## **NYSBA FAMILY LAW SECTION UPDATE, November 2022**

## **Matrimonial Update**

## **By Bruce J. Wagner**

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

## **Agreements - Action to Set Aside – Dismissed on Motion**

## In Stuber v. Stuber, 2022 Westlaw 5406402 (4th Dept. Oct. 7, 2022), the former husband (husband) appealed from a June 2021 Supreme Court order, which denied his motion to dismiss [CPLR 3211(a)(1), (5) and (7)] the former wife’s (wife’s) complaint in her action to set aside the parties’ agreement incorporated into the judgment of divorce upon the grounds of fraud, undue influence, unconscionability and duress. The Fourth Department reversed, holding that the wife’s “vague allegations that [the husband] failed to make full financial disclosure when the agreement was entered into are belied by the evidence produced in [the husband’s] motion papers” and that the wife “failed to come forth with any facts or circumstances” supporting her allegations. Further, the vagueness of the wife’s allegations led the Appellate Division to conclude that she failed to state a cause of action for recission upon the grounds of fraud, undue influence, unconscionability and duress and that “Supreme Court erred in denying [the husband’s] motion insofar as it sought dismissal pursuant to CPLR 3211(a)(7).”

## **Agreements - Prenuptial – Effective Upon Marriage; Consummation Not Required**

## In Fort v. Haar, 2022 Westlaw 6577794 (1st Dept. Oct. 11, 2022), the husband appealed from an April 2022 Supreme Court order which granted the wife a declaratory judgment, finding that the phrase “consummation of the anticipated marriage” in the parties’ August 2014 prenuptial agreement means “sexual relations between a married couple” and ordered a limited hearing to determine whether the parties had so consummated the marriage. The agreement also stated that it was “conditioned upon \*\*\* a valid ceremonial marriage \*\*\* and it shall become effective as of the date of that marriage.” The First Department reversed, on the law, denied the wife’s motion and granted the husband’s cross motion, declaring that the agreement is effective and enforceable as of the date of the parties’ February 2015 marriage. The Appellate Division held that the agreement “sets an ascertainable date for determining the effectiveness and enforceability” thereof and that this interpretation effectuates the parties’ intent “to avoid unnecessary and intrusive litigation in the event of divorce.” The Court concluded by noting that “the wife’s acceptance of benefits under \*\*\* the prenuptial agreement forecloses her from questioning its enforceability” and “the parties’ conduct in executing [a] modification agreement further underscores that they believed that it was in force and effect.”

## **Agreements -** **Valuation and Cut-off Date – Interpretation**

## In Goldberg v. Goldberg, 2022 Westlaw 7174203 (1st Dept. Oct. 13, 2022), the husband appealed from a September 2021 Supreme Court order which denied his motion further to a February 2020 agreement, seeking an order setting December 13, 2019 as the cut-off date for determining the valuation of marital property. The agreement, which expressly stated that it would expire on December 13, 2020, provided that December 13, 2019 would be the cut-off date for the valuation of marital property and the length of the marriage. The February 2020 agreement further provided that if either party filed “a Divorce Pleading prior to or on December 13, 2020, which filing [was] followed by notice thereof to the other party with seven (7) days of such filing,” then December 13, 2019 was preserved as the cut-off date. The wife filed a divorce action on November 8, 2020, but provided notice of the filing on November 17, 2020, 9 days later, as opposed to 7 days later. The First Department affirmed, holding that under the plain language of the agreement, there were 2 conditions to avoid expiration of the December 19, 2019 cut-off date: a filing on or before December 13, 2020 and notice of such filing within 7 days thereof. Here, only 1 condition, the filing, was met. The notice provision (which was clearly in the control of the filing party), was not satisfied, and the agreement expired according to the plain meaning of its terms.

## **Attorney & Client - Charging Lien; Fees from Client**

## In Lorne v. Lorne, 2022 Westlaw 5234633 (1st Dept. Oct. 6, 2022), the wife appealed from an October 2021 Supreme Court judgment for $177,802.37 in favor of her former attorneys. The First Department modified, only to the extent of vacating the award for fees incurred by the law firm in litigating its fee claim against the wife. The Appellate Division held that the law firm was entitled to its unpaid fees, finding the firm substantially complied with the court rules, even though the retainer agreement did not include 8 of 13 provisions required by 22 NYCRR 1400.3, holding that “either the omitted provisions addressed matters that were not relevant to the wife in any event, or the wife was made aware of those provisions through the statement of client’s rights and through her experiences in this proceeding,” and further noting that “the wife clearly understood her right to end [the firm’s] representation of her, as she had already discharged several law firms.” The Court concluded that as to the wife’s argument, that a charging lien is not available because the firm did not show that it created any “new fund,” that contention “is best addressed when the firm attempts to enforce its lien against certain funds or assets and a complete record is made on the issue.”

