DOMESTIC VIOLENCE AND FAMILY LAW LEGISLATIVE UPDATE
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The 2010 New York State Legislative session culminated in the passage of several significant measures with respect to legal representation, domestic violence, child welfare, juvenile justice, child support and matrimonial proceedings, all but one of which (the Office of the Child Advocate bill, A 3233-b, *infra*) have been signed by the Governor. All are summarized below. Texts and supporting memoranda are available on-line at www.nysenate.gov or www.nyassembly.gov or by calling 1 800 342 9860.

I. REPRESENTATION OF CHILDREN AND ADULTS:

1. Change of term "law guardian" to "attorney for the child" [Laws of 2010, ch. 41]: Consistent with the recommendations of the Matrimonial Commission in its report to the Chief Judge in 2006 and Rule 7.2 of the Rules of the Chief Judge, which was promulgated shortly thereafter, this Family Court Advisory and Rules Committee measure replaces all statutory references to "law guardian" with the term "attorney for the child." The use of the term "attorney" more accurately reflects the mandate for client-directed representation except in very limited circumstances, consistent with attorney ethical requirements. The measure amends the Civil Practice Law and Rules, the Domestic Relations Law, the Executive Law, the Judiciary Law, the Family Court Act, the Public Health Law and the Social Services Law to substitute "attorney" or "counsel" for "law guardian." **Effective: April 14, 2010.**

2. Indigent Defense Commission [Laws of 2010, ch. 56; A 9706-c/S 6606-B, Part E]: This measure, part E of the language bill accompanying the Public Protection Budget for Fiscal Year 2010-2011, establishes an Office of Indigent Legal Services within the Executive branch, with responsibility to "monitor, study and make efforts to improve the quality of services provided pursuant to Article 18-B of the County Law." Its full-time director must be nominated by the Governor for a five-year term and reports to an appointed nine-member Indigent Legal Services Board. The director, who may be removed for cause by a 2/3 vote of the Board, must have had at least five years experience in public defense and have a "demonstrated commitment to the provision of quality public defense representation and to the communities served by public defense providers." The Board, chaired *ex officio* by the Chief Judge, must be appointed by the Governor for three-year terms as follows: one each recommended by the President *Pro Tempore* of the Senate and Speaker of the Assembly, one from a list of at least three from the NYS Bar Association, two from a list of at least four from the NYS Association of Counties, one from a list of at least two from the Chief Administrator of the Courts, one who has at least five years public defense experience and one additional attorney. The Board must evaluate existing indigent legal services programs and determine the "type of indigent legal services...to best serve the interests of persons receiving such services," must consult with and advise the Office of Indigent Legal Services, must accept, reject or modify the Office's allocation of funds and grants and make an annual report to the Governor, Legislature and Judiciary.

The measure also amends the State Finance Law to provide that the Indigent Legal Services Fund must be used to fund the Office of Indigent Legal Services, to assist counties and New York City to improve the quality of Article 18-B representation and to assist the State with respect to assigned counsel under Judiciary Law §35. State funds provided to localities may not supplant existing funds and "maintenance of effort" is required. **Effective: June 22, 2010.**

II. CHILD WELFARE MEASURES:

1. Termination of parental rights of incarcerated parents [Laws of 2010, ch. 113]: This

measure amends Social Services Law §384-b to add an explicit exception to the presumptive requirement that agencies must file termination of parental rights petitions for children who have spent 15 of the past 22 months in foster care. The exception applies to a parent:

• whose incarceration or participation in a substance abuse treatment program is a "significant factor in why the child is in foster care;" and

• where the parent "maintains a meaningful role in the child's life;" and

• where the agency "has not documented a reason why it would otherwise be appropriate" to file a TPR petition.

The assessment of "meaningful role" in the child's life must be based upon evidence, which may include:

• "expressions or acts manifesting concern for the child, such as letters, telephone calls, visits and other forms of communication with the child;"

• efforts by the parent to work with the agency, foster parent "or other individuals of importance in the child's life," attorneys for the parent and child and agencies providing services to the parent, including correctional, mental health and substance abuse "for the purpose of complying with the service plan and repairing, maintaining or building the parent-child relationship;"

• positive response by the parent to the agency's diligent efforts; and

• whether the parent's continued involvement in the child's life is in the child's best interests.

The agency must obtain input regarding these factors from "individuals and agencies in a reasonable position to help make this assessment" and the court may direct the agency to "undertake further steps to aid in completing its assessment."

