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

## **Matrimonial Update**

## **Adoption - Father’s Consent Required**

##  In Matter of William, 2022 Westlaw 2092955 (4th Dept. June 19, 2022), petitioners appealed from an April 2021 Family Court Order, which among other things, determined that the father’s consent to the adoption of his son was required pursuant to DRL 111. The Fourth Department affirmed, noting that the father acknowledged his paternity from the outset of the mother’s pregnancy, pursued paternity testing, and that the mother’s expenses were paid through the father’s military benefits. The mother told the father that he could have custody of the child after his birth and he arranged for family members to care for the child until his enlistment ended. The Appellate Division found that the mother “misled petitioners into believing that the father did not want the child” and “misled the courts by filing a false affidavit stating that no one was holding himself out as the father.”

## **Child Support - CSSA – Imputed Income – Housing, Use of Vehicles**

##  In Matter of Sorscher v. Auerbach, 2022 Westlaw 2136784 (2d Dept. June 15, 2022), the mother appealed from a November 2021 Family Court order, denying her objections to a September 2021 Support Magistrate Order, which, as is here relevant, determined child support for the parties’ 5 children upon the mother’s June 2019 petition. On an earlier round of objections by the father to a July 2021 order, a September 2021 Family Court order remitted to the Magistrate for new findings with respect to income imputed to the father, based upon free housing provided to him by his former foster parents and free use of vehicles he received from a friend. The Second Department reversed, on the facts and in the exercise of discretion, granted the mother’s objections, and vacated the Magistrate’s September 2021 Order. The Appellate Division held that as Family Court determined in its September 2021 order upon the father’s objections, the aforesaid imputation of income “was not supported by the record, as the Support Magistrate explicitly set forth in her [July 2021] findings of fact \*\*\* that she conducted her own research to estimate the value of the father’s housing and adopted the mother’s unsubstantiated estimate of the value of the father’s vehicle use.” The Appellate Division concluded that “Family Court should have remitted the matter to the Support Magistrate to determine the appropriate value, if any, to be imputed to the father for his free housing and vehicle use,” and remitted “for a hearing \*\*\* concerning the limited issue of whether a value can be ascertained for the father’s free housing and vehicle use \*\*\* and a new determination, if necessary, of the father’s income.”

## **Child Support - Violation – Arrears Payments Ordered; Incarceration Denied; Willful Violation Found; Evidence - Updated Arrears Statement Offered After Resting Case – Not Received**

##  In Matter of Santman v. Schonfeldt, 168 NYS3d 333 (2d Dept. June 15, 2022), the mother appealed from an August 2021 Family Court order denying her objections to a June 2021 Support Magistrate Order, which: directed the father to pay her child support arrears of only $20,204 at the rate of only $250 month; denied her request to commit the father to jail unless he paid a purge amount; and declined to accept into evidence a second updated statement of arrears owed, which was offered after she had rested her case. The Second Department affirmed, holding that the Support Magistrate: properly “set the schedule for the father’s payment of child support arrears based on evidence at the hearing of the father’s income, expenses, and payment history;” did not violate FCA 454(4) by failing to explain the reasoning for the denial of “the mother’s request for a purge payment or weekend incarceration” and “complied with the statute by setting forth the facts upon which the determination was based”; and “providently exercised her discretion in declining to accept the \*\*\* statement of arrears \*\*\* offered after the mother had rested her case.”

## **Child Support - Violation – Counsel Fees Denied; Not Willful**

##  In Matter of Laura R. v. Thomas Christopher B., 2022 Westlaw 2164235 (1st Dept. June 16, 2022), the mother appealed from a September 2021 Family Court order denying her objections to an April 2021 Support Magistrate order which, among other things, determined that the father’s failure to pay child support was not willful and denied her request for counsel fees. The First Department affirmed, noting that while the father stopped paying child support in June 2019, and the 2 younger children did not come to live with him until early 2020, the oldest child had lived with the father since at least 2018. The mother also argued that the father’s failure to pay child support caused her to move in with her parents, and she then sent the children to live with the father because of her parents’ susceptibility to COVID-19. The Appellate Division found that this latter argument was “unavailing since it also fails to account for the oldest child’s living situation and also implicates credibility issues.” As to counsel fees, the First Department held that the mother’s request was properly denied, “on the ground that her retainer agreement was incomplete” and that “[h]er contention that an admissible retainer agreement is not a prerequisite to a fee award is unsupported, and she has not shown that she could not have tried to introduce a complete agreement into evidence later in the willfulness hearing.”

## **Custody - Modification – to Nonparent**

##  In Matter of Kennell v. Trusty, 2022 Westlaw 1942391 (4th Dept. June 3, 2022), the mother appealed from a September 2020 Family Court Order, which modified a prior order (joint custody, primary to mother) by awarding primary custody of the subject child to petitioner, who is the father and custodial parent of the 2 youngest of the mother’s 7 children, but is not the father of the subject child. The Fourth Department affirmed, holding that extraordinary circumstances existed in that a dispositional order in an Article 10 proceeding determined the mother had neglected the subject child. The Appellate Division found the requisite change of circumstances warranting modification was established by evidence that: “the child was subjected to physical aggression in the mother’s home by some of the mother’s other children”; “while in the mother’s care, the child had many unexplained absences from school and the mother failed to assist the child with his homework resulting in his need to repeat second grade”; and “the mother failed to comply with requirements of the prior custody order to ensure that the child is \*\*\* properly bathed and groomed and to maintain a safe and sanitary home.” The Court noted that while not dispositive, “the child expressed a strong preference to live with petitioner” with whom “petitioner has a close bond.”

