## **NYSBA FAMILY LAW SECTION UPDATE, April 2023**

## **Matrimonial Update**

## **By Bruce J. Wagner**

## **Support Magistrate, Schenectady & Montgomery County Family Courts**

## **Child Support - CSSA – Income – Imputed and W-2; No Child Care – No Showing of Working, Seeking Work**

##  In Matter of Capone v. Westbrook, 2023 Westlaw 2669272 (2d Dept. Mar. 29, 2023), the mother appealed from a December 2021 Family Court order denying her objections to an October 2021 Support Magistrate order which, after a hearing, imputed income to the father of only $114,064.56 and declined to direct the father to reimburse her for certain child care expenses. The Second Department affirmed, holding that “the Support Magistrate properly calculated the father’s income based on, among other things, his 2020 W-2 forms, which were admitted into evidence.” Regarding childcare expenses, the Appellate Division found that “it could not be determined, based on the evidence submitted by the mother, whether she was either working or seeking work for the relevant time periods.”

## **Child Support - CSSA – Modification – Over Cap – Denied**

##  In Matter of Monaco v. Monaco, 2023 Westlaw 2290584 (2d Dept. Mar. 1, 2023), the father appealed from a March 2022 Family Court order, granting so much of the mother’s objection to a December 2021 Support Magistrate Order, to the extent of modifying the June 2013 judgment of divorce and incorporated stipulation, so as to award support for the parties’ 3 children upon their combined parental income over the then $154,000 income cap. The Support Magistrate had limited the child support award to the combined parental income up to $154,000. Family Court disagreed, finding that since the parties’ 2013 stipulation applied the CSSA to their then entire combined income of $185,980, child support should continue to be so determined in the subject modification proceeding. The Second Department reversed, on the law, the facts and in the exercise of discretion, holding that “the parties’ agreement in their stipulation did not provide an appropriate rationale for the court’s calculation of child support on parental income over the statutory cap.” The Court concluded that the record supported the Support Magistrate’s determination, in that: (1) the evidence “does not demonstrate that the children are not living in accordance with the lifestyle they would have enjoyed had the household remained intact,” citing FCA 413(1)(f)(3); and (2) although the father’s gross income was higher than the mother’s gross income \*\*\* [FCA 413(1)(f)(7)], the record does not establish that the difference between the parties’ gross incomes warrants applying the statutory percentages to the parties’ combined income in excess of the statutory cap.”

## **Child Support – Constructive Emancipation – Denied**

##  In Matter of Kenneth H. v. Dawn P., 2023 Westlaw 2396318 (2d Dept. Mar. 8, 2023), the parties’ older child (born in 2003) and the mother appealed from an October 2021 Family Court order which, following a hearing, granted so much of the father’s petition as sought to terminate his child support obligation for the older child. The father alleged that he had not spoken with the children (including the younger child born in 2004) since September 2018. The Second Department, reversed, on the law, and denied the stated portion of the father’s petition, holding that “[t]he evidence adduced at the hearing demonstrated that the father’s conduct [unspecified] was a primary cause of the breakdown in the relationship between him and the older child.”

## **Child Support - Suspension – Parental Alienation – Denied**

##  In Matter of Lew v. Lew, 2023 Westlaw 2396132 (2d Dept. Mar. 8, 2023), the father appealed from a September 2021 Family Court order which, without a hearing, dismissed so much of his April 2021 modification petition as sought to suspend his obligation to pay support for the parties’ child pursuant to a November 2009 divorce judgment, with prejudice. The Second Department modified, on the law, by deeming the dismissal to be without prejudice, and otherwise affirmed. The Appellate Division held that the father who raised (among other modification grounds) parental alienation, “did not allege conduct on the part of the mother that, if proven, would rise to the level of deliberate frustration or active interference with his parental access rights so as to warrant suspension of his basic child support obligation.” The Court concluded by noting that in a prior appeal (152 AD3d 520), it had “affirmed Family Court’s determination that the father did not have a right to reasonable parental access because [the same] \*\*\* would be detrimental to the child’s well-being.”

