**NYSBA FAMILY LAW SECTION, Matrimonial Update, July 2019**

By Bruce J. Wagner
McNamee Lochner P.C., Albany

**Agreements - Post Judgment – Enforcement**

In Schaff v. Schaff, 172 AD3d 1421 (2d Dept. May 29, 2019), the former wife (wife) appealed from a July 2017 Supreme Court order, which granted the former husband's (husband) December 2016 motion to amend the parties' October 2005 judgment of divorce (which incorporated a 2004 separation agreement and permitted Supreme Court to enforce its terms), so as to enforce the terms of the parties' December 2007 and September 2008 child support modification agreements, both of which were signed, but not acknowledged. The wife cross-moved for a determination of child support arrears. The parties have 3 children, all now emancipated, and their 2004 separation agreement provided for custody to the wife and child support of $446 per week payable by the husband. The December 2007 agreement changed custody of one child to the husband and reduced child support to $1,256 per month. The September 2008 agreement provided that "[c]hild support will end, effective immediately." The Second Department affirmed, rejecting the wife's argument that the husband was required to commence a plenary action, noting that he was "seeking to enforce the terms of the parties' separation agreement, which he asserts were modified by the 2007 writing

and the 2008 writing." The Appellate Division reasoned that the separation agreement permitted written modifications and that the judgment conferred continuing jurisdiction upon Supreme Court to enforce the terms thereof. The Court further rejected the wife's contention that the unacknowledged agreements were unenforceable under DRL 236(B)(3), given that the parties were no longer married. The Second Department concluded that the 2007 and 2008 agreements were unambiguous and that Supreme Court was not required to conduct a hearing before determining that the same were enforceable.

**Child Support – CSSA–Over Cap–Upheld; Counsel Fees –After Trial; Equitable Distribution -Separate Property–Commingling Found; Tax Sharing Unpreserved; Maintenance - Durational**

In Candea v. Candea, 2019 Westlaw 2363775 (2d Dept. June 5, 2019), the parties were married in 1997 and both appealed from a March 2017 Supreme Court judgment which, after a 2016 trial of the wife's March 2015 divorce action, among other things, awarded the wife maintenance of $2,133 per month for 7 years, directed the husband to pay child support of $4,133 per month for 2 children born in 2003 on the parties' income over the CSSA cap, awarded the wife a separate property credit of $51,895 for inherited funds, directed that certain stock be sold and equally divided, without directing an equal sharing of tax liability, and denied the wife's request for $25,000 in counsel fees. The

Second Department modified, on the law, by reversing the separate property credit to the wife, holding that when she deposited inherited funds into a joint account, she "created a presumption that the funds were marital," and failed to rebut that presumption by establishing that the deposit was "only as a matter of convenience without the intention of creating a beneficial interest." The Court held that the wife further failed to establish a correlation between the funds so deposited and the subsequent purchase of gold coins and other precious metals. The Appellate Division otherwise affirmed as to the above-stated issues, finding that Supreme Court considered the maintenance factors in arriving at an appropriate award and that Supreme Court's application of the CSSA to all income over the cap "primarily due to the [husband's] considerable income and the standard of living to which the children were accustomed" was a provident exercise of discretion. The Second Department found that the tax issue raised by the husband was unpreserved and that the wife's claim for counsel fees was properly denied, "considering the equities and circumstances of the case, including the parties' respective financial conditions."

**Counsel Fees –After Trial–Granted (41%); Equitable Distribution -Proportions –Investments–Increased (25% to 50%); Maintenance - Denied-Equitable Distribution as a Factor**

In Hofmann v. Hofmann, 2019 Westlaw 2504654 (1st Dept. June

18, 2019), the wife appealed from a July 2018 Supreme Court judgment which, after trial, among other things, awarded her 41% of counsel fees, 25% of certain investments associated with the husband's former employment, and denied maintenance. The First Department upheld the counsel fee award "in view of her substantial distributive award and the evidence that payment of her remaining counsel fees will not affect her ability to meet her living expenses." The Appellate Division modified, on the law and the facts, to award the wife 50% of the funds and investments derived from the husband's former employment, upon the ground that the same constituted compensation and were in part purchased with marital funds. The First Department affirmed the denial of maintenance as "supported by the record, which shows that [the wife's] distributive award – now substantially increased – would generate cash flow sufficient to render her self-supporting."

