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

## **Matrimonial Update**

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## **Agreements - Interpretation - Ambiguity**

##  In Matter of John U. v. Sara U., 2021 Westlaw 2459024 (3d Dept. June 17, 2021), the father appealed from a July 2020 Family Court order which, in his January 2020 proceeding seeking enforcement and modification of certain custody terms of a December 2019 Supreme Court judgment incorporating an October 2017 agreement and a September 2019 modification thereto, granted the mother’s motion to dismiss his petition. The parties’ agreement provided for joint legal custody and shared physical custody of 2 children born in 2010 and 2012 and stated that so long as the father maintains a residence in a stated school district, the children shall “continue to attend” school “within” that school district unless the parties otherwise agree in writing. A June 2019 change in law (PHL 2164) eliminated religious exemptions from vaccination. In response to the district’s denial of the mother’s request for medical exemptions, the children were removed from the school in September 2019 and the mother commenced home schooling. The father’s petition, relying upon the “within” the school district language, sought an order compelling the vaccinations, or, in the alternative, modifying the judgment so as to award him sole legal custody. The Third Department modified, on the law, by reversing so much of the order as granted the motion to dismiss, finding that the parties’ agreement was ambiguous. Namely, the home schooling could be interpreted as satisfying the “within” the school district provision, as the home schooling was occurring “within” the district. The Appellate Division further noted that the “continue to attend provision” was also ambiguous, because at the time the parties signed the modification agreement in late September 2019, the children were already being home schooled. The Third Department concluded that Family Court should have held a hearing to determine the intent of the school provision and remitted for that purpose, noting that after determining the proper interpretation of the provision, the court may then address the father’s request for enforcement.

## **Child Support - UIFSA – Registration of Foreign Order**

##  In Matter of Alava v. Caceres, 145 NYS3d 789 (1st Dept. June 17, 2021), the father appealed from a July 2019 Family Court order, which denied his objections to a May 2019 Support Magistrate order dismissing his petition to vacate the registration of a Swiss child support order. The First Department affirmed, finding that Switzerland is a foreign reciprocating country under UIFSA and the father failed to prove that the Swiss court did not have personal jurisdiction over him, which is a defense available under FCA 580-607(a). Notably, the father admitted that the Swiss Court advised him of the support proceedings against him and asked him for a Swiss contact for notifications, which he failed to provide, even though he was engaged in custody proceedings in Switzerland at the time and was represented by counsel.

## **Counsel Fees - Appellate – Granted**

##  In Curley v. Curley, 2021 Westlaw 2367679 (3d Dept. June 10, 2021), the former husband (husband) appealed from a November 2019 Supreme Court order which, after a hearing, granted the former wife’s (wife’s) September 2016 motion, to the extent of $21,450 in counsel fees to defend the husband’s second and third appeals and related motion practice and $1,500 in sanctions. The parties’ 2013 judgment of divorce, issued following 4 years of litigation, provided for equitable distribution of the marital residence and other property, spousal maintenance and counsel fees. The husband appealed, which was partially successful (125 AD3d 1227). While the first appeal was pending, the husband engaged in motion practice, which the wife argued was frivolous, with which contention Supreme Court agreed and denied the husband’s motion, awarding the wife counsel fees as a sanction. The husband appealed and the Third Department affirmed (144 AD3d 1334). The parties were unable to agree upon a division of personalty, placed the same in storage and proceeded to binding arbitration. In September 2015, after discovering that that contents of the storage unit had been damaged or destroyed, the wife moved for an order awarding the husband ownership of the personalty, directing him to pay all costs of the arbitration, storage and disposal. Supreme Court granted the motion and the husband appealed and the Third Department affirmed (149 AD3d 1306). The Third Department affirmed, holding that Supreme Court properly found that “the second and third appeals were frivolous and wholly without merit” and “properly considered the parties’ respective financial circumstances.”

