BASICS OF CHILD SUPPORT

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I. SOURCES OF LAW

A. Domestic Relations Law (DRL §§ 236 and 240)

B. Family Court Act (FCA Arts. 4 and 5)

II. FORMS

A. Forms are Available from the NYS Office of Court Administration at http://nycourts.gov/forms/index.shtml

B. The Child Support Standards Chart is available at https://www.newyorkchildsupport.com/dcse/pdfs/cssa_2016.pdf

Prior years's charts are available by changing the year in the address (e.g., cssa_2015, cssa_2014, etc)

III. RESEARCH MATERIALS

Available at the Support Magistrates' Intranet Site
http://inside-ucs.org/courts/magistrates/index.shtml

IV. WHO MAY RECEIVE SUPPORT? - FCA § 422

A. Either parent

B. A caretaker on behalf of a child

C. A child

D. A Department of Social Services (DSS) on behalf of a child

V. WHO MUST PAY CHILD SUPPORT?

A. Either or both parents

B. Step parents - FCA § 415

1. Only if the child will become a public charge.

2. Child Support guidelines do not apply.
   Rockland County Dept. of Social Services v. Alexander, 151 Misc.2d 447 (Fam. Ct., Rockland Cty. 1992); see also, Commissioner of Social Services of City of New York v. Nieves, 229 A.D.2d 325 (1st Dept., 1996).

3. Obligation ceases when child no longer in danger of becoming a public charge or when the marriage is terminated.

C. Adoptive parents

VI. COMMENCEMENT OF OBLIGATION FOR SUPPORT - FCA § 449; DRL § 236B(7)(a)

A. Filing of support petition in Family Court

B. Application for support as part of a matrimonial action

C. Date child began receiving public assistance if petitioner is DSS

VII. TERMINATION OF SUPPORT OBLIGATION

A. Child reaches 21

B. Emancipation

1. Child supporting self. But full time work does not result in emancipation if the child still relies on one or both of the parents for significant economic support. Drumm v. Drumm, 88 A.D.3d 1110 (3rd Dept., 2011); Thomas B. v Lydia D., 69 A.D.3d 24 (1st Dept., 2009).

2. Child marries

3. Child abandons home without good cause (Constructive Emancipation). Roe v. Doe, 29 N.Y.2d 188 (1971); Bogin v. Goodrich, 265 A.D.2d 779 (3rd Dept., 1999); Alice C. v. Bernard G.C., 193 A.D.2d 97 (2nd Dept., 1993). However a child who leaves the home with good cause is still entitled to support. Drumm v. Drumm, 88 A.D.3d 1110 (3rd Dept., 2011); Thomas B. v Lydia D., 69 A.D.3d 24 (1st Dept., 2009)

C. Death of child or supporting parent.

D. Adoption of the child by another parent. DRL § 117.1(a). The effect of an adoption is to terminate the parent's support obligation without further court order. Betz v. Horr, 276 N.Y. 83 (1937); Harvey-Cook v. Neill, 118 A.D.2d 109 (2nd Dept., 1986)

E. Voluntary surrender of child born out of wedlock to a social services official. SSL § 398(6)(f). But see Greene Co. Dept. of Social Services v. Ward, 8 N.Y.3d 1007 (2007), where the Court of Appeals held that this provision only applies to out-of-wedlock *biological* children. The court denied the application of an unwed adoptive mother who sought to terminate her support obligation when she surrendered the child to the County.

VIII. CHILD SUPPORT STANDARDS ACTS (CSSA)

A. Enacted in 1989, it creates a rebuttable presumption in favor of child support guidelines.

B. Agreements on consent must comply with CSSA.
All support agreements must state that the parties were advised of the provisions of the CSSA, the amount that the support obligation would presumptively have been under the CSSA and, to the extent that the obligation varies from the presumptive obligations, the factors on which the variance was determined. FCA § 413(1)(h) and DRL § 240(1)(h). Bill v. Bill, 214 A.D.2d 84 (2nd Dept., 1995); Sievers v. Estelle, 211 A.D.2d 173 (3rd Dept., 1995).

C. Income is the "gross (total) income as should have been or should be reported in the most recent federal income tax return." FCA § 413(1)(b)(5)(i), DRL § 240(1-b)(b)(5)(i).