## **Child Support - Violation – Dismissed; Unincorporated Stipulation – No Family Court Jurisdiction**

##  In Matter of Barra v. Barra, 2023 Westlaw 2602640 (3d Dept. Mar. 23, 2023), the mother appealed from a January 2022 Family Court order denying her objections to a Support Magistrate order, which, after a hearing, dismissed her February 2021 petition seeking a finding that the father was in willful violation of a 2015 judgment incorporating a 2011 agreement, insofar as the same provided for his payment of child support for the parties’ 6 children born between 1988 and 2000. The Third Department affirmed, noting that upon its review of the record, “the father did not underpay and, as a result, there are no child support arrears.” The Appellate Division noted that it did agree with the mother that Family Court erred in considering a 2018 stipulation, which, although it was signed, notarized and filed in the County Clerk’s office, was not incorporated into any subsequent order. The Court concluded that “Family Court lacked subject matter jurisdiction to consider the 2018 stipulation to determine whether the father had failed to comply with his child support obligations,” citing Family Court Act 454(1), which permits it to enforce “any lawful order of support.” In a footnote, the Third Department stated: “Family Court may only consider these extrajudicial agreements to aid in its inquiry of whether a violation was willful.”

## **Counsel Fees – After Trial – Denied – Lack of Evidence; Equitable Distribution - Transfers in Contemplation of Action; Wasteful Dissipation – Credit Usage**

##  In Kao v. Bonalle, 2023 Westlaw 2590953 (2d Dept. Mar. 22, 2023), the parties were married in July 2007 and have one child born in 2008. The husband appealed from a July 2019 Supreme Court judgment rendered upon a July 2018 decision after trial of the wife’s July 2013 divorce action, which: (1) awarded the wife $138,870.84, representing 50% of the excessive charges incurred by him on his Amex card after the commencement of the action; (2) awarded the wife $75,000, representing 50% of the amount he deposited, in contemplation of divorce, into 529 accounts for his 2 children from a previous marriage; (3) awarded the wife $8,819.15, representing 50% of the sale proceeds of an Ohio condominium; and (4) directed him to pay 2/3 of the wife’s counsel fees. The Second Department modified, on the law and the facts, by: (1) reducing the award for the Amex charges to $63,756.87, based upon some fact-specific calculations, agreeing with Supreme Court’s methodology of using an average monthly pre-commencement baseline for the husband’s Amex charges and comparing the same to the level of spending over 29 post-commencement months in arriving at the reduced award; and (2) deleting the counsel fee award to the wife, holding that “neither the plaintiff nor her attorney submitted any documentation or evidence that would have supported such an award,” and otherwise affirmed. The Appellate Division upheld the $75,000 award to the wife upon the ground that “the record demonstrates that these transactions were performed in contemplation of this action,” citing DRL 236(B)(5)(d)(13). The Second Department affirmed the equal Ohio condo distribution, noting that the husband “failed to produce evidence that he paid 100% of the carrying costs.”

## **Counsel Fees - After Trial – Granted; Equitable Distribution - Personal Property not Proved; Proportions – Dental Practice (33%), Valued Using 35% Capitalization Rate; Separate Property Claims Denied; Maintenance – Durational – Affirmed – Imputed Income**

##  In Novick v. Novick, 2023 Westlaw 2669469 (2d Dept. Mar. 29, 2023), the husband appealed from a November 2019 Judgment of Divorce, entered upon an August 2019 decision following trial of his January 2017 action, which, among other things: (1) awarded the wife maintenance of $12,000 per month for 9 years, based on income imputed to her of only $40,000 per year and income imputed to him of $375,000 per year; (2) awarded the wife 33% of the value of his dental practice, arriving at a valuation by utilizing a 35% capitalization rate as found by a court-appointed expert; (3) awarded the wife counsel fees of $55,000; (4) failed to distribute the wife’s T.D. Ameritrade account; and (5) failed to distribute certain personal property. The wife cross appealed from so much of the judgment as, among other things: (1) awarded her only $55,000 in counsel fees; (2) failed to award her a $100,000 separate property credit for a mortgage payment on the marital residence, failed to award her separate property credits for the down payments on the marital residence and the husband’s dental practice, and failed to find that her IRA was her separate property and awarded the husband ½ thereof. The parties were married in 1992 and have 3 emancipated children. The husband was 57 years old as of the time of trial and was self-employed in his dental practice, being the primary wage earner during the 24-year marriage. The wife was a homemaker and the primary caretaker of the children, and did not have outside employment during the majority of the marriage. The Second Department modified, on the law, the facts and in the exercise of discretion, by: (a) equally dividing the wife’s TD Ameritrade account, holding that the wife failed to provide any evidence that the same was her separate property; and (b) remitted for a calculation of pendente lite maintenance arrears due, given Supreme Court’s failure to explain its determination thereof, and otherwise affirmed. The Appellate Division held on the other issues raised by the husband: (1) Supreme Court’s imputed income findings were proper for both parties, noting that the wife earned 2 Master’s Degrees during the marriage and that the husband’s imputed income was correctly based upon “evidence of the parties’ expenses and lifestyle over the course of the marriage” and concluding that the maintenance award, in this case where the husband’s income exceeded the then $184,000 income cap, was proper upon consideration of statutory factors; (2) the 33% award for the dental practice was properly based upon the wife’s “direct and indirect contributions, including that of primary caretaker of the parties’ three children,” while noting that the court-appointed expert testified that the capitalization rate for professional services companies was typically 33.33% and that he applied a slightly higher rate “to account for the slightly above-average risk associated with the [husband’s] dental practice” and that Supreme Court properly credited the expert; (3) the counsel fee award, approximately one half of the wife’s total, properly considered “the merits of the parties’ positions and their respective financial circumstances”; and (4) as to personal property, “there was insufficient proof regarding any such property and its value.” As to the wife’s cross appeal on the remaining issues, the Second Department held that the wife “failed to meet her burden of tracing claimed separate funds to establish that they were used for the down payments or to pay down the mortgage,” and “failed to provide any evidence that the [TD Ameritrade] account was her separate property.”