## **Custody -** **Criminal Record; Domestic Violence; Special Needs**

##  In Matter of Daniel B. v. Selina T., 145 NYS3d 334 (1st Dept. June 10, 2021), the mother appealed from a February 2020 Family Court order, which, after a hearing, granted the father sole legal and physical custody of the parties’ children. The First Department affirmed, noting that since March 2017, the children have resided with the father, who found a school with services required by the parties’ autistic son, arranged for the children’s medical care and was willing to have the children maintain a relationship with the mother. The Court considered that the father had a criminal record but had not repeated the conduct in more than a decade and was no longer under supervision. In contrast, the mother’s relationship with the children was limited and she did not visit consistently. She was the subject of several neglect proceedings, arising out of violent behavior by her youngest child’s father, who she permitted to remain in her home in violation of an order of protection.

## **Custody - Facts Outside Record – New Hearing Ordered**

##  In Matter of Magana v. Delph, 145 NYS3d 360 (2d Dept. June 9, 2021), the mother appealed from an October 2019 Family Court order which, after a hearing upon the parties’ October 2016 petitions, granted the father sole legal and physical custody of the parties’ child born in 2013 and denied the mother’s petition seeking the same relief. The Second Department reversed, on the facts and in the exercise of discretion, remitted for a reopened hearing to be conducted forthwith and a new determination of the petitions, left the order appealed from in place as a temporary order and directed that upon remittal, Family Court shall forthwith issue an order directing neither parent to disparage the other parent in the presence or within earshot of the child. The Attorney for the Child on appeal advised the Court of “certain alleged new developments including that shortly after the child began living with the father, the child reported that the father told her that the mother was evil, and the child stated that she no longer wanted to see the mother at all.” The Appellate Division concluded that “the record is no longer sufficient to determine which arrangement is in the best interests of the child.”

## **Custody - Modification - Illegal Drug Use; Recent Work History**

##  In Matter of Dobson v. Messervey, 2021 Westlaw 2471075 (4th Dept. June 17, 2021), the father appealed from a November 2019 Family Court order, which, in the father’s proceeding seeking to modify a prior consent order, awarded primary physical custody of the parties’ child to the mother. The Fourth Department modified, on the law, by vacating the award to the mother and granting primary physical custody to the father and remitting to Family Court to establish an appropriate visitation schedule. The Appellate Division noted “the mother’s continued abuse of illegal narcotics” and found that in 3 separate incidents in the 6 months before the hearing, the mother overdosed and had to be revived with Narcan, was found passed out in a parking lot, and went missing over a weekend, leaving the child in the care of her father. Although the father had abused drugs in the past, he had not done so in the 5½ years before the hearing. The father worked full-time, and the mother had not worked in the 2 years prior to the hearing.

## **Custody -** **Modification – Special Needs; Relocation Denied**

##  In Matter of Daniel G. v. Marie H., 2021 Westlaw 2689944 (3d Dept. July 1, 2021), the mother and the attorney for the parties’ son born in 2005 appealed from an October 2020 Family Court order, which, after a 4-day hearing in August and September 2020 and *Lincoln* hearings with both children, granted the father’s November 2019 petition to modify a June 2014 consent order (joint legal custody, equally shared physical custody and final decision making to the father), made when both parties were living in Ithaca. The parties also have a daughter born in 2003 and both children have been diagnosed with autism. The father remarried and moved to MA in 2015. In August 2016, after difficulty in school in Ithaca, the daughter moved to MA to be with the father. Family Court modified the prior consent order and granted the parties joint custody of the son, with primary physical custody and final decision-making to the father, and in effect, also granting the father permission to relocate the son’s residence from Ithaca, where he had resided with the mother since the father’s move to MA in 2015. The Third Department granted a stay pending appeal and reversed, on the law, dismissed the father’s petition and granted the mother’s petition, stating: “Although a very close call, we agree with the mother and the son’s AFC that Family Court’s determination \*\*\* is not supported by a sound and substantial basis in the record.” Briefly stated, the Appellate Division cited: the son’s very strong bond to the mother, given the last 6 years he has lived with her since the father’s move to MA, except for short periods of visitation with the father; the son’s limited visitation with the father since the 2019 holiday season, due largely to the COVID-19 pandemic; the husband’s questionable allegations regarding the living conditions at the mother’s home, given his testimony that the same was a long-standing problem, yet he relocated to MA and left both children in her care; and the father’s contention that the son should not have changed schools in Ithaca because he has difficulty with change, yet he feels that it is appropriate to relocate him to MA. A reading of this lengthy decision is recommended.

