NYSBA FAMILY LAW SECTION, Matrimonial Update, December 2020

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COURT OF APPEALS NOTE: In Matter of Marian T. (Lauren R.),2020 Westlaw 6877600 (Nov. 23, 2020), the issue was whether an adoption was categorically precluded under DRL 111(1)(a) [consent of an adoptee over age 14 is required, but the court may dispense with the consent] because the adoptee, a 66-year-old woman with significant developmental disability who had lived with the petitioners for 15 years, did not have the capacity to give her consent. The Court of Appeals held (6-1) that such an adoption is not so precluded and given no abuse of discretion and record support for the affirmed best interests finding, the order of adoption was affirmed, Judge Rivera dissenting.

Agreements - Set Aside; Summary Judgment Denied

In Eichholz v. Panzer-Eichholz, 2020 Westlaw 6602904 (1st Dept. Nov. 12, 2020), the wife appealed from an October 2018 Supreme Court order, which, in the husband's March 2013 action to set aside a December 23, 2011 separation agreement, granted his motion for summary judgment to set aside the agreement and denied her motion for summary judgment dismissing the set aside cause of action. The Second Department modified, on the law, by denying the husband's motion and otherwise affirmed. The parties were married in 1992 and have 3 children. The husband began suffering from

depression in 2010, "culminating in multiple suicide attempts and hospitalizations," for which his treatment included psychotropic medication and electro-convulsive therapy and he was released from the hospital on December 14, 2011 to a day treatment program. The husband alleged that he saw the agreement for the first time on December 22, 2011, the day he signed it, without consulting an attorney and without financial disclosure, under the duress of the wife stating that she had an order of protection excluding him from the marital residence, to which he would not be allowed to return if he did not sign the agreement. The agreement provided for sole legal custody to the wife with supervised visitation to the husband. The husband was required to pay child support of $25 per month, based upon his stated income of $0 and the wife's income of $229,375, and the wife was given exclusive use and occupancy of the residence until the youngest child was 18 years old. Among other things, the husband waived his rights to: the parties' joint bank accounts; the wife's bank accounts; maintenance; and the wife's pension and retirement plans. The Appellate Division held that while the husband's complaint adequately pleaded a cause of action upon the ground of unconscionability, Supreme Court should have held a hearing to determine the totality of the circumstances, given the husband's failure to provide medical records from a doctor to establish any inability to understand the agreement's terms and his failure to provide evidence of the value of most of

the marital assets.

Child Support - CSSA – Income Capped at $250,000; College – 529 Plan Used First; Reversed for 14 y/o; Room and Board Credit; SUNY Cap Denied; Equitable Distribution - Distributive Award Installments Lengthened, Interest; Enhanced Earnings (25%); Student Loan Debt Apportioned

In Spinner v. Spinner, 2020 Westlaw 6478477 (2d Dept. Nov. 4, 2020), the parties were married in 1998 and have 2 children, one college age and the other 14 at the time of trial of the husband's April 2012 divorce action. During the marriage, the husband attended and graduated from medical school, completed a 5-year residency in internal medicine and neurology and a fellowship on neurophysiology. After trial, Supreme Court's July 2017 order, from which the husband appealed: (1) awarded the wife a 25% share ($1,351,500) of the husband's enhanced earning capacity, payable over 5 years starting October 1, 2017 with interest from that date; (2) directed the husband to pay child support of $1,769.23 per week upon a combined parental income cap of $400,000; (3) directed the husband to pay 92% of the children's extracurricular activities up to $15,000 per year; and (4) directed him to pay 92% of the children's college expenses. The Second Department modified, on the law and the facts, by: (1) reducing the distributive award to $1,293,622.50, by subtracting 25% of the husband's $231,510 student loan debt therefrom and increasing the installment period

to 10 years beginning January 1, 2021 with 9% statutory interest, considering the nonliquid nature of the husband's assets and the substantial amount of the award, while rejecting the husband's argument to reduce the wife's 25% share based upon the parties' employment of a nanny to assist with childcare and housekeeping, and noting the wife's contributions as a spouse, parent, wage earner (the wife started law school in September 2001) and homemaker; (2) reducing child support to $1,105.77 per week based upon a lower income cap of $250,000, given that the children lived a middle-class, not lavish, lifestyle, and attended public schools and summer camp on a daily and not sleep-away basis; (3) deleting the directive for college expenses for the 14-year-old child as premature and directing the parties to pay their 92% and 8% pro rata shares of the older child's college expenses after exhaustion of 529 Plan funds, while providing the husband with a room and board credit and denying his request for a SUNY cap, based upon his acquiescence to private college by accompanying the child to the college and paying her room and board deposit.

Child Support - CSSA – Over the Cap - Upheld

In Matter of Ward v. Hall, 2020 Westlaw 6930666 (2d Dept. Nov. 25, 2020), the father appealed from an October 2019 Family Court order granting the mother's objections to an August 2019 Support Magistrate Order which, after a hearing upon the mother's January 2019 petition, directed him to pay child support for the

parties' child born in 2018 of $2,400 per month, under circumstances where the CSSA obligation upon all parental income would be $8,076 per month, to the extent of directing him to pay $4,000 per month. The Second Department affirmed, holding that despite the Support Magistrate's finding that the child's needs would be met if the father paid $2,400 per month, Family Court properly considered the father's "considerable income," the income disparity between the parties, the father's child support obligations for his other children, and "the living condition and needs of the parties' child."

