UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK X

GABRIEL R. FALCO,

Plaintiff

- against -

JUSTICES OF THE MATRIMONIAL PARTS OF THE SUPREME COURT OF SUFFOLK COUNTY,

Defendants.

X

CV-14 0029

14-CV-

PIANCO, J.

TOMLINSON, M

COMPLAINT

Plaintiff GABRIEL R. FALCO (herein "FALCO"), pursuant to the Federal Rules of Civil Procedure and otherwise, hereby files this Complaint against JUSTICES OF THE MATRIMONIAL PARTS OF THE SUPREME COURT OF SUFFOLK COUNTY (herein "JUSTICES") and states as follows:

PRELIMINARY STATEMENT

FALCO seeks declaratory relief against Defendants JUSTICES in connection with their unconstitutional policy and practice of requiring divorcing spouses, including FALCO, to spend their own money (and/or incur debt) in order to "directly pay" for the NY Supreme Court appointed Attorney for the Child(ren) to represent their children in a "contested divorce" matrimonial action in which both parents simultaneously seek sole "custody" of their children, although there is no statutory authority to require a parent to pay. FALCO has standing to seek this declaratory relief because in September 2013, over his objection, FALCO was ordered to pay a $1,250.00 retainer (and thereafter 50%-100% of the legal invoice at the hourly rate of $250.00) to a private attorney Darelle Cairo, whom (Acting) Supreme Court Justice Marlene L. Budd

FALCO alleges violations under the Fourteenth Amendment, incorporating aspects of the Equal Protection and Due Process Clauses, and the 1st, 4th, and 5th Amendments.

FALCO seeks a declaration that New York Judiciary Law 35 is unconstitutional on its face and as being applied, and it fails to afford Equal Protection and equality to married persons whose child custody disputes must be resolved in Supreme Court rather than Family Court, because their custody disputes are part of a divorce action. New York's statutes and laws are being applied unequally throughout New York , and harshly to Long Islanders in "bad faith". Because the State of New York has failed to promulgate uniform statewide objective criteria for the discretionary denial of Judiciary Law § 35's public funds available for an "indigent" child's Attorney for the Child, and because the Third Judicial Department consistently treats the family's ability to have access to such State funds for a child's appointed counsel as a ministerial, non-discretionary duty, this federal court should enter a declaratory decree that holds that the JUSTICES should cease their customs and practice of ordering parents to pay the child's attorney.

SUMMARY OF CONTENTS

PARTIES, JURISDICTION AND VENUE

1. Plaintiff GABRIEL R. FALCO (herein "FALCO") is a resident of Suffolk County, New York. FALCO and his wife have 2 children, a boy and girl. Married in March 2009, FALCO filed for divorce in Suffolk County in August 2013, following his wife's July 11, 2013 arrest for 2 misdemeanors (aggravated harassment; child endangerment) and a violation of NY VTL 1192 – 2-a, for alleged drunk driving with their daughter (i.e., a "Leandra's Law" felony).

2. Defendants JUSTICES OF THE MATRIMONIAL PARTS OF THE SUPREME COURT OF SUFFOLK COUNTY (herein "JUSTICES ") are sued in their official capacities, and preside as either elected, or appointed, or "acting" Supreme Court Justices in Suffolk County. One of said JUSTICES is (Acting) Supreme Court Justice Marlene L. Budd, who was elected to a 10 year term on the Suffolk County Family Court (beginning in 2006) and was later assigned to preside over cases in a Matrimonial Part in the Supreme Court of Suffolk County.

3. Jurisdiction of this Court is based upon Plaintiff's federal claims under 42 U.S.C. §1983, the civil rights law, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (As amended Pub. L. 104-317, title III, Section 309(3) Oct. 19, 1996, 110 Stat. 3853.)

4. Federal Courts have jurisdiction in matters where state actors deprive a plaintiff of a federal right and that deprivation resulted from "the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the state is responsible" and "the party charged with the deprivation [is] a person who may fairly be said to be a state actor" either "because he is a state official, because he has obtained significant aid from a state official, or because his conduct is otherwise chargeable to the State." Lugar v. Edmonson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982).

5. Federal Courts have jurisdiction over matters in order to issue declaratory and injunctive relief where unconstitutional violations have occurred by a State official or an official of a State subdivision. See Saenz v. Roe, 526 U.S. 489 (1999). Federal courts can also determine that legislation passed by a municipality is unconstitutional, see Goldberg v. Town of Rocky Hill, 973 F.2d 70 (2nd Cir. 1992), and can also find State laws unconstitutional based upon the facts presented in a federal lawsuit when the State's Attorney General has been provided with timely notice that the constitutionality of a State law has been drawn into question and raises issues about it.

6. Venue is proper under 28 U.S.C. §1391(a) because the cause of action arose in the County of Suffolk. All parties are subject to the venue of this Court.

7. Plaintiff is entitled to declaratory relief because he is an aggrieved party with standing to file this civil rights action under 42 U.S.C. §1983.

8. To the extent that some of Plaintiff's claims rest exclusively upon New York State law, Plaintiff requests the Court adjudicate such claims under the Court's supplemental jurisdiction pursuant to 28 U.S.C. §1367.

9. All conditions precedent to this action have been satisfied.

10. A formal notice of claim is not required for federal court jurisdiction over civil rights violations asserted against a municipality or governmental law enforcement body under 42 U.S.C. §1983. See Felder v. Casey, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988). See also Crist v. Town of Greenburgh, 156 F.R.D. 85 (S.D.N.Y. 1994). No formal Notice of Claim pursuant to New York General Municipal § 50-h is required.

11. Plaintiff's attempt to have the judicial policy rectified in the state court system has been rejected by the Second Department, and there are no other avenues to correct this injustice except for a federal court declaratory decree, as a prerequisite to injunctive relief in the future.

ALLEGATIONS COMMON TO ALL COUNTS

12. During their marriage, FALCO was the parent with primary childcare responsibility for their 2 toddlers. The 2012 joint income tax return showed that 100% of their combined gross income was derived from his wife's W-2 from Sea Aire, Inc., a New York corporation engaged in equestrian activities. His net earnings were $0 in 2012.

13. In August 2013, FALCO filed a matrimonial action for a divorce from his wife, seeking an equitable division of marital property and sole custody of the 2 toddlers. Shortly after the commencement of the lawsuit, FALCO made a motion (using the procedure for the issuance of an Order To Show Cause, upon notice) for the purpose of obtaining some temporary support for the children's food and other necessities and also requesting an order that prohibited his wife from selling or transferring 2 horses he considered marital assets. There has yet been no hearing or determination of that motion.

14. On September 24, 2013, a preliminary conference and hearing was held before Suffolk Supreme Court Justice Marlene L. Budd, to whom the divorce action was assigned.

Although it was the "return date" for FALCO's application for some temporary support, the matrimonial court did not delve into those issues nor determine them.

15. On that date, the matrimonial court did, however, proceed as it usually does in connection with its initial conference for contested divorces. Under the JUSTICES' standard rules, the parties and their counsel must personally attend court and must complete certain information on the preliminary conference stipulation/order form as to the deadline dates for the completion of the exchange of discoverable documents and other things. In accordance with the JUSTICES' Court procedures, the form must be signed and submitted before the parties' counsel are even permitted to conference with Justice Budd and her Law Secretary in Chambers.

16. One of the sections on the preliminary conference form pertains to evaluations and appraisals of marital property and business. Another section of the form pertains to whether the parties and counsel believe that an Attorney for the Child(ren) (previously called a "law guardian for the child"), is necessary or required in the divorce action, and the "allocation" of fees for that.

17. Concerned that he lacked the present financial wherewithal to pay for the appraisers that the matrimonial court would appoint to financially evaluate the marital residence and the business of Sea Aire, Inc. (and a New York corporation for which FALCO worked called Falconstrike Incorporated), and concerned that would not be able to afford that in the foreseeable future, FALCO and his counsel informed the matrimonial court that he did not consent to an initial 50%-50% allocation of such appraisal expenses, subject to a possible 100% allocation of all expenses to him at some later date.

18. In addition, FALCO and his counsel informed the matrimonial court that although he did not disagree that there should be an Attorney for the Children appointed by the matrimonial court, FALCO lacked the present financial wherewithal to pay for the costs of such an appointed attorney. FALCO and his counsel also informed the Court that there was currently an Attorney

for the Children appointed by the Family Court at the expense of the State of New York (Heidi Hilton, Esq, of the Legal Aid Society of Suffolk County – Children's Law Bureau) in conjunction with various Family Court matters that had resulted in the temporary placement of the children in the physical custody of FALCO at the marital residence, with FALCO's wife having only supervised visitation with the children outside of the home.

19. FALCO requested that the Attorney for the Children be paid with New York State funds. Nevertheless, after a very brief constitutionally inadequate hearing was conducted with just a few questions from the Justice, and there was no evidence that FALCO presently had the money to make such payments to any of the matrimonial court appointees, the matrimonial court orally determined that FALCO would be required to pay for the business and residence appraisers as well as the private Attorney for the Children that the matrimonial court would select and appoint.

20. Before leaving the matrimonial courtroom on the afternoon of September 24, 2013, FALCO was required to sign another form that the matrimonial court requires, which he did, but with the matrimonial court's knowledge, he also indicated on that form that he did not consent to the 50%-50% allocation that the matrimonial court had announced that it would initially impose, subject to a later reallocation which could increase his obligation to 100% in the matrimonial court's sole discretion.

21. The Matrimonial Court's order of appointment of the "direct pay" Attorney for the Children, Darelle Cairo, at the rate of $250.00 per hour, was issued on September 30, 2013 (with the wrong case #) and a correction order was reissued. FALCO believes that the "private pay" Attorney for the Children order was made in "bad faith" (i) because FALCO lacked the financial means to pay a "private pay" Attorney for the Children in light of the many underdetermined economic matters over which he had no control, particularly in light of the divorce action, (ii) because all JUSTICES lacked the statutory authority to direct parents to pay "private pay"

attorneys for a litigant's children where the children themselves are indigent except for money in their own piggybanks, and (iii) because FALCO was not given a constitutionally adequate hearing nor informed about any specific uniform statewide objective criteria and standards that was required so his family may qualify for a State funded Attorney for the Children so that FALCO could avoid using his very limited personal funds to pay for legal services at triple the rate the State pays and without any prediction of final amount of the fees, ceiling or cap.

22. Shortly thereafter, Attorney for the Children Darelle Cairo sent a letter requesting her retainer of $1,250.00, to which FALCO's counsel replied by explaining his objections to the "direct pay" order, and further explaining the need to first clear anticipated conferences with the children with the Family Court (Judge Rouse) and the Family Court's Attorney for the Children.

23. FALCO also sought to appeal to the Second Department (through proposed Orders To Show Cause, which were signed) the 2 orders directing him to pay 50% of the court-appointed real estate evaluator ("Given") and the court-appointed business evaluators ("Brisbane", whose retainer letter demanded an immediate $5,000 retainer against an unlimited number of hours, and also demanded that FALCO agree that he would be personally liable for any monies that his wife did not pay Brisbane, creating even a more financially onerous business relationship than the Matrimonial Court order appeared to require.) The Second Department dismissed those two appeals, perhaps because the orders recited on their face that were made "on consent", although both the submitted transcript and the papers signed by FALCO clearly show that the appraisal orders were not made with his consent and the Second Department was provided with that.

24. FALCO simultaneously appealed the order appointing Darelle Cairo as the Attorney for the Children with a "direct pay" obligation of 50% or more of her hourly rate of $250.00 and a retainer of $1,250.00 to be paid by FALCO. The proposed Order To Show Cause also asked that the Second Department grant FALCO leave to appeal that order appointing Darelle Cairo as the

Attorney for the Children if it was not an otherwise appealable order. The Second Department denied leave to appeal and dismissed that appeal as well. FALCO believes that no further appeal is possible now.

25. On October 23, 2013, Justice Budd was informed that FALCO had not paid the retainer monies to the business evaluator Brisbane ($5,000) (which varied from the court order by requiring additional onerous terms including that FALCO be responsible for 100% of the costs and expenses if his wife did not pay her share) and the retainer monies for the "direct pay" Attorney for the Children, Darelle Cairo.

26. Typically, much of the Matrimonial Court's business is customarily conducted in the Chambers of Justice Budd, outside the presence of FALCO, where note-taking by counsel is expressly prohibited by that Matrimonial Part's Law Secretary. Based upon Justice Budd's comments in the courtroom later that day, FALCO became increasingly worried that Justice Budd was going to hold him in contempt of court for non-payment of the retainer to the appointees Darelle Cairo and the 2 others. Justice Budd acknowledged that 2 orders appointing the appraisers incorrectly recited that those orders were "on consent" when they were not.

27. On November 26, 2013, FALCO and his wife appeared in the matrimonial court, with their lawyers to try to resolve an issue that arose as a result of some Family Court orders issued by Family Court Judge Rouse the previous week. Those orders had left the determination of the precise terms and conditions of "visitation" by his wife in the discretion of Suffolk County's Child Protective Services (CPS), yet had allowed his wife to visit with the children inside the marital residence on the days and hours that CPS was to determine to be her visitation days and hours. FALCO's wife's visitation time had theretofore always been "supervised" by one of four CPS-approved "supervisors". FALCO's attorney had explained to his wife's criminal defense

attorneys there was a problem due to the Family Court's and CPS's failure to yet adopt a specific visitation schedule, and the Family Court's omission of any interim schedule from its orders.

28. On November 26, 2013, the Supreme Court court-appointed "private pay" Attorney for the Children Darelle Cairo also appeared before the JUSTICES' Supreme Court Justice Budd, and Ms. Cairo informed the matrimonial court that FALCO had been "uncooperative" and had not paid her the "retainer" money.

29. After hearing from Ms. Cairo that FALCO had been "uncooperative" and had not paid the $1,250.00 retainer to Ms. Cairo, Justice Budd (1) ordered that FALCO move out of the marital residence immediately, giving him only about 2 hours that same day to remove any possessions that he wanted, (2) ordered that FALCO's physical custody of the children be changed into a role of only daytime "visitation" on the same schedule that FALCO's wife had been following as ordered by Family Court Judge Rouse, (3) opined that the November 2013 Family Court orders by Judge Rouse did not require that FALCO's wife's time with the children be "supervised" by any CPS-approved "supervised" in the discretion of CPS, (4) entered an order granting Supreme Court exclusive jurisdiction of all matters (although CPS was not a party to the divorce action and did not appear), and (5) commented again about FALCO's failure to follow the Matrimonial Court order that required FALCO to pay Darelle Cairo her retainer of $1,250.00.

30. As a consequence of that Supreme Court ordered judicial "eviction" from the marital residence, FALCO was effectively rendered "homeless" on only a couple hours' notice, and the children remained in the house with their mother, notwithstanding that the Family Court had ordered only unspecified hours of visitation just a few days earlier, by agreement with the Family Court's Attorney for the Children, leaving the determination as to which parenting hours should be "supervised" or "unsupervised" in the discretion of CPS. FALCO believes that the Family Court determined the continuing physical custody arrangement that way out of genuine concern

over the pending criminal charges that led to FALCO's wife's arrest for a Leandra's Law felony drunk driving violation with their baby daughter as a passenger.

31. Therefore, FALCO was no longer allowed to be inside the marital residence, nor reside on the property in the guesthouse, although FALCO had been the primary caretaker of the children since they were born.

32. FALCO believes that the reason that the Supreme Court Justice completely reversed the custody and visitation of Family Court Judge Rouse is because the matrimonial court's court-appointed Attorney for the Children Darelle Cairo told the matrimonial court's Justice Budd that FALCO had been "uncooperative" and had not paid her the court-ordered retainer of $1,250.00.

33. FALCO further believes that the matrimonial court order restricting him from the marital home would not have occurred if the Supreme Court court-appointed Attorney for the Children Darelle Cairo had not been appointed as a "private pay" attorney, because then there would have been no reason for Ms. Cairo to state to Justice Budd that FALCO was "uncooperative" insofar as he had not paid her retainer of $1,250.00.

34. At the time of the Supreme Court's complete reversal of the "custody /visitation" order that Family Court Judge Rouse had put in place, FALCO had not yet received any specific oral or written directions from CPS that explained which of his wife's "visitation" hours were to be "supervised" and which "unsupervised", or when her "parenting time" was to be. Although his wife had concluded the main part of her proceedings in Family Court, she still remained under its supervision with respect to her parenting time with the children and other CPS supervisory issues.

35. FALCO has thus benn deprived of all overnight visitation with the children for over a month. Having insufficient assets to rent a home in The Hamptons (due in part to his requests for temporary support not having been determined), FALCO is not presently able to have any overnight visitation with the children nor play with the children in the familiar setting of their

home and with their toys. FALCO's time with their toddlers has thusly been cut short for a variety of reasons, stemming from the fallout of FALCO being stigmatized by the label of being "uncooperative" due to his failure to directly pay the private Attorney for the Children Darelle Cairo, whilst the Family Court appointed Attorney for the Children Heidi Hilton, Esq. was still acting in that same capacity.

36. Although FALCO did not pay the $5,000 retainer to Brisbane Consulting, neither did his wife. At the time Judge Budd removed and excluded FALCO from the marital residence, following Attorney for the Children Darelle Cairo's comment about FALCO's lack of "cooperation" and failure to pay her "retainer", the evaluator Given had not yet sent any retainer request to FALCO so no retainer payment there was past due.

37. Copies of New York's Judiciary Law 35 and 35-a are attached hereto. **[Exhibit 1]** Judiciary Law 35 provides for assignment of counsel to "indigent persons" in a child "custody proceeding" if that person is "financially unable to obtain counsel". Judiciary Law 35 and Family Court Act, Article 2 are the laws authorizing that attorneys who are appointed to represent children in "custody" proceedings are to be paid for by the State. The New York State Court specific rules concerning such appointments are contained in 22 NYCRR §611, 679, 835 and 1032, 22 NYCRR Part 36 Appointments by the Court, Family Court Act, Article 2.

