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

## **Matrimonial & Family Law Update**

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

## **Agreements - Interpretation – Appraisals for Buyout**

## In Martin v. Martin, 2022 Westlaw 1243095(3d Dept. Apr. 28, 2022), the former husband (husband) appealed from March 2020 and March 2021 Supreme Court orders which, among other things, denied his motion to reject the former wife’s (wife’s) appraisal of the former marital residence for buy-out purposes, and granted the wife’s motion to direct him to pay her a sum for such buyout determined in part through consideration of the appraisal to which he objected. The parties’ 2012 divorce judgment incorporated a written agreement, which gave the husband the right to buy out the wife’s interest in their lakefront home in Saratoga County, for, as is here relevant, one half of the value of the average of 3 appraisals conducted by licensed appraisers. The husband obtained 2 such appraisals and the wife obtained a 3rd appraisal, which, according to the Appellate Division, set a value “roughly twice the value set by the first and second appraisals.” The husband obtained a 4th appraisal, in connection with a mortgage application intended to provide him with funds for the buy-out, which set a value between his prior 2 appraisals. The Third Department noted that “courts may also consider what is reasonably implied by the agreement’s language,” and concluded that “a reasonable implication of the agreement is that the parties \*\*\* intended for the appraisers to comply with the appraisal standards mandated for state licensed and certified appraisers.” Affidavits submitted in connection with the parties’ motions raised issues as to whether the wife’s appraiser complied with the provisions of the Uniform Standards of Professional Appraisal Practice (USPAP), as set forth in Executive Law 160-d(1)(d), (2) and (3) and 19 NYCRR 1106.1(a) and (b). The Appellate Division therefore held that: Supreme Court should have held a hearing to resolve the factual issues raised by the affidavits; if Supreme Court finds that the wife’s appraiser “did not substantially comply with \*\*\* USPAP,” then his appraisal should not be considered as one of the required three; if the finding is that the wife’s appraiser “substantially complied with USPAP,” then the same is considered as one of the required three and the husband must pay the wife according to the average thereof; and remitted for a limited hearing consistent with its decision.

## **Attorney & Client - Client Information on Attorney’s Smartphone**

##  NYSBA Committee on Professional Ethics Opinion 1240 (Apr. 8, 2022) provides in summary: “If ‘contacts’ on a lawyer’s smartphone include any client whose identity or other information is confidential under Rule 1.6, then the lawyer may not consent to share contacts with a smartphone app unless the lawyer concludes that no human being will view that confidential information, and that the information will not be sold or transferred to additional third parties, without the client’s consent.”

## **Attorney & Client - Court Order for Attorney’s Hard Drive**

##  NYSBA Committee on Professional Ethics Opinion 1239 (Mar. 22, 2022) provides in summary: “An attorney in receipt of a court order directing production of his hard drive containing the confidential information of clients who have not waived privilege or consented to disclosure, has the obligation to advise non-waiving clients of the existence of the court order. Absent the clients’ informed consent to waiver of the attorney-client privilege and consent to disclosure, an attorney must consult with the non-waiving clients about the reasonable steps necessary to avoid or limit production of confidential information and undertake those steps before complying with the court order.”

## **Child Support - Emancipation Age 21, Not 18; Life Insurance**

##  In Shvalb v. Rubinshtein, 2022 Westlaw 1231633 (2d Dept. Apr. 27, 2022), the wife appealed from a February 2019 judgment of divorce which, upon a November 2018 decision after trial, among other things, directed the husband to pay child support and add-on expenses for the parties’ 2 children born in 2010 until they reach age 18 or are sooner emancipated, and failed to direct the husband to secure the child support award with life insurance. The Second Department modified, on the law and in the exercise of discretion, by: providing that child support and add-on expenses are paid until age 21 [DRL 240(1-b)(b)(2)]; directing the husband to obtain and maintain sufficient life insurance [DRL 236(B)(8)(a)]; and remitting to Supreme Court for a calculation of the appropriate amount of insurance.

