THE JUDICIAL ROLE IN APPOINTMENT OF MASTERS, MONITORS, FIDUCIARIES AND OTHER JUDICIAL ADJUNCTS

NEW YORK STATE COURT AUTHORITY

I. Special Masters and Quasi-Judicial Referees

The use of special masters is limited in the New York state courts due to the lack of a statutory framework. The New York Code of Rules and Regulations provides that the Chief Administrator of the Courts (Chief Administrator) may authorize the creation of a program for the appointment of attorneys as special masters in designated courts to preside over conferences and hear and report on applications to the court (*see* 22 NYCRR 202.14). However, there are no state statutes, court rules, or regulations that empower and give authority to special masters or set forth the process for their appointment. Further, the Rules specifically provide that special masters serve without compensation (*see id.*).

Notwithstanding the absence of relevant statutes or guidelines, there are some state court special master programs.

A program utilizing special masters was created by the Appellate Division, First Department some time ago. It is a mediation program that requires the parties to attend pre-argument settlement conferences handled by special masters (*see* 22 NYCRR 600.17). The volunteer special masters are retired justices or retired senior partners of New York law firms, selectively chosen based upon their extensive experience and qualifications and appointed by order of the appellate court panel.

Recently, Chief Administrative Judge A. Gail Prudenti, with the advice and consent of the Administrative Board of the Courts, and upon the recommendation from the Commercial Division Advisory Council, authorized a pilot program in the Commercial Division of Supreme Court, New York County, involving the referral of complex discovery issues to special masters. The program took effect on September 2, 2014 and is to remain in effect for 18 months. Under the program, Commercial Division Justices may, in their discretion and with consent of the parties, designate matters for assignment to special masters to hear and report. The special masters are to be selected, on a random basis, from a pool created by the Chief Administrative Judge of retired practitioners with substantial experience in complex commercial matters. Each special master is not to have conflicts, have the requisite experience to serve without further training, and is to serve pro bono (except for expenses) and for a sufficient duration to deal with a complex matter.

New York state courts have participated in and benefitted from the appointment of a special master in litigation pending in federal court. For example, a special master was appointed under the federal rules by the United States District Courts for the Eastern and Southern Districts

working in conjunction with the New York Supreme Court for the counties in the City of New York to assist in the settlement of thousands of federal and state personal injury and wrongful death claims in which the plaintiffs alleged that exposure to asbestos occurred at the Brooklyn Navy Yard and various other sites in the City of New York *(see In re New York City Asbestos Litigation*, 142 FRD 60 [ED NY 1992]).

New York statutes recognize the authority of special masters appointed under federal law (*see* Estates, Powers & Trusts Law § 11-4.7 [limiting the liability of personal representatives for claims arising out of distributions from the victim compensation fund established by the Federal Air Transportation Safety and System Stabilization Act in response to the terrorist attacks of September 11, 2001, such distributions having been approved by the special master appointed under the Act]).

It appears that the occasional references to special masters in the state case law are a result of the courts' attempts to use the term "special master" in place of "referee," a judicial adjunct who derives authority from state statute (*see American Home Prods. Corp. v Shainswit*, 215 AD2d 317 [1st Dept 1995]). In one case, the Appellate Division, First Department found that there was "a fundamental error presented by the aberrational role" of the special master to "hear and report" in a slander action brought against former employers since, to the extent that the person so appointed might be viewed as a referee, there was no compliance with any of the statutory provisions relating to referees (*Caplan v Winslett*, 218 AD2d 148, 155-156 [1st Dept 1996]; *see CMI II, LLC v Newman & Newmann P.C.*, 19 Misc3d 1131 [A] [Sup Ct, NY County 2008] [special master appointed to issue and sell certain stock to satisfy judgment creditors also referred to as special referee]). Indeed, it has been held that the attempted appointment of a special master to administer funds paid as restitution in a grand larceny case violated New York Criminal Procedure and Penal Laws (*see People v Wein*, 294 AD2d 78, 87 [1st Dept 2002]).

Instead of special masters, New York state law provides for the appointment of private attorneys, judicial hearing officers, or court attorneys to serve as referees. To be clear, the Rules of the Chief Judge provide that the term "special master" is not included under the term "referee" as would relate to any appointments made by any judge or justice of the unified court system (22 NYCRR 36.1 [a][9]).

A referee is appointed to hear and determine or to hear and report to the court. The New York Civil Practice Law and Rules provides that "[a] court may appoint a referee to determine an issue, perform an act, or inquire and report in any case where this power was heretofore exercised and as may be hereafter authorized by law" (CPLR 4001). Where a referee is appointed to determine an issue or to perform an act, the referee "shall have all the powers of a court in performing a like function; but he shall have no power to relieve himself of his duties, to appoint a successor or to adjudge any person except a witness before him guilty of contempt" (CPLR 4301). A referee appointed to hear and report has more limited powers, which include "the power to issue subpoenas, to administer oaths and to direct the parties to engage in and permit such disclosure proceedings as will expedite the disposition of the issues" (CPLR 4201). The scope of the authority of a referee is determined by the court pursuant to an order of reference

(*see* CPLR 4311).

Specific statutory authority for the appointment of referees as judicial adjuncts to supervise disclosure is set forth in CPLR 3104 as follows:

> (a) Motion for, and extent of, supervision of disclosure. Upon the motion of any party or witness on notice to all parties or on its own initiative without notice, the court in which an action is pending may by one of its judges or a referee supervise all or part of any disclosure procedure.
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> (b) Selection of referee. A judicial hearing officer may be designated as a referee under this section, or the court may permit all of the parties in an action to stipulate that a named attorney may act as referee. In such latter event, the stipulation shall provide for payment of his fees which shall, unless otherwise agreed, be taxed as disbursements.
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> (c) Powers of referee; motions referred to person supervising disclosure. A referee under this section shall have all the powers of the court under this article except the power to relieve himself of his duties, to appoint a successor, or to adjudge any person guilty of contempt. All motions or applications made under this article shall be returnable before the judge or referee, designated under this section and after disposition, if requested by any party, his order shall be filed in the office of the clerk.
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> (d) Review of order of referee. Any party or witness may apply for review of an order made under this section by a referee. The application shall be by motion made in the court in which the action is pending within five days after the order is made. Service of a notice of motion for review shall suspend disclosure of the particular matter in dispute. If the question raised by the motion may affect the rights of a witness, notice shall be served on him personally or by mail at his last known address. It shall set forth succinctly the order complained of, the reason it is objectionable and the relief demanded.
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> (e) Payment of expenses of referee. Except where a judicial hearing officer has been designated a referee hereunder, the court may make an appropriate order for the payment of the reasonable expenses of the referee.

