## **NYSBA FAMILY LAW SECTION UPDATE, January 2022**

## **Matrimonial Update**

## **By Bruce J. Wagner**

**Support Magistrate, Schenectady & Montgomery County Family Court****s**

## COURT OF APPEALS NOTE: In Anderson v. Anderson, 2021 Westlaw5935382(Dec. 16, 2021), the issue in two appeals heard together, as framed by the Court, was “whether non-compliance with the signature acknowledgement requirements of Domestic Relations Law (DRL) §236(B)(3) renders a nuptial agreement irrevocably unenforceable.” In Anderson, the Court concluded that “the signature must be acknowledged contemporaneously within a reasonable time of signing” and held that because “the wife signed and acknowledged the agreement the month after the wedding, while the husband delayed nearly seven years before acknowledging his signature and did so shortly before he commenced a divorce action, the husband’s acknowledgment is ineffective and the nuptial agreement unenforceable.” The only remedy “was for the parties to reaffirm the agreement’s terms, which did not occur \*\*\*.” In the companion case Matter of Koegel, the acknowledgements of each party were made contemporaneously with the signing of the nuptial agreement, but the certificates of acknowledgement were defective, lacking the “personally known to [the notary or other official] at the time of signing.” The Court held in Koegel that where the defect is a notary or other official’s error, and not a flaw in the parties’ signing and acknowledgement, “a reaffirmation of the agreement terms is unnecessary” and “may be overcome, as here, with extrinsic evidence of the official’s personal knowledge or proof of identity of the signer.”

## **Adoption - Father’s Consent Not Required**

##  In Matter of Prinzivalli v. Kaelin, 2021 Westlaw 5816498 (2d Dept. Dec. 8, 2021), the father appealed from a November 2020 Family Court order which, after a hearing, found that the father’s consent to the November 2019 petition of the maternal grandparents, seeking to adopt 2 children ages 5 and 7 at the time of order (DRL 111[1][d]), was not required. DRL 111[2][a]. The Second Department affirmed. The father had temporary custody of the children for about 4 months in 2016, but he was arrested for burglary in the fall of 2016 and was incarcerated from May 2017 to July 2019 on a parole violation. The Appellate Division held that the father “failed to establish that he maintained substantial and continuous contact with the children through the payment of support and either regular visitation or other communication with them or the grandmother” and that his incarceration “did not absolve him of” those responsibilities.

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

##  In Butcher v. Butcher, 2021 Westlaw 5702021 (3d Dept. Dec. 2, 2021), the husband appealed from an October 2020 Supreme Court order, which granted the wife’s September 2020 motion for summary judgment dismissing his July 2019 complaint seeking to set aside the parties’ December 2018 agreement, which was incorporated into a February 2019 judgment of divorce. The Third Department affirmed, noting that the husband tendered the agreement in question to the wife, “which had been prepared by his counsel, containing the terms he now seeks to vacate.” Notably, the wife was not represented by counsel at the time of the execution of the agreement, and the agreement contained recitations that the parties: signed the same “freely and voluntarily”; were fully “apprised of the legal rights that each may have”; “clearly understood and assented to the terms”; acknowledged that the terms were “fair and reasonable”; waived their respective rights to discovery and expert evaluations; and assented to the division of assets in the agreement. The Appellate Division concluded that the agreement is not so one-sided as to shock the conscience and that “the husband’s allegations were insufficient to disturb the agreement.”

##  In Weddell v. Trichka, 2021 Westlaw 6066643 (3d Dept. Dec. 23, 2021), the wife appealed from a February 2021 Supreme Court order which, in her 2019 action seeking to set aside the parties’ 2018 separation agreement, granted the husband’s motion for partial summary judgment and dismissed the wife’s claims based upon duress, overreaching, fraud and unconscionability. The parties were married in 1988 and the wife was an attorney. She was unrepresented by counsel at the time of the agreement, which provided for: maintenance to her, equal division of an investment account, a $1,500 payment to her for a lease deposit, the husband’s payment of all credit card debt of both parties through the date of the agreement, and a mutual waiver of formal financial disclosure. The Third Department affirmed, holding that as to the wife’s claims of duress and overreaching: she was not prevented from seeking the advice of counsel of her choosing; her claims of mental anxiety and panic attacks at the time of the agreement were “conclusory and not supported by medical evidence; and her allegation that the husband threatened her with divorce if she did not sign the agreement did not amount to duress. Regarding the wife’s contention that husband committed fraud by failing to disclose all of his assets, the Appellate Division cited the above waiver of disclosure and noted that the husband provided evidence that the parties met with their financial advisors, who confirmed in their affidavits that each party had the individual authority to ask questions of each of them The wife admitted in her affidavit that she did not take notes at the meeting and did not pay close attention, which, in the Court’s view, “does not amount to fraud by the husband.” With respect to unconscionability, the Third Department concluded that the agreement was not “so one-sided as to shock the conscience.”

