NYSBA FAMILY LAW SECTION, Matrimonial Update, November 2019

By Bruce J. Wagner
McNamee Lochner P.C., Albany

Child Support - Modification – Child Care Granted; Downward Modification Dismissed; Non-Subject Child Order

In Matter of Jurgita C. v. Manuel O., 2019 Westlaw 4773694 (1st Dept. Oct. 1, 2019), the father appealed from a March 2018 Family Court order, which denied his objections to an August 2017 Support Magistrate order rendered after a hearing, dismissing his petition for downward modification and granting the mother's petition for upward modification regarding child care expenses. The First Department affirmed, holding that the mother established a substantial change in circumstances in that the child was no longer cared for by a relative and she was now incurring day care and babysitting expenses. With regard to the father's petition, the Appellate Division held that while father lost his employment through no fault of his own, he failed to show that he "made diligent efforts to secure employment commensurate with his education, skills, and experience" and his "testimony showed that he spent most of his time establishing and promoting himself as a motivational speaker and coach, and also spent four months abroad during the relevant period." As to a prior order for a non-subject child, the father testified that he had not paid any support for that child in a year, and Family

Court therefore properly declined to deduct it from the father's income because it was not support "actually paid." FCA 413(1)(b)(5)(vii)(D).

Child Support - Modification – Parental Alienation – Hearing Needed

In Matter of McNichol v. Reid, 2019 Westlaw 4849269 (2d Dept. Oct. 2, 2019), the father appealed from an August 2018 Family Court order which, without a hearing, granted the mother's motion for summary judgment dismissing his February 2018 petition for modification of an October 2016 child support order for the parties' son born in 2003, and for termination of her child support obligation, upon the ground of parental alienation. An August 2017 consent order suspended the father's child support obligation while the child temporarily resided with him. The Second Department reversed, on the law, denied the mother's motion and remitted for a hearing on the father's petition. The Appellate Division held that Family Court improperly relied on: "inadmissible information that had been provided at court conferences *** before a different judge"; "hearsay statements and conclusions by an expert, whose credibility was not tested by either party, from an earlier forensic evaluation"; and "statements and conclusions by two therapists, whose opinions and credibility were not tested by either party, made at a conference before a different judge."

Custody - Domestic Violence; More Likely to Foster NCP Relationship

In Matter of Cassissa v. Solares, 2019 Westlaw 4849316 (2d Dept. Oct. 2, 2019), the mother appealed from a May 2018 Family Court order which, after a hearing, granted the father's January 2017 petition for sole custody of a child born in September 2015 and denied her petition seeking the same relief, finding that the father "is more likely than the mother to foster the child's relationship with the noncustodial parent." The parties separated in December 2016 and the mother moved out. The Second Department affirmed, noting that the mother alleged several instances of domestic violence which occurred while the parties were living together and that Family Court should have determined whether she proved her allegations by a preponderance of the evidence. The Appellate Division, making its own credibility assessment, found that: the mother "did not seek medical or police intervention for the domestic violence"; "once the parties ceased living together *** there were no further incidents"; and "she consented to the lifting of an order of protection against the father."

Custody - Initial – Relocation to Italy; Return to NY Directive Vacated

In Matter of Arthur v. Galletti, 2019 Westlaw 4769698 (1st Dept, Oct. 1, 2019), the father appealed and the mother cross-

appealed from a May 2018 Supreme Court order which, after a custody trial, awarded the father residential custody of the children with permission to relocate to Lodi, Italy, until the younger child is 8 years old, at which time the children shall relocate to NYC, provided the mother still works there. The First Department modified, on the law and the facts, to vacate the relocation to NYC directive, and otherwise affirmed. The Appellate Division held that Supreme Court "properly concluded that, while the evidence demonstrated that both parties were fit and loving parents, the children's best interests would be served by remaining with [the father]" who "acted as the children's primary caregiver, getting them ready for school and feeding them dinner, while [the mother] was often unavailable, choosing to absent herself from the home at the expense of spending time with the children." The relocation was upheld given that "the children had already spent a substantial portion of their childhood in Lodi, where they attended school, and they were surrounded by [the father's] family, who provided emotional and practical support." The First Department modified the return to NYC directive because it "impermissibly purports to alter the parties' custodial arrangement automatically upon the happening of a specified future event without taking into account the child(ren's) best interests at that time."

