## **NYSBA FAMILY LAW SECTION, Matrimonial Update, October 2021**

## **By Bruce J. Wagner**

**Support Magistrate, Schenectady County Family Court**

## **Annulment – Fraud – Dismissed**

 In Travis A. v. Vilma B., 2021 Westlaw 4200934 (3d Dept. Sept. 16, 2021), the wife appealed from a January 2020 Supreme Court judgment which, after trial, granted the husband an annulment of their June 2019 marriage pursuant to DRL 140(e), upon the ground of fraud in the inducement, specifically, the husband’s allegation that the wife obtained his consent to the marriage for “the sole purpose of becoming a U.S. citizen.” The Third Department reversed, on the law and dismissed the complaint, finding that the husband failed to prove fraud by clear and convincing evidence. The Court noted that the husband’s evidence of the parties’ conflicts included the wife’s statements that she wanted to return to her family in the Philippines, yet she remained in the U.S. after the marital separation, which is insufficient to demonstrate that she induced the husband into the marriage for the sole objective of obtaining an immigration benefit.

**Counsel Fees – After Trial; Equitable Distribution – Business (50%) and Wasteful Dissipation; Maintenance – Durational**

In Silvers v. Silvers, 2021 Westlaw 4185779 (2d Dept. Sept. 15, 2021), the husband appealed from a May 2017 Supreme Court judgment which, upon a January 2017 decision after trial of the wife’s 2012 action, awarded the wife 50% of the husband’s two businesses, a credit of $30,000 for wasteful dissipation of marital property, and maintenance of $1,375 per month for 13 years, and the wife cross-appealed from so much of the judgment as awarded her only $20,000 in counsel fees. The Second Department affirmed. The parties were married for 32 years and had 2 emancipated children. The husband had purchased his father’s insurance agency during the marriage, which had stipulated value of $595,000, and he also held a 10% interest in a real estate holding company. The Appellate Division found that given the length of the marriage, the fact that the wife was 67 and the husband was 70, and the wife’s “longtime indirect contributions to the businesses by supporting the defendant and affording him the time and energy to manage the family enterprises,” and given the lack of credibility of his testimony regarding the businesses, the 50% award was proper. The Second Department affirmed the wasteful dissipation credit based upon the wife’s credible evidence thereof and the maintenance award as a provident exercise of its discretion. The Appellate Division’s decision contained no particulars regarding either the dissipation claim or the basis for the maintenance award, such as the parties’ incomes. On the issue of counsel fees, the Court affirmed the $20,000 award based upon Supreme Court’s finding that “the parties were on equal financial footing, and that the defendant had engaged in certain obstructive conduct that resulted in some unnecessary delay.”

## **Custody -** **Refusal to Visit – Court-Imposed “House Rules” for Discipline of Children**

 In E.E.C. v. S.S., 2021 Westlaw 4448857 (Sup. Ct. Monroe Co., July 23, 2021, Dollinger, J.), the parties had 2 children, and each had primary custody of one of them. There were issues regarding both children not wanting to visit the other parent. Both parents maintained that they were “encouraging” the children to comply with the stipulated access schedule. The Court stated: “a parent’s failure to take actions, required by a court order determined to be in the child’s best interest, cannot be defended by leaving compliance up to the child. The same logic compels the same conclusion here: no child should be permitted to decide whether to attend visitation without a consequence invoked in the household where they reside.” The Court imposed a series of “house rules” containing consequences for failure to visit the other parent, including suspension of extracurricular activities, camps, summer programs, confiscation of cell phones and electronic devices and internet devices, and access to social media, Facebook and Instagram.

## **Custody - Supervised Visitation; Temporary Order of Protection**

 In Matter of Matthew P. v. Linnea W., 2021 Westlaw 4464371 (1st Dept. Sept. 30, 2021), the father appealed from a May 2020 Family Court order, which: denied his motion to extend a temporary stay away order of protection (TOP) against the mother in favor of the father and child; and modified a temporary order to change the mother’s visitation from supervised to unsupervised. The First Department modified, on the facts and in the exercise of discretion, by extending the TOP in favor of the father, only, and by reimposing supervised visitation, 3 times per week or as agreed between the parties, pending further order. The Appellate Division held that the father showed good cause for the TOP against the Mother (FCA 828), given that the mother sent numerous text messages to him in which she, among other things, threatened to confront the father, to abscond with the child, to destroy the father’s personal property and to leave the child unattended. The Court concluded that supervised access was required, noting that the mother endangered the child’s welfare by leaving her alone, threatened to leave the child unsupervised and to take the child to Italy without permission, and concluding that the mother’s explanations of her actions “fall short and do not establish that she no longer poses a risk to the child.”