## **Agreements – Set Aside Denied – Plenary Action Required; Default Vacatur Motion – Denied – Untimely; No Misrepresentation Found**

##  In Vandamme v. Curran, 2021 Westlaw 6071937 (4th Dept. Dec. 23, 2021), the husband appealed from a December 2020 Supreme Court order which denied her motion to vacate the parties’ judgment of divorce and rescind their separation agreement. The Fourth Department affirmed, holding that a plenary action was required for the rescission claim. As to so much of the motion as sought to vacate the default judgment, it was: untimely, not having been brought within 1 year of its service with notice of entry; lacking in establishment of a reasonable excuse for the default and a meritorious defense; and the husband failed to show that the wife’s allegedly misleading statements constituted misrepresentation under CPLR 5015(a)(3).

## **Child Support - CSSA – Deviation – Downward – Equal Custody; Counsel Fees – After Trial; Equitable Distribution - Separate Property – Credit for Separate Property Payment on Premarital Mortgage; Maintenance - Denied**

##  In Hughes v. Hughes, 2021 Westlaw 6066467 (3d Dept. Dec. 23, 2021), both parties appealed from an October 2019 Supreme Court judgment, rendered following a 3-day trial of the husband’s January 2018 action held between November 2018 and April 2019 which, among other things: (1) denied maintenance to the husband; (2) deviated downward from the presumptive CSSA obligation of $1,329 per month and directed the wife, the party with the greater income where custody of the parties’ son born in 2014 was equally shared, to pay the husband $500 per month; (3) credited the husband $5,279, which was 50% of the $10,558 he paid from his separate property to avoid foreclosure of the mortgage upon the wife’s premarital home, still owned jointly with her ex-husband; and (4) awarded the husband partial counsel fees of $6,000. The Third Department affirmed. As to maintenance, the Appellate Division affirmed the denial thereof, noting that the parties were married in July 2013, were both 40 years old at the time of trial and in good health. The husband earned between $2,100 and $3,100 per month and the wife’s 2018 income was $101,740. The Court cited the wife’s testimony that: “the husband was often unemployed and at times received unemployment, and she often worked two jobs to support the family”; and she had $63,000 in student loan debt. Although the presumptively correct maintenance guidelines amount was not stated, the Third Department found that the marriage was of relatively short duration and referred to Supreme Court’s determination that “the husband has not sacrificed anything in his career by virtue of the marriage and provided no assistance to enhance the wife’s career.” The Appellate Division upheld the downward deviation from the CSSA, considering, among other factors, “the ability of the wife to maintain a household for the child while managing significant debt if she were required to pay the basic child support obligation of $1,329 per month.” The Court also noted that Supreme Court deviated from the CSSA in the husband’s favor, by directing the wife to maintain the child’s health, dental and vision insurance without contribution by the husband. Regarding the credit to the husband of only 50% of his use of $10,558 of his separate property to avoid foreclosure of the wife’s home, the Appellate Division held that Supreme Court properly deemed it to be “inequitable for the wife and her ex-husband \*\*\* to benefit from the husband’s financial loss,” while at the same time considering that “the husband did not regularly contribute to the mortgage payments due to his frequent periods of unemployment during the marriage.” Finally, the Court rejected the wife’s argument that the $6,000 counsel fee award to the husband was an abuse of discretion, concluding that he was the less-monied spouse and that the wife’s conduct “in commencing an annulment action after the instant action was commenced and filing, prior to trial, an unsigned order to show cause in Family Court, later withdrawn, in an effort to prove that she was the custodial parent, added unnecessarily to the husband’s litigation costs.”