Custody - Modification – Joint to Sole

In Matter of Keller v. Keller, 107 NYS3d 912 (4th Dept. Oct. 4, 2019), the mother appealed from a November 2017 Family Court order which, after a hearing, modified a prior order by granting the father sole legal and physical custody of the subject child. The Fourth Department affirmed, holding that "the parties have an acrimonious relationship and are not able to communicate effectively with respect to the needs and activities of their child," such that modification of the previous joint custody arrangement was appropriate. The Appellate Division gave no specifics as the reasons for the change in custody and held that Family Court's determination has a sound and substantial basis in the record. The Court, however, did state that it "would be remiss in failing to admonish the Referee, the Attorney for the Child, and the mother's own counsel for their unseemly conduct and unprofessional comments throughout the hearing."

Custody - Modification – Joint to Sole; Evidence – Child's Hearsay Statements

In Matter of Poromon v. Evans, 2019 Westlaw 4893291 (4th Dept. Oct. 4, 2019), the mother appealed from a February 2018 Family Court order which, after a hearing, modified a prior order by granting sole legal and physical custody of the child to the father. The Fourth Department affirmed, holding that the father established a substantial change in circumstances "through evidence of the mother's criminal conviction, the

breakdown in the parents' ability to cooperate and the mother's admitted failure to provide the child with necessary medication." The Appellate Division found that the change in custody was in the child's best interests "given the mother's incarceration, her failure to exercise visitation or telephonic rights with the child, and the child's own stated wishes." The Court rejected the mother's contention that Family Court erred by admitting hearsay statements to establish that the child had been sexually abused by his half-brother while under the mother's supervision, where the statements were sufficiently corroborated by "an expert who did more than merely vouch for the child's credibility and, instead, 'objectively validate[d] [the child's] account' of the alleged abuse."

Custody - Modification – No Overnights; Supervision; Suspension of Visit Conditions

In Matter of Aree RR v. John SS, 2019 Westlaw 5606717 (3d Dept. Oct. 31, 2019), the mother appealed from a February 2018 Family Court order rendered upon a January 2018 decision, which, following a hearing (held on 11 separate dates between December 2015 and February 2017) upon her July 2015 petition seeking unsupervised visitation on alternate weekends, granted her some modification of her previously monitored and supervised visitation with the parties' child born in 2008. An October 2014 consent order provided: joint legal custody and primary physical

custody to the father; monitored visitation on Sundays (11 a.m. – 3 p.m.); supervised visitation at other times as agreed upon between the parties; the mother was to notify the father if she is hospitalized or has a psychiatric episode related to her bipolar disorder; and the mother was required to sign releases to allow her service providers to inform the father if she is hospitalized or has a psychiatric episode and to update the father as to whether she is complying with her medication regimen. Family Court expanded the mother's visitation to Sundays (10 a.m. – 7 p.m.), Wednesdays (after school to 7 p.m.) and 3 days each week in the summer (10 a.m. – 7 p.m.), with the father being able to monitor the visitation by calling the child during visits. The order appealed from required: (1) the mother to sign releases permitting the father to speak with her providers about her compliance with medications and treatment attendance; (2) the mother and her boyfriend to advise the father of any medical or mental health issues affecting the mother; (3) permitted the father to determine whether it is appropriate for the child to visit the mother if she is hospitalized or decompensating or otherwise having an issue with her bipolar condition, and whether any contact immediately thereafter should be supervised. The Third Department affirmed so much of the order pertaining to the visits, the schedule and the monitoring by the father. The Appellate Division modified,

on the law, by reversing: the directive that the mother's boyfriend to take any actions under item (2) above; and so much of item (3) above as permitted the father to prevent visits while the mother is "decompensating or otherwise having an issue with her bipolar condition" or to require supervision thereafter without court intervention. In a lengthy footnote, the Third Department expressed its "concern over the inordinate amount of time that has elapsed since the commencement of this proceeding in July 2015" and stated that it was "unsettling that this petition was filed more than four years ago, during which time the child has grown from age 7 to age 11."