## **Custody - Modification – Visitation Denied – Child’s Wishes (14 y/o); Mental Disorder**

##  In Matter of Colon v. Roggeman, 194 AD3d 1042 (2d Dept. May 26, 2021), the father appealed from a December 2019 Family Court order, which, after a hearing and 2 *in camera* interviews, denied his September 2018 petition to modify a September 2009 order (sole legal and physical custody to mother with father’s access as agreed) pertaining to the parties’ daughter born in 2006, so as to grant him a specific schedule of access. The Second Department affirmed, noting that the father had not seen the child for 9 years, was incarcerated for 8 of those years and that the child, who was nearly age 14 at the conclusion of the hearing, was adamantly opposed to any access by the father. The social worker, who had met separately with each parent and the child to attempt supervised therapeutic access, testified that forcing the child to visit would have a negative effect. The father also was diagnosed with a mental disorder, had a history of violence when he failed to take his medication, and maintained that he did not suffer from a mental disorder.

## **Custody - Modification – Visitation – Graduated Unsupervised**

##  In Matter of Damon B. v. Amanda C., 2021 Westlaw 2229739 (3d Dept. June 3, 2021), the mother appealed from an April 2020 Family Court order which, after a hearing, granted the father’s petition for modification of a prior order (sole legal and primary custody to mother, father’s time as agreed and arranged through a 3d party), to the extent of granting him unsupervised time with the parties’ child born in 2013 on a fixed schedule, starting with 2 visits of 6 hours each and graduating to overnight visits on the weekends. The AFC advocated for a regular schedule. The Third Department affirmed, noting that the issue of changed circumstances was not in dispute given that “the record reveals that the mother refused to allow the father to exercise his parenting time.” The Appellate Division found that Family Court considered a January 2019 incident during which the father and his roommate had a verbal dispute and the father broke the roommate’s dresser, while the child was in another room in the apartment, and took into account the father’s alleged marihuana use. Family Court directed the father to refrain from loud or confrontational arguments in the child’s presence and from using marihuana during his time with the child and ordered the father to attend at least 2 domestic violence sessions and follow any recommendations. According deference to Family Court’s credibility determinations, the Third Department found a sound and substantial basis in the record for the award of unsupervised time to the father.

## **Custody - Sole – Domestic Violence; Intoxication; Mental Health; Reckless & Unlicensed Driving; Supervised Access**

##  In Matter of Carin R. v. Seth R., 2021 Westlaw 2690296 (3d Dept. July 1, 2021), the father appealed from a February 2020 Family Court order which, following a hearing and a *Lincoln* hearing, granted the mother’s February 2019 petition for sole legal and primary physical custody of the parties’ child born in 2012, with time to the father at least one time per week, supervised by the paternal grandfather or uncle as arranged. The Third Department affirmed, noting that the father “had engaged in several acts that exhibited a lack of concern for the child’s safety and placed the child’s physical, mental and emotional well-being at risk,” including: domestic violence against the mother in the presence of the child; driving the child when he did not have a valid driver’s license; attempting to evade the police in a car chase while the child was in the vehicle; and drinking to the point of intoxication while the child was in his care. Finally, the Appellate Division found that the father did not prove that his mental health issues were being managed successfully.