Custody - Forensic Appointment Reversed - No Petition Pending

In Matter of James R. v. Jennifer S., 2020 Westlaw 6929190 (3d Dept. Nov. 25 2020), the mother appealed from an August 2019 Family Court order which, over the mother's objection, granted the father's motion for a forensic evaluation pertaining to their 2 children born in 2004 and 2006. A July 2018 stipulation incorporated into a March 2019 order provided for family counselling and a protocol for the selection of a therapist. The parties failed to agree upon a therapist, and upon the father's request, the Court appointed a psychologist in June 2019, who declined the assignment, prompting the father's application. After staying Family Court's August 2019 order pending appeal, the Third Department reversed, on the law, and denied the father's motion, holding that there were no petitions pending at the time of the

order appealed from, such that Family Court had no jurisdiction to direct a forensic evaluation pursuant to FCA 251(a).

Custody - Modification – Dismissed – Condition Precedent Not Met; No Changed Circumstances

In Matter of Jessica EE. v. Joshua F.F., 2020 Westlaw 6929323 (3d Dept. Nov. 25, 2020), the mother appealed from an April 2019 Family Court order, which, without a hearing, granted the father's motion to dismiss the mother's modification petition filed in February 2019 (verified in December 2019) seeking primary residential and sole legal custody of the parties' children born in 2010 and 2011. An October 2018 consent order provided, among other things, for joint legal and physical custody and required, in the event of a conflict regarding decision making, enforcement, modification or violation, that the parties "make a good faith effort to engage in mediation prior to returning to court or filing any petitions." The Third Department affirmed, holding that the mother failed to satisfy the mediation condition precedent and agreed with Family Court that the mother's emails to the father were "mere suggestions to utilize a mediation service" which "do not qualify as a good faith effort, particularly as the other party was responsive." The Appellate Division further found that Family Court properly dismissed the modification petition for failure to sufficiently allege changed circumstances, noting that the "multiple allegations" were "vague, undated" and most of the

alleged conduct occurred before the October 2018 consent order; the only allegation which clearly post-dated October 2018 "described a single incident that, without more, was insufficient to warrant inquiry into the children's best interests." As to the mother's allegation that the parties "cannot agree on matters" concerning the children, the Third Department noted "the short period of time" between the October 2018 order and the commencement of the proceeding in February 2019.

Custody - Modification – Expand Parental Access – Alcohol History

In Matter of Epstein v. Soler-Epstein, 2020 Westlaw 6750517 (2d Dept. Nov. 18, 2020), the mother appealed from a June 2019 Family Court order which, after a hearing, granted the father's March 2018 petition to expand his access under a July 2016 order incorporated into the parties' February 2017 judgment of divorce, which provided for sole custody to the mother of their children born in 2007 and 2009, with limited access to the father. The father had successfully completed a 7-month alcohol abuse treatment program. Family Court's order included overnight access to the father, conditioned upon his procurement of a SoberLink device and enrollment in a daily reporting service that forwards the results to the mother on a weekly basis. The Second Department affirmed, noting that while the father admitted that he drank alcohol on a few occasions during and after completing his treatment program, "the evidence established that the father had

progressed in his treatment, tested negative for alcohol on all monthly screenings by the court following his initial test, and now recognizes his alcoholism and the need to refrain from alcohol use." The Appellate Division concluded by noting Family Court's imposition of "strict sobriety controls."

Custody - Modification – False Reports

In Matter of Stepan K. v. Marina M., 2020 Westlaw 6877943 (1st Dept. Nov. 24, 2020), the mother appealed from a June 2019 Supreme Court order which, after trial, granted the father's motion for modification of the parties' 2015 custody agreement and awarded him legal and primary residential custody of their child. The First Department affirmed, finding that the father proved changed circumstances, including: the mother's refusal to share information regarding the child's school; her traveling with the child for extended periods without telling the father or ensuring that he could communicate with the child; and the mother's filing reports, which she does not deny, that the father sexually abused the child and committed domestic violence against her. As to best interests, the Appellate Division found that Supreme Court properly credited the father's testimony that he was taking good care of the child, and that the mother's filing of false reports supported the determination that the mother "is not fit to be the custodial parent."

Custody – Relocation (CO) – Domestic Violence

In Matter of Ramon R. v. Carmen L., 132 NYS3d 613 (Nov. 17, 2020), the father appealed from a December 2018 Supreme Court order which granted the mother's motion for sole custody and permitted her to relocate with the children to Colorado. The First Department affirmed, noting that Supreme Court found the father's testimony to be incredible and properly determined that the mother had been the primary caregiver and was better able to provide a stable home environment. As to relocation, the Appellate Division held that relocation from NY, where the mother had been living in shelters after fleeing domestic violence by the father, would enhance the children's lives.