## **Child Support - College – Student Loan Reimbursement Denied**

## In Pinto v. Pinto, 2022 Westlaw 6850257 (2d Dept. Oct. 12, 2022), following an action in which the parties were divorced in February 2012, the father appealed from a December 2019 Supreme Court order, which denied his motion to direct the mother to reimburse him for repayment of one-half of the amount of student loans (approximately $155,000) incurred for the college costs of the parties’ 2 children. The parties entered into a stipulation in 2011, after the older child began college and 2 years before the younger child started college, which was incorporated into the February 2012 divorce judgment, which recited the parties’ intent that the children attend college, would apply for “merit and need based financial aid,” and “should there be necessary costs and expenses once financial aid, merit aid and scholarships are exhausted, the parties shall consult and try to reach an agreement on payment of these costs and expenses at the time those costs and expenses arise. If the parties cannot agree they can address the issue in a Court of competent jurisdiction.” The father’s 2019 motion alleged that grants and financial aid were insufficient to cover college costs, thus necessitating the loans, but the father did not identify the obligor upon the loans. The parties did not come to any definitive agreement on college expenses following the judgment of divorce and 2011 stipulation. The Second Department affirmed the denial of the father’s motion, holding that the 2011 stipulation was nothing more than “a mere agreement to agree” which left a material term for future negotiations. Thus, the mother had no obligation which the father could enforce by way of his motion for reimbursement of the student loans.

## **Child Support - Imputed Income – Disability Not Proved**

## In Matter of Davis v. Shihadeh, 2022 Westlaw 6849324 (2d Dept. Oct. 12, 2022), the father appealed from a December 2021 Family Court order denying his objections to an October 2021 Support Magistrate Order which, after a hearing upon the mother’s May 2021 petition, modified a March 2015 consent order ($50 per month for 1 child) to $112.01 per week. The Second Department affirmed, while noting the father’s testimony that he “was unable to work in any job for more than approximately two weeks due to a long-term disability resulting from having been hit in the head with a golf club when he was 10 years old.” The father did concede that he had worked briefly for limousine and contracting companies, and maintained that he had received disability benefits, which were terminated “a couple of years” prior to the 2021 hearing. The father claimed that his benefits ceased because he did not respond to mail notices; however, one of the mother’s witnesses testified that the father told her his disability benefits stopped because “they didn’t find him to be in any form of disability.” The Appellate Division held that the Support Magistrate’s findings regarding the father’s ability to work “were based upon credibility determinations which are supported by the record and should not be disturbed,” noting that the father “failed to submit any medical evidence showing that his disability, with which he had lived since he was 10 years old, prevented him from working.”

## **Child Support - Violation – Not Willful – Employer Withholding and SCU Errors**

## In Matter of Santman v. Schonfeldt, 174 NYS3d 880 (2d Dept. Oct. 12, 2022). The mother appealed from an April 2022 Family Court order denying her objections to a March 2022 Support Magistrate Order which, after a hearing, dismissed her October 2021 violation petition alleging the father willfully violated: (1) an October 2018 order requiring him to pay $2,750 per month toward the support of the parties’ 2 children; and (2) a June 2021 order directing him to pay $250 per month toward arrears. At the hearing, the Support Magistrate considered only whether there was evidence of willful violation of the June 2021 order, and found that the mother had not met her burden of proof on the issue of willfulness, although the mother established that the father had made only 1 payment since June 2021 and that he owed $19,591.43 in arrears. The Second Department modified, on the law, to the extent of granting her objection to so much of the Support Magistrate Order as failed to award her a money judgment and remitting to Family Court for entry thereof, given that such a judgment is mandated by statute where, as here, there was competent proof that the father failed to obey a lawful order of support. FCA 454(1). The Appellate Division found that “[t]he father testified, and presented proof, that he intended to pay, but his employer and/or the Support Collection Unit had not properly followed through with the wage garnishment procedure,” and the Support Magistrate credited that testimony. The Second Department held that “the father’s showing was sufficient to establish that his failure to pay was not willful.”

