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

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## **Child Support - CSSA – Failure to Impute Income Reversed**

 In Thompson v. Thompson, 2020 Westlaw 5778490 (1st Dept. Sept. 29, 2020), the wife appealed from a June 2019 Supreme Court order which denied her request to impute income to the husband for child support purposes. The First Department reversed, on the facts, granted the request to impute income and remanded for further proceedings. The Appellate Division found that Supreme Court improvidently exercised its discretion by accepting the husband’s “self-reported gross annual income at the time of trial and declining to impute income to him,” where the evidence established that between 2011 and 2016, his income ranged from $78,866 to $100,000, and after he lost his job in 2017 and took a lesser paying job, he failed to explain his inability to secure a similar position.

## **Child Support – CSSA - Opt-Out Vacated**

 In Martelloni v. Martelloni, 2020 Westlaw 5807373 (2d Dept. Sept. 30, 2020), the parties were divorced by a June 2012 judgment which incorporated a January 12, 2012 stipulation. The wife commenced a plenary action in May 2014, seeking to vacate so much of the stipulation as pertained to unreimbursed medical expenses and childcare expenses for failure to comply with the CSSA while deviating therefrom. A January 2015 Supreme Court order determined that the aforesaid portion of the stipulation was invalid. The wife moved on July 10, 2017 to compel the husband to pay his pro rata share of the children’s unreimbursed medical expenses and child care expenses, which relief was granted by an August 25, 2017 order, but made retroactive only to July 10, 2017, the date of her motion, rather than to January 12, 2012, the date of the invalidated stipulation. The Second Department reversed, on the law, holding that the wife “did properly commence a plenary action to vacate those provisions of the stipulation” pertaining to medical costs and childcare expenses and that Supreme Court “should have granted” so much of the wife’s motion seeking such costs and expenses retroactive to the date of the stipulation of settlement.

## **Child Support - Modification – Denied; Violation Found**

 In Matter of Siouffi v. Siouffi, 2020 Westlaw 5549919 (3d Dept. Sept. 17, 2020), the father appealed from: (1) a May 2018 Family Court order which dismissed his May 2017 modification petition; (2) an October 2018 Order which granted a portion of the mother’s August 2017 petition and found him in violation of a prior order; and (3) a February 2019 order which granted counsel fees to the mother. The parties were married in 2002 and have one child born in 2003. The parties’ December 2014 and September 2015 agreements provided for child and spousal support and were incorporated into a December 2015 judgment of divorce. The agreements opted out of the 15% and 3-year modification grounds. After a hearing, the support magistrate found that the father did not establish a change in circumstances warranting modification, based upon his claim of a substantial and unforeseen change in his income. At the time of the judgment, the father was a salaried hospital physician with a base salary of $425,000 and actual earnings for each of the 2 prior years closer to $500,000. The father maintained that his employment was in jeopardy and that is why he started looking for another job, and that he was “pressured to leave,” ultimately taking a job in Florida with a base salary of $250,000, as against another offer in Florida for $275,000. The Appellate Division, noting credibility problems with the father’s testimony, affirmed the dismissal of his modification petition, holding that the father failed to establish that his employment ended “through no fault of his own,” and further failed to show “other efforts to procure equivalent employment.” The Court held that the mother established the violation, which was not found to be willful, and Family Court made an appropriate discretionary counsel fee award, given that the mother’s petitions were successful and the father did not attack the fee award as unreasonable.

## **Custody - Adjournment Denied; Sole – Criminal Charges; Drug Treatment Abscond; Limited Contact with Child**

 In Matter of Jerry VV v. Jessica WW, 2020 Westlaw 5549906 (3d Dept. Sept. 17, 2020), the mother appealed from a January 2020 Family Court order, which granted the father’s petition for custody of the parties’ child born in 2007, which he filed after the mother “was arrested for, among other things, violating probation” and pursuant to which he was granted temporary custody. At a November 2018 appearance at which the mother appeared by phone, Family Court scheduled a December 2018 hearing. Prior to the hearing, “the mother was unsuccessfully discharged from a drug treatment program, she absconded and a warrant was issued for her arrest.” The mother failed to appear and her counsel requested an adjournment, which Family Court denied and proceeded with the hearing, in which the mother’s counsel actively participated. The Third Department affirmed, holding that Family Court did not abuse its discretion in denying an adjournment to the mother, given that the court “had previously adjourned the matter, found the excuse for the mother’s nonappearance suspect and knew that she was the subject of an outstanding warrant.” As to Family Court’s custody award to the father, the Appellate Division found the same to be in the child’s best interests, noting that “the mother had criminal charges pending, was unsuccessfully discharged from a drug treatment program, had absconded and was the subject of an outstanding arrest warrant.” In the previous 6 months while the child was in the father’s temporary custody, the mother called the child only 3 times.

## **Custody - Relocation (Manhattan to Montauk) – Granted**

 In Matter of Louis B. v. Jennifer L., 2020 Westlaw 5778345 (1st Dept. Sept, 29, 2020), the mother appealed from a June 2019 Family Court order, which granted the father’s petition to modify a 2017 consent order (sole physical custody to him) to permit him to relocate with the parties’ teenage daughter (age not specified) from New York County to Montauk. The First Department affirmed, holding that the father established by a preponderance of the evidence that the child’s life would be economically enhanced and finding that the child had lived with the father and his wife for most of her life, the child expressed her preference for the move, and the mother had limited involvement in the child’s life and medical care.