## **Child Support – CSSA** - **Modification – 2010 Amendments – 15% and 3 years; Custody - Relocation – Parent Coordinator Condition Precedent Valid – Denied**

##  In Assad v. Assad, 2021 Westlaw 5913153 (2d Dept. Dec. 15, 2021), the mother appealed from a January 2021 Supreme Court order which denied, without a hearing, the mother’s June 2020 motion to modify the parties’ January 2016 stipulation incorporated into a September 2016 judgment of divorce, so as to permit her to relocate to TX with the parties’ 3 children, or in the alternative, to grant her an upward modification of child support and sole custody, and which granted the father’s January 2021 cross motion for counsel fees to the extent of $5,000, and *sua sponte*, enjoined the mother, absent an emergency, from instituting further motions or actions without written leave of court, under pain of sanctions and costs. The Second Department modified, on the law and in the exercise of discretion, by: vacating the counsel fee award and denying the father’s motion; deleting the denial of the mother’s motion for child support modification and remitting for a hearing; and vacating the restriction on the mother’s future filings. The January 2016 stipulation prohibited the mother from relocating with the children outside of NYC without the father’s prior written consent, or a court order. An April 2018 so-ordered amendment to the stipulation required the parties, as a condition precedent to litigation of enforcement and modification issues, to seek the advice and counsel of the parent coordinator to attempt to resolve the issue without court intervention, and to attend at least 1 and no more than 3 sessions with the coordinator. The Appellate Division held that the mother failed to comply with the condition precedent and that her motion for relocation was properly denied without a hearing, and further, that the mother failed to show changed circumstances regarding relocation or legal custody. The Second Department found that because the parties did not opt out of the 15% and 3-year child support modification grounds, and given that the mother made a prima facie case on each ground, Supreme Court was required to hold a hearing. As to counsel fees, the Court concluded that the father was the monied party and the mother’s motion was not so lacking in merit as to justify a counsel fee award.

## **Child Support – CSSA – Over Cap; Healthcare – In Network Required; Counsel Fees – After Trial – Denied; Equitable Distribution - Credit – Mortgage Principal Reduction; Debt – 100% to H, No Credits; Maintenance - Durational**

##  In Bari v. Bari, 2021 Westlaw 5913165 (2d Dept. Dec. 15, 2021), both parties appealed from an August 2018 judgment of divorce which, upon a June 2018 decision following a March 2018 trial of the husband’s April 2014 divorce action, among other things: (1) directed the husband to pay the wife maintenance of $9,000 per month for 4 years, $7,500 per month for 2 years and $5,000 per month for 2 years; (2) directed the husband to pay 100% of a credit card debt and a line of credit; (3) declined to award the husband a credit for payments he made toward the wife’s credit card and landscaper fees; (4) declined to award the husband credit for mortgage and real estate tax payments for the marital residence; (5) directed the husband to pay child support of $5,075 per month until emancipation of the oldest child, then $4,375 per month until emancipation of the middle child, and $2,975 per month until emancipation of the youngest child; (6) directed the husband to pay 75% of the children’s uninsured healthcare expenses; and (7) denied counsel fees to the wife. The parties were married in June 1997 and have 3 children. The Second Department modified, on the law and the facts, and in the exercise of discretion: (1) by affirming the maintenance award, based upon present and future earning capacities, the wife’s having foregone career opportunities and the time needed for her to become self-supporting; (2) by affirming the 100% allocation of the credit card debt and line of credit to the husband, finding that the payments were “relatively minimal in relation to the [husband’s] annual income; (3) by affirming the denial of credit to the husband for the wife’s credit card and landscaper fees, for the same reason; (4) awarding the husband a credit of $26,240.21 for principal reduction of the mortgage on the marital residence during the pendency of the action, but declining a credit for real estate taxes because the pendente lite order varied from the presumptive amount of temporary maintenance, in consideration of carrying charges; (5) affirming the over the cap ($148,000) child support award upon “consideration of the financial resources of the parties and the standard of living enjoyed by the children during the marriage”; (6) by directing that the husband’s obligation for uninsured healthcare expenses of the children is to pay 75% thereof for “in-network providers” or to pay 75% for out-of-network providers “only if the provider has an established relationship with the child, the [husband] has approved the provider in writing, or there are no available in-network providers; and (7) by affirming the denial of counsel fees to the wife, without comment, other than stating that “[t]he parties’ remaining contentions are without merit.”