The parties must consent to a hearing and determination of an issue by a referee (*see* CPLR 4317; *Matter of Gale v Gale*, 87 AD3d 1011, 1012 [2d Dept 2011]; *Litman, Ashe, Lupkin & Gioiella v Arashi*, 192 AD2d 403 [1st Dept 1993]). In addition, the parties must agree to share the costs of a private attorney to serve as a referee to hear and report. A court lacks the authority to *sua sponte* appoint a private attorney to serve as a referee to oversee discovery, and to be

compensated by the parties without their consent (*see Surgical Design Corp. v Correa*, 309 AD2d 800 [2d Dept 2003]; *Csanko v County of Westchester*, 273 AD2d 434 [2d Dept 2000]; *see also Mitchell v A.J. Medical Supply, Inc.*, 141 AD2d 732, 734 [2d Dept 1988] [finding that the Supreme Court erred in appointing a private referee to hear and report on the value of the petitioners' stock, where the matter did not involve complex issues or require an extended hearing, and it was to the shareholders' advantage and in the best interests of the small, closely held corporation for the Supreme Court to try the issue or refer it to a judicial hearing officer rather than burdening the litigants with the expense of a private referee]).

There is no established criteria for the selection of private attorneys to serve as referees upon consent of the parties. The customary practice is for the parties to agree upon and submit at least three names of attorneys to be appointed and the judge will make a final determination. The attorneys selected are typically well established, "seasoned" counsel with judicial temperament. Typically, counsel for the parties will not consent to the use of a private attorney to serve as a referee, in particular for discovery issues, unless counsel know in advance who may be appointed.

More common are references to hear and report to court attorney-referees who are salaried employees of the court system. These orders of reference do not require consent of the parties (*see Llorente v City of New York*, 60 AD3d 1003, 1004 [2d Dept 2009], *lv dismissed* 12 NY3d 898 [2009]). Court attorney-referees are utilized by the New York State court system to conduct conferences and address discovery disputes and other preliminary matters so as to reserve judicial resources for trials and other substantive matters.

Similarly, a judicial hearing officer (JHO) can also serve as a referee to hear and report without the consent of the parties. A JHO is a person who formerly served as a judge or justice of a court of record of the New York State unified court system, or of a city court which is not a court of record (*see* Judiciary Law § 850). The Rules of the Chief Administrator provide for the establishment of panels of JHOs for particular courts in individual counties (*see* 22 NYCRR 122.5). A person seeking the title of JHO must be certified by the Chief Administrator as mentally and physically capable of performing judicial duties (*see* Judiciary Law § 850[1][a]). The designation of a JHO is discretionary and is dependent upon the finding that "the services of that former judge are necessary to expedite the business of the courts" (Judiciary Law § 850[1][b]). Compensation of JHOs is at a fixed amount established by the Chief Administrator, and is funded through the state court system's budget (*see* Judiciary Law § 852[1]). At present, JHOs are paid $300 per day or any part thereof at which the JHO is performing his or her duties in a courtroom or facility designated for court appearances (*see* 22 NYCRR 122.8). There is no compensation for out-of-court work by JHOs (*see id.*). A JHO may also serve voluntarily without compensation (*see id.*).

Whether the referee appointed is a private attorney, a JHO, or a court attorney-referee, or

the reference is to hear and determine upon stipulation of the parties or to hear and report, the referee's authority must be set forth in an order of reference issued by the judge (*see* CPLR 4311). However, an order of reference to hear and report may be issued *nunc pro tunc* over the parties' objections (*see Walter v Walter*, 38 AD3d 763, 765 [2d Dept 2007]).

II. Judicial Adjuncts in Court Sponsored Alternate Dispute Resolution

A. Overview

The New York State court system is committed to promoting the use of various alternate dispute resolution initiatives as a means of resolving disputes and conflicts. These initiatives utilize judicial adjuncts throughout the state. The programs include arbitration,[1] mediation,[2] and neutral evaluation[3] programs.[4]

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[1]In arbitration, a neutral arbitrator hears arguments and evidence from each side and then decides the outcome. Arbitration is less formal than a trial and the rules of evidence are often relaxed. In *binding arbitration*, parties agree to accept the arbitrator's decision as final, and there is generally no right to appeal. In *nonbinding arbitration*, the parties may request a trial if they do not accept the arbitrator's decision.

[2]In mediation, a neutral person called a mediator helps the parties try to reach a mutually acceptable resolution of the dispute. The mediator does not decide the case, but helps the parties communicate so they can try to settle the dispute themselves. Mediation may be particularly useful when family members, neighbors, or business partners have a dispute. Mediation may be inappropriate if a party has a significant advantage in terms of power or control over the other.

[3]In neutral evaluation, a neutral person with subject-matter expertise hears abbreviated arguments, reviews the strengths and weaknesses of each side's case, and offers an evaluation of likely court outcomes in an effort to promote settlement. The neutral evaluator may also provide case planning guidance and settlement assistance with the parties' consent.

[4]There are also ADR programs such as the Collaborative Family Law Center Program in the City of New York, which offers free mediation for divorcing couples by volunteer attorneys or third-year law students under the supervision of a law professor. Community Dispute Resolution Centers (CDRCs) have been established with the assistance of local non-profit organizations in numerous counties throughout New York to provide mediation as an alternative to court. While the state court system provides funding to maintain CDRCs and promulgates regulations regarding mediators, the judiciary is not directly involved in the appointment of mediators to a particular matter.

