## **NYSBA FAMILY LAW SECTION UPDATE, August 2021**

## **Matrimonial Update**

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## **Agreements -** **Prenuptial – Overreaching – Hearing Ordered**

In Marinakis v. Marinakis, 147 NYS3d 416 (2d Dept. July 7, 2021), the wife appealed from a February 2018 Supreme Court order, which, without a hearing, denied her motion to set aside the parties’ prenuptial agreement. The parties were married in February 2004 and signed their prenuptial agreement “[i]n the days prior to their marriage.” The agreement provided for a waiver of both marital property principles and maintenance. The husband commenced the divorce action in February 2016 and the wife’s motion to set aside alleged unconscionability, fraud and overreaching. The Second Department reversed, on the law, and remitted for further proceedings, first holding that the wife failed to meet her burden as to unconscionability, given that she received “meaningful, bargained-for benefits,” including equal distribution of joint property and a joint account “to which all monies shall be deposited” and the husband’s payment of child support and educational expenses. The Appellate Division determined that the waiver of maintenance, by itself, fails to establish unconscionability. As to overreaching, the Second Department ruled that Supreme Court should have held a hearing, noting that while actual fraud need not be shown, here, there was a “vast disparity between the parties’ assets” at the time of the agreement; the husband may have unilaterally selected and paid for the wife’s attorney; and the attorneys engaged in negotiations for about 6 weeks prior to the wife’s initial consultation.

## **Attorney & Client - Disqualification Denied; Child Support - College – Agreement Obligation Upheld**

##  In Graziano v. Andzel-Graziano, 2021 Westlaw 2828545 (3d Dept. July 8, 2021), the former husband (husband) appealed from a November 2019 Supreme Court order which granted the wife’s July 2019 motion seeking an order directing him to pay college expenses and denied his motion seeking to disqualify the former wife’s (wife’s) counsel. The parties were married in 1994 and have 2 children. The husband sued for divorce in March 2015 and the parties’ March 2017 stipulation was incorporated into an October 2017 judgment of divorce. The Third Department affirmed, holding that as to disqualification (for the second time, see 169 AD3d 1195 [2019]), the husband’s 2011 consultation with the wife’s counsel, when the child now seeking college expenses was 10 years old, “is not substantially related” to her counsel’s representation of the wife in the post-judgment dispute over college expenses, 8 years later. As to college expenses, the stipulation “unequivocally provided that the husband would pay for the child’s college expenses, provided that the choice of college was agreeable to both parties” and that consent was “not to be unreasonably withheld or delayed.” The Appellate Division rejected the husband’s contention that he was not adequately consulted, noting that he attended 2 meetings with the wife, child and the director of college counseling at the child’s high school, and engaged in numerous email and text exchanges with the wife and child regarding the college selection process and was aware as early as March 2019 that the child had been accepted at his first-choice college. The Court concluded that there was nothing in the stipulation which required the wife to confer with the husband and “keep him apprised of every single college selection activity” and that the husband’s arguments did not relieve him of his obligation to pay college expenses.

## **Counsel Fees – After Trial; Equitable Distribution - Business Share Denied – No Valuation; Separate Property – Commingling Found; Maintenance – Amount and Duration Increased**

##  In Weiss v. Nelson, 2021 Westlaw 3177791 (2d Dept. July 28, 2021), the wife appealed from a November 2017 Supreme Court judgment rendered upon a July 2017 decision after trial of the wife’s April 2015 action, which: awarded her taxable maintenance of only $1,500 per month until age 62; directed a post-trial valuation of her business and awarded the husband a 50% credit for its date of commencement value; awarded the husband 50% of the value of certain stock in her name; and directed the husband to pay 70% of her counsel fees. The Second Department modified, on the law, the facts, and in the exercise of discretion, by: increasing the maintenance award to $3,500 per month until the wife’s eligibility for full Social Security benefits, to sooner terminate upon her remarriage or the death of either party; deleting the directive regarding the business valuation and credit to the husband; and otherwise affirmed. The parties were married in June 1987 and have 3 emancipated children. As to maintenance, the Appellate Division considered that the husband earned well over $200,000 per year and held that Supreme Court erred in imputing $80,000 in annual income to the wife, who was nearly age 55 at the time of trial, had been a stay-at-home mother for almost 10 years and had never earned more than $19 per hour, finding that $35,000 was a more appropriate imputed income. Regarding the business, given that the husband failed to submit evidence as to its value, Supreme Court should not have directed a posttrial valuation or a share thereof to the husband. The Second Department held that Supreme Court properly awarded the husband a 50% share of the wife’s stock, given that the same had been commingled with marital property. Finally, the Appellate Division affirmed the directive that the husband pay only 70% of the wife’s counsel fees, considering “the relative financial circumstances of the parties” including the maintenance award and the equal division of marital assets.