## **Child Support - Public Assistance – Dismissal Reversed**

##  In Matter of Commissioner o/b/o Karla M. v. Omar G., 2021 Westlaw 5893751 (1st Dept. Dec. 14, 2021), the Commissioner appealed from an October 2020 Family Court order, denying the Department’s (DSS) objections to a February 2020 Support Magistrate order which dismissed its September 2019 petition for lack of subject matter jurisdiction, because DSS sought only retroactive support and health insurance costs for a child whose cash public assistance ended on January 31, 2020, Medicaid having been provided to the child for another year, through January 2021. The First Department reversed, on the law, granted DSS’ objection and vacated the order of dismissal, holding that DSS properly filed its petition “while the child was still receiving cash public assistance,” citing FCA 422 and SSL 102(1), “and Family Court had jurisdiction to determine the petition.” The Appellate Division noted that FCA 434 requires Family Court to make a temporary order, which would have issued before the child’s cash public assistance ended, “[i]f not for Family Court’s adjournments” for administrative reasons from October 29, 2019 to November 15, 2019, and from November 15, 2019 (when the parties were present), for time constraint reasons, to February 11, 2020, when the order of dismissal was entered.

## **Conciliation - Dismissal Affirmed**

##  In Matter of Fusco v. DeGelormo, 155 NYS3d 124 (2d Dept. Dec. 8, 2021), the husband appealed from a December 2020 Family Court order which, following an October 2020 court appearance during which the wife stated that she was not interested in conciliation, dismissed his petition filed pursuant to FCA 921. The Second Department affirmed, rejecting the husband’s argument, that he was deprived of due process because he never conferred with the probation service and the wife was never invited to a conciliation conference, as being both unpreserved and lacking in merit. The Appellate Division held that while probation “is authorized by statute to meet with petitioners and may hold conciliation conferences with the parties (see Family Ct Act §§ 922, 924), those procedures are not mandated in every proceeding \*\*\*.”

## **Counsel Fees - Custody - Agreement Term – Enforcement; Custody - COVID-19 Test – No Consent Required; Radius Clause not Altered by Pandemic**

##  In Cleary-Thomas v. Thomas, 155 NYS3d 316 (1st Dept. Dec. 14, 2021), the mother appealed from a December 2020 Supreme Court order, which, without a hearing, granted the father’s motion directing her to be responsible for all transportation of the children for his custodial time (equally shared) with the children while she lives outside the 5-mile radius in the parties’ custody agreement and awarded him counsel fees of $10,000, and denied her cross motion seeking to remove the radius clause, imposition of a halfway meeting point and a mandate for mutual consent to non-emergency medical care. The First Department affirmed, holding that “the parties’ informal agreement to reside in their second homes in Long Island did not alter the five-mile radius clause of the custody agreement,” noting that the children attend private school in Manhattan and the father returned to Manhattan in September 2020. As to counsel fees, the same were mandated by the parties’ settlement agreement, given an enforcement application decided in favor of the father. The Appellate Division concluded that the mother’s request that the father obtain her mutual consent “before obtaining any ‘non-emergency medical care’ of the children, specifically COVID-19 testing, is unnecessarily burdensome and unwarranted under the circumstances,” while finding that “a COVID-19 test is diagnostic, not a treatment and is routine and not so invasive as to require both parties’ consent.”

## **Counsel Fees - Custody – Reversed; Custody - Modification – Denied – Children’s Wishes and Forensic Opinion**

##  In DiNapoli v. DiNapoli, 2021 Westlaw 6130308 (2d Dept. Dec. 29, 2021), (1) the mother and the AFC appealed from a September 2020 Supreme Court order, which, after a hearing, granted the father’s March 2019 motion to modify the custody provisions of the parties’ January 2019 divorce judgment and incorporated stipulation (sole custody and final decision-making to the mother) by granting him sole custody and final decision-making over the parties’ 2 children, ages 15 and 12 at the time of the hearing; and (2) the mother appealed from a December 2020 order of the same court, which granted the father’s August 2020 cross-motion for counsel fees to the extent of $25,000. The Second Department, after granting a stay pending appeal thereof in October 2020, reversed the September 2020 order on the law and the facts and denied the father’s motion, noting that despite the father’s testimony that “he had little or no relationship” with the children, which he claimed was “100 percent” the mother’s fault, the witness who supervised the therapy sessions with the father and children opined that the mother “did everything in her power … to encourage [the children] to verbally participate” in the aforesaid therapy sessions. The appointed forensic expert testified that the children were “fearful of [the father]” and “do not want anything to do with [him]” and that it was not “psychologically appropriate” for the children to award residential custody to the father, which findings the Appellate Division determined were “amply supported by the record.” The Court concluded that the wishes of the children were entitled to some weight given their ages (15 and 12) at the time of the hearing. The Second Department noted in its changed circumstances (or not) analysis that the father’s visits with the children ceased in June 2018 due to an order or protection. The Appellate Division reversed the counsel fee order on the law and in the exercise of discretion and denied the father’s motion, holding that Supreme Court’s award to the father, the monied party, was an improvident exercise of discretion under the circumstances of the case.