38. In February 2006, a Report to the New York State Chief Judge by the Matrimonial Commission (Hon. Sondra Miller, Chairperson) was issued on matrimonial law guardians in New York. The report included a portion about compensation of law guardians. **[Exhibit 2].** Aware of the divergent positions taken in New York's various Judicial Departments as to orders that concerned the access to, or denial of, state funds for children's law guardians, and the judicial custom and policy of either allowing or withholding of state funds for law guardians for children, based upon varying judicial interpretations of Judiciary Law §35(3), the Commission reported:

(1) that "The Commission unequivocally states that it is essential that such appointments be fair and unbiased. Further, they should be made and communicated to the litigants and the public in such a manner that they reflect impartiality." (p.41);

(2) that "Additionally, parties require clarification of the payment structure and process for these attorneys" (p.42);

(3) "The Commission recognizes a need to have uniform protocols for representation of children in every aspect of custody litigation from the preliminary through the post-trial proceedings. The Commission also recognizes that some variations exist in the local practices of law. Nevertheless, the Commission recommends that there be uniform statewide protocols for the representation of children. " (p 42) :

(4) "*Compensation for the Attorney for the Child in Custody Cases.* The Commission found that the discretionary practice of directing parents with sufficient means to pay an attorney's fee is not consistent throughout the four judicial departments of the State. The Commission also notes that in matrimonial actions, Supreme Courts can provide for the payment of attorneys for the child with State funds pursuant to Family Court Act § 245 and Judiciary Law § 35(3)." (p. 44)

(5) "To assure consistent and meaningful assistance of counsel to children and statewide uniformity in the availability of such counsel, the commission recommends that the OCA [New York State's Office of Court Administration] seek to amend the Domestic Relations Law, the Family Court Act and the Judiciary Law, to expressly empower courts with the discretion to direct parents with sufficient means to pay the fee of the attorney for the child. It is hoped that this initiative would not only place the responsibility for the cost of these services upon those who can afford them, but would also reduce the case load and cost of publicly funded

programs and assignments. The attorney for the child should advise the court if fees are not paid in a timely manner so that the court may act to facilitate payment." (p.44).

(6) The Commission further recommends that it be required whenever such an appointment is made that an Order be entered specifying the allocation of fees, the source of payment, the attorney's hourly rate, the frequency and reporting process of the billing, the means for enforcement of payment, and any other relevant factors that will eliminate conflict in connection with the appointment of an attorney for the child." (p.45)

(7) "A small minority of the commission believes that each of the four Appellate Divisions should be permitted to continue to chart its own course – both administratively and with respect to its view of the law – on the issue of paid attorneys for the child." (p. 44, footnote 51).

39. The four New York Appellate Divisions differ in connection with whether or not to direct a parent to pay an attorney for the child and how much he or she should pay.

40. In March 2005, New York's Third Department issued a unanimous decision [Mercure, JP, Crew III, Carpinello, Rose and Lahtinen, JJ] in Redder v. Redder, 17 AD3d 10, 13 (Third Dept. 2005) **[Exhibit 3]** about law guardian compensation in a divorce action, where child custody was an issue, holding:

> The award of a fee payable equally by the parties directly to the Law Guardian has provoked arguments from both parties. In a contested custody case, children generally "should be represented by counsel of their own choosing or by law guardians" (Family Ct Act § 241; *see Lips v. Lips,* 284 AD2d 716, 176 [2001]). Children rarely have the financial means to seek counsel of their own choosing so most law guardians are appointed from the Law Guardian Program, which is governed by a statutory and regulatory framework (See Family Ct Act art 2, part 4; 22 NYCRR part 835). To foster the goal of quality and independent representation for children in this vital position of law guardian (*See Matter of Carballeira v. Shumway*, 273 AD2d 753, 755 [2000], *lv denied* 95 NY2d 7764 [2000]), attorneys who seek to serve in such capacity must apply, be screened by a court, undergo training and meet various criteria (*see generally* 22 NYCRR part 835), and they are governed by the pertinent standards regarding compensation (*see* Judiciary Law § 35[3]; 22 NYCRR 835.5). With respect to

> compensation, while the statutes and regulations speak directly to a procedure for payment from the state (*see* Family Ct Act § 248; 22 NYCRR 835.5), there is no specific statutory language or regulatory scheme for direct payment of an appointed law guardian by a parent or parents (*see generally* Brandes, Law and the Family, *Compensation of Law Guardians*, NYLJ, July 28, 1998, at 3, col 1). The lack of parameters for a direct-pay system creates the potential for issues about the integrity of the appointment process in such situations (which often pay no attention to the statutory caps on compensation for assigned counsel), draws into question the independence of the law guardian, and raises concerns about fundamental fairness to all children regardless of the economic status of their parents. We have previously stated, albeit in dicta, that "Law Guardian costs shall be payable by the [s]tate" (*Lips v. Lips*, *supra* at 17). We acknowledge that resolution of this issue is susceptible to more than one reasonable view (*see Matter of Plovnick v. Klinger*, 10 AD3d 84 [2d Dept 2004]) and there are policy arguments supporting different feasible approaches. However, until the Legislature or Court of Appeals provides otherwise, we are persuaded that the current statutory and regulatory framework should be interpreted as limiting compensation to law guardians appointed pursuant to the Law Guardian Program in a contested custody proceeding to payment by the state (*See Lips v. Lips, supra* at 17; *see also* Family Ct Act § 248 ["The costs of law guardians … shall be payable by the state of New York"]; *Matter of Lynda A.H. v. Diane T.O.*, 243 AD2d 24, 27-28 [4th Dept 1998], *lv denied* 92 NY2d 811 [1998] [holding that Family Court "had no authority to compel the parties to pay the Law Guardian's legal fees and expenses"]; Brandes, Law and the Family, *Compensation of Law Guardians*, NYLJ, July 28, 1998, at 3, col 1). The order directing the parties to pay the Law Guardian directly must thus be reversed, and the Law Guardian can apply for a fee as provided in 22 NYCRR 835.5.

41. At the end of the Redder v. Redder, the panel added a footnote 2, which made it clear that an Third Department case upon which the Second Department had relied when affirming a direct pay law guardian in Matter of Plovnick v. Klinger, 10 AD3d 84 [2d Dept 2004] "should not be followed".

42. The Second Department is the appellate court for all Supreme Court cases in Suffolk County and Nassau County, [therefor in the Eastern District of New York], if an appeal is permitted at all. In Matter of Plovnick v. Klinger, 10 AD3d 84 [2d Dept 2004], **[Exhibit 4]** the Second Department analyzed the Family Court Act and Judiciary Law §35 (3) and concluded that:

> "While the ability to assign counsel who can be compensated from the public funds helps ensure that independent advocates are available to children in emotionally charged custody disputes, the interests of justice do not dictate that payment must, in all cases, be made from public funds. Indeed, it has been observed that "[t]o provide publicly funded legal representation to individuals with an ability to afford their own counsel makes no sense." (*Colangelo v. Colangelo*, 176 Misc 2d 837, 842 [1998]). Thus, where the interests of justice so dictate, the Family Court, pursuant to Judiciary Law § 35(3), may direct that a parent who has sufficient financial means to do so pay some or all of the law guardian's fees."

43. The Second Department has continued to decide challenges to private-pay appointment orders by using Matter of Plovnick v. Klinger as precedent, and it did that in 2009 in Pascazi v. Pascazi, 65 AD 3d 1201, 885 NYS2d 735 (2d Dept. 2009) **[Exhibit 5].**

44. The treatise New York Family Court Practice, Second Edition , 2012, by Merril Sobie and Gary Solomon, explains the authors' view of the impact of Judiciary Law 35 and the Family Court Act in New York on page 671 [**Exhibit 6]** as follows:

> "In recent years it has become possible in some judicial departments to appoint an attorney for the child and simultaneously order the parents to pay the attorneys fees (usually significantly higher than state paid rates). However, the Appellate Divisions are split concerning the authority of the court to appoint a "private pay" attorney. The Second Department has held that both Family Court and Supreme Court may order the parents to pay for the child's attorney while the Fourth Department has concluded that Family Court lacks such authority. The Third Department has held that neither court may appoint a "private pay" law guardian, concluding that the statutes limit appointment to certified attorneys for children paid by the state."

45. The Second Department website boasts that over 650 attorneys are certified, yet the Second Department has failed to post any objective criteria that explains what "child custody" litigants must demonstrate to the Supreme Court and Family Court to ensure that the public monies for Attorney for the Child compensation under Judiciary Law 35(3) can be accessed.

46. The Fourth Department's decision in Matter of Lynda A.H. v. Diane T.O., 243 AD2d 24, 27-28 [4th Dept 1998], *lv denied* 92 NY2d 811 [1998] [holding that Family Court "had no

authority to compel the parties to pay the Law Guardian's legal fees and expenses"] is attached as **Exhibit 7**. The First Department's decision in Pedreira v. Pedreira, 34 AD 2d 225, 822 NYS2d 707 (First Dept. 2006) is attached as **Exhibit 8**.

47. New York's haphazard *ad hoc* system of attorney for the child payment determinations, allows all such direct payment decisions to be left up to the discretion of the JUSTICES of Suffolk County and Nassau County sitting in the various matrimonial parts, and there are no set guidelines whereby those matrimonial part Justices can effectively determine whether a parent actually has the financial ability to pay a private pay attorney for the child *pendente lite* the child custody dispute in the context of a divorce.

48. The role of New York's judiciary in any determination of who must pay a "private pay" Attorney of the Children is an unconstitutional intrusion into the separate role of a different branch of government. It has an adverse impact upon the democratic process, given the fair and impartial role that the judiciary must maintain to dispense justice in a fair way. JUSTICES' standard Preliminary Conference Stipulation/Order does not even address the issue. [**Exhibit 9**]

49. The policy and practice of the JUSTICES, has resulted in an intolerable denial of equal protection and due process for FALCO, and his lack of financial wherewithal was used to "punish" him by depriving him of living with his children at the marital residence.

50. The policy and practice of such Attorney for the Child appointments is even further complicated because the e-courts website shows that the same Justice appointed the same Attorney for the Children in at least 3 cases during the same period of time, with 2 of such cases being litigated by the lawyer retained by FALCO's spouse, giving the impression on the public website that such Attorney for the Child appointments are not completely random and impartial.

51. Although the Third Department wrote in Redder v. Redder's footnote 1 that "[w]e make no comment at this time on whether the state can seek to recoup from a parent in an

appropriate situation the funds paid by it to a law guardian" [**Exhibit 3**], it does not appear that the State of New York has ever promulgated a set of law concerning any recoupment process which the State could follow to determine each parent's financial wherewithal at the conclusion of the lawsuit, the final division of marital assets, and a final determination as to which parent is granted custody of the child when there is more available financial data to ascertain whether one of the parents may have added expenses of a new place to live that is not the marital residence.

52. There is no sound reason for any matrimonial court in New York to impose the financial costs of an Attorney for the Children upon either parent of a child who has limited financial resources of his or her own to pay for an attorney to represent the child concerning "child custody" issues in a divorce action. Those children are actually financially "indigent" under Judiciary Law 35(3) so they should qualify under the law for counsel to be paid for by the State, because the Family Court Act Sections 241-249 [**Exhibit 10]** provide for that in Family Court. Children is custody dispute in every New York Court need to have their parents be free of the additional expense for children's lawyers and the imposition of the financial burdens. Without access to the State funds, New York children certainly experience emotional hardship because an additional expense for a child's lawyer will adversely impact upon the family's socioeconomic status, which children and adults mentally process relative to the standard of living that they previously experienced and the comparison to their peers' standards of living.

53. FALCO objects to the imposition of an order directing FALCO's direct payment of a lawyer for his children in the divorce action (at thrice the rate of what the State pays for lawyers from State funds), and requiring FALCO's monetary compliance under penalty of being held in contempt of court and jailed, if her bills (and expenses of her experts) are not paid. [**Exhibit 11**].

54. The Chief Judge of the State of New York was made aware of these inconsistencies in the court-appointed Attorney for the Children process in both the Family Court and the Supreme

Court throughout the State of New York, as explained in ¶ 38. [**Exhibit 2**] These are the same inconsistencies that have adversely affected FALCO by depriving him of rights, privileges, property rights, liberty interests, due process and equal protection of the laws of the State of New York, and perceived retaliation as a result of his exercise of rights to speech and to petition the government to address his grievances about this inequality and lack of due process.

55. The disparity in the judicial interpretations of compensation to an Attorney for the child in Supreme Court and Family Court matter concerning "child custody" is so profound so as to demonstrate concrete evidence in the Matrimonial Commission's 2007 report that Judiciary Law 35(3) is confusing and/or perplexing to four different Appellate Divisions of New York's court system. Such judicial disagreement is *a fortiorari* concrete evidence of a law that is effectively both unconstitutional on its face and as being applied to FALCO and to others by the JUSTICES, because it is intolerably unfair, vague and ambiguous.

56. The New York State Legislature and New York's Court of Appeals has still not resolved the conflict that the Third Department identified in 2005 in Redder, thus making it appropriate for this federal court to declare Judiciary Law §35 vague, ambiguous and unconstitutional on its face. It is also appropriate to declare unconstitutional the JUSTICES' failure to direct and to implement a policy that every appointed Attorney for the Children be paid for by the State of New York at the state funded rate of $75 per hour, and that no Justice should have instead directed that FALCO pay a $1,250 retainer and thereafter 50% of the hourly rate of $250 per hour for a private pay Attorney for the Children (subject to reallocation which may increase FALCO's financial obligations to 100%, and granting the Attorney for the Child to further authorize forensic evaluators for the child, at the expense of the parents).

57. Because all 3 of the matrimonial court orders deprive FALCO of money which FALCO needs for other basic necessities such as food and housing and appear to have no limits as

to the amounts that he would have to pay, particularly before his requests for temporary support were even addressed, FALCO believes that they too are unconstitutional insofar as they require him to perform acts that are financially impossible for him to perform, both presently and in the foreseeable future. FALCO believes that such orders unfairly subject him to a "debtor's prison".

58. FALCO presently believes that (i) he is perilously close to being held in contempt of matrimonial court orders requiring him to pay monies to court appointees that is impossible for him to pay, (ii) that he may possibly be jailed by the JUSTICES for his failure to pay monies to those 3 court appointees, because of his failure to follow court orders , and (ii) such orders are unconstitutional insofar as the JUSTICES routinely impose such appointment orders without an objective standard or criteria for any "means" test for either the child or the parents.

59. FALCO believes that there will be continuing harm to him by the JUSTICES' policy and practice, and interpretation of Judiciary Law 35. FALCO believes that this harm to him will not cease because of a past and continuing history of the JUSTICES' intentional conduct of making arbitrary "direct pay" orders in derogation of the constitutionally protected rights of FALCO and other parties who appear in the matrimonial courts. Such litigants who strive to obtain divorce decrees are being saddled unfairly with a "divorce tax" of having to directly pay an Attorney for the Child who is personally selected by the matrimonial judge presiding over the matrimonial action. Such "direct pay" orders have the potential to deprive FALCO and other litigants of the opportunity to live with and spend time with his/their young children.

60. FALCO now seeks declaratory relief that declares the policy and practice of the Defendants JUSTICES appointing "private pay" Attorney for the Children to be unconstitutional under the Equal Protection, Procedural and Substantive Due Process Clauses. The JUSTICES' policy and practice cannot be justified in the United States of America because New York State's resources must be allocated throughout the State in a fair, impartial and equal manner, without

favoring non-married parents in a "child custody" issues over married parents, without interposing a financial impediment to obtain a divorce, and without conveying to parent litigants that they must be "cooperative" with the Attorney for the Children and pay that personally selected court appointee an amount of money that the matrimonial court determines on a case by case basis (for FALCO it was $250.00 per hour) that is approximately triple the amount of money that such Attorney for the Children would earn if the State paid such Attorney for the Children ($75.00 per hour) after such State vouchers were first scrutinized by the State under the Judiciary Law 35-a processing procedures.

61. Because the judicial conduct at issue here is capable of repetition and could otherwise evade any appellate judicial review in the State of New York, FALCO (who is currently unemployed) requests that the Court issue a declaratory decree that declares the JUSTICES' conduct of directing matrimonial court litigants to directly pay an Attorney for the Child of any judge of the matrimonial court's own choosing is offensive to the United States Constitution.

COUNT I:

VIOLATION OF PLAINTIFF'S (AS WELL AS OTHERS') FIFTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER 42 U.S.C. §1983 et seq.

62 . Plaintiff realleges Paragraphs 1-61 and hereby incorporate same by reference.

63. New York's Judiciary Law §35 and §35-1 scheme violates Plaintiff's rights to Due Process and Equal Protection on their face and as applied. Specifically, under principles of modern American constitutional jurisprudence, Plaintiff has the property right, privilege and/or benefit to a state funded Attorney for the Children for his children, who are the subjects of the "child custody" dispute between Plaintiff and his wife in a divorce action.

64. When the Family Court appointed an Attorney for the Children in the pre-divorce action Family Court matters in July 2013 and assigned counsel for the children at the expense of the State, the State of New York implicitly acknowledged Plaintiff's right. It makes no sense that Plaintiff should have to pay for a different Attorney for the Children at a private pay rate of $250 per hour, when the children have already been determined to be eligible for an Attorney for the Children at State expense without cost to Plaintiff. The JUSTICES' policies are unconstitutional.

65. To the extent that the State of New York's laws and rules differ depending upon whether the "child custody" dispute is being adjudicated in the Supreme Court or the Family Court, such laws and rules violate the United States Constitution because there is no rational reason for the State of New York and its judiciary to disfavor the children or the parents of such children whose custody issues are being determined in the Supreme Court, Family Court or both.

66. A state funded Attorney for the Children was already put in place at no cost to Plaintiff months prior to September 24, 2013. The Family Court judges had ordered that Plaintiff was the custodial parent who was to be living in the matrimonial residence with the children, and the children's mother was to have only "supervised visitation" with CPS-approved supervisors.