## **Custody - Visitation – As Agreed, With Therapy**

##  In Matter of Timothy D. v. Becki C., 2021 Westlaw 2229826 (3d Dept. June 3, 2021), the father appealed from a June 2019 Family Court order, which, after fact-finding and *Lincoln* hearings, partially dismissed his September 2018 petition to modify a June 2018 consent order of custody and visitation (as agreed) pertaining to the parties’ child born in 2004. The father alleged that the mother had refused to respond to his repeated attempts to reach agreement upon a visitation schedule. Family Court denied the father’s request for a structured schedule, but directed that upon the father’s positive engagement with a mental health counselor for 3 consecutive months, the mother was required to enroll the child in counselling to improve the father-child relationship. The Third Department affirmed, noting that while Family Court properly found changed circumstances, the court also “thoughtfully provided for a course of preparational therapy, first for the father, and if successful, for the child.”

## **Equitable Distribution - Separate Property Credit – Despite Commingling**

## In Lapoint v. Claypoole, 145 NYS3d 890 (4th Dept. June 17, 2021), the husband appealed from a December 2019 Supreme Court judgment which, among other things, directed equitable distribution. The Fourth Department modified, on the law, by awarding the husband a separate property credit of $116,919.60 toward the down payment on the marital residence. The Appellate Division found that the sale proceeds from his pre-marital stock were deposited into the parties’ joint bank account for a matter of weeks before being withdrawn to pay toward the home purchase. The husband presented uncontroverted testimony, supported by documentary evidence, that he so deposited the stock proceeds into the joint account because it was the only available checking account at the time. The Court concluded that the joint bank account was used “only as a conduit” and the husband’s funds retained their separate property character.

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

In Matter of Smith v. Morrison, 2021 Westlaw 2689945 (3d Dept. July 1, 2021), Respondent appealed from a November 2019 Family Court order, which, after a hearing, found that he had committed harassment 2d and disorderly conduct against Petitioner, with whom he had been in an intimate relationship which ended in April 2019, and granted Petitioner a 1-year stay away order of protection. The petition arose from an alleged conflict in April 2019, during an arranged return of Respondent’s hat. Petitioner observed Respondent’s car parked along the road outside her residence and pulled over to return the hat. Respondent crossed the road to meet Petitioner and a verbal altercation ensued between Respondent and a male passenger in Petitioner’s car, apparently prompted by a racial epithet uttered by said male passenger toward Respondent. The parties argued in the road. Petitioner further alleged 5 incidents between June and July 2019 where she perceived Respondent to be following her in some fashion. The Third Department reversed, finding a failure of proof by a preponderance of the evidence as to both alleged family offenses, and noting that the hearing evidence revealed that Respondent had legitimate reasons for being at the 5 locations, as opposed to having had any intent to harass, annoy or alarm Petitioner.

## **Family Offense - Harassment 2d – Found; Non-Discussion Directive Vacated;** **Order Duration Not Affected by Duration of Temporary Order**

 In Matter of Sophia M. v. James M., 2021 Westlaw 2545204 (1st Dept. June 22, 2021), the respondent appealed from a February 2020 Family Court order which found that he had committed harassment 2d, granted a 2-year order of protection, and directed him “not to discuss Petitioner or this case with anyone familiar with Petitioner.” The First Department modified, on the law and the facts, by deleting the “no discussion” provision. The Appellate Division held that harassment 2d was established by respondent’s transmission of 3 emails to at least 53 people, on which Petitioner was blind-copied, complaining that her mother was manipulating her into alienating him, and his sending at least 2 more emails to petitioner, chastising her for taking medication to treat her ADHD diagnosis. Petitioner testified that she suffered panic attacks when she saw the emails. The Court held that Family Court was not required to consider the nearly 2-year duration of the temporary order of protection when determining the length of the final order of protection. Finally, although the Appellate Division held that respondent’s transmission of the subject emails was not protected by the First Amendment, the Court vacated the “no discussion” directive because the harassment “is adequately addressed” by the stay away order of protection.

## **Legislative Items**

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

## 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. A.0898B/S.04467B.

## **Equitable Distribution – Companion Animals**

 As reported in the June 2021 Bulletin, A05775/S04248 passed both houses as of May 20, 2021 and has not yet been delivered to the Governor as of this writing. AAML NY Chapter has submitted a memo opposing this bill.