With respect to permanent neglect cases, the measure requires the court to consider "particular constraints" caused by the incarceration or residential drug treatment, including, but not limited to, limitations upon family contact and "unavailability of social or rehabilitative services " to aid in developing a meaningful relationship, to plan for the child's future and to maintain contact with the child. With respect to abandonment cases, the court may consider "the particular delays or barriers" experienced by parents in prison or treatment centers in keeping agencies apprised of their locations. The agency must obtain from the NYS Office of Children and Family Services and provide to parents in prison or treatment centers information regarding the parents' legal rights and obligations and social or rehabilitative services available in the community, including transitional and family support services. Finally, the statute amends Social Services Law §409-e to authorize use of audio- or video-conferencing technology in order to permit parents in prison or in residential drug treatment to consult in the development and periodic review of family service plans and requires the plans in such cases to "reflect the special circumstances and needs of the child and the family." **Effective: June 15, 2010.**

2. Subsidized kinship guardianship (Laws of 2010, ch. 58, S 6608-b/A 9708-c, Part F): This measure, which is part of the Fiscal Year 2010-2011 New York State budget**,** incorporates and expands upon the Family Court Advisory and Rules Committee's proposal to establish a subsidized kinship guardianship assistance program. Taking advantage of the opportunity to obtain federal Title IV-E funding for guardianships with relatives, pursuant to the *Fostering Connections to Success and Increasing Adoptions Act of 2008* [Public Law 110-351], the measure amends Family Court Act §§1055-b and 1089-a to permit the Family Court to order subsidized kinship guardianship at or after the conclusion of a child protective dispositional hearing or a permanency hearing. This option would be available in child protective cases in which the fact-finding and first permanency hearing have been completed or in voluntary foster care, juvenile delinquency or Persons in Need of Supervision placement cases in which the first permanency hearing has been completed.

As prerequisites, the prospective relative guardian must have entered into a signed

guardianship assistance agreement with the local social services department and must have cared for the child as a foster parent for at least six months prior to the application for the agreement. The relative must file a petition under Article 6 of the Family Court Act or Article 17 of the Surrogate's Court Procedure Act with the court presiding over the child protective or permanency proceeding and the Court may consolidate the proceedings. If enumerated findings are made and the guardianship is granted, all orders under the child protective or permanency proceeding, as applicable, would be terminated; no further permanency hearings would be held and no services or supervision would be provided. In addition to the above prerequisites, in order to determine whether this option would further the child's best interests, the Family Court must consider the child's permanency goal and the relationship between the child and relative. The Court must enumerate compelling reasons for finding that neither adoption nor return home would be in the child's best interests and would, therefore, not be appropriate permanency options. The Court must "hold age-appropriate consultation with the child." If the child is fourteen or older, the Court must ascertain the child's preference and if eighteen or older, the child must consent to the guardianship. The guardianship order must provide that the local social services department and child's attorney must "receive notice of, and be made parties to, any subsequent proceeding to vacate or modify the order of guardianship."

The measure adds a new Title 10 of Article 6 of the Social Services Law [SSL §§458-a - 458-f], which sets forth definitions, eligibility requirements and procedures for the new program. "Child" includes youth under 21, whose "custody, care and custody or custody and guardianship have been committed" prior to the child's eighteenth birthday to a social services official pursuant to a child protective, voluntary, juvenile delinquency or Person in Need of Supervision placement or pursuant to a termination of parental rights proceeding. A "prospective relative guardian" must be related to the child and must have cared for him or her as a "fully certified or approved foster parent for six consecutive months prior to applying for guardianship assistance payments." This means, *inter alia*, that the relative and individuals over the age of eighteen in the relative's home must have undergone the required criminal history check pursuant to Social Services Law §378-a. Additionally, individuals aggrieved by a local social services district's failure to act upon an application within thirty days of its filing or failure to make payments or by the amount of such payments may apply to the New York State Office of Children and Family Services for a fair hearing.

In determining whether to approve the prospective relative guardian and enter into a guardianship assistance agreement, the local social services department must determine that neither adoption nor return home would be appropriate permanency options, that the child has a "strong attachment" to the relative, that "age-appropriate" consultation has been held with the child (including ascertaining the position of a child over fourteen and obtaining consent of a child over eighteen) and that the child has been living with the relative as a foster parent for at least six consecutive months. The department is precluded from considering the financial status of the prospective relative guardian. The guardianship assistance agreement includes provision of non-recurring expenses up to $2000 and remains in effect regardless of whether the guardian moves to another state. The monthly payments must be at least 75% but not more than 100% of the applicable foster care board rate. The guardianship subsidy is payable until the child reaches eighteen or, if the child turned sixteen before the guardianship agreement became effective (that is, letters of guardianship were issued), the subsidy is payable until the child reaches twenty-one if the child is enrolled in a secondary or post-secondary school or vocational program, is working at least eighty hours per month or is medically incapable of either school or employment. The child is also eligible for medicaid assistance if the guardian applies prior to issuance of the letters of guardianship and is eligible for independent living assistance, including education and training vouchers, if the guardianship became effective after the child's sixteenth birthday.