67. On or about November 21, 2013, the Family Court had ordered the children's mother's yet unspecified "visitation" schedule was to be either "supervised" or "unsupervised" depending upon how CPS determined such overall terms of the "visitation" time to be conducted. The Family Court court-apppointed Attorney for the Children had not objected to those orders which gave the children's mother joint legal custody but only "visitation" rights, with Plaintiff having primary "physical custody" of the children living with them at the marital residence and facilitating his wife's CPS-directed "visitation" on a schedule CPS was to create and inform them of, while his wife's criminal charges are still proceeding through the Suffolk criminal court system, awaiting a resolution of the felony drunk driving charge ("Leandra's Law" violation).

68. It is beyond cavil that whether the state-funded Attorney for the Children was a "right" created by the State of New York or merely a state "privilege", that necessary State benefit cannot be taken away from Plaintiff without due process. See Bell v. Burson, 402 U.S. 535, 539 (1971). The "substance" of the JUSTICES' appointment of a second Attorney for the Children at the expense of the parents was a confusing detriment to Plaintiff. It also deprived him of the continuity of the legal relationship and effectively deprived Plaintiff of his property interests by taking away his money and future earnings, without Due Process, under the threat of a court order of civil or criminal contempt that would deprive him of liberty interests as well.

69. At least one federal district court judge has commented that "the dividing line between substantive and procedural due process is fuzzy" (quoting Senior District Judge Pettine in Ginaitt v. Haronian, 806 F. Supp 311 (D. Rhode Island 1992). In this federal suit, there is likely an overlap of constitutional issues in certain respects.

70. Clearly, arbitrary and capricious decisions that significantly adversely impact one's right to parent one's children, and one's right to liberty interest and avoidance of jail, can be considered an infringement of constitutional rights if they are implemented by any branch of state government, including its judiciary.

71. Where there is an absence of state guidelines for fair and impartial interpretation and application of the law, such as Judiciary Law § 35(3) and a standard for determining if a parent has the financial ability to pay for an Attorney for the Children at all and/or at triple the rate that the State of New York has established, there is a potential for a deprivation of a State established "right" and "privilege".

72. Just as a municipal government's architectural review standards which are relied upon as grounds to deny a permit for a private building which is determined in the first instance to be "inappropriate" and/or "incompatible" (with surrounding properties) have ultimately been held to

be invalid as matter of law due to such standards being unconstitutionally vague, *see* Anderson v. City of Issaquah, 851 P.2d 744 (Wash. App. 1993) and Waterfront Estates Dev. v. City of Palos Hills, 597 N.E.2d 641 (Ill. App. 1992), the JUSTICES and the New York Supreme Court administrators should have articulated clear, written statewide uniform guidelines for a judicial evaluation of the financial criteria that disqualifies a parent and the children of that parent from an Attorney for the Child at the State's expense under Judiciary Law § 35. Yet they failed to do so.

73. The need for such guidelines is particularly important where fundamental issues of privacy, family matters, childrearing matters, and political matters are involved here. Plaintiff suffered a detriment as a consequence of such lack of guidelines associated with a State law that is obviously being interpreted and applied differently throughout the State, although it is the same State fund to be accessed. Without uniform guidelines, JUSTICES cannot punish Plaintiff.

74. Plaintiff was treated differently, arbitrarily and capriciously by the JUSTICES' policy. Even assuming, *arguendo*, that an indigent child's right to an attorney provided by the State in a "child custody proceeding" is not a fundamental constitutional right, a State's denial of public funding to that child and the child's parents, while providing public funding to others in similar circumstances, and subjecting a parent litigant to the onerous condition of the possibility of being jailed for contempt of court by a failure to "direct pay" the Attorney for the Child, gives rise to an Equal Protection Clause claim. Because the Third Department has a consistent "ministerial policy" of allowing an Attorney for the Children to be paid by public funds under Judiciary Law 35(3) in both the Supreme Court and the Family Court, and because the other judicial departments have various *ad hoc* discretionary policies that do not mimic the Third Department's "ministerial" policy, the only way for New York State to provide Equal Protection of its laws to the families with children who are the subject of "child custody disputes" (in all the State's Supreme Courts and Family Courts) is to follow the Third Department's "ministerial policy" of public funding.

75. Procedural due process is violated because Plaintiff had a property interest defined by state law. Plaintiff had a right to have the State pay for the children's court-appointed Attorney for the Children rather than being forced to pay for all or part of that expense himself. At least, Plaintiff had the right to a uniform, fair application process. The JUSTICES, acting under color of state law, deprived Plaintiff of that property interest, without a constitutionally sufficient hearing.

76. Before issuing the September 30, 2013 order, the one assigned Justice of the JUSTICES asked just a few questions from the bench, during which time it was evident that Plaintiff had been the primary caretaker. It was also evident that Plaintiff had earned some money through a "private corporation" that he owned, but after deducting the work related expenses, Plaintiff had not earned any reportable income that was reported on their joint 2012 tax return.

77. The JUSTICES' did not allow any evidence that would demonstrate what Plaintiff's upcoming expenses would likely be, if his one work project was cancelable by the client (as it was), or what other expenses Plaintiff was obligated to pay in the future (e.g., vehicle loan, health, medical, insurance, food). JUSTICES did not provide a form to seek Judiciary Law § 35 funds.

78. Having failed to first sort out any temporary support issues as Plaintiff had requested in August 2013, none of the JUSTICES had the vital information with respect to FALCO's present ability to pay an Attorney for the Children. The lack of any statewide uniform guidelines is neither cured by nor alleviated by inclusion of a provision that the court order appointing the Attorney for the Children requiring 50% initial payments may be reallocated between the parents.

79. One or more of the Defendants JUSTICES violated Plaintiff's constitutionally protected rights, and that violation appears to be part of a pattern and practice of the JUSTICES with respect to Plaintiff and others, and a continuing violation of Due Process and Equal Protection.

80. Plaintiff seeks a declaration that the appointment orders as to Plaintiff are unconstitutional and further that JUSTICES' pattern, practice, custom and policy of routinely appointing a private pay Attorney for the Children is unconstitutional because it deprives "child custody" litigants the benefits of Judiciary Law § 35 to be afford to them and their children.

COUNT II:

VIOLATION OF PLAINTIFF'S (AS WELL AS OTHERS') FIRST, FOURTH, AND FOURTEENTH AMENDMENT RIGHTS TO SPEECH, PROPERTY AND LIBERTY INTERESTS AND EQUAL PROTECTION UNDER 42 U.S.C. §1983 et seq.

81. Plaintiff realleges Paragraphs 1-61 and 63-80 and hereby incorporates same by reference.

82. Plaintiff attempted to appeal the 3 orders of appointment to the Appellate Division in Brooklyn, but no temporary stay of the 3 orders was granted and the appeals were unsuccessful. The appeals were dismissed based upon the opposition by FALCO's wife who, as the "earner" spouse, had the financial wherewithal to pay the court appointees and did not object thereto.

83. Plaintiff also directed his attorney to write a letter to the Matrimonial Court court-appointed Attorney for the Children Darelle Cairo, explaining his legal position about the appointment order and about her request to meet privately with the children while Plaintiff and the children were still under the directives of the Family Court order that had put a different Attorney for the Children in place over two months earlier.

84. The letter communicated that Plaintiff did not wish to speak directly to the Supreme Court appointed Attorney for the Children, without his attorney present, nor have the children do so until the Family Court (Judge Rouse) and the Family Court appointed Attorney for the Children gave their permission for such communication.

85. Family Court Judge Rouse never authorized such communications (to the best of Plaintiff's knowledge), nor did the Family Court appointed Attorney for the Children Heidi Hilton, Esq. ever provide any written authorization request of the Family Court Judge Rouse to do so, although she was aware of the Supreme Court's appointment of a second Attorney for the Children. JUSTICES' appointment of an additional Attorney for the Children is/was confusing.

86. On November 26, 2013, in the courtroom, the Attorney for the Children Darelle Cairo informed one of the Defendant JUSTICES, that Plaintiff was "uncooperative" as result of not providing her $1,250 (private pay) "retainer" that was ordered and also "meeting" with her.

87. As a consequence of the statements of the Attorney for the Children Darelle Cairo, the JUSTICES' assigned Supreme Court Justice swiftly directed that Plaintiff move out of the marital residence on that same day, giving him only 2 hours to do so, leaving him homeless.

88. Thus, Plaintiff suffered actual harm on the basis of both his expressed speech (i) as to his political view that the State of New York needs to provide an Attorney for the Children for all children at state expense as there are so many uncertainties as to what costs would be so as to create an unfair hardship and deny equal protection under the law, (ii) his political view that a private pay Attorney for the Children was not factually and legally justified under his circumstances, and (iii) his political view that there was a conflict with the Family Court orders concerning a different court-appointed Attorney for the Children that Family Court Judge Rouse needed to first consider to avoid being held in contempt of Family Court orders by allowing a person that Judge Rouses did not appoint to discuss matters with the children that could impact upon a "custody" determination.

89. In addition, Plaintiff's First Amendment rights have been transgressed and harmed by certain Family Court Act statutes and New York Domestic Relations Laws provisions (such as §§ 235 and 236, which shield matrimonial court files from public view) insofar as such provisions

have the effect of "prior restraint" on his speech that is required to even bring all of the facts to the attention of this federal court. Plaintiff will be seeking a federal court order permitting certain legal documents to be filed "under seal" in this federal court so that this federal court can fully review the constitutional issues for the judicial conduct for which Plaintiff seeks a declaratory decree.

90. Plaintiff has been harmed as a result of the conduct of one or more of Defendants' JUSTICES and their policy, custom, practice and pattern of making *ad hoc* "private pay" appointments where parents are not wealthy, even where there is already a State funded Attorney for the Children in place for the children of "child custody" litigants.

COUNT III:

VIOLATION OF PLAINTIFF'S (AS WELL AS OTHERS') FIRST, FOURTH AND FOURTEENTH AMENDMENT RIGHTS TO PETITION AND TO BE FREE OF RETALIATION FOR THE EXERCISE OF THAT RIGHT UNDER 42 U.S.C. §1983 et seq.

91. Plaintiff realleges Paragraphs 1- 61, 63-80, and 82-90 and hereby incorporates same by reference.

92. The Fourth Amendment protects the exercise of one's liberty interests, which is one of the quintessential rights protected under the Constitution's right to "life, liberty and the pursuit of happiness."

93. The right to be at liberty includes the right to avoid being sent to jail for contempt of court on the basis of arbitrary criteria, simply because one lacks the financial resources to pay a "private pay" Attorney for the Children, and/or lacks the financial resources to pay a $5,000 retainer (plus hourly charges in the thousands of dollars) to a private business evaluator to evaluate an equestrian business that one's spouse operates.

94. The Second Circuit has held that one's freedom and liberty interests can be constitutionally infringed even when that individual is not in a jail cell, Murphy v. Lynn, 118 F.3d 938 (2d Cir. 1997), and that having to attend court appearances in order to have the government address one's right to liberty is itself an infringement of a liberty interest.

95. The Supreme Court Justice assigned to Plaintiff's case, requires that matrimonial litigants appear in person. The next hearing is scheduled for January 7th, 2014. Because of the policy, practice, pattern and custom of the JUSTICES to enforce the JUSTICES' court orders by imposition of orders holding litigants in contempt of court and jailing them for non-compliance with a Matrimonial Court order to pay a "private pay" Attorney for the Children, Plaintiff is very anxious and worried that one or more of the JUSTICES will further derive Plaintiff of his liberty.

96. Defendants JUSTICES' conduct insofar as "private pay" court appointment, when state funded counsel was available for the children at public expense, was in violation of Plaintiff's constitutionally protected rights and that conduct has caused damages to Plaintiff.

97. Plaintiff seeks a declaratory decree (i) that declares that the order appointing Darelle Cairo as Attorney for the Children under the conditions of a "private pay" rate of $250 per hour with Plaintiff being required to pay 50-100% of whatever the sum will be, without any ceiling on it, constitutes a violation of Plaintiff's constitutional rights because Plaintiff was deprived of the benefits of Judiciary Law § 35(3), and (ii) that declares unconstitutional all of the JUSTICES similar orders directing that parents must "private pay" a court-appointed Attorney for the Child.

COUNT IV

VIOLATION OF NEW YORK'S JUDICARY LAW 35 AND A DEMAND THAT CERTAIN PORTIONS THEREOF BE DECLARED UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED

98. Plaintiff realleges Paragraphs 1-61, 63-80, 82-90, and 92-97 and hereby incorporates same by reference.

99. Plaintiff requests that the Court determine that New York Judiciary Law 35 is unconstitutional as on its face as now written because it is vague and ambiguous and as such it unfairly discriminates against persons such as Plaintiff in New York "child custody proceedings" by not containing an express provision that corresponds to the Third Department's holding in Redder v. Redder so as to make it uniformly clear that all orders of appointment of Attorney for the Children in every New York Supreme Court and New York Family Court must limit compensation to any Attorney for the Children (formerly called law guardians) appointed in any contested custody proceeding to payment made only by the State of New York, and embroidering upon the State's law a federal district court "judge-made" decree that any "private pay" court orders for an Attorney for the Child(ren) by the New York Family Court and/or by the New York Supreme Court are unconstitutional in light of the State's continuing failure to adopt any uniform statewide concrete objective criteria by which the State can fairly and impartially determine whether a parent can afford to pay an Attorney for the Child and arbitrarily exclude their entitlement to attorney compensation for the child under Judiciary Law 35.

100. The JUSTICES' imposition of "private pay" orders unfairly embroils the JUSTICES in the child custody litigants' motion practice, invites motions for contempt from both spouses and court-appointed "private pay" attorneys, and potentially taints both the JUSTICES' and the Attorney for the Child's abilities to impartially determine the critical issue of "child custody", by instead focusing on the perception of a parent's ability to "private pay".

101. Plaintiff is currently unemployed and he cannot afford to "private pay" his children's court-appointed attorney, and the JUSTICES' conduct has already tainted a fair trial.

RELIEF REQUESTED

WHEREFORE, Plaintiff prays for relief as follows:

(1) a declaratory decree that declares that Judiciary Law § 35 (3) is unconstitutional on its face because it is vague, ambiguous, and perplexing to the Justices sitting in the Appellate Division of the Second Department, which Justices have failed to create judicial decisions that adopt the sounder reasoning adopted by the Third Department in Redder v. Redder, thus creating an intolerable denial of Due Process and Equal Protection in the Matrimonial Parts of the Supreme Court of Suffolk County, causing harm to Plaintiff and others similarly situated who seek the benefits of a State provided and fully funded Attorney for the Children for their children and were subjected to a deprivation of their rights by being subjected to the financial burdens of an arbitrary and capricious judicial decision;

(2) a declaratory decree that declares that New York Judiciary Law 35 is unconstitutional as on its face as now written because it is vague and ambiguous and as such it unfairly discriminates against persons such as FALCO by not containing an express provision that corresponds to the Third Department's holding in Redder v. Redder so as to make it clear that all orders of appointment of Attorney for the Children in every New York Supreme Court and New York Family Court must limit compensation to the Attorney for the Children (formerly called law guardians) appointed in any contested custody proceeding to payment only by the State of New York, and modifying the law by a judicial interpretation from this federal court that makes it clear that any "private pay" court orders for an Attorney for the Child(ren) by the Family Court and/or by the Supreme Court are unconstitutional in light of the State's continuing failure to adopt any uniform statewide concrete objective criteria by which the State can fairly

and impartially determine whether a parent can afford to pay an Attorney for the Child and arbitrarily exclude their entitlement to attorney compensation for the child under Judiciary Law;

(3) a declaratory judgment that declares that orders directing divorcing litigants to pay retainers of $500 to $5,000 or more are unconstitutional on their face and as applied, because there is no uniformly stated "means" test to determine whether the litigants such as FALCO have the financial means to make such payments to third parties, given the uncertainties of so many financial matters early in the stages of a matrimonial action, and thus such orders are arbitrary and capricious, creating an intolerable denial of Due Process and Equal Protection in the Matrimonial Parts of the Supreme Court of Suffolk County, and causing harm to Plaintiff and others similarly situated, who should not be subjected to a deprivation of their rights by being subjected to the financial burdens of an arbitrary and capricious judicial decision;

(4) a declaratory judgment that declares Defendants' conduct transgresses the United States Constitution as it was applied to Plaintiff insofar as the 3 orders directing that Plaintiff make the direct payments to the 2 appraisers and the Supreme Court's court-appointed Attorney for the Children;

(5) an interim declaratory decree that the JUSTICES' practice, policy, custom and pattern of making "private pay" Attorney for the Child orders is unconstitutional;

(6) Costs of this action;

(7) Statutory attorneys fees under 42 U.S.C. §1988; and

(8) Awarding such other legal and equitable relief as the court deems just and proper, including temporary and permanent injunctive relief if it becomes necessary for this Court to do so, under circumstances required to prevent a gross injustice to Plaintiff in the event that Plaintiff is subjected to any further deprivation of his constitutional rights, including any contempt of court proceeding or jail term, as a consequence of the JUSTICES' appointment of a

$250 per hour "private pay" Attorney for the Children when a State funded Attorney for the Children had already been appointed by the Family Court to handle disputed "child custody" matters.

Dated: January 3, 2014

Respectfully submitted,

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EXHIBIT 1

Judiciary

§ 35. Assignment of counsel to indigent persons and appointment of physicians in certain proceedings. 1. a. When a court orders a hearing in a proceeding upon a writ of habeas corpus to inquire into the cause of detention of a person in custody in a state institution, or when it orders a hearing in a civil proceeding to commit or transfer a person to or retain him in a state institution when such person is alleged to be mentally ill, mentally defective or a narcotic addict, or when it orders a hearing for the commitment of the guardianship and custody of a child to an authorized agency by reason of the mental illness or mental retardation of a parent, or when it orders a hearing to determine whether consent to the adoption of a child shall be required of a parent who is alleged to be mentally ill or mentally retarded, or when it orders a hearing to determine the best interests of a child when the parent of the child revokes a consent to the adoption of such child and such revocation is opposed or in any adoption or custody proceeding if it determines that assignment of counsel in such cases is mandated by the constitution of this state or of the United States, the court may assign counsel to represent such person if it is satisfied that he is financially unable to obtain counsel. Upon an appeal taken from an order entered in any such proceeding, the appellate court may assign counsel to represent such person upon the appeal if it is satisfied that he is financially unable to obtain counsel.

b. Upon an appeal in a criminal action or in a proceeding in the family court or surrogate's court wherein the defendant or person entitled to counsel pursuant to the family court act or surrogate's court procedure act, is financially unable to obtain counsel, the court of appeals or the appellate division of the supreme court may assign counsel other than in the manner as is prescribed in section seven hundred twenty-two of the county law only when it is satisfied that special circumstances require such assignment.

