## **NYSBA FAMILY LAW SECTION, December 2022**

## **Matrimonial Update**

## **By Bruce J. Wagner**

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

## **COURT OF APPEALS NOTE**: In Matter of D. L. v. S.B.**,** 2022 Westlaw14123151(Oct. 25, 2022), the case before the Court concerned the Interstate Compact on the Placement of Children (ICPC), which is an agreement among the states to follow certain procedures in connection with sending children across state borders “for placement in foster care or as a preliminary to a possible adoption” (SSL 374-a(1)[art III][a]). The issue was whether ICPC applies to out of state non-custodial parents seeking custody of their children who are in the custody of NY social services agencies. The Court held that ICPC does not apply.

## **Agreements - Prenuptial – Interpretation – Rental Income**

## In Lek v. Lek, 2022 Westlaw 16935679 (1st Dept. Nov. 15, 2022), the wife appealed from an October 2021 Supreme Court order, which denied her motion seeking 50% of the rental proceeds from the former marital residence, which derived from a 3-year lease the husband arranged with his father. The prenuptial agreement provided that the residence would be listed for sale within 90 days of a “dissolution event,” unless one party agreed to buy the other out. The wife contended that the lease to the husband’s father impeded the sale of the property, to her detriment. The First Department reversed, on the law, granted the wife’s motion and remanded for a calculation of rental proceeds, directing that the wife is entitled to 50% thereof. The Appellate Division reasoned that although the prenuptial agreement was silent on the issue of rental proceeds, a “commonsense” approach led the Court to “find that the parties intended for defendant to share in the rental proceeds generated by the property.”

## **Child Support - Modification – Emancipation During Appeal – Dismissed; No Recoupment**

## In Matter of Grimes v. Medero, 176 NYS3d 520 (4th Dept. Nov. 10, 2022), the mother appealed from a July 2021 Family Court order denying her objections to a Support Magistrate Order, which dismissed her petition seeking modification of child support. The child turned 21 during the pendency of the appeal, which led the Fourth Department to dismiss the appeal as moot. The Appellate Division held that even if the mother prevailed upon appeal, she “would have no avenue to regain any sums [s]he might have overpaid in child support,” (citation omitted), given the “strong public policy against restitution or recoupment of support overpayments” (citation omitted).

## **Child Support - Violation – Willful; Medical Proof Insufficient; SSD Application Not Determinative**

## In Matter of Farina v. Karp, 2022 Westlaw 17168978 (3d Dept. Nov. 23, 2022), the father appealed from: (1) a June 2021 Family Court Order, which confirmed a Support Magistrate finding made in the mother’s January 2020 violation proceeding, that he willfully violated a June 2013 order directing him pay support for the benefit of the parties’ child born in 2003; and (2) a July 2021 Order of the same Court which committed him to jail for 6 months. The Third Department affirmed, noting that the father did not dispute that he had failed to pay support as ordered, such that the burden shifted to him to prove an inability to pay. The Appellate Division held that the father’s allegation that back and knee pain prevented him from working in construction was not supported by competent evidence which established that he was unable to pursue employment in a different field. The Third Department found that the father’s pursuit of Social Security Disability benefits “does not preclude Family Court from determining that he was able to work in some capacity.” The Court concluded that the 6-month suspended sentence “was not an improvident exercise of Family Court’s discretion.”

## **Custody - Modification – Dismissal Reversed; AFC Found Ineffectiv**e

## In Matter of Sloma v. Saya, 2022 Westlaw 17075260 (4th Dept. Nov. 18, 2022), the AFC appealed from a July 2021 Family Court order which dismissed the father’s custody modification petition. The Fourth Department reversed, on the law, reinstated the father’s modification petition and remitted to Family Court, holding that the child received ineffective assistance of counsel, in that the AFC at trial: did not “zealously advocate the child’s position” that there be a change of custody, as required by 22 NYCRR 7.2(d); did not cross-examine the mother, the police officers, or the school social worker called by the father; and conducted a cross-examination of the father which undermined the child’s position.

## **Custody -** **Modification – Dismissal Reversed – Award to Mother on Appeal**

## In Matter of Brittni P. v. Michael P., 2022 Westlaw 17168675 (3d Dept. Nov. 23, 2022), the mother appealed from a July 2021 Family Court order, which, following a June 2021 hearing, dismissed her February 2021 petition seeking to modify a January 2017 Order (joint legal, primary to father) pertaining to the parties’ son born on 2014. The January 2017 Order directed the parties to refrain from being under the influence of alcohol or drugs in the presence of the child. The Third Department modified, on the law and the facts, by reversing the dismissal of the mother’s modification petition and granting the same, to the extent of continuing joint legal custody and awarding primary physical custody to the mother, with time to the father as the parties shall mutually agree. The Appellate Division held that there was no dispute as to changed circumstances, in that the mother showed that she has obtained stable housing and employment, completed mental health treatment and maintained a valid driver’s license. The Court concluded, however, that Family Court’s determination to maintain physical custody with the father lacks a sound and substantial basis in the record, and held that the mother has overcome her prior challenges and has achieved a stable home life. In contrast, the Appellate Division found “problematic the evidence of the father’s regular drinking in the child’s presence and his apparent lack of candor during [his] DWI assessment, as well as the dirty and unkempt condition of his apartment.”

