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

## **Matrimonial Update**

## **By Bruce J. Wagner**

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

## **Attorney & Client - Fees from Client – Account Stated; Summary Judgment Granted**

## In Garr Silpe, P.C. v. Weir, 2022 Westlaw 4474597 (1st Dept. Sept. 27, 2022), the client appealed from a November 2021 Supreme Court judgment awarding the law firm $87993.92. The First Department affirmed, holding that the law firm’s right to recover attorneys' fees “was not barred by its failure to provide a statement of client's rights and responsibilities in the prescribed form at the initial consultation, a notice to arbitrate, or a copy of a filed retainer, as there had been substantial compliance with the rules.” The Appellate Division determined that Supreme Court “properly granted plaintiff summary judgment on its claim for account stated. Plaintiff submitted evidence establishing that defendant did not object to the bills and invoices within a reasonable time, and had in fact made partial payments (citation omitted). Defendant failed to proffer any proof raising a triable issue of fact.” The Court concluded: (a) that the client’s “challenge to the reasonableness of the fees is unavailing. Where an account has been stated by a law firm, the firm is not required to establish the reasonableness of its fees since the client's act of holding the invoices without objection constitutes an acquiescence to the correctness of the invoices”; and (b) the client’s “assertion that she is entitled to arbitration because the correct uninflated amount in dispute is under $50,000 is unpersuasive.”

## **Child Support - CSSA – Shared Custody**

## In Matter of Smisek v. DeSantis, 2022 Westlaw 4361153 (2d Sept. 21, 2022), the mother appealed from an August 2021 Family Court Order, denying her objections to a May 2020 Support Magistrate Order, which granted the father’s motion to dismiss her petition seeking child support for the parties’ children born in 2010 and 2013. The Support Magistrate and Family Court agreed that “the mother could not be awarded child support because a strict counting of the parties’ custodial overnights with the children rendered him the custodial parent.” The parties separated in 2017. The mother at that time was a dance instructor in a studio in which she had an ownership interest and the father was a partner in a law firm. After a trial, Family Court awarded the parties joint legal custody and shared physical custody as above stated. The Second Department, in a lengthy signed opinion (Iannacci, J. with Duffy, J.P., Rivera and Zayas, J.J., concurring) reversed, on the law, denied the father’s motion to dismiss and remitted to Family Court for further proceedings on the mother’s child support petition. The Appellate Division held that “considering the reality of the situation, including the overall amount of time each parent spends with the children, this is a case in which the ‘custodial arrangement splits the children’s physical custody so that neither can be said to have physical custody of the children for the majority of the time’ (*Baraby v. Baraby*, 250 AD2d at 204).” The Second Department reasoned that “while counting custodial overnights may suffice in most shared custody cases, that approach should not be applied where it does not reflect the reality of the situation. Similarly, while it may be clear in most cases which parent’s share of the parenting time constitutes the majority of the custodial time (see *Bast v. Rossoff*, 91 NY2d at 729 n 3), the reality of the situation must also be considered when there is a closer division of parenting time.” The Court concluded: “since it has not been determined \*\*\* which parent has the greater pro rata share of the child support obligation, we remit the matter to the Family Court \*\*\*.”

## **Counsel Fees - Enforcement and Modification – Custody; Hearing Deemed Waived**

## In Brennan v. Caltabiano, 2022 Westlaw 4540302 (1st Dept. Sept. 29, 2022), the husband appealed from an October 2021 Supreme Court order, which granted the wife counsel fees (amount not specified) in a proceeding to enforce and modify the parties’ custody stipulation. The First Department affirmed, holding that “the husband’s repeated violations of the custody stipulation necessitated the motion,” citing DRL 238, and determining that “the husband, after relocating outside of New York, did fail to comply with some of the detailed provisions of the custody stipulation \*\*\*, adversely affecting the children and wife, so that a discretionary award of fees was warranted.” The Court concluded that the husband “waived his right to a hearing on the issue of whether he violated the stipulation when he failed to request one on the wife’s application for attorney’s fees or to object when the motion court indicated that the motion would be decided on the papers submitted.”