2. The chief administrator of the courts may enter into an agreement with a legal aid society for the society to provide assigned counsel in the proceedings specified in subdivision one of this section. The agreement shall be in a form approved by the chief administrator and shall provide a general plan for a program of assigned counsel services to be provided by such society. It shall also provide that the society shall be reimbursed on a cost basis for services rendered.

3. No counsel assigned pursuant to this section shall seek or accept any fee for representing the person for whom he or she is assigned without approval of the court as herein provided. Whenever it appears that such person is financially able to obtain counsel or make partial payment for the representation, counsel may report this fact to the court and the court may terminate the assignment or authorize payment, as the interests of justice may dictate, to such counsel. Counsel assigned hereunder shall at the conclusion of the representation receive compensation at a rate of seventy-five dollars per hour for time expended in court, and seventy-five dollars per hour for time reasonably expended out of court, and shall receive reimbursement for expenses reasonably incurred. For representation upon a hearing, compensation and reimbursement shall be fixed by the court wherein the hearing was held and such compensation shall not exceed four thousand four hundred dollars. For representation in an appellate court, compensation and reimbursement shall be fixed by such court and such compensation shall not exceed four thousand four hundred dollars. In extraordinary circumstances the court may provide for compensation in excess of the foregoing limits.

4. In any proceeding described in paragraph (a) of subdivision one of this section, when a person is alleged to be mentally ill, mentally

defective or a narcotic addict, the court which ordered the hearing may appoint no more than two psychiatrists, certified psychologists or physicians to examine and testify at the hearing upon the condition of such person. A psychiatrist, psychologist or physician so appointed shall, upon completion of his services, receive reimbursement for expenses reasonably incurred and reasonable compensation for such services, to be fixed by the court. Such compensation shall not exceed two hundred dollars if one psychiatrist, psychologist or physician is appointed, or an aggregate sum of three hundred dollars if two psychiatrists, psychologists or physicians are appointed, except that in extraordinary circumstances the court may provide for compensation in excess of the foregoing limits.

4-a. In any proceeding under article ten of the mental hygiene law, the court which ordered the hearing may appoint no more than two psychiatrists, certified psychologists or physicians to examine and testify at the hearing upon the condition of such person. A psychiatrist, psychologist or physician so appointed shall, upon completion of his or her services, receive reimbursement for expenses reasonably incurred and reasonable compensation for such services, to be fixed by the court in accordance with subdivision (a) of section 10.15 of the mental hygiene law.

5. All expenses for compensation and reimbursement under this section shall be a state charge to be paid out of funds appropriated to the administrative office for the courts for that purpose. Any rules and orders respecting the assignment and compensation of counsel, and the appointment and compensation of psychiatrists, psychologists or physicians pursuant to this section and the form and manner of processing of a claim submitted pursuant to this section shall be adopted by the chief administrator. Each claim for compensation and reimbursement pursuant to subdivisions three and four of this section shall be submitted for approval to the court which made the assignment or appointment, and shall be on such form as the chief administrator may direct. After such claim is approved by the court, it shall be certified to the comptroller for payment by the state, out of the funds appropriated for that purpose.

6. Assigned counsel and guardians ad litem appointed pursuant to the provisions of title two of article nine-B of the social services law shall be compensated in accordance with the provisions of this section.

7. Whenever the supreme court or a surrogate's court shall appoint counsel in a proceeding over which the family court might have exercised jurisdiction had such action or proceeding been commenced in family court or referred thereto pursuant to law, and under circumstances whereby, if such proceeding were pending in family court, such court would be authorized by section two hundred forty-nine of the family court act to appoint an attorney for the child, such counsel shall be compensated in accordance with the provisions of this section.

8. Whenever supreme court shall exercise jurisdiction over a matter which the family court might have exercised jurisdiction had such action or proceeding been commenced in family court or referred thereto pursuant to law, and under circumstances whereby, if such proceedings were pending in family court, such court would be required by section two hundred sixty-two of the family court act to appoint counsel, supreme court shall also appoint counsel and such counsel shall be compensated in accordance with the provisions of this section.

Judiciary

§ 35-a. Statements to be filed by judges or justices fixing or approving fees, commissions, or other compensation for persons appointed by courts to perform services in actions and proceedings. 1. (a) On the first business day of each week any judge or justice who has during the preceding week fixed or approved one or more fees or allowances of more than five hundred dollars for services performed by any person appointed by the court in any capacity, including but not limited to appraiser, special guardian, guardian ad litem, general guardian, referee, counsel, special referee, auctioneer, special examiner, conservator, committee of incompetent or receiver, shall file a statement with the office of court administration on a form to be prescribed by the state administrator. The statement shall show the name and address of the appointee, the county and the title of the court in which the services of the appointee were performed, the court docket index or file number assigned to the action or proceeding, if any, the title of the action or proceeding, the nature of the action or proceeding, the name of the judge or justice who appointed the person, the person or interest which the appointee represented, whether or not the proceeding was contested, the fee fixed or approved by the judge or justice, the gross value of the subject matter of the proceeding, the number of hours spent by the appointee in performing the service, the nature of the services performed and such other information relating to the appointment as the state administrator shall require. The judge or justice shall certify that the fee, commission, allowance or other compensation fixed or approved is a reasonable award for the services rendered by the appointee, or is fixed by statute. If the fee, commission, allowance or other compensation for services performed pursuant to an appointment described in this section is either specified as to amount by statute or fixed by statute as a percentage of the value of the subject matter of the action or proceeding, the judge or justice shall specify the statutory fee, commission or allowance and shall specify the section of the statute authorizing the payment of the fee, commission, allowance or other compensation.

(b) Paragraph (a) shall not apply to any compensation awarded to appointees assigned to represent indigent persons pursuant to Article 18-B of the county law, counsel assigned pursuant to section thirty-five of the judiciary law or counsel appointed pursuant to the family court act.

(c) Any judge or justice who fixes or approves compensation for services performed by persons appointed as referees to examine accounts of incompetents pursuant to section 78.25 of the mental hygiene law shall file, annually, with the office of court administration a statement containing such information regarding such appointments as the state administrator shall require.

2. The office of court administration shall annually submit to the appellate division of the supreme court in each of the judicial departments of the state a report containing a summary of the information contained in the statements filed with it pursuant to this section by the judges and justices sitting in courts in that department during the preceding year. Each appellate division of the supreme court shall keep and file such reports and shall have power to make such rules respecting the supervision of all such court appointees within its judicial department as it may deem necessary.

3. The statements and reports required by this section shall be matters of public record and available for public inspection. Each court may permit the information contained therein to be made available for publication at such times and in such manner as it may deem proper.

EXHIBIT 2

REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK

Matrimonial Commission

HON. SONDRA MILLER, *CHAIRPERSON*

FEBRUARY 2006

ROLE AND APPOINTMENT OF ATTORNEY FOR THE CHILD

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

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

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

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

> The law guardian is the attorney for the child. In juvenile delinquency proceedings, it is the responsibility of the law guardian to vigorously represent the child. In other types of proceedings, it is the responsibility of the law guardian to diligently advocate the child's position in the litigation. In ascertaining that position, the law

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

> guardian must consult with and advise the child to the extent possible and in a manner consistent with the child's capacities. If the child is capable of a knowing, voluntary and considered judgment, the law guardian should be directed by the wishes of the child, even if the law guardian believes that what the child wants is not in the child's best interest. However, when the law guardian is convinced either that the child lacks the capacity for making a knowing, voluntary, and considered judgment or that following the child's wishes is likely to result in a risk of physical or emotional harm to the child, the law guardian would be justified in taking a position that is contrary to the child's wishes. In these circumstances, the law guardian should report the child's articulated wishes to the court if the child wants the law guardian to do so, notwithstanding the law guardian's position. [40]

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

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

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

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

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

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

The appointment of an attorney for the child, and his or her active participation in the proceedings, ensures independent representation for the children.[43] Pursuant to Family Court Act § 249, the appointment of an attorney for the child in a custody dispute is within the sound discretion of the court. Nonetheless, there is a preference for the appointment of an attorney for the child in such disputes. Indeed, the failure to make such an appointment in certain custody proceedings has been deemed to be an improvident exercise of a court's discretion.[44]

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

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

As a result of a careful review of the testimony offered at the hearings, responses to the surveys prepared by the Commission and written submissions received, it became obvious that parties often lack a full understanding of the duties

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

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

and obligations of the attorney for the child. Additionally, parties require clarification of the payment structure and process for these attorneys.

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

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

The Commission recognizes a need to have uniform protocols for representation of children in every aspect of custody litigation from the preliminary stages through the post-trial proceedings. The Commission also recognizes that some variations exist in the local practice of law. Nevertheless, the Commission recommends that there be uniform statewide protocols for the representation of children. In pursuing this goal, the Commission thoroughly reviewed and considered the Law Guardian Representation Standards promulgated by the New York State Bar Association's Committee on Children and the Law. These standards, organized into sections by the preliminary, trial and post-trial stages of custody litigation, were first adopted and published in 1992. A second edition was published in 1999. The current revision (awaiting adoption by the New York State Bar Association Executive Committee[46]) most accurately reflects the principle that these attorneys must be viewed as the attorneys for the children and are subject to the same rules of professional responsibility applicable to all attorneys. Included are restrictions and obligations concerning ex-parte communications, client confidentiality and conflicts of interests. After careful consideration, the Commission recommends the adoption of the New York State Bar Association's Law Guardian

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

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

Representation Standards by administrative rule. These standards should be viewed as a supplement to the Code of Professional Responsibility.[47]

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

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

A recurring problem cited in the responses to the Commission's surveys relates to the court's expectations regarding the role of the attorney for the child. The court should not ask an attorney for the child for a recommendation or personal opinion. As stated earlier, the attorney for the child is not an arm of the court or a fiduciary and, as the attorney for the child, he or she must advocate on that child's behalf as is required of any other attorney in a civil proceeding or action. The attorney for the child is expected, however, to take a position in the litigation – in accordance with the considerations outlined earlier – and to use every appropriate means to advance that

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

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

position.[49] Consistent with the earlier recommendations by this Commission regarding judicial training, it is essential that judges receive training in child development issues. Additionally, the following areas of judicial training should be expanded so that judges:

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

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

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

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

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

[50] *See supra* n. 8.

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

The Commission further recommends that it be required whenever such an appointment is made that an Order be entered specifying the allocation of fees, the source of payment, the attorney's hourly rate, the frequency and reporting process of billing, the means for enforcement of payment, and any other relevant factors that will eliminate conflict in connection with the appointment of an attorney for the child.

THE ROLE AND APPOINTMENT OF EXPERTS

Forensic Experts.

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

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

- The use (or overuse) of forensic experts, i.e., when is it appropriate for the court to order forensics in a custody case.
- The qualifications of the forensic experts, including their training and sensitivity to discrete issues such as diversity, alcoholism, use of illegal drugs, abuse of prescription drugs, domestic violence, and others that may affect the evaluation.
- The quality of the reports produced and the criteria for an appropriate valuation.
- Whether reports should contain recommendations on the ultimate issue presented to the court in a custody case, i.e., which parent should be awarded primary physical custody.
- The use of the reports by the courts. That is, to what extent should the court rely on the forensic's report. Here, the issue is raised as to the "scientific" validity of certain testing and conclusions rendered in forensic reports as they pertain to parenting and, thus, whether the report is admissible in evidence under the prevailing standards for the admissibility of expert testimony.[52]
- Procedural aspects as to how a forensic's report is handled by the courts. In particular, the access to the reports given to parties and counsel, the review of these reports by courts prior to trial and discovery of the underlying bases for the reports by counsel prior to trial. A corollary issue raised here is the availability of discovery in general in custody cases and the lack of uniformity on this issue among the departments.
- The cost of forensic experts and allocation of that cost.

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

EXHIBIT 3

17 A.D.3d 10 (2005)
792 N.Y.S.2d 201

GEORGE W. REDDER, Appellant-Respondent,

v.

MARY FRANCIS REDDER, Respondent-Appellant.

Appellate Division of the Supreme Court of the State of New York, Third Department.

March 10, 2005.

11 *11 *Beatrice Havranek,* Rosendale, for appellant-respondent.

Moran & Gottlieb, Kingston (*Andrea Moran* of counsel), for respondent-appellant.

Isabelle Rawich, South Fallsburgh, *Law Guardian.*

MERCURE, J.P., CREW III, CARPINELLO and ROSE, JJ., concur.

OPINION OF THE COURT

LAHTINEN, J.

The parties signed a prenuptial agreement providing for their separate property shortly before their 1991 marriage. During the marriage, plaintiff kept all his property separate from defendant. They had two children, one born in 1994 and the other born in 1995. The marital relationship deteriorated and, in December 1999, defendant signed a
12 separation agreement and a *12 postnuptial agreement prepared by plaintiff in which she waived any claim to defendant's property in exchange for $8,000 and any claim to maintenance in exchange for a payment of $10,000. She also stipulated at that time to permit plaintiff to have custody of the children, and that stipulation was used to obtain a consent order entered in January 2000. However, by the end of December 1999, before the consent order had even been entered, plaintiff and defendant had resumed residing together in an apparent effort at reconciliation that lasted until September 2001. Both parties ultimately claimed cruel and inhuman treatment as a ground for divorce and each sought custody of the children.

At the commencement of the March 2003 trial, the parties stipulated to mutual divorces on the ground of cruel and inhuman treatment and a trial ensued on the issues of custody, child support and maintenance. Supreme Court found the parts of the separation and postnuptial agreements that spoke to maintenance to be patently unfair and influenced by plaintiff's overreaching. The court thus awarded defendant maintenance in the amount of $1,500 per month for 24 months in addition to the payment provided in the separation agreement. After considering the evidence pertinent to custody, including evidence presented at a *Lincoln* hearing, the court granted joint custody. Physical custody of the children was divided so that they generally spent three days with defendant and four days with plaintiff each week, but more vacation time with defendant than plaintiff. Because of allegations of excessive alcohol use by both parties, Supreme Court issued a one-year order of protection directing that neither party consume alcoholic beverages 24 hours prior to or during custodial time with the children. Plaintiff, an attorney with substantially more income than defendant (who had worked as a legal secretary), was deemed the noncustodial parent for purposes of child support and directed to pay $250 per week. Requests by the parties for counsel fees were denied. The Law Guardian applied for a fee in excess of the statutory limit and for payment of that fee from plaintiff. Supreme Court awarded a fee of $7,125 and directed each party to pay half of that amount to the Law Guardian. Both parties appeal.

Plaintiff first argues that Supreme Court erred in modifying the consent custody order and directing joint custody. The modification of an existing order generally must be supported by a showing of a change in circumstances revealing a

13 real need *13 for the modification to ensure the ongoing best interests of the children (*see Matter of Tavernia v Bouvia*, 12 AD3d 960, 961 [2004]; *Matter of Gregio v Rifenburg*, 3 AD3d 830, 831 [2004]). The agreements setting forth the prior custody arrangement were signed in December 1999 and, before the consent order was entered in January 2000, the parties had resumed living together. The evidence amply supports Supreme Court's findings that, during the ensuing period of nearly two years, both parents were actively involved in raising the children, defendant provided an important role for the emotional well-being of the children, she was more nurturing and more involved in the daily lives of the children, and the children wanted to spend more time with her than was set forth in the consent order. That consent order was entitled to less weight than a disposition following a trial (*see Matter of Crippen v Keator*, 9 AD3d 535, 536 [2004]), and the substantial period of time that both parents resided together with the children following its execution, which resulted in an increased role of defendant in the lives and needs of the children, constituted a sufficient change in circumstances to justify modification of custody. Supreme Court made credibility determinations regarding the conflicting evidence and discussed a host of factors in arriving at its conclusion that joint custody with near equal physical custody time for each parent was in the best interests of the children. Upon review of the record, we discern no reason to disturb those determinations and conclusions (*see Matter of Engwer v Engwer*, 307 AD2d 504, 505 [2003]; *Scialdo v Kernan*, 301 AD2d 884, 885 [2003]).

Next, plaintiff contends that he should not have been directed to pay any child support. Supreme Court noted that "the parties have substantially the same amount of custodial time with the children," and found that during 2001, plaintiff had income of nearly $80,000 while defendant, who had not worked in 2001, had earning potential of about $27,000. The court applied the three-step method from the Child Support Standards Act (*see* Domestic Relations Law § 240 [1-b]) in calculating child support for this essentially shared custody situation (*see Bast v Rossoff*, 91 NY2d 723, 724 [1998]), determined that plaintiff had the greater pro rata share of the child support obligation (*see Baraby v Baraby*, 250 AD2d 201, 204 [1998]), and directed child support accordingly. Upon the facts of this case, we are unpersuaded that this determination should be set aside.

