## **NYS BAR ASSOCIATION FAMILY LAW SECTION UPDATE - March 2022**

## **Matrimonial Update**

## **By Bruce J. Wagner**

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

## **Agreements - Prenuptial – Mexico – Invalid**

In Lezama v. Pedraza, 158 NYS3d 627 (2d Dept. Feb. 2, 2022), the husband appealed from a June 2018 judgment of divorce which, upon an April 2017 order in the wife’s February 2016 action, denied so much of his September 2016 motion as sought to confirm and enforce a prenuptial agreement allegedly made in Mexico in 1990, containing a separation of property election under Mexican law, and made an equitable distribution of marital property. The Second Department affirmed, finding that the alleged agreement “consisted of a marked checkbox on their marriage certificate, electing a ‘separation property regime’” and holding that the husband’s evidence “was insufficient to establish that the marriage certificate containing the separation of property election conformed to the requirements under Mexican law” and was therefore “not valid or enforceable in New York,” citing DRL 236(B)(3) and RPL 301-a.

## **Attorney & Client - Undignified or Discourteous Conduct – Not Excused in COVID-19 Virtual Proceedings; Custody - Modification – Domestic Violence, School Absences, Violence Toward Others**

In Matter of Saymone N. v. Joshua A., 2022 Westlaw 399712 (1st Dept. Feb. 10, 2022), the father appealed from an April 2021 Family Court order which, after a virtual hearing, granted the mother’s August 2018 petition to modify a March 2017 order, by granting her sole legal and physical custody to the child. The First Department affirmed, noting that Family Court “had the authority to modify its hearing procedures (*see* Judiciary Law § 2-b)” and “[c]ontrary to the father’s vitriol and the disdain for the hearing court exhibited by both counsel, the record is clear that the court conducted the proceedings fairly, preserving the parties’ due process rights.” The Appellate Division held that Family Court properly found changed circumstances, given that since the date of the last custody order, “the father allegedly engaged in domestic violence and assaulted a third person in front of the child,” and “the father was incarcerated for four months, during which time the mother cared for the child.” The First Department concluded that as to the child’s best interests: the record “raises some concerns about [the father’s] parental judgment since he committed assault in proximity of the child”; while in the father’s care in 2019, the child had unexplained absences from kindergarten; and in 2020, when in the mother’s care, the child attended school. The Court stated in a footnote: “Attorneys for both the mother and the father were strongly admonished in Family Court for their unprofessional behavior and were directed to review the Rules of Professional Conduct,” including those pertaining to “undignified or discourteous conduct or conduct intended to disrupt the tribunal” and concluded: “We note that these rules remain in effect despite or perhaps because of the frustrations that may arise from having to adopt to new court procedures, necessitated in these times by Covid-19.”

## **Custody - Violation – Willful – Not Found – COVID-19 Circumstances**

In Matter of Damon B. v. Amanda C., 2022 Westlaw 47948 (3d Dept. Feb. 17, 2022), the mother appealed from a December 2020 Family Court order which, following a hearing upon the father’s June 2020 petition, found her to be in willful violation of an order directing visitation with the parties’ child born in 2013 every other week for 2 hours in a public place. There was no dispute that the father did noy have visitation on March 22, 2020, or from April 14, 2020 through May 2020. The father testified that as to the March 22 visit, “I would say that I was forced to not getting that visit because of COVID.” As to the April 14, 2020 visit, there was confusion between the parties and their attorneys due to the granting of a stay pending appeal of a separate order, which resulted in the reinstatement of the “2 hours in a public place” provision. Regarding the visits between April 18, 2020 through May 2020, the father testified that due to COVID-19: “If there’s nothing public open, where am I to take my son? I offered [the mother] to come to my house [and] she told me no.” The Third Department reversed, on the law, and dismissed the violation petition, holding that “Family Court erred in finding that [the mother] willfully violated the order,” noting “both parties testified as to the difficulties involved \*\*\* in a public venue during COVID-19, there was confusion among the parties as to which order was in effect at the time, and the mother relied on her attorney’s advice, which had a sound basis.”

**Enforcement – Willful Violation – Probation**

In Matter of Bermejo v. Suquilanda, 159 NYS3d 881 (2d Dept. Feb. 23, 2022), the father appealed from a July 2021 Family Court order, which directed that he be placed on probation for 3 years for his willful violation of a child support order, contending that Family Court was not permitted to order probation after committing him to incarceration. Upon the father’s default in appearance for a May 2021 confirmation hearing, Family Court committed the father for 90 days unless he paid a purge amount of $15,000, and then suspended the commitment and released him in June 2021. At a July 2021 court appearance attended by both parties, Family Court noted that the father had paid $15,000 after the commitment was suspended and the mother requested that he be placed on probation. The Second Department affirmed, noting that “Family Court has the discretion to suspend an order of commitment and to place a respondent on probation under such conditions as the court may determine,” citing FCA 455(1). The Appellate Division found that the $15,000 payment could not be applied to the purge amount, because it was paid after the order of commitment was suspended. Once the commitment was suspended, Family Court was authorized to impose 3 years’ probation pursuant to FCA 455(1).