B. Arbitration

Even outside of a court annexed program, the court may appoint an arbitrator in the event that an agreement provides for arbitration. For example, where an agreement provides for binding arbitration and the selection process for the designation of such arbitrator fails, the court may select an arbitrator on application of a party (*see* CPLR 7504; *see also Matter of American Home Assur. Co.*, 39 Misc3d 184, 186-189 [Sup Ct, NY County 2013]) . Qualifications of the appointed arbitrator should be consistent with the criteria set forth in the parties' agreement, as well as any additional requirements of the appointing justice. Compensation is governed by the subject agreement.

CPLR 7601 empowers the court to entertain a special proceeding to specifically enforce an agreement that a question of valuation, appraisal, or other issue of controversy be determined by a person named or to be selected. Appraisal proceedings are informal and resolve only valuation questions, leaving all other disputes for resolution in court or arbitration (*see generally Penn Central Corp. v Consolidated Rail Corp.*, 56 NY2d 120 [1982]).

The court appoints arbitrators when arbitration is mandated by statute or court rule. Pursuant to the Rules of the Chief Judge (*see* 22 NYCRR Part 28), arbitration is required with respect to claims for money damages only under prescribed amounts. Claims for money damages less than $6,000 brought in all courts outside the City of New York, except small claims courts, and claims for less than $10,000 brought in the Civil Court of the City of New York shall be referred to arbitration (*see* 22 NYCRR 28.2[b]). Attorneys interested in becoming arbitrators apply to the court's arbitration commissioner in the county where they wish to receive such assignments (*see* 22 NYCRR 28.3; 28.4). Applicants may be required to complete a training program authorized by the Chief Administrator (*see* 22 NYCRR 28.15). Arbitrators are compensated at a rate of $75 per case and generally six cases are assigned to an arbitrator at one time.

The New York State court system has also established an arbitration system for fee disputes between attorneys and clients for representation in civil matters (with exceptions) where the disputed fee is between $1,000 and $50,000 (*see* 22 NYCRR 137.0; 137.1). Attorneys seeking to serve on the panel of arbitrators in any judicial district must complete a minimum of six hours of fee dispute arbitration training approved by the Board of Governors administering the program and attend an orientation program. Arbitrators participating in the fee dispute resolution program serve as volunteers.

C. Mediation

Mediation programs utilizing judicial adjuncts to resolve disputes have been established in numerous courts throughout the state by local court rule. Although there is no statutory authority or statewide court rule mandating mediation, these programs have proven to be highly effective and are sponsored in large part through the collaborative efforts of the local courts and bar associations. Examples of mediation programs in use in the Ninth Judicial District are as follows:

Commercial Division–Westchester Supreme Court

Where the parties agree to mediate their dispute or where the court determines that an action is suitable for mediation, the Commercial Division Justice can appoint a mediator from the roster of mediators in accordance with the rules of the Alternate Dispute Resolution Program. Qualifications for mediators for the Commercial Division include: (1) a minimum of 10 years of experience in commercial law or comparable experience as an accountant or business professional; (2) completion of a minimum of 40 hours of training in a New York Office of Court Administration (OCA) sponsored or OCA recognized training program that includes 24 hours of training in basic mediation skills and techniques and 16 hours of training in specific mediation techniques pertaining to commercial litigation; (3) recent experience mediating commercial cases; and (4) compliance with the Commercial Division's Standards of Conduct for Mediators (*see* www.nycourts.gov/courts/comdiv/PDFs/NYCounty/Attachment3.pdf).

Mediators are compensated at the rate of $300 per hour unless the parties and mediator agree in writing as to a different amount, except that the mediator shall not be compensated for the first four hours spent in required mediation sessions or for time spent in the selection or appointment process.

General Civil Mediation–Westchester Supreme Court

Where the parties agree to mediate their dispute, the IAS Justice or Court Attorney-Referee can refer a matter to mediation and permit the parties to select a mediator from the roster of mediators in accordance with the Rules of the Alternate Dispute Resolution Program for Civil Cases. Qualifications for mediators for the general civil mediation panel include: (1) a minimum of 10 years of experience in the subject area of the cases referred to them; (2) completion of a minimum of 40 hours of training in an OCA sponsored or OCA recognized training program that includes 24 hours of training in basic mediation skills and techniques and 16 hours of training in specific mediation techniques pertaining to the subject area of the types of cases referred to them; and (3) recent experience mediating general civil matters.

Mediators shall be compensated at the rate of $300 per hour unless the parties and mediator agree in writing as to a different amount, except that the mediator shall not be compensated for the first 90 minutes spent in required mediation sessions or for time spent in the selection or appointment process.

Contested Matrimonial Part–Westchester Supreme Court

The assigned Matrimonial Part Justice or the assigned Court Attorney-Referee may refer parties to mediation or the parties may request mediation. Appointments of mediators are made from the roster of mediators in accordance with the Statement of Procedures for the Matrimonial Mediation Program. Attorneys interested in applying for admission to the roster must have completed at least 60 hours of family mediation training in a training program recognized by OCA. They must also have at least 4 years of family mediation experience, including 250 hours of face-to-face mediation with clients and a minimum of 25 custody and visitation cases. Cases involving financial issues will be referred to only those mediators with knowledge of, training in, and experience with financial aspects of divorce. Cases involving issues relating to decision making for a child or parenting time with a child shall be referred only to those mediators with knowledge of, training in, and experience with such issues. All mediators must attend at least six hours of additional approved training relevant to their respective practice areas every two years. Application for admission to the panel shall be made to the Ninth Judicial District Administrative Judge, who shall determine whether a person qualifies for admission and has the requisite temperament, character, and discretion for such appointment. Mediators shall be compensated at the rate not to exceed $300 per hour, except that the mediator shall not be compensated for the first 90 minutes spent in required mediation sessions or for time spent in the selection or appointment process. Mediators are also encouraged to work on a sliding scale to take into account the parties' financial circumstances.[5]

