded the wife child support of $8,500 per month; (2) awarded her 50% of the marital assets; (3) failed to apply the tax impacted rate of 40% to the marital portion of certain assets; (4) awarded her nontaxable maintenance of $12,000 per month for 5 years; and (5) awarded the wife prejudgment interest on certain awards. On appeal, the Second Department modified, on the law, on the facts, and in the exercise of discretion, by: (1) reducing child support to $5,100 per month; (2) reducing the wife's share of marital assets to 30%; and (3) applying the tax impacted rate of 40% to the assets in question. The parties were married in June 1998, and their child was born in November 2000. The Appellate Division found that the parties "lived a luxurious lifestyle, almost exclusively funded with the defendant's earnings as a successful Wall Street bond trader," and that the parties agreed that the wife, a high school graduate, would quit her job to care for the child. The action came to trial in 2008, but a mistrial was ordered due to the death of the judge, who had not yet rendered a final determination. At the second trial, the Court adopted the valuation of certain assets as per a March 2011 JHO report, and allowed the wife prejudgment 9% statutory interest on her distributive award. The Appellate Division found that "Supreme Court providently exercised its discretion in awarding the plaintiff monthly nontaxable maintenance in the sum of $12,000 for a period of five years." As to child support, the Second Department held: "In high income cases such as this one, the appropriate determination under Domestic Relations Law §240(1-b) for an award of child support where parental income exceeds the statutory income threshold of $136,000 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 (citations omitted). Here, although the Supreme

Court enumerated the factors it considered in determining the child support award, those factors, on this record, do not support basing child support on $600,000 of the defendant's annual income, which is $464,000 more than the $136,000 statutory cap. Specifically, there was insufficient evidence in the record supporting the plaintiff's claims regarding expenses for the child's clothing, recreation, and miscellaneous items. Therefore, in considering the relevant factors enumerated in Domestic Relations Law §240(1-b)(f), and the child's actual needs and the amount that is required for the child to live an appropriate lifestyle, the defendant's child support obligation should have been based on $360,000 in annual income." With regard to equitable distribution, the Second Department found that "Supreme Court improvidently exercised its discretion in directing an equal division of the marital assets between the defendant and the plaintiff," and "given the relatively short five-year duration of the marriage, the income and property of the parties at the time of the marriage, the award of exclusive occupancy of the marital residence to the plaintiff, and the maintenance award to the plaintiff," the marital assets "should have been divided so as to award 30% to the plaintiff." The Court concluded that the wife "was entitled to prejudgment interest based on the fact that she was deprived of the use of her share of the marital property during the pendency of the action," but agreed with the husband that Supreme Court "should have applied the 'tax impacting rate' of 40% to the marital portion of certain assets identified in the [JHO] *** report."

**COUNSEL FEES – AFTER TRIAL**

In Brody v. Brody, 2016 Westlaw 886296 (2d Dept. Mar. 9, 2016), the wife and her trial counsel appealed from an August 2014 Supreme Court order which, upon reargument, adhered to an April 2014 order directing the husband to pay additional counsel fees to her of only $150,000, where the husband had already paid over $400,000, consisting of: $270,513 for her counsel; fees for the attorneys for the children; and fees for the neutral mental health professional. On appeal, the Second Department affirmed, noting that other issues in the same case were decided the same day in a separate decision. The Appellate Division held that Supreme Court's award "reflects consideration of the relevant factors, including the defendant's conduct in dissipating assets during the litigation rather than using available funds to pay her attorneys or to pay for necessary items for the children or herself," and that Supreme Court "did not improvidently exercise its discretion in awarding the defendant the sum of only $150,000 in counsel fees."

**COUNSEL FEES – AFTER TRIAL - DENIED; MAINTENANCE – DURATIONAL – REDUCED**

In Stuart v. Stuart, 2016 Westlaw 1165330 (4th Dept. Mar. 25, 2016), the husband, age 66, appealed from a May 2014 Supreme Court judgment, which, among other things, directed him to pay maintenance to the wife of $1,116 per month for 7½ years and $2,000 for her counsel

fees. On appeal, the Fourth Department modified, on the law, by reducing maintenance to $850 per month and vacating the award of counsel fees. The Appellate Division noted that the husband had Social Security benefits of $1,509 per month and $466.29 per month from his pension, for a monthly total of $1,975.29, and found that after paying maintenance and child support, he has only $252.59 per month left. The Court determined that a reduction of maintenance to $850 per month "reflects an appropriate balancing of [defendant's] needs and [plaintiff's] ability to pay." As to counsel fees, given that the wife did not submit an affidavit pursuant to DRL 237, "identifying the services rendered by her attorney or the fees incurred, the court was precluded from awarding attorney's fees to her."

