## **NYSBA FAMILY LAW SECTION, Matrimonial Update, November 2020**

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## **Attorney and Client - Withdrawal – Coronavirus Risk to Attorney**

In NYSBA Ethics Opinion 1203 (October 8, 2020), the Committee determined that the inquiring attorney, who was representing a client in an immigration court matter for which an in-person appearance was scheduled, under circumstances where the attorney stated that no coronavirus safety protocols or procedures had been established for such personal appearances, thus presenting a substantial health risk to the attorney and his family, may seek permission of the court to withdraw from the representation. The Committee reasoned that Rule 1.16(b) permits withdrawal when “the lawyer’s mental or physical condition renders it difficult for the lawyer to carry out the representation effectively.”

## **Child Support - CSSA – Shared Custody – Count Overnights, Not Hours**

## In Matter of Laskowsky v. Laskowsky, 2020 Westlaw 6163839 (3d Dept. Oct. 22, 2020), the father appealed from a February 2019 Family Court order, which dismissed his March 2018 petition seeking to terminate his child support obligation of $1,424 per month for 2 children (born in 2005 and 2008), as set forth in an agreement incorporated into a 2015 judgment of divorce. A November 2017 consent order granted shared custody, with primary physical custody to the mother. The father maintained, by counting the hours the children were technically in his custody (which included time spent with caregivers) that the children were with him 52.1% and 53.4% of the time, respectively, and that this change of circumstances since the time of the judgment, warranted modification. The Third Department affirmed, holding that “the undisputed evidence demonstrated that, over a 14-day period, each parent had the children for a total of seven overnights,” and given the father was the party with the higher income, he “is the noncustodial parent within the meaning of the CSSA.”

## **Counsel Fees - Post-Judgment – Denied**

In Giasemis v. Giasemis, 130 NYS3d 386 (2d Dept. Oct. 7, 2020), the parties were divorced in September 2007 and the former husband (husband) appealed from an August 2017 Supreme Court order rendered in a post judgment proceeding, which granted the former wife’s (wife’s) November 2016 cross-motion for counsel fees in the sum of $26,622, to the extent of awarding her $7,500. The Second Department reversed, on the facts and in the exercise of discretion, and denied the wife’s motion, “considering the equities and the circumstances of this case, including the parties’ respective financial positions, the fact that they both engaged in extensive motion practice and settled their differences without a hearing and the plaintiff’s failure to demonstrate that she was financially unable to compensate her counsel, we find that the Supreme Court improvidently exercised its discretion in awarding attorney’s fees to the plaintiff (see Domestic Relations Law §238 \*\*\*).” [For prior appeal, see 139 AD3d 794].

## **Custody - Access by Parent’s Partner**

In Matter of Kerr v. Kerr, 2020 Westlaw 5867849 (4th Dept. Oct. 2, 2020), the mother appealed from a June 2019 Family Court order which, after a hearing, determined that the father’s live-in girlfriend shall not be required to be supervised while interacting with the subject children. The Fourth Department affirmed, holding that despite the girlfriend’s lengthy criminal history and past substance abuse issues that led to her losing custody of her own children, Family Court credited her testimony that “she had been drug free for seven years, was employed, and had been a law-abiding citizen since her most recent conviction in 2012” and also credited the testimony of her sister and mother, who had no concerns about her interacting with children.

## **Custody - Modification – Corporal Punishment; Joint to Sole**

In Matter of Morales v. Vaillant, 129 NYS3d 874 (4th Dept. Oct. 2, 2020), the mother appealed from a January 2019 Family Court order which, after a hearing, modified a prior order so as to award sole legal and physical custody of the parties’ then 3½- year-old child to the father, with visitation to her. The Fourth Department affirmed, holding that the father established the requisite change of circumstances based upon, among other things, “the mother’s inability to handle the then 3½ year-old child’s purported misbehavior and her resort to inappropriate physical discipline to punish the child.” The Appellate Division held that the custody award to the father was in the child’s best interests, given the parties’ “heightened inability to communicate in a manner conducive to sharing joint custody.”

**Custody -** **Modification – Dismissal Reversed**

In Matter of Edwin Z. v. Courtney v. AA., 2020 Westlaw 6163798 (3d Dept. Oct. 22, 2020), the father appealed from an April 2019 Family Court order which granted the mother’s motion to dismiss, following the close of proof of his July 2018 petition. The father sought to modify a December 2016 consent order (joint legal custody, primary to mother and parochial school through 8th grade) pertaining to their then 14-year-old son, so as to allow the child to enroll in a public high school and to grant him increased custodial time, given his proximity to the proposed school. The Third Department reversed, on the law, and remitted for further proceedings, holding that the father established changed circumstances: the parents cannot agree upon public or parochial school; the agreement is silent on school after 8th grade; and the child expressed a preference for public school, while noting that Family Court erred in denying the father’s motion for a Lincoln hearing.