## **Custody - Third Party – Grandmother v. Stepparents; Mother of Half-Siblings Deceased; Fathers Aligned with Grandmother**

## In Matter of Leslie LL. V. Robert NN., 2022 Westlaw 4239598 (3d Dept. Sept. 15, 2022), the stepfather and his wife (stepparents) of 2 half-siblings (a girl born in 2003 and a boy born in 2013) appealed from a January 2020 Family Court Order which, after a hearing, dismissed their petition seeking custody of the subject children. The children resided with the mother from their respective births until her death in 2017. The mother never married either of the fathers and neither father ever had legal or physical custody of his respective child. From 2008 to 2013, the mother was married to petitioner stepfather, who, following his divorce from the mother, married petitioner stepmother. The stepfather continued to provide financial support to the mother and the stepparents had ongoing contact with the children, particularly the boy. Family Court granted temporary custody to the grandmother upon consent of both fathers and denied a subsequent motion by both fathers and the grandmother to dismiss the stepparents’ petition, finding that they had made sufficient allegations of extraordinary circumstances, which, if true, would allow the Court to reach the issue of the children’s best interests. The boy’s father testified that following the mother’s death, he formulated a plan for both children to live with the grandmother, given that he was unable to assume custody because of physical disabilities and his residence in public housing which does not allow children. Family Court observed that “the children are being raised together by the grandmother in a loving home.” Following a hearing, Family Court determined that the stepparents failed to establish extraordinary circumstances to warrant interference with the voluntary custodial arrangement made by the father. The Third Department affirmed, finding “a sound and substantial basis in the record to conclude that [the stepparents] failed to meet their burden of demonstrating extraordinary circumstances,” while noting that petitioners in their brief on appeal stated that they were no longer pursuing custody of the girl, who turned age 18 during the pendency of the appeal, thus rendering the appeal moot as to her.

## **Enforcement - Childcare and Unreimbursed Medical Expenses; Evidence of the Same**

## In Matter of Catherine L. v. Terence M., 2022 Westlaw 4540354 (1st Dept. Sept. 29, 2022), the father appealed from an April 2021 Family Court order denying his objections to a March 2020 Support Magistrate Order, which awarded the mother a money judgment of $36,991.08 for arrears in childcare and unreimbursed medical expenses. The First Department affirmed, holding that the mother “sufficiently demonstrated that respondent owed arrears for the add-on expenses by submitting the prior support orders and a summary of the expenses along with proof of payments. Rejecting the father’s claim that the mother did not provide him notice of the expenses before she filed her petition, the Appellate Division found that the mother “testified that she had hand delivered hardcopies of the invoices to him,” and concluded that there was no basis to disturb the Support Magistrate’s relative credibility determinations.

**Evidence – Video; Family Offense – Disorderly Conduct Not Found**

## In Matter of Bridgette B.E. v. Lisandro R.C., 2022 Westlaw 4474926 (1st Dept. Sept. 27, 2022), petitioner appealed from a November 2021 Family Court order which, after a hearing, dismissed her petition alleging that respondent committed disorderly conduct. The First Department affirmed, holding that petitioner “failed to establish by a fair preponderance of the evidence that respondent committed the family offense of disorderly conduct when he came to petitioner’s apartment with his adult daughter, who allegedly threatened petitioner with a box cutter. Petitioner's testimony, which focused on the allegedly threatening conduct by respondent's daughter, was insufficient to establish that respondent acted with intent to cause, or recklessly created a risk of causing, public inconvenience, annoyance, or alarm, as required to support a finding of disorderly conduct.” The Appellate Division found that “Family Court's determination that petitioner's testimony was not credible is entitled to deference, regardless of respondent's decision not to testify.” The Court concluded that “Family Court did not improvidently exercise its discretion in admitting [a] video into evidence, \*\*\* properly authenticated by respondent's daughter, who testified that she recorded it on her phone and that it accurately represented the events depicted.”