Custody – Relocation (FL) – Denied

In Matter of Raymond S.H. v. Nefertiti S.M., 2019 Westlaw 5073835 (1st Dept. Oct. 10, 2019), the father appealed from a September 2017 Family Court order which, after a hearing, denied his petition to relocate with the parties' child to Florida. The First Department affirmed, noting that the father, who had been awarded sole custody in 2015, failed to establish by a preponderance of the evidence that the proposed relocation was in the child's best interests. The Appellate Division found that while the father reasonably asserted that he could create a better life for the child, he "offered no testimony showing that life in Florida, would, in fact, be better." The First Department cited the father's claims that he had investigated

schools, therapy and other matters, but the father "provided no concrete examples and no evidence that the Florida schools and services were better than their New York counterparts." The Court concluded that the father's plan to relocate to Florida "was less of a plan and more of an amorphous idea."

Custody – Relocation (FL) – Denied

In Matter of Doreen F. v. Fabricio M., 2019 Westlaw 5370798 (1st Dept. Oct. 22, 2019), the mother appealed from a May 2017 Family Court order which denied her request to relocate to Florida with the children. The First Department affirmed, noting that the mother had primary physical custody and the father had visits every other weekend and week-long visits during the winter and summer breaks, which the father exercised at all times. The Appellate Division found that the mother seeks to relocate to Florida because her mother lives there and could provide some child care assistance, and she testified that she wanted to get a better paying job in Florida, enroll in college classes, and place the children in a charter school, but was "unable to provide details regarding the steps she has taken or planned to take." The Court concluded that the father had sound reasons for opposing the relocation and noted that the children's wishes to relocate were not determinative.

Custody - Relocation (NJ) – Granted

In Matter of Cindy F. v. Aswad B.S., 2019 Westlaw 5379478

(1st Dept. Oct. 22, 2019), the father appealed from a September 2018 Family Court order which, after a hearing, granted the mother's petition to relocate with the parties' child from Bronx County to Edison, NJ. The First Department affirmed, noting that a prior order, entered when the child was 2 years old, required the father's consent or a court order for the mother to move outside of New York City. The Appellate Division found that the child was now of school age and that the move will serve the child's best interests, given that the mother and child were presently living "in a cramped one-bedroom apartment with [her] mother, in an area that petitioner believes is not child-friendly and is potentially dangerous" and that "the move to Edison will provide the opportunity for the child to attend a good public school that provides busing."

Custody - Sole – Alienation; Fostering NCP Relationship

In Matter of Nieves v. Nieves, 2019 Westlaw 5057657 (2d Dept. Oct. 9, 2019), the mother appealed from an August 2018 Family Court order which, after a hearing on the parties' 2014 petitions, denied her petition for sole legal and physical custody of their child born in 2009 and granted the father's petition seeking the same relief. The Second Department affirmed. The father was on active military duty and was deployed, at which time the child lived with the mother and had limited contact with the father. In 2012, the father was

stationed in Florida, but the mother moved with the child to Italy in March 2012 for 18 months, returning to NY in September 2013. The father received a disability discharge in 2015; the parties were divorced that same year and have both since remarried. The father has remained in Florida with his new wife and in 2017, during these proceedings, the mother and her new husband (the stepfather), who had joined the Army, moved to Texas where he was stationed. A September 2016 report of a court-appointed forensic evaluator noted "extensive evidence that the mother and stepfather had engaged in behavior intended to alienate the child from the father," yet recommended against awarding custody to the father because it would be "devastating" to the child. The Appellate Division noted that the mother "consistently resisted the father's parental access, and the father was repeatedly required to seek court intervention." The Second Department held that as Family Court observed, "the record is replete with evidence of the efforts of the mother and stepfather to thwart the father's parental access and alienate the child from the father," including: "forcing the child to take telephone and video calls with the father outdoors, even in inclement weather" and "taking a tablet that had been provided by the father to facilitate the video calls and that the stepfather claimed was 'garbage.'" In contrast, the Appellate Division found that "there was no evidence that the father or

his family disparaged the mother or her family or interfered with her parental access during his time with the child."