## **Equitable Distribution - Marital Residence – Who Gets? Mortgage Credit – Date of Commencement; Proportions – Business (30% and 50%); Separate Property Contribution – Share Reduced; Separate Property Credit; Valuation – Income Producing Property; Maintenance – Durational**

## In Kattan v. Kattan, 2022 Westlaw 385950 (2d Dept. Feb. 9, 2022), the husband appealed from a December 2018 judgment, which, upon a May 2018 decision rendered following a 45-day trial of his January 2009 divorce action held between May 2011 and May 2014, made certain directives regarding equitable distribution and maintenance. The parties were married in 1989 and have 4 children, the youngest of whom was found by the Appellate Division to be “currently 20 years old.” The Second Department modified, on the law and the facts, and in the exercise of discretion, by: (1) increasing the husband’s share of the marital residence, providently awarded to the wife “upon consideration of the totality of the circumstances, including the court’s distribution awards with respect to the remainder of the parties’ marital property and the [wife’s] position as custodial parent of \*\*\* the then-unemancipated child,” from $1,637,500 to $2,133,208.27, to account for his separate property credits toward the purchase and renovation of the residence; (2) reducing the wife’s share of the appreciation in value of the husband’s separate real property from $1,190,301.18 (50%) to $595,150.59 (25%), noting that the property was inherited by the husband and the wife’s own expert testified that the bulk of the value of the property was attributable to the land, due to its “highly desirable” location “a mere three lots from the [Deal, NJ] beach,” and not to the improvements thereon; and (3) decreasing the wife’s award of $472,500 for marital property in Brooklyn to $428,492.50, based upon Supreme Court’s error in using the mortgage balance as of the time of trial in 2011, rather than the balance as of the January 2009 divorce action filing date. The Appellate Division affirmed the awards to the wife of: 30% of the appreciated value of one of the husband’s premarital businesses, based upon her direct and indirect contributions thereto; and 50% of the value of an additional interest in the same business acquired during the marriage. The Second Department also upheld Supreme Court’s valuation of an income-producing marital property in Brooklyn: (a) using the income capitalization approach, based upon the net operating income “as advanced by the [husband’s] own expert at trial”; (b) “providently \*\*\* crediting the [wife’s] expert in applying a capitalization rate of 7.33%”; and (c) determining the same as of the date of the commencement of the action. The Appellate Division affirmed the maintenance award to the wife of $5,000 per month for 18 months, considering “the length of the parties’ marriage and the lifestyle they enjoyed, the age[s] of the parties [not specified], the [wife’s] lack of work history, and the court’s equitable distribution award.”

## **Equitable Distribution -** **Proportions – Retirement Plans (0%) – Long Separation; Maintenance – Guidelines Award Denied**

## In King v. King, 2022 Westlaw 547156 (3d Dept. Feb. 24, 2022), the wife appealed from a March 2020 judgment, which, following a trial of the husband’s July 2016 divorce action, denied her a share of the husband’s retirement plans and denied her request for maintenance. The parties were married in 1977 and the husband moved out of the marital residence in 1989. The parties briefly reconciled and finally separated in 1991. The parties consented to a 1991 Family Court spousal support order of $550 bi-weekly, which was intended to cover the mortgage on the marital residence, which the wife purchased in 1985; she added the husband’s name to the deed in 1986, when they secured a $66,000 mortgage. The husband transferred his interest in the residence to the wife at or about the time of the parties’ initial separation in 1989. A family friend paid off the mortgage in 2001 and received co-ownership of the home with the wife, who continues to reside therein, on a rent-free basis since 2005, although she pays the homeowners’ insurance and certain maintenance expenses. The husband’s 1993 divorce action upon the ground of cruel and inhuman treatment was dismissed. Family Court entered an order in 2011, reducing the spousal support obligation and providing for the payment of arrears. At the time of trial, the husband was 63 years old and in good health, and was earning about $61,000 per year; the wife was also 63 years old and in good health, has an Associate’s Degree in secretarial science, retired and receiving $750 per month in Social Security benefits, in addition to spousal support and SNAP. The Appellate Division found: “The wife indicated that she has not applied for any jobs recently, but there is no reason she could not work in certain positions.” Supreme Court imputed income to the wife at the hourly rate of $10 per hour for part-time work and found that the presumptive maintenance guidelines amount [unspecified] was unjust and inappropriate, stating that “the wife could support herself through her Social Security income and food stamps, her ownership of the marital residence, her support from family and friends and her ability to work.” The Appellate Division affirmed the denial of maintenance and held that the deviation from the maintenance guidelines “is supported by the record, especially considering that the wife conceded that the spousal support payments were for the mortgage,” which was paid in 2001. Regarding Supreme Court’s denial to the wife of any share of the husband’s retirement assets, the Third Department found that the husband accumulated the same between 2005 and 2016. The husband’s 401k plan had a balance of about $10,000 as of June 2018 and he has a pension which will pay him $500 per month at age 65. The Appellate Division noted Supreme Court’s finding that the parties had been separated for 14 years by 2005, when the husband commenced the employment which yielded the retirement plans, as well as Supreme Court’s award of the former marital residence to the wife, and affirmed Supreme Court’s denial of a share of the husband’s retirement plans to the wife.

