NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION

LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

JOHN W. McCONNELL
COUNSEL

MEMORANDUM

January 18, 2017

To: All Interested Persons

From: John W. McConnell

Re: Request for Public Comment on Proposed Amendment of the Form of Judgment in Matrimonial Actions (22 NYCRR §202.50[b])

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The Administrative Board of the Courts is seeking public comment on a proposed amendment of the uniform rules for the Supreme Court and the County Court addressing the form of judgment in matrimonial actions (22 NYCRR §202.50[b]) (Exh. A). Recommended by the Unified Court System's Matrimonial Practice Advisory and Rules Committee, the proposed new section 202.50(b)(3) would add three provisions in contested or uncontested judgments of divorce: a declaration that prior settlement agreements are incorporated by reference in the judgment, and shall survive and not be merged; a retention of jurisdiction over the matter; and a requirement that enforcement or modification proceedings relating to any settlement agreement shall be brought in a county where a party or minor child resides, absent good cause shown.

A fuller explanation of these proposed changes is set forth in the Committee's supporting memorandum, attached as Exh. B.

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Persons wishing to comment on the proposed rule should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than March 7, 2017.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

Proposal:

Paragraph (3) is hereby added to 22 NYCRR § 202.50(b), as follows (new):

3) Additional Requirement with Respect to Uncontested and Contested Judgments of Divorce. In addition to satisfying the requirements of paragraphs (1) and (2) of this subdivision, every judgment of divorce, whether uncontested or contested, shall include language substantially in accordance with the following decretal paragraphs which shall supersede any inconsistent decretal paragraphs currently required for such forms:

ORDERED AND ADJUDGED that the Settlement Agreement entered into between the parties on the day of , ❑ *an original* **OR** ❑ *a transcript* of which is on file with this Court and incorporated herein by reference, shall survive and shall not be merged into this judgment,* and the parties are hereby directed to comply with all legally enforceable terms and conditions of said agreement as if such terms and conditions were set forth in their entirety herein; and it is further

*: In contested actions, this paragraph may read either [shall survive and shall not be merged into this judgment] or [shall not survive and shall be merged into this judgment].

ORDERED AND ADJUDGED, that the Supreme Court shall retain jurisdiction to hear any applications to enforce the provisions of said Settlement Agreement or to enforce or modify the provisions of this judgment, provided the court retains jurisdiction of the matter concurrently with the Family Court for the purpose of specifically enforcing, such of the provisions of that (separation agreement)(stipulation agreement) as are capable of specific enforcement, to the extent permitted by law, and of making such further judgment with respect to maintenance, support, custody or visitation as it finds appropriate under the circumstances existing at the time application for that purpose is made to it, or both; and it is further

ORDERED AND ADJUDGED, that any applications brought in Supreme Court to enforce the provisions of said Settlement Agreement or to enforce or modify the provisions of this Judgment shall be brought in a County wherein one of the parties reside; provided that if there are minor children of the marriage, such applications shall be brought in a County wherein one of the parties or the child or children reside, except for good cause shown; and it is further

EXHIBIT B

Memorandum

To: John W. McConnell, Counsel

From: Susan W. Kaufman, Counsel, Matrimonial Practice Advisory and Rules Committee

cc: Hon. Jeffrey Sunshine, Chair, Matrimonial Practice Advisory and Rules Committee

Date: November 4, 2016

Re: Divorce Venue Rule Proposal for Post Judgment Enforcement and Modification Applications [22 NYCRR § 202.50(b) (3)] (new)

The Matrimonial Practice Advisory and Rules Committee chaired by the Hon. Jeffrey S. Sunshine hereby submits for consideration by the Chief Administrative Judge a proposal for a new court rule applicable to post judgment applications for modification or enforcement of judgments of divorce in Supreme Court. The rule proposal would add a new paragraph (3) to 22 NYCRR § 202.50(b). [1]

At present, most post judgment applications seeking enforcement or modification of Judgments of Divorce are brought in the same county that the original divorce proceeding occurred. While the designation of that county may have been proper at the time of commencement, often by the time that post judgment litigation ensues neither the parties nor the children have a nexus to that county. Similarly, the initial filing at commencement may have been made pursuant to CPLR § 509, notwithstanding the fact that neither party had any nexus to the jurisdiction at the time, other than it was a more convenient forum for the attorneys or, because of backlogs in one county or another county, became the venue of choice. This results in certain counties being forced to process a disproportionate volume of uncontested and contested divorces in comparison to other counties, which results eventually in post judgment litigation subsequently being heard in that same county.