Although the guardianship assistance program does not take effect until April 1, 2011, the New York State Office of Children and Family Services must submit a State plan amendment to the United States Department of Health and Human Services for its approval and make any necessary revisions to its rules and regulations in advance of that date. NYS OCFS must report annually, starting February 1, 2012, to the Governor and Legislature regarding implementation of the program statewide. **Effective: April 1, 2011.**

3. Adoption registry [Laws of 2010, ch. 181]: This New York State Department of Health measure provides that upon receiving a report of a foreign adoption, the NYS Commissioner of Health, rather than a local registrar, must file a birth certificate, provided that there is no other birth certificate other than a birth certificate in the child's country of birth. The birth certificate must be filed upon proof that the parent (not "or the child") resides in New York State at the time of the adoption. Evidence of an IR-4, not simply an IR-3, visa or a successor immigrant visa, suffices. Grandfathering in reports of foreign adoptions made to local registrars, the measure provides that "[a]ny existing certificates of birth data shall continue to be effective" and requires that reports made to local registrars and supporting documentation shall be forwarded by them to the Department of Health. Additionally, by replacing the phrase "each parent" with "either parent," the measure amends the adoption information registry statutes [Public Health Law §§4138-c and 4138-d] to enable information to be released to consenting registrants even if just one, not both, birth parents have signed consents. It further eliminates the ability of a biological sibling to access non-identifying information about an adopted sibling who had not registered and had, therefore, not consented to release of any in formation. **Effective: July 15, 2010.**

4. Restoration of parental rights [Laws of 2010, ch. 343]: Similar to legislation enacted in California in 2005 and Washington in 2007, this Family Court Advisory and Rules Committee measure amends the statutes regarding termination of parental rights to allow the Family Court, in narrowly defined circumstances, to modify dispositional orders committing guardianship and custody of children and to reinstate parental rights. A petition to restore parental rights would be permitted to be filed upon the consent of the petitioner (unless court finds the consent unreasonably withheld), as well as the respondent and child, in the original termination of parental rights proceeding. The termination of parental rights would have to have occurred more than two years prior and the child would be required to be 14 years of age or older, to remain under the jurisdiction of the Family Court and to have a permanency goal other than adoption. The Family Court would be authorized to grant the restoration petition where clear and convincing proof established that it would be in the child's best interests. The Family Court would also have the option, similar to a provision in the Washington statute, to grant the restoration petition provisionally for a period of up to six months, prior to making the restoration permanent. **Effective: Nov. 11, 2010.**

5. Trial discharges of youth in foster care and voluntary re-placements of youth into foster care [Laws of 2010, ch. 342]: This measure, developed by the Family Court Advisory and Rules Committee and Permanent Judicial Commission on Justice for Children, amends the trial discharge provisions of Articles 10 and 10-A of the Family Court Act to explicitly permit the Family Court to extend trial discharges at permanency hearings until youth reach the age of 21; extensions of trial discharges of youth over the age of 18 would require the youth's consent. Additionally, the proposal would create a new Article 10-B of the Family Court Act that would permit youth between the ages of 18 and 21, who have been discharged from foster care within the past 24 months because of their failure to consent to continued care, to make motions before the Family Court that would enable them to return voluntarily to foster care. In such cases, the Family Court would be required to find that the youth has no reasonable alternative to foster care, that the youth consents to attend an appropriate educational or vocational program and that such return is in the youth's

best interests. The local department of social services would have to consent to the child's reentry unless the Court finds that the consent had been unreasonably withheld. **Effective: Nov. 11, 2010.**