III. Small Claims Assessment Review – Hearing Officers

Small Claims Assessment Review (SCAR) is a procedure that provides property owners with an opportunity to challenge the tax assessment on their real property as determined by the Board of Assessment Review (in counties outside the City of New York excluding Nassau County) or the Assessment Review Commission (in the City of New York and Nassau County). Pursuant to Real Property Tax Law § 730, property owners may petition the court for small claims review of their property assessment by hearing officers. The Chief Administrative Judge of the Unified Court System is responsible for appointing SCAR hearing officers from the available applicant pool. Applications to become hearing officers are screened by the local

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[5]Rockland County Supreme Court also sponsors a similar Matrimonial Meditation and Neutral Evaluation Program.

administrative judges of the various judicial districts. The continued eligibility to serve as hearing officer is dependent upon, among other things, the hearing officer's completion of training every two years through the New York State Judicial Institute. A hearing officer must be: (1) an attorney admitted to the New York State Bar, registered with OCA; (2) a trained, certified appraiser; (3) a trained, former assessor (current assessors are not eligible); (4) a licensed real estate broker; or (5) a holder of a residential appraisal license from the New York State Department of State. Hearing officers are compensated at a rate of $75 per hearing with a cap of $300 per day, and are paid through the court system's budget.

IV. Special District Attorneys

Pursuant to County Law § 701 and 22 NYCRR 200.15 (Uniform Rules for Courts Exercising Criminal Jurisdiction), upon the recusal of the District Attorney, an application is made to have a Special District Attorney appointed. Attorneys who have an office for the practice of law in the county of the recused District Attorney, or reside in such county or an adjoining county are eligible for appointment (*see* County Law § 701 [1] [a]). In the Ninth Judicial District, applications for appointment are generally handled by the Administrative Judge, who considers the experience and professional reputation of an attorney in making appointments. Frequently, such appointments are given to former prosecutors now in the private practice of law.

Reasonable hourly rate compensation for service as a Special District Attorney must be approved by the court but is an expense of the county where the Special District Attorney served (*see* County Law § 701[5]; *Katzer v County of Rensselaer*, 1 AD3d 764, 765 [(3d Dept 2003]).

V. Fiduciary Appointments and Part 36 Regulation

A. Part 36 of the Rules of the Chief Judge

In New York State court civil proceedings, judges must often appoint persons or entities to serve as fiduciaries or assist the court by performing a variety of statutorily mandated functions. Many court fiduciary appointments in New York are governed by Part 36 of the Rules of the Chief Judge. **It is important to note that the above referenced appointments (*i.e.*, referees, arbitrators, mediators, and hearing officers) that are quasi-judicial in nature are generally not subject to regulation pursuant to Part 36 (*see* 22 NYCRR 36.1).**

The stated purpose of the Part 36 rules is to foster public trust in the judicial process: to ensure that appointments are free from nepotism, favoritism or politics, and that appointed individuals are selected on the basis of merit (*see* 22 NYCRR 36.0). Accordingly, Part 36 disqualifies certain categories of persons from appointment. For examples, relatives of judges

are ineligible to receive Part 36 appointments anywhere in the state (*see* 22 NYCRR 36.2 [c] [1]). This is an extraordinarily broad disqualification that applies to relatives within the fourth degree (first cousins) and applies to judges' relatives by both blood and marriage.

The adoption of new Part 36 rules was part of a broad initiative to reform the fiduciary appointment process. In 2000, then-Chief Judge Kaye created the Commission on Fiduciary Appointments to assess the system after concerns were raised that the courts were selecting fiduciary appointees based on factors other than merit. In its 2001 report, the Commission recommended a series of reforms "so that full public confidence in the integrity and impartiality of New York's fiduciary appointment process may be maintained." The new rules incorporated these recommendations.

The Commission on Fiduciary Appointments rejected an approach mandating a "blind, rotational" selection process, and instead, recommended steps that should be taken to facilitate the court's selection of appointees "with the skill and background needed to meet the task at hand."

Part 36 establishes public lists of those who are eligible for appointment (*see* 22 NYCRR 36.2 [b] [1]; 36.3 [c]),[6] promulgates educational and training requirements for those seeking placement on the lists, and authorizes the Chief Administrator to remove from the lists those whose performance is unsatisfactory or whose conduct is incompatible with appointment (*see* 22 NYCRR 36.3).

Part 36 contains limitations based on compensation: appointees may accept only one "high value" (compensation over $15,000) appointment per year (*see* 22 NYCRR 36.2 [d] [1]). In addition, appointees who have been awarded compensation exceeding $75,000 in one calendar year from the courts are ineligible for appointment in the succeeding year (*see* 22 NYCRR 36.2 [d] [2]). The purpose of these limitations is to facilitate the entry of new individuals into the applicant pool, and to inhibit the concentration of appointments among a small group of individuals. Part 36 applies to the following appointments of fiduciaries by the court.

B. Receivers

Receivers may be appointed in many different types of actions, such as foreclosure

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[6]An appointing judge may appoint a person or entity not on the appropriate list of applicants upon a finding of good cause, which shall be set forth in writing and shall be filed with the fiduciary clerk at the time of the making of the appointment (*see* 22 NYCRR 36.2 [b] [2]).

actions, business dissolutions, and matrimonial actions, to ensure that property will not be materially injured or destroyed before the dispute is resolved. A party may petition the court for the appointment of a receiver to manage the property and to sue for, collect, and sell debts or claims. The authority for appointment of a receiver is provided pursuant to CPLR 6401, as follows:

> (a) Appointment of temporary receiver; joinder of moving party. Upon motion of a person having an apparent interest in property which is the subject of an action in the supreme or a county court, a temporary receiver of the property may be appointed, before or after service of summons and at any time prior to judgment, or during the pendency of an appeal, where there is danger that the property will be removed from the state, or lost, materially injured or destroyed. A motion made by a person not already a party to the action constitutes an appearance in the action and the person shall be joined as a party.
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> (b) Powers of temporary receiver. The court appointing a receiver may authorize him to take and hold real and personal property, and sue for, collect and sell debts or claims, upon such conditions and for such purposes as the court shall direct. A receiver shall have no power to employ counsel unless expressly so authorized by order of the court. Upon motion of the receiver or a party, powers granted to a temporary receiver may be extended or limited or the receivership may be extended to another action involving the property.
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> (c) Duration of temporary receivership. A temporary receivership shall not continue after final judgment unless otherwise directed by the court.