## **Custody - Modification – Dismissed**

In Matter of Brandy P. v. Pauline W., 130 NYS3d 297 (1st Dept. Oct. 8, 2020), the father appealed from a May 2019 Family Court order, which dismissed his petition seeking to modify a prior order granting custody of the children to the maternal grandmother, so as to grant him joint custody. The First Department affirmed, holding that the father failed to show changed circumstances, noting that while “it is commendable that he is now attending therapy, he has presented no evidence of the progress he has made or the insight he has gained into his parental deficiencies.”

## **Custody - Modification – Hearing Required**

In Matter of Fouyalle v. Jackson, 2020 Westlaw 6051487 (2d Dept. Oct. 14, 2020), the father appealed from a March 2019 Family Court order which, without a hearing, granted the mother’s November 2017 petition to modify a March 2016 order (joint legal custody, residential to mother), so as to suspend his parental access at the request of the then 11-year-old child (supported by the AFC) and denied his November 2017 petition to enforce the March 2016 order. The Second Department reversed, on the law, and remitted to Family Court to “expeditiously conduct a hearing and for a new determination thereafter” of the parties’ petitions, leaving the March 2019 order in effect pending such hearing and determination. The Appellate Division held that there were disputed factual issues which required a hearing and that Family Court erred in relying upon “the hearsay statements and conclusions of the forensic evaluator and the child’s therapist, whose opinions and credibility were untested by the parties.’

## **Custody - Modification – Relocation (NC) – Granted**

In Matter of Monique J. v. Keith S., 130 NYS3d 301 (1st Dept. Oct. 13, 2020), the father appealed from a July 2019 Family Court order which, after trial, granted the mother’s petition to modify a prior order (joint custody), so as to award her sole legal custody and permission to relocate to North Carolina. The First Department affirmed, noting the mother’s credible testimony that the father committed domestic violence against her, leading to a neglect finding against him. The Appellate Division found that the mother has been the child’s primary caretaker since birth and has “closely managed his extensive educational and medical needs, with little to no participation by the father.” As to relocation, the First Department determined that the move “would improve the child’s quality of life since [the mother] would have family support, educational and medical resources, and employment opportunities.”

## **Custody - Modification – Visitation – Increased – Wishes of Children (12 and 14 y/o)**

In Hendershot v. Hendershot, 2020 Westlaw 5867811 (4th Dept. Oct 2, 2020), the father appealed from a May 2019 Supreme Court order, which granted the mother’s motion to modify the judgment of divorce so as to increase her visitation with the parties’ then 12 and 14-year-old children. The Fourth Department affirmed, noting that the father was living entirely in Canandaigua at the time of the judgment (the mother had moved to Albany) and had significant time with the children during the week, but thereafter began attending college in Ithaca and living there during the week, leaving the children entirely in the care of his mother. The mother then moved back to Canandaigua. The Appellate Division held that the combined effect of the parties’ relocations was a change of circumstances warranting a reexamination of visitation, while noting that although not dispositive, the parties’ children stated they wished to spend more time with the mother.

## **Custody -** **Third Party – Aunt – Granted**

In Matter of Frances M.L. v. Luis F.O.C., 130 NYS2d 303 (1st Dept. Oct. 13, 2020), the father appealed from an October 2019 Family Court order, which awarded joint legal custody of the subject children to the aunt and him, with primary physical custody to the aunt. The First Department affirmed, holding that the aunt established extraordinary circumstances to demonstrate standing to seek custody following the mother’s February 2018 death. The Appellate Division noted that: the aunt has been involved in the children’s upbringing throughout their lives and the children were thriving in her care; the children had lived with the aunt since September 2013, except for 6-month period in 2017; and the father was largely absent and had never lived with the children or cared for them for any length of time.