Custody - Sole – with Relocation (CT)

In Matter of Eckstein v. Young, 2019 Westlaw 5057835 (2d Dept. Oct. 9, 2019), the father appealed from an October 2015 Family Court order which, after a hearing which began in 2012 and continued until 2015, denied his petition for sole custody of the parties' child born in 2007 and granted the mother's petition for the same relief and, in effect, for permission to relocate with the child to Connecticut. The parties separated in 2011, at which time the mother moved with the child to Connecticut. The Second Department affirmed, noting that there was evidence that: the mother was the child's primary caregiver even before she left the parties' shared home; the father had verbally abused the mother in the child's presence; the mother would foster a positive relationship with the father but that the father would not do the same in return; and the mother had a stable home and job in Connecticut and support from her extended family in that state, which she did not have in NY.

Custody - Temporary–Reversed–Alienation; Expert Report Issues

In Matter of Suarez v. Suarez, 2019 Westlaw 5057584 (2d Dept. Oct. 9, 2019), the mother appealed by permission from a temporary October 2018 Family Court order which, after a hearing, granted so much of the father's petition to modify the

parties' judgment of divorce so as to: (1) award him temporary legal and physical custody of the two children; (2) direct the children and father to participate in a social worker intervention program; (3) prohibit the mother from having any contact with the children until 90 days after the intervention program began; and (4) direct the mother to sign any necessary releases and authorizations for the intervention program. By order dated November 14, 2018, the Appellate Division stayed enforcement of the aforesaid order and further determination by Family Court on the issue of custody, pending the appeal. The Second Department reversed, on the law and the facts, all directives contained in the aforesaid order. The judgment of divorce had provided for joint legal custody, with primary custody to the mother. Family Court determined that the father had not had contact with the children since December 2016, "despite his considerable efforts" and that "the children had been alienated from the father." The Appellate Division found that although a psychologist testified that the children were alienated from the father, she did not perform a forensic evaluation, acknowledged that she continued to provide therapy to the father, after she terminated court-ordered family therapy sessions, and did not state that the social worker's intervention program was necessary. The Second Department noted further that Family Court should not have considered the social

worker's report because the parties were not given the opportunity to review it or cross-examine the social worker on its contents.

Custody - Third Party – Extraordinary Circumstances Found

In Matter of Lenora D. v. Richard J.R., 107 NYS3d 670 (1st Dept. Oct. 3, 2019), the father appealed from a March 2018 Family Court order which, after a hearing, found that extraordinary circumstances existed to confer standing, DRL 72(2)(a), upon the maternal grandmother to seek custody of the subject child (born in 2006) following the mother's unexpected death in 2017, and awarded her custody, with visitation to the father. The First Department affirmed, finding on the standing issue that for "about four years before the mother's death in 2017, the mother and the child had lived in the grandmother's household, and the mother and grandmother together provided for all the child's financial and other needs" while "the father resided with the child for about two years after her birth, until the mother moved out with the child in about 2008." With respect to custody, the Appellate Division noted that the grandmother "has supported the child and provided a stable and loving home where the child is thriving and all of her needs are met" and that the "child is fully bonded with the grandmother."