## **Custody -** **Relocation (AZ) – Granted – Domestic Violence; Self-Help Upheld**

##  In Matter of Edwards v. Ferris, 2021 Westlaw 2883199 (4th Dept. July 9, 2021), the father appealed from a July 2019 Family Court order which, after a hearing, modified a prior order (sole custody to mother and no removal from Monroe County absent consent or court order) so as to permit her to relocate to Arizona with the child. The mother had unilaterally relocated with the then 5-year-old child, contrary to the prior order. One year later, after discovering the child’s whereabouts, the father petitioned for custody and the mother cross-petitioned for permission to relocate *nunc pro tunc*, citing “a continuous and relentless cycle of domestic violence.” The Fourth Department affirmed, noting that while the unilateral removal can be considered, the decision must ultimately be based upon the child’s best interests. The Appellate Division noted the hearing testimony, which included an incident where the father placed his hands around the mother’s neck while she was holding the child and choked her nearly into unconsciousness, resulting in a 1-year order of protection against him. The Court noted that: Family Court found the father’s testimony “not to be credible”; the father did not have a job or a driver’s license; and had never paid child support.

## **Custody - Relocation in Violation of Court Order**

##  In Sukul v. Sukul, 2021 Westlaw 3073563 (2d Dept. July 21, 2021), the parties were divorced in April 2012 and the mother appealed from a September 2019 Supreme Court order which, after a hearing, granted the father’s motion to modify the custody provisions of the parties’ October 2011 incorporated stipulation, so as to award him sole legal and physical custody of the parties' children born in 2004 and 2009. The Second Department affirmed. The stipulation provided that the mother would have sole legal and physical custody and that if either party moved the residence of either child beyond a radius of 75 miles, the parties had to "confer and enter into . . . fair and equitable revisions" of the stipulation. In March 2015, the father moved for a temporary restraining order to prevent the mother from relocating with the children to TX. Supreme Court granted the father's motion and directed that the mother shall not move the children to TX "or beyond 75 miles from the children's present residence." Despite the order, in December 2016, the mother moved with the children to GA, which prompted the father to seek the children’s return to NY and modification of custody. The Appellate Division noted that the hearing evidence supported a finding “that the mother absconded with the children to Georgia, without the knowledge and consent of the father, and in violation of the court order enjoining her from moving with the children ‘beyond 75 miles from the children's present residence.’” The mother: “acknowledged that she did not tell the father she moved to Georgia or provide him with an address and that the father texted one of the children after the move to find out ‘where [they] lived’”; testified that she should be entitled to relocate with the children out of NY despite the court order because "[t]his is a free country"; stated that the father is "no good" and did not believe he should ever see the children. The father testified that if he were awarded sole custody of the children, he "would ensure they spend time with [the mother]." The Second Department concluded that “the mother acted to alienate the children from the father, and that the father was more willing than the mother to maintain contact between the children and the other parent.”

## **Custody - Reversed-Incomplete Psychological Evaluation; Lincoln Hearing Denied**

##  In Matter of Pontillo v. Johnson-Kosiorek, 2021 Westlaw 3012243 (4th Dept. July 16, 2021), the mother and the AFC appealed from a March 2020 Family Court order which, after a hearing, modified a prior order and awarded the father sole custody of the parties’ child. The Fourth Department reversed, on the law, reinstated the mother’s modification petition and remitted to Family Court. The Appellate Division noted: “The mother's mental and emotional health was the central issue contested in this proceeding, and we conclude that the court abused its discretion in making its determination and awarding the father sole custody of the child without first considering the results of the psychological evaluations that it ordered. (Citations omitted).” The expert who testified “interviewed the parties and the subject child to assess whether the child had been sexually abused, and therefore he did not provide much information on the mother's emotional functioning, the impact her mental health issues had on her ability to parent the child, or the fitness of either parent.” The Court held that there was insufficient evidence for the court to resolve the custody dispute without considering the court-ordered psychological examinations of the parents. The Fourth Department concluded that Family Court “did not abuse its discretion in failing to hold a *Lincoln* hearing given the young age of the child and the fact that the child may have been inadvertently coached by the mother to repeat unfounded allegations.”