## **Custody - Third Party – Child’s Sister; AFC Substitution During Hearing**

In Matter of Watkins v. Hart, 2020 Westlaw 5867931 (4th Dept. Oct. 2, 2020), the mother appealed from a December 2018 Family Court order which, after a hearing, granted custody of the subject child to the child’s adult sister. The Fourth Department affirmed, holding that the sister met her burden of establishing extraordinary circumstances to establish standing, where the child was removed from the mother immediately after birth and placed in DHS custody, remaining in foster care for almost 2 years before being placed with the sister. As of the time of trial, the child had been with the sister for almost a year and had never lived with the mother, who had admitted neglect in a separate proceeding. The Appellate Division found that the award of custody to the sister was in the child’s best interests, noting that the mother failed to testify at trial and failed to present any proof to counter the sister’s petition for custody. The Fourth Department rejected the mother’s contention that Family Court erred by substituting a new AFC on the second day of trial when the original AFC had to recuse due to a conflict of interest.

## **Custody - Third Party – Grandmother – Joint Legal, Primary**

In Matter of Hilkert v. Parsons-O’Dell, 2020 Westlaw 5987239 (4th Dept. Oct. 9, 2020), the father appealed from a September 2019 Family Court order, which, after a hearing, granted joint legal custody of the subject children (one turned 18 while the appeal was pending) to the maternal grandmother and him and primary physical custody to the grandmother. The Fourth Department affirmed, holding that the grandmother established extraordinary circumstances to warrant standing, given that the mother was deceased, a prior custodian relinquished custody and the father had gone years without seeing the younger child. The Appellate Division noted that the younger child has been doing well in school while living with the grandmother pursuant to a temporary order, and that she is willing to foster a relationship with the father. The father’s request for physical custody would require the child to move to South Carolina, which is against the child’s wishes.

## **Custody - UCCJEA – No NY Jurisdiction to Modify**

In Matter of Quevedo v. Overholser, 130 NYS3d 373 (2d Dept. Oct. 14, 2020), the mother appealed from an August 28, 2019 Family Court order which dismissed, for lack of subject matter jurisdiction, her August 21, 2019 petition to modify a May 2016 North Carolina order, which awarded custody of her child born in July 2005 to the grandmother. A previous 2006 Florida order awarded sole legal and physical custody to the grandmother, who relocated to North Carolina with the child in 2008. The mother thereafter brought a modification proceeding which resulted in the aforesaid May 2016 order. A March 2017 North Carolina order awarded custody to the mother, who later moved with the child to Virginia. Appeals ensued, resulting in affirmance of the May 2016 order and vacatur of the March 2017 order. The mother obtained a stay pending her appeal to the Supreme Court of North Carolina and moved with the child to New York in December 2018. The Supreme Court of North Carolina dismissed the mother’s appeal in June 2019. The NY and NC courts communicated in August 2019 and it was determined that a custody petition remained pending in NC, leading the Second Department to affirm Family Court’s dismissal of the mother’s modification petition.

## **Equitable Distribution -Foreign Judgment – Res Judicata Defense Waived**

In Jolley v. Lando, 2020 Westlaw 5867597 (4th Dept. Oct. 2, 2020), the wife appealed from a November 2017 Supreme Court order which equitably distributed marital property. The Fourth Department modified certain of the monetary terms and remitted for further proceedings. The husband obtained a Pennsylvania judgment of divorce and then commenced this action seeking equitable distribution. The wife argued that the husband’s equitable distribution claim was barred by res judicata, but the Appellate Division agreed with the husband that the wife waived that defense by failing to raise it in either a pre-answer motion to dismiss or her answer, citing CPLR 3211(e).

## **Equitable Distribution - Modification – Denied**

In Cohen v. Cohen, 130 NYS3d 352 (2d Dept. Oct. 7, 2020), the wife appealed from an April 2018 Supreme Court order, which denied so much of her cross motion to revisit the issue of equitable distribution in the event the court granted the husband’s February 2018 motion to modify the child support provision of the parties’ September 9, 2016 stipulation of settlement. The Second Department affirmed. The parties were married in 1999 and have 3 children. The wife commenced the divorce action in December 2013. A September 8, 2016 stipulation provided for sole legal and residential custody to the husband. The September 9, 2016 stipulation resolved child support, maintenance, equitable distribution, counsel fees and arrears. The wife waived maintenance; the husband waived child support and the parties agreed to sell the marital residence, along with other terms. Supreme Court questioned whether the September 9, 2016 stipulation complied with the CSSA and the wife’s counsel admitted it did not, and asked for more time to submit a written stipulation complying with the CSSA. No stipulation, proposed findings or judgment was ever submitted. Supreme Court denied the husband’s February 2018 motion to modify child support, finding that the stipulation was invalid under the CSSA, and set the child support and maintenance provisions aside, while also denying the wife’s cross motion to revisit equitable distribution. The Appellate Division held that Supreme Court properly denied the wife’s cross-motion, given that the record “does not support a finding that the equitable distribution provisions were intertwined with the child support provision so as to require that it be set aside with the child support provision.”