**Custody - AFC Appeal Standing; Child's Wishes; Modification Petition Dismissed**

In Matter of Newton v. McFarlane, 2019 Westlaw 2363541 (2d Dept. June 5, 2019), the attorney for the child appealed from a December 2017 Family Court order which, after a hearing, granted the mother's petition to modify a November 2013 order, which had awarded sole legal and physical custody of the parties' daughter born in November 2002 to the father, so as to direct that the

mother shall have sole legal and physical custody. The Second Department reversed, on the law and the facts, and dismissed the mother's petition. The Appellate Division concluded that: the AFC had the authority to pursue the appeal and that the child was aggrieved by Family Court's order; Family Court should not have held a hearing without determining that the mother had alleged and established a sufficient change in circumstances to warrant an inquiry into whether the child's best interests were served by a modification; and Family Court erred by failing to give due consideration to the expressed wishes of the child. Among other things, the Second Department held that: the child's alleged academic difficulties were neither new nor related to the father's parenting; the father's handling of the child's taking and/or distribution of explicit photographs was appropriate and more proactive than the mother's response thereto; and the mother's move to a location in New Jersey closer than her previous residence did not constitute a sufficient change in circumstances.

**Custody - Modification–School Absences & Performance; Sex Offender in Home**

In Matter of Phillip M. v. Precious B., 2019 Westlaw 2375122 (1st Dept. June 6, 2019), the mother appealed from a June 2018 Family Court order which, after a hearing, modified a June 2015 order by awarding sole legal custody to the father. The

First Department affirmed, noting that while the child was in the mother's custody, "the child was excessively absent and late to school, to the detriment of her academic performance." The Appellate Division found that the mother "failed to appreciate the danger that her relationship with an abusive, level three sex offender posed to the child, even bringing the child to see him while he was incarcerated, despite knowing that he was a convicted sex offender and having an active order of protection against him." The Court concluded that the father was "able to ensure that the child's education and emotional needs are met" and "has provided the child with a safe and stable home."

**Custody - Temporary – No Hearing - Exigent Circumstances**

In Matter of Daclin-Goyatton v. Cousins, 2019 Westlaw 2274966 (2d Dept. May 29, 2019), the mother appealed (by permission) from an August 2018 Family Court order which, without a hearing, awarded temporary custody of the parties' child to the father, with supervised access to her. The Second Department affirmed, noting: "Where undisputed facts are before the court, a hearing is not necessary." The Appellate Division agreed with Family Court's determination, rendered prior to a hearing, given that the father "demonstrated the necessary exigent circumstances."

**Disclosure - Child's Mental Health Records**

In Matter of Valerie S. (Jose S.), 63 Misc3d 1229(A) (Fam.

Ct. Bronx Co. May 9, 2019, Taylor, J.), ACS filed a petition against the father in August 2018, alleging that he sexually abused the subject child over the course over several years, starting when she was 4 years old. In April 2019, ACS served a CPLR 3101(d) expert witness disclosure stating that the child's therapist would testify regarding the child's treatment and her diagnosis of PTSD related to the father's alleged abuse. The father moved for release of the child's mental health records. Family Court found that there was good cause for release of confidential mental health records, citing FCA 1038(d) and MHL 33.13(c)(3), noting that there was a showing of no alternative and effective means of obtaining the information. 42 CFR 2.64(d). Family Court noted that it was obligated to define the scope of the disclosure, and to limit the same to what is necessary for the movant's legitimate purposes, MHL 33.13(f), while concluding that the interests of justice significantly outweighed the child's need for confidentiality, given the allegations against the father. The Court stated that it would conduct an *in camera* examination of the records before distributing records to counsel, "to the extent the records contain information consistent with the parameters of the disclosure laws."