The courts have authority to appoint receivers in a number of corporate situations, such as non-judicial dissolution and judicial dissolution (BCL §1202). In judicial dissolution proceedings, the court may appoint a receiver at any stage of the case (BCL §1113).

The payment of receivers is governed by CPLR 8004, which states:

> (a) Generally. A receiver, except where otherwise prescribed by statute, is entitled to such commissions, not exceeding five per cent upon the sums received and disbursed by him, as the court by which he is appointed allows, but if in any case the commissions, so computed, do not amount to one hundred dollars, the court, may allow the receiver such a sum, not exceeding one hundred dollars, as shall be commensurate with the services he rendered.
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> (b) Allowance where funds depleted. If, at the termination of a receivership, there are no funds in the hands of the receiver, the court, upon application of the receiver, may fix the compensation of the receiver and the fees of his attorney, in accordance with the respective services rendered, and may direct the party who

> moved for the appointment of the receiver to pay such sums, in addition to the necessary expenditures incurred by the receiver. This subdivision shall not apply to a receiver or his attorney appointed pursuant to article twenty-three-a of the general business law.

Receivers generally lack the authority to retain counsel or other experts on their own but may do so with the approval of the court (see CPLR 6401). It is not uncommon in corporate dissolution matters and commercial foreclosure cases involving rental properties (such as office buildings and shopping centers), for receivers to request authority to employ counsel as well as property managers. The receiver would be entitled to recovery of expenses, which may include counsel fees (see BCL §1217; CPLR 8004; *Corcoran v Joseph M. Corcoran, Inc.*, 135 AD2d 531 [2d Dept 1987]).

C. Accountants, Appraisers, and Related Service Providers

Accountants, appraisers, actuaries, and other experts are often appointed to assist the court in determining the existence, value, or income stream from assets held by the parties to an action.[7] Such experts review records and provide testimony. For example, in a matrimonial action, 22 NYCRR 202.18 provides as follows:

> In any action or proceeding tried without a jury to which Section 237 of the Domestic Relations Law applies, the court ... may appoint an accountant, appraiser, actuary or other appropriate expert to give testimony with respect to equitable distribution or a distributive award.

Appraisers, auctioneers and real estate brokers are typically awarded what is customary in the given field. For example, for a real estate closing, a real estate broker typically receives 2.5-5% of the sale price of the real property. A flat fee is typically awarded to an appraiser. A commission is typically awarded to an auctioneer, which is usually a percentage of the amount of money that is generated from the auction. The court must be given support for the requested fees and will award what it deems to be reasonable in a given case if amounts are requested that exceed what is usual and customary.

D. Mental Health Professionals

In matrimonial actions and Family Court proceeedings, mental health professionals may

[7] In addition, such professionals may be retained by a receiver or by a guardian.

be appointed in matters relating to disputed custody and/or visitation proceedings by the court to provide an expert opinion on the parenting skills and deficiencies of the parties. In addition, the mental health professional may provide opinion testimony with respect to any alleged mental illness or substance abuse problem of the parties and/or children, and any impact such disability may have on parenting.

As noted in 22 NYCRR 202.18, "[i]n any action or proceeding tried without a jury to which Section 237 of the Domestic Relations Law applies, the court may appoint a psychiatrist, psychologist, social worker or other appropriate expert to give testimony with respect to custody or visitation.... In the First and Second Judicial Departments, appointments shall be made as appropriate from a panel of mental health professionals pursuant to 22 NYCRR Parts 623 and 680. The cost of such expert witness shall be paid by a party or parties as the court shall direct."

In matrimonial actions, the cost of experts appointed is borne by the parties, in accordance with the court's direction. Domestic Relations Law § 237(a), applicable to matrimonial actions filed on or after October 12, 2010, provides in part:

> [T]he court may direct either spouse . . . to pay counsel fees and fees and expenses of experts directly to the attorney of the other spouse to enable the other party to carry on or defend the action or proceeding as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties. There shall be rebuttable presumption that counsel fees shall be awarded to the less monied spouse. In exercising the court's discretion, the court shall seek to assure that each party shall be adequately represented and that where fees and expenses are to be awarded, they shall be awarded on a timely basis, pendente lite, so as to enable adequate representation from the commencement of the proceeding. Applications for the award of fees and expenses may be made at any time or times prior to final judgment.

In Family Court proceedings, Family Court Act § 251(a) (entitled "Medical examinations") controls. That provision authorizes a Family Court judge to require any person within its jurisdiction and the parent or any other person responsible for the care of any child within its jurisdiction to submit to an examination by a physician, psychiatrist or psychologist "appointed or designated for that purpose by the court." Section 251 makes clear that any examination of the parties' children should be done by a court-appointed professional (*see Matter of Michelle A.*, 140 AD2d 604, 605 [2d Dept 1988]), as opposed to one chosen by a party to the proceeding.

County Law § 722-c provides that upon a finding in an ex parte proceeding that investigative, expert, or other services are necessary, and a person described in Family Court Act § 262 is financially unable to obtain them, the court shall authorize said person's counsel, whether or not assigned in accordance with a plan, to obtain such services for that person. The

court must determine the reasonable compensation for the services and direct payment to the person who rendered said services or to the person entitled to reimbursement (*see id.* § 722-c). Section 722-c provides that only in extraordinary circumstances may the court provide compensation in excess of $1000 per investigative, expert, or other service provider. The appointment of a service provider under this section requires that the court make inquiry into the financial status of the parties.