**CUSTODY - MODIFICATION – LINCOLN HEARING REQUIRED**

In Matter of Noble v. Brown, 2016 Westlaw 1164847 (4th Dept. Mar. 25, 2016), the mother appealed from an October 2014 Family Court order, which, at the close of her proof, dismissed her petition to modify a prior order, pursuant to which the father had sole legal and primary physical custody of the parties' 14 year old daughter. On appeal, the Fourth Department reversed, on the law, reinstated the mother's petition and remitted to Family Court. The Appellate Division concluded that Family Court "abused its discretion in denying the mother's request that it conduct a Lincoln hearing before ruling on the father's motion," and that such a hearing may be conducted "during or after fact-finding." The Court noted that the child "expressed a preference to live with the mother, the Attorney for the Child did not oppose a Lincoln hearing, and many of the changed circumstances alleged by the mother concerned matters within the personal knowledge of the child but not that of the mother or her witnesses."

**CUSTODY – MODIFICATION – MEASURED FROM STIPULATION, NOT JUDGMENT**

In Matter of Tuttle v. Tuttle, 2016 Westlaw 1164568 (4th Dept. Mar. 25, 2016), the mother appealed from an April 2015 Family Court order, which, in a proceeding seeking to modify the custody provisions of an incorporated stipulation, awarded primary physical residence of the parties' child to the father. On appeal, the Fourth Department affirmed. The Appellate Division rejected the mother's argument that "Family Court erred in considering events predating the divorce judgment in determining whether there was a significant change in circumstances to warrant an inquiry into the best interests of the child," and noted that the parties' oral stipulation regarding custody predated the judgment of divorce by 9 months. The Court held: "Where a party seeks modification of a custody order entered upon the parties' stipulation, the party must demonstrate a change in circumstances from the date of the stipulation, and here the stipulation predates the divorce judgment." The Fourth Department determined that "the express wishes of older and more mature children can support the finding of a change of circumstances" and found

that “the Attorney for the Child advised the court of her client's strong preference to live with her father. In addition, the mother's efforts to undermine the father's relationship with the child and his participation in decisions concerning the child's welfare constitute a sufficient change in circumstances to warrant inquiry into the child's best interests.”

**CUSTODY – RELOCATION (FLORIDA) – DENIED**

In Matter of Hirschman v. McFadden, 2016 Westlaw 1066286 (4th Dept. Mar. 18, 2016), the mother appealed from an October 2014 Family Court order, which dismissed her petition seeking to relocate to Florida with the parties’ child. On appeal, the Fourth Department affirmed, noting that “although the mother asserted financial reasons for the proposed relocation, she failed to present any proof of her purported job offer and, moreover, she failed to establish that any employment she was offered in Florida would be anything more than temporary.” The Appellate Division found that “while the mother testified that the child could receive a superior education upon relocation, ‘she failed to offer any proof from which [the court] reasonably could conclude that the [Florida] school system was a significant improvement over the school system in [New York].’” While the mother and child lived with the maternal grandmother in New York, her nearest family member in Florida would be over an hour away. The Court concluded that the mother’s proposed visitation arrangement “was unlikely to materialize given her uncertain employment and the lack of financial resources necessary to facilitate the child's transportation to New York.”

**CUSTODY – REMITTAL FOR UPDATED FORENSIC REPORT**

In E.V. v. R.V., 50 Misc3d 1223(A), NY Law Journ. March 15, 2016 (Sup. Ct. Westchester Co., Colangelo, J., Feb. 26, 2016), the Appellate Division reversed Supreme Court’s July 2014 order (44 Misc3d 1210A), made after 44 non-consecutive days of trial, and which had modified custody of a child born in 2005, so as to award sole legal custody to the father, “primary” physical custody to the mother and a 50/50 alternate week time sharing. The Second Department remanded to Supreme Court “for a re-opened expedited hearing solely to receive an updated forensic mental health evaluation conducted by the same court-appointed expert *** [whose first report was submitted in January 2012] and an in camera examination of the child.” The Appellate Division directed that “Supreme Court shall issue a new expedited determination of that branch of the father's cross motion which was to modify prior orders of custody and visitation incorporated into the parties' judgment of divorce.” 130 AD3d 920 (2d Dept. July 22, 2015). Supreme Court issued such an order on August 7, 2015 and the expert submitted the updated report in December 2015. The mother and the attorney for the child, in essence, took the position that additional testimony, from both the expert and others, was necessary, and the attorney for the

child moved to appoint another expert. Supreme Court, finding that "enough is enough," denied the requests of both the mother and the attorney for the child, and stated that it would issue an expedited determination in accordance with the Appellate Division's remittitur.