## **Family Offense – Dismissal Reversed – 17 y/o Child May Testify**

## In Matter of O’Connor v. O’Connor, 158 NYS3d 604 (2d Dept. Feb. 2, 2022), the mother appealed from a December 2020 Family Court order and a January 2021 order of dismissal, which, respectively, granted the father’s motion to dismiss her family offense petition for failure to state a cause of action, directing the dismissal of the same and a violation petition, and dismissed both aforesaid petitions with prejudice and vacated a September 2020 temporary order of protection. The Second Department dismissed the appeal from the December 2020 order, as no appeal as of right lies from a non-dispositional order (FCA 1112[a]) and reversed the January 2021 order of dismissal, on the law, reinstated both petitions and the temporary order of protection, vacated the December 2020 order, and remitted for further proceedings. The Appellate Division noted that Family Court stated that the mother “would be unable to prove her allegations because the child’s out-of-court statements were inadmissible” and held that Family Court “erred in concluding that there was no other way” for the mother to proceed, “for instance, by having the child, who was 17 years old at the time the petition was filed, testify in open court.”

## **Paternity – Equitable Estoppel – Denied**

## In Matter of John D. v. Carrie C., 2022 Westlaw 478489 (3d Dept. Feb. 17, 2022), the mother appealed, by permission, from a May 2021 Family Court order, which, following a hearing pursuant to FCA 532(a), ordered genetic marker testing for purposes of establishing petitioner’s paternity of a child born to her in 2014. The mother told both petitioner and respondent John during her pregnancy that either of them could be the father. During the pregnancy, John provided financial support and housing to the mother and went to her prenatal appointments, and he signed an acknowledgement of paternity and was listed on the birth certificate as the father. When the child was 6 months old, an out of court paternity test revealed John was not the father, and the parties agreed that John would no longer be referred to as dad, but by his first name. The mother and child lived with John until she and John separated in the spring of 2016, a few months before the child’s 2nd birthday. Petitioner learned from the mother’s coworker that he was the child’s father, met with the mother in January 2020 and thereafter with the then nearly 6-year-old child, who was told that he was her father. Regular visitation ensued for more than 2 months, when the mother then terminated the visits, leading Petitioner to commence the within paternity proceeding. The mother moved to dismiss the proceeding upon the ground of equitable estoppel. The Third Department affirmed, finding that although John has had a long-standing relationship with the child, “it does not equate to an operative parent-child relationship, particularly after the child moved out of his residence in the spring of 2016.” The Appellate Division noted that the child knows that John is not her father, has been told Petitioner is her father and calls him “daddy.” The Court concluded that the child would not suffer irreparable loss of status, destruction of her family image or other harm if a genetic marker test proceeded as ordered.

## **Procedure – Virtual – Removal from Proceedings is Willful Default**

## In Matter of Smith v. Bullock, 158 NYS3d 606 (2d Dept. Feb. 2, 2022), the father appealed from a February 2021 Supreme Court (IDV Part) order, which granted the petition of the nonparent Smith for custody of the subject child and denied his petition seeking the same relief. The Second Department dismissed the appeal, given that the order was entered upon the father’s default, except with respect to matters which were the subject of contest. The Appellate Division affirmed, insofar as reviewed, holding: “The record demonstrates that the father’s disruptive behavior over the course of these proceedings, and specifically, during the conference on January 27, 2021, was grossly disrespectful to Supreme Court and precipitated his removal from the virtual courtroom. Therefore, the court acted properly in excluding the father from further participation in the proceedings, as the father’s conduct was sufficient to constitute a knowing and willful default.”

## **Rule Proposal – Alternative Dispute Resolution (ADR)**

## The Administrative Board of the Courts is seeking public comment by April 4, 2022, of a proposed new Part 60 of the Rules of the Chief Judge, along with a proposed new Part 160 of the Rules of the Chief Administrative Judge, to establish general statewide rules for presumptive ADR. The new rules, with allowance for appropriate exceptions, will refer parties in civil disputes in the trial courts to mediation and other forms of ADR. The proposals may be found at:

## [Request-for-Public-Comment-ADR-rules-web.pdf (nycourts.gov)](https://www.nycourts.gov/LegacyPDFS/rules/comments/pdf/Request-for-Public-Comment-ADR-rules-web.pdf)

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