## **Custody - Temporary – Modification – Without a Hearing**

##  In Matter of Mercedes E.H. v. Dexter R.N., 2021 Westlaw 4432035 (1st Dept. Sept. 28, 2021), the father appealed from an October 2020 Family Court order which modified a temporary order of visitation. The First Department affirmed, holding that Family Court properly exercised its discretion and “had sufficient relevant information to determine the child’s best interests without holding an evidentiary hearing; indeed, respondent failed to identify any necessary additional evidence.”

## **Divorce – No Personal Jurisdiction**

##  In Karam v. Karam, 2021 Westlaw 4432103 (1st Dept. Sept. 28, 2021), the wife appealed from a January 2020 Supreme Court order, which granted the husband’s motion to dismiss her complaint upon the grounds of lack of personal jurisdiction and forum non conveniens. The First Department affirmed, holding: (1) the parties’ 2015 New York post-nuptial agreement did not comply with DRL 236(B)(3) [defective acknowledgment as to Notary’s basis for knowledge of the parties’ identities and could therefore not constitute a transaction of business in NY for long-arm jurisdiction under CPLR 302(a)(1)]; (2) the post-nuptial agreement is defective on its face for lack of consideration, in that the husband received “no clear benefit” therefrom; (3) the husband’s various business interests and indirect ownership of real property in NY “cannot serve as bases for jurisdiction under CPLR 302(a)(1) and (a)(4), since plaintiff failed to articulate the requisite nexus either between the divorce action and any in-state business transaction (citation omitted) and defendant’s ownership, possession or use of New York real property”; and (4) CPLR 302(b) cannot confer long-arm jurisdiction since “New York was never the parties’ matrimonial domicile.” As to forum non conveniens, the Appellate Division concluded that the wife’s residence in NY is outweighed by other factors: the parties are both Venezuelan citizens; they executed a Venezuelan prenuptial agreement which is written in Spanish and implicates foreign law; and the husband resides and maintains his business in Panama, where the parties jointly own property, and states that his ability to travel to NY is restricted.

## **Family Offense - Attempted Assault 3d – Found; Procedure – Covid-19 Time Limits**

##  In Matter of Francisco A. v. Amarilis V., 2021 Westlaw 4528629 (1st Dept. Oct. 5, 2021), the mother appealed from a March 2021 Family Court order which, after a hearing, granted the father sole legal and physical custody of the subject children and granted a final order of protection against the mother. The First Department affirmed, rejecting the mother’s contentions that she was deprived of a full and fair hearing and technological issues at the virtual hearing precluded her from adequately presenting her case (the latter issue being unpreserved). The Appellate Division noted that her counsel “objected at one point to being rushed by the court, but respondent failed to show that counsel was prevented from asking questions or otherwise hampered by the court’s time constraints.” The First Department concluded that the time constraints “were imposed in an even-handed manner against all parties and in consideration of the extraordinary circumstances presented by the Covid-19 pandemic,” citing Judiciary Law 2-b(3). As to the family offense, the Appellate Division held that the father established attempted assault 3d through his credible testimony that the mother “went to his apartment with two other individuals, entered without his permission, and physically attacked him.”

## **Family Offense - Menacing 2d – Found**

##  In Matter of Dolores T. De C. v. Adalberto D.C., 2021 Westlaw 4528781 (1st Dept. Oct. 5, 2021), the husband appealed from a September 2020 Family Court order which, after a hearing, found that he had committed menacing 2d and granted the wife a 3-month order of protection. The First Department affirmed, holding that the testimony showed that during a dispute over the wife’s alleged infidelity, the husband “threatened her with a 13-inch-long kitchen knife and threatened to kill her, thereby placing [the wife] in reasonable fear of physical injury,” citing PL 120.14(1), and noting that the husband’s “intent was readily inferable from his conduct and statements during the incident.”

## **Procedure - Appeal – Intermediate Order – Right Terminates on Judgment**

 In Small v. Yezzi, 2021 Westlaw 4200929 (3d Dept. Sept. 16, 2021), the husband appealed from a July 2019 Supreme Court order, which granted the wife’s motion to strike his answer. Supreme Court thereafter rendered a November 2020 judgment in favor of the wife, from which the husband took no appeal. The Third Department dismissed the husband’s appeal, citing the rule that the right to appeal from an intermediate order terminates upon entry of a final judgment, from which, in this case, the husband took no appeal.