## **Equitable Distribution - Professional Practice (50%); Separate Property Appreciation (35%) – Granted**

In Pace v. Pace, 2020 Westlaw 6324729 (3d Dept. Oct. 29, 2020), both parties appealed from an October 2018 Supreme Court judgment which, among other things, awarded the wife a 35% share of the appreciation of the husband’s premarital rental properties and awarded the husband a 50% share of the wife’s audiology practice. The Third Department affirmed, noting that the husband: “tended to the [] properties regularly, maintaining them in good condition, making repairs as necessary and actively working towards ensuring that each rental space was utilized to its income potential”; and that the husband’s efforts were “facilitated by the wife’s indirect contributions in the home and in caring for the children.” As to the audiology practice, the Appellate Division found that: the wife obtained her Master’s Degree and Doctorate during the marriage and started her practice during the parties’ 22-year marriage; the husband was involved in the design, lay out and decorating of the wife’s practice locations and that he undertook greater responsibilities at home and with the children; and that he directly and indirectly contributed to the wife’s efforts in starting and growing her practice.

## **Equitable Distribution - Proportions; Separate Property Contributions as Factor; Valuation Failure**

## In Gorman v. Gorman, 2020 Westlaw 6277295 (1st Dept. Oct. 27, 2020), the wife appealed from a March 2019 Supreme Court judgment which, among other things: (1) awarded the husband 55% of the net proceeds of the sale of the marital residence, given his substantial separate property contributions thereto; (2) awarded him 70% of two brokerage accounts “largely funded by [his] separate property”; and (3) failed to make an in-kind distribution to her of the husband’s minority interests in certain limited partnerships. The First Department affirmed, noting that Supreme Court providently exercised its discretion as to the disproportionate awards, even if a separate property credit was not warranted, and given that there was no evidence that the husband could assign his partnerships and the wife’s waiver of valuation of those interests, “the court did not have a basis to make an in-kind distribution.”

## **Evidence - Family Offense – Child’s Hearsay Statement Inadmissible**

In Matter of Godfrey v. Bahadeur, 130 NYS3d 404 (2d Dept. Oct. 14, 2020), respondent appealed from an August 2018 Family Court order of protection, which found that he had committed a family offense against one of petitioner’s children and directed him to stay away from the subject children for 3 years. The Second Department reversed, on the law, and dismissed the petition, holding that the only evidence submitted was the child’s hearsay statements. The Appellate Division noted that while the FCA 1046(a)(vi) hearsay exception may apply to a custody proceeding founded on neglect or abuse, it does not apply in a family offense proceeding.

## **Paternity - Personal Jurisdiction**

In Matter of Joyce M.M. v. Robert J.G., 2020 Westlaw 5986878 (4th Dept. Oct. 9, 2020), the maternal grandmother and custodian of the subject child appealed from a February 2019 Family Court order which dismissed, with prejudice upon the ground of lack of personal jurisdiction under FCA 519, her petition seeking a declaration that respondent, a North Carolina resident, is the father. The Fourth Department modified, on the law, by providing that the petition is dismissed without prejudice, holding that FCA 519 was not applicable where the putative father is available. The Appellate Division noted that FCA 580-201 provides for personal jurisdiction over a non-resident, but here, the grandmother’s petition failed to allege any of the requisite grounds.

## **Pendente Lite - Counsel Fees**

In Lvovsky v. Lvovsky, 2020 Westlaw 6136914 (1st Dept. Oct. 20, 2020), the husband appealed from a January 2019 Supreme Court order in the wife’s 2014 divorce action, which granted her $150,000 in temporary counsel fees. The First Department affirmed, holding that: the husband was in a superior financial position and had transferred significant sums out of his account for 2 years after commencement of the action; had refused to comply with support orders; and even if the wife had access to funds, “there would be no requirement that she spend down a substantial portion of those assets.”

## **Pendente Lite - Temporary Maintenance** **and Carrying Charges – Reversed**

In Capozzoli v. Capozzoli, 2020 Westlaw 6051566 (2d Dept. Oct. 14, 2020), the husband appealed from an October 2018 Supreme Court order, which granted wife temporary child support of $6,753 per month, temporary maintenance of $6,940 per month and directed the husband to pay the real estate taxes, homeowner’s insurance, and homeowner’s association fees on the marital residence. The Second Department modified, on the law, by deleting the award of temporary maintenance and carrying charges and remitted for a new determination on temporary maintenance. The parties were married in 2000 and have one child and the wife commenced the action in 2018. The Appellate Division held that Supreme Court’s temporary maintenance award resulted in a double shelter allowance, since the formula for temporary maintenance “is intended to cover all of the plaintiff’s basic living expenses, including housing costs.” The Court concluded that Supreme Court erred by deviating in this manner from the guideline amount without making a finding that such amount was unjust or inappropriate based upon the factors enumerated in DRL 236(B)(5-a)(h).