The award of a fee payable equally by the parties directly to the Law Guardian has provoked arguments from both
14 parties. *14 In a contested custody case, children generally "should be represented by counsel of their own choosing or by law guardians" (Family Ct Act § 241; *see Lips v Lips*, 284 AD2d 716, 716 [2001]).[1] Children rarely have the financial means to seek counsel of their own choosing so most law guardians are appointed from the Law Guardian Program, which is governed by a statutory and regulatory framework (*see* Family Ct Act art 2, part 4; 22 NYCRR part 835). To foster the goal of quality and independent representation for children in the vital position of law guardian (*see Matter of Carballeira v Shumway*, 273 AD2d 753, 755 [2000], *lv denied* 95 NY2d 764 [2000]), attorneys who seek to serve in such capacity must apply, be screened by a court, undergo training and meet various criteria (*see generally* 22 NYCRR part 835), and they are governed by the pertinent standards regarding compensation (*see* Judiciary Law § 35 [3]; 22 NYCRR 835.5). With respect to compensation, while the statutes and regulations speak directly to a procedure for payment from the state (*see* Family Ct Act § 248; 22 NYCRR 835.5), there is no specific statutory or regulatory scheme for direct payment of an appointed law guardian by a parent or parents (*see generally* Brandes, Law and the Family, *Compensation of Law Guardians,* NYLJ, July 28, 1998, at 3, col 1). The lack of parameters for a direct-pay system creates the potential for issues about the integrity of the appointment process in such situations (which often pay no attention to the statutory caps on compensation for assigned counsel), draws into question the independence of the law guardian, and raises concerns about fundamental fairness to all children regardless of the economic status of their parents. We have previously stated, albeit in dicta, that "Law Guardian costs shall be payable by the [s]tate" (*Lips v Lips, supra* at 717). We acknowledge that resolution of this issue is susceptible to more than one reasonable view (*see Matter of Plovnick v Klinger*, 10 AD3d 84 [2d Dept 2004]) and there are policy arguments supporting different feasible approaches. However, until the Legislature or Court of Appeals provides otherwise, we are persuaded that the current statutory and regulatory framework should be interpreted as limiting compensation to
15 law guardians appointed pursuant to the Law Guardian Program in a contested custody proceeding to payment *15 by the state (*see Lips v Lips, supra* at 717; *see also* Family Ct Act § 248 ["The costs of law guardians . . . shall be payable by the state of New York"]; *Matter of Lynda A.H. v Diane T.O.*, 243 AD2d 24, 27-28 [4th Dept 1998], *lv denied* 92 NY2d 811 [1998] [holding that Family Court "had no authority to compel the parties to pay the Law Guardian's legal fees and expenses"]; Brandes, Law and the Family, *Compensation of Law Guardians,* NYLJ, July 28, 1998, at 3, col 1).[2] The

order directing the parties to pay the Law Guardian directly must thus be reversed, and the Law Guardian can apply for a fee as provided in 22 NYCRR 835.5.

The remaining arguments require little discussion. The duration of the maintenance award, the denial of defendant's request for counsel fees, and the evidentiary rulings regarding expert testimony have all been reviewed and found to fall within Supreme Court's discretion as to such issues. Plaintiff's appeal from the order of protection regarding consuming alcoholic beverages during the time he had physical custody expired on April 24, 2004 and is thus moot.

Ordered that the appeal from the order entered April 24, 2003 is dismissed, as moot, without costs.

Ordered that the order entered May 13, 2003 is reversed, on the law, without costs, and the Law Guardian's motion for payment of a fee directly from plaintiff is denied.

Ordered that the judgment is affirmed, without costs.

[1] The fact that the underlying custody dispute was heard in Supreme Court rather than Family Court does not alter the analysis regarding the role of law guardians (*see* *Lips v Lips, supra* at 716-717; *Davis v Davis*, 269 AD2d 82, 84 [2000]).

[2] We make no comment at this time on whether the state can seek to recoup from a parent in an appropriate situation the funds paid by it to a law guardian. We further note that to the extent our decision in *Gadomski v Gadomski* (245 AD2d 579 [1997]) can be read as permitting a court to order a parent, without the parent's consent, to pay a law guardian directly in a disputed custody case, it should not be followed.

EXHIBIT 4

10 A.D.3d 84 (2004)
781 N.Y.S.2d 360

In the Matter of MIRAL PLOVNICK, Respondent,

v.

AVI KLINGER, Appellant. BRUCE J. COHEN, Nonparty Respondent.

Appellate Division of the Supreme Court of the State of New York, Second Department.

July 30, 2004.

85 *85 *Russell I. Marnell, P.C.*, East Meadow (*Scott R. Schwartz* of counsel), for appellant.

Carol Lewisohn, Cedarhurst, for respondent.

Bruce J. Cohen, Jericho, *Law Guardian*, nonparty-respondent pro se.

Altman, J.P., Adams and Townes, JJ., concur.

OPINION OF THE COURT

KRAUSMAN, J.

Family Court Act § 249 provides the court with the discretion to appoint law guardians to represent children in a variety of proceedings, including custody disputes. Although the appointment of law guardians in custody cases is not mandatory, the practice has become increasingly widespread, as courts seek to ensure that children have independent counsel to represent their interests in proceedings which have a profound impact upon their lives. With the increased frequency of appointments, questions have arisen as to the manner in which law guardians can be compensated. In many instances, attorneys appointed as law guardians in custody matters are selected from an approved panel, and compensated by the State at the rates set forth in Judiciary Law § 35 (3). However, in some instances, where the parents have sufficient financial means, the courts have ordered one parent or both parents to pay the law guardian's fees. On this appeal, the father challenges the Family Court's authority to direct him to pay the fees of the Law Guardian appointed to represent his son, and we are asked to determine whether there is statutory authority to require a parent to pay a law guardian's fees in Family Court custody proceedings. For the reasons which follow, we conclude that the Family Court was authorized to direct the father to pay the Law Guardian's fees, and that the order appealed from should be affirmed.

We note that the order dated December 10, 2002, is not appealable as of right, however, we treat the notice of appeal as an application for leave to appeal and grant leave (*see* Family Ct Act § 1112).

The parties in this proceeding are the parents of Jordan, who was born on April 26, 1995, and is now nine years old.
86 On April *86 21, 1999, the parties entered into a stipulation settling their pending divorce action. Under the terms of the stipulation, the mother was awarded custody of Jordan, and the father was granted visitation on alternate weekends, two week night evenings, and specified holidays. The stipulation further required the father, who earned 85% of the couple's income, to pay child support in the sum of $710 per month in accordance with the Child Support Standards Act (*see* Domestic Relations Law § 240 [1-b]). The stipulation was incorporated, but not merged, in the ensuing judgment of divorce entered September 3, 1999. Both parents remarried shortly after their divorce.

Eleven months later, in August 2000, the father sought a change of custody in the Supreme Court, Nassau County. In November 2000, the Supreme Court issued separate orders directing a hearing on the father's application, and appointing counsel to serve as Jordan's law guardian. The order appointing counsel for Jordan required the father to

pay the law guardian's fees at a rate of $150 per hour. Following extensive negotiations, on April 25, 2001, the parties entered into a stipulation in which they agreed to share custody of Jordan. The April 2001 stipulation set forth a comprehensive schedule for dividing physical custody of Jordan between the parents.

Approximately seven months later, in December 2001, the mother filed a pro se petition in the Family Court, Nassau County, seeking sole custody of Jordan. In her petition, the mother alleged that the shared custodial arrangement had proved unworkable because of animosity and a lack of communication between the parties. When the parties made their first appearance in Family Court on the mother's petition, the Family Court questioned the mother about her financial circumstances, and then appointed counsel to represent her. The Family Court also assigned the same attorney who previously represented Jordan in the Supreme Court custody matter as the child's law guardian.

When the Law Guardian made his first appearance before the Family Court in March 2002, he advised the court that when he represented Jordan in the Supreme Court, the father was directed to pay his fees at a rate of $150 per hour. The Law Guardian then requested that he be compensated in the same manner for his representation of Jordan in the Family Court. The father's attorney opposed the application, arguing that the Family Court lacked jurisdiction to require a party to pay a law guardian's fees.

87 *87 At the Family Court's direction, after making an oral application on the record in open court to direct the father to pay his fees, the Law Guardian submitted a written application to direct the father to pay his fees at the rate of $150 per hour. In support of his application, the Law Guardian argued that Judiciary Law § 35 (3), which primarily governs the compensation of attorneys appointed to represent indigent parties, also permitted the court, in the interest of justice, to require a litigant who was not indigent to pay reasonable fees to a law guardian assigned to represent his or her child. The Law Guardian further argued that the father had sufficient financial means to pay his fees, and that Jordan was "entitled to a law guardian with experience and expertise who should be paid at a commensurate rate for the reasonable value of his services." In opposition, the father argued that a law guardian appointed in Family Court was required to be compensated in accordance with Judiciary Law § 35 (3), and maintained that this provision solely authorized payment to be paid from public funds at a rate which was then $40 per hour for time expended in court, and $25 per hour for time expended out of court. The father further argued, relying upon the decision of the Appellate Division, Fourth Department, in *Matter of* Lynda A.H. v Diane T.O. (243 AD2d 24 [1998]), that the Family Court, as a court of limited jurisdiction, did not have inherent authority to exercise powers beyond those expressly granted to it by statute.

After conducting a brief hearing, the Family Court granted the Law Guardian's application, and ordered the father to pay his fees at the rate of $150 per hour. The father now appeals, challenging the Family Court's authority to direct a litigant such as himself to pay fees to the law guardian appointed to represent his child. In support of his position, the father continues to rely upon *Matter of* Lynda A.H. v Diane T.O. (*supra*). *In Matter of Lynda A.H.*, the Appellate Division, Fourth Department noted that the Family Court is a court of limited jurisdiction which is prohibited from exercising powers beyond those granted to it by statute, and determined that there was no statutory authority to compel parties to pay a law guardian's fees. Although this Court has previously affirmed Family Court orders directing parties to pay a law guardian's fees (*see e.g.* Rosenbaum v Rosenbaum, 270 AD2d 242 [2000]; *Matter of* Bungay v Morin, 256 AD2d 462 [1998]; *Matter of Department of Social Servs. [Wolfson] v Wolfson*, 228 AD2d 594 [1996]), and
88 recently observed that the Family Court has the authority to *88 award a reasonable fee to a law guardian (*Matter of* Campo v Campo, 3 AD3d 565 [2004]), we now take the opportunity to explain the rationale for our divergence from the Appellate Division, Fourth Department's view.

We begin our analysis of this issue by considering the statutory framework for the appointment and compensation of law guardians in Family Court. Pursuant to Family Court Act § 249, the appointment of law guardians is mandatory in certain proceedings, including juvenile delinquency proceedings, child protective proceedings, and termination of parental rights proceedings. Family Court Act § 249 also gives the Family Court the discretion to appoint law guardians in a variety of other Family Court proceedings. In this regard, Family Court Act § 249 (a) provides that "[i]n any other proceeding in which the court has jurisdiction, the court may appoint a law guardian to represent the child, when, in the opinion of the family court judge, such representation will serve the purposes of this act." While the appointment of a

law guardian in a contested custody proceeding is not mandatory, we have recognized that such an appointment is appropriate and helpful to the court, since the law guardian "may act as champion of the child's best interest, as advocate for the child's preferences, as investigator seeking the truth on controverted issues, or may serve to recommend alternatives for the court's consideration" (*Koppenhoefer v Koppenhoefer*, 159 AD2d 113, 117 [1990]).

The Family Court Act also authorizes the Appellate Divisions of the Supreme Court to designate a panel of qualified attorneys to provide law guardian services (*see* Family Court Act § 243 [c]). Where such a panel is established, as is the case in this judicial department, Family Court Act § 245 (c) provides that "law guardians shall be compensated and allowed expenses and disbursements in the same amounts established by subdivision three of section thirty-five of the judiciary law." Judiciary Law § 35 governs the "[a]ssignment of counsel to indigent persons," and subdivision (3) of the statute, which establishes the terms of compensation for assigned counsel, was recently amended to increase the compensation rates to $75 per hour for time expended in court and for time reasonably expended out of court. Although the focus of subdivision (3) is clearly upon the compensation of assigned counsel for indigent litigants from public funds, it also provides that whenever it appears that the person who has been assigned counsel *"is financially*
89 *able to obtain counsel or make partial payment for the representation,* *89 *counsel may report this fact to the court and the court may terminate the assignment or authorize payment, as the interests of justice may dictate."* (Emphasis added.) Thus, Judiciary Law § 35 (3) allows the court to utilize an alternative method to compensate attorneys who have been assigned to represent individuals with the financial ability to retain counsel. Although we recognize that a child is not ordinarily a person who is "financially able to obtain counsel or make partial payment for the representation," Family Court Act § 245 (c) specifies that law guardians are to be compensated in accordance with Judiciary Law § 35 (3). We are thus persuaded that the alternative method for compensation of attorneys permitted by Judiciary Law § 35 (3) vests the Family Court with authority to require litigants, who are financially able to do so, to make full or partial payment of fees to the law guardians assigned to represent their children in custody proceedings. While the ability to assign counsel who can be compensated from public funds helps ensure that independent advocates are available to children in emotionally charged custody disputes, the interests of justice do not dictate that payment must, in all cases, be made from public funds. Indeed, it has been observed that "[t]o provide publicly funded legal representation to individuals with an ability to afford their own counsel makes no sense" (*Colangelo v Colangelo*, 176 Misc 2d 837, 842 [1998]). Thus, where the interests of justice so dictate, the Family Court, pursuant to Judiciary Law § 35 (3), may direct that a parent who has sufficient financial means to do so pay some or all of the law guardian's fees.

We note that the practice of directing parents to pay a law guardian's fees in custody matters appears to be more prevalent in the Supreme Court, where the court similarly has the option of directing compensation from public funds pursuant to Judiciary Law § 35. This Court, as well as the Appellate Divisions, First and Third Departments, have upheld the practice of requiring parties to pay law guardian fees in custody proceedings initiated in the Supreme Court (*see e.g. Rupp-Elmasri v Elmasri*, 8 AD3d 464 [2d Dept 2004]; *Pascarelli v Pascarelli*, 283 AD2d 472 [2001]; *Stephens v Stephens*, 249 AD2d 191 [1998]; *Gadomski v Gadomski*, 245 AD2d 579 [1997]; *Bronstein v Bronstein*, 203 AD2d 703 [1994]). We perceive no basis for creating a disparity between the Family Court and the Supreme Court in custody matters by holding that only the Supreme Court is permitted to depart from the public payment scheme for assigned
90 law guardians. Indeed, we have previously held that in *90 matters of custody, the Family Court has the same powers possessed by the Supreme Court, which includes the authority to award counsel fees (*see Matter of O'Neil v O'Neil*, 193 AD2d 16 [1993]). Since the Supreme Court and the Family Court share concurrent jurisdiction over custody proceedings, both courts should have the ability to direct parents to pay law guardian fees in appropriate circumstances.

Authority to require a parent to pay a child's legal expenses also flows from the statutory duty to support a child under the age of 21 (*see* Family Ct Act §§ 413, 416), which encompasses a duty to provide necessaries. While necessaries have traditionally been defined to include a child's most basic needs, such as food, clothing, shelter, and medical care, in appropriate circumstances the duty to provide necessaries may obligate a parent to provide a child with counsel (*see Matthews v Matthews*, 30 Misc 2d 681 [1961], *mod on other grounds* 18 AD2d 830 [1963], *affd* 14 NY2d 778 [1964]; *People v Kearns*, 189 Misc 2d 283 [2001]; *Matter of Cheri H.*, 121 Misc 2d 973 [1983]; *see also Colangelo v*

Colangelo, supra). Indeed, it has been stated that "[t]he unemancipated child without means who has been provided with necessaries may reasonably look to his [parent(s)] to bear the full responsibility for the costs thereof without regard to the fact that free legal services *may be* available to indigents" (Fanelli v Barclay, 100 Misc 2d 471, 475 [1979]). The provision of legal services to a child as a necessary was recognized by the Appellate Division, First Department in Matter of Baby U. (263 AD2d 385 [1999]), where an infant's birth parents sought to set aside their extrajudicial consents to his adoption. The First Department concluded that the birth parents failed to demonstrate a basis to void their consents, and remitted the matter to the Family Court for a best interests hearing. In remitting the matter, the First Department observed that "Baby U. did have a right to be represented in these proceedings and, on remand, a Law Guardian must provide those services as necessaries to be subsequently compensated in such manner as the Family Court may determine" (Matter of Baby U., supra at 388). A parent's potential duty to pay for legal services provided to a child as necessaries was also recognized by the Court of Appeals in Felder v Mohr (39 NY2d 1002 [1976]). In that case, the Court of Appeals affirmed an order dismissing an attorney's action against a father to recover legal fees upon the ground that the father provided the mother, who was the custodial parent, with an
91 adequate and sufficient level of child support. However, the Court *91 of Appeals noted that an attorney might be able to recover the necessary value of legal services provided to a child "in a proper case" (Felder v Mohr, supra at 1003).

We additionally note that where, as here, the court has elected to exercise its authority to direct one or both parents to pay the law guardian's fees, it may establish a reasonable hourly fee which exceeds the statutory rates set forth for the representation of indigent parties in Judiciary Law § 35 (3). In this regard, it has been observed that the below market rate fee schedule set forth in Judiciary Law § 35 (3) comprises reduced rates to be paid by the State as a means of providing legal assistance to indigent litigants, and that "[t]here is no basis for nonindigent private parties to have their litigation subsidized at bargain rates" (C.E. v P.E., 177 Misc 2d 272, 275 [1998]; *see* Stephens v Stephens, supra). However, if a parent who has been directed to pay a fee contests a law guardian's claims relative to the time expended and the reasonable value of the services provided, he or she should be afforded a hearing on this issue (*see Matter of* Campo v Campo, 3 AD3d 565 [2004], *supra*; Gadomski v Gadomski, 245 AD2d 579 [1997], *supra*).

The father alternatively argues on appeal that if the Family Court is empowered to compel litigants to pay law guardian fees, the mother should be required to contribute to this expense. While we agree that both parents have an equal responsibility to provide counsel for their child if they can afford to do so, we note that the mother commenced this proceeding pro se and the Family Court assigned counsel to represent her after determining that her financial circumstances were such that she was unable to retain counsel. Under these circumstances, the Family Court did not err in requiring the father to pay the full cost of providing Jordan with legal representation. The father's remaining contentions are without merit.

Accordingly, the order dated December 10, 2002, is affirmed, with costs.

Ordered that on the court's own motion, the notice of appeal is treated as an application for leave to appeal, and leave to appeal is granted (*see* Family Ct Act § 1112); and it is further,

Ordered that the order dated December 10, 2002, is affirmed, with costs.

EXHIBIT 5

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D24285
G/kmg

_____AD3d_____

Submitted - June 8, 2009

REINALDO E. RIVERA, J.P.
PETER B. SKELOS
RUTH C. BALKIN
JOHN M. LEVENTHAL, JJ.

