## **NYSBA Family Law Section Update, September 2021**

## **Matrimonial Update**

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## **Child Support - CSSA – Imputed Income; Modification – Denied; Maintenance - Modification – Extreme Hardship – Denied**

## In Ryan v. Ryan, 2021 Westlaw 3782664 (4th Dept. Aug. 26, 2021), the ex-husband (husband) appealed from an August 2019 Supreme Court order, which denied his 2017 motion to terminate spousal maintenance and for downward modification of child support, alleging health issues and an inability to continue working as a surgeon. The parties’ 2016 divorce judgment incorporated a stipulation which required him to pay maintenance and child support for 6 children. The Fourth Department affirmed, holding that Supreme Court properly imputed income to the husband based upon his employment history and earning capacity, and correctly determined that the husband had the ability to meet his obligations. The Appellate Division further noted that while the husband’s medical disability was not of his own making, he failed to demonstrate that he made a good-faith or diligent effort to obtain employment commensurate with his ability, qualifications and experience. The Court concluded that the husband has non-taxable disability income and substantial assets and failed to establish an extreme hardship as defined by DRL 236(B)(9)(b)(1).

## **Child Support - CSSA – Over Cap – Denied; College – Mandated Use of Marital Account; Counsel Fees – After Trial; Maintenance – Durational – Over the Cap**

In Mahoney v. Mahoney, 2021 Westlaw 3641338 (2d Dept. Aug. 18, 2021), the wife appealed from an October 2019 Supreme Court judgment which, upon an August 2018 decision after trial of her May 2017 action: (1) awarded her maintenance for 8 years of only $7,500 per month until the emancipation of the younger child and $8,333 per month thereafter; (2) directed the husband to pay CSSA child support up to the cap of only $2,097 per month; (3) directed that a certain marital savings account be used only for the children’s college tuition; and (4) awarded her only $35,000 in counsel fees in addition to stipulated pendente lite fees, while declining to reallocate marital monies equally divided to pay counsel fees. The Second Department modified, on the facts and in the exercise of discretion, by increasing the counsel fee award to $100,000, based upon the disparity between the parties’ incomes and the size of the distributive award (unspecified) and otherwise affirmed. The parties were married in July 1994 and have 2 children born in 1997 and 1999. At the time of trial, the wife was 49 years old and the husband was 52 years old. As to maintenance, the Appellate Division affirmed the over the cap ($184,000) award (the presumptive guidelines amount was not specified), noting Supreme Court’s consideration of the parties’ age and health, their present and future earning capacities, the termination of child support before maintenance, and the marital standard of living. The Second Department found that Supreme Court sufficiently articulated its reasons (unspecified) for limiting the child support to the $154,000 income cap. Regarding the mandated use of the marital account for college expenses, the Appellate Division found that the trial testimony supported Supreme Court’s determination that it was the parties’ intent to do so.

## **Custody - Modification – Hearing Needed; Termination of AFC Appointment Denied**

In Castro v. Kaminski, 2021 Westlaw 3641297 (2d Dept. Aug. 18, 2021), the father appealed from a May 2019 Supreme Court order, which directed a hearing on the mother’s June 2018 motion to modify the custody provisions of the parties’ April 2013 judgment and a March 2016 stipulation and denied so much of his cross motion to terminate the AFC’s appointment, alleging that the AFC primarily had discussions with the mother and her attorney and effectively shut him out of the process. The Second Department treated the notice of appeal from so much of the order as directed a hearing upon the motion as an application for leave to appeal, granted the same and affirmed. The Appellate Division noted that the mother’s motion raised issues of fact pertaining to her request that the father’s spouse be barred from contact with the children during the father’s access and that the custodial provisions be otherwise modified and concluded that the order directing a hearing was proper. The Second Department concluded that the father’s motion to remove the AFC was properly denied, given that he raised only conclusory and unsubstantiated allegations of bias.