6. Abandoned infants [Laws of 2010, ch. 447]: This measure amends Penal Law §260.00 to provide that a person is not guilty of the Class E felony of criminal abandonment of a child when "(a) with the intent that the child be safe from physical injury and cared for in an appropriate manner; (b) the child is left with an appropriate person, or in a suitable location and the person who leaves the child promptly notifies an appropriate person of the child's location; and (c) the child is not more than thirty days old." A similar amendment is made to Penal Law §260.10, endangering the welfare of a child, a Class A misdemeanor. By repealing the affirmative defenses contained in the *Abandoned Infant Protection Act* [Laws of 2000, ch. 156; Penal Law §§260.03 and 260.15], therefore, these amendments make these factors elements of the crime and also increase the ages of the abandoned children covered from five to thirty days old. **Effective: Aug. 30, 2010.**

7. Adoption by unmarried intimate partners [Laws of 2010, ch. 509]: The measure amends Domestic Relations Law §110 to permit "any two unmarried adult intimate partners" to adopt together and substitutes gender-neutral terms "spouse" and "married couple" for "husband" and "wife." **Effective: Sept. 17, 2010).**

III. JUVENILE JUSTICE AND RELEVANT CRIMINAL LAW MEASURES

A. ENACTED:

1. Sexual contact [Laws of 2010, ch. 193]: This measure amends sections 130.00(3) and 260.31(2) of the Penal Law to remove the marital exemption from the definitions of "sexual contact" and to add "emission of ejaculate by the actor upon any part of the victim, clothed or unclothed." The latter change enables charges to be brought of endangering the welfare of a vulnerable elderly, incompetent or physically disabled person, a Class E felony, as well as sexual abuse in all three degrees (a Class D felony or a Class A or B misdemeanor, respectively), instead of simply the Class B misdemeanor of public lewdness [Penal Law §245.00]. **Effective: Oct. 13, 2010.**

2. Orders of protection for designated witnesses [Laws of 2010, ch. 421]: This measure, similar to a measure proposed by the Family Court Advisory and Rules Committee, adds a new subdivision (1-a) to Family Court Act §352.3 to provide that upon issuance of an adjournment in contemplation of dismissal under Family Court Act §315.3 or a disposition under Family Court Act §352.2, the Family Court may issue an order of protection prohibiting the respondent from intimidating or attempting to intimidate any designated witness specifically named in the order. As a prerequisite, the Court must make a finding that the respondent "did previously, or is likely to in the future, intimidate or attempt to intimidate such witness..." [Note: the new provisions protecting designated witnesses apply as well to temporary orders of protection. Family Court Act §304.2(2) authorizes temporary orders of protection, which may be issued any time after a juvenile is taken into custody or is the subject of an appearance ticket or after a petition has been filed, to contain any of the conditions enumerated in Family Court Act §352.3]. **Effective: Nov. 28, 2010.**

3. School bullying [Laws of 2010, ch. 482]: This measure, known as the *Dignity for All Students Act*, adds a new Article 2 to the Education Law to protect public school students from discrimination and harassment by students and school employees on school property and at school functions on the grounds of "actual or perceived race, color, weight, national origin, ethnic group, religion, religious practice, disability, sexual orientation, gender, or sex..." Exceptions are provided for actions, including program exclusions, permitted under state or federal law, e.g., for single-gender schools or athletic teams. Harassment is defined as "the creation of a hostile environment by conduct

or by verbal threats, intimidation or abuse that has or would have the effect of unreasonably and substantially interfering with a student's educational performance, opportunities or benefits, or mental, emotional or physical well-being..." on the basis of, but not limited to, the above grounds. A plain language, age-appropriate version of this policy must be included in all school codes of conduct adopted by local school boards or trustees. The State Education Commissioner is charged with developing model policies, providing grants to school districts, promulgating regulations and establishing a uniform incident reporting mechanism that protects incident reporters from retaliation. Additionally, Education Law §801-a, which requires the Board of Regents to ensure that school curricula include "civility, citizenship and character education," is amended to include "awareness and sensitivity to discrimination or harassment and civility in the relations of people of different races, weights, national origins, ethnic groups, religions, religious practices, mental or physical abilities, sexual orientations, genders, and sexes." Finally, the measure amends Education Law §2801 to permit school suspensions for violations of the anti-discrimination and anti-harassment provisions of the new Article 2 of the Education Law. **Effective: July 1, 2012 (rules or regulations to be promulgated in advance of that date).**

B. <u>Awaiting Governor's Signature</u>: Office of the child advocate [A 3233-b/S 6877; delivered to Governor Sept.20, 2010]: This measure adds a new Article 19-I to the Executive Law [Exec. Law §§533-539] to establish an Independent Office of the Child Advocate within the Executive branch. The Office is charged with examining, reporting to the Governor and Legislature "as needed" but at least twice annually and advocating suggested legislative, regulatory or policy changes regarding "particular and systemic issues" in juvenile justice programs overseen by the NYS Office of Children and Family Services and "multi-systemic issues that children in the juvenile justice system experience in accessing needed services across systems." The authority of the Office includes placements with local departments of social services, as well as with NYS OCFS, and includes youth in all types of juvenile justice programs. The Office is to be headed by a Child Advocate, who is appointed for a five-year tem by, and reports to, the Governor and who may hire staff with expertise in juvenile justice, child welfare, child behavioral health, foster care, preventive services or child care. The Child Advocate must have had at least five years of experience in juvenile justice, child welfare or childhood behavioral health.