## **Counsel Fees - Paternity by Estoppel – Hearing Required**

## In Matter of K.G. v. C.H., 2022 Westlaw 10207780 (1st Dept. Oct. 18, 2022), petitioner appealed from: a June 2021 Supreme Court order, which awarded respondent counsel fees of $2,250,000 and other expenses in a “contentious and highly litigated case, commenced in 2016”; a December 2021 order finding her in contempt for not paying the counsel fees; and a January 2022 order, which denied her petition to determine parenthood by equitable estoppel. The First Department reversed the June 2021 order, on the law and the facts, and remitted to Supreme Court for a hearing to determine reasonable counsel fees. The December 2021 contempt order issued upon petitioner’s non-compliance with the June 2021 order was vacated. The January 2022 Order which dismissed her petition was affirmed.

## **Custody - In Camera – Adult Sibling Included; Child’s Wishes Not Determinative**

## In Matter of Inman v. Coleman, 208 AD3d 1637 (4th Dept. Sept. 30, 2022), the mother appealed from a May 2021 Family Court order, which granted sole legal and physical custody of the subject child (age not specified) to the father. The Fourth Department affirmed, holding that the award of custody had a sound and substantial basis in the record and noting that while “the wishes of the child favored the mother \*\*\* that factor alone is ‘not … determinative,’ \*\*\* (citations omitted).” The Appellate Division found that “the mother consented to the subject child’s adult sister’s testimony in camera and \*\*\* has waived the contention that the court erred in conducting the in camera hearing (citations omitted).”

## **Custody - Modification – Joint to Sole – Deterioration of Parental Relationship**

## In Matter of Johnson v. Johnson, 174 NYS3d 921 (4th Dept. Oct. 7, 2022), the father and the AFC appealed from a November 2021 Family Court order which, after a hearing, dismissed his petition seeking to modify a prior order providing that the parties have joint custody of their child. The Fourth Department reversed, on the law, and remitted for further proceedings on the petition. The Appellate Division held that “the continued deterioration of the parties’ relationship is a significant change of circumstances justifying a change in custody,” where, as here, the evidence “established that, after the initial custody award was entered, the parties reverted to ‘an acrimonious relationship and are not able to communicate effectively with respect to the needs and activities of their child[,] and it is well settled that joint custody is not feasible under these circumstances.” The Fourth Department, finding that the record was sufficient to make a best interests determination, awarded the father sole custody, while remitting to Family Court “to fashion an appropriate visitation schedule.”

## **Custody - Visitation – Denied**

## In Matter of Ajmal I. v. La Toya J., 2022 Westlaw 11379771 (3d Dept. Oct. 20, 2022), the mother appealed from a September 2021 Family Court order, which granted the father’s petition to modify a February 2012 order (sole legal and physical custody of the parties’ son born in 2007 to the mother), to the extent of granting him 2 hours of supervised visitation so long as he provided the mother at least a week’s notice of his plans to travel to NY to exercise the same. The father left NY in 2009 and had limited contact with the child over the ensuing years. In November 2019, the mother learned that the father had offered money on social media to anyone who gave him the mother’s address, then posted that he had obtained the address and would “[s]ee [her] soon.” The Third Department reversed, on the law, and dismissed the father’s modification petition, holding that the mother established that any visitation with the father would be harmful to the child citing the following factors: the father’s failure for 7 years following the 2012 order to seek visitation may be taken into account; during a 2014 visit, the father cut off contact with the mother and left the child with relatives so that he could attend a party in NYC, leaving the mother unaware of the child’s whereabouts for several days; at a 2017 trip to an amusement park, the father livestreamed the visit, including the child’s personal conversations, over social media; and the AFC advised Family Court and the Appellate Division that “the teenage child is upset by the interactions with the father for a variety of reasons and does not wish to see him.”

## **Custody - Visitation – Suspended; Delegation of Resumption Reversed**

## In Matter of M.K. v. Harolyn M., 2022 Westlaw 6579105 (1st Dept. Oct. 11, 2022), the father appealed from an April 2021 Family Court order which, after a hearing upon the mother’s modification petition (over multiple dates, with multiple in camera interviews with the child and a report and testimony by a forensic evaluator), suspended his visitation. The First Department modified, on the law, to delete the portion of the order which suspended the visitation until a mental health professional advises the court that a resumption thereof was safe for the child’s mental health. The Appellate Division found that “the child was suffering from acute psychiatric symptoms” and that the father had a “lack of understanding of the severity of the child’s physical and mental health issues, including her threats of self-harm.” The Court noted that the father “continually disparaged the mother to the child, pressured her to agree with him that the mother was mentally ill, and told the child that he wished the mother was dead.” The First Department concluded that Family Court “providently determined that suspending in-person visitation was in the child’s best interests, while still permitting the father to have electronic contact with her.”