## **Child Support - UIFSA – Continuing Exclusive Jurisdiction**

##  In Matter of Salim v. Freeman, 2022 Westlaw 1020819 (2d Dept. Apr. 6, 2022), the mother appealed from a July 2021 Family Court order, which granted the father’s objections to a March 2021 Support Magistrate order, which, in turn, dismissed his September 2020 petition seeking support for the parties’ child born in Virginia in 2007, and vacated its own December 2020 temporary order directing the mother to pay child support. Family Court’s July 2021 order also reinstated the aforesaid temporary order. The Second Department treated the notice of appeal as a motion for permission to appeal, granted the same, and reversed, on the law, denied the father’s objections and dismissed his petition. The Appellate Division found it was undisputed that prior to the father’s September 2020 New York petition, a Virginia Court had rendered an order directing the father, who resides in Virginia, to pay child support to the mother. The Court concluded that Virginia retains exclusive jurisdiction to modify its order, citing Family Court Act 580-205(a) and 28 USC 1738B(d), and rejected the father’s argument, that his petition was a “de novo” application and was not in the nature of a “modification,” citing Matter of Spencer v. Spencer, 10 NY3d 60, 67 (2008).

## **Counsel Fees – Modification–Denied; Maintenance – Modification- Denied**

##  In Hickman v. Hickman, 2022 Westlaw 1037788 (3d Dept. Apr. 7, 2022), the former wife (wife) appealed from a September 2020 Supreme Court order, which, without a hearing, denied her May 2020 motion to modify maintenance and for counsel fees. The parties’ 2012 divorce judgment required the former husband (husband) to pay the wife maintenance of $50,000 per year for 5 years. The Third Department affirmed and held that modification is “generally not appropriate where one spouse ‘has the present ability to obtain higher paying employment, but brings about a reversal of financial condition by the spouse's own actions or inactions.’” The divorce judgment imputed annual income of $55,000 to the wife, based upon her status as caretaker of the parties’ 2 children and homemaker for 14 years of the marriage. The Appellate Division noted the wife’s motion papers, which stated that: “[S]he applied for more than 100 jobs over 18 months, finally being offered one position with an annual salary of $40,000. After 15 months in that position, which had work hours from 9:00 a.m. to 5:00 p.m., she quit her job because she felt that she needed more flexibility to transport her children — then both teenagers — to afterschool activities. The wife then purchased a nonmedical home care business, despite having no experience in that field. The business thereafter experienced net losses each year, and she lacked capital to advertise and market its services. The wife avers that she unsuccessfully continued to look for jobs and tried to sell the business. Due to the expenses of the marital residence, the wife agreed to sell it earlier than required by the divorce judgment. Using some of the money from that sale along with a large mortgage, she purchased a spacious, expensive house, just five months before the maintenance payments were scheduled to cease.” The Third Department found that although the husband’s income had “increased significantly after the divorce, that is not determinative and does not necessarily present a substantial change in circumstance warranting a modification to increase maintenance.” The Court determined that the wife “was not required to show a change in circumstance that was unexpected, but she was required to establish a substantial change in circumstance or an inability to support herself” and found that “the wife's behavior was at least partially responsible for her current financial situation, considering that she voluntarily left her job, purchased a house beyond her means and, contrary to advice from professionals, purchased a business that resulted in no profit.” The Appellate Division concluded that “the wife failed to make a *prima facie* showing of an inability to be self-supporting or a substantial change in circumstance that would warrant reinstating spousal maintenance” and “was not entitled to a hearing.” The Third Department affirmed Supreme Court’s denial of counsel fees, and held that although the wife was the less monied spouse, “her application lacked merit and it was decided on the papers such that counsel's expenditure of time was relatively limited.”

## **Custody & Visitation - Access Delegation Reversed**

##  In Matter of Felgueiras v. Cabral, 2022 Westlaw 1097247 (2d Dept. Apr. 13, 2022), the mother appealed from a March 2021 Family Court custody order which, after a hearing, among other things: (1) granted the father’s July 2020 petition to modify an October 2019 order of the same court (joint legal, primary to mother) by awarding him sole legal and physical custody; (2) directed that if the mother ceases to attend a certain program before a successful discharge, her access to the child shall be immediately suspended; and (3) directed that if the mother has any unsupervised access without prior court approval, her access to the child shall be immediately suspended. The Second Department modified, on the law and in the exercise of discretion, by deleting items (2) and (3) above and otherwise affirmed. The Appellate Division held that the deleted items “effectively allow the father to determine” whether the mother’s access should be suspended without giving the mother an opportunity for judicial review, and therefore “constitute an improper delegation of authority by the Family Court.”