## **Custody - COVID-19 Vaccine Ordered – 11 y/o**

##  In J.F. v. D.F., 2021 Westlaw 577901(Sup. Ct. Monroe Co., Dollinger, J., Dec. 3, 2021), the parties were divorced in 2013 and have 3 children, ages 19, 17 and 11, with the younger two being subject to joint custody. The father opposed a COVID-19 vaccine for the 11-year-old, who became eligible therefor on November 9, 2021. The older 2 children were already vaccinated by agreement of the parties. The child’s pediatrician testified that she recommended the vaccine and in response to the father’s concerns, stated that there was a “higher risk” of complications from COVID than from the vaccine, while noting that “the risk of myocarditis from the \*\*\* COVID illness, is about 11 times more likely than to get myocarditis from the vaccine.” The AFC reported to the Court that the child’s desire “was to join her sisters in the vaccine process” and supported administration of the vaccine. The Court found that “the father’s objections, while sufficient to raise some substantive concerns, are not sufficient to deter this Court from concluding that the best interests of the child require issuance of an order that the child be vaccinated as soon as possible.”

## **Custody - UCCJEA – Continuing Exclusive Jurisdiction; Inconvenient Forum**

##  In Matter of Sutton v. Rivera, 2021 Westlaw 6130319 (2d Dept. Dec. 29, 2021), the father appealed from a January 2021 Supreme Court order, which, without a hearing, granted the mother’s October 2020 motion to dismiss his September 2019 petitions seeking modification and enforcement of a July 2014 order, which granted custody of the parties’ two children to the mother, for lack of continuing jurisdiction (CEJ) or in the alternative, for forum non conveniens, in favor of Hawaii. The Second Department reversed, on the law, and remitted to Supreme Court “to expeditiously conduct a hearing and for a new determination of the mother’s motion thereafter.” The father alleged that the mother moved to Florida with the children in 2107 without his permission or court approval and that she returned to NY in April 2019, at which time the children were re-enrolled in school. In August 2019, the mother relocated to HI with the children, again allegedly without the father’s permission or court approval. The Appellate Division held that Supreme Court should not have determined, without a hearing, that NY lacked CEJ due to the children’s residences in FL and HI, where, as here, NY made the initial custody determination and would retain CEJ under DRL 76-a. Supreme Court should have given the parties the opportunity to present evidence as to whether “the children had maintained a significant connection with New York, and whether substantial evidence was available in New York concerning the children’s ‘care, protection, training, and personal relationships,’” citing DRL 76-a(1)(a). The Second Department held that the inconvenient forum determination, without a hearing, was also erroneous, and upon remittal, Supreme Court must consider the DRL 76-f factors and reminded Supreme Court that “the extended time that has passed since the father filed his September 2019 petitions should ‘not militate in favor of finding that New York is an inconvenient forum’ (citation omitted) and \*\*\* the UCCJEA provides a mechanism for taking testimony from outside of New York,” citing DRL 75-j.