We propose a court rule to lessen the burden on those counties and on litigants. Our rule proposal would provide a means for parties to correct the injustice resulting from an initial inappropriate CPLR §509 designation once post judgment litigation ensues by requiring the post judgment litigation in a more appropriate venue. It would also allow parties who have moved away to pursue post judgment litigation without having to travel back to the county where the

[1] 22 NYCRR § 202.50(b) already delineates language requirements for proposed judgments in matrimonial actions. The first part of our rule proposal would require that the Supreme Court specify in the judgment of divorce that it shall retain jurisdiction for enforcement of the settlement agreement or for enforcement or modification of the judgment, provided that such jurisdiction shall be concurrent with the Family Court to hear certain applications to enforce the settlement agreement with regard to maintenance, support, custody, or visitation. Similar language is already required in the forms approved under subdivisions 1 and 2 of 22 NYCRR § 202.50(b). However, our language is broader than enforcement of settlement agreements alone, and supersedes said language to the extent of any inconsistency. The second part of the rule requires that the judgment contain an order as to venue related to residence for post judgment enforcement or modification applications in Supreme Court.

judgment was entered. The proposal would apply to all divorce actions, contested or uncontested, with or without minor children.[2]

To address the special concerns when there are minor children of the marriage, our Committee recommends that the applications should be brought in the county where one of the parties, or a child or the children reside, except for good cause,[3] leaving it up to Judge's discretion whether there is good cause to make an exception. The good cause exception might include situations where the Judge was so familiar with the unique facts, issues and personalities in the divorce action that he/she decides it serves the interest of justice to hear the post judgment application rather than permit it to be brought in the county related to residence. It might also apply to ease the burden on attorneys or legal staff of certain poverty law programs with limited resources who must travel long distances to file papers, to protect confidentiality of addresses of a party or child in cases of domestic violence, or to address situations where parties and children have moved out of state. In such circumstances, the court would have discretion to accept venue in a county within New York State that is other than the county of residence of the parties or the children.

We recommend that the rule apply to post judgment applications for modification as well as enforcement. Previously, we recommended a rule applicable to enforcement *only* because we were concerned about violating the controlling venue rules in Article 5 of the CPLR, which pertain to "the trial of an action."[4] However, even if the "trial of an action" is read to apply to the divorce action and the post judgment action as separate actions, the retention of jurisdiction by Supreme Court to hear the post judgment application resolves our concerns about violating the CPLR venue rules for a separate action. Therefore, we now expand our proposal to cover post judgment modification as well. [5] Our request to include modification in addition to enforcement is predicated upon the substantial number of cases where enforcement applications result in motions for modification as well.

Ultimately, we hope that CPLR §509 will be modified by legislation so that the burden on certain counties of Plaintiffs' inappropriate designation of venue in the initial divorce action will cease. In the context of matrimonial actions, CPLR §509 is unfair to residents of the counties who must compete for limited judicial resources, and it is unfair to parties who have to

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[2] Admittedly, cases with minor children present the most compelling case for venue related to residence because of the need to appoint an Attorney for the Child and provide other appropriate services.

[3] To specify that post judgment applications involving minor children always be in the county where the child or children reside might be too rigid in certain cases. Similarly, to specify that applications involving children always be in the county where one of the parties resides might result in forum shopping by the parents, without taking into account the child (ren)'s needs.

[4] CPLR § 509 reads as follows: "Notwithstanding any provision of this article, the place of trial of an action shall be in the county designated by the plaintiff, unless the place of trial is changed to another county by order upon motion, or by consent as provided in subdivision (b) of rule 511."

[5] We cannot recommend that our rule apply to applications to vacate a judgment of divorce which we believe must be controlled by Article 5 of the CPLR. Applications to set aside a judgment of divorce (e.g. defendant never served, error in judgment, *etc.*) would still have to be heard in the county where judgment was entered.

travel long distances at great expense to challenge venue or appear in the action, and are therefore likely to default or consent to the divorce (see *Castaneda v Castaneda*, 36 Misc 3d 504 [Sup Ct 2012]. See our statutory proposal for a new CPLR §514 at pp. 40-44 of our 2016 Annual Report to the Chief Administrative Judge.[6]

Until such time as there is legislative action regarding CPLR §509, it is our hope to provide some relief to the courts in overburdened counties and to litigants by our rule proposal regarding post judgment enforcement and modification.

[6] Our statutory proposal is an omnibus special matrimonial venue proposal which requires that venue be the residence of one of the parties in all divorce actions as well as actions in Supreme Court for custody and visitation, all applications to modify a Supreme Court order of custody or visitation, all post judgment proceedings, and all matrimonial actions described in DRL § 236(B)(2). By providing a good cause exception to the requirement that venue in matrimonial actions shall be the residence of one of the parties, it allows courts to take into account the residence of the children where there are children, and other factors similar to those described above regarding our rule proposal described herein. It avoids courts' having to change improper venue designations sua sponte because it supersedes CPLR§ 509. Rather than allow courts to transfer venue to the proper county, a time consuming process fraught with delays, this proposal requires that venue be proper in the first place, but gives the court authority for good cause shown to allow the trial to proceed in the county where it was brought even if the venue is not the county of residence.