**Procedure - Bifurcation – Criticized**

## In Kaufman v. Kaufman, 2020 Westlaw 6051523 (2d Dept. Oct. 14, 2020), both parties appealed from a July 2016 Supreme Court judgment, in an action the wife commenced in 2011 and in which 21 days of trial were had in April and May 2013. The Second Department’s opinion and order is 46 pages and will be only briefly summarized. A full reading is recommended. The issues are best described by this excerpt from the court’s opinion:

These appeals and cross appeal, as well as the two other appeals in the same case also decided today, are a graphic illustration of the prolixity that may ensue when a complicated matrimonial case is cabined into constituent parts which are heard and decided piecemeal by the Supreme Court. The court bifurcated the trial into phases but, in the end, only conducted one of the two promised phases of the trial. Because some of the issues did not lend themselves to a neat division, the issues, and the court's seriatim determination of them, overlap. As a consequence of the incremental approach to the serial determination of the significant issues raised, which were followed by sequential appeals and cross appeals from the various orders and the final judgment, which appeals are prosecuted on voluminous appendices and supplemental appendices, this Court has not been provided with either a clear, comprehensible, and accessible record or a unified, comprehensive analysis by each party as to what determinations were made by the Supreme Court and which of those decisions each party accepts or challenges. Moreover, with respect to equitable distribution of the parties' substantial investment assets, the judgment of divorce entered by the court merely incorporated by reference its prior decisions, without specifying what is actually ordered, adjudged, and decreed, except that it set forth certain deviations from those prior decisions. Since the decisions conflict with each other in important respects, it is unclear what the court actually directed as to the equitable distribution of major and valuable assets.

Most significantly, while the Supreme Court initially divided the trial into phases, it ultimately conducted only the first phase of the trial and rendered one posttrial decision; the other phase of the trial was short-circuited, with decisions being rendered on the basis of the record in the first trial, supplemented by what the court gleaned from conferences and from motion practice. The court's failure to conduct a trial on all contested issues, in contravention of the court's own established ground rules for this case, is a fundamental error that would ordinarily, by itself, require reversal of those aspects of the court's determinations which are contested by the parties and were made without affording them the opportunity to submit their evidence. However, on those issues where the parties seek review but do not request a further hearing, we have evaluated their positions on the basis of the record as it stands.

We take this opportunity to remind the matrimonial courts of their fundamental obligations to conduct a trial on the contested financial issues, to develop a clear trial record, to render a comprehensive decision which covers all of the issues in dispute, and to issue a comprehensive judgment which clearly and definitively sets forth the parties' rights and obligations. While it is within the discretion of the courts to bifurcate the financial issues to be tried, the courts should refrain from issuing piecemeal decisions. The issues of equitable distribution, maintenance, child support, and counsel fees are intertwined. Indeed, equitable distribution sub-issues such as the characterization, value, and distribution percentage of the parties' property are also interconnected. A holistic and comprehensive review of the parties' finances is required in order to provide a just and equitable resolution of the parties' rights and obligations. Moreover, it should not be necessary to emphasize, as we do here, that the court's decision after trial should be based on the evidence admitted at the trial and the parties should have a full and fair opportunity to tender admissible evidence relevant to all of the issues in dispute.

Ultimately, after an extensive analysis and discussion, the Second Department modified, on the law, on the facts, and in the exercise of discretion, by (1) deleting the provisions thereof equitably distributing the parties’ assets and calculating the defendant's child support obligations, (2) deleting the provision thereof directing that the defendant's maintenance payments to the plaintiff be credited against the plaintiff's equitable distribution award, and (3) deleting the provision thereof awarding the plaintiff $1.5 million in interim counsel fees, and substituting therefor a provision awarding the plaintiff $500,000 in interim counsel fees, to be paid by the defendant to the plaintiff's counsel within thirty (30) days of the service of the opinion and order with notice of entry. The Appellate Division remitted to Supreme Court for further proceedings “to be conducted expeditiously” and for the entry of an appropriate amended judgment thereafter. Pending the new determination on the issue of child support, the child support provisions of a June 2011 so-ordered stipulation were continued.