## **Custody & Visitation - Enforcement; Replacement of Parent Coordinator**

##  In Mastrocola v. Alcoff, 2022 Westlaw 1086366 (1st Dept. Apr. 12, 2022), the mother appealed from a July 2021 Supreme Court order, which denied her motion to enforce the access provisions of the parties’ custody stipulation and to replace the parent coordinator. The First Department reversed, on the law, granted the mother’s motion to the extent of adopting her proposed access schedule for the 2021-2022 school year and replacing the coordinator, and remanded for further proceedings to select a new parent coordinator. The Appellate Division found that the father did not dispute that the access rules and 2021-2022 access schedule established by the parent coordinator “contravene certain portions of the parties’ custody stipulation,” and noted that he did not submit his own schedule. The Court concluded that Supreme Court should have granted the motion to replace the parent coordinator, given that the stipulation provided that if the parties cannot agree upon the issue of replacement, a party may seek that relief from the Court.

## **Custody & Visitation - Mother’s Friend Barred From Contact With Children**

##  In Matter of Hall v. Velez, 2022 Westlaw 1196681 (4th Dept. Apr. 22, 2022), the mother appealed from a September 2020 Family Court order, which modified a prior order by granting sole custody of the parties’ children to the father and prohibited any contact between the children and the mother’s male friend. The Fourth Department affirmed, finding that “the mother’s friend engaged in acts of violence in the presence of the children, repeatedly used drugs with the mother, and, along with the mother, frequently and fragrantly violated the court’s temporary order that the children not be in his presence.”

## **Enforcement - Child Support – Add-Ons; Contempt**

##  In Zombek v. Zombek, 2022 Westlaw 1160955 (2d Dept. Apr. 20, 2022), the former husband (husband) appealed from a September 2019 Supreme Court order which, after a hearing upon the former wife’s (wife’s) 2016 motion to enforce a June 1999 stipulation incorporated in a July 1999 judgment of divorce, held the husband in contempt and awarded her $256,000 in child support add-on arrears and $15,000 in counsel fees. The stipulation, which opted out of the CSSA, required the husband to pay yeshiva and summer camp tuition and extracurricular activities, and uninsured orthodontic expenses, all in lieu of a basic child support obligation. The Second Department affirmed, rejecting the husband’s argument that Supreme Court was without authority to make its award because the stated sums were “add-ons” and not basic child support, holding that DRL 240(1-b)(b)(2) defines child support, among other things, as “a sum to be paid pursuant to court order \*\*\* for care, maintenance and education of any unemancipated child \*\*\*.” [Ed. Note: Although not mentioned by the Court, DRL 244 (money judgment) and DRL 245 (contempt) are remedies available upon a payor’s “default in paying any sum of money as required by the judgment \*\*\*.”] The Appellate Division further noted that the wife’s motion was not time barred, citing CPLR 211(e).

## **Enforcement - Unincorporated Stipulation – Plenary Action Needed; Venue**

##  In DeGiovine v. Kaufmann, 2022 Westlaw 1020766 (2d Dept. Apr. 6, 2022), the wife appealed from a March 2021 Supreme Court order (Suffolk County), which denied her February 2021 motion to: (1) enforce a January 2021 so-ordered stipulation entered in Bronx County; and (2) modify a January 2020 judgment of divorce entered in Bronx County, so as to award her maintenance. The March 2021 order further directed that the wife “may attempt to address the issue” of equitable distribution “via a plenary action in the appropriate jurisdiction, i.e., Bronx County.” The husband’s March 2018 divorce action was determined upon the wife’s default by the aforesaid January 2020 judgment, which stated that no maintenance or equitable distribution was awarded, and that any enforcement or modification applications “shall be brought in a county wherein one of the parties resides.” The wife thereafter moved to vacate the default judgment of divorce, which resulted in the so-ordered stipulation about a year later, in January 2021, which provided that “as of this date no ancillary relief claims have been litigated in this matter on their merits and same may proceed in Suffolk County as a motion to modify the decree.” The Second Department modified, on the law, by deleting the provision directing that the wife “may attempt to address the issue” of equitable distribution “via a plenary action in the appropriate jurisdiction, i.e., Bronx County.” The Appellate Division held that the January 2021 stipulation, made nearly a year after the January 2020 judgment, could not be incorporated into a judgment entered in an already terminated action “since the court did not retain the power to exercise supervisory control over the action.” The Court concluded that “the question of maintenance should be deferred with other relief to a plenary action,” but the Bronx County venue directive therefor contained in the order appealed from “is not supported by the terms of the stipulation.”