## **Enforcement - Statute of Limitations; Venue – Post-judgment Motion**

##  In Mussmacher v. Mussmacher, 155 NYS3d 845 (4th Dept. Dec. 23, 2021), the former husband (husband) appealed from a March 2021 Supreme Court money judgment in favor of the former wife (wife) in the sum of $75,804.08 plus interest, awarded following a hearing upon her July 29, 2019 motion seeking arrears owed for her Majauskas share of his pension, pursuant to a stipulation incorporated into a 1994 judgment of divorce. A QDRO was entered following the divorce, but was not served upon the plan. The husband retired in 2003 with 32 years of service, at which time his “pension” was on deposit in a cash balance thrift plan, for which he elected a lump sum distribution that was transferred to an IRA and distributed in approximately $25,000 increments between 2010 and its depletion in 2018. The Fourth Department modified, on the law, by reducing the judgment to $52,325.93 plus interest from January 7, 2021, holding that the wife’s claim, which seeks arrears and a money judgment for damages under the stipulation, is subject to the 6-year statute of limitations and may only include her share of the payments made to the husband commencing July 29, 2013, 6 years prior to her motion. The Appellate Division found that the record showed that on October 1, 2013, the date closest to July 29, 2013, the husband’s IRA balance was $127,983.20. The wife’s Majauskas share was 50% of 314 months during the marriage in the plan/384 months (32 years) in the plan, or .40885 x $127,983.20 = $52,325.93. On a procedural matter, the Fourth Department held that Supreme Court did not err by denying his cross-motion to transfer the wife’s motion from her chosen venue of Oneida County to Fulton County, where the parties were divorced. The Appellate Division agreed that the wife’s motion should have been filed in Fulton County, “where the judgment of divorce was entered, rather than Oneida County, which is in a different judicial district and not contiguous to Fulton County,” citing CPLR 105(r) and 2212(a). The Court reasoned that Supreme Court has statewide jurisdiction and that the filing of the motion in Oneida County was not a jurisdictional defect, noting that the wife was permitted to proceed by motion or by plenary action to enforce an incorporated stipulation, and having chosen the motion option, both Supreme Court and the Appellate Division “had the authority to convert the motion to a plenary action,” citing CPLR 103(c). Given that the plenary action could have been filed in Oneida County, the Fourth Department concluded that “there is no reason to reverse the judgment on appeal and transfer the matter to Supreme Court, Fulton County.”

## **Enforcement - Willful Violation Not Found**

##  In Matter of Wessels v. Wessels, 2021 Westlaw 5702013 (3d Dept. Dec. 2, 2021), the mother appealed from a November 2020 Family Court order which, after a hearing, partially dismissed her May 2019 petition to hold the father in willful violation of a 2018 divorce judgment and incorporated agreement, which required him to pay $1,650 per month in child support for the parties’ child born in 2003, as modified by an April 2019 Family Court order which added $200 per month toward arrears. The Support Magistrate found the father to be in willful violation, entered a judgment for $26,074, recommended 120 days in jail, and referred the matter to Family Court for confirmation. Family Court found that the failure to pay was not willful, suspended his support obligation, and directed him to file another modification petition. The Third Department affirmed, holding that the father’s brother hired him in 2017 for a purchasing agent position for Georgia car dealerships managed by the brother, which paid the father $125,000 per year at the time he agreed to the $1,650 monthly obligation. Thereafter, the brother fell out of favor with the owner, and the father’s employment was terminated. The father documented an unsuccessful search for similar work in the auto industry, following which he restarted a landscaping business he had previously operated in NY, from which he showed he earned $42,000 per year. The Appellate Division noted that “the father did not ignore his support responsibilities after losing the purchasing job, instead attempting on multiple occasions to modify his support obligation, making regular support payments to the mother in a lower amount and borrowing money to cover a few larger payments to her.” The Third Department concluded that the record did not establish “by clear and convincing evidence” that the father was in willful violation.

## **Equitable Distribution -** **Credit – Marital Funds Used for Carrying Charges; Proportions – NYSTRS Pension (50%); Separate Property – Commingling – Adequate Tracing Found**

## In Palazolo v. Palazolo, 2021 Westlaw 5622008 (2d Dept. Dec. 1, 2021), the husband appealed from a January 2020 judgment of divorce, which awarded the wife: (1) certain shares of stock as her separate property; (2) $70,000, representing half of the marital funds he used to pay the carrying costs of the marital residence during his exclusive occupancy thereof; and (3) a 50% share of the marital portion of his NYS Teachers’ Retirement System pension, a portion of which had already been awarded to his former spouse. The Second Department modified, on the law and the facts, by adjusting the number of shares awarded as the wife’s separate property from 2,541 shares to 1,703 shares, based upon discrepancies in the account statements produced at trial, and divided the remaining 838 shares equally as marital property, and otherwise affirmed. The parties were married in June 1991 and the wife commenced the divorce action in February 2011. The Appellate Division held that although the wife placed her inherited stock into an investment account which also contained marital assets, the wife “sufficiently traced the source of the majority of those shares \*\*\* to her inheritance, so as to rebut the presumption that those shares were marital property.” The Court noted that “the use of interest and dividends accrued on those shares for marital purposes did not transmute the shares themselves into marital property.” The Appellate Division held that it was proper for Supreme Court to award the wife $70,000 as a 50% credit for marital funds the husband used to pay carrying charges for the residence which he occupied exclusively, over and above marital funds already equally divided and spent by both parties under a separate agreement. The Second Department concluded that the 50% award to the wife of the marital portion of his NYSTRS pension was proper, despite the fact that the husband’s former wife already receives a portion thereof, which does not diminish the marital portion or the wife’s entitlement to a portion thereof.