In private pay cases, the judge may order payment to a court-appointed mental health professional by allocating a certain percentage to be paid by both the petitioner and the respondent, after appropriate inquiry into the financial status of the parties, subject to reallocation at trial.

E. Court Evaluators, Examiners, and Attorneys for AIPs or Incapacitated Persons

Court evaluators and examiners are frequently appointed in the context of guardianship proceedings. At the outset of a guardianship proceeding, the court selects and appoints a court evaluator to assist the court in determining whether an alleged incapacitated person (AIP) is in fact incapacitated (*see* Mental Hygiene Law § 81.09). The court evaluator must determine whether the AIP desires, or evaluate whether the AIP otherwise requires, the assistance of legal counsel (*see id.* § 81.09 [c] [3]). If the AIP has not selected his or her own attorney, and it is determined that the AIP should be represented by counsel, the court must appoint legal counsel to represent the AIP throughout the proceeding (*see id.* § 81.10). If the AIP is ultimately deemed incapacitated and a guardian is appointed, the court may appoint a court examiner to review the guardian's initial and annual reports (*see id.* § 81.32[b]).

Court evaluators, examiners, and counsel for the AIP are awarded fees after submission and approval of an affidavit of services. The fees are subject to the guidelines/chart of the Appellate Division, Second Department, which sets the fees based upon the gross assets of the guardianship estate. If these fiduciaries can demonstrate, in an affidavit of services, that they have rendered extraordinary services in a particular matter, then the judge may deviate from the chart and award additional fees. In determining the reasonableness of the claim for services and the amount awarded, the court also considers such required factors as the time spent on the matter, the difficulties involved in the particular matter in which the services were rendered, the nature of the services rendered, the professional standing of the claimant, and the results obtained on behalf of the client (*see* 22 NYCRR 36.4; *Matter of Freeman*, 34 NY2d 1, 9 [1974]).

F. Guardians for Incapacitated Persons

If the court determines after a hearing that the AIP is incapacitated, the court must appoint a guardian. If no guardian has been nominated or proposed by the AIP or a party to the

proceeding, or if the nominated or proposed guardian is unwilling or unfit for appointment, the court must select a guardian (*see* Mental Hygiene Law § 81.19). Guardians may also be appointed by the Surrogate's Court in proceedings under Surrogate's Court Procedure Act Article 17 (minors) and Article 17-A (mentally retarded/developmentally disabled persons).[8] Counsel to the guardian may also be appointed if neccessary.

The guardian of the property may be awarded commissions in the judgment, pursuant to Surrogate Court's Procedure Act §§ 2307 or 2309. Alternatively, commissions may be awarded pursuant to a plan that is submitted to and approved by the court based upon the specific facts of the guardianship. Typically, § 2309 commissions are awarded. However, if the newly appointed guardian is initially marshaling a large sum of assets and pouring them into a trust, such as a supplemental needs trust, he or she may be awarded commissions pursuant to § 2307 for the first year of the guardianship, and then § 2309 commissions every year thereafter. Guardians of the person may be awarded an hourly fee, typically in the range of $50 to $150 per hour upon the submission and review of an affidavit of services. The fees requested are often reduced if the hours expended were duplicative or not deemed to be reasonable or necessary, upon consideration of all relevant factors. In Westchester County, the initial, annual, and final accountings are reviewed by the Guardianship Court Attorney-Referee and ultimately approved by the judge. The amount of commissions awarded may differ from case to case depending on the facts and circumstances of a given case and the type of work performed by a guardian.

G. Guardians Ad Litem

Guardians ad litem are appointed to protect the interests of individuals not capable of protecting themselves. The court in which an action is triable may appoint a guardian ad litem at any stage in the action upon its own initiative or upon motion (*see* CPLR 1202). After the guardian's review of the matter, the guardian files a report with the court containing his or her opinion on the best interests of the disabled party, whether or not such opinion is consistent with the disabled party's wishes (*see Matter of Aho*, 39 NY2d 241, 247 [1976]).

CPLR 1201 authorizes the court to appoint a guardian ad litem for any person, if the person before the court is under a disability. That section provides:

> Unless the court appoints a guardian ad litem, an infant shall appear by the guardian of his property or, if there is no such guardian, by a parent having legal custody, or, if there is no such parent, by another person or agency having legal custody, or, if the infant is married, by an adult spouse residing with the infant, a

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[8]Guardians are subject to all mandates set forth in Part 36 of the Rules of the Chief Judge, unless they are (1) relatives of the incapacitated person ("lay guardians"); (2) "nominated" or "proposed" by the incapacitated person or a party to the proceeding, or (3) nonprofit institutions or departments of social services (*see* 22 NYCRR 36.1[b][2]).

> person judicially declared to be incompetent shall appear by the committee of his property, and a conservatee shall appear by the conservator of his property. A person shall appear by his guardian ad litem if he is an infant and has no guardian of his property, parent, or other person or agency having legal custody, or adult spouse with whom he resides, or if he is an infant, person judicially declared to be incompetent, or a conservatee as defined in section 77.01 of the Mental Hygiene Law and the court so directs because of a conflict of interest or for other cause, or if he is an adult incapable of adequately prosecuting or defending his rights (CPLR 1201).

CPLR 1204 provides that a court may award a guardian ad litem reasonable compensation for his or her services. Specifically, that section states:

> A court may allow a guardian ad litem a reasonable compensation for his services to be paid in whole or part by any other party or from any recovery had on behalf of the person whom such guardian represents or from such person's other property. No order allowing compensation shall be made except on an affidavit of the guardian or his attorney showing the services rendered (CPLR 1204).

In Family Court proceedings, the appointment of a guardian ad litem is expressly required for a child in a PINS (person in need of supervision) proceeding, pursuant to Family Court Act § 741(a), in the following situation:

> In the event of the failure of the respondent's parent or other person legally responsible for his or her care to appear, after reasonable and substantial effort has been made to notify such parent or responsible person of the commencement of the proceeding and such initial appearance, the court *shall appoint an attorney for the respondent and shall, unless inappropriate also appoint a guardian ad litem for such respondent*, and in such event, shall inform the respondent of such rights in the presence of such attorney and guardian ad litem (emphasis added).

