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

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## **Agreements - Nuptial – Defective Acknowledgement Not Cured**

In Anderson v. Anderson, 2020 Westlaw 4876407 (4th Dept. August 20, 2020), the wife appealed from a December 2018 Supreme Court order, which denied her motion for summary judgment seeking a determination that an agreement made one month after the parties’ August 2011 marriage was invalid and unenforceable, upon the ground that the husband’s signature was not acknowledged until nearly 7 years later, in May 2018. Supreme Court found that the later acknowledgement cured the defect. The Fourth Department reversed, on the law, and granted the wife’s motion, holding: “when an acknowledgement is missing from a nuptial agreement, an acknowledgement and reaffirmation by the parties is required to cure the defect. To hold otherwise would permit a spouse to act unilaterally to cure the lack of his or her acknowledgement at some later date, and would thereby permit that spouse to choose, based on circumstances that may have changed in ways unanticipated by the other spouse at the time of the initial signing of the agreement, whether to acknowledge the agreement and make it enforceable or to leave it as unacknowledged and defective.”

## **Agreements -** **Set Aside – Denied**

In Cilento v. Cilento, 2020 Westlaw 4661442 (2d Dept. Aug. 12, 2020), the husband appealed from a December 2018 Supreme Court order, which denied his motion set aside an August 2017 stipulation. The Second Department affirmed, holding that the husband failed to establish that the stipulation was procedurally unconscionable, despite the fact that the same was the product of a mediation conducted by an attorney who had represented him previously. The Court noted that the husband waited more than 8 months before he moved to vacate the stipulation and that his claim that he did not understand the same “is wholly inconsistent with his contention that the reason he had retained the attorney (\*\*\* the mediator) in the past was because he had used the attorney to explain and translate legal documents.” The Appellate Division found that the husband also failed to show that the stipulation was substantively unconscionable, given that each party “relinquished significant rights \*\*\*, including maintenance and any equity interest in each other’s businesses; the [husband] agreed to remain in the marital residence and assume the carrying costs; and [the wife] received primary physical custody of the three children and remains responsible for \*\*\* health care for the children.” While the stipulation sets the husband’s income at $90,000 and requires him to pay $48,000 per year in child support for the 3 children, the Second Department concluded that “it will not be set aside simply because the [husband], in retrospect, may view some of its provisions as improvident or one-sided.”

**Counsel Fees – After Trial; Maintenance – Durational-Increase to Social Security Age**

In Zehner v. Zehner, 2020 Westlaw 4809957 (2d Dept. Aug. 19, 2020), the wife appealed from a July 2017 Supreme Court judgment which, upon a January 2017 decision after trial of the husband’s September 2012 divorce action, awarded her maintenance of only $2,000 per month for 7 years and counsel fees of only $17,500. The Second Department modified, on the facts and in the exercise of discretion, by increasing maintenance to $3,000 per month until the wife is eligible for full Social Security benefits and by increasing the counsel fee award to $30,000. The parties were married in 1991 and have 2 emancipated children, for whom the wife, age 58 at the time of trial, served as primary caregiver and homemaker. The wife “had been absent from the workforce for more than 20 years, had limited employment history and level of education, and suffered from physical and mental health issues,” leading the Appellate Division to conclude that Supreme Court’s imputation of $30,000 in income to the wife was without any evidentiary basis. The Second Department increased the counsel fee award “considering the overall financial circumstances of the parties and the circumstances of the case as a whole.”

## **Counsel and Expert Fees – After Trial**

In Nieves-Iglesias v. Iglesias, 2020 Westlaw 5223356 (2d Dept. Sept. 2, 2020), the husband appealed from a May 2017 Supreme Court order rendered in the wife’s May 2011 divorce action, following the parties’ January 2015 incorporated stipulation (permitting the wife to seek counsel and expert witness fees on papers), which awarded the wife $100,000 of the $167,781 in counsel fees sought (about 60%) and $7,226 in expert fees for a wine appraisal. The parties were married in June 1987 and have 2 emancipated children. The Second Department affirmed, holding that the husband did not overcome the statutory presumption in favor of an award of counsel fees to the wife as the lesser-monied spouse, and finding that the husband “took positions during the proceedings that led to delay and unnecessary litigation.” The Court concluded that the wine appraisal “was necessary.”

## **Custody - Modification – Dismissal Without Hearing Reversed; Violation Sanctions Improper**

In Matter of Gerard P. v. Paula P., 2020 Westlaw 4678335 (3d Dept. Aug 13, 2020), the mother appealed from: (1) a May 2019 Family Court order which, upon the father’s October 2017 petition, held her in willful violation of a May 2017 consent order pertaining to the parties’ children born in 2003, 2004 and 2006; (2) an October 2018 order of the same court which granted the father’s motion to dismiss her amended modification petition; and (3) an April 2019 order of the same court which granted the father’s motion to dismiss her modification petition. The May 2017 order provided for joint legal and equally shared physical custody, with final decision-making over the oldest child to the mother and the younger two children subject to the same by the father. The Third Department reversed, on the law, and remitted to Family Court for new hearings on all 3 petitions before a different judge, to be commenced within 45 days, with the May 2017 order to remain in effect pending said proceedings. The Appellate Division held that Family Court erred by dismissing the mother’s modification petitions without a hearing considering, among other things, its allegations regarding the parties’ inability to discuss a school safety issue, the father’s unwillingness to discuss medical decisions and his unilateral cancellations of the children’s medical appointments, which the court found, if proven, “demonstrate \*\*\* a complete deterioration of the parents’ ability to coparent and the infeasibility of continuing joint legal custody.” The Third Department noted that Family Court impermissibly sanctioned the mother in the violation proceeding, by granting the father sole legal custody, without determining whether there had been a change in circumstances, and by failing “to engage in any discernible analysis of whether a modification was in the best interests of the children.”

## **Custody - Modification – Relocation; Decreased Involvement of Parent; Deterioration of Parental Relationship**

In Matter of Annette M.-L. v. William L., 2020 Westlaw 4514917 (1st Dept. Aug. 6, 2020), the mother appealed from a May 2017 Family Court order, which dismissed her petition to modify the custody terms of the 2010 Florida divorce judgment. The judgment provided for primary physical custody to the mother and alternate weekend visitation to the father. The mother and child relocated to NY in 2013 with the father’s consent, and the father was to have the child with him during each summer. The father did not arrange for any summer visitation in 2014 or 2015 and saw the child in NY for few days in the latter summer. In summer 2016, the mother drove the child to Florida with the understanding that the father would return the child to NY in time to start school. The father failed to return the child and enrolled the child in school in Florida without the mother’s consent and filed a custody petition in Florida. The mother filed petitions in Family Court in August 2016. In October 2016, the FL and NY courts held a joint telephonic hearing and the Florida judge found that the father had consented to the child’s move to NY in 2013, declined jurisdiction and dismissed the father’s petition. In November 2016, Family Court ordered the father to return the child to NY and granted him Christmas 2016 visitation in Florida and set a February 2017 court date. The father did not make arrangements for Christmas 2016 visitation. The father did not appear in Court in February 2017 and the judge telephoned him and told him he would have to appear in person for trial on May 9, 2017. The father did not appear on May 9, 2017 and Family Court proceeded with an inquest. Family Court dismissed the mother’s petition for failure to demonstrate changed circumstances. The Appellate Division reversed, on the law, reinstated the mother’s petition and granted the same, directing Family Court to enter an order accordingly, without prejudice to further proceedings to determine the father’s visitation. The First Department held that the mother demonstrated 3 changes in circumstances: the mother and child’s 2013 relocation to FL with the father’s consent, which rendered his visitation impractical; the father’s decreased involvement in the child’s life; and the deterioration in the parties’ relationship, as illustrated by the father’s summer 2016 failure to return the child to NY.

## **Custody – Third Party – Grandparent Visitation Granted**

In Matter of Honeyford v. Luke, 2020 Westlaw 4876659 (4th Dept. Aug. 20, 2020), the parents appealed from an October 2018 Family Court order, which granted the grandmother visitation with two of her grandchildren over the parents’ objection. The Fourth Department affirmed, finding that “despite the animosity between the parties, there is a sound and substantial basis” for the visitation order, noting that Family Court “found the grandmother’s testimony credible and the record clearly establishes that the grandmother had a loving and beneficial relationship with the children that the parents permitted and encouraged.”

## **Equitable Distribution - Credit for HELOC Usage Granted; Credit for Promissory Notes Denied; Separate Property Credit Denied; Maintenance - Durational**

In Ferrante v. Ferrante, 2020 Westlaw 4659023 (2d Dept. Aug. 12, 2020), the husband appealed from a December 2016 Supreme Court judgment which, upon a September 2016 decision after trial of the wife’s March 2012 divorce action: (1) directed him to pay the wife $508,918, representing a share of monies paid to his mother on certain promissory notes; (2) awarded the wife $14,195 and $51,000 for her share of his interests in 2 businesses; (3) failed to award him a separate property credit on the marital residence; (4) directed him to pay the wife $27,500 representing funds he withdrew from the parties’ HELOC; and (5) directed him to pay the wife maintenance of $5,000 per month until her age 66. The Second Department modified, on the law, by deleting the $508,918 payment for the promissory notes and by adding a provision that maintenance shall sooner terminate upon the death of either party or the wife’s remarriage. The parties were married in September 1993. The Appellate Division held that the wife failed to demonstrate that the promissory notes were paid with marital funds or that the note payments constituted a wasteful dissipation of marital assets. The Court held that since the husband offered only his own testimony pertaining to his use of separate property and did not trace the source of the funds, Supreme Court properly denied him a credit. The Second Department stated that it agreed with Supreme Court’s determination to direct the husband to pay $27,500, as he withdrew that amount post-commencement to satisfy his obligation to pay the wife’s counsel fees and to pay for his own counsel fees. The Court concluded that Supreme Court properly imputed $300,000 in income to the husband, based upon his incredible testimony as to his earnings, and upheld the maintenance award based upon the statutory factors, including the wife’s health issues and the marital standard of living.

## **Equitable Distribution - Egregious Marital Fault**

## In Socci v. Socci, 2020 Westlaw 5223043 (2d Dept. Sept. 2, 2020), the husband appealed from an October 2015 Supreme Court judgment, rendered upon a May 2015 decision made after trial of the wife’s October 2009 divorce action, which awarded the wife 75% of the net proceeds of the sale of the marital residence and 60% of the parties’ investment and bank accounts and the marital contributions to his deferred compensation plan. The parties were married in February 1987 and have 2 children. In March 2008, the husband pled guilty to 2 counts of assault 2d, kidnapping 2d and aggravated criminal contempt “related to incidents in which he beat the parties’ two daughters with a belt and chained them to a tree overnight, and forced the [wife] into his vehicle and tried to make her pour gasoline on herself.” The criminal convictions were affirmed on appeal. People v. Socci, 160 AD3d 904. The Second Department affirmed, holding that “Supreme Court providently exercised its discretion in finding that the defendant’s sustained physical abuse of the plaintiff over the course of their marriage constituted egregious marital fault to be factored into the equitable distribution award \*\*\*.”