## **Counsel Fees - Custody – Modification and Enforcement – Granted; Custody - Modification – Joint to Sole - Father’s Limited Insight & Poor Judgment; Violation Found**

##  In Matter of Angelica CC v. Ronald DD., 2023 Westlaw 2414426 (3d Dept Mar. 9, 2023), the father appealed from: (1) a September 2020 Family Court order, which, after a 13-day hearing held between April 2018 and December 2019, granted the mother’s request to modify a March 2017 consent order (joint legal and shared physical custody) pertaining to the parties’ child born in 2016 and found that he had willfully violated the same; and (2) a June 2021 order of the same Court, which granted the mother’s motion for counsel fees by awarding her $32,000, representing 75% of counsel fees charged to her. The Third Department affirmed, finding that a March 2018 court-ordered forensic evaluation, which was received into evidence, and as to which the parties declined cross-examination, “observed that the father presented with limited parental resources, limited insight and poor judgment, noting that he induces conflict,” and “concluded that the only viable custodial plan was to award sole custody to the mother.” The Appellate Division held that “[t]he record supports this assessment.” As to the issue of willful violation, the Third Department held that the father “willfully violated the prior order on 21 separate and distinct occasions,” while finding, among other things, that the mother’s testimony and video evidence “reveal that the father’s behavior was overly assertive, disrespectful to the mother, argumentative and, in every sense, taunting and bullying.” Regarding counsel fees, the Appellate Division upheld the award upon the authority of DRL 237(b) and Judiciary Law 773, while considering the 21 separate violations and concluding that “the relative merit of the parties’ positions strongly balances in favor of the mother.”

## **Custody - Modification – Joint to Sole – Forensic Evaluation Properly Denied**

##  In Matter of Virginia OO. v Alan PP., 2023 Westlaw 2315583 (3d Dept. March 2, 2023), the father appealed from a July 2021 Family Court order, which modified a stipulated January 2019 order (joint legal, mother designated as custodial parent), by granting sole legal custody of the parties’ child born in 2012 to the mother, and directing a 9-night for mother and 5-night for father alternating schedule during the school year, with alternating 2-week periods to each party during the summer. The Third Department affirmed, holding that Family Court “found that the hostility between the parents has made it impossible for them to co-parent,” while noting the father’s “unjustified contempt for [the mother] which he does not attempt to hide, and [which] distorts his ability to parent, let alone his ability to co-parent.” The Appellate Division concluded that Family Court did not err by deciding not to direct forensic or mental health evaluations of the parties, finding that the father “did not produce any evidence suggesting that the mother had any mental illness.”