1. The Family Court Act does not prohibit "reliance upon partial information from a tax year not yet completed." Kellogg v Kellogg, 300 A.D.2d 996 (4th Dept., 2002); Culhane v. Holt, 28 A.D.3d 251 (1st Dept., 2006); Taraskas v. Rizzuto, 38 A.D.3d 910 (2nd Dept., 2007); Armstrong v. Armstrong, 72 A.D.3d 1409 (3rd Dept., 2010)

2. Where a party provides credible evidence that the overtime would not be available in the current tax year, it is proper to base an obligation on the base pay only. Taraskas v. Rizzuto, 38 A.D.3d 910 (2nd Dept., 2007).

D. All income is counted except:

1. Unreimbursed business expenses;
2. Alimony or maintenance paid to a non-party spouse;
3. Alimony or maintenance paid to the party spouse provided that the order provides for a specific adjustment of child support upon the termination of the alimony or maintenance obligation;

a. The Appellate Divisions are split on whether a payor is entitled to a deduction from income if the agreement/order does not provide for an increase when maintenance terminates. The 1st and 4th Depts have held that the payor is not entitled to a reduction. Schmitt v. Schmitt, 107 A.D.3d 1529 (4th Dept., 2013); Jarrell v. Jarrell, 276 A.D.2d 353 (1st Dept., 2000). The 2nd and 3rd Depts have held that the payor is entitled to the deduction. Nichols v. Nichols, 19 AD3d 775 (3rd Dept., 2005); Lee v. Lee, 79 A.D.3d 473 (2nd Dept.2005).

b. The Appellate Divisions are also split on whether maintenance is income to the payee-spouse. The 1st and 3rd Depts have held that the maintenance is income to the payee. Hughes v. Hughes, 79 A.D.3d 473 (1st Dept., 2010); Nichols v. Nichols, 19 AD3d 775 (3rd Dept., 2005). The 2nd and 4th Depts have held that the maintenance is not income unless and until it is included in the prior year's tax return. Lee v. Lee, 79 A.D.3d 473 (2nd Dept.2005); Huber v Huber, 229 A.D.2d 904 (4th Sept., 1996).

4. Child support paid to other children;
5. Public Assistance;
6. Supplemental Security Income (SSI);
7. NYC or Yonkers tax;
8. FICA (7.65% of earned income - This consists of 1.45% on all earned income for Medicare tax and 6.20% of earned income up to $106,800 in 2010 for Social Security).

E. Distributive awards, even when based upon enhanced earning capacity resulting from a professional license obtained during the marriage, are not deducted from the payor's income or added to the payee's income. Holterman v. Holterman, 3 N.Y.3d 1 (2004).

IX. CHILD SUPPORT COMPUTATION

A. Child Support Percentages - FCA § 413(1)(b)(3), DRL § 240(1-b)(b)(3)
   1. One child - 17%
   2. Two children - 25%
   3. Three children - 29%
   4. Four children - 31%
   5. Five or more children - 35%

B. Percentages mandatorily applied up to the first $143,000 of combined income. The amount of additional support for the income exceeding $143,000 is determined by applying the factors listed in section FCA § 413(1)(f) or DRL § 240(1-b)(f) (see D below for factors) and/or the child support percentage. FCA § 413(1)(c)(2&3); DRL § 240(1-b)(c)(2&3); See, Cassano v. Cassano, 85 N.Y.2d 649 (1995); Carr v. Carr, 309 A.D.2d 1001 (3d Dept., 2003).

C. Effective March 1, 2018, and every two years thereafter, the "$143,000 cap" will increase based upon changes in the Consumer Price Index. SSL § 111-i(2).

D. Percentages must be used unless the court finds that the order would be unjust or inappropriate. FCA § 413(1)(f), DRL § 240(1-b)(f). The court must review the following factors in making such a determination:

1. The financial resources of the custodial and non-custodial parent, and those of the child;
2. The physical and emotional health of the child and his/her special needs and aptitudes;
3. The standard of living the child would have enjoyed had the marriage or household not been dissolved.
4. The tax consequences to the parties;
5. Non-monetary contributions the parents will make toward the well-being of the child;
6. The educational needs of either parent.
7. A determination that the gross income of one parent is substantially less than that of the other;
8. The needs of the children not subject to the order;
9. Extraordinary expenses incurred in visitation;
10. Any other factor the court deems relevant.

E. Split or Shared Custody

1. Split Custody - Where the physical custody of the children is split between the parties, each party is responsible for paying support to the other party for the child or children in that party's custody. The Court then determines the net support payment. Riseley v. Riseley 208 A.D.2d 132 (3rd Dept., 1995).