**CUSTODY - MODIFICATION – VIOLATION AS A FACTOR**

In Cunningham v. Cunningham, 2016 Westlaw 1164984 (4th Dept. Mar. 25, 2016), the mother appealed from a July 2015 Supreme Court judgment of divorce, which awarded sole legal custody of the parties' child to the father. On appeal, the Fourth Department affirmed and held that Supreme Court's determination "is supported by the evidence in the record, including that the mother placed the child in a home-schooling program in order to permit the mother to relocate with the child in contravention of the court's prior orders, and that the mother is only home schooling the child a maximum of one day per week. In addition, we see no reason to overturn the court's determination not to credit the mother's version of the events underlying her claims of domestic violence and sexual abuse."

**ENFORCEMENT – CONTEMPT – LESS DRASTIC MEASURES**

In Rhodes v. Rhodes, 2016 Westlaw 885986 (2d Dept. Mar. 9, 2016), the mother appealed from a March 2014 Supreme Court order, which denied her October 2013 motion to hold the father in civil contempt, for failure to comply with the child support provisions in the parties' July 2008 judgment of divorce, and for counsel fees. On appeal, the Second Department affirmed. The stipulation incorporated into the judgment of divorce, required the father to pay basic child support of $2,000 per month, plus one-half of reasonable uninsured medical expenses, one-half of extracurricular activity expenses, and a share of any child care expenses incurred by the mother to attend work. The mother alleged that the father failed to pay $3,795 in basic child support payments, and refused to reimburse her for his share of child care, medical care, and extracurricular activity expenses. The father submitted bank records to support his claim that he had made the child support payments, and contended that the mother failed to respond to his request for documentation of the claimed child care, medical care, and extracurricular activity expenses. The father also argued that the mother had failed to make the statutorily required showing that she had "exhausted other enforcement remedies prior to seeking to hold him in civil contempt." The Second Department held that "the mother did not attempt to utilize any less drastic enforcement mechanism before moving to hold the father in contempt, and failed to demonstrate that resort to a less drastic enforcement mechanism would be ineffectual. Contrary to the mother's contention, the fact that the child care, medical care, and extracurricular activity expenses she sought payment of were not for a sum certain did not prevent her from seeking to

fix any arrears due for those expenses and enforcing the father's payment obligations through less drastic means." The Appellate Division found that the denial of counsel fees was proper.

**FAMILY OFFENSE – FAMILY COURT CONCURRENT JURISDICTION**

In Matter of Hassan v. Habib, 2016 Westlaw 886166 (2d Dept. Mar. 9, 2016), the wife appealed from an August 2014 Family Court order, which granted the husband's motion to dismiss her May 2014 family offense petition and vacated a temporary order of protection, which directed him to stay away from the wife and the marital residence. On appeal, the Second Department reversed, on the law, reinstated the petition and remitted to Family Court for the issuance of a new temporary order of protection and for further proceedings. The wife's petition alleged that during an argument, the husband slapped her and hit her arm with a glass bottle. In July 2014, the wife's attorney advised Family Court that there was a matrimonial action pending. Family Court "suggested that the petitioner apply in the Supreme Court for an order of protection, because the Supreme Court could provide a prompt hearing" and "adjourned the matter for two weeks to give the petitioner an opportunity to make such an application." Family Court stated: "I may dismiss [this proceeding] because there's a matrimonial pending, and I'm adjourning the matter to allow the parties ample time to make this application in Supreme Court pursuant to the Domestic Relations Law." At the next Family Court appearance, the husband moved to dismiss the petition, upon the ground that there was a pending matrimonial action in Supreme Court; the wife argued that there was no statute mandating dismissal on such ground. The Appellate Division noted that DRL §252(1) provides that "in a matrimonial action, both the Supreme Court and the Family Court 'shall' entertain applications for orders of protection" and concluded that "the commencement of the matrimonial action was not a ground to dismiss the family offense proceeding commenced in the Family Court, which should have been adjudicated on the merits, since it was commenced in a proper forum."