## **Custody - Third Party – Standing – Non-Adoptive, Non-Biological**

##  In Matter of Scott v. Adrat, 2021 Westlaw 2944297 (2d Dept. July 14, 2021), Adrat appealed from an October 2019 Family Court Order denying her objections to a July 2019 Support Magistrate Order, which, after a hearing, granted Scott’s petition, filed in December 2016 (following Matter of Brooke S.B.) to the extent of directing Adrat to pay child support of $1,727 per month for twins born in 2010 to Scott. Adrat and Scott entered into a same-sex relationship in November 2008 and agreed to conceive and raise children together in December 2008 or January 2009 and began attempting to conceive through artificial insemination. The parties broke up in late 2009 and reconciled thereafter and went to a new fertility clinic in February 2010. In April 2010, Scott learned she was pregnant with twins. The parties separated for the last time in April 2011, at which time Scott and the children moved out. Adrat last saw the children at a court appearance in May or June 2011 and has not supported the children since that time. A February 2019 Family Court order, rendered after a hearing following the Support Magistrate’s referral, found that Adrat is the non-biological parent of the children and responsible for their support. The Second Department affirmed, holding that the evidence “established that the parties planned jointly for the children’s conception, participated jointly in the process of conceiving the children, planned jointly for their birth, and planned to raise them together.” The Court noted that on the day of the children’s birth, “Adrat signed Scott’s hospital admission documents voluntarily and without hesitation” and that after the birth, “Adrat referred to the children as ‘my girls.’” The Appellate Division concluded that it was not error for Family Court to consider post-conception behavior in determining the existence of a preconception agreement.

## **Enforcement - Contempt – Vaccinations – Denied**

##  In Heffer v. Krebs, 2021 Westlaw 3177763 (2d Dept. July 28, 2021), the parties were divorced in June 2019 and the former wife (wife) appealed from a June 2020 Supreme Court order, which denied so much of her December 2019 motion to hold the former husband (husband) in contempt and to modify the custody provisions of the parties’ February 2019 incorporated stipulation pertaining to their child born in 2006, so as to grant her sole legal and physical custody. The wife alleged that the husband and/or her own parents on 4 separate occasions, had the child vaccinated for common childhood diseases without discussing it with her and “in spite of her claimed religious beliefs opposing vaccines.” The Second Department affirmed Supreme Court’s denial of the wife’s contempt motion, given that the language of the parties’ agreement required the parties to “continue to cooperate and consult with one another to arrive at decisions which they believe are in the best interest of the [c]hild \*\*\*” and did not prohibit the husband from having the child vaccinated. The Court concluded that the wife failed to make an evidentiary showing to warrant a hearing on her request for custody modification, given that she did not establish that the parties’ relationship was so acrimonious that joint custody was no longer appropriate.

## **Enforcement - Incorporated Agreement – No Limitation Period**

##  In Sangi v. Sangi, 2021 Westlaw 2828544 (3d Dept. July 8, 2021), the former husband (husband) appealed from a May 2020 Supreme Court order, which granted the former wife’s (wife’s) July 2018 motion for a money judgment against him. The parties were married in November 1978 and signed a separation agreement in November 1992, which provided maintenance, support and other financial obligations payable by the husband to the wife. The agreement was incorporated into a 1995 judgment of divorce. Following the wife’s December 1995 motion, Supreme Court found the husband in contempt and imposed a fine of nearly $131,000, which he never paid. Following the wife’s 2005 motion, Supreme Court’s August 2005 order reaffirmed the earlier fine and directed the husband to pay the same. Supreme Court granted the wife’s July 2018 motion for a money judgment of nearly $130,000 plus interest from the 2005 order, rejecting the husband’s argument that her motion was time-barred. The Third Department affirmed, holding that a post-judgment motion to enforce the terms of a separation agreement, brought under the index number of the original divorce action, is not an action and is therefore not subject to either the 6-year statute of limitations under CPLR 213(2) or the 20-year statute of limitations of CPLR 211(e).

## **Family Offense - Dismissed – No Subject Matter Jurisdiction**

##  In Matter of Santana v. Pena, 2021 Westlaw 3073526 (2d Dept. July 21, 2021), the mother appealed from a January 2020 Family Court order, which dismissed her family offense petition for lack of subject matter jurisdiction and vacated a temporary order of protection. The Second Department affirmed, holding that “the Family Court properly determined that it did not have subject matter jurisdiction to entertain her family offense petition on the ground that another state had exclusive continuing jurisdiction over the parties' custody and parental access dispute and the order of protection which she was seeking would have necessarily affected the respondent's parental access rights,” while noting that FCA §154-e provides the petitioner with the ability to enforce another state’s order of protection in New York.

## **Legislative Items**

## **Child Support – Disabled Adult Children – Beyond Age 21**

## As reported in the July 2021 Update**,** passed by both houses as of June 9, 2021, and if signed, this legislation would immediately amend the DRL and the FCA to establish an obligation for the support of adult children up to age 26, if the person is developmentally disabled as defined in Mental Hygiene Law 1.03(22). The bill has not yet been delivered to the Governor as of this writing. A0898B/S04467B.

## **Equitable Distribution – Companion Animals**

 As reported in the June 2021 Update, A05775/S04248 passed both houses as of May 20, 2021 and has not yet been delivered to the Governor as of this writing.