The Office must conduct periodic inspections of NYS OCFS facilities, with or without prior notice, and its staff may "visits all areas and observe all parts and aspects" of the programs. Where the Office identifies a systemic problem involving NYS OCFS, a local social service department or any public or private entity contracting with OCFS or a local social services department, it must submit a written report of findings and recommendations to the agency or entity, which has the option to respond in writing within 90 days. Within 30 days of receipt of the response, the Child Advocate must submit its report on the issue to the Governor and Legislature and if no response has been received from the agency or entity, the report must so indicate. The Office has the right to inspect and copy any records necessary to carry out its functions, must keep records identifying children confidential and has the authority to subpoena records and individuals. The State must indemnify the Child Advocate and his or her staff and retaliation against anyone making a complaint to the Office of the Child Advocate is prohibited. Executive Law §501 is amended to ensure access by the Office of the Child Advocate to NYS OCFS facilities, individuals and (except as prohibited by federal law or regulation) records. Additionally, the Office of the Child Advocate must take steps to inform children and adults of its services and procedures and must "create informational materials regarding the rights of children" in detention centers, facilities operated by NYS OCFS, jails, or prisons "and the methods and assistance available to enforce those rights." **Effective: April 1, 2011 (regulations or policies to be promulgated in advance of that date).**

IV. <u>DOMESTIC VIOLENCE MEASURES</u>:

1. Electronic and facsimile transmission of orders of protection for service [Laws of 2010, ch. 261]: This measure amends Family Court Act §153-b and Domestic Relations Law §§240(3-a), 252 to permit orders of protection, temporary orders of protection and "any associated papers that may be served simultaneously" in Family Court and Supreme Court matrimonial proceedings to be transmitted to peace or police officers electronically or by facsimile so that they can provide "expedited service." By making the authorization statewide and permanent, it thus expands upon the temporary authority in Laws of 2007, ch. 330, for the judiciary to establish pilot projects in designated counties for electronic and facsimile transmission of orders to law enforcement. The measure also fully conforms Domestic Relations Law §§240(3-a) and 252 to Family Court Act §153-b to incorporate the presumption of service of temporary orders of protection and orders issued upon default by a police or police officer unless the party requesting the order states on the record that he or she will make alternative arrangements. **Effective: July 30, 2010.**

2. Crime of endangering the welfare of an incompetent or physically disabled person [Laws of 2010, ch. 14]: This measure amends Penal Law §§260.32 and 34 to expand the crimes of endangering the welfare of vulnerable elderly persons in the first and second degrees, Class D and E felonies, respectively, to include "incompetent or physically disabled persons." The definition of "caregiver" in Penal Law §260.31(1) is expanded to include a caregiver for an "incompetent or physically disabled" person. Penal Law §260.31(4) defines "incompetent or physically disabled" person as "an individual who is unable to care for himself or herself because of physical disability, mental disease or defect." **Effective: May 22, 2010.**

3. Special ballots for Victims of Domestic Violence [Laws of 2010, ch. 38]: Expanding upon the statute permitting victims of domestic violence to cast paper ballots at the Board of Elections, rather than having to appear at their local polling stations [Laws of 1996, ch. 702], this statute conforms the definition of those covered by the term "members of the same household or family" in Election Law §11-306 to include those within the "intimate relationship" definition enacted by Laws of 2008, ch. 326. Additionally, the scope of the statute is enlarged to include domestic violence victims who fled their homes to escape emotional harm, in addition to those who fled to escape physical harm to themselves or members of their families or households. **Effective: April 14, 2010.**