**Enforcement - Contempt – Custody Order**

In Matter of Guy v. Weichel, 2019 Westlaw 2518722 (2d Dept.

June 19, 2019), the mother appealed from a June 2016 Supreme Court order which, after a hearing, granted the father's motion to hold the mother in civil contempt for violating certain provisions of a March 2014 order pertaining to custody of their child born in 2009. The Second Department affirmed, holding that "the record established by clear and convincing evidence that the mother violated the unequivocal provisions of the parties' final consent order by failing to inform the father of the child's travel outside of the country on three separate occasions, failing to produce the child for the father's parental access on two separate occasions, and unilaterally deciding to move the child to a new school."

**Family Offense - Aggravating Circumstances; Duration of Order**

In Matter of Anecia S.H. v. Grevelle D.B., 2019 Westlaw 2375099 (1st Dept. June 6, 2019), both parties appealed from an April 2018 Supreme Court IDV Part order which found, after a hearing, that petitioner proved aggravating circumstances and granted her a 5-year order of protection, but determined that the 5 years started to run upon issuance of a March 2017 criminal court order upon sentencing by the same Court. The First Department affirmed, finding that respondent's actions "of attempting to strangle petitioner, hitting her head against the wall, and threatening to kill her, constituted "an immediate and ongoing danger" and were perpetrated while the parties' child

was in close proximity. As to the effective date of the order of protection, the Appellate Division held that the duration of an order of protection is within the court's discretion under FCA 842.

**Family Offense - Assault 2d and 3d Not Found; Harassment 2d Found**

In Matter of Vanessa R. v. Christopher A.E., 2019 Westlaw 2344435 (1st Dept. June 4, 2019), respondent appealed from a May 2017 Family Court order, which found that he committed assault 2d and harassment 2d and issued a one-year order of protection. The First Department modified, on the law, to vacate the finding of assault 2d. The Appellate Division noted that petitioner testified that while on top of her in bed, respondent caused some bruising to her legs, which she treated at home with an ice pack, and found that this did not establish that respondent intended to and did cause petitioner "serious physical injury," nor could the testimony establish an intent to cause physical injury, as would be required to support a finding of assault 3d, as petitioner contended on appeal. The Court further noted that Petitioner testified that respondent said he was "play fighting," from which the Court stated "it would not be rational to infer that respondent intended to cause physical injury." With regard to harassment 2d, the First Department upheld this finding based upon petitioner's testimony that respondent made

several threatening phone calls to her and followed her around the neighborhood, which "alarmed" her and "served no legitimate purpose."

**Family Offense - Harassment 2d - Found – Striking; Not Found – Course of Conduct**

In Matter of Rohrback v. Monaco, 2019 Westlaw 2480338 (4th Dept. June 14, 2019), petitioner appealed from an August 2017 Family Court order, which granted respondent's motion to dismiss her family offense petition alleging that he committed harassment in the second degree as defined by Penal Law 240.26(1) and (3). The Fourth Department modified, on the law, by reinstating so much of the petition as alleged a violation of Penal Law 240.26(1), holding that petitioner's allegation that respondent "pushed [her] so hard into the door that the door ripped off the hinges" in September 2016 and that respondent "slammed [her] onto a table" in December 2016, "adequately pleads an allegation of harassment in the second degree under section 240.26(1)." As to subdivision (3), the petition alleged that respondent engaged in a course of conduct that annoyed and alarmed petitioner, but the Appellate Division found that the petition failed to allege that respondent's alleged course of conduct "serve[d] no legitimate purpose" and was therefore properly dismissed to that extent.

**Family Offense Harassment 2d - Found – Text Message**

In Matter of Richardson v. Brown, 2019 Westlaw 2440056 (2d Dept. June 12, 2019), petitioner appealed from an August 2018 Family Court order, which dismissed her family offense petition alleging harassment 2d, based on a text message respondent sent her in October 2016. The Second Department modified, on the law and the facts, by granting the petition and remitting to Family Court for issuance of a "refrain from harassment and threats" order of protection. The parties were married in 1999, have 2 minor children and resided on separate floors of the marital residence. The Appellate Division found that: the text message "contained a genuine threat of physical harm"; "it was reasonable for petitioner to take the threat seriously since it was sent during a period of extreme marital discord"; and "respondent's intent to commit harassment in the second degree is properly inferred from the surrounding circumstances."