## **Custody - Prior Restraint on Speech – Father’s Blogs and Postings**

##  In Matter of Walsh v. Russell, 2023 Westlaw 2590848 (2d Dept. Mar. 22, 2023), the father appealed from a February 2022 Family Court order which, after a hearing held in the mother’s July 2018 custody proceeding and subsequent family offense proceeding, and upon the AFC’s October 2021 motion, prohibited him from “posting, uploading blogs, and displaying the likeness of the child …regarding these proceedings and disparaging the child’s relatives in any and all public forums and/or social media platforms,” and directed the father to erase, deactivate and delete “any existing blogs and likenesses.” The Second Department modified, on the law, by deleting the foregoing “erase, deactivate and delete” directive and substituting a provision directing the father “to erase, deactivate, and delete any existing blogs which reference these proceedings or disparage the child’s relatives, and any likenesses of the child posted in connection with such blogs,” and otherwise affirmed. The Appellate Division held that the order appealed from “was not tailored as precisely as possible to the exact needs of the case,” and required the father to delete “any existing blogs or likenesses, regardless of whether the blogs or likenesses relate to the child, the mother, the mother’s family, or the instant proceedings.” The Court rejected the father’s contention “that the order’s remaining restrictions on his ability to post blogs, display the likeness of the child, and disparage the child’s relatives, were constitutionally impermissible,” holding that “the prior restraint was narrowly tailored to the exact needs of the case,” citing Kassenoff v. Kassenoff, 213 AD3d 822 (2d Dept. Feb. 15, 2023).

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

##  In Matter of Matthews v. Allen, 2023 Westlaw 2622480 (4th Dept. Mar. 24, 2023), the mother appealed from a November 2021 Family Court order which, after a hearing upon her September 2020 modification petition, found that the paternal grandparents established extraordinary circumstances and that it was in the best interests of the subject child to remain in their care, following a September 2017 consent order of temporary custody and a subsequent order entered upon the mother’s default. The Fourth Department affirmed, noting that the mother established changed circumstances including that she had regained custody of 2 of her 3 children, and had found stable employment and housing. The Appellate Division determined that the mother did not make “any serious attempts to regain custody or resume a parental role in the child’s life” for more than 24 months, citing DRL 72(2). The Court concluded upon the issue of the child’s best interests that “the child has a close bond with the grandparents and that, while she remains in their custody, she has regular visits with her father and two of her siblings” and that “the grandparents have encouraged and facilitated the child’s education and extracurricular activities, whereas the mother was unable to state in her testimony what activities the child was engaged in or which grade the child was in.”

## **Custody - UCCJEA – NY Is Home State; Modify FL Order; Mother’s NY Residence Deemed “Maintained”**

##  In Matter of McKissen v. DeLeon, 2023 Westlaw 2547892 (4th Dept. Mar. 17, 2023), the mother appealed from a September 2021 Family Court order, which modified a FL order by granting the father custody of the subject child. The Fourth Department affirmed, holding that NY is the child’s home state, given that “[t]he record establishes that the child had been living in New York for more than six months at the father commenced the modification proceeding,” citing DRL 75-a(7). The Appellate Division determined, contrary to the mother’s contention, that NY had jurisdiction to modify the FL order because neither the child nor the parents resided in FL, DRL 76-b(2). The Court held that it was “undisputed that the child and the father were not Florida residents, and the record supports the conclusion that, although the mother was staying in Florida, she maintained her residence in New York.” The Fourth Department found that the father met his burden of establishing changed circumstances and that Family Court’s custody determination was supported by the record [reasons not specified].

## **Custody - Visitation – Modification – Supervised – Hygiene Issues; Improper Supervision; Marihuana Growing**

##  In Matter of Tara DD. v. Seth CC., 2023 Westlaw 2315542 (3d Dept. Mar. 2, 2023), the father appealed from a November 2020 Family Court order which, after a fact-finding hearing and a Lincoln hearing, granted the mother’s petition to modify a September 2018 consent order (sole legal and primary to mother, alternate weekends to father) pertaining to the custody of the parties’ child born in 2009, to the extent of limiting the father to certain supervised and/or public place visitation. The Third Department affirmed, holding that “the record firmly supports Family Court’s determination,” while noting: “an incident between the subject child and one of his paternal half siblings occurred while under the father’s care, which was directly attributable to his failure to provide adequate supervision”; “Family Court was free to credit the testimony and photographic evidence of the [father’s marihuana] growing operation \*\*\* [and] the Family Ct Act § 1034 report noting the father’s suspicious conduct and the strong odor of marihuana in the home during the investigators’ initial visit”; and “ongoing hygienic concerns with the father’s primary residence, evidenced by several reported instances of the paternal half siblings contracting lice, pinworms and scabies following visits with the father.”