## **Equitable Distribution - Gift, Not Loan; Mortgage Indemnification; Violation of Automatic Orders; Wasteful Dissipation; Maintenance - Guidelines Award Upheld; Rental Income; Tax Issues Not Raised**

##  In Harris v. Schreibman, 2021 Westlaw 5701812 (3d Dept. Dec. 2, 2021), both parties appealed from a May 2019 Supreme Court judgment directing equitable distribution. The husband appealed from, among other things, a December 2019 order which modestly reduced the amount and duration of maintenance awarded by the judgment. The parties were married in September 2004 and have 3 children, 1 born in 2008 and twins born in 2010. The wife commenced the divorce action in June 2017. A pretrial oral stipulation: transferred the husband’s 1/3 interest in the marital residence to the wife; waived his interest in the wife’s Airbnb business; and distributed the husband’s expected capital account payout from his former law firm, the parties’ retirement accounts and their credit card debts. A trial proceeded on remaining issues, including maintenance and the repayment of $50,000 to the wife’s mother. Supreme Court awarded the wife maintenance of $1,963.92 per month pursuant to the guidelines for a duration of 3 years and 10 months (the maximum advisory duration) and declined to deviate from the guidelines. The Third Department affirmed the amount of the maintenance award, rejecting the husband’s argument that the wife should be held accountable for making less money than she had in previous employment ($134,000 per year on average), noting that the wife “lost her job through no fault of her own and was reluctant to take a position that would require her to commute into New York City or travel a lot, taking her away from the children.” The Appellate Division found that Supreme Court properly set the wife’s income at $59,000: $35,000 from an elected position as Town Supervisor and $24,000 from Airbnb rental income. The Court noted that the husband resigned his partnership interest in a NYC law firm for the same reasons, to take a position for less than half his former earnings, having been elected to a position in 2017 at a salary which led Supreme Court to find his CSSA income to be approximately $170,136. The Third Department found that the duration of the award was properly supported by Supreme Court’s detailed consideration of the factors in DRL 236(B)(6)(e). The Court rejected the husband’s argument that Supreme Court should have adjusted the maintenance award in light of the Tax Cuts and Jobs Act of 2017, “as the husband failed to raise this argument at trial or in his posttrial brief.” Supreme Court found that the $50,000 from the wife’s mother was a loan, not a gift, directed her to repay the same and granted her a $25,000 credit therefor in equitable distribution. The Third Department reversed this determination, finding that “the evidence shows that the wife’s mother did not intend to be repaid the $50,000 and, even if she did, her intent was for those payments to go into 529 accounts for the children, not to receive them as cash payments.” Regarding automatic orders, the Appellate Division held that “Supreme Court properly concluded that when the husband transferred $38,000 in cash to pay off campaign debts, he directly controverted the automatic order[s].” The Court further noted that the wife “did not have the husband’s written consent to remove money from her retirement accounts to pay off debts,” also in violation of the automatic orders. The Third Department found that the wife’s use of her severance monies “for renovations to the marital residence, where both parties resided, food, outings with the children and other living expenses” was properly found by Supreme Court not to be wasteful dissipation. The Court concluded that despite violating the automatic orders, “the parties did so to pay off debts, pay taxes, cover everyday expenses and pay legal fees,” and Supreme Court properly “canceled out each party’s alleged wasteful dissipation of the assets in coming to its determination on equitable distribution.” The wife took title to the marital residence, subject to the mortgage, and while there was no stipulation stating that the wife would “remove the husband as an obligor from the mortgage,” the Appellate Division concluded that it was not the wife’s intention “to have the husband burdened by the payments due under the mortgage.” Therefore, the Third Department modified the judgment by directing that the wife “shall defend, indemnify and hold the husband harmless from any and all payments due under the mortgage.”