2. Shared Custody

a. In virtually every case, a determination of the primary custodian can be made. The CSSA requires a determination of the basic child support obligation in every case and, where appropriate, a deviation may be made to account for the shared custody. Bast v. Rossoff, 91 N.Y.2d 723 (1998)
b. In cases where primary physical custody cannot be determined, the parent with the greater income is the non-custodial parent for CSSA purposes. Baraby v. Baraby, 250 A.D.2d 201 (3rd Dept., 2000).

F. Poverty Level

1. Where the annual amount of the basic child support obligation would reduce the non-custodial parent's income below the Federal poverty level for a household of one,

currently $11,880 annually (2016), the obligation is $25 per month. FCA § 413(1)(d), DRL § 240(1-b)(d).

2. The CSSA sets the presumptively minimum support order at $25 per month (FCA § 413(1)(g), DRL § 240(1-b)(g)), but the presumption can be rebutted by consideration of the variance factors (FCA § 413(1)(f), DRL § 240(1-b)(f)). See, Broome Co. DSS v. Meaghan XX, 2013 WL 6182496 (3rd Dept., 2013).

G. Self-Support Reserve

1. Support order may not reduce non-custodial parent's income below the self-support reserve (135% of Federal poverty level for a household of one, currently $16,038 annually (2016)). FCA § 413(1)(d); DRL § 240(1-b)(d). If it does, the obligation is $50 per month, or the difference between the self-support reserve and the non-custodial parent's income, whichever is greater.

2. However, where the basic child support obligation reduces the non-custodial parent's income below the self-support reserve but above the poverty level, the court may, "in its discretion", award or allocate health, education and child care expenses in addition to the basic payment.

3. The self-support reserve is adjusted on March 1 of each year based upon the poverty levels published by the United States Department of Health and Human Services. FCA § 413(1)(b)(6), DRL § 240(1-b)(b)(6). The Federal poverty guidelines are available at http://aspe.hhs.gov/poverty/index.shtml.

X. OTHER ITEMS OF SUPPORT

A. Health Insurance (FCA § 416; DRL § 240(1)(b)):

1. Parties are required to provide health insurance if "reasonable in cost" and "reasonably accessible"
   a. Health insurance is presumed to be reasonable in cost if the cost of the benefits does not exceed 5% of the combined parental gross income.
   b. Health insurance is presumed to be reasonably accessible if the child lives within 30 miles or 30 minutes from the provided services.
   c. Both presumptions are rebuttable.

2. If health insurance is unavailable, the Court shall direct the custodial parent to maintain or apply for Child Health Plus or Medicaid.

B. Cash Medical Support (FCA § 413(1)(c)(5); DRL § 240(1-b)(c)(5))

1. Cash medical support is the combination of health insurance premiums, whether publicly or privately provided, and unreimbursed health care expenses.

2. Private health insurance or Child Health Plus premiums are prorated between the parties. If the custodial parent provides the health insurance, then the non-custodial parent's share is added to the basic child support obligation. If the non-custodial parent provides the health insurance, then the custodial parent's share is deducted from the basic child support obligation.

3. If health insurance is unavailable and the child(ren) are receiving Medicaid, the non-custodial parent may be directed to pay a portion of the premium.

4. Unreimbursed health-related expenses are apportioned *pro-rata*.

C. Child care costs (FCA § 413(1)(c)(4); DRL § 240(1-b)(c)(4))

1. Custodial parent working or receiving elementary, secondary or higher education, or vocational training which will lead to employment.

2. Child care costs are apportioned *pro rata.*

D. Optional costs:

1. Child care when the custodial parent is seeking work and incurs expenses as a result. FCA § 413(1)(c)(6).

2. Post-secondary, private, special, or enriched education where the court finds such education appropriate. FCA § 413(1)(c)(7).

XI. MODIFICATION OF THE SUPPORT OBLIGATION

A. Orders entered prior to October 13, 2010

1. Court-ordered support not resulting from a separation agreement or stipulation.

a. A party requesting modification has the burden to show that a change of circumstances has occurred warranting a modification of the order of support in the child's best interests. Michaels v. Michaels, 56 N.Y.2d 924 (1982).

b. Where the change of circumstances resulted from a party's own wrongful conduct, the request for a downward modification will be denied. Knights v. Knights, 71 N.Y.2d 865 (1988); Winn v. Baker, 2 A.D.3d 1169 (3d Dept., 2003).

