## **NYSBA FAMILY LAW SECTION UPDATE, January 2023**

## **Matrimonial Update**

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## **Support Magistrate, Schenectady & Montgomery County Family Courts**

## **Agreements - Set Aside – Denied; Counsel Fees - Defense of Motion to Vacate JOD and Set Aside Stipulation**

## In Forman v. Forman, 2022 Westlaw 17480735 (2d Dept. Dec. 7, 2022), the wife appealed from a September 2019 Supreme Court order, which: (1) denied her June 2019 motion to vacate the parties’ April 2019 judgment of divorce and to set aside the November 2018 stipulation incorporated therein; and (2) granted the husband counsel fees of $6,987.50. The Second Department affirmed, noting that the stipulation required the husband to pay the wife maintenance and to pay a distributive award of about $6,000,000 over 8 years, and finding that “the terms of the stipulation were not so unfair as to shock the conscience and confound the judgment of any person of common sense.” The Appellate Division determined that the wife “failed to meet her burden of demonstrating that the stipulation was the result of duress or overreaching,” and her claim of “diminished capacity when she executed the stipulation is unsupported by evidentiary facts in admissible form.” The Court held that “by accepting the benefits of the stipulation for a period of more than seven months, the [wife] ratified the agreement.” Upholding the counsel fee award, the Second Department concluded that while the wife is the less monied spouse, her conduct “resulted in unnecessary litigation.”

## **Child Support - CSSA – Add-On – Therapeutic Expense is not Education Expense; Proof of Payment – Educational Expense**

##  In Matter of Ning-Yen Y. v. Karen K., 2022 Westlaw 17835664 (1st Dept. Dec. 22, 2022), the mother appealed from a March 2022 Family Court order, denying her objections to a Support Magistrate order, rendered after a hearing, which: (1) found the expenses of the subject child’s residential treatment program in Idaho to be “educational costs” under the parties’ agreement, for which the mother would be 30% responsible, as opposed to being “medical” or “therapeutic” expenses, for which she would only be 8% responsible under the same agreement; and (2) credited the father for a $5,000 payment for school tuition. The First Department reversed, on the law and the facts, granted the mother’s objections and remanded to Family Court for further proceedings. The Appellate Division held that the evidence established that the “overriding purpose” of the therapeutic boarding school, which did not offer classes or course credit, was to provide the child with “intensive psychiatric and substance abuse treatment,” while noting that the child took on-line classes at a local high school from which he received his diploma. As to the $5,000 credit, the First Department found that “the father did not provide any proof of payment of $5,000 toward the tuition \*\*\*, as required when seeking reimbursement of payments made to a third party,” and that the evidence presented, a ledger entry from the school, “does not constitute actual proof that the father paid this sum.”

## **Child Support - CSSA – Opt-Out Vacated; Procedure - Judgment Includes Terms Not Agreed By Parties – Remand**

##  In Bradley v. Bakal, 2022 Westlaw 17490833 (1st Dept. Dec. 8, 20220, the wife appealed from a May 2021 Supreme Court Judgment, which incorporated an oral stipulation providing for, among other things, child support and statutory add-on expenses. The First Department modified, on the law, by vacating the child support and add-on provisions, and remanding for a determination of child support and pro rata shares of statutory add-on expenses. The Appellate Division held that the oral stipulation failed to comply with the CSSA in that it omitted recitation of the presumptively correct basic child support obligation and the reasons for the parties’ deviation therefrom, as mandated by DRL 240(1-b)(h). The Court directed that pending the determination upon remittal, the husband shall continue to pay $5,000 per month plus 70% of the add-on expenses, as directed by the Judgment, and ordering that any overpayment shall be credited against his future payment of add-on expenses and that any underpayments shall be included as arrears in an amended Judgment. The First Department noted that the stipulated terms regarding private school tuition are “not invalidated by the parties’ failure to comply with the CSSA and remains enforceable.” The Appellate Division concluded that “even if the judgment of divorce includes terms that were not expressly agreed to by the parties \*\*\* [and] notwithstanding that certain discrete issues were left open to future negotiation,” given that “the parties are unable to reach an agreement on those remaining issues, the court is entitled to fill in the gaps based on objective criteria.” The First Department therefore remanded “for a determination that the terms of the judgment of divorce not expressly agreed to by the parties comport with some objective criteria.”