Custody-Relocation(Ontario Co.-Monroe Co.)-Changed Circumstances Not Required

In Matter of Betts v. Moore, 2020 Westlaw 6816595 (4th Dept. Nov. 20, 2020), the mother appealed from an August 2018 Family Court order, which, without a hearing, granted the father's motion to dismiss her petition seeking to relocate with the subject child from Ontario County to Monroe County, upon the ground that the mother failed to allege a change in circumstances. The Fourth Department reversed, on the law, denied the father's motion, reinstated the mother's petition and remitted to Family Court. The Appellate Division held that the mother was not required to alleged changed circumstances, and that her allegations of her "specific employment advancement opportunities at her job in Monroe County"

constituting "economic necessity," "may present a particularly persuasive ground for permitting the proposed move," citing Tropea, and her petition's assertions regarding enhancement of the child's extracurricular activities, namely the child's acceptance into an advanced ballet school in Monroe County, may also support relocation, where, as here, the AFC indicated that the child favored the relocation.

Custody - Visitation - Unsupervised Days Before Overnights

In Matter of Khalia R.R. v. Evans D., 132 NYS3d 614 (1st Dept. Nov. 17, 2020), the father appealed from an October 2019 Family Court order which, without a hearing, directed that he should have a series of unsupervised day visits with the child before overnight visits could begin. The First Department affirmed, holding that Family Court properly considered the age of the child (unspecified), the amount of time she had spent with the father, evaluation reports by Comprehensive Family Services, the father's relocation out of NY and recent enlistment in the Army, leading to his limited availability to visit with the child. The Appellate Division agreed that no hearing was necessary, as Family Court "possessed sufficient uncontested information to render an informed determination consistent with the best interests of the child."

Enforcement - Willful Violation – Suspended Sentence Reversed

In Matter of Dupuis v. Costello, 2020 Westlaw 6929264 (3d

Dept. Nov. 25, 2020), the father appealed from a May 2019 Family Court order which, following his payment in full of all arrears and his waiver of a confirmation hearing, suspended his sentence for a willful violation of a child support order, upon condition that he meet his child support obligations for a period of 3 years. The Third Department reversed, on the law, holding that Family Court erred in suspending the father's sentence and should have discharged the same without condition, given his payment in full of all arrears, and that a sentence to compel payment was not authorized by Judiciary Law 774.

Family Offense - Harassment 2d

In Matter of Schade v. Kupferman, 2020 Westlaw 6930678 (2d Nov. 25, 2020), respondent appealed from a December 2019 Family Court order of protection issued after a hearing, which directed her to stay away from her daughter and her daughter's children for 2 years. The Second Department affirmed, holding that Family Court properly determined that respondent committed harassment 2d (PL 240.26[3]), by repeatedly approaching her daughter's young children (ages unspecified) to introduce herself as their grandmother, and surreptitiously delivering gifts and leaving notes for the children, despite petitioner's clear instruction to not contact her or her children.

In Matter of Tawanda A.A. v. Joseph D.A., 2020 Westlaw 6494324 (1st Dept. Nov. 5, 2020), respondent appealed from a July 2019

Family Court order which, after a hearing, among other things, found that he committed harassment 2d. The First Department upheld this finding, given petitioner's testimony that during an argument, respondent grabbed her from behind and threw her on the coffee table, causing her pain and bruising to her back, noting that Family Court "properly inferred intent from respondent's actions and the surrounding circumstances."

Pendente Lite - Counsel Fees

In Mezinev v. Tashybekova, 132 NYS3d 607 (1st Dept. Nov. 17, 2020), the husband appealed from a March 2019 Supreme Court order, which granted the wife's motion for temporary counsel fees to the extent of granting her $100,000 of the more than $280,000 in fees she requested. The First Department affirmed, holding that the award was supported by the record and "will be taken into account in determining the amount of the equitable distribution award."

Legislative Items

Orders of Protection – Prohibit Remote Control of Connected Devices

As covered in the October 2020 Update, this bill, passed by both houses in July 2020, has been signed into law: various provisions of the Domestic Relations Law, Family Court Act and Criminal Procedure Law are amended, **effective November 11, 2020**, to prohibit a party to an order of protection from remotely controlling any connected device of a person protected by such order. For example, FCA 842 would be amended by the addition of a

new subdivision (h), which allows the court to direct a party "to refrain from remotely controlling any connected devices affecting the home, vehicle or property of the person protected by the order." The term "connected device" is defined as "any device, or other physical object that is capable of connecting to the internet, directly or indirectly, and that is assigned an internet protocol address or bluetooth address." A.10039/S.07926, L. 2020, Ch. 261, signed November 11, 2020.

Refusal to Surrender Firearms

Family Court Act 842-a(3)(c) was added, **effective April 3, 2020** [as part of the budget bill] to provide that where a defendant "willfully refuses to surrender" firearms pursuant to FCA 842-a(3)(a) and (b), "or for other good cause shown," the court may order the immediate seizure thereof, and search therefor, pursuant to CPL Article 690, consistent with defendant's constitutional rights. A.9505B/S.7505, Laws of 2020, Chapter 55, signed April 3, 2020.