**Paternity - Equitable Estoppel Denied – DNA Test Allowed**

In Matter of Stephen N. v. Amanda O., 2019 Westlaw 2375460 (3d Dept. June 6, 2019), the mother and petitioner putative father (Stephen) appealed from an August 2017 Family Court order which dismissed Stephen's October 2014 petition (based upon a positive private DNA test) seeking to be adjudicated as the father of a child born in 2003 while the mother was in a relationship (from January 2003 and 3 years thereafter) with William, who signed an acknowledgement of paternity several days

after the child's birth. Family Court found that Stephen was equitably estopped from asserting paternity and denied his request for a DNA test. The mother had a single sexual encounter with Stephen in February 2003. In 2006, the mother contacted Stephen because she thought he might be the father, and the mother, child and Stephen resided together from June 2006 through October 2008, at which time Stephen was incarcerated (and will not be released at earliest until 2025). The Third Department reversed, on the law, and remitted to Family Court for further proceedings, finding that while William satisfied his initial burden to invoke equitable estoppel against Stephen (noting William's acknowledgement of paternity, relationship with the child, payment of child support and exercising his court-ordered visitation following his separation from the mother in 2006), Stephen resided with the mother and child for over 2 years, sent her at least 50 cards and letters since 2008, contacted her by phone, and Stephen's sister testified that the child has been attending events with Stephen's family for over a decade. The mother testified that the child knows William as a father figure but has known Stephen to be her father. The Appellate Division concluded that it was in the child's best interests that DNA testing occur, holding that the "record is clear that the child understands that [William] is her 'legal' father and that there is a significant chance that [Stephen] is

her biological father," and even though there are "inherent inequities" in allowing DNA testing given the child's age, the analysis "must turn exclusively on the best interests of the child."

**Pendente Lite - Counsel Fees – to Outgoing Counsel**

In Pezzollo v. Pezzollo, 2019 Westlaw 2439866 (2d Dept. June 12, 2019), the wife's outgoing counsel appealed from a July 2016 Supreme Court order made in the wife's September 2014 divorce action, which denied the motions of the wife and her outgoing counsel for counsel fees totaling $78,380 and granted counsel permission to withdraw. The Second Department reversed, on the facts and in the exercise of discretion, to the extent that outgoing counsel was awarded $58,785, finding that the husband failed to rebut the presumption that he was the monied spouse. The parties were married in 2001, have 2 children with whom the wife stayed home, and the husband earned $1.26 million in salary from his medical practice in 2013, which he has since sold. The wife received an initial award of $25,000 in counsel fees in March 2015.

**Pendente Lite - Maintenance Guidelines – Deviation**

In Salmon v. de Salmon, 2019 Westlaw 2363269 (2d Dept. June 5, 2019), the wife appealed from an October 2016 Supreme Court order which denied her March 2016 motion for temporary maintenance. The Second Department reversed, on the law and the

facts, to the extent of granting her $310 per month in temporary maintenance, retroactive to the date of her motion, plus $100 per month toward arrears until paid. The parties were married in September 2010 and there is one unemancipated child who lives with the husband, who commenced the action in July 2015 and thereafter obtained an order of protection against the wife which excluded her from the marital residence. Supreme Court declined to award pendente lite maintenance (October 2010 guidelines) due to the short duration of the marriage and the existence of the order of protection. The Appellate Division held that while Supreme Court properly found that the husband was entitled to a downward deviation from the presumptive amount (not specified) of temporary maintenance, based upon a reduction in his income due to a work-related injury, and the expenses he incurs in caring for the parties' child, the motion court failed to consider the wife's "needs and inability to meet her current financial obligations." The Second Department found that the wife's monthly income was $1,040, as against reasonable expenses of $1,350 and awarded her the monthly deficit of $310 as temporary maintenance, subject to reallocation at trial.