## **Counsel & Expert Fees – After Trial - Default Provision of Separation Agreement; Custody - Modification – Joint to Sole – Alienation by Mother**

##  In Keefer v. Keefer, 2022 Westlaw 17660462 (2d Dept. Dec. 14, 2022), the wife appealed from, among other things, a January 2021 Supreme Court judgment, which: (1) after a hearing that lasted 45 days, modified a January 2017 Family Court order (joint legal custody of 2 children, primary to the wife) by awarding the husband sole legal and residential custody; and (2) upon an October 2020 order of the same Court, awarded the husband $225,000 in counsel fees. The Second Department affirmed, holding that Supreme Court properly modified Family Court’s custody order upon its finding that the wife “alienated the children from the [husband] by severely and persistently interfering with [his] parental access rights in violation of the \*\*\* custody order, denigrating [him] in the children’s presence, and minimizing the importance of the children’s relationship with the [husband].” The Appellate Division further noted the trial evidence that the wife “demonstrated a lack of a meaningful interest in the children’s education by permitting excessive absences from school.” The Court concluded that the counsel fee award was proper under the “default provision” of the parties’ December 2015 separation agreement, which initially resolved custody (joint legal, primary to the wife) and other issues, and was incorporated into the judgment of divorce.

## **Counsel & Expert Fees - After Trial – Substantial Compliance with 60-day Billing – Granted on Appeal**

##  In Spataro v. Spataro, 2022 Westlaw 17971862 (2d Dept. Dec. 28, 2022), the wife appealed from an October 2018 Supreme Court judgment entered in the husband’s June 2017 action, which, upon an August 2018 order, denied her request for counsel fees based upon her attorney’s failure to comply with the “every 60-day” billing requirement of 22 NYCRR 1400.3(9). The parties were married in 1997. The wife was last employed as a teacher’s aide in 2016, earning $17,309, but was thereafter unable to work for medical reasons. The husband was a physician and earned about $275,000 in 2017. The divorce action was settled by a May 2018 stipulation, which provided that the issue of counsel fees would be decided upon written submissions. The Second Department reversed, on the law and in the exercise of discretion, finding that although the attorney did not send his initial billing statement until 154 days after he was retained, the remainder of his invoices to the wife complied with the 60-day rule, and concluding that this constituted substantial compliance. The Appellate Division granted the wife’s application for counsel fees to the extent of awarding her $135,315.90 and remitted to Supreme Court for entry of an amended judgment of divorce.

## **Counsel & Expert Fees - Custody – Granted**

##  In Matter of Coward v. Biddle, 210 AD3d 1083 (2d Dept. Nov. 30, 2022), the mother appealed from April 2021 and December 2021 Family Court Orders, which, respectively: (1) directed the mother to pay the father’s counsel fees of $3,000; and (2) found that her non-payment of the fees required by the April 2021 order constituted contempt, and directed her to pay an additional $4,500 in counsel fees. The Second Department affirmed both orders, determining that Family Court: (a) had the authority to award counsel fees in the April 2021 order pursuant to FCA 651(b) and DRL 237(b); (b) properly awarded counsel fees based upon its determination that the mother had engaged in frivolous conduct [22 NYCRR 130-1.1(a)]; (c) was not required to hold a hearing under the circumstances, “since the father requested the imposition of attorneys’ fees and sanctions in his motion papers”; and (4) properly considered the father’s submission, which “evidenced substantial compliance with” 22 NYCRR Part 1400. The Appellate Division concluded that the mother failed to substantiate her claim of inability to pay the fees required by the orders, noting that “the mother appears to have significant financial resources from family members and her fiancé, who have paid for the mother’s living expenses and vacations.”