## **Family Offense - Intimate Relationship – Not Found**

## In Matter of Silverman v. Leibowitz, 2022 Westlaw 4490676 (2d Dept. Sept. 28, 2022), petitioner (father of 2 children with his former spouse) appealed from two January 2021 Family Court orders which dismissed, without a hearing, his family offense petitions against the respondents, the maternal grandfather and aunt of the children. The Second Department affirmed, finding that the parties confirmed at the first appearance that they never resided together, did not interact with each other in a family-like way, and that petitioner stated that he had no direct interaction with the respondents following the divorce from his former spouse. The Appellate Division held that “the parties have no direct relationship and are only connected through the petitioner’s children, who are the respondents’ grandchildren, and niece and nephew, respectively.” The Court concluded that “Family Court properly determined that the parties are not in an ‘intimate relationship’ within the meaning of Family Court Act §812(1)(e).”

## **Procedure - Arrears Satisfaction Precludes Appellate Review of Willful Violation Finding**

## In Matter of Clarissa C. v. Alexei G., 2022 Westlaw 4474927 (1st Dept. September 27, 2022), the father appealed from a July 2021 Family Court order denying, as premature, his objections to April 2021 Support Magistrate orders which, after a hearing, found that he was in willful violation of a prior child support order, recommended incarceration, and entered a money judgment against him. The First Department affirmed, holding that the father’s sole remedy for challenging the willfulness finding was to await Family Court’s final order confirming the same, and to appeal from that final order. Here, the father “chose to largely satisfy his support arrears before the purge period expired, thus obviating the need for referral to a Family Court Judge \*\*\*.” The Appellate Division concluded that inasmuch as “the Support Magistrate’s finding of a willful violation was never confirmed \*\*\*, the issue is not properly before us on appeal.”

## **Procedure - Judicial Disqualification**

## In Matter of John II. v. Kristen JJ., 2022 Westlaw 4098523 (3d Dept. Sept. 8, 2022), the father appealed from an April 2021 Family Court order, which granted the mother’s motion to dismiss his July 2020 petition seeking modification of a June 2017 custody order pertaining to the parties’ 3 children. The father also sought Family Court's disqualification, noting that a November 2012 order listed the judge as the mother's counsel. Family Court denied the father's disqualification motion. The Third Department reversed, on the law, and remitted to Family Court for a new hearing before a different judge, holding: "A judge shall not sit as such in, or take any part in the decision of, an action, claim, matter, motion or proceeding . . . in which he [or she] has been attorney or counsel," citing Judiciary Law §14 and22 NYCRR §100.3[E][1][b] [i]. The Appellate Division noted further: “This prohibition is absolute and establishes a bright-line disqualification rule,” finding that Family Court was “statutorily disqualified from the instant proceedings.”

## **LEGISLATIVE & COURT RULE ITEMS**

## **Assigned Counsel – FCA 262, Judiciary Law 35(8), SCPA 407 – New Court Rule**

## Pursuant to Administrative Order 220 of 2022 (AO/220/2022) **dated September 28, 2022 and effective immediately**, 22 NYCRR 205.19 has been added and mandates that “[c]ounsel shall be provided unless the person is conclusively ineligible based upon the criteria in this section.”

## **Forensic Evaluator Training Requirements**

## As previously reported, passed by the Legislature as of June 1, 2022, and **if signed,** DRL 240(1) **would be amended, 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. The training is established by an amendment to Executive Law 575(3), which adds a new paragraph (n), requiring the Office for the Prevention of Domestic Violence to contract with the NYS Coalition Against Domestic Violence to develop the training program. The Chief Administrator of the Courts, with the approval of the Administrative Board, is authorized to promulgate any rule (to be made and completed on or before the effective date) which is necessary to implement the law on its effective date. **As of this writing on September 30, 2022, the legislation had not yet been delivered to the Governor for signature**. A02375C/S06385B. **The AAML NY Chapter’s Board of Managers approved a memo commenting on this legislation, which has been circulated to the appropriate Executive and Legislative Branch contacts as of September 23, 2022**.