4. Confidentiality of Election Records of Domestic Violence Victims [Laws of 2010, ch. 73]: This measure permits a victim of domestic violence to apply in the Supreme Court of the county in which the victim is registered to vote for an order to keep the victim's election registration records confidential. A victim of domestic violence is defined similarly to Family Court Act §812 to encompass a person abused by a "family or household member," which includes a present or former spouse, a person with whom the victim has a child in common, a person to whom the victim is related by consanguinity or affinity or a person in a present or former "intimate relationship" with the victim. Domestic violence is defined to include an act or acts that resulted in actual physical or emotional injury or created a substantial risk of physical or emotional harm to the victim or the victim's child and that involved commission of a violent felony, as defined in Penal Law § 70.02, disorderly conduct, harassment in the first or second degree, aggravated harassment in the second or third degree, stalking in the fourth degree, criminal mischief, menacing in the second or third degree, reckless endangerment, assault in the third degree or an attempted assault. Upon granting of such an order, the records must be kept separate from other records and not be made available for inspection or copying except by election officials when such records are "pertinent and necessary" to their performance of their official duties. **Effective: May 5, 2010.**

5. Strangulation [Laws of 2010, ch.405]: This measure amends the Penal Law, the Criminal

Procedure law and the Family Court Act to create new crimes of strangulation and to include the new crimes in the list of family offenses for which criminal and Family Courts exercise concurrent jurisdiction. The new crime has three degrees ranging from criminal obstruction of breathing or blood circulation, a Class A misdemeanor, to criminal strangulation in the first and second degrees, which are, respectively, Class C and D violent felonies. It is a valid affirmative defense if a strangulation procedure was performed for a valid medical or dental purpose. **Effective**: **November 11, 2010.**

6. Orders of Protection: Non-contemporaneous events [Laws of 2010, ch. 341]: Overruling a line of appellate cases, this measure amends the Family Court Act and Domestic Relations Law to provide that an order of protection cannot be denied simply because the events alleged are not "relatively contemporaneous" with the application. **Effective: August 13, 2010 (applies to OP's pending and entered after that date)**

7. Extensions of orders of protection [Laws of 2010, ch. 325]: This bill authorizes the Family Court, upon motion, to extend an order of protection for a "reasonable period" of time upon a showing of good cause (instead of the current standard of "special circumstances") or upon the parties' consent. The fact that abuse hasn't occurred during the pendency of the order may not be a ground to deny the extension. The court must state "a basis for its decision" on the record. **Effective: August 13, 2010 (applies to OP's pending and entered after that date)**

8. Extension of referee and judicial hearing officer authority to hear *ex parte* applications for temporary orders of protection [Laws of 2010, ch. 363]: This measure provides a two-year extension of referee and JHO authority to Sept. 1, 2012 to hear *ex parte* applications for orders of protection statewide at any hour. **Effective: August 13, 2010.**

9. Service of Extensions and Violations of Orders of Protection [Laws of 2010, ch. 446]: This Family Court Advisory and Rules Committee measure amends Family Court Act §153-b to provide litigants with the same options of peace and police officer service for modified orders and for petitions alleging violations of orders of protection as they have for original orders and accompanying pleadings. Consistent with legislation enacted in 2007, as well as requirements of the federal *Violence Against Women Act*, it further clarifies that such service must be available without fee to the litigants. *See* Laws of 2007, ch. 36; 42 U.S.C.A. §3796hh(c)(4). **Effective: August 30, 2010.**

V. CHILD SUPPORT AND MATRIMONIAL MEASURES:

1. *"Low Income Support Obligation and Performance Improvement Act; "* modification of child support orders [NYS OTDA bill; Laws of 2010, ch. 182]:

a. Modifications of child support orders, judgments and stipulations: Incorporating a proposal made by the Family Court Advisory and Rules Committee, this bill, submitted by the New York State Office of Temporary and Disability Assistance, resolves the disparity between public and private child support cases regarding standing to seek child support modification. Under present law, in Title IV-D cases, including both cases of custodial parents on public assistance whose rights are assigned to local departments of social services and custodial parents who have requested child support services, child support petitioners may obtain complete review of child support orders by objecting to the periodic cost of living adjustments [*Tompkins County Support Collection Unit on behalf of Linda S. Chamberlin v. Boyd M. Chamberlin*, 99 N.Y.2d 328 (2003)], in contrast to private litigants, including parents not in receipt of child support services, who must demonstrate an unforeseen change in circumstances, pursuant to *Matter of Boden v. Boden*, 42 N.Y.2d 210, 213 (1977). Unless litigants specifically opt out in an agreement, this measure would afford all litigants standing to apply for a modification by using either of two new standards: the passage of three years or a 15% change in the gross income of either party subsequent to the date of the most recent

original or modified order. The substantial change of circumstances threshold would remain as an alternative ground for standing to obtain a modification.