**FAMILY OFFENSE - HARASSMENT SECOND – FOUND**

In Matter of Chigusa Honono D. v. Jason George D., 2016 Westlaw 1137201 (1st Dept. Mar. 24, 2016), respondent appealed from a November 2014 Family Court 2 year order of protection, which among other things, found that he committed harassment in the second degree and directed him to stay away from petitioner. On appeal, the First Department found that "respondent's actions during both incidents constituted the family offense of harassment in the second degree, since his conduct evinced an intent to harass, annoy or alarm petitioner (see Family Ct Act §832). Petitioner testified that during one incident, respondent grabbed her by the neck, dragged her into the kitchen, pushed her to the wall, called her an obscene name, and

threatened to punch her in the face (citation omitted). She testified that during the second incident, respondent hit her on the top of her head with his fist."

**FAMILY OFFENSE - HARASSMENT SECOND – NOT FOUND**

In Matter of Shephard v. Ray, 2016 Westlaw 1164779 (4th Dept. Mar. 25, 2016), Respondent appealed from a December 2014 Family Court order of protection, which, after a hearing, found that he committed harassment in the second degree, and directed him to stay away from petitioner. On appeal, the Fourth Department reversed, on the law, and dismissed the petition. The Appellate Division determined that the finding that respondent committed harassment in the second degree was "based upon the Referee's conclusion that respondent told petitioner during a lengthy telephone call that he did not know what he would do if he saw her with another man, sent her two or three text messages stating that he hoped to reconcile with her, and then left on petitioner's car several mementos that petitioner had given him along with the message that he would 'never forget [her], bye.'" The Court concluded "that such conduct was comprised of relatively innocuous acts that were insufficient to establish that respondent engaged in a course of conduct with the intent to harass, alarm or annoy petitioner."

**MAINTENANCE - DURATIONAL**

In Brody v. Brody, 2016 Westlaw 886300 (2d Dept. Mar. 9, 2016), the wife appealed from a June 2014 Supreme Court judgment which, after trial, awarded her maintenance of only $13,000 per month for 24 months, commencing May 1, 2014, and failed to grant her reimbursement for certain medical insurance premiums and expenses. On appeal, the Second Department affirmed. The parties were first divorced from each other in 1995, then reconciled and had 2 children; they remarried in January 2001 and had 1 more child. In 2007, about 6½ years after the remarriage, the husband commenced the action for divorce. The wife was 48 years old at the time of the divorce, and the Appellate Division found that she will not be the primary caretaker for the children, can pursue full-time employment, and she was awarded $8,000 in monthly child support payments. The Second Department noted Supreme Court's determination that the wife "had not utilized the child support award primarily for the benefit of the children," and that she "had not, over the course of this very lengthy litigation, taken any steps to prepare herself for a career despite having had the ability and opportunity to do so." While the husband had substantial earnings from his medical practice (amount unspecified) the Appellate Division found that parties' lifestyle was not "so lavish that the award of $13,000 per month was inadequate to meet her needs" and that the duration of 24 months was appropriate. As to the start date for maintenance, the Second Department stated that "Supreme Court did not improvidently exercise its discretion in providing that the award of spousal maintenance would be prospective only, and

that the plaintiff would not be required to reimburse the defendant for the cost of medical insurance premiums and unreimbursed medical expenses that she paid. These determinations were supported by, among other things, the court's findings that: the defendant utilized a significant portion of the $8,000 per month child support payments to cover her own personal expenses; the defendant had the ability to become self-supporting during the litigation, but 'made other choices'; and the plaintiff adequately provided for the needs of the defendant and the parties' children during the entire pendency of this litigation."