2008-05292
2008-05293
2008-05297

DECISION & ORDER

Kathleen Pascazi, plaintiff, v Michael Pascazi, appellant; Paul L. Mollica, etc., nonparty-respondent (and another title).

(Index No. 1235/06)

Michael Pascazi, Fishkill, N.Y., appellant pro se.

Paul L. Mollica, Poughkeepsie, N.Y., nonparty-respondent pro se.

In an action for a divorce and ancillary relief, the defendant appeals, as limited by his brief, from so much of (1) an order of the Supreme Court, Dutchess County (Brands, J.), dated November 5, 2007, which approved compensation for Paul L. Mollica, the attorney for the parties' unemancipated child, in the sum of $4,366.25, and directed him to pay one half of that fee, (2) an order of the same court dated April 18, 2008, as granted, without a hearing, that branch of the motion of the attorney for the child which was for the issuance of a money judgment against him for unpaid counsel fees in the sum of $472.50, and (3) an order of the same court dated May 23, 2008, as granted the application of the attorney for the child to approve his final compensation in the total sum of $5,381.24 and directed him to pay the attorney for the child the sum of $805 (50% of $5381.24 less credit for $1885.62 already paid).

ORDERED that on the Court's own motion, the attorney for the child's notice of appeal from the order dated May 23, 2008, is treated as an application for leave to appeal, and leave to appeal is granted (*see* CPLR 5701[c]); and it is further,

ORDERED that the orders are affirmed insofar as appealed from; and it is further,

ORDERED that one bill of costs is awarded to the nonparty-respondent.

In 2006, the Supreme Court appointed an attorney for the child in this matrimonial action by private-pay appointment order in accordance with 22 NYCRR part 36. Pursuant to this order, the court required the parties to pay a retainer for the attorney for the child and directed that compensation for his services, at the rate of $175 per hour, be shared equally between them. On appeal, the husband challenges, inter alia, the order dated May 23, 2008, requiring him to pay his one-half share of the total fees for the attorney for the child, contending, inter alia, that the compensation for the attorney for the child was limited to the statutory rate of Judiciary Law § 35(3).

Since courts are authorized to direct that "a parent who has sufficient financial means to do so pay some or all of the [attorney for the child]'s fees" (*Matter of Plovnick v Klinger*, 10 AD3d 84, 89; *see* 22 NYCRR 36.4; Judiciary Law § 35[3]; *Rupp-Elmasri v Elmasri*, 8 AD3d 464; *Jain v Garg*, 303 AD2d 985, 986; *Pascarelli v Pascarelli*, 283 AD2d 472), the Supreme Court properly approved the final compensation request of the attorney for the child, requiring the husband to pay one half of the total counsel fees at the rate set forth in the private-pay appointment order (*see Matter of Plovnick v Klinger*, 10 AD3d at 91; *Pedreira v Pedreira*, 34 AD3d 225).

The husband's remaining contentions are without merit.

RIVERA, J.P., SKELOS, BALKIN and LEVENTHAL, JJ., concur.

ENTER:

James Edward Pelzer
Clerk of the Court

EXHIBIT 6

NEW YORK FAMILY COURT PRACTICE

SECOND EDITION

Volume 10

By

MERRIL SOBIE
Editor-in-Chief

and

GARY SOLOMON

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might adversely affect the granting of temporary or permanent custody or visitation to a party. Accordingly, the court, with only limited exception, is required to review the records prior to the issuance of a permanent or temporary order and again review when any subsequent order is issued after 90 days have elapsed since issuance of the prior order.

The records to be reviewed include the court's own files, surely available and presumably checked regardless of the new mandate (in fact, it is rather insulting to admonish the judge to review "related decisions in court proceedings"). Of greater difficulty is the requirement that the court review statewide registries of orders of protection, Family Court warrants, and sex offender registries. (The court may issue a temporary emergency order and then review the next court day if immediate review is not possible.)

The required information is pertinent, but the all too often creaky databases are not always able to respond on a timely basis (not to mention the now required super-timely basis). Perhaps for that reason, the subdivision concludes with a mandate to study and report on the feasibility of a computerized "real time" database, connecting Family Courts throughout the state with the centralized databases.

§ 9:9 Assignment of counsel

Family Court Act § 262(a)(v) provides that the parent of any child seeking custody or contesting the substantial infringement of his or her right to custody must be assigned counsel if he or she is financially unable to obtain private counsel. Hence, the Family Court must assign counsel to the indigent parent seeking custody or contesting a different party's petition for custody.[1]

A non-parent is not statutorily entitled to assignment of counsel even if indigent. Thus, a grandparent or other relative seeking or contesting custody cannot be assigned counsel. However, a non-parent party must be apprised of the right to be represented by retained counsel.[2]

The court may also, in its discretion, appoint an attorney to represent the child who is the subject of a custody or visitation proceeding.[3] Although discretionary, the trend has been to assign counsel in virtually every contested custody case and often in non-contested cases; in fact, the failure to appoint an attorney to

---

[Section 9:9]

[1]See § 13:8, infra, for a complete discussion of the assignment of counsel for adults. A parent seeking any form of physical or legal custody or join custody is entitled to counsel.

[2]Arlene R. v. Wynette G., 37 A.D.3d 1044, 829 N.Y.S.2d 768 (4th Dep't 2007).

[3]FCA § 249.

represent the child may constitute an abuse of discretion.[4] Ergo, most children are represented.[5]

Of course, a party may appear by privately retained counsel. When relevant, the court may award counsel fees in a custody action.[6]

In recent years, it has become possible in some judicial departments to appoint an attorney for the child and simultaneously order the parents to pay the attorney's fees (usually significantly greater than state paid rates). However, the Appellate Divisions are split concerning the authority of the court to appoint a "private pay" attorney. The Second Department has held that both Family Court and Supreme Court may order the parents to pay for the child's attorney[7] while the Fourth Department has concluded that Family Court lacks such authority.[8] The Third Department has held that neither court may appoint a "private pay" law guardian,[9] concluding that the statutes limit appointment to certified attorneys for children paid by the State.

As counsel representing a party, a child's attorney is limited by the customary attorney proscriptions and, in turn, must be accorded the customary attorney of record rights. Thus, a parent must obtain the attorney's consent before arranging for a psychiatrist to evaluate the child and prepare a report.[10] Further, counsel cannot engage in ex parte communications with the court or submit written reports which incorporate facts and evidence that is not a part of the record.[11] And, although the attorney for the child may make a "recommendation" to the court concerning

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[4]See Arlene R. v. Wynette G., 37 A.D.3d 1044, 829 N.Y.S.2d 768 (4th Dep't 2007), and Albanese v. Lee, 272 A.D.2d 81, 707 N.Y.S.2d 171 (1st Dep't 2000).

[5]See §§ 13:2 and 13:3, infra, for a discussion of the assignment and the standards for a child's attorney representation.

When the assigned law guardian cannot attend a hearing due to illness, the court may proceed with a prepared substitute law guardian who fully participates; Storch v. Storch, 282 A.D.2d 845, 725 N.Y.S.2d 399 (3d Dep't 2001).

[6]See FCA § 652 and DRL § 237(b); Gross v. Kellerman, 62 A.D.2d 1149, 404 N.Y.S.2d 178 (4th Dep't 1978); see also § 13:14, infra.

[7]Campo v. Campo, 3 A.D.3d 565, 772 N.Y.S.2d 68 (2d Dep't 2004); Plovnick v. Klinger, 10 A.D.3d 84, 781 N.Y.S.2d 360 (2d Dep't 2004).

[8]Lynda A. H. v. Diane T. O., 243 A.D.2d 24, 673 N.Y.S.2d 989 (4th Dep't 1998).

[9]Redder v. Redder, 17 A.D.3d 10, 792 N.Y.S.2d 201 (3d Dep't 2005).

[10]Campolongo v. Campolongo, 2 A.D.3d 476, 768 N.Y.S.2d 498 (2d Dep't 2003).

[11]Weiglhofer v. Weiglhofer, 1 A.D.3d 786, 766 N.Y.S.2d 727 (3d Dep't 2003).

custody or visitation, any such "recommendation" is nothing more than the position of the attorney representing the child.[12]

§ 9:10 Standard in custody determinations; between parents

The pertinent statutes require the court to decide matters of custody as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child.[1] This statutory mandate is deliberately broad, enabling the court to approach and decide each individual case on its own facts and to tailor the decision to fit the particular circumstances. In determining a child's custody, the court acts as parens patriae to do what is best for the child. The court is to place itself in the position of a "wise, affectionate, and careful" parent and make provision for the child accordingly.[2]

The pivotal question in custody determinations is that of the best interests of the child.[3] Since the court should always strive to do what is best for the child, the best interests of the child standard does not, on its own, offer much real guidance. Its importance is to stress that the court's concern must be, at all times, for the interest and needs of the child. The interest and needs of the competing adults are, at best, secondary.

Of greater practical significance than the statutory best interests test are the criteria which have developed through the litigation of countless custody matters. The custody determination criteria developed by case law constitute a set of factors and preferences that the courts, in determining custody, should consider. However, the case law criteria are not arbitrary and inflexible rules; they are matters to be considered, not matters to be blindly followed. In determining what is in the best interests of a child, there are no absolutes; rather, there are a series of policies designed not to bind the courts but to guide them in determining what is in the best interests of the child.[4]

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[12]Graham v. Graham, 24 A.D.3d 1051, 806 N.Y.S.2d 755 (3d Dep't 2005). The court may nevertheless indicate its agreement with the law guardian recommendations; McAuley v. Martin, 24 A.D.3d 1254, 807 N.Y.S.2d 255 (4th Dep't 2005).

[Section 9:10]

[1]See, e.g., DRL § 240(1).

[2]Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624, 40 A.L.R. 937 (1925).

[3]McIntosh v. McIntosh, 87 A.D.2d 968, 451 N.Y.S.2d 200 (3d Dep't 1982).

[4]Eschbach v. Eschbach, 56 N.Y.2d 167, 451 N.Y.S.2d 658, 436 N.E.2d 1260 (1982); Friederwitzer v. Friederwitzer, 55 N.Y.2d 89, 447 N.Y.S.2d 893, 432 N.E.2d 765 (1982).

See also Goodale v. Lebrun, 307 A.D.2d 397, 761 N.Y.S.2d 396 (3d Dep't 2003) and Guryn v. Guryn, 308 A.D.2d 564, 764 N.Y.S.2d 716 (2d Dep't 2003).

EXHIBIT 7

243 A.D.2d 24 (1998)
673 N.Y.S.2d 989

In the Matter of Lynda A. H., Respondent,
v.
Diane T. O., Appellant

Appellate Division of the Supreme Court of the State of New York, Fourth Department.

June 10, 1998

Marsha Hunt, Syracuse, for appellant.

Alderman & Alderman, Syracuse (*Richard Alderman* of counsel), for respondent.

Lucia B. Whisenand, Syracuse, Law Guardian.

GREEN, J. P., LAWTON, WISNER and CALLAHAN, JJ., concur.

25 *25BOEHM, J.

After living together for 17 years, petitioner and respondent decided to have a child and agreed that respondent would be artificially inseminated. The child was born on September 17, 1993. Together they planned for the birth of the child and agreed to share the rights and responsibilities of child rearing. The child was given petitioner's last name as her
26 middle name and respondent's last name as her last name. Both parties *26 participated in rearing the child and contributed to her financial support. The child called petitioner "omi" (i.e., other mommy). In February 1997, when the child was 3½ years old, the parties jointly filed an adoption petition in Family Court to enable petitioner to adopt the child. However, in October 1997, the parties' relationship ended, and respondent and the child moved out of the house they had shared with petitioner. Respondent revoked her consent to the adoption, and the court *sua sponte* dismissed the adoption petition. Thereafter, petitioner commenced this proceeding pursuant to Family Court Act § 651, seeking custody or, in the alternative, visitation with the child.

The issues on this appeal are whether petitioner, who is not a parent of the child, has standing to obtain custody of or visitation with the child in the absence of extraordinary circumstances, and whether Family Court has the authority to set the fee of the Law Guardian and require that the fee it sets be paid by the parties.

Family Court erred in denying respondent's motion to dismiss the petition and in awarding temporary visitation to petitioner. It has long been the law in this State that, as between a biological parent and a nonparent, the parent has a superior right to custody of a child "that cannot be denied unless the nonparent can establish that the parent has relinquished that right because of `surrender, abandonment, persisting neglect, unfitness or other like extraordinary circumstances'" (*Matter of Michael G. B. v Angela L. B.*, 219 AD2d 289, 291, quoting *Matter of Bennett v Jeffreys*, 40 N.Y.2d 543, 544; *see*, *Matter of Michael B.*, 80 N.Y.2d 299, 309; *Matter of Male Infant L.*, 61 N.Y.2d 420, 426-428; *Matter of Merritt v Way*, 58 N.Y.2d 850; *Matter of Dickson v Lascaris*, 53 N.Y.2d 204, 208-209). The nonparent has the burden of proving that extraordinary circumstances exist. "[U]ntil such circumstances are shown, the court does not reach the issue of the best interests of the child" (*Matter of Michael G. B. v Angela L. B.*, *supra*, at 291). Here, petitioner has failed to show that respondent relinquished her superior right to custody. Although the proof that is necessary to establish extraordinary circumstances "cannot be precisely measured" (*Matter of Michael G. B. v Angela L. B.*, *supra*, at 292), it is insufficient to show that the child has bonded psychologically with the nonparent (*see*, *Matter of Burghdurf v Rogers*, 233 AD2d 713, 715, *lv denied* 89 N.Y.2d 810; *Matter of Gray v Chambers*, 222 AD2d 753, 754, *lv denied* 87 N.Y.2d 811; *Matter of Michael G. B. v Angela L. B.*, *supra*, at 292; 27 *27 *Matter of Bisignano v Walz*, 164 AD2d 317, 320). Absent evidence that respondent has abandoned, surrendered or otherwise forfeited her parental rights, "the inquiry ends" (*Matter of Male Infant L.*, *supra*, at 427).

Further, petitioner, who is neither the biological nor adoptive parent, lacks standing to seek visitation of the child, who is properly in the custody of her biological mother (*see*, *Matter of Alison D. v Virginia M.*, 77 N.Y.2d 651; *Matter of Ronald FF. v Cindy GG.*, 70 N.Y.2d 141; *Matter of Boland v Boland*, 186 AD2d 1065). The award of temporary visitation to petitioner impermissibly impaired respondent's right to custody and control of the child.

Contrary to the contention of petitioner and the Law Guardian, the custody and visitation rights of petitioner in a proceeding commenced under Family Court Act § 651 are no greater than those of the petitioner in *Matter of Alison D. v Virginia M.* (*supra*), who commenced her proceeding pursuant to Domestic Relations Law § 70. The strong policy considerations in New York regarding custody and visitation are not affected by the statute under which a proceeding is brought. We reject the contention of petitioner that she has standing in this proceeding because of her pending motion to vacate the dismissal of the adoption petition.

The court exceeded its statutory authority in directing the parties to pay the legal fees and expenses of the Law Guardian. Family Court is a court of limited jurisdiction, and it may not exercise powers beyond those granted to it by statute (*see*, *Matter of Howard v Janowski*, 226 AD2d 1087). The Family Court Act provides that "law guardians shall be compensated and allowed expenses and disbursements in the same amounts established by [Judiciary Law § 35 (3)]" (Family Ct Act § 245 [c]). Family Court's authority to award compensation to Law Guardians is limited by section 35 of the Judiciary Law. Judiciary Law § 35 (3) provides that assigned counsel in original proceedings shall be compensated at the conclusion of his or her representation at a rate not exceeding $40 per hour in court and $25 per hour out of court up to a maximum of $800, unless extraordinary circumstances are shown, and shall be reimbursed for reasonable expenses. "All expenses for compensation and reimbursement under [Judiciary Law § 35] shall be a state charge to be paid out of funds appropriated to the administrative office for the courts for that purpose" (Judiciary Law § 35 [5]). Thus, although the court properly exercised its discretion in appointing a Law Guardian to represent the
28 *28 child (*see*, Family Ct Act § 249 [a]), it had no authority to compel the parties to pay the Law Guardian's legal fees and expenses (*see*, Marnell, Outside Counsel, *Authority of Court to Order Party To Pay Fees of Law Guardian*, NYLJ, Aug. 15, 1996, at 1, col 1).

Accordingly, the order should be reversed, the motion granted, and the petition dismissed.

Order unanimously reversed, on the law, without costs, motion granted, and petition dismissed.

EXHIBIT 8

34 A.D.3d 225 (2006)
822 N.Y.S.2d 707

JANE PEDREIRA, Appellant,

v.

JORGE PEDREIRA, Defendant.

JO ANN DOUGLAS, ESQ., as Law Guardian, Respondent.

Appellate Division of the Supreme Court of the State of New York, First Department.

Decided November 2, 2006.

Concur — Tom, J.P., Mazzarelli, Andrias, Sweeny and Malone, JJ.

The Law Guardian's motion for fees was properly granted without a hearing. Plaintiff never requested a hearing and never challenged the reasonableness of the fees sought, despite being in possession of all or nearly all of the Law Guardian's billing records for up to three years. Moreover, plaintiff never raised any factual issue. No triable issue of fact was raised by plaintiff's baseless allegations that the Law Guardian had been biased against her. Finally, the court properly awarded the Law Guardian costs incurred by her in bringing the instant motion (*see* O'Shea v O'Shea, 93 NY2d 187, 193 [1999]), especially since the record discloses that plaintiff has unreasonably caused this protracted fee litigation.

EXHIBIT 9

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

----------X

Plaintiff,

Index No.:_____

- against -

Part No.:_____

Defendant.

----------X

PRELIMINARY CONFERENCE STIPULATION/ORDER
CONTESTED MATRIMONIAL

PRESIDING:_____
Justice of the Supreme Court

The parties and counsel have appeared before this Court on _____ at a preliminary conference on this matter held pursuant to 22 NYCRR §202.16.

(1) **NET WORTH**: A sworn statement of net worth as of date of commencement of the action:
☐ has been filed with the Court,
OR
☐ will be filed with the Court no later than _____.

(2) **RETAINER:** A signed copy of each party's attorney's retainer agreement: and client's bill of rights statement:
☐ has been filed with the Court,
OR
☐ will be filed with the Court no later than _____.