## **Custody - Modification – Denied, But Paramour Access Restricted**

##  In Matter of Christopher TT. v. Lisa UU., 2022 Westlaw 17835279 (3d Dept. Dec. 22, 2022), the father appealed from a March 2021 Family Court order, which partially dismissed his 2019 petition to modify a November 2017 custody order (joint legal, primary to mother) pertaining to the parties’ daughter born in 2015. When the child was less than a year old, the father retired and relocated to Pennsylvania, 2 hours from where the parties had resided in Broome County. Family Court denied the father’s request for physical custody, noting, among other things, that the mother appropriately cares for the child and that a relocation to the father’s home, 2 hours away in another state, would greatly impact the child and not be in her best interests. Family Court did impose a restriction, “prohibiting the paramour from moving into the mother’s residence or from staying overnight while the child is present.” The Third Department affirmed Family Court’s order, holding that continued custody to the mother was in the child’s best interests, and that Family Court properly denied the father’s request “to prevent all contact between the child and the paramour,” who does have some mental instability, but has nevertheless been able to maintain shared custody of his 5 children. The Appellate Division noted that the paramour’s ex-wife, “a mandated state reporter – testified that she had no concerns with the paramour as it related to their children.”

## **Custody -** **Temporary Modification Without Hearing – Reversed; New Developments**

##  In Matter of Colin M. v. Panna B., 2022 Westlaw 17480786 (2d Dept. Dec. 7, 2022), the AFC appealed by permission from a May 2021 Family Court Order, which, upon the father’s March 2020 petition seeking modification of a 2012 judgment of divorce (joint legal, primary to mother), temporarily transferred primary custody of the parties’ child born in December 2009 to the father. The Second Department reversed, on the facts and in the exercise of discretion, and remitted to Family Court “for an expedited hearing, and a final determination on the issue of custody after a full hearing,” pending which hearing and final determination, “residential custody of the child shall remain with the mother.” The Appellate Division found that “new developments \*\*\* have been brought to this Court’s attention by the attorney for the child, including updates provided during oral argument,” including “ongoing allegations that the father abused the child and the child’s continued residence with the mother.” The Court concluded that “the record is no longer sufficient to review whether the Family Court’s determination \*\*\* is in the best interests of the child.”

## **Custody - Third Party – Grandparents – Denied**

##  In Matter of Virginia HH. V. Elijah II., 2022 Westlaw 17490471 (3d Dept. Dec. 8, 2022), the parents separately appealed from a March 2021 Family Court Order, which, after a hearing held in November 2020 and January 2021 upon the maternal grandparents’ September 2019 petition seeking visitation with the parents’ children born in 2015 and 2018, granted visits of increasing duration, culminating in one full weekend per month at the grandparents’ home. The Third Department reversed, on the facts, and remitted to Family Court for further proceedings before a different judge, with an AFC to be appointed. The Appellate Division held that the grandparents established standing with respect to the younger child, there being a stipulation as to standing regarding the older child, but held that the visitation award lacks a sound and substantial basis in the record, noting: the parents were separated at the time of the hearing, but were united in their opposition to grandparent visitation, and Family Court “should not lightly intrude against [fit parents’] wishes”; Family Court failed to consider the negative effects upon the older child, a son who is autistic and has ADHD, and whose difficulty with transitions was verified in part by the testimony of the director of the child’s preschool; the grandmother undermined the mother’s parental authority, by stating in the presence of the children that “she did not deserve to be a mother”; “Family Court does not appear to have considered the animosity [between the parents and grandparents] in this case, and, more importantly, its potential impact upon the [parties], to cooperatively care for the children and especially for the son, given his unique set of challenges”; “the acrimony on the part of the grandmother is further evident in her pro se brief, which \*\*\* is \*\*\* concerning for its combative tone regarding the parents”; the appellate AFC opposes visitation; and there was no AFC for the children at the hearing.