## **Custody - Modification – Dismissal Reversed – Remit to Different Judge – Inability to be Fair**

## In Matter of Nicole B. v. Franklin A., 2022 Westlaw 17168800 (3d Dept. Nov. 23, 2022), the mother appealed from a November 2021 Family Court order which, after a hearing and upon the close of her proof, granted the father’s motion to dismiss her April 2021 petition, seeking to modify a 2018 order, which granted sole legal and physical custody of the parties’ child born in 2015 to the father. The Third Department affirmed that order upon appeal [185 AD3d 166 (3d Dept. 2020)]. A 2019 Order continued the 2018 order’s custody award to the father, reduced the mother’s time to daytime visits on alternate Saturdays, prohibited contact between the child and the mother’s then-paramour, a registered sex offender with whom the mother has a younger child, and encouraged the mother to enroll in a DSS parenting program. The Third Department modified, on the law, by denying the father’s motion to dismiss and remitting for further proceedings before a different judge, such proceedings to be commenced with 45 days. The Appellate Division held that “the mother’s proof regarding injuries suffered by the child during the father’s parenting time, taken together with the mother’s improved parenting abilities and living conditions, demonstrated a change in circumstances sufficient to overcome a motion to dismiss.” On the issue of remittitur to a different judge, the Third Department determined that “Family Court demonstrated an inability to be fair at various stages of the proceeding, starting with the first appearance, where the court indicated that it was inclined to dismiss the mother’s modification petition without a hearing,” and among other rulings and actions, the trial court “prompted the father to make a motion to dismiss the mother’s petition” and then granted the motion, leading the Appellate Division to conclude that “Family Court appears to have prejudged the case.”

## **Custody -** **Modification – to Father with Decision-Making – Unfounded Sexual Abuse Allegations; In Camera Not Required (6 y/o at time of Order); Permission Before Petitions Reversed**

In Matter of McDowell v. Marshall, 2022 Westlaw 16827201 (2d Dept. Nov. 9, 2022), the mother appealed from an October 2021 Family Court Order which, after a hearing, modified a stipulated June 2017 Order (joint legal custody, primary to mother) by granting the father primary physical custody of, and final decision-making authority pertaining to, the parties’ child born in February 2015. Family Court also directed that the mother seek permission from the Court before filing any additional custody or family offense petitions. The Second Department modified, on the law, the facts, and in the exercise of discretion, by deleting the provision requiring the mother to seek pre-filing court permission, and otherwise affirmed. The Appellate Division noted that the mother’s September 2018 family offense proceeding, alleging that the father sexually abused the child, was dismissed in June 2019, following an NYPD investigation and an “unfounded” determination by ACS. The Second Department noted that in October 2019, “the mother had the child treated at an urgent care center for a rectal irritation, and reiterated the allegations of sexual abuse,” and subsequent events caused the father to file for modification. The Appellate Division found that Family Court properly determined that “there was a change in circumstances sufficient to change the parties’ custodial arrangement, based upon \*\*\* the mother’s repetition of sexual abuse allegations \*\*\* in October 2019 \*\*\*” and that “the evidence of a hostile relationship between the mother and the father indicated that joint decision-making was untenable \*\*\*.” The Second Department noted that no *in camera* interview was held and none was requested, and concluded that given “the child’s young age, an in camera interview to ascertain the child’s wishes was not required (citations omitted).” The Appellate Division held that Family Court’s order was in the best interests of the child and “has a sound and substantial basis in the record.” The Court concluded that “the mother filed one family offense petition, ultimately determined to be unfounded, and filed one related petition, to modify the parties’ custody arrangement” and “it cannot be said that the mother engaged in vexatious litigation or that her petitions were filed in bad faith.”