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

##  In Matter of Harvey v. Harvey, 2023 Westlaw 2622665 (4th Dept. Mar. 24, 2023), respondent appealed from a March 2022 Family Court order of protection entered following a hearing, upon a finding that he committed harassment 2d against his mother. The Fourth Department affirmed, holding that respondent’s mother “testified at the fact-finding hearing that respondent struck her in the back of the head as she drove and that he threatened to harm her,” thus satisfying the requisites of Penal Law 240.26(1).

## **Maintenance - Modification – Extreme Hardship – Denied**

##  In Chiusano-Koch v. Koch, 2023 Westlaw 2396308 (2d Dept. Mar. 8, 2023), the former wife (wife) appealed from a September 2020 Supreme Court order which, without a hearing, denied her motion to modify the former husband’s (husband’s) maintenance obligation pursuant to a September 2013 judgment of divorce, which incorporated a July 2013 stipulation. The stipulation required the husband to pay the wife maintenance of $30,000 per year for 8 years, to terminate sooner upon the death of either party or the wife’s remarriage. The wife’s motion sought to extend the husband’s maintenance obligation for another 7 years. The Second Department affirmed, concluding that the wife “failed to make the required showing of extreme hardship,” while noting that the motion papers establish that the wife “has been employed in the same job for the last 15 years, earns additional income from a second job, and has a relatively substantial amount of liquid assets.” The Appellate Division found that while the wife “claims that an accident-related medical condition limits her ability to work, the accident occurred, and the injuries manifested, six years prior to her execution of the stipulation \*\*\*.”

## **Paternity – Equitable Estoppel – Granted**

##  In Matter of Yaseen S. v. Oksana F., 2023 Westlaw 2590800 (2d Dept. Mar. 22, 2022), Yaseen S., who was named as father upon the birth certificate, appealed from an October 2019 Family Court order which, after a hearing, dismissed his petitions asserting paternity of, and seeking visitation with, the subject child born in 2008, and granted the petition of the AFC to adjudicate Yuriy K. to be the father. The Second Department affirmed, holding that Family Court properly applied equitable estoppel, finding that Yaseen S. lived with the mother and child until 2011, but has not had a parent-child relationship with his biological daughter since that time. Yaseen testified that he was aware that the mother married Yuriy in 2012. The Appellate Division held that “the evidence at the hearing demonstrated that Yuriy K. has established a strong father-daughter relationship with the child,” with whom he has lived with 2011 and the 15-year-old child refers to Yuriy as “daddy” or “papa.” The Court noted in conclusion that Yaseen “did not commence the instant paternity proceeding until the child was 7 years old, and not until after Yuriy K. filed a petition to adopt the child.”

## **Pendente Lite - Counsel Fees – Granted**

## In Chiarello v. Chiarello, 2023 Westlaw 2590863 (2d Dept. Mar. 22, 2023), the husband appealed from a December 2018 Supreme Court order which, in his 2016 divorce action, granted the wife’s September 2018 motion seeking $25,000 in temporary counsel fees, to the extent of $20,000. The Second Department affirmed as a proper exercise of discretion, noting “the disparity of income between the parties, the plaintiff’s litigation tactics, and the evidence showing that the defendant lacked the resources necessary to continue litigating the action.”

## **LEGISLATIVE ITEMS**

## **Forensic Evaluator Training Requirements**

##  Further to previous reports on this issue, the **amendment** to A02375C/S06385B (signed December 23, 2022, Laws of 2022, Ch. 740), and which December 2022 law was to be effective June 21, 2023 (but is now no longer effective on that date, see below), **has been signed by the Governor on March 3, 2023** and**: (a)** provides if the child is living out of state and if further than 100 miles from the New York border, permit the evaluator to conduct the evaluation utilizing video conferencing technology and so long as the evaluator takes all steps reasonably available to protect the confidentiality of the child's disclosures for any evaluation conducted remotely; **(b)** changes the creation and oversight of the training to require the Office for the Prevention of Domestic Violence (OPDV), in conjunction with an organization recognized by the federal department of health and human services to coordinate statewide services for the prevention and intervention of domestic violence, to create and administer a training program for court appointed forensic evaluators. OPDV and the organization will be responsible for providing the training to psychiatrists, psychologists, and social workers who are licensed in New York state, so that they may conduct these evaluations. OPDV and the organization recognized by the federal department of health and human services must review and update the training every two years; and **(c)** changes the effective date from 180 days to 1 year following the signing of the original bill on December 23, 2022, which makes the **new effective date December 23, 2023**. S00860/A00632, L. 2023, Ch. 23.