A. BACKGROUND INFORMATION:

Attorney for the Plaintiff:	Attorney for the Defendant:	Attorney for the Child(ren):
_____	_____	_____
_____	_____	_____
_____	_____	_____
_____	_____	_____
Phone: _____	Phone: _____	Phone: _____
Fax: _____	Fax: _____	Fax: _____
Email: _____	Email: _____	Email: _____

(2) **SUMMONS**: Date filed:_____ Date served:_____

(3) **COMPLAINT**: ☐ The Plaintiff has served a Verified Complaint on _____*.

OR

☐ The Plaintiff will serve a Verified Complaint on or before _____*.

****This date shall be the date used to determine the timeliness of a Notice of Discontinuance [CPLR §3217(a)]*.**

(4) **DATE OF MARRIAGE**: _____

(5) **DATE OF BIRTH**: Plaintiff: _____ Defendant: _____

(6) **OCCUPATION & EMPLOYER**: Plaintiff: _____ _____ Defendant: _____ _____

(7) **CHILDREN : List the name(s) and date(s) of birth of parties' child(ren)**

(8) **ORDERS OF PROTECTION**

☐ There **has not** been an Order of Protection issued involving the parties in this case.

OR

☐ There **has been** an Order of Protection issued involving the parties in this case. The order was issued on_____ by the _____ Court. The order was issued against the: ☐ plaintiff ☐ defendant, and the order was issued for the protection of the ☐ plaintiff ☐ defendant ☐ the parties' children . *Attach copy of order.*

(9) **OTHER ORDERS**

The following other orders involving the parties have previously been issued:

☐ No other orders.

☐ Nature of Order: _____

Issuing Court : _____ Date Issued: _____

Attach copy of order.

Nature of Order: _____

Issuing Court : _____ Date Issued: _____

Attach copy of order.

(10) **TRANSLATOR**

☐ Neither party is in need of a translator, OR ☐ Plaintiff and/or ☐ Defendant is requesting a translator in the _____ language.

(11) **OTHER AGREEMENTS**

Prenuptial: ☐ None exists ***OR*** ☐ Date of Agreement _____

Postnuptial: ☐ None exists ***OR*** ☐ Date of Agreement _____

Separation: ☐ None exists ***OR*** ☐ Date of Agreement _____

Any challenge(s) by the Plaintiff shall be asserted no later than _____.

Any challenge(s) by the Defendant shall be asserted no later than _____.

B. **GROUNDS FOR DIVORCE:**
The issue of fault is:

☐ **Resolved:** The parties agree that _____ will proceed on an uncontested basis to obtain a divorce on the grounds of _____.

OR

☐ **Unresolved:** a jury trial ☐ **is** ***OR*** ☐ **is not** requested. A trial of this issue shall be held on _____ .

C. **CUSTODY:** ☐ There are no children (*if checked then proceed to Section D.*)

If there are an existing orders, agreements or stipulations with regard to custody, parenting time, visitation, and/or decision making - attach a copy of same hereto.

(1) The issue of custody is: ☐ **unresolved** *OR* ☐ **resolved** *(if resolved explain below).*

(2) The issue of parenting time is : ☐ **unresolved** *OR* ☐ **resolved** *(if resolved explain below).*

(3) Issues related to decision making are: ☐ **unresolved** *OR* ☐ **resolved** *(if resolved explain below).*

In the event that an Attorney for the Child(ren) or forensic evaluator has not been previously appointed, any appointment of an attorney for the child or forensic evaluator shall be by separate order which shall designate the attorney for the child appointed, the manner of payment, source of funds for payment and each party's responsibility for such payment.

(4) **Attorney for the Child(ren)** *[Check the appropriate boxes]:*

☐ The parties are NOT requesting the appointment of an Attorney for the Child(ren) at this time, but reserve the right to make such request at a later time.

OR

☐ The parties are requesting that an Attorney for the Child(ren) be appointed by the Court.

☐ The parties agree that the cost for the Attorney for the Child(ren) be paid _____% by the plaintiff and_____% by the defendant, subject to reallocation by the Court.

OR

☐ The parties do not agree on allocation of the cost of an Attorney for the Child(ren) and request that the court determine the allocation thereof.

(5) **Forensic Evaluator** *[Check the appropriate boxes]:*

☐ The parties are NOT requesting the appointment of a forensic evaluator at this time, but reserve the right to make such request at a later time.

OR

☐ The parties are requesting that a forensic evaluator be appointed by the Court.

☐ The parties agree that the cost for the forensic evaluator be paid _____% by the plaintiff and_____% by the defendant, subject to reallocation by the Court.

OR

☐ The parties do not agree on allocation of the cost of a forensic evaluator and request that the court determine the allocation thereof.

D. FINANCIAL:

(1) Maintenance is: ☐ **unresolved** *OR* ☐ **resolved as follows:**

_____.

(2) Child Support is: ☐ **unresolved** *OR* ☐ **resolved as follows:** _____

_____.

(3) Equitable Distribution is: ☐ **unresolved** *OR* ☐ **resolved** *(if resolved explain below and attach any orders, agreements or stipulations regarding the same hereto)*

_____.

(4) Attorney's Fees: ☐ **unresolved** *OR* ☐ **resolved** *(if resolved explain below and attach any orders, agreements or stipulations regarding the same hereto)*

_____.

E. OTHER:

List all other causes of action and ancillary relief issues that are unresolved:

ANY ISSUES NOT SPECIFICALLY LISTED IN THIS STIPULATION AS UNRESOLVED MAY NOT BE RAISED IN THIS ACTION UNLESS GOOD CAUSE IS SHOWN.

F. *PENDENTE LITE* RELIEF:

With respect to *pendente lite* relief, the parties stipulate and agree that:

G. DISCOVERY:

(1) **PRESERVATION OF EVIDENCE:**

(a) **Financial Records:** Each party shall maintain all financial records in his or her possession through the date of the execution of a final stipulation of settlement, separation agreement, or entry of a judgment of divorce, whichever occurs first.

(b) **Electronic Evidence:** For the relevant periods relating to the issues in this litigation, each party shall maintain and preserve all electronic files, other data generated by and/or stored on the party's computer system(s) and storage media (i.e. hard disks, floppy disks, backup tapes), or other electronic data. Such items include, but are not limited to, e-mail and other electronic communications, word processing documents, spreadsheets, data bases, calendars, telephone logs, contact manager information, internet usage files, offline storage or information stored on removable media, information contained on laptops or other portable devices and network access information.

(c) **Other Evidence to be preserved:**

(2) **DOCUMENT PRODUCTION:**

(a) **No later than 45 days after the date of this Order**, the parties shall exchange the following records for the following periods:

(Cross out any item that is not to be exchanged between the parties)

Time Period Requested

_____ to _____ Federal, state and local tax returns, including all schedules, K-1's, 1099's, W-2's and similar data.
_____ to _____ Credit card statements for all credit cards used by a party.
_____ to _____ Joint checking account statements, checks and register.
_____ to _____ Individual checking account statements, checks and register.
_____ to _____ Brokerage account statements.
_____ to _____ Savings account records.
_____ to _____ Other: (specify)_____
_____ to _____ Other: (specify)_____
_____ to _____ Other: (specify)_____

Absent any specified time period, records are to be produced for the **three years** prior to the commencement of this action through the present. If a party does not have complete records for the time period, that party shall take all reasonable steps to obtain such records within the stated time period.

Any written authorization to obtain any such records directly from the source shall be executed by the party within five business days of presentation of such written authorization, or in the event that such authorization is presented at the preliminary conference then it shall be executed at the preliminary conference.

No later than sixty days from the date of this Order, the parties shall notify the Court of all items to be provided above that have not been provided. Failure to comply with the scheduled discovery may result in sanctions, including the award of legal fees.

(b) No later than _____, a notice for discovery and inspection shall be served by plaintiff.

(c) No later than _____, a notice for discovery and inspection shall be served by defendant.

(3) **OTHER DISCOVERY:**

			Plaintiff	**Defendant**
(a)	Interrogatories:	Shall be served no later than	_____	_____
(b)	Party Depositions:	Shall be completed no later than	_____	_____
(c)	3rd-Party Depositions:	Shall be completed no later than	_____	_____
(d)	Other:	_____		

Compliance with discovery demands shall be on a timely basis pursuant to the CPLR. **Failure to comply may result in sanctions, including the award of legal fees.**

H. EXPERTS (Valuation/Financial Experts and Other Experts)

(1) Check if experts are required to value any of the following, and indicate the date of valuation:

		Plaintiff	Defendant	Date of Valuation
(A)	Deferred compensation	☐	☐	
(B)	Retirement assets	☐	☐	
(C)	Business interest	☐	☐	
(D)	Professional practice	☐	☐	
(E)	License/Degree/Certification	☐	☐	
(F)	Jewelry	☐	☐	
(G)	Separate property	☐	☐	
(H)	Residential real estate	☐	☐	
(I)	Commercial real estate	☐	☐	
(J)	Stock options, stock plans or other benefit plan	☐	☐	
(K)	Intellectual property	☐	☐	
(L)	Sports Memorabilia	☐	☐	
(M)	Other Identify:_____	☐	☐	

(2) **Neutral Experts:**

(a) The parties agree to the appointment of the following experts by the Court, and the parties further agree that they will be bound by the results thereof:

1. **Pension Appraisal(s)** ☐ Not applicable

Pension appraisal(s) for ☐ the plaintiff and/or ☐ the defendant shall be performed by:_____ and the cost shall be paid as follows: _____ % by the plaintiff, and _____ % by the defendant.

Each party shall execute any requisite authorizations for pension appraisals and cause the same to be delivered to the above mentioned expert **no later than ten (10) business days from the date of this order**; copies of said authorizations shall be sent at same time to all opposing counsel and the Court.

2. **Real Property Appraisal(s)** ☐ Not applicable

Real Property appraisal(s) for the following real property :

_____

shall be performed by: _____ and the cost shall be paid as follows: _____ % by plaintiff, and _____ % by defendant.

3. **Business Appraisal(s)**

Plaintiff's Business(es): ☐ Not applicable

Appraisal(s) for ☐ the **plaintiff 's business(es)** known as_____

shall be performed by:_____ and the cost

shall be paid as follows: _____ % by plaintiff, and _____ % by defendant.

Defendant's Business(es): ☐ Not applicable

Appraisal(s) for ☐ the **defendant's business(es)** known as_____

shall be performed by:_____ and the cost

shall be paid as follows: _____ % by plaintiff, and _____ % by defendant.

4. **License Valuation(s)**

Plaintiff's ☐ License ☐ Degree ☐ Certification: ☐ Not applicable

Valuation for ☐ the **plaintiff's** _____

shall be performed by:_____ and the cost

shall be paid as follows: _____ % by plaintiff, and _____ % by defendant.

Defendant's ☐ License ☐ Degree ☐ Certification: ☐ Not applicable

Valuation for ☐ the **defendant's** _____

shall be performed by:_____ and the cost

shall be paid as follows: _____ % by plaintiff, and _____ % by defendant.

5. **Other Appraisal** ☐ Not applicable

The Court shall appoint a neutral expert for items _____ listed above in section H.1 (on page 6). Such appraisal(s) for said items shall be performed by _____ and the cost shall be paid as follows: _____ % by plaintiff, and _____ % by defendant.

(b) The parties are unable to agree to the appointment of a neutral expert for the following items _____ listed above in section H 1. (on page 6). Appointment of the expert shall be pursuant to a separate order which shall designate the neutral expert, what is to be valued, the manner of payment, the source of funds for payment, and each party's responsibility for such payment.

The parties may suggest names for the Court to consider appointing. Said names shall be submitted by letter **no later than ten (10) business days from the date of this order.**

(c) The parties shall notify the Court no later than _____ as to whether any other neutral experts are required.

(3) **Experts to be Retained by a Party:** ☐ Not applicable
Each party shall select his/her own expert with respect to items_____ _____listed above. The expert shall be identified to the other party by letter with their qualifications and retained no later than _____. If a party requires fees to retain an expert and the parties cannot agree upon the source of the funds, an application for fees shall be made no later than _____. Any expert retained by a party must represent to the party hiring such expert that he or she is available to proceed promptly with the valuation.

Expert reports are to be exchanged by _____. Absent any date specified, they are to be exchanged 60 days prior to trial. Reply reports are to be exchanged 30 days after service of an expert report.

(4) **Additional Experts:**
If a net worth statement has not been served prior to this order or a party cannot identify all assets for valuation or cannot identify all issues for an expert, the party promptly shall notify the other party as to any valuation or as to which an expert is needed. If the parties cannot agree upon a neutral expert or the retention of individual experts, either party may notify the Court for appropriate action. Timely application shall be made to the Court if assistance is necessary to implement valuation or the retention of an expert.

I. HEALTH INSURANCE COVERAGE NOTICE :

I fully understand that upon the entry of the divorce agreement, I may no longer be allowed to receive health coverage under my former spouse's health insurance plan. I may be entitled to purchase health insurance on my own through a COBRA option, if available, otherwise I may be required to secure my own health insurance coverage.

J. FURTHER ORDERS:

(1) **COMPLIANCE CONFERENCE**
The parties and **their attorneys** shall appear at a compliance conference to be held on

_____ at _____ am/pm .

(2) **NOTE OF ISSUE**
A Note of Issue shall be filed on or before _____. Failure to file a Note of Issue as directed herein may result in dismissal pursuant to CPLR 3216.

(3) **TRIAL**
The trial in this matter shall be held on:_____ at _____ am/ pm

(4) **AUTOMATIC ORDERS (Domestic Relations Law §236(B)(2)(a)&(b)**
PURSUANT TO DOMESTIC RELATIONS LAW § 236 (B)(2)(a) &(b), both parties are bound by the following AUTOMATIC ORDERS, which shall remain in full force and effect during the pendency of the action unless terminated, modified or amended by further order of the Court or upon written agreement between the parties:

(a). Neither party shall sell, transfer, encumber, conceal, assign, remove or in any way dispose of, without the consent of the other party in writing, or by order fo the court, any

property (including, but not limited to, real estate, personal property, cash accounts, stocks, mutual funds, bank accounts, cars and boats) individually or jointly held by the parties, except in the usual course of business, for customary and usual household expenses or for reasonable attorney's fees in connection with this action.

(b). Neither party shall transfer, encumber, assign, remove, withdraw or in any way dispose of any tax deferred funds, stocks or other assets held in any individual retirement accounts, 401k accounts, profit sharing plans, Keogh accounts, or any other pension or retirement account, and the parties shall further refrain from applying for or requesting the payment of retirement benefits or annuity payments of any kind, without the consent of the other party in writing, or upon further order of the court.

(c). Neither party shall incur unreasonable debts hereafter, including, but not limited to further borrowing against any credit line secured by the family residence, further encumbering any assets, or unreasonably using credit cards or cash advances against credit cards, except in the usual course of business or for customary or usual household expenses, or for reasonable attorney's fees in connection with this action.

(d). Neither party shall cause the other party or the children of the marriage to be removed from any existing medical, hospital and dental insurance coverage, and each party shall maintain the existing medical, hospital and dental insurance coverage in full force and effect.

(e). Neither party shall change the beneficiaries of any existing life insurance policies, and each party shall maintain the existing life insurance, automobile insurance, homeowners and renters insurance policies in full force and effect.

Dated: _____

_____ Plaintiff

_____ Defendant

_____ Attorney(s) for Plaintiff

_____ Attorney(s) for Defendant

Dated: _____
Central Islip, New York

SO ORDERED:

_____

Justice of the Supreme Court

EXHIBIT 10

Law Guardians

§ 241. Findings and purpose

This act declares that minors who are the subject of family court proceedings or appeals in proceedings originating in the family court should be represented by counsel of their own choosing or by law guardians. This declaration is based on a finding that counsel is often indispensable to a practical realization of due process of law and may be helpful in making reasoned determinations of fact and proper orders of disposition. This part establishes a system of law guardians for minors who often require the assistance of counsel to help protect their interests and to help them express their wishes to the court. Nothing in this act is intended to preclude any other interested person from appearing by counsel.

§ 242. Law guardian

As used in this act, "law guardian" refers to an attorney admitted to practice law in the state of New York and designated under this part to represent minors pursuant to section two hundred and forty-nine of this act.

§ 243. Designation

(a) The office of court administration may enter into an agreement with a legal aid society for the society to provide law guardians for the family court or appeals in proceedings originating in the family court in a county having a legal aid society.

(b) The appellate division of the supreme court for the judicial department in which a county is located may, upon determining that a county panel designated pursuant to subdivision © of this section is not sufficient to afford appropriate law guardian services, enter into an agreement, subject to regulations as may be promulgated by the administrative board of the courts, with any qualified attorney or attorneys to serve as law guardian or as law guardians for the family court or appeals in proceedings originating in the family court in that county.

(c) The appellate division of the supreme court for the judicial department in which a county is located may designate a panel of law guardians for the family court and appeals in proceedings originating in the family court in that county, subject to the approval of the administrative board of the courts. For this purpose, it may invite a bar association to recommend qualified persons for consideration by the said appellate division in making its designation, subject to standards as may be promulgated by such administrative board.

§ 244. Duration of designation

(a) An agreement pursuant to subdivision (a) of section two hundred forty-three of this chapter may

be terminated by the office of court administration by serving notice on the society sixty days prior to the effective date of the termination.

(b) No designations pursuant to subdivision © of such section two hundred forty-three may be for a term of more than one year, but successive designations may be made. The appellate division proceeding pursuant to such subdivision © may at any time increase or decrease the number of law guardians designated in any county and may rescind any designation at any time, subject to the approval of the office of court administration.

§ 245. Compensation

(a) If the office of court administration proceeds pursuant to subdivision (a)of section two hundred forty-three of this chapter, the agreement shall provide that the society shall be reimbursed on a cost basis for services rendered under the agreement. The agreement shall contain a general plan for the organization and operation of the providing of law guardians by the respective legal aid society, approved by the said administrative board, and the office of court administration may require such reports as it deems necessary from the society.