Custody - Third Party – Grandparent Custody & Visitation Denied

In Matter of Smith v. Ballam, 2019 Westlaw 4892941 (4th Dept. Oct. 4, 2019), the grandmother appealed from a June 2018 Family Court order which denied her petition seeking custody and visitation and awarded custody of the subject child to the mother. The Fourth Department affirmed, noting that the grandmother failed to establish that extraordinary circumstances existed, in that she failed to support her claim that the mother suffered from unaddressed, serious mental health issues. On the issue of visitation, the Appellate Division noted that the grandmother failed to abide by court orders, showed animosity toward the mother and "frequently engaged in acts that undermined the subject child's relationship with the mother."

Custody - Third Party – Grandparent Visitation Granted

In Matter of Susan II v. Laura JJ, 2019 Westlaw 5228230 (3d Dept. Oct. 17, 2019), the mother appealed from a January 2018 Family Court order which, after a hearing, granted the maternal grandmother visitation with two children born in 2005 and 2007, following her August 2011 and June 2012 petitions. The father was not involved in the proceedings. The Third Department affirmed, holding that the grandmother established standing because she "had, at one time, a loving relationship with the children, *** spent substantial time with them and she also provided them with financial support" and "was an active part of the children's lives until one day the mother decided that she

no longer trusted her." As to the issue of best interests, the Appellate Division found that "the court-appointed psychologist, opined, after a thorough evaluation process, that the mother suffers from a delusional disorder and that visitation with the children would be in the best interests of the children."

Custody - Visitation – Modification – Supervised Reduced

In Matter of Shaffer v. Woodworth, 175 AD3d 1803 (4th Dept. Sept. 27, 2019), the father appealed from a March 2018 Family Court order, which denied his petition seeking unsupervised visitation and granted the mother's petition seeking to reduce his supervised visitation to one day per week. The Fourth Department affirmed, holding that Family Court properly discontinued the father's Sunday visitation, which interfered with the child's other activities and noting that he "failed to avail himself of his Sunday visitation on numerous occasions" and that the record supported continued supervision (reasons unspecified).

Custody - Visitation – Supervised (4x per year) and Children's Wishes

In Matter of Edward L. v. Jasmine M., 107 NYS3d 668 (1st Dept. Oct. 3, 2019), the father appealed from an October 2018 Family Court order which granted him 4 annual supervised visits with the subject children, once per quarter for 2 hours each, with additional visits in the children's discretion. The First

Department affirmed, noting that the father "has a history of being unable to control his anger, using corporal punishment on the children and screaming and speaking poorly of their mother during phone calls" and that both children "expressed through their attorney that they do not wish to have a significant relationship with their father." The Court concluded that Family Court did not "improperly delegate its authority by leaving to the children's discretion whether they wanted" contact outside of the quarterly visits.

Custody - Visitation - Supervised – Limited Time – Child's Wishes; Mother's Cancellation Rights Curtailed

In Matter of Liriano v. Hotaki, 2019 Westlaw 4849282 (Oct. 2, 2019), the mother appealed from a July 2018 Family Court order which, after a hearing, granted her petition to modify a June 2015 order only to the extent of directing that the father's access to the parties' child born in 2008 be supervised for 2 months and then become gradually unsupervised and stating that the mother was only entitled to cancel visits "for substantial medical reason involving the child." The Second Department affirmed, finding that the father "took affirmative steps *** to engage in the child's mental health treatment plan and to educate himself about the child's special needs" and that "the child's preference that parental access with the father be unsupervised." The Appellate Division noted that the

cancellation provision in question is a fairly standard one www.nycourts.gov/forms/matrimonial/ParentingPlanForm.pdf at ¶2.12, is in the child's best interests and is supported by a sound and substantial basis in the record.