## **Family Offense - Identity Theft, Stalking, Sexual Misconduct – Dismissed on Motion**

 In Matter of Tammy TT. V. Charles TT., 2022 Westlaw 1243127 (3d Dept. Apr. 28, 2022), the wife appealed from a January 2021 Family Court order, which granted the husband’s motion to dismiss her [August or September 2020] family offense petition. The Third Department affirmed, holding that: (1) as to identity theft, the wife did not allege any facts “indicating that the husband himself had assumed her identity, instead claiming that he helped someone else do so (see Penal Law 190.78[1] and [2])”; (2) the wife’s allegations of stalking are “speculative, for the wife’s supposition that she ‘think[s]’ the husband was entering her home and moving items is not factual and cannot serve as a foundation”; and (3) the alleged sexual misconduct incident occurred 10 to 12 years before the petition was filed and was “based on the wife’s perception of a memory, derived from nightmares from a two-year period [2008-2010] that, by the wife’s own account, she does not remember,” and which “is simply too speculative to provide a factual basis for the claim.” The Appellate Division noted that “the parties continued to reside together until August 2019, and the record does not otherwise demonstrate that the wife was in imminent danger.”

## **Paternity -** **Equitable Estoppel Denied; DNA Test Results Allowed**

In Matter of Mark R. v. Kimberly V., 2022 Westlaw 1086356 (1st Dept. Apr. 12, 2022), the mother appealed from a June 2021 Family Court order which, after an estoppel hearing, denied her motion to dismiss the putative father’s paternity petition and to prevent him from obtaining the results of a DNA test already performed. The First Department affirmed, holding that the mother “failed to establish by clear and convincing evidence that petitioner should be equitably estopped from asserting his paternity of the child through DNA testing,” and noting that while the mother’s current husband “has assumed the role of the child’s father and executed an acknowledgment of paternity, petitioner has consistently and diligently asserted his paternity” (internal quotation marks and citation omitted). Petitioner communicated with the mother and planned for the child before the birth, and the mother and child lived with him for a time thereafter, during which time he cared for and provided for the child. The mother then unilaterally terminated contact with petitioner when the child was only 4 months old, and he promptly filed his paternity petition. The Appellate Division concluded that there was no indication that the test results would be harmful or traumatic, noting the child’s young age and the testimony of both petitioner and the husband, that each of their relationships with the child would not change if petitioner proved to be the biological father.

## **Procedure - Adjournment Denial Upheld; COVID-19 Delay and Video Proceedings**

 In Matter of Darlene H. v. Abdus R., 2022 Westlaw 1177463 (1st Dept. Apr. 21, 2022), the father appealed from a March 2021 Family Court order entered upon his default, to the extent that his request for an adjournment was denied. The First Department affirmed, noting that while no appeal lies from an order entered upon default, CPLR 5511, the denial of the father’s request for an adjournment is appealable because that application was the subject of contest. The Appellate Division held that Family Court properly denied the adjournment request when the father failed to appear by video to continue his testimony on his petition, observing that the proceedings had already been adjourned for 4 months at the father’s request, after an extended delay due to the COVID-19 pandemic. The First Department concluded that further delay was not in the children’s best interests, given that “the father had been warned of the consequences of failing to appear by video and was given ample time to find access to a computer or other device that would permit him to participate by video.”

## **Procedure - Appeal – Electronic Recording Inadequate**

 In Matter of Jereline Z. v. Joseph AA., 2022 Westlaw 1243172 (3d Dept. Apr. 28, 2022), the father appealed from a March 2021 Family Court order which, after a fact-finding hearing upon the mother’s April 2020 petition and a January 2021 order thereupon, found that he committed family offenses and granted the mother a one-year order of protection. One of the witnesses at the hearing, recorded by an electronic system, was the father’s mother, to whom counsel posed 81 questions; the transcript included in the record on appeal provided 4 of the answers thereto and the remaining 77 answers were transcribed as “inaudible.” The Third Department reversed, on the law, holding that “the absence of that testimony makes meaningful appellate review an impossibility” and remitted for a new hearing. The Appellate Division noted its “agree[ment] with respondent that Family Court should use a court reporter upon remittal in order to avoid the ‘unintended results[,] such as unintelligible records of trial proceedings,’ that arose from the electronic recording of the first hearing.”