## **Custody - Relocation (Scarsdale to Armonk) – Denied**

 In Schwartz v. Schwartz, 2020 Westlaw 5806649 (2d Dept. Sept. 30, 2020), the mother appealed from an October 2019 Supreme Court order which, after a hearing: (1) denied her September 2018 motion for permission to relocate with the 3 children (born in 2006, 2009 and 2011) 12.5 miles from Scarsdale to Armonk; (2) denied her request for counsel fees; and (3) directed her to pay counsel fees to the father of $450,000. The Second Department modified, on the facts and in the exercise of discretion, by reversing the directive that the mother pay counsel fees, and otherwise affirmed. The parties were married in 2005 and moved to Scarsdale in 2009, where the father’s parents, friends and religious community were located. The wife commenced the divorce action in 2015 and the parties entered into an agreement in 2017 which was incorporated into a November 2017 judgment of divorce. The agreement required the mother to stay in Scarsdale with the children until the youngest child graduated from high school, unless the father died, moved out of Scarsdale, or the mother made a motion, no sooner than one year following the agreement, and made a showing to the satisfaction of the court that her continued residence in Scarsdale was intolerable to her “for specific reasons that are determined by the Court to be legitimate,” such as actions of the father or his family or his religious community not caused by the mother, and that such a move would likely alleviate such intolerable circumstances, would not be contrary to the best interests of the children and is sanctioned by a court order. The Second Department held that the mother did not meet her burden under the agreement and that the move “would significantly hamper” the father’s ability to participate in the children’s activities. The father does not generally travel by motor vehicle on the Sabbath or certain religious holidays; much of the children’s extracurricular activities that occur on the Sabbath take place in Scarsdale and the father is able to attend and get the children to the same by walking, biking or scooter. The Appellate Division noted that the mother’s reason for moving “is focused on her level of discomfort living in a community that she no longer feels a part of because of the divorce.” Regarding counsel fees, the Second Department found that Supreme Court’s counsel fee award to the father “makes no reference to the parties’ finances,” leading to the conclusion that “there is no basis in the record for an award of counsel fees to the defendant.”

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

 In Matter of Bonnie AA v. Kiya DD, 2020 Westlaw 5549921 (3d Dept. Sept. 17, 2020), a May 2017 order granted joint legal custody of twin daughters born in 2013 to the father and maternal grandmother with primary physical custody to the grandmother, and joint legal custody of a son born in 2010 to the father and the children’s maternal cousin, with primary physical custody to the cousin. The father had supervised visitation with all the children twice per month. In June 2017, the grandmother filed a petition for modification, alleging that the son had begun residing with her; the father also filed for modification, seeking sole legal and physical custody of all 3 children. Following a hearing, Family Court entered an August 2018 order granting primary physical custody of the son, and sole legal custody of all 3 children, to the grandmother, and dismissed the father’s petition. Upon the father’s appeal, the Third Department affirmed, noting that the acrimonious relationship between the father and grandmother made joint legal custody impractical and not in the children’s best interests. Regarding physical custody, the grandmother provided a suitable home and had been a steady presence in the children’s lives, while the father was incarcerated from 2013 to December 2016, the twins had never lived with him, he had only recently gained steady employment and his living situation was entirely dependent upon his continued relationship with his girlfriend of several months.

## **Pendente Lite - Prior Restraint on Speech – Unconstitutional**

 In Karantinidis v. Karantinidis, 2020 Westlaw 5648552 (2d Dept. Sept. 23, 2020), the husband appealed from a January 2016 Supreme Court order which, among other things, directed the husband “not to discuss, demean, or disparage the [wife] to any third parties, including, but not limited to the [wife’s] patients.” The Second Department modified, on the law, by directing the husband “not to discuss, demean, or disparage the [wife] to her patients,” holding that the directive encompassing “any third parties” was an unconstitutional prior restraint on speech which was “overbroad, and not tailored as precisely as possible to the exact needs of this case.” The Appellate Division noted that the wife is a psychologist and her concern about damage to her professional reputation is remedied by the order as modified.

**Procedure – Virtual Hearing – Objections Denied**

 To the same effect as A.S. v. N.S., 68 Misc3d 767 (Sup. Ct. N.Y. Co., Dawson, J., July 1, 2020)[see AAML NY Chapter Bulletin, August 2020, Vol. 6 No. 8 at 10], denying an objection to a virtual hearing, is C.C. v. A.R., 2020 Westlaw 5824118 (Sup. Ct. Kings Co. Sunshine, J., Sept. 30, 2020). Note that by finding that a virtual hearing is permissible where one of the remedies sought is criminal contempt, C.C. expresses a view contrary to S. C. v. Y. L., 67 Misc3d 1219(A) (Sup. Ct. N.Y. Co., Cooper, J., May 18, 2020) [see AAML NY Chapter Bulletin, August 2020, Vol. 6 No. 8 at 7].

**LEGISLATIVE AND COURT RULE ITEMS**

## **Mediation Model Protocol**

##  A Model Protocol for Matrimonial and Family Mediation was approved on September 15, 2020 by the Chief Judge and Chief Administrative Judge’s Statewide ADR Advisory Committee.

## **Orders of Protection – Prohibit Remote Control of Connected Devices**

 Passed by both houses as of July 22, 2020, and if signed, various provisions of the Domestic Relations Law, Family Court Act and Criminal Procedure Law would be amended, effective immediately, to prohibit a party to an order of protection from remotely controlling any connected device of a person protected by such order. For example, FCA 842 would be amended by the addition of a new subdivision (h), which allows the court to direct a party “to refrain from remotely controlling any connected devices affecting the home, vehicle or property of the person protected by the order.” The term “connected device” is defined as “any device, or other physical object that is capable of connecting to the internet, directly or indirectly, and that is assigned an internet protocol address or bluetooth address.” A.10039/S.07926.