## **Procedure - Sanctions – Frivolous Conduc**t

 In Marshall v. Marshall, 2021 Westlaw 4487427 (4th Dept. Oct. 1, 2021), the former wife (wife) appealed from a January 2020 Supreme Court order, which denied her motion seeking, among other things, to “correct” a judgment of divorce. The Fourth Department affirmed, with costs against the wife. The former husband (husband) was also awarded costs pursuant to 22 NYCRR 130-1.1, in the form of reimbursement by the wife’s attorney “for actual expenses reasonably incurred and reasonable attorney’s fees” based upon “the frivolous conduct of [the wife’s attorney] in prosecuting this appeal,” and the matter was remitted to Supreme Court for further proceedings. The Appellate Division held that Supreme Court properly refused to “correct” the judgment as to the amount of the husband’s maintenance payments, given that the wife’s stated bases for relief, CPLR 2001 (clerical errors) and CPLR 5019(a) (correction of ministerial mistakes) were inapplicable. Regarding the denial of the wife’s claim for counsel fees, her citation to CPLR 5015(a)(1) (excusable default) was similarly lacking in merit, in that there was no default, but, rather, Supreme Court’s discretionary determination was reached following a 3-day trial, upon its finding that the proof did not support such an award.

## **Legislative Items**

## **Blindness Impermissible Factor in Custody, Guardianship, Adoption**

##  Passed by both houses as of June 3, 2021, and if signed, this legislation would, 90 days after enactment, add new DRL 75-m and 111-d, FCA 643 and 658 and SSL 393, to: prohibit decisions on guardianship, custody, visitation or adoption petitions from being made solely on the basis of a petitioner’s blindness; prohibit DSS from acting upon such petitions or requests solely upon an applicant’s blindness; and prohibits DSS from taking actions solely because an applicant is blind. A.2113/S.4407. **The bill was delivered to the Governor on September 28, 2021.**

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

## As reported in the July 2021 Bulletin**,** 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). A0898B/S04467B. **The bill was delivered to the Governor on September 29, 2021.**

## **Domestic Violence Advocate Privilege**

##  CPLR 4510 is amended, **effective July 23, 2021,** to create a privilege for certain confidential communications between a domestic violence advocate and a client. A. 2520/S. 1789, Laws of 2021, Chapter 309.

## **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.

## **Family Court Forms Revised**

Pursuant to Administrative Order AO/273/21 dated September 23, 2021 and **effective September 29, 2021**, many Family Court forms were revised. As seems to be most relevant to family and matrimonial law practice, Forms 4-3a, 4-7, 4-7a, 4-17, 4-17a and 5-3 have been modified to indicate that it is the child’s eligibility for public assistance that is the operative date, and the financial disclosure forms include references to both retirement income and the SNAP (food stamp) program. The above-mentioned revised forms may be found at <http://ww2.nycourts.gov/forms/familycourt/childsupport.shtml> and <https://www.nycourts.gov/LegacyPDFS/FORMS/familycourt/pdfs/5-3.pdf>

## **Firearms Seizure Order**

 Pursuant to Administrative Order AO/135/21, effective April 23, 2021, a new firearms seizure order, Form SC-3, was promulgated and may be found at <http://ww2.nycourts.gov/divorce/forms.shtml#Statewide>

## **Gender Recognition Act**

 Various provisions of the Civil Rights Law were amended, and new ones were added; VTL 490 and 502 were amended and VTL 502(1) was repealed; and PHL 4132 and 4138 were **amended,** **effective 180 days after June 24, 2021** with the stated justification:

In the continued fight for true equality for all, this bill updates current law to remove excess, discriminatory burdens placed on those petitioning for a change in sex designation as well as to expand eligibility to have those records sealed for purposes of protection. There is a long history of discrimination against the LGBTQ+ community. The current law requires that applicants for name changes publish their present name and address as well as their previous name, place of birth, and birth date in a designated newspaper. This puts community members in danger of hate crimes, public ridicule, and random acts of discrimination. It is time to update our laws in accordance to the future we would like to welcome; a future of acceptance, unity, respect, equality, and diversity.

A.5465D/S.4402B, Laws of 2021, Chapter 158.

## **Referees – Orders of Protection**

##  Judiciary Law 212(2)(n), as amended in 2010, was **extended, effective July 16, 2021, to September 1, 2023** and provides that the chief administrator of the courts shall

 Have the power to authorize a court under subdivision (b) of

 section forty-three hundred seventeen of the civil practice law and

 rules to order a reference to determine an application for an order of

 protection (including a temporary order of protection) that, in

 accordance with law, is made ex parte or where all parties besides the

 applicant default in appearance; provided, however, this paragraph shall

 only apply to applications brought in family court during the hours that

 the court is in session, and after five o'clock p.m. Training about

 domestic violence shall be required for all persons who are designated

 to serve as references as provided in this paragraph.

##  S.07103/A. 08019, Laws of 2021, Chapter 303.