April 28, 2005

Hon. Sondra Miller
Chair, New York State Matrimonial Commission
Supreme Court, Appellate Division, Second Department
140 Grand Street
White Plains, New York 10601

RE: Matrimonial Commission

Dear Justice Miller:

_____In our capacities as Co-chairs of the Family Court Advisory and Rules Committee, we are writing to convey the Committee's concerns regarding several of the issues under consideration by the Matrimonial Commission. The Family Court Advisory and Rules Committee is one of the standing advisory committees established by the Chief Administrative Judge pursuant to section 212(1)(q) of the Judiciary Law and section 212(b) of the Family Court Act. The Committee, which includes experienced judges, hearing examiners, Family Court clerks and court attorneys, practitioners and law school professors drawn from throughout New York State, brings a variety of front-line perspectives to the myriad issues relating to the Family Court. It recommends proposals in the areas of Family Court procedure and family law as part of the annual legislative program of the New York State Unified Court System, prepares suggested revisions to court rules and forms and reviews and comments on pending legislative and policy matters.

_____As custody, visitation and child support cases comprise almost three-quarters of the ever-growing caseload of the Family Courts statewide, the Committee is deeply interested in the forensic, law guardian and other issues addressed in recent hearings of the matrimonial Commission. According to New York State Office of Court Administration figures, since 1990, custody filings in Family Courts statewide reflect the most dramatic escalation of any case category. Custody petitions increased 94% from 85,334 (16% of the total 540,209 petitions filed in 1990) to 165, 941 in 2003 (24 % of the total 689, 281 petitions filed). Child support and paternity filings reflect a 52% increase from a total of 250, 847 filings (46% of the total 540,209 petitions filed in 1990) to 382,367 filings in 2003 (48% of the total 689, 281 petitions filed). These sharply increasing caseload trends continue to date.

Of particular concern to the Committee is the prevalence of self-represented litigants in Family Court proceedings. This creates unique problems regarding whether or not to provide copies of forensic reports to the parties, responding to litigants who fail to cooperative with forensic evaluations, and unwarranted communications by the parties with the forensic expert.

The Committee believes that automatic appointment of mental health experts in all custody and visitation matters should be discouraged. We find troublesome the practice of judges relying upon forensic reports and testimony which contain recommendations for the ultimate decision regarding custody and visitation. These are issues for the court to decide, using relevant forensic evidence as one element in a larger picture. In addition, forensic experts increase the cost of litigation beyond the means of many litigants in Family Court.

When there are, however, specific reasons to appoint forensic experts in custody and visitation cases, the Committee suggests consideration of use of a form order of appointment stating the issues to be addressed, without being prescriptive regarding all issues. Furthermore, expertise regarding issues such as domestic violence, child sexual abuse, and child development should be required when relevant.

Counsel for the parties, as well as the law guardian, should be prohibited from communicating with the forensic expert other than for the purpose of scheduling appointments for their clients and transmitting requested documents and information. We have observed the problem of zealous counsel who make unwarranted contact with the forensic expert to enhance their clients' cases.

There is a need to provide for secure and fair opportunities for counsel and self-represented litigants to prepare for trial with advance access to any written forensic reports. At the same time, we are concerned about the judges reading these reports before they are received in evidence at trial.

The Committee would like to commend to the Commission the successful use of law guardians in the Family Court. Law guardians from institutional programs, who are well trained, provide necessary representation to the children who are the subjects of the custody and visitation cases. Their independence from the adult parties allows them to present evidence that neither adult would offer.

Law guardians are and should be governed by the same ethical considerations and disciplinary rules as attorneys representing adults in the courts. We agree with

the Statewide Law Guardian Advisory Committee, chaired by Hon. Edward O. Spain, that law guardians should not be called to testify, should not function as social workers, and should not be allowed or required to make *ex parte* communications to the court. There role must remain distinct from that of guardians *ad litem*.

Finally, the Committee would like to convey a long-standing suggestion regarding child support, that is, that the statutory $80, 000 "cap" should be raised. The *Child Support Standards Act* ('CSSA') was passed on September 15, 1989 with the express purpose of establishing "a method for determining an adequate level of support in actions involving children." [Governor's Program Bill Memo, Laws of 1989, ch. 567,p. 1].

CSSA reformed an existing child support system that was perceived all too often to set child support at an inappropriate and inconsistent level. The basic premise of CSSA was and remains that each parent must have a responsibility to contribute to the economic well-being of their children and that the children would not unfairly bear the economic burden of parental..... requires that the Court award child support pursuant to a statutorily determined method. The method set forth in the statute requires use of child support percentages based upon the number of children against the statutorily defined income of the parents. If the Court determines that the support to be awarded by the statutory method would be unjust and inappropriate, that is, a 'variance' from the statutory method, the Court is required to set forth in writing the factors it considered and the reasons for variance.

Application of the percentages is mandated only to the first $80,000.00 of combined parental income. Above that amount the Court can, but is not required to, consider the income above $80,000.00 in determining the child support award. The Court must set forth the reasons or factors it considered in determining the amount of support awarded, if any, over the $80,000.00. The $80,000.00 figure is frequently referred to as a 'cap'.

CSSA has more than fulfilled its expectations over the years. Child support awards have consistently risen and have helped to lift custodial parents and children out of poverty. The awards are much more predictable and consistent from jurisdiction to jurisdiction, from Court to Court. Moreover, the Legislature has enacted legislation that has clarified, refined and enhanced the provisions of the statute and the appellate courts have developed a substantial body of case law interpreting the CSSA. However, one area of CSSA that has remained unchanged since its passage in 1989 and that has been troublesome in its interpretation is the $80,000.00 'cap' on the mandatory application of the support percentages.

Despite the suggestion in the Governor's Memorandum in support of CSSA that "the $80,000.00 figure is not intended to artificially limit child support" and numerous other supporting memoranda echoing this suggestion, early applications of CSSA indeed treated the figure as a limit or ceiling. In fact, it was not until the Court of Appeals decided *Cassano v. Cassano,* 85 N.Y.2d 649 (1995), that the lower Courts received specific direction in regards to support awards in which the combined parental income exceeds $80,000.00. But that direction has not provided custodial parents and children with consistent awards of child support above combined parental income of $80,000.00.

Lower courts' interpretations of the $80, 000 cap are only one part of the problem. The second is the passage of time since the figure was established and the increase in the expenses of raising children since 1989. The Appellate Division, Second Department, in *Clerkin v. Clerkin*, 304 A.D.2d 784 (2d Dept., 2003), summarized the problem well:

> [T]he statutory limit on basic child support does not reflect current economic reality. The current basic child support cap was adopted by the Legislature in 1989. Since that time, the consumer price index, which represents the average monthly change in the prices paid by urban consumers for a representative basket of goods and services, has increased significantly. In 1989, the consumer price index for the New York metropolitan area, including Westchester County, was $130.60 ; it is now $196.90, an increase of 51 %. At the same time, family income has increased by 31%.

In other words, in 2003, $1.54 was required to purchase the same goods and services that $1 bought in 1989. Clearly, the time has come to raise the anachronistic $80,000 cap.

Our Committee would be happy to work with the Matrimonial Commission in drafting any court rules, policies, legislative proposals, forms or protocols affecting the Family Court and in answering any questions the Commission may have. We wish to express our appreciation for the opportunity to share our concerns with the Commission.

Sincerely,

Hon. Sara Schechter, Family Court, New York County
Co-chair, Family Court Advisory and Rules Committee

Peter Passidomo, Chief Family Court Magistrate
Co-chair, Family Court Advisory and Rules Committee