## **Custody - Relocation (NYC to suburb) – Granted**

##  In Kessler v. Charney, 167 NYS3d 793 (1st Dept. June 9, 2022), the father appealed from a September 2021 Supreme Court order which, without a hearing, granted the mother’s motion to relocate with the parties’ child from Manhattan to a suburban area (unspecified). The First Department affirmed, upholding Supreme Court’s finding that “this is one of those rare instances where the determination on relocation can be made without the need for further proceedings.” The Appellate Division noted that: “the father did not dispute that the schools in the area where the mother proposes to relocate are excellent and that the child’s eligibility for middle school in Manhattan will be based on lottery rather than merit”; “the father’s claim that Manhattan is better for the child than the suburban area to which the mother proposes to relocate is belied by the father’s himself having left Manhattan for a suburban area”; the mother agreed “to take on extra travel so as to accommodate the father’s schedule”; and the mother had complied with the terms of the relocation provision in the parties’ custody agreement.

## **Custody - Violation – Disparagement**

##  In Matter of Fowler v. Fowler, 2022 Westlaw 2092960 (4th Dept. June 10, 2022), the father appealed from an August 2020 Family Court order, which found that he had violated the terms of a prior order stating that “the parties were prohibited from disparaging each other in the presence of the child in a manner that might alienate the child’s affection toward the other party” and that “they were prohibited from discussing litigation involving the child in her presence.” The Fourth Department found that the father “spoke to the child about upcoming proceedings that might alter her custody arrangement and also told the child that the mother engaged in certain inappropriate behavior while in the child’s presence.” The Appellate Division concluded that a finding of willfulness was not necessary.

## **Family Offense - Intimate Relationship – Hearing Required**

##  In Matter of Krishna S. v. Claire A., 2022 Westlaw 2251360 (1st Dept. June 23, 2022), respondent appealed from a November 2021 Family Court order, which denied respondent’s motion to dismiss the family offense petition for lack of subject matter jurisdiction. The First Department affirmed, finding that although “petitioner alleged that after meeting through an online dating site, the parties were in an ‘intimate relationship’ [Family Court Act 812(1)(e)],” Family Court “properly found that respondent’s affidavit in support of the motion to dismiss raised issues of fact warranting a hearing on the issue of \*\*\*intimate relationship” as opposed to whether the parties were “casual acquaintances.”

## **Pendente Lite -** **Add-ons, Carrying Charges (2 homes), Child Support, Counsel Fees, Housekeepers, Imputed Income**

## In Safir v. Safir, 2022 Westlaw 2136811 (2d Dept. June 15, 2022), the parties were married in August 2003 and have 4 children. In July 2020, the wife commenced the action for divorce and thereafter moved for *pendente lite* relief. Supreme Court denied both parties’ motions for temporary custody, but determined that the wife was the *de facto* custodial parent, as she was residing in the marital residence with the children and the husband was living elsewhere. Supreme Court determined, in granting the wife $30,000 in temporary counsel fees, that the husband was “undoubtedly the monied spouse,” given that his “reduced, part-time employment income is more than twice the Plaintiff’s current salary,” and that he had “access to substantial amounts of separate assets.” Upon the husband’s appeal, the Second Department affirmed Supreme Court’s March 2021 temporary order in its entirety, holding: “the Supreme Court did not improvidently exercise its discretion in directing the defendant to pay, pendente lite, child support in the sum of $6,000 per month, 100% of the carrying charges for the marital residence, including the costs of the real estate taxes, homeowner's insurance, homeowner's association dues, and repairs for that property, 100% of the carrying charges, maintenance costs, and other expenses attributable to the Florida property, and 74% of the cost of employing two housekeepers. Contrary to the defendant's contention, the court providently, in effect, imputed income to him and determined the plaintiff's income, at that point in time, based solely upon her base salary (citations omitted). The defendant failed to establish the existence of any exigent circumstances warranting a modification of these awards, and any perceived inequity can best be remedied by a speedy trial, at which the parties' financial circumstances can be fully explored (citations omitted). For the same reason, the court properly denied that branch of the defendant's cross motion which was to direct the plaintiff to pay an equal share of the housing expenses.”

## **Pendente Lite - Custody Modification – Denied**

## In Hall v. Banks-Hall, 167 NYS3d 791 (1st Dept. June 7, 2022), the mother appealed from a November 2021 Supreme Court order, which denied her cross motion to modify the parties’ so-ordered stipulation (then in effect for nearly a year) providing for 50/50 shared custody of the parties’ 2 young children, so as to award her temporary sole custody. The First Department affirmed, finding that the mother “only cross-moved for interim custody in response to plaintiff’s motion for pendente lite support \*\*\* and made no claims that there had been a change in circumstances to warrant altering this schedule.” The Appellate Division concluded that Supreme Court under the circumstances acted within its discretion to deny the motion “without first holding an evidentiary hearing, obtaining forensic evaluations, or appointing an attorney for the children.”

## **LEGISLATIVE ITEM**

## **Forensic Evaluator Training Requirements**

##  As reported last month, this bill was passed by the Legislature as of June 1, 2022, and **if signed**, **would amend** DRL 240(1), **effective 180 days from signing**, by the addition of a new paragraph (a-3), which, among other things, requires an appointed forensic custody evaluator to be a psychologist, social worker or psychiatrist, and to complete biennial domestic violence training in order to qualify for the appointment. As of this writing on July 4, 2022 and according to the legislative website listing, the bill had not yet been delivered to the Governor for signature. A.02375C/S.06385B.