## **Custody - Visitation – Incarcerated Parent**

##  In Matter of Aaron OO. v. Amber PP., 2022 Westlaw 17347236 (3d Dept. Dec. 1, 2022), the father (incarcerated since 2013, earliest release date 2053) appealed from two February 2021 Family Court orders, which, in a combined hearing including a *Lincoln* hearing upon his petitions filed in 2016 and 2019, seeking in-person visitation with the parties’ children born in 2006, 2009 and 2013, partially dismissed the same. A 2017 Family Court order, which dismissed the father’s 2016 petition, was reversed and remitted for a new hearing and the assignment of new counsel to the father [170 AD3d 1436 (3d Dept. 2019)]. Family Court granted the father 2 in-person visits per year, directed the father to bear the costs thereof, and permitted liberal contact via telephone, letters or electronic means between the father and the children. The Third Department affirmed, holding that Family Court properly exercised its discretion, which was consistent with the AFC’s position, while noting that the father’s sister offered to be a resource for transporting the children for visitation.

## **Disclosure -** **Wife’s Communications with Husband’s Partnership; Good Faith Affirmation**

##  In Lehrman v. Lehrman, 2022 Westlaw 17813642 (1st Dept. Dec. 20, 2022), the wife appealed from a February 2022 Supreme Court order, which granted the husband’s motion to compel her to produce copies of all communications between her, directly or through her attorneys or representatives, and Cantor Fitzgerald. The First Department affirmed, holding that the husband’s subject disclosure request was “reasonably calculated” to yield information “material and necessary” within the meaning of CPLR 3101(a), namely, the reasons for termination of the husband’s partnership interests. The husband attributes his termination to a conversation the wife had with the wife of Cantor Fitzgerald’s CEO, wherein he alleges that the wife asked if the CEO would act as the parties’ divorce mediator and stated that she would be serving a subpoena upon the company. The wife did not deny that the call occurred and admitted she told the CEO’s wife that her attorneys “needed to depose” the CEO. The Appellate Division concluded that “[g]iven the temporal proximity of the call and the termination of the financially significant partnership interests, the motion court properly found the communications between [the wife] (or her counsel or other representatives) and Cantor Fitzgerald discoverable.” The First Department rejected the wife’s argument that the husband’s counsel failed to comply with the good-faith provisions of 22 NYCRR 202.7, finding that counsel’s affirmation “described efforts to resolve this dispute” and that “other communications \*\*\* and [the wife’s] counsel’s stated position during a \*\*\* conference with the court, show that further efforts \*\*\* without motion practice would have been futile.”

## **Enforcement - Visitation – Failure to Return Child – Contempt Adjudicated**

##  In Matter of McRae v. Brown, 2022 Westlaw 17882702 (4th Dept. Dec. 23, 2022), the father appealed from a May 2021 Family Court order, which found him to be in willful violation of an order of custody, which provided him with visitation every other weekend and “such other and further visitation as the parties may agree.” The Fourth Department affirmed, finding that the mother “established that she and the father had agreed to extend one of his weekend visitations with one of the children until Monday morning” and that the father “conceded that the child was not returned to the mother at the agreed time.” The mother obtained “an order to show cause and police assistance \*\*\* to regain custody of the child several days later” and therefore “established by clear and convincing evidence that the father violated the order of custody.”

## **Family Offense - Harassment 2d Found; Children Included in Order**

##  In Matter of Cook v. Berehowsky, 2022 Westlaw 17480744 (2d Dept. Dec. 7, 2022), the father appealed from an October 2021 Family Court order, which, after a hearing, found that he committed harassment 2d and granted a 1-year “refrain from” order of protection which included the mother and the subject children. The Second Department affirmed, holding that harassment 2d was established by the mother’s testimony “that the father pulled a rug out from under her, causing her to fall \*\*\* in the presence of the subject children, and the mother’s hand hit one of the subject children as she fell.” The Appellate Division determined that the father’s “intent to harass and alarm the mother can be inferred from \*\*\* his screaming before the incident and the lack of a legitimate reason for the father to pull the rug \*\*\*.” The Court concluded that the subject children were properly included in the order of protection, as being “necessary to further the purposes of protection,” citing FCA 842(1).