## **Family Offense - Assault – Not Found; Disorderly Conduct and Harassment 2d – Found**

## In Matter of Jose M.R. v. Arian S., 2022 Westlaw 10207779 (1st Dept. October 18, 2022), respondent Arian S. appealed from, among other things, a January 2022 Family Court order, which, after a hearing, found that he committed the family offenses of assault 2d and 3d, disorderly conduct and harassment 2d. The First Department modified, on the law, vacating the assault findings and affirming the disorderly conduct and harassment 2d findings and the 2-year order of protection issued to Jose M.R. thereupon. The Appellate Division found that disorderly conduct was established by Jose M.R.’s testimony that Arian S. hit him in the face with 2 bottles of peroxide while standing outside a store, causing the people inside the store to be “shocked” and a cashier to summon the police. Upon the same incident, which included testimony that Respondent followed Petitioner in and out of the store as Petitioner pleaded with Respondent to leave him alone, established harassment 2d. In addition, the First Department held that harassment 2d was proved by Jose M.R.’s testimony that Arian S. hit him and ripped items in his home with a knife that he then used to threaten Jose, causing Jose to become afraid and seek shelter in a neighbor’s apartment. As to assault, Jose’s testimony that Arian S. left him with “a lot of injuries” was insufficient to establish the element of “serious physical injury” as defined by PL 10.00 and 120.05(1).

## **Pendente Lite - Counsel Fees – Second Award**

## In Cohen v. Cohen, 174 NYS3d 588 (1st Dept. Oct. 4, 2022), the husband appealed from a March 2022 Supreme Court order, which granted the wife’s motion for a second award of temporary counsel fees in the sum of $600,000. The First Department affirmed, holding that Supreme Court “providently exercised its discretion \*\*\* and \*\*\* the amount awarded was supported by the evidence presented,” considering “the scope and complexity of the financial issues presented, the parties’ assets and liabilities, as sworn to in their respective statements of net worth, and the prior determination that plaintiff husband, who controls much of the parties’ real estate holdings and interest in a cosmetics business, is the monied spouse,” citing DRL 237(a). The Appellate Division noted in conclusion that DRL 237(a) does not bar a second counsel fee application, and indeed the same “is expressly permitted” by the statute.

## **Procedure - Automatic Orders – Wine Collection Sale Denied**

## In Davidoff v. Davidoff, 2022 Westlaw 10778464 (2d Dept. Oct. 19, 2022), the husband appealed from a June 2019 Supreme Court order denied his motion to sell a portion of the parties’ wine collection pendente lite in order to pay marital debts and expenses. The Second Department affirmed, noting the factual disputes between the parties regarding the size and value of the wine collection, and holding that Supreme Court’s denial of the motion “was appropriate and in keeping with the statutory purposes of Domestic Relations Law §236(B)(2)(b)(1), to preserve the status quo and to ensure that neither party would be prejudiced by the potential ‘unilateral dissipation of marital assets’ (citations omitted).”

## **Procedure - Confidentiality – DRL 235(1)**

## In F.L. v. J.M., 2022 Westlaw 5233676 (1st Dept. Oct. 6, 2022), a non-party appealed from an October 2021 Supreme Court order, which denied his motion for access to the motion papers resulting in the same Court’s January 2021 order, directing a website to take down a cached published First Department decision (which contained the parties’ full names) that was later recalled and vacated, and then reissued, using only the parties’ initials. The Appellate Division held that the non-party failed to provide good cause for granting public access to the underlying motion papers, “which implicated the parties’ matrimonial action, and thus were deemed confidential by law,” citing DRL 235(1) and 22 NYCRR 1250.1(e)(2)(ii).

## **LEGISLATIVE & COURT RULE ITEMS**

## **Forensic Evaluator Training Requirements**

## As previously reported, passed by the Legislature as of June 1, 2022, and **if signed,** DRL 240(1) **would be amended, effective 180 days from signing**, 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. **As of this writing on October 30, 2022, the legislation had not yet been delivered to the Governor for signature**. A02375C/S06385B. **As was also previously reported, the AAML NY Chapter’s Board of Managers approved a memo commenting on this legislation, which has been circulated to the appropriate Executive and Legislative Branch contacts as of September 23, 2022**.