All child support orders must contain a notice of the right to apply for a modification based upon the passage of three years, 15% change in income or substantial change in circumstances.

Finally, in cases where the custodial parent is on public assistance, where a respondent is directed by the Family Court to participate in a work program and such program generates the obligor's child support payments, the Support Collection Unit is barred for one year from filing a petition to modify the child support order.

b. Employer obligations: The measure requires employers to report whether dependent health coverage is available and the date the employee qualifies to receive them.

c. Retroactive child support: The measure provides that retroactive support is payable and enforceable through an income deduction order pursuant to Family Court Act §440.

d. Incarceration of child support obligors: The measure provides that incarceration of the support obligor does not preclude a finding of a substantial change in circumstances that would permit an application to modify a child support order, provided that such incarceration is neither the result of non-payment of a child support order nor an offense against the custodial parent or child who is the subject of the order or judgment.

Effective: Oct. 13, 2010 (90 days after Governor's July 15, 2010 signing), although employer reporting obligation takes effect July 15, 2011 (one year from signing).

2. No-fault divorce [Laws of 2010, ch. 384]: This measure allows a spouse to obtain a divorce unilaterally by adding "irretrievable breakdown" for at least six months as a ground for divorce. All financial, custody and visitation issues must be resolved and incorporated into the divorce judgment prior to the divorce being granted. **Effective: Oct. 12, 2010.**

3. Temporary and final post-marital maintenance [Laws of 2010, ch. 371]: This measure establishes a formula for calculating presumptive guideline amounts for temporary post-marital maintenance, expands the factors to be utilized in determining final orders of maintenance and requires the Law Revision Commission to perform a study to guide further legislation, particularly with respect to final orders of maintenance. It directs the judiciary to promulgate any necessary rules in order to implement the statute. Significantly, the measure only amends the Domestic Relations Law**,** not the Family Court Act, and thus applies on a mandatory basis only in Supreme Court matrimonial proceedings. It may, however, be applied in Family Court proceedings on a discretionary basis in the determination of a "fair and reasonable" maintenance award in accordance with Family Court Act §412**.**

a. Temporary Maintenance Formula and Factors: Perhaps most significant, a new subdivision (5-a) is added to Domestic Relations Law §236B to delineate the formula and factors for temporary maintenance. First, where the payor's income is up to or including the income cap of $500,000 (adjustable every two years, starting January 31, 2012, based upon Consumer Price Index changes), the guideline amount for temporary maintenance would be the lesser of:

- 30% of the payor's income up to the income cap minus 20% of the payee's income OR
- 40% of the SUM of the payor's income up to the income cap plus the payee's income MINUS the payee's income (i.e., the remainder after deducting the payee's income from 40% of the sum of the payor's income up to the income cap plus the payee's income)

If the presumptive guideline amount would be zero or less, the presumptive temporary maintenance

award would be zero. If the presumptive amount would reduce the payor's income below the self-support reserve amount for a single adult, the guideline amount would be the difference between the payor's income and the self-support reserve. Where the payor's income is already below the self-support reserve, a rebuttable presumption of no temporary maintenance would apply. *See* DRL §§236B 5-a (c)(1)(c), 236B 5-a (c)(1)(d), 236B 5-a (c)(3) .

Second, where the payor's income exceeds the income cap (currently $500,000, adjustable every two years as above), the temporary maintenance guideline would be the amount calculated as above for the payor's income up to the income cap, with an additional amount added through consideration of the following 19 enumerated factors:

- length of the marriage,
- substantial difference in the parties' incomes,
- standard of living during the marriage,
- age and health of the parties,
- present and future earning capacity of the parties,
- need of a party to incur educational or training expenses,
- "wasteful dissipation of marital property,"
- transfer or encumbrance of property "in contemplation of of a matrimonial action without fair consideration,"
- "existence and duration or a pre-marital joint household or a pre-divorce separate household,"
- actions by one party against the other that "inhibit a party's earning capacity or ability to obtain meaningful employment," including, but not limited to, domestic violence as defined in Social Services Law §459-a,
- availability and cost of medical insurance for the parties,
- care of children, stepchildren, adult disabled children or stepchildren, elderly parents or in-laws that "inhibit a party's earning capacity or ability to obtain meaningful employment,"
- inability of a party to obtain meaningful employment due to age or absence from the workforce,
- need to pay for "exceptional additional expenses" for the child or children, including, but not limited to, school, child-care or medical expenses,
- tax consequences for each party,
- marital property subject to distribution,
- reduced or lost earning capacity of party seeking temporary maintenance as a result of foregoing or delaying education, training or employment opportunities,
- contributions of party seeking temporary maintenance to the "career or career potential" of the other party, and
- "any other factor which the court shall expressly find to be just and proper."