Additionally, the judge may appoint a guardian ad litem in a juvenile delinquency proceeding where the respondent has been found to be an incapacitated person pursuant to Family Court Act § 322.2.

H. Attorneys for the Children

Attorneys for the children are generally appointed in Supreme Court matrimonial actions and Family Court proceedings to protect the interests of children (*see* Family Court Act § 241). The purpose of the appointment is to provide independent representation for the children of parties in contested custody or visitation proceedings (*see Koppenhoefer v Koppenhoefer*, 159 AD2d 113, 117 [2d Dept 1990]). The attorney may act as champion of the child's best interests,

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 (*see id.*; *see also Braiman v Braiman*, 44 NY2d 584, 591 [1978]; *Borkowski v Borkowski*, 90 Misc2d 957, 961-962 [Sup Ct, Steuben County 1977]). The authority for appointment in Family Court is pursuant to the Family Court Act § 249.[9]

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[9]The following langugage in Family Court Act § 249(a) governs until September 1, 2015:

> In a proceeding under article three, seven, ten, ten-A or ten-C 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 or in any proceeding where a minor is detained under or governed by the interstate compact for juveniles established pursuant to section five hundred one-e of the executive law, the family court shall appoint an attorney 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 people with 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 assigned counsel. In any proceeding under article ten-B of this act, the family court shall appoint an attorney to represent a youth, under the age of twenty-one, who is the subject of the proceeding, if independent legal representation is not available to such youth. In any other proceeding in which the court has jurisdiction, the court may appoint an attorney 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 (emphasis removed).

The authority for the Supreme Court to make such an appointment is found in the New York Constitution, article VI.[10] In *Kagen v Kagen* (21 NY2d 532, 537-538 [1968]), the Court of Appeals found that a trial court improperly dismissed various causes of action on the ground that the Family Court retained exclusive jurisdiction over the issues, and held that the New York Constitution, article VI, § 7(a) expanded the jurisdiction of the trial court and endowed it with concurrent jurisdiction with the Family Court. Notably, 22 NYCRR 202.16(f)(3) also provides that the court "may appoint an attorney for the infant children, or may direct the parties to file with the court . . . a list of suitable attorneys for the children for selection by the court."

Courts have held that although there is no statute authorizing the court to award an attorney for the child legal fees, there is inherent authority to direct the parties to pay the fees of the attorney for the child (*see Rotta v Rotta*, 233 AD2d 152 [1st Dept 1996]). It has also been held that a party has a right to a hearing to challenge the reasonableness of the fees awarded to an attorney for the child (*see Matter of Plovnick v Klinger*, 10 AD3d 84, 91 [2d Dept 2004]).

Pursuant to Family Court Act § 248, the costs of attorneys for the children assigned under Family Court Act § 245 shall be payable by the state of New York within the amounts appropriated therefor. Pursuant to 22 NYCRR 127.4, claims by attorneys for children for compensation, expenses, and disbursements pursuant to Family Court Act § 245 and Judiciary Law § 35 shall be determined based on the rules of the appropriate appellate division. Additionally, Family Court Act § 245 states that "where the appellate division proceeds pursuant to [Family Court Act § 243(c)]," meaning that the appellate division designated a panel of attorneys for children, the attorneys for the children are compensated and allowed expenses and disbursements as established by Judiciary Law § 35(3). Section 35(3) sets the rate of compensation for an attorney for the child in trial court proceedings at $75 per hour for both in-court and out-of-court time, with reimbursement for expenses reasonably incurred. The statute

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[10]New York Constitution, article VI § 7 states:

> a. The supreme court shall have general original jurisdiction in law and equity and the appellate jurisdiction herein provided. In the city of New York, it shall have exclusive jurisdiction over crimes prosecuted by indictment, provided, however, that the legislature may grant to the city-wide court of criminal jurisdiction of the city of New York jurisdiction over misdemeanors prosecuted by indictment and to the family court in the city of New York jurisdiction over crimes and offenses by or against minors or between spouses or between parent and child or between members of the same family or household.
> b. If the legislature shall create new classes of actions and proceedings, the supreme court shall have jurisdiction over such classes of actions and proceedings, but the legislature may provide that another court or other courts shall also have jurisdiction and that actions and proceedings of such classes may be originated in such other court or courts.

further provides that compensation for representation upon a hearing shall be fixed by the court wherein the hearing was held. Such compensation shall not exceed $4,400. Claims for compensation in excess of the statutory maximum of $4,400 may be made in extraordinary circumstances, and require submission of an affirmation of extraordinary circumstances with the attorney's voucher for payment.

Pursuant to Part 36 of the Rules of the Chief Judge, a member of the panel of attorneys for children appointed by the court must register with OCA in order to be eligible to accept an assignment as counsel for the child *only* in circumstances where private parties will pay for the representation, and not where payment is made from public funds.

I. Supplemental Needs Trustees

When a seriously injured person receives a large award or settlement, the proceeds may be placed in a supplemental needs trust to ensure that the funds recovered are not considered an asset of the plaintiff for purposes of eligibility for certain government benefit programs and are not exhausted during the plaintiff's lifetime for payment of medical expenses that would be otherwise payable by governmental entities under programs such as Medicaid (*see* Social Services Law § 366 [2] [b] [2]). The creation of such a trust is authorized by statute (*see* Estates, Powers & Trusts Law § 7-1.12 [a] [5]).

Except for 22 NYCRR 36.2(c)(6) and 36.2(c)(7), Part 36 of the Rules of the Chief Judge does not govern a supplemental needs trustee who is: (1) nominated by the beneficiary of a supplemental needs trust, (2) proposed by a proponent of the trust, or (3) a bank or trust company (*see* 22 NYCRR 36.1 [b] [2]).