## **Custody - Sole; Limited Visitation; Wishes of Child**

## In Matter of Kendra E. v. Jared T., 209 AD3d 606 (1st Dept. Oct. 27, 2022), the father appealed from a July 2020 Family Court Order which, after trial, awarded sole legal and physical custody of the subject child to the mother, with limited visitation to him. The First Department affirmed, holding that the award of sole custody was a provident exercise of discretion, noting that Family Court “found the mother’s testimony credible and the father’s far less credible,” and that the record “also shows that the mother, who has cared for the child his entire life, has capably made all decisions concerning him, and that he has thrived under her care,” while “the father has been uninvolved in the child’s life.” The Appellate Division determined that it was proper for Family Court to award sole custody, given that “the parents cannot agree on issues concerning the child, as they cannot communicate or share information \*\*\*, and the father becomes aggressive when he disagrees with the mother.” The First Department concluded that Family Court’s “stringent limitations on [the father’s] access” were sound, noting “the child’s fear of the father and the father’s physical altercations with the mother” and that the child “wished to spend less time with the father – a preference that the court properly took into account.”

## **Custody -** **Violation – Not Found (COVID-19 Pandemic)**

## In Matter of Jennie BB. v. Anne CC., 2022 Westlaw 17168619 (3d Dept. Nov. 23, 2022), the mother appealed from a May 2021 Family Court order, which, after a hearing, dismissed her July 2020 petition seeking to hold respondents father and grandmother in willful violation of a 2019 Order (joint legal custody to parents and grandmother, physical custody to grandmother) granting her overnight weekend visitation with her child (born in 2012) in common with the father. The Third Department affirmed, noting the grandmother’s testimony that she was in quarantine due to the pandemic beginning in March 2020, came in close contact with someone who may have been infected, and avoided travel until May 2020, while speaking with the mother in March and April 2020 about making up missed visitation time. The mother maintained in her testimony that the grandmother used the pandemic as a pretext to deprive her of visitation. The Appellate Division concluded that in deference to Family Court’s credibility determinations and taking into account that the grandmother provided make up visitation time, there was no abuse of discretion in finding no willful violation and dismissing the petition.

## **Custody -** **Violation – Contempt Fines Reduced; “House Rules” Imposed Without a Hearing; Lincoln Hearing Denial and Limits on AFC Contact Reversed**

## In Burns v. Grandjean, 2022 Westlaw 17075145 (4th Dept. Nov. 18, 2022), the mother and the AFC appealed from an October 2020 Supreme Court Order which, among other things, expanded the father’s visitation with the subject children. The issue, as framed by Supreme Court, was:

## This matter involves a novel question, unexplored in New York or elsewhere: can a Court order a parent to impose discipline on children who voluntarily refuse to engage in court-ordered visitation with the other parent? Faced with children who, apparently with one parent's blessing, want to define their own best interests contrary to the visitation plan agreed to by their parents, this Court elects to use its contempt powers to impose disciplinary measures to protect the parental choice of best interests for these children.

## Matthew A. v. Jennifer A., 68 Misc3d 1226(A) (Sup. Ct. Monroe Co, Dollinger, A.J., 2020).

## Both the trial court and Appellate Division decisions are lengthy. The “house rules” are in the Supreme Court decision. The mother and the AFC appeal: the expansion of the father’s visitation, the suspension of the father’s child support obligation, the imposition of the “house rules” (without a hearing, which had been requested by the mother and the AFC), findings that the mother was in contempt, and directives that the mother pay the father’s counsel fees and the initial costs of reunification therapy in order to purge the contempt. The Fourth Department modified, by reinstating the visitation provisions of an incorporated separation agreement, remitting to Supreme Court for a hearing and a *Lincoln* hearing, noting as to the latter that one child was a teenager throughout the post-judgment proceedings, another entered his teenage years during the litigation, and that Supreme Court “erred in refusing the AFC’s repeated requests for a *Lincoln* hearing and in otherwise declining to consider the children’s views in determining visitation.” The Appellate Division held that even assuming “that the Court had the authority to impose such rules (citation omitted), we conclude that the record fails to demonstrate that the imposition of the house rules in this case was in the children’s best interests.” The Fourth Department further determined that Supreme Court erred by limiting the AFC’s interactions with the children. The Appellate Division upheld some of the contempt findings, and as to those findings which were upheld, the penalties imposed, which included: 6 weekends in jail, payment of the AFC’s expenses, payment in full of the full costs of reunification therapy, and $20,000 in counsel fees, the Court determined “that those penalties are punitive and excessive.” The Fourth Department vacated the penalties imposed and reduced the same to a fine of $250 and counsel fees of $1,000.