2. Support obligation resulting from a separation agreement or stipulation ("Boden/Brescia" standard)

    a. A party seeking an upward modification of an order of support contained within a separation agreement or a stipulation has the burden of demonstrating

        (1) that the agreement was not fair or equitable when it was entered into,

        (2) that there has occurred an unanticipated and unreasonable change of circumstances, Boden v. Boden, 42 N.Y.2d 210 (1977); Cook v. Bornhorst, 230 A.D.2d 934 (3rd Dept., 1996.)

        (3) that the basic needs of the child are not being adequately met. Brescia v. Fitts, 56 N.Y.2d 132 (1982).

    b. An upward modification cannot be granted solely upon the increased needs of a child and/or the increased income of the noncustodial parent. Overbaugh v Schettini, 103 A.D.3d 972 (3rd Dept. 2013); Friedman v. Friedman, 65 A.D.3d 1081 (2nd Dept., 2009)

    c. A party seeking an downward modification of an order of support contained within a separation agreement or a stipulation has the burden of demonstrating

        (1) that the agreement was not fair or equitable when it was entered into;

        (2) that there has occurred an unanticipated and unreasonable change of circumstances, or

        (3) that the party has suffered a material adverse change in his financial circumstances subsequent to entering into the agreement. Feld v. Feld, 214 A.D.2d 884 (3rd Dept., 1995); Allen v. Bowen, 149 A.D.2d 828 (3rd Dept., 1989).

B. Orders entered on or after October 13, 2010

    1. Grounds are spelled out on DRL § 236-B(9) and FCA § 451

    2. The party seeking a modification must show:

        a. that there has been a substantial change in circumstances since the last order of support;
        b. three years have passed since the order was entered, last modified or adjusted; or

c. There has been a change in *either* party's gross income by 15% or more since the order was entered, last modified, or adjusted. In the event of a reduction in income, the reduction must be involuntary and must be accompanied by diligent attempts to find suitable employment.

3. When making an order of support, the parties may choose to opt out of the three year and 15% bases for future modification "in a validly executed agreement or stipulation."

4. If the order of support incorporates an unmerged agreement which was executed on or after October 13, 2010, there is no longer any higher burden of proof required to modify the obligation.

C. If custodial parent was in receipt of public assistance when the order was made, a new order may be made without a showing of a change in circumstances. FCA § 571.3(b), Burke v. Palermo, 190 A.D.2d 1075 (4th Dept., 1993).

D. COST OF LIVING ADJUSTMENT (COLA) - FCA § 413-a; DRL § 240-c

1. Child must be on public assistance or in receipt of child support services from Support Collection Unit (SCU)

2. Parties eligible if at least two years have passed and the cost of living has changed by at least 10%.

3. Upon request of a party to an order eligible for a cost of living adjustment, the SCU computes the adjustment by adding the cost of living increase to the support obligation and notifies the parties.

   a. e.g., if a support obligation for $100 per week was established in 2004 and by 2008 the cost of living has increased by 12%, the new obligation will be $112 per week.

4. If no objections are filed within 35 days, the new order takes effect automatically.

5. If either party files a timely objection, the court shall hold a hearing and make a new order of support based upon application of the CSSA without any further showing of a change in circumstances.

6. COLA will also serve to modify order contained within separation agreement or stipulation which otherwise would not be subject to modification. Tompkins Co. SCU v. Chamberlin, 99 N.Y.2d 328 (N.Y. 2003).

XII. ENFORCEMENT

A. Support Collection Unit (SCU)

1. Available only for Child Support only or combined Child/Spousal Support obligations
2. SCU collection methods:
   a. Income executions
   b. Income Tax intercepts
   c. Lottery/Gambling Winning intercept
   d. Property Liens
   e. License Suspensions

B. Income Withholding Order (IWO)

1. IWO's must be issued on a federally mandated form
   a. Child Support only or combined Child/Spousal Support orders - Form 4-9
      These orders must direct the income payor to send the payments to the SCU, which sends the payments on to the obligee.
   b. Spousal Support Only orders - Form 4-9a
      These orders direct the income payor to send the payments directly to the obligee.

C. CPLR §5241

1. Arrears can be deducted from income without a money judgment up to
   a. 50% earned income if arrears less than 8 weeks old and debtor supporting spouse or children who are residing with him/her.
   b. 55% of earned income if arrears less than 8 weeks old and debtor not supporting other children residing with him/her.
   c. 60% of earned income if arrears at least 8 weeks old and debtor supporting children residing with him/her.
   d. 65% of earned income if arrears at least 8 weeks old and debtor not supporting other children residing with him/her.

2. No limit on deduction for unearned income.

D. Office of Child Support Enforcement (OCSE) regulations at 18 NYCRR §347.9

1. SCU limited in §5241 executions.
   a. Cannot reduce income below self-support reserve;
   b. Payor must provide documentary proof to the local SCU to obtain relief.