(b) If an appellate division proceeds pursuant to subdivision (b) of such section two hundred forty-three, the agreement may provide that the attorney or attorneys shall be reimbursed on a cost basis for services rendered under the agreement. The agreement shall contain a general plan for the organization and operation of the providing of law guardians by the respective attorney or attorneys, and the appellate division may require such reports as it deems necessary from the attorney or attorneys.

(c) If an appellate division proceeds pursuant to subdivision © of such section two hundred forty-three, law guardians shall be compensated and allowed expenses and disbursements in the same amounts established by subdivision three of section thirty-five of the judiciary law.

§ 246. Supervision by administrative board

The administrative board of the judicial conference may prescribe standards for the exercise of the powers granted to the appellate divisions under this part and may require such reports as it deems desirable.

§ 248. Appropriations

The costs of law guardians under section two hundred forty-five shall be payable by the state of New York within the amounts appropriated therefor.

§ 249. Appointment of law guardian

(a) In a proceeding under article three, seven, ten or ten-A of this act or where a revocation of an

adoption consent is opposed under section one hundred fifteen-b of the domestic relations law or in any proceeding under section three hundred fifty-eight-a, three hundred eighty-three-c, three hundred eighty-four or three hundred eighty-four-b of the social services law or when a minor is sought to be placed in protective custody under section one hundred fifty-eight of this act, the family court shall appoint a law guardian to represent a minor who is the subject of the proceeding or who is sought to be placed in protective custody, if independent legal representation is not available to such minor. In any proceeding to extend or continue the placement of a juvenile delinquent or person in need of supervision pursuant to section seven hundred fifty-six or 353.3 of this act or any proceeding to extend or continue a commitment to the custody of the commissioner of mental health or the commissioner of mental retardation and developmental disabilities pursuant to section 322.2 of this act, the court shall not permit the respondent to waive the right to be represented by counsel chosen by the respondent, respondent's parent, or other person legally responsible for the respondent's care, or by a law guardian. In any other proceeding in which the court has jurisdiction, the court may appoint a law guardian to represent the child, when, in the opinion of the family court judge, such representation will serve the purposes of this act, if independent legal counsel is not available to the child. The family court on its own motion may make such appointment.

(b) In making an appointment of a law guardian pursuant to this section, the court shall, to the extent practicable and appropriate, appoint the same law guardian who has previously represented the child. Notwithstanding any other provision of law, in a proceeding under article three following an order of removal made pursuant to article seven hundred twenty-five of the criminal procedure law, the court shall, wherever practicable, appoint the counsel representing the juvenile offender in the criminal proceedings as law guardian.

§ 249-a. Waiver of counsel

A minor who is a subject of a juvenile delinquency or person in need of supervision proceeding shall be presumed to lack the requisite knowledge and maturity to waive the appointment of a law guardian. This presumption may be rebutted only after a law guardian has been appointed and the court determines after a hearing at which the law guardian appears and participates and upon clear and convincing evidence that (a) the minor understands the nature of the charges, the possible dispositional alternatives and the possible defenses to the charges, (b) the minor possesses the maturity, knowledge and intelligence necessary to conduct his own defense, and © waiver is in the best interest of the minor.

b. Article 2, Part 6

Counsel for Indigent Adults in Family Court Proceedings

§ 261. Legislative findings and purpose

Persons involved in certain family court proceedings may face the infringements of fundamental interests and rights, including the loss of a child's society and the possibility of criminal charges, and therefore have a constitutional right to counsel in such proceedings. Counsel is often indispensable

to a practical realization of due process of law and may be helpful to the court in making reasoned determinations of fact and proper orders of disposition. The purpose of this part is to provide a means for implementing the right to assigned counsel for indigent persons in proceedings under this act.

§ 262. Assignment of counsel for indigent persons

(a) Each of the persons described below in this subdivision has the right to the assistance of counsel. When such person first appears in court, the judge shall advise such person before proceeding that he or she has the right to be represented by counsel of his or her own choosing, of the right to have an adjournment to confer with counsel, and of the right to have counsel assigned by the court in any case where he or she is financially unable to obtain the same:

(i) the respondent in any proceeding under article ten or article ten-A of this act and the petitioner in any proceeding under part eight of article ten of this act;
(ii) the petitioner and the respondent in any proceeding under article eight of this act;
(iii) the respondent in any proceeding under part three of article six of this act;
(iv) the parent, foster parent, or other person having physical or legal custody of the child in any proceeding under article ten or ten-A of this act or section three hundred fifty-eight-a, three hundred eighty-four or three hundred eighty-four-b of the social services law, and a non custodial parent or grandparent served with notice pursuant to paragraph (e) of subdivision two of section three hundred eighty-four-a of the social services law;
(v) the parent of any child seeking custody or contesting the substantial infringement of his or her right to custody of such child, in any proceeding before the court in which the court has jurisdiction to determine such custody;
(vi) any person in any proceeding before the court in which an order or other determination is being sought to hold such person in contempt of the court or in willful violation of a previous order of the court, except for a contempt which may be punished summarily under section seven hundred fifty-five of the judiciary law;
(vii) the parent of a child in any adoption proceeding who opposes the adoption of such child.
(viii) the respondent in any proceeding under article five of this act in relation to the establishment of paternity.

(b) Assignment of counsel in other cases. In addition to the cases listed in subdivision (a) of this section, a judge may assign counsel to represent any adult in a proceeding under this act if he determines that such assignment of counsel is mandated by the constitution of the state of New York or of the United States, and includes such determination in the order assigning counsel;

(c) Implementation. Any order for the assignment of counsel issued under this part shall be implemented as provided in article eighteen-B of the county law.

EXHIBIT 11

SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART XXVI SUFFOLK COUNTY

PRESENT:
HON. MARLENE L. BUDD

GABRIEL R. FALCO,
Plaintiff,

-against-

LAURA ANN B. FALCO,
Defendant.

INDEX NO.: 21122-2013

ORDER APPOINTING ATTORNEY FOR CHILD(REN)

Upon all of the prior proceedings heretofore had herein, it is hereby,

ORDERED that **Darelle C. Cairo, Esq** with an address at Law Office of Darelle C. Cairo, 131 W. Main Street, Riverhead, NY 11901, telephone: 631-744-5366 is appointed attorney for the subject child(ren): Jackson Falco (DOB: 3/10/2010) and Ella Falco (DOB: 5/5/2012).

ORDERED that upon receipt of this order and UCS 872 (Notice of Appointment and Certification of Compliance), the attorney for the child(ren) shall complete, execute and return UCS 872 to the Fiduciary Clerk;

ORDERED that within 10 days of service of a copy of this order of appointment the parties shall pay to the attorney for the child(ren) a retainer of $2,500.00;

ORDERED that no less often than every 60 days from the date of this order of appointment the attorney for the child(ren) shall send to counsel for the parties bills for compensation and the reimbursement of disbursements;

ORDERED that the attorney for the child(ren) shall bill at a rate of compensation of $250.00 per hour;

ORDERED that subject to reallocation at trial the retainer and all subsequent compensation, including reimbursement for disbursements, shall be paid to the attorney for the child(ren) by the parties according to the following percentages:

50% Plaintiff **50% Defendant**

ORDERED that once the retainer is expended, or where no retainer is authorized, the parties shall pay all bills sent by the attorney for the child(ren) within 20 days of the date of the bill;

ORDERED that all compensation and reimbursement for disbursements billed by the attorney for the child(ren) during the pendency of this action/proceeding shall be approved by the Court in the final order of compensation, which shall be settled by the attorney for the child(ren), on five days notice, at the conclusion of the attorney for the child(ren)'s service in the action/proceeding, or otherwise directed by the Court;

ORDERED that the final order of compensation shall be supported by the attorney for the child(ren)'s affirmation of services on a form approved by the Chief Administrator of the Courts;

ORDERED that within 10 days of service of a copy of the final order of compensation the attorney for the child(ren) shall return to a party any amount paid by that party in excess of his/her share of compensation and reimbursement for disbursements, as approved by the Courts in the final order of compensation;

ORDERED that,

- Counsel for the parties shall immediately contact the attorney for the child(ren) to schedule the interview(s) with the attorney for the child(ren) outside the presence of the parties and their counsel;

- The parties shall make themselves, the child(ren), and anyone living in either party's household, available for interviews with the attorney for the child(ren) (counsel for the parties may be present at any interview between the attorney for the child(ren) and counsel's client, or the party may, upon written consent of his/her counsel, waive counsel's presence);

- Each party, on written consent of his/her counsel, may schedule interviews with the attorney for the child(ren), with or without his/her counsel present, to discuss all issues relevant to custody and visitation (the sequence and frequency of such interviews shall be at the sole discretion of the attorney for the child(ren);

- The parties and counsel shall cooperate with the attorney for the child(ren) in providing any documents, papers or information requested, including executing releases permitting the attorney for the child(ren) to speak with, or receive information from, any mental health professionals, social service workers or agencies, physician, schools, or other persons or entities having material and necessary information regarding the parties or the child(ren);

- The parties shall provide reasonable, private and unhampered access by the children to the attorney for the child(ren), including contact in person or by phone, FAX, email or regular mail;

ORDERED that the attorney for the child(ren) shall make such applications to the court as deemed appropriate, including requests for the appointment of forensic experts to conduct evaluations, the cost of which shall be borne by the parties in the same percentages as have been established for the payment of the attorney for the child(ren)'s compensation, unless the Court directs otherwise;

ORDERED that counsel for the parties shall immediately send the attorney for the child(ren) copies of all papers in the action/proceeding, including pleadings, motion and prior orders, and

ORDERED that the parties, counsel and the attorney for the child(ren) shall appear for a conference in the part at **9:30 am on, October 23, 2013.**

DATED: September 30, 2013
Central Islip, New York

HON. MARLENE L. BUDD

MARLENE L. BUDD
ACTING SUPREME COURT JUSTICE

Attorney for Plaintiff:
Patricia Weiss, Esq
78 Main Street
PO Box 751
Sag Harbor, NY 11963-0019

Phone: 631-725-4486
Fax: 631-725-0295

Email:PWESQSAG@aol.com

Attorney for Defendant:
Jeanmarie P. Costello, Esq
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Phone: 631-727-1090
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Email: jeanmarie@jcpfamilylaw.com

14 CV 00029

JS 44 (Rev. 12/07) (JFB)(AKT)

CIVIL COVER SHEET

CV-14 0029

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS
GABRIEL R. FALCO

(b) County of Residence of First Listed Plaintiff Suffolk
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)
Patricia Weiss, Esq., 78 Main Street, Suite 14,
POB 751, Sag Harbor, NY 11963-0019 (631) 725-4486

DEFENDANTS
JUSTICES OF THE MATRIMONIAL PARTS OF THE SUPREME COURT OF SUFFOLK COUNTY

County of Residence of First Listed Defendant Suffolk
(IN U.S. PLAINTIFF CASES ONLY)
NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)
[unknown]
delivery to: Chief Clerk's Office, 1 Court Street, Riverhead, NY 11901

BIANCO, J.

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

TOMLINSON, M

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance	PERSONAL INJURY	PERSONAL INJURY	☐ 610 Agriculture	☐ 422 Appeal 28 USC 158	☐ 400 State Reapportionment
☐ 120 Marine	☐ 310 Airplane	☐ 362 Personal Injury - Med. Malpractice	☐ 620 Other Food & Drug	☐ 423 Withdrawal 28 USC 157	☐ 410 Antitrust
☐ 130 Miller Act	☐ 315 Airplane Product Liability	☐ 365 Personal Injury - Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881	PROPERTY RIGHTS	☐ 430 Banks and Banking
☐ 140 Negotiable Instrument	☐ 320 Assault, Libel & Slander	☐ 368 Asbestos Personal Injury Product Liability	☐ 630 Liquor Laws	☐ 820 Copyrights	☐ 450 Commerce
☐ 150 Recovery of Overpayment & Enforcement of Judgment	☐ 330 Federal Employers' Liability	PERSONAL PROPERTY	☐ 640 R.R. & Truck	☐ 830 Patent	☐ 460 Deportation
☐ 151 Medicare Act	☐ 340 Marine	☐ 370 Other Fraud	☐ 650 Airline Regs.	☐ 840 Trademark	☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)	☐ 345 Marine Product Liability	☐ 371 Truth in Lending	☐ 660 Occupational Safety/Health		☐ 480 Consumer Credit
☐ 153 Recovery of Overpayment of Veteran's Benefits	☐ 350 Motor Vehicle	☐ 380 Other Personal Property Damage	☐ 690 Other		☐ 490 Cable/Sat TV
☐ 160 Stockholders' Suits	☐ 355 Motor Vehicle Product Liability	☐ 385 Property Damage Product Liability	LABOR	SOCIAL SECURITY	☐ 810 Selective Service
☐ 190 Other Contract	☐ 360 Other Personal Injury		☐ 710 Fair Labor Standards Act	☐ 861 HIA (1395ff)	☐ 850 Securities/Commodities/ Exchange
☐ 195 Contract Product Liability			☐ 720 Labor/Mgmt. Relations	☐ 862 Black Lung (923)	☐ 875 Customer Challenge 12 USC 3410
☐ 196 Franchise			☐ 730 Labor/Mgmt.Reporting & Disclosure Act	☐ 863 DIWC/DIWW (405(g))	☐ 890 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	☐ 740 Railway Labor Act	☐ 864 SSID Title XVI	☐ 891 Agricultural Acts
☐ 210 Land Condemnation	☐ 441 Voting	☐ 510 Motions to Vacate Sentence	☐ 790 Other Labor Litigation	☐ 865 RSI (405(g))	☐ 892 Economic Stabilization Act
☐ 220 Foreclosure	☐ 442 Employment	Habeas Corpus:	☐ 791 Empl. Ret. Inc. Security Act	FEDERAL TAX SUITS	☐ 893 Environmental Matters
☐ 230 Rent Lease & Ejectment	☐ 443 Housing/ Accommodations	☐ 530 General	IMMIGRATION	☐ 870 Taxes (U.S. Plaintiff or Defendant)	☐ 894 Energy Allocation Act
☐ 240 Torts to Land	☐ 444 Welfare	☐ 535 Death Penalty	☐ 462 Naturalization Application	☐ 871 IRS—Third Party 26 USC 7609	☐ 895 Freedom of Information Act
☐ 245 Tort Product Liability	☐ 445 Amer. w/Disabilities - Employment	☐ 540 Mandamus & Other	☐ 463 Habeas Corpus - Alien Detainee		☐ 900 Appeal of Fee Determination Under Equal Access to Justice
☐ 290 All Other Real Property	☐ 446 Amer. w/Disabilities - Other	☐ 550 Civil Rights	☐ 465 Other Immigration Actions		☐ 950 Constitutionality of State Statutes
	☒ 440 Other Civil Rights	☐ 555 Prison Condition			

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.
★ JAN 06 2014 ★
LONG ISLAND OFFICE

V. ORIGIN (Place an "X" in One Box Only)

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION
Cite the U.S. Civil Statute under which you are filing **(Do not cite jurisdictional statutes unless diversity)**:
42 U.S.C. 1983 and 42 U.S.C. 1988
Brief description of cause:
declaratory decree: Suffolk Supreme Justices don't constitutionally apply NY Jud Law 35 (state paid kids' attorney)

VII. REQUESTED IN COMPLAINT:
☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23
DEMAND $
CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY (See instructions): JUDGE none DOCKET NUMBER

DATE 01/03/2014
SIGNATURE OF ATTORNEY OF RECORD Patricia Weiss Esq (PW-6095)

FOR OFFICE USE ONLY
RECEIPT # 14260 AMOUNT $400.00 APPLYING IFP JUDGE MAG. JUDGE

CERTIFICATION OF ARBITRATION ELIGIBILITY

Local Arbitration Rule 83.10 provides that with certain exceptions, actions seeking money damages only in an amount not in excess of $150,000, exclusive of interest and costs, are eligible for compulsory arbitration. The amount of damages is presumed to be below the threshold amount unless a certification to the contrary is filed.

I, Patricia Hess, counsel for Plaintiff, do hereby certify that the above captioned civil action is ineligible for compulsory arbitration for the following reason(s):

- ☐ monetary damages sought are in excess of $150,000, exclusive of interest and costs,
- ☒ the complaint seeks injunctive relief,
- ☐ the matter is otherwise ineligible for the following reason

DISCLOSURE STATEMENT - FEDERAL RULES CIVIL PROCEDURE 7.1

Identify any parent corporation and any publicly held corporation that owns 10% or more or its stocks:

RELATED CASE STATEMENT (Section VIII on the Front of this Form)

Please list all cases that are arguably related pursuant to Division of Business Rule 50.3.1 in Section VIII on the front of this form. Rule 50.3.1 (a) provides that "A civil case is "related" to another civil case for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge." Rule 50.3.1 (b) provides that " A civil case shall not be deemed "related" to another civil case merely because the civil case: (A) involves identical legal issues, or (B) involves the same parties." Rule 50.3.1 (c) further provides that "Presumptively, and subject to the power of a judge to determine otherwise pursuant to paragraph (d), civil cases shall not be deemed to be "related" unless both cases are still pending before the court."

NY-E DIVISION OF BUSINESS RULE 50.1(d)(2)

1.) Is the civil action being filed in the Eastern District removed from a New York State Court located in Nassau or Suffolk County: yes

2.) If you answered "no" above:
a) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in Nassau or Suffolk County?_____

b) Did the events of omissions giving rise to the claim or claims, or a substantial part thereof, occur in the Eastern District?_____

If your answer to question 2 (b) is "No," does the defendant (or a majority of the defendants, if there is more than one) reside in Nassau or Suffolk County, or, in an interpleader action, does the claimant (or a majority of the claimants, if there is more than one) reside in Nassau or Suffolk County?_____

(Note: A corporation shall be considered a resident of the County in which it has the most significant contacts).

BAR ADMISSION

I am currently admitted in the Eastern District of New York and currently a member in good standing of the bar of this court.

☑ Yes ☐ No

Are you currently the subject of any disciplinary action (s) in this or any other state or federal court?

☐ Yes (If yes, please explain) ☑ No

I certify the accuracy of all information provided above.

Signature: Patricia Hess Esq PH-6095