In all cases, the length of the marriage must be considered in determining the duration of the temporary order. A temporary order automatically terminates upon the earlier of the issuance of a final order or death of either party. Significantly, the Court must set forth the factors considered and reasons for its decision in a written order, a requirement that may not be waived by either of the parties.

b. Variances from the temporary maintenance formula: The Court must award the presumptive guidelines amount unless it finds it to be "unjust or inappropriate" and thereby adjusts it based upon a consideration of all of the above factors except length of the marriage and substantial differences in income of the parties. [Length of the marriage, as noted, is relevant to the duration of the order]. Where deviating from the presumptive guidelines amount, the Court must state the factors and bases for any adjustment in a written order, a non-waivable requirement. Where a party defaults and/or the Court has insufficient information to calculate his or her gross income, the Court must

order an amount based upon the greater of the payee's needs or the parties' standard of living prior to commencement of the divorce action.

c. Notice to unrepresented parties; stipulations and agreements; modifications: Where either or both parties are unrepresented, the Court must inform the parties of the presumptive guideline amount prior to entry of a temporary maintenance order. Where, after the effective date of the provision, the parties present a stipulation or agreement for incorporation into an order, the agreement must specify that the parties have been informed of the presumptive amount and that the agreement either reflects it or, if not, the reasons for any variance. A difference between the presumptive guideline amount and the amount ordered prior to the effective date of the statute is not a change of circumstances justifying modification.

d. Final maintenance factors: The measure makes current Domestic Relations Law §236B(6) applicable only to final maintenance awards. It sets no formula for final maintenance but adds the following factors to the existing list of final maintenance considerations:

- need of a party to incur educational or training expenses,
- "existence and duration or a pre-marital joint household or a pre-divorce separate household,"
- actions by one party against the other that "inhibit a party's earning capacity or ability to obtain meaningful employment," including, but not limited to, domestic violence as defined in Social Services Law §459-a.
- care of children, stepchildren, adult disabled children or stepchildren, elderly parents or in-laws that "inhibit a party's earning capacity or ability to obtain meaningful employment,"
- inability of a party to obtain meaningful employment due to age or absence from the workforce,
- need to pay for "exceptional additional expenses" for the child or children, including, but not limited to, school, child-care or medical expenses,
- equitable distribution of marital property, and
- availability and cost of medical insurance for the parties.

e. Law Revision Commission Study: The measure directs the Law Revision Commission to prepare a comprehensive review of the economic consequences of divorce upon the parties and of the effectiveness of maintenance laws in "ensuring that the economic consequences of divorce are fairly and equitably shared by the divorcing couple." The Law Revision Commission's preliminary report and recommendations are due **May 30, 2011** (nine months from the effective date of the statute) and a final report and recommendations are due by **December 31, 2011.**
Effective: temporary and final maintenance provisions effective October 12, 2010 (applicable only to matrimonial actions commenced on or after that date); Law Revision Commission study and court rules provisions effective August 13, 2010.

4. Counsel and expert fees in matrimonial actions [Laws of 2010, chs. 329 + 415]: This measure establishes a rebuttable presumption that fees for attorneys and experts in matrimonial proceedings shall be paid by the monied spouse. Applications for such fees may be made at any time prior to final judgment, including *pendente lite*. Both parties must file affidavits detailing their arrangements with counsel, including retainers. The court must ensure that the parties are adequately represented, including ordering *pendente lite* payment. The "chapter amendment" (A 11576/ S 8391) advanced the effective date from 120 to 60 days after the Governor signs the bill.
Effective: October 12, 2010 (applies to actions + proceedings commenced on or after effective date).

5. Pension exemption from automatic orders [Laws of 2010, ch. 32]: On March 30, 2010, a chapter amendment was signed to the automatic order legislation [Laws of 2009, ch. 72], retroactive to September 1, 2009, the effective date of Chapter 72, in order to allow retirees to continue to receive retirement benefits notwithstanding the commencement of a matrimonial action. It amends Domestic Relations Law §236B(2)(b)(2) to exempt transfers of retirement plan assets from the restrictions upon transfers of assets upon the commencement of matrimonial actions where a party is in "pay status," that is, receiving payments from the retirement plan. **Effective: September 1, 2009 [signed March 30, 2010]. Effective: Sept. 1, 2009.**