2. The regulation sets a formula for determining the additional amount:
   a. The additional amount is 50% of the current support order;

b. Where a current support obligation no longer exists, the additional amount is 150% of the amount of the most recent current support obligation, at the same frequency as the most recent support obligation;
c. Where no current support obligation ever existed for current support but support arrears were established by the court, the additional amount shall be the amount of arrears divided by 12, payable in monthly installments.

E. Violation Proceeding. FCA §§ 453, 454

1. The petitioner has the burden to demonstrate that the respondent did not make court-ordered payments.

2. The burden then shifts to the respondent to present "some competent, credible evidence of his inability to make the required payments." Powers v. Powers, 86 N.Y.2d 63 (1995).

3. A finding of willfulness resulting in incarceration must be supported by clear and convincing evidence. Davis-Taylor v. Davis-Taylor, 79 A.D.3d 1312 (3rd Dept., 2010); Brill v. Brill, 288 A.D.2d 335 (2nd Dept., 2001).

4. Court Remedies. FCA § 454
   a. Money Judgment. FCA § 460; DRL § 244
   b. Undertaking. FCA § 471; DRL § 243
   c. Sequestration. FCA § 457; DRL § 243
   d. Driver's, professional and recreational license suspension. FCA §§ 458-a, 458-b, 458-c; DRL §§ 244-c, 244-b, 244-d
   e. Counsel fees. FCA §§ 438(a); DRL § 237
      (1) Mandatory where willful violation is shown. FCA § 454(3); DRL § 237(c)
   f. Probation. FCA § 456
      (1) Only available with a finding of willfulness.
   g. Commitment. FCA §§ 455; DRL § 245
      (1) Punishment of incarceration up to 6 months.
      (2) The sentence may be suspended under such terms as the court may determine.

5. Confirmation FCA § 439(a)
   a. A finding of a willful violation by a Support Magistrate that recommends incarceration must be referred to a Family Court Judge for confirmation.

XIII. DISCOVERY

A. Net Worth Statement or Financial Disclosure Affidavit. FCA § 424-a; DRL § 236-B(4)

1. The parties must provide tax returns, W-2's, and pay stubs.

2. Parties required to provide details about available health insurance plans.

B. Because Family Court support proceedings are special proceedings, CPLR Article 31 discovery devices are available only by leave of the Court. CPLR § 408.

XIV. THE HEARING

A. By Supreme Court Judge, Family Court Judge or Support Magistrate

B. All rules of evidence apply. FCA § 439(d)

XV. OBJECTIONS AND APPEALS

A. Order by a Support Magistrate

1. If the hearing was held before a Support Magistrate, objections to the order must be served on the opposing party and filed within 30 days of the date the order was received in court or by personal service or, if the order was received by mail, within 35 days of the mailing of the order.
   a. Service on opposing counsel is sufficient. Nemcek v. Connors, 92 A.D.3d 1117 (3rd Dept., 2012, Etuk v. Etuk, 300 A.D.2d 483 (2nd Dept. 2002).
2. The opposing party has 13 days to serve and file responding papers.
3. Objections are reviewed by a Family Court Judge. FCA § 439(e). The Family Court Judge must issue an order on the objections with 15 days after the rebuttal is filed or the time to file a rebuttal has expired.
4. In general, objections to non-final orders are not permitted, Fisher v. Fritzsch, 35 A.D.3d 1146 (3rd Dept., 2006), but have been allowed in cases where the Support Magistrate order's is likely to cause irreparable harm. See, e.g., Torres v. Wade, 46 Misc.3d 1215(A) (Fam. Ct., Kings Cty, 2015).
5. Where a finding of willfulness and a recommendation of incarceration is referred to a Family Court Judge for confirmation, the order of the Support Magistrate is non-final; therefore objections are not proper. Dakin v. Dakin 75 A.D.3d 677 (2nd Dept., 2010).
   a. However, see Baumgardner v. Baumgardner, 126 A.D.3d 895 (2nd Dept., 2015), which held that the prohibition against objections only applied to the finding of willfulness and the recommendation of incarceration, but not to final aspects of the Support Magistrate's order, such as the entry of a money judgment.
6. A final order of the Family Court Judge on the objections is appealable to the Appellate Division pursuant to Article 11 of the Family Court Act. FCA § 439(e)

B. If the support order is made by a Supreme Court or Family Court Judge, appeals are to the Appellate Division.