## **Disclosure - Post-Note of Issue Disclosure Denied; Pendente Lite -** **Counsel Fees – Deferral to Trial Court Reversed; Counsel & Expert Fees Subject to Reallocation at Trial**

## In Fugazy v. Fugazy, 2022 Westlaw 16626149 (2d Dept. Nov. 2, 2022), the wife appealed from, among other things: (1) an October 2018 Supreme Court order, which denied her motion to compel the husband to appear for a further deposition and to produce documents and referred her request for temporary counsel fees to the trial court; and (2) a January 2019 Supreme Court order which directed that the retainer and subsequent fees of a neutral financial evaluator be paid from the escrowed sale proceeds from the marital residence. The Second Department modified the October 2018 Order, on the facts and in the exercise of discretion, by granting the wife’s motion for counsel fees to the extent of directing the husband to pay the wife’s attorneys $75,000 within 30 days, subject to reallocation at trial, holding that the deferral of the motion to trial “functions as a denial.” The Appellate Division affirmed the denial of the motion seeking a further deposition and documents, given that the wife had already filed a note of issue and did not seek relief from the certificate of readiness, holding that the wife waived her objections to the husband’s failure to provide disclosure by failing to move for sanctions under CPLR 3126 before filing the note of issue. As to the January 2019 Order, the Second Department modified, on the law, by directing that the evaluator’s retainer and subsequent fees be subject to reallocation at trial, given that no equitable distribution of the marital residence sale proceeds had yet been made.

## **Equitable Distribution - Pension – Pre-marriage Bought Back is Separate Property; Funds Used are Marital**

## In Szypula v. Szypula, 2022 Westlaw 17168939 (3d Dept. Nov. 23, 2022), the husband appealed from a July 2021 Supreme Court judgment which, in the wife’s 2019 action, determined that 11 years of military pension service, 9 of which occurred prior to the marriage, were marital property. The parties were married in 1996 and the husband had 11 years of military service from 1987 to 1998. In 2012, the husband began service in a federal government job and bought back the military service, using marital funds. The Third Department modified, on the law, by reversing so much of the judgment as determined that the 9 years of service were marital property, and remitting for further proceedings to amend the DRO, to reflect that the 9 years of pre-marriage service are the husband’s separate property and for equitable distribution of the marital funds used to buy back the military service.

## **Family Offense -** **Disorderly Conduct – “Public” Element Not Established**

## In Matter of Kilts v. Kilts, 2022 Westlaw 17168983 (3d Dept. Nov. 23, 2022), the husband appealed from a February 2021 Family Court Order which, after a hearing upon the wife’s October 2020 family offense petition, found that he had committed disorderly conduct [PL 240.20(1)] and issued a 6-month order of protection to the wife. The Third Department reversed, on the law, and dismissed the petition, holding that although the wife testified that she has “always been afraid of” the husband and that he had threatened her life in September or October 2020, she failed to meet her burden of showing that the husband “had the requisite intent to create public inconvenience, annoyance or alarm, or recklessly creating a risk of the same,” as required by the statute. The Appellate Division determined that the husband “appears to have threatened petitioner’s life only in their company, and without having drawn the attention of others to the scene,” there being no police report in evidence, from which it could be discerned whether the police were called or if, for example, a neighbor heard the disturbance and called the police.

## **Pendente Lite -** **Maintenance Guidelines – Deviation Reversed; Possession of Business Premises**

## In Severny v. Severny, 175 NYS3d 729 (1st Dept. Nov. 1, 2022), the husband appealed from a February 2022 Supreme Court order which granted his motion for renewal, and upon renewal, reinstated temporary maintenance of $625 per month and reaffirmed the wife’s access to the parties’ place of business, a photography studio, two days per week. The First Department modified, on the law, by vacating the maintenance and child support awards and remanding for reconsideration, and otherwise affirmed. The Appellate Division found that while Supreme Court “appears to have followed the calculations \*\*\* to arrive at an award of temporary maintenance, it then deviated from the presumptive amount by directing continued payment of the wife’s rent, cell phone bills, utilities, and other household expenses,” and held that Supreme Court must “explain the reasons for any deviation.” The First Department noted that the maintenance determination affects child support, which led the Court to also vacate the child support award. The Appellate Division upheld the wife’s access to the photography studio, agreeing that the same “was necessary to preserve the pre-action status quo.”

## **Procedure - Summary Contempt – Vacated**

## In S.P. v. M.P., 176 NYS3d 512 (4th Dept. Nov. 10, 2022), the mother appealed from a February 2021 Supreme Court order which, in a post-judgment custody proceeding, fined her $1,000 upon two findings of criminal contempt pursuant to Judiciary Law 750(A)(3). The Fourth Department reversed, on the law, and vacated the contempt adjudications. The Appellate Division held that while a direct appeal from a summary contempt finding ordinarily does not lie, an Article 78 proceeding being the remedy (Judiciary Law 752, 755), such an appeal may be entertained when the record is adequate. The Fourth Department concluded that Supreme Court erred by failing to afford the mother the “opportunity, after being ‘advised that [she] was in peril of being adjudged in contempt, to offer any reason in law or fact why the judgment should not be pronounced’” (citations omitted).

## **LEGISLATIVE & COURT RULE ITEMS**

## **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 November 28, 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**.