## **Pendente Lite -** **Child Support and Residence Carrying Costs; Counsel Fees Reversed**

## In Murray v. Rashid, 2022 Westlaw 17490799 (1st Dept. Dec. 8, 2022), the husband appealed from a May 2021 Supreme Court Order which granted the wife’s motion for child support, half of the marital residence carrying costs, and counsel fees. The First Department modified, on the law, by vacating the counsel fee award and otherwise affirmed. The Appellate Division held that Supreme Court properly determined child support based upon the parties’ imputed incomes, and that both parties were correctly directed to be responsible for the mortgage and other expenses of the marital residence, noting that the award will both preserve the asset and “provide an incentive for the husband to cooperate in moving the action forward and facilitating the sale of the residence.” Regarding counsel fees, despite the wife’s status as the less monied spouse, “the disparity in the parties’ incomes is not so great that the wife was unable to obtain and pay for adequate representation,” and there was no finding by Supreme Court that the husband “had engaged in dilatory practices increasing the wife’s counsel fees.”

## **Procedure - Default Judgment Vacated**

##  In Zeledon v. Zeledon, 2022 Westlaw 17835276 (3d Dept. Dec. 22, 2022), the husband appealed from, among other things: (1) an October 2021 Supreme Court default judgment of divorce, which, in the wife’s April 2017 divorce action, directed equitable distribution, following a September 2021 order of the same Court, which denied the husband’s motion to vacate his default in appearance at trial; and (2) a November 2021 DRO of the same court. The Third Department reversed the judgment and DRO, on the law, and remitted to Supreme Court. The Appellate Division found that the husband’s affidavit in support of his motion to vacate his default stated that on the day of trial, “he was suffering from shingles, and, as such, he was in extreme pain, sleep deprived, disoriented and unable to leave his bed.” Further, an affidavit from a physician’s assistant stated that she saw the husband 2 weeks prior to the trial date and again the day after the missed trial, and she “observed a noticeable progression of the shingles rash on [the husband’s] body,” all of which was found by the Third Department to be a reasonable excuse for his default. The Court found that the husband has a potentially meritorious defense, in that a portion of his NYS Police and Fire Retirement System pension, which has been in pay status since March 2009, is derived from accidental disability retirement benefits, and Supreme Court’s DRO awarded the wife her marital share of the entire monthly benefit. The Appellate Division concluded that the husband may have an additional meritorious claim to share in the wife’s pension.

## **LEGISLATIVE & COURT RULE ITEMS**

## **Forensic Evaluator Training Requirements**

##  DRL 240(1) has now been **amended, effective June 21, 2023, 180 days from the Governor’s signing of the bill on December 23, 2022**, by the addition of a new paragraph (a-3), which, among other things, requires an appointed forensic custody evaluator to be a psychologist, social worker or psychiatrist, and to complete biennial domestic violence training in order to qualify for the appointment. The training is established by an amendment to Executive Law 575(3), which adds a new paragraph (n), requiring the Office for the Prevention of Domestic Violence to contract with the NYS Coalition Against Domestic Violence to develop the training program. The Chief Administrator of the Courts, with the approval of the Administrative Board, is authorized to promulgate any rule (to be made and completed on or before the effective date) which is necessary to implement the law on its effective date. A02375C/S06385B, signed December 23, 2022, Laws of 2022, Ch. 740. The Governor’s approval memo states:

## Minor changes to this bill were needed to allow for remote evaluations to be conducted by a trained evaluator when a child lives out of state, and to include more governmental oversight in the training development process. I have reached an agreement with the Legislature to make these necessary changes. Based on this agreement, I am pleased to sign this bill into law.