Equitable Distribution - Artwork – Sale Ordered; Marital Debt

In Macklowe v. Macklowe, 2019 Westlaw 5073816 (1st Dept. Oct. 10, 2019), the wife appealed from a February 2019 Supreme Court judgment, which directed the sale of certain marital artwork with equal division of the sale proceeds and determined marital debt to be $66,878,603. The First Department affirmed, holding that Supreme Court properly directed the artwork to be sold and noting that the parties' retained experts presented "wildly divergent valuations – in one instance their valuations differed by $30 million" and given "the rare and unique character of the parties' art collection, the court was faced with 'unusual circumstances' that made the valuation of certain artwork 'unfeasible,'" citing Capasso v. Capasso, 119 AD2d 268, 270 (1st Dept. 1986). The Appellate Division rejected the wife's proposal of a remand for the appointment of a neutral expert, which the court found "would serve only to prolong this litigation between octogenarians." Regarding marital debt, the First Department held that Supreme Court properly relied upon a financial statement from the husband's accountant certified 6 weeks after the date of the commencement of the action, and

although the husband had represented marital debt to be less than half of $66,878,603, 6 months prior to the commencement of the action, there was another financial statement from the same time period estimating the marital debt at $67.5 million.

Family Offense - Assault 3d; Menacing 3d – Found

In Matter of Yenis C. v. Daniel R., 2019 Westlaw 4772713 (1st Dept. Oct. 1, 2019), the father appealed from a January 2018 Family Court order which, after a hearing, found that he committed the family offenses of assault 3d and menacing 3d and granted a 1-year order of protection in favor of the mother. The First Department affirmed, holding that the mother's testimony that the father threatened her with a steak knife and told her he wanted to kill her, causing her to become "very scared" and "very sad," placed her or attempted to place her in fear of death, imminent serious physical injury or physical injury, satisfied the elements of menacing in the third degree. The Appellate Division found that the mother's testimony that she was in a lot of pain on one occasion after the father pushed and kicked her, requiring emergency medical attention, and had difficulty breathing on another while the father sat on her head for about one minute and would not get off her until their 14-year-old daughter intervened, satisfied the requisites of assault in the third degree.

Income Tax - Dependency Exemption Order – Violation

In Matter of Quick v. Brown, 2019 Westlaw 5581905 (2d Dept. Oct. 30, 2019), the father appealed from an August 2018 Family Court order which, following a hearing upon the father's February 2018 petition, found that the mother violated an April 2015 consent Family Court order stating that "the parties shall alternate the tax deductions for the child unless they shall otherwise agree," when she claimed the child as a dependent for the 2016 and 2017 tax years. As a remedy for the violation, Family Court directed that the father shall claim the child as a dependent for 2018 and subsequent even-numbered years. The father contended on appeal that Family Court's remedy was inequitable. The Second Department affirmed, finding that Family Court's order "was not an improvident exercise of discretion."

Maintenance - Durational – Affirmed

In Murphy v. Murphy, 175 AD3d 1540 (2d Dept. Sept. 25, 2019), the husband appealed from a November 2016 Supreme Court judgment which, upon a May 2016 decision after trial, awarded maintenance to the then 42-year-old wife of $10,760 per month from June 1, 2016 until the first day of the month following her 67th birthday. The Second Department modified, on the facts and in the exercise of discretion, only to the extent of directing that maintenance would terminate sooner upon the death of either party or the wife's remarriage. The parties were married in September 2004, prior to which time the wife was diagnosed with

MS. The parties have no children. The wife commenced the divorce action in March 2013 and the parties settled all issues except maintenance. Supreme Court determined that the wife "was incapable of maintaining employment because of the symptoms she experienced as a result of multiple sclerosis" and that she also suffered from Hassimoto's thyroiditis. The Appellate Division held that Supreme Court's "rejection, as incredible, of the opinion of the [husband's] expert witness that the [wife] was capable of working full time in a sedentary job" was "entitled to great deference on appeal."

Pendente Lite - Counsel Fees

In Soltanpour v. Koch, 2019 Westlaw 5364388 (1st Dept. Oct. 22, 2019), the husband appealed from a November 2017 Supreme Court order which awarded $135,000 in temporary counsel fees to the wife (90% of her request for $150,000), subject to reallocation at trial. The First Department affirmed, given "the husband's failure to rebut the statutory presumption that fees shall be awarded to the less monied spouse" and his failure "to support his claim that he was no longer the more monied spouse with, at a minimum, a completed updated net worth statement and recent tax returns."