**PENDENTE LITE - TEMPORARY MAINTENANCE GUIDELINES & COUNSEL FEES**

In M.W. v. N.B, N.Y. Law Journal March 15, 2016 (Sup. Ct. Nassau Co., Goodstein, J., Feb. 23, 2016), the wife's January 28, 2016 motion sought temporary counsel fees of $20,000 plus her initial retainer of $5,000, temporary maintenance of at least $2,266 per month, and medical and dental insurance coverage and uninsured medical and dental expenses. The parties, who had no children, were married in October 2014, separated in August 2015 and the husband commenced the action on November 25, 2015. The wife alleged that she earned $500-$725 per week as a waitress as of January 1, 2016, with net income of $2,079 per month and monthly expenses of $4,868.99. Supreme Court found that the parties have no real property; the husband alleged that the only assets to be distributed are engagement, shower and wedding gifts, and their wedding bands. Supreme Court stated: "An award of support pendente lite is designed to maintain the status quo (citation omitted) and provide for the reasonable needs of the parties pending the determination of the litigation. (citations omitted). It is meant to tide over the more needy party, not to determine the correct ultimate amount of support. (citation omitted)." The husband's income was $107,365.86 and the wife claimed that her 2015 income was $25,094.86. Supreme Court found that the wife "failed to provide a tax return with her Statement of Net Worth in her initial application" and initially "failed to advise the Court that she worked in 2015 at Urgent MD," but in reply, she "provided a W2 from said employment totaling $15,417.36." Supreme Court applied the new temporary maintenance guidelines effective October 25, 2015, and found that the presumptive amount was $20,457.67 per year or $1,704.80 per month. However, the Court found "that awarding the presumptive amount of temporary maintenance would be unjust and inappropriate," considering the following factors: "the age and health of the parties (Wife is 28; Husband is 30; both healthy); the present or future earning capacity of the parties (Wife is allegedly capable of operating her own business, working in a medical office, and working at a restaurant partially owned by her parents); the availability and cost of medical insurance (Wife admittedly always paid for her own medical insurance); the standard of living of the parties established during the marriage (none was ever established and it appears the parties' finances were always separate); and the other factor of the Wife's credibility as set forth in detail above as well as the extremely short duration of this marriage." Supreme Court also noted that the new maintenance statute "provides an advisory durational formula based on the length of the

marriage," and while it "does not list the length of time of the marriage as a factor to be considered for temporary maintenance purposes, *** this Court believes that the length of the marriage, especially one of short duration, must be considered in any pendente lite award." Supreme Court stated: "This Court finds that it would be inequitable to issue a temporary award which could last longer than the marriage, or for that matter, longer than the advisory formula for post-divorce maintenance." The Court awarded taxable temporary maintenance of $750 per month, retroactive to January 28, 2016 (plus an additional $200 per month toward the retroactive amount), to terminate on June 30, 2016, and further directed that if not settled, the action would be tried before May 31, 2016. Supreme Court ordered that since each party had his and her own residence, "each party shall pay their own bills and carrying charges." The Court denied the wife's request for health insurance. As to counsel fees, Supreme Court denied the request for $25,000, and found: "based upon the facts of this case, including that the distribution is of only wedding gifts and debt, said request is inappropriate"; and that the wife's attorney "failed to provide proof of written, itemized bills in her initial application (see 22 NYCRR 1400.2)."

**PROCEDURE - COURT QUESTIONING AND PROVIDING EVIDENCE – REVERSED**

In Matter of Washington v. Edwards, 2016 Westlaw 902241 (3d Dept. Mar. 10, 2016), the father appealed from a January 2015 Family Court order, which granted the mother's 2014 petition to hold him in violation of a prior order of support. A 2010 order required the father to pay $185 biweekly toward the support of 2 children born in 2004 and 2008. A Support Magistrate determined that the father had violated the order, but that the violation was not willful, and established arrears in the amount of $17,726. Family Court denied the father's objections, which contended that the Support Magistrate acted inappropriately by actively participating in the hearing. At the hearing, the mother, who was not represented by counsel, testified that the father had only paid approximately $100 per year in support since the 2010 order, but stated she did not have any documentary evidence to support her claim. The Support Magistrate provided her with a copy of the Child Support Enforcement Support Obligation Summary, which summarized the amounts owed and the payment history regarding the 2010 order and showed the arrears. Over the father's objection, the Support Magistrate then questioned the mother regarding the contents of the summary. The Appellate Division found that the Support Magistrate "repeated his question to the mother as to whether she had any documents that she would like to enter into evidence" and then "inquired whether the mother was requesting that the summary report be admitted into evidence, at which point she answered affirmatively and, over the father's continued objections, the document was admitted into evidence." The Support Magistrate used the summary as the basis for his calculation of the amount of arrears. The Third Department noted that a Support Magistrate "may properly question witnesses to insure that a proper foundation is made for the admission of evidence and question a witness in an effort to clarify confusing testimony as well as to facilitate the orderly and expeditious progress of the

hearing." The Court concluded: “In our view, however, the Support Magistrate exceeded his authority here. By actually providing the evidence to the mother during the hearing and using his questions to ensure that she introduced that evidence, we cannot say that the Support Magistrate was merely ensuring that a proper foundation was set for the admission of the evidence or facilitating the expeditious progress of the hearing.” The Appellate Division reversed, on the law, and remitted to Family Court.

*Editor’s Note: If you wish to submit an article for consideration for inclusion in the Bulletin, please send it to me in MS Word at wagner@mltw.com by the 15th of each month, for the next succeeding month, with a copy to ekarabatos@soklaw.com.*