## **Equitable Distribution - Separate Property – Marital Residence Share Denied; Retirement Account – Valued by Judicial Notice of SNW**

##  In Garcia v. Garcia, 154 NYS3d 855 (2d Dept. Dec. 1, 2021), the wife appealed from a June 2018 judgment of divorce which, upon a November 2017 decision following trial of the wife’s August 2010 divorce action, awarded the husband: (1) 45% ($137,250) of the marital residence she purchased in July 2001, 2 months before the marriage; and (2) a share of her pension and retirement accounts. The Second Department modified, on the law, on the facts and in the exercise of discretion, by deleting the award for the marital residence and otherwise affirming. The Appellate Division noted that the parties lived together in the residence for most of the marriage until 2005, when the husband relocated to the Philippines. The Court held that “there was no evidence that the marital residence appreciated in value from any factor other than market forces” and thus “remained separate property.” The Second Department rejected the wife’s argument that the award to the husband of a share of her pension and retirement accounts was error, given that there was no evidence at trial of the existence or value of the accounts, holding that Supreme Court properly took judicial notice of her statement of net worth, which although not admitted into evidence, had been filed with the Court.

## **Family Offense - Jurisdiction – Age of Child Not Determinative**

##  In Matter of Vellios v. Vellios, 2021 Westlaw 6057543 (2d Dept. Dec. 22, 2021), the mother appealed from a November 2020 Family Court order which, after a hearing, granted the father’s motion to dismiss her June 2018 family offense petition on behalf of the parties’ then 19-year-old developmentally disabled daughter, for lack of subject matter jurisdiction based upon the daughter’s reaching the age of 21 during the pendency of the proceedings. Family Court also denied the mother’s request to stay the proceeding and appoint a guardian due the child’s continuing incapacity. The Second Department reversed, on the law, denied the father’s motion, reinstated the petition and remitted to Family Court for further proceedings. The Appellate Division held that as to a family offense proceeding, “the question of subject matter jurisdiction is generally confined to whether a qualifying offense has been committed,” citing FCA 115(e) and 812(1), “irrespective of the complainant’s age.” The Court concluded that given the “questions of fact as to whether the complainant may require the assistance of a guardian ad litem to protect her interests, the Family Court should have \*\*\* conduct[ed] a hearing to determine whether such an appointment was necessary pursuant to CPLR 1201.”

## **Paternity - Equitable Estoppel**

In Matter of Amber N. v. Andrew S., 155 NYS3d 77 (1st Dept. Dec. 7, 2021), respondent appealed from a February 2020 Family Court order which, after a hearing, found that he was equitably estopped from seeking genetic marker testing and declared him to be the father. Respondent was married to the child’s mother at the time of his birth, and the marriage was annulled 12 years later. The First Department affirmed, finding that “respondent assumed the role of a parent to the child from the moment the child was born and allowed the child to believe that he was the father for the next 11 years of his life” and “the child formed a familial relationship \*\*\* with his paternal grandfather and great-grandmother.” The Appellate Division held that respondent’s desire “to remove his doubts” about paternity “is not a sufficient basis for ordering a DNA test, almost 13 years after the child’s birth.”

## **Procedure - *Sua Sponte* Dismissal “With Prejudice” Reversed**

In Matter of Brian W. v. Mary X., 2021 Westlaw 6066610 (3d Dept. Dec. 23, 2021), petitioner appealed from, among other things, an December 2020 amended Family Court Order, which, sua sponte, changed its October 2020 dismissal of his March 2020 family offense petition against his former intimate partner from “without prejudice” to “with prejudice.” The Third Department modified, on the law, by reversing the “with prejudice” dismissal to “without prejudice.” The Appellate Division held that Family Court may “correct or amend an order, so as to cure mistakes, defects or irregularities in the order that do not affect a substantial right of a party,” citing CPLR 5019(a), “or to resolve any ambiguity in the order to make it comport with what the court’s holding clearly intended.” The Court concluded that in the absence of a motion pursuant to CPLR 2221(d) or 5015(a), Family Court lacks the authority to alter a dismissal of a petition from “without prejudice” to “with prejudice,” “as such alteration is one of substance.”