J. Referees to Compute and Sell Real Property

Referees are commonly appointed in foreclosure actions. "If the defendant fails to answer within the time allowed or the right of the plaintiff is admitted by the answer, upon motion of the plaintiff, the court shall ascertain and determine the amount due, or direct a referee to compute the amount due to the plaintiff and to such of the defendants as are prior incumbrancers of the mortgaged premises, and to examine and report whether the mortgaged premises can be sold in parcels and, if the whole amount secured by the mortgage has not become due, to report the amount thereafter to become due" (RPAPL 1321[1]).

Once the referee computes the total amount owed to the lender by the borrower, the lender moves for a Judgment of Foreclosure and Sale. The referee oversees the auction of the property at the location designated in the judgment. This responsibility includes conducting the closing of sale, as well as distributing the proceeds following the sale. Any surplus monies are to be deposited with the County Commissioner of Finance.

The appointment of referees is governed by 22 NYCRR 36.1(a) (9). All referees must

come off of an approved list (*see* 22 NYCRR 36.2 [b]). "A referee is entitled, for each day spent in the business of the reference, to fifty dollars unless a different compensation is fixed by the court or by the consent in writing of all parties not in default for failure to appear or plead" (CPLR 8003 [a]); *see Pittoni v Boland*, 278 AD2d 396, 397 [2d Dept 2000]; *Neuman v Syosset Hosp. Anesthesia Group, P.C.,* 112 AD2d 1029, 1030 [2d Dept 1985]). Pursuant to CPLR 8003(b),

> A referee appointed to sell real property pursuant to a judgment is entitled to the same fees and disbursements as those allowed to a sheriff. Where a referee is required to take security upon a sale, or to distribute, apply, or ascertain and report upon the distribution or application of any of the proceeds of the sale, he or she is also entitled to one-half of the commissions upon the amount secured, distributed or applied as are allowed by law to an executor or administrator for receiving and paying out money. Commissions in excess of fifty dollars shall not be allowed upon a sum bid by a party, and applied upon that party's judgment, without being paid to the referee. A referee's compensation, including commissions, upon a sale pursuant to a judgment in any action cannot exceed five hundred dollars, unless the property sold for fifty thousand dollars or more, in which event the referee may receive such additional compensation as to the court may seem proper.

In the event that a sale is canceled on short notice or occurs long after the referee has prepared the paperwork, the referee may seek additional compensation, but it must be approved by the court. Referees are not required to file the UCS 875 form.

K. Fiducary Appoinments in Surrogate's Court

Fiduciaries are often appointed in Surrogate's Court. The most common appointments are: (1) Executor (nominated under decedent's will; *see* Surrogate's Court Procedure Act art 14); (2) Administrator with the Will Annexed, also known as Administrator CTA (when person offering will for probate is not nominated in the will; *see* Surrogate's Court Procedure Act § 1418); (3) Ancillary Executor (non-New York estate's executor coming to New York to administer New York property; *see* Surrogate's Court Procedure Act art 16); (4) Preliminary Executor (needed pre-probate; *see* Surrogate's Court Procedure Act § 1412); (5) Administrator (when the decedent does not leave a will; *see* Surrogate's Court Procedure Act art 10); (6) Administrator De Bonis Non, also known as Adminstrator DBN (replacement for original administrator(s); *see* Surrogate's Court Procedure Act § 1007); (7) Temporary Administrator (needed pre-administrator; *see* Surrogate's Court Procedure Act art 9); (8) Voluntary Administrator (for estates consisting only of personal property not exceeding $30,000; *see* Surrogate's Court Procedure Act art 13); (9) Testamentary Trustee (trust created under a decedent's will; *see* Surrogate's Court Procedure Act art 15); (10) Inter Vivos Trustee (trust created during a person's lifetime; *see* Surrogate's Court Procedure Act art 15); and (11) Successor Custodian for bank accounts established under the Uniform Transfers to Minors Act (*see* Estates, Powers & Trusts Law § 7-6.1, *et seq*.).

In such cases, the Surrogate's Court must review the fiduciary's qualification to act. Fiduciaries may be disqualified on the grounds of infancy, mental incapacity, status as a non-domiciliary alien unless serving jointly with a New York fiduciary, conviction of a felony unless the proposed fiduciary has obtained a certificate of relief from civil disabilities, want of understanding, dishonesty, improvidence, substance abuse, or inability to read/write English (*see* Surrogate's Court Procedure Act § 707 [1], [2]).

Part 36 applies to the public administrator within the City of New York and for the counties of Westchester, Onondaga, Erie, Monroe, Suffolk, and Nassau and counsel to the public administrator (*see* 22 NYCRR 36 [a] [11]). The administrative board of the public administrator promulgates a fee schedule under Surrogate's Court Procedure Act § 1128, which addresses "compensation of investigators, appraisers, accountants, warehouses, [and] auctioneers." In the counties of the City of New York, compensation for attorneys may be approved upon the submission of an affidavit of legal services pursuant to Surrogate's Court Procedure Act § 1108 [2] [c]).

L. Part 36 Fiduciary Compensation Generally

The compensation of fiduciaries is governed by 22 NYCRR 36.4(b), which states:

> (1) Upon seeking approval of compensation of more than $500, an appointee must file with the fiduciary clerk, on such form as is promulgated by the Chief Administrator, a statement of approval of compensation, which shall contain a confirmation to be signed by the fiduciary clerk that the appointee has filed the notice ofappointment and certification of compliance.
>
> (2) A judge shall not approve compensation of more than $500, and no compensation shall be awarded, unless the appointee has filed the notice of appointment and certification of compliance form required by this Part and the fiduciary clerk has confirmed to the appointing judge the filing of that form.
>
> (3) Each approval of compensation of $5,000 or more to appointees pursuant to this section shall be accompanied by a statement, in writing, of the reasons therefor by the judge. The judge shall file a copy of the order approving compensation and the statement with the fiduciary clerk at the time of the signing of the order.
>
> (4) Compensation to appointees shall not exceed the fair value of services rendered. Appointees who serve as counsel to a guardian or receiver shall not be compensated as counsel for services that should have been performed by the guardian or receiver.