## **Divorce - Action Dismissed – No Valid Marriage**

In Yusupov v. Baraev, 2021 Westlaw 3378803 (2d Dept. Aug. 4, 2021), the wife appealed from a June 2017 Supreme Court order which, after a hearing, granted the husband’s motion to dismiss her 2014 divorce action, upon the ground that there was no valid marriage between the parties. The wife’s witnesses, including the officiant, testified that the parties were married in November 1998 before a rabbi and that the husband signed, in Hebrew, a ketubah (marriage contract). There were no photographs of the wedding and the wife never indicated on her tax returns that she was married. The husband and his mother testified that: there was no wedding ceremony; the marriage was not approved by the parties’ respective families; and that the signature on the purported ketubah was not his, because he only wrote in Russian or English and not in Hebrew. There was no marriage certificate. The Second Department affirmed, noting that while a marriage is not void for a lack of a marriage license if the marriage is solemnized (DRL 12), its review of the hearing evidence supported Supreme Court’s determination that there was no valid marriage between the parties.

## **Equitable Distribution -** **Disability Retirement DRO; Lump Sum Distribution Entitlement**

In Taberski v. Taberski, 2021 Westlaw 3782794 (4th Dept. Aug. 26, 2021), the ex-husband (husband) appealed from a December 2019 Supreme Court order, which denied so much of his August 2019 motion as sought to recoup from the ex-wife (wife) a lump sum payment she received from his NYS disability retirement benefits. The parties’ February 2009 judgment of divorce incorporated a stipulation which provided that the wife would receive her Majauskas share of the husband’s pension. A DRO was filed in December 2010, which was approved in December 2011 with a letter from NYSRS stating that since the DRO was silent regarding the effect of a disability retirement, the wife’s entitlement in that event would be calculated according to the disability retirement allowance, in keeping with its standard policy. The husband retired in August 2016 and filed a disability retirement application at the same time. The parties began receiving their shares of the husband’s service retirement allowance, and NYSRS approved the husband’s disability application in February 2019, retroactive to August 2016. The resulting lump sum retroactive payment and disability retirement allowance were then apportioned between the parties. Before the distribution of the lump sum, the husband’s attorney put the wife on notice that he was disputing her entitlement to a portion of the disability lump sum and retirement allowance. Supreme Court granted the husband’s motion, to the extent that it sought to amend the DRO to state that the wife was only entitled to the service retirement benefits, retroactive to the date of his August 2019 motion, but denied his claim for recoupment of the lump sum upon the ground of laches. The Fourth Department reversed (3-2 split) on the law, granted the husband’s motion in its entirety, and remitted to Supreme Court for further proceedings. The Appellate Division held that Supreme Court abused its discretion in applying the doctrine of laches, given that the husband made his motion in August 2019, 7 months after the NYSRS’ February 2019 determination, and further, erred in its finding that the wife detrimentally relied upon the husband’s apparent acquiescence to her prejudice, given the husband’s notice to her that he disputed her entitlement to the disability benefits before the lump sum was ever paid to her. Justices Nemoyer and Bannister dissented and voted to affirm, noting that the husband knew for nearly 8 years prior to his August 2019 motion that the NYSRS was going in interpret the DRO, given its silence on the issue of a disability retirement, to apportion any such disability benefits in the wife’s favor.

## **Procedure - Referee – Hear and Report – No Authority to Preclude Party’s Case**

In Pulver v. Pulver, 2021 Westlaw 3641419 (2d Dept. Aug. 18, 2021), the husband appealed from a July 2018 Supreme Court order, which granted the wife’s motion to confirm an April 2018 referee report after trial and denied his cross motion to reject the referee’s report and for a new trial. The Second Department reversed, on the law, denied the wife’s motion, granted the husband’s cross motion and remitted to Supreme Court. The husband failed to appear on several dates in August 2017 due to his epileptic condition and side effects from a new anti-seizure medication and the referee granted the wife’s motion to preclude the husband from presenting a case. The Appellate Division held that neither CPLR 4201 (referee’s authority to issue subpoenas, administer oaths and direct disclosure) nor any other provision “confers the authority upon a referee assigned to hear and report to impose a penalty on a party for failing to appear, such as precluding a party from presenting any evidence.”

## **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